

Westminster Hall debate: Legal aid and the post-implementation review

Tuesday 4 September 2018, 6:30 – 7:30pm

Introduction

The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

This briefing addresses the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in relation to access to justice, the effects on people with protected characteristics, access to redress for human rights breaches, and access to redress for discrimination.

Issue:

- LASPO came into force in 2013 and made significant changes to the provision of civil legal aid in England and Wales. The Ministry of Justice is carrying out a post-implementation review of LASPO, which is expected to report in December 2018.¹ The Commission has submitted a full response to the review with eight recommendations for action.²
- LASPO considerably narrowed the scope of legal aid, with the result that it is no longer available for most private family, housing, debt, welfare benefits and employment matters.³ It also made changes to the financial eligibility criteria for legal aid, including by

¹ For the terms of reference for the Ministry of Justice review see:

<https://www.gov.uk/government/publications/post-implementation-review-of-laspo>.

² The Commission's response and recommendations are available at:

<https://www.equalityhumanrights.com/en/legal-responses/consultation-responses>.

³ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, available at:

<http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

increasing the amounts that people have to contribute from their income, and by removing automatic eligibility for people on means-tested benefits.⁴

- Other changes introduced by LASPO include an exceptional case funding scheme, intended to be a ‘safety net’ where a failure to provide legal aid could result in a breach of an individual’s rights, and a telephone gateway, which is largely the only way legal aid can be accessed in special educational needs, discrimination and debt matters.
- The Commission is concerned by evidence that these changes have restricted access to justice as required by common law and by Article 6 to schedule 1 of the Human Rights Act 1998. There is also evidence of a disproportionate negative impact on people sharing certain protected characteristics. Further, there is evidence that LASPO has limited access to redress for breaches of human rights and for discrimination claims.

Evidence

A. Impact of LASPO on access to justice

Access to justice in areas of law that remain in scope

- The number of cases receiving funding for legal help, which provides initial legal advice and assistance, has fallen by 75 per cent since LASPO was introduced, and continues to decline.⁵ The number of grants for legal aid for representation at court or at the upper level tribunal has fallen by 30 per cent.⁶ It is estimated that the Government has saved £500 million more than expected when LASPO was first introduced.⁷
- Research from the Law Society suggests the means test under LASPO is set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living. The findings

⁴ The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, available at: <http://www.legislation.gov.uk/ukxi/2013/480/contents/made>. See also Ministry of Justice (2017) *Legal Aid, Sentencing and Punishment of Offenders Act 2012: post-legislative memorandum*, paras 17 & 28, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf.

⁵ Legal Aid Agency (2018), *Legal aid statistics tables*, table 6.1: Civil representation, applications received in period and grant status, available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>.

⁶ Ibid.

⁷ The Bach Commission (2017), *The right to justice: final report of the Bach Commission*, available at: http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf.

show that people on incomes already 10 to 30 per cent below the minimum income standard are being excluded from legal aid.⁸

- There is evidence of ‘advice deserts’, in particular in relation to housing law, which puts access justice beyond the reach of many people even where they qualify for legal aid. Women, disabled people, and people from ethnic minorities are overrepresented in this category of law.⁹ Almost a third of legal aid areas in England and Wales have only one law firm providing housing advice through legal aid, and some areas, including Suffolk and Shropshire, have none.¹⁰ This may mean that legal aid is not accessible to people who are homeless, facing eviction or renting properties in serious disrepair.
- There is a shortfall in the take-up of the legal aid that remains available, which has been partly attributed to a failure to ensure that people are aware of their eligibility for legal aid and how to access it. The Justice Committee, for example, noted very low awareness of the telephone gateway and recommended the Ministry of Justice carry out a public campaign “to combat a widespread impression that legal aid is almost non-existent”.¹¹

Access to justice in areas of law taken out of scope

- Take-up of exceptional case funding (ECF) is much lower than expected, with only 70 successful grants in the first year after LASPO was introduced¹² compared with a prediction of 3,700.¹³ In 2017-18 the number of successful ECF grants increased to 1,420 but this still comparatively low number suggests the scheme is not functioning as intended.¹⁴
- The withdrawal of legal aid for initial legal advice in many areas of law can result in the escalation of relatively minor problems into

⁸ Law Society (2018), *Priced out of justice? Means testing legal aid and making ends meet*, available at: <http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/legal-aid-means-test-report/>.

⁹ Ministry of Justice (2011), *Reform of legal aid in England and Wales, equality impact assessment*, available at: <http://webarchive.nationalarchives.gov.uk/20111013060745/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-eia.pdf>.

¹⁰ Law Society (2016), Interactive map: current number of providers with housing contracts, available at: <http://www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/>.

¹¹ Justice Committee (2015), *Impact of changes to civil legal aid under Part 1 of LASPO*, p11, available at: <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>.

¹² Legal Aid Agency (2018), *Legal aid statistics tables*, table 8.1

¹³ Lord Faulks (2014), House of Lords Hansard 11 February 2014: Column 530.

¹⁴ Legal Aid Agency (2018), ‘Legal aid statistics tables’, table 8.1. Note that at the point these statistics were published, a grant decision had not been made for 93 of the 2,628 applications received.

more complex legal issues.¹⁵ Research we commissioned highlights the significant financial, emotional and health impacts this has on individuals.¹⁶ Worsening legal problems put additional pressure on courts (at public expense) to deal with more complex cases that could have been avoided,¹⁷ and may shift costs elsewhere in the public sector – for example, unresolved employment problems can lead to increased reliance on welfare benefits.¹⁸ There is a clear link between the provision of early professional advice and earlier problem resolution.¹⁹

- The Government anticipated that people with legal problems in areas taken out of scope of legal aid by LASPO would use alternative, less adversarial means of resolution.²⁰ There is some evidence that these alternatives do not provide a route to justice. In family law, for example, there has been a fall in the use of mediation, despite the Government's prediction that it would increase after LASPO was introduced.²¹ Overall, there is limited evidence on what people do when they cannot access legal aid, and it is therefore not possible to demonstrate whether people who cannot access legal aid can resolve their problems by other means. Research we commissioned found that people were largely unable to resolve their legal issues without access to legal aid for advice and representation.²²

¹⁵ Equality and Human Rights Commission (2018), *Progress on socio-economic rights in Great Britain: Update report on Great Britain's implementation of the International Covenant on Economic, Social and Cultural Rights*, available at: <https://www.equalityhumanrights.com/sites/default/files/progress-on-socio-economic-rights-in-great-britain.pdf>.

¹⁶ We commissioned research from the University of Liverpool into how and whether people could resolve their legal problems without legal aid. See James Organ and Jennifer Sigafoos, University of Liverpool (2018), *The impact of LASPO on routes to justice*, available at: <https://www.equalityhumanrights.com/en/publication-download/impact-laspo-routes-justice>.

¹⁷ The Bach Commission (2017), *The right to justice: final report of the Bach Commission*.

¹⁸ Organ and Sigafoos (2018), *The impact of LASPO on routes to justice*.

¹⁹ According to research by Ipsos MORI and the Law Society, the time it took for a quarter of people to resolve their legal issue was 3 to 4 months when early professional legal advice was provided, compared with 9 months where no early advice was provided. See Ipsos MORI and the Law Society (2017), *Analysis of the potential effects of early legal advice/intervention*, available at: <http://www.lawsociety.org.uk/policy-campaigns/campaigns/early-advice/>.

²⁰ Ministry of Justice (2011), *Reforms of legal aid in England and Wales: the Government response*.

²¹ See Ministry of Justice (2017), *Legal Aid, Sentencing and Punishment of Offenders Act 2012: post-legislative memorandum*.

²² Organ and Sigafoos (2018), *The impact of LASPO on routes to justice*, available at: <https://www.equalityhumanrights.com/en/publication-download/impact-laspo-routes-justice>.

B. Disproportionate impacts on access to justice for people with protected characteristics

- The over-representation of people with certain protected characteristics in areas of law excluded by LASPO suggests a disproportionate impact on these groups, and a potential reduction in their access to justice.
 - The removal of most welfare benefits law from the scope of legal aid has disproportionately affected disabled people.²³ The number of benefits disputes cases with legal aid has reduced by 99 per cent compared to pre-LASPO levels, from 29,801 cases in 2011-12 to 308 in 2016-17.²⁴ When individuals are able to challenge benefits decisions the majority are overturned: since 2013, 63 per cent of appeals against Personal Independence Payment decisions and 60 per cent of appeals against Employment Support appeals were decided in the claimant's favour.²⁵
 - The removal of most private family law from scope is likely to disproportionately affect women, who make up the majority (62 per cent) of family law claimants.²⁶ The National Audit Office in 2014 reported a 30 per cent increase in cases across the family courts and a 22 per cent increase specifically in cases involving child contact in which neither party was represented.²⁷
 - The removal of most immigration law from legal aid has had a significant impact on people from certain ethnic minorities.²⁸ People from ethnic minorities are also overrepresented in housing cases.²⁹

²³ See Equality and Human Rights Commission (2017), *Disability rights in the UK: updated submission to the UN Committee on the Rights of Persons with Disabilities*, available at: <https://www.equalityhumanrights.com/en/publication-download/disability-rights-uk-updated-submission-un-committee-rights-persons>.

²⁴ Response to written parliamentary question 130690, available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-03-01/130690/>.

²⁵ House of Commons Work and Pensions Committee (February 2018), *PIP and ESA assessments: seventh report of session 2017-19*, available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/829/829.pdf>.

²⁶ Ibid.

²⁷ National Audit Office (2015), *Implementing reforms to civil legal aid*, available at: <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/>.

²⁸ See Anthony and Crilly (2015), *Equality, human rights and access to civil justice: a literature review*.

²⁹ Equality and Human Rights Commission (2018), *Progress on socio-economic rights in Great Britain*.

C. Access to redress for human rights breaches

- Many of the areas of law removed from the scope of legal aid cover issues central to domestic and international human rights protections. Restrictions on the availability of legal aid carry the real risk of preventing the enjoyment of fundamental rights and freedoms, especially when the practical effect of such measures is to hinder, dissuade or deny access to legal redress when individual rights have been violated.
 - The removal of legal aid in many family law and immigration cases carries implications for those seeking redress for violations of the right to respect for family life under Article 8 of the ECHR.
 - The removal of provision in education cases presents barriers to justice for those seeking redress for breaches of the right to an education protected by Article 2, Protocol 1 of the ECHR.
 - The removal of many social welfare law cases from the scope of legal aid, carries implications for the UK's international obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR Committee has recommended that the Government review the impact of the reforms to the legal aid system with a view to ensuring access to justice and the provision of free legal aid services, in particular for disadvantaged and marginalized individuals and groups.³⁰

D. Access to redress for discrimination claims

- Although discrimination remains in scope for legal aid, there is evidence that it is not operating effectively to allow people to enforce their rights. Concern has been raised about the operation of the Civil Legal Advice (CLA) mandatory telephone gateway, which is often the only way - subject to a small number of exceptions - that a victim of discrimination can access the legal aid system.³¹

³⁰ International Committee on Economic, Social and Cultural Rights, concluding observations, para 21, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW3XRinAE8KCBF0qOHNz%2fvuCC%2bTxEKAl18bzE0UfQhJkxxOSGuoMUxHGypYLjNfKwxnMR6GmqogLJF8BzscMe9zpGfTXBkZ4pEaigi44xqiL>.

³¹ See eg Equality and Human Rights Commission (2018), *Progress on socio-economic rights in Great Britain*; Joint Committee on Human Rights (2018), *Enforcing human rights: tenth report of session 2017-19*, available at:

<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>.

- The Public Law Project independent review of the CLA gateway in 2015 identified a 60 per cent shortfall in legal aid awarded for discrimination cases following LASPO compared with the Government's predictions.³² Since 2015 the number of discrimination cases referred to CLA specialist advisers has continued to fall from 3,558 in 2014/15 to 2,608 in 2016/17.³³ Between 2012 and 2017, on average only 8 public funding certificates a year were granted in the category of discrimination, which compares, for example, with over 8,000 per year in housing.³⁴
- The telephone gateway has dealt with over 18,000 discrimination cases since 2013 but only 16 people were referred for face-to-face advice in that period.³⁵ The Government predicted when the gateway was introduced that the referral rate for face-to-face advice would be 10 per cent.³⁶ In 2016-17, no discrimination cases were referred for face to face advice.³⁷
- Based on the most recent figures publicly available, in 2013-14, there were 6,872 calls to CLA about discrimination cases of which 2,384 were taken on as legal aid cases by CLA specialist providers. However, in terms of outcomes achieved in the same year, only 4 cases (0.3 per cent) resulted in a client receiving an award from a court or tribunal, and only 2 (0.1 per cent) proceeded under other legal aid funding, which might for example fund a court case.³⁸
- The accessibility and effectiveness of legal aid for discrimination cases is the subject of an inquiry by the Commission examining

³² Public Law Project (2015), *Keys to the gateway: an independent review of the mandatory Civil Legal Advice Gateway*, available at: <https://publiclawproject.org.uk/wp-content/uploads/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>.

³³ Written parliamentary question response 111874, available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-07/111874/>.

³⁴ Legal Aid Agency (2018), *Legal aid statistics tables, table 6.1*.

³⁵ Ibid.

³⁶ Ministry of Justice (2014), *Civil legal advice mandatory gateway: overarching research summary*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384307/cla-gateway-research-summary.pdf.

³⁷ Written parliamentary question response 111874.

³⁸ Ministry of Justice (2014), *Civil Legal Advice mandatory gateway: A secondary analysis of management information*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384311/cla-mandatory-gateway-secondary-analysis-management-information.pdf.

the extent to which victims of discrimination are able to obtain access to justice through the provision of legal aid.³⁹ It will examine:

- how discrimination cases are funded by legal aid;
- how many individuals receive legal aid funding for discrimination claims, including representation or assistance with bringing a case in a court or tribunal, and how this compares with evidence of the number of individuals who seek advice about discrimination;
- whether there are barriers to effective access to legal aid;
- whether some individuals experience specific difficulties in accessing legal aid for example due to language or literacy difficulties, or because of a protected characteristic;
- the operation of the mandatory telephone gateway as the access point for most discrimination advice; and
- in light of the above, whether legal aid provides effective access to justice for individuals who complain of discrimination, and whether improvements could be made to reduce barriers and improve access to justice.

Recommendations

Recognising that restrictions to the scope of legal aid and changes to the eligibility criteria for legal aid following LASPO may have created insurmountable obstacles for many individuals when they need to seek redress from the justice system, we recommend that the Government:

- i. Use the full range of evidence available to assess the impact of LASPO on the ability of individuals to enjoy effective access to justice as required by common law, by Article 6 to schedule 1 of the Human Rights Act 1998 and under EU law. The Government should commission further research and analysis where necessary, including analysis of how and whether people can access justice when they cannot access legal aid.
- ii. Revise the means test for legal aid with a view to expanding eligibility and ensuring that any contributions individuals are required to make are truly affordable and do not prevent the maintenance of an adequate standard of living. As a minimum, the Government should

³⁹ For further details of the inquiry including the terms of reference see: <https://www.equalityhumanrights.com/en/our-legal-action/inquiries-and-investigations/legal-aid-victims-discrimination-our-inquiry/>.

ensure that individuals in receipt of means-tested benefits automatically qualify for legal aid.

- iii. Reinstate legal aid for initial advice, in at least family and housing cases, so that legal problems can be addressed before they escalate, helping to prevent the detrimental emotional and financial impacts that worsening legal problems have on individuals, the unnecessary pressure on courts to deal with more complex cases that could have been prevented, and the knock-on costs to other parts of the public sector, for example as a result of ill health or increased demand for welfare benefits.
- iv. Address the shortfall in take-up of legal aid by providing appropriate and accessible information on the areas of law where legal aid remains available. Further, the Government should continue to support the work of the Public Legal Education Panel to ensure that individuals have the information and resources they need to understand and enjoy their rights.
- v. Reform the exceptional case funding scheme so that it works effectively to ensure that the absence of legal aid does not lead to violations of people's rights under the Human Rights Act 1998 or under EU law. The Government should ensure there is an effective procedure for urgent applications for exceptional case funding, and take action to address all other shortcomings identified in the scheme, including barriers in the application process.
- vi. Identify where LASPO has had a disproportionately negative impact on people sharing certain protected characteristics and take mitigating action, including bringing areas of law back into scope where necessary. Priority attention should be given to the impacts on disabled people, women and people from ethnic minorities. The Government should encourage and facilitate participation in its Post-Implementation Review by groups representing people sharing these protected characteristics.
- vii. Take action to address any reduction in people's access to redress for human rights breaches as a result of the restrictions to legal aid arising from LASPO. In doing so, both breaches of the rights incorporated through the Human Rights Act 1998 and EU law, and the effect on rights protected by the international human rights treaties to which the UK Government is a signatory, should be considered.
- viii. Make changes to the mandatory telephone advice gateway to make it effective and accessible for all, including by implementing any recommendations resulting in due course from the Commission's inquiry into the provision of legal aid for discrimination claims.

Particular consideration should be given to the accessibility of the telephone gateway for disabled people and those with limited English language skills.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission's work at: www.equalityhumanrights.com.

For more information, please contact:

Parliamentary lead:

Katherine Perks

Katherine.Perks@equalityhumanrights.com

020 7832 7813

Policy lead:

Lorel Clifton

Lorel.Clifton@equalityhumanrights.com

020 7832 7800