



“The Future of Legal Aid” Inquiry
Submissions to the Justice Committee
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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.
2. JUSTICE does not represent or advise individual legally aided clients, rather our work examines and makes recommendations to improve the justice system and access to it, focusing on the most vulnerable within society. Legal aid is of course an essential part of that access; in the words of Lord Bingham, "denial of legal protection to the poor litigant who cannot afford to pay is an enemy of the rule of law".¹
3. We were clear, in our responses to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") and to the *Transforming Legal Aid* consultation, that we considered the cuts in legal aid in 2013 to be ill-considered, rushed and unsupported by evidence. However, since 2013, we have sought to promote innovative but practical solutions to try to protect the most vulnerable despite drastically depleted legal aid provisions.²
4. We particularly welcome the opportunity to feed into this important inquiry into legal aid and its sustainability. Unfortunately, whilst the 2013 legal aid cuts produced immediate savings, some have led to long-term inefficiencies, causing cost and delay elsewhere in the system. It is clear to us that a sustainable legal aid system is one that must meet the needs of the present without compromising the future.
5. The below evidence is drawn from a number of JUSTICE Working Parties, our principal way of working. Our Working Parties are made up of professional and cross-party expertise, chiefly from our membership, inclusive of barristers, solicitors, legal executives, academic lawyers, law students and interested non-lawyers. Those Working Parties examine evidence on particular issues within the justice system and produce reports proposing practical solutions to law-makers, judges and relevant public servants. Such Working Parties have, since LASPO, reviewed the adequacy of access to justice within

¹ *The Rule of Law* (Allen Lane, London, 2010), p. 88.

² See the focus on early case management, mediation and neutral evaluation in JUSTICE's registrar model, to improve litigant in person journeys through court, in JUSTICE, *Delivering Justice in an Age of Austerity* (2015) available at: <https://justice.org.uk/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>

affected areas and have produced specific conclusions, recommendations and insights that touch upon the provision of legal aid. We have, in addition, highlighted areas which we are actively considering in our current Working Parties.

6. Our submissions respond to three of the Committee's terms of reference:

A. Our response to "how LASPO has impacted access to justice" addresses particular issues with legal aid provision in family, housing and benefits disputes, in accordance with our discrete work in those areas.

B. Our response to "the impact of the court reform programme and the increasing use of technology on legal aid services and clients" focuses on the idea of an Online Advice Platform. This makes additional observations about the need for such a platform since the Coronavirus outbreak, rather than repeating the submissions under the Covid-19 heading. It also makes discrete observations about the need to invest upstream in immigration and asylum reform, with which we have been closely involved.

C. Our broader conclusions on the future of legal aid, based on the breadth of our work, are set out at the end of our evidence under "the challenges for legal aid over the next decade, the reforms needed and what can be learnt from elsewhere."

A. How LASPO has impacted access to justice

Family Justice

Private Children Cases (to report in 2021)

7. JUSTICE is extremely concerned at the impact of LASPO in the context of private children cases. At the time, the withdrawal of legal aid in these cases was linked to the need to encourage out of court settlement of cases between parents:

"The Government's view is that people should take responsibility for resolving such issues themselves, and that this is best for both the parents and the children involved... Legal aid funding can be used to support lengthy and intractable family cases which may be resolved out of court if funding were not available."³

As such, being advised about your rights and responsibilities in the context of private family law was paradoxically framed as being a negative thing, from which legal aid cuts would

³ Ministry of Justice (2010) *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967) paras 4.210–4.211.

emancipate families from court. This was combined with an initiative to promote mediation, with Mediation, Information and Assessment Meetings (MIAMs) becoming mandatory for applicants in 2014.

8. This policy has undoubtedly failed to have the desired effect. Far fewer people are attending MIAMs than before legal aid was removed (around one third), and fewer people are embarking on mediation after those meetings.⁴ This cannot be explained by an overall decrease of need, quite opposite: the number of private children cases pre-covid had reached an all-time high.⁵
9. This failure has now been acknowledged by the Government in their Post-implementation review of Part 1 of LASPO, published in February 2019, albeit using the phrase “not entirely successful”.⁶ Academics have observed that LASPO made mediation more difficult by removing lawyers: *“In the absence of a reliable stream of referrals from solicitors, mediators now have to do their own recruitment. Many clients arrive at MIAMs un-screened and un-encouraged by a lawyer, and un-advised as to their legal position.”*⁷
10. An additional problem is ascertaining in that short meeting the appropriateness of mediation. For example, it is acknowledged that the majority of domestic abuse cases will be inappropriate for a conciliatory resolution, due to the risk of pressure to agree or safety risks to the child pursuant to contested allegations which need to be determined by a judge.⁸ However, “excessive faith in the value of the mediation process, the virtues of cooperation and the mediator’s own skills and experience, exacerbated post-LASPO by the perceived lack of alternatives for clients and a business imperative to retain clients,

⁴ The number of publicly funded MIAMs has dropped from 31,336 in 2011/12 (pre-removal of legal aid) to 10,508 in 2018/19 (fall of 66.5%). Alongside the decline in publicly funded MIAMs, mediation starts have also declined. From 2011/12 to 2018/19 the number of publicly funded mediation starts fell by 57.5%. The introduction of the statutory MIAM in April 2014 led to an initial rise but has since declined. See MoJ, Legal Aid Statistics Tables October to December 2019, Tables 7.1 and 7.2, available at <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2019>.

⁵ Before this year, the highest annual total was in 2013, perceived by many as a rush to issue in anticipation of the removal of legal aid. However, the numbers have been steadily rising since 2014, and in 2019 reached 54,920, in excess of the 2013 total of 54,620. See Table 1, Family Court Quarterly Statistics, at: <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2019>.

⁶ Post-implementation review of Part 1 of LASPO, published in February 2019, 1143-44, at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf

⁷ Anne Barlow, Rosemary Hunter, Janet Smithson, Jan Ewing, *Mapping Paths to Family Justice Resolving Family Disputes in Neoliberal Times* (London: Palgrave, 2017), p.211.

⁸ The MIAM exemptions list includes cases where there is specified evidence of domestic abuse, see Practice Direction 3A of the Family Procedure Rules.

can result in inadequate screening for domestic violence and inadequate responses when violence and abuse is disclosed.”⁹

11. JUSTICE highlights this area to the inquiry ahead of convening a Working Party to look at access to justice within private children law proceedings. JUSTICE considers that the future of private family legal aid must include a proper valuing of early advice by specialist family lawyers. This is not only due to the clear failure of the removal of legal aid to reduce case numbers, but also due to the need to ensure the fair and safe resolution of disputes.

Housing

Solving Housing Disputes (2020)

12. Our *Solving Housing Disputes* Working Party,¹⁰ chaired by Andrew Arden QC, considered the housing disputes landscape in detail over 12 months, reporting in March 2020. The most relevant recommendations from the report to this inquiry concern i) early advice provision, ii) alternative dispute resolution (ADR) and iii) the Working Party’s future vision of a housing disputes service.
13. Early advice provision: The cuts to legal aid in housing matters, combined with court closures, have decimated the accessibility of housing advice for large swathes of the country. Recent analysis suggests that 52% of local authorities do not have any legal aid providers of housing advice within their boundaries at all, and London had 49% of the country’s 455 providers.¹¹
14. Research consistently shows that early advice increases earlier resolution of issues¹² and reduces downstream costs,¹³ and as such this lack of advice provision will undoubtedly

⁹ Barlow et al, *Mapping Paths*, p.108.

¹⁰ JUSTICE, *Solving Housing Disputes* (2020) available at: <https://justice.org.uk/our-work/civil-justice-system/solving-housing-disputes/>

¹¹ Heath, ‘Behind the numbers: what impacts have legal aid cuts had on housing?’ (Inside Housing Online, 7 February 2020) available at <https://www.insidehousing.co.uk/insight/behind-the-numbers-what-impacts-have-legal-aid-cuts-had-on-housing-64986>

¹² Participants in an Ipsos MORI survey who did not receive early advice were, on average, 20% less likely to have resolved their issue at a particular point in time (compared to those who did receive early advice). Ipsos MORI, ‘Analysis of the potential effects of early advice/intervention using data from the Survey of Legal Needs’, (November 2017) p. 6 available at <https://www.lawsociety.org.uk/support-services/research-trends/research-on-the-benefits-of-early-professional-legal-advice/> p.6.

¹³ The Low Commission cited extensive global evidence demonstrating the economic benefit of early legal advice across housing, benefits and debt advice in reducing downstream costs for other public services related to homelessness, poor health outcomes and work productivity, see G. Cookson and F. Mold, The business case for social welfare advice services (Low Commission evidence review, July/August 2014) available at: <https://www.lag.org.uk/?fileid=-17039> . For example, a typical young person with a civil legal problem will cost local health, housing and social services around £13,000 if they cannot access early advice, Balmer, N.J. and Pleasence, P. The Legal Problems and Mental Health Needs of Youth Advice Service Users, (Youth Access, 2012) available

further exacerbate the backlog of cases going through the courts. Key to facing the post-Covid housing litigation landscape, therefore, will be enabling people to understand their rights and responsibilities *before* court, so they can make informed decisions about alternatives to court, including negotiation and mediation.

15. Whilst we welcome the Ministry of Justice Legal Support Action Plan's stated intention to expand Government investment in early legal advice, **we recommend that it urgently address the need for sustainable funding for the legal aid and advice sector, with specific attention given to how to respond to legal aid "housing deserts."** If the funding is not at a sustainable rate for the profession, providers will have to continue prioritising those at crisis point,¹⁴ within the limited geographical areas they already serve, and no real change can be achieved.
16. In addition, effective legal aid provision must account for the interrelatedness of legal problems. Most consultees we spoke to told us that many people facing possession for rent arrears were suffering from benefits issues, often relating to Universal Credit, and were often unable to get early advice and assistance with those issues. We support the further evaluation of co-located advice hubs in health clinics to see if legal advice on benefits, mental health law and housing assistance could be beneficial, and we would encourage consideration of extending this to hospital settings. As such, **we recommend further specific attention be given to providing funding for advice that addresses "clustered" legal problems.**
17. **ADR:** The encouragement of ADR in housing disputes is often to both parties' advantage, as well as having cost-saving advantages for the justice system. However, currently there are structural impediments to the uptake of ADR within the legal aid rules, particularly pre-action ADR. As such, **we recommend that the definition of "legal help" under legal aid contracting for housing should be changed to capture and remunerate acting and advising through pre-action ADR processes.** We also recommend that legal

at <https://baringfoundation.org.uk/wp-content/uploads/2014/09/YAdviceMHealth.pdf>; and a 2010 Citizens Advice report demonstrated that for every £1 spent on legal aid, the state saves £2.34 from housing advice; £2.98 on debt advice; and £8.80 from benefits advice. Citizens Advice, 'Towards a business case for legal aid. Paper to the Legal Services Research Centre's eighth international research conference', (2010) available at <https://www.accesstojusticeactiongroup.co.uk/wp>

¹⁴ A problem acknowledged in the MoJ's Legal Support Action Plan: resourcing constraints meant advice providers had to "reprioritise their services away from early legal advice towards supporting people once they have reached a crisis point" and that the reduction in early support has been particularly felt in housing and benefits, where demand for services remains high, Ministry of Justice, 'Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems' (February 2019) p. 19 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/le_gal-support-the-way-ahead.pdf citing the Law Centres Network (2018), 'LASPO Act 2012 Post-Implementation Review Submission from the Law Centres Network' available at <https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/briefings-and-submissions>

aid practitioners should not have to obtain prior authority from the Legal Aid Agency to engage in ADR but should be free to pursue it as part of an ordinary legal aid certificate.

18. Tenant lawyers we spoke to and judges on our Working Party told us that many respondents who face mortgage repossession cases have a tendency to put their head in the sand, and for that reason, the pre-action requirements for lenders to negotiate with borrowers can be ineffective. As such, we **recommend that the legal aid categorisation be changed so that mortgage possession claims sit in both “debt” and “housing” so that respondents facing repossession can get both early legal advice and representation should it be needed.**
19. The future of housing disputes: The majority of the Working Party supported a longer-term vision of a non-court model, which incorporates early advice, benefits of ADR and a holistic approach to clustered legal and social problems. Instead of court or tribunal at first instance, the *Housing Disputes Service* would be the first port of call, and would act as an arbiter, investigator, advisor and problem-solver, looking at all elements in a housing relationship on an inquisitorial basis.¹⁵ Advice would feature at the very start, with independent lawyers sustainably remunerated under a new legal aid contract, or other funding arrangement, capable of enabling appeal to court and tribunal if the dispute cannot be resolved through the HDS.
20. We would expect the HDS’s holistic approach to housing disputes to promote longer tenancies and relationships in the rented sector and alleviate pressures caused by housing problems that manifest in the courts, the NHS and on local authorities. The model needs to be piloted and carefully evaluated, but JUSTICE commends it to the inquiry as an example of a future vision of how early and sustainable advice funding could sit within innovative new approaches to dispute resolution.

Benefits Appeals

Reforming Benefits Decision-Making (to report in 2021)

21. Our *Reforming Benefits Decision-Making* Working Party¹⁶ is chaired by Lord Low of Dalston CBE. It is considering how to improve Department for Work and Pensions decision

¹⁵ See Chapter 2 of JUSTICE *Solving Housing Disputes* (2020) for further details of the model.

¹⁶ Information about the current Working Party available at: <https://justice.org.uk/our-work/civil-justice-system/current-work-civil-justice-system/reforming-benefits-decision-making/>

making, make the appeals system more efficient and ensure that online benefits appeals are accessible to all users. As with our research in the housing sector, it is evident that there are a number of issues that would be assisted by early advice provision.

22. Many individuals are not aware of their potential eligibility for social security benefits. Even for those that are aware, the process of claiming social security benefits is often complex; the criteria for entitlement are not straightforward and the translation of these criteria into a self-assessment mechanism is difficult and may not be successful in capturing the information required to make a full assessment.¹⁷ People with health problems and disabilities are particularly badly affected, since they may find the forms too complicated and difficult to complete on their own.¹⁸ Without advice, people often feel forced to give up, or make errors leading to much slower resolution of their problems.¹⁹
23. As noted in the context of housing above, access to early advice leads to more effective resolution of problems and reduces downstream costs, particularly in light of the clustering of legal problems described above. We welcome the Ministry of Justice Legal Support Action Plan's stated intention to evaluate different forms of early legal support. However, we urge the Government to commit to funding early legal advice in welfare benefits, in a variety of forms including face-to-face advice. Face-to-face advice is essential to many welfare benefits claimants who are often particularly vulnerable and digitally excluded. We also reiterate that further specific attention be given to the need to provide funding for advice that addresses "clustered" legal problems in the context of benefits.
24. As part of our evidence gathering, we have also been informed that there are difficulties in recruiting sufficient specialist lawyers, due to cuts to legal aid in this area. The resumption of funding for early legal help should up-skill a new generation of welfare benefits specialists.

¹⁷ McKeever, M. Simpson and C. Fitzpatrick, 'Destitution and paths to justice Final report', June 2018, available at https://www.researchgate.net/publication/325788484_Destitution_and_paths_to_justice_Final_report, p.40.

¹⁸ Dr James Organ and Dr Jennifer Sigafoos, University of Liverpool; Equality and Human Rights Commission Research Report 118 '*The impact of LASPO on routes to justice*' p. 36, available at: <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>; McKeever et al, p.40.

¹⁹ *Ibid.* p. 39; McKeever et al, p 38 on interviewees struggled to identify what benefits might lift them out of poverty.

B. The impact of the court reform programme and the increasing use of technology on legal aid services and clients

25. JUSTICE Working Parties have considered at some length the role technology can play in enhancing access to justice,²⁰ observations which have gained further relevance since the Coronavirus pandemic. In light of the legal aid deserts which have emerged post-LASPO, discussed above, and the now increased restricted movements of many for public health reasons, JUSTICE wishes to highlight the need for an Online Advice Platform.

26. JUSTICE considers the Reform Programme to present an opportunity to build tailored guidance and assistance into an online court or tribunal process.²¹ We consider this to be vital to the efficacy and uptake of online courts, as well as an unmissable opportunity to expand the availability and reach of specialist advice provision and ensure that the Reform Programme makes justice more widely accessible.

27. Through our research,²² we have identified four principles that we consider should be the starting point of an Online Advice Platform:

- a. **Supporting users to understand** – In the absence of an in-person rapport between legal representative and client, literature on remote provision of legal advice has emphasised the importance of client-sided assistance providing practical, technical and emotional support.²³ In JUSTICE’s *Preventing Digital*

²⁰ *Delivering Justice in an Age of Austerity* (fn 2), JUSTICE’s *Preventing Digital Exclusion from Online Justice* (2018) available at: <https://justice.org.uk/our-work/assisted-digital/>; JUSTICE, *Immigration and Asylum Appeals – A Fresh Look* (2018) available at <https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>.

²¹ For example, we understand that the Ministry of Justice is developing “Case Builder”, a decision-tree which may initially be deployed for Online Civil Money Claims, which could include several structured questions to help a claimant articulate their claim, a tool to populate claimants’ information into pre-issue letters as well as offering generic advice. Law for Life, in their evidence to the Justice Committee inquiry into the Reform Programme, emphasised the need for justice policies “to be more responsive and proactive in providing multidimensional forms of assistance in a timely and targeted way”, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidence/document/justice-committee/hmcts-court-and-tribunal-reforms/written/97788.html>

²² We took evidence throughout 2019, and held a roundtable in September 2019, with those across the advice sector, legal profession, Government and regulatory bodies.

²³ See, for example Australian Pro Bono Centre, *Pro bono legal services via video conferencing: Opportunities and Challenges* (2nd-3rd July 2015), p. 3, 13 and 16, available at <https://probonocentre.org.au/wp-content/uploads/2015/09/ProBonoLegalServicesViaVideoConferencing-OpportunitiesAndChallenges040615.pdf> LiP Network, *Setting up a Skype Clinic?* (4th July 2017), available at <http://www.lipnetwork.org.uk/topics/post/skype-clinics> Roger Smith and Alan Paterson also refer to a study carried out in 1996 and funded by the Nuffield Foundation, which found that self-help kiosks set up in courts “worked best when fed, watered and tendered by living people rather than just dumped and left in dark courthouse corners”. The report had found that the best kiosk was one which was set up in a law library and supervised by staff. Roger Smith and Alan Paterson, *Face to Face Legal Services and their Alternatives: Global Lessons from the Digital Revolution* (2014)

Exclusion, the Working Party recognised the value of this support provision, and advocated for greater investment in “trusted faces” in “trusted places”, i.e. services familiar to the user which already provide in-person support and internet access.²⁴ To be effective, remotely delivered advice should be augmented by an expanded commitment to non-lawyer client-sided support, such as Citizens Advice, which can help clients engage with remotely delivered legal advice.²⁵ For organisations without specialist understanding of legal problems, funding and support must include training on the identification, characterisation and triaging of legal problems.

b. The primacy of quality advice provision – The Reform Programme represents an opportunity to expand the reach of expert legal advice provision beyond geographic limitations. An online advice portal should accommodate practitioners with expertise in the relevant area of law, whether proximate or remote to users of online justice services and whether legal aid-funded or on an unbundled basis. We also recognise that pro bono help is increasingly being deployed to plug gaps in advice and representation caused by LASPO cuts,²⁶ and an Online Advice Platform may present the opportunity to make the most effective use of these services by removing geographical boundaries. However, demand for pro bono advice far outstrips supply. It cannot be a panacea to the shortfall in public funding.

c. Facilitated legal advice – An Online Advice Platform must be easy to find for users. Users must also be *aware* of both the *importance of* and *availability of*

p.55-56 available at https://strathprints.strath.ac.uk/56496/1/Smith_Paterson_CPLS_Face_to_face_legal_services_and_their_alternatives.pdf

²⁴ JUSTICE, *Preventing Digital Exclusion* (fn20), Executive Summary. We are keen to stress that the idea of “trusted faces” in “trusted places” must be viewed expansively, to capture NGOs, AdviceUK members, Law Centres and Citizens Advice.

²⁵ In the JUSTICE Working Party report, *Understanding Courts*, we highlighted the value that court users place on the Personal Support Unit (now called Support Through Court). The Working Party recommended that provision should be made for practical and emotional court supporters in all courts and tribunals and for all lay participants, not to provide legal advice but to provide practical support. These support persons could, we suggested, be PSU/STC volunteers, law students or unpaid McKenzie friends, JUSTICE *Understanding Courts* (2019) paras 4.1-4.4 and 4.19-4.26, available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf>

²⁶ Hyde, ‘Pro bono sector ‘overwhelmed’ after legal aid cuts’, (The Law Society Gazette Online, 2 January 2019) available at <https://www.lawgazette.co.uk/news/pro-bono-sector-overwhelmed-after-legal-aid-cuts-cjc/5068761.article>

legal advice. Pathways to legal advice *must feature prominently* within HMCTS online justice services to ensure uptake. The JUSTICE Working Party, *Understanding Courts*, recommended the creation of an HMCTS landing page to help lay users understand what will happen when they attend a court or tribunal, which would include links to sources of independent advice (“HMCTS Online”).²⁷ Our preliminary view is that the Online Advice Platform could be a prominent part of HMCTS Online.

- d. Research and user testing on online advice provision** – The creation and piloting of an Online Advice Platform must be informed by research and user testing addressing concerns around accessibility for vulnerable users²⁸ and qualitative differences between in-person and remotely delivered advice provision. The pandemic has offered an unprecedented opportunity to evaluate remotely delivered justice,²⁹ and delivery of any Online Advice Platform must similarly be robustly evaluated and tested.

28. We stress, this should not be taken as detracting from the need to increase investment in publicly funded face-to-face advice provision. Personally delivered advice remains the best option in most circumstances. However, online advice provision would enhance the Reform Programme to ensure maximum accessibility and efficacy.

Immigration and Asylum Appeals – Online Pilots and Legal Aid

29. JUSTICE’s recommendations on the immigration and asylum appeals system in 2018³⁰ helped shape digitisation within the immigration and asylum tribunal as part of the HMCTS

²⁷ That landing page would feature user centric design, as required by Government Digital Service principles and would replicate the information in the HMCTS leaflets available at courts and wherever relevant provide curated hyperlinks to independent service providers such as Citizens Advice, Advicenow and Victim Support, JUSTICE, note 18 above para 2.29-2.31.

²⁸ The term “vulnerable” in the judicial system denotes factors, whether inherent to a person or situational, which impede upon their ability to participate in a court or tribunal process, JUSTICE, note 18 above, para 1.21. The Working Party stressed that a court process itself may render a person vulnerable, by virtue of the environment being unfamiliar, anxiety-inducing or improperly adapted to the needs of ordinary people.

²⁹ See for example the rapid review of the impact of Covid-19 on the civil justice system, Byrom, Beardon, Kendrick, ‘The impact of COVID-19 measures on the civil justice system’ (Civil Justice Council and Legal Education Foundation), May 2020 available at <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>

³⁰ JUSTICE, Immigration and Asylum Appeals – A Fresh Look (2018) available at <https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>

Reform programme. However, a particular legal aid issue in the piloting of such digital procedures has been highlighted in the past year.

30. The Working Party recommended further attention be concentrated at the pre-hearing stage, to reduce adjournments as well as increase Home Office concessions of cases bound to succeed. The resulting pilot in the first-tier tribunal of the Immigration and Asylum Chamber adopted the recommendations by including a new requirement for an “Appeal Skeleton Argument” from the appellant representative, with a mandatory pre-appeal reconsideration by the Home Office to follow. Only upon the completion of these two sequential steps was the case listed. This pre-hearing additional work has led to 16-20% of cases being conceded pre-hearing by the Home Office per month, a significant saving of the appellant, respondent and tribunal’s time, not least uncertainty for the appellant, as well as a saving for the public purse.
31. Ahead of the consultation that will be held in relation to the legal aid funding of such work, JUSTICE highlights the need for such frontloading to be sustainably funded. A proper analysis of the value of such work cannot simply consider the legal aid cost per case in a silo, but must also take into account the savings accrued for the Home Office and the tribunals in the reduction of cases. Sustainable investment in legal aid will ensure downstream savings are preserved – by affording legal representatives funding for the time quality legal submissions require - whereas failing to properly fund additional work for appellant representatives will risk eroding away the system-wide benefits.³¹

³¹ We contributed this analysis in our evidence to the recent Public Law Project research paper on the Immigration and Asylum Online Pilot, with the resulting findings supporting this perspective. Hynes et al, *Online Immigration Appeals: A Case Study of the First-Tier Tribunal* (PLP Research Paper, 2020) available here: https://publiclawproject.org.uk/wp-content/uploads/2020/08/200825_Online-Immigration-Appeals_FINAL.pdf

C. What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.

32. It has been said that “there are three things that can be done in relation to self-representation by litigants: one is to get them lawyers, the second is to make them lawyers and the third is to change the system”.³²
33. JUSTICE acknowledges it is unlikely that this Government and those which follow will restore publicly funded legal representation.
34. The first challenge, therefore, is to identify where the absence of lawyers is unacceptable, undermines the rule of law and/or interferes with the human rights of litigants. Such red lines should be drawn and publicly funded representation either ringfenced or returned. For example, JUSTICE supports the prohibition of cross-examination between alleged victims and alleged perpetrators of domestic abuse, and the consequential funding of representation where necessary, to be provided for in the Domestic Abuse Bill.³³ This responds to a largely LASPO-created problem of domestic abuse victims being cross-examined by their abusers in person in the Family Court. It has been described by the judiciary as “inherently and profoundly unfair”³⁴ which has “sometimes amount[ed], and on occasions quite deliberately, to a continuation of the abuse, as the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process”.³⁵ The fact that legislative action is being taken to prevent such abuse is evidence of the failure of Exceptional Case Funding as a catch-all caveat to legal aid cuts.
35. A further example was highlighted in the conclusion of our most recent Working Party – *When Things Go Wrong*³⁶ chaired by Sir Robert Owen – on legal aid provision for families

³² Deputy Chief Justice Faulks, Family Court of Australia, Self-Represented Litigants: Tackling the Challenge (February 2013), [3], available online at <http://njca.com.au/wp-content/uploads/2013/07/Justice-Faulks.pdf>. See also Trinder et al. for the Ministry of Justice, Litigants in Person in Private Family Law Cases (November 2014), pp.112-113, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf See our further discussion of this tripartite division in *Delivering Justice in an Age of Austerity* (fn 2 above) p. 4 onwards.

³³ Current Clause 59, awaiting second reading in the House of Lords at the time of writing. See the JUSTICE briefing on the Bill here: <https://justice.org.uk/justice-submits-a-briefing-on-the-domestic-abuse-bill/>

³⁴ Hayden J, Re A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (Fam), at [60].

³⁵ President of the Family Division, Sir James Munby ‘Because it is the right thing to do’ (24 July 2018), available at: <https://www.judiciary.uk/wp-content/uploads/2018/07/pfd-speech-fjyjb.pdf>

³⁶ JUSTICE, *When Things Go Wrong* (2020) available at: <https://justice.org.uk/our-work/system-wide-reform/when-things-go-wrong/>

during inquests. A particular concern of the Working Party was the stark inequality of arms between bereaved people and public bodies involved in navigating often-complex procedures and legal issues, including: scope; the application of Article 2 ECHR; public interest immunity; anonymity; and disclosure. As public funding for legal representation in inquests is heavily circumscribed and only available through the Exceptional Case Funding scheme, the vast majority of bereaved people are unable to benefit from the clear advantages of being legally represented.

36. On the other hand, State and corporate interested persons are typically able to deploy ranks of solicitors, junior barristers and QCs to advise and advocate on these issues.³⁷ In this context, to claim that families' effective participation can be guaranteed by the coroner and the "inquisitorial" nature of the process is to ignore the reality. Last year, responses to Freedom of Information Act requests submitted by organisations including INQUEST gave a sense of partial Government spend on inquest representation:³⁸

***Mental Health:** Responses from 26 [of 53] trusts revealed that **£4,026,787.45** was spent on legal representation. In the same year the Legal Aid Agency paid a total of **£117,968** towards fees for legal representation at inquests for families following the death of a relative in contact with mental health services.*

***Policing:** Just over **£41,000 (£41,265)** was granted by the Legal Aid Agency towards legal fees for families' representation for those who had died in police custody. 32 of 44 police forces responded, revealing that their legal bills came to **£409,744.81**.*

***Prisons:** In 2017, the Ministry of Justice spent **£4.2million** on Prison and Probation Service legal representation at prison inquests, while granting just **£92k** in legal aid to bereaved.*

Julie's Mental Health Foundation, BBC Radio 4 File on 4; INQUEST

³⁷ For example, in the London Bridge inquests, legal representation for public authorities comprised:

- three QCs and a Junior for the Secretary of State;
- one QC and one Junior for the Metropolitan Police;
- one QC for the City of London Police;
- one QC and one Junior for the British Transport Police;
- one junior for the London Ambulance Service;
- one junior for the London Fire Commissioner;
- one junior for Transport for London;
- one junior for the City of London Police; and
- one junior for the IOPC.

All of the above were supported by full solicitor teams. The Working Party is grateful to Hogan Lovells for the provision of this information.

³⁸ See INQUEST, '[New figures reveal "shocking" funding injustice faced by bereaved families at inquests](#)', 1 October 2019. In respect of the data, the article notes that private providers are not included, and multiple agencies or individual members of staff/police are often separately represented at inquests.

37. The imbalance exposed by these figures serves to preclude effective participation and may in consequence impede the ability of an inquest to discharge its function as a full and fearless investigation. It is with these figures and concerns in mind that the Working Party recommended that **the Lord Chancellor should amend the Exceptional Funding Guidance (Inquests) so as to provide non-means tested public funding for legal representation for families where the State has agreed to provide separate representation for one or more interested persons.**
38. With such areas identified and effectively ringfenced, JUSTICE considers the next challenge to be the effective design and sustainable funding of a legal system for those without lawyers. Leaving the system as it is, and hoping that litigants in person will not seek to access it, has not, and cannot, work, both from an access to justice perspective and from an efficiency perspective. Instead, inefficiencies identified since LASPO provide opportunities for reconsideration of where State funding will be most effective in providing fair and efficient access to justice.
39. Sometimes this will be court-based, but problems may be more productively dealt with outside of court through informal or more formal alternative dispute resolution procedures. Our recent *Solving Housing Disputes* Working Party repeatedly heard evidence of the need for more opportunities for landlords and tenants to engage in negotiations which could avoid the need for possession hearings altogether. The benefits of avoiding court proceedings were also highlighted in our 2015 report, *Delivering Justice in an Age of Austerity*:
- “an accessible and efficient dispute resolution system combined with improved access to information and advice can offer important cost savings in the long term. The resolution of problems at the earliest possible stage represents an important economy not only for the justice system, but also for society as a whole.”³⁹
40. However, to ensure effective navigation between court-based and non-court-based resolution, early advice is critical. The belief that “delegalising” problems by removing advice provision would lead to more out of court resolution was mistaken and led to concerning inefficiencies. Instead, disputes come to court which do not need it, and those that do still arrive less advised, less prepared and less supported, and therefore require

³⁹ *Delivering Justice in an Age of Austerity* (fn 2), p. 4.

more of the courts' time. Legal advice can empower others to settle confidently knowing they are not short-changing themselves.

41. JUSTICE is particularly concerned about the inefficiency of advice being received for the first time when already at court, and even more concerned at hearing from our judicial consultees that they are having to provide this. We have heard from judges and magistrates in our recent family work, for example, who regularly have two parents before them, both appearing in person, to whom they are explaining for the first time the applicable law. Not only does this undermine the function of the judge as the neutral arbiter, it is also the most expensive advice option possible and extraordinarily inefficient.
42. In addition to early advice, clustering of advice provision is key to ensuring both effective access to justice and efficiencies within the system. Many legal problems suffered by those with lower means, who are unable to pay for a lawyer, can very often co-exist, as highlighted by the Low Commission in 2014:

“when people get into difficulty in their daily lives, [...] they need to get the right information and advice as early as possible. If this information and advice is not available, they could become unemployed, homeless or in debt, and not only will they suffer distress but the state will incur increased costs.”⁴⁰

The MoJ's Legal Action Plan does include clustering of advice within social welfare law. JUSTICE considers the need for this will only increase in the wake of the coronavirus pandemic, with the many interrelated ways in which the pandemic will affect people's income, housing, and health. As such, a key role for the future of legal aid will be to sustainably fund such advice provision so that interrelated problems can be tackled together, rather than narrowly pursued in litigation silos.

43. Finally, legal advice must be understood as one of numerous supports needed by people in addition to emotional, practical, linguistic and digital support.⁴¹ Ensuring effective co-location, signposting and navigation between support, legal and non-legal, is essential if the full value of the legal advice is going to be realised. Those providing advice should be funded sustainably so that they can function as signposters to other supports, in addition to the advice they provide. In addition, advice and other supports should coexist, especially when the justice process is online and additional digital support may be required. As

⁴⁰ Low Commission, Tackling the advice deficit. A strategy for access to advice and legal support on social welfare law in England and Wales, January 2014, available at: http://www.lag.org.uk/media/147015/low_commission_report_final_version.pdf

⁴¹ See JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018) available at: <https://justice.org.uk/our-work/assisted-digital/>

discussed, above in relation to an Online Advice Platform, we recommend greater investment in “trusted faces” in “trusted places”, i.e. services familiar to the user which already provide in-person support and internet access.

Conclusion

44. Our evidence seeks to highlight the role of legal aid within a far more complex picture of public spending on access to justice. JUSTICE urges evidence-based, thoughtful development of legal aid policy, which understands that availability of legal aid, successful management of court capacity, accessible support and information, early advice and the appropriate use of alternative dispute resolution are co-dependent. Careful investment upstream can produce savings in line with the fair and efficient access to resolution of disputes. In contrast, absence of coherent advice, information and support can lead to extraordinary inefficiencies.

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