



# Access to Justice in the Family Court

1. The primary purpose of this paper is to explain to all candidates in the forthcoming General Election how the changes to civil legal aid under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) are causing injustice to many children and their families. Throughout we refer to the evidence.
2. The removal of legal aid for most private law family disputes and the lowering of the financial eligibility criteria have caused injustice to many families in the last two years. As a result of LASPO, 160,000 fewer families cases were funded in 2013-14 compared with the previous year. That meant over 13,000 families per month, all of them in trying circumstances, and many of them including vulnerable people, have not been getting legal help<sup>1</sup>. One of the consequences is that the number of cases in which neither party is represented has increased by 30% across all family court cases.<sup>2</sup>
3. Litigants in person who have no choice but to represent themselves inevitably struggle to present their cases. The treatment of vulnerable people in the Family Court is so poor that it has been described as ‘shameful’ by the **President of the Family Division, Sir James Munby**.
4. The efficient delivery of family justice intended by the creation of the single Family Court is under threat. Judges and HMCTS staff are under intolerable pressure in seeking to arrive at just decisions based on inadequate evidence and preparation<sup>3</sup>. Delays and abortive hearings are growing, thereby creating extra costs for HMCTS. Judges, Magistrates and barristers have all provided evidence that delays in the Family Court have increased as a result of LASPO.<sup>4</sup> The assertion of the Ministry of Justice (MoJ) that there is no evidence of delays is based on experimental and unreliable statistics.<sup>5</sup>
5. Due to these delays children across the country are suffering damage to relationships with non-resident parents and some are losing contact altogether as parents give up on pursuing contact through court proceedings. Being denied access to legal help means many women are effectively trapped in abusive relationships thereby exposing themselves and their children to further harm.
6. LASPO has created wider costs across the public sector, the scale of which the outgoing government did not assess.<sup>6</sup> Latent social costs complete the picture of false economy.

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1 [NAO report](#) Implementing reforms to civil legal aid HC784 17 November 2014

2 [NAO report](#)

3 Family Justice Council evidence to the Justice Committee: Impact of changes to civil legal aid under Part 1 of LASPO Act 2012 HC311 12 March 2015

Summary of the report: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

4 Judicial Executive Board and Magistrates' Association written evidence to the Justice Committee; [http://www.barcouncil.org.uk/media/303419/laspo\\_one\\_year\\_on\\_-\\_final\\_report\\_september\\_2014.pdf](http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014.pdf)

5 [http://www.jordanpublishing.co.uk/system/redactor\\_assets/documents/2129/hearing-length-experimental-stats.pdf](http://www.jordanpublishing.co.uk/system/redactor_assets/documents/2129/hearing-length-experimental-stats.pdf)

6 See the report of the Public Accounts Committee 4 February 2015

7. We are not asking for all of the LASPO changes to be repealed but we urge the next government to take steps to mitigate the effects of LASPO, which has denied access to justice to the most vulnerable people, contrary to one of the MoJ's objectives, which was to target legal aid at those who need it most.
8. We set out below the minimum steps required to restore access to justice to the most vulnerable.
9. They are not listed in order of priority – all are of equal importance and are inter-linked.

**Families on a very low income have no access to legal advice; what is needed is reinstatement of pre-LASPO financial eligibility criteria**

10. Before LASPO there were litigants in person (LiPs) in the Family Court but they were more likely to be employed people with a level of ability to articulate issues and engage in the court process. Post LASPO those who are least able to represent themselves are forced to engage in the court process without the benefit of any legal advice. The President of the Family Division, Sir James Munby, shares this view:

*“Previously we had a lot of litigants in person who were there through choice. They tended to be people who had a particular point of view, but who understood the case, were articulate and had the confidence to appear in court. We now have a lot of litigants in person who are there not through choice and who lack all these characteristics.”<sup>7</sup>*

11. The MoJ assumed that the system could absorb more LiPs without adverse effects as long as more information was made available. This failed to recognise the limitations of the litigants involved.
12. Before LASPO the financial eligibility threshold was already low, having been gradually lowered over the 3 years prior to 2013. Broadly speaking, those in receipt of benefits were passported into legal aid. Post LASPO many benefits are taken into account. Those with a monthly disposable income<sup>8</sup> above £733 are ineligible for free Legal Help and those with a monthly disposable income above £315 are required to make a contribution to the cost of legal representation.

<sup>7</sup> Evidence to the Justice Committee, paragraph 97

<sup>8</sup> Income after tax, NI, housing costs, employment related expenses and childcare

13. An example of the injustice produced by these very low thresholds is the case of D<sup>9</sup> where parents faced an application by a local authority for the permanent removal of their child from their care. The father has a significant cognitive impairment whereby he was unable to act without a litigation friend. However he is employed and ineligible for legal aid because his disposable income was about £70 above the threshold for eligibility. It is obvious that he could not afford to pay for legal representation. In his judgment the President referred to this as a “*stark, indeed shocking*” predicament for the parents and described it as “*unconscionable*” and “*unjust*” that they should have to face the local authority’s application without proper representation.
14. Eventually the father was granted legal aid due to the commitment of lawyers who gave days of their time unpaid to pursue the issue on his behalf. There are many other cases where LiPs were not so fortunate.
15. Another example is K & H<sup>10</sup> where a fact-finding hearing was required as a 17 year old girl (Y) had made allegations of sexual abuse against her step-father. The allegations were pivotal to determining welfare issues in respect of the two young children of the relationship between Y’s mother and her step-father. His monthly disposable income was a little over £733 and he could not afford to fund legal representation. The question for the court was who should pay for the step-father to be represented for the narrow but essential purpose of cross-examining Y at a cost of a few hundred pounds.
16. The judge relied on the President’s judgment in Q v Q:<sup>11</sup> if the essential requirements of a fair trial cannot otherwise be met, the effect of the words “*cause to be put*” in section 31G(6) of the Matrimonial and Family Proceedings Act 1984 is to enable the judge to direct that appropriate representation is to be provided at the expense of HMCTS, and the judge so directed. The government appealed this decision and the family remains in limbo pending that appeal.
17. It might be thought that these litigants would have fallen within the scope of the exceptional funding ‘safety net’ but they did not because only those under the financial threshold are eligible to apply for exceptional funding.

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9 Re D (A Child) [2014] EWFC 39

10 K & H (Children: Unrepresented Father: Cross-Examination of Child) [2015] EWFC 1

11 Q v Q; Re B; Re C [2014] EWFC 31 at paragraph [79]

## Legal problems cost more if not treated early; what is needed is access to legal advice at the beginning of a dispute

18. Part of government thinking behind the removal of most private law family work from the scope of legal aid was that members of the public with legal problems must be diverted away from the courts and into mediation as much as possible. We agree with this ethos, subject to the suitability for mediation of the parties and of the case.
19. But there is a balance to be struck between the provision of mediation and the provision of legal advice. The former is far more effective when accompanied (or at the very least preceded) by the latter, because the compromises made are based on an understanding of the rights compromised and advice on how a judge would deal with the issues.
20. The use of mediation dropped markedly after LASPO as there are far fewer legally aided lawyers to guide litigants to mediation, and non-lawyer mediators complain that mediated agreements often fail at the point when the agreement needs to be embodied in a court order.
21. We urge the next Government to reinstate **Legal Help**<sup>12</sup> in private law cases for those who were eligible pre LASPO so that at least initial legal advice can be provided. This would improve the number of referrals to mediation and the number of mediated solutions. The cost of Legal Help is only 8% of the whole legal aid spend but Legal Help comprises 21% of the ‘acts of assistance’<sup>13</sup>.
22. For cases not suitable for mediation, a negotiated solution is more likely to be achieved with legal advice. Early legal advice will also improve the ability of the litigant to focus on the relevant issues and the relevant evidence, for those cases which have to be resolved by a judge.
23. A government commissioned report, “*Litigants in person in private law cases*” by **Professor Liz Trinder** et al<sup>14</sup>, highlighted the importance of initial legal advice at the outset of proceedings, to identify and complete forms, to assist in framing the case and to provide legal knowledge about procedure and outcomes. Without such legal advice it is difficult and time-consuming for judges at the first directions hearing to identify what the important and relevant issues are and what evidence is needed to address them. Judges are concerned that they do not achieve this in enough cases.

12 Which means the first point of contact for legal advice and covers help on the telephone and face to face advice, including through not for profit centres; it is not representation

13 Legal aid statistics 2013-2014

14 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf) published in November 2014

24. One of the recommendations of the Justice Committee is the development of a one-stop legal helpline to divert inquirers to other services, in particular to legal aid providers where legal aid is available.<sup>15</sup> We agree, but information alone is not sufficient for many people. As the Justice Committee noted, **Professor Roger Smith**, former Director of JUSTICE, conducted an international review of legal information helplines and found that they are most useful to better-educated prospective litigants.<sup>16</sup> The combination of poor education, lack of confidence and the emotional stress of family breakdown renders many prospective litigants in the Family Court unable to make effective use of information without advice about how the law applies to their particular circumstances and the best way to resolve their problem.

**The exceptional funding scheme<sup>17</sup> is not fit for purpose and requires an overhaul:**

25. During the passage of the Bill through Parliament, when the Ministry of Justice was warned by many professionals involved in the family justice system that injustice would be inflicted, section 10 was said to be a ‘safety net’ for the vulnerable. The MoJ estimated that between 5,000 and 7,000 applications for exceptional case funding (ECF) would be made annually, of which about 3,700 (53/74%) would be granted. In stark contrast to that estimate figures from the Legal Aid Agency (LAA) show that in the first 18 months after LASPO came into force only 2,090 applications were made (equating to 1,393 per year) of which only 151 (7.2%) were granted. More recent statistics show an improvement in the proportion of applications granted to 25% but the number of applications has decreased by 31% compared to the same quarter in 2013.<sup>18</sup>
26. As currently operated, the ECF scheme does not provide a safety net for the most vulnerable members of the public.
27. There are 2 main reasons for the lower than anticipated numbers of applications and grants:
- (i) the application form is lengthy and complex, requiring a detailed explanation of the legal merits of a case. Any litigant able to complete it without legal assistance would be capable of conducting their own case. Lawyers and other workers in the not for profit and charitable sector have decided that the use of time involved is not sustainable, when the vast majority of applications are refused. There is also a perverse disincentive to legal aid contract holders who are further deterred from making ECF applications because a rejection counts against them for future contracting purposes;

15 HC 311, conclusions and recommendations, para. 34

16 HC 311, paragraph 118

17 See section 10 of LASPO

18 <https://www.gov.uk/government/collections/legal-aid-statistics>

(ii) the Lord Chancellor's Guidance sent a clear signal to LAA caseworkers that a refusal of legal aid would amount to a breach of the right to a fair trial only in rare and extreme cases. This Guidance was found to be unlawful by the Court of Appeal in December 2014.<sup>19</sup>

28. The Justice Committee found that the ECF scheme has been mismanaged and has not protected access to justice for the most vulnerable people. The Guidance needs to be amended in the light of the Court of Appeal's judgment. The form also needs to be simplified and the MoJ needs to ensure that caseworkers have the requisite knowledge and abilities to assess the applications fairly and efficiently.
29. This issue is linked with the issue of financial eligibility, as only those who fall below this very low threshold are eligible for ECF, no matter how deserving the case.

### **Victims of domestic abuse are unable to get legal assistance:**

30. Those who have suffered or are at risk of domestic abuse and can provide evidence as specified in the Act can access legal aid for a private law family dispute.<sup>20</sup> The MoJ did introduce some additional acceptable forms of evidence with effect from April 2014 but they are not sufficient to meet all cases, particularly where the abuse is emotional and psychological.
31. The 24 month time limit is also problematic. For example, some women leave an abusive relationship but 2 or more years later their former partner applies for contact with the children; the time limit means that she will have to deal with him face to face, inside and outside court, cross-examining him personally and facing cross-examination by him. Rights of Women and other groups have expressed concern that mothers are agreeing to arrangements for contact that are not appropriate as they cannot manage opposition to the father's application.
32. The Justice Committee recommended amendments to the regulations to provide:
- (i) a 'catch-all' clause giving discretion to grant legal aid to a victim of domestic abuse who does not fit within the current criteria;
  - (ii) acceptance of evidence more than 24 months old where the applicant would be materially disadvantaged by having to face the perpetrator in court;
  - (iii) victims of domestic violence should not be expected to pay for production of the required evidence.<sup>21</sup> We urge the next government to put these recommendations into effect.

<sup>19</sup> R (Gudanaviciene and others) v Director of Legal Casework and the Lord Chancellor, British Red Cross intervening) [2014] EWCA Civ 1622

<sup>20</sup> known as the 'domestic violence gateway'

<sup>21</sup> women are having to pay up to £50 to obtain the required documentation

## Challenging unlawful government decisions is restricted to the wealthy; the recent changes to legal aid for judicial review must be reversed

33. It is essential that members of the public should be able to challenge unlawful decision making by public authorities, eg the wrongful refusal of legal aid; the wrongful refusal of a statement of special educational needs; wrongful de-registration of foster parents; or prolonged delay by Cafcass in allocating a children's guardian to a case. Changes to legal aid regulations implemented by the government mean that payment for work done by legal advisers between issue of an application for judicial review and consideration of permission will be conditional upon permission being granted, or at the discretion of the LAA if permission is refused. This is a significant disincentive and is unfair as correction of an unlawful exercise of discretion is often achieved by issue of the application without the need to proceed further.

## The residence test is unjust and must be abandoned:

34. The previous government's proposal to limit legal aid to people with a 'strong connection' to the UK has been shelved after it lost a judicial review<sup>22</sup>, decided on the basis that the introduction of such a test by way of secondary legislation under LASPO was beyond the scope of the powers granted to the Lord Chancellor.
35. The Joint Committee on Human Rights has concluded that such a test applied to children would be unlawful<sup>23</sup> and has concerns over its applicability to vulnerable adults. In its most recent report it expressed serious concerns about the adverse effects of LASPO on children.<sup>24</sup>
36. The Justice Committee has questioned whether pursuing the appeal against the judicial review is a good use of public money, when the residence test is likely to save very little from the civil legal aid budget and would potentially bar some highly vulnerable people from access to the court.<sup>25</sup> We agree.

22 R (Public Law Project) v Secretary of State for Justice [2014] EWHC 2356 (Admin)

23 Legal aid, children and the residence test (1<sup>st</sup> report, Session 2014-15, HL Paper 14/HC234)

24 <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/14409.htm>

25 Para 56

## All vulnerable people in the Family Court must be assisted and protected

37. It is not only children in the Family Court who are vulnerable. Those who have suffered abuse, or have a learning difficulty or disability, face an even greater challenge without access to legal assistance. In two of the cases referred to above the court was concerned to protect a vulnerable person from being cross-examined by the alleged abuser. Due to lack of legal representation, this feature is too common in the Family Court.
38. The Vulnerable Witnesses & Children Working Group appointed by the President of the Family Division said in its final report published on 17 March 2015:<sup>26</sup>
- “there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims ... processes which we still tolerate in the Family Court are prohibited by statute in the Crown Court.”*
39. What is needed is statutory recognition that cross-examination by an alleged abuser is abusive and must not happen in the Family Court. It does not happen in the criminal courts and there is no good reason for any different approach in the Family Court.<sup>27</sup>
40. But there are wider issues. Within the family justice system there are parents with learning disabilities, mental health problems or other communication difficulties which render them vulnerable and unable to conduct their own case. Such parties must have legal representation. If the ECF scheme were operating as represented, then such litigants would be granted legal aid.
41. Irrespective of the operation of section 10, once a party has been identified as vulnerable by the court s/he ought **not** to be required to go through the tortuous exceptional funding application process; legal aid for representation ought to be automatic, thereby enabling the court to conduct the case efficiently and justly in accordance with the overriding objective.<sup>28</sup>

26 <https://www.judiciary.gov.uk/publications/final-report-of-the-vulnerable-witnesses-and-children-working-group/>

27 See Youth Justice and Criminal Evidence Act 1999 which prohibits cross-examination of victims by defendants

28 Under rule 1.1 of the Family Procedure Rules 2010 the court is required to deal with cases justly, having regard to any welfare issues involved; justly includes: expeditiously, saving expense and with parties on an equal footing. This is to be amended to add: “make provision for vulnerable parties and witnesses and children to assist them in improving the quality of their evidence and to participate fully in proceedings.”

42. The woman called Michelle who appeared in the BBC Panorama programme, which investigated the Government's decision to cut its legal aid budget,<sup>29</sup> is a typical example of a vulnerable person who was unable to cope with the emotional and psychological pressure of the court process involving her child. Michelle suffers with mental health difficulties yet there was no expert evidence before the court regarding her current state of health or prognosis.
43. When children and other vulnerable witnesses give evidence a registered intermediary may be required to support and assist the witness to give his or her best evidence. In the Crown Court registered intermediaries are readily available. On 23 February 2015 the MoJ announced that the number of court intermediaries would double but this was for the criminal courts only<sup>30</sup>. Public statements about protecting victims of crime are high priority; protecting vulnerable people in the family justice system should be afforded the same level of priority.
44. In the Family Court HMCTS is required to provide an intermediary for a witness with communication difficulties when giving evidence. The cost of a report regarding the specific needs of a witness and the cost of an intermediary to attend meetings between a vulnerable party and his/her legal representatives were covered under a legal aid certificate, where granted, but recently LAA officials have been declining to cover such costs leading to delay and injustice.<sup>31</sup>
45. The view of the Working Group:

*"It is difficult to understand any argument that would suggest that intermediaries (like translators or interpreters) should not be present when necessary for the purposes of meeting with professionals, particularly legal representatives out of court and during the preparation of the vulnerable party's case. The position of funding, which is dealt with on an ad hoc basis, is unsatisfactory. If access to justice for vulnerable parties is not to be denied it is a matter which requires urgent review and clarification."*

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29 30 March 2015 at 7-30pm on BBC1.

30 <https://www.gov.uk/government/news/courtroom-communications-experts-to-double>

31 Eg in the case of D (see note 5 above) where instructions had to be taken from vulnerable parties (who are of course also witnesses) with the support of intermediaries provided by HMCTS at court, causing delay in the commencement and conduct of the hearing.

## What we propose is affordable:

46. The report of the National Audit Office<sup>32</sup> shows that the MoJ made much greater savings than expected in the first year post LASPO, with the LAA spend on civil legal aid being £41m less than its budget. Because several years can elapse between the grant of legal aid and the date of payment by the LAA, some of the 2013-2014 spend includes cases that were commenced pre-LASPO. Therefore the true level of savings per year would increase over time and the NAO estimated this would be £300m per year<sup>33</sup>. That would be a 32% cut on pre LASPO spend.
47. There is no scope for any further cuts in legal aid. Providers have suffered a real-terms reduction in fees since 1998-99 of 34%<sup>34</sup>. The number of civil legal aid contract holders has shrunk by 39% since 2008 due to previous cuts and there was a marked shrinkage of 11% in the year after LASPO.
48. The total public spending budget for the year 2015-2016 is £743 billion. Of that, the spend of £801 million on civil legal aid is a little over 0.1%. Family cases account for about 47% of the civil legal aid spend but about 55% of that is for public law cases. The spend on private law cases is a tiny part of the overall budget but the potential for greater burdens on the Family Court, the NHS, the criminal justice system and social care is incalculable.

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32 See note 2 above

33 ditto

34 NAO report, para 3.20



April 2015

Some of the published judgments which focus on the unfairness suffered by a parent in private law proceedings by reason of the denial of legal aid:

Kinderis v Kinderis [2013] EWHC 4139 (Fam)

Re B (a child)(private law fact finding – unrepresented father) [2014] EWHC 700 (Fam)

Q v Q [2014] EWFC 7

Q v Q (No.2) [2014] EWFC 31

Re H [2014] EWFC B127

Re D (A Child) [2014] EWFC 39

CD v ED [2014] EWFC B153

Re D (A Child)(No.2) [2015] EWFC 2

Re K & H (Children: Unrepresented Father: Cross-Examination of Child) [2015] EWFC1

Re JC (Discharge of Care Order: Legal Aid) [2015] EWFC B39

All readily accessible using this link and entering the case citation

<http://www.bailii.org>