

GENERAL SYNOD

LEGAL AID REFORM

Summary

There is now a significant body of very respectable opinion which believes that the legal aid system brought into force in 2013 no longer provides access to justice for significant numbers of people within our communities who are either too poor to be able to afford legal redress, or who suffer disproportionately because of illness, disability, difficulties with literacy or numeracy or language barriers. The published works cited in the motion and within this report demonstrate that our courts and tribunals are no longer as accessible as they used to be because the only pathway realistically open to many, in order to access it, was through the legal aid system. Those parts of our communities affected by the current system are marginalised and as Christians we should speak up in favour of reform.

The motion before Synod addresses the resulting unfairness. We should have a legal system that strives to achieve as level a playing field as possible in accessibility terms. Having read this paper and any materials cited Synod is asked to back the motion aimed at reforming our current legal aid system by getting it back to where it was before 2013.

The Motion

That this Synod, mindful that a justice system should be open and free from barriers of any kind, and also provide easy access to enable the most vulnerable and disadvantaged people in our society to seek professional help in bringing their claims before our courts and tribunals:

- (a) recognise our legal aid system as an essential public service and fully endorse its preservation for the benefit of the nation;
- (b) welcome the reports by Amnesty International and the Bach Commission about the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and note both their findings about its impact on the most vulnerable and disadvantaged groups in our society and their recommendations for reform of the current system; and
- (c) call on Her Majesty's Government to respond positively to these reports and explore ways of alleviating the impact that the 2012 Act has had on these groups.

Background

1. Free schemes run by volunteer lawyers to advise the poor involved in litigation emerged at the end of the 19th century. The modern system was created by Clement

Attlee's post-war government, through the *Legal Aid and Advice Act 1949*¹. Legal support and representation was to be available in all courts. There were merit tests and, above a certain limit, a sliding scale of contributions. Devised at the same time as the welfare state, legal aid was not a nationalised service like the NHS or the benefits system. Instead, its administration was handed over to the Law Society, which represents solicitors. Legal Aid celebrated its 70th anniversary in 2019.

2. In the 1980s, the growing cost to the taxpayer of the legal aid budget became a political issue. More than half of the funds were by that stage being spent in the criminal courts. During the Thatcher administration responsibility for legal aid expenditure was transferred to the Legal Aid Board. Its successor is now the Legal Aid Agency.

3. In the aftermath of the banking crisis, the coalition government initiated a cost-saving review that led to the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* ('LASPO'). LASPO came into force in 2013. Its coming into force had a dramatic effect on the provision of legal aid. The huge shrinkage in the availability of legal aid has meant that previously eligible people must either pay for advice and assistance privately, find free support from a charity or volunteer organisation, represent themselves, or do nothing. The consequences for ordinary people is really what the motion and this paper is about. Much needed professional support was put beyond their means or made considerably more difficult to access. It is also about the emotional, social, financial and mental health impact of the legal aid cuts implemented by LASPO.

4. Concern about the impact of LASPO led to the commissioning of two reports which are referred to in the motion². There have now been further reports from the Equality and Human Rights Commission³ and the UN⁴. The detail of the reports cannot be set out fully here. It would be helpful to at least dip into the reports, if not read them fully. The reports draw on practitioner experience (solicitors, barristers, Citizens Advice Bureaux) and the stories of ordinary people.

¹ The white paper preceding the legislation said the aim was "to provide legal advice for those of slender means and resources, so that no one would be financially unable to prosecute a just and reasonable claim or defend a legal right; and to allow counsel and solicitors to be remunerated for their services".

² '*Cuts That Hurt*' *The impact of legal aid cuts in England on access to justice* commissioned by Amnesty International in 2016 and '*The Right to Justice*,' commissioned by the Fabian Society and led by the Bach Commission in 2017.

³ *Equality and Human Rights Commission Research Report 118 : The impact of LASPO on routes to justice*, Dr James Organ and Dr Jennifer Sigafoos, University of Liverpool, September 2018 ('EqHRC Report').

⁴ UN Special Rapporteur on extreme poverty and human rights (Professor Philip Alston) Report published 19 November 2018. Prof. Alston wrote : "*There have been dramatic reductions in the availability of legal aid in England and Wales since 2012 and these have overwhelmingly affected the poor and people with disabilities, many of whom cannot otherwise afford to challenge benefit denials or reductions and are thus effectively deprived of their human right to a remedy. The LASPO Act (Legal Aid, Sentencing and Punishment of Offenders Act) gutted the scope of cases that are handled, ratcheted up the level of means-tested eligibility criteria, and substituted telephonic for many previously face-to-face advice services.*"

Impact

5.The cuts to legal aid under LASPO have had a particularly serious and disproportionate impact on disadvantaged and marginalised people in the UK and this has been borne out by the testimony given to the bodies who reported on the issues. Those formerly eligible for legal aid have had to undergo financial deprivation to pay for their own legal fees or have taken on debt to fund their own advice and representation. Those affected most have additional needs : poor literacy and numeracy skills, physical and mental health challenges, disability, language barriers. There have also been consequences for the quality of outcomes in courts and tribunals. Those forced to represent themselves present cases badly, cases that may have had greater merit with professional input. Rules and procedures are complex and are not easy to navigate at the best of times and cases prepared by litigants in person suffer through poor presentation and a failure to understand the issues or rules of evidence.

6.After LASPO came into force you can no longer get help with a family breakdown unless you are a victim of domestic violence. Nor can you get help when the DWP wrongly assesses you as fit for work or takes away your Personal Independence Payment. The same applies if you are unfairly dismissed or are facing deportation, as those embroiled in the Windrush saga discovered. Legal aid was also taken away for medical negligence, with the exception of birth injury cases. Help is available if you are going to be made homeless, or as a tenant your home is in such poor disrepair that your health is being affected. You cannot get help with any other housing matters. More specific issues are addressed below.

7.Services offered freely by solicitors (typically in 30 minute surgeries) is barely enough time and scratches at the surface of the problem at hand. Voluntary organisations have seen a huge increase in demand and are oversubscribed. They frequently lack the specialist experience required. Some particular areas of law that suffered from the cuts are now highlighted.

Family Law

8.Amongst those most affected by the cuts are children. Prior to LASPO legal aid was available to parents to resolve disputes over their children. Post-LASPO legal aid was removed except where there was domestic abuse against one of the parents.

9.It is in the family courts where the increase in self-representation has been marked. Parents acting for themselves now have to pay court fees to start their case. They often have to access some legal support to help put together a court bundle or gather evidence but are largely doing so single-handedly. Often expert evidence is required such as drug tests or psychiatric reports. Evidence of this kind is expensive and would have been funded by legal aid pre-LASPO. In other words, the evidence that was seen as valuable to the court in making informed decisions about a child's welfare can no longer be guaranteed as being available to a court because of cost.

10.If a parent cannot understand the evidence requirements for a case, cannot navigate procedures and then represent themselves then the interests of a child may not be seen as clearly as it should be. This concern has been noted judicially at a high level in a case where legal aid was denied to one of the parties⁵.

Employment Law

11.A challenge here arose initially from the imposition of tribunal fees which were eventually ruled unlawful in 2017⁶. The imposition of fees led to a massive reduction in claims being brought before the employment tribunal⁷. Potential litigants found themselves in a trap with low value claims not being seen by solicitors' firms as worth taking on a 'no win, no fee', whilst at the same time not being able to afford to pay for private representation.

12.Legal Help (the scheme for advice only, and not representation) is only available for discrimination claims now. It was formerly available for a whole range of potential claims arising out of employment which made sense : employment tribunal proceedings often involved a number of parallel claims around unfair dismissal, discrimination and pay issues for example. Advice about potential discrimination now has to be accessed initially via a telephone gateway. Detecting discrimination is not straight-forward evidentially. If it happens at all it is almost always in the twilight. It normally needs the eyes of an expert to see it or detect its operation in the workplace.

13.Employment law and tribunal proceedings are particularly complex and a lay person could easily get lost in its rules and procedures. There is often an inequality of arms as employers are usually represented at all hearing stages of a case. This exacerbates feelings of powerlessness, and in some instances a desire to give up. Although legal aid was never available for representation in the tribunal, the former pre-LASPO advice only phase at least offered potential claimants some valuable professional appraisal of their case.

⁵ Sir James Munby, President of the Family Division, in *Q v. Q* [2014] EWFC 7, para. 19 : *"it seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here. I emphasise the interests of the son because, under our procedure in private law case like this where the child is not independently represented, fairness to the child can only be achieved if there is fairness to those who are litigating. There is the risk that, if one has a process which is not fair to one of the parents, that unfairness may in the final analysis rebound to the disadvantage of the child"*.

⁶ *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 which noted in para 20 that fees were set at between £160 and £1,200

⁷ Ministry of Justice data indicated a 72% drop in claims accepted by the employment tribunal comparing the first quarter of 2013/14 with the first quarter of 2015/16 : Report at note 3, page 30.

Welfare Benefits

14. Research has shown that welfare benefit issues often cluster with debt and housing issues⁸. Some commentators have seen a close relationship between changes to the benefits system and legal aid cuts⁹. Those affected by benefit reductions and negative medical re-assessments found it harder to challenge the decisions because of legal aid cuts. Not surprisingly, this is the largest area of impact and of highest demand and need for legal advice and assistance. LASPO cuts have created 'advice deserts' in this sector. The cuts have seen a massive reduction in specialists in welfare benefits law continuing to work in the sector and the vacuum has been filled by less qualified (albeit still knowledgeable) third sector providers. Such alternative provision is very general in nature and there are delays in accessing support due to demand. Support here does not include representation at any tribunal hearing¹⁰.

15. The government even recognised in its initial consultation on LASPO the disproportionate effect on disabled people. The equality impact assessment also acknowledged that those in receipt of legal aid for welfare benefits were more likely to be disabled. The government's answer was to rely on the 'user-friendly nature of the tribunal' as a response. The evidence Amnesty International received suggested otherwise. Those dependent on benefits often have issues which make them even less capable of navigating a judicial process¹¹. Evidence suggested also that there was over-reliance on seeing the tribunal process as 'inquisitorial' and there is doubt as to whether it operates in this fashion.

Immigration Law

16. Migrants and refugees are affected. There are two particular areas where legal aid was withdrawn : Article 8 (right to private and family life) immigration cases and family reunification cases.

17. Take as examples, a child born in the UK, a mother or father whose children are all British citizens, or a person married to a British citizen. They all have prima facie rights to remain. Article 8 (of the European Convention on Human Rights) is a qualified right and a government can argue for an interference with it as long as it meets tests of lawfulness, necessity and proportionality. The government's argument in favour of withdrawing legal aid was that applications on this footing were straightforward and the tribunal process was accessible. Immigration law is complex, the rules often change, and it is sensitive to small errors. This complexity is reflected in the fact that there is a regulation of the supply of advice and assistance under the Immigration and

⁸ EqHRC Report, page 36.

⁹ EqHRC Report, page 39 referring to an earlier report in 2017 by Logan Green and Sandbach for the Legal Action Group.

¹⁰ Commonly the First-tier Tribunal (Social Entitlement Chamber).

¹¹ 'Cuts That Hurt', pages 45-46, and EqHRC Report, page 13.

Asylum Act 1999. Again, people in this group often have additional needs : there are language barriers, literacy problems, mental health challenges, homelessness.

18.As for family reunification cases, refugees applying to have their family join them in the UK are no longer eligible for free legal advice and assistance. Typically, these are people who have come to the UK through war and other types of conflict to secure asylum status. Amnesty International has argued for the automatic eligibility for legal aid in such cases and a High Court decision supported that position, only to be overruled by the Court of Appeal¹². The government had argued prior to LASPO's introduction that such applications were straight-forward¹³ but again the experience of practitioners suggests otherwise.

Exceptional Case Funding

19.Seen as a safety net, LASPO introduced 'exceptional case funding'¹⁴ for cases outside the scope of funding but where failure to provide legal aid risked a breach of an individual's human rights, or rights based on EU law, or where the Director of Legal Aid Casework so determined. The scheme proved to be inadequate as an initial statistic demonstrating its outworking showed : in the first year of the ECF scheme operating only 16 out of 1,315 applications were granted¹⁵, a success rate of just over 1%. Legal challenges led to changes being made to the ECF scheme and an increase in successful applications has resulted (950 in 2016/17). The government anticipated 5,000-7,000 applications annually under LASPO but the take up has been underwhelming. The reasons for this have been put down to the complexity of the application form, the restrictive guidance on funding, low success rates acting as a deterrent to making an application and a restriction on payment to solicitors completing the form only when an application is granted¹⁶.

20.A promised review of the impact of LASPO was conducted through 2018 and into the beginning of 2019. The response to the review was lukewarm. Many were disappointed that after almost six years of explaining the damaging consequences of LASPO, the review did not properly address the impact of LASPO. One commentator¹⁷ expressed concern that the Ministry of Justice had no plans 'to undertake research or properly assess whether current provision actually meets the demand for legal advice'.

¹² *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622

¹³ Ministry of Justice 'Reform of Legal Aid in England and Wales : the Government Response' June 2011.

¹⁴ S.10 LASPO 2012.

¹⁵ 'Cuts That Hurt', page 24.

¹⁶ EqHRC Report, pages 13-14.

¹⁷ Legal Aid Practitioners Group CEO, Chris Minnoch, speaking to Legal Action <https://www.lag.org.uk/article/206047/muted-response-to-laspo-review>

The Church's Response

21. We are called to work towards transforming unjust structures. To do so effectively, we must first see their out-working and how the structures and institutions shape our lives and the lives of those around us. Only by striving to see unfairness that is hidden can we then expose it as part of that upside-down world that feels intrinsically wrong, a world where indifference and meanness persist. Dietrich Bonhoeffer famously suggested that, "The Church is not simply called to bandage up the wounds of victims beneath the wheels of injustice but to drive a spoke into the wheel itself."¹⁸

22. The effects of LASPO are that they create a distortion in our legal system with the emergence of a two-tier system of justice. Those in control of the resources and choices over access to courts and tribunals have caused it at the expense of those identifiable as vulnerable for financial reasons, or because of disability, mental health and debt. LASPO is a process that hinders those groups from exercising the opportunity to be properly heard on matters of substance in their lives. It is a system of inequity which operates at an institutional level to advantage some and to disadvantage others.

23. This is not a cause that is without support from others within the public life of this country. Lady Hale, the President of the Supreme Court who will have retired by the time the debate of the motion takes place, has spoken out recently on this subject¹⁹. Frank Field, until 12 December 2019 MP for Birkenhead, had lodged his own private members' bill on the issue as well²⁰. The themes and content of this paper are not just a well-trodden path but now a deeply rutted one. The subject matter has been well-researched and well-rehearsed in the papers cited as well as others and they now comprise a small library. This writer is merely placing before Synod the campaigning of others and the fruits of their work.

24. This is a public debate the church can speak into. The papers referred to in the motion have specific reforming aims of their own and these can be seen in their own recommendations. I am not affiliating myself to any of the recommendations but merely bringing to the attention of Synod the growing chorus of calls for reform of a legal aid system which is failing ordinary people.

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¹⁸ Letters and Papers from Prison, 1943-1945

¹⁹ <https://www.bbc.co.uk/news/uk-50923289>

²⁰ See Hansard 30 September 2019 : Justice (Equality of Access) Bill, Presentation and First Reading (Standing Order No. 57).