

GENERAL SYNOD

Legal Aid Reform – A Background Paper from the Secretary General

Summary

The rule of law and universal access to justice are essential elements to Christian teaching on a just society. The 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act has raised consistent and serious concerns that access to, and quality of, justice have been undermined. The Church will continue to monitor and engage with the government on this issue. However, the reports cited in the motion do not reflect the latest data or reforms, or the ongoing review into LASPO. As such their findings and recommendations ought to be treated with some caution as the basis for engagement on this issue.

Access to Justice as a concern of the Church

1. Christian theology and teaching have consistently identified that the rule of law is an essential element to a just society. Included in this as a theme throughout the Old Testament is a concern that rulers should ensure the impartiality of the law, regardless of economic status (e.g. Leviticus 19:15 'You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great: with justice you shall judge your neighbour'). This demand is seriously undermined if there is not universal access to justice, since without that there is no way in which rights can be exercised or obligations enforced. This requires an active advocacy for those who would otherwise be denied a voice ('Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy.' (Proverbs 31:8-9)).
2. This is, therefore, an issue which is of pressing concern to the Church and one which prompted several responses from the Church of England Mission and Public Affairs Division and from the Lords Spiritual between 2010 and 2014. This included, among others, responses to consultations from the Ministry of Justice and to the Joint Committee on Human Rights in 2013, a speech in the House of Lords from the Bishop of St Edmundsbury and Ipswich in 2011 and the Bishop of Rochester signing a joint statement with other Christian denominations in 2015 highlighting concerns and laying out the Christian commitment to access to justice in a foreword to a report from the Christian think tank Theos.¹

The Amnesty International and Bach Commission reports and wider evidence base

3. The motion asks Synod to note the findings and recommendations of two reports. The Amnesty International report *Cuts That Hurt: The impact of legal aid cuts in England on access to justice* was published in October 2016. The final report of the Bach Commission *The Right to Justice* was published in September 2017. Both were written to analyse and respond to the effects of the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act.

¹ Caplen A. and McIlroy D. (2015) "Speaking Up": *Defending and Delivering Access to Justice*. Theos. p6.

4. *Cuts That Hurt* was based on desk research and qualitative interviews with people who had been refused legal aid and individuals or organisations who provide legal advice, information, representation, or other support to groups affected by the legal aid cuts. It was carried out by researchers at the human rights organization Amnesty International. It warned of an emerging ‘two-tier justice system: open to those who can afford it, but increasingly closed to the poorest, most vulnerable and most in need of its protection.’ It argued that the effects had been particularly significant on children and vulnerable young people, migrants and refugees and people with vulnerabilities including mental health problems. It called for a review of the impact of the LASPO 2012 Act and the provision of better legal education such that people can better understand and claim their rights. It also made a series of other recommendations including that children should be eligible for legal aid regardless of the nature of the issue, an overhaul of the Exceptional Case Funding system and the restoration of legal aid for immigration cases with human rights concerns.
5. The Bach Commission was established at the end of 2015 by the Labour Peer Lord Willy Bach, a former Under-Secretary of State in the Ministry of Justice and drew on the expertise of a number of high profile legal experts. The secretariat was provided by the Fabian Society, a Labour-affiliated think tank. Its findings suggested that the legal aid system was in crisis and highlighted several areas of concern, including that the Exceptional Case Funding (ECF) system was granting aid to significantly fewer children and young people than the government had suggested would be covered. Its recommendations were more radical than the Amnesty International report. Specifically, it called for a new Right to Justice Act with codified rights of access to justice, a new Justice Commission to monitor and enforce that right and significant reforms to legal aid assessment. The latter would entitle all children and a much broader scope of family law cases to legal aid. The Bach Commission costed these proposals at £400 million a year, though defended those additional costs on the basis that that would amount to less than half of the savings made by the government through cuts since 2010. The then Minister of State for Courts and Justice, Dominic Raab, dismissed the report, which was perceived as being closely tied to the Labour Party (it was launched at Labour Party conference) with a two line response “We will continue to focus legal aid on those who most need help, recognising the cost of this support is met by the taxpayer, even as Labour produce yet more unfunded proposals.”
6. It should be noted that these two reports named in the motion are respectively from October 2016 and September 2017. Accordingly, neither represents the latest data or research and, crucially, both pre-date several subsequent reforms and the Ministry of Justice’s ‘Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)’ and ‘Legal Support Action Plan’ which were both published in February 2019. That review acknowledged several of the criticisms contained in the cited reports, including fears over ‘advice deserts’ in some areas of law, particularly in rural areas, the rise of self-representation in courts and concerns over some costs and fee thresholds. Already the evidence base for domestic violence cases has been expanded, and the ‘Legal Support Action Plan’ laid out intentions to review the thresholds for legal aid entitlement, to increase awareness

of the availability of legal aid and simplify the Exceptional Case Funding (ECF) scheme. This review is due to report in late 2020.

7. That said the findings (though not necessarily the recommendations) of both the Amnesty International and Bach Commission reports are broadly consistent with those of several other reports including some which were completed more recently. These include highly critical reports from the Equalities and Human Rights Commission in September 2018² and from the Law Society in June 2017.³ The parliamentary Joint Committee on Human Rights also raised several serious concerns along similar lines in a July 2018 report.⁴ More recently still, the Institute for Government produced a review of performance standards of criminal courts in 2019. This highlighted that financial savings had been significant, and that the government had successfully lowered the number of cases reaching court (thereby partially reducing demand on stretched courts). More negatively it also noted that there was evidence of a significant reduction in recruitment and morale to the judiciary since 2010 (the number of magistrates has halved, and there are 10% fewer judges) and highlighted fears that the quality of justice may be being undermined (though noting that this was very difficult to prove definitively).⁵ Also in 2019 another EHRC report raised specific concerns that vulnerable individuals are not being supported to bring discrimination claims and over the effectiveness of the mandatory telephone gateway.⁶

Conclusions

8. The LASPO reforms have undoubtedly led to significant financial savings for the government. Her Majesty's Courts and Tribunals Service (HMCTS) spending was 18% lower in real terms in 2018/19 than it was in 2010/11. It is relevant to note that there was broad consensus in 2010 (including in the manifestos of other political parties) that reforms to the Ministry of Justice and HMCTS and financial savings were required to some degree given the economic situation. The objective of first the Coalition, and subsequent Conservative governments has been to make significant financial cuts and to prioritise spending on only those most in need of financial assistance. There was also a desire to reduce the number of cases reaching court that did not in fact require a court resolution and which nevertheless were making extensive use of public funds, and a positive desire to increase the principle of mediation in public disputes. The Coalition government minister responsible, Lord McNally, continues to stand by the argument that such reforms were necessary to reduce the burden on courts and to encourage a culture of mediation rather than seeing courts as the natural solution to all disputes.⁷

² Organ J and Sigafoos J 'The impact of LASPO on routes to justice' September 2018, EHRC.

³ The Law Society *Access Denied?: LASPO four years on: a Law Society review* June 2017

⁴ Joint Committee on Human Rights 'Enforcing human rights: Tenth Report of Session 2017–19' July 2018 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66902.htm>

⁵ Atkins et al (2019) 'Performance Tracker 2019: A data-driven analysis of the performance of public services' Institute for Government pp137-163 <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts>

⁶ ECHR 'Access to legal aid for discrimination cases' June 2019.

<https://www.equalityhumanrights.com/en/publication-download/access-legal-aid-discrimination-cases>

⁷ Bowcott O 'Lord McNally: 'We had to cut legal aid. It's not a bottomless pit'' *Guardian* 30 January 2019

9. It is concerning, however, that there is such a significant weight of expert and professional opinion that the consequences of the financial savings have been to undermine access to justice in several key areas of law that affect some of the poorest and most vulnerable. As summarised by the Law Society⁸ these concerns are in short that:
- a. legal aid is no longer available for many who need it
 - b. those eligible for legal aid find it hard to access
 - c. wide gaps in provision are not being addressed
10. The ongoing government review of the thresholds for legal aid entitlement, and of how to simplify the Exceptional Case Funding (ECF) scheme may alleviate some of those concerns, though it is not expected to report before late 2020.
11. Given the importance of the rule of law and access to justice as a point of Christian teaching, as well as the broader concern to advocate for and defend the rights of the poor and vulnerable, this will certainly remain an issue on which it is essential that the Church retains an active interest and involvement, particularly in the context of responding to the review.

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Secretary General

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⁸ See LASPO ACT webpage <https://www.lawsociety.org.uk/policy-campaigns/articles/laspo-act/>, last updated August 2019