



**The Bar Council**

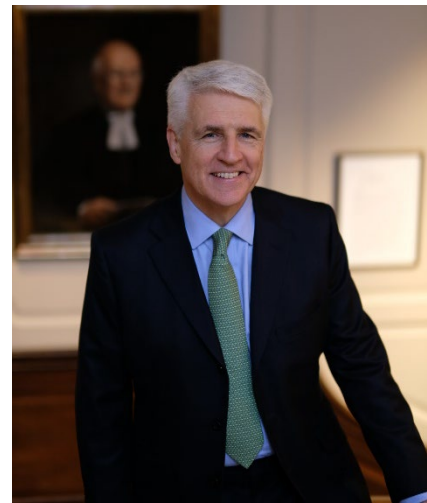
# **Running on Empty**

## **Civil Legal Aid Research Report**

**January 2021**

# Foreword from the Chair of the Bar

To the person on the street, 'civil legal aid' might be an obscure legal term. In reality, it goes to the very heart of how members of the public without means can exercise their legal rights, whether they face issues from housing and employment to immigration and inquests. A fair and functioning society cannot exist without this support, yet our report finds a civil legal aid system running on an empty tank, kept going by nothing more than the goodwill of the legal profession. This is not a sustainable way to guarantee the future of such an essential service for the public.



The Bar Council has consistently called for a reversal of LASPO, which took many areas of legal aid funding out of scope. Eight years later, we continue to see its damaging effects. This report, based on a series of interviews with barristers and clerks, uncovers a number of serious problems with the system which go beyond red tape and the 'culture of refusal' we have come to see from the Legal Aid Agency. It reveals, for example, a severe inequality of arms when it comes to bereaved families being represented at inquests. For grieving families in this situation not to have funding suggests, as one participant put it, that as a society "we're not doing our duty towards them at all."

The consequences of underfunding of the civil legal aid system will continue to snowball if action is not taken. We now find ourselves pleading for the bare minimum. We urge the Government to heed the findings of this report and seek to meet the Bar's commitment to social duty and access to justice with some proper investment in, and respect for, the justice system.

**Derek Sweeting QC**

**Chair of the Bar of England and Wales**

# Definition of terms:

**Area of practice** - The area of law in which a barrister mostly works. Most barristers would tend to have one main area of practice, for example crime or commercial law.

**Ethnic minority background** – Black, Asian and minority ethnic.

**The Bar** – The collective noun for barristers.

**Call/Year of Call** – The year in which a barrister is formally recognised by their Inn of Court to have passed their training and been ‘called to the Bar’.

**Conditional Fee Agreement/CFA** - An arrangement currently used in much civil litigation, especially where the claimant has limited means and legal aid is not available, such as in almost all injury cases. Under the most usual type of conditional fee agreement (commonly described as a “no win, no fee” agreement) the lawyer charges nothing for their services if they lose the case, but receives their base fees, and possibly a percentage uplift on their base fees (a success fee), if they win. There are alternative forms of conditional fee agreement used in niche areas of practice. These include discounted rate conditional fee agreements (usually described as “no-win, low fee” agreement) where the lawyer receives a low fee in the event of a loss and their usual fee in the event of a win.

**Civil/civil legal aid**- The system of public funding made available for non-family and non-crime legal issues that is administered by the Legal Aid Agency. The scope of funding available is defined in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), Schedule 1.

**Chambers** -The rooms used by a barrister or a group of barristers.

**Clerks** - Administrative and diary staff, usually employed by chambers, who manage barristers’ workload, diaries, payments and general running of chambers.

**Escape Case/Escape Fee** – In certain civil matters in which the claim exceeds the fixed fees by a certain amount, the case becomes payable on an hourly rate.

**Exceptional Case Funding/ECF** – A provision in LASPO where funding can be made available even when a case is outside the scope of legal aid, where an absence of funding would be a breach of an individual’s rights under the European Convention on Human Rights (ECHR), or their rights to legal aid under EU law.

**Inn of Court** – A professional association for barristers. All barristers must belong to one of four Inns of Court (Gray’s Inn; Lincoln’s Inn; Inner Temple; Middle Temple).

**Inquest** – A judicial inquiry held to determine the cause of a person’s death.

**Judicial review** – A court proceeding in which a judge reviews a decision or action made by a public body and considers whether the law has been properly followed.

**Junior** - A barrister who is not a QC. Around 90% of practising barristers in England and Wales are juniors.

**LAA** - Legal Aid Agency. Executive agency of the Ministry of Justice responsible for the administration of legal aid.

**LASPO/LASPO 2012** - Legal Aid, Sentencing and Punishment of Offenders Act 2012.

**Legal aid** – Government funding for legal matters that can meet or help to meet the costs of legal advice, mediation or representation.

**LiP** - Litigant in Person. Someone who is representing themselves in litigation, whether through genuine choice or lack of access to a legal professional.

**Practice** - A barrister's workload.

**Pro bono** - Latin phrase which describes the voluntary provision of professional services for no fee.

**Pupillage** - A period of training at chambers. Usually paid a (low) wage, and usually lasting one year. Securing pupillage is highly competitive.

**QC** - Queen's Counsel. A limited number of senior barristers (around 10% of the practising Bar in England and Wales) become Queen's Counsel (receive 'silk') as a mark of outstanding ability. They are normally instructed in very serious or complex cases. Most senior judges once practised as QCs.

**Set** - Another name for barristers' chambers but can also refer to the group of barristers who work out of that chambers.

**Silk** – Another name for a QC. Barristers are said to 'receive/take silk' when they become QCs.

# Introduction

The General Council of the Bar, known as the Bar Council, is the Approved Regulator of the Bar of England and Wales, and the representative body for the profession. It discharges its regulatory functions through the independent Bar Standards Board.

The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend.

This report looks at civil legal aid practice - one of the three areas of publicly funded legal representation (the others being criminal and family). Civil law covers areas that are essential to a fair and functioning society, including housing, immigration, employment, clinical negligence and inquests. We had found that, anecdotally, certain issues concerning working conditions, access to justice and sustainability were being raised by practitioners. We felt it necessary to document the policy challenges and working circumstances of this type of publicly funded work in order to inform our future policy positions and act as evidential support in our conversations with the Ministry of Justice and the Treasury.

## Summary findings:

- 1. The widespread closures of advice centres and high street solicitors, and increased pressure on those that remain, have seriously impacted the Bar.**
- 2. There is a serious problem with inequality of arms when it comes to bereaved families being represented at inquests.**
- 3. Increased case volume is made to compensate for the reduction in fees, leading to a stressful and last-minute working culture.**
- 4. Unsustainability for those coming in at the junior end, and problems with retention and career development, particularly from those without independent financial means.**
- 5. Processes at the Legal Aid Agency feel obtuse and complicated. There is a perception of a "culture of refusal".**

Since the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) came into force in April 2013, the structures of work and remuneration around publicly funded legal work have changed considerably (a summary of the history of legal aid in England and Wales is available in Annex I). Many areas have been taken out of scope, and changes to the means testing for areas still in scope has meant that many people can no longer access legal aid funding for their legal issues. These changes have had a profound impact on the legal services sector, including the Bar.

The Bar Council has consistently called for a reversal of LASPO, as it undermines the ability of people to access justice and has a detrimental impact on working conditions at the Bar. In both our two previous reviews of the impact of LASPO on the Bar – “LASPO: One Year On” (September 2014)<sup>1</sup> and “LASPO: Five Years On” (October 2018)<sup>2</sup> we highlighted that those barristers who were still taking on civil legal aid work were working on a higher volume of cases to make ends meet while fee income decreased, and that clients were struggling to find and pay for legal representation. Our policy position on which specific issues within the legal aid sector we have been campaigning on has changed over the years (for a full discussion, please see Annex II). Most recently in our March 2020 Budget Submission we asked for an increase in fees for publicly funded legal work, targeted re-introduction of civil and family legal aid, and additional resourcing of the Legal Aid Agency (LAA).<sup>3</sup> In our September 2020 Spending Review submission we asked for non means-tested legal representation to be made available for all domestic abuse cases, and for early legal advice to be made available for social welfare issues.<sup>4</sup>

This report outlines the findings of a detailed listening exercise, where we spent time exploring the lived experience of working as a civil legal aid barrister in 2020. We wanted to better understand the conditions of work for civil legal aid barristers and record how this has changed in recent years.

Between July and September 2020, the Bar Council interviewed 16 civil legal aid barristers and clerks. Our interviewees were sampled to be broadly representative of the profession in terms of area of practice, protected characteristics and region of England and Wales in which they primarily practiced. They were sourced through email communication with civil legal aid

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<sup>1</sup> Bar Council (September 2014) “The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On. Final Report” [https://www.familylaw.co.uk/docs/pdf-files/LASPO\\_One\\_Year\\_On\\_-\\_Final\\_Report\\_September\\_2014\\_.pdf](https://www.familylaw.co.uk/docs/pdf-files/LASPO_One_Year_On_-_Final_Report_September_2014_.pdf)

<sup>2</sup> Bar Council (October 2018) “LASPO Five Years On: Bar Council submission to the Ministry of Justice LASPO Post-Implementation Review” <https://www.barcouncil.org.uk/uploads/assets/e89215f4-6588-491d-820390e1809f5905/laspopirsubmissionbarcouncilfinal.pdf>

<sup>3</sup> Bar Council (March 2020) “The Bar Council Budget Submission” <https://www.barcouncil.org.uk/uploads/assets/bd562809-f05a-4c55-964e414e28d7ae9a/3da04fbe-03b3-484c-ad3a61e6faa94d04/Bar-Council-Budget-Submission-March-2020-SR.pdf>

<sup>4</sup> Bar Council (September 2020) “Bar Council Spending Review Submission” <file:///C:/Users/RHolmes/Downloads/Bar%20Council%20Spending%20Review%20Submission%20September%202020.pdf>

clerks in identified sets. Each interview was conducted over remote video conferencing and lasted approximately one hour, with some follow up conversations and email exchanges.

We found a civil Bar still deeply committed to the social principles of justice for all but weary of their labour, commitment and goodwill being continually taken for granted by a government seemingly anxious to save every possible penny of legal aid funding even at the expense of short term effectiveness and long-term sustainability. Barristers who choose to work in publicly funded work, despite knowing they could earn substantially more elsewhere with their hard-won qualifications, have usually made a deliberate vocational choice from a sense of social duty and moral conviction. They are then put into a position where they are progressively expected to work harder for less reward and more stressful working conditions. Our barristers are extremely worried about the sustainability of their profession, particularly in its interdependence with solicitor colleagues, who have been just as hard hit by funding cuts.

A spirit of social duty is the bedrock of publicly funded law, but it cannot, and should not be expected to endure in a climate of little reciprocal care or respect from the government for the profession and the justice system.

## Our participants – the sample and method

We selected the participants through email contact with civil clerks. We asked clerks from a variety of sets – some specialist legal aid sets and some mixed - whether they could nominate barristers within their set to participate. We asked to speak to those with a predominantly civil publicly funded practice, but then left it to the judgement of the clerks as to who would be most relevant for us to speak with. Once barristers had been nominated, we then wrote directly to those we wished to interview.

Our participants were selected to be broadly representative of areas of practice within civil legal aid and of the profession. The representation of area of practice was our main requirement, as we wanted to ensure we spoke to as many specialist areas within civil practice as possible, and to speak to several people within the largest areas (immigration, housing, public law and judicial review). We spoke to barristers who covered the following areas; actions against the police, clinical negligence, community care, employment, family, housing, immigration and asylum, inquests, mental health law, prison law, public law and judicial review.

We also considered representativeness of our participants according to location and protected characteristics. Of 16 participants, three were clerks; three QCs; eight women, eight men; three were from ethnic minority communities/backgrounds; one told us they had a disability; one a long-term medical condition; and four were primary carers for a child or children. London

is over-represented as a primary practising location, with 12 of our participants based in London.<sup>5</sup>

We are conscious to emphasise that this was an in-depth listening exercise designed to give a full, textual sense of the lived experience of working as a civil legal aid barrister in 2020, and it is not intended or implied to be genuinely or fully representative.

**Table of participants (the names and some identifying characteristics of some of our participants were changed at their request to preserve their anonymity and/or that of their clients).**

Name of participant (* denotes name changed)	Level of experience	Primary area(s) of practice	Primary practice region
Sarah Nicolls*	2010 call	Immigration	London
Sam Jacobs	2011 call	Public law	London
Zia Nabi	1991 call	Public law/housing	London
Sian Wilkins	Senior clerk	Civil	London
Ella Davies*	2013 call	Housing	Leeds
John Edwards*	2008 call	Personal injury/clinical negligence	Manchester
Hugh Southey QC	1996 call	Public law	London
Andrew Bridgman	2001 call	Inquests/Personal injury/clinical negligence	Manchester
Abid Mahmood	1992 call	Public Law, Human Rights, Court of Protection and Immigration	London, Midlands and Manchester
Sarah Hemingway	2006 call	Inquests, actions against the police	London
Rachel Francis	2012 call	Family, immigration	London
Michael Harris	Senior consultant clerk	Civil	Midlands and national
Sonali Naik QC	1991 call	Immigration, public law	London
Stephanie Harrison QC	1991 call	Public Law, Immigration and human Rights.	London
Emma Manning	Senior civil practice manager	Civil	London
Jason McDonald*	2006 call	Housing	London

<sup>5</sup> For context. There are currently around 1, 200 members of the IBC (Institute of Barristers' Clerks); 11.2% of barristers are QCs; 37.7% of the practising Bar are women; 13.9% are from ethnic minority or mixed ethnicity communities/backgrounds; 3.4% have informed us they have a disability; 14.9% are primary carers for a child or children; 60.9% of barristers have their primary practising location as London.



This research project was conducted with full compliance of research ethics norms. The General Council of the Bar (GCB) adheres to the Economic and Social Research Council's [Framework for Research Ethics](#) and the Social Research Association's [Research Ethics Guidance](#). The General Council of the Bar is registered with the Information Commissioner's Office (ICO) (Z6471364). For the purposes of this project, the Bar Council was the Data Controller, and all personal data was only handled by those authorised to work with that data.

This study involved participants in interviews. The invitation to interview explained what the research was about, how the data would be handled, and provided contact details should participants wish more information or require their response to be withdrawn at any point.

We provided full information on how personal data would be treated confidentially and sought written consent to publish (anonymously if requested) quotes from the interview in the final report. All participants were offered the opportunity to review and redact, where needed to protect theirs or clients' confidentiality, the transcript from the interview. The final report was reviewed collaboratively with all participants prior to publication.

We structured the interviews around a set of template questions, which the participants were offered the opportunity to review beforehand if they wished. These questions were either asked as part of an interview conversation, which was recorded (with consent of interviewee) and then transcribed or, if interviewees preferred, they just provided written answers. Some participants chose to both submit written responses and participate in an interview. The full list of template questions is provided in Annex III. In many of the interviews the conversation veered into other areas, and we were flexible about the topics our participants chose to discuss.

In the analysis section we have chosen to group the narrative under the five headings of the key policy findings for reasons of clarity and brevity. This is not to suggest that there were no other points of merit or interest that came out of the interviews.

## Findings and analysis

### **1. The widespread closures of advice centres and high street solicitors, and increased pressure on those that remain, have seriously impacted the Bar.**

Early legal help and advice (particularly regarding welfare benefits advice) supports clients in resolving their legal problems as quickly, effectively and cheaply as possible. When legal problems are not handled quickly, they tend to compound, making the situation far more complicated than it needs to be. The removal of legal aid for welfare benefits advice and early legal help has a knock-on effect on other legal problems. As Ella Davies, a junior housing practitioner in Leeds who was working at a law centre when LASPO came into effect explained:

"I started pupillage in 2014, I was working at the law centre when it [LASPO] first came in so I saw the most devastating effects to those primary services as we lost our

welfare benefits advisor. We could not fund them anymore. The strain was put on us as housing advisors where a very, very, very high proportion of our clients actually had welfare benefit problems which had led to the housing problems and because of the legal aid contract, we could not help them with the benefit problem. We could only do that if we did it pro bono separately on the side and that was really, really difficult. You can't deal with someone's housing problem if you can't deal with their welfare benefit problem or their employment problem or their immigration problem."<sup>6</sup>

Barristers feel that clients who have cases with legal merit are often not able to access a good solicitor. The hinterland of unmet legal need is a separate and serious issue in its own right. Solicitors' firms that *do* still take on legal aid work are stretched thin, resulting in difficult and stressful working conditions for solicitors and barristers. Ella Davies described the difficulties faced by the solicitors she now works with: "The main firms that I do work for will have maybe one housing solicitor and their workload – I actually don't know how they function; I think I would have a nervous breakdown because their workload is just absolutely insane. I honestly don't know how they do it."<sup>7</sup>

The lack of access to early legal advice can also mean that, for those clients who manage to find support, their case has become more complicated and urgent by the time it reaches a barrister. Barristers are frequently having to take on cases that would have never needed the trouble and expense of court time had their clients received sensible welfare benefits advice in the early stages of their legal problem.

Barristers rely on solicitors to source work, build client relationships and organise funding for cases. As Sarah Nicolls, an immigration junior in London, emphasised, most barristers would agree that effective working relationships with good solicitors are key in building a successful practice:

"In my view, when you're looking at publicly funded work, a huge difference is in working with solicitors who don't really understand the system and don't know how to operate it. Because it is extremely involved and extremely hard work. There are issues with funding and with making applications to the Legal Aid Agency for exceptional case funding that I just know nothing about even though I work at the end of this process every year. Even having looked into it on occasion it's incredibly complicated and really only the very best solicitors can grapple with it and get paid."<sup>8</sup>

The pressure that legal aid cuts have put on solicitors, and the fact that many law centres and high street solicitor firms have closed, has created a real issue with front-line access to justice.

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<sup>6</sup> Bar Council interview with Ella Davies– 28 July 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>7</sup> Bar Council interview with Ella Davies– 28 July 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>8</sup> Bar Council interview with Sarah Nicolls – 14 July 2020. The name and some identifying characteristics of this barrister have been changed.

Jason McDonald, a junior housing practitioner in London described the issue as he saw it, identifying that the Bar was really being impacted at a secondary level:

“The real problem is on the ground at solicitor level and law centre level and advisor level and for those kind of stakeholders. And if anything, the cuts pre LASPO, in 2007/2008 were more drastic and LASPO, I think, was the last straw for a lot of those firms. I’ve seen a drastic reduction in the number of firms that exist that are practising in this field. And what that does then mean is; one, I’m concerned that there’s work out there that is not being addressed because there are deserts in the sense of people not being able to get hold of a lawyer. It also has resulted in the nature of the work being I think of a more complex, more urgent, more last-minute nature because solicitors can only take on so much work, they have to prioritise those cases which seem more extreme. So the nature of the work I think is probably more extreme than it was insofar of the individuals concerned... And also the timing because solicitors don’t have the capacity to see someone straight away because there’s not enough firms out there, there’s not enough advisors, you’re dealing with a lot more last minute urgent things, out of time applications, all this sort of stuff.”<sup>9</sup>

Work for legal professionals has become stressful, unnecessarily complicated and firefighting in nature. As Jason McDonald went on to say: “There’s a lot more firefighting and dealing with things at the last minute than we saw prior to the cuts. It’s the nature of the work rather than the actual reduction in work for me.”<sup>10</sup>

Zia Nabi, a highly experienced housing practitioner based in London, described how it feels when working in an area where, because of a lack of solicitors, few people get legal aid funding:

“In a sense the people who get to a barrister are the fortunate ones. They’ve managed to find a solicitor who has taken them on, who has got them public funding, who has then satisfied the Legal Aid Agency that there’s sufficient merit, and then got to a barrister. So I’m seeing a small proportion of the lucky ones. And what we do know is that there are huge legal aid deserts, people who aren’t getting any representation at all. Every now and then I will do a case in a court in an area where there isn’t a legal aid provider. My colleagues and I have remarked upon the different atmosphere sometimes experienced in such circumstances where courts have become used to non-represented litigants and are reliant on the represented side to put the case, in a system which is set up to be adversarial.”<sup>11</sup>

Leading junior Abid Mahmood, also a Recorder of the Crown and County Court and a Deputy Upper Tribunal Judge, noted the differential impact of an inability to access legal

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<sup>9</sup> Bar Council interview with Jason McDonald – 22 September 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>10</sup> Bar Council interview with Jason McDonald – 22 September 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>11</sup> Bar Council interview with Zia Nabi – 22 July 2020.

representation on people from south Asian communities. The same could be said more broadly for those who live in more deprived areas. The Law Society has carried out some well-publicised work on legal aid deserts, pointing out that they mean that, “people on low incomes facing important legal issues are struggling to get the local face-to-face advice they're legally entitled to.”<sup>12</sup> Lack of access to proper legal representation has become a problem that is more profound depending on geography, poverty, race and class:

“Many persons from the south Asian communities find it very difficult to access lawyers. When they do, some from within their own communities are not able to progress their cases well because there is little funding for them to do so. Those firms work on a shoestring and so they cannot risk taking on cases with low prospects of success. It means many cases with borderline prospects are left to wither. It means those clients fall into depression or worse without legal assistance.”<sup>13</sup>

As Abid Mahmood, who is a specialist in public law, human rights, court of protection and immigration put it: “The system now for legal aid is not only bureaucratic, but unfair and unpredictable.”<sup>14</sup> Mahmood went on to say: “The legal aid deserts are real. I have seen many excellent solicitors and solicitor firms disappear because they cannot afford to do legal aid work.”<sup>15</sup> If legal aid solicitors are not there, the legal need does not get picked up, as people cannot find their way to legal representation. Legal aid barristers, therefore, do not get work. Mahmood described the impact of this: “That is a shame because, just as in medicine, law is not always about getting the best returns for each pound. Sometimes it will cost a huge amount of money to give a person an extra year of life. Similarly, sometimes it will cost a large amount of money to fight a wrong approach by a local government or central government department.”<sup>16</sup>

Reduced funding for early legal advice results in people either not being able to access legal representation at all or else being forced, rather than choosing, to attempt to represent themselves in court. Self-representation is not how the court system is designed and is an unsatisfactory outcome for everyone concerned. The number of people representing themselves (known as litigants in person (LiPs)) has gone up considerably since 2013. Precise numbers are difficult to come by, and the National Audit Office has criticised the Ministry of Justice’s record-keeping on the matter.<sup>17</sup> All available data suggest a dramatic rise. For example, in the financial year 2012/13, immediately preceding the introduction of LASPO, a total of 58% of parties were recorded as having legal representation in private law cases that had at least one hearing. In 2017/18, this had reduced to 36% of parties.<sup>18</sup> In family cases, the proportion of cases where both parties had legal representation went from 41% in January to

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<sup>12</sup> The Law Society (2020) “Legal Aid Deserts Campaign”

<https://www.lawsociety.org.uk/en/campaigns/legal-aid-deserts>

<sup>13</sup> Bar Council interview with Abid Mahmood – 17 August 2020.

<sup>14</sup> Bar Council interview with Abid Mahmood – 17 August 2020.

<sup>15</sup> Bar Council interview with Abid Mahmood – 17 August 2020.

<sup>16</sup> Bar Council interview with Abid Mahmood – 17 August 2020.

<sup>17</sup> House of Commons Library (2016) “*Litigants in Person: The Rise of the self-represented litigant in civil and family cases*” Briefing Paper 07113.

<sup>18</sup> Letter from The Right Honourable the Lord Burnett of Maldon to Bob Neill MP, 25 January 2019.

March 2013 to 21% in April to June 2020.<sup>19</sup> LiPs have a real impact on the smooth running of court proceedings. As Rachel Francis described:

“Litigants in person can have an exhausting effect on the system, in terms of the resources of all the people who are involved in a case (judges, lawyers, court staff, etc); and, specifically, the increased time involved in managing these cases for lawyers on the other side. It’s just not manageable. I know from reading various reports on this issue that judges often find cases involving LiPs extremely fatiguing and that such cases have a perverse impact on the resources level of the system as a whole. If litigants were funded to have a lawyer for those type of cases (for example respondents in private law children cases where domestic abuse is alleged), then it would cost the system an awful lot less overall and you would not end up having this revolving door of cases coming into the court system again and again.”<sup>20</sup>

LiPs are one issue; another is people simply not getting any resolution for their legal problems. Jason McDonald articulated the danger in failing to support the legal advice sector:

“For sustainability of legal aid, I think the Bar will be fine. I think we need to help out solicitors and help out the advice sector. That’s where the problem is most concerning. I don’t think it’s going to disappear but I think again the workload is going to become more and more last minute, more and more “fire fighting”, more and more urgent, less productive from a public funding perspective in that we’re going to be spending more and more money on less positive outcomes and everybody always forgets that the court time costs money as well in that context. That’s not paid for by the Legal Aid Agency but it is paid for by the Ministry of Justice and I think we’re going to see fewer and fewer firms as well and my concern is that people just aren’t going to get the access to the courts as well, which will be a problem for them.”<sup>21</sup>

Good quality early legal advice and access to solicitors when needed are the gateway to legal support. When that becomes fragile, the whole sector is impacted. For those who require and are able to access early legal help, having this early legal help could mean that their issues will not be as complicated and urgent by the time a barrister steps in. For the working conditions of barristers, a robust legal advice sector means that their workflow is consistent, stress levels are kept down, and the ability to plan their time and spend the necessary hours on a case is supported. In the current climate, the crisis in the early legal advice sector means the Bar struggles to identify and meet legal need.

## **2. There is a serious problem with inequality of arms when it comes to bereaved families being represented at inquests**

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<sup>19</sup> Ministry of Justice (2020) “Family Court Statistics Quarterly, England and Wales, April-June 2020” <https://www.gov.uk/government/publications/family-court-statistics-quarterly-april-to-june-2020/family-court-statistics-quarterly-april-to-june-2020>

<sup>20</sup> Bar Council interview with Rachel Francis – 20 August 2020

<sup>21</sup> Bar Council interview with Jason McDonald – 22 September 2020. The name and some identifying characteristics of this barrister have been changed

Bereaved families are only able to access legal aid for inquests when Article 2 of LASPO has been engaged or where there is a wider public interest, meaning broadly it has been demonstrated that the state had a duty of care to the person who died. The fixed brief fee for inquests is too low to give junior counsel time to fully prepare for and attend the first day of the hearing in which they are to represent a bereaved family. Decision making as to which inquests get exceptional case funding can feel obtuse and, even if funding is granted, it can come very late, making the process stressful for families and their legal representatives.

In a complicated case that may involve two, three or four core state agencies (the police, the Ministry of Justice, a local authority, a health trust, for example), each state agency will be represented by counsel or a team of counsel, likely to be much more experienced than the counsel for the family. This means that, in practice, a bereaved family is likely to be represented by one junior barrister who, despite best efforts, has not had the time or resource to fully familiarise themselves with the background, get to know the family, investigate or probe the case, and is in court facing a number of more senior practitioners.

Sam Jacobs, a junior who specialises in inquests, actions against the police and community care, described how this limits his time to fully prepare for cases:

“And you may often get three or four lever arch bundles of paper and as a representative for the bereaved family, you are central to the process and you have an interest in all of the witnesses. You are challenging the witnesses, rather than just being there to protect their interests and you are doing the bulk of the work and the representatives of the state participants have a lower stress job, a much easier job and they get paid much better. If you might be preparing for a two-week jury inquest with 15-20 witnesses including cross-examining consultant psychiatrists and challenging witnesses to cross-examine and have three or four lever arch files of paper and £900 to cover all of your preparation and the first day of the inquest, it is hopeless. ...I would like to have a week to prepare but I can't spend a week plus first day of the inquest earning £900, 20% of which I have to pass on to my chambers. It is not financially viable, and it is also a high stress job. It is travelling all over the country, away from family.”

This appears and is unfair. Although in February 2019 the Ministry of Justice confirmed its position that it would not be widening the legal aid provision for bereaved families at inquests,<sup>22</sup> it seems clear this is unsatisfactory. Junior barristers experience huge pressure to do additional unpaid work or to represent families for free at inquests, and often feel unable to compete, even in the inquisitorial spirit with which inquests are intended to be heard, with more experienced and better resourced counsel. Sam Jacobs described the emotional impact of this kind of work:

“[M]y perspective is that inquest work is probably the most important work that I do, and it is probably the most challenging and requires the most expertise and it is by far

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<sup>22</sup> Ministry of Justice (February 2019) “Final Review of Legal Aid for Inquests” [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777034/review-of-legal-aid-for-inquests.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777034/review-of-legal-aid-for-inquests.pdf)

the worst paid... if I am preparing for an inquest...I spend 2-2.5 really high stress days preparing and often on the weekend. So, if the inquest starts on Monday, I would prepare on Friday, Saturday morning and Sunday which means that on the Monday to Thursday of [the preceding] week, I can be earning some proper money on other work. You know that is probably why I was choking up a little bit talking about inquests because I finished an inquest yesterday and that is exactly what I did. I worked the last three weekends straight and I did the preparation by working on Saturday and all-day Sunday and really early in the mornings and late at night during the hearing... If you have an absolutely lovely client who is perfectly reasonable but crying all the time, who is absolutely desperate for the state authorities to realise that they've screwed up and there are four barristers who are better paid than you and all against you effectively and cross-examining and getting to grips with the role of a GP, and the role of the psychological therapy service, the role of the psychiatrist and the CHMT service, the role of the police and how police systems work, all in an adversarial environment, it is quite intense and in the ... moment, I do not feel like it is too much, I just get on with it but then the day after, someone asks me what it is like doing inquests for £900 and I'm like it's not very good. It's not very good."<sup>23</sup>

The families who can access legal representation are the fortunate ones. Sarah Hemingway, a Garden Court barrister who does a lot of inquest and claims against the police work, was adamant that grieving families cannot and should not be expected to essentially represent themselves at an inquest:

"[G]rieving families are not in any state to start reading through documentation and questioning witnesses. And just understanding the procedure, this is something that is so alien to them. To have their son die in prison; which is predominantly the sorts of cases I do that people have died in prison, or died as a result of a police pursuit, or died in police custody or police shootings, that sort of thing. Those families cannot possibly go through that whole process without proper funding. So at the top end of the scale we've got police shooting; they're going to be funded, there's no question about it. But at the hazier end, where you might have a young woman who dies in a psychiatric unit; then there are questions around whether she should be given article 2 funding. Well, you've got the local NHS trust that's funded...[I]f there's any police involvement, you'll have the police service that's funded; If she's been going out and she's been getting into trouble and she's been taking drugs and maybe getting into criminal activity, police will be funded. And so all state agencies will be funded. But the parents are there left with no funding whatsoever, and they're the ones that are really needing the questions answered, they're the ones that gave a lot to her care, and what they had to go through in order to get that care in the first place, problems that families face in terms of getting mental health care in the community, and all that sort of thing. For families not to have funding is just atrocious. I mean that is something that... they need to have that. And not to, I think is a society where we're not doing our duty towards them at all."<sup>24</sup>

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<sup>23</sup> Bar Council interview with Sam Jacobs – 16 July 2020.

<sup>24</sup> Bar Council interview with Sarah Hemingway – 18 August 2020.



The view from the bench recognises the impossible situation coroners are put in when families are not properly represented. Andrew Bridgman, an assistant coroner in Manchester South, described the issues from a coroner's perspective.

"The Legal Aid Agency's taken the view that families don't need representation because it's a non-adversarial process and the coroner can take the interest of the family into account but that's just... As an independent judicial officer conducting my own inquiry, how can I possibly represent the views of the family? They may have complete[ly] different issues. I invite them to tell me what their issues and concerns are. But they may miss the point. And I find it far easier for me as a coroner to conduct my inquiry more thoroughly and without fear of bias if the family is represented"<sup>25</sup>

There is a perception that the funding for inquests is kept so tight deliberately to stop the costs inevitable in a full and detailed preparation getting extremely high very quickly. As Michael Harris, a consulting clerk with 38 years of experience, summarised:

"Inquests are very tightly controlled. You can get legal aid but the LAA will keep them very, very tightly controlled money-wise, because they have this ability to eat up lots of money very quickly. Particularly in a pub bombings case, where there are hundreds of thousands of pages of evidence. Well if you were legal aided to start sifting through all of that stuff then you're very soon going to start getting very large sums. So what the LAA do is they grant you £900 on the brief and £450 a day, and you then have to absolutely fight to get any more than that."<sup>26</sup>

While, as Michael Harris identified, the costs involved for a bereaved family to be represented in a long and complicated inquest *could* get high, the fact remains that, in such an instance, the state is already paying for everyone else involved to be represented. The fractionally higher cost involved in making sure the family is represented and a satisfactory outcome reached seems well worth it on financial grounds alone. In March 2019, Bar Council was one of the signatories of INQUEST's "Now or Never! Legal Aid for Inquests" campaign.<sup>27</sup> This campaign called for the introduction of automatic non-means tested legal aid funding for bereaved families following state related deaths. On grounds of fairness, equality and decency, allowing families legal representation on a par with state agencies would help ensure the best outcome for everyone involved.

### **3. Increased case volume is made to compensate for the reduction in fees**

Since the implementation of LASPO 2012, fee income for certain kinds of civil legal aid case has dramatically reduced. Senior practitioners can be earning a considerably lower hourly rate in cash terms than they were at the start of their careers. Emma Manning, the Garden Court senior civil clerk with 20 years' experience, shared that:

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<sup>25</sup> Bar Council interview with Andrew Bridgman – 7 August 2020

<sup>26</sup> Bar Council interview with Michael Harris – 21 August 2020

<sup>27</sup> INQUEST (4 March 2019) "NEWS: Families will not be silenced, we will not be silenced. Change is possible" <https://www.inquest.org.uk/news-legal-aid-launch>



“One of the main changes was the introduction of the prescribed cf1 rates that were introduced by LASPO, these apply to all legal aid certificated cases, prior to this the rate for a barrister in the county court was £135 per hour and in the High Court £112.50 p/h. The new reduced rates are £63 for preparation in the county court amounting to a 53% decrease in the hourly rate and for the rate for advocacy of £59.40 represents a decrease of 56%. Even with claiming the maximum enhancement uplift of 50% this only takes these figures £94.50 p/h preparation equating to a 30% reduction and £89.10 for advocacy equating to 34% reduction. I have looked at one of the housing barristers and from the period of 2010 to 2019 this individual has seen a reduction in legal aid payments of 39%.”<sup>28</sup>

This dramatic reduction in fee income has led to some barristers being forced to turn away from legal aid work in favour of better-paid private work. Many, despite preferring legal aid work, do choose to supplement their income with private work. But to balance their vocation for legal aid work with their financial obligations, practitioners have tended to compensate for the reduction in fees by taking on more cases and working longer hours. This results in an all-hours last-minute working culture where there is little time to pause, reflect and consider cases, and still less for a healthy work-life balance.

The Bar has always been a place where people will choose to spend long and antisocial hours completing the work to a high standard, but now legal aid barristers are finding that in order to support their practice they are having to work all-nighters, weekends and 60 or 70 hour working weeks.

The role of a barrister, in a climate of underfunding of public services, has been forced to stand in for that of roles that should have been done by other public services. When people are being failed by a system more broadly, perhaps in terms of their mental health, their access to decent housing, their family circumstances, an official representative they *do* come into contact with ends up acting as a general advocate, rather than a legal specialist.

John Edwards, a junior on the Northern Circuit, speaking particularly about his work at inquests, described the role as being “you are half social worker, half handler, part counsellor and then advocate.”<sup>29</sup>

Outlining how in his housing practice he essentially has to think more broadly about being an advocate for his clients to access the services they need, Jason McDonald described:

“[N]ine times out of 10 it’s not the law you need but it’s the strategic broader thinking that looks at getting the result you need. For the possession work it tends to be you advance a series of different defences to the case, so essentially put those roadblocks in the way, then look at getting the support that’s needed by other means so looking at social services, are they acting under their Care Act obligations? Are people recognising this individual is actually disabled? Likely because of their mental health

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<sup>28</sup> Bar Council interview with Emma Manning – 09 September 2020.

<sup>29</sup> Bar Council interview with John Edwards – 04 August 2020. The name and some identifying characteristics of this barrister have been changed.

condition. Are they taking steps to address that? Is a care package in place? Is a support package in place? Is the medication being taken? Are people in place to ensure that as best as possible that is complied with? The more day to day focus on the cases. The more legal defence stuff that's kind of why I'm brought in to particularise and advance that, but nine times out of 10 that's a strategy to ensure they legally get the support, the care, in a circumstance that helps both sides in the end. So there's a degree of social work in what we do which I don't think all members of the Bar see in other fields. You're kind of expected to get a positive result in legal aid cases, nine times out of 10 you're looking at the stuff that isn't covered by the Legal Aid Agency."<sup>30</sup>

He went on to reflect on the impact this can have on the mental health of legal professionals, "I think there's a real impact on the health of practitioners in the legal aid sector because of the stress levels involved, because these are invariably exceptionally complex cases, very vulnerable individuals. Some clients are at risk of death in some circumstances and you're dealing with that and having to manage that and everything else on top, the workload and the solicitors."<sup>31</sup>

Legal aid solicitors, as established in section 1 of this paper, are extremely hard pressed. Early legal help is often just not available to those clients who need it. The combination of having to act well outside of professional capacity, working with solicitors who are immensely stretched, and the absence of early legal advice meaning cases with legal merit often do not reach counsel until there has been quite some time delay, means that civil legal aid barristers are working in a last-minute, immensely pressured, culture. Stephanie Harrison QC, a leading public law and human rights silk and joint head of Garden Court Chambers, outlined in stark terms the realities of a culture in which a 60-hour working week is seen as a minimum:

"So your choice is if you want to make a legal aid practice work, you have to work ridiculous hours. For it to be viable you have to have a very high volume of work, that's how practitioners who have sustained a predominately public law practice do it... [T]hey would obviously rather not do it, and certainly over the entire period over my career, the demands, physical and mental, to make it work financially are considerable; I have committed my time to the work, as opposed to having chosen to do other types of law to supplement the publicly funded work. And to be honest, at times it can be pretty overwhelming, the kind of demands that doing the work well and in volume takes, it's a lot of effort and for clients where so much is at stake. A lot of work that you do is never paid for."<sup>32</sup>

Harrison went on to explain the public service nature of work as a legal aid barrister, "I don't think its valued and properly recognised at all in the law, it's a public service basically and it only functions as other essential services do, like the health service, and the education system,

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<sup>30</sup> Bar Council interview with Jason McDonald – 22 September 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>31</sup> Bar Council interview with Jason McDonald – 22 September 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>32</sup> Bar Council interview with Stephanie Harrison QC – 04 September 2020.

on the basis that there is a group of people who are willing to go way above and beyond to continue to provide that service to people. I don't think that's healthy, and I don't think it should be expected, but people do it."<sup>33</sup>

Emma Manning outlined in stark terms the main change she has seen in her time at the Bar:

"During my career I think the main thing that has happened is that barristers and solicitors are working harder for less money. For barristers, cuts to funding have come in and reduced the hourly rates or taken funding away completely. For solicitors there are more hoops to jump through just to secure funding in the first place, the means test has meant that you need to be virtually destitute to qualify."<sup>34</sup>

As Emma Manning expressed so clearly, when hourly rates have come down dramatically in a short period of time, the inevitable consequence is that people work more for less return. This leads to a sense of personal commitment, vocation and sacrifice being misunderstood and underappreciated that came out time and again in our interviews.

#### **4. Unsustainability for those coming in at the junior end**

There is a widespread acknowledgement among civil legal aid practitioners that they consciously choose to go into publicly funded work knowing they will earn substantially less than colleagues in private practice, but feeling nonetheless a vocation for the kind of work they are doing, and an intellectual interest in the legal issues at play.

Stephanie Harrison QC, who is from a working-class background and was the first person in her family to go to university, described her motivation in becoming a barrister:

"It definitely was a commitment and an interest in representing individuals who didn't and wouldn't have access to justice if there wasn't the provision of publicly funded legal aid... [The introduction of legal aid was] at the time, a very radical step in redistributing power, because it did mean that the ordinary person and the disadvantaged actually could hold the state, or employers<sup>35</sup>, or landlords, or whoever it was who had more power than them, to account."<sup>36</sup>

Barristers, when they describe how they feel about their work, tend to talk about the intellectual interest of the legal challenges involved and the social and moral merit they feel in helping people. Michael Harris described the way barristers often approach their work: "A number of people treat it as a vocation and aren't interested in the money in effect... if you have that ability and the experience and the flair to persuade a jury that your client perhaps isn't guilty, then some people are prepared to put up with the lack of finance for job satisfaction."<sup>37</sup>

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<sup>33</sup> Bar Council interview with Stephanie Harrison QC – 04 September 2020.

<sup>34</sup> Bar Council interview with Emma Manning – 09 September 2020.

<sup>35</sup> Legal Aid has never been made available for Employment Tribunal cases but was, for example, for work related deaths and personal injury claims.

<sup>36</sup> Bar Council interview with Stephanie Harrison QC – 04 September 2020.

<sup>37</sup> Bar Council interview with Michael Harris – 21 August 2020

Andrew Bridgman, a Manchester clinical negligence practitioner and assistant coroner who was a dentist before being called to the Bar, describes the impulse to practice law:

“[It’s] not about money for me and it’s not all about getting damages for patients, although it’s helpful...I meet a lot of variety of society obviously and helping them find answers to what happened inside prison you know when their son or daughter’s died... So that’s where it comes from, I think, that’s what keeps me in it.”<sup>38</sup>

That being said, the rates of pay at the junior end are now so low, particularly when seen alongside increased living costs and student debt that, although recruitment is healthy at the moment, there are real concerns among practitioners relating to sustainability at the junior end in relation to:

- a. Recruiting and retaining the best quality candidates for publicly funded work.
- b. Social mobility for those from less privileged backgrounds where they do not have financial support from a family or partner being able to build *and advance* their practice in terms of the type of case they are able or choose to take on.
- c. Burnout resulting from years of financial stress and emotional pressure, training, securing pupillage then tenancy at the Bar, and then taking on a heavy caseload often necessitating considerable travel and out-of-pocket expenses to build a practice.

For those at the junior end, the financial barriers to training and developing a practice in the first few years are high, particularly for those with little financial backing. As Ella Davies outlined:

“I ended up in £7k of credit card debt before finishing pupillage as there was no money coming in. If you are in a commercial set where they pay you £50k or £70k that is fine, but I was getting £20k and that was a lot compared to my friends who were doing legal aid and some sets where you get £12k. I don’t think it is much higher now, it has probably not changed very much [in 10 years] and that was in London. How on earth can anyone afford to live?”<sup>39</sup>

Stephanie Harrison QC noted the same point, regarding a potential exodus of juniors from immigration work:

“You also have to take into account the fact that juniors now come to the Bar with enormous debts and the cost of living in London, particularly accommodation, is prohibitively high in a way it was not 30/20 years ago. And for juniors now the finances are kind of marginal. I think we’re at a bit of a crossroads at the moment because of some changes that the government are making to funding for appeals. And if some of

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<sup>38</sup> Bar Council interview with Andrew Bridgman – 7 August 2020

<sup>39</sup> Bar Council interview with Ella Davies– 28 July 2020. The name and some identifying characteristics of this barrister have been changed.

them go through, I think it would result in a very significant exodus of juniors from that area of [immigration] work.”<sup>40</sup>

Hugh Southey QC, a leading specialist in public law and human rights, emphasised the impact this has particularly on those aspiring barristers who do not have financial backing from family, and places it in the wider context of a lack of funding for legal education:

“I think at the moment it can be quite intimidating effectively to be in a position where, if you don’t have parents to back you up financially, you are potentially going to take up a large loan to be able to come to the Bar and there is no guarantee that you will make it. I think issues with legal aid make it even more unattractive.”<sup>41</sup>

Leading immigration silk Sonali Naik QC had noticed the stress levels among juniors rising in recent years due to the sustained levels of pressure and high workload:

“I think, when I look at the juniors now, particularly juniors who are going to tribunal every day, it’s totally unsustainable, they are totally burnt out. Even after a couple of years, let alone five or 10 years...Literally, people don’t stop. There’s no, “after court, I will have a cup of coffee.” In an ordinary work environment, you may have a cup of coffee after [you] finish some work. People don’t do that. When I suggested to somebody that we had coffee, they said: “It’s lunchtime, you should eat lunch” but I don’t have time for that, I need to do the next thing. People are working in a frenzied way and that is unsustainable, I think.”<sup>42</sup>

There is a real danger that efforts to make the Bar as a career more accessible to those from less privileged backgrounds, women and barristers from ethnic minority backgrounds will go into reverse. Stephanie Harrison QC went on to highlight the potential for this, “It’s the legally aided Bar, and solicitors, that have made all the major advances in terms of diversity; representation of women, and black people and other minorities. If you took away the legal aid Bar, the Bar and a lot of solicitors’ firms would look pretty much the same as they did 30 years ago, or even 50 years ago.”<sup>43</sup> This is not just a question of access to the Bar in the first place. It’s a question of working conditions being such that people can take the risk in their practice to take on the cases that will advance their careers, particularly if they become parents or carers. Sarah Nicolls highlighted the challenges she faced as a mother and primary carer of young children being able to take on the sort of cases that would allow her to progress her career:

“As soon as I try and do anything that isn’t familiar or that might progress my career, that is where I hit a wall. The stress that is involved and the amount of work that is involved to surmount, that is just too much, I find, when it comes to trying to have a family life as well and, indeed, any sort of work-life balance. The stress of an unfamiliar case is just incompatible given the work involved. It’s unmanageable and

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<sup>40</sup> Bar Council interview with Stephanie Harrison QC – 04 September 2020.

<sup>41</sup> Bar Council interview with Hugh Southey QC – 04 August 2020.

<sup>42</sup> Bar Council interview with Sonali Naik QC – 03 September 2020.

<sup>43</sup> Bar Council interview with Stephanie Harrison QC – 04 September 2020.

in terms of actually progressing... For example, if I wanted to be silk there's just no way I would be able to take on those cases that tend to be pro bono in my area in order to do that."<sup>44</sup>

One of our interviewees, who wishes this quote to remain anonymous, predicts a trend where, if rates of pay and working conditions become still worse at the legally aided Bar, it will lose prestige as a place to work, and groups already under-represented at the Bar will become "stuck" doing unglamorous and underpaid work: "The legal aid Bar is in danger of becoming a ghetto. Maybe...it already sort of is in regards to women, BAME...I don't believe that all those years ago white men who did legal aid would put up with this rate of pay."<sup>45</sup>

Many of our interviewees brought up the issue of how absolutely exhausting it was to have to fight to be paid at all for work that was done, on top of the demands of a job that is adversarial in nature. As Rachel Francis, a family and immigration practitioner noted for her work with vulnerable clients, articulated when describing how it felt right at the beginning of her career:

"It was – and is – very fatiguing to have to battle all the time. Battle for all your clients to get funded, battle in court, battle with limited resources, and battle to retain the limited resources that are still available for vulnerable clients... It just creates this vacuum, a vacuum of funding which still has all of these people in that space, in that vacuum, who had – and still have – real needs and who have no kind of sudden ability to articulate those needs and just as meritorious a case, funded or not."<sup>46</sup>

This sense of the tiring and ceaseless battle is not restricted to those starting out in practice. Hugh Southey QC also used the language of "fighting" and "battling" with the LAA to get adequate funding for cases:

"I think it is fair to say that I am a little worn out by the battles with the Legal Aid Agency that we now have. There probably are cases where I think it is not worth the effort that will be involved in trying to get funding through this case, somebody else can do this case. I think I am a little worn out by regular fights with the Legal Aid Agency."

Sarah Hemingway noted the difficult position barristers are in when they choose whether to risk doing huge amounts of work unpaid under Conditional Fee Arrangements (CFAs), where one no longer charges a success fee:

"We're getting a lot more CFAs. But you're working at risk- for no benefit then, at the end of the day. So I think as a barrister you're less inclined to take those cases on. So it might be that somebody has a case, it's got merit, but it's not sufficient merit for you to think that I'm *definitely* going to recover money here. Rather than you know, sometimes you think oh

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<sup>44</sup> Bar Council interview with Sarah Nicolls – 14 July 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>45</sup> Bar Council interview.

<sup>46</sup> Bar Council interview with Rachel Francis – 20 August 2020

I'm working as a charity almost, because the amount of free work that you're doing under CFAs, because you want to do it for those people, because they are vulnerable, because I work in a set where we're all about social justice and fighting for the underdog, and getting people access to justice. But there's a limit. Particularly when you've got small children. I'm not prepared to give up valuable time with my small children to do a case where I think there's only about 50 or 60% chance I'm going to recover any fees from this."<sup>47</sup>

We fear that barristers will not choose to go into publicly funded areas of law at the start of their career, or will be forced to diversify their practice and take on more private work as they become more senior, with the sector thus losing the time of more experienced practitioners. As Sarah Hemingway described bluntly:

"It's a poorly paid area of law and that's just it. I think people recognise that when they go into it, to a degree. If you were interested in the money you'd go into commercial law. But equally, you want good people coming into this area of practice. We've got some fantastic lawyers who really do hold the state to account and get justice for people who otherwise wouldn't have justice. And to say that they should be paid a pittance is wrong."<sup>48</sup>

Sonali Naik QC said that she would, reluctantly, as her work has been a vocation for her, not now advise a junior to build a practice based on solely publicly funded work: "The real sadness in me is that when I see younger people now coming to the Bar, I'd never recommend them doing only legal aid work, and that's a travesty, it's an absolute travesty."<sup>49</sup> Sian Wilkins, the senior civil clerk at Doughty Street, agreed that in several areas of practice, barristers were having to diversify away from a pure legal aid practice:

"We have a number of practitioners who, for example, are housing specialists but we have seen their practice has broadened out. Where they may have previously had a practice comprising of 96% housing, it may now be closer to 70%. It is still a core area and the areas that they are exploring are adjacent and closely linked such as community care, court of protection, property, but they are having to diversify. There are probably two reasons for it, one is the constant fear that an area will be taken out of scope and so if someone has invested their whole career in specialising in just that field, they will be left without a lifeline. We have felt that there has been no choice but to encourage people to look beyond what they might have set out to focus in. Secondly, funding cuts have meant practitioners have had no option but to look at other areas to supplement the work they feel really passionate about and really enjoy doing. These cuts might have meant it is just not financially viable for them to stay a complete immigration, housing or even inquest practitioner."<sup>50</sup>

This feeling of an inability to focus just on legal aid work, echoed by many of our interviewees, presents a serious risk to sustainability on a personal and sector level.

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<sup>47</sup> Bar Council interview with Sarah Hemingway – 18 August 2020.

<sup>48</sup> Bar Council interview with Sarah Hemingway – 18 August 2020.

<sup>49</sup> Bar Council interview with Sonali Naik QC – 03 September 2020.

<sup>50</sup> Bar Council interview with Sian Wilkins - 23 July 2020.

## 5. Processes at the Legal Aid Agency feel obtuse and complicated

There is a widespread perception that there is a “culture of refusal” at the Legal Aid Agency and, further, a lack of transparency in the decision-making process by which funding is awarded. Barristers and clerks feel there is no accessible clear guidance available on how to word or structure applications for legal aid or exceptional case funding. It can feel as though decisions on funding are arbitrary and lacking in due attention to the merits of a case.

This results in problems for counsel, clerks and clients. Clerks and counsel (and the solicitors they work with) do huge amounts of wasted administrative work in applying for funding; counsel can end up doing involuntary unpaid work on cases where there are delays in funding applications or problems claiming fees from the solicitors; and clients can be left in a position where they do not know whether or not they will be liable for the legal costs of their case.

First, processes feel and are obtuse and complicated. Emma Manning, the senior civil practice manager at Garden Court, expressed the frustration she and other clerks feel at the administrative difficulties involved in applying for funding:

“My view is that the process of applying for funding is specifically designed to be hard and to discourage people from bringing cases e.g. paperwork/CCMS/means and merits tests/delays and refusal on decision making. Lots of cases I see begin with requiring the barrister and sometimes solicitors to do unpaid work, as they can require lots of research into challenging points, advising on the merits of bringing cases and adding legal points and strategy in pre-action correspondence (which may ultimately mean the case settles and doesn’t have to go to court). Reductions in funding over time have also in my view led to a reduction of solicitors working in legal aid and those that do are often more junior/less experienced, so preparation of cases can also be lacking. This all leads to heavier reliance and more pressure on the barrister instructed.”<sup>51</sup>

The procedural method needed to bill a civil case is needlessly time consuming, as Emma Manning went on to detail:

“In family, they can bulk upload their claims onto CCMS. So it’s a case of bulk uploading documents into a scanner and uploading them. Whereas for civil legal aid, the way that CCMS is designed, we bill our barristers’ work on our system – we use LEX – then we have to go into CCMS and bill it again. So effectively we’re doing it twice. There’s no interconnection between the two. So you’re putting it in line by line on a regional fee note or a CF1A form and then you have to do exactly the same process again on CCMS... [Also] there doesn’t seem to be any cohesion into what they allow for the enhancements and what gets rejected. Or guidance as to what classifies it as a case that will get 50%. At one point myself and a few of the billing clerks actually went up to the Legal Aid Agency in Jarrow to meet them and discuss issues and we asked them, “what do you use? You must be giving your advisers who are making these claims some sort of sheet they’re working from to tell them this would qualify for 50%”

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<sup>51</sup> Bar Council interview with Emma Manning – 09 September 2020.



And they didn't, apparently. They may not have wanted to give it to us but there was nothing that could be given."<sup>52</sup>

Second, the funding relationship between the LAA, barristers and solicitors doesn't always work in practice. Solicitors are primarily responsible for making sure that legal aid funding is in place and, the LAA will not fund a case on direct access with the barrister, but only via a solicitor with a legal aid contract. Consequently, barristers' fees will often only come through solicitors at the resolution of a case. Sian Wilkins explained how complicated that can become in terms of barristers getting paid for work they have done:

"We have a number of practitioners who are sitting on an aged debt where chambers are desperately trying to get final bills paid that haven't and can't because solicitors don't have the resources they need to prepare and finalise them, or in some cases, there are issues around the initial funding applications or subsequent amendments which take a huge amount of time and capacity to resolve. We of course sympathise with the limited resources firms are often working with but the bottom line is that the Bar and individual practitioners don't get paid for years or sometimes at all in circumstances where they have undertaken the work in good faith. The Bar/chambers have no direct line into the LAA and everything is at the mercy of the contract holder which makes it difficult when we have issues we need resolving and support with. Ultimately, under the standard terms chambers and individuals can sue the solicitors, although not feasible if a firm goes into administration for example, but there is also the relationship that chambers has with particular firms, which needs to be balanced alongside the needs of individuals. There needs to be more of a line from the LAA into the Bar not so as to circumvent solicitors, those relationships are really, really important but rather than the sort of line that it currently is: LAA, solicitors then the Bar, more of a triangle which means that three of them work and operate as a team. I think we need a new system overall, one that improves efficiency and ultimately saves on resources and costs."<sup>53</sup>

Third, there are often delays to funding applications, or funding is declined for reasons that do not seem justifiable or clear to those involved. Section 4 introduced the idea that barristers feel they have to "battle" with the LAA to get funding for cases that clearly have legal merit. This uncertainty about funding, the feeling of having to fight to get funding in place, and delays in it being granted has an impact on clerks, solicitors, barristers, the clients, and on relationships between everyone involved in a case. John Edwards described some of the emotional impact of procedural difficulties:

"You try and convince the LAA that your client qualifies for exceptional case funding; and I'm afraid that my experience is that the vast majority of people making these decisions have very little if any understanding of what an inquest is, what the law is, what their own regulations are; most of the time. It rather strikes, a lot of the time, as its any excuse to say 'no.'... The second element of it is even when decisions are made they are made extremely late. I dealt with an inquest a couple of years ago now

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<sup>52</sup> Bar Council interview with Emma Manning – 09 September 2020.

<sup>53</sup> Bar Council interview with Sian Wilkins - 23 July 2020.

involving the death of a young man who took his own life... We had made the application six months before the inquest. The inquest came, and as of the first day of the inquest, we still did not know whether or not funding had been granted. So I had a family going - it's the start of a two and a half week inquest - and I say to the family; 'sorry, I'm happy to do two or three day cases pro bono - I can't do two and a half week cases pro bono - so you have to be prepared that if the decision comes through and the answer is no - you're going to have to pay'."<sup>54</sup>

Sarah Nicolls outlined the challenges in getting properly paid for immigration work, particularly the issues of fixed fees for asylum appeals:

"For example, you might have a child that underwent trafficking and persecution and who isn't in a situation where they are able to give clear instruction. So if you think about the amount of work that needs to be obtained – evidence in terms of medical experts and also just the time taken in terms of taking instruction – being able to draft the witness statements. As long as you do three times the general amount of work it would then convert into hourly rates and you would be paid at hourly rates. But you would never know this, unless solicitors are really watching the clock. You would have to know what your solicitor was doing as well in terms of the hours they were doing. So you would never know this until the end. And very often what I find, even now, is that I'm just short. And so you end up with £350 for what could be 3 days' work, even just before the hearing. And so that had a huge impact on finances. And the other thing is that there is no provision for payment unless you get permission in a judicial review. And in my field that's significant because the written pleadings are extremely substantial. In terms of the work involved to actually get them to a standard where you feel that permission can be achieved. And there are various aspects that knock on in terms of whether permission can be granted. So, for example, something might happen after you've drafted the pleadings that means the case changes or arguably becomes academic or the other side introduce something new or send you a new document that you haven't seen before. All of which can mean that you don't get paid. You've actually achieved what you set out to achieve but you don't get paid for the work done."<sup>55</sup>

Additional clarity, guidance and support from the LAA on making funding applications; clear reasons given as to why an application has been unsuccessful; and a timely and informed response to enquiries or requests for support would go a long way to supporting clerks and barristers in the short term. Rethinking the entire payment structure, even in the absence of additional funding, to ensure that barristers are guaranteed to be paid for work they have done in good faith, would seem a sensible approach in the medium term.

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<sup>54</sup> Bar Council interview with John Edwards – 04 August 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>55</sup> Bar Council interview with Sarah Nicolls – 14 July 2020. The name and some identifying characteristics of this barrister have been changed.

# Conclusion

While the Bar Council would like to see, and has consistently campaigned for, a reversal of LASPO 2012 we find ourselves becoming reluctantly resigned to the fact that the funding climate for legal aid is now, and is likely to be for the foreseeable future, hostile. In this context, we find ourselves pleading for the basics.

This report affirms the Bar Council's compromise policy position of a considered, targeted reintroduction of civil legal aid in areas where it is likely to:

- a) Save public money in the long run, such as reinstate early legal advice, particularly welfare benefits advice or restore legal aid to cover applications for permissions to appeal made to the First Tier.
- b) Support a sustainable legal services market, ensuring the continued ability to recruit and retain the best candidates across all areas of practice and allowing them to work in reasonable and adequately remunerated conditions. There should be an independent review on legal aid remuneration to increase fees at least in line with the current levels of inflation.
- c) Meet legal need and ensure fair access to justice, particularly for the most vulnerable in society, and including for inquests:
  - i. There should be an automatic non means tested legal aid funding for families' specialist legal representation immediately following a state related death to cover preparation and representation at the inquest and other legal processes.
  - ii. There should be funding equivalent for legal aid clients to that enjoyed by state bodies/public authorities and corporate bodies represented.

Publicly funded barristers are quasi-public servants, self-employed on hourly rates much lower than those of barristers in other areas of practice in particularly stressful and difficult conditions of work. We see the civil legal aid barristers we represent working consistently long, hard, often unpaid hours, dealing with difficult legal issues and, at times, cases that are emotionally very draining because of the distress of clients or the trauma they have experienced. They battle on behalf their clients, then battle again to get paid.

As Andrew Bridgman described, this is by no means a world of fat cat legal aid lawyers: "Legal aid covers such a broad spectrum of importance to people's actual lives that it's inconceivable it's so underfunded. But there we are. And that's the challenge. What do you call it? Fake news? Whatever it's called. Fat cat legal aid lawyers. I don't know of any fat cat legal aid lawyers, I don't know any."<sup>56</sup>

The continued functioning of the justice system in England and Wales is entirely dependent on the goodwill and commitment of publicly funded barristers and solicitors. They need to be paid and supported to do their jobs.

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<sup>56</sup> Bar Council interview with Andrew Bridgman – 7 August 2020

At the Bar Council we represent the interests of barristers who serve the justice needs of their clients. Many of our interviewees emphasised the impact on access to justice of legal aid cuts, and the costs this incurs on a personal level and to the Exchequer. As Ella Davies described, “the ultimate effect is on the people who need their help who can’t get it anymore. These people must then end up costing the state in so many other ways not just in terms of the court service but in terms of every other service because they are homeless for example. The cost to anyone who works in the system, the cost to society of removing that front-line legal aid is so clear and so obvious.”<sup>57</sup>

In describing how it felt working within a system where the early legal advice sector has been seriously undermined, Zia Nabi outlined: “If we have inequality of arms, and that’s what I see in my time at the Bar, no-one wins. What you end up with is an unhappier society and more social problems. You know, people feel that they don’t have a voice. So, everyone I work with is driven in that sense.”<sup>58</sup>

Civil legal aid barristers, as outlined in this report, can feel beleaguered and underappreciated, but to feel attacked by government, as they recently have, is a new and worrying development.<sup>59</sup> Stephanie Harrison QC articulated the point: “I think they, the government, does literally see those who practice in legal aid as just a thorn in their side, and they even seek to undermine them by calling them “activist” lawyers, the lawyers who are representing people and defending their rights in a politically sensitive area. So this is a new and dangerous development of delegitimising and vilifying lawyers who seek to hold the government to account – this is described as being activist but in my view it’s just doing your job to the best of your ability.”<sup>60</sup>

The continued ability of the publicly funded Bar to deliver quality legal representation is dependent on the working conditions and remuneration being adequate to attract, develop and retain committed barristers. After a decade of austerity that has brought a 37% real cut in legal aid spending per capita in England and Wales, pay and conditions at the civil Bar continue to decline to the point where, now, even notwithstanding the impact of the Covid-

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<sup>57</sup> Bar Council interview with Ella Davies– 28 July 2020. The name and some identifying characteristics of this barrister have been changed.

<sup>58</sup> Bar Council interview with Zia Nabi – 22 July 2020.

<sup>59</sup> Home Secretary Priti Patel criticising specifically immigration lawyers in her speech at the Conservative Party Conference and elsewhere, “For those defending the broken system – the traffickers, the do-gooders, the lefty lawyers, the Labour Party – they are defending the indefensible.” (Jemma Slingo, *Law Gazette* (5 October 2020) “Patel lashes out at ‘lefty lawyers’ in asylum speech” <https://www.lawgazette.co.uk/news/patel-lashes-out-at-leftie-lawyers-in-asylum-speech/5105870.article>) and Boris Johnson in his speech at the Conservative Party Conference backing her up by referencing his intention of, “stopping the whole criminal justice system from being hamstrung by what the Home Secretary would doubtless and rightly call the lefty human rights lawyers and other do-gooders.” (Harry Banks, *City AM* (6 October 2020) “PM Boris Johnson's Tory conference speech in full” <https://www.cityam.com/in-full-pm-boris-johnsons-tory-conference-speech-in-full/> )

<sup>60</sup> Bar Council interview with Stephanie Harrison QC – 04 September 2020.

19 pandemic, sustainability is called into question.<sup>61</sup> As barristers feel increasingly unsupported to do their jobs properly, the goodwill of legal professionals on which the system depends is fraying.

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<sup>61</sup> Bar Council (July 2020) “Small Change for Justice: Funding for Justice in England and Wales: 2010-2019” <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

## Annex I: Legal Aid

The legal aid system was created by Clement Attlee's Labour Government through the 1949 Legal Aid and Advice Act. The aim of this 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".<sup>62</sup>

Divorce work in the High Court was the first to be introduced in the legal aid system. Other areas of civil work followed. The first law centre opened in North Kensington on 17 July 1970.

From the 1980s, the cost of legal aid was becoming more of a matter of political concern. The first major cut to legal aid took place in 1986. By 1986, total payments under all forms of legal aid were £419 million, and the net cost to the Exchequer (when client contributions and other costs recovered were taken into account) was £342 million.<sup>63</sup>

Eligibility for legal aid originally included 80% of the population of England and Wales. In 1973, the figure was 40%; by 1979 it had increased to 79%. It remained at this level in the early 1980s before falling during the rest of that decade. In 1986, 63% of the population was eligible for civil legal aid and the decrease has been noticeable year on year. Between 1997 and 2005, government expenditure on civil legal aid had fallen by a quarter in real terms. In contrast, spending on criminal matters had increased by 37% in real terms.<sup>64</sup> In 2007, only 29% of the population were eligible for civil legal aid.<sup>65</sup> There was a slight increase in 2008-09 due to the expansion of legal help for social welfare law.

LASPO 2012 came about due to the cost-saving review initiated by the coalition government in 2010. Spending on legal aid was cut from £2,602 million in real terms in 2010/11 to £1,657 million in real terms in 2018/19 because of the implementation of LASPO. Civil legal aid suffered the deepest cut at 38%.<sup>66</sup> Since the implementation of LASPO, over half of the law

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<sup>62</sup> UK Parliament (1948) "Legal Aid and Advice Bill" <https://api.parliament.uk/historic-hansard/commons/1948/dec/15/legal-aid-and-advice-bill#:~:text=It%20is%20the%20charter%20of,wealth%20or%20ability%20to%20pay.>

<sup>63</sup> Sir Henry Brooke (2017) "The History of Legal Aid 1945-2010" Bach Commission on Access to Justice: Appendix 6 <https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf>. 10.

<sup>64</sup> Hazel Genn (2009) "Judging Civil Justice" Cambridge University Press 41.

<sup>65</sup> Sir Henry Brooke (2017) "The History of Legal Aid 1945-2010" Bach Commission on Access to Justice: Appendix 6 <https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf>.

<sup>66</sup> Ministry of Justice (2019) "Legal aid statistics England and Wales tables October to December 2018" Table 1.0. Expenditure here refers to resource department expenditure limit (RDEL) and the figures here are expressed in March 2017/18 prices.

centres or agencies offering free legal advice have been closed. This has resulted in “legal aid deserts”, particularly in certain areas such as immigration and housing.<sup>67</sup>

A report commissioned by the Equality and Human Rights Commission in 2018 that interviewed over 100 people in Liverpool with legal problems highlighted that almost everyone who had a legal problem struggled to resolve it without specialist legal help.<sup>68</sup> Lizzie Iron, the Head of Service at Support Through Court in an interview said that “most people expect someone who uses our services to be vulnerable. But LASPO has impacted every sector of society, from the illiterate and homeless...to the articulate and educated.”<sup>69</sup> Amnesty International reported that LASPO had resulted in a two-tier legal system, open to those that could afford it but closed to those who could not pay.<sup>70</sup>

The means testing guidance published by the Legal Aid Agency is by no means straightforward. The document itself is 292 pages long and complex to navigate.<sup>71</sup> In short, to qualify for legal aid, a person must have:

- Less than £2657 gross income per month (your salary before tax and National Insurance are taken off). You can add £222 to this figure for each child if you have more than 4 child dependents e.g. add £222 to £2657 for the 5<sup>th</sup> child etc...;
- Less than £733 disposable income per month (income left over when you take away tax, rent or mortgage, and bills); and
- Less than £8000 in savings and other financial assets (assets are property of financial value that you own).

Professor Donald Hirsch in his 2018 review of LASPO noted that “at the maximum level of disposable income at which legal aid is allowed, households have too little income to reach a minimum standard of living even before footing any legal bills.”<sup>72</sup> Furthermore, even if a person qualifies for the means test for legal aid, that person might still have to make a contribution towards their legal cost. “This includes households whose income would only

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<sup>67</sup> The Law Society (2019) “*Technology, Access to Justice and the Rule of Law: Is technology the key to unlocking access to justice innovation?*” <https://www.lawsociety.org.uk/support-services/research-trends/technology-access-to-justice-rule-of-law-report/>

<sup>68</sup> Equality and Human Rights Commission Research Report 118 (2018) “The impact of LASPO on routes to justice” <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>

<sup>69</sup> Jane Croft and Barney Thompson, *Financial Times* (September 27, 2018) “Justice for all? Inside the Legal Aid Crisis” <https://www.ft.com/content/894b8174-c120-11e8-8d55-54197280d3f7>

<sup>70</sup> Amnesty International (2016) “Cuts that hurt: the impact of legal aid cuts in England on access to justice”. Available at [https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf).

<sup>71</sup> Legal Aid Agency (April 2019) Means Assessment Guidance [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/793462/Means\\_Assessment\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793462/Means_Assessment_Guidance.pdf)

<sup>72</sup> Law Society (28 September 2018) “Ministry of Justice post-implementation review of Part 1 LASPO Act - Law Society response” [https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/#.Annex\\_4\\_‘Price\\_out\\_of\\_justice?\\_Means\\_testing\\_legal\\_aid\\_and\\_making\\_ends\\_meet’](https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/#.Annex_4_‘Price_out_of_justice?_Means_testing_legal_aid_and_making_ends_meet’).

be just enough to pay for food, heating, travel and housing costs, even before meeting other expenses such as clothing, household goods and personal care items.”<sup>73</sup>

We should note at this point that if a person is receiving Income Support, Income-Based Jobseekers’ Allowance, Income-Related Employment and Support Allowance, Guarantee Credit or Universal Credit then they will automatically qualify on income on the means test as they will be “passportted”. However, they still need to pass the scope and merits test as well as not have savings over £8,000.

Maintaining a legal aid system for criminal and civil legal matters is a European international legal requirement, in compliance with the requirements of the European Convention on Human Rights and the case law of the European Court, which advocates an appropriate legal aid system to ensure access to justice for everyone.

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<sup>73</sup> Law Society (28 September 2018) “Ministry of Justice post-implementation review of Part 1 LASPO Act - Law Society response” [https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/#.Annex 4, 'Price out of justice? Means testing legal aid and making ends meet'](https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/#.Annex%204,%20'Price%20out%20of%20justice?%20Means%20testing%20legal%20aid%20and%20making%20ends%20meet').



## Annex II: The Bar Council's policy response to LASPO 2012 – Civil Legal Aid

The Bar Council has, before this report, undertaken two substantial reviews of the impact of LASPO on the Bar – “LASPO: One Year On” (September 2014)<sup>74</sup> and “LASPO: Five Years On” (October 2018)<sup>75</sup>.

The One Year On research used a survey of 716 barristers and 19 interview follow-ups to canvass the profession on the immediate impact LASPO was having. Even at that point, publicly funded civil and family barristers emphasised that “LASPO has adversely impacted the ability of individuals to access legal advice and representation and to enforce their legal rights. The barristers who responded to the survey also feel that LASPO has negatively impacted their case volume, fee income and fee security, with a significant minority indicating that the impact of LASPO has made them seriously consider the viability of a long-term career at the Bar.”<sup>76</sup>

Overall, the report found there had been:

- A preference for cutting costs over the provision of appropriate access to the courts for individuals to enforce their legal rights;
- Excessive demands placed on under-resourced courts and judiciary;
- A failure to provide appropriate funding mechanisms for low to medium-value complex cases;
- A failure to provide appropriate funding mechanisms for cases without recoverable damages;
- An increase in LiPs which is unsustainable without wider reforms to make processes and procedures more transparent and accessible;
- A failure to value legal services, especially early legal advice;
- A failure to value a diverse legal profession and judiciary; and
- A diminishing optimism in viability of long-term careers at the self-employed Bar, especially for family practitioners.

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<sup>74</sup> Bar Council (September 2014) “The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On. Final Report” [https://www.familylaw.co.uk/docs/pdf-files/LASPO\\_One\\_Year\\_On\\_-\\_Final\\_Report\\_September\\_2014\\_.pdf](https://www.familylaw.co.uk/docs/pdf-files/LASPO_One_Year_On_-_Final_Report_September_2014_.pdf)

<sup>75</sup> Bar Council (October 2018) “LASPO Five Years On: Bar Council submission to the Ministry of Justice LASPO Post-Implementation Review” <https://www.barcouncil.org.uk/uploads/assets/e89215f4-6588-491d-820390e1809f5905/laspopirsubmissionbarcouncilfinal.pdf>

<sup>76</sup> Bar Council (September 2014) “The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On. Final Report” [https://www.familylaw.co.uk/docs/pdf-files/LASPO\\_One\\_Year\\_On\\_-\\_Final\\_Report\\_September\\_2014\\_.pdf](https://www.familylaw.co.uk/docs/pdf-files/LASPO_One_Year_On_-_Final_Report_September_2014_.pdf)

The Ministry of Justice formally reviewed LASPO in its Post-Implementation Review in 2018. In October 2018 the Bar Council submitted further evidence to the MoJ review in the form of the “LASPO: Five Years On” report.<sup>77</sup>

The additional evidence was from a survey of 511 barristers and follow-up interviews with 13 barristers who specialised in civil and family legal aid work. The Bar Council’s findings were summarised in its press release:<sup>78</sup>

- More than 91 per cent of respondents reported the number of individuals struggling to get access to legal advice and representation had increased or risen significantly;
- 91 per cent of respondents reported a significant increase in the number of litigants in person (members of the public attempting to represent themselves in court) in family cases; and 77 per cent of respondents reported a significant increase in the number of litigants in person in civil cases;
- 77 per cent saw a significant delay in family court cases because of the increase in litigants in person;
- Almost 25 per cent of respondents have stopped doing legal aid work; and
- 48 per cent of barristers surveyed do less legal aid work than before.

The press release quotes the then Chair of the Bar, Andrew Walker QC:

"LASPO has failed. Whilst savings have been made to the Ministry of Justice's budget spreadsheets, the Government is still unable to show that those savings have not been diminished or extinguished, or even outweighed, by knock-on costs to other government departments, local authorities, the NHS and other publicly funded organisations.

"Nor do we accept that the reforms have discouraged unnecessary or adversarial litigation, or ensured that legal aid is targeted at those who need it, both of which the Act was billed as seeking to achieve. If anything, LASPO has had the opposite effect, and has denied access to the justice system for individuals and families with genuine claims, just when they need it the most.

"We need a significant change of direction to rectify five years of failure."

The Bar Council’s submission to the Post-Implementation Review consultation called for urgent immediate action in the following specific areas, which were to be considered minimum needs:<sup>79</sup>

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<sup>77</sup> Bar Council (October 2018) “LASPO Five Years On: Bar Council submission to the Ministry of Justice LASPO Post-Implementation Review”

<https://www.barcouncil.org.uk/uploads/assets/e89215f4-6588-491d-820390e1809f5905/laspopersubmissionbarcouncilfinal.pdf>

<sup>78</sup> Bar Council press release 25 October 2018 <https://www.barcouncil.org.uk/resource/bar-council--laspo-has-failed.html>

<sup>79</sup> Bar Council (2018) “Bar Council submission to the Ministry of Justice LASPO Post-Implementation Review” <https://www.barcouncil.org.uk/uploads/assets/e89215f4-6588-491d-820390e1809f5905/laspopersubmissionbarcouncilfinal.pdf>

- *Crime*: reverse the "innocence tax" upon those acquitted of criminal offences who are unable fully to recover the reasonable costs of a privately funded defence;
- *Family*: reintroduce legal aid in a range of family law proceedings, including for respondents facing allegations of domestic abuse and for private law children proceedings;
- *Civil*: reintroduce a legal help scheme for welfare benefit cases;
- *Coroner inquests*: relax the criteria for exceptional case funding where the death occurred in the care of the state and the state has agreed to provide separate representation for one or more interested persons; and
- *Means testing*: introduce a simplified and more generous calculation of disposable income and capital so that the eligibility threshold, and contribution requirements, are no longer an unaffordable barrier to justice."

In February 2019, the Government published the outcome<sup>80</sup> of its Post-Implementation Review. It made some very minor changes but left the main cuts to civil and family legal aid in place. The then Chair of the Bar, Richard Atkins QC stated:<sup>81</sup>

"The 500-page report offers little of substance to ease the impact of LASPO on vulnerable individuals seeking justice.

"Although up to £5m investment has been promised to improve technology for accessing legal advice and £3m over two years to help litigants in person navigate the court system, such monies are but a drop in the ocean given the impact LASPO has had on restricting individuals' access to justice."

The "Action Plan" outcome of the Post-Implementation Review was to establish another review<sup>82</sup>, this time into means testing for legal aid, whereby members of the public who need legal advice and representation but cannot afford to pay for it, nevertheless fail the means test eligibility for legal aid. The Government stated:<sup>83</sup>

"725. [...] evidence submitted throughout the engagement phase has suggested that vulnerable defendants are no longer accessing or being delayed in accessing legal aid, due to having to pass another aspect of the eligibility test."

The Government quoted the multiple sources of evidence that had been supplied to it on the problems with the current means testing calculation and the changes that were needed to

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<sup>80</sup> Ministry of Justice, "Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)", February 2019

<https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>

<sup>81</sup> Bar Council Press Release, 7 February 2019. <https://www.barcouncil.org.uk/resource/laspo-review--bar-council-reaction.html>

<sup>82</sup> Ministry of Justice, "Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems" February 2019

<https://www.gov.uk/government/publications/legal-support-action-plan>

<sup>83</sup> Ibid. Page 168.

correct it, including from the Law Society; the Housing Law Practitioners Association (HLPA); Young Legal Aid Lawyers; Professor Donald Hirsch; the National Centre for Domestic Violence; and Women's Aid.

The Means Testing Review continues, and results are now expected in 2022. The Bar Council is one of the participants in the MoJ's Stakeholder Advisory Group on Means Testing and is preparing to submit again the evidence that we have previously submitted.

In the meantime, we have most recently expressed our current policy position on legal aid in our March 2020 Budget Submission and September 2020 Spending Review Submission. In the Budget Submission we asked for four main points relating to legal aid:

- Justice spending to be swiftly increased, in recognition of the Ministry of Justice's 27% budget cut in the last decade.
- Urgently increase defence and prosecution publicly funded fees to fairly reflect the vital public service lawyers provide and ensure a sustainable workforce.
- A targeted re-introduction of civil and family legal aid.
- Additional resourcing of the Legal Aid Agency.<sup>84</sup>

In the September 2020 Spending Review Submission we:

- Drew attention to the 37% reduction on spending per person on legal aid in England and Wales, 2012-2019.
- Asked that the Government make non-means tested legal aid available for all domestic abuse cases.
- Asked that the Government (re) introduce early access to legal advice for social welfare issues.<sup>85</sup>

We continue to review our own policy position on legal aid, seek to understand and represent the interests of the Bar, and provide evidence to Government reviews at regular intervals.

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<sup>84</sup> Bar Council (March 2020) "The Bar Council Budget Submission"  
<https://www.barcouncil.org.uk/uploads/assets/bd562809-f05a-4c55-964e414e28d7ae9a/3da04fbe-03b3-484c-ad3a61e6faa94d04/Bar-Council-Budget-Submission-March-2020-SR.pdf>

<sup>85</sup> Bar Council (September 2020) "Bar Council Spending Review Submission"  
<https://www.barcouncil.org.uk/resource/bar-council-spending-review-submission-september-2020-pdf.html>

## Annex III: Template interview questions (July-September 2020)

### Questions for barristers:

- What was your route to the Bar?
- What are your areas of practice?
- Why did you choose those areas of practice?
- How long have you been practising in these different areas?
- To what extent (in percentage) have you had to supplement your different areas of civil legal aid work with private work?
- To what extent (in percentage) have you seen a reduction in income from your different areas of practice since LASPO 2012?
- When did you begin working on your different areas of civil legal aid cases? How would you characterise the work at that time in your different areas of practice?
- What has changed during your career?
- How would you describe the effect of LASPO 2012 on your areas of practice?
- Have you had to change your areas of work as a result of LASPO?
- Could you describe a “typical” case in each of your areas of practice you might work on and the route it takes through the legal process?
- Could you describe a case that has stayed with you?
- What would you identify as the key challenges you and your clients face in accessing justice?
- How do you think civil legal aid could be improved? Specifically, how do you think your areas of practice could be improved?
- How has Covid-19 impacted your different areas of practice and access to justice for your clients?
- How would you describe the immediate and long-term outlook for sustainability of your own areas of practice and civil legal aid in general?
- Is there anything else you would like to mention or discuss?

### Questions for clerks:

- What is your job role?
- What was your route into your current job role?
- Do you specialise in any areas of practice?
- How would you describe your chambers culture and the work you carry out?
- To what extent (in percentage) have you seen a reduction in fee income from different areas of practice you cover since LASPO 2012?
- When did you begin working on civil legal aid cases?
- How would you characterise the work at that time in your different areas of practice?
- What has changed during your career?
- How would you describe the effect of LASPO 2012 on your chambers?
- Have you had to change your areas of work as a result of LASPO?

- Could you describe a “typical” case in each of your areas of practice you might work on and the route it takes through the legal process?
- Could you describe a case that has stayed with you?
- What would you identify as the key challenges you and your chambers’ clients face in accessing justice?
- How do you think civil legal aid could be improved?
- How has Covid-19 impacted your chambers and access to justice for your clients?
- How would you describe the immediate and long-term outlook for sustainability of your chambers and civil legal aid in general?
- Is there anything else you would like to mention or discuss?