

The Rt Hon Elizabeth Truss MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
102 Petty France
Westminster
London SW1H 9AJ

Your Ref:

Our Ref: AP

Date: 21 December 2016

Dear Lord Chancellor

Re: Proposed review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Public Law Project (PLP) is a national legal charity founded in 1990 which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage. Since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') in April 2013, a major focus of PLP's work has been the civil legal aid reforms introduced by LASPO and subsequently, including as a result of the 'Transforming Legal Aid' consultation launched in April 2013.

We are writing further to your statement in Parliament earlier this month that you would shortly be announcing the timeline for the review of LASPO which the Government is committed to undertaking by April 2018. PLP welcomes the Government's intention to conduct a review into the LASPO legal aid reforms which have had far reaching implications for access to justice in England and Wales.

We are taking the opportunity to write to you now with some suggestions as to the areas which the Government's review should cover. This is a non-exhaustive list of areas of particular concern and which you will no doubt wish to consider in order to fully understand the implications for access to justice and the rule of law of the LASPO reforms, given your oath and statutory duties as Lord Chancellor. PLP would welcome the opportunity to provide more detailed evidence and

information about our concerns in any of these areas to the review; our intention at this stage is simply to highlight areas which in our view ought to be included in the review.

While we have attempted below to set out our concerns thematically as they relate to different areas of the scheme, PLP considers that in order to properly understand the impact of LASPO, it will be necessary to consider the cumulative effect of the reforms and of the issues with the legal aid scheme, and to consider them in the wider context of access to justice in the UK. For example, the implications of the barriers to access to legal aid cannot be considered separately from the increases in fees for courts and tribunals. The difficulties we identify below with the Legal Aid Agency's online application system needs to be seen in the context of wider problems with bureaucracy in the legal aid system, such as those identified in the Bach Commission's recent report, which recorded that despite the cuts in the legal aid budget, the administration budget of the Legal Aid Agency has increased by £2.1m in the last year.¹ In light of these issues, we invite you to consider conducting a cumulative impact assessment of the impacts of LASPO and associated reforms on access to justice in the UK.

(1) Concerns about the scope of civil legal aid

Areas of civil legal aid which were retained in scope following LASPO are listed in the paragraphs of Part 1 of Schedule 1, LASPO, subject to the exceptions and limitations set out therein and in Parts 2 and 3 of Schedule 1. Aside from our general concerns about the impact of removing significant areas of law from the scope of civil legal aid, we have specific concerns that the definitions of what is "in" scope in Part 1 of Schedule 1 are either unclear, or have the effect of routinely excluding vulnerable individuals who have a particularly acute need for access to legal advice in complex and/or important areas of law.

Our particular concerns relate to:

- **Victims of domestic violence.** We have concerns that despite recent improvements, the evidential requirements for victims of domestic violence seeking legal aid for private family law proceedings remain restrictive. Further the provisions of paragraphs 28 and 29 which provide for legal aid to be available for non-asylum immigration advice for victims of domestic violence are unduly restrictive, as they allow legal aid to be provided in relation to only two narrow categories of individuals who may need immigration advice following domestic violence.
- **Parents needing advice or representation in connection with child arrangements orders.** These private law family proceedings can have profound effects on parents' and children's lives but parents are only entitled to legal aid where they can meet the domestic violence evidence requirements, or if there is evidence that the child is at risk of abuse from another party. Those excluded include parents whose first language is not

¹ Bach Commission on Access to Justice, Interim Report , The crisis in the justice system in England & Wales, November 2016. Available at http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf Accessed 21 December 2016.

English² or who may have a learning difficulties or other capacity issues which inhibit their access to the court.³

- **Judicial review where inadequate notice of removal.** Paragraph 19(8) of Part 1 provides for an exception to the exclusion of legal aid for judicial review of removal directions where “prescribed conditions” relating to the notice an individual is given of his removal from the UK are met. However no such conditions appear to have been prescribed. This lacuna is of particular importance given the role which proper notice of removal directions plays in securing access to justice.
- **Refugee family reunion applications and appeals.** Repeated concerns have been expressed by organisations such as the British Red Cross⁴ and Amnesty International⁵ about the need for legal advice and representation in family reunion cases.
- **Victims of trafficking and modern slavery** requiring advice about their immigration status before a positive reasonable grounds or conclusive decision has been made under the National Referral Mechanism.
- **Unaccompanied and separated children** requiring immigration advice in non-asylum matters.⁶
- **Welfare benefits advice.** In particular the exclusion of appeals in the First-tier Tribunal, which may raise complex points of law, and of applications for permission to appeal to the Upper Tribunal on the grounds that the First-tier Tribunal has erred in law (legal aid only being available once permission to appeal has been granted).⁷

We are also concerned about the exclusion from scope of **prison law** cases which were previously funded under criminal legal aid, particularly those where Exceptional Case Funding may not be available at all.

(2) Inaccessibility of the Exceptional Case Funding scheme

PLP continues to be concerned that the Exceptional Case Funding (‘ECF’) scheme for providing legal aid where necessary to prevent a breach of Convention right or of EU law rights (under s10 LASPO) does not provide the ‘safety net’ which it was supposed to ensure. Although we acknowledge that there have been some improvements to the scheme and that the number of

² Such as Salmah, the case study cited by Amnesty International in its October 2016 report at p. 39.

³ Such as Robert, the case study cited by Amnesty International at pp. 43-44.

⁴ See <http://www.redcross.org.uk/About-us/Advocacy/Refugees/Family-reunion/Applying-for-family-reunion-legal-cuts-human-cost>

⁵ <https://www.amnesty.org/en/documents/eur45/4936/2016/en/>

⁶ See the June 2015 report by The Children’s Society, “Cut off from Justice: The impact of excluding separated migrant children from legal aid”

http://www.childrensociety.org.uk/sites/default/files/LegalAid_Summary.pdf and the recommendation of the House of Commons Justice Committee in its report Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Eighth Report of Session 2014-15, HC311, 12 March 2015, paragraph 62.

⁷ See the concerns expressed in Amnesty International’s report at pp. 45-46.

applications and grant rate have increased, the number of applications remains significantly lower than the Government estimated prior to the implementation of LASPO⁸, and the grant rate has recently fallen back below 50%.

- Continuing complexity in the application process continues to represent a barrier to direct applications, including in identifying the correct forms and explaining the legal, procedural and evidential complexity of a case in order to justify the need for a grant of ECF funding.
- The absence of remuneration for providers who make an unsuccessful application for ECF. Taken together with the relatively low grant rate (by way of comparison the most recent legal aid statistics show that the grant rate for applications for civil representation in matters which remain in scope is 90%) and the time taken to complete an application, this remains a significant barrier to access to the scheme.
- The inability of the Legal Aid Agency ('LAA') to guarantee that urgent applications will be dealt with in the necessary timescale. Although there is now a procedure for dealing with cases which the LAA accepts to be urgent, the timeframe for such applications is 5 working days, rather than the 48 hour timescale for urgent in-scope applications.

These concerns are shared by others who have examined the scheme including the Bach Commission on Access to Justice, whose interim report published in November 2016 found that the scheme has “failed to deliver for those in need” and Amnesty International who found that “*In practice... the ECF scheme is inadequate and does not provide the promised safety net for vulnerable or disadvantaged people who are struggling to navigate complex legal processes and effectively advocate for their rights*”.⁹

(3) The mandatory telephone gateway

In 2015, PLP published a report into the operation of the **mandatory telephone gateway system** introduced under LASPO which is available here: <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf> Our conclusions included the following:

1.34. Our findings indicate that there is insufficient evidence that the Gateway is meeting Parliamentary and policy intentions, and that in some areas those intentions are being undermined or frustrated. The MoJ review does not fully engage with these issues.

1.35. From a service user perspective, our findings indicate that there have been clear disadvantages of the Gateway including:

⁸ The Government estimated that 5000 to 7000 applications would be made in a year. The most recent quarterly statistical bulletin shows that 479 ECF applications were made between July and September 2016, the highest in a single quarter since the scheme began, 395 of which were new applications. If this application rate is sustained across 12 months, that would equate to 1580 new applications each year, around a quarter of what was expected.

⁹ Amnesty International, Cuts that hurt: The impact of legal aid cuts in England on access to justice, October 2016, p. 23.

- *very low levels of awareness of the service on the part of potential users;*
- *significantly lower volumes of advice being given than anticipated;*
- *an ongoing reduction in volumes of advice being given;*
- *service user difficulties navigating and proceeding beyond the Operator Service;*
- *significant numbers of matters resulting in ‘outcome not known or client ceased to give instruction’; and*
- *very low levels of referrals to face-to-face advice being made.*

1.36. *Furthermore, in terms of value for money the Gateway may be a significantly more expensive system of advice than that in face-to-face advice settings once additional costs are taken into account, as our research suggests is the case in Debt matters.*

PLP’s findings were supported by the findings made by the House of Commons Justice Committee in its report on the LASPO reforms in March 2015,¹⁰ noting in particular the significant underspend with 85% fewer debt cases being started than had been anticipated.

The concerns expressed in PLP’s report do not seem to have gone away. By way of example, based on the latest legal aid statistics, it remains the case that significantly lower volumes of advice are being given than anticipated, and there seems to be an ongoing reduction, particularly in the discrimination category. Thus:

- In the discrimination category, the LAA anticipated that each of the 3 contracted providers would open 2,136 Cases per year (i.e. a total of 6,408 Cases per year in Controlled Work).¹¹ The published statistics show that there were 2301 matters started in 2013/14; 1,602 in 2014/15; 1417 in 2015/16; and 699 in the first six months of 2016/17.¹² The number of certificates issued for licenced work in the discrimination category is extremely low: just 30 certificates have been issued since April 2013.¹³
- In the education category, the LAA anticipated 729 Cases per Provider per year (a total of 2177 each year across 3 Providers). In fact 1,153 Cases were started in 2013/14; 1,752 in 2014/15; 1,708 in 2015/16; and 816 in the first six months of 2016/17. 99 certificates for licenced work have been issued since April 2013.

(4) Restrictive financial eligibility criteria

The current financial eligibility criteria are such that they exclude significant numbers of people from legal aid who would not be able to afford to pay for legal advice or representation or to pay their opponents’ costs of proceedings in which an adverse costs order may be made against them. There are very limited

¹⁰ Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, Eighth Report of Session 2014-15, HC311, 12 March 2015, especially paragraphs 21-29.

¹¹ Invitation to Tender to deliver Community Legal Advice Specialist Telephone Advice Services from April 2013: Information for Applicants. Available at <http://webarchive.nationalarchives.gov.uk/20140711191156/http://www.justice.gov.uk/downloads/legal-aid/tenders/cla-itt-ifa-for-2013-cla-contractsv2.pdf> Accessed 19.12.2016.

¹² Legal Aid Statistics England and Wales July to September 2016 tables, table 5.1.

¹³ Legal Aid Statistics England and Wales July to September 2016 tables, table 6.2.

provisions to waive the financial eligibility limits or requirements to pay contributions in cases where the financial eligibility criteria apply.¹⁴

(5) Judicial review payment regulations

The proposals made in Transforming Legal Aid included changes to the rules for payment for work on judicial review claims, introduced through the Civil Legal Aid (Remuneration) (Amendment) Regulations 2014. These Regulations were quashed by the High Court following a judicial review and further amendments were made by the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015. The full consequence of these changes has yet to become apparent, but the Government's review should consider the extent to which they have a chilling effect on the willingness/ability of providers to take on judicial review claims, and on the ability of providers to remain financially viable where they may not be paid at all for professionally appropriate work preparing a reasonable claim for judicial review, particularly for clients who may have additional needs/require additional time as a consequence of protected characteristics. The latest legal aid statistical bulletin shows a significant and steady decline in the number of applications for legal aid for judicial review granted each quarter since July-September 2015.

(6) Shortages of legal aid provision/advice deserts

One of the consequences of the massive reductions in legal aid post-LASPO has been a shrinking of the number of legal aid providers, particularly in those areas of law, such as welfare benefits and private family law, where there has been a significant reduction in the types of case for which legal aid is now available. There are now large areas of the country where there is only extremely limited, if any, provision in particular areas of law.¹⁵ The consequences of this loss of accessibility of providers include a loss of expertise. It also has significant consequences for access to justice even where funding is available for those areas which remain in scope, or where ECF is granted. The Government's review should look at the relationship between the cuts to legal aid and the genuine accessibility of specialist advice and representation throughout England and Wales.

(7) Client and Costs Management System

Although the introduction of the Client and Costs Management System ('CCMS') was not directly a result of LASPO, it presented an opportunity to streamline and modernise applications to the benefit of clients, providers and the LAA alike. However, in practice **its operation and poor functionality is a major barrier to access to legal aid**. The experience of many providers, including PLP, is that errors are extremely common; the system is slow and cumbersome to operate; and that its systems and procedures add significantly to the administrative burden of legal aid cases. It represents a significant threat to the viability of legal aid practice.

The problems posed by CCMS are exacerbated by the fact that **delegated powers are not available** in most areas of law post-LASPO, subject to narrow

¹⁴ Regulations 9-12 and 44 of The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, 2013/480.

¹⁵ These concerns were shared by the Justice Committee in its 2015 report on the LASPO reforms: see paragraphs 73-89 in particular.

exceptions. Thus even in dealing with urgent matters, including those where individuals' life or liberty is at risk or children are at risk of losing a roof over their heads, providers often have to make an application to the LAA before they can commence work. That is so even in relation to judicial review applications where, as a result of the payment regulations referred to above, all the risk at the initial stages of a case is carried by the provider.

We trust the above is of assistance to you in considering the scope of the review of LASPO and, as indicated at the outset, we would be pleased to provide more detailed information or evidence about our concerns to the review.

Yours sincerely,

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