



The Law
Society



The Law Society's interim submission to the Review of Civil Legal Aid

August 2023

The Law Society's interim submission to the Review of Civil Legal Aid

Contents

Introduction	2
Sustainability.....	3
Administration and governance of the system	7
Advice deserts.....	12
Scope	15
Knock on costs	18
Strategic Approach	19
Subject Areas	22
Community Care Law	22
Discrimination	23
Education	24
Exceptional Case Funding.....	26
Family.....	27
Housing	31
Immigration	33
Inquests	34
Mental health.....	35
Public Law	36
Welfare Benefits.....	36

The Law Society's interim submission to the Review of Civil Legal Aid

Introduction

Legal aid provides a lifeline for many at times of crisis, from preventing homelessness to providing protection from abuse. A well-funded and sustainable legal aid system is part of the foundation for our thriving communities and local economies by helping to resolve debt, housing and family problems.

The resolution of issues through timely, expert legal advice supports stable public finances by resolving them before they reach a crisis point, reducing the demand on our public services.

However, legal aid is in crisis and the safety net it provides is fraying. There are increasing numbers of advice deserts, where local legal support is unavailable, and many of those eligible for legal aid cannot access it for lack of available practitioners. The scope of legal aid is fragmented with extremely limited support in areas like social welfare and early advice.

The last time fees were increased was in 1996, over 25 years ago. A further 10% fee-cut was implemented in 2011. This represents a real-terms cut of 49.4% in fees to 2022. Continuing at this level of investment is unsustainable and the decline of civil legal aid will echo across public services.

Surveys of legal need have demonstrated that people experience their problems in clusters, for example family problems lead to debt or housing issues, but the scope of legal aid does not allow people to address their problems early and stops them from escalating or resolve their cluster of problems in a holistic way.

Decline is not inevitable, and the review of civil legal aid is an opportunity to look at the entire system, the challenges it is facing and put in place the reforms and funding needed so that legal aid can continue to support our communities and businesses for years to come.

This submission sets out in detail the challenges facing civil legal aid around sustainability, recruitment, and administration. It puts forward what steps the civil legal aid review needs to do to address these in turn. We can end the crisis in civil legal aid, but only if the government takes the required measures.

We call on government to:

- **Implement an emergency investment injection while the review takes place** - an interim increase of fees is required for all fee levels to sustain the system while the comprehensive review takes place. An interim increase of **15%** for work

undertaken at the early advice stage, would cost an estimated **£11.3 million** based on 2022/23 expenditure.¹

- **Widen the scope of legal aid** – the review must look again at the scope of legal aid, widening access to early advice in social welfare and family law cases to ensure people are able to prevent their problems from escalating, and reduce the knock-on costs arising from financial, social, and health impacts of unresolved problems.
- **Reduce bureaucracy** – onerous and punitive bureaucracy is an additional burden that is driving practitioners away from legal aid work. A more flexible approach to the contracts would encourage innovation and a better relationship with providers.
- **Invest in recruitment and retention of staff** – legal aid firms struggle to attract or retain staff. Law students do not see legal aid as a viable career option. The government must invest in the training of the future legal aid workforce and provide a sustainable service that represents a viable career option for young legal aid lawyers.

Sustainability

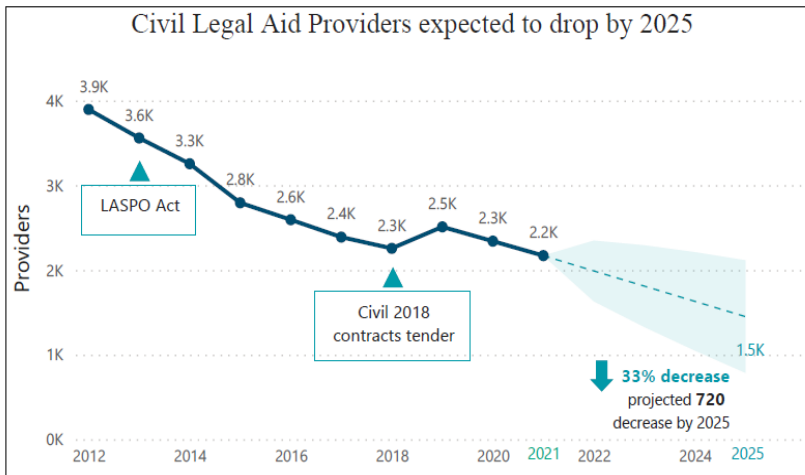
There are sustainability concerns in all civil legal aid categories. The observation in the recent Criminal Legal Aid Independent Review that the situation is ‘parlous’ applies equally to civil legal aid.

The implementation of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) in 2013, significantly reduced the scope of civil legal aid in family, immigration and housing cases and virtually abolished it in categories such as welfare benefits, debt, employment and clinical negligence.

The scope cuts reduced work volumes considerably and is one of the reasons for the decline in civil legal aid provision. It might have been expected that once the sector had absorbed the impact of the scope cuts, provider numbers would have levelled out, but this has not happened.

Instead, the overall number of providers continues to decline year on year as illustrated by the graph below which also includes a projected fall of 33% from 2021 levels by 2025.

¹ Controlled work (Legal Help, CLR, excluding CLA) solicitors fees expenditure for 2022/23 was £75,463,272, a 15% increase to this amount would be an additional £11,319,490 all other factors being equal. Figures obtained from [MoJ/LAA Civil Legal Aid Provider Dashboard -Expenditure](#)



The fall in the number of providers means less access to legal advice for the most vulnerable people in society whom the legal aid system is designed to assist. Reduced access to justice means fewer problems are resolved with inevitable financial and social costs.

Declining viability and need for interim investment

Research indicates that the main reason for the continuing fall in the number of providers results from the declining financial viability of civil legal aid work. Fees have not been increased since the 1990s and more recently high inflation has further eroded their value. In the 2021 LAPG legal aid census 50.1% of organisations indicated that there were areas where they used to but no longer provide legal aid services. When asked to explain why their organisation had moved away from certain areas of legal aid practice, 61% explained it was because it was not profitable or economically viable to undertake the work.²

Between 1996 and 2022 the real terms value of civil fees has reduced by 49.4%. Whilst we welcome the MoJ’s review we note that the timescale indicates that final recommendations will be made by March 2024, but it is inevitable that there will be further delay before proposals can be implemented. It is also necessary to factor in the added uncertainty of the outcome of a general election which must take place within the timescale of the review.

Even the most optimistic estimate suggests that recommendations will not be implemented before 2025 at the earliest, but this could be too late to save the sector now from almost total collapse. For that reason, we call for urgent interim measures to increase legal aid fee rates to a level that enables civil legal aid work to be viable for both private and not for profit providers.

Recommendation:

An interim increase of fees is required for all fee levels. An interim increase of **15%** for work undertaken at the early advice stage, that is for legal help and controlled

² <https://lapg.co.uk/wp-content/uploads/We-Are-Legal-Aid-Findings-from-the-2021-Legal-Aid-Census-Final.pdf>

representation, would cost an estimated **£11.3 million** based on the expenditure from the financial year 2022/23. We call on the government to make this immediate increase.

Fixed fees and escape cases

In addition to low fees, the move to a fixed fee model for many cases, but without any adjustment when elements of the case were removed by LASPO, has added to the decline in financial viability.

The move to fixed fees mainly for Controlled Work took place in the 2000s prior to the implementation of LASPO. Initial fixed fee calculations were based on an average of hourly rate spend from a mixed caseload, a 'swings and roundabouts' approach, where in some simpler cases, providers were rewarded with a surplus, and in some more complex cases providers lost out - but the stated intention was that overall, it should average out.

The LASPO scope cuts shifted the balance significantly to more complex cases as early advice provision often only requiring a 'one off' advice session was largely removed from scope. For example, the removal of non-asylum immigration matters which included a significant amount of 'one off advice' shifted the focus decisively to asylum claims which are inherently long running and usually complex matters. Consequently, the ability for providers to claim the fixed fee in excess of the actual value of the work virtually disappeared, to be replaced with a situation where a higher proportion of cases significantly exceed the value of the fixed fee. The Legal Aid Census 2021 demonstrates this, 94.1% of respondents to the Census indicated that fixed fees did not adequately cover the number of hours actually worked to complete a fixed fee task. The Census further found that only 57 minutes of every two hours of work performed is remunerated under the fixed fee regime.³

Escape cases

Controlled Work fixed fees have an 'escape threshold' where if the value of work calculated at hourly rates exceeds the fixed fee by three times, the provider can submit their claim for costs at hourly rates. So, for example, if the fixed fee is £150, the 'escape threshold' is £450. If the work done exceeds £450 the claim can be made at hourly rates, but this means that providers could do work up to the value of £449 and still only be entitled to the fixed fee of £150. This arrangement also negates the potential that fixed fees might offer in terms of simpler administration, as providers still have to assess their fees at hourly rates to determine whether the escape threshold has been reached. Where the threshold is reached the claim is still more complex to assess and submit than if it had been claimable at hourly rates from the outset.

In recent changes to the Asylum and Immigration contract, the escape threshold has been reduced to 2x the fixed fee. We see this as a positive development as it reduces the amount of unremunerated work that can be done before the threshold is reached. This threshold should be implemented across all the contract categories, but this must be done in conjunction with raising the fixed fees themselves to a sustainable level.

³ <https://lapg.co.uk/lapg-publishes-the-findings-of-the-2021-legal-aid-census/>

Recommendation - escape threshold is set at 2x fixed fee across all categories of work and fixed fees overall are increased to a sustainable level for practitioners.

The cost base

The present fee schemes do not reflect the costs of carrying out legal aid work. The Law Society's 2023 Law Management Section Financial Benchmarking Survey⁴ demonstrates that a typical firm, working 1,100 chargeable hours, a standard average for a law firm, would need to see rates of around £80 per hour to break even each year. Currently civil legal aid rates are significantly below this level, the average fee being £45-50 per hour, meaning that, civil legal aid work is unsustainable. Many firms are cross subsidising their legal aid work with private work but this is not a sustainable business model and not an option for practices that do not have means to do this. The effect is to place the burden of funding legal aid advice on SMEs.

Fees should be set at a level that realistically reflects the cost base of providing services and should be regularly reviewed by an independent body as suggested by the CLAIR review for criminal fees.

Recommendation

- Longer term fees should be set at a level that realistically reflects the cost base of providing services.
- Independent body to regularly review and uprate fees.
- Regular uprating of fees with inflation.

Recruitment and retention

The current parlous economic situation for legal aid providers means that they have little or no resources to invest in future service provision, whether that be the training of future legal aid lawyers, or capital investment in Lawtech or other infrastructure that could reduce the costs of administration and increase access to justice overall. The MoJ has recognised there has been loss of expertise in social welfare law areas and is in the process of creating a limited number of funded social welfare law training contracts to facilitate the operation of the Housing Loss Prevention Advice Service. In principle we see this as a positive step, but the reality is that a few funded training schemes will not address the wider sustainability issues surrounding civil legal aid and will do little to convince young lawyers already carrying the financial debts of education and training, that they have a viable career future in legal aid work.

Investment in infrastructure

As stated above, legal aid work does not generate sufficient income for providers to make capital investment in systems that might assist them to operate more effectively and

⁴ This figure is based on analysis of the costs for law firms in the lower quartile turning over less than £2m annually from the Law Society's 2023 Law Management Section Financial Benchmarking Survey

efficiently. This is a significant drag on progress in the sector and the Government should increase the level and profile of available funding such as that related to the existing statutory framework under section 2 of the Legal Aid Sentencing and Punishment of Offenders Act, which allows the Lord Chancellor to make loans and grants in such situations.

Loss of expertise

Loss of expertise in the legal aid sector arises generally from the decline in the number of new entrants. Whilst law students are interested in doing legal aid work, it is not widely seen as a viable career option in financial and career development terms (LAPG Census 2021). Expertise has also been lost due to the LASPO scope cuts, particularly in areas where there is little or no market for private services such as welfare benefits, debt and discrimination. This has hindered the development of recent MoJ initiatives to provide a more holistic approach to social welfare law such as the planned Housing Loss Prevention Service (HLPAS) and the Early Advice Pilot (ELAP) which would offer advice in housing, welfare benefits and debt. In the HLPAS case, the MoJ is currently trying to set up a Specialist Support advice line to assist front line providers who will provide welfare benefits and debt advice but do not currently have a supervisor who has sufficient expertise in these areas. We can only regard this as a partial solution which is unlikely to resolve the expertise issue in the long run as the limited resources going into HLPAS and ELAP are not sufficient to enable providers to cultivate the level of expertise required. We have also pointed out to potential providers that not having in-house specialists can increase the risk of being in breach of their professional duty of care to clients.

Recommendation

- Invest in training grants.
- Invest in capital grants for innovative technology and provider IT that work compatibly with Governments agencies' own systems

Administration and governance of the system

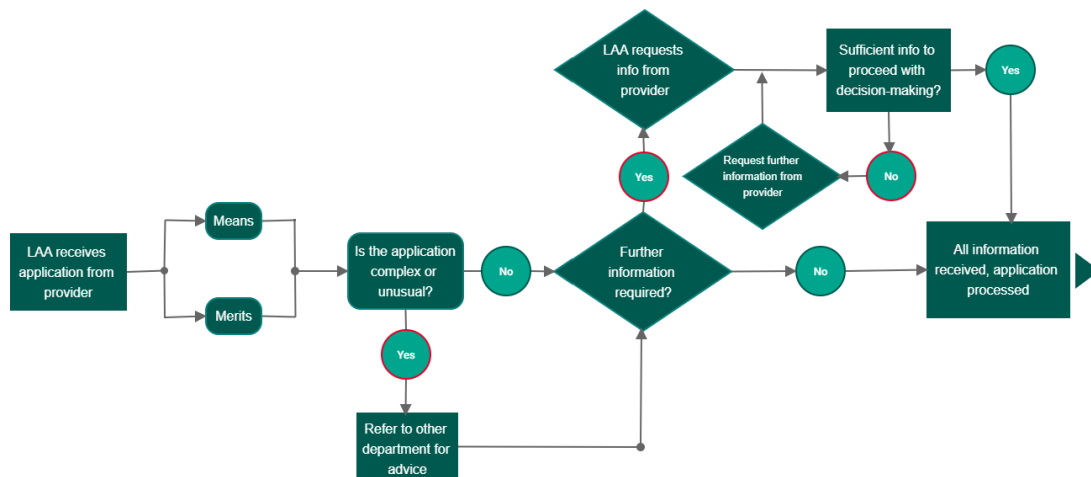
As well as the central problem of low fees there are other factors which make legal aid work unattractive and has resulted in providers withdrawing from their contracts. These are mainly based around administrative burdens placed on practitioners by overly prescriptive measures in the civil legal aid contract. These measures affect the day-to-day operation of cases and the overall management of the business, preventing providers from adopting the most appropriate business models for delivering services.

The unpaid administrative costs of running a legal aid contract include the costs of dealing with applications and means testing, billing, audits, complying with contractual pre-requisites such as obtaining Lexcel or the Specialist Quality Mark accreditation and using the online Client and Costs Management System (CCMS). These are in addition to the usual costs of running a private practice, such, as professional indemnity insurance and practising certificates. These costs are not taken into consideration when calculating fees paid and have increased year on year.

Micromanagement

The micromanagement of the legal aid contract by the LAA gives rise to a huge amount of bureaucracy. In 2021/22 the LAA processed around 400,000 legal aid applications and over 1.2 million bills.

The legal aid scheme is made up of a complex mixture of contracts, guidance and legislative provisions. The complexity of the application process alone is demonstrated by the flow chart below.



The legal aid contracts specify in remarkable detail not only what work solicitors do, but how they should do it. The civil specification is full of rules about how casework is to be carried out and recorded. For example, a significant problem that arose in family cases was that to progress from level 1 to level 2 fees, the rules required that the solicitor has a second meeting with the client, even when this is completely unnecessary for the conduct of the case. This created considerable confusion and unfair penalties.

This micro-management extends beyond the conduct of cases to take in file management systems, supervisory arrangements, and business management.

Supervisor requirements - finding supervisors that meet LAA requirements is difficult particularly in categories such as housing, community care and mental health. This presents a barrier to firms and organisations applying for a civil legal aid contract or being able to continue with their present contract.

Office requirements - the contract includes the requirement to have a permanent office in a procurement area. This requirement is increasingly at odds with the way providers offer services post Covid, and for some firms and organisations represents a significant overhead that may act as a barrier to those firms applying for a legal aid contracts - particularly as in common with many industries law firms no longer maintain the same levels of estate in the shift to homeworking. Clients too are seeking greater opportunities to engage through calls or online means for accessibility and cost reasons. We do not want to dispense with the principle of local client access and face to face provision but as long as the provider can offer telephone access during normal office hours and can demonstrate their ability to arrange physical face to face interviews in appropriate local

venues, we do not think that a permanent office presence in the procurement area is essential or cost effective.

Cashflow and interim payments – controlled work is only paid for at the end of the case. For the majority of legal areas there is no ability to claim for interim payments throughout the life of the case. This includes not being able to claim for disbursements, such as, interpreters or experts fees. Cases may take over a year to complete and involve carrying a large amount of work in progress with negative implications for firms' cash-flow. This is particularly difficult for new entrants who wish to start providing legal aid services or where a new caseworker has been taken on. As there will be no income generated for this service or caseworker for a significant period. This represents an additional disincentive to start or grow legal aid services. Therefore, there must be arrangements for interim costs and disbursements for controlled work across all the civil categories or else effectively firms themselves are bearing the costs of providing the legal aid system.

Means Test

Whilst the recent improvements to the legal aid means test are welcome the proposal to remove Universal Credit as a passporting benefit for legal aid will significantly add to the bureaucracy of the application process, adding to unpaid work that legal aid providers have to undertake and making the work less financially viable. As outlined in our response to the government's consultation on the Legal Aid Means Test Review, we believe that Universal Credit should remain as a passporting benefit and practitioners should be remunerated for the work involved in the means test application process. Our recommendations regarding the means test are outlined in our response to consultation here: <https://www.lawsociety.org.uk/campaigns/consultation-responses/legal-aid-means-test-review>.

Decision making

This level of micromanagement requires considerable decision making on the part of LAA caseworkers. Reports from practitioners suggest that poor and inconsistent decision making at case level from the LAA has impaired operations of providers. Evidence from the Legal Aid Practitioners Group survey (2019)⁵ indicated most practitioners experienced the following in the prior 12 months:

- Incorrect refusals of substantive certificates and/or amendments to substantive certificates
- Delays in granting substantive certificates and/or amendments to substantive certificates
- Incorrect nil assessments of Escape Fee or other claims for costs
- Incorrect requests for evidence of means that may be impossible to obtain and/or not in compliance with the regulations
- Issues with the appeal or internal review process for challenging any of the above (or any other) decisions by the LAA 8

⁵ <https://lapg.co.uk/wp-content/uploads/We-Are-Legal-Aid-Findings-from-the-2021-Legal-Aid-Census-Final.pdf>

- Being forced to issue a claim or make an application 'at risk' (i.e. not knowing whether legal aid will be granted to cover the claim/application) while awaiting the outcome of an appeal

These results were linked to a perceived "culture of refusal" at the LAA resulting in the refusal of certificates for licenced work required for vulnerable clients.

Micromanagement of cases also means there are times when simple errors are made by practitioners on forms but the onerous level of decision making on each case means this generates costs and delays for both the provider and the LAA as claims go back and forth.

Audits

The LAA's costs assessment and audit regimes often mean that solicitors find payments for work genuinely done in good faith for eligible clients, are disallowed because of very minor and technical errors. A report by Wilding (2019) indicates that audits of immigration providers by the LAA have been triggered by minor errors in billing or means testing - with undue delay and disruption to serving clients as a result.

A stringent audit and contracting process is likely to have been influenced by the LAA's concerns not to have their accounts qualified by the NAO as happened to their predecessor the Legal Services Commission three years in a row from 2009 -2012. Qualification indicates the auditor had reservations about aspects of the accounts which, in this case, related to payments to legal aid providers. However, in their reporting NAO identified the complexity of the schemes as a major contributory factor toward the relatively high level of error in claims (NAO, 2010).

Simpler processes would be easier to implement and monitor but have not materialised in the intervening years, whilst complex audit arrangements have been maintained.

We have repeatedly argued that standard commercial contracts would not require such strict compliance with such a vast array of very technical rules, or in some cases impose disproportionate penalties for minor breaches. It makes no sense either for the contracting authority or the contractor. The contract should be rewritten on sensible commercial terms, including provision for a "margin of error" which will not lead to any financial penalties for minor breaches in good faith.

Recommendation:

- Simplify the contracting process based on standard commercial contracts so that the weight of resources is spent on the provision of much needed professional advice rather than administration.
- Simplify the contract audit process.
- Include within the contract a provision to allow for a 'margin of error' that will not lead to any financial penalties for minor breaches in good faith.

Appeals

Providers also have concerns regarding the poor quality of legal aid appeal decisions and the lack of independence in the appeals process.

The costs, funding and contract appeal processes are supposed to be independent; however, both are wholly administered by the LAA and both Independent Costs

Assessors, and Independent Funding Adjudicators are recruited, trained and paid for by the LAA. This results in lack of confidence in the independence of decision-making.

These appeal panels provide the last line of defence for practitioners against poor LAA decision making, very few practitioners would have the resources to pursue matters to legal proceedings, and so it is critical that these appeal routes are robust and truly independent of the LAA.

Recommendation:

- Set up an appeals process independent of the LAA

Tendering process

The current tendering process takes place approximately every three to five years with ad hoc tenders occurring in smaller areas when required. Therefore, providers that may want to enter the market could have to wait several years for the opportunity to do so. The contract tendering process should be changed to provide greater flexibility for new entrants. This could take the form of rolling contracts rather than the current fixed term contract arrangement. This would allow for newcomers and the evolution of the sector. When there is such a shortage of providers it does not make sense to retain unnecessary barriers to entry.

Recommendation:

- The contract tendering process should be changed to provide greater flexibility for new entrants to join the market.

LAA IT systems

The main systems used in civil legal aid are CCMS (Client Costs Management System) for Licensed Work applications and billing, and CWA (Controlled Work Administration) that covers Controlled Work billing. The CCMS online processing system has been plagued by delays and technical difficulties and times of complete shutdown. CCMS became mandatory to use in 2016 despite concerns raised at the time that it was not fit for purpose. Practitioners have complained that submitting applications and bills through the system is more time consuming than the paper-based system it replaced.

Although the LAA has made piecemeal improvements to the system since 2016, it is still largely regarded by providers as an unduly cumbersome system with poor functionality which has failed to deliver the benefits that should be provided by a modern digital system.

The limitations of the CWA system for Controlled Work have also prevented the LAA from introducing more flexible stage billing arrangements. Urgent investment in operational systems is required to reduce administrative overheads for both providers and the LAA.

Recommendation:

- Urgently invest in updating the LAA's IT systems to enable more flexible billing arrangements and less onerous administrative procedures.

Constraints of the contract stifling innovation

The combined effect of these rules is to stifle the development of more efficient processes for undertaking work, and the evolution of more effective business models. A more flexible, less punitive approach to the contracts would encourage innovation and a better relationship with providers. The government should set the broad parameters for what the system should deliver but allow flexibility within those parameters. It should allow organisations the commercial freedom to manage their businesses and services in an economical and professionally rational way.

Advice deserts

The knock-on effect of the reduction in provider offices is that even those who are eligible for legal aid are finding it difficult to find a solicitor to represent them.

Our analysis of data from the Legal Aid Agency shows a number of areas of the country have little or no provision of legal aid advice - otherwise known as legal aid deserts. A desert is an area where advice is not available through legal aid or where there is only one provider locally.

Legal aid deserts 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.

In March 2023, we updated our five heat maps⁶ showing the shortage of providers across the country for:

- community care - 11.6% drop in providers since April 2022
- education - 10% drop in providers since April 2022
- housing - 25.3m people (42%) do not have access to a local provider.
- immigration and asylum - 39m people (66%) do not have access to a local provider.
- welfare - 21% drop in providers since April 2022

Large areas have no provider, but having only a single provider in a legal aid area is also a major problem for advice provision for the following reasons:

- Families on low incomes cannot afford to travel to see the one provider that might be located many miles away from where they live. This means they are unable to seek essential legal advice, even in the most extreme cases, such as homelessness.
- One firm in a large area might not have capacity to provide advice to all those who need it.
- As what remains within the scope of legal aid are crisis issues, such as, repossession or domestic violence people need that advice urgently, and cannot

⁶ <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts>

go onto a waiting list. This means that some of the most vulnerable people in Society are left without critical professional advice and support.

- Conflicts of interest can arise because one law firm cannot, for example, represent both a tenant and their landlord. A conflict can also arise if the firm has been acting for e.g. the landlord on another issue, such as a family matter. This would mean the firm would not be able to act for the tenant.

In a sustainable market, ten years after a change like LASPO, case volumes should have stabilised, particularly given the cost-of-living crisis and growing need for advice. There has been no reduction in demand over this time but the number of firms providing services are continuing to reduce.

Lexis Nexis have also undertaken research into legal aid deserts and compared the demand for services with supply⁷. Their data showed areas with high demand but worryingly low supply. In the area of family legal aid the research revealed:

- 1.09m people live in legal aid deserts for family law expertise.
- The five best served local authorities have 14.43 providers per 1,000 incidents.⁸
- The family legal deserts in the bottom 10% had 0 providers per 1,000 incidents.

Much of the research into advice deserts has been based on the number of providers that have legal aid contracts. However, the published information does not indicate the amount of work that is being undertaken by those contracted providers. A recent Freedom of Information request⁹ demonstrated that for many areas there are dormant contracts where providers that have contracts are no longer taking on new legal aid work. The table below shows the different areas of law, the number of contracts for each area and the percentage of contracts where work is no longer being undertaken. It also demonstrates the provider loss from September 2021-March 2023 where firms have handed back their legal aid contracts. The number of inactive providers are particularly stark in debt and welfare benefits. Nearly a third of housing providers, where we know there are significant advice deserts, are also inactive.

Area of law	Procurement Areas	Offices (Sept 21)	Matter Starts Reported (21-22)	Inactive providers (21-22)	Provider loss (Sept 21-March 23)
Housing	131	431	14,923	129 (30%)	80 (20%)

⁷ <https://www.lexisnexis.co.uk/insights/the-lexisnexis-legal-aid-deserts-report/index.html#section-Housing-Y9KiWILmGc>

⁸ The definition of incidents within the Lexis Nexis report 'Legal need was determined by the number of legal "incidents" in a local authority area (for example, domestic abuse cases, homelessness or crimes committed), while legal aid supply was determined by using the number of legal aid providers in a local authority area as a proxy.'

⁹ <https://www.thejusticegap.com/serious-decline-in-legal-aid-provision-reveals-extent-of-post-laspo-crisis/>

Debt	131	431	57	401 (93%)	80 (20%)
Immigration and asylum	6	262	32,714	38 (14.5%)	38 (14.5%)
Welfare benefits	8	51	119	36 (71%)	14 (27%)
Community care	12	127	1,843	52 (41%)	21 (17%)
Discrimination	4	22	198	9 (41%)	3 (16%)
Education	4	22	325	6 (27%)	4 (18%)
Mental health	5	182	32,762	5 (3%)	38 (21%)
Claims Against Public Authorities	7	102	1,416	39 (38%)	12 (11%)
Public law	7	131	2,751	39 (29%)	18 (14%)
Family law	106	1,556	23,999	489 (31%)	122 (8%)

The Low Commission report from 2015 demonstrated how stark the reduced access to specialist legal advice had become over the years. As the figures show the situation has only deteriorated since 2015:

'20 years ago over 10,000 solicitors offices offered publicly funded legal advice through the civil legal aid (green form) scheme across most areas of law, working alongside a Citizens Advice network that run 721 CABx operating from multiple access points, and a growing Law Centres movement. Today less than 2,000 firms offer any civil legal aid at all with many fewer firms than that providing social welfare advice... only 21 [CABx] offer specialist civil legal aid advice compared to over 200 just five years ago... [I]t is impossible to come to any other conclusion that key services are being eroded over time (Low Commission, 2015: 20).

Recommendations:

- Urgent work should begin on solutions to ensure that there are visible access points to legal aid services in every local authority.
- The review should seek to understand the demand for services in local areas and the degree to which that demand is being met.

Scope

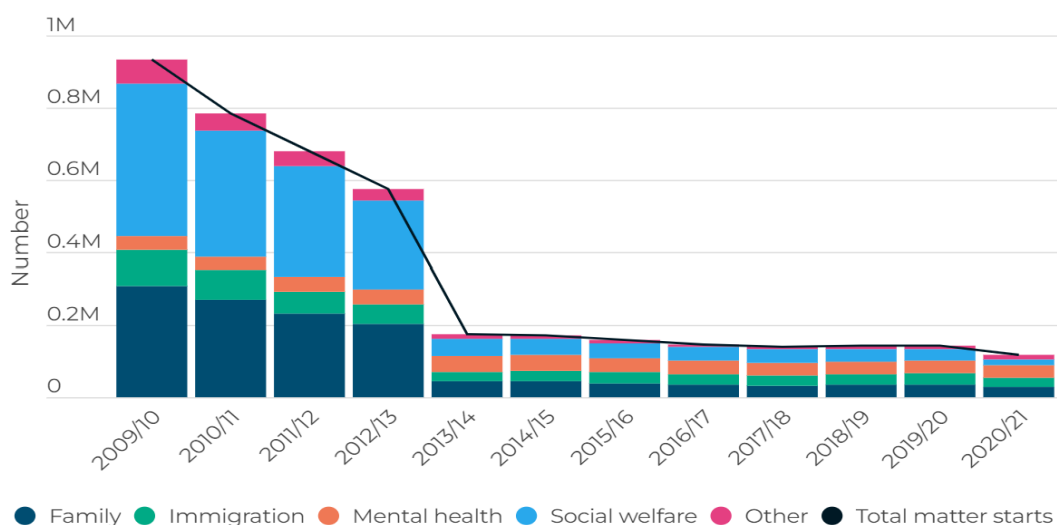
Along with the reduced provider base another key issue is the impact of scope cuts which has limited client access to early legal advice and problem resolution. LASPO changed the approach to deciding which areas of law were within the scope of legal aid. Prior to LASPO the Access to Justice Act allowed for all areas of law to be within the scope of legal aid apart from a proscribed list that was excluded. LASPO reversed this approach, excluding all areas of law from legal aid apart from a proscribed list of areas that were within scope. Most social welfare law was removed from scope along with much of early advice, most notably on family and housing. The result of this change was to fragment services and limit a client's ability to resolve their problems. The table below demonstrates the drastic reduction in social welfare cases.¹⁰

Area of law	year	Legal Help case numbers
Debt	2009/10	143,858
	2022/23	475
Employment	2009/10	31,223
	2022/23	5
Welfare Benefits	2009/10	141,625
	2022/23	78

Early advice

Early advice enables problems to be resolved at an early stage before they escalate to a point where the costs in financial, social and potentially health terms are likely to have exceeded the relatively low costs of advice provision. The graph below demonstrates the significant drop in early advice legal help cases since 2009/10.

¹⁰ <https://www.gov.uk/government/collections/legal-aid-statistics>



The limited scope of legal aid also prevents problem resolution, for example, in housing cases the practitioner can deal with the crisis of the repossession proceedings but is then not able to resolve the cause of the repossession as there is no legal aid available to advise on the debt and housing benefit matters which have led to the repossession.

Following the 2019 LASPO Post Implementation Review the MoJ has a greater understanding of the benefits of legal advice provided in a timely way, hence initiatives such as Housing Loss Prevention Service (HLPAS) the Early Advice Pilot and the Co-location Pilot (ELAP).

The Law Society supports these initiatives in principle although we have concerns about the details and implementation of HLPAS and ELAP which means that these initiatives as currently designed are unlikely to effectively resolve the problems they are intended to.

In family cases the cuts to legal aid have made it very difficult for separating couples, on a low income, to get early advice to sort out their problems. The Government predicted that by cutting legal aid for separating couples, they would reduce the number of cases going to court and more people would go to mediation.

In fact, the data demonstrates, the opposite is true. After the cuts to legal aid were introduced the number of legal aid mediations reduced significantly¹¹:

Case type	Year	Amount
Mediation assessments	2011-12	31,336
Mediation assessments	2022-2023	11,577
Mediation starts	2011-12	15,357
Mediation starts	2022-23	7,320

¹¹ <https://www.gov.uk/government/collections/legal-aid-statistics>

The main referral route to mediation prior to 2013 had been through early advice from solicitors. The cuts removed this referral route and hence the number of mediations dropped significantly.

At the same time the number of people representing themselves in the family courts has tripled.¹² Not only did LASPO fail to divert people away from court and towards mediation it has added to the pressures on the court system with increasing case volumes and backlogs. Litigants in Person (LiPs) are unfamiliar with court processes leading to inevitable delays.

Not only has early legal advice reduced due to scope cuts but there is also evidence of a reduction in case numbers for early advice in areas of law where there were no scope cuts. The table below, (based on a report produced by Access Social Care but with updated figures for 2022/23) shows the number of new Legal Help matter starts opened in 2011/12 compared 2022/23 and the respective scope cuts brought in by LASPO in the different areas. This demonstrates a 73% cut in community care and a 20% cut in mental health although neither of these areas of law had seen their scope cut because of LASPO.

Number of matter starts opened in non-family work¹³

Area	2011/12	2022/23	Reduction % (to nearest whole number)	Summary of impact of LASPO on scope
Community Care	6216	1705	73%	No change
Actions against the Police	4007	1509	62%	Scope of work reduced
Clinical Negligence	3649	29	99%	Restricted to neo-natal cases
Debt	102065	475	99%	Almost completely removed from scope
Discrimination	Previously recorded under separate categories	2261	–	No change
Education	3775	348	53%	Restricted to special educational needs
Employment	18870	5	100%	Almost completely removed from scope

¹² <https://www.gov.uk/government/collections/family-court-statistics-quarterly>

¹³ Table (updated) from <https://www.accesscharity.org.uk/news-blog/community-care-legal-career-pathways-research-report>

Housing	101905	26592	74%	Most disrepair removed from scope
Immigration/Asylum	60792	37206	39%	Almost all immigration removed from scope
Mental Health	39578	31818	20%	No change
Miscellaneous	900	81	91%	Different definitions
Personal Injury	527	0	100%	Almost completely removed from scope
Public Law	1624	3044	Increase	No change
Welfare benefits	102920	78	100%	Almost completely removed from scope

The low fee levels for Legal Help work and the onerous auditing of cases at this level mean that it is not financially viable for practitioners to undertake and the most likely reason for the drop in numbers. Community care work is particularly complex with extremely vulnerable clients which adds to the cost of delivery.

Recommendation:

- Proposals for effective early advice in social welfare law and family must be one of the main outcomes of RoCLA.

Knock on costs

Despite the significant drop in cases and the number of providers undertaking legal aid, the demand for services has not decreased. This has resulted in knock on costs across the justice system and to other government departments.

Litigants in Person (LiPs)-

As outlined above there has been a reduction in the number of family cases going to mediation after cuts to early advice and a significant rise in the numbers of litigants in person (LiPs) in the family courts. LiPs can be a substantial burden on court time and resources - in 2014 it was estimated that the increase in litigants in person in family courts cost the MoJ £3.4 million¹⁴, and since then the number of LiPs has increased. The number of cases where neither party is represented has increased by 300% over the last decade. LiPs often struggle to understand their legal entitlements and create additional work for judges and court staff. Judges have estimated cases involving litigants in person take 50% longer on average. This creates not only additional costs for the courts but the costs of

¹⁴ National Audit Office, Implementing reforms to civil legal aid HC 784 Session 2014-15 20 November 2014, <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/> paragraph 1.19

unresolved family issues. The backlogs in the family courts presently stand at 60,847¹⁵ cases. There are significant delays; private children's law cases, where families apply for child arrangements, such as where a child will live or who a child will spend time with, took on average 47 weeks to conclude between January to March 2023, up almost four weeks on the same period in 2022. This continues the upward trend seen since the middle of 2016, where the number of new cases overtook the number of closed cases.

Cafcass currently have 52,276 children on open active children's cases. This represents both an emotional and financial cost. Law Society analysis in 2018 estimated that the cost of a day of court time would be £2,692¹⁶. The re-introduction of legal aid for early advice would be a cost-effective way to deal with this issue and provide better support for families.

Better data is needed on the experience of claimants who represent themselves. Without this data, policy is being made in the dark. Better data will help show where investment is needed and what changes are working.

Without legal advice, which is free or subsidised, and accessible, individuals are more likely to wait until a problem has escalated before seeking or accessing help. This means that relatively minor problems which could be resolved quickly - such as rent arrears - can end up becoming much worse - such as resulting in the loss of a home. These escalating problems can create additional public service costs, for example for the NHS, and local authorities dealing with increased homelessness and health problems.

Access to justice research over the last two decades has demonstrated that social welfare law problems can cause adverse impacts on health¹⁷, with a knock-on cost for the health service. Early access to legal advice can improve health outcomes and consequently reduce the cost of public health care provision, and the burden to the taxpayer.

Strategic Approach

The legal aid landscape is fragmented. There is a failure to apply a strategic approach to services that address legal needs.

The MoJ undertook a post implementation review of LASPO (PIR) and as a result published the Legal Support Action¹⁸ plan in February 2019, with the stated aim of ensuring 'everyone in society should be able to access the right support, at the right time, in the right way for them.' The outcome of this work, whilst exploring good initiatives, has been limited and the projects, such as support for litigants in person, have largely been funded on an ad hoc basis. We have repeatedly called for a more strategic approach to this work that recognises legal support is only one part of an ecosystem - that for legal support to be effective there needs to be investment in all elements of the system including legal aid.

¹⁵ <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-october-2022>

¹⁶ <https://www.lawsociety.org.uk/topics/research/cost-of-day-in-court-new-analysis-by-law-society>

¹⁷ [Hazel Genn, When Law is Good for Your Health: Mitigating the Social Determinants of Health through Access to Justice](#)

¹⁸ <https://www.gov.uk/government/publications/legal-support-action-plan>.

The Legal Aid Agency's (LAA) role

The PIR also explored the role of the LAA in which practitioners raised concerns that the LAA undertakes a purely operational role unguided by the strategic objective of ensuring access to justice. The review must consider the current role of the LAA and the nature of the relationship between the LAA and the Ministry so that strategic objectives are met.

The LAA primarily functions as the gatekeeper to legal aid funding, its role being to administer funds based on policy priorities determined by the MoJ. However, there is a common perception amongst providers that the LAA represents a barrier to funding rather than as a facilitator, or even neutral administrator of it.

The LAA sees its role and measures its success in relation to its efficiency and effectiveness within the existing and limited parameters defined by LASPO. Despite its mission statement to 'make sure our services meet the needs of everyone who uses them, including the most vulnerable in our society' the LAA has no remit to qualitatively understand what those needs are, or to evaluate the level of need. We understand there is a minimal aim to have at least one legal aid provider per procurement area, but even within the confines of the existing system this is a low bar, and there is no attempt to understand whether this minimal level of provision is adequate to meet demand.

Although we have no desire to go back to the days of the overly bureaucratic Legal Services Commission, the LSC had a role to seek to understand unmet legal needs and develop partnerships and services to address them. Whilst we accept that these initiatives were not entirely successful, the LSC did at least attempt to ensure appropriate and adequate provision. This aspect is almost totally lacking in the remit of the LAA.

If these issues are to be addressed there must also be consideration of whether this can best be achieved under the present role and structure of the LAA as an executive agency of the Ministry of Justice, or whether it should be formally separated from the Ministry and function as an independent body.

Recommendation:

- The review must consider the current role of the LAA and the nature of the relationship between the LAA and the Ministry so that strategic objectives are met.

Co-location

Co-location in relation to legal advice services usually refers to the siting of advice services in accessible locations such as GP surgeries. Such services are also sometimes characterised as 'health-justice partnerships'. Co-location falls within the wider framework of 'social prescribing' where non-medical solutions are offered to patients, recognising that the cause of illness such as depression may be exacerbated by welfare, debt, housing and family issues. The intention is to enable people, including the most vulnerable, who would not usually consider going to a solicitor, to obtain advice in a more familiar location that they regularly visit. The theory behind this is that there is a link between health outcomes and access to legal advice particularly for social welfare law problems, and that better health outcomes can be achieved by the provision of that advice. There is some evidence that a modest outlay for advice provision can result in significant savings on more expensive health treatment including hospitalisation. In *The Low Commission report*

'*Getting it Right in Social Welfare Law*' (March 2015)¹⁹ in section 4 there is a good explanation of the interaction of health and legal issues and some evidence of the benefits that co-location can offer. More recently as an outcome of the LASPO Post Implementation Review the MoJ has become interested in co-location and is funding co-located advice sessions operated by Citizens Advice Wirral and is commissioning a study of several existing other co-located advice projects.

Co-located services potentially have a valuable part to play in delivering advice to hard-to-reach clients. This must include the provision of specialist legal advice to be provided in the co-located environment or at least the ability of the co-located services adviser to make effective referrals to a specialist local legal advice provider. This can only work where civil legal aid services are sufficiently resourced to be sustainable.

We understand that the current MoJ co-location pilots will include an evaluation of the evidence of costs savings to both the justice and health systems that may be obtained from the provision of co-located services. Given the potential costs savings to the NHS, we think that NHS trusts should be persuaded of the financial benefits of providing funding for co-located services as one element of social prescribing.

Integrated cost benefit analysis

When calculating the value for money for the public purse there should be consideration of the outcomes for citizens and communities, and the savings for other government departments rather than purely the number of cases and the administrative costs of the LAA. The MoJ should undertake regular cost benefit analysis of legal aid to demonstrate the cost savings overall, generated to the Treasury.

A report commissioned by the Low Commission in 2014,²⁰ reviewed the research into the economic value of legal aid. All of the studies reviewed concluded that legal aid not only pays for itself, but also makes a significant contribution to households, local economies and reducing public expenditure.

From the UK, the most commonly cited study is by Citizens Advice²¹ (2010) which estimated that for every £1 spent on legal aid, the state saves:

- £2.34 from legal aid spent on housing advice;
- £2.98 from legal aid spent on debt advice;
- £8.80 from legal aid spent on benefits advice; and
- £7.13 from legal aid spent on employment advice.

¹⁹ <https://www.lag.org.uk/about-us/policy/the-low-commission-200551>

²⁰ LegalAction Low Commission evidence review, The business case for social welfare advice services An evidence review – lay summary Professor Graham Cookson and Dr Freda Mold1 University of Surrey July/August 2014
<https://openresearch.surrey.ac.uk/esploro/outputs/journalArticle/The-business-case-for-social-welfare/99514601402346>

²¹ [Towards a business case for legal aid. Paper to the Legal Services Research Centre's eighth international research conference, Citizens Advice, 2010.](#)

Similarly, the think tank the New Economics Foundation (NEF) and AdviceUK, a network of independent advice agencies (2010) estimated the social return on investment for debt and housing as over £9 for every £1 invested.²²

More recently a financial evaluation by Citizens Advice in 2015/16 reported a return on investment of £20.57 for every £1 invested in welfare advice services. This evaluation was undertaken in conjunction with New Economics using a tool that had been developed and approved by HM Treasury economists.²³

Economic research by the Access to Justice Foundation published in 2021 also showed that the provision of free legal advice to the most vulnerable in society on issues such as housing, employment, welfare benefits and debt would save the taxpayer £4bn a year.²⁴ Therefore, a strong case exists for regular cost benefit analysis to demonstrate the value of investing in legal aid services.

Learnings and systemic improvements should also be integrated into the process. Many cases are generated through poor decision making of other government departments. There should be an approach which seeks to address this.

Recommendation:

- The MoJ should undertake regular cost benefit analysis of legal aid to demonstrate the cost savings overall, generated to the Treasury.

Subject Areas

The Ministry of Justice will be aware of our recommendation regarding subject specific areas. This section provides further context to those earlier recommendations.

Community Care Law

Community Care legal aid provides specialist legal advice for adults and children with disabilities on their rights to care and support, when they cannot afford to pay for that advice themselves.

Reductions in cases

After the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) reductions in some areas of legal aid practice were predicted where case types were removed from the scope of the legal aid scheme. Although no changes were made to the scope of Community Care there has been a 77% reduction in the number of Community Care cases taken on under Legal Help in the last 10 years. This catastrophic

²² Outcomes in advice, NEF and AdviceUK, 2010, page 12, available at:

http://www.infohub.moneyadvicetrust.org/content_files/files/bold_outcomes_advice_final.pdf

²³

<https://www.citizensadvice.org.uk/Global/Public/Impact/ModellingthevalueoftheCitizensAdvicesevicein201516.pdf>

²⁴ <https://atjf.org.uk/supporting-free-legal-advice-would-save-treasury-4bn-next-year>

decline in Legal Help matter starts does not reflect a reduction in the need for specialist Community Care legal advice.

Demand for services

Academic research commissioned by Access Social Care²⁵ identified 'large and increasing numbers of people who are not receiving the social care they need and to which they may well be entitled under the legislation.' The research found that:

- the number of people with a disability in the U.K. is rising and is now around 21% of the total population, or 14.1 million people.
- there is also an increasing number of people with learning disabilities who, thanks to medical advances, are now not only surviving childhood, but living much longer.
- the number of older, and oldest-old, people has also been rising. In the UK, the number of people over 85, when needs tend to increase sharply, will double from 1.6 million by 2041.

Legal Aid Deserts

The Law Society's analysis of legal aid data demonstrates that there are large parts of the country where people cannot access legal aid funded specialist advice for Community Care. Our research shows that 68% of the population, or over 40 million people, do not have access to a community care legal aid provider. Only around 16% of the population have access to more than a single legal aid provider in their local authority area.

As in other areas of law, remuneration is the problem that has led to the reduction in legal advice cases. A particular problem for community care casework is that a significant amount of the work is undertaken at the initial advice stage, and this stage of the case is paid for at the lowest fee level which providers find financially unviable.

Community Care cases are often complex, both legally and factually. There is often a lot of paperwork documenting the history of interactions between the client and social services. However, after early legal help through specialist advice, in most cases the local authority will reconsider, so the cases do not need to go to court.

It therefore makes both financial and moral sense for this work to be placed on a more sustainable footing.

Discrimination

Discrimination law issues are largely employment related but can cover other aspects of discrimination against 'protected groups' as defined by the Equalities Act 2010.

From the implementation of LASPO in 2013 until May 2020 legal aid for unlawful discrimination was only available via the mandatory Telephone Gateway which presented a barrier to accessing advice. Following the abolition of the Gateway the number of providers providing Controlled Work in the discrimination category currently stands at 19.

²⁵ <https://www.accesscharity.org.uk/news-blog/community-care-legal-career-pathways-research-report>

Legal aid discrimination law providers are largely from the not-for-profit sector (approximately 10 out of 19) and 8 providers are based in the Greater London area. Due to the small number of providers and limited geographical spread, most potential clients will not have access to face-to-face advice from a local provider.

Volumes of legal aid discrimination work are low. In 2022/23 there were 2,2261 Controlled Work matter starts which is not atypical of previous years. These low volumes point to a need to quantify unmet need in relation to discrimination law.

Education

Legal aid for advice and representation in education matters covers:

- **Special Educational Needs** this work is for disabled children and young people, with complex needs. One of the ways local authorities discharge their duties towards this group of children and young people is through an Education Health and Care plan that can run from birth to the age of 25. This plan is a legal document which outlines the education and social care support that will be provided by the local authority (and Clinical Commissioning Group where it relates to health) and what placement a child or young person should attend. Disputes regarding EHC plans can be resolved through an appeal to the Special Educational Needs and Disability Tribunal.
- **Disability discrimination cases within schools** - these are also resolved through the tribunal.
- **Judicial review** - these can range from cases such as failures to provide a child with an education plan, through to challenges of local authority's policies, and budget cuts. This particular type of work is often under a legal aid public law contract.

High demand for services

There were 430,700 children and young people with Education, Health and Care (EHC) plans in January 2021. This is an increase of 10% from 390,100 as at January 2020. This follows similar increases in recent years since the plans were introduced in 2014.

This is also an area where concerns have been raised regarding a crisis in the system with an increasing number of complaints and problems with provision of services. In October 2019 the Local Government Ombudsman issued a report looking at SEN complaints and found that 9 out of 10 complaints (87%) involving Education and Health Care plans were upheld. The Ombudsman is now investigating more complaints than ever before. In 2018-19 it received 45% more complaints and carried out 80% more detailed investigations about EHC plans, than in 2016-17.

At the same time, the number of appeals to Tribunal continues to rise year on year. In 2020, there were 7,843 appeals to the SEND Tribunal.

The knock-on effects of failure in provision have a significant impact on a child's education and attainment.

Reductions in the provider base - impact of the Mandatory Telephone Gateway

Prior to LASPO, advice on education law was provided on a face-to-face basis but this was removed when LASPO introduced access through a mandatory telephone gateway. The number of providers dropped significantly to the point where there were just two providers nationally doing all the education work. Significant concerns were raised about the Gateway and that it was creating a barrier to justice in these cases. After the contract tender round in 2018, the Legal Aid Agency announced that it wasn't going to be awarding any civil legal aid contracts for the telephone gateway for education because there were insufficient compliant tenders. Finally in February 2019 the mandatory telephone gateway was removed completely, but by that stage it had decimated the legal aid provider base in this area of law.

As of the latest LAA tender round, there are now just 13 law firms available nationally to support almost 8,000 appeals to the SEND Tribunal each year. Even where a firm does have a legal aid contract, there will often only be a small number of solicitors within the firm who do this work.

Number of provider offices completing work in each period for Legal Help and Controlled Legal Representation

Year	Number of provider offices
2011-12	49
2012-13	33
2013-14	32
2014-15	24
2015-16	11
2016-17	4
2017-18	4
2018-19	1
2019-20	3
2020-21	10
2021-22	13

Reduction in legal aid case numbers

The Legal Aid Agency statistics show a huge year on year drop in education cases. In 2006 to 2007 there were 11,930 matter starts for legal help work, but by 2011-2012, this had dropped to just 3,775. For 2022-23 the figure had dropped further to just 1,754. Whilst there has been a significant increase in the client group needing support, and a

system in crisis, there has at the same time been a huge drop in education legal aid cases. Provision is not meeting demand. Practitioners are turning down huge numbers of new inquiries, because they don't have capacity to take on the work.

Financial viability of work

The central reason why firms are not undertaking this work is the same as for other areas, remuneration. The majority of special education needs work is funded under the Legal Help Scheme. The tribunal offers no opportunity for inter partes costs, that is costs from the other side if the case is successful. The most a solicitor can recover for a very complex tribunal appeal is at the Legal Help rate which for a solicitor based outside of London, would be £48.24 an hour. This level of remuneration does not cover overheads and means that firms are very often working at a financial loss with no potential to recover inter-partes costs. In comparison, the HMCTS guidelines hourly rate for a solicitor outside of London is between £146 and £217 depending on expertise.

Exceptional Case Funding

Section 10(3) of LASPO provides for exceptional case funding (ECF) for categories of law that are out of scope for Legal Aid and where failure to provide legal services would be in breach of an individual's Convention rights (within the meaning of the Human Rights Act) or other enforceable retained EU rights relating to provision of legal services.

During the Parliamentary debates on LASPO, the government estimated that there would be 5,000- 7,000 applications a year, of which 53-74% would be granted. Application numbers and grant rates have increased significantly since an initial low start in 2013/14 of 1516 applications with a 5% grant rate, to 3,724 in 2021/22 with a grant rate of 75%, but the overall level of applications is still significantly lower than originally predicted.

In terms of categories of law, by far the largest number of applications relate to immigration with 2617 applications in 2021/22, followed by inquests with 414, and family with 404. Numbers in other categories are negligible but there were 180 in 'other' non-specified categories.

ECF applications are complex and time consuming. Solicitors only receive payment if the application is successful, which means that there is little incentive for solicitors to take on these applications. The Legal Aid Agency will accept applications directly from applicants in person but very few have been made. In 2021/22 of the 3724 applications made only 575 (around 15%) were applications in person. Although there have been attempts to simplify the ECF1 application form, the problem is that the ECF eligibility criteria are inherently complex for lay applicants. Most will lack the specialist legal knowledge to demonstrate that the highly technical criteria of breach, or risk of breach of Convention or retained EU rights, will apply in their case.

We are also aware of problems with ECF applications in immigration where the LAA has granted ECF to an applicant in person (usually assisted by a charity) but the applicant has been unable to find a solicitor to take on their case, due to lack of provider capacity.

Another issue is that the majority of ECF applications in some areas such as asylum family reunion cases will be granted. This suggests that it would make sense for cases of this nature to be included in scope for mainstream legal aid and this would avoid the

additional complexity and administrative burden for the LAA and providers which is generated by an ECF application.

Family

Family legal aid represents the largest percentage of the civil legal aid spend. It provides advice in complex cases involving vulnerable individuals, largely children.

The main areas covered by family legal aid are care proceedings involving social services, referred to as 'public family law', and family breakdown cases between two individuals often in relation to parental separation, referred to as 'private family law'. The Legal Aid Sentencing and Punishment of Offenders Act (LASPO) cut legal aid for most private family law cases. Legal Aid is now only available where there is evidence of domestic abuse or child abuse. The impact has been significant as a quarter of a million fewer people receive legal help in private family cases now than they did in 2009-2010.

In addition to the family category there is a separate contract category for Legal Aid to undertake family mediation, which remained in scope.

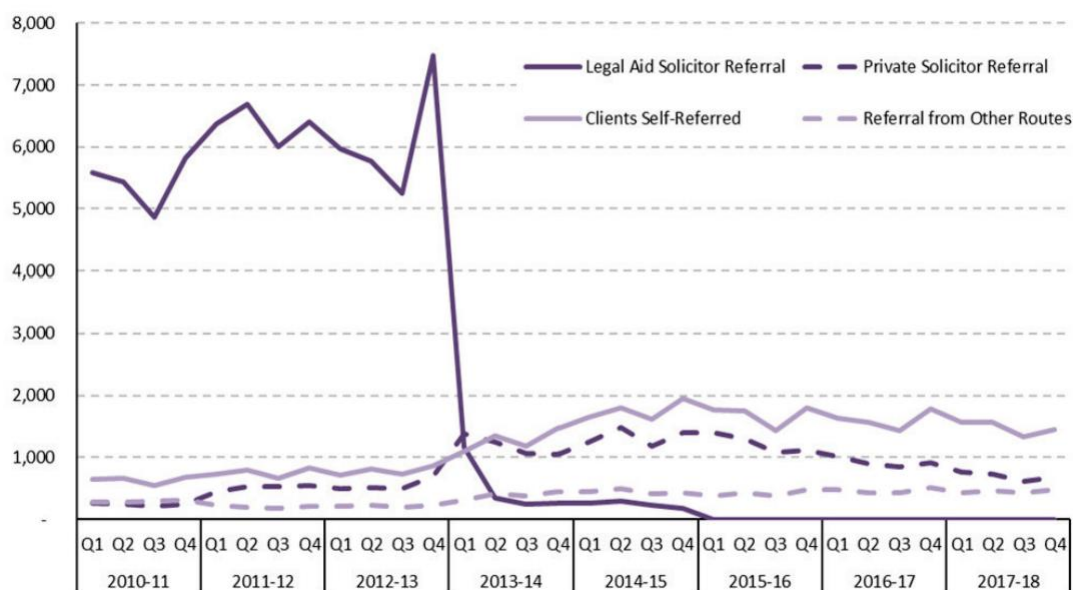
Early legal advice for separating couples

Since the cuts to legal aid in 2013 it has been very difficult for separating couples, on a low income, to get early advice to sort out their problems. The Government predicted that by cutting legal aid for separating couples they would reduce the number of cases going to court, and more people would go to mediation.

In fact, the data demonstrates, the opposite is true. After the cuts to legal aid were introduced the number of legal aid mediations reduced significantly and, despite efforts to address this, today remains at under half the pre-LASPO levels, dropping from 15,357 mediation starts in 2011-12 to 7,320 mediation starts in 2022-23. The reason for this, was highlighted in the government's post-implementation review (PIR) of LASPO²⁶, where it stated: 'The loss of the primary referral routes to mediation is the most significant factor in the post-LASPO decline in MIAM uptake. Prior to LASPO, the majority of referrals to mediation were made by legal aid funded solicitors. The removal of private family law from the scope of legal aid removed the opportunity to refer cases towards mediation.' The table below taken from the PIR shows that the number of MIAMs fell by 66% between 2012-2018 and evidences the drop in referral route:

²⁶<https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>

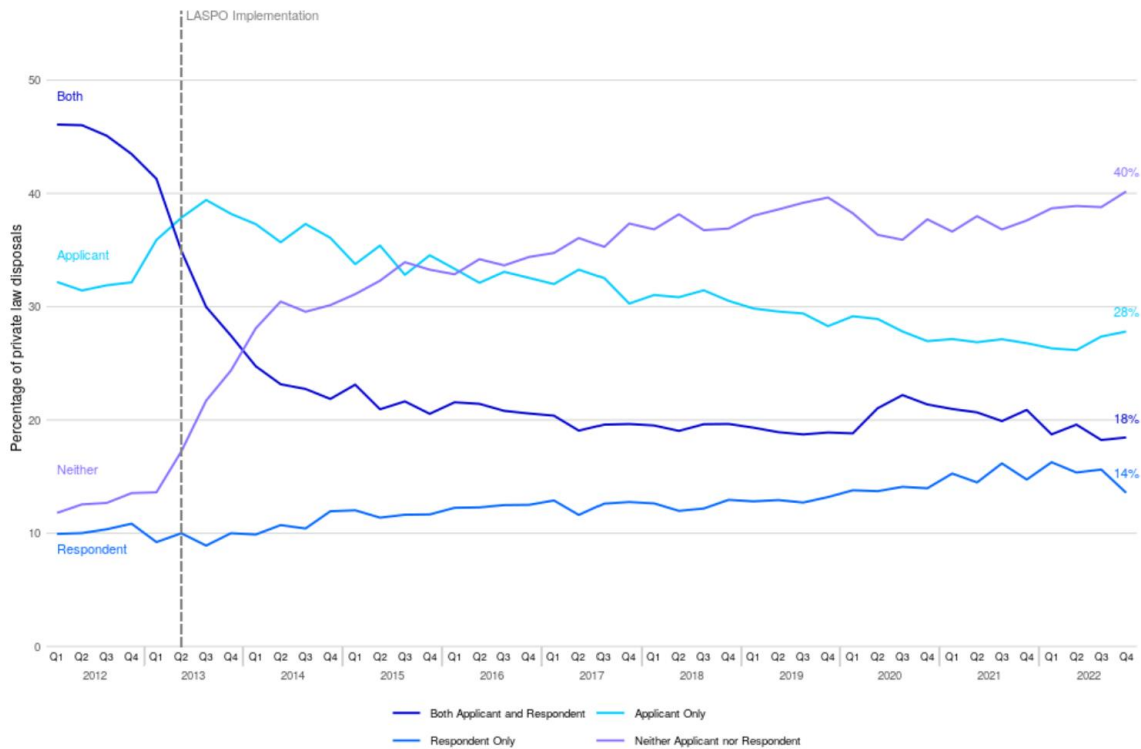
Figure 87: Volume of Publicly Funded MIAMs by Referral Routes¹⁵⁹ 2010-11 to 2016-17¹⁶⁰



At the same time the number of people representing themselves in the family courts has tripled. Not only did LASPO fail to divert people away from court and towards mediation, but it has also added to the pressures on the court system with increasing case volumes and backlogs. Litigants in Person (LiPs) are unfamiliar with court processes leading to inevitable delays.

In October to December 2022, the proportion of disposals where neither the applicant nor respondent had legal representation was 40%, up from 13% in Jan - March 2013, and up 3% from the same time last year²⁷. The graph below demonstrates the year-on-year rise.

²⁷ [Family Court Statistics Quarterly: January to March 2023 - GOV.UK \(www.gov.uk\)](http://www.gov.uk)



The Government has recently completed a consultation on mandatory mediation in private family cases. This makes the need for early advice even more vital to ensure that the right people are channelled towards mediation and that those for whom it is not appropriate, are clearly identified.

The Domestic Abuse Act has been a positive step forward in the Government recognising coercive and emotional control can be a significant aspect of abusive behaviour. There is a danger that without early advice, a mandatory mediation process may fail to identify these victims at risk and force them into a process that empowers their abuser. Although the current plans for mandating mediation would exclude cases where there is a history, or allegations, of domestic abuse, early legal advice would help make sure previously unidentified cases are not put forward for mandatory mediation.

In some instances, the nature of coercive control in domestic abuse will make this difficult to spot. Early legal advice helps ensure safeguarding issues are flagged and, if necessary, such cases are removed from the compulsory mediation track.

Funding early advice meetings means problems are resolved at an early stage before they become entrenched. Advice provides a 'reality check' managing unrealistic expectations, assessing a client's suitability for mediation, and providing legal advice they trust. Reducing conflict and helping clients better understand the parameters of their case results in significant benefits for both mediation and court processes. It focuses parents on the needs of the child and allows for referral to other services such as Separating Parents Information Programmes.

There are also benefits for those who must go to court, helping people understand their case better, and helping clients access services they are entitled to in relation to domestic abuse and child abuse cases.

Legal aid funding for cases involving children where there are allegations of abuse

Where there are allegations of abuse in family cases it is sometimes necessary and relevant to a child's welfare for a fact-finding hearing to take place.

The fair and effective conduct of these hearings is of huge importance to the outcome of the case. There are significant risks for both the victim of abuse and the child, if the victim is not able to effectively participate. If the wrong decision is made the outcome could be exposing the child or parent to further risk and abuse. Conversely, if the alleged abuse did not occur the result could significantly limit a parent's future relationship with their child.

Presently in these cases survivors of abuse can receive legal aid for representation only if they have provided sufficient evidence of the abuse they have suffered (this is referred to as the domestic violence gateway), and meet the legal aid means test. If they do not meet these thresholds, they may find themselves acting as a litigant in person, having to prosecute their own case and present evidence of their or their child's abuse to the court, acting against the alleged perpetrator.

Those responding to allegations of abuse are not entitled to legal aid, regardless of the seriousness of the accusations, their merits, or their ability to conduct proceedings. If those who are wrongly accused are unable to effectively participate, they also risk serious consequences, since the result may limit their relationship with the child.

Many alleged perpetrators will be acting as litigants in person due to the lack of legal aid. They will therefore be cross-examining their alleged victim in person, which is both a distressing and re-traumatising experience for the victim. The [Domestic Abuse Act](#) has sought to address this in limited circumstances. The MoJ are running a Qualified Legal Representative (QLR) scheme which allows the court to appoint an advocate to undertake the cross-examination, in domestic abuse cases, in place of the litigant in person. However, the scheme is struggling to attract advocates because of the low remuneration rates available for the work. In response to a recent Freedom of Information request only 113 QLRs have been used in courts across England and Wales since it launched last July. This is adding more adjournments and wasted resources to an already struggling court system.

While the QLR Scheme is intended to be a last resort and will only be applied where there are no other means of preventing the alleged perpetrator from cross-examining vulnerable witnesses, the lack of legal aid for family law cases means that this situation will arise frequently and increase the need for QLRs. To overcome this, legal aid should be available for private law family cases up to the stage of Fact Finding Hearings. This would mean there will be less of a burden on the scheme and fewer practitioners required for the scheme to be viable.

It is in the best interests of families - particularly the children - for both parties to have legal aid for representation during the Fact-Finding Hearing, where the facts regarding the alleged abuse can be explored and established.

Sustainability of Legal Aid in family cases

Fees - in addition to the lack of inflationary increase to fee levels, the introduction of fixed fees combined with the scope cuts introduced in 2013, have caused problems in family

legal aid. Before 2009 family legal aid was remunerated on an hourly basis. In 2009 a fixed and standardised fee scheme was introduced. The calculation was based on an average of hourly rate spend from a mixed caseload, a 'swings and roundabouts' approach.

Scope cuts - in 2013 LASPO introduced cuts to the scope of legal aid, and private family law was the hardest hit. All private family law work was cut from scope apart from cases involving domestic abuse or child abuse. This had a significant impact on the mix of cases available to practitioners. By their very nature the remaining cases were the most complex but the standard fee remained the same with no ability to cross subsidise from simpler cases.

Year on year reduction in the provider base - The effect of the unsustainable fee levels means that many family law firms have stopped undertaking legal aid work. The number of providers undertaking family Legal Help work has dropped by over half from 2,401 in 2011-12 to 1,108 in 2021-22.

Fees in care proceedings - for public law cases the backlogs in the family courts has led to a recent relaunch of the Public Law Outline (PLO). The PLO was originally introduced in 2008 and was designed to reduce unnecessary delay and promote better co-operation between the parties. In order to achieve this there is a greater emphasis on pre-proceedings work. However, this work is paid at very low rates that are not financially viable for firms. The fees need to be increased to appropriately reflect the shift in emphasis to earlier work.

Housing

The main areas of law covered by the Housing and Debt category are possession proceedings for tenants and mortgage borrowers, homelessness, unlawful eviction, and some disrepair matters. Although housing disrepair is endemic, since the implementation of LASPO legal aid is only available for serious disrepair that presents a health risk. This undermines the ability of tenants to obtain early resolution of disrepair issues before they become a risk to health.

The requirement for there to be a serious risk of home loss has prevented tenants and mortgage borrowers from seeking early advice to assist with arrears and other grounds for possession. The 'Debt' element of the category is largely nominal as most debt advice has been out of scope since the commencement of LASPO.

The HPCDS (Housing Possession Court Duty Scheme) enables tenants and mortgage borrowers to obtain advice at court on the day of the hearing. HPCDS providers must also have a Housing and Debt contract as a pre-requisite for HPCDS work, but the majority of Housing and Debt providers do not do HPCDS work.

From August 2023 the HPCDS has been replaced by HLPAS (Housing Loss Prevention Advice Service) which in addition to providing court duty advice, will offer a limited amount (3 hours) of non-means, non-merits tested legal advice on housing, debt and welfare benefits prior to the hearing date, from the point where the landlord/mortgage lender has indicated they intend to issue proceedings. Welfare benefits and debt are

regarded as key associated issues often linked to arrears. These additional areas have been brought back into scope specifically for HLPAS.

We welcomed the HLPAS concept to adopt an approach embracing earlier and more holistic advice but cautioned that the pre-hearing date advice element of the scheme will be problematic to implement because of the general sustainability issues facing housing providers. Since LASPO, the legal aid sector has lost most of its welfare benefits and debt specialists, and providers cannot afford to take on new caseworkers with these skills. We also expressed concerns that the 3-hour limit on advice is insufficient to address anything but the most straightforward housing, welfare benefits and debt matters.

We also expressed similar concerns about ELAP (Early Legal Advice Pilot), to provide early advice for housing welfare benefits at an earlier stage than HLPAS. We are aware that the pilot has not had a great deal of success in obtaining client referrals. Our understanding is that this has been the result of shortcomings in the design of the pilot scheme, such as a convoluted referrals process, rather than any indication of lack of legal need, and we urge the MoJ to continue to explore early advice as an essential element of legal aid provision.

There is a clearly observable crisis on housing legal aid. Since the main bid round for the 2018 civil legal aid contracts, the LAA has needed to issue multiple local re-tenders for housing and HPCDS work as existing providers have dropped out. The number of provider offices completing housing work for Legal Help and Controlled Legal Representation fell to 303 in 2021-22 from 755 ten years earlier. The Law Society has produced [housing advice desert maps](#); the most recent, based on April 2022 data shows that 41% of the population of England and Wales have no housing legal aid provider in their local authority area. It is also noted that the LAA is struggling to find providers to offer the new HLPAS services from August 2023. The December 2022 tender was unable to secure contracts in 12 HLPAS areas which represents just over 10% of planned schemes. Even after two subsequent re-tenders there are 5 court areas including major population centres such as Liverpool and Hull which remain without a HLPAS provider. The LAA has now accepted that the tendering process has failed in these areas and is looking at alternative approaches to secure HLPAS provision.

Although housing legal aid provision is in decline, we do not see this as in any way reflective of a lack of demand. Following the Covid moratorium, [the level of possession proceedings](#) has increased significantly in the last year, and whilst still below pre-pandemic levels we expect the trend to continue because of the cost of living crisis. Also, recent widely publicised reports point to the poor state of the UK's housing stock and suggest a high level of unmet legal need in relation to disrepair.

The situation is particularly acute for the duty scheme and potentially for HLPAS too because of the overheads of travelling to court in rural areas where client numbers are low, although there have also been problems maintaining service provision in major urban centres.

The housing legal aid sector is now in an extremely precarious position and there is a real possibility of further collapse within the timeframe of RoCLA and the implementation of any proposals coming out of the review. A cash injection to make fees commercially viable for providers is required urgently.

Immigration

The Immigration and Asylum category predominantly concerns asylum work as most non asylum work was taken out of scope in 2013. The non asylum work remaining in scope includes bail applications, immigration advice for victims of domestic violence, trafficking and modern slavery, and immigration advice for unaccompanied minors. Non asylum immigration is the main category of law where exceptional case funding (ECF) applications are made and granted for otherwise out of scope work, where not granting legal aid could breach the applicant's rights under the ECHR.

In addition to the main Immigration and Asylum Contract some providers also have contracts under the Detained Duty Advice (DDA) scheme to provide 30 minutes of initial advice to detainees in immigration removal centres. All caseworkers undertaking immigration and asylum work under a legal aid contract must be personally accredited under the Law Society's Immigration and Asylum Accreditation Scheme (IAAS).

Whilst the actual number of Immigration and Asylum provider offices (currently around 270) has remained constant there are still concerns that the sector does not have the capacity to meet demand. Reasons for this include:

- A significant proportion of provider offices with Immigration and Asylum legal aid contracts have either not commenced any matter starts or have only undertaken low volumes of work.
- There has been a large increase in the number of asylum applications in the last year.
- Immigration providers are mainly located within Greater London and other metropolitan areas, but under the Home Office asylum dispersal policy, asylum applicants can be located in areas where there is no local access to legal aid providers.
- Increasingly immigration legal aid work is becoming less economically viable. As with other civil categories there has been no increase in fees since 1996, thus reducing the real terms value of the fee in 2022 by approximately half. One of the largest providers of Immigration and Asylum legal aid work has recently announced a substantial reduction in the amount of appeal cases under Controlled Legal Representation (CLR) it is able to take on. The Law Society is concerned that other providers are likely to follow suit and that it will become increasingly difficult for clients to find legal aid representation, particularly at the CLR appeal stage.
- Whilst we are aware that the MoJ is proposing a fee increase of up to 15% for work required under the Illegal Migration Act, even if there is a full 15% increase just for this limited area of work, it will not be sufficient to enable providers to increase capacity to meet the anticipated demand.

In addition to low fees there are other pressures impacting on the sector including:

- Inability to control workflow due to lengthy Home Office delays in determining asylum applications. After months of low activity there can be a sudden batch of refusals resulting in providers experiencing major difficulties in providing resources to represent clients at appeal. Whilst it is recognised that the

Government needs to reduce the backlog of asylum claims, the sector will struggle to provide advice to clients under current initiatives that require asylum seekers to return a questionnaire within a short timeframe.

- Major delays in appeals coming to hearing which creates similar problems in planning availability of representation when appeals are finally listed. There is the added problem with providers having to carry unremunerated work in progress pending an appeal, and this problem has been exacerbated by the Tribunal's online appeals procedure which requires greater frontloading of casework than previously. Therefore, the Law Society has repeatedly called upon the LAA to implement interim payments for CLR at the stage where the Appeal Skeleton Argument has been filed.
- Providers are also under increased pressure from new elements of work introduced under the Nationality and Borders Act, as although this work is specifically remunerated, payments are based on inadequate fee rates.
- Highly complex fee arrangements under the Asylum and Immigration Legal Aid Contract. There are now five different types of CLR claims determined by an interaction of the date of the initial grant, the nature of the appeals process and case outcome, and claims can include a combination of hourly rate and fixed fee claims. It is an additional administrative overhead to work out which fee is the applicable one and the level of complexity inevitably means that inadvertent mistakes are made. This points to the need for simplification of the Asylum and Immigration contract.
- Recent comments in the media and from some sections of government that criticise immigration lawyers for doing their job by advising clients within the law are also having a demoralising effect on the sector and have created genuine fears that such views could place lawyers at risk of physical danger.

Inquests

Legal Aid for inquests is subject to highly complex scope and financial eligibility arrangements. For legal advice and assistance with preparation for an inquest hearing Legal Help funding is available for family members under paragraph 41 of LASPO Schedule 1, Part 1. The Director of Legal Aid has a discretion to waive the Legal Help financial eligibility limits particularly where Article 2 (right to life) issues are engaged. There is no specific funding for legal aid under the LASPO Schedule for representation at the inquest hearing. The Government maintains the view that an inquest is an inquisitorial fact-finding process so legal representation is unnecessary. We fundamentally disagree with this position as State and corporate bodies will inevitably be represented by solicitors or counsel seeking to deny or reduce their client's culpability, and without representation for family members there is no level playing field.

There are however limited circumstances where legal aid for representation at inquests may be obtained under the Exceptional Case Funding (ECF) procedure, and ECF should be granted where one of the following criteria apply:

- The inquest is being held under the Coroners Act 1988 (i.e. where Article 2 issues are engaged) or
- The Director has made a 'wider public interest' determination that the outcome of the inquest could have implications beyond the circumstances of the instant case.

Since January 2022 where ECF is granted under these criteria there will be no financial eligibility assessment for civil representation, and this will include any associated Legal Help Work.

We welcome the changes introduced in 2022 for the means test to be waived in Article 2 inquests but the 'level playing field argument' applies equally to non-Article 2 inquests and we would like the means test waiver to be extended more widely.

In our ECF section we have referred to the complexity of the applications process and this applies equally to the ECF process for inquests. As the presumption is that Article 2 cases should be eligible for legal aid, this raises the question why they should continue to be subject to the ECF applications process and not be brought within the mainstream legal aid scheme.

Mental health

The Mental Health category mainly covers advice and representation of clients detained in hospital under the Mental Health Act, as well as those under Community Treatment Orders. It includes representation at Mental Health Tribunals.

The scope of Mental Health cases was unchanged by LASPO. However, the number of firms starting work in the mental health category dropped from 274 in 2011-12 to 169 in 2021-22. This again suggests that even in areas where there has been no change to scope, firms are deciding to stop undertaking the work. The number of legal help matter starts also dropped from 39,578 in 2011-12 to 31,818 in 2022-23 despite the fact there was little change in the number of clients at tribunal over the same period.

The work is paid for on a fixed fee basis. There are three levels to the payment structure.

- Level 1 covers all work from the initial meeting, submission of the application to the tribunal, initial letters, and advice to the client. This is paid at £129.
- Level 2 covers investigation and examination of evidence, including reports to the tribunal, review of medical records, interviews with the client for instructions and interviews with professionals for additional information. This is paid at £321.
- Level 3 covers advocacy at the tribunal hearing and follow-up work. This is paid at £294.

When first introduced in 2008 the fixed fees for completing all three levels was £827, although this was reduced by the 10% fee cut introduced in 2011 to £744. The Mental Health Lawyers Association have calculated that this amounts to the hourly rate on a tribunal file in the region of £45 per hour, and for non-tribunal work as little as £35 per hour.²⁸ Firms cannot afford to cover their overheads at these fee levels which include

²⁸ <https://www.lawgazette.co.uk/news-focus/news-focus-mental-health-lawyers-are-willing-to-strike-over-pay/5116036.article>

office leases, insurance, staff, IT, training, as well as the costs associated with complying with the legal aid contract.

The Government's Draft Mental Health Bill 2022, which will reform the Mental Health Act 1983, proposes a greater number of safeguards and tribunals all of which will require lawyers to represent the clients, but there are no proposals to ensure that there is a sustainable legal aid supplier base to provide these services.

Public Law

The Public Law category mainly relates to judicial review proceedings determined to be in scope under LASPO Schedule 1, Part 1 as well as those cases granted legal aid under the Exceptional Case Funding provisions. Public Law contracts can also provide advice on other avenues of redress such as a complaint to the Parliamentary and Health Service Ombudsman. There is some overlap with other categories such as immigration, housing, public law family and community care, as providers with contracts in these categories can also undertake judicial review proceedings. Holding a Public Law contract can be useful where a judicial review involves more than one category for example, housing and community care.

One of the main barriers to legal aid funding for judicial review is the risk faced by providers who can only be sure that their legal aid costs will be paid if the application for permission for judicial review is granted, or where the judge orders a 'rolled up' hearing, i.e. where the permission and applications stages are combined into a single hearing. Costs where permission is refused may be payable but only if they are reasonable based on the criteria set out in paragraph 5A of the Civil Legal Aid (Remuneration) Regulations 2013. This creates a level of uncertainty that acts as a disincentive for legal aid providers to do this work. This issue arises irrespective of whether the case has been taken on under the Public Law or another relevant contract category. The number of provider offices completing Public Law civil representation certificates has fallen significantly from 211 in 2014/15 to 99 in 2021/22.

Welfare Benefits

Prior to the implementation of LASPO legal advice on welfare benefits was available under the legal aid scheme. But since 2013 legal aid for welfare benefits has been limited to legal services relating to an appeal on a point of law to the Upper Tribunal, Court of Appeal or Supreme Court. This in effect means that welfare benefits are effectively out of scope as higher-level appeals on a point of law are few. This stark reality is illustrated by the statistics which show 84,254 Legal Help welfare benefits matter starts in 2012/13 compared to just 144 in 2021/22.

Failure to provide legal aid advice in welfare benefits should be regarded as a false economy as it impacts the most vulnerable members of society and creates consequences such as rent arrears that can result in possession proceedings and homelessness as well as other social problems and health issues for the client. This creates additional knock-on costs for other government departments and local authorities.

The MoJ has recognised the need to include welfare benefits and debt advice as elements of a more holistic approach to social welfare law as envisaged by the Early

Advice Pilot and the Housing Loss Prevention Advice Scheme. These categories have been brought back into scope for Legal Help specifically for and limited to these initiatives. The problem is that these categories have been out of scope since 2013 and there are very few specialist practitioners in these areas to provide welfare benefits and debt advice. Additionally, providers do not have resources to recruit or train advisers for these limited schemes.

Welfare benefits should be restored to scope generally together with a strategic approach and adequate funding to ensure enough specialist practitioners to provide this advice.