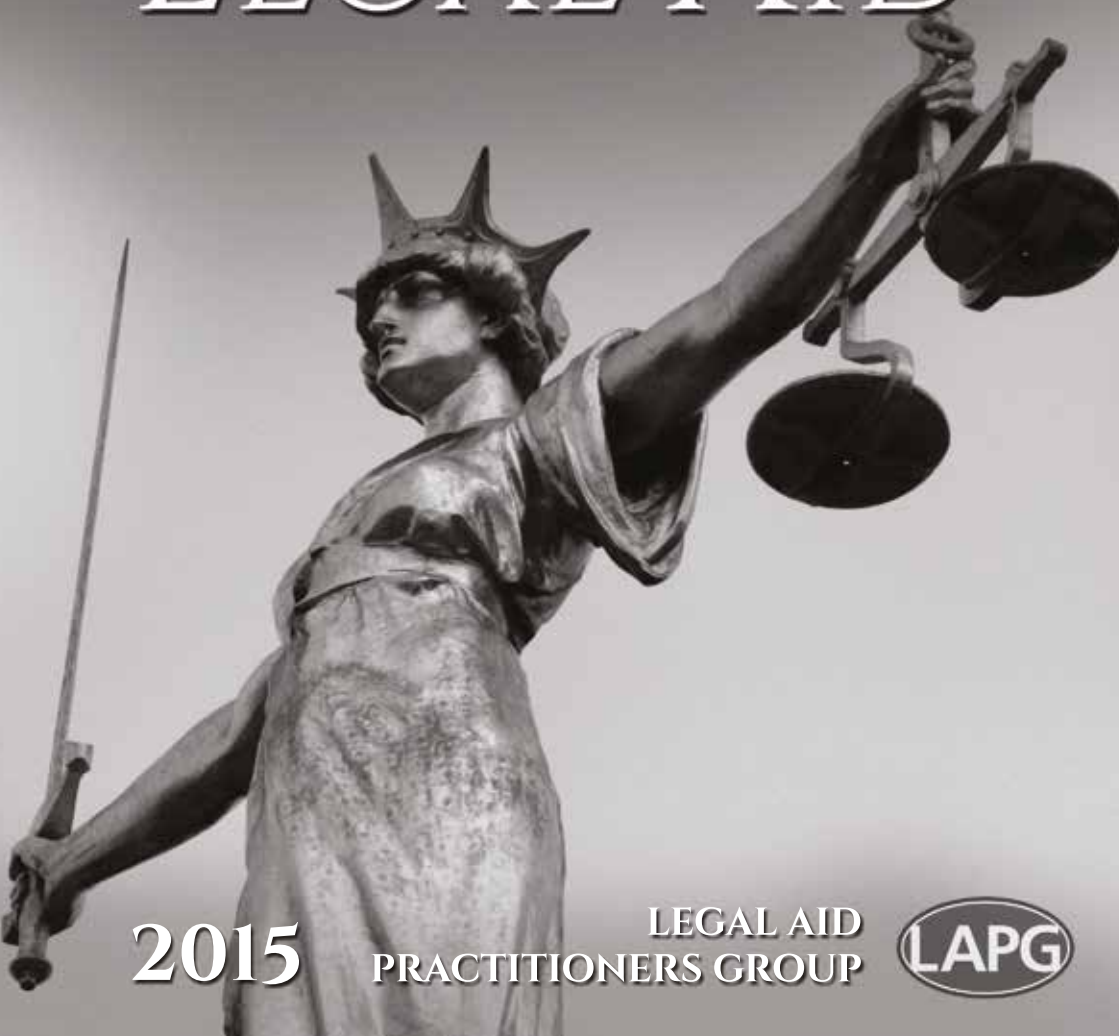


# MANIFESTO

— *for* —

# LEGAL AID



2015

LEGAL AID  
PRACTITIONERS GROUP





# **MANIFESTO FOR LEGAL AID**

**LEGAL AID PRACTITIONERS GROUP**

## Executive summary

The Legal Aid Practitioners Group represents solicitors, barristers and charities working within the legal aid scheme. We believe that:

- legal aid and fair access to legal assistance and redress is a cornerstone of a just and fair society
- those without money or power have just as much right to establish and defend their rights as those with resources to do so
- a legal aid scheme that encompasses all areas of law for the poorest members of our society is essential for the health and stability of our society
- committed, innovative, properly resourced legal aid practitioners not only add value to our society in general but, through providing appropriate and timely legal assistance, save Government significant money that would otherwise be spent picking up the pieces when people's lives are in disarray.

This is a crucial time when the adverse impact of the cuts to scope and eligibility for legal aid have proved to have serious consequences on equality in our society and the public purse as a result of an increased burden arising from costs shifting and the damage to social cohesion. Many if not most of the changes we suggest could be implemented swiftly and without any significant additional expenditure. They would make a huge difference to our justice system and priority client groups in need.

We call upon the next Government to uphold the rule of law and to take the following action:

- immediately to review the impact of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPOA) and the consequential cost to society and the public purse, particularly the courts, of the vast increase of litigants in person
- heed the warnings of key stakeholders in the justice system (including the judiciary) as to the knock-on effect of denial of justice on society generally and the reputation of our justice system

- consider where key groups such as children, vulnerable and disabled people are disadvantaged by the removal of areas of law from the scope of the legal aid system, and make amendments to the Act
- prioritise those in need, such as vulnerable families, victims of domestic violence and people at risk of abuse and neglect
- reverse the recent barriers to ordinary people holding Government and public body decision makers to account for extraordinary decision making, by way of judicial review
- work with practitioners on developing a sustainable criminal justice system for the next generation and beyond
- develop a new threshold and process for accessing ‘exceptional funding’ for civil legal aid so that those who are most marginalised can obtain help to apply for funding
- implement the independent recommendations of the Law Commission for housing and social welfare law
- commit to developing a comprehensive network of community advice agencies with existing groups to provide services at an early stage, preventing unnecessary injustice, litigation and ultimately higher costs to social justice and the public purse
- abolish the ‘mandatory telephone gateway’ as the only route to accessing certain civil legal aid services
- cease action on reintroducing the ‘residence test’ which is discriminatory and has already been declared unlawful by the courts
- amend the financial means test for legal aid to correct new injustices, for example disregarding the equity of the main home below a maximum threshold and disregarding children’s savings, removing the capital test for those on passported benefits, and allowing for care costs and costs of disability to be taken into account

- introduce a new discretion to grant legal aid to a person who is not eligible in court proceedings where there would be an overall saving to the taxpayer for that person to have legal advice
- create an independent organisation to review rates of pay on legal aid cases so that the system is sustainable in future years, and restoring the 2011 rates with no further cuts pending independent review
- ensure that any fees payable to access the court system are subject to a proper, fair and accessible scheme for exemption and means testing
- simplify the administrative steps in applying for legal aid, removing bureaucracy wherever possible and revisiting the new legal aid digital system (CCMS) to ensure that any digital system is fit for purpose.

# The importance of justice in a civilised society

## Introduction

This year sees the 800th anniversary of the sealing of the Magna Carta, an appropriate reminder of the importance of the rule of law and access to justice. The purpose of legal aid is to ensure that people in need of legal advice and representation can access justice when they cannot afford to do so from their own means, and is intended to secure equality of arms between the rich and the poor.

LAPG is a membership organisation of primarily private practice and not-for-profit organisations throughout England and Wales. Individual barristers and costs lawyers have recently added to our membership. We regularly attend meetings with the Legal Aid Agency and Ministry of Justice on specific issues and attend the regular Civil Contracts Consultative Group and the Criminal Contracts Consultative Group where operational and policy matters are discussed. We respond to consultations on justice issues. We run training courses for practitioners, an annual conference and the Legal Aid Lawyer of the Year awards to celebrate the coalface work done by legal aid lawyers.

LAPG, in conjunction with other groups, has identified a list of important changes to the legal aid system which:

- would assist people in need of legal advice and representation
- as a minimum, deliver the legal aid system that the Government committed to deliver but which experience has shown to be deficient in practice
- takes a pragmatic and realistic approach as to what is achievable in the short term, whilst making recommendations for changes in the medium term
- ensures the survival of sufficient quality providers to deliver a meaningful legal aid and justice scheme.

LASPOA was implemented in April 2013 ostensibly in order to reduce the expenditure on legal aid whilst preserving resources for the most vulnerable in society. More than anticipated has been cut from legal aid. In November 2014, the National Audit Office reported that the Ministry is on track to exceed spending reduction forecasts by £32 million.<sup>1</sup>

However, many of the cuts have had a disproportionate impact on vulnerable persons who are now unable to obtain even the most basic legal advice about their rights, let alone to enforce those rights when other ways of resolving problems have proved to be ineffective. In addition, the effect of the cuts on the organisations delivering legal aid services has been catastrophic, with fewer providers and increased advice deserts. The closure of many local advice services, Law Centres and in many cases the reduction in staff numbers is a further manifestation of these changes illustrating that it is not the ‘fat cats’ lobby with which we are concerned. The result is societal inequality at an unacceptable level, with groups such as children and disabled people being even more marginalised than previously. The cost which was intended to be saved through cuts to legal aid is being outweighed by the knock-on cost to society. As the NAO report confirms these additional costs to society and the public purse have not been properly considered or understood.

This publication is intended to be a starting point for dialogue about the lessons which have been learnt from the recent cuts, and to provide a helpful list of areas which could be the subject of swift amendment without vast (or in many cases any) expenditure from the public purse. Indeed, it is our view, based on our practical experience in delivering legal services, that in many cases considerable savings will follow, whilst at the same time societal equality will be improved with the result that there will be enhanced social justice for groups such as children, disabled people, and those least able to represent themselves.

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<sup>1</sup> <http://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/>



## Broken justice - practical solutions

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## **1. Removal of areas from scope of legal aid – the case for review**

The implementation of LASPOA in April 2013 represented one of the most significant reforms to the welfare state since legal aid was first introduced via the Legal Advice and Assistance Act 1949.

These reforms came on the back of cumulative cuts to financial thresholds for eligibility to legal aid, hourly rates paid for legal aid work and the introduction of fixed fees for payment for legal aid cases. The impact of these cuts had not been quantified by the time the new reforms were introduced. Access to justice was already under serious threat by the time that LASPOA was introduced.

The most drastic change was that whole areas of law were removed from the scope of legal aid altogether. The largest group of cases affected has been private family law cases where unless it can be proved that domestic violence has recently taken place, no legal aid is available for advice or representation in relation to the future of children or other family matters. This has had a devastating effect on children in particular, and has had a direct knock-on effect on the Court system generally.

In addition to private family cases, most welfare benefits cases, immigration (non-asylum), clinical negligence (save for birth injury cases), employment, debt (save for mortgage possession), many housing cases, and most recently prison law have all been removed from the scope of legal aid.

The impact has not only been on clients, but also on the organisations which deliver justice services – private practice, Law Centres, advice services. The changes in scope and changes in funding for one area of law can impact directly on the ability of the organisations to deliver other services to clients.

We address the particular problems in each individual area of law in section 13 below, and we make detailed recommendations for change. The evidence given to the Justice Select Committee shows how even small changes to the existing broken scheme would result in enormous changes for groups who are excluded from justice altogether.

Even where cases were intended to be within scope, the way in which the Regulations are being implemented and interpreted is so restrictive as to deter and exclude people who were intended to be eligible for legal aid. This is illustrated below in relation to domestic violence cases. Although it was intended that the safety net of the exceptional case funding scheme would ensure that people would not be left without assistance where this was required, as we discuss below this important feature of the scheme is not working. The result is that people who were intended to continue to be able to access legal advice through legal aid are left without any help.

The Access to Justice Act 1999 provided that (subject to a merits and means test) all areas of law were within scope unless they were expressly excluded (eg personal injury cases, boundary disputes etc). LASPOA has turned this approach on its head, and now only cases which are expressly within scope and included in Schedule 1 to the Act are within the legal aid scheme. We are now seeing cases which were intended to be within scope falling outside.

We have been dismayed that for areas of law which remain within scope there has been inadequate action taken by Government to ensure that people who are still entitled to legal aid actually know it is available. This is a democratic shortfall because it denies the public the information about accessing justice which is necessary for even initial steps to be taken by them or on their behalf. The publicity around the cuts has resulted in much of the public believing that all legal aid has been removed when this is not the case, yet nothing has been done to inform the public properly. LAPG has produced a poster together with the Legal Action Group ('LAG') and The Law Society, yet this is not a substitute for a proper information campaign by Government.

We call for:

- an immediate review of the areas removed from scope with particular reference to the impact on society of removing access to legal aid for groups such as children, disabled people, and other vulnerable groups such as victims of domestic violence, slavery or trafficking
- reinstatement of areas of law within the scope of legal aid giving priority to vulnerable client groups (suggestions are given in the specific category sections below)

- an information awareness campaign so that the public are provided with knowledge about the availability of legal aid and how they can access services
- a root and branch review of the delivery mechanisms of legal aid which has led to widespread advice deserts and almost complete decimation of first tier advice in communities, with the result that early intervention to prevent legal problems from escalating is absent in many areas, often costing the welfare state far more and causing distress to the people who are affected.

## **2. Financial eligibility – saving costs by reducing complexity**

In addition to the dramatic changes to the scope of legal aid generally, LASPOA also introduced significant changes to eligibility on the basis of a means assessment. This has resulted in the proportion of the population being eligible for legal aid dropping sharply.

The financial eligibility changes result in people without means to pay for legal advice being ineligible for legal aid. This disproportionately affects disabled and other disadvantaged client groups and further discriminates against them. It has been the subject of recent criticism in the Family Courts. Changes to the treatment of a person's main dwelling house have resulted in people being ineligible for legal aid despite having no funds to pay for legal advice. Changes to the law on mental incapacity have also resulted in massive inequality with people being forced to pay for legal advice about their own detention, including potentially unlawful detention.

Even people who are in receipt of means tested welfare benefits such as Universal Credit are now also means tested on their capital for legal aid. These are people who have already been means tested by one department of the State as being without funds and therefore eligible for State support, and where additional means testing and evidence requirements simply result in delay in providing prompt advice. This additional means test results in significant additional cost to practitioners and the Legal Aid Agency, and people who are in need of advice are being prevented from being able to access that advice. The majority of clients on means tested benefits have no capital or have small amounts of capital below the threshold, yet are unable to prove their capital because of the strict evidence requirements. This is particularly so where the client is in a crisis situation, for example in a domestic violence refuge, without access to complete sets of bank statements. It is an unnecessary layer of bureaucracy which leads to an unfair result.

Investment in better processing of applications enables cross departmental checks (for example to check for a benefits claim) for applicants, meaning that the whole process is simplified. Yet the advantage of this joined-up approach is lost because of the imposition of the new set of eligibility rules which actually renders only a very small number of applicants as being ineligible. The administrative burden is extremely high without any identifiable benefit for the taxpayer. Even from a cost cutting perspective the benefit is far outweighed by the cost.

We recommend the following:

- removal of the capital test for people in receipt of means tested benefits
- restoration of the equity disregard for a client's main dwelling house up to a maximum threshold
- removal of the current cap on housing costs which can be taken into account (currently £545 per month maximum) and replacement of this with the real cost of actual housing costs (save where plainly excessive)
- removing children's savings from the calculation of capital (the children are not the applicant)
- removing student loans from the means calculation
- taking into account additional costs such as payment for private legal fees, costs arising from disability, care costs etc. in the means calculation
- improving the means process so that there is flexibility as far as evidence of means is concerned for disabled or vulnerable persons, including those who are homeless, mentally incapacitated, in refuges etc
- introduction of non means tested legal aid for the small category of cases where the liberty or protection of the person is involved, for example deprivation of liberty of incapacitated persons
- reintroduction of the limited discretion to disregard income or capital or both if reasonable to do so (as contained in the previous Community Legal Service (Financial) Regulations 2000) – for example where there is a conflict of interest or where a mentally incapacitated person cannot access their own funds because someone else controls their finances
- simplification of the means evidence and operational processing issues generally to save costs for both the Legal Aid Agency and practitioners.

### 3. Exceptional case funding (s.10 LASPOA)

During the passage of LASPOA through Parliament, firm commitments were made that whilst large areas of law would be removed from scope there would be exceptions to the ‘non-availability’ of legal aid through the ‘exceptional funding scheme’. This would allow certain cases to be funded through legal aid despite being out of scope, because to deny legal aid in such cases would violate the person’s fundamental right of access to the Court and to a fair hearing.

The then Minister for Legal Aid, Jonathan Djanogly, said in the House of Commons on 8 September 2011:

‘It is right to have an exceptional funding scheme to provide an essential safeguard for the protection of an individual’s fundamental right of access to justice’.

It was expected that a large number of applications (between 5000-7000) would be received. However, the exceptional funding scheme has been implemented in a way that has resulted in far fewer applications being made and only a tiny number of cases being eligible – only 69 successful applications in the first year.<sup>2</sup> Many serious concerns have been expressed at the manner in which the scheme has been implemented.

The overly restrictive way that the exceptional funding scheme has been operated and the legal thresholds applied by the Government to entitlement to legal aid have already been declared unlawful (*Gudanaviciene v Director of Legal Aid Casework and Others* [2014] All ER (D) 123) by the Courts. It is plain that the exceptional funding scheme is not operating as the safeguard which Parliament promised it would be. The result is that cases which it was intended would be funded have not been, resulting in unlawful denial of access to the Courts.

We recommend:

- that the Government accepts the decision of the Courts and makes immediate amendments to the exceptional funding guidance and training materials to ensure that the threshold is set at the right and lawful level and that the threshold for funding takes proper and real account of people who are in need of advice and representation

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/366575/legal-aid-statistics-2013-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf)

- the linking of the test for qualifying to the common law right of access to the Court as well as human rights principles
- the Government makes proper funding available for the work in preparing exceptional funding applications, including funding disbursements such as interpreter's fees, mental capacity and medical reports where necessary
- an immediate review and fundamental simplification of the system of the application procedures
- the introduction of proper procedures for prompt determination of urgent cases and applications from particularly vulnerable applicants such as children or persons lacking mental capacity.



## 4. The Mandatory Telephone Gateway

The Civil Legal Aid (Procedure) Regulations 2012 introduced a mandatory telephone gateway for three areas of law – special education needs, certain debt cases (mortgage repossession), and a new cluster of cases called ‘discrimination’. For the three areas of law within the Gateway, the rule is that clients are not permitted to approach an adviser directly in person, by post or by telephone. They can only access legal aid through a specified mandatory telephone call centre which triages their legal problem over the phone. The default position is that the person’s entire case will be dealt with solely by telephone, unless exceptional circumstances apply. They cannot choose their legal adviser and cannot choose to meet with their adviser face to face.

The Gateway directly disadvantages all people who wish to choose their legal adviser, who prefer to meet face to face with the person advising them, and client groups such as those with mental health needs, fleeing persecution, with learning disabilities etc. Many people find it difficult to use the telephone to explain their legal problem, and such persons are directly disadvantaged, even prevented from accessing advice because of the restrictions inherent in the scheme.

Clients who need legal aid services are often the most disadvantaged in society. It is necessary to have flexibility to accommodate the different ways that they try to access services. One size does not fit all. A telephone advice service will work for some people; however this must be developed alongside other means of clients accessing services in accordance with their preferences and individual needs.

The development of the mandatory Gateway has also resulted in a significant drop in the number of provider organisations because the contracts for the legal aid work are artificially limited. This has a direct impact on the quality of the service for clients, and accessibility. For example, in special education needs (SEN), the number of contracts let to providers dropped from 27 to 3 overnight when the Gateway was introduced. Many skilled and longstanding providers were lost and clients who need face to face services are not able to access local services.

In December 2014, the Government published a review of the CLA Gateway.<sup>3</sup> The findings of the user interviews suggest that many people struggled to access the Gateway and were not always clear about its role and purpose. Concerns

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<sup>3</sup> <https://www.gov.uk/government/publications/civil-legal-advice-mandatory-gateway-review>

were also expressed about the failure to provide appropriate adjustments and not “diverting users to face-to-face advice even though this is the most suitable service for them” (page 31). In the discussion section of this report, the authors conclude that “In essence, the research indicates that there are advantages in delivering the Operator stage of the Gateway remotely, but that these do not automatically transfer through to the Specialist stage”. (page 29)

In its response to the research, the Government acknowledges these issues, but concludes “Overall, the research confirms that the Gateway is effectively meeting the specific needs of users who qualify and contact the service” (page 23 of the Government review). It seems that no change of policy is planned, although the Government does indicate that it will seek to make improvements.

It should be emphasised that the research was limited. It did not look at the experiences of those who failed to access the Gateway or the group of ‘invisible’ persons who are denied access to justice through being unable to access the scheme in the first place. Any expansion of the Gateway based on the review would therefore be wholly illogical and is likely to result in further legal challenge.

We recommend that:

- the mandatory Telephone Gateway is scrapped in favour of a scheme which allows clients both the flexibility of telephone access and face to face access, and develops innovative methods of delivery with monitoring of effectiveness, with proper independent evidence gathering for decision making in future
- if, despite its serious flaws, the Gateway is to be retained in even a limited form, a further and proper review should be conducted, and in any event clients with disabilities, vulnerable persons and those who allege that they are being deprived of their liberty should be included in an expanded definition of ‘exempt persons’ in the Civil Legal Aid (Procedure) Regulations 2012 to avoid continued discrimination against such groups.

## 5. The Residence Test

The ‘residence test’, which was due to be implemented in August 2014, was found on 15 July 2014 by the Divisional Court to be unlawful, as it discriminates between client groups not on the basis of need or category of law, but on their residence status. The Government is expending even further public funds on appealing that decision. We question the utility of expending yet more taxpayers’ money on seeking to justify an unlawful scheme. We call for this appeal to be abandoned.

The test would have the effect of excluding from the scope of legal aid people who have not been in the UK for a ‘continuous period of 12 months’. Importantly it also excludes people who cannot prove that they meet the test, which will be the vast majority of current clients who need legal aid.

Whilst there are exceptions to the test, they are extremely limited. The effect of the test, if implemented, will be that people who are in immediate need, such as victims of trafficking, disabled adults who are being abused or neglected, will have no right of access to justice. Those who cannot satisfy the onerous evidence requirements of the test (passport, utility bills etc) will also be denied any legal advice about any legal problem, however serious. Therefore, even for the areas of law which remain within the scope of legal aid, access to justice will be significantly reduced.

We recommend:

- abandoning the appeal against the Court’s decision that the test is unlawful
- stopping the introduction of the residence test altogether on the basis that it is unworkable, not cost effective, and is discriminatory.

## **6. Judicial Review (Criminal Justice and Courts Bill 2014 and Regulations 22 April 2014)**

When LASPOA was being debated in Parliament, assurances were repeatedly given that legal aid for judicial review would remain available for individuals to challenge decisions or omissions of public bodies.

However, only days after LASPOA was implemented in April 2013, further changes to the availability of legal aid for judicial review were announced. These included removing guaranteed legal aid payment for judicial review cases save where permission was granted, eventually culminating in the Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014 which were subject to the negative resolution procedure and became effective on 22 April 2014. A legal challenge has been brought and permission has been granted by the Court to bring a judicial review of the decision to introduce the Regulations. At the time of finalising this manifesto, judgment is awaited. However, whether or not the challenge is successful will not affect the fundamental objections to the changes on a constitutional basis, as recently reflected by the debates between the Houses on the progress of the Criminal Justice and Courts Bill.

These changes are not concerned with resources. They are intended to restrict the ability of individuals to challenge decisions of the State. There is no evidence that unmeritorious judicial review cases are being brought funded by legal aid, and the Courts already have powers to punish legal advisers who bring such cases not only in costs orders but in reputational terms by referring poor conduct to their professional bodies. On the contrary, judicial review cases funded by legal aid are subject to rigorous merits testing by practitioners and by the Legal Aid Agency, unlike privately funded cases. Most cases settle between proceedings being issued and permission being considered, meaning that most cases will not have funding guaranteed. Making payment dependent on a successful outcome deters legal aid practitioners from taking on cases which may require judicial review challenges, a 'chilling' effect on the accountability of executive decision making. Meritorious cases will not be brought. This will give greater immunity to inconsistent and unlawful decision making as public bodies are aware that they are less likely to need to be accountable for their actions because they will not be challenged (see, for example, *Ntege (Inner London Crown Court) 23/10/14*).

Whether or not the legal challenge is successful, the impact of the Regulations and the relevant provisions of the Criminal Justice and Courts Bill is to stifle proper challenges to the unlawful acts of public bodies. This cannot be permitted to continue in a civilised society.

We therefore recommend the following:

- repealing the Regulations which introduce the ‘payment conditional on success’ test
- restoring the ‘borderline success’ test for the handful of cases each year which raise public interest issues or which are of significant importance to the individual
- reintroduction of delegated functions by trusted contracted providers in cases of genuine urgency for emergency applications, or at least a fast track system of fax or email applications for legal aid
- repealing the provisions of the Criminal Justice and Courts Bill which restrict the availability of judicial review, funding and interventions in appropriate cases
- review the rules for costs in judicial review cases to incentivise settlement at an early stage.

## 7. The Low Commission

The Low Commission, chaired by Cross-bencher Lord Low, was established at the end of 2012 to assess the future of social welfare law (SWL) advice services and to devise a new strategy. By ‘social welfare’ law the Commission included welfare benefits issues, debt, housing law, employment rights, immigration and asylum, some aspects of community care and education issues. Most of these areas of law have been excluded from the scope of legal aid or legal aid is only available in very limited circumstances.

The Commission published its report in January 2014, entitled ‘Tackling the Advice Deficit’.<sup>4</sup> It concluded that given the scale of the scope cuts it would be necessary increasingly to fund SWL advice services outside the legal aid system. However the Commission makes recommendations around improving and simplifying the exceptional funding arrangements. It recommends that the Ministry of Justice conducts a ‘sense check’ review of the matters excluded from the scope of LASPOA and considers reinstatement of some provisions to ensure there are no inconsistencies between its stated aims and practice - for example, housing cases involving disrepair and the right to quiet enjoyment and/or where housing benefit issues are the cause of potential eviction.

The Commission’s Strategy for Future Provision gives higher priority to public legal education and reducing preventable demand. It views advice and support as a continuum including public legal education, informal and formal information, general advice, specialist advice, legal help and legal representation. To this end the Commission recommends that:

- the next UK government should develop a National Strategy for Advice and Legal Support in England for 2015–20, preferably with all-party support, and the Welsh Government should develop a similar strategy for Wales. There should be a Minister for Advice and Legal Support within the MoJ, with a cross-departmental brief for leading the development of this strategy including a strong focus on public legal education
- the next UK government should establish a ten-year National Advice and

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<sup>4</sup> <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

Legal Support Fund of £50m p.a., to be administered by the Big Lottery Fund, to help develop provision of information, advice and legal support on social welfare law in line with local plans. The Low Commission believes it would be possible to attract £50m match funding from other sources, NHS, Housing Associations, Money Advice Service and the private sector

- local authorities, or groups of local authorities, should co-produce or commission local advice and legal support plans with local not-for-profit and commercial advice agencies
- central and local government should do more to reduce preventable demand including requiring the DWP to pay costs on upheld appeals. Courts and tribunals should review how they can operate more efficiently and effectively and adapt their model of dispute resolution at every stage to meet the needs of litigants with little or no support.

The Low Commission's proposed model of provision includes funding relevant agencies to develop web-based public legal education, and a commitment to the concept of national comprehensive helplines, with appropriate website support and with links to single-topic helplines, as well as to commercial and not-for-profit frontline advice agencies.

Advice should be delivered in convenient settings – for example, workplaces, GPs' surgeries and hospitals, schools, supermarkets, local communities etc. Advice provision needs to respond to users' needs by enabling them to talk to specialists as early as possible in the process, rather than having to go through too many gateways which will deter them from obtaining advice.

We believe that the Low Commission recommendations, together with our proposals for the legal aid system, form the basis for rebuilding the legal advice scheme in social welfare law.

## **8. The need for an independent organisation to oversee legal aid payments**

The cost to the public purse of a legal aid system has been the subject of much comment, and comparison with other jurisdictions is always made to justify cost cutting. There are well known criticisms of the evidential basis for such comments and different statistics can always be used to justify arguments on both sides. However, what is in issue is the future of our justice system and how to secure a system which is value for money but provides a service which meets the needs of the public who require advice.

In order to make properly informed decisions about the future funding of a legal aid system, robust independent evidence is required as to the costs drivers in the system, where costs may be saved without compromising on justice, and how the system can work better for clients and for the public overall.

We support the establishment of an independent organisation which has the responsibility for setting reasonable fees for criminal and civil legal aid casework based on sound and firm evidence of the costs of running organisations delivering legal aid services and the need to maintain/improve quality. It is vital that organisations which provide legal advice do so to a quality standard, and that the costs of providing the services are independently verified by a trusted and respected organisation so that decisions can be made based on sound evidence and not sound bites.

This organisation should also make recommendations for the fair assessment of claims for payment based on a simplified system. Payment should be made at a fair rate for the work done without second guessing at the end of the case. Uncertainty about income leads to business instability and detracts from the true task at hand, which is ensuring that the best possible quality legal advice is provided to those who cannot otherwise afford to pay for justice.



## 9. Priority groups - children, disabled people and other vulnerable groups

Flaws in the criminal and civil justice system are revealed when people with specific needs are not well served. Particular attention therefore needs to be paid to how the system works (or does not work) for client groups with additional disadvantages. Society has an obligation to ameliorate and compensate for these additional hurdles faced by such persons, and to facilitate justice for them. This may require creative solutions to be devised to enable them to play an active part and ensure their voices are heard.

In September 2014 the Office of the Children’s Commissioner released evidence based research demonstrating the adverse impact of the cuts to legal aid since April 2013 on children and young people.<sup>5</sup> Despite the subsequent announcement that the Ministry for Justice would investigate whether vulnerable children were being deprived of access to justice, it has since been confirmed that the review has been abandoned.

Children, together with other vulnerable groups, are those who are least able to represent themselves and most likely to need advice. Without a voice, they will remain invisible and unable to enforce their rights.

As part of the review which we support of the effect of the removal of areas from scope and how the current legal aid and justice system disadvantages vulnerable people we urge particular focus on the following groups:

- children and how the removal of legal aid or barriers to justice will affect them life long
- parents who are also children under the age of 18
- disabled children
- disabled adults and how different disabilities result in different barriers to access to justice, requiring different solutions (for example older people, people with learning disabilities, those in mental distress, people with physical disabilities, or who have serious and chronic illnesses)

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<sup>5</sup> [http://www.childrenscommissioner.gov.uk/content/publications/content\\_873](http://www.childrenscommissioner.gov.uk/content/publications/content_873)

- carers including extended family members
- people with impaired mental capacity
- victims of sexual exploitation or trafficking
- victims of slavery or forced labour
- victims of domestic violence (including all forms of abuse)
- people who are homeless, or who have chaotic lives
- people fleeing persecution
- victims of crime in accordance with the EU Directive which is to be implemented by member states by November 2015.<sup>6</sup>

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<sup>6</sup> [http://ec.europa.eu/justice/criminal/victims/index\\_en.htm](http://ec.europa.eu/justice/criminal/victims/index_en.htm)

## **10. Ensuring public awareness of the legal aid scheme**

We have already referred to the urgent need for there to be an awareness raising programme targeted at informing the public where legal aid is still available.

It is important that where legal aid remains within scope (ie. available for types of cases), people know that they can access it and how to do so. We are concerned that no organisation, whether it is the Ministry of Justice or the Legal Aid Agency, sees it as part of its role and responsibility to inform the public about their potential eligibility for legal aid.

We strongly support a national information campaign which corrects the misleading impression that legal aid has been abolished and informs and reminds the public that it is still available. This is particularly important for victims of domestic and other violence, where legal advice and representation can often save lives.

It is also important that the public are aware that legal aid is still available for a range of cases and that there is an open and accessible information system which helps the public find out whether they are eligible, and if so, where they can get help. The current tools on websites are too complex and do not recognise that clients will often not diagnose their own legal problem accurately, so will find it difficult to obtain information.

There is also a need for a free publicly accessible page on Gov.uk which has all legal aid statutes and delegated legislation in a consolidated form, because the complexity of the legal aid system has created a plethora of Regulations which are then amended, yet the consolidated versions are not readily available.

Many people are unable to use computers, and therefore information about the availability of legal aid needs to be provided to the public in different forms. The information must be accessible to people who find digital communication difficult, or even impossible. Limiting information only to that in digital form will exclude many people who would be entitled to legal aid.

We are also keen to improve the transparency of decision making about access to legal aid. All too often it is difficult, if not impossible, to find accurate data about the provision of legal aid services, contracts, where any New Matter Starts (cases

which can be started) are unused in a particular procurement area (if the Start system continues), and unmet need. This information is vital because decisions are being made about access to legal aid and the signposting of clients based on inadequate or insufficient evidence.

## **11. Simplification of the legal aid scheme and the move to digital working**

Generally, the administration of the legal aid system needs to be simplified. Legal aid is an unnecessarily complex system to operate, for the public, providers and the Legal Aid Agency. The system needs to work efficiently, and there needs to be certainty for providers who deliver services and clarity for the public who receive them. Such a system requires an approach of joint working between providers and the Legal Aid Agency for the benefit of clients. Where there is uncertainty or a discretion, if the provider has acted in good faith in applying the rules then any discretion should be exercised in the client's favour. All too often we are seeing the rules being applied in an overly rigid way, which only serves to foster reluctance by providers to take any risks in acting for clients. Ultimately it is the clients who suffer. Providers have seen their work remunerated at lower and lower rates following the cuts and there are very real risks to the viability of the already reduced provider base. There is no place for any further cuts but there is an urgent need to review the guidance on claims to ensure that providers have certainty that they will be fairly paid for the work they do, and will not be paid less now than in 2011.

We wholeheartedly support the use of digital technology where this works for clients, providers and for the Legal Aid Agency, However, the proposed 'CCMS' digital scheme for all civil legal aid applications which is to be made mandatory from October 2015 is not fit for purpose in its current form and it is unclear whether it can be fixed. According to the Legal Aid Agency the CCMS system has already cost in excess of £31m of public money in just three years. It was not devised or purchased as a bespoke product to meet the needs of providers and clients. Many organisations have spent extensive amounts of time in helping to pilot the new system, at massive cost to their organisations and clients.

Whilst some changes have been made to the CCMS it does not work efficiently or effectively for legal aid applications and even the aspects of the system which do work are much more time consuming for providers. If this can be fixed, that is to be welcomed, but if the current flaws remain, then it would be foolhardy to proceed with making the scheme compulsory because this will result in meltdown of the legal aid system and chaos for clients. A new independent view is needed as to the defects in the CCMS system and whether they can be remedied. If they cannot then no further public money should be spent on a system which is not

fit for purpose and a different system which works needs to be commissioned.

We call for:

- an urgent review with the aim of simplifying the legal aid system, removing unnecessary hurdles to clients accessing legal aid services which just cost more
- the removal of the New Matter Start scheme which only serves to generate more layers of administrative red tape at cost to the Government and providers, without benefit to clients
- longer term contracts to provide business stability and certainty, whilst ensuring flexibility for new entrants providing quality standards are met
- an independent legal aid commission to set fees based on proper evidence as to the costs of running a quality service (see Section 8 above)
- reversal of the latest criminal and civil fee cuts, reinstatement of rates at 2011 levels, with no further cuts to rates
- re-introduction of delegated functions in cases of genuine emergency without all the means evidence being available, for example where the client is at risk of homelessness or physical or psychological harm
- the Legal Aid Agency to withdraw the contract notice to providers making the new CCMS system compulsory for all organisations from October 2015, pending a formal independent review of the effectiveness of the CCMS system.

## **12. Social mobility and a sustainable future for legal aid**

Ensuring that talented entrants, from all backgrounds, are able to work in the legal aid sector is imperative for the long-term sustainability of the profession and maintenance of quality standards for clients. This applies whether legal aid services are provided by private practice, Law Centres or the advice sector.

People should be able to access and remain in the profession irrespective of their background or means. And those who do enter the profession should be provided with the training and supervision that they need to do the best quality job for clients. To an extent these are issues for which the legal profession should take responsibility. But the Ministry of Justice (MoJ)/Legal Aid Agency (LAA) also have a part to play.

The MoJ/LAA should ensure that organisations which are able to demonstrate a commitment to promoting these goals are given credit for this during the tendering process for legal aid contracts. Consideration should also be given to the reinstatement of training contract grants, sponsored by the LAA, to fund a set number of training contracts each year in the legal aid sector. A similar programme was previously maintained by the former Legal Services Commission.

If there is to be a quality civil and criminal justice system in future years, it is the next generation who will provide this, supported by the organisations with the expertise and skills to train them. Both elements are necessary for the justice system to survive for the next generation and beyond.

## **13. Specific problems by category of law**

### **Actions against the police**

We believe that the decision to remove legal aid in relation to negligent acts by the police and other state agents should be reviewed. These cases can often lead to very damaging consequences, including loss of liberty. Similarly, the removal of legal aid in cases involving trespass to goods by state agencies can lead to financial and other difficulties.

### **Clinical negligence**

Legal aid is now only available for clinical negligence cases involving catastrophic birth injuries and is subject to strict conditions. The previous system enabled other complex medical negligence cases to be underwritten by legal aid so that victims of negligence could obtain a remedy. Legal aid acted like a loan in such cases and enabled victims to seek redress.

It is unclear whether there are meritorious cases where victims have been unable to bring a claim because of the lack of legal aid, and whether the gap has been filled by other types of funding. Research is needed to look at the costs of withdrawal of legal aid for medical negligence cases and whether it is more cost effective and equitable to reintroduce a form of legal aid for specific types of cases and priority client groups.

### **Community care**

The Care Act 2014 is due to be implemented in April 2015, bringing extra rights for disabled people and carers of people in need. There is a dearth of community care providers offering specialist legal advice to disabled clients and their carers, with only a handful of advisers across England and Wales.

There is an urgent need to review the pattern of supply of community care advice and representation services so that the vulnerable (disabled) client group is better provided for when the Act comes into force, and existing advice deserts are addressed. There is a need to develop legal services at both the general and specialist level to meet the needs of disabled people and their carers.



## **Crime**

The criminal justice system is in crisis, with firms facing impossible uncertainty as to whether they will survive, and many organisations with established track records leaving. They have already sustained a devastating 8.75% cut to income, on top of years of cuts in real terms. This latest cut must be reversed and no further cuts in rates implemented. We oppose the artificial limiting of the market by arbitrary setting of maximum contract numbers.

At the time of finalising this manifesto, judgment is awaited in the appeal of the judicial review decision of the process which led to the decision to grant only 527 contracts of 1600 existing criminal contracts. Whether the appeal is successful or not, there is clearly an urgent need for action to secure a viable and stable criminal justice system now and in the future.

We call for an independent review into the operation of the criminal justice system generally, taking into account all costs and costs drivers in the system, including the police, the CPS, defence costs and the court service. Practitioners know that there are savings to be made in the system, whilst not compromising on quality, yet their voice is not being heard. This is an opportunity to develop a criminal justice system for future years which retains the respect of the international community and secures a safer and more just society for all.

## **Debt**

We call for the recommendations of the Low Commission to be implemented (see above). Debt is one of the most significant contributing factors to ill health, stress and mental distress and proper independent advice at an early stage will benefit many thousands of families in need and prevent additional costs to the welfare state.

It must also be noted that, until recently, it was recognised by Government that social welfare law issues rarely existed in isolation. Indeed much of the commissioning strategy was built on the premise of 'clusters' of interconnected legal problems such as unmanageable debt and unresolved benefit issues triggering rent arrears and possession claims. The almost complete removal of debt and benefits advice from scope has therefore undermined the stated intention of retaining housing advice to prevent homelessness.

We therefore call for a review of the impact of the scope changes to social welfare law. In particular we recommend a review of the ability of providers adequately to cater for matters remaining in scope (i.e. possession and eviction cases) in the absence of funding to resolve underlying issues such as debt and benefit problems.

## **Education, including Special Educational Needs**

We ask for the removal of special educational needs from the mandatory telephone gateway, allowing clients to meet with advisers face to face. We call for an end to the artificial limiting of contract numbers in such low volume specialist categories of law where there are already very few providers offering services to clients. We are also particularly concerned by the problems faced by children excluded from school.

## **Employment**

It is vital that early legal advice is available in the complex area of employment law, to ensure that people understand their rights and responsibilities. This important service might mean the difference between a person being reliant on state benefits or continuing to be employed and supporting themselves.

We support:

- the reintroduction of initial legal aid, Legal Help, for cases subject to the usual merits test
- a review of the fee remission scheme and/or a reduction in fees to remove this very real barrier to access to justice via the tribunal
- a review of the possibility of extending legal aid to fund legal advocacy at the tribunal in selected cases as we believe that this will encourage the earlier settlement of many cases and provide savings across the tribunal system.

## **Family, including domestic violence evidence**

The largest number of people adversely affected by LASPOA has been in family law. Almost all ‘private law’ cases have been removed from the scope of legal aid save where the applicant can provide particular types of documentary evidence that they have suffered domestic violence in the last 2 years – the so-called ‘domestic violence gateway test’.

The very high threshold of specific evidence required for the DV gateway has already resulted in 50% of victims not being able to access the help they need. This leaves victims and their children at serious risk. The changes to financial eligibility have had a disproportionate effect on victims of domestic violence. Even an application for an order to protect a person from violence is less accessible, so that many have no access to protection for themselves or their children.

Because of the removal of initial legal advice to clients, the number of cases referred to mediation for family breakup has plummeted. The changes have also disproportionately affected children who may be prevented from having contact with one parent and the extended family because of the lack of legal advice for the parents. There is an urgent need to review the availability of legal aid for family cases.

We call for the following:

- provision of funding for initial advice, which might include a referral to mediation, because the evidence has shown that without lawyer referral the take up of mediation is extremely low
- amendment of the DV evidence test so that people who have been victims can obtain the legal advice they need. The 2 year rule for DV evidence is arbitrary and rules out many genuine victims. Other forms of evidence are dependent on third parties (eg the GP, social services) to provide and this can often result in injustice because there is no way of forcing the production of such evidence, or paying for evidence, particularly at a time of urgent crisis. The evidence should cover more options and there needs to be flexibility so that victims can access advice immediately. We consider that the DV evidence test needs to be amended so that the Government’s definition of DV accords with the evidence required. The statutory

definition includes domestic abuse and coercive control yet the evidence criteria are geared towards physical injuries which have been reported to particular persons. This shows a very surprising lack of empathy and insight into the difficulties faced by this vulnerable group who often do not report their abuse. Over 50% of victims who urgently need help are excluded from obtaining advice because either the definition or the evidence required are insurmountable hurdles for them

- changing a minor but important aspect of the operation of legal aid so that solicitors and other advisers approved under the legal aid contract as supervisors should have the delegated power to confirm that a client meets the ‘victim of DV’ test, without being second guessed at the end of the case
- availability of legal aid in fact finding cases where allegations of DV are made but there is no valid evidence. If the matter is listed for a fact finding hearing then victims should be entitled to funding for representation at the fact finding. If findings are made by the Court then the case should continue to be funded. If findings are not made then the funding can be brought to an end
- having a genuine system for granting legal aid in exceptional cases (see above). Mediation, although beneficial in the right case, is not always possible (for example, for people with learning difficulties, mental health needs, personality disorders, where the other parent has disappeared or is a distance away or is implacably hostile). The tortuous and unpaid system for applying for exceptional funding and the shockingly low success rates for those who apply means that huge numbers of parents have no way of resolving arrangements for their children, and children are, as a result, being deprived of relationships with their parents
- reinstatement of funding for private law applications for extended family members (for example grandparents) seeking to care for children where their parents are not able to do so. The criteria to access legal aid for such applications could be a letter of recommendation from children’s services.
- a discretion to grant legal aid to a party who is not eligible for legal aid, but where the costs to the justice system overall would be greater if the party was not represented.

## **Housing**

We call for the implementation of the Low Commission's recommendations to reinstate legal aid for all housing cases, to include provision of advice in relation to Housing Benefit and related problems.

Under the previous system where court action led to repair works being carried out, legal work could continue to ensure that compensation was paid to clients and (importantly for public funds) legal costs were often paid by the landlord. This resulted in many legal aid payments being refunded to the Legal Aid Fund, so legal aid acted like a loan. The current system means that solicitors are having to stop working for a client after repair works have been carried out (due to other sources of funding not being available) but before the question of compensation is decided. This means that legal costs are not being recovered on those cases. There is also more expenditure from the Legal Aid Fund because of the complex arrangements and separation of different issues for which legal aid is only available for some parts of a case and not others.

Additionally, at present advisers cannot help clients deal with Housing Benefit issues, often a major cause of threatened homelessness. These problems often include complex appeals, and there is a real lack of alternative advice available to clients because of closures of advice and Law Centres. This means that clients' rent arrears (which could be resolved at an early stage) increase during the court case, making their eviction more likely. Early advice could resolve many cases. Early advice to resolve Housing Benefit issues also often resolves a rent arrears issue before the landlord issues court proceedings. This early intervention therefore reduces costs for landlords (many of whom are public bodies) and also reduces demand on the court service, thereby making another saving to the public purse.

If all housing cases are not reinstated in scope, we support the following as a minimum:

- restoring advice about Housing Benefit within the scope of legal aid where the client is at risk of being evicted from their home (ie amend Schedule 1 of LASPOA to include Housing Benefit work under paragraph 33)
- ensuring that allocation cases under the Housing Act 1996 are brought within scope – this particularly affects children and people with disabilities

- covering a wider range of disrepair cases and allowing funding to continue where there is a linked damages claim
- clients with mortgage possession cases being able to access advice through any method including face to face advice, and not just via the mandatory telephone Gateway
- ensuring that quiet enjoyment cases are within scope even if the harassment does not necessarily constitute a breach of the Protection from Harassment Act 1977 (which is too narrow and too high a threshold to cover many forms of harassment)
- availability of early advice on landlord and tenant disputes generally (under Legal Help), including claims in relation to tenancy deposits and status of occupiers.

## **Immigration/Asylum**

We support the following:

- reintroduction of legal aid for cases involving deportation where the individual is part of a household that includes a British citizen child or partner
- ensuring access to legal advice for those detained who are challenging their detention or the underlying decisions giving rise to detention
- prioritising those who are additionally vulnerable whether by reason of age or health to ensure that they can access advice across the range of legal problems in the field
- reintroduction of funding for refugee family reunion cases, including cases falling outside the immigration rules. In priority terms these are the most vulnerable groups who are least represented and have the greatest need. See our comments regarding the importance of assessing the needs of such groups, including children, in accessing justice.

## **Inquests**

Families of loved ones who have died under state control are often unable to grapple with the complexities of evidence, law and procedure at a time when they are grieving for their relatives. Legal aid for representation at inquests is discretionary and many families are unable to obtain the legal support they need because of the way that the criteria are devised and discretion is exercised (see above regarding Exceptional Funding more generally).

The recent judgment in the Joanna Letts case where the criteria for legal aid were criticised confirms that the criteria need to be reviewed urgently to ensure that families are consistently able to obtain the representation they need.

We call for:

- revision of the Lord Chancellor's Guidance on Exceptional Funding for inquests so that it properly reflects the law and facilitates fair and just decision making
- a review of the means test for legal aid for family representation at inquests, to give priority to cases where the Article 2 obligation (right to life) to investigate may arise or where there is wider public interest
- improvement in the system of administration of funding in this area including for urgent cases, and simplification of the forms
- in damages claims for breach of Article 2, review of the costs benefit ratio for granting legal aid in inquest cases, and a change so that the compensation that families receive can be retained by them in full.

## **Mental capacity**

The Mental Capacity Act 2005 and the deprivation of liberty safeguards for people in care homes and hospitals has been the subject of considerable debate. The safeguards for mentally incapacitated adults are long overdue and will need amending as they are embedded and problems arise in practice. However already there are significant inequalities and injustices which need to be remedied.

Legal aid is available for some types of proceedings to protect vulnerable adults who are being abused or neglected, but not for the whole range of issues. This needs to be remedied urgently.

We call for:

- a system which ensures that all cases which involve deprivation of liberty of a mentally incapacitated person (wherever they live) are non means tested, whether or not the court considers the case on the papers or at an oral hearing. This will ensure consistency as between mental capacity and mental health cases (people who are subject to compulsory detention under the Mental Health Act as opposed to the Mental Capacity Act)
- extension of legal aid to cover psychological and emotional abuse or neglect of a mentally incapacitated person, and respect for their home under Article 8 ECHR (this is excluded at present)
- introduction of a system of discretionary funding to grant legal aid for representation to a party who is not eligible for legal aid where the Legal Aid Agency considers that, taking into account all the features of the case, it would cost less to public funds overall for that party to be represented than to be a litigant in person. Already we have seen cases where if a family member had been legally represented via legal aid it would have cost the taxpayer less overall and resulted in more effective and swifter justice for all concerned.



## **Prison law**

We support the reintroduction of legal aid for advice and where necessary representation for prisoners, including treatment cases. As prison is a closed institution it is vital that in appropriate cases, legal advice is available. This is even more important where the client is disabled, a child or an older person with particular needs for support and access to health and care services, not readily available in a prison setting.

Legal advice should be available for problems with progression, resettlement and treatment. The current position of only allowing legal aid in cases directly affecting liberty is short sighted as liberty is dependent on several factors that often require legal advice at an early stage, such as access to courses, rehabilitation and appropriate resettlement packages.

## **Welfare Benefits**

We support the implementation of the Low Commission proposals (see above).

We also call for the restoration of legal aid in welfare benefits cases to cover the application for permission to appeal made to the First Tier Tribunal (as opposed to the application directly to the Upper Tribunal).

This was promised during the passage of LASPOA, but when the House of Lords passed a fatal motion on the draft Regulations because the definition was too narrow, the Minister simply withdrew the Regulations without further amendment. This has left a gap which was not intended by Parliament, whereby the appellant has to identify the error of law and make the initial application themselves without legal advice or representation and it is only once that is refused that they can seek legal help. This is obviously circular and we consider that Parliament's intention in passing a fatal motion against the Regulations should be given effect so this small category of cases is brought back within scope of legal aid.





'WE WILL SELL TO NO  
MAN, WE WILL NOT DENY  
OR DEFER TO ANY MAN  
EITHER JUSTICE OR RIGHT.'

*Magna Carta, 1215*



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