



Making the case for legal aid

August 2017

Executive summary

Those of us who are convinced of the virtues and ideological necessity of legal aid and access to justice often underestimate how much the public's opinion deviates from this starting point. If we want to protect legal aid, we need to improve the wider public's understanding of what it is and how it underpins a better society. To bring critics and sceptics on board, the message can be reshaped to combine arguments about justice, equality, and rule of law, with those of economic efficiency. Not only is an effective legal aid system a crucial element of the rule of law, but it also brings economic benefits when considered against the backdrop of state provided welfare as a whole.

Last year, Jeremy Corbyn asked Lord Willy Bach to undertake a review of the legal aid system. Lord Bach set up the Bach Commission on Access to Justice, with the aim of setting out how the state can guarantee access to advice or representation for those who need it to enforce their rights. The Commission's premise is that access to justice is a public service alongside education and healthcare.¹

The Commission published its interim report in November 2016, entitled 'The crisis in the justice system in England & Wales'. The report's findings note that the number of legal advice centres has more than halved between 2005 and 2015,² and cuts to the government's legal aid bill have been "at great cost to citizens' access to justice".³

In this briefing we seek to demonstrate why the Bach Commission's review is so important by explaining through examples the value of legal aid in ensuring that human rights protection is a reality for all individuals. In doing so, we make two key points: legal aid is necessary for a fair society and the operation of an effective justice system, and the provision of timely legal advice can generate huge costs savings for the state in the long-term.

¹ The Fabian Society, 'Access to Justice: The Bach Commission' (<http://www.fabians.org.uk/access-to-justice-the-bach-commission/>).

² The Bach Commission on Access to Justice, 'The crisis in the justice system in England & Wales', Interim report, November 2016 (http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf), p5.

³ Ibid p7.

Introduction

Those of us who are convinced of the virtues and ideological necessity of legal aid and access to justice often underestimate how much the public's opinion deviates from this starting point. If we want to protect legal aid, we need to improve the wider public's understanding of what it is and how it underpins a better society. To bring critics and sceptics on board, the message can be reshaped to combine arguments about justice, equality, and rule of law, with those of economic efficiency. Not only is an effective legal aid system a crucial element of the rule of law, but it also brings economic benefits when considered against the backdrop of state provided welfare as a whole.

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The Commission's final report will establish minimum standards for access to justice and make recommendations for how advice and representation should be made accessible, taking into account legal aid, legal advice and legal education. It will also consider how the provision of advice and the justice system can operate with increased efficiency, making use of technological innovation.⁷

Here we seek to demonstrate why the Bach Commission's review is so important by explaining through examples the value of legal aid in ensuring that human rights protection is a reality for all individuals. In doing so, we make two key points: legal aid is necessary for a fair society and the operation of an effective justice system, and the provision of timely legal advice can generate huge costs savings for the state in the long-term.

Firstly, this briefing provides a summary of legal aid and its recent upheaval. Secondly, we explain why legal aid is necessary to uphold individuals' human rights by considering two areas of law significantly impacted by the recent reforms: immigration and social welfare. We then explain how in addition to being necessary for justice, legal aid is a cost-effective way of helping those in need. Finally, we seek to address some of the misconceptions about legal aid.

What is legal aid?

Legal aid is the provision of legal advice and representation funded by the government and free for those who are unable to pay for legal advice privately. As a country, we value the rule of law and a justice system founded on strong principles of equality and human rights. Legal aid was established to make this a reality for all individuals, regardless of wealth. It empowers individuals to identify their legal rights so they have the best chance of achieving a fair outcome in legal matters.

Legal aid was introduced by the Legal Aid and Advice Act 1949 by Clement Attlee's Labour government. In 1950, 80% of the population were entitled to means-tested legal aid and its principal uses were for criminal cases and divorce.⁸ With the inception of law centres in the 1970s, it was

⁴ The Fabian Society, 'Access to Justice: The Bach Commission' (<http://www.fabians.org.uk/access-to-justice-the-bach-commission/>).

⁵ The Bach Commission on Access to Justice, 'The crisis in the justice system in England & Wales', Interim report, November 2016 (http://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf), p5.

⁶ Ibid p7.

⁷ Ibid p4.

⁸ Young Legal Aid Lawyers, 'Legal Aid – An Introduction', September 2012 (http://www.younglegalaidlawyers.org/sites/default/files/An%20introduction%20to%20legal%20aid_history%20and%20the%20current%20system.pdf), p1.

increasingly used for areas such as housing and employment.⁹ By 2008, this 80% figure had dropped to 29%.¹⁰

The entry into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') in April 2013 marked a critical juncture for legal aid. Brought in by the Coalition government, LASPO vastly reduced the scope of legal aid and removed many areas of law partially or entirely from its scope, including the majority of civil and social welfare cases. LASPO was brought about to reduce the country's legal aid bill. In this respect, at least, it has been a success: in 2009/10, money spent on funding criminal and civil legal aid cases was £2.1 billion¹¹ and by 2014-2015 this had fallen to less than £1.5 billion.¹² However, in terms of both human costs and wider economic costs LASPO has been a disaster.

These cuts are being exposed and successfully challenged. Earlier this year, increased levels of violence and suicide in our prisons received widespread media attention. The record highs of violence came after LASPO had cut legal aid for prisoners in 2013. The Court of Appeal ruled in April that these cuts were unlawful because they were inherently unfair.¹³

Amnesty International recently published a report into the impact of the cuts to civil legal aid, 'Cuts That Hurt'. They concluded that as a result of LASPO, we have a 'two-tier justice system: open to those who can afford it, but increasingly closed to the poorest, most vulnerable and most in need of its protection.'¹⁴

Combined with hikes in court and tribunal fees, LASPO has made the rule of law and access to justice illusive for the majority of the population.

Legal aid as a human right

Article 8 of the UN's Universal Declaration of Human Rights 1948 provides that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

In order to obtain an effective remedy, individuals must not only be aware of their rights, but also able to enforce them. In our adversarial justice system, individuals usually require the assistance of a lawyer to do so. Without assistance in understanding, interpreting and presenting the law accurately, human rights risk being merely theoretical to most people.

In a recent judgment in the family courts, Mostyn J noted that where parties are representing themselves there is arguably a violation of their rights under both Article 6 (right to a fair trial) and Article 8 (right to a private and family life) of the European Convention on Human Rights.¹⁵

The following examples demonstrate how a lack of legal aid can mean a lack of human rights protection.

Immigration and family reunification

Most immigration cases are now outside of the remit of legal aid. With particularly devastating effects, LASPO removed legal aid for family reunification cases. This includes those who have been granted refugee status in the UK who are trying to bring their families to the UK to join them. They are

⁹ Ibid, p1.

¹⁰ The Bach Commission Interim report (n2), p8.

¹¹ Full Fact, 'Far fewer social welfare cases get legal aid', 2 October 2015 (<https://fullfact.org/law/far-fewer-social-welfare-cases-get-legal-aid/>).

¹² Ministry of Justice Annual Reports and Accounts 2015-16

(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535530/moj-annual-report.PDF), p134.

¹³ The Howard League for Penal Reform, 'Court of Appeal: Cuts to legal aid for prisoners are unlawful', 10 April 2017 (<http://howardleague.org/news/court-of-appeal-ruling-on-legal-aid/>).

¹⁴ Amnesty International, 'Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice', 11 October 2016 (<https://www.amnesty.org/en/documents/eur45/4936/2016/en/>), p3.

¹⁵ Paul Magrath, 'The legacy of LASPO', The Incorporated Council of Law Reporting, 23 April 2017 (<https://www.iclr.co.uk/the-legacy-of-laspo/>).

permitted to do so, but are not entitled to legal aid to help complete the application because the government deems this type of application to fall outside of the asylum remit for which legal aid is available. A joint project by Asylum Aid and the British Red Cross found that most applicants are men trying to bring over their wives and children, who are still living in areas of conflict where it is unsafe to travel or to reach British embassies to submit paperwork. Their research found that the application procedure is so complex that refugees face extreme difficulties in completing it without assistance.¹⁶

Before LASPO, approximately 20% of applications in the 'Family: other' category (most of which are family reunification applications) were refused; yet for the year ending June 2016, this had shot up to almost 40%.¹⁷

Applicants in family reunification cases frequently face additional barriers including emotional trauma, isolation and language barriers.¹⁸ Having fled their homes, a lack of documentation proving family ties exacerbates the difficulties faced in completing a successful application. With legal help, the reasons for the lack of evidence could be explained clearly and alternative evidence could be sought.¹⁹

Applications for siblings, step-children and adopted children present further challenges. Successful applications require consideration of the rules and the eligibility criteria, advice on obtaining appropriate evidence and understanding of relevant guidance.²⁰ It is unrealistic to expect that all those who have recently fled their homes and been granted refuge are now in positions to do this, whilst also overcoming language barriers.

Amnesty International interviewed applicants and their lawyers for 'Cuts That Hurt'. Ruth is from central Africa and became the main carer for her sister's children when her sister was killed. Ruth later thought the children had died when they were at church and soldiers started to kill people and everyone was forced to flee. She was granted refugee status in the UK and has been diagnosed with PTSD having since discovered that two of the children had survived. However, she has no documentation to prove her relationship to the children and her application to bring them to the UK to join her was refused by the Home Office. She is being assisted by a student who is now exploring whether funding can be obtained for an appeal.²¹

It is difficult for most UK taxpayers to fully appreciate the significant human cost caused by a lack of publicly funded legal advice, particularly where immigration is concerned. The fact remains that anybody could need to rely on legal assistance at any time in their life: just as nobody expects to be accused of a crime or become homeless, nobody expects to need to seek asylum in another country. It is the role of a fair justice system to protect those who find themselves in such unfortunate circumstances.

Social welfare

The remit of social welfare law covers community care, debt, employment, housing and welfare benefits.

¹⁶ Asylum Aid, 'Without free legal assistance for family reunion refugees are unable to bring family members to safety', 23 July 2016 (<http://www.asylumaid.org.uk/without-free-legal-assistance-for-family-reunion-refugees-are-unable-to-bring-family-members-to-safety/>) and Jacob Beswick, 'Not so straightforward: the need for qualified legal support in refugee family reunion', British Red Cross, 2015 (<http://www.redcross.org.uk/~media/BritishRedCross/Documents/About%20us/Not%20so%20straightforward%20refugee%20family%20reunion%20report%202015.pdf>).

¹⁷ Melanie Gower and Terry McGuinness, 'The UK's family reunion rules: striking the right balance?', House of Commons Briefing Paper, 28 November 2016 (<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7511#fullreport>), p19.

¹⁸ Cuts That Hurt (n11), p33.

¹⁹ Ibid.

²⁰ Cuts That Hurt (n11), p33-34.

²¹ Cuts That Hurt (n11), p34.

Debt matters are no longer eligible for legal aid unless there is a risk of homelessness. Welfare benefits no longer fall within the scope of legal aid, other than appeals against refusals to grant benefits reaching the Upper Tribunal, Court of Appeal or Supreme Court.

Unfortunately, debt problems and issues accessing benefits and housing do not provide a compelling reason to support legal aid for many people. Depictions of the harsh reality such as in Ken Loach's film *I, Daniel Blake* shocked the public, making them aware of the complex system that applicants for disability benefits must navigate, frequently to no avail. Decisions regarding disability benefits are made incorrectly with an alarming frequency, such that often those affected are able to win their cases on appeal.²²

Ms S' lawyer was also interviewed for 'Cuts That Hurt'.²³ She reported that Ms S has suffered with mental health problems for her entire life. Although hospitalised for the last six months, she received a notice stating that she was 'fit for work' which affected her entitlement to benefits. Legal aid is not available to help her challenge this assessment so she is faced with dealing with it alone.

The current system means that vulnerable people are faced with either the daunting prospect of challenging a rejection at a tribunal without legal support, or surviving without the benefits required to pay rent and buy food.

Legal aid is now only available for a restricted number of housing matters, including when tenants are facing eviction. However, there are not enough lawyers available with the expertise to advise on housing issues.²⁴ A recent Law Society campaign revealed that parts of the country are 'advice deserts',²⁵ with some legal aid areas having no law firms at all providing housing advice via legal aid.²⁶

Before the deep cuts brought in by LASPO, tenants would have a chance to obtain advice before reaching a position of potential eviction. Indeed, the underlying cause of such problems is often related to issues accessing benefits, for which no legal aid is available.²⁷

Sue James, a legal aid housing lawyer, tells of a tenant facing eviction due to rent arrears because of the impact of the bedroom tax. She had an empty bedroom because her daughter had died whilst on holiday earlier that year. As Sue James notes in her article, we learn from *I, Daniel Blake* that this could happen to anyone.²⁸ Legal advice forms a safety net to prevent these problems spiralling and having further devastating effects.

The number of social welfare cases receiving funding dropped by a shocking 99% following LASPO.²⁹ This not only means a lack of justice for those unable to receive legal help, but results in a wider knock-on cost to the government, in particular through increased demand for the NHS.

Legal aid as a cost-effective public service

The House of Commons Justice Committee has reported that whilst LASPO has indeed reduced the legal aid bill, there is no evidence that it represents value for money for taxpayers. Intervening after a

²² Frances Ryan, 'The government is skewing benefits appeals against disabled people', *The Guardian*, 17 May 2016 (<https://www.theguardian.com/society/2016/may/17/government-skewing-benefits-appeals-process-against-disabled-people>).

²³ *Cuts That Hurt* (n11), p46.

²⁴ Owen Bowcott, 'Thousands left homeless by shortage of legal aid lawyers, say charities', *The Guardian*, 18 December 2016 (<https://www.theguardian.com/society/2016/dec/18/thousands-homeless-shortage-legal-aid-lawyers-charities>).

²⁵ Monidipa Fouzder, 'Shocking infographic highlights housing 'advice deserts'', *The Law Society Gazette*, 28 July 2016 (<https://www.lawgazette.co.uk/law/shocking-infographic-highlights-housing-advice-deserts/5056873.article>).

²⁶ The Law Society, 'End legal aid deserts' (<http://www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/>).

²⁷ Sue James, 'I am a legal aid lawyer for people facing eviction – they are the real Daniel Blakes', *The Guardian*, 18 March 2017 (<https://www.theguardian.com/public-leaders-network/2017/mar/18/legal-aid-lawyer-tenant-housing-eviction-i-daniel-blake-homelessness>).

²⁸ *Ibid.*

²⁹ *Cuts That Hurt* (n11), p9.

crisis rather than ensuring preventative measures are in place has in many cases pushed the costs from the legal aid bill onto courts and local authorities.³⁰

Obtaining early advice on matters of social welfare would prevent huge costs consequences in the long-term. An individual whose benefits have been unfairly stopped may also be suffering with debt problems. They may then be unable to pay their rent and face eviction. Although entitled to legal aid at this point, they may be unable to access advice locally and in time. Homelessness in turn affects their ability to access benefits, sustain employment and may lead to health problems and place increasing strain on the NHS and other public services. It may lead to mental health problems and crime, and will have a huge impact on family relationships. Problems can quickly escalate when vulnerable people are left without a means to enforce their rights, which effectively become meaningless. Although difficult to estimate the precise financial cost of these knock-on effects, it is clear that a relatively small spend on timely legal advice could provide a quicker, cheaper solution to the root causes of legal problems.

Even earlier advice on relatively minor landlord and tenant issues including rent increases and relationship breakdown means that problems are less likely to reach crisis point.³¹ Nipping the root cause of these problems in the bud can prevent problems spiralling and causing far more individual harm and cost to the state.

The increase of litigants in person has led to many reported problems, including cases taking up more court time as the unrepresented party is unfamiliar with the law, court processes and how to cross-examine effectively. Members of the judiciary themselves have pointed to the existence of an increased risk of miscarriages of justice as judges must, in a limited amount of time, research the law and unpick the evidence themselves.³² This is of particular concern in the family courts where the decisions made have an impact upon children.³³

The National Audit Office produced a report in 2014 examining whether the legal aid cuts provide value for money. They concluded that the estimated overall cost of the legal aid cuts to the Ministry of Justice alone was £3.4 million.³⁴ This comprises the increased cost of unrepresented parties for HM Courts & Tribunals. Wider costs to the government will also result from an increased need for healthcare and support from other welfare support systems.³⁵

The potential for the coalition government's legal aid cuts to lead to this myriad of problems was brought to the attention of the Ministry of Justice before the Bill was passed.³⁶ With the general election imminent, we must urge the next government to acknowledge the mistakes made and take positive steps to correct them.

Legal aid myths

*'Lawyers are 'fat-cats' who exploit the system to earn more money'*³⁷

Lawyers working in legal aid-funded law centres earn on average £25,000 per annum.³⁸

³⁰ House of Commons Justice Committee, 'Impact of changes to civil legal aid under part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012', March 2015 (<https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31111.htm>), Part 8.

³¹ Ibid.

³² Magrath (n12).

³³ Maeve McClenaghan, 'Family courts: self-representation hinders justice say magistrates', The Bureau of Investigative Journalism, 1 June 2014 (<https://www.thebureauinvestigates.com/stories/2014-06-01/family-courts-self-representation-hinders-justice-say-magistrates>).

³⁴ National Audit Office, 'Implementing reforms to civil legal aid', 17 November 2014 (<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>), p4.

³⁵ Ibid, p19.

³⁶ Magrath (n12).

³⁷ See more at: The Secret Barrister, Guest post by CrimeGirl: The fallacy of the fat cat legal aid lawyer, 24 February 2017 (<https://thesecretbarrister.com/2017/02/24/guest-post-by-defencegirl-the-fallacy-of-the-fat-cat-legal-aid-lawyer/>).

'Why should tax-payers' money be spent defending criminals?'

Put simply, defendants in criminal trials are innocent until proven guilty. This principle is the foundation of our criminal justice system. A public trial with equality of arms between each party is the best way for us to ascertain whether a defendant is in fact guilty or innocent.

If as a society we are to deprive individuals of their liberty as a form of punishment for committing a crime, we must provide them with the means to effectively challenge the accusation. It is in the interests of the accused, the victim and the public at large to do as much as possible to ensure we are convicting the right people.

It is also worth repeating that legal aid is not only spent on defending those accused of crimes. Problems needing the support of legal aid are everyday problems of ordinary people: debt, housing, family and employment disputes amongst many others.

'Our legal aid system is one of the most generous in the world – why does it need more funding?'

The Bach Commission reports that research from the European Commission for the Efficiency of Justice shows that our overall justice bill is at the European average. Whilst in England and Wales sources of legal advice are limited to law centres and trade unions, continental countries benefit from a wider range of legal support services provided via health centres, insurance providers and welfare organisations.³⁹ In addition, the fact that our justice system is adversarial and based on common law makes it more expensive than legal systems where the law is codified and judges carry out much of the investigative work, rather than opposing parties.

Conclusion

Together with a well-funded public education system and a National Health Service, legal aid forms part of the bedrock of the welfare state in the UK. LASPO has reduced the country's legal aid bill but at great human and wider economic cost.

If we are to accuse people of crimes, withhold benefits, and decide that someone does not have the right to live in this country, we must also ensure that there is an effective means of redress for those affected, regardless of their personal wealth.

Sir Oliver Heald announced in January that the government will be undertaking its post-legislative review of LASPO this year, expected to be completed by April 2018.⁴⁰ It remains to be seen if this timetable will remain in place following the election.

Ensuring that the legal aid system is fair and protects the most vulnerable is one of LCHR's top priorities. We encourage Labour MPs and members to continue to campaign for positive change to the provision of legal aid and access to justice.

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³⁸ Liberty, 'Legal aid' (<https://www.liberty-human-rights.org.uk/human-rights/justice-and-fair-trials/legal-aid>).

³⁹ The Bach Commission Interim report (n2), p8.

⁴⁰ Monidipa Fouzder, 'At last: MoJ announced timetable for LASPO review', The Law Society Gazette, 18 January 2017 (<https://www.lawgazette.co.uk/law/at-last-moj-announces-timetable-for-laspo-review/5059442.article>).