



## **GARDEN COURT CHAMBERS' RESPONSE TO CALL FOR EVIDENCE: CIVIL LEGAL AID REVIEW**

This consultation response is submitted by Garden Court Chambers, which is a multi-disciplinary Chambers based in London. It has over 180 barristers (including 30 King's Counsel) and is one of the largest in the country with over 40 years of experience in cases with a human rights context. We are the largest chambers delivering services funded by legal aid. Details are here: [Barristers | Garden Court Chambers | Leading Barristers located in London, UK](#)

34 of our members practise in family law, around 80 – 90 practice in civil law, comprising public and administrative law, housing law, inquests, immigration, civil liberties, and community care. A third practise in criminal law.

We act predominantly for individuals or not-for-profit organisations. A large part of this work is either legally aided or, in the case of not-for-profit organisations, pro bono, or with the benefit of a protective costs order. Some is conducted on conditional fee arrangements.

Although not always "high value" in monetary terms this work is often of fundamental importance to the individuals and organisations concerned. It often has wider public interest implications, playing a key role in access to justice often for disadvantaged groups, in ensuring equality before the law and in maintaining the rule of law by holding the executive and other public authorities to account.

Significant cohorts of the clients we represent face barriers in access to justice and effective participation in legal proceedings arising from factors such as physical or mental disability, race and ethnic origin, language, gender, education and social class. Many have a past experience of violence and abuse and are victims or potential victims of serious human rights violations in the UK and/or abroad.

### **Executive Summary**

Throughout this consultation response document, we have highlighted the pressing and urgent issues that are affecting civil and family legal aid legal aid suppliers. We sincerely hope that this review will mark the beginning of a new era in which the importance of legal aid work is recognised, and urgent steps taken to prevent it from dying on its feet.

We consider the urgent issues affecting all civil and family legal aid areas of law are:

1. A failure to maintain means criteria at a level that is in line with inflation and the increased costs of living is resulting in fewer people being financially eligible for legal aid year on year and those who are living with barely sufficient financial resources to live are forced either to find the money to fund expensive private legal fees or to represent themselves. The means

test should be urgently reviewed and increased. In any event, we request that a hardship review mechanism is put in place to allow for some discretion to allow funding in cases where the applicant suffers real financial hardship, their case is complex, and it would be difficult for them to represent themselves adequately.

2. The removal of Universal Credit as a passporting benefit for those earning over £500 creates an additional unnecessary and wasteful burden on legal aid providers to assess whether a potential applicant will meet the legal aid means test and a burden upon the applicant to produce additional documentary evidence of their means to fulfil the legal aid means test.
3. There is an urgent need to reinstate early properly remunerated legal help advice across all areas of law to help prevent unmeritorious applications reaching the overburdened court system and to encourage early settlement of cases where that is appropriate.
4. There is a need for increased remuneration for solicitors and barristers in an effort to halt the decline in available providers of legal aid services. Fees have not increased since 1996, an astonishing 27 years. There is difficulty recruiting and retaining solicitors and barristers in publicly funded areas of work due to poor remuneration and therefore causing concerns over the medium to longer term sustainability of legally aided practices.
5. There is difficulty attracting new entrants to the profession due to better remuneration and work life balance in other areas of law. As experienced lawyers leave the profession, there are insufficient junior lawyers ready willing and able to take the place of those departing. Ultimately the failure of the state to ensure adequate legal aid lawyers are available now will result in time with fewer experienced lawyers who are in a position to take up judicial office or silk.
6. Legal aid lawyers have complained for many years that the administration of legal aid difficult and burdensome.
7. It has been evidenced that there are decreasing number of providers resulting in advice deserts in some areas of law and geographic locations and low numbers of providers in some areas such that potential clients have to travel further afield to find representation
8. We consider that there should be an urgent review of scope of legal aid, under LASPO, Schedule 1. In particular, we urge that legal aid, and early legal advice, is reinstated for welfare benefits cases, debt, private family law cases (removing the need to evidence domestic violence or child abuse) all areas of housing law, and non-asylum immigration cases. In the medium term, we suggest that the restrictions on scope in LASPO are repealed and that legal aid is restored to all cases, subject to means and merits, except for libel and personal injury (the pre-LASPO position).

## Response to Questions

### Overarching questions

These questions seek views on broad, cross-cutting areas related to civil legal aid such as suggestions for improvements, future risks and opportunities, and the wider benefits of civil legal aid.

#### 1. Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes?

Please see the legal aid category specific responses set out in para 1.1. below.

#### 1.1. Do you have any suggestions of changes – both short-term and longer-term changes – that could improve each of the following categories of law?

##### a. Family

The family law team at Garden Court Chambers comprises 34 barristers who undertake a range of publicly funded and privately paid work in both public family law proceedings and private family law proceedings. Within the last three years, two of our barristers have transferred from practising as solicitors in legal aid practices and therefore have unique insight into how the legal aid system operates for clients from the outset of a case.

LASPO 2012 has had a severe and deleterious impact upon on the availability of legal aid in private family law disputes. We consider that all matters taken out of scope by LASPO should be returned to being in scope. The lack of availability of early advice to separating couples under the legal help scheme has caused an increase in matters taken to court where there is then an increase in the number of litigants in person. We have noted that court time appears to be spent on some issues that had a litigant in person had legal advice, the case may not have reached court.

Case example - The father made an application for a Child Arrangements contact order in relation to his two children. The mother was denying him contact due to her suspicions that he was sexually abusing their daughter. The court appointed a Guardian to represent the children's interests under FPR rule 16.4. A fact - finding hearing was listed to deal with the mother's allegations against the father. Both parents were litigants in person. Under cross examination on behalf of the Guardian, the mother admitted she had no evidence and only suspicion about the father and wanted the court to decide whether it was safe for the children to see their father. She lacked any understanding that in a fact finding hearing she had the burden of proving the allegations. Two days of court time were used before reaching a point that where she accepted that there was no basis to her case.

The family courts are struggling to contain listing issues. At present the Central Family Court is listing final hearings in 2025 even in public law family matters which are treated as the most urgent. Private family law matters are often removed from the court list at the last minute to accommodate other cases and then suffer lengthy delays before being relisted.

There are issues with the operation of LASPO in family law matters which we consider merit particular attention. These are set out fully below. The issues we wish to particularly mention are in relation to

1. Legal Aid for domestic violence victims
2. The operation of the Exceptional Case Funding Scheme
3. The availability of legal aid for parents and carers of children subject to Secure Accommodation and Deprivation of Liberty Orders

## **1. DOMESTIC VIOLENCE VICTIMS**

Although Parliament's intention was to retain the availability of legal aid for domestic violence victims, in practice we consider there are a number of structural barriers in place that obstruct a victim from easily obtaining legal aid. These are:

- i. The s33 and s34 LASPO evidential gateway
- ii. The stringent means assessment test
- iii. The requirements for a victim to obtain documentary evidence of means
- iv. The greater burden placed upon solicitors when applying for legal aid in a Trapped Capital case.

The Ministry of Justice's Harm Report found that the "most important and frequently mentioned form of structural disadvantage was lack of access to legal representation"

[Assessing Risk of Harm to Children and Parents in Private Law Children Cases \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

### The s33 and s34 evidential gateway

The evidential gateway requirements create an unnecessary and burdensome barrier to the domestic violence victim obtaining legal aid. Despite the Judicial Review proceedings brought by Rights of Women (*R (on the application of Rights of Women) v The Lord Chancellor* [2016] EWCA Civ 91) which removed the time limits on the period in which the domestic violence had to have occurred, there remain many barriers to domestic violence victims obtaining the evidence to pass the evidential gateway. Domestic abuse has often not been reported previously to any professional and reports are often made to lawyers first due to the understanding victims have that their lawyer is under a duty of confidentiality unless and until the victim decides to speak out. Requiring a domestic abuse victim to either obtain written evidence of the abuse or take her abuser to court in non-molestation proceedings are not attractive options and, in some cases, may even jeopardise the victim's sense of safety and security.

## The means assessment

Legal aid for domestic violence victims remains means tested and therefore a significant number of victims are excluded from accessing justice due to not meeting the stringent requirements of the means test but neither being able to afford to pay for private legal fees.

### Case example

- Victim of GBH from her ex-partner who broke an eye socket, a plate had to be fitted.
- Three-day final hearing, following extensive proceedings.
- Father is able to pay for direct access lawyers and solicitors as he is not having to care for the two children.
- Mother, who is a qualified teacher and has to work to meet needs of her children and pay rent and outgoings has no money after payment of expenses, is not eligible for Legal Aid. Earns less than £2,500 pcm.

### Case Example

- In an application for a Child Arrangements Order, the applicant wanted help with refuting her former partner's false claims of 'child abduction under the Hague Convention'. The applicant can no longer afford to pay for a barrister to represent her due to her low income and the cost of living. She is not eligible for legal aid due to her means being marginally over the disposable income limit. She needs legal representation at an upcoming High Court Hearing. Her only option is to seek pro bono assistance.

It is particularly concerning that as a result of the civil means review 2023, Universal Credit was removed as a passporting benefit for those earning more than £500, therefore placing another barrier to accessing legal aid for domestic violence victims who work and yet whose means are so low that they depend on state benefits to supplement their income.

The domestic violence income waiver does not of itself offer sufficient protection in ensuring domestic abuse victims are eligible for legal aid as it often requires the victim to pay a high monthly contribution to their legal aid, which has in our experience caused women to decline the legal aid offer. Little is known of what then happens to these victims, it can only be assumed that some represent themselves in their litigation, some decide not to take legal action leaving themselves at further risk and some turn to pro bono services or pay for their case privately when they can ill afford to do so. Rights of Women noted the gap in knowledge as to what happens to the women who fall outside of legal aid eligibility in their response to the Family Justice Review 2010

[Microsoft Word - Rights of Women response - Family Justice Review call for evidence Sept 2010.doc](#)

In 2021 a survey by Surviving Economic Abuse found that more survivors had to self-represent in legal proceedings than were able to access legal aid .

[Denied-justice-October-2021.pdf \(survivingeconomicabuse.org\)](#)

The National Audit Office (NAO) found that the reduced sources of funding as a result of LASPO led to a 22% increase in cases involving children and a 30% increase in all family cases in which neither party had legal representation.

[Litigants in person in the court system: access to justice | Association of Consumer Support Organisations \(ACSO\)](#)

### Documentary evidence of means

By virtue of fleeing domestic violence, victims are unlikely to be able to meet the stringent requirements of the means test. Legal Aid applicants are asked to provide evidence of their means such as bank statements, wage slips, benefit letters, mortgage or rent statements. The stringent requirements create another structural barrier to victims obtaining legal aid. Although there are provisions for solicitors to grant emergency legal aid before having all of the documentary evidence, in reality this merely presents an opportunity for the applicant to delay providing documents rather than allowing them relief from the burden of providing evidence that may not be within their power to obtain without placing themselves at risk. For example, without knowing a bank account number or holding proof of identity, the applicant is unlikely to be able to obtain documents directly from the bank.

### Trapped Capital

Domestic violence victims are also a group disproportionately affected by cases involving “Trapped Capital.” With capital tied up in a home held jointly with their abuser, the victim has the additional structural barrier of finding a solicitor with the time and energy to submit a carefully drafted legal aid application that identifies the trapped capital issue and requests that the application for legal aid is passed to a ‘lead means assessor’ for a decision. Solicitors are unlikely to risk incurring fees without having a decision from the LAA because their own fees would be at risk of not being paid. Delay whilst having the decision made by the LAA rather than a grant of emergency legal aid by the solicitor can be detrimental to the conduct of the case, including if representation is not available by the time of the hearing for which it is required. The system for applications in Trapped Capital cases could be sped up by removing the barriers preventing solicitors granting Emergency Funding in such cases. This would entail removing the threat that the solicitor will not be paid for work undertaken before the grant of full legal aid, if, the solicitor having acted in good faith and with a degree of due diligence, granted emergency funding but was then found that the Trapped Capital decision was not correct. In the vast majority of cases, we are confident that where a victim says the capital is trapped, it is indeed very likely to be so and therefore there is unlikely to be any real loss to the legal aid fund but a removal of a disincentive to solicitors granting emergency funding in cases where urgency of action is required.

### Case example

- Representing the mother in Children Act proceedings where the father applied for a Child Arrangements Order for a shared 'lives with' order. Our client alleged domestic abuse from the father, including physical abuse and emotional abuse. She states that the domestic abuse has affected the children emotionally. She was advised that she was ineligible for legal aid due to savings for the children's school fees. She had £9,500 in savings but set aside for children's school fees as the father was allegedly refusing to pay them. In addition, there was a house worth £1m with £100k left to pay on the mortgage. The applicant alleges that the father is being obstructive in the sale of the property. She is unemployed and had a monthly income of £798 and therefore would be eligible on the income test. Despite the commitment she had to upcoming school fees and the equity in the property, her savings and the equity were not treated as trapped capital.

When it is known that a victim will suffer many incidents of abuse in silence before reporting abuse any barrier to accessing legal advice is in our view a barrier too many. The system needs to be simplified to allow domestic violence victims urgent access to good quality early legal advice and representation. We believe that the only way to achieve that aim is to entirely remove the evidential gateway imposed under s33 and s34 LASPO, for Universal Credit to be reinstated as a fully passporting benefit for the means assessment process to be simplified and to remove disincentives to solicitors granting emergency legal aid in cases where some uncertainty lies as to whether capital is "trapped."

## **2. THE WORKING OF THE EXCEPTIONAL CASE FUNDING SCHEME IN PRIVATE LAW PROCEEDINGS**

In 2017 the Public Law Project produced a guide to assist solicitors identify cases that may be suitable for an exceptional case funding application to be made due to a dearth of attempted applications immediately following the implementation of LASPO. In the period July to September 2023 11% of the total applications for Exceptional Case Funding were made in the family law category. In that period of 87 applications made only 38 were granted.

We are concerned that the scheme is still not operating to provide a safety net for those exceptional cases that require funding. There are in our submission barriers to applications being made in family law cases caused by

- The reduction in the number of suppliers providing family law legal aid particularly in private family law legal aid cases.
- Busy professionals working long hours without time to devote to work for which there is no remuneration.

- Statistically poor chances of a successful outcome to an application lowering the motivation for suppliers to attempt to make borderline applications.
- Difficult process for legal aid applicants to navigate themselves without help from a lawyer.
- The ECF system only allows for representation where the applicant is in any event financially eligible for legal aid and provides no discretion for representation of those where means may be borderline but real hardship is caused by not being represented. We suggest that in any event a hardship review should be introduced.

We are aware of many cases in which parties or intervenors to proceedings in both private and public law proceedings have appeared before the court unrepresented despite being accused of very serious allegations such as domestic violence allegations, allegations of non - accidental injury and allegations of sexual abuse.

#### Case example

- o Father seeks to establish contact with his two sons who currently reside with their mother. He began proceedings to establish contact, however, the mother has filed domestic abuse claims to counter his request for contact. Applicant claims there is no truth behind those statements and the alleged behaviour is due to his diagnosed ADHD. His disability significantly impacts on his ability to participate in proceedings. He can't afford lawyers.

We submit that the scheme needs to be amended to allow for representation of parties and intervenors in a greater number of cases, especially where the unrepresented party is at a significant disadvantage being unrepresented when other parties in the same proceedings have the benefit of legal aid representation. Equality of arms before the law is an important principal which we submit legal aid should seek to support.

One particular area of work that requires careful reconsideration is that of unrepresented litigants who are accused of domestic violence. Whilst the Domestic Abuse Act 2021 introduced a prohibition on an alleged abuser cross examining their alleged victim directly and requiring the court to appoint a Qualified Legal Representative to undertake the cross examination, that scheme has failed to achieve its aims due to the poor remuneration and low uptake of QLR accreditation by barristers. We consider that it would be better for legal aid provision to be made so that those accused of domestic abuse are fully represented and assisted to submit their evidence to the court and at fact finding hearings.

#### Hardship review

We are aware of many cases where real disparities occur between the representation one or more parties have compared with another accused of serious allegations. Intervenors in care proceedings are particularly at risk of appearing before the court unrepresented when other parties may be represented by a team of lawyers including a KC in serious non accidental injury or sexual abuse



cases. Another group often hit disproportionately in this way are grandparents and family members seeking to join care proceedings to seek the care of the children into their care.

We submit that it is essential that a hardship review mechanism is introduced to civil legal aid. The right to request a hardship review already exists within criminal legal aid, which can result in a person being deemed eligible or having their contributions reduced or waived. We recommend that a similar mechanism should be introduced to civil legal aid.

Case example – ineligible on means

- One of our barristers represented a mother in care proceedings in 2019 where the intervenor [maternal uncle] was not eligible for legal aid as he failed the means test but could not afford legal representation for a 12-day hearing. He represented himself and ended up in the pool of perpetrators for an injury to one child and had findings of sexual abuse in relation to another child made against him. He was completely out of his depth, with the local authority and two of the parents asking the court to make findings against him

### **3. PARENTS AND CARERS OF CHILDREN SUBJECT TO DEPRIVATION OF LIBERTY ORDERS AND SECURE ACCOMMODATION ORDERS**

The Nuffield Family Justice Observatory reported on 09 February 2022 that in 2020/21, 392 applications were made in England and Wales for secure accommodation orders and **579 applications** were made for deprivation of liberty orders under the inherent jurisdiction:

[What do we know about children and young people deprived of their liberty in England and Wales? An evidence review - Nuffield Family Justice Observatory \(nuffieldfjo.org.uk\)](#)

Whilst the young person is granted non means and non-merits tested legal aid in secure accommodation applications under s25 Children Act, their parents are not.

The Nuffield Family Justice Observatory (NFJO) found that 88.5% of parents and carers were not legally represented at any hearings in applications made under the High Court's inherent jurisdiction. Compared with representation in care, placement and adoption applications where the parents are subject to no means or merits test, we consider it anomalous that legal aid is not available for parents whose children are subject to deprivation of liberty proceedings in the High Court or applications for secure accommodation orders.

With care applications often running alongside secure accommodation applications and deprivation of liberty proceedings, our barristers have experience of a number of cases in which funding is available to represent our parent clients in the care proceedings but not the deprivation of liberty proceedings. This creates a tricky situation for the barrister to navigate when the two sets of

proceedings are listed alongside one another in the same Court on the same day. The issues are inevitably interlinked, and the client requires holistic advice on their legal rights, duties and obligations towards their child in exercising their PR and the impact of the local authority sharing PR. The parent's consent to a deprivation of liberty for their child can override the need for an order. We therefore submit that it is necessary for the parents or other carers (such as special guardians or kinship foster carers) to have non means non merits tested legal aid in deprivation of liberty cases. Under the present system the barrister either has to withdraw from those parts of the hearing which deal with the secure accommodation or deprivation of liberty application or offer advice to the parent and represent them in the hearing pro bono. Our principal reason for requesting legal aid certificates for parents to be represented in deprivation of liberty proceedings is so that, when care proceedings and the secure or inherent jurisdiction are listed on separate occasions, the parent or carer may be represented in both sets of proceedings.

#### **b. Community Care**

Garden Court Community Care Team is a group of barristers practising in the whole range of community care work almost entirely for clients reliant on legal aid.

Our practices include *core community care* - by which we mean cases concerning: Care Act 2014, NHS Continuing Health Care in the community, Mental Health s 117 care in the community, Children Act 1989 services for disabled children and their families and young people. Community care law is a specialist area of public law requiring knowledge of a range of statutory schemes and case-law, as well law and practice of judicial review in the High Court.

Garden Court Chambers community care barristers are committed to working in this area for legally aided clients.

Garden Court Chambers community care barristers observe that over the years since LASPO (April 2013) there are fewer specialist solicitors practising in the area of core community care law, and this area of practice has diminished. This is despite the need for specialist and experienced practitioners to advise people on their rights to social care services being as great as ever.

Our observations fit with the description of core community care legal aid practice as "*dying on its feet*" - in an article on the state of legal aid in community care in *Legal Action Magazine: LAG and community care: a call to arms to save a dying system*, Karen Ashton, *Legal Action*, October 2022.

The article cites an investigation carried out by Access Social Care: *Community care legal career pathways Research report*, April 2022, by Ashton, Gough, Ling and Sherratt, Access Social Care, page 14, which is telling of the trend in this area which is leading to shrinkage of core community care legally aided work:

*“Practitioners overwhelmingly told us that they find it difficult to run a financially sustainable practice in community care on legal aid funding. The clear evidence from project participants is that the reduction in legal help matter starts is directly related to the strategies that providers have adopted in response. Limiting the type and amount of legal aid work they do, referred to by many as “maintaining a balance caseload” is a way to maintain at least a level of service rather than withdrawing from legal aid altogether.*

***This balance is achieved by taking on a greater proportion of community care case types with better rates of legal aid pay, such as Court of Protection work (which often bypasses the legal help stage), a proportion of privately paying work and grant-funded project work in the not-for-profit sector.”*** (emphasis added)

It has become clear that the legal aid scheme is currently not working in a way that makes core community care law a sustainable area of practice for solicitors, hence the shrinkage in the area of core community care (as opposed to other areas within the wider field such as Court of Protection) and reduction we observe in experienced/ specialist practitioners in this area.

Our experience of working in core community care legal aid cases, discussions with our instructing solicitors and knowledge of research on the subject by Access Social Care tells us that a key issue is the amount of skilled work involved at the pre-action stage in a core community care case. Many cases are resolved as a result of this work without the need to issue proceedings but those that need to proceed to issue of proceedings also required that this careful groundwork is done. This skilled and effective but also protracted work, at the pre-action stage, has to be done on Legal Help, given the way the legal aid scheme is currently organised. It will be seen immediately that resolving cases without the need for issuing proceedings produces a very significant social benefit, not just to the applicant themselves (whose needs are resolved more quickly) but also to local authorities, health authorities and others, as well as the courts, because time and resources that would otherwise go into litigation is instead directed to resolving the dispute at an early stage.

Suggested change to civil legal aid in community care:

Legal aid in community care law would be improved by changes to the scheme that recognise the large amount of skilled and effective pre-action work done in this area. This work should be properly remunerated and not required to remain on Legal Help.

Community care cases almost invariably involve complex facts and histories that require many hours of skilled work at the pre-action stage and therefore currently are carried out on Legal Help.

This is far from routine work, often involving an already long-running dispute between individual and public body by the time legal advice is sought, requiring detailed investigation of facts with reference to the statutory schemes and public law principles; identifying the right questions to client and public body in order to identify the legal point, assess merits and attempt to resolve the dispute pre-action.



Often obtaining instructions from a client is far from straightforward because of a disability impacting on communication or a mental health vulnerability.

Specialist community care solicitors can undertake this work efficiently and effectively to achieve positive outcomes for many clients without the need to issue proceedings. We as counsel are often

instructed to assist in this detailed pre-action work or when instructed to advise with a view to issue of proceedings often the right advice is that further refined points defining the issue and articulating the case should be put forward in pre-action representations before the step of issuing the claim is taken.

The legal aid scheme should recognise the high quantity of pre-action work inherent in core community care law practice (in contrast to some other areas for example Court of Protection work) and the scheme should remunerate this work appropriately (not merely as Legal Help).

### **c. Housing & Debt**

Garden Court Chambers' housing team is one of the largest teams of specialist housing barristers in the country. The vast majority of its work is funded by civil legal aid.

Our work includes the whole range of housing law, including homelessness, possession, housing conditions, social housing allocations and housing-related public law challenges. We act for many of England & Wales principal firms of housing legal aid solicitors and not-for-profit legal aid providers.

Over recent years we have seen many of our professional clients – even the larger and more sustainable solicitors' teams – collapse or down-size. We continue to see many of our professional clients leaving the legal aid profession. We have found it extremely difficult to recruit specialist housing practitioners, and we have been deeply concerned about the viability of our own members' legal aid practices.

Overall, we are extremely concerned about the impact of the present state of civil legal aid on clients. As the specialist trade magazine *Inside Housing* recently put it, 'The decimation of housing legal aid over the past three decades is hurting not just those who need to access it, but the entire social housing sector. And the problem has gone beyond simple fixes.' (Inside Housing, 5 February 2024, at [Inside Housing – Insight – How the housing legal aid crisis is impacting tenants and landlords](#)).

The effects of the post-LASPO crisis in housing legal aid are obvious when we look at the housing crisis itself. Many millions of privately and socially rented homes are in a hazardous condition, while (at the same time) the number of disrepair cases funded by legal aid has been gradually reducing. Possession claims and homelessness approaches are rapidly increasing while legal aid availability continues to diminish.

Changes to both scope and funding have resulted in ‘advice deserts’ covering 42% of the population of England and Wales. Even those parts of the country where legal aid is still available have seen a rapid decline and a wholly inadequate level of service provision: on average, each surviving legal aid provider turns away 26 eligible cases each month.

It is therefore necessary to look at the overall context in order to answer this question. In summary, and as the survey of legal aid practitioners produced for this review found, demand for legal aid now far outstrips supply.

The data annexed to the consultation response shows the following important statistics:

- Spending on housing legal aid between 2018 – 2019 and 2022 – 2023 declined from £43 million to £33 million i.e. a reduction of £10 million or nearly one quarter.
- There was a reduction in controlled work from 69,172 to 48,850 over the same period.
- There was also a reduction in licensed work from 7,466 to 4,285 over the same period.
- There was a reduction in housing legal aid providers from 296 to 208 (nearly one-third) over the same period.

Even this data does not provide a complete picture, for several reasons:

- The figures include VAT and disbursements, and do not simply reflect legal costs proper.
- LASPO has been in effect since 2013, so a far better comparison would be between current data and pre-2013 data (the National Audit Office (Government’s management of legal aid (NAO, 9 February 2024, HC 514) reports a reduction of £728 million in spending on all legal aid since the introduction of LASPO, a 28% reduction).
- Nearly a third of housing legal aid providers do not actually deliver any legal aid cases, according to research by Professor Jo Wilding (quoted in Inside Housing above).
- Even where clients are able to find a legal aid solicitor, there is then a further barrier in finding an available barrister when needed (even as one of the largest legal aid housing teams in the country, we have to turn away a very significant proportion of our work).
- There are huge levels of professional dissatisfaction among practitioners (59%), with particular concerns being low fees, spending time on matters that providers cannot bill for, rigidity of the fee system, administrative barriers to being paid, difficulty in attracting junior lawyers and time needed to manage the service user.
- More than half (55%) of private practices reported not making a profit from their civil legal aid services (33% were loss making, 22% breaking even), and contracts are being given up because they are not economically viable.
- These problems are only getting worse: 42% of participants in the survey reported that, if nothing changes within the next year, they will decrease the volume of their provision or leave the civil legal aid sector, and 40% said that they would leave the sector in the next five years.

### Short term changes

Fee rates have not increased since 1996, and the data cited above shows that civil legal aid continues its serious decline as providers can only work on a loss-making or breaking-even basis. The simple answer is that there must be adequate funding, implemented immediately.



Restoring early advice on welfare benefits matters would prevent further problems of debt, rent arrears and possession claims, saving public money in the form of legal aid for litigation representation, costs of Court resources, legal costs of public authorities and prevention of homelessness.

Scope must be amended to include claims by tenants against landlords for breach of repairing covenant where there is no serious risk of harm to health and safety. Such an amendment would involve minimal cost to the public, since the merits test requires that cases are only brought where there is a 50% or more prospect of success and, where successful, claims for damages for breach of repairing covenant will recover legal costs from the landlord.

#### Medium term changes

To foster a more sustainable legal aid market in the future, we recommend a return to the pre-LASPO position, where all civil cases were potentially within scope unless excluded (as libel and personal injury cases were).

The threshold for means test for legal aid should be increased. The proportion of UK taxpayers that had an income below the gross income for civil legal aid decreased by 11% between 2013 and 2021, from 73% to 62% (National Audit Office, Government's Management of Legal Aid).

The removal of legal advice in the area of welfare benefits (LASPO) was a false economy. Housing legal aid providers are funded to represent a client faced with possession on the grounds of rent arrears, but they are not able to resolve welfare benefits which are often a fundamental cause of rent arrears. Early advice on welfare benefits matters can prevent further problems of debt, rent arrears and possession claims, saving public money in the form of legal aid for litigation representation, costs of Court resources, legal costs of public authorities and prevention of homelessness.

#### **d. Immigration and Asylum**

Garden Court Chambers Immigration team is recognised as the pre-eminent set of barristers in the UK specialising in immigration law. Our team won 'Immigration Set of the Year' at the Legal 500 Bar Awards 2023. We have been awarded the highest 'Band 1' status for immigration law by the independent Chambers Bar Guide rankings and we are ranked in 'Tier 1' in the Legal 500 UK Bar rankings. The team consists of 8 silks and 50 junior barristers. The team specialises in all areas of immigration and asylum law acting on a legal aid and privately funded basis.

Post LASPO legal aid has only been available in relation to asylum applications and applications for immigration bail. According to Anthony and Crilly (2015), "Equality, human rights and access to civil justice: a literature review," the removal of most immigration law from legal aid has had a significant impact on people from certain ethnic minorities.

The Public Law Project and Haringey Migrant Support Centre published a report in September 2023 which can be accessed here [https://plp150.sharepoint.com/sites/LegalAid2/Shared Documents/Resources/Research & policy outputs/Oceans of Unmet Need Report and Background Briefing/231807 Oceans of unmet need v 3 final \(publiclawproject.org.uk\)](https://plp150.sharepoint.com/sites/LegalAid2/Shared Documents/Resources/Research & policy outputs/Oceans of Unmet Need Report and Background Briefing/231807 Oceans of unmet need v 3 final (publiclawproject.org.uk)) setting out the considerable problems that immigration clients have finding or being referred to legal aid immigration solicitors. The chilling conclusions it reaches are that:

“The immigration legal aid sector at present simply cannot support all those who need, and are entitled to, help. It is no longer accurate to say that the immigration legal aid market is failing it has failed. Advice deserts continue to grow. More and more providers give up on legal aid. People who require legal aid, and those who provide it, are sinking in an ocean of unmet need.”

We echo those conclusions and raise concern that those who will be seeking advice in relation to deportation applications under the Illegal Migration Act 2023 will cause further pressure on legal aid providers already working at capacity and beyond due to the very tight deadlines imposed by the Act.

The recommendations we make for change in relation to legal aid in immigration matters are:

1. That, subject to means testing, the scope of legal aid needs to extend to include immigration and citizenship including Article 8 family life rights which were removed by LASPO and should not be limited to protection claims.
2. Raise remuneration rates to enable those working in the field to afford to do the work. Remuneration rates were last considered in 2011 and were cut on that occasion. They have not been increased since 1996.
3. No legal aid work should be done ‘at risk’ of not being paid (the work is either done in accordance with professional standards or not; if so done, it should be paid).
4. Whether through on-line technology or face-to-face delivery, regions of England and Wales with advice deserts or limited capacity should be provided for so advice is available to those who need it.
5. The administration of legal aid contracts ought to be simplified, there is no reason not to trust solicitors and for the Legal Aid Agency to scale back its level of control.
6. Access to early and good advice can and will enhance early dispute resolution alone or taken together with the proposals concerning enhanced Home Office policy and leadership decisions. If the initiatives set out below were implemented, there would not necessarily be any overall increase in spend but rather better and greater remuneration for the fewer cases that require more detailed advice, and which proceed through the courts:



CHAMBERS

- (1) **Deportation:** the restoration of *means-tested* legal aid for legal advice and thereafter for representation before the FTT. These appeals usually take time because the person concerned has British citizen family members protected by the right to respect for family life (Article 8 ECHR) and the Human Rights Act 1998. There may be children who stand to lose a parent and there may overlap with proceedings in the family courts. We consider

it better to resolve things early through high quality legal advice and representation than to prolong matters and end up with last-minute but well-founded challenges to removal.

- (2) **For those seeking to join or remain with British family members:** the restoration of *means-tested* legal aid for legal advice on applications and thereafter representation before the FTT. The lives of British citizens and their family members are protected by the right to respect for family life (Article 8 ECHR) and the Human Rights Act 1998. It is perverse not to enable the people affected to have access to good quality initial advice and representation. The harm done at present to British citizens and their family members includes splitting up families and damaging children's lives, something which has long-term consequences for those innocent victims.

#### h. Public Law

Garden Court Chambers Public Law Team is a leading set of barristers practising in public law. While there is overlap in our work with other Chambers' teams' substantive areas of law, the Public Law Team is where Chambers' specialism in administrative law is concentrated, as regards our expertise in the High Court and Upper Tribunal on applications for judicial review, and our work in other administrative tribunals and courts. The Team has expertise not only in constitutional and administrative law but also in cross-cutting public law principles that apply in all areas, as well as in Equality Act 2010, Human Rights Act 1998, EU Withdrawal Agreement, and Retained EU/Assimilated Law. We have over 60 barristers including 10 KCs who practise in this field.

Judicial review work is peculiarly vulnerable to being poorly paid as a consequence of existing civil legal aid arrangements in areas of work that often bring wider benefit than to the individual claimant and where the claims are always brought against public authorities who do not have an interest in properly funding such claims. Hence the importance of the independence of the Legal Aid Agency.

Payment for a judicial review claim by the LAA is 'at risk' of not being made unless permission to proceed with judicial review is granted at a preliminary stage. However, no claim is lodged unless in the exercise of professional judgment the lawyers instructed consider it to be arguable. Having had to read into a case, advise on evidence, draft grounds, and file the claim, the lawyers instructed ought to be paid. Work done in accordance with professional standards should be paid if they meet merits criteria for being funded and not simply subject to the additional hurdle of only being paid if the claim is granted permission by the Court at a later date.

There are many categories of reasons why permission to proceed might be refused: (i) the claim lacks arguable merit in a judge's opinion, (ii) new circumstances render the claim solely of academic





CHAMBERS

interest, (iii) practical relief is obtained by other means, (iv) the defendant makes a fresh decision, etc. Coming second is an occupational hazard in these circumstances. But it is not a reason to go unpaid. It is not the job of public lawyers to subsidise the justice system through the provision of unpaid labour as a benefit in kind. **Our recommendation is that fees for bringing judicial review claims ought no longer to be ‘at risk’ of not being paid.**

That fees in a judicial review case are at ‘at risk’ of not being paid does not disincentivise a lawyer from bringing a hopeless claim. Instead, professional ethical standards, file audits, and regulators see to that. Indeed, perhaps perversely, where fees are ‘at risk’, if there were unscrupulous lawyers they might be incentivised to churn high volumes of claims with a view to settling them with favourable costs orders.

In addition, what is now considered an ‘uplift’ on fees where so assessed by LAA staff (up to 100% of the hourly rate where cases are deemed complex and/or urgent) should simply be added to and baked into the hourly rate so as to create a firm foundation for an adequate rate of remuneration. Without greater certainty as to income stream, lawyers with the ordinary expenses of a settled life are disincentivised to sustain a practice in this area.

Finally, even with the ‘uplift’ added to the fees, remuneration rates need to be raised. Up-rating is standard even in public sector pay. That, notwithstanding the inflationary rise in living costs, there have been no raises in the rates in 27 years in this one sector makes the case for an increase in the rates of the first priority and indeed an urgent priority. A want of leverage by civil legal aid lawyers and it not being in the interests of the Defendant/Respondent public authorities is not a reason to allow such draconian real terms pay cuts to go uncorrected.

## Inquests

Exceptional case funding is awarded pursuant to section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the “Act”) in two circumstances. Firstly, where Article 2 ECHR is engaged and secondly, where there is wider public interest in the case.

### Article 2

The increasing trend following case law supporting this approach is, in all but automatic cases, to leave the determination of whether article 2 is engaged until the conclusion of the evidence at the inquest: see *R (Grice) v HM Senior Coroner of Brighton and Hove* [2020] EWHC 3581 (Admin) and *R (Boyce) v HM Senior Coroner for Teesside and Hartlepool v Middlesbrough Borough Council, Tees Valley Care Ltd* [2022] EWHC 107 (Admin) at para 74:



*It is plain from analysis of the authorities that notwithstanding that the natural reading of sections 5(1) and 5(2) tends to suggest there is a difference in scope of the two types of inquest, in practice that is not the situation. Recent decisions in the Court of Appeal ( Sreedhan and Maguire set out in paragraph 70 above) make that clear. I accept Mr Hough's submission that the practical solution is for inquests to address the broad circumstances especially if there is a possibility that Article 2 may become relevant in the future. In those circumstances the enquiry should be broad enough to cover the ground for the coroner or jury to make the necessary conclusions.)*

The difficulty in this approach is that it limits the circumstances in which the family of the deceased can obtain public funding.

The Lord Chancellor's Exceptional Case Funding Guidance sets out that where the Article 2 operational or systemic obligations are not automatically triggered, the question should still be asked as to whether funded representation for the family of the deceased is required to discharge the procedural obligation.

Where the procedural obligation is triggered, paragraph 21 of the Lord Chancellor's Guidance nevertheless asks whether funding is required to discharge the procedural obligation in conducting the inquest. This necessitates a review of

- i) the nature and seriousness of the allegations against State agents.
- ii) previous investigations into the death; and iii) the particular circumstances of the family.

As such, funding is not automatic even in an article 2 inquest. But where the coroner has not determined that the inquest will proceed as an article 2 inquest and ruled that the question will be kept under review, the family of the deceased will have to make their article 2 arguments directly to the Legal Aid Agency and hope that it concludes that article 2 is in fact engaged.

Wider public interest

Guidance as to when the second circumstance in which public funding may be available - a "wider public interest determination" - is set out in paragraphs 27 and 29 of the Lord Chancellor's Guidance:

*"a determination that, in the particular circumstances of the case, the provision of advocacy for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the applicant and members of the applicant's family.*

*In the context of an inquest, the most likely wider public benefits are the identification of dangerous practices, systematic failings or other findings that identify significant risks to the life, health or safety of other persons."*

The wider public interest must be significant, and it must be necessary that the family is represented in order to give effect to it. This will require a consideration of whether there was a systems failure, or whether a system was in place but not followed and whether this was because of poor training or some other systemic failing. Where improvements can be identified to avoid future failings, it should be considered whether that will bring significant benefits to a significant number of people. Consideration will need to be given as to whether there was an independent review that recommended improvements or whether the inquest can identify further improvements.

As such, the second circumstance is a high hurdle to achieve unless there is evidence that a broader failure may have occurred, which in most circumstances would indicate that article 2 is engaged in any event.

Therefore, the coronial practice of waiting to make a determination as to whether article 2 is engaged until the end of the evidence at the inquest can unfairly preclude the availability of legal aid. This has occurred in a number of cases members have been directly involved in over the past year and solicitors have told us that it is a regular problem.

An expansion of the Guidance to recognise this practice – for cases where article 2 has not been ruled *out* and is being kept under review given the circumstances of the death in the context of State action – would greatly assist the fair and proper representation of families at inquests.

Family members of the deceased are in a very vulnerable position when having to engage with the coronial system. Quite often they attempt to navigate the system alone and seek legal assistance late in the process. A member recently had a case involving a death in police custody where the sister of the deceased attempted to conduct the inquest herself against barristers for four other interested parties. The inquest was adjourned and re-commenced for other reasons, but she was heavily advised by the coroner to obtain legal assistance. In many cases, a final inquest hearing (often with a surprisingly short listing) may be imminent when legal assistance is sought.

Since the coronial jurisdiction is administered by each local authority and not HMCTS, inconsistency in access to guidance about legal and support services is a regular feature of coroners' courts. As has been repeatedly suggested, bringing the Coronial system under the umbrella of HMCTS would significantly improve access to justice, in particular through consistent access to guidance concerning obtaining legal aid.

#### **j. Claims Against Public Authorities**

This section is answered by the Garden Court Chambers Civil Liberties Team. For their biography, please see section h. above.

In the area of civil actions against the State, we envisage that there may be some problems given the broadening of cases subject to the fixed fee regime introduced in October 2023 by amendments to the Civil Procedure Rules. Practitioners are concerned at this early stage with regard to the uncertainty as to whether success in a case will result in a lower *inter partes* recovery than legal aid rates and whether this will affect the LAA's decision to fund a case in the public interest. We are keeping this situation under review as cases progress.

#### **k. Welfare Benefits**

Please refer to the comments made under paragraph c for Housing and Debt above. We consider it essential that Welfare Benefits advice is brought back into scope.

#### **2. What are the civil legal aid issues that are specific to your local area? Please provide any specific evidence or data you have that supports your response.**

Garden Court Chambers is located in London, although we provide a service nationally and our barristers are often called upon to travel to other regions of the country to provide representation in court.

London is the most expensive place in the country to live and work and of course for providers to set up and maintain a legal aid practice due to the higher costs of rent and overheads which often attract a London premium. We are aware of many practices ceasing to undertake legal aid work since the introduction of LASPO and others that have limited the areas of legal aid work or types of cases that they will take on. What is concerning is that some of those practices have long held a strong commitment to legal aid, are some of the largest legal aid suppliers in London and nationally and that despite their diversifications into other areas of law so that they can effectively "subsidise" legal aid departments and allow those departments to function at much lower profit levels than other departments, nevertheless they have found it unsustainable to maintain a full service legal aid offering.

The combination of a lack of increases to the underlying hourly remuneration rates for civil legal aid since 1996 and the increased costs of maintaining a practice are very much an issue of every legal aid practice in London.

The costs of living in and around London are reported by younger members of the profession in particular to be prohibitive when faced with low salaries (trainee solicitors and newly qualified solicitors) and insecurity (pupil and early years of call barristers). It is becoming significantly more



CHAMBERS

difficult for legal aid firms and chambers to recruit and sustain staffing levels. This is not a problem only with recruitment at the junior end but with retention and recruitment of senior lawyers too.

Examples:

- Chambers has this year agreed to provide a specialist housing pupillage due to the difficulties our housing team has had recruiting junior tenants.
- There is evidence, for example within the Access Social Care report of difficulties with recruitment into the profession, and specifically in relation to community care law.
- It is also our observation from speaking to students looking to enter the legal professions (e.g. on open days) that there is little awareness of community care law as an area of practice amongst this cohort (through no fault of their own).

**3. What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers? Please provide any specific evidence or data you have that supports your response.**

The LAA's CCMS platform that we use to claim Barristers' fees presents the following issues:

1. For us to claim a payment on account, upload a FAS claim or submit a final bill on CCMS, the solicitors need to allocate funds for each counsel on CCMS. This means that unless the solicitors allocate funds on CCMS we cannot make a claim for Counsel's fees. A lot of solicitor firms do not allocate funds to counsel on CCMS unless they are chased multiple times. This creates an added layer of administration for Chambers. Prior to CCMS where there was a paper type certificate, once there were funds available on the funding certificate, we could apply for payments on account or submit a FAS claim without the solicitor's input.
2. For civil certificated cases (excluding cases that fall within the Family Advocacy Scheme; FAS), the individual fees claimed by counsel has to be billed on a line-by-line basis within CCMS, therefore duplicating the billing process on both our internal Case Management System and CCMS. When billing on a line-by-line basis, we have to choose court level, barrister level, VAT, barrister name etc on each entry. We have already logged in to bill for a particular barrister so if we could just enter this information once, it would be a benefit and save time. Additionally, for FAS cases, CCMS can accommodate upload of Counsel's billing and therefore does not require the need for line-by-line billing on CCMS. Extending this across to the other civil certificated cases would assist Chambers' administration immensely.
3. When a case plan has been agreed and an uplift approved, we still have to provide justification for the enhancement on Counsel's fees, it would save time if we did not need to provide this again as already approved within the case plan.
4. It would be helpful for CCMS to show standard certificate information within Chambers/Counsel's log in, such as date of issue of funding certificate, scope, discharge date, etc. At present CCMS shows only the funds allocated to Counsel and any payments to Counsel.



5. Where cases have been registered as High Cost and counsel are assigned to a case, we should be allowed to claim POAs whilst the case plan is being agreed. At present, counsel has to wait for Case Plan Stages to be agreed, cost limits to be extended and funds allocated to counsel. The current process means that POAs cannot be claimed until Case Plan Stages and extension to funding is approved and agreed. This can take several months, if not years to resolve due to the back and forth with Solicitors and LAA.

#### **4. What potential risks and opportunities do you foresee in the future for civil legal aid:**

**i) in general; and**

**ii) if no changes are made to the current system?**

Across all areas of civil legal aid, we foresee a risk of the civil legal aid system breaking down as fewer providers undertake legal aid work leaving vulnerable people without access to legal advice and representation. The trends we see are of suppliers reducing rather than increasing their provision of legal aid services, and suppliers having difficulty recruiting and retaining good legal aid lawyers. In turn there will be fewer specialist lawyers available to be chosen for judicial office and selection for silk at the upper end of the profession.

It is important to note that we know from working with solicitors practising in legal aid, that they work very hard indeed, day after day, dealing with complex issues and clients who are often vulnerable. Their efforts are not properly remunerated, and they rarely receive the credit they deserve for the important work they do.

Legal aid work is unsustainable under present circumstances, and increasingly so. Fee rates have not increased since 1996. Providers are making losses in some cases or breaking-even in others. A sustainable legal aid sector requires adequate, long-term funding so that providers can continue to function and to attract and retain committed young legal aid lawyers.

As barristers, we also note that a great many of our colleagues are seeking to diversify their practices away from legal aid and to seek better remunerated work. This presents risks across the profession in terms of new entrants who are put off from entering the profession, to experienced lawyers leaving and taking with them their wealth of knowledge and experience which is then not available to be passed on to younger generations.

Many of our barristers find it hard to maintain a practice solely undertaking legal aid work. Many barristers' chambers no longer take on the more poorly remunerated aspects of their area of law, such as private family law legal aid where solicitors often indicate to us that they have not been able to find barristers willing to take on the cases. Bearing in mind that these are cases in which the legal aid client will have had to demonstrate they are a victim of domestic violence, this is a concrete example of the legal aid system no longer properly serving some of the most vulnerable people in society.

Our community care barristers note specific difficulties in that area of work with a lot of the work barristers are instructed for being pre action advice which is not properly remunerated as the work is undertaken under the Legal Help scheme rather than being certificated. This is far from routine work, often involving an already long-running dispute between individual and public body by the time legal advice is sought, requiring detailed investigation of facts with reference to the statutory schemes and public law principles; identifying the right questions to client and public body in order to identify the legal point, assess merits and attempt to resolve the dispute pre-action. Often obtaining instructions from a client is far from straightforward because of a disability impacting on communication or a mental health vulnerability. Specialist community care solicitors can undertake this work efficiently and effectively to achieve positive outcomes for many clients without the need to issue proceedings. We as counsel are often instructed to assist in this detailed pre-action work or when instructed to advise with a view to issue of proceedings often the right advice is that further refined points defining the issue and articulating the case should be put forward in pre-action representations before the step of issuing the claim is taken.

Our housing barristers are concerned that there is a deepening crisis of housing legal aid provision, and less specialised legal aid solicitors doing housing work.

It is also our observation from speaking to students looking to enter the legal profession that there is little appetite to train or practise as specialised housing legal aid lawyers, and this is evident from the recruitment difficulties across the housing bar.

Unless there are immediate changes to civil legal aid funding, to fairly remunerate lawyers for the complex, time consuming work undertaken when representing vulnerable clients across the spectrum of civil and family legal aid services, **we consider the future to be very bleak**. We hope that this opportunity to review the system will conclude that the only way to halt the current trends towards a decline in this sector is to properly and fairly remunerate lawyers so that future generations of lawyers are incentivised to enter the profession rather than disincentivised as is currently the case.

**5. What do you think are the possible downstream benefits of civil legal aid? The term ‘downstream benefits’ is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation. Please provide any specific evidence or data you have that supports your response.**

This is a point of major importance, and any Government seriously seeking to avoid waste and inefficiency should be particularly keen to ensure that legal aid access helps solve problems that would otherwise create problems and costs elsewhere. When across the board the civil and family courts are currently experiencing high volumes of cases, backlogs with listing cases and increases in the number of litigants in person whose cases take longer on average to be heard, the obvious



solution would be to reinstate the pre LASPO legal aid scope to ensure early legal advice can be obtained by prospective litigants. The early identification of the legal issues in a case, advise on the merits of bringing cases and honing of the issues that will be put before a court by early negotiation and attempts to settle will have a time and cost saving in terms of the number of Judges required to sit, the duration of court hearings and on the listing backlogs.

The Law Society commissioned research in 2018 [Research on the benefits of early professional legal advice | The Law Society](#) found:

- On average, one in four people who receive early professional legal advice had resolved their problem within three to four months. For those who did not receive early legal advice, it was not until nine months after the issue had first occurred that one in four had resolved their issue.
- At any stage in the issue, people who did not receive early advice were 20 per cent less likely than average to have had their issue resolved.

In 2010, Citizens Advice calculated that £1 of housing advice saved the state £2.34 (Quoted in Right Time, Right Place, Improving access to civil justice, Social Market Foundation, May 2022 [Right-time-right-place-May-2022.pdf \(smf.co.uk\)](#)).

Legal sector stakeholders consulted in the survey considered that costs had shifted from legal aid funding to elsewhere in the public sector, such as local authorities funding legal advice, and additional costs due to negative impact on court efficiency from people representing themselves.

Often our clients in community care have sought legal advice in relation to already long-running disputes over their care package where the lack of adequate support and effort of arguing their case themselves to the public body has been dominating their life and causing anxiety for them and their families over a long time. These disputes often come with a vast amount of past correspondence having taken place between the individual and the public body. This shows that a lot of time has also been taken by social workers and others in public bodies dealing with complaints and representations without resolution. Specialist legal advice for the individual will enable the dispute to be resolved.

Our family team note that when private law family disputes continue unresolved over longer periods, they sometimes cross the threshold under s31 Children Act and social services intervene to start public law proceedings or at least place the children on Child in Need Plans or Child Protection Plans. The overall public purse would be saved money if families could access good quality legal advice and representation to resolve their issues earlier and avoid social workers and local authority's having to become involved.

Our housing team also note that the earlier a housing dispute can be resolved, the more cost-effective it is. If, for example, a skilled housing solicitor persuades a local authority to resolve a





CHAMBERS

dispute with a homeless person without the need to issue proceedings, there is an enormous benefit as two publicly funded parties need not incur any litigation costs.

Beyond the justice system itself, we hear anecdotally that prospective litigants unable to find solutions to their issues spend time visiting their MPs, local councillors and GPs in an attempt to find advice and solutions.

## **Fees**

**The Review aims to ensure that civil legal aid offers a financially viable business option for legal aid providers (both private and not-for-profit) and is an attractive career option. This question seeks views on the incentives created by the structure of the current fee system.**

### **6. What are your views on the incentives created by the structure of the current fee system?**

We note that the question asks for views on incentives in the funding structure. Sadly, we see no incentives and only disincentives in the civil legal aid fee system.

Fee rates have not increased since 1996. It is not sustainable to operate a civil legal aid service if providers can only do so on a loss-making or breaking-even basis. Sustainability requires adequate, long-term funding so that providers can continue to function and to attract and retain committed young legal aid lawyers.

In our experience, our instructing solicitors are routinely leaving the legal aid sector. It is virtually impossible to recruit adequate numbers of legal aid barristers. There have been several occasions on which we have advertised positions and no suitable candidates have applied (and we are aware that our competitors are in similar positions). These issues arise in the main from disillusionment across the profession with the remuneration available for legal aid cases.

Fixed fee schemes incentivise those who complete the minimum work in order to maximise profit margins. We have always believed that it is better to pay for work actually completed than setting fixed fees arbitrarily. Legally aided clients require specialist and skilled solicitors and counsel to work on their cases to achieve the best outcomes. The vast majority of legal aid lawyers will go above and beyond to ensure justice for their clients. We believe that they need to be properly remunerated for that work. The current fee structures do not compensate for the enormous work that is undertaken.

Our administration team have noted specific difficulties they encounter with obtaining payment of counsel fees in response to question 3 above.

**6.1. Do you think these support the effective resolution of problems at the earliest point?**

**6.2. How could the system be structured better?**

**Please provide any specific evidence or data you have that supports your response and any views or ideas you may have on other ways of payment or incentives.**

Across all areas of civil and family work we note that resolution of disputes can be achieved at less cost and more quickly through a properly funded system of early legal advice being available. The removal of so many areas of law from the scope of legal aid under LASPO has prevented those who need advice from obtaining early advice in relation to:

- Debt cases except where there is an immediate risk to the home.
- Employment law cases.
- Private family law cases save where there is evidence of domestic violence or child abuse.
- Housing matters, except homelessness assistance, cases where the home is at immediate risk, and cases where there is a serious risk to health or safety in the home.
- Non-asylum immigration cases; and
- Welfare benefits cases save for appeals on a point of law in the Upper Tribunal.

Early advice can assist the resolution of legal disputes. Where mediation or Alternative Dispute Resolution can be accessed, it is more likely to be successful if all parties are equally represented. Investment in legal advice and representation for mediation &/or ADR can help resolve disputes at an early stage.

### **Career development and diversity**

**These questions seek views on career development and how diversity of the profession could be increased. It is important for the sector to reflect the society it serves and make use of the best talent in society, so that members of the public can be confident in the legal services they receive. A more diverse sector also means a more diverse pipeline to the judiciary. The MoJ is eager to understand what more it can do to improve diversity in the context of civil legal aid practitioners.**

**7. Is there anything in particular in civil legal aid that prevents practitioners with protected characteristics from starting and continuing their careers? If yes, how could this be addressed? Please provide any specific evidence or data you have that supports your response.**

Again, this is a question of funding. Evidently, if a sustainable legal aid practice is a struggle across-the-board, career hardship will be disproportionately faced by people with protected characteristics. Legal aid providers and individuals are not even surviving under present conditions, so it is impossible to fund the sorts of measures that are necessary to overcome systemic disadvantages.

Further, in our experience, legal aid work under present circumstances takes an extraordinary toll on practitioners' mental health. Extreme pressures of work under conditions of low pay are causing new forms of disability, and exacerbating disadvantages related to pre-existing protected characteristics.

**8. How can the diversity of the profession be increased in legal aid practice, including ethnicity, disability, sex, age and socio-economic background? Please provide any specific evidence or data you have that supports your response.**

#### **User needs**

**The Review aims to ensure that the civil legal aid system is accessible to people eligible for legal aid, and that these individuals can successfully apply for and receive legal aid. These questions seek views on the experience and needs of those seeking and receiving civil legal aid and how these needs can be best met.**

As noted in the answer to the previous question, it will only be when legal aid work is properly funded that legal aid providers will be in a position to overcome systemic disadvantages. In reality the diversity of the profession will only be addressed at the initial training stages of a legal career when legal aid areas of law are viewed as financially attractive, and able to provide a stable long-term career. The awarding of civil legal aid contracts for only three or so years at a time does not allow private practices to plan for the longer term and provide attractive career opportunities that measure up against the opportunities available in other areas of law, working in the city and privately funded practice.

**9. What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid? Please provide any specific evidence or data you have that supports your response.**



C H A M B E R S

Across all areas of Chambers practice the overwhelming response to this question has been the lack of availability of legal aid practitioners creates the largest barrier to those seeking access to legal aid. There is data showing that each provider turns away 26 eligible housing cases each month. In our own experience, a very significant proportion of our work is turned away due to lack of capacity.

The number of firms and charities delivering legal aid has been in decline for many years, with the sharpest reduction following the introduction of significant cuts to legal aid in 2013. LAPG report that the attrition rate has continued in recent years, with 1 in 6 Community Care, 1 in 5 Mental Health and 1 in 5 Housing providers withdrawing from legal aid over the last two years.

In some areas there are legal aid deserts where there is no provider of legal aid services. The Law Society analysed data from the LAA directory of providers and the ONS and found that

- 71% of the population, or over 42 million people, do not have access to a community care legal aid provider.
- only around 12.6% of the population have access to more than a single community care legal aid provider in their local authority area.
- across England and Wales, 65.8% of the population do not have access to an immigration and asylum legal aid provider.
- due to the Home Office's dispersal policy, there can often be a mismatch between supply and demand, with those at need of support housed in areas without immigration legal aid provision.
- 42% of the population of England and Wales do not have a housing legal aid provider in their local authority area, a figure that has grown by around 5% since 2019.
- only 33% of the population have access to more than one housing provider in their local authority area.
- nine in 10 people in England and Wales do not have an education legal aid provider in their local authority, that's over 53 million people.
- There are only 13 legal aid providers providing education law services nationally.
- The number of family law legal aid offices has fallen from 2,401 in 2011/12 to just 1,125 in 2020/21.

Access to a lawyer on a remote only basis will not serve all legally aided clients due to their various needs, some finding it more difficult than others to access online services, and others to assimilate information given in this way. We consider it essential that a broad offering of face to face and remote services are offered to clients in order to meet the individual client's needs.

Many people are simply unaware that they have legally enforceable rights and that their situation could be improved by legal advice.



The sheer effort and resilience required to find a lawyer who is suitably experienced and available to take on the case can of itself become a barrier to finding an experienced lawyer.

For a significant number of legal aid applicants, the effort of obtaining the evidence required for means testing and or the s 33 or s34 LASPO gateways in family law are a time-consuming additional hurdle to receiving legal aid.

**10. What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs? Please provide any specific evidence or data you have that supports your response.**

With the number of legal aid lawyers in significant decline as noted in response to question 9, our response remains that the best way to improve client choice will be to properly fund the legal aid system so that the current trend towards declining numbers of experienced lawyers is halted and the profession becomes a more attractive career option to those entering or considering legal practice as a career.

It is also apparent that many people who need legal advice are unaware that they need it or of how to find legal advice. A public information campaign may be required.

The legal aid directory of providers is hard to find online in the tangle of information on the Justice.gov.uk website. When completing a google search with the search term "find a solicitor" the directory does not come up as an option on the first page of information. It is only when searching specifically "find a legal aid solicitor" that the directory is mentioned as an option. The directory needs to be easier to find for those who do not even realise that they may need a legal aid solicitor.

When googling "am I eligible for legal aid?" the Justice.gov.uk page which one is directed to here [Legal aid: Eligibility - GOV.UK \(www.gov.uk\)](https://www.gov.uk/legal-aid-eligibility) does not even mention that the applicant would need to contact a solicitor to get legal advice and does not provide a link to the legal aid providers directory which is on another Justice.gov.uk website. The easiest solution to assisting those looking for legally aided advice services would be to have a dedicated legal aid website aimed at members of the public or at a minimum properly signposting to all relevant legal aid information on one web page on the Justice.Gov.uk website.

In the context of inquests, this Gov.UK page is available <https://www.gov.uk/after-a-death/when-a-death-is-reported-to-a-coroner> However, it does not link through to any guidance on being an



CHAMBERS

interested person at an inquest and/or applying for legal aid. It does not even signpost to INQUEST or the INQUEST handbook. This should be rectified.

**11. Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed?**

**Please provide any specific evidence or data you have that supports your response.**

We agree with the premise of this question that there are likely to be people who do not know what is available or how to access it. Please see the response to question 10 in relation to difficulties we have encountered trying to navigate the Justice.gov.uk web pages and to find the legal aid directory of solicitors.

**12. How do you think that people receiving civil legal aid can be supported in cases where they have multiple or 'clustered' legal issues and some of these are outside of the scope of civil legal aid? Please provide any specific evidence or data you have that supports your response.**

Unfortunately, those of us who have been practising in legally aided practice for many years will recall a number of failed attempts to address this issue by attempting to contract with firms who are able to offer full-service offerings or the FAINS legal help project. However, none of the schemes attempted have ever been properly resourced. The single biggest way in which people can be assisted with multiple problems is by having skilled, properly remunerated lawyers cross working with one another to address the issues. Garden Court Chambers is an example of such a multi-disciplinary organisation.

**13. How do you think that the Exceptional Case Funding scheme is currently working, and are there any ways in which it could be improved? Please provide any specific evidence or data you have that supports your response.**

As noted in our answer to question 1a under the family law heading, solicitors need to be remunerated for making the ECF application. At present there is no incentive to a solicitor to spend the considerable time it takes to make such an application; we believe that potential clients are more likely to be turned away if a case is not within scope than a solicitor taking the case on and making the ECF case on a pro bono basis.

The Public Law Project has put together this directory of free advice services that may be able to assist with certain ECF applications: [Database of organisations supporting ECF applications - Public Law Project](#). We note that the only solicitors firm listed does not have a legal aid contract, McKenzie



CHAMBERS

friends and other non - legally qualified organisations are listed and that overall, there are only 11 organisations listed. There is a clear need for experienced legal aid professionals to be incentivised to make ECF applications by being properly remunerated for making the application.

## Use of technology

**The Review aims to feed into MoJ's wider strategic objectives on the use of technology. Technology should enable users to engage with the legal process and support the smooth running of the civil justice system. These questions seek views on how the use of technology could improve civil legal aid, including through where appropriate, remote advice.**

**14. What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid. Please provide any specific evidence or data you have that supports your response.**

**15. Remote legal advice, for example advice given over the telephone or video call, can be beneficial for delivering civil legal aid advice. Please provide any specific evidence and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.**

Research into legal need and legal advice during the pandemic was published in 2021 (Vulnerability, legal need and technology in England and Wales, Newman, Mant and Gordon, International Journal of Discrimination and the Law 2021, Vol 21(3) 230 -253 [13582291211031375 \(sagepub.com\)](https://doi.org/10.1177/13582291211031375)). The pandemic required legal aid providers to move towards delivering legal services remotely. The research identified positives in using technology, such as training staff, having meetings online, an online case management system. But it also found that certain clients lacked access to suitable equipment, internet access and data. Those clients were particularly those who had did not have English as a first language, were elderly, were homeless, had mental health difficulties or drug or alcohol addictions. They needed physical face-to-face contact in order to provide instructions.

Remote working, and technology, should not be universal. There should remain the opportunity for clients to meet their legal advisers in person.

**16. What do you think are the barriers with regards to using technology, for both providers and users of civil legal aid?**

**16.1. Do you think there are any categories of law where the use of technology could be particularly helpful?**

**16.2. Do you think there are any categories of law where the use of technology would be particularly challenging?**

**Please provide any specific evidence or data you have that supports your response.**

HMCTS' digitisation programme has consistently demonstrated that simplified and directed online guidance and form fields can greatly reduce error rate, enabling access to advice more accurately and quickly.

We set out in response to question 3 some of the issues that our admin team encounter with the billing of cases via CCMS. On the whole we believe providers have adapted to the use of CCMS and

to the use of remote technologies to communicate with clients and to conduct court hearings during the pandemic without too much difficulty. There have of course been issues from time to time when CCMS has been "down", or technical glitches have caused issues. There will therefore always be a need for an alternative to technology for such occasions.

We consider that it is important to retain the capacity for there to be face to face meetings, home visits and office meetings with clients and not to be solely dependent on technology for communication with the client. Clients may not have access to appropriate technology or may not be able to use it for a variety of reasons.

Many areas of legal aid services by their nature require discussion of issues of a very personal nature, for which a video conference can be an unsuitable means of communication. Clients may require support during meetings with communication, or moral support from a friend or relative, breaks and time to be taken over the legal issues which may be complex, for which online communication is often unsuitable.

For some clients an online meeting is a good option and enables a meeting to take place with them face to face (albeit remotely) that would not otherwise take place at all, but this should not be the expectation or the norm. To have no possibility of meeting the client face to face in person and in their own home would be a serious deficit in practice – it would undermine the means available to gain understanding of and be best able to articulate the client's case, meaning a negative impact on the strength of the case to be put forward.

There are cases where it is of clear assistance to the ability of the lawyers to put forward the best case on behalf of the client, that the solicitor, or sometimes solicitor and barrister, if instructed, can meet with the client in their own home.





In each case, remote technology may or may not assist lay clients to access legal advice and court hearings. For some people this will enable them to participate most effectively, for others, it will not. This will very much depend on their personal characteristics and can change during the course of case progression and even the hearing.

In some cases, being able to access technology can improve the sight and sound of a conference or hearing where they would in person have visual or hearing limitations.

In almost all cases since Covid, client conferences with both lay and professional clients have been conducted remotely where they are able to do so. This enables clients to be in their own homes without the cost and effort of getting to Chambers. This also means that conferences can be arranged flexibly around their work and life commitments. While clients may not have computers, most do have smart phones that can access a video call, or at least take part by telephone. In circumstances where this access is limited or the lay client may find accessing the technology difficult, they will attend the solicitors' office and join a remote conference with us from there.

Regularly during inquest proceedings, bereaved family members may not wish to be in court for certain evidence and therefore find it helpful to attend remotely where they can be in the comfort of their own home and leave the room or turn off the link/sound if the evidence is particularly distressing. As far as we are aware, every inquest since Covid has offered this opportunity to interested persons and it greatly aids family members' ability to participate.

Likewise, we have regular experience of county court trials for actions against the police – both jury and judge alone - where video links have been made available for witnesses who would otherwise not have been able to provide evidence to the court, either due to commitments or mental or physical disabilities. In every case it is essential to check that the client can hear, see and understand what is happening and to regularly ensure this.

Since covid it has become routine for expert witnesses to give evidence in family court proceedings via video link rather than in person. On the whole this seems to work well as long as there are no issues with the link or sound. Clients are often noted to need simple explanations of a witness' evidence whether they are present physically in the room or appearing remotely. There does not appear to be any adverse interference with the administration of justice when witnesses give evidence remotely, although it is important that each case is assessed on its merits' dependent on the needs of the parties to the case.

### **Early resolution**

**The Review aims to feed into MoJ's wider strategic objective to encourage, where**



CHAMBERS

appropriate, the early resolution of disputes, providing swift access to justice through early engagement where appropriate. This question seeks views on what could be done to encourage early resolution of disputes.

**17. What do you think could be done to encourage early resolution of and/or prevention of disputes through the civil legal aid system? Please provide any specific evidence or data you have that supports your response.**

As noted in response to previous questions, we fully support initiatives that aim to provide early resolution to disputes. We consider the only means by which this can be achieved is to provide full and fair remuneration to legal aid providers across all areas of civil disputes. We consider that the scope of legal aid provision for early advice needs to be reinstated at pre LASPO 2013 levels.

Better remuneration of work currently done under Legal Help is required to encourage providers to take on these matter starts and therefore incentivize doing the work and instructing counsel, if necessary, at an early stage to reach a resolution pre-action.

Specialist legal advice is necessary- public legal education is not going to achieve this, nor self-help/ student clinics. Civil legal aid encompasses many specialist areas of law requiring specialized training and knowledge.

It is already built into judicial review legal procedure that a relevant complaints process must have been engaged with or must be shown not to be a suitable alternative remedy before a judicial review is commenced. It is our observation and reported in a recent report by the Equality and Human Rights Commission that people often find the process complex, energy sapping and lengthy and may fear negative repercussions<sup>1</sup>. Local authority complaints processes lack an independent adjudicator. We see no evidence to suggest that greater use of complaints processes, would be an effective way of achieving early resolution of and prevention of disputes going through the legal aid system.

### Examples

- One member of our community care team who has practised in legal aid social welfare areas of practice for nearly 30 years recalls numerous cases of individuals who have sought advice through various non-specialist agencies over long periods, never receiving advice that has got to the crux of the matter, or from anyone who has sufficient confidence in the area of law to provide the hard advice or articulate the case with clarity, and the issue has therefore trundled on dominating that person's life and remained unresolved until finally getting to a specialist solicitor. The most efficient way to resolve disputes is to have early specialist

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<sup>1</sup> Equality and Human Rights Commission report, Challenging adult social care decisions in England and Wales, February 2023



advice. The careful groundwork is done, the issue is properly identified and clearly articulated, and this gives the best chance of reaching a resolution early.

- A member of our family team with 27 years of experience also advises on the Rights of Women telephone advice line, a free telephone advice service. She has noted that by far the greatest need of the callers is early advice as to their legal rights, obligations and options, without that they have little prospect of being able to navigate and reach a settlement in mediation or negotiations with other lawyers for the other party that would also meet the court's exacting requirements in a consent order.
  
- Our housing team also note that early advice can assist the resolution of legal disputes. Where mediation or Alternative Dispute Resolution can be accessed, it is more likely to be successful if all parties are equally represented. Investment in legal advice and representation for mediation &/or ADR can help resolve disputes at an early stage.

#### **Other areas for consideration**

**18. Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.**

Garden Court Chambers remains committed to serving legally aided clients in all areas of civil and criminal legal aid. We sincerely hope that this review will mark the beginning of a new era in which the importance of legal aid work is recognised, and urgent steps taken to prevent it from dying on its feet. We hope that the submissions and evidence provided above point towards some solutions, including saving the costs, time and resources of people outside the legal profession as well as those with this specialist knowledge.