

The Future of Legal Aid Inquiry Submission
to the Justice Select Committee
October 2020

Administrative Justice Council
Advice Sector Panel

Introduction

1. The Administrative Justice Council (AJC) is the only body with oversight of the whole of the administrative justice system in the UK, advising government, including the devolved governments, and the judiciary on the development of that system. The AJC aims:
 - To keep the operation of the administrative justice system under review;
 - To consider how to make the administrative justice system more accessible, fair and efficient;
 - To advise the Lord Chancellor, other relevant ministers and the judiciary on the development of the administrative justice system;
 - To share learning and areas of good practice across the UK;
 - To provide a forum for the exchange of information between Government, the judiciary, and those working with users of the administrative justice system;
 - To identify areas of the administrative justice system that would benefit from research;
 - To make practical proposals for reform.
2. The AJC is chaired by the Right Hon. Sir Ernest Ryder and the Secretariat is provided by JUSTICE, an all-party law reform and human rights NGO.

Advice Sector Panel

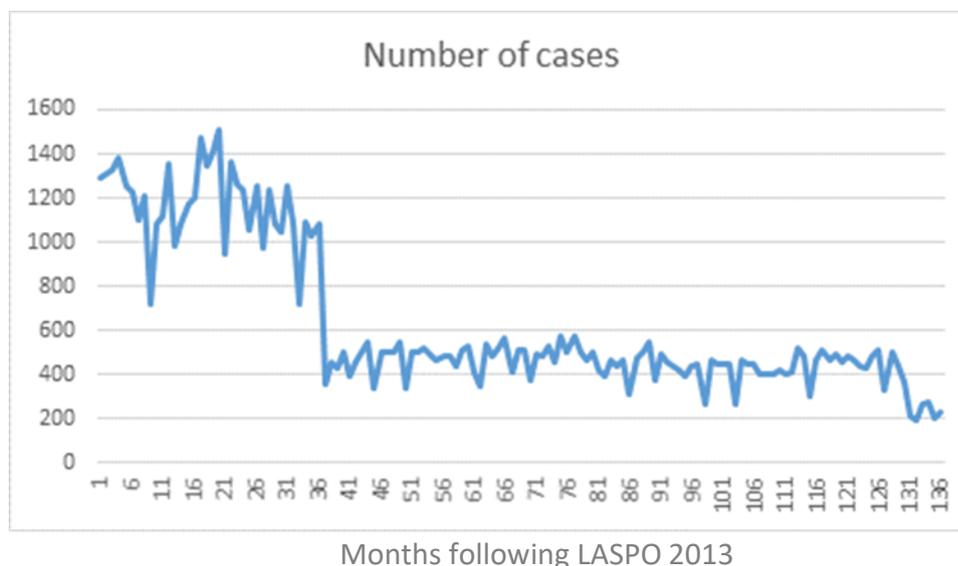
3. The Advice Sector Panel is one of the three sector based advisory panels to the AJC. It provides the AJC with research and advice from the not-for-profit advice sector who have ground level experience of advising those who come into contact with the administrative justice system. It is chaired by Lindsey Poole, Director at Advice Services Alliance. Membership of the panel can be found at Appendix A.
4. We have taken views from our membership and aim to illustrate the key issues of the current legal aid system which has an overall effect on the administrative justice system. For a summary of our key issues and recommendations please see our Summary and Conclusion together with our recommendations set out on pages 12-13. More specific examples and details will be provided by our member organisations, who are practitioners with legal aid contracts, or member organisations that represent them. They will share their experiences of working within the legal aid system and the difficulties since the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO)¹. We fully support the submissions of our members and will provide a brief overview of concerns (in the

¹ <https://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

context of administrative justice) which were expressed in a recent meeting on our response to the Inquiry.

5. The AJC supports a further working group on social care and legal aid which is led by Access Social Care (ASC), a new charity working to provide access to justice for people with social care needs. The working group sits under the Advice Sector Panel and focuses on access to justice issues and specifically, legal aid for community care cases. We feel this is a particular area to focus on because it illustrates an extreme exemplar of what is wrong with the system – a lack of specialist community care lawyers which results in unchallenged local authority decision-making and social care accessibility issues. Access Social Care has provided a separate submission focusing specifically on legal aid in the context of community care, which we endorse. We will highlight a few of these overarching issues in this submission.
6. The AJC focuses on areas within administrative justice and public law. For the purposes of this submission, we will focus on areas of social welfare law including asylum and immigration; social/community care; welfare benefits and housing.
7. The Advice Sector panel will focus on the following areas:
 - a) Unmet need and demand;
 - b) Advice deserts;
 - c) Remuneration;
 - d) Scope and the impact on access to justice;
 - e) The knock-on effects of an ineffective legal aid system;
 - f) The impact of digitisation; and
 - g) The role of the legal aid agency.
- a) Unmet need and demand
8. In the Advice Sector Panel meeting of 29th September 2020, the panel agreed that one of their main areas of focus in our response should be unmet need and demand. For a full understanding of the issues, it is important to consider the differences between need and demand in this context,- need is the existence of a social welfare legal problem; demand is not only the existence of the problem but also the recognition of that problem together with the seeking of assistance for it. Although it should follow that need fuels demand; that can only be the case when the public is aware of what they are entitled to and what resources exist. We would like to emphasise the following points in respect of all public law legal aid contracts:
 - 8.1 There has been a significant downturn in 2013 in legal aid agency/certified work cases since the introduction of LASPO, with numbers running between a third and a half of previous levels. Evidence from AdviceUK (one of our member organisations), which has 650 members providing Social Welfare Law advice

across England, Scotland and Wales has shown that members undertaking Legal Aid Agency/Certified work cases in a given month, irrespective of volume, has decreased by about a quarter. Their case management system, AdvicePro, shows the following monthly decreases since 2013:



8.2 Further evidence is provided in the MoJ’s own statistics which show that the number of ‘other non-family cases’ dropped from 488,329 in 2009-10 to 39,488 in 2019-20 which is a reduction of 92%.² In immigration and asylum cases, matter starts dropped from 60,792 in 2011–12 to just 29,051 in 2018-2019. They are currently less than half of pre-LASPO levels.³

8.3 Whilst the number of legal aid contracts has significantly reduced, the panel are concerned that the need for legal aid has not; and this need will continue to increase due a range of factors. In social care, for example, it is anticipated that there will be an increased need for social care due to demographic changes. It was noted that 75% of 75 year olds in the UK have more than one long term health condition⁴. With an ageing population, the requirement for social care will rise and with local authorities already making tactical, poor decisions because of years of funding cuts, the need for specialist legal advice will rise alongside this.

8.4 More generally, demand in areas of public law has increased significantly. Shortly after LASPO in 2013, it was reported by Hackney Law Centre that they had seen an increase of 400% in people looking for help with welfare benefits, a

² [MoJ Legal aid statistics England and Wales tables April to June 2020](#)

³ [MoJ Legal Aid Statistics: July–September 2019](#)

⁴ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)60240-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)60240-2/fulltext)

200% increase in people looking for immigration help and a 500% increase in calls made to its telephone advice line⁵.

8.5 Furthermore, the National Audit Office (NAO) consultation with providers found that those organisations would not be able to meet the extra demand generated by the reforms; 70% of third-sector respondents said they could meet half or less of the demand from clients who were not eligible for civil legal aid⁶.

8.6 The panel is concerned that demand issues are compounded by the lack of specialist legal aid lawyers. Citizens Advice estimated that they had lost 350 specialist advisers nationally, and that this was largely due to the removal by LASPO of the legal aid contracts that funded them. There is a real concern in community care where there is a decline of community care specialists and agencies willing to take on the cases, as they are seen as loss making for legal aid lawyers.

8.7 Lack of specialist legal advice, especially with administrative appeals, leave clients with no alternative but to represent themselves at Tribunal stage; or, give up on their appeal altogether. The removal of public funding for cases such as welfare benefits has disproportionately affected those most vulnerable. The Equality and Human Rights Commission found that there was an added stress both physical and mental for people trying to pursue justice without legal aid (see Section d).

b) Advice Deserts

9. The panel also noted that cuts to legal aid have led to a growth in legal aid 'advice deserts'. In large areas of England and Wales, people are unable to access legal aid advice for housing or community care. Currently 80% of local authorities in England and Wales do not have a single community care legal aid provider and 52% do not have any legal aid providers of housing advice. In London, where 49% of the country's 455 providers are based, 37% of local authorities do not have a housing legal aid provider. This raises huge concerns over access to justice as people on low incomes facing important legal issues are struggling to get the local face-to-face advice they're legally entitled to. This is a particular concern in housing where people are often facing eviction and/or homelessness.

10. In immigration, the figure below, taken from 'An Overview of Immigration Advice Services in England and Wales'⁷ clearly illustrates the areas of immigration advice

⁵ [An overview of immigration advice services in England and Wales, Saira Grant, March 2020](#)

⁶ [National Audit Office, Ministry of Justice and Legal Aid Agency: Implementing Reforms to Civil Legal Aid \(HC 2014-15\).](#)

⁷ [An overview of immigration advice services in England and Wales, Saira Grant, March 2020](#)

files. In the immigration context the majority of cases will be fixed fee and so there is no option for a stage bill or interim payment for work in progress (only for disbursements).

14. Fixed fee files are relatively low value. In the immigration context this is £413 for an asylum claim, £234 for an immigration matter (under Legal Help at the application stage, different fees apply to work conducted under CLR). These cases are complex and can involve hundreds of hours of work by the provider. Likewise, in community care, fixed fees for legal help are problematic - the hourly rate of remuneration is insufficient for the amount of time taken to deal with these particularly complex cases. This is also true of legal help for homelessness assistance. Nevertheless, the provider will only be paid the fixed fee, unless it becomes an escape fee (ie it escapes the fixed fee and is paid at hourly rates where three times the amount of the fixed fee has been incurred). Even when the escape fee is applied, the hourly rate is so low that it is not financially viable.
15. Further, escape fees are subject to assessment by the Legal Aid Agency (LAA). Before this can take place, there is a form which needs to be completed and the entire file must be sent to the LAA. This is a significant administrative burden for providers. When submitting a claim for an escape fee it is possible for the LAA to nil assess a file, meaning that the fixed fee already paid would be recouped from the provider. There is a right of appeal against a nil or reduced costs assessment. This is a time-consuming process and adds to the time lag between work undertaken and ultimate recovery by the provider.

d) Scope and impact on access to justice

16. With the narrowing of scope, LASPO removed from scope many areas which concerned decisions of public authorities including areas of immigration law, housing and welfare benefits. This made it difficult for people trying to challenge poor decision-making by public bodies in relation to these areas of law. LASPO also greatly restricted access to legal aid more generally as the eligibility criteria has tightened.
17. Taking these areas out of scope has been a huge concern to the AJC as challenging and improving poor decision-making by public bodies is one of the main areas of focus. As well as working towards providing financial incentives and recommendations to the Department of Work and Pensions (DWP), to improve their first instance decision-making on welfare benefits, we are also concerned that those needing to challenge unlawful decision-making are unable to do so, as these areas of law are no longer in scope for legal aid.

18. Welfare benefits claimants are a particularly vulnerable cohort of people (particularly those applying for disability benefits) and often consider not challenging decisions because of the stress and complexity of navigating through the process without legal advice; reducing their ability to get access to justice. Further, our members note that the inability for claimants to access the benefits that they are entitled to, has a wider financial impact and can affect other 'passport' benefits i.e. if some benefits are withdrawn, so are the others. This can lead to debt, homelessness, the need for food banks etc. It can also lead to the deterioration of applicants' physical and mental health. This case study from one of our members, Z2K, shows how their advice and support was vital in helping their client seek justice.

Malik contacted Z2K in November 2019, he had long term health problems and wanted to understand whether he was receiving the correct benefits. It was found that he was receiving Disability Living Allowance (DLA) but only for mobility needs despite requiring substantial support with daily living. He was advised to make a Personal Independence Payment (PIP) claim instead as it would not be possible to make changes to his DLA. Malik required help completing the health questionnaire and during his appointment it was revealed that his Employment & Support Allowance (ESA) had just been stopped following a Work Capability Assessment.

A Mandatory Reconsideration (appeal) to dispute the closure of his ESA claim was made. It took 9 weeks to receive a decision and during this time Malik had no income. Z2K arranged for supermarket vouchers as well as food bank referrals. Eventually Malik received a decision from ESA, he was still found to be fit for work despite poor health. An appeal was lodged to take the case to tribunal. In order to start receiving ESA again at the assessment rate, Malik needed to supply a fit note from his GP and proof that he had lodged an appeal to his local job centre. The job centre refused to process Malik's fit note as it didn't cover the entire period he had been without ESA. Fortunately, Z2K wrote to Malik's GP who provided a longer fit note which was accepted by the DWP and he finally began receiving an income from ESA 15 weeks after his claim was first closed.

When Malik's ESA claim first ended, his Housing Benefit was also suspended. Z2K contacted Westminster Council to reinstate Malik's Housing Benefit which was backdated to the end of his ESA claim. However, the water rates that Malik was liable to pay were not covered by Housing Benefit and he was issued with a Notice Seeking Possession (NSP) on his flat for unpaid water rates of just £132. Z2K contacted Malik's Income Officer to dispute the NSP, explaining that Malik was a disabled man with absolutely no income. Malik's Income Officer agreed that they would not act on the NSP provided Malik cleared his account once his benefits were reinstated. Malik eventually managed to clear his account but the threat against his home caused considerable distress.

In May 2020 Malik finally received a decision on his ESA appeal. The appeal was allowed and Malik was found to have limited capability for work related activity followed by a decision on his PIP claim, where he was awarded the standard allowance for daily living and the enhanced rate for mobility. Due to the extent of his health problems Z2K considered that he should be entitled to the enhanced rate. Another appeal was lodged and was successful and client has now been awarded both enhanced daily living and mobility.

19. Had Malik not received assistance from Z2K, he would have had extreme difficulties in challenging the decisions on the benefits he was entitled to. The knock-on effect of not receiving his ESA, meant that his housing benefit had been stopped and the resultant lack of income led to him being in arrears for his water bill. Z2K were able to organise other assistance through their 'wrap around service' to help Malik access food vouchers and financial support while he awaited the outcome of his appeal. Further evidence that benefits intersect and that there is a knock-on effect when one benefit is denied is provided in Citizens Advice data (2018) which shows that 38% of ESA claimants had an issue with PIP, 17% with housing and 12% with council tax⁹.
20. Malik fortunately had a successful outcome despite the stress and anxiety caused as a result of his benefits stopping and due to the lengthy, complex process to resolve the poor initial decision made by DWP. However, some claimants who were not successful at the mandatory reconsideration stage, and were still not satisfied with the decision, would have had to appeal again to a tribunal, causing further unnecessary distress to claimants, particularly if they have to represent themselves at the tribunal. Malik's experience illustrates the disproportionate effect on disabled people and anyone who has a long-term health problem.
21. The complex process deters claimants from appealing and as a result they fall out of the system, making it even more challenging to measure demand. Sadly, they never access the basic rights that they are entitled to.

e) The knock-on effect of an ineffective legal aid system

22. The panel felt that an ineffective legal aid system resulted in wider systemic problems. Funding that was initially available for legal help, that has since come out of scope for legal aid, has had a knock-on effect to problems further down the line and would have an additional cost to the government. The NAO (2014) found that there was an escalation of legal issues as a result of not being able to access legal aid at an early stage which resulted in increased costs elsewhere in the system¹⁰. The Bach Commission concurred that the withdrawal of legal aid for legal help "is one of the least cost-effective cuts"¹¹.
23. The BACH Commission's 2017 report recommended that the government reinstate legal aid for early legal help (before tribunal or court stage) to pre-LASPO levels in all areas of social welfare law. In Appendix 7 to the same report, much consideration

⁹ [The impact of LASPO on routes to justice, EHRC, 2018, p36](#)

¹⁰ [National Audit Office \[NAO\] \(2014\) Implementing reforms to civil legal aid.](#)

¹¹ [Bach Commission on access to justice. Appendix 2 p29.](#)

was given to the importance of the provision of early legal help. Citing the primary objective of LASPO being to save money, the report notes that the coalition government's approach failed to consider the probable economic consequences 'downstream' particularly associated with social welfare issues which tend to be multi-faceted and far-reaching. Furthermore, the Appendix notes 'When a person's legal problem is allowed to spiral out of control, this can lead to the burden being shifted from the justice system to elsewhere in the public sector, for example the health service.'¹²

f) The impact of digitisation on legal aid

24. As already indicated, LASPO has disproportionately affected both disadvantaged and marginalised individuals by withdrawing public funding for many areas of public welfare law. The introduction of the HMCTS Courts and Tribunals Reform Programme¹³ has disadvantaged this cohort even further as a large number of individuals has become 'digitally excluded'. This has created an even greater demand for advice services to provide digital assistance to navigate through the online system. As demonstrated in the AJC report 'Digitisation and Accessing Justice in the Community'¹⁴, front-line organisations will need to respond and adapt to meet the growing demand for digital assistance as a result of the modernisation programme. The findings of the report indicate that the provision of digital assistance with welfare benefits was the most prevalent area which, we have already noted, is no longer in scope for legal aid.
25. The report noted "the reality based on the evidence found in this report is that many organisations are struggling to meet demand for requests for digital assistance as they are not equipped to do so and do not have the finances to scale up. Investment is urgently needed to remove existing barriers preventing an integrated service to enable front line advice providers to adapt to meet demand and to ensure access to justice in a digital justice system."
26. Further findings demonstrate that organisations are unable to meet the demand for services across all levels of social welfare law. As demonstrated in section (a) of our submission, demand outstrips capacity; and this is particularly true in social welfare law. We noted in the report that, whilst one of the aims of the modernisation programme is to streamline the justice system, there is already a high demand for assistance and it is important that this is not exacerbated by digitisation, causing an increase to workload and demand on front line services. One respondent commented that "we have many more people seeking help with welfare benefits

¹² [The Right To Justice, The Final Report of the Bach Commission, September 2017; Appendix 7 Cost Implications and Potential Savings, 2017](#)

¹³ <https://www.gov.uk/guidance/the-hmcts-reform-programme#our-reform-programme>

¹⁴ [Digitisation and Accessing Justice in the Community, Diane Sechi April 2020](#)

than we can help and we haven't been able to attract further grant funding to cover the need for advice left by LASPO cuts".

27. Based on our own research, we consider that digitisation will have an adverse effect on providers of social welfare law, for areas both in and out of scope for legal aid, due to the lack of funding and capacity of providers. In turn, this will have a significant effect on litigants in person who are unable to access free legal advice, and are unable to navigate through the digital appeals process. The AJC is currently undertaking a follow-up survey on the impact of the pandemic on social welfare provision which we would be happy to share on its completion.

g) The Role of the Legal Aid Agency (LAA)

28. A number of AdviceUK members managing legal aid contracts have been critical of the LAA's administrative systems for overseeing legal aid contracts – with high levels of bureaucracy, poor IT systems lack of integration with wider support and failure to understand drivers of demand (both for advice with casework and specialist legal advice).

29. The high level of bureaucracy which was reported by members was also due to the amount of regulation and accreditation by the LAA. By way of background, legal aid providers have a designated contract manager (CM) to help ensure compliance against the legal aid contract. A CM visits providers every year to check compliance against contractual requirements and to ensure that evidence is retained on file. Where breaches of contract are found, sanctions can be applied. In addition to the annual review by the CM, there are frequent core testing reviews, peer reviews, and in the context of immigration law – Immigration Upper Tribunal Reviews (for cases before the Upper Tribunal, paid at hourly rates in which reasonable costs can be incurred). In order to hold a legal aid contract, providers must have a specialist quality mark (SQM or Lexcel). To offer advice under legal aid, a provider must be accredited and undergo reaccreditation (administered by the Law Society) every three years.

30. Providers are mindful of the prospect of sanctions to their contract for even minor, one-off breaches. Even where sanctions are not imposed, providers are asked to self-review a sample of files. The LAA can ask for files covering the last six years.

31. It was reported that the LAA's computer system is difficult to use and online funding applications are time consuming. The consideration process is also subject to delays.

Summary and Conclusion

32. In conclusion, the Advice Sector Panel considers that LASPO has led to the following challenges:

- A reduction to access to justice by taking areas out of scope of the legal aid scheme;
- A decline in the number of legal aid contracts but an increase in need for legal aid services;
- An increase in advice deserts and lack of specialist legal aid lawyers who can deal with particularly complex cases;
- Inadequate and unsustainable remuneration making legal aid contracts unviable for some providers;
- Insufficient funding through fixed fees which do not cover the costs of lengthy and complex cases;
- An administrative burden to apply for escape fees which are also subject to assessment by the Legal Aid Agency;
- A complex process for welfare benefits appellants, particularly for vulnerable litigants in person, who may need additional assistance when 'passport' benefits have been stopped;
- Additional costs to the Government due to the absence of early legal help which leads to the escalation of issues that could have been dealt with at an early stage;
- Increased demand and insufficient resources to provide digital assistance as a result of digitisation; and
- High levels of bureaucracy by the Legal Aid Agency in their regulation and accreditation and poor IT systems which make applications lengthy, cause delay and require more administrative burden for the provider.

33. For an effective administrative justice system, appellants should have a right to redress which should be accessible, efficient and effective. The AJC considers that the current system is not fit for purpose and users are unable to challenge public bodies when they have made unlawful decisions. All of which have an effect on their livelihood. The reduction to eligibility and scope has made it more difficult for people to challenge these decisions, making public bodies less accountable. Specialists in areas of law are scarce because remuneration is inadequate and

complex lengthy cases are not desirable, as the fixed fee does not cover the amount of work required.

34. We recommend that areas under social welfare law are brought back into scope of the legal aid scheme and agencies are paid an hourly rate for complex areas of law. We also recommend that the Ministry of Justice and Legal Aid Agency take onboard the experience of the sector and provide more efficient and less bureaucratic systems to apply, deal with the financing of and management of, legal aid contracts.
35. We are grateful for the opportunity to provide evidence to the Select Committee's inquiry on the future of legal aid. For further information, please contact Heidi Bancroft, Secretary to the Administrative Justice Council at hbancroft@justice.org.uk.

APPENDIX A

Advice Sector Panel members

Name	Role	Organisation
Lindsey Poole (Chair)	Director	Advice Services Alliance
Kirsty Thompson	Director	JustRight Scotland
Lisa Wintersteiger	Chief Executive	Law for Life
Eileen Pereira	CEO	Support Through Court
Rebecca Wilkie	CEO	Advocate
Chilli Reid	Executive Director	AdviceUK
Kari Gerstheimer	CEO	Access Social Care
Kevin Higgins	Head of Policy	Advice Northern Ireland
Anne Killeen	Head of Casework and Support Services	Zacchaeus 2000 Trust
Ken Butler	Welfare Benefits and Policy Adviser	Disability Rights UK
Karen Ashton	Head of Public Law and Human Rights	Law Centres Network
Chris Minnoch	CEO	Legal Aid Practitioners Group
Diane Sechi	Senior Pro Bono Lawyer	Simmons & Simmons
Nicola Burgess	Legal Director	Joint Council for Welfare of Immigrants
Andrew Medlock	Deputy Director	Parliamentary and Health Service Ombudsman