Young Legal Aid Lawyers:

Submission to the Justice Committee Inquiry on the Future of Legal Aid

2 November 2020

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Contents:

1. Introduction

Young Legal Aid Lawyers ('YLAL') was formed in 2005 and has over 3,500 members.

We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales.

We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL was set up and operates to pursue the following objectives:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it
- To increase social mobility and diversity within the legal aid sector
- To promote the interests of new entrants and junior lawyers and provide a network for like-minded people beginning their careers in the legal aid sector

YLAL has been campaigning around issues relating to access to justice and legal aid since its inception. We believe that access to justice can only be possible where there is a properly funded legal aid system, enabling all within society to access justice on an equal footing.

YLAL has substantial concerns about the impact which the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') has had upon our justice system.

We have published numerous reports and consultation responses dealing with access to justice, our concerns about the current legal aid system in both civil and criminal law, and the way in which the legal aid system impacts the sustainability and future of the profession.

We have referred to a number of our key publications throughout our submission and would specifically draw the attention of the Justice Committee to the following:

1. Young Legal Aid Lawyers: Social Mobility in a time of Austerity, March 2018;

2. YLAL Submission to the LASPO Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, September 2018;

3. Young Legal Aid Lawyers COVID-19 Report; April 2020;

4. YLAL Response to Civil Justice Committee Rapid Consultation on Remote Justice, May 2020;

5. Young Legal Aid Lawyers: Second COVID-19 Report, May 2020; and

6. YLAL Submission to the Ministry of Justice consultation on the Criminal Legal Aid Review: an accelerated package of measures amending the criminal legal aid fee schemes; June 2020.

2. Executive Summary

Throughout this submission, YLAL has addressed all of the issues raised by the Justice Committee. In summary, the key points are as follows:

How LASPO has impacted access to justice and for views on the post-implementation review and the criminal legal aid review

In YLAL's view, LASPO has had a devastating impact on the justice system (3.1). The cuts have gone far deeper than intended and have been a false economy. It has caused an increase in litigants in person, and problems that could have been resolved by the early intervention of legal aid lawyers are now left to escalate at significant cost to public authorities.

We consider the LASPO post-implementation review (3.2) to have been a wasted opportunity. The legal aid means test needs urgent reform to ensure that people who cannot afford a lawyer can access justice. Given the gravity of criminal matters, more wide-ranging reforms to criminal legal aid means test are needed to ensure access to justice.

We are concerned by the progress of the Criminal Legal Aid Review ('the CLAR') (3.3). The "Accelerated Areas" were a recognition of the impending crisis in the criminal legal aid sector but they do not adequately address the breadth of the issues practitioners are facing. The sector is overworked and underpaid, which has resulted in a sustainability crisis. This in turn has led to a succession crisis, with few young legal aid lawyers specialising in crime.

The role of the Legal Aid Agency

YLAL considers the Legal Aid Agency ('LAA') to be failing in its statutory duties to effectively administer legal aid. Our members have experienced a "culture of refusal", with LAA caseworkers appearing to be deliberately obstructive (4.1). The LAA's bureaucratic approach is also a barrier to access to justice. Its case management system, CCMS, is not fit for purpose and practitioners are not sufficiently compensated for the time spent complying with the LAA's administrative procedures (4.2).

Recruitment and retention problems among legal aid professionals;

YLAL is uniquely placed to speak to barriers to recruitment and retention in the sector, due to our longstanding work to address social mobility and diversity. We have identified three key issues with

recruiting and retaining talented practitioners (5.1): debt and low wages; unpaid work experience; and stress, lack of support and juggling legal aid work with other responsibilities.

We consider that extended opening hours would be detrimental to the long-term future of the profession, by making it inaccessible to many including people with caring responsibilities (5.2).

The impact of the court reform programme and the increasing use of technology on legal aid services and clients;

COVID-19 has accelerated the court reform programme (6.0). While this has been necessary to ensure court user safety, it has not been without problems. Our members have identified the following issues with online courts: the practical inadequacies of technology; digital exclusion through lack of means or ability; a lack of reasonable adjustments for people with disabilities; a greater risk that clients will not be represented; a reduction in public scrutiny through the dilution of open justice; a failure to consider the importance of the experience of being physically in court and the impact that has, particularly in terms of reaching settlement; that the persuasiveness of oral evidence and advocacy will be lost; and above all, the sense that clients will not feel they have been treated fairly in all cases (6.1). Some areas of law are more suited to having online hearings than others. Regardless of the area of law, a case-by-case approach is appropriate to determining whether a hearing should take place remotely or in person(6.2).

Our members highlighted concerns that online hearings make it harder for representatives to communicate with clients (6.3).

Technology is increasingly used in the delivery of legal advice services to clients (6.4). In YLAL's view, where an individual has a social welfare law issue, there is no substitute for face-to-face advice from a legal aid law

The impact of Covid-19 on legal aid services and clients

COVID-19 has exacerbated at least two issues in the sector: the ability of firms to maintain their services, and the ability of vulnerable clients to access the services that are available (7.0).

What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.

YLAL has serious concerns about recruitment and retention of legal aid lawyers as a result of consistently low salaries, poor working conditions, and the lack of available funding for compulsory post-graduate

courses (8.1). Civil legal aid fees have not been raised for decades, meaning that in real terms legal aid fees are constantly decreasing in line with inflation (8.2). Legal aid deserts, areas where free legal advice is not available or very limited, have grown since the introduction of LASPO and are set to get worse.

Proposed reforms pose significant risks. We are particularly concerned about the transition to digital courts, the risk of removal of juries and further deterioration of the court estate, and the threats to the Human Rights Act 1998 and public law remedies such as judicial review.

3. How LASPO has impacted access to justice and for views on the post-implementation review and the criminal legal aid review;

3.1. How LASPO has impacted access to justice

YLAL believes that, to put LASPO in its proper context, consideration must be given for the legal aid system prior to LASPO's enactment.

In 1945, the Rushcliffe Committee presented the Report of the Committee on Legal Aid and Legal Advice in England and Wales to Parliament.[1] The purpose of the report was 'to make such recommendations as appear to be desirable for the purpose of securing that Poor Persons in need of legal advice may have such facilities at their disposal'.

This report formed the foundation of the Legal Aid and Advice Act 1949, which established the modern legal aid system. The Rushcliffe Committee report set out a number of recommendations in respect of the principles upon which a legal aid system should be based. Some of these recommendations were as follows:

- Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require
- This provision should not be limited to those who are normally classed as poor but should include a wider income group
- Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something toward costs
- The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities
- Barristers and solicitors should receive adequate remuneration for their services

YLAL believes that these principles remain highly relevant today and should be the fundamental starting point for any legal aid system. Legal aid should be available to anyone who is unable to afford to pay for advice and representation, not only those classed as poor.

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[1] Rushcliffe Committee, Report of the Committee on Legal Aid and Legal Advice in England and Wales, 1945, p.1

One of the core principles of a legal system, and thus a legal aid system, should be the principle of equal justice for all. YLAL believes the cost of legal aid should be met by the state through general taxation. We believe access to justice is a public good which should be treated by government in the same manner as the rights to healthcare and education, which are free at the point of use.

LASPO came into force on 1st April 2013 and introduced sweeping changes to the structure of the legal aid system, removing whole areas of law from scope and restricting access to publicly funded legal aid, therefore, also restricting access to justice.

The objectives which were intended to achieve through LASPO were set out in the Lord Chancellor's publication, 'Reform of Legal Aid in England and Wales: The Government Response.'[2] These objectives were as follows:

- To discourage unnecessary and adversarial litigation at public expense;
- To target legal aid to those who need it most;
- To make substantial savings to the cost of the scheme; and
- To deliver better value for money for the taxpayer

YLAL has previously expressed concerns that none of the four aims of LASPO contained reference to protecting, promoting or ensuring access to justice. As we stated in our submission to the Post-Implementation Review of Part 1 of LASPO:[3]

> *"Access to justice is a fundamental right and YLAL believes that this right has been undermined by the changes to the legal aid system implemented by LASPO. YLAL believes that wide-ranging reform to the way in which legal aid is administered in England and Wales must be implemented if we are to ensure the legal rights of the most vulnerable in society are protected and in order to uphold the rule of law."*

YLAL urges the government to ensure that any proposals made following this post-implementation review have access to justice, the rule of law and the protection of the vulnerable at their heart.

YLAL notes the concerns we have raised previously, particularly in our submission to the LASPO post-implementation response.

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[2] Ministry of Justice, Reform of Legal Aid in England and Wales: The Government Response, June 2011.

[3] YLAL, Submission to the Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, p.4.

YLAL is concerned that LASPO has failed to succeed in the areas in which it purported to perform. As detailed in YLAL's submission to the LASPO Post-Implementation Review ('PIR'), we assert that, in addition to causing a crisis in the abilities of individuals to access justice, LASPO as not achieved its aims.

In respect of the stated aim of discouraging unnecessary and adversarial litigation, YLAL notes that the restrictions in scope of legal aid has in fact removed the abilities of individuals to resolve issues at an early stage. In our PIR submission, we noted:[4]

> *"The Bach Commission report states that legal aid provision is now skewed towards the use of the courts system, regardless of the fact that it would be cheaper to resolve disputes at an earlier stage. Restrictions to scope mean that, rather than dealing with issues as soon as they arise, individuals must wait until they reach crisis point in order to obtain legal advice and representation. For example, early legal advice for a welfare benefits matter may prevent an individual from incurring rent arrears, leading to other debt issues, potentially going so far as to become repossession proceedings."*

YLAL believes that the scope of legal aid funding should be widened and that wide-ranging early legal advice should be reintroduced in order to allow people to resolve issues before court proceedings become necessary. We believe that, in a just and equitably legal aid system, publicly funded advice and representation should be available for all areas of law relating to the rights of the individual. However, YLAL is of the opinion that, at a minimum, the areas of law which should be brought back into scope include welfare benefits, employment, family and housing.

As expanded upon below, YLAL believes that the means test is too restrictive and that access to legal advice is not being targeted to those who need it most. We submit that the current iteration of the means test does not ensure that those who are unable to pay for private legal representation can access publicly funded legal advice. The means test is simply not a reasonable calculation of a person's ability to pay for private legal advice.

We further believe that the restrictions in scope have meant that those who most need legal advice are unable to access it - for example, an individual who wants to challenge a decision regarding their welfare benefits is unable to access legal aid to do so. Thus, LASPO has failed in its aim to target legal aid to those who need it most.

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[4] YLAL, Submission to the Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, p.49.

It would be an understatement to say that LASPO has been successful in its aim of making substantial savings to the scheme. The Government estimate was that £350 million would be saved by 2014/15. In fact, legal aid spending is now £950 million less than in 2010.

LASPO was also intended to deliver better value for money to the taxpayer. Legal aid cuts have had huge implications upon other public services, including the NHS and GP Surgeries, shifting the costs burden on to different areas.

Even putting aside the false economy of legal aid cuts, it remains undeniable that a cheap justice system is not something to which we should aspire.

YLAL believes that LASPO has had a huge, detrimental impact upon the entirety of the justice system, frustrating access to justice. We believe urgent action must be taken to repair our justice system before it is too late.

There is a crisis within our justice system and one result of this has been ever-growing obstacles to access to the profession for aspiring and junior lawyers. We believe urgent steps must be taken to ensure that future generations of legal aid lawyers are attracted to a career in legal aid and the fulfilment of a vital public service.

3.2. LASPO Post-Implementation Review

In 2018, the Ministry of Justice commenced a review of Part 1 of LASPO. This review was published on 7th February 2020. As noted above, YLAL made a substantive submission to the review, setting out our concerns about the impact LASPO has had upon access to publicly funded legal advice and representation, and the impediment to access to justice which this has caused.

We refer the Justice Committee to our full submission which sets out the full details of our concerns. However, we will outline our main concerns in respect of the impact of LASPO, specifically our concerns regarding the means tests and the restrictions to scope implemented by LASPO, as follows.

The means test for financial eligibility

YLAL believes the current means test for legal aid eligibility in both civil and criminal legal aid to unfairly exclude a significant proportion of the country who, whilst ineligible for public funding, are unable to fund

their own legal proceedings. Legal aid should be available to anyone who is unable to pay for advice and representation, not only those who are poor.

Equal access to justice for all irrespective of wealth should be the absolute core principle of our legal aid system, and we are sad to state that this is not the case within the current iteration of our legal aid system.

We believe that access to justice is a right from which all but the most poor in society have been excluded; a right which is conducive to the functioning of a democratic society operating under the rule of law. YLAL believes that access to justice, and legal aid funding where required, should be treated in the same manner as access to education and healthcare and should be accessible to all and free at the point of use.

An estimated 80% of the population would have satisfied the legal aid means test in 1950 when the modern legal aid system was introduced. As the means test has become more restrictive, eligibility has declined and this figure has fallen significantly. In 2015, the Ministry of Justice itself estimated that around 25% of the population were eligible for free or contributory legal aid.

YLAL considers it to be grossly unfair that the vast majority of the population are ineligible for legal aid in civil matters. As a comparator to the financial eligibility criteria in England and Wales, it is reported that in Scotland, 70% of the population are eligible for legal aid.[5]

YLAL believes that the means tests are overly complex, with different requirements for criminal proceedings in the magistrates' court and the Crown Court, and a different means test for civil proceedings. The types of civil cases in which the means test is not required are too limited, for example, where a parent is trying to challenge a local authority's attempt to take their child into care, or where a challenge regarding deprivation of liberty is brought by an adult who lacks mental capacity.

The principal changes brought in by LASPO in respect of the means test were:

- The requirement that those on passporting benefits were subjected to capital assessments, rather than being automatically being passported through both the income and capital tests;
- The capping of the capital disregard for property which is the 'subject matter of dispute' at £100,000; and
- The contributions clients were required to pay towards their legal aid from income were increased to a maximum of 30% of monthly disposable income.

[5] Joint Committee on Human Rights, Enforcing human rights, 2018, p.14.

The means tests

YLAL is concerned about the impact of the restrictive means test and the hindrance this poses to our clients' abilities to access justice. Some common concerns arising from our members' feedback since the implementation of LASPO are as follows:

- The requirement to apply the capital test for those on passporting benefits is illogical. Where an individual has been granted means-tested benefits based on their financial resources by the Department for Work and Pensions, it is illogical to then apply a different test for public funding which may conclude that they are not entitled to assistance.

- The cap on the allowance for housing costs is unrealistic (£545 per month) especially for those who live in large cities where housing costs are significantly higher.

- The Legal Aid Agency has no discretion when applying the means test, so even if a client is barely earning more than the limit, or where their income varies from month to month, they are refused legal aid.

- In the calculation of 'disposable' capital, the value of a person's home is now taken into account. This results in people being ineligible for legal aid despite having no real access to funds to pay for legal advice, particularly as many people are unable to raise funds on the equity in their home.

- Those with capital are required to make contributions within 28 days, which may not be possible particularly where assets are not liquid.

- Only £45 per month is deductible as employment expenses, which calculates as approximately £2 per day. This is unrealistic and unfair as travel to work often costs significantly more than this. In London, this would not even pay for a single tube journey.

- The failure to account for inflation. The disposable income limit is £733 per month and, according to the Bank of England's inflation calculator,[6] £733 in 2013 is the equivalent of £846.36 in 2019. It is essential that means tests be index linked to inflation.

- The quality of the Legal Aid Agency's decision making is poor, requiring solicitors to waste time challenging incorrect assessments of means, the costs of which is not recoverable.

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[6] Bank of England, Inflation Calculator.

- The difficulty in providing adequate proof of means for self-employed clients, particularly those in the 'gig economy' or who do piecemeal work, who earn varying amounts.

- Evidence of means is difficult to obtain. For example, the requirement for imprisoned clients to provide full bank details and statements is incredibly difficult to satisfy due to a combination of the client not having the necessary account details whilst they are in prison, the inability to obtain identity documents from individuals held in custody, and the extensive procedures which must be followed by banks when trying to obtain statements on behalf of a third party.

- Evidence from individuals who are financially supporting the client is also difficult to obtain, particularly where the individual gives the client small amounts of cash on an ad hoc basis, which is significantly more likely to be the case than regular, recurring amounts.

- The requirements of the evidence required for family law cases in which the client must prove they are a victim of domestic abuse remain difficult to satisfy. The nature of domestic abuse means that victims often do not report the abuse because they are too frightened, therefore they won't have any 'evidence' to provide.

The constraints of the means test have had the most impact upon the 'squeezed middle', who have enough money to no longer qualify for legal aid, but who are unable to pay for private legal representation.

However, we caution that the term 'squeezed middle' summons visions of individuals with secure, reasonably paid employment and sufficient disposable income to pay for legal support if, perhaps, they make cut-backs elsewhere. In fact, a single person with no dependents working full-time in a £9.50 an hour job would fail the means test and therefore, according to the current legal aid scheme, has sufficient means to pay privately for their representation. This despite the fact that, if working a standard 37.5 hour week, they would earn only £18,525 (before tax), well below the London Living Wage of £20,963, and only just over the National Living Wage of £18,135.

The result of the legal aid financial eligibility criteria is that almost anyone who is not in receipt of means-tested state benefits will be financially ineligible for civil legal aid. YLAL believes that this represents a widespread denial of justice to the people of this country.

In addition, there has been a demonstrable increase in litigants in person. Whilst the statistics in this area are limited, in 2012-13, 42% of parties in private family law cases were litigants in person; whereas by 2016-17, this had increased to 64%.[7]

Our members have reported a rise in the numbers of both litigants in person in civil courts, and unrepresented defendants in criminal courts. YLAL is concerned primarily that this inequality of arms leads to inequitable results and, even on a purely practical basis, it significantly increases the amount of court time required to deal with cases.

Criminal legal aid means test:

To deal with the criminal and civil legal aid schemes as though they were one would surely cause inequitable results, given that different means tests are applied. Although the above concerns are broadly applicable to both the civil and criminal means tests, there are specific issues within the criminal means tests which are notable.

YLAL believes that any person who is suspected of a criminal offence should be able to access publicly funded legal advice and representation, from police station to sentencing. Financial considerations should never lead to an individual being prosecuted by the state being unrepresented. We believe this is a key principle of criminal justice for any civilised society.

We are concerned that the significant cuts within the criminal legal aid fee schemes means that many criminal defence firms are at risk of bankruptcy and criminal barristers have resorted to taking direct action in protest against the unfairly low levels of remuneration. We are concerned that the profession is losing huge numbers of experienced practitioners and insufficient new practitioners are joining. For the criminal justice system to remain legitimate, there must be practitioners of sufficient experience and expertise to advise and represent defendants.

We believe that the following changes should be made to the criminal means tests, in order to ensure individuals are given an appropriate level of access to advice:

- Significantly increase the limits for both the Crown Court and the magistrates' court means tests.
- The interests of justice test in the magistrates' court should be deemed automatically satisfied., regardless of whether the offence is imprisonable. The impact of a criminal record upon a person's

[7] Equality and Human Rights Commission, Research Report 118: The Impact of LASPO on routes to justice, September 2018, page 11.

life, no matter the penalty, cannot be understated. The fact that, during a prosecution it is the state or a state body who are acting against you should be sufficient to satisfy the merits test and YLAL believe that to promote access to justice and the principle of equality or arms, criminal legal aid should be subject to means testing only.

- Remove the 'innocence tax' which means that where someone is financially ineligible for§ legal aid and pays a lawyer privately and is acquitted, they are only able to claim the costs of their defence back at legal aid rates rather than being able to claim back their reasonable costs.

- Give powers to judges to order the Crown Prosecution Service to be required to pay defence costs, for example where they have offered no evidence at a late stage in the proceedings.

Summary

YLAL believes that a wide-ranging reform of the means test should be one of the most important steps to ensuring access to justice is a reality within our legal aid system. We believe that legal aid should not be reserved only for the poorest in society, but for anyone who is unable to pay for advice and representation.

We believe that the financial eligibility tests should be regularly reviewed and increased in inflation. We believe there is scope for simplifying the means test to reduce the unnecessary bureaucracy which creates further administrative burden not only for legal aid firms and the Legal Aid Agency, but for the clients themselves, the most vulnerable of whom are simply unable to obtain the required evidence and paperwork.

Scope and Early Legal Advice

LASPO removed whole areas of law from the scope of public funding. Purportedly in an attempt to tackle 'compensation culture', this in fact involved the exclusion of many areas of law including private family law including disputes about child arrangements and divorce, welfare and benefits, immigration, education and housing disrepair.

YLAL believes that, in removing access to early legal advice which results in individuals being required to act as litigants in person, access to justice has been inhibited; with financial burdens being inflicted upon other public services and, consequently, the taxpayer; disproportionately impacted the most vulnerable in society and undermined the legal profession and advice sector resulting in the sector becoming unsustainable.

We are concerned that the government's approach of targeting legal aid funding only at the most serious of problems is fundamentally flawed as it leads to problems escalating unnecessarily, which results in higher

personal cost to both the individual and the state. For example, as welfare benefits have been removed from scope, an individual who wishes to challenge the removal of their benefits by the Department for Work and Pensions will have no recourse to legally aided advice and representation. If they are fortunate, they may be able to access advice through a legal advice centre. If not, they will be required to represent themselves and survive without their benefits, likely unable to pay rent, until a tribunal determines their case.

Impact on the individual's physical and mental health and well-being

YLAL do not believe that the government has given adequate consideration to the human cost to individuals, the additional stress and strain caused by being required to wait until their problems have reached crisis point before being able to access legal advice to resolve the issue.

Where an individual is worrying about access to their child, struggling to make ends meet due to changes to their benefits, attempting to resolve their immigration status, or facing eviction and the loss of their home, they are already in a highly vulnerable and precarious position.

To be forced due to restrictive scope requirements to refuse these individuals assistance in their hour of need is inhumane. In addition, this only leads to further issues later down the line, when these issues will have been exacerbated and reached crisis point, and therefore become more costly to resolve.

The provision of early legal advice also creates a population who are more legally informed, thus have more knowledge of their rights and are better equipped for decision making in order to avoid future problems from arising.

Pressure on the court system

As noted by the Bach Commission's 2017 report 'The Right to Justice', legal aid provision is now "skewed" towards to use of the courts, regardless of the fact that it would significantly cheaper to resolve disputes at an earlier stage.[8]

The LASPO system of allowing problems to spiral out of control and reach a court room setting before providing publicly funded legal advice and representation is nonsensical, short sighted, fundamentally flawed.

[8] Bach Commission, The Right to Justice, 2017, p.17.

A lack of early advice creates costs for the public purse, due to cases going to court which could have been capable of earlier resolution. If, following early legal advice, a case still continues through to court proceedings, the issues will be narrower, and the parties properly advised and prepared, which will both reduce the time and administrative burden upon the court and promote a more equitable resolution.

In 2016, the results of the Speak Up for Justice survey showed that, of the 141 justice sector staff surveyed, 87% of respondents stated that the increase in litigants in person has had a detrimental impact on the ability of family and civil courts to to deliver justice fairly effectively and efficiently.[9]

In December 2017, BuzzFeed News surveyed the Magistrates' Association and found a 65% increase in litigants in person in family proceedings before magistrates, since 2014. One magistrate who responded to the survey stated "I fail to see how removing legal aid from private law family proceedings is saving any money at all, given the number of extra hearings and additional time spent in court. The situation is becoming a joke."[10]

The National Audit Office has estimated that litigants in person create an additional cost to HM Courts and Tribunals Service of £3 million per year, in addition to direct costs of approximately £400,000 to the Ministry of Justice.[11]

Higher costs elsewhere in the public sector

The Justice Committee have previously considered the false economy of legal aid cuts and the financial impact upon other areas of the public sector, and YLAL endorses the Justice Committee's concern that: "[t]he Ministry's efforts to target legal aid at those who most need it have suffered from the weakness that they have often been aimed at the point after a crisis has already developed, such as in housing repossession cases, rather than being preventive."[12]

Citizens Advice has estimated that, for every £1 spent on debt advice the state potentially saves £2.98, and for every £1 spent on employment advice, the state potentially saves £7.13.[13] A report by the Low Commission

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[9] Trades Union Congress, Justice Denied, 2016, p. 4.

[10] BuzzFeed News, Magistrates Say Children Suffer In Family Court Hearings When Their Parents Have No Lawyers, Emily Duggan, 17 December 2017.

[11] National Audit Office, Implementing Reforms to Civil Legal Aid, 2014, p.6.

[12] Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 4 March 2015, p.4.

[13] Trades Union Congress, Justice Denied, 2016, p. 10.

has also noted that long term, the restriction of early legal advice is likely to have negative consequences. In our submission to the PIR, we stated:[14]

> "Aside from the obvious cost to the health service of treating those with physical and mental health issues caused, or exacerbated, by the desperate situations they find themselves in, the likely additional cost to other public services is clear. For instance, a person may fail to resolve an issue with their welfare benefits, resulting in other areas of their life going wrong, their health deteriorating and them requiring medical treatment on the NHS; a person involved in possession proceedings and unable to access legal advice in respect of housing benefit may be evicted and then need to be housed by the local authority; an individual who is unable to access advice on the merits of their legal case, such as immigration detainees, add an additional cost to the state and are unable to resolve the situation they find themselves in. Providing legal aid only at the point when a crisis has already developed, rather than taking a preventative approach, means that the costs are simply moved from the legal aid budget to the budget of other public services."

There is evidence of the burden being shifted onto MP's surgeries and the NHS, with Hogan Lovells and the All Party Parliamentary Group on Pro Bono observing that, of 325 constituent appointments at MP surgeries between October and November 2016, 89% related to legal issues, predominantly those relating to housing, benefits and immigration.[15] The Legal Aid Practitioners Group have surveyed General Practitioners, who noted an increase in patients attending with legal issues, relating to community care, employment, welfare benefits and debt,[16] which is therefore indicative of an increased burden upon the National Health Service.

Additional demands upon the advice sector

The lack of legal aid being available for a substantial section of legal issues and proceedings has resulted in Law Centres and legal advice clinics bearing a substantial part of the burden in respect of the provision of advice and representation in those areas of law which are out of scope. This burden is unsustainable and, with insufficient organisations able to provide free legal advice and assistance, vulnerable individuals are being left without the support they need.

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[14] YLAL, Submission to the Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, p.31.

[15] Hogan Lovells and the All Party Parliamentary Group on Pro Bono, Mind the Gap: an assessment of unmet legal need in London , 2017, p. 7.

[16] Trades Union Congress, Justice Denied, 2016, p. 27.

This increased pressure upon legal advice clinics has come at a time when the numbers of these centres has dropped significantly, from 3,226 in 2005 to only 1,462 in 2015.[17] Advice centres are therefore unable to meet the demand upon their services.

The increase in requests for assistance has created an unsustainable burden upon the advice clinic sector, which is simply unable to cope with the demand. As previously noted by the Justice Committee:[18]

> *"the Law Centres Network said 'our offices have experienced a surge in enquiries after help in the areas now out of scope, primarily family, immigration and employment'. As an example, 'Hackney Community Law Centre... in winter 2013 reported a 400% increase in people looking for help with welfare benefits, a 200% increase in people looking for immigration help and a 500% increase in calls to their telephone advice line.'"*

Trial of Early Legal Advice

YLAL was pleased to see that the Ministry of Justice had recognised the concerns which had been raised in respect of early legal advice, in the Legal Support Action Plan. However, we are concerned by the then-Lord Chancellor's statement that:[19]

> *"[M]any people attempt to resolve a problem on their own, or with the help of 'informal' sources of advice such as family and friends, before seeking specialist advice and support, and that the level of formal or professional support they seek is related to the seriousness of the problem. Focusing funding on legal aid alone means opportunities may be missed to support people to resolve legal problems sooner and reduce conflict, stress and cost."*

Whilst of course we accept that individuals will turn to friends and family for advice and support in times of need, we disagree with the implication that this could be an acceptable replacement for advice from a qualified lawyer, particularly when one considers the dire state of public legal education.

We accept that there are different levels of advice required for different issues, but legal aid funding must be accepted as the most important means by which an individual can be empowered to access to justice and

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[17] Bach Commission, The Right to Justice, 2017, p.12.

[18] Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 4 March 2015, para. 80.

[19] Ministry of Justice, Legal Support Action Plan, p.19.

enabled to assert their legal rights. Leaflets, guidance documents, and technology are no substitute for lawyers with expertise providing face-to-face guidance.

YLAL would urge the Ministry of Justice to proceed with caution when seizing upon the use of technology, for example, "web based products which bring a range of legal support tools together in one place", the use of telephone advice, and the delivery of legal support through technology.[20] We warn against treating this as a feasible alternative to face-to-face legal advice: many of our members' clients are highly vulnerable, not computer literate, and would have difficulty accessing online resources, or engaging in telephone consultations.

YLAL welcomes the announcement of a trial of face-to-face legal advice in social welfare law relating to housing. However, we are concerned that the process of testing, piloting and researching the provision of early legal advice was scheduled to take two years.[21]

We note that the now retired Permanent Secretary at the Ministry of Justice, Dame Ursula Brennan, told the Public Accounts Committee that speed of change was of the essence when LASPO was enacted: "the Government was absolutely explicit that it needed to make these changes swiftly. Therefore, it was not possible to do research about the current regime before moving to the cuts".[22]

YLAL is concerned that early legal advice was swiftly removed by swingeing cuts, but the proposed trial of its return is too slow to stop the deterioration of the sector. The profession is at breaking point, with the coronavirus pandemic compounding the issues which were already endemic within the legal aid and legal advice sector.

3.3. Views on the Criminal Legal Aid Review

The Criminal Legal Aid Review ('CLAR') was announced in December 2018 and was intended to be a holistic review of the criminal legal aid fee schemes within England and Wales, including a consideration of all aspects of criminal legal aid funding, from the police station to sentence. CLAR was initially due to report back by Summer 2020, but has been plagued by delays and set backs.

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[20] Ibid, p.6.

[21] Ibid p.20.

[22] Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 4 March 2015, para 8.

The aims of CLAR are:

1. To reform the criminal legal aid fee schemes so that they:

- fairly reflect, and pay for, work done;
- support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce;
- support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer;
- are consistent with and, where appropriate, enable wider reforms;
- are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies; and,
- ensure cases are dealt with by practitioners with the right skills and experience.

2. To reform the wider criminal legal aid market to ensure that the provider market:

- responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer;
- operates to ensure that legal aid services are delivered by practitioners with the right skills and experience; and,
- operates to ensure the right level of legal aid provision and to encourage a diverse workforce.

Having suffered decades of cuts, the criminal defence community is in crisis. The result of so many years of neglect has been the slow but sure decimation of the future of the profession and access to justice. The sad reality of the current criminal fee schemes is that criminal legal aid is so difficult to maintain as an area of practice that many firms have stopped working in this area, or have been forced to subsidise their crime departments with more profitable areas of work.

Criminal defence practitioners have been required to take on ever-increasing caseloads in order to maintain at least a small measure of profit, which is detrimental both in respect of the practitioners' quality of life, and the service they are able to provide their clients. YLAL believes that there are clear risks of miscarriages of justice occurring, due to the extent to which defence practitioners are overstretched.

YLAL believes that the inadequate levels of remuneration within the fee schemes has negatively impacted access to justice for those individuals who come into contact with the criminal justice system, whether their involvement is as a defendant, a complainant, or a witness.

The Accelerated Areas

The Accelerated Areas were five areas of the criminal legal aid system which were selected for accelerated review. These five areas were intended to be a 'quick fix' to pump some funds back into the criminal legal aid schemes whilst the full review was pending. One key reason for these accelerated areas was the concern about the sustainability of the profession, with high numbers of defence practitioners leaving for financially viable and less all-consuming areas of practice.

The consultation on the proposals for the Accelerated Areas was originally due commence in November 2019. This was delayed until February 2020 due to the general election. The Accelerated Areas consultation was due to close in March 2020 but was further delayed, due to the COVID-19 pandemic. The Accelerated Areas had been intended to provide interim relief from early 2020 until Summer 2020. The changes to the fee schemes were implemented in October 2020.

The decision of the MoJ to expedite the accelerated areas was a clear recognition of the impending crisis in the criminal defence profession, a sticking plaster, pending the completion of the full CLAR review. However, we do not consider that the Accelerated Areas went sufficiently far in mitigation of the harm the current fee schemes continue to cause to legal aid practitioners. Our criticisms of the decisions in respect of the individual proposals for each are are set out in full within our substantive submission to the consultation.[23]

The Independent Review and CLAR Part II

The Lord Chancellor's announcement that there will be an independent review of the criminal legal aid system, to run alongside the MoJ's CLAR part II, was welcomed by YLAL.

We are staunch in our belief that any independent review will reach the conclusion YLAL and the rest of the defence community already have - that the current system of criminal legal aid is unsustainable and the miserly fee schemes have lead to low remuneration and excessive caseloads, which have been fatal to the principle of social mobility.

[23] YLAL, Submission to the Ministry of Justice consultation on the Criminal Legal Aid Review: an accelerated package of measures amending the criminal legal aid fee schemes, 17 June 2020.

The MoJ have not confirmed the timescales for the Independent Review, nor for CLAR Part II. YLAL surveyed some of our crime practitioner members as part of our Accelerated Areas consultation response. In the responses to this survey, 15% of respondents stated that they would only continue practicing criminal defence for a further 12 months. 27% stated that they intended to remain practicing for between 1-2 years.

YLAL believes that this is a direct consequence of the sustained lack of investment in the criminal legal aid sector and, indeed, the criminal justice system as a whole. We are concerned that, by the time the criminal legal aid system is reformed to make it a sustainable career choice, it will be too late. In response to our survey, one of our members stated:

> *"The criminal justice system will fall apart without significant investment. There will be significant miscarriages of justice as the talent continues to drain away from the profession and the older generation retire, particularly in relation to solicitors. The current remuneration is simply not sustainable."*

The profession has been stretched to breaking point for too long, attempting to protect the integrity and maintain the functioning of the criminal justice system, the functioning of which is entirely reliant upon the goodwill of practitioners. The criminal defence practitioners are running out of goodwill, unable to continue operating within the current legal aid system.

The justice system of England and Wales is often lauded as 'the best justice system in the world'. Those who are on the ground dealing with the everyday realities of the criminal justice system, in our magistrates' courts and Crown Courts, would disagree. With no increase in rates for in excess of two decades, the criminal justice system has been decimated by the cuts and austerity. Without a clear, systemic change in the way in the treatment of the criminal defence profession, the damage may be irreparable.

The Sustainability of the Profession

There is a crisis of sustainability in the criminal defence profession. Criminal defence is an ageing profession, and the effects of the succession crisis are incontrovertible - the average age of criminal duty solicitors is now 47.[24] Criminal legal aid is such a disincentive to enter this area of practice, that insufficient junior lawyers are choosing to practice in criminal defence, instead choosing to practice in more profitable areas, or those with less out of hours work, which allows for a significantly increased quality of life.

[24] The Law Society, Criminal duty solicitors: a looming crisis.

In our Accelerated Areas survey, many respondents explained their plans to obtain experience in other areas of practice to enable them to leave criminal legal aid. We are concerned that if urgent measures are not brought in to stem the flow of those abandoning criminal legal aid practice, there may not be a profession left to save.

YLAL believes that the succession crisis can only be solved with a substantial funding injection into the fee schemes. Unless criminal defence returns to its previous condition, as a financially viable career choice, the numbers of new entrants will continue the downward trend, thus exacerbating the pre-existing problems and causing further decline to access to justice within the criminal justice system.

As the most junior members of the profession, YLAL members are often in the most vulnerable position in terms of being the lowest paid, with the most precarious work, little financial stability, and most at risk of exploitation in terms of the quantity and complexity of work they should be completing. YLAL is concerned that the working conditions are such that junior practitioners will recognise the untenable nature of criminal legal aid and move to different areas of practice, thus further compounding the sustainability crisis.

Urgent action must be taken to protect the future of the criminal defence profession. A sustained effort is required to promote social mobility and diversity, by ensuring that rates of remuneration are such that those without third-party financial support are able to practise in this area of law.

4. The role of the Legal Aid Agency;

LASPO replaced the Legal Services Commission ('LSC') with the Legal Aid Agency ('LAA'). The role of the LAA should be to effectively administer legal aid, in accordance with LASPO and and the Lord Chancellor's guidance. However, this is not happening as the LAA has a culture of refusal and imposes unnecessary administrative burdens on legal aid providers.

4.1. Culture of refusal

YLAL members and other practitioners in the legal aid community have found that there is a 'culture of refusal' at the LAA. In October 2019, the Legal Aid Practitioners Group ('LAPG') organised an open meeting where more than 200 hundred legal aid practitioners attended to provide examples of the culture of refusal at the LAA. Attendees reported that the LAA was frequently obstructive in the following ways:

- Unreasoned refusals;
- Poorly reasoned refusals on the grounds of "merits" despite positive advice from counsel;
- Unnecessary requests for further information that create delay;
- Unreasonable delays in determining applications.

At the event, a whistle blower from the LAA noted that:

> "*In terms of when a decision is made, and you guys appeal it for whatever reason, there isn't a system whereby that decision is looked at by somebody else. That decision gets back directly to the person that actually originally made the decision, […] and that individual looks at it again based on the submissions that you guys have made and decides whatever they decided […], it only then goes to an independent person on your second challenge, so again, the argument about independence…*

As to whether there was a culture of refusal at the LAA, the whistleblower stated:

> *"If I'm honest, it's a mixture of both. Because there are individuals in there that (without trying to breach confidentiality) I have would say seen decisions that a member of staff would have made and granted funding and it gets circumvented because of policy."*[25]

[25] The Justice Gap, Legal aid deserts and a culture of refusal 2 March 2020.

Following the event, LAPG surveyed the sector and received 550 responses. The survey findings show that legal aid lawyers overwhelmingly consider the LAA to have a culture of refusal and be barrier to access to justice.

The culture of refusal is having a profound effect on junior legal aid lawyers' wellbeing. The LAA's unlawful refusals and delay often require lawyers to choose between the best interests of clients and acting "at risk" of not being paid. Daily, YLAL members must navigate the competing pressures of billing targets and doing the best for their clients. This task is made more difficult by having to challenge the LAA's unlawful delays and refusals. The unnecessary stress created by the LAA is harmful to our members' wellbeing.

4.2. Administrative burden

The LAA's bureaucratic approach is a barrier to access to justice.

The LAA's system for applying for civil legal aid funding, Client and Cost Management System ('CCMS'), is not fit for purpose. There are widespread technical and design difficulties which render processes inefficient. The system has been criticised as "slow, cumbersome and susceptible to technical errors".[26] LAPG has recorded that many providers have had to create and/or agree 'workarounds' with the LAA to mitigate CCMS' limitations.[27] LAPG has also found that the problems with CCMS have "pushed the supplier base to an operational precipice".[28] The bureaucracy "adds to the demoralisation of the profession, which has significant ramifications for its future sustainability". As the Bach Commission remarked, "every hour spent on unnecessary administration is an hour not spent helping people with their problems."[29]

The application forms are needlessly involved. For example, research by Public Law Project[30] into the low application rates for Exceptional Case Funding ('ECF') found:

- 77% of respondents disagreed that ECF is effective in ensuring that people can access legal aid when it is needed (61% 'strongly disagreed')
- 64% of respondents made between 0-5 applications in the last year (20% made none)

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[26] Legal Aid Practitioners Group, Manifesto for Legal Aid, 2nd edition, 2017, p.27.

[27] Ibid, p.28.

[28] Ibid, p.27.

[29] Bach Commission, The Right to Justice, 2017, p.35.

[30] Public Law Project, PLP survey shows lack of faith in legal aid system, 20 January 2020.

- Nearly 50% of respondents have only made between 1 and 5 applications since the scheme was introduced

- 39% of respondents said they do not make ECF applications on behalf of their clients. Key reasons for the low application rate for ECF included the application process being time consuming and "at risk".

- 75% of respondents said they would be more likely to make applications if the Ministry of Justice worked with legal aid practitioners to simplify the process, improve the timeliness of the process, and consider introducing an emergency procedure for urgent matters.

Legal aid providers are not sufficiently compensated for administrative work required to secure legal aid. This threatens providers' financial viability, which forces providers to rely heavily on YLAL members: junior lawyers, trainees and paralegals, frequently working on low salaries with little or insufficient guidance and training. This raises serious concerns because it compromises the quality of legal assistance providers can offer to their clients.

5. Recruitment and retention problems among legal aid professionals;

YLAL's membership is made up of junior and aspiring lawyers up to 10 years post-qualification experience or call. YLAL has particular concerns about the sustainability of the legal aid sector and what the future of the profession looks like.

YLAL has published three comprehensive reports on social mobility in recent years, the most recent of which was published in 2018.[31] This report highlights significant difficulties with recruitment and retention, particularly in terms of social mobility and diversity following the implementation of LASPO. The report also highlights the difficulty of recruiting and retaining new entrants to the profession full stop given a large number of hurdles. We would direct the Justice Committee to the full report, however the salient points are noted below.

5.1. Barriers to Entry and Retention

There are three key issues with recruiting and retaining talented recruits in this area.

Debt and low wages:

The LASPO cuts and lack of subsequent investment mean that providers of legal aid services work with very low profit margins and therefore pay their employees (particularly those at the junior end of the profession) low wages, which are frequently below the living wage. There is no legal minimum salary for trainee solicitors, though one is recommended by The Law Society. This is also true for those at the Bar as they are self-employed.

Prior to receiving such low salaries, entrants to the profession will have accrued significant debts. Undergraduate fees currently stand at £9000 per annum. Where an individual did not doa law degree for their undergraduate degree, they will need to complete the Graduate Diploma in Law. It is also necessary to have a postgraduate professional qualification, either the Legal Practice Course or the Bar Practice Training Course. Many postgraduate courses in this area frequently do not attract any kind of student loan funding, unless the course can be completed incorporating a Masters of Law. Postgraduate course fees are extremely high.

Unlike commercial firms, legal aid providers are not able to cover, or even subsidise, the significant cost of essential postgraduate qualifications and few of our members were able to self-fund these fees through

[31] YLAL, Social Mobility in a time of Austerity, 2018.

parallel work. Of respondents to our most recent report, 72% had debts of over £15,000 due to educational requirements and 26.5% had debts over £35,000. Over half of respondents earned under £25,000 a year.

Unpaid work experience:

There are extremely limited opportunities for those wishing to enter the profession to undertake relevant paid work experience. Even the most entry level positions with Legal Aid providers will require significant work experience in a relevant area. 70% of respondents in our 2018 report indicated they had undertaken some form of unpaid work experience with 13.5% stating that the requirement for unpaid work experience was a significant barrier to entry into the profession.

It goes without saying that having unpaid work experience as a prerequisite to obtaining paid work necessarily excludes those who are not independently wealthy from the profession.

Stress, lack of support and juggling legal aid work with other responsibilities:

Stress was cited as the second biggest challenge faced by young legal aid lawyers, with 21% of respondents saying it has been their greatest challenge. Legal aid work is on the 'legal front line' and there is an appreciable risk of vicarious trauma from the content of the work along with burnout from a combination of work volume and financial insecurity. There is a general lack of adequate mental health support or mentoring due to resources being stretched so thinly.

We anticipate that these issues are likely to be exacerbated due to the current concerning rhetoric used by both the Home Office and the Prime Minister around 'left wing activist lawyers' which will lead to many feeling undervalued and pressured by society.[32]

There was concerning evidence from our 2018 report that the combination of these barriers was causing those at the junior end of the profession to leave. One respondent stated:

> *"Unfortunately, I no longer work in legal aid. The junior criminal bar became too much; the financial anxiety was overwhelming. Working ten hour days when you didn't know if you were going to be paid or not became too much."*

5.2. Impact of Extended Opening Hours - Civil, Family and Criminal Courts

[32]The Law Gazette, Johnson opens new front in war on 'lefty lawyers', Michael Cross, 6 October 2020.

Part of the Court Reform Programme, which is addressed in full at section 6 below, includes the proposal that certain courts open for extended hours. There are currently ongoing piolets of this in several areas. The Law Society has expressed significant concerns with this proposal which are shared by YLAL.[33] In the context of recruitment and retention, it is our view that a move towards extended hours would be detrimental to the long term future of the profession. Legal aid practitioners already work long hours well outside the normal opening hours of courts in order to prepare cases. Extending court sitting time would have the effect of further increasing an already excessive work schedule for many and make a career in this area simply impossible for many and, most particularly, those with caring responsibilities.

5.3. Impact of COVID-19

As with all areas of life, the COVID-19 pandemic has further exacerbated all of the issues which were already there. Legal aid providers have found themselves in an even more precarious financial position and the ability to do the job has been made appreciably harder due to social distancing restrictions (see section 7 below)

Large numbers of staff at firms and not for profit organisations were furloughed and earning 80% of what were already low wages. Yet more are likely to be made redundant and we are anecdotally aware that this is starting to occur. Barristers who are just starting out in their careers have missed out on many of the support schemes put in place to help those who are self-employed due to them not meeting the necessary criteria of a previous tax assessment. The shock of the lockdown and ongoing disruption is likely to have an ongoing negative impact on the viability of legal aid providers and therefore retention and recruitment.

COVID-19 has also had a significant impact on the ability to train the next generation. We have had instances of members whose offers of pupillage or employment were rescinded following the nationwide lockdown in March 2020.

5.4. The Way Forward

If current trends continue, the barriers to entry into legal aid work will become prohibitive to all. Our 2018 Social Mobility report highlights how barriers are already essentially prohibitive for many. The average age of a criminal duty solicitor is now 47 and in some parts of the country is it significantly higher.[34] These issues were all already apparent prior to the COVID-19 crisis which will only have a further negative impact.

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[33] YLAL, Extended Operating Hours in Civil, Family and Criminal Courts: What's the problem? September 2020.

[34] The Law Society, Criminal duty solicitors: a looking crisis.

YLAL requests that, when considering this submission to the Justice Committee consultation, the contents of our social mobility report be viewed by the committee in the context of the detrimental impact LASPO has had upon social mobility and the sustainability of the profession.

YLAL believes that if the recommendations made within this submission and our social mobility report are implemented, access to justice and sustainability of the profession can be significantly improved, and the resulting diversity, particularly with reference to socio-economic background, will encourage the profession to flourish and better serve the vast unmet public need for legal advice and representation.

6. The impact of the court reform programme and the increasing use of technology on legal aid services and clients;

As junior legal aid lawyers, YLAL members are well-placed to provide insight into the rapid rollout of technology in courts and its use in delivering legal aid services.

During the pandemic, YLAL has formally and informally consulted its members about the impact court reforms and the increased use of technology in delivering legal aid services. Between 26th March-3 April 2020 we produced a rapid report on the impact of COVID-19 on legal aid lawyers ('first COVID-19 report'), with 309 responses.[35] We produced a follow-up report ('second COVID-19 report') between 2-13 May 2020, which had 104 responses.[36] Between 2-8 May 2020, YLAL surveyed its members about the impact of the move to remote hearings during the pandemic on the civil justice system ('civil justice survey'), in which we had 68 responses.[37] Our members have also fed back on their experiences on these issues during our bi-monthly member meetings.

6.1. Court reform

COVID-19 has accelerated the court reform programme. As professional court users, YLAL members represent some of the most vulnerable court users. However, our members are unable to speak directly to the experiences of litigants whose views, feelings and experiences should be given proper consideration.

In our civil justice survey, which was held almost two months into the national lockdown which commenced in March 2020, 20.9% of respondents had conducted video hearings, and 20.9% had conducted telephone hearings. Less than half of respondents had done remote hearings prior to COVID-19, and for the remainder, it was a new experience.

At that stage, 8.1% of respondents said that they thought that the current system of attending courts or tribunals either remotely or in person was working well, 16.1% did not think it was working well, while the majority (75.8%) felt that it was working well in part.

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[35] YLAL, COVID-19 Report, April 2020.

[36] YLAL, Second COVID-19 Report, 25 May 2020.

[37] YLAL, Response to the Civil Justice Committee Rapid Consultation on Remote Justice, 15 May 2020.

Respondents commented that it was positive that hearings could continue, albeit in a new format, and that it was encouraging that parties had adapted to the new circumstances. For certain types of hearings, such as case management hearings, remote hearings are seen to provide a practical solution and had been utilised effectively before the pandemic.

However, many respondents felt that remote hearings were no replacement for in-person hearings. Given the issues associated with remote hearings, some respondents were reluctant to see it as any more than a temporary arrangement:

> *"At the moment, technology is not good enough and there is a danger of a two-tier justice system depending on how well each element of the justice system is funded. Whilst some courts will have excellent video and sound quality, others will only have access to a telephone conferencing system. The two cannot be compared. The system needs to be the same quality nationally and in each court (crown, county, mags, coroner) before I will think positively about this."*

Although it is generally accepted that remote hearings may be necessary during COVID-19 in some areas of practice, such as Family and Court of Protection ('CoP'), our members have expressed concern that there is a real risk of injustice should remote hearings become the norm following the pandemic. Across the board, our members have raised concerns about the impact of remote hearings on justice and cited multiple causes of potential injustice, including:

- the practical inadequacies of technology;
- digital exclusion through lack of means or ability;
- a lack of reasonable adjustments for people with disabilities;
- a greater risk that clients will not be represented;
- a reduction in public scrutiny through the dilution of open justice;
- a failure to consider the importance of the experience of being physically in court and the impact that has, particularly in terms of reaching settlement;
- that the persuasiveness of oral evidence and advocacy will be lost; and
- above all, the sense that clients will not feel they have been treated fairly in all cases.

YLAL members' experiences of technology and remote hearings have been mixed. There are some notable advantages to remote hearings and those who had positive experiences of remote hearings felt that the system worked well. Many respondents to the civil justice survey reported technological issues, however, and noted the obstruction these caused to the standard course of justice:

> *"I dialled into a hearing in the Admin court at the start of the lockdown. Counsel was present but I couldn't hear most of the hearing to take a proper note and the system of dialling in required numerous calls and requests before it was granted."*

> *"Video hearing took 30mins to get going, lack of sound, connection dropped off, pic went. Faff."*

The consensus was that video hearings were preferable to telephone hearings in that parties could see faces and this helps to build rapport. However, participation in video hearings is often stymied by connection issues which affect sound and/or video quality and can lead to participants being 'kicked out' of a hearing due to a technical glitch, leaving them unable to take part for some time or, in some cases, for the rest of the hearing.

Sound quality in telephone hearings was dependent on signal strength and poor-quality lines increase the opportunity for misunderstandings and/or need for repetition. In addition, these hearings become more complicated when there are several individuals involved. Not being able to see or identify speakers causes confusion and overlap, and much is lost in the absence of visual cues.

The move to remote hearings has had mixed effects on access to justice for disabled clients, depending on the nature of their disabilities. One member noted that their client would not have been able to physically attend the Administrative Court due to restrictions on travel and that virtual hearings allowed them to attend their hearing. Another member noted that the Special Educational Needs and Disability ('SEND') tribunal had not made appropriate reasonable adjustments for a deaf client. The online platform ('Kinly') only displayed the videos of the four people to speak most recently. As the client's BSL interpreter was not speaking there was no way that the client and their interpreter could see each other throughout the hearing. This YLAL member had to use their personal Zoom account to set up a separate video call so that the interpreter and client could communicate during the hearing to ensure that the client could participate.

YLAL members have raised concerns about access to justice for clients. Many clients do not have the required technology or technological abilities to engage effectively in a video hearing. This does not appear to be routinely considered by courts when arranging the hearing format.

It was noted that in some prisons and police stations, internet connections were often poor, and court buildings were noted to have low bandwidth.

A respondent to the civil justice survey commented:

> *"It would seem that HMCTS should have its own video conferencing software or service, designed specifically for hearings. This could include private chats between solicitor and barrister, for example, or the option to have the barristers and the judge and solicitors all on screen, to replicate a proper hearing."*

Maintaining confidentiality for clients in detention was noted to be a particular issue:

> *"Issues with sound is a huge problem during interviews (where all parties cannot be heard) and confidentiality of consultations cannot be independently verified."*

In addition to performing their ordinary roles during hearings, YLAL members have to spend time prior to and during hearings resolving clients' technological issues, such as helping install software and assisting with re-establishing dropped connections, which detracts from their ability to engage with the process themselves. As one respondent commented:

> *"It would be useful to have guidance… which could be shared with defendants on how to join so it's not up to just us to work out and train them all remotely."*

One respondent noted that conducting hearings remotely, rather than in person, forces the parties to think about the content of their bundles, which is advantageous in cutting out unnecessary or superfluous material. While parties have largely been swift to adapt to electronic bundles, however, some judges are still insisting on hard copy bundles, apparently without recognition of the administrative burden this places on practitioners who are unable to access their usual office facilities or utilise admin support. Some members have encountered issues sending electronic bundles to courts which only accept certain file sizes or formats.

6.2. Which types of hearing are suitable to be conducted online?

Remote hearings are unsuitable where significant client engagement is needed before, during or after the hearing. In our civil justice survey, 75.9% of respondents answered 'sometimes', 17.2% answered 'no' and 6.9% answered 'yes' when asked whether remote hearings were suitable in their practice area.

Additionally, respondents reported concerns that some clients may feel their non-attendance at a remote hearing will be detrimental to their case. Respondents stated that clients ought to be involved in any decision-making as to the suitability of remote hearings now and in the future.

YLAL members who work with vulnerable adults or clients who have multiple or complex needs expressed particular concerns with remote hearings. They reported that some clients need to know they have been seen in order for justice to effectively be done and that some clients do not understand remote technology. There is a concern that this will reduce an individual's ability to access and understand the justice system; a problem which is exacerbated when practitioners are unable to meet their clients and take instructions face-to-face.

In certain practice areas, justice is seen as a process, not just an outcome and it is viewed as vital to the efficacy of that process that clients feel as meaningfully involved as possible. There is scepticism as to how far this can be achieved remotely by removing the 'human element'.

Crime

In YLAL's view, it will rarely be appropriate for any criminal proceedings to be heard remotely, and should only be done so where it is an absolute necessity. YLAL endorses the findings of Penelope Gibbs' October 2017 report, "Defendants on video – conveyor belt justice or a revolution in access?"[38] In particular, there needs to be extensive empirical research to ensure that reliance on technology does not compromise a defendant's right to a fair trial. YLAL is deeply concerned that defendants will feel disengaged and isolated from their representatives, and will not feel confident that they are able to communicate confidentially via a remote video link in a prison or police station.

At a YLAL meeting, "COVID-19: 6 months on", held on 9 September 2020,[39] Lady-Gené Waszkewitz, a pupil barrister at 25 Bedford Row and YLAL member, who started practising during the pandemic spoke about her experiences of remote hearings in criminal proceedings. While Waszkewitz accepted that remote hearings have their time and place, she found that they can disorientate her clients. She discussed the struggle of trying to deliver her best advocacy in a virtual hearing despite technical difficulties and issues being able to hear the opposition. Waszkewitz strongly felt that virtual meetings with clients on bail are not as effective as in-person meetings. She also spoke of the challenges trying to get through to clients appearing from a police station and concerns about whether calls were truly confidential.

Family and Court of Protection

Remote hearings for non-contentious matters and case management in care are potentially appropriate to be heard remotely, where all parties are represented. This is only the view of practitioners, however, and does not

[38] Transform Justice, Defendants on video – conveyor belt justice or a revolution in access?, October 2017.

[39] YLAL, COVID-19: 6 months on, September 2020.

consider the experiences of other court users, including clients. It also includes the important caveat that decisions to conduct hearings remotely must be taken on a case by case basis and will not generally be appropriate where any party is unrepresented.

In contrast to case management, practitioners did not view final hearings as suitable for remote hearing, including but not limited to the following:

- fact finding hearings;
- large, contested hearings in public law children cases;
- hearings where a significant decision is being made;
- hearings where one or more litigant acts in person;
- Court of Protection hearings with clients present.

Where both parties are represented, this makes remote hearings easier. With litigants in person, however, it was expressed that 'remote hearings have been near impossible.'

Domestic violence cases, where the perpetrator can see the victim online, are not seen as appropriate for remote hearings, especially where there is a possibility that the perpetrator might harass the victim or record the proceedings for their own use.

Immigration and Asylum

YLAL endorses the findings of Public Law Project's ('PLP') report, 'Online Immigration Appeals: A Case Study of the First-Tier Tribunal',[40] which broadly reflect the experiences of our members working in this area of law.

We are deeply concerned about digital exclusion in this context, particularly where individuals are unrepresented. We echo PLP's support the publication by HMCTS of a Vulnerability Action Plan67 and the collection of protected characteristics data on service users. We suggest this good practice can be developed upon by conducting research into the impact of the online procedure on especially vulnerable appellants.

Housing

[40] Public Law Project, Online Immigration Appeals: A cASe Study of the First Tier Tribunal, August 2020.

Remote hearings where parties have agreed an order or adjournment prior to the hearing are generally suitable, saving time and money, and seen as unlikely to affect the client or the outcome for the client. Some interim hearings can be conducted remotely without causing significant injustice. However, the suitability of each client to participate remotely should be assessed on a case by case basis only, and that the accepted norm should still be that hearing will take place in person.

Where there is no agreement between the parties, remote hearings are viewed as unsuitable as, in most cases, it is important that the 'humanity' of the defendant is seen by the judge. This is especially important in hearings for breach of a civil injunction and/or committal where a person's liberty, and potentially their home, is at stake. Many defendants are extremely vulnerable and require in person support.

Additionally, respondents reported a decrease in the number of agreements reached 'at the door of court'; although common during in-person hearings, practitioners take the view that an out of court settlement is less likely to be reached by email or phone, especially where matters are complicated and require explanation in person. This type of concern could be brushed aside as anecdotal and is difficult to measure in terms of impact. However, these 'at the door' conversations reduce the issues between the parties, and potentially enable settlement. As a result, these save the Court and the parties significant face-to-face time, and therefore also save money. Considerations of how this can be facilitated and encouraged in a remote setting should be explored.

Public Law

YLAL members' experiences reflect those highlighted in PLP's report on judicial review in the Administrative Court during the COVID-19 pandemic.[41] Our members did not provide details of their experiences of judicial review in the Upper Tribunal.

YLAL endorses the following findings from PLP's 20 April 2020 report:

- There is support for hearings still being able to go ahead and remote hearings have certain strengths. The Administrative Court has demonstrated good practice in a number of areas.
- There are also various technical difficulties arising, as well as more fundamental concerns about open justice and participant engagement.
- Remote hearings are not seen as universally appropriate, even in a jurisdiction with a focus on 'law-heavy' disputes. There was significant concern about the use of remote hearings for cases that

[41] Public Law Project, Judicial Review during COVID-19, 20 April 2020

involved litigants in person, were particularly complex, or where significant case management had not been completed prior to the hearing.

Inquests

Although Pre-Inquest Review Hearings ('PIRHs') may be suitable for remote hearing if all interested persons agree and the bereaved family is represented, this should not be the norm.

Remote hearings are not generally suitable in inquests due to the nature and subject matter of both interim and final hearings, the need for the family to build trust and rapport with the coroner and their team, the need for the family to be at the forefront of the process (particularly if Article 2 of the European Convention of Human Rights is engaged) and the sensitivity with which the inquest process needs to be handled. Practitioners would welcome guidance that establishes a general rule that PIRHs and inquest hearings will take place in-person unless all interested persons agree to a remote hearing.

One YLAL member reported attending a PIRH which, in principle, went well but was unsettling for the bereaved family. It proved difficult to ensure that both family members could participate, as they live separately and only one of them had the means to attend by Microsoft Teams; the other family member could only attend through loudspeaker on their representative's phone. The difficulties were further exacerbated by low bandwidth in the courtroom, which made it impossible to hear the Coroner at times and further reduced the family's ability to effectively participate. Although the hearing was 'successful' in the sense that progress was made, this YLAL member reported that it was far from ideal for the bereaved family.

In addition, concerns have been raised among practitioners that there is an increasing tendency among coroners to suggest that inquests can be concluded on the papers and to invite submissions from interested persons. This is particularly concerning because many bereaved families do not have access to legal representation at inquest hearings, as inquests are out of scope for the purposes of legal aid; those families will therefore be at a disadvantage in making representations. In addition, practitioners report concerns that these suggestions have been made for purely pragmatic reasons, due to a lack of resources and concern among coroners about the number of inquests that will need to be concluded after the pandemic.

Welfare Benefits

Remote hearings are viewed as suitable where cases are 'good on the papers' and for clients who suffer from anxiety, who do not have to attend the court environment.

Remote hearings are not suitable, however, for the many clients who require face-to-face support and those who benefit from a judge seeing the impact of their conditions in person, which is particularly important when considering the impact of physical disability.

6.3. How do remote hearings impact on the ability of representatives to communicate with their clients?

Of respondents to YLAL's civil justice survey, 89.7% said that remote hearings make it more difficult to communicate with clients. 6.9% said that it depends on the circumstances and the type of hearing as to whether remote hearings make communication with clients more difficult.

The majority of respondents expressed concerns about how they are able to communicate with their clients during remote hearings.

Concerns included the practical side of taking instructions, including being able to telephone clients whilst dialled into a hearing, but this requiring access to two telephones; whether clients have access to the necessary devices to 'attend' the hearing at all; as well as being unaware of clients' surroundings, and whether they are able to have privileged discussions confidentially.

The added difficulties of clients with mental health problems, English as a second language, and assisting these clients remotely to have effective access to a remote hearing means that some members' clients were simply unable to attend a hearing they otherwise would if the hearing had been in person.

Many of our members referred to being uncomfortable with the general concept of having to give legal advice on what will often be a life-changing case remotely, rather than in person.

Our members raised concerns not only about the practical impact on the process and progress of the case; it is equally imperative that they are able to build rapport with their clients and provide support and communication throughout a hearing in order to be effective advocates. This enables full instructions to be taken in an effective and compassionate manner.

Remote hearings are making clients remote to their advocates, which in turn may result in additional time and cost to the Court and the justice system more widely; when full instructions cannot be taken and clients' understanding cannot be confirmed, there will be more ineffective 'effective' hearings.

6.4. Technology in the delivery of legal aid services

Technology is increasingly used in the delivery of legal advice services to clients. In YLAL's view, where an individual has a social welfare law issue, there is no substitute for face-to-face advice from a legal aid lawyer.

People in need of specialist social welfare law advice are often left to find information online due to there being legal aid advice deserts or their issue not being within scope of legal aid. In most cases people do not know what to look for. The Chief Executive of Law for Life has remarked that people are "hindered from using digital help effectively because they struggle to frame their problems in a way that enables them to search for what they need. If they do find information, they are often unable to assess its quality and veracity properly. In addition, they cannot always correctly identify whether the information they have accessed applies to the relevant jurisdiction."[42] Put simply, technology cannot make up for people's lack of legal understanding created by a deficit in public legal education.

Both the public and service providers are unaware of the information available online or how to locate services. This is in part because information and advice provided by the government on the internet is poorly coordinated and under-promoted. The APPG on Pro Bono found that in dealing with constituents' legal matters, MPs did not commonly refer them to websites, predominantly because they did not know these online resources existed.[43] Consequently, access to justice is at risk because, as the Bach Commission highlights, "the law is meaningless unless people are supported to have the knowledge to understand it and the power to enforce it."[44]

It is difficult to find comprehensive and transparent information about legal aid eligibility especially on areas no longer within the remit of legal aid. The Children's Society examined the Law Society database for immigration law solicitors. It found many errors, including out-of-date information about firms providing such advice, incorrect contact details and even the inclusion of firms which no longer exist. As the Children's Society also raised, a database does not guarantee quality of advice or a firm's capacity to take on a case.[45]

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[42] Bach Commission, The Right to Justice, 2017, p.42.

[43] Hogan Lovells and the All Party Parliamentary Group on Pro Bono, Mind the Gap: an assessment of unmet legal need in London , 2017.

[44] Bach Commission, The Right to Justice, 2017, p.11.

[45] The Children's Society, An update to: Cut off from Justice: the impact of excluding separated migrant children from legal aid, August 2017, Chapter 4, p.23.

LASPO resulted in an 80% reduction in civil legal aid and led to a significant number of advice agencies being closed across the UK.[46] Third sector organisations have seen an ever-increasing demand for their services despite already working at full capacity. Whilst the Citizens Advice Bureau had 43 million visits to its website in 2017, it had the capacity to see fewer than three million people in person.[47] In a study of MPs' surgeries, 89% of concerns raised by constituents related to legal issues. In many cases MPs and caseworkers are inadequately trained on the availability of legal advice, resources and eligibility.[48] This situation is not sustainable. Reliance on technology, third sector organisations and MPs' surgeries cannot be treated as a substitute for vital face-to-face intervention by legal practitioners.

Digital or telephone advice will exclude some of the most vulnerable. For example, a report by the Equality and Human Rights Commission, 'Being Disabled in Britain' found that telephone advice can be inappropriate for people with "communication-related impairments, mental health conditions or learning difficulties."[49] The University of Oxford's Migration Observatory's report, 'Unsettled Status- 2020: Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit' similarly identified digitally excluded groups who would struggle to access legal advice or otherwise be able to submit an application to the EU Settlement scheme without face-to-face assistance. The report identified elderly, Roma and others with specific disabilities and socio-economic barriers as unlikely to navigate the online application process alone.[50]

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[46] LawWorks, Clinics Network Report April 2014 – March 2015, November 2015, p. 3. See also, Ministry of Justice, Legal Aid Statistics in England and Wales 2013-2014, 24 June 2014, p.19.

[47] All Party Parliamentary Group on Legal Aid, Early Advice: Minutes of Meeting, 7 March 2018.

[48] Hogan Lovells and the All Party Parliamentary Group on Pro Bono, Mind the Gap: an assessment of unmet legal need in London , 2017, p.7

[49] Equality and Human Rights Commission, Being Disabled in Britain: A journey less equal, 1 April 2017.

[50] Migration Observatory, Unsettled Status – 2020: Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?, 24 September 2020.

7. The impact of Covid-19 on legal aid services and clients;

The legal aid system was already creaking before the COVID 19 pandemic.[51] The current crisis has significantly exacerbated the current issues in two main ways; the ability of firms to maintain their services and the ability of vulnerable clients to access the services that are available.

7.1. Maintaining Legal Aid Services

As noted in YLAL's second COVID-19 report for which we surveyed our members, many firms are currently in a vicious cycle:

- Staff are being furloughed, having their hours reduced or being asked to take unpaid leave in order to save salary costs. (The impact of the increasing restrictions in some areas is yet to be seen)
- In turn, workload capacity is reduced.
- Organisations then have to decide whether to advertise their services in order to support the community they serve and increase revenue yet risk not having capacity to meet the new demand without sufficient caseworkers and lawyers.

There is some hope based on the lower numbers of our members who reported that their work had decreased at the time of our second survey. However this has to be seen in the context of how precarious the situation was before the pandemic. There is also the problem that at the time of submission restrictions are increasing, having started on a piecemeal basis throughout the country and increasing to a second national lockdown with the potential for different restrictions in different regions. We believe this has the potential exacerbate the problem of advice deserts.

On 27 March 2020, the Legal Aid Agency published its guide 'Financial relief for legal aid practitioners',[52] most recently updated on 15 October 2020. This document reminds providers that they are able to claim interim payments on account in civil cases and interim payments and hardship claims in the Crown Court. The most recent amendments allowed for travel to be claimed from a home address rather than office location. Although the guidance contains some helpful provisions, such as the provision that remote criminal hearings may be charged in the same way as face-to-face hearings, YLAL believes it does not go far enough. Much of

[51] YLAL, The COVID-19 Pandemic: a scapegoat for the imminent collapse of the CJS, July 2020.

[52] Legal Aid Agency, Financial relief for legal aid practitioners, 27 March 2020.

the provision for civil claims, for example, is not new. More is required to provide the financial support that legal aid firms desperately need to keep afloat so that the vulnerable clients for whom they act are still able to access advice and justice; both now and in the future.

The Legal Aid Agency states that it continues to work with the Ministry of Justice and representative bodies to investigate other immediate action to support firms. This guidance simply does not appear to recognise the urgency of the financial pressures on legal aid providers who often have very small cash reserves.

Though many legal aid providers are profit-making businesses, some continue to draw the entirety, or vast majority, of their income from legal aid work. Fewer of these organisations exist now than in years pre-LASPO, however, as it has become increasingly difficult to operate given the exclusionary contracting rules and inadequate fee schemes.

In the aftermath of this pandemic, we expect that there will be a significant increase in advice needed relating to Family, Housing, Public, Welfare Benefits, Immigration and Employment Law, both as a result of the backlog of cases but also the effects of the lockdown and the likely ensuing financial crisis.

Given the importance of publicly funded work to the operation of the rule of law, we encourage the Ministry of Justice and the Legal Aid Agency to take further steps to ensure the continued operation of legal aid providers in these desperate times.

The shock of the pandemic has further slowed what was already slow progress of cases through the courts. Some criminal firms have experienced an 80% drop in income.[53] The number of providers has fallen from 1271 last year to 1147 today with more likely to follow in the ongoing crisis.

An independent thinktank[54] estimates that the government will need to spend £220 million over the next two years to clear the criminal court backlog and return waiting times to 2019/20 levels. This is in stark comparison to the £50 million offered by the Ministry of Justice and highlights just how much damage both LASPO and the pandemic have caused the system.

7.2. Access to Advice

[53] The Law Society Gazette, Covid-19 has 'significantly reduced' value of criminal legal aid offer, Monidipa Fouzder, 17 June 2020.

[54] The Law Society Gazette, £220m needed to clear Covid-19 court backlog, Monidipa Fouzder, 29 April 2020.

Given the above issues with sustainability, the impact on legally aided clients is already a concern in the time of COVID-19. This concern is further increased for those clients who are vulnerable and/or are detained by the state in some way. Due to the nature of legally aided work this is a large proportion of our clients.

The ability of legally aided clients to engage in remote or virtual court proceedings is something that is currently being assessed. The experience of our members[55] and research completed pre-COVID[56] is that the experience of clients in extremis is negative. There is also significant difficulties with clients being able to contact legal aid providers ahead of hearings or for initial advice where traditional office meetings are reduced or removed as they cannot be COVID-secure.

There are significant accessibility issues where advice increasingly has to be sought online, which causes difficulties for clients with limited technical skills, those who do not speak English or do not have home access to the internet or video technology. This is often the case in the areas in which our members work.

Access to advice for those who are imprisoned or detained in some other way was already challenging and has become significantly more difficult (and in some cases functionally impossible) since the start of the pandemic.

From 23 March 2020 until July 2020 no in person legal visits were permitted in prisons in England Wales. Some establishments have restarted these with COVID-secure measures in place though at vastly reduced capacity. It has not yet become clear what impact the second national lockdown will have upon legal visits although it would seem reasonable to assume that the few establishments who had recommenced in person visits will cancel these. Some prisons had not restarted any in person legal visits. There are many reports of videolink appointments being booked up several months in advance.[57]

Access to telephone and videolink visits is very limited and continues to be limited in a number of prisons despite the pandemic being in its eighth month. There are multiple instances of prisons suggesting that it is sufficient to rely on post or pin-phone calls (which are generally limited to ten minutes and are not guaranteed to be confidential given that the telephones are often in communal areas of the wing) to conduct preparation for such hearings. There are instances of prisons who opened legal visits but have now closed these again due to establishments or the legal representative being in an area of local lockdown.

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[55] YLAL, Meeting: Remote Justice and Our Clients: the view from YLAL North, April 2020.

[56] Transform Justice, Defendants on video – conveyor belt justice or a revolution in access?, October 2017.

[57] The i, Solicitors 'face 10-week wait' to talk to their clients in prison via videolink, Joanna Whitehead, 19 September 2020.

There has been a reluctance from the prison service to keep pace with the 'return to normal' seen in the wider community and indeed calls for strict lockdown to remain in place in prison.[58] Some prisons remain without access to videolink facilities at all, or alternatively prisons do have them but refuse to allow them to be used for legal videolinks, stating that they are only for use by the court and probation service. This limits the access of prisoners to legal advice in relation to criminal and parole proceedings, both of which relate to the person's liberty. All parole hearings are being conducted by telephone or videoconference for the foreseeable future[59] further reducing the amount of contact clients have with their representatives.

The picture is similar in a hospital setting. High secure hospitals continue to ban all external visitors and face-to-face meetings at other hospitals are dependent on whether a hospital is in a local lockdown area. This severely impacts on the ability of those detained under the Mental Health Act to access legal aid services as they are reliant on telephone calls. This is particularly difficult as these clients are particularly vulnerable and establishing a trusted relationship with a legal advisor can be particularly challenging. All Tribunals are being conducted by phone or video for the foreseeable future.[60]

COVID-19 has exacerbated and accelerated the decline in legal aid services and is stretching providers, who were in a precarious position to begin with, to the point of systemic collapse. The crisis has also caused an additional set of difficulties with regards to clients accessing appropriate and timely advice. A number of changes to Legal Aid have been suggested recently both by The Law Society,[61] Shadow Justice Secretary David Lammy MP and Shadow Attorney General Lord Falconer;[62] and Shadow Minister for Legal Aid Karl Turner MP[63] to ensure the long term sustainability of legal aid, as well as prevent imminent collapse. These suggestions include:

- scrap LASPO;
- make early legal advice available during and after the COVID-19 emergency;

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[58] Gatelodge, Returning to chaos is not an option, Summer 2020, p.6.

[59] Parole Board, Guidance: Immediate cancellation of all face to face hearings, 3 June 2020.

[60] Senior President of Tribunals, Amended General Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal, 14 September 2020.

[61] The Justice Gap, Law Society predicts 'market collapse' as one in 10 defence firms collapse, Jon Robins, 19 June 2020.

[62] Law Society Gazette, Labour's justice plan to beat Covid-19, 4 May 2020.

[63] Karl Turner MP, Coronavirus, COVID-19, Outbreak - The Criminal Justice System: Saving Access to Justice, July 2020.

- provide support for the legal profession at large as 'many solicitors and barristers will not survive another 18 months like the last';
- increase the scope of remote hearings for those limited circumstances in which it is appropriate and online streaming of cases;
- adjustments to the method of payment in order to help organisations with cash flow problems;
- relief from business rates;
- a reversal of the 8.75% cut on criminal legal aid;
- a widening of the overall support package to promote sustainability; and
- an investigation into the sustainability of civil legal aid.

The legal aid system needs to be reinvigorated, not downgraded further. As issues surrounding social inequality becomes more urgent, now is the time to invest in legal aid to ensure access to justice for all. When faced with the prospect of the biggest recession the UK has ever seen following the 2020 public health crisis, it has never mattered so much.

8. What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere;

8.1. Retention and recruitment

As detailed above, YLAL has serious concerns about recruitment and retention of professionals in the legal aid sector as a result of consistently low salaries, poor working conditions, and lack of available funding for compulsory post-graduate courses.

Unfortunately, many of the findings from our 2018 report, Social Mobility in a Time of Austerity,[64] remain prevalent. Key barriers to entering, or remaining in the profession, include the critical combination of student debt and low earning potential. Undergraduate course fees remain high at £9,000 per annum, not including living or accommodation costs. The average cost of the Graduate Diploma in Law (GDL) at the two main national providers is £11,820 in London.[65] The Legal Practice Course costs a further average £16,995 in London.[66] Young people can therefore enter the profession with tens of thousands of pounds of debt, only to earn salaries which do not reflect the level of training they have undertaken. In research conducted for our 2018 report, we found that the majority of respondents earned less than £25,000 per year. 72 per cent of respondents stated they have or will have debt over £15,000 and 26.5 per cent will have over £35,000.

For those who do successfully enter the profession, retention remains extremely challenging. High levels of stress are caused by long hours, emotionally tiring work and low pay, combined with worries about financial problems, caring for young children and/or dealing with mental health and physical disabilities. The political climate against legal aid and criticism of "activist lefty lawyers", which has most recently been espoused by Home Secretary Priti Patel MP,[67] adds to the sense that legal aid lawyers are undervalued by society, and indeed regularly pilloried in the press. It is understandable that work in the legal aid sector can appear an

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[64] YLAL, Social Mobility in a time of Austerity, 2018.

[65] See, University of Law, Graduate Diploma in Law: Fees and Funding, which has an annual course fee in London of £12,050. See also BPP, Law Conversion Course (PGDL): How much does the Law Conversion Court (PGDL) cost?, which, for 2020/21 has an annual course fee in London of £11,590.

[66] See, University of Law, Legal Practice Course: Fees and Funding, which has an annual course fee in London of £17,300. See also BPP, Legal Practice Course (LPC): How much does the Legal Practice Course (LPC) cost?, which has an annual course fee in London of £16,690.

[67] The Law Society Gazette, Patel lashes out at 'lefty lawyers' in asylum speech, Jemma Slingo, 5 October 2020.

unattractive prospect to Legal Practice Course graduates who can obtain greater respect, better working conditions, and salaries many times larger in other areas of law.

8.2. Ever-decreasing fees

Civil legal aid fees have not been raised for decades, meaning that in real terms legal aid fees are constantly decreasing in line with inflation. Criminal legal aid fees have been subjected to a cut of 8.75% for ideological austerity reasons, in addition to the fees decreasing in real terms due to inflation. As a result, it is increasingly difficult for legal aid providers to deliver a quality service to clients and remain economically viable, let alone profitable.

Our members find themselves doing hours of necessary work on cases which will be considered by the Legal Aid Agency as non-chargeable. A classic example of this is time spent drafting a letter to a vulnerable client: the LAA currently allows a rate of £4.05 per standard letter. If the letter runs to two pages, £8.10 can be charged. This is on the basis that a lawyer might spend 6-12 minutes writing such a letter. Any additional time will not be paid. This is simply not a realistic timeframe in which to write a letter setting out complex legal principles and processes to a vulnerable client, and advising them on their case. Caught between the billing targets which many firms impose on their staff members, and the genuine requirements of the cases on which they work, many legal aid lawyers are left to make difficult decisions about whether to cut corners or simply work for free, while attempting to ensure their firms remain profitable.

In the current climate, and particularly in the wake of COVID-19's impact on the UK economy, an increase in legal aid rates does not appear likely to be a priority of the government. Nevertheless, without an increase in hourly rates it is difficult to see how legal aid firms will continue to maintain solvency or to provide adequate services for their clients.

8.3. Legal Advice deserts

It is already acknowledged that, partly as a result of the limitations of the scope of legal aid imposed by LASPO, England and Wales suffers from 'legal aid deserts', namely areas where publicly funded legal advice is not available or very limited. The Law Society has conducted a campaign on this subject,[68] particularly looking at the lack of housing and community care lawyers in vast areas of the jurisdiction. According to their research, 78% of local authorities in England and Wales do not have a single community care legal aid

[68] The Law Society, Legal aid deserts.

provider, and 37% of the population live in a local authority area with no housing legal aid providers. This problem will only be further exacerbated over the next decade if serious steps are not taken to improve the economic viability of legal aid providers in order to encourage new firms to grow in those regions. The problems above of recruitment and retention will also compound the problems of availability of legal advice.

8.4. Risks from proposed reforms

Digital courts

As mentioned above, YLAL has serious qualms about the expanding use of digital courts, whether to create entirely or partially digital hearings, or to allow Defendants to appear only by videolink. While in the short term this may be a necessary measure to prevent the spread of COVID-19, it is crucial that this is not allowed to become a norm in the functioning of our civil and criminal courts. The quality of advice and support afforded to vulnerable clients in receipt of legal aid is substantially poorer when delivered remotely. Vulnerable individuals who struggle to understand the legal proceedings in which they are embroiled are likely to experience even more difficulty comprehending a hearing conducted digitally, without the presence of their lawyer to assist them. As we are seeing frequently during the COVID-19 pandemic, this is particularly the case for legal aid clients who will often not have access to the technology required to engage effectively in remote hearings.

Risk of removal of juries and further deterioration of the HMCTS courts estate

We believe that the right of defendants to have a trial by jury is fundamental to the rule of law and ensures fairness in the criminal justice system. We unequivocally disagree with any proposal to change to the current jury system, whether the proposal includes reducing the number of jurors or replacing a jury with a judge and two magistrates.

We recognise that the backlog of criminal cases caused by chronic under-funding of the criminal justice system and exacerbated by the COVID-19 pandemic will inevitably have a negative impact upon access to justice for defendants and victims of crime. However, we note that the Crown Court backlog pre-COVID-19 was at 39,000 cases, was at 41,000 when the proposals in respect of changes to jury trials were made. The backlog is now approximately 48,000 Crown Court cases. We do not accept the suggestion made by the Lord Chancellor Robert Buckland that this increase to the backlog is a new and unprecedented challenge caused solely by the COVID-19 crisis that requires fundamental constitutional change.

The backlog of criminal cases is a direct result of cuts to criminal legal aid. Since 2010, half of the courts in England and Wales have closed. Crown Court sitting days fell from 97,400 in 2018/19 to 82,300 in 2019/20 with approximately 40% of Crown courtrooms sitting idle. It is unclear how removing the protection that a jury trial affords a defendant will address the central issue that led to the backlog in the first place – decades of underfunding of the criminal justice system.

It is our position that abolishing juries for either-way offences under the guise of a COVID-19 emergency response is disingenuous and a threat to the integrity of our criminal justice system. The principle that a person who is facing a life-changing judgment, and risks losing their freedom, has the right to have their case heard and judged by people representative of their community – of different ages, ethnicities and professional and educational backgrounds – is a fundamental aspect of the criminal justice system in England and Wales.

That the judiciary and magistracy lack diversity at every level is no secret. In 2019, only 4% of Crown Court judges identified as being from Black, Asian or Minority Ethnic backgrounds (BAME), with a mere three Crown Court judges being black. Compare this stark statistic with the fact that approximately 20% of defendants who appear before the courts come from BAME backgrounds. We know that young black men are more than nine times as likely to be given a custodial sentence when compared to their white peers, and make up more than half of the young people in prison, despite only constituting 14% of the wider population. Judges and magistrates are also much older than the general population. The average age of a person appointed as a Crown Court judge is 52 years old and over 40% of Crown Court judges are over 60. An overwhelming amount of magistrates (84%) are aged 50 and over, and more than half are over the age of 60. We also note the lack of socio-economic diversity in the judiciary. Research has shown that where only 7% of the general population attended private schools, 74% of senior judges are privately educated, and 71% of senior judges attended Oxford or Cambridge.

What all these statistics mean in real life is that a randomly selected jury of 12 will bring the diversity and variety of the community from which they are selected to the criminal trial and their decision of guilty or not. The experience of the judiciary and magistracy is far removed from the defendants who appear before them.

The fairness and efficiency of juries has been well documented, and so it is particularly concerning that a vital safeguard from a system heavily weighted against BAME defendants, is currently being threatened. As Lord Devlin said, "Trial by jury is more than an instrument of justice and more than a wheel of the constitution; it is the lamp that shows that freedom lives."

Trial by jury ensures that at least in that respect, the criminal justice system reflects the values and standards of the general public. It is democracy in action and we will wholeheartedly oppose any proposal that seeks to demolish this vital protection or compromises the rule of law.

Defending critical legislation and procedures: the Human Rights Act and Judicial Review

As we look ahead to the future of legal aid, the previously threatened abolition of the Human Rights Act and changes to the judicial review procedure are reforms which have the potential to seriously diminish the ability of our members to defend the rights of their clients.

8.5. Recommendations

In light of the challenges which are likely to arise in respect of legal aid and access to justice which we have highlighted within this section, we encourage the Justice Committee to:

1. Recommend the tackling of the sustainability crisis within the legal aid profession;
2. Recommend an increase to hourly rates paid under the civil and criminal legal aid schemes;
3. Address the question of 'legal aid deserts' by supporting the development of legal aid providers, particularly for housing and community care services, across England and Wales
4. Recommend against the expansion of the digital courts system beyond that strictly necessary while social distancing measures as a result of COVID-19 are in place;
5. Defend the use of juries as a crucial element of our criminal justice system; and
6. Support the maintenance of the existing judicial review procedure and the protection of the Human Rights Act.

9. Conclusion

To conclude this submission, YLAL would like to refer to the past, to the principles upon which the modern legal aid system was founded, to the reasons for the creation of a system of publicly funded legal advice and representation. It is said that one who forgets the lessons of history is doomed to repeat them.

In enacting LASPO, YLAL believes that the Government had failed to heed the lessons of the past. In expecting pro bono lawyers and the not-for-profit advice sector to pick up the slack left by LASPO's swinging cuts, the Government failed to consider the implications this would have. These implications were in respect of the harm to individuals who are no longer able to access legal advice and representation, the insufficient capacity of legal advice clinics to cope with the additional work, the loss of expertise in whole areas of practice which have been removed from scope, the challenges posted to courts by dealing with significantly increased numbers of litigants in person and the impact upon other public services.

LASPO has caused untold damage to our justice system and the system has remained reliant upon the goodwill of lawyers to prevents it from collapse. Therefore, we refer to the conclusion of the report of the Rushcliffe Committee, which stated:[69]

> *"Many witnesses paid tribute to the work of Poor Man's Lawyers and Legal Aid Centres, but we are satisfied that though their work is often excellent, and generous as the legal profession has been been with their gratuitous service, the total of all the existing free facilities is inadequate to meet the present demand. We think it would be impossible to expect any extension of gratuitous professional services, particularly as there appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance.*
>
> *It follows that a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in future to provide that assistance to a considerable section as a voluntary service."*

These words are as apt today as they were in 1949.

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[69] Rushcliffe Committee, Report of the Committee on Legal Aid and Legal Advice in England and Wales, 1945, p.23.

Too high a burden is placed upon law centres and free legal advice clinics. The work carried out by citizens advice bureaus and law centres is excellent and available only due to the generosity of charities and grant funders. They are plugging a void which should be filled by a properly funded and resourced legal aid system.

However, the "total of all the existing free facilities is inadequate to meet the demand" - Law Centres are overrun by enquiries, overburdened by their caseloads and stretched to breaking point.

Legal aid lawyers already carry out huge amounts of work for free, assisting clients with matters that are out of scope of legal aid, and assisting those who fail the means test but are unable to afford to pay privately. Law Centres and other advice services can only do the work they do through reliance upon charitable funding, allowing them to assist in areas which are unreasonably deemed out of scope.

For those areas that are in scope and clients are financially eligible, legal aid rates are so low that lawyers are forced to take on more cases that reasonably feasible, in order for a firm to be profitable. However, "it would be impossible to expect any extension of the gratuitous professional services".

Legal aid lawyers already spend too much time working for little to no money. We cannot give any more. There is only so much blood that can be squeezed from a stone.

LASPO's legal aid cuts have created advice deserts, for example, in housing law provision. This has meant that "a service which was at best somewhat patchy has become totally inadequate", with individuals simply unable to obtain legally aided advice in their area.

Finally, it is not enough to rely on the pro bono efforts of law firms and barristers. As was recognised in 1949, pro bono work is not a solution to a badly funded legal aid system. Solicitors, legal executives and barristers are professionals, who have undergone a great deal of expensive education and training. They "cannot be expected in future to provide that assistance to a considerable section as a voluntary service", rather, they should be fairly and adequately remunerated for their expertise.

10. Acknowledgements

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