Labour Party Legal Aid Review:
Submission by Young Legal Aid Lawyers to The Bach Commission

May 2016

This is the submission by Young Legal Aid Lawyers (YLAL) to the call for written evidence by The Bach Commission, which was set up by Lord Bach after he was asked by Jeremy Corbyn to carry out a comprehensive review of legal aid for Labour, considering civil, crime, family and social welfare law.

The terms of the review are as follows:

1. To set out the principles that should be at the heart of the legal aid system.
2. To develop a legal aid policy that is credible, principled and up to date.
3. To look at the consequences of LASPO and the legal aid cuts.
4. To influence the present government to make changes to their existing policies.

We answer the questions set out in The Bach Commission's call for evidence below. We also append to this response a copy of the Briefing Note which we prepared for the launch of the Labour Legal Aid Review in November 2015.[1]

Topic 1: The current state of access to justice

1. Please provide us with your name, contact details, and the name of your organisation and your role in it (if applicable).

Our organisation is called Young Legal Aid Lawyers, and we can be contacted at ylalinfo@gmail.com. Our current co-chairs are Oliver Carter and Rachel Francis, who can be contacted at oliver.r.carter@gmail.com and rachel.francis87@gmail.com respectively.

2. In a sentence, what are your biggest concerns about the state of access to justice? Please provide up to three answers.

Our three biggest concerns about the current state of access to justice are as follows:

- The extensive denial of access to justice resulting from the removal of areas of law from the scope of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which has the potential to create increased social problems with greater knock-on costs for the state in the long run;

- The extensive denial of access to justice resulting from overly stringent financial means tests for legal aid, which undermine one of the founding principles of the legal aid system: that provision should not be

[1] The Briefing Note is also available on our website here: http://www.younglegalaidlawyers.org/Labour4LegalAid

limited to those normally classed as poor, but rather should be available to anyone who is unable to afford to pay for legal advice and representation;

- The extensive denial of access to justice resulting from court and tribunal fees which have been increased drastically in recent years to unaffordable levels, putting access to the courts out of reach for many individuals and organisations.

We believe that these three factors have created and entrenched a two-tier justice system which only serves wealthy individuals and organisations, while millions of ordinary people are completely denied the legal representation and access to the courts which are required to ensure justice.

3. Please outline in more detail the way in which your/your organisation's work intersects with the question of access to justice, and the way in which current policy enables and undermines access to justice.

Young Legal Aid Lawyers is a group of lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL currently has approximately 2,500 members, comprised of 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's objectives are:

- 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; and
- To promote the interests of new entrants and junior lawyers and provide a network for likeminded people beginning their careers in the legal aid sector.

In summary, YLAL believes in equal and effective access to justice for all and that the legal profession should be open to all.

<u>How current policy enables access to justice</u>

We believe that current policy enables access to justice in only a very limited sense. Access to justice is severely limited both in terms of the areas of law for which people can obtain publicly-funded legal advice and representation and in relation to the proportion of people who are financially eligible for such legal help. We would reiterate the concerns about the current state of access to justice highlighted at Question 2 above. We strongly believe that the impact of LASPO, the current overly stringent means tests for legal aid and the recent drastic escalation of court and tribunal fees preclude vast swathes of the public from any meaningful access to justice.

<u>How current policy undermines access to justice</u>

Our members have highlighted the following key concerns about how current policy undermines access to justice:

- The removal of vast areas of civil law from the scope of legal aid, combined with the stringent means test for civil legal aid, continues to prevent many people from accessing legal representation and consequently from vindicating their rights, with drastic increases in court fees further serving to simply price people out of justice. This is perhaps most stark in the field of social welfare law, where the number of 'matter starts' has fallen drastically since 2012.[2]

- The limitations to the scope of legal aid mean that the legal needs of many vulnerable clients are being met solely by the altruistic commitment of practitioners, whether by acting pro bono or through working

[2] https://fullfact.org/law/far-fewer-social-welfare-cases-get-legal-aid/

effectively without funding where the legal aid system imposes unrealistic and inflexible fixed fees. Many other people are simply falling through the gaps: ineligible for legal aid and unable to otherwise fund legal advice and representation, and therefore excluded from any meaningful access to justice. In the post-LASPO landscape, even the fate of many clients who are eligible for legal aid depends upon a labyrinthine, piecemeal and excessively bureaucratic system of funding that impedes access to justice and serves to exhaust practitioners' morale.

- Many vulnerable individuals are being forced to represent themselves in court. This creates an unjustifiable imbalance between the individual and the state. Many people are simply unable to realise their rights when pitted in court against legally-represented opponents, causing frequent and grave injustices. We are particularly concerned that many such injustices inevitably go unseen, unheard and unresolved due to the difficulty of monitoring people who are unable to obtain legal aid. We believe that marginalised individuals are quietly experiencing an erosion of their right of access to justice.

- The reforms to legal aid have had a detrimental impact on access to the profession. Firms and chambers carrying out publicly-funded work are offering fewer training contracts and pupillages, with no guaranteed minimum salary for trainee solicitors and pupillage awards persisting at a level of £12,000 per annum. As detailed in our 2013 Social Mobility and Diversity Report, 'One Step Forward, Two Steps Back'[3], paralegals and junior lawyers are under increasing pressure due to increased caseloads, often with cases concerning complex and/or traumatic issues, at minimal levels of pay. Anecdotally, we are aware that many young practitioners are moving into NGO or third sector roles due to fatigue, job insecurity and low levels of remuneration within the legal aid sector. This has a knock-on effect on social mobility and diversity across the profession, as low rates of pay drive competitive candidates from under-represented groups, such as those from black and minority ethnic backgrounds, those who care for dependent family members and those without independent financial means, away from the legal aid sector and into more financially rewarding commercial and corporate roles.

Topic 2: Transforming our justice system

4. In a sentence, what practical steps could be taken to ensure access to justice for all was a reality? Please provide up to three answers.

In our view, the three most important practical steps which could be taken to ensure that access to justice for all is a reality are as follows:

- Repeal LASPO, bring the areas of law which were removed from scope back into scope and return to a presumption that a case which satisfies the means and merits criteria is within the scope of legal aid except in limited categories which are specifically excluded;

- Increase the thresholds and simplify the financial means tests for civil and criminal legal aid to ensure that legal aid is not reserved for only the poorest and most vulnerable in society, but rather is available to anyone who is unable to afford to pay for legal advice and representation; and

- Conduct an independent and comprehensive review of the impact of court and tribunal fees on access to the courts and recognise that the cost of justice should be primarily borne by society as a whole, rather than by people using the courts to defend or protect their rights.

[3] http://www.younglegalaidlawyers.org/sites/default/files/One%20step%20forward%20two%20steps%20back.pdf

5. Please outline in more detail ideas for practical solutions to the crisis in access to justice. These could range from minor alterations to a radical overhauling in our justice system.

Designing a legal aid system afresh

The modern legal aid system was introduced by the post-war Labour government through the Legal Advice and Assistance Act 1949. This Act was the result of recommendations made by the Rushcliffe committee, which reported to Parliament in May 1945. The Rushcliffe recommendations included:

- 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; and
- Barristers and solicitors should receive adequate remuneration for their services.

We agree that these principles remain relevant and should form the basis of the legal aid system. In particular, we believe it is vital that legal aid is available for all categories of case in which important civil rights are at stake. Legal aid should not be limited only to those classed as poor but rather should be available to anyone who is unable to afford to pay for legal advice and representation. Equal access to justice for all irrespective of wealth should be the absolute core principle of our legal aid system. We believe that the cost of legal aid should be met by the state through general taxation. We believe that access to justice is a public good that should be classed by government in the same category as the rights to healthcare and education, which are free at the point of use.

Minimum requirements to legal advice and assistance that the state should provide

We have an adversarial, rather than inquisitorial, justice system. In such a system, access to genuine, meaningful, justice is effectively synonymous with access to legal advice and representation and to the courts. As such, given the structure of our justice system, it is only an effective legal aid system which can ensure access to justice. A legal aid system must ensure that all those who need legal advice or representation in order to enforce important legal rights are able to access this legal help. That is not something that is presently being achieved.

The crisis in access to justice has been brought about by sustained under-investment in the justice system in general, and legal aid in particular. This has been not just under the present government and the Coalition government, but under the previous Labour administration. It is important to understand when considering the present crisis that if equivalent underinvestment in health or education had occurred over the last 20 years, our NHS and state education system would be facing similar crises. As such, a practical approach to ensuring access to justice cannot ignore the fact that as one of the pillars of the welfare state, money must be invested in legal aid in order for it to succeed.

Funding the legal aid system

We believe that, ultimately, a significant funding commitment is required to develop a credible and principled legal aid policy and to ensure access to justice for all. We believe that access to justice is a public good that should be funded by everyone through general taxation, and we believe that legal aid is the most effective method to ensure access to justice. We believe that a core and fundamental component of ensuring access to justice is through the provision of a comprehensive and accessible scheme of legal aid for advice and representation in civil and criminal cases. It should be recognised that such a scheme of legal aid does not just benefit the individual litigants in publicly-funded cases, but benefits society as a whole. As such, it is right that legal aid should be funded by the state.

While comparisons in legal aid spending are complicated by the difference between adversarial and inquisitorial systems, in England and Wales the proportion of GDP spent on the justice system as a whole is below the EU

average.[4] In this context, we believe that the legal aid budget from central government should be increased in order to protect and improve access to justice.

The scope of legal aid

We believe that, as a minimum, there should be a proper, independent and objective assessment of the cost of bringing areas which were removed from the scope of legal aid by LASPO back into scope as soon as possible. The government committed to review the impact of LASPO three to five years after its implementation in April 2013, but at present – just over three years after LASPO came into force – there has been no announcement of a review. When the cuts to legal aid are reviewed, we will submit that at the very least, the removal of areas from scope which can be shown to be a false economy, creating greater knock-on costs to the state, should be immediately reversed.

Much of the present crisis in access to justice arises from the removal from the scope of legal aid of whole areas of law. Many of the areas that have been removed from scope engage human rights, such as the right to family life, or basic necessities in a civilised society, such as adequate shelter. We believe that legal aid should be available, subject to appropriate and fair means and merits tests, for cases in the following areas which are currently wholly or partially outside the scope of legal aid: private family law, debt, housing, welfare benefits, immigration, employment, inquests, personal injury and clinical negligence. Bearing in mind that legal aid in all areas of civil law is subject to a merits and means test, the reintroduction of legal aid for these areas would be doing no more than ensuring that those who need legal advice and representation to enforce important rights are able to do so.

Ultimately, it is our view that LASPO should be repealed and all of the areas of law which were removed from the scope of legal aid should be brought back into scope. The legal aid system should return to a presumption that a case which satisfies the means and merits criteria is within the scope of legal aid except in limited categories, which are specifically excluded because they do not engage important civil rights.

For inquests, there should be a presumption that legal aid for representation will be available for families who have lost family members where there is a question about the conduct of any public authority, irrespective of financial means. The government maintains that inquests are not adversarial processes, but anyone who has attended an inquest in which the conduct of a public authority is called into question will know this to be specious: the state will instruct lawyers to vigorously defend its own conduct, while denying grieving families legal aid to ensure that they too are represented in the inquiry into the death of their loved ones. The principle of equality of arms requires that families be entitled to publicly-funded legal representation at inquests in these circumstances.

Exceptional funding

In the short term, while the areas of law referred to above remain wholly or partially outside the scope of legal aid, it is vital that the operation of the exceptional case funding scheme is reviewed urgently. It needs to be redesigned in consultation with lawyers who understand the types of cases where legal aid is truly required. The test should not solely be a breach of Convention rights, but a wider test of "significant injustice" or similar. The lawyers assisting to draft the guidelines can provide input as to examples of the sorts of cases these would be.

A modest fixed fee should be introduced for lawyers to complete exceptional funding applications. At present, exceptional funding applications can take six to eight hours and lawyers are not remunerated for this work. This significant financial disincentive clearly presents a further barrier to access to justice for clients who may have cases which would satisfy the exceptional funding criteria. In order to ensure there was no suggestion of applications being put in speculatively, a system of review could exist to refuse payment for plainly unmeritorious applications for exceptional funding.

[4] https://fullfact.org/law/diy_justice_vital_reform_legal_aid-41090 and http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf#page=57

Legal aid means tests

As stated above, we believe it is necessary to significantly increase the thresholds for the financial means tests for civil and criminal legal aid to ensure that legal aid is not reserved for only the poorest and most vulnerable in society, but rather is available to anyone who is unable to afford to pay for legal advice and representation. Eligibility for legal aid should be regularly reviewed and could be fixed to a percentage of average earnings to ensure that eligibility keeps pace with inflation. We also believe that the means tests should be simplified to reduce the vast amount of unnecessary bureaucracy in the legal aid scheme which also serves as a practical barrier to access to justice.

Civil legal aid

When the civil legal aid scheme came into operation in 1950, it is estimated that 80% of the population had a means-tested entitlement to legal aid.[5] However, as the eligibility criteria for civil legal aid have been restricted, this figure has fallen significantly, to 40% in 1973 and 29% in 2008.[6] It is likely to have fallen further since the introduction of LASPO. While it is true that at its inception, legal aid was predominantly used for family and criminal law, we do not believe it is fair that the vast majority of the population should be financially ineligible for any form of publicly-funded legal advice or representation in civil matters.

The strictness of the means test for civil legal aid today means that anyone whose 'disposable' household income exceeds £733 per month or whose 'disposable' capital exceeds £8,000 is automatically ineligible for almost any form of publicly-funded civil legal help. The means test for civil legal aid does not bear a direct relationship to applicants' actual ability to meet the costs of privately obtaining legal advice and representation. In reality, the result of the current financial eligibility criteria is that almost anyone who is not in receipt of means-tested state benefits will be financial ineligible for civil legal aid. In our view this represents a widespread denial of justice to the people of this country.

Criminal legal aid

In criminal legal aid, we believe it is vital that anyone charged with a criminal offence should have access to publicly-funded legal advice and representation, from the police station to trial. When the state chooses to prosecute somebody for a crime, financial considerations should never lead to that person being unrepresented. This must be a red line for a justice system in any civilised society. While the right to publicly-funded representation in criminal case is largely recognised and accepted by government, reform of criminal legal aid contracts and significant fee cuts have meant that many criminal firms risk going out of business. It is vital to the legitimacy of the criminal justice system that there is a sufficient number of lawyers with expertise and experience in criminal law to advise and represent defendants.

This basic principles set out above lead to the following conclusions:

- The means threshold in the Crown Court should be significantly increased. The cost of any private criminal case is prohibitive – precisely because legal aid rates are so low that firms can only afford to stay open if they charge high rates for private cases.
- People facing *any* criminal charge in the magistrates' court who the magistrates deem to be struggling to deal with proceedings – even in non-imprisonable cases – should be offered the publicly-funded services of a lawyer. A criminal record is a serious outcome for anyone, and the reality for any lawyer who has spent any time prosecuting in the magistrates' court is the knowledge that an unrepresented defendant stands no chance at all.
- People must be able to reclaim their reasonable legal costs from the state, not only at legal aid rates. People have bankrupted themselves defending themselves against charges of which they were innocent. This is unconscionable. More power should be given for a portion of these costs to be paid by the prosecution where appropriate, at the discretion of the judge. The Crown Prosecution Service (CPS) often causes inflation of costs by failing to reply to correspondence, resulting in unnecessary hearings. In the worst

[5] *The Justice Gap*, Steve Hynes and Jon Robins, p21
[6] Ibid

cases, the CPS brings unmeritorious prosecutions. There are very limited powers to hold the CPS to account, and it is defendants who pay for these mistakes. Increasing the ability to do this would firstly lead to better decision making, and secondly to a greater willingness of individuals to pay privately even if they did qualify for legal aid.

Remuneration for publicly-funded work

As the Rushcliffe committee recommended, lawyers carrying out publicly-funded work should receive adequate remuneration for their services. At present, we do not believe that legal aid lawyers receive adequate remuneration. Many lawyers who carry out legal aid work are dependent on income from privately-paying clients in order to remain in business. A simple way to ensure that lawyers carrying out publicly-funded work would be to link legal aid hourly rates to the Guideline Hourly Rates set by the Civil Justice Council,[7] e.g. legal aid rates could be set at 80% of the guideline rates. Alternatively, legal aid rates could be set directly by the courts or by an independent body charged with setting remuneration for legal aid lawyers at a fair level – perhaps as a percentage of market or guideline rates – which will protect access to justice by ensuring that lawyers receive adequate remuneration for carrying out publicly-funded work.

Court fees

Where an individual or organisation is discouraged from bringing a meritorious case because of the court fee, this is a denial of justice. In recent years, court and tribunal fees have been vastly increased in the High Court, employment tribunal, immigration tribunals and elsewhere. The impact of such increases is predictable and clear, particularly in the employment tribunal which has seen a huge fall in the number of cases following the introduction of exorbitant fees. There can be no effective access to justice when people are unable to bring cases simply due to significant court fees.

It appears to be the present government's view that the cost of court hearings should be borne primarily by court users; however, in our view, justice is a public good and should therefore be funded by society as a whole. We therefore believe that all court fees should be reviewed as soon as possible to ensure that individuals or organisations with meritorious cases are not discouraged from bringing meritorious cases.

Making a career in legal aid more attractive to young lawyers

It is vital that talented and ambitious aspiring lawyers who wish to serve the public through the law are not discouraged from pursuing a career in legal aid. At present, however, the combination of very high course fees for academic and vocational study and the typically low salaries available to junior legal aid lawyers mean that a career in legal aid is simply unsustainable for many people. Further to this, the number of jobs available to aspiring legal aid lawyers has been significantly reduced by cuts to legal aid.

There is a vast unmet public need for legal services and a ready supply of talented aspiring lawyers who wish to provide these legal services, but in our view the government has abdicated its responsibility to ensure that access to justice is available to all. Bringing areas of law back into scope, increasing the budget available to fund legal aid and providing adequate remuneration for publicly-funded work will provide for a sustainable career in legal aid.

Further specific changes which we would advocate to make a career in legal aid more attractive to young lawyers, which may fall outside the remit of government, are as follows:

- The re-introduction of the minimum salary for trainee solicitors, which was abolished by the Solicitors Regulation Authority;
- Ensuring that the minimum pupillage grant provided by chambers is equivalent to a living wage for pupil barristers;
- Regulating professional course fees for the Legal Practice Course and Bar Professional Training Course, with consideration also to be given to replacing these courses with a form of work-based learning.

[7] http://webarchive.nationalarchives.gov.uk/20110218200720/http:/www.hmcourts-service.gov.uk/publications/guidance/scco/previous_rates.htm

The role of technology in promoting access to justice and providing information to the public

We support the use of technology to improve access to justice wherever possible. We have been encouraged by the use of crowdfunding for public interest litigation through CrowdJustice, but submit that, like pro bono, this is no substitute for a properly-funded legal aid system. Internet and mobile advice is a growing area and the legal aid sector should not shy away from innovating in this area as far as possible to improve their service to clients. However, the low rates of remuneration for publicly-funded work mean that legal aid practitioners are operating with a precarious financial position, with limited scope for investment in new and innovative technology.

There is vast scope for the government to utilise technology to improve access to justice through public legal education and signposting towards advice and legal services. A comprehensive government website dedicated to providing simple guides to different areas of public and criminal law would have obvious benefits, especially in terms of the accessibility of the law, ensuring that people seek further legal advice when they need it, and improving general awareness of the law. At the very least, this would provide basic advice coverage and a starting point for anyone with access to the internet.

It is evident that, at least at present, the use of technology and internet advice can only go so far. Perhaps most obviously, many people still do not have access to an internet connection. A comprehensive website of the type suggested above could also only go so far. Whilst plain English guides on everyday areas of legal aid law would undoubtedly be extremely helpful, there will always be situations where advice or representation from a lawyer is needed. We believe this will remain crucial even as the digital age causes huge changes in the traditional landscapes of the law. But these two differing visions of the future do not necessarily need to combat one another. A website which provides basic advice on common legal topics on the one hand, but then prompts users to contact law firms, advice centres or charities (of which a list organised by region would be available) would combine both of these aspects of legal provision.

Other ideas

We also believe that the following ideas for improving access to justice merit consideration by the Commission:

- Fixing expenditure on access to justice to a set percentage of government spend;
- Introducing provision for a small amount of basic publicly-funded legal advice which is free at the point of use – either without a means test or with only a very limited means test – in certain areas, such as social welfare law, along the lines of the previous 'Green Form' scheme;
- Reduce the use of fixed fees for legal aid work, which do not reflect the unpredictability and complexity of legal work in practice. At a minimum, where fixed fees do exist within the legal aid scheme, the 'escape' fee above which lawyers can be paid for the actual amount of work which was required should not be set at three times the level of the fixed fee, but should allow lawyers to apply for payment for any work beyond the fixed fee;
- Creating a Legal Aid Inspectorate to produce annual reports on the state of access to justice;
- Defendant public authorities could be required to make a contribution to the legal aid budget each year in proportion to the costs paid in cases which they lose, as a version of the "polluter pays" principle. An additional punitive element of costs should be contributed by public authorities to the legal aid budget in cases which they unsuccessfully defend despite receiving negative legal advice;
- Reintroducing success fees in conditional fee agreements for individual litigants against public authorities and/or extending the remit of qualified one way costs shifting. This would allow people whose finances are above the civil legal aid means threshold to bring cases to rectify a wrong done by the state;
- Judges should be given discretion to direct the Legal Aid Agency to grant legal aid to unrepresented litigants (in criminal or civil proceedings) where a failure to do so would cause manifest injustice, significant delay or significant difficulty in concluding proceedings justly;
- Creating a position for an interdepartmental minister of justice in order to encourage government to work better cross-departmentally to ensure that questions of justice are dealt with coherently and in a coordinated fashion;

- Investigating the potential of linking advice services with healthcare and other public services;
- Including education about law and the justice system in the national curriculum for secondary school students, perhaps within a compulsory citizenship course.

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