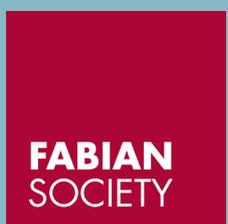


# The crisis in the justice system in England & Wales

THE BACH COMMISSION ON ACCESS TO JUSTICE

Interim report | November 2016





## Acknowledgements

This interim report is the first publication of the Bach Commission on Access to Justice, and we want to thank all those who have contributed to our work thus far. This includes those who have spoken at witness sessions: the Law Society, the Bar Council, the Society of Labour Lawyers, Professor Richard Susskind, Professor Roger Smith, Legal Action Group, the Law Commission, the Criminal Law Solicitors' Association and the London Criminal Courts Solicitors' Association. It also includes the 100 individuals and organisations who have kindly submitted written evidence to the Commission. Within the Commission itself, a special thank you must be extended to Sir Henry Brooke for his diligent work dissecting and interpreting the evidence we have received. We would also like to thank those without whose support the Commission would not exist; namely Lord Falconer and Thompsons Solicitors.

The report author, Tobias Phibbs, would like to thank all the commissioners for their valuable assistance in producing this report. At the Fabian Society, the author would particularly like to thank Olivia Bailey, Andrew Harrop and Kate Murray for their help writing and sharpening the report, and Claire Sewell for her work preparing the report for publication. Any errors in this report are the authors alone.

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Further details of the Commission can be found on our website:

<http://www.fabians.org.uk/access-to-justice-the-bach-commission/>

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## Foreword

In the autumn of 2015, I was asked by the leader of the Labour Party Jeremy Corbyn and Labour's then Shadow Lord Chancellor Charlie Falconer to undertake a review of the legal aid system. I decided to establish a commission of independent experts to steer a wider review of access to justice, and asked the Fabian Society to work as the Commission's secretariat. This interim report provides a summary of the work that we have done so far and an indication of our work to come.



The rule of law is the basis of order and just conduct in our society. Without it people can have no trust in their institutions or in the free associations they form with one another. Maintenance of the rule of law depends on the ability of all people to have basic equality of access to the law. If some cannot access justice because it is beyond their means, then the rule of law everywhere suffers.

Yet in our society today, as Britain's most senior judge, Lord Chief Justice Thomas of Cwmgiedd, has argued, "our justice system has become unaffordable to most". This is a remarkable statement about a country whose founding document, the Magna Carta, in a statute that still stands in English law, states that "We will sell to no man, we will not deny or defer to any man either Justice or Right."

It is clear that a great many people who previously relied on legal aid are now being denied access to justice because they cannot afford to pay for it. The Legal Aid, Sentencing and Prosecution of Offenders Act 2012 (LASPO) has compounded problems in the justice system that have been years in the making.

Courts and legal advice centres are closing down, while fees for courts and tribunals continue to rise. The scope of legal aid has suffered deep cutbacks. Exceptional case funding, which was meant to be a safety net for those in most need, has failed to deliver. The desultory result is that now only 17 per cent believe it is easy for people on low incomes to access justice.

When he was Lord Chancellor, it looked for a moment as though Michael Gove had grasped the crisis in access to justice: some of the worst excesses of government policy were reigned in during his brief tenure. I hope that his replacement, Liz Truss, will be attuned to the importance of access to justice in a way that her predecessors, Chris Grayling and Kenneth Clarke, were not.

Our Commission understands the economic and political imperative to control public spending, and we do not simply propose to repeal LASPO in its entirety. Instead, the Commission will establish a set of minimum standards for access to justice, and explore policy options in a number of key areas to make those standards realisable. In particular, we will look at legal aid, legal education, legal advice and integration of services, as well as investigating the role that technological innovation can play.

We welcome the recent flurry of work in this area – in particular, the recent report from Amnesty International UK into civil legal aid<sup>1</sup>, and from the TUC into legal aid and courts services<sup>2</sup>. As the work of the Commission goes forward, we will continue to draw on the rich body of work from organisations across the legal world.

We intend to publish our final report during 2017, and hope this initial report provides a useful indication of our direction of travel.

**Lord Willy Bach**

## Executive summary

This report summarises the work of the Bach Commission on Access to Justice from its inception in January 2016 through to November 2016. It presents the Commission's conclusions on the current state of access to justice and indicates initial thoughts on policy recommendations for the future.

### What's wrong with the justice system?

The Commission has identified six key features of the justice system which undermine its ability to provide justice for all:

#### 1. Fewer people can access financial support for a legal case

There has been a huge decrease in the numbers of people who are eligible for legal aid. Most cases involving housing, welfare, debt, immigration, medical negligence and family law have been removed from scope.

#### 2. Exceptional case funding has failed to deliver for those in need

The exceptional case funding (ECF) scheme, designed to mitigate the effects of LASPO cuts to legal aid, has failed. The government suggested around 847 children and 4,888 young adults would be granted ECF each year. Yet between October 2013 and June 2015 only 8 children and 28 young adults were granted legal aid under the scheme.

#### 3. Public legal education and legal advice are inadequate and disjointed

Levels of legal aid support are falling and public legal education continues to be ineffective. For example, the number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015. The services that do exist are not effectively integrated.

#### 4. High court and tribunal fees are preventing people pursuing legal claims

Employment tribunal fees were introduced in 2013, and in the months between October 2013 and June 2014 alone, the number of single cases fell by 67 per cent.

#### 5. Bureaucracy in the Legal Aid Agency is costly and time-consuming

There is excessive bureaucracy in the Legal Aid Agency which is adversely affecting the efficiency of the legal aid system generally. While the overall budget of the Legal Aid Agency was cut by 25 per cent, the administration budget saw no cuts whatsoever and in the last year has increased by £2.1m. The complexity of the legal aid scheme needs addressing urgently and any unnecessary bureaucracy removed.

#### 6. Out of date technologies keep the justice system wedded to the past

The British justice system has failed to effectively utilise technological innovation. While Canada, the Netherlands and the United States are using new technologies to great effect, Britain is lagging behind.

The solution to these entrenched problems cannot simply be to reverse the LASPO cuts in their entirety and expand the legal aid budget indefinitely. Instead, the Commission hopes to devise plans to simplify the legal system, use new technologies, focus on the journey of the user through the system and build public support – as well as looking at reversing some of the deepest and least cost-effective LASPO cuts.

## Making access to justice a reality

With the above principles guiding our work, the Commission plans to develop proposals to:

- **Establish a minimum standard for access to justice in Britain**, considering: how to enshrine that standard in law, and ways to best enforce it.
- **Reform legal aid** by considering: the reform or replacement of the LAA; reform of legal aid eligibility criteria; simplification of the legal aid scheme; and, a ‘polluter pays’ scheme to fund lower fees; and, reform or removal of the legal aid gateway.
- **Transform legal education** for the public, considering: how to embed legal education in the school curriculum, as well as exploring options for lifelong learning in communities.
- **Increase the availability of legal advice** by considering: policies to ensure integration of advice across public services; ways to increase financial support to legal advice centres and develop and support existing legal aid specialists; and, how to standardise and audit provision of legal advice across the country.
- **Increase technological innovation** by considering: a new central online portal; an innovation fund to encourage experimentation with technology; and options for alternative dispute resolution.

## Section One: What's wrong with the justice system?

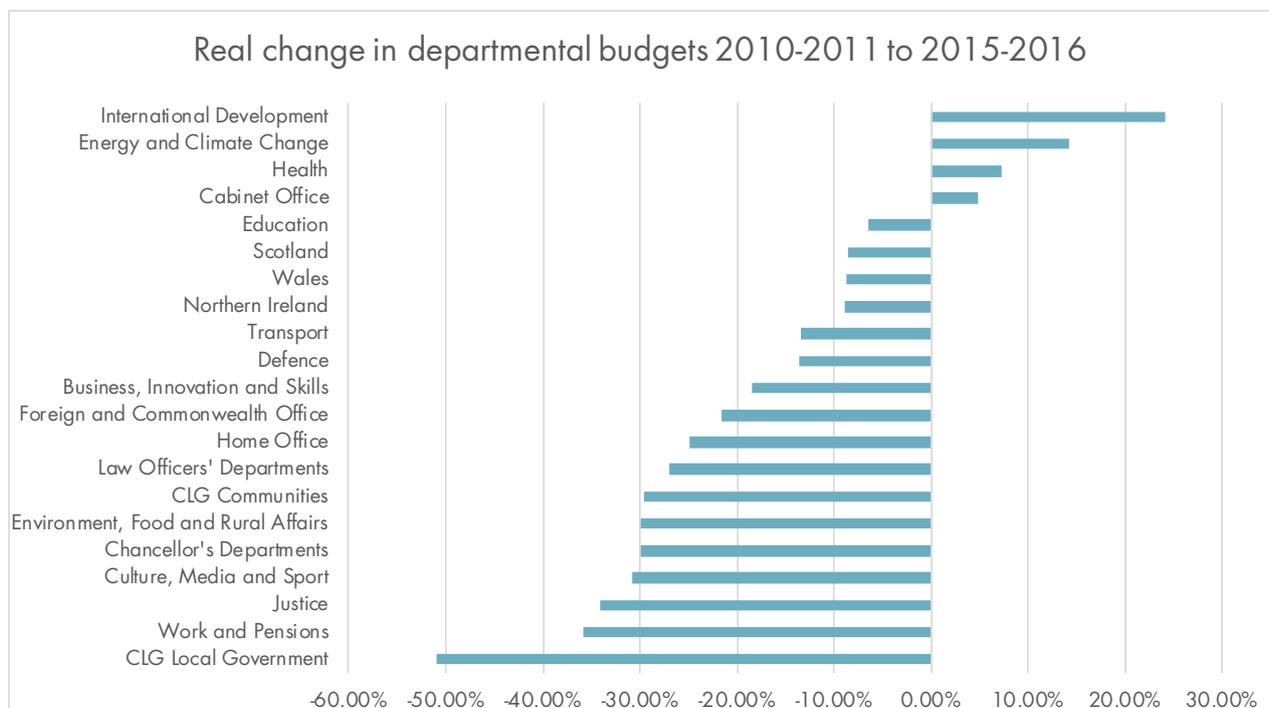
Problems with accessing the justice system long predate the implementation of the Legal Aid, Sentencing and Prosecution of Offenders Act (2012). There has been, for example, a steady decline since the 1980s in the number of households eligible for legal aid, and even in 2009 experts talked of a crisis in legal aid, caused by a “long-term absence of vision”.<sup>3</sup>

### What is LASPO?

The Legal Aid, Sentencing and Prosecution of Offenders Act 2012 was a wholesale reform aimed at reducing the cost of our justice system. Most significantly, it removed from the scope of legal aid most cases involving housing, welfare, debt, employment, immigration, family and medical negligence; and replaced the non-departmental Legal Services Commission with the Legal Aid Agency, under the control of the Ministry of Justice.

However, LASPO deepened this crisis and its effects have seriously damaged the functioning of the justice system, especially for those most in need. Despite widespread opposition from legal experts, the legislation passed into law on 1 May 2012 and its associated cuts first took effect on 1 April 2013. Designed to reduce the legal aid bill, it has done so only at great cost to citizens' access to justice.

From 2010-11 to 2015-2016 there has been a 34 per cent cut in spending by the Ministry of Justice. Only the Department for Work and Pensions has been cut harder (the comparison with changes to the CLG local government budget is not valid due to it being offset by changes in council tax and local funding).



Source: HM Treasury<sup>4</sup>

The effects of these cuts have been many and varied. Based on the evidence it has received, the Commission has identified six key problems with the justice system that currently undermine the principle of access to justice for all.

### **The cost of our justice system: clearing up the myths**

It is widely believed that our justice system is the most expensive in the world. In parliament and elsewhere, this has been used as a justification for continued spending cuts to the justice department as a whole – most notably during the implementation of LASPO.

However, this picture of overspending lacks nuance and is misleading. It confuses legal aid with the justice system as a whole. While our legal aid budget is high, research from the European Commission for the Efficiency of Justice (CEPEJ) shows our overall justice bill to be at the European average.

What's more, our system is adversarial and based on common law and so (by its nature) is likely to involve greater expense. As there are, rightly, no proposals to change either of these constitutional arrangements, it is wrong to compare it simplistically to other systems.

The volume and nature of casework also plays a role in the high levels of expenditure. High case volumes in England and Wales drive up spending. Additionally, MoJ research shows that England and Wales has a higher than average criminal prosecution rate and cases more often involve suspects being brought to court.

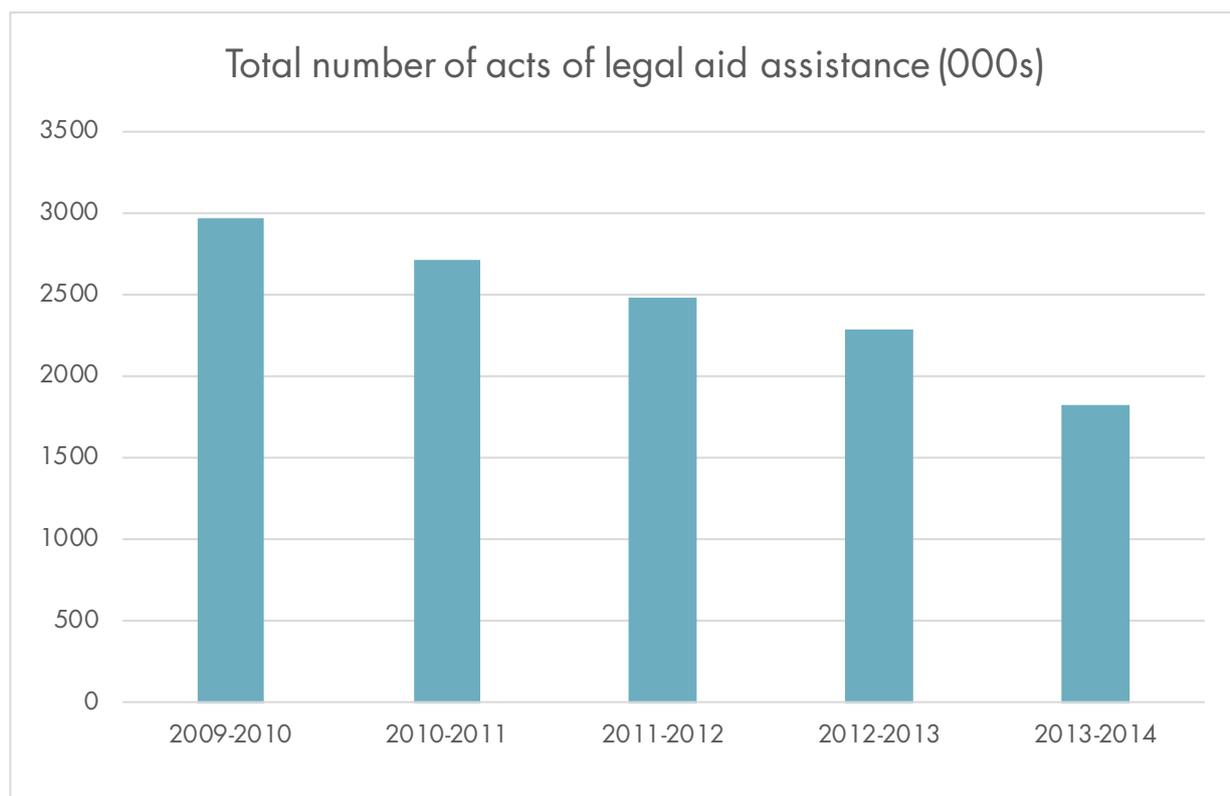
Finally, as work from CEPEJ shows, in our justice system there are few sources of legal advice that might reduce the cost to the justice department. In continental Europe, health centres, insurance providers, welfare organisations and social counsellors all play a role in providing legal advice. In England and Wales, the only resources available are advice centres, which are closing at an alarming rate, and trade unions, whose memberships are also falling.

## **1. Fewer people can access financial help with a legal case**

### **Declining levels of legal aid support**

LASPO has accelerated a longstanding crisis in the numbers of people entitled to legal aid. In the 1980s, around 80 per cent of households were eligible to civil legal aid, but by 2008 that figure had dropped to 29 per cent.<sup>5</sup> LASPO has further worsened the situation by removing most cases involving housing, welfare, debt, immigration, employment and medical negligence law from scope.

Hundreds of thousands are now going without the legal aid they require. The number of litigants in person is rising, and the number of 'acts of assistance' granted through legal aid has been falling consistently since 2009/10. While a figure that does not differentiate between assisting with simpler and more complex cases, it nevertheless provides an indication of the overall decline in levels of legal aid assistance.



Source: Ministry of Justice<sup>6</sup>

However, the evidence suggests that legal aid enables disadvantaged groups to access justice, and it also saves the state money. Research focusing on the adverse consequences of civil problems shows that legal aid expenditure on housing, debt, benefits and employment advice is cost-effective in the long-run. This is because the provision of legal aid allows for early intervention and prevents the escalation of conflict and costly appeals.<sup>7</sup> It also saves spending by the state on other services. For example, Citizens Advice found that for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34; and for every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.<sup>8</sup>

At the same time as whole areas of legal problems were taken out of scope by LASPO, a new means test was introduced for those areas which remained. This reduced the group of those eligible for legal aid even further. The legal aid calculation sets rigid allowances without any flexibility to account for the reality of people's finances. For example, the new legal aid test only allows rent costs up to a cap of £545 per month even if a person is having to pay a higher rent in practice. People are assessed as having accessible capital for paying legal costs in any property they own even though there is no realistic prospect of banks lending against that equity. The overall result is even fewer people being eligible for legal aid.

For prisoners, this situation is especially stark. In their evidence to the Commission, the Association of Prison Lawyers (APL) explained that the majority of legal cases concerning those who are incarcerated have been taken out of scope of legal aid. This has meant that the function of complaints resolution in prisons now resides with the widely mistrusted internal prisons complaints system. As the APL put it:

“The effective removal of the ability for prisoners to access to legal advice about the majority of the problems and issues they encounter in prison has removed any semblance of access to justice for this group. The problems are particularly acute for juveniles and women prisoners.”

**Case study one, from Rights of Women:**

“I earn a low income, yet I’ve been assessed as having too much disposable income (they don’t take into account living costs for utilities etc...) and when you aren’t eligible you’re expected to pay full solicitors’ costs - there’s no help anywhere in between. I’ve had to face my violent ex-partner in court twice now, and will have to continue to do so as I simply cannot afford costs.”

***Unrepresented defendants in magistrates’ courts***

While cuts to criminal legal aid have not been as deep-reaching as those to civil legal aid, the pressures placed upon some parts of the criminal sector are leading to the loss of some services; unrealistic pressures on criminal advocates where low wages for junior professionals are pushing people, especially from already underrepresented groups, out of the profession; and a likely rise in unrepresented defendants and miscarriages of justice, particularly in magistrates’ courts.

There are no official statistics on the number of unrepresented defendants in magistrates’ courts, but a recent Transform Justice report suggests, based on interviews with judges and lawyers and Magistrates’ Association data, that there has been a rise in numbers.<sup>9</sup> In some cases, particularly traffic cases, defendants choose to represent themselves; but increasingly often defendants are going unrepresented through no choice of their own.

As the Transform Justice report details, such a rise translates to a corresponding increase in miscarriages of justice and a much greater burden falling on court staff, judges and advocates. Often this leads to problems with unrepresented defendants *“not understanding what they were charged with, pleading guilty when they would have been advised not to, and vice versa, messing up cross examination of witnesses, and getting tougher sentences because they didn’t know how to mitigate.”*

**2: Exceptional case funding has failed to deliver for those in need**

Exceptional case funding (ECF) was introduced as part of LASPO with the stated aim of ensuring that out-of-scope cases with exceptional circumstances would have access to the legal aid when needed. The evidence suggests it has failed to do so, because its criteria for inclusion are unrealistically strict. Far too few people have been covered by the scheme and it has thus failed to function as an effective safety net.

LAA statistics show that whereas the government suggested around 847 children and 4,888 young adults would be granted ECF each year, in fact between October 2013 and June 2015 only 8 children and 28 young adults were granted legal aid under the scheme.<sup>10</sup>

According to the latest LAA data, there has been a recent upturn in the success of applications for ECF, due to a liberalisation in acceptance criteria prompted by four court decisions. However, a recent Court of Appeal decision has made the criteria more restrictive again in certain respects – the consequences of which are yet to filter through into statistics.<sup>11</sup> Between January and March 2016,

201 out of 370 applications processed were granted, up 34 percentage points on figures from a year earlier.<sup>12</sup> But the total number of applications is still far below expectations and government predictions.

**Case study two, from Southall Black Sisters:**

“Ms P’s in-laws and her husband subjected her to ongoing abuse. She eventually developed serious health conditions for which she needed urgent access to medical care. For two years, she was in and out of hospitals. At one stage, her in-laws visited her in the hospital and told her that she would never recover and she was better off dead. As a result, she became suicidal and she was kept on ‘suicide watch’ by a nurse.

“She was discharged from the hospital and returned to the matrimonial home. There she was kept in a shed at the back of the house which led to a deterioration in her health. She was kept in the shed for one year even though all the professionals involved knew about her home circumstances.

“Her father eventually contacted Southall Black Sisters and they managed to get her out of the matrimonial home. Ms P cannot apply for legal aid for divorce and make claims for financial support or relief because none of the professionals involved recognised her situation as a case of domestic violence. For example, the hospital recorded her experiences as ‘family problems’.

“Without proper recording of domestic violence, Ms P cannot obtain the evidence needed to obtain legal aid under the ECF scheme and to pursue legal remedies for the abuse she suffered.”

### **3: Public legal education and legal advice is inadequate and disjointed**

#### ***Public legal education***

Organisations including law centres, the Civil Justice Council and the Legal Aid Practitioners’ Group have told the Commission their biggest concern about the state of access to justice is a lack of public legal education. In order for citizens to act on their right to justice, they need the capacity to identify a problem as legal in character, understand the help to which they are entitled and select an appropriate service.

Public awareness of the law is at dangerously low levels. Nearly half of individuals who experience a legal problem put it down to ‘bad luck’ while 40 per cent describe their problem as merely social or bureaucratic. The result is that 43 per cent of people try to solve their legal problems alone, with 15 per cent seeking help from family or friends.<sup>13</sup>

#### ***Legal advice and integration***

While public legal education remains insufficient, the need for good legal advice is ever more pressing. The Centre for Law and Social Justice, the Law Centres Network, Liverpool Law Society and many others all cited this lack of focus on preventative advice as among their greatest concerns about the state of access to justice.

Cuts continue to worsen the provision of legal advice, with Ministry of Justice research showing the number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015. More than half of the 700 who responded to the Ministry of Justice survey reported that they had client

groups who they were unable to help due to lack of resources, expertise, or because they fell outside the centre's remit.<sup>14</sup>

As with public legal education, inadequate investment in advice undermines the ability of people to access justice and is not cost-effective. New Economics Foundation research estimated that the social return for advice given by law centres for complex problems could be up to £10 for every £1 spent.<sup>15</sup> Likewise, the Low Commission write that they see:

“social welfare law as a spectrum or continuum including public legal education, informal and formal information, general advice, specialist advice, legal help and legal representation. The more preventive work we can do at the beginning of this continuum, the less we should have to do at the end”.<sup>16</sup>

#### **Case study four: Mary Ward Legal Centre**

“The removal of funding means that the preventative help which previously people were able to access is now gone. This means that most housing cases which we take on are already extremely urgent by the time someone gets to a point where we are able to take their case on. In the past when someone received a notice warning them that their landlord was going to issue court proceedings we would have been able to give advice and assistance at that stage and help them to organise their debts or their housing benefit claim and work out some sort of manageable repayment plan for them. Now that work is no longer in scope we are increasingly having to turn people away and tell them to come back to us when they've got a court hearing date or an eviction warrant with the result that when we are in a position to assist we only have a matter of days until the hearing/eviction. This significantly weakens our ability to put forward a strong defence for our clients.”

## **4: Court closures and court and tribunal fees are preventing people pursuing legal claims**

### ***Court closures***

A substantial proportion of the respondents to the Commission's public call for evidence – including Money Advice Trust and Hodge Jones and Allen LLP – cited court closures and court and tribunal fees as the main barrier to access to justice. The Commission has also heard from individuals who, so disheartened by fees, have simply given up on attempting to secure justice altogether.

Government statistics show that between May 2010 and July 2015, 146 courts have been closed. In addition to these closures, in February 2016 a further 86 court and tribunal buildings were earmarked for closure.<sup>17</sup> Court and tribunal closures have been justified by the idea that we are moving towards a justice system less dependent on geographical proximity. Yet online courts remain far from the mainstream, and cuts of 48 per cent between 2010-2011 and 2015-2016 to funding for HM Courts and Tribunals Service demonstrate that the closures are a response to cuts, not innovation.<sup>18</sup>

As the PCS union, Shelter and many others have reported in their evidence to the Commission, these closures have meant an increase in time taken to travel to court, and a rise in associated travel costs. Shelter wrote that, along with cuts to legal aid, courts closures will increase the numbers of those liable

to lose their homes. Access to justice must include the ability to be able physically to access the court system where necessary, either in person or through another means.

### ***Court and tribunal fees***

The impact of court closures is compounded by rises in court and tribunal fees, which were introduced under the coalition government. Resolution's evidence to the Commission expressed particular concern at the impact of the 60 per cent rise in divorce fees since 2013, from £340 to £550. And at the extreme end, there has been a 600 per cent rise in court fees for those making claims of more than £200,000 in the civil courts (with the exception of divorce cases).<sup>19</sup>

The PCS union, the Equality and Diversity Forum and others expressed to the Commission special concern at the introduction of employment tribunal fees. Previously, individuals were not required to pay fees to take their claims to tribunals. Since the introduction of employment tribunal fees in July 2013, the gradual fall in claims has quickly become a steep decline. The number of single cases (brought by an individual) fell by 67 per cent between October 2013 and June 2014, while the number of multiple cases (brought by multiple individuals) fell by 69 per cent.<sup>20</sup>

Often, it now makes no economic sense to take a case to tribunal, however valid the claim. PCS in its evidence to the Commission wrote that:

*"Level 1 cases, for example unlawful deductions and non-payment of wages, have an issue fee of £160 and a hearing fee of £230. Claims are often for amounts below the fees set so this is leaving many people having to concede valid claims."*

Remissions are only available for those on very low incomes. There is also no provision for those who earn in excess of the upper limit to qualify for fee remission but have high levels of debt. Money Advice Trust in its evidence to the Commission wrote that:

*"Many of our clients may have an income that exceeds the level that means they will qualify for fee remission, but because of their level of debts, their income will be used to pay back priority debt arrears such as rent and mortgage, fuel and council tax, and to pay back their creditors. As you will be aware, if people in debt are already making payments on their court judgements, they risk getting further into difficulties if they have to miss payments in order to find a court fee."*

Moreover, the time-consuming bureaucracy that those seeking remission must comply with adds its own costs. In its evidence to the Commission, Thompsons Solicitors wrote that:

*"While the government points to fee remissions as the solution, in reality they are little more than a fig leaf. For each separate fee incurred a separate application for remissions, with detailed evidence of income, must be provided. The guidance booklet itself is 31 pages long and the preparation of applications can take up to 30 minutes each, increasing the costs of the case every time a court fee is incurred. Such work also has an impact on the time of court staff, represents unnecessary bureaucracy and is a backwards step to the governments' stated march towards efficiency and cost-cutting."*

## 5: Bureaucracy in the Legal Aid Agency is costly and time-consuming

Bureaucracy in the Legal Aid Agency was cited as a serious inhibitor to access to justice by many individuals and organisations, including individual solicitors and Young Legal Aid Lawyers. While cuts have hit frontline services hard, administration continues unabated to drain time and costs for both clients and providers. As Richard Miller in his oral evidence to the Commission told us, while the Legal Aid Agency's budget has been cut by 25 per cent since LASPO, administration costs stayed static at over £100m in 2014-2015<sup>21</sup> and rose by £2.1m in 2015-2016.<sup>22</sup> This despite the MoJ's avowed aim to reduce the administration budget by 50 per cent by 2019-2020.<sup>23</sup>

LAA services, particularly the cost case management system (CCMS) and the civil legal aid gateway telephone service, appear to be dysfunctional. CCMS was introduced in 1 April 2016, following years of problematic piloting, as a compulsory mechanism for applying for legal aid. It replaces a more efficient paper system, in which legal service providers could expect to receive a response to their urgent applications on the day that they submitted them. The new system has replaced a four-page form with a 13-page form, and so it takes an inordinate amount of time to submit an application, with Adam Tear of Duncan Lewis solicitors telling the Commission that "some applications are taking days if not weeks or months to be completed". Likewise, Ben Hoare Bell LLP wrote in its evidence to the Commission that: "the system frequently crashes, does not work effectively, does not allow for emergency applications and is on a regular basis leaving children in situations of significant harm for weeks, often months at a time."

As well as introducing to clients an unacceptable amount of uncertainty and added workload, CCMS hurts providers and discourages legal aid work. As the Mary Ward Legal Centre points out, "trying to get paid by the Legal Aid Agency at the end of a case can be as much of a battle as getting the legal aid granted in the first place."

### ***The civil legal aid gateway telephone service – barriers to justice***

In order to obtain face-to-face advice on special education needs, mortgage possession and discrimination, clients must first pass through the civil legal aid gateway telephone service. Clients are prevented from going directly to a legal aid provider of their choice in these areas of law, and must use the telephone service. But in addition to the removal of choice, there are doubts as to whether clients, especially disabled clients, are able to receive the specialist advice they need through this service and articulate clearly their need for face-to-face advice. The Deaf and Disabled People's Organisation, for example, in its evidence to the Commission wrote that "it raises significant hurdles for disabled people in accessing advice", while the Housing Law Practitioners' Association suggests that "vulnerable clients may struggle to articulate their issue meaning that the exact kind of client who is likely to require face-to-face advice, will be unable to obtain it."

The Public Law Project has undertaken detailed work on the gateway and their findings suggest that the volume of advice being given out is 75 per cent less than expected, based on the figures of the Legal Aid Agency's forerunner, the Legal Services Commission. Additionally, in its evidence to the Commission they write that "service users experienced difficulty in navigating and proceeding beyond the operator service; that there was a very low level of awareness of the service amongst potential service users; and that significant numbers of matters results in 'outcome not known or

client ceased to give further instruction’, indicating that individuals were struggling to engage with it.” In short, excessive bureaucracy and dictation of how people access legal services is preventing people accessing justice.

## 6: Out of date technologies keep the justice system wedded to the past

There is variation within the justice system in the extent to which new technologies are being exploited effectively, with criminal law outpacing civil law by some distance. But as the example of CCMS allude to, the justice system as a whole has too often been slow to implement new technologies – and where it has they have been out of date and excessively bureaucratic. This picture is beginning to change, however, with London serving as a hub of new technological innovation.

We have heard from experts in the field, Richard Susskind and Roger Smith, who have described how other professions are making the most of the new opportunities that technological innovation provides while the legal profession remains wedded to the past. Legal advice centres, for example, have been slow to utilise digital services. Only 10 per cent offer Skype or any online chat service, while just 8 per cent use some form of automated web-based programme with no advisor input.<sup>24</sup>

On the other hand, Lord Justice Briggs’ report into online courts<sup>25</sup> has prompted a serious consideration of online triage and dispute resolution, and lessons are being learnt from Canada, the USA and the Netherlands. The new British Columbia Civil Resolution Tribunal went live in July 2016 as a voluntary scheme confined to a relatively select group of small claims and housing disputes, but there is much scope for expansion and already discussion about making it mandatory – while maintaining people’s rights to access courts.<sup>26</sup> The successes and failures of such programmes should be closely monitored.

Likewise, the £700m investment in modernising courts and tribunals announced in the 2015 Autumn Statement is to be welcomed, so long as it is not a means of making cuts to essential services and face-to-face help.<sup>27</sup>

### Rechtwijzer

The Dutch legal system has introduced an online portal, Rechtwijzer, which empowers individuals to manage their legal problems. The ‘online dispute resolution’ service enables users to identify their problem as legal in character and walks them through the rights they have and the action they could take. Most importantly of all, it is user-friendly. As Roger Smith said in his evidence to the Commission: “This is a paradigm vendor: no other website looks so good.”

A UK version, Relate, has been launched this year. It is currently in its pilot phase and is confined to helping divorcing or separating couples. Unlike Rechtwijzer, it has no government support and lacks official status or public recognition. Nevertheless, it shows the potential of new technologies, if managed effectively, to play an important role in securing access to justice for all in the context of squeezed finances. However for many people, particularly those with disabilities or unfamiliar with the internet, other means of access, including face-to-face advice will still be necessary as part of the spectrum of means of delivery.

## Section two: Making access to justice a reality

In the current political and economic climate, it is unrealistic to propose repealing LASPO wholesale. For all its adverse effects, significant savings have been made: in 2010 the legal aid budget was £2.1bn out of an overall Ministry of Justice budget of £8.5bn; now that figure is down to £1.6bn. As much as we believe these cuts should not have been made in the first place, reversing them in their entirety is not immediately viable in a context of squeezed finances. Moreover, a purely financial response to the crisis – although further funding may be part of the solution – would fail to solve deep-seated structural problems within the justice system. Reforms are badly needed and these should include, but not be limited to, re-examining the scope of legal aid with a view to its partial re-expansion and the rationing and distribution of money within the legal aid sector.

We have drawn up a number of principles which should guide future policy thinking in this area. These basic principles have emerged from our own experiences working in the profession, and from the evidence that we have heard during the course of the Commission. They have informed our approach throughout this process.

### ***The importance of technology***

As technological innovation continues its advance into the professions, the legal system must seize the opportunities it presents. The justice sector must look to the future, imagining how technology will continue to develop apace in the years to come and design a system for the long term in the context of low levels of funding.

But this does not mean accepting technology as the whole solution. As many witnesses have pointed out to the Commission, face-to-face contact is irreplaceable. While Professor Susskind suggests as little as 3 per cent of the population are without internet access, research from the Legal Education Foundation found only 50 per cent of those entitled to civil legal aid pre-2013 would be willing and able to operate online. People facing the type of legal problems for which legal aid is needed are much less likely to be able to utilise the internet to resolve their problems. As the Legal Education Foundation note, it “certainly cannot be assumed that effective access simply equates with access to the internet.”<sup>28</sup>

### ***Client focused design***

Client focused design provides a useful framework for thinking about policy solutions, putting the journey of service users through the system at the centre. The Low Commission define the related concept of systems thinking as:

“addressing the issues of users in the round, and not just tackling problems in silos ... looking not just at the presenting problem but also at the background issues of poverty, unemployment, homelessness or poor health, especially mental health, drug and alcohol addiction, etc ... bearing down on inefficiencies in the system that give rise to delay and bureaucratic mistakes and working with the public service providers to improve their early delivery.”<sup>29</sup>

In practice, this means giving citizens the capacity to address or at least recognise problems of a legal nature themselves, providing opportunities for early intervention and integrating services effectively. As the Low Commission has pointed out, local initiatives emerging from systems thinking have already proved greatly effective in places like Coventry, Nottingham and Portsmouth. For example, in Portsmouth after the collapse of their 'community legal advice centre', a new service model reduced the rate at which people abandoned trying to use the service from 33 per cent to 2 per cent, as clients were given a range of options rather than simply being told to come back first thing in the morning and join the queue.<sup>30</sup>

### ***Simplicity***

The legal system today is convoluted and filled with unnecessary and often costly bureaucracy. As various legal professionals told the Commission, we have reached a point where legal professionals spend time filling out forms to account for time spent filling out forms. Service users face unnecessary bureaucratic challenges that hamper their ability to access justice. As we have seen, recent reforms to the justice system such as the implementation of the LAA's CCMS have only added to the burden of bureaucracy, taking away valuable time which could be spent on solving people's problems. Future reform must take as its starting point the importance of simplicity so that those entitled to legal aid can access it swiftly and the professionals delivering legal services are not hampered by costly systems which are not fit for purpose.

### ***Public support***

In addition to financial viability, there needs to be public support to solve the problems the justice system faces. Fortunately, public backing for the principle of access to justice remains high, with 84 per cent of adults seeing it as a fundamental right. When the concept of legal aid is explained, 89 per cent of people support it being available to ensure access to justice for disadvantaged groups.<sup>31</sup> However, this positive response sits alongside widespread misconceptions about legal professionals and the law in general. Legal professionals are, in the face of the facts, presented as universally wealthy, while the law is often thought about as something that only criminals have to deal with.

As Richard Miller remarked in his oral evidence to the Commission, a service designed for the poor will be allowed to be a poor service. Future reforms to the justice system must be framed as relevant for the entire population.

With these principles underpinning our work, we have set out to answer the fundamental question of how we can ensure people can access justice in the current political and economic climate. The Commission will explore possible solutions under five strands, before making our final recommendations.

## **Strand one: minimum standards**

The Commission set out with the premise that the state has a duty to provide a guarantee to all its

citizens of access to justice, in the same way as it has a duty to provide its citizens with a decent education and health service. Access to justice and support for the rule of law have been incorporated into the UN's sustainability goals so adopting minimum standards would set an international example.

This is a principle already reflected in common law. Access to the courts has been judicially described as a 'common law constitutional right'<sup>32</sup> and the right to a fair trial is a fundamental human right. What's more, the Court of Appeal has recently explained how the jurisprudence of the European Court of Human Rights has developed the meaning of the guarantee of 'access to justice', whose governing principles include a practical and effective right of access to the courts; the ability to "present the case properly and satisfactorily" before the court or tribunal; fairness in the proceedings (taken as a whole), and the appearance of fairness in the proceedings and equality of arms such that each side can present their case "under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponent".

Likewise, the Rushcliffe Committee of 1945, the recommendations of which led to the pivotal Legal Aid and Advice Act 1949, also set out key principles. It stated that legal aid should be available in all courts; legal aid should be available for free to those who cannot pay for it; there should be a sliding scale of contribution towards legal aid fees based on means; barristers and solicitors should receive fair remuneration for their work; provision should be available not merely for those who are considered poor, but instead for a wider group.

### ***Future policy direction***

- **Minimum standards.** The Commission will consider minimum standards for access to justice to be enshrined clearly in law – which could include legal aid for all those who need it, equality of arms, sufficient and comprehensive legal education, and the availability of accessible technologies of triage. The standards should be clear enough to provide a substantive guide to help auditors and guide policy.
- **An independent inspectorate.** The Commission will consider the enforcement of these standards by an independent body. Just as there is a chief inspector of prisons, the Commission will consider whether there should be a chief inspector of the justice system to hold government to account.

#### **Questions for the Commission to address**

- What minimum standards will provide a clear yardstick by which to measure whether access to justice is being delivered, and how would progress against them be measured?
- How should an independent auditing body operate?
- What would the relationship be between the Ministry of Justice and an independent inspectorate?
- What mechanism should be used to determine fair levels of funding?

## **Strand two: legal aid**

In their submission to the Commission, the Law Society wrote that: *"We re-affirm the philosophy behind*

*the Legal Aid and Advice Act 1949 that nobody should be unable to enforce or defend a right for want of the advice and representation they need to do so effectively.”*

The Commission agrees. Legal aid plays an integral role in our justice system, enabling those who cannot afford to pursue claims and defend themselves privately to access legal help. The narrower scope of legal aid has seriously damaged the ability of the legal system to uphold the principle of equality under the law, and thus the rule of law itself.

### **Future policy direction**

- **The future of the LAA.** A number of witnesses raised serious questions about the effective functioning of the LAA. The Commission has heard calls for a review into the possibilities for its replacement by an independent body which maintained some degree of ministerial oversight.
- **Legal aid eligibility.** The Commission will consider the decline in levels of financial eligibility for legal aid, considering the necessity of loosening the stringency of current means testing and evidence requirements, and where aspects of the cuts to the scope of legal aid may need to be reversed.
- **The ‘polluter pays’ principle.** In 2013/2014, 42 per cent of tribunal appeals against DWP decisions were successful,<sup>33</sup> and between October 2013 and December 2015 for appeals against DWP Employment Support Allowance determinations (following mandatory reconsideration) that number increased to 56 per cent. If the DWP had to pay a levy if more than (say) 10 per cent of these decisions were found against them, it might incentivise them to get decisions right first time round. This levy would raise money for legal services, which could then be hypothecated to reducing court and tribunal fees. Witnesses have called for further work into the possibility of a polluter pays scheme, incorporating government departments beyond just the DWP, which would shift costs to those who cause them.
- **The legal aid gateway.** The legal aid gateway telephone service is not working. In order to obtain face-to-face advice clients must first pass through this telephone service. There are doubts as to whether clients, especially disabled clients, are able to receive the specialist advice they need through this service and articulate clearly their needs.

### **Questions for the Commission to address**

- How can the LAA be reformed or replaced such that it is fit for purpose?
- How can legal aid be available to all those who need it without placing an unaffordable burden on the nation’s finances?
- How could a polluter pays scheme be made to work?
- Can the legal aid gateway telephone service be better adapted for disabled clients and other vulnerable groups or is the whole premise of the gateway flawed?

## Strand three: public legal education and capability

Many witnesses said that better public legal education should be a key component in ensuring that people can access justice on an equal basis. Islington Law Centre, for example, told the Commission:

“The lack of any proper funding framework for public legal education mean[s] that it is increasingly difficult for people to identify that they have a problem for which there is a legal remedy. Word of mouth is a powerful tool in a lot of communities and the loss of a plurality of agencies promoting justice and dealing with initial enquiries has led to a loss of confidence that anything can be done.”

As Richard Susskind argued in his oral evidence to the Commission:

“The ambulance should be at the top of the cliff. The state should play its part in promoting dispute avoidance. We need to reduce the need for dispute resolution by placing a fence at the top of the cliff. Legal education is [an] aspect of this. Most think of law as imposing restrictions, but actually it’s wonderfully empowering if we knew what our entitlements are and then what avenues are available to us to pursue claims and enforce things in relation to our employer, landlord, retailer, etc.”

Early intervention and public legal education is also cost-effective in the long run, as Law Commission research has shown, because it prevents disputes ending in costly litigation.

Legal awareness should form part of everybody’s education, both at schools and throughout life. To be without knowledge of your legal rights is equivalent to political disenfranchisement, as you are unable to enforce your basic democratic rights. The Commission will explore possibilities for expanding effective public legal education, so that every citizen can identify a legal problem and know the steps they should take to resolve it.

### *Future policy direction*

- **Legal education in schools.** Legal education in schools is currently insufficient. The Commission will examine ways of integrating public legal education into schools such that it feels relevant, and even empowering, for everyone.
- **Legal education through life.** As the Commission has heard, rather than confining legal education just to schools, information should be available where people access services already – in libraries, job centres, GP surgeries, etc. We will consider policies to ensure legal education is available throughout life.

### **Questions for the Commission to address**

- How can the school curriculum be improved, in the context of numerous competing priorities?
- How can basic knowledge of fundamental legal entitlements become universal?
- How can public legal education reach typically hard to reach groups, such as older and disabled people?

## Strand four: legal advice and integration

Like public legal education, specialist legal advice plays an invaluable role not only in ensuring citizens can access justice, but also as a cost-saving mechanism. Frontloading work and encouraging conflict resolution and containment rather than escalation helps to avoid expensive conflict in the courts. Currently advice is being delivered in a piecemeal way, worsened by closures due to cuts, which means that advice is uneven across the country.

As Brighton Housing Trust wrote in its evidence to the Commission:

“Advice provision needs to be coherent across the country and this is why there needs to be a national body overseeing this. This would enable advice services to be joined up (from first level entry right up to LAA contracts) and have the ability to ensure that clients get to the advice service that they require at the earliest possible stage.”

Additionally, problems of a legal character often have other components to them. For example, many legal service users whose problems relate to losing their home have a disability or experience mental health problems. Integrating legal advice services with services like health and social care is a possible response to these overlaps, ensuring that problems aren’t treated in isolation.

### *Future policy direction*

- **Integration of services.** The ongoing integration of public services like health and social care offers a potential model for providing legal advice and triage in the community. The Commission has heard proposals for one-stop centres which would offer a combination of intersecting services, to address deficiencies in both the provision of legal advice and public knowledge of services where they do exist.
- **A national body.** Brighton Housing Trust and others have proposed to the Commission a national body to ensure the provision of legal advice is coherent throughout the country. The Commission will consider how such a body would learn from the experience of the Legal Services Commission.
- **Financial support.** The Commission will consider costed proposals for government support to legal advice centres to ensure they are available in every part of the country.

### **Questions for the Commission to address**

- How can legal advice services be supported in a context of squeezed finances?
- What might the relationship be between legal advice and other integrated services?
- What body would be best placed to standardise and audit the provision of legal advice nationally?
- How can services be effectively branded to make them recognisable and formally verified?
- How can the case for financial support for legal advice centres be won?

## Strand five: technological innovation

Technology has a vital role to play in ensuring that people can secure access to justice in an effective and efficient way. But many witnesses to the Commission have expressed concerns about technology being used to justify cuts and undermine invaluable face-to-face help. The Centre for Law and Social Justice, for example, wrote that:

“[I]t is important that any use of technology – such as the ‘online court’ proposed in the Briggs report – is supplementary, rather than a replacement for face-to-face adjudication. For many individuals, this element of humanity may be essential for meaningful interaction with the justice system.”

The Commission believes that technologies should be experimented with and utilised wherever possible so as to cut down on bureaucracy, improve efficiencies and make savings. However, these developments should be used to free up time and resources for more direct contact with disadvantaged groups who need face-to-face support. There will always be a large part of the population who will need such face-to-face support, and existing legal aid and advice practitioners should be supported rather than replaced.

### *Future policy direction*

- **An online portal.** We will consider the possibility of a central online portal, based on the lessons of the Dutch Rechtwijzer system, to enable clients to identify their problem as legal in character and walk them through the rights they have and the action they could take. In his oral evidence to the Commission, Richard Susskind suggested that this could be administered by Citizens Advice so as to effectively centralise and brand the portal in a recognisable place. Both Citizens Advice and Gov.uk are currently working on such a portal.
- **An innovation fund.** Witnesses, including Professor Roger Smith and Lord Low, have proposed a fund to encourage private experimentation with new technologies to provide legal services. The Legal Education Foundation have advocated that 1 per cent of all legal aid funding goes towards such a fund, paralleling schemes such as the successful technology initiative grants in the US.<sup>34</sup> Such a scheme should be considered in England and Wales.
- **Alternative dispute resolution.** The online small claims courts and other forms of alternative dispute resolution, which have been debated in Lord Justice Briggs’ report and elsewhere, are radical proposals worth taking seriously. Existing schemes such as the new British Columbia Civil Resolution Tribunal should be closely followed and lessons learned and implemented.

### **Questions for the Commission to address**

- How can new technologies be incorporated without excluding those in hard to reach groups?
- What organisation would host an online portal and how will it be funded?
- How could finances for an innovation fund be raised?
- How can forms of alternative dispute resolution be used effectively without hindering common law?

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