

Submission from Public Law Project of evidence to the Commission on Justice in Wales

June 2018

Public Law Project (PLP) is a national UK charity, operating since 1990, committed to helping poor and marginalised communities in England and Wales through the application of public law principles. Public law is the law that governs the way public bodies behave. PLP seeks a world in which individual rights are respected and public bodies act fairly and lawfully. In furtherance of this PLP's objectives are to:

- Promote access to justice
- Ensure fair systems and
- Uphold the rule of law

PLP is unique in employing a combination of research, training, casework (much of it strategic) and policy work to achieve our charitable aims. We are a second-tier advice provider, in that we provide advice and training to other lawyers and advisers, and receive case referrals from them, rather than directly from members of the public.

PLP holds an annual conference in Wales, running since 2009, focussing on public law and access to justice issues both specific to Wales and relevant more widely across Wales, England, and the UK. The event is intended as both outreach and information exchange, helping PLP's expert lawyers and researchers stay informed about policy, issues and legalisation in Wales, and allowing us to pass on relevant expertise and training.

This submission is a PLP research briefing paper exploring the effects of the LASPO reforms on civil legal aid provision in Wales. The paper was written by Sue Harper, with the assistance of PLP's Research team. We consider the evidence to be significant across the Commission's work streams, most specifically on the following aspects:

- Civil justice, family justice, administrative justice and tribunals
- The legal profession, legal tech and the economy of Wales
- Access to justice and other overarching issues

It addresses, at least in part, the following suggested questions from the commission

1. What problems face the people who work within the justice system in Wales (including policing, prosecution, courts, prisons and probation) and the people who are affected by it?
2. Does the justice system in Wales currently provide access to all who require its services, including advice?

While the paper does not suggest any solutions, it does provide an informative, succinct and comparative picture of the disproportionate effects on Wales of the withdrawal of legal aid since LASPO was enacted, on the breadth and scale of the depletion of advice, and on the impact on the economy of providers both in the private and NGO sectors. The economies of small and medium-sized enterprises (SMEs) and smaller charities, for instance, are likely less resilient to cuts in publicly funded work. This has had a two-fold impact, leading to the closure of services and the loss of specialism. The latter seems to have been especially problematic with regard to social welfare law, where the number of providers of legal advice has fallen very dramatically. Further evidence is in the lack of any legal aid Exceptional Funding applications in Welfare Benefits or Housing from any providers in Wales.

This paper does not look at impacts on the lives of individuals unable to access legal advice, or the effect this is having on holding Government or private actors to account through the law, and ultimately the effect this is having on society in or outside of Wales. The paper's analysis does point implicitly to areas that require investment and capacity building to insure, at minimum, there is no further loss of access to justice in these areas in Wales.

Summary

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) substantially reduced the scope of civil legal aid. Areas removed from scope included all private family law except where there is evidence of domestic violence or child abuse; housing matters except where the home is at immediate risk; most employment law; debt, except where there is an immediate risk to the home; non-asylum immigration law; the majority of welfare benefits cases¹

This briefing paper explores effects of the LASPO reforms on civil legal aid provision in Wales. It draws on Welsh and UK¹ Government statistics and reports; publications by legal professional bodies, Parliamentary Committees, Independent Commissions and the voluntary sector; academic sources; informal consultations with solicitors and advice charities.

Key findings

- Between 2012-2017, Wales has seen a larger proportionate fall in civil legal aid expenditure, and in firms providing advice and representation under legal aid than England.
- A reduction in legal aid providers for matters remaining in scope in Wales leading to large geographical areas with sparse legal aid provision.
- Nearly twice as many firms in Wales reported changes to legal aid as being a significant problem than firms in England.
Many people near or below minimum living standards cannot access legal aid due to restrictions on eligibility. They are unlikely to be able to afford private legal advice.

Civil legal aid statistics

The Ministry of Justice (MoJ) reported that in 2012/13, funding was provided for 575,000 new Legal Help matter starts and 150,000 new certificates for Legal Representation. By 2016/17 the Legal Help figures had fallen by 74% to 145,000 and the Legal Representation figures by 29% to 105,000. Between 2010/11 and 2016/17, annual legal aid fund expenditure fell by £950m, or 38%, in real terms at 2016/17 prices.² The government pre-LASPO impact assessment had predicted savings of £410m per year.³

Legal Aid Agency (LAA) statistics break expenditure into regions. Wales comprises one region and England is divided into 11 regions. In the years 2011/12 to 2016/17, the Wales region saw a 34% fall in civil legal aid expenditure on solicitor firms and a 69% fall in civil legal aid expenditure on Not for Profit (NfP) organisations. For the same categories, the 11 English regions combined have seen average falls of 23% and 63% respectively.⁴ During this time the populations of Wales and England have grown by approximately 1.5% and 4% respectively; the population of Wales is approximately 5% of the England and Wales total.⁵

Decrease in providers

The number of firms in Wales providing legal aid has fallen by 29% since 2012; the average fall for the England regions is 20%.⁶

The House of Commons Justice Committee stated in March 2015 that it was “troubled by National Audit Office findings which indicate that there may already be ‘advice deserts’, geographical areas where [publicly-funded legal] services are not available” and noted the difficulty and expense that would be involved in restoring lost capacity and expertise.⁷

The Law Society has drawn attention to the existence of advice deserts within Housing law noting that the problems this causes include:

- those on low incomes may not be able to afford to travel to see the provider;
- one firm in a large area may not have capacity for the demand;
- conflicts of interest arising.⁸

Submissions to the Bach Commission reported clients encountering such difficulties.⁹ The Law Society research shows that four of the eight procurement areas in Wales have only one Housing legal aid provider.

Following the implementation of LASPO, the number of solicitors with Family legal aid contracts has fallen in the mid-Wales area, where legal aid provision was already sparse.¹⁰ This raises the concerns listed above regarding accessing legal aid for matters remaining in scope.¹¹

The area of welfare benefits was removed from the scope of legal aid apart from appeals to the Upper Tribunal and above on a point of law.¹² Data received from the LAA shows that in 2012 there were 31 providers holding welfare benefits legal aid contracts located throughout the whole of Wales; now three remain, in Cardiff, Newport and Swansea. This raises questions about how individuals can access the knowledge and advice to apply for funding in the limited areas still remaining in scope. A greater proportion of welfare benefit clients are expected to be ill or disabled compared with any other category of law.¹³ Wales has a higher percentage of people on benefits and prevalence of disability than England.¹⁴

In the first year of the implementation of LASPO nine law centres closed, with Cardiff Law Centre closing in 2014.¹⁵ The Welsh Government Advice Services Review noted that levels of legal aid funded social welfare advice sessions were forecasted to be at a sixth of current advice provision following the reforms.¹⁶ Demand for services is rising due to changes in the benefits system and legal aid reforms. Swansea-Neath Port Talbot Citizens Advice and other organisations reported that there was much more demand than their services could cope with.¹⁷

Problems for firms in Wales

In the Law Society Firm review 2013/14, firms were asked to indicate their most significant problem. The survey found that 46% of firms in Wales indicated changes to legal aid had been either a 'fairly' or 'very significant problem', compared to an average of 24% of all law firms reporting similarly across England and Wales.¹⁸ The next highest figure in this response category was 33% from firms in the North East region.

LASPO came into force at a time when civil legal aid fees had not been increased in line with inflation since 1998/99 and were subject to a 10% cut in 2011. The NAO has calculated that this amounts to a 34% real-terms reduction in civil legal aid fees over that 13-year period.¹⁹ The Law Society has warned that “the future sustainability of legal aid practice is in significant doubt”.²⁰

Research from 2005 found that average legal firm size in Wales is lower than any region in England.²¹ Practitioners describe how firm size has implications for the financial sustainability of providing legal aid, for example through: lack of staff capacity to delegate work to in order to be able to complete the work within the fixed fee limit; audit fees and preparation time disproportionate to remuneration; complying with the minimum number of

matter starts. Additionally there were reports of administrative hurdles that must be cleared to apply for legal aid and meet the demands of the auditing regime, excessive administrative costs, software not fit for purpose and time-intensive administrative workloads. These issues are leading to demoralisation, which has been described as “damaging not just to the working lives of professionals but to everyone’s right to justice”.²²

The Bach Commission note that the operation of the LAA, and the ability of legal aid practitioners to do their job, is being hampered hugely by the time and money spent on excessive bureaucracy.²³ Although the overall LAA budget has been cut by 25 per cent since the implementation of LASPO, the administrative costs of the LAA had continued to rise until 2017, when they dropped to £95 million. This is a greater expenditure than the £92.5 million spent on Legal Help in the same year.²⁴

Means

There has been no increase in line with inflation on the maximum gross income cap for financial eligibility for civil legal aid since 2013, nor for the ‘artificially capped’ fixed allowances for expenditure, which the means test takes into account.²⁵ The capital means test includes equity in the home (above a certain amount) and LASPO introduced a new capital means test; where previously anyone receiving means-tested benefits would automatically qualify for legal aid. Now anyone with more than £8,000 capital will not be eligible despite the eligibility capital limit for benefits being twice that at £16,000.

A Law Society commissioned report found that people on incomes 10% to 30% below a minimum living standard are being excluded from legal aid.²⁶ Statistics show that average income is lower in Wales than in England, suggesting that further research is needed to explore whether and how this may impact on legal aid eligibility or ability to afford contributions.²⁷ People on low or moderate incomes are very unlikely to be able to afford privately funded legal advice and so are likely to be shut out from advice altogether.

Exceptional Case Funding (ECF)

Section 10 of LASPO provides for ECF to be made available in a case that would otherwise be out of scope, where a failure to do so would breach, or risk breaching an individual’s Convention rights within the meaning of the Human Rights Act 1998 or enforceable EU law rights. Those eligible for ECF are typically vulnerable and have a very serious legal problem. PLP and the Law Society have expressed concerns that ECF remains inaccessible in practice for many people, with the numbers of applications well below those anticipated.²⁸

Ministry of Justice data shows that in the years 2013 to 2015, providers in Wales made approximately 5% of the total ECF applications; for the years 2015 to 2017 they made 2%-3% of the total applications. Further research could be undertaken to gain understanding of the capacity to make ECF applications in Wales and the categories of law that applications are made in. While noting that not all applications were able to be matched to a region,²⁹ it appears that there have been no welfare benefits ECF applications made in the Wales region since the scheme’s introduction in 2013, in comparison to 73 that have been made in the English regions.³⁰ There appear to have been no Housing ECF applications made in the Wales region in the years 2015-2017 (102 have been made in the English regions during this time).³¹ This indicates that some of the most vulnerable people in Wales with most serious problems are not even able to apply to the ECF scheme.

Acknowledgements

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References

- 1 Matters remaining "In scope" are listed in Part One, Schedule One of LASPO. Additionally accompanying regulations introduced changes to financial eligibility: The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.
- 2 Ministry of Justice, *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum* (2017) paras 174, 188. See also para 189: In 2010/11 the Government spent £2.51bn on legal aid, in real terms, of which £1.13bn (45%) was on civil and family legal aid. By 2016/17, total legal aid expenditure had fallen to £1.55bn, of which £650m (42%) was on civil and family legal aid.
- 3 Sir Henry Brooke, *Bach Commission on Access to Justice: Appendix 5 'An Analysis of the Evidence'* (September 2017), p6.
- 4 Ministry of Justice, *Legal aid statistics for England and Wales. Tables January to March 2017* (June 2017). Table 9.2. See also, Ministry of Justice, *Legal Aid Statistics in England and Wales, January to March 2017* (June 2017), p49, which states:
"Figures are based on office provider location; a provider may serve clients from other geographic areas as well as that in which the office is located. Although figures can be used at the regional level to show volume and expenditure on work done by providers based in Wales, it cannot be used to infer a detailed picture of local provision or coverage of legal aid services within Wales, or a precise measure of the proportion of legal aid funding that is spent in Wales".
- 5 Office for National Statistics, *Population Estimates for England and Wales, Mid-2011* (September 2012); and, Office for National Statistics, *UK Population 2017* (July 2017).
- 6 UK Parliament, *Legal Aid Scheme: Written question - 9862* (September 2017): Wales refers to those providers in the Cardiff LAA region. A firm may have more than one office. Figures include Not for Profit providers. See also, The Guardian, *Number of legal aid providers falls 20% in five years, figures show* (September 2017).
- 7 House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Eight Report of Session 2014-15* (March 2015) paras 88-89. See also, National Audit Office, *Implementing Reforms to Civil legal aid* (November 2014).
- 8 The Law Society, *End legal aid deserts* (no date of publication); Law Society of England and Wales, *Access Denied? LASPO four years on: a Law Society review* (2017) p13.
- 9 Sir Henry Brooke, *Bach Commission on Access to Justice: Appendix 3 'Transforming Our Justice System'* (September 2017) p37.
- 10 In the Central procurement area, comprising Ceredigion and Powys, the number of firms providing Family legal aid has fallen by nearly 50% since 2012; 7 firms (8 offices) remain.
- 11 Legal Aid Agency, *28 March 2018 – Update on further tender opportunities for 2018 contract work* (March 2018). None of the Wales procurement areas were among the 39 procurement areas in which 1 or fewer compliant tenders were received for the 2018 civil contract tender in the Housing & Debt category, or the 7 procurement areas where 5 or fewer family bids were received.
- 12 LASPO Sch 1, Pt 1, para 8; Council tax reduction scheme appeals on a point of law in the High Court and the Court of Appeal pursuant to SI: 2013/748.
- 13 Ministry of Justice, *Reform of Legal Aid in England and Wales: Equality Impact Assessment* (June 2011), para 2.213.
- 14 Stats Wales, *Out-of-work benefit claimants by GB country/English region, measure and client group* (updated May 2017); Department for Work and Pensions, *Family Resources Survey 2012/13* (2014) p64.
- 15 Sir Henry Brooke, *Bach Commission on Access to Justice: Appendix 1 'Oral Evidence: First Session'* (September 2017) pp18-19.
- 16 Welsh Government, *Advice Services Review: Final research report* (2013) p34.
- 17 Sir Henry Brooke, *Bach Commission on Access to Justice: Appendix 5 'An Analysis of the Evidence'* (September 2017) p37. See also, National Audit Office, *Implementing Reforms to Civil legal aid* (November 2014) para 2.14. See also Ministry of Justice, *Survey of Not for Profit Legal Advice Providers in England and Wales* (2015) pp19-20.
- 18 The Law Society, *Problems faced by firms: The Law Society's Firm Survey 2013-14* (October 2014) p6.
- 19 National Audit Office, *Implementing Reforms to Civil legal aid* (November 2014) para 3.20.
- 20 House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Eight Report of Session 2014-2015* (March 2015) p31.
- 21 Davies, I. and Mainwaring, L, *Research report: The supply of private practice legal skills in Wales* (2005).
- 22 Fabian Society, *The Right to Justice: The Final Report of the Bach Commission. Policy report.* (September 2017) p11 and p34.
- 23 *Ibid.* p34.
- 24 *Ibid.* See also, Legal Aid Agency, *Annual reports and Accounts 2016-17* (July 2013) p18.
- 25 Law Society of England and Wales, *Access Denied? LASPO four years on: a Law Society review* (2017) pp10-11.
- 26 Hirsch, D., *Priced out of Justice? Means testing legal aid and making ends meet* (2018).
- 27 Stats Wales, *Average (mean) gross weekly earnings by UK country- English region and year (£)* (updated October 2017).
- 28 PLP, *Written evidence of the Public Law Project to the Joint Committee on Human Rights inquiry into human rights: attitudes to enforcement* (February 2018); Law Society of England and Wales, *Access Denied? LASPO four years on: a Law Society review* (2017) pp21-22.

29 Around 13% of applications were unable to be matched to providers and, as a result, to a region. Figures are based on provider location, not client location.

30 Ministry of Justice, *Legal aid statistics for England and Wales tables July to September 2017* (December 2017) Table 8.2.

31 Ibid.