





The Westminster Commission on Legal Aid

INQUIRY INTO THE SUSTAINABILITY AND RECOVERY OF THE LEGAL AID SECTOR



The All-Party Parliamentary
Group on Legal Aid



FOREWORD

The All-Party Parliamentary Group on Legal Aid has been campaigning vigorously in defence of the legal aid system – under successive governments – since we were established in 2007. We, as MPs from a number of different parties, share a common commitment to making our justice system work for everyone, regardless of means.

When the pandemic struck, it massively increased the need for assistance, notwithstanding the valuable respite offered in some areas, such as the temporary evictions ban. It also damaged the business model on which law firms rely, and as is the nature of such crises, exposed the underlying fragility of a system already struggling to provide services everywhere in the country and to recruit and retain the lawyers to deliver those services. We decided to carry out both our Inquiry and the accompanying Legal Aid Census so as to take a snapshot of legal aid provision as we began to emerge into a post-covid world. Our warmest thanks are due to our witnesses, who gave up so much of their time to participate in the hearings, to our panel members and to Rohini and the LAPG team who serviced the Inquiry throughout.

It has been a genuinely humbling experience taking part in this Inquiry – possibly the most comprehensive and in-depth look into the condition of legal aid yet undertaken. The evidence we took was compelling, whether from people whose lives have been changed as a result of access to a good lawyer, or from the lawyers themselves, whose extraordinary dedication deserves much more than the recognition this report gives them. We heard about how legal aid and the justice system are embracing innovative ways of working, but also that there are inevitable limitations to technology, especially in respect of the most vulnerable. All through the Inquiry, and threaded through this report – has been the recurrent theme: ‘There can be no justice without access to the means of securing justice. There can be no rights without means of enforcing those rights’. As we heard, however, the system is buckling, and the demands and pressures of covid have only intensified what was a service already under significant stress. We are also aware that the Legal Aid Census – the largest ever workforce survey undertaken into the legal aid sector is due to publish its results shortly. We await this with interest. The legal aid system depends on being able to recruit and retain excellent lawyers and to serve all parts of the country, but increasingly that can no longer be relied upon. The time to act is now.



Karen Buck MP

**Chair of the Westminster
Commission on Legal Aid**



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**Vice-Chair of the Westminster
Commission on Legal Aid**

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EXECUTIVE SUMMARY

It is often said that we have the one of the best justice systems in the world – and indeed there is much that we can be proud of throughout the legal profession, as it has risen, again and again, to meet the challenges of the past eighteen months. Most of all, we can – and we should – be proud of the high calibre and commitment of its people. However, while the public perception may be of a single, homogeneous profession, the reality is markedly different, with conditions in the commercial sector unrecognisable to those carrying out publicly funded work.

The legal aid sector is an essential part of our high streets. Many legal aid firms and organisations are small businesses, employing local people and servicing their local communities. The sector as a whole is in desperate need of revitalisation and investment if it is to meet public demand in the years to come. Successive governments over the past two decades have taken measures to reduce the cost of the legal aid system and the proportion of the population that it is able to help is becoming increasingly small. The system itself has changed significantly over the past decade, with civil legal aid comprehensively remodelled by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in response to the then financial crisis. The position in criminal legal aid has been altered less dramatically, though urgent problems do exist, such as an ageing criminal defence profession, collapsing court duty schemes and decreasing numbers of firms holding criminal legal aid contracts.

We are now eight years from the passing of LASPO and the country is emerging from a pandemic that has placed significant strain on all of our public services. It is a pivotal moment for legal aid as the government and the professions have taken steps toward improving the system and access to justice throughout England and Wales by committing to the following reviews:

- the Independent Review of Criminal Legal Aid, chaired by Sir Christopher Bellamy QC and due to report in 2021;
- a comprehensive government review of the legal aid means test, with proposals due to be published in autumn 2021; and
- an internal government review of the sustainability of civil legal aid (the scope and timings of which were yet to be confirmed at the time of writing).

We see these reviews, particularly the work of the Criminal Legal Aid Review (CLAR) and the means test review, as positive, showing that government recognises the need for structural improvements to be made to the system. We believe that a similarly thorough review of the sustainability of the civil legal aid sector is necessary and urge the government to publicise its intentions with regards to this. Additionally, both the House of Commons Justice Select Committee, chaired by Sir Bob Neill MP, and the House of Lords Constitution Select Committee have, respectively, produced excellent reports into the future of legal aid and COVID-19 and the courts. For the first time, there seems to be a cautiously optimistic mood among some of the practitioners we spoke to through the course of this Inquiry, a recognition that this body of work and this commitment by the government could lead to positive change for legal aid over the next decade.

As an Inquiry, we wanted to use this opportunity to look at the changes made to legal aid over the past decade and assess: whether the legal aid system is fit for purpose now, as our communities seek to rebuild themselves after the pandemic, and in the years to come; whether the system is 'sufficient' to meet the needs of the individuals whom it purports to serve; and whether the system as a whole is 'sustainable'.

Evidence was shared with us by practitioners and clients across crime, family and social welfare law in a series of oral evidence sessions from October 2020 to March 2021. Throughout this period, and in written submissions in the months that followed, witnesses shared their lived experience from the coalface of the legal aid sector both pre-pandemic and during it. This report and the recommendations it contains are based on that evidence and independent research undertaken on our behalf.

We found that although the government spent £1.76 billion on legal aid in 2019-20, there were significant issues around individuals accessing the justice system. This may be because of a lack of providers in their area, or being deemed ineligible for legal aid under the current means thresholds and/or exceptional case funding (ECF) scheme. In some areas, this led to a worrying inequality of arms for those unable to access legal advice or representation in the most emotive and challenging of cases. A review into the civil legal aid means test is due to report shortly and we recommend its urgent simplification and reform so that those who truly cannot afford to pay for legal advice and representation are able to access them. It is also our view that the ECF system is not fit for purpose and in urgent need of review.

Turning to the issue of the scope of legal aid itself, we heard evidence, and know from our own casework, that legal problems generally occur in clusters. To that end, we recommend that certain areas of social welfare law are put back into scope to allow for the provision of a more holistic service that takes into account all a client's legal needs. Witnesses also described the benefits to both clients and the state of advice

given earlier and the knock-on, positive effects that this has on the fairness and effectiveness of court proceedings, and on reducing unnecessary litigation.

Finally, we looked at the sustainability of the legal aid sector, including the effects of the COVID-19 pandemic. Witnesses told us that over the past two decades, vast areas of law have been removed from the system, rates of pay have stagnated and there have been specific cuts to fees. They explained that this has led to widespread concerns around the recruitment and retention of practitioners. Civil and criminal legal aid providers are facing major sustainability challenges, with current fee schemes failing to reflect the complexity of the work for this often vulnerable client group. Practitioners across the publicly-funded spectrum reported the need to heavily subsidise legal aid work in order to make a living from it. At the bar, we heard from barristers struggling to build and maintain careers in publicly funded work. Recruitment and retention difficulties have contributed to growing advice deserts in many locations. While improvements have been made through the use of technology and in response to the demands of the pandemic, witnesses reported that the system lacks flexibility and the fee structure is in urgent need of reform in all categories of legal aid.

The evidence from our witnesses suggests that the short- to medium-term viability of the sector rests on changes to government policy and on investment. To that end, we recommend a number of measures to tackle the financial viability of a career in legal aid. Firms have told us that they struggle to finance training contracts, so it is our recommendation that we return to a number of state-funded training periods for solicitors, barristers, legal executives and other such forms of training. While practitioners may choose to subsidise their work with private income, it is our belief that legal aid rates should be sustainable in and of themselves. These rates have been frozen for more than two decades in some areas and we recommend that the rates be increased in line with inflation, taking 2011 as a baseline. It is also our recommendation that the 8.75% cut in criminal legal aid be reversed with immediate effect. As with other reviews, it is our belief that an Independent Fee Review Panel should be set up so as to bring the legal aid system in line with other publicly funded services. We believe that any reform of the civil and criminal legal aid systems must view the system as a whole.

What we found over the course of the past year is that the legal aid system as it stands is not sufficient. Nor is it sustainable. We explore each of these themes further throughout the course of the report. If we are to truly level up as a nation, we must ensure that no one is left behind. We believe that legal aid has a significant part to play in this and its role as a safety net in society must be preserved.



THE WESTMINSTER COMMISSION ON LEGAL AID

WHO WE ARE AND WHY WE SET THE COMMISSION UP

The Westminster Commission on Legal Aid (the Commission) is a cross-party initiative formed by the All-Party Parliamentary Group on Legal Aid (the APPG) to carry out an independent review of the viability of the legal aid profession as it emerges from the COVID-19 pandemic (the Inquiry). We spent six months collecting a comprehensive body of evidence from practitioners and members of the public on the impacts of both the LASPO cuts and the COVID-19 pandemic on access to justice and the legal aid workforce.

The APPG receives secretariat support from Legal Aid Practitioners Group (LAPG) and Young Legal Aid Lawyers (YLAL). In 2020, when the Commission was created, LAPG and YLAL were designing research projects to gather data on the legal aid workforce. These separate research projects developed into the Legal Aid Census, which, at the time of writing this report, was in the analysis phase after obtaining over 2,300 responses from organisations and individuals delivering legal aid, former legal aid practitioners, and students aspiring to practise in legal aid. It was felt that the Inquiry and the Census would be complementary explorations of the issues impacting on the delivery of legal aid, and would both feed into and assist the development of future policy.

The Commission is chaired by **Karen Buck MP**, with the support of **James Daly MP** as vice-chair and parliamentarians from both houses and across the political spectrum.

Karen Buck MP is the Labour Member of Parliament for Westminster North and has been Chair of the APPG on Legal Aid since 2016.

James Daly MP is the Conservative Member of Parliament for Bury North. He is a solicitor and was a criminal defence solicitor for 16 years.

Baroness Helena Kennedy QC is a Labour peer and a leading barrister practising at Doughty Street Chambers, predominately in criminal law. She has also had a notable academic career lecturing on human rights and criminal law as well as publishing several books on justice including the acclaimed *Eve Was Framed*.

Baroness Natalie Bennett is a Green peer and a former leader of the party. She previously had a successful career in journalism, working as editor of the Guardian Weekly from 2007 – 12.

Lord Willy Bach is a Labour peer and was the elected Police and Crime Commissioner for Leicestershire from 2016–21. He was a Parliamentary Under Secretary of State in the Ministry of Justice from 2008 – 10 and before entering politics worked as a barrister. He also chaired the influential 2017 Bach Commission on Access to Justice.

Lord Colin Low is a cross-bench peer, academic and campaigner. He chaired the influential Low Commission on the Future of Advice and Legal Support from 2012–16.

Laura Farris MP is the Conservative Member of Parliament for Newbury. She is a practising barrister, working primarily in employment and public law.

Yvonne Fovargue MP is the Labour Member of Parliament for Makerfield. She was previously chief executive of St Helens Citizens Advice Bureau.

Gareth Bacon MP is the Conservative Member of Parliament for Orpington. He previously worked in finance consultancy and was a member of the London Assembly from 2008 – 21.

Andy Slaughter MP is the Labour Member of Parliament for Hammersmith. He was Shadow Minister for Justice from 2010 – 16 and previously worked as a barrister, practising primarily in personal injury and housing law.

THE INQUIRY INTO THE SUSTAINABILITY OF LEGAL AID

The Commission was formed by the APPG in May 2020 to examine the state of the legal aid sector as it emerges from the COVID-19 pandemic. The full effects of the pandemic on the economy and on society are yet to unfold.¹ The Office for National Statistics has said that the recession brought about by the pandemic led to the largest fall in quarterly GDP on record in 2020² with the Money and Pensions Service highlighting that some sectors will be hit harder than others. The Money and Pensions Service has also identified that many of the worst impacts will be felt by those who are least financially resilient – i.e. low- income families, younger people and students, parents with dependent children, women, people of Black, Asian and minority ethnic (BAME) origin, renters, the self-employed, those working variable hours and those in the gig economy. Emerging from the pandemic, many of these individuals are likely to need legal advice but be unable to afford it. Their ability to access justice will be heavily dependent on the continued availability of publicly funded legal aid.

Prior to the crisis, anecdotal evidence indicated that those delivering legal aid were generally doing so at a loss and/or reliant on subsidies from private work or grant funding. To our knowledge, there has been no research undertaken into the financial viability of civil legal aid firms, but we refer to the Otterburn and Ling report from 2014, which looked at the profitability of criminal legal aid firms prior to the 8.75% fee cut.³ The report approximated that when salaries and a proportion of overheads were taken into account, each fee earner was estimated to cost their organisation around £96,000, meaning that fee earners would need to generate that level of fee income in order for an organisation to break even. Firms were reported to be achieving a net profit margin of 5% in crime and this was prior to both the cuts that year and the pandemic.

The same anecdotal evidence has shown that there are fewer lawyers entering the field and increasing numbers of firms forced to either take on private work to remain commercially viable or leave the sector entirely. Legal Aid Agency (LAA) figures have shown a sharp fall in the number of organisations delivering legal aid over the past decade leading to well-publicised advice deserts throughout England and Wales. In 2012-13, 1733 offices with criminal legal aid contracts and 3,555 offices with civil legal aid contracts commenced legal aid work across England and Wales. By the time the first lockdown occurred in March 2020, the LAA confirmed that just 1,174 offices

holding a criminal Legal Aid contract and 2,342 holding a civil legal aid contract commenced legal aid work⁴. The Law Society published research in 2019 and 2020 which demonstrated that advice deserts have spread across the country in relation to community care and housing law, with worrying trends emerging in relation to the ageing profile of criminal defence duty solicitors. Further research has since been published by Dr Jo Wilding around decreasing numbers of immigration law providers throughout England and Wales. However, the dearth of data in relation to legal aid providers means that the picture is piecemeal. Some firms have merged, others have ceased practising in certain areas. Of the providers that remain in the sector there are also a worrying number of legal aid contracts lying 'dormant' as organisations elect not to use them and to pursue more commercially viable cases instead. All of these factors create significant barriers for members of the general public trying to access justice. As MPs we have seen this in our own constituencies, with increasing casework demands but a diminishing number of organisations to refer constituents to for legal assistance.

The LASPO post-implementation review, as well as both the Bach and Low Commissions, recommended that further, independent research be undertaken on the state of the legal aid profession and its continued viability. It was the intention of both Commissions that the research would examine LASPO's impact on the public's ability to access justice and look at its effects on the next generation of aspiring legal aid lawyers. As a Commission, it was originally our intention to undertake this research. When the COVID-19 pandemic hit, however, our focus shifted to how the sector and those practising within it would emerge and rebuild. We saw the wealth of experience in our cross-party panel as an opportunity to take a strategic, non-partisan and long-term look at the legal aid system in England and Wales to ensure that it is fit for purpose and fair. It is our hope that this profession continues to attract the best and brightest individuals to take on these complex and vital areas of law, and that our work will contribute towards this in some way.

Witnesses were chosen at all levels of experience, and from an array of practice areas and geographic locations, to give evidence at a series of thematic oral evidence sessions. We wanted to hear from those directly on the front line with current, coalface experience of managing organisations and delivering services. The oral evidence sessions were augmented by input from a number of clients who were generous and brave in sharing their lived experiences of the legal system and of fighting for access to justice.

Over a period of 12 months commencing in October 2020, the Commission:

- (i) held the following oral evidence sessions:
 - a. criminal legal aid;
 - b. family legal aid;

- c. civil (non-family) legal aid;
 - d. the publicly funded bar;
 - e. access to justice; and
 - f. the future of the legal aid workforce (experiences of junior practitioners); and
- (ii) carried out extensive desk-based research, and further engagement with expert practitioners, to provide context to and a broader exploration of the issues and concerns raised by witnesses at the oral evidence sessions.

Witnesses pointed to a lack of targeted and centralised research undermining policymaking in this area. We have seen this absence of data for ourselves in the writing of this report, and have therefore sought to build as comprehensive a picture as possible of the legal aid sector as it emerges from the pandemic. We see the work that we have undertaken as an initial step in addressing this dearth of data, and hope that our findings and those of the Legal Aid Census will form a baseline of research for this sector in the years to come.

Part 1 of this report sets out our recommendations in full. We are aware that it is not being drafted in a vacuum and that the government is currently developing a number of policy areas which directly and indirectly impact on the delivery of legal aid, on client access and on the sustainability of the provider base. Where we were cognisant of these developing areas, we have tried to reflect this in our recommendations. Foremost in our minds are the ongoing review of the legal aid means test and Sir Christopher Bellamy's independent Review of Criminal Legal Aid, both of which may reach a formal, public stage by the time of publication of this report. However, we are also aware of potential developments around digital ways of working, the delivery of early legal advice in social welfare law, changes to immigration and housing legal aid, and a number of 'legal support' work strands under the Legal Support Action Plan.

Part 2 seeks to provide some recent historical context to the Inquiry and to our recommendations. It has been a tumultuous 18 months across all of the UK as a result of the pandemic. No one has been immune to the impact of the necessary, repeated lockdowns and the other measures taken by government to control the spread of COVID-19. However, to understand how the legal aid sector can recover one must understand how fragile and under-resourced it was before the pandemic. One must also understand that legal aid is part of our wider justice system. Most commentators agree that even before the pandemic the justice system was struggling to respond to public need, however that was measured.

Part 3 sets out our understanding of the public perspective of the legal aid sector and explores what a 'sufficient' legal aid system might look like. In this section, we ask what clients need from a publicly funded system that is designed to ensure that those without financial means have access to justice.

Part 4 expands on the evidence we received from practitioners and policy experts, and summarises the provider perspective, examining issues that we believe go to the heart of the question of sustainability: fees, bureaucracy, recruitment, retention and succession planning.

We have provided additional detail and contextual information in our appendices about the history of legal aid, how the pandemic has impacted on each legal aid practice area and recent explorations into themes similar to that of this report from The Low and Bach Commissions. We also include the recommendations from the report of the Justice Select Committee's Inquiry into the Future of Legal Aid, published this year, as appendix 4 to this report.

As we write this report, we do so in the knowledge that applying principles of economics may be deemed controversial. Legal aid is about access to justice, not about access to services. It is about lawyers seeking to provide a safety net for society and to uphold rights for individuals, rather than selling services to consumers. These arguments are correct, but the focus of this report has been the financial viability of this work and accordingly, we have adopted economic, market-focused language in order to look at the central issues.

The primary intention of this work, and that of the complementary Legal Aid Census research project, is to provide a policy framework that will ensure that the legal aid sector is sustainable and that the system is fit for purpose. This presupposes that the provider base is not currently sustainable and that the legal aid system does not meet client need, but we do not think that these two suppositions are in any doubt.

In order to do fulfil this intention it was also necessary to establish a comprehensive picture of how many organisations and practitioners are currently working in legal aid, the ability of practitioners to enter and remain in the profession and their capacity to respond to client need. We are concerned by the lack of independent and available data on access to justice. The data collected by the Ministry of Justice (MoJ) may not adequately reflect legal need across England and Wales or the impact of litigants in person on court time. This inability to produce high-quality data on the impact of legal advice on access to justice renders it far harder to make the case for additional funding for legal advice and representation with Treasury. It is our hope that the Legal Aid Census will go a long way to filling what was previously a data vacuum in this regard and that a more evidence-based approach to policy making can be adopted.

In hearing from witnesses and exploring the challenges raised, we have identified the main issues undermining the sustainability of the sector and inhibiting client access. Our work also points to the likelihood that without a significant change in government policy, providers will continue to leave the sector and client access will diminish.

Our recommendations seek to address these two extremely worrying phenomena.

ACKNOWLEDGEMENTS

The Commissioners would like to offer our sincere thanks to all of those who have contributed evidence through the Inquiry's oral evidence sessions, written submissions and participated in the Legal Aid Census.

We would particularly like to thank those who appeared in person at our oral evidence sessions for sharing their experience and expertise with us:

- Rose Arnall, Solicitor, Shelter
- Jenny Beck QC (Hon), Director, Beck Fitzgerald
- Sir Christopher Bellamy QC, Chair of the Independent Criminal Legal Aid Review
- Julie Bishop, Director, Law Centres Network
- Rakesh Bhasin, Partner, Edwards Duthie Shamash Solicitors and London Criminal Courts Solicitors Association
- Alex Chalk MP, then Parliamentary Under Secretary of State (Ministry of Justice) now Solicitor General
- Dr S Chelvan, Barrister, 33 Bedford Row
- Deborah Coles, Director, INQUEST
- Pam Coughlan
- Stephen Davies, Solicitor, Tuckers Solicitors LLP
- Professor Jo Delahunty QC, Barrister, 4PB
- Michael Etienne, Barrister, Garden Court Chambers
- Anthony Graham, Director, Amosu Robinshaw Solicitors and BSN
- Lorraine Green, Partner, Miles and Partners
- Joanna Hardy, Barrister, Red Lion Chambers
- Jo Hickman, Director, Public Law Project
- Henrietta Hill QC, Barrister, Doughty Street Chambers
- Kerry Hudson, Director, Bullivant Law and London Criminal Courts Solicitors Association
- Aqsa Hussain, Barrister, No5 Chambers
- Malvika Jaganmohan, Barrister, St Ives Chambers
- Dr Laura Janes, Legal Director, Howard League for Penal Reform
- Rosaleen Kilbane, Partner, Community Law Partnership
- David Lammy MP, Shadow Secretary of State for Justice and Shadow Lord Chancellor
- Cyrus Larizadeh QC, Barrister, 4PB, Chair of the Family Law Bar Association

- Jawaid Luqmani, Partner, Luqmani Thompson & Partners
- Cris McCurley, Partner, Ben Hoare Bell LLP
- Nicola Mackintosh QC (Hon), Director, Mackintosh Law
- Richard Miller, Head of Justice, The Law Society
- Sir Bob Neill MP, Chair of the Justice Select Committee
- Angela Pownall
- 'Sally'
- Marina Sergides, Barrister, Garden Court Chambers
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- James Stark, Barrister, Garden Court North Chambers
- Marcia Willis Stewart QC (Hon), Birnberg Peirce Ltd
- Polly Sweeney, Partner, Rook Irwin Sweeney
- Siobhán Taylor-Ward, Solicitor, Vauxhall Community Law Centre
- Karl Turner MP, Shadow Minister (Justice)
- Stephen Tyler
- Bill Waddington, Consultant Solicitor, Williamsons Solicitors and Criminal Law Solicitors Association
- Adam Wagner, Barrister, Doughty Street Chambers
- Dr Jo Wilding, Barrister, Garden Court Chambers and academic
- Lord David Wolfson QC, then Parliamentary Under Secretary of State (Justice)

All of their views and insights were invaluable and helped to shape this Inquiry and its recommendations.

The Commissioners would also like to thank Legal Aid Practitioners Group, in particular Rohini Teather, Chris Minnoch, Kate Pasfield, Luna Spada, Chris Moss for their work in assisting the Commission, organising the evidence sessions and drafting the final report. Further thanks go to Andrew Sperling, Oliver Carter, Carol Storer OBE, Andrea Shumaker, Marc Bloomfield and Lily Lewis for their assistance in producing this report.

We remain grateful to The Legal Education Foundation, without whose financial support it would not have been possible to establish the Commission. This Commission was, however, entirely independent of any other organisation and does not necessarily reflect their views. The Commission has had full editorial control of this report, and its conclusions and any errors are our own.

INTRODUCTION

1. This has been a year the likes of which our generation has never seen. COVID-19 is not an equal opportunities virus and has laid bare inequalities across society: the health and economic consequences have hit the poorest and the most vulnerable in our communities the hardest. As restrictions continue to ease and we move towards a comparatively normal way of life, it is likely that it will take those same communities longer to recover.
2. At some point in our lives, all of us will be involved with the law. For the fortunate, these brushes will be non-contentious (buying a home or getting married) or relatively minor (a consumer dispute, perhaps). Many issues may be easy to resolve, but others will prove more complicated, time-consuming or, if we are unlucky, life-changing. As Professor Jo Delahunty QC remarked in our publicly funded bar evidence session, there could be a knock at the door for any one of us at any time. We may find ourselves unexpectedly charged with a criminal offence, drawn into the family courts, wrapped up in complicated probate disputes or involved in a serious employment matter.
3. For others, the law is part of their daily existence. It sets out the parameters of the duties and responsibilities that schools, hospitals and other institutions hold in respect of them and may govern much of their lives.
4. The issues experienced by most of the individuals above are unlikely to make headlines. Often, they may not appear significant, but each will have profound consequences for the individuals involved and require specialist help to negotiate. Whether they occur once in a lifetime, or on a more regular basis, each and every one of us must hope that if we need to, we can call on someone with the skill and expertise to fight our corner. While some will be in position to pay privately for legal advice, many will not and will be reliant on legal aid and other forms of free legal services to access the advice and assistance they need.
5. In writing this report, we are conscious of the widespread impact of the pandemic and the likelihood that legal need has increased over the past year and a half as a result. In particular, we are concerned that where the pandemic has exposed growing inequality, a greater demand has been created

for legal services. While the quarterly statistics produced by the LAA show a mixed picture in relation to legal aid cases across civil and criminal legal aid advice organisations have reported a huge uptake in their services. Like many other organisations, Citizens Advice saw a huge increase in demand when the pandemic hit.⁵ Over the past 18 months, it has given one-to-one advice to more than 2 million people, the vast majority of them remotely. In 2020, the organisation assisted 77% more people by phone, 83% more by web chat and 41% more by email compared with the previous year.

6. Yet the legal system is all too often portrayed as being only relevant to criminals and lawyers. Popular fiction has spawned generation after generation of vigilante superheroes ridding the world of evil, and perhaps because of this, the public perception of justice is embedded in crime, in heroes and villains, rather than as a blueprint for defining the acceptable limits of human behaviour intrinsic to all socio-economic interactions. Justice is rarely perceived by the public to be as essential as the National Health Service or the education system. After the months of the lockdown, it seems even less likely that it will be seen as important to our recovery. Yet, access to advice will be essential to that recovery for many months to come.
7. Witness after witness in our evidence sessions remarked on the need to change the public perception of justice. The portrayal of legal aid lawyers by certain politicians in successive governments as fat cats, or lefty liberal activists, has damaged the profession immeasurably. The negative portrayal of human rights in certain sections of the press has further undermined the work of those seeking to uphold the law. The legal aid system has been depicted as bloated and inefficient, an optional luxury, the preserve of a metropolitan elite. So when spending cuts have been made by Labour, Conservative and coalition governments, legal aid has shouldered a disproportionate burden.⁶ These cuts belie the fact that the system is more expensive than that of our European counterparts as we operate an adversarial system of justice. Costs have also risen as legal aid is a demand-driven service with no fixed budget. If there is more demand for the service and increased numbers eligible under its criteria, then the costs will increase. Similarly, where new offences are created, or a new process introduced by the Crown Prosecution Service (CPS) or police to charging or prosecuting, the costs of the system will be driven up. The evidence that we heard from witnesses throughout the course of the Inquiry were that costs had not been driven up by an increase in fees paid to practitioners. Legal aid is an essential part of the wider justice system. If we take away from it, we diminish the whole.

8. So what is the purpose of a justice system? Justice is something that belongs to us all; it is a living, breathing guarantee of our rights and freedoms and demarcation of individual roles and responsibilities within society. Justice also ensures that those in power act in accordance with the law, and that when they fail to do so, those without power can hold them to account. For a society to be truly fair, every individual who lives within it must count. Their rights must be recognised and capable of enforcement. There must be balance between individuals and between individuals and the state. But what does that mean in practice and what do we need in place as a society as we attempt to build back after this pandemic? A decent society requires a framework for individuals to protect themselves when public bodies make errors or act unlawfully, and the ability of its citizens to uphold their legal entitlements and rights regardless of their means. But individuals, especially those who are already disadvantaged, cannot be expected to fully understand their rights or legal processes any more than they could be expected to diagnose a medical ailment. The law is meaningless unless people are able to use it. If every person is to be equal in the eyes of the law, then they need assistance in translating it and applying it to their own lives. Without this assistance, whatever form it takes, the citizen and the state cannot be on a level playing field. Without access to legal advice and assistance, justice is denied and the vulnerable remain voiceless and imperilled.
9. As MPs, we have all seen the impact of the pandemic on our caseloads over the past year and a half. Our constituents have lost jobs, businesses and incomes, and some also face losing their homes. Others fight battles on a daily basis: children with additional needs unable to attend their schools, employees dismissed without proper procedure being followed and individuals desperate to regularise their immigration status. The law is an integral part of every one of these cases. While big picture political issues like the situation in Afghanistan or our exit from the European Union have dominated headlines, the workings of our justice system receive far less attention, but they are just as crucial to the everyday lives of those whom we have been elected to represent. While the crisis in legal aid was not caused by the pandemic, as we start to rebuild our communities and businesses in the wake of the past 18 months, we have an opportunity to reopen the debate about our justice system: what this should look like and how it should best serve the public.
10. In writing this report, we are conscious that we stand on the shoulders of giants. We are extremely fortunate to count Lords Willy Bach and Colin Low among our panel, and to be able to draw on the evidence amassed by their excellent Commissions into the justice system as we make our recommendations. There is also a wealth of literature available and we acknowledge with grateful thanks

the work of the Justice Select Committee under the chairmanship of Sir Bob Neill MP as well as the recently published *Justice in a Time of Austerity: Stories From a System in Crisis* by Daniel Newman and Jon Robins.

11. It is not, however, our intention that this report be seen as a follow-up from earlier reports. Rather, it is our aim to assess the impact of the legislative climate and the pandemic upon access to justice from both the public and practitioner perspectives. We hope that our recommendations will inform the policymaking that will determine how the legal aid system recovers from the crisis, both immediately and in the longer term. Where possible, we have provided an indication of the prospective costs of these proposals based on publicly available information. Readers will note, however, that in some cases it has been impossible to do so. It is our belief that this very inability highlights that data on legal aid is piecemeal and that there is a need for further research.
12. The pandemic brought with it the chance to pause for a moment and to reflect. It has offered us the opportunity for a recalibration. To think about the justice system that our society needs. And to strive for better.

PART 1 – RECOMMENDATIONS TO IMPROVE THE SUSTAINABILITY AND SUFFICIENCY OF LEGAL AID

In rebuilding our society in the wake of the past year and a half, we have an opportunity to look afresh at the justice system and at the ability of those in need to have real, practical access to justice. We have tried to determine what justice should look like and what is sufficient in terms of access. We have not sought to compare our legal aid system with other systems around the world, but it is the Commission's belief that our justice system is renowned globally. We say that not least because of the quality and commitment of those working in private practice and third sector advice organisations that we have had the privilege of meeting during the course of this Inquiry.

In making these recommendations we are aware of the ongoing public policy dilemma of a country seeking to rebuild after the ravages of the pandemic. We are conscious of the multiple and competing demands that will be placed upon the public purse in the coming months and accordingly we are not proposing wholesale structural reform. Rather, these recommendations are intended to mitigate some of the damage done to the sector over the past two decades and to ameliorate the impact of the pandemic. But there must be a recognition across government that the Rule of Law is not something we can have for free. It is a choice we make as a society: either we decide that the law should apply to us all equally or we don't. If we decide we do, then there is a cost. It is a small cost relative to other areas of public spending and it is one that we believe is worth paying.

Recommendations A – C: Legal Aid Fees

A. Increase legal aid fees in line with inflation

While the cost of the legal aid system generally increased in the decades pre-LASPO, the fees paid to providers have not been increased since 1996. We recommend that legal aid fees be raised in line with inflation as this would mitigate the damage done by many years of frozen or decreasing fees. This would incentivise practitioners to return to legal aid work and reflect that the cost of delivering services has increased over time. An equitable settlement will include an uprating to reflect inflationary increases over a specified period of time. We would suggest using 2011 as a baseline

for this calculation so that an inflationary increase can also account for the 10% cut introduced to civil fees that year. The services producer price inflation index gives a 25.02% rate of inflation since 2011.⁷ If this rate is applied to all of civil and family legal aid, we estimate that this will cost £171m more per annum. If the same rate is applied to criminal legal aid, this would be a further £224m.

B. Reverse the 8.75% cut made to criminal legal aid fees

Furthermore, it is our recommendation that the 8.75% cut made to criminal legal aid fees in 2014 be reversed with immediate effect.⁸ The Impact Assessment 'Transforming Legal Aid – Next Steps: Government Response, Procurement of Criminal Legal Aid Services estimated that this would cost £60m per annum without any inflationary increase.⁹

C. Establish an Independent Legal Aid Fee Review Panel

The provision of legal aid is a public service and we recommend that an Independent Fee Review Panel be established to undertake an annual review of legal aid fees and to bring the profession in line with other public service providers. The members of this panel would be appointed by the Secretary of State. The panel itself would be similar in nature to the Review Body on Doctors' and Dentists' Remuneration and determine whether fees properly reflect the cost of delivering legal aid services (by solicitors, barristers and external experts). The Panel must be authorised to make appropriate recommendations which, while non-binding, could advise Government on setting appropriate fee levels to accurately reflect the cost of delivering services.

In reaching its recommendations, the Review Panel should have regard to the following needs:

- I. to recruit, retain and motivate solicitors and barristers in the social welfare sphere;
- II. to provide high-quality legal advice and representation
- III. to provide value for money to the taxpayer
- IV. to responds to the needs of the public both now and in the future
- V. to ensure that the provider base is robust and sustainable
- VI. to contribute to the efficiency and effectiveness of the justice system; and
- VII. regional/local variations in the various communities around England and Wales and their effects on the recruitment and retention of legal professionals.

Recommendation D: Recruitment and Retention

D. The Ministry of Justice should fund training and qualification placements within legal aid firms and NfPs and publicly-funded chambers

We heard detailed evidence about the crisis in recruitment and retention at the junior end of the legal aid profession. We believe further investment should be made in the sector to allow firms, NfPs and chambers to recruit, train and retain new lawyers. The Legal Services Commission used to award publicly-funded training grants of £20k per trainee, per annum to legal aid firms to allow them to fund 100% of the tuition fees of the Professional Skills Course, and to contribute towards Legal Practice Course fees and the trainee's salary for the two years of their training contract. This practice assisted more than 750 trainees in qualifying but ceased in 2010¹⁰. Others have stepped in to assist with these costs, most notably the Legal Education Foundation's Justice First Fellowship Scheme, but this is able to help far smaller numbers of prospective lawyers (15-20 per year). It is our recommendation that publicly funded grants should be reinstated for solicitors, barristers and legal executives to ensure an adequate pipeline of new practitioners into the sector. We look to the relevant ministerial team for proposals as to how best to action this recommendation.

The SRA should also work with the profession and with education providers to ensure that the new Solicitor's Qualifying Exam includes modules on social welfare law. It is vital that the sector continues to encourage bright and committed individuals to its ranks and that the profession remains as open to those from diverse backgrounds as it always has been. We recognise however that this is a complex process, and one where the profession must work with regulators to find a solution that does not undermine access to justice. The government has a role to play in facilitating these discussions, but we have not made a specific recommendation for government on this issue.

Recommendations E - H: Broadening the scope of civil legal aid and meeting legal need

E. Review the scope of civil legal aid and link scope to independent research on legal need

The scope of the legal aid scheme is not only relevant to the issue of meeting public legal need, it also shapes the provider base and influences whether services are sustainable. An urgent and independent review is needed in relation to the scope of civil legal aid to determine whether it is currently meeting the needs of those who lack the means to pay for legal assistance. The MoJ has been discussing a formal review of civil sustainability, to include a review of scope, for many months and yet as this report goes to print nothing concrete has been announced. We are, however, aware that any review panel will take months to form and years to report and we are concerned about

the impact on client access and provider sustainability in the meantime. We set out our thoughts on areas of law that should be brought back into scope below.

F. Immediate changes to legal aid scope to increase access to justice

Due to our concerns about client needs and provider sustainability, and how these two issues have deteriorated over the course of the pandemic, we recommend that the government consider a range of immediate changes to the scope of legal aid. These changes should be made to provide the public with a more holistic service and to make the provision of legal aid a more financially viable choice for providers, addressing the disparity between the work required to provide a quality service to the public, and the work currently remunerated by legal aid.

F1. Restore legal aid for early legal advice to the pre-LASPO position

We recommend that the government restores legal aid for early legal advice to pre-LASPO levels for all areas of social welfare law (including debt, employment, welfare benefits, immigration and housing).

We recommend that early legal advice be restored for family law and for prisoners in certain appropriate cases.

The removal of certain areas of law from scope fails to reflect the reality of how problems present themselves. As MPs, we have seen this in our own casework. Although some people may experience only one type of problem in isolation, it is the nature of social welfare problems that they occur in a cluster of interrelated issues. Both socio-legal research¹¹ and social exclusion studies have shown that people tend to experience a combination of interrelated problems, with money and debt identified as the 'central element'. So the provision of a service is made especially difficult if only certain aspects of a problem are within scope and the individual's legal issues cannot be dealt with as a whole.

Legal problems should be viewed in a holistic manner and lawyers should be able to advise on all parts of the issue rather than simply those that are deemed within scope. If specialist advice is given at the early stages of a problem, the problem is less likely to escalate and generate greater cost for both the individual and the state. In relation to the cost of early legal advice in various areas of social welfare law, we calculated the figures below on the basis of the legal aid spend in the financial year 2012-2013 before the LASPO took effect. These figures are pre-inflation and are included as an indication only. We note that the actual spend would vary considerably depending on the case mix and volume of cases in any given year and that demand for these services (and therefore cost) may be higher due to the impact of the pandemic.

- Housing - £10m
- Welfare Benefits - £26m
- Debt - £17m
- Employment law - £4m
- Immigration - £10m¹²
- Private family - £31m

We heard evidence about the difficulties in sustaining areas of legal aid practice where certain types of work have been removed from scope. These problems have been exacerbated over the past year with the drop in income for many providers caused by the lockdowns and delays or halts to certain types of court and tribunal proceedings. The government has considered a range of measures intended to help the legal aid community to weather the past year. However, for a number of reasons these have not been implemented. It is our view that the government should widen the scope of funded legal advice and representation in several critical areas including elements of housing and family law as this will allow practice to be more financially viable.

F2. Restore funding for housing disrepair cases

The Commission is concerned about the impact on legal aid providers of the recently published MoJ response to the 2019 consultation paper – Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s Proposals. We heard evidence from housing providers that recovering costs at inter partes rates is of central importance to the viability of legal aid practices. It is likely that the extension of Fixed Recoverable Costs to all areas of civil litigation will have serious adverse effects for legal aid practitioners and, in consequence, their clients. If inter partes costs are cut to the levels proposed in the consultation response, the sustainability of many legal aid firms will be further undermined.

While these recommendations are not intended to address each area of legal aid, it is clear that the pandemic has had a particularly adverse financial impact on housing law providers who have struggled to keep their businesses afloat as a result of the moratorium on evictions and reduction in capacity in the courts since possession claims resumed. We recommend that all disrepair work be put back into scope with immediate effect. The removal of areas from scope is particularly relevant in respect of disrepair cases, for which public funding was abolished save in relation to the removal or reduction of a serious risk of harm to the health or safety of the tenant or a member of his or her family. This will have limited cost to government as a large proportion of the costs associated

with proceedings will be borne by landlords who default on their statutory repairing obligations. It will, however, make housing contracts more viable, address the lack of client access to these services, and more accurately reflect the work that is required to provide a full service to clients. Were disrepair to be reintroduced to scope, based on the figures from 2012-2013, we estimate that this would cost £3m per annum.

F3. Remove barriers to legal advice and representation for those seeking protection from domestic abuse and their families

The pandemic and the measures put in place to contain it have created a perfect storm for survivors of abuse. We are particularly conscious of the effects of the lockdown; financial concerns, children being off school, anxiety associated with illness and a lack of space for individuals to 'cool off', all heaping pressure on families. We heard evidence that the usual means of escape for victims have been eroded, that women's refuges are often full and that there are associated health risks with different families using communal areas.

The role of the criminal justice system is crucial in the response to domestic abuse. The statutory definition of abuse needs to be effectively incorporated into both criminal and civil remedies. Government has recently taken welcome steps to make civil protection for survivors more accessible during lockdown by publishing information on how victims can apply for an injunction in the family court if they are unrepresented.¹³ Over the course of the pandemic, experts, including Domestic Abuse Commissioner Nicole Jacobs, Dame Vera Baird QC, Victims' Commissioner for England and Wales, and other called for the abolition of the means test in accessing legal aid to apply for protective injunctions for survivors and their families.

We welcome the advances that have been made in this area such as the decision to remove the £100,000 mortgage cap¹⁴ for capital eligibility and we are pleased at the decision of the courts to ensure that inaccessible capital should not be taken into account. However, we are saddened that it was necessary for a victim of domestic abuse to litigate to obtain legal aid because of a means test so out of step with legal need.

We recommend that the criteria for legal aid should be urgently revised to ensure that survivors of domestic abuse can access legal advice irrespective of their means. Aside from applications for urgent protections by way of injunctions, survivors of abuse need continued assistance with legal representation for associated family matters such as arrangements for

children and finances. The current gateway evidence fails to fully recognise the statutory definition of domestic abuse which includes psychological abuse and coercive and controlling behaviour. Gateway evidence needs to be amended so that evidence of coercive and controlling behaviour (now recognised one of the most dangerous abusive behaviours) can enable access to the legal representation that survivors need. We recommend that the gateway criteria should be extended to cover evidence of coercive and controlling behaviours in the same way that financial abuse is currently evidenced.

F4. Restore legal aid for private family law and for both sides in a dispute

We believe that funding advice for private family law disputes would result in the resolution of many disputes before one or both parties resort to litigation, would increase the take-up of mediation services and would reduce the number of litigants in person trying to navigate the court system. All of these outcomes would result in direct savings to the state.

In circumstances where litigation is unavoidable, legal aid should be brought back in for both parties (particularly where there are allegations of domestic abuse) to ensure equality of arms and to ensure that the courts are not used to perpetuate abuse between parties.

F5. Expand access to legal aid for bereaved families for inquests

We have heard a great deal of evidence in relation to the law around inquests and the inequality that exists in the current system towards the grieving family. In order for the system to be fair and to represent the needs of all parties, where the state is funding one or more of the other parties at an inquest, it should also provide legal aid for representation of the family of the deceased. The cost of this has been estimated as between £30-70m per annum¹⁵, although we note that the charity INQUEST has disputed this estimate, adding that this figure 'has to be considered within the context of the costs to the public purse of state lawyers.

We note that further to the Means Review, the Ministry of Justice has announced that they will be removing the means test for applications for ECF in relation to legal representation at inquests. Further, they propose to provide non-means tested legal help in relation to an inquest for which ECF has been granted for legal representation. We commend the Ministry for their work on this review and the steps that they are taking. However, it is our belief that there is further work to be done.

G. Conduct further research into how to increase the capacity of providers in areas that are currently in scope

We explore a number of worrying issues that relate to areas of law that remained in scope post-LASPO. Advice deserts have developed across vast swathes of England and Wales in areas such as Housing and Community Care, despite LASPO retaining Community Care and some areas of housing law within the scope of legal aid. Areas like Special Education Needs and Discrimination were delivered by a telephone-only service until the gateway was abolished in May 2020¹⁶ but attempts to tender for face-to-face services have attracted few providers. Whilst many will posit that this decline in providers is predominantly down to uneconomic fees (and it may be) further research must be done to understand how scope, contracting, compliance, auditing, other forms of bureaucracy and the viability of linked categories of legal aid undermine the viability of these practice areas (and therefore the willingness of providers to retain contracts or tender for new contracts).

H. Develop robust research mechanisms for measuring legal need, and link the commissioning of services to that research

The MOJ is currently developing a high level 'legal needs dashboard', which collates information from various sources such as HMCTS, local authorities and the Department for Housing Communities and Local Government. This dashboard is designed to assist MOJ officials to understand some of the drivers for legal need and the pressure points in the justice system. While we appreciate the intention behind this work, we do not believe it is a sufficiently detailed or robust mechanism for informing the commissioning of services or the development of legal aid/legal needs policy.

We recommend that the MOJ works with external experts from legal practice and legal/socio-economic research fields to develop a mechanism for regularly monitoring and measuring the public's need for legal assistance. Commissioning of services should be informed by and aligned to this measurement of legal need.

Recommendation I: Judicial Review

I. Ensure legal aid is paid for all judicial review cases (irrespective of the outcome of the case)

Judicial review is an essential tool for holding public bodies to account and levelling the playing field between the individual and the state. Judicial review cases remained within the scope of legal aid post-LASPO. However we heard from practitioner witnesses that changes to the payment mechanisms have discouraged many from bringing proceedings as time-consuming work is done 'at risk' because payment

cannot always be claimed if permission is refused to proceed to full judicial review. For true equality of arms, in issues of such importance as the lawfulness of the actions or inactions of public bodies, the public must have ready access to lawyers who specialise in public law. Those without the means to pay for advice and representation must be able to access the assistance they need from specialists under the legal aid scheme. Given the importance of the issues at stake, and the significant hurdles in place during the application stage to establish that a claim has merit, some members of our Inquiry were of the opinion that public law specialists should not be expected to work at risk. There was, however, no consensus by the Inquiry regarding the recommendations to be made in relation to this.

For an indication of the cost of paying practitioners for the work done during this preliminary stage we looked at the Impact Assessment: Reforms to Judicial Review. This estimated that legal aid providers would experience a fall in income of £1m-£3m per annum when the reform came into effect.¹⁷

Recommendation J: Exceptional Case Funding

J. Overhaul the Exceptional Case Funding scheme

Exceptional Case Funding has not provided the safety net that was intended under LASPO. What this has meant in practice is that legal aid is unavailable and as a result fundamental rights are breached in ways not intended by parliament. While LAA statistics¹⁸ suggest that the volume of matters being dealt with under ECF has grown and continues to grow, evidence from our witnesses suggests there is still need for wholesale improvement to the ECF scheme. We would suggest that the process be made more accessible to direct applicants; the evidence required should be simplified; and providers should have increased powers to determine eligible cases. In order for the work to be financially viable, we recommend that the Legal Aid Agency remunerate solicitors and specialist advisers for all applications for exceptional funding under section 10 of LASPO.

There should be an urgent, independent review of all cases granted under Exceptional Case Funding to determine whether there are further areas which should be brought back into scope. If particular types of cases are routinely funded under ECF, we believe they cease to be 'exceptional'. This provides a strong indication that there is a need for scope to be widened to incorporate such cases so that the legal aid scheme is fit for purpose and reflects public legal need. This review process and potential expansion process should be carried out by government on an annual basis.

Recommendation K: Means testing**K. Ensure the legal aid means test does not prevent those without means from accessing justice**

We believe that the means test must be overhauled to bring it back to its original purpose – enabling those without the means to pay privately for advice to access publicly-funded legal assistance. We commend Government for carrying out what appears to be a comprehensive review of the means test and we look forward to seeing how their recommendations are implemented over the coming months.

Given the ongoing work in this area, and the knowledge that the government is engaging extensively with a range of legal aid experts as part of that process, we have set out only high level recommendations to improve the means test, which are:

- Increase the income and capital thresholds to enable a greater percentage of the population to access both civil and criminal legal aid. This could assist a large number of those experiencing legal problems who are not financially eligible for legal aid but also cannot afford to pay privately for legal assistance.
- Standardise assessment of those on means-tested benefits with other government departments such as the DWP – this will reduce the administrative burden on clients, practitioners and the LAA.
- Remove capital from the means assessment process where it is clear that such capital cannot be realised and used to pay for legal assistance. Capital locked in a client's home is an example as clients should not be expected to sell their property to access legal support and in reality most legal aid clients are on a low income and cannot secure a lending against their property to pay for legal services.
- Review whether additional areas of legal aid should be 'non-means tested' where the client group is particularly vulnerable and the potential outcome of proceedings involving that group or individuals from that group would have particularly serious consequences
- Review the 'income disregards' that can be taken into account when assessing a client's disposable income to ensure they are a fair reflection of the amount of income that is realistically available to pay for or contribute to legal costs.
- Where clients (or those in their household) are asked to make a financial contribution towards their legal aid, review the thresholds at which contributions are required, the level of contribution required, and the range of people who can be required to contribute.
- Ensure the LAA takes a proportionate and sensible approach to the assessment of means, particularly for clients on low or erratic incomes (such as the self-employed) and for those who have difficulty providing evidence of means.

PART 2 – HOW DID WE GET HERE?

What is legal aid and why is it important?

13. Legal aid or publicly funded legal assistance is a critical part of the English and Welsh legal system. It provides access to justice for those people who are unable to pay for their own lawyers. This includes providing access to specialist advice and legal representation.

There are a wide range of organisations that deliver some form of publicly funded legal assistance. The providers of advice and legal support on social welfare law issues in England and Wales fall into five main categories.

These are:

- i. private law firms, providing paid-for, publicly-funded and pro bono legal help and representation;
 - ii. (NfP advice agencies, comprising around 280 local Citizens Advice charities, around 750 agencies forming the AdviceUK network, and other local organisations providing information and advice and some legal support across a number of areas of social welfare law;
 - iii. 42 local Law Centres under the umbrella of the Law Centres Network, set up to alleviate poverty, provide legal help and representation, and undertake policy work across many aspects of social welfare law;
 - iv. larger, national charities such as Age UK, Shelter and Mencap that, along with other services, provide information, advice and representation in various practice areas; and
 - v. local authorities, providing general information and advice through a wide range of social and community workers, as well as dedicated specialist staff providing advice on homelessness and some other social welfare issues such as welfare benefits.
14. The main focus of this report and the Commission's Inquiry into sustainability is on organisations contracted to provide legal aid: private law firms, Law Centres and a small number of other charities.

15. The provision of publicly funded legal assistance is anchored in the desire – and many would say the duty – to help those who are suffering hardship as a result of some form of inequality, whether financial, educational or social. The desire for the law to cast its protection over every citizen. Legal aid services provide support to some of the most vulnerable people in society and can be used to directly assist others tackling problems arising in family breakdown, education, employment, housing, immigration, mental health and a range of other areas. It makes a tangible difference to people’s lives, enhances social cohesion and supports the delivery of a broad range of social policy objectives. It benefits society as a whole, not just those who are direct users, and we are a better society for it. The outcomes achieved by publicly funded legal assistance are sometimes hard to define, and often difficult to assess in financial terms, because they have a value to society that is critical but tricky to measure.
16. Appendix 1 provides an overview of the foundations of the legal aid scheme and a brief summary of the development of legal aid up to the introduction of LASPO.

Legal aid prior to the COVID-19 pandemic

The LASPO post-implementation review

17. Prior to the introduction of LASPO, the MoJ undertook to review the impact of the legislation within three to five years of its introduction on 1 April 2013.
18. After a number of delays, the *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)* (the LASPO PIR) was announced in 2017 and published in February 2019¹⁹ together with an accompanying Legal Support Action Plan.²⁰ The LASPO PIR declared the legal aid market to be ‘operating at sufficient levels to meet demand’.²¹ The Legal Support Action Plan contained 23 recommendations that ranged from the abolition of the mandatory telephone gateway to a review of the legal aid means test. A number of the proposals in the LASPO PIR were positive, including an emphasis on the importance of early legal advice, although the delivery of the proposals has been somewhat derailed as a result of the pandemic.
19. The LASPO PIR suggested that ‘more research is required to determine the long-term sustainability of the profession’,²⁵ yet more than two years on from the LASPO PIR, and despite a very engaged team of civil servants at the MoJ, very little such research has been undertaken by government. Some useful information has been shared by The Law Society, The Bar Council and the CPS, which has led to the recent publication of a data compendium about criminal legal aid,²⁶ but this existing (now dated) data relates solely to criminal legal

aid practitioners and was gathered for reasons other than understanding the viability of the sector.

20. Witnesses have identified that reductions to funding for public services are difficult to measure because the cuts themselves have reduced the capacity of organisations to monitor and report on the impact of LASPO. In particular, the closure on 1 April 2013 of the Legal Services Research Centre, which both commissioned and undertook important research into the justice system, instantly reduced the volume and quality of information we have about people's experiences of social welfare law. In the intervening years, a number of studies have been undertaken, but the approach has tended to focus on a particular practice area or geographical location. Consequently, there is a conspicuous absence of data covering the legal aid sector as a whole and how it sits within the justice system itself.
21. The figures that the LAA provides on a quarterly basis tell us that in 2012 annual expenditure for the civil and criminal legal aid system stood at approximately £2.5 billion. By March 2020, this had dropped to £1.7 billion, a reduction of 32%. Around £800-900 million has been cut year after year and this figure is now even lower as a consequence of the COVID-19 pandemic. Official LAA statistics show that closed-claim expenditure in 2020/21 was £348 million lower than in 2019/20.²⁷ Expenditure in many areas, such as housing, is likely to remain low for some time to come due to the long-running eviction ban and as the court and tribunal system continues to experience lower volumes and adjusts to new ways of working. Beyond these broad-brush figures, we do not have a precise number for the amount of money cut from the legal aid budget in the past decades. Nevertheless, the Justice Select Committee has considered the impact of the LASPO cuts in successive reports,²⁸ and while they reference the significant financial pressures that led to a reduction in the legal aid budget in 2012, Chair Sir Bob Neill MP has stated that those cuts went too far.²⁹

Table 1: A declining provider base

Providers with a legal aid contract ²²		
Year - March	Civil	Crime
2012-13 ²³	2129	1652
2021	1401	1080
Offices completing legal aid work ²⁴		
Year - March	Civil	Crime
2012-13	3,242	2,318
2013-14	3,133	2,258
2014-15	2,944	2,142
2015-16	2,931	2,040
2016-17	2,769	1,969
2017-18	2,609	1,981
2018-19	2,369	1,913
2019-20	2,536	1,802
2020-21	2,439	1,717

The Criminal Legal Aid Review (2018 – present)

22. CLAR³⁰ was first announced in December 2018 by the Ministry of Justice when it provided its response to amending the Advocates' Graduated Fee Scheme (AGFS).³¹ In February 2019, the MoJ incorporated CLAR into the publication of its post-implementation review of LASPO,³² a review of legal aid for inquests³³ and the Legal Support Action Plan.³⁴
23. The purpose of CLAR is a review of the entire 'criminal legal aid cycle', from fixed fees in the police station and Magistrates Court, to graduated fees in the Crown Court (AGFS and the Litigators' Graduated Fee Scheme). The review also includes a review of Very High Cost Cases.
24. CLAR has two main objectives:
 - (i) To reform the criminal legal aid fee schemes so that they: fairly reflect, and pay for, work done; support the sustainability of the market, including recruitment, retention and career progression within the professions and a diverse workforce; support just, efficient and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer; are consistent with and, where appropriate, enable wider reforms; are simple and place proportionate administrative burdens on providers, the LAA, and other government departments and agencies; and ensure cases are dealt with by practitioners with the right skills and experience.
 - (ii) To reform the wider criminal legal aid market to ensure that the provider market: responds flexibly to changes in the wider system; pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer; operates to ensure that legal aid services are delivered by practitioners with the right skills and experience; and operates to ensure the right level of legal aid provision and to encourage a diverse workforce.
25. The CLAR Programme overview was published on 30 April 2019.³⁵ The MoJ agreed to accelerate certain aspects of the overall review by November 2019; however, as a result of Brexit and purdah, those items were delayed until February 2020. The accelerated items included changes to payment mechanisms for unused evidence, sending cases to the Crown Court, paper-heavy cases and cracked trials in the Crown Court. The key publications included the consultation and impact assessments.³⁶ Meanwhile, the main CLAR report was due in the summer of 2020.
26. In February 2020, the Attorney General's Office published the *AG's Guidelines on Disclosure*³⁷ and the consultation on a revision to the guidelines.³⁸ The announcement from the AG was important for two reasons: first, criminal

legal aid and disclosure are intertwined concepts; and second, CLAR is reliant on the AG recommending 'pre-charge engagement' before a fee scheme can be created.

27. On 28 February 2020, the MoJ published an accelerated package of measures that would amend the criminal legal aid fee schemes. It has published four out of the five accelerated items. A four-week consultation closed on 17 June 2020, several months later than planned due to COVID-19. The government responded³⁹ to the consultation in relation to the accelerated items on 21 August 2020, together with an equality statement⁴⁰ and an impact assessment.⁴¹

The government stated that the accelerated proposals represented an additional £35 million to £51 million for criminal legal aid per annum.⁴²

28. The MoJ also announced that part of the review would be made independent: 'Having carefully considered consultees' views, we believe that while the views expressed highlight legitimate concerns about the fee schemes, many were outside the remit of this accelerated consultation and the intention had always been to consider these issues as part of the wider holistic Review – as described above it is our intention to change our overall approach to delivery and progress an independent review and a review of the current criminal legal aid fees and contractual arrangements in the context of the wider criminal justice system. The concerns raised about fees that related to the fundamental sustainability of the system will be considered as part of the next phase of the Review ...'⁴³

The Independent Review consists of Chair Sir Christopher Bellamy QC and a Challenge Panel comprising experts from the sector. Its work began in January 2021 and it is expected to report back, together with the government's response, in autumn 2021. The then Lord Chancellor, Robert Buckland QC MP, pledged that 'this independent review will be wide-ranging and ambitious, ensuring the criminal legal aid market remains effective and sustainable, while reflecting the diverse society it serves'.⁴⁴

COVID-19 and the legal aid sector

29. When the country first went into lockdown in March 2020, practitioners across the civil and criminal legal aid world reported an immediate disruption to cash flow and, in most areas of law, a huge reduction in available work. It also became clear that the impact of the crisis varied greatly, depending on factors such as business models, the ability to maintain contact with different client groups, the ratio of legal aid to privately-funded work (private work, where

available, often subsidises legal aid work), staffing structures, practice areas, case mixes, the applicability of government relief schemes, and the ability of HMCTS to conduct remote hearings. As a result of these differences, the point at which particular providers reached a financial cliff-edge has varied. However, every provider has been adversely affected to some degree. For example, even those able to work remotely have had to spend more on their IT systems and staff training while continuing to meet the costs of offices that sat empty for weeks or months at a time.

30. As an initial response to the pandemic, the LAA and the MoJ put in place some operational measures specific to legal aid providers. Examples of these were: greater flexibility in dealing with clients remotely due to lockdown (over the collection of means evidence and the use of digital signatures); pausing contract management activities; flexibility over time limits for submitting applications for legal aid and supplying supporting documents; the ability to claim payments on account more frequently and at a higher percentage of the overall work in progress; and interim payments for work in progress on asylum and inquest cases. However, concerns around the system long pre-date the chaos caused by the pandemic. Witness after witness described an overly bureaucratic system, which has developed over time and frustrated providers in 'normal circumstances'. Representative bodies have told us that relatively minor tweaks to the system have been insufficient to mitigate against the impact of the pandemic and that further measures are needed to assist providers during this time of crisis.
31. The government introduced a number of wider schemes intended to assist small and medium-sized enterprises. However, witnesses told us that many of the measures made available to support such enterprises were focused on the hospitality and retail sectors, and there was no tailored support made available to the legal aid sector despite the clear and immediate impact of lockdown on, for example, the volumes of cases progressing through the court system.
32. In our evidence sessions, we asked witnesses to assess the efficacy of the financial relief measures that they were able to access. Nearly all of the legal aid providers that we spoke to availed themselves of the furlough scheme. This enabled staff retention, albeit amidst fears that some will be made redundant once the scheme is wound up, as it will take time for workflow and income streams to return to pre-pandemic levels. These concerns are exacerbated by the other consequences of the pandemic, such as the huge court backlogs, the stay on possession proceedings etc., as it is taking some providers many more months to be paid for work done as cases are deferred. While the LAA has sought to alter systems to pay legal aid bills as quickly as possible, and to introduce new system to allow interim payments, witnesses told us that

delays built into the legal aid system, and the need to routinely challenge LAA decisions, continue to exacerbate the financial pressures on providers.

33. Similarly, many of the practitioners who gave evidence availed themselves of 'bounce-back loans' as a means to pay overheads and staff, but expressed concerns about taking on further debt in order to keep unviable businesses afloat. Overheads such as rent have remained due and providers also reported great uncertainty about whether business rates relief would be extended. While this is true of other service providers, we note that these further concerns add to the existing strains placed upon legal aid providers.
34. In terms of the other available measures, we heard from self-employed individuals (e.g. partners in solicitors' firms and barristers) in relation to their experiences with the Self-Employment Income Support Scheme. The Bar Council reported that 14% of self-employed barristers had applied to the scheme.⁴⁵ Eligibility for the scheme was based on previous profits and accessible only to those with operating profits below £50,000.⁴⁶ This precluded many partners and barristers from relief, despite profits being relatively modest. Junior barristers and those returning from breaks (i.e. sick leave, childcare purposes) were among the groups unable to access the scheme.⁴⁷ Witnesses reported their own experiences and those of colleagues who were ineligible for the scheme and thus received little or no income during the pandemic due to the vast decrease in workflow.
35. We were told that the situation for NfP providers is perilous. While only around 30% of law centres' income comes from legal aid contracts, the pandemic has affected their ability to generate earned income from legal aid, and recovery, when it comes, is expected to be slow and gradual. This is largely due to the pause on evictions as possession cases make up the majority of law centres' legally-aided work. As it stands volumes of housing work have not returned to pre-pandemic levels as listing practices have changed and far fewer cases are entering the system and being heard each day. In May 2020, the government provided a welcome £3 million grant to support law centres,⁴⁸ but this was intended to replace six months of lost income. Trusts and foundations have also stepped in to provide support to the NfP sector, with a number reacting admirably by collaborating to form the Community Justice Fund and provide immediate financial and practical support. However, given the length and impact of the pandemic, it is clear that NfP agencies will continue to require targeted support to survive.
36. Law centres report similar concerns to private practice firms in relation to staff recruitment and retention. As with other legal aid providers, law centres cannot afford to pay their lawyers generously and certainly cannot compete

with public services or commercial law firms. The Law Centres Network reports that it costs each organisation approximately £65 per hour to employ a solicitor or caseworker.⁴⁹ The Legal Aid scheme in England & Wales pays headline rates of between £43 and £69 per hour and, depending on case lengths, rates of as low as £17 per hour. If an average case or client intervention takes 10 hours, then every case/ intervention would cost £656.80, well above most fixed fees but in many cases below the threshold for claiming escape fees. While law centres have access to alternative means of funding such as grants and charitable donations, these are restricted to specific purposes and are not comparable to the income generated by commercial legal services. In recent years, law centres have experimented with chargeable services to supplement their incomes, but experience has shown that there is a very limited number of clients in a position to pay for social welfare legal advice.

37. So what does this mean for the overall picture of legal aid services across England and Wales? With so many different types of practices and business models, and the absence of holistic data, the picture has not been an easy one to map. First, we note that while there are many firms that specialise in one area of law, e.g. crime, many others are multi-specialist. Of the 1,089 firms that held criminal legal aid contracts in May 2021, 404 also held contracts in one or more areas of civil legal aid. We are aware that private client departments will often cross-subsidise publicly funded work. Within legal aid, some practice areas may subsidise others. While this may work as a short-term strategy, evidence from our witnesses indicates that the lack of adequate remuneration across areas of legal aid is leading to decisions being taken about the viability of whole firms. It also suggests that when government considers changing the fee structure or approach in relation to one area of legal aid, it must consider the knock-on effect on others.
38. The most recent LAA figures show that civil legal aid providers relinquished 43 contracts between April and September 2021 alone, covering offices in 72 locations, which is a stark attrition rate.⁵⁰ In terms of the impact on the criminal legal aid sector, there were 52 fewer providers delivering services in March 2021 than there were in March 2020⁵¹ and we know that more providers have withdrawn from legal aid since. It must be noted that current legal aid tendering processes lock providers out of the system until the LAA opens a formal tender round. Providers cannot apply for contracts on an ad hoc basis. With large-scale tender processes four to five years apart (the last full civil tender process occurred in 2018 and the next will be for contracts that commence in 2023), the number of providers is generally always in decline.

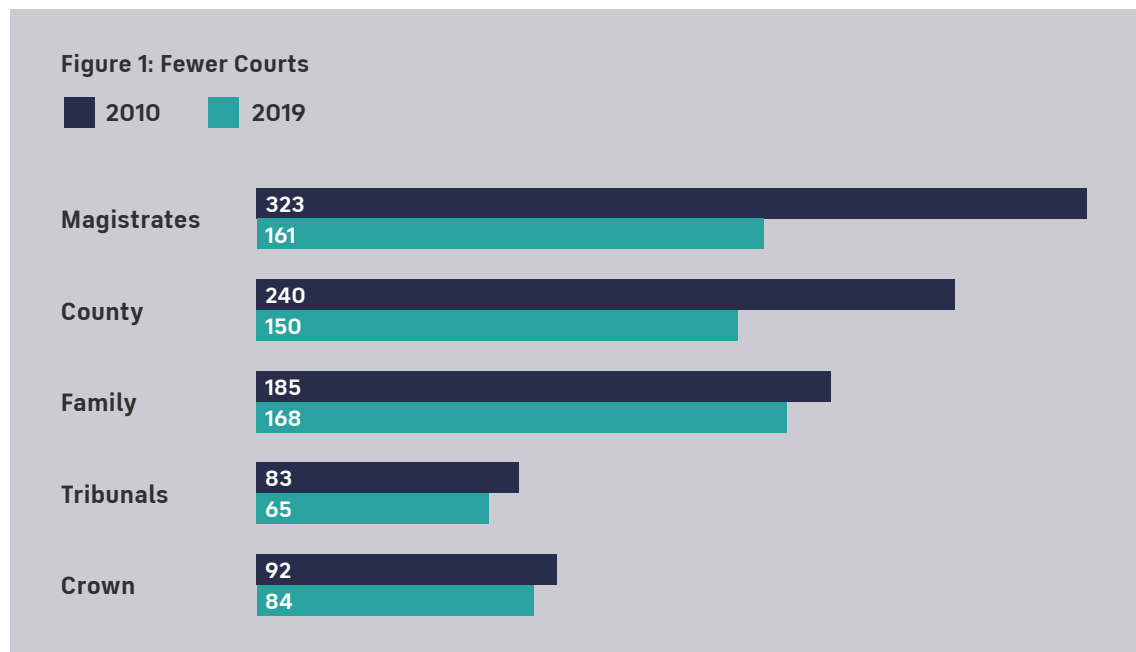
39. Legal aid firms are smaller than the average law firm, with an average of seven qualified solicitors and turnover of £1.5 million per annum.⁵² Profit margins have been smaller over decades so often many of the back-office or administrative functions such as billing and casework are undertaken by lawyers rather than support staff. The time taken to do these tasks is time that could be spent undertaking billable work, but the profit margins may not allow for it. We have heard from witnesses that their organisations have already reduced their overhead cost base to a minimum and have no scope to make further reductions.
40. The nature of the work undertaken by social welfare lawyers is less likely to lend itself to cost- savings measures such as the increased use of technology. A high proportion of individuals in this particular client base are vulnerable and may require additional time and care. Numerous witnesses gave evidence about the sheer volume of work that goes unremunerated under the current fee schemes because they do not accurately reflect the complexity of the work and needs of such a vulnerable client group.
41. Charitable foundations such as The Legal Education Foundation, Therium Access, The Baring Foundation and the Community Justice Fund have stood by the NfP sector and have gone above and beyond to accommodate changing, growing need. Still, by sheer scale they are unable to meet the need for ongoing funding flexible enough to meet this changing need. While an exact figure is difficult to calculate, LASPO has cut hundreds of millions of pounds from civil legal aid each year over a period of eight years, whereas trusts and foundations distribute an estimated £30 million a year for legal and advice work. We also note that these funds are generally intended for short-term projects, rather than ongoing services, so do not necessarily help to build financial resilience. Charitable foundations cannot generally award grants to private practice organisations established 'for profit' (regardless of whether they actually generate a profit) such as law firms and barristers chambers, so the vast majority (more than 95%⁵³) of legal aid providers cannot access this type of support.

The court backlogs

42. The COVID-19 pandemic necessitated significant and unprecedented change to the operation of courts and tribunals in England and Wales. This added to the pressures on a court system that was already under strain due to a change in ministerial approach, reduced courts estate and outdated IT systems. Before exploring the impact of the pandemic on the justice system, we briefly consider these pre-existing challenges below.

Pre-pandemic

43. In September 2016, a policy paper entitled *Transforming Our Justice System* was jointly announced by the Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals in relation to the future of HMCTS.⁵⁴ Over £1 billion was to be invested into HMCTS's court reform programme by Her Majesty's Treasury. One-third of that was to be raised by HMCTS, which saw much of the existing court estate being sold.
44. An independent review of the reform programme concluded that it would significantly alter the way in which users access justice.⁵⁵
45. Figure 1 shows that in 2010 there were 923 courts in total. By 2019, there were 628⁵⁶. Similarly, in 2010, there were 110,000 Crown Court sitting days in total. By the eve of the pandemic, sitting days had reached a low of 86,000 meaning that only 45% of available space – about 200 courtrooms – was being used. The Crown Court backlog has increased from 40,000 cases pre-pandemic to more than 58,000 cases.



The Times and Sunday Times
Source: House of Commons Library

The numbers of outstanding cases in both the Magistrates Courts and the Crown Court were as follows:

Table 2: Outstanding cases in the Magistrates Court and Crown Court

Date	Magistrates Courts outstanding cases	Crown Court outstanding cases
March 2019 ⁵⁷	293,412	31,916
March 2020 ⁵⁸	409,564	40,591
April 2020	463,740	41,305
May 2020	495,090	41,621
June 2020	514,272	42,667
July 2020	525,059	44,574
August 2020	514,394	47,777
September 2020	503,721	50,179
October 2020	489,035	52,429
November 2020	474,961	54,460
December 2020	468,114	55,150
January 2021	473,546	56,915
February 2021	477,487	57,840
March 2021	472,094	57,967
April 2021	462,670	58,228
May 2021	453,482	57,503

Pandemic

46. Lockdown and social distancing measures introduced in March and April 2020 were a necessary response to a public health emergency. Both HMCTS and professionals involved in court proceedings rapidly adapted to the increased use of digital/remote hearings, and our witnesses told us that legal aid practitioners did all they could to minimise the impact that these changes had on their clients. As Table 4 demonstrates, these measures did, however, exacerbate significant backlogs, particularly in the criminal justice system.
47. The backlog in the Magistrates Court rose sharply at the start of the pandemic and peaked at 525,000 cases in July 2020. While it has been gradually decreasing it remains significantly higher than in pre-pandemic levels, as can be seen in Table 4.

48. In the Crown Court, the rise was marked and consistent throughout the first year of the pandemic. In April and May 2021, the Crown Court backlog started to fall for the first time since the pandemic began (58,228 to 57,503 outstanding cases – see Table 4), having swollen by almost 50%. However, we understand from practitioners and the MoJ that ‘major challenges’ remain.⁵⁹ The Bar Council also raised concerns about an increase in both the number of Crown and Magistrate Court cases waiting to be heard in June 2021.⁶⁰

‘We are left with a question of what are we to do with this problem of court backlogs. I would disagree with those who suggest that as backlogs have existed before, they are therefore not the problem people make them out to be and that, frankly, we should do nothing radical to deal with this one. I do not accept that proposition. When we had a backlog anything like this in the past, thinking back to the early 2000s, the truth was there were substantially more sitting days in the system, substantially more courts and courtrooms in the system and substantially more judges. The system could deal with a backlog of that size.’

David Lammy MP⁶¹

49. We applaud the incredible efforts of the judges, all court staff and practitioners in trying to ensure that individuals still had access to justice during the most difficult of years. We also acknowledge investment by the MoJ of £450 million to deliver speedier justice for victims.⁶² An MoJ spokesperson said:

‘While the pandemic has posed an unprecedented challenge to our criminal courts, dedicated staff and professionals ensured justice continued to be delivered for victims.’

‘Thanks to their efforts we are seeing positive results – outstanding cases in the Crown Court are beginning to drop, and have fallen by around 70,000 in the Magistrates Court since last summer. Major challenges remain which is why we are investing hundreds of millions to further increase capacity, deliver swifter justice and support victims.’⁶³

50. There are now 300 COVID-safe courtrooms open for jury trials, plus 120 extra spaces for hearings and an additional 60 temporary so-called ‘Nightingale Courts’ to further ease the pressure. Thirty of those Nightingale Courts can hold jury trials.
51. But many courtrooms across England and Wales remain locked and completely unusable because they are too small to accommodate all the people required for a prosecution to progress.

52. Social distancing guidance also restricts the number of defendants who can be safely held in each building. This problem has become so acute that two separate courtrooms in Manchester are being knocked into one to allow major gang trials to progress.
53. The plan to reduce the backlog is also dependent on the availability of part-time judges. These are experienced lawyers who take time out from their work to sit as judges. These fee-paid judges are a critical part of the criminal justice system. The BBC reported in April 2021 that '[f]unding to pay for their work was halved in the two years to the eve of the pandemic – and with backlogs now so high, it is unclear how many eligible lawyers will be able to find the time to pick up the work'.⁶⁴
54. Those barristers who gave evidence to the Inquiry spoke of being instructed on trials that have been listed in 2024. There is also a danger that fewer cases will reach a conclusion, as evidence is compromised by the passage of time or the loss of confidence from victims and those involved. It should be noted that there is some regional variation with regards to court backlogs. The figures provided in Table 4 above represent the most current official statistics but we have heard anecdotal evidence that certain areas have managed to clear their backlogs.
55. However, the impact of the court closures and backlogs is twofold. For individuals, a long journey to a court hearing makes it less likely that they will attend. They may not have legal representation prior to the hearing and will be unable to avail themselves of the duty advisers. Similarly, having to take time off from work and travel by bus to another town or city to seek legal advice because there are no local providers simply adds another barrier to people's ability to access justice and therefore the likelihood of their obtaining it.
56. For practitioners, court backlogs can mean that work is done on a case but fees cannot be claimed in a timely fashion from the LAA, severely disrupting their income.

'With regards to the backlog, the situation is awful at present. It is very frustrating to hear COVID blamed for the backlog. We know there was a conscious decision to reduce sitting days, all the pandemic did was shine a light on it and increased that backlog ten-fold. In London the situation is terrible, my firm has not had an effective trial since March – not because firms are not ready, but because courts don't have space. This has a terrible impact on cash flow. We don't even know why courts have no space. Magistrates Courts are having more disposals than receipts, but potentially health and safety issues in

terms of footfall. Again, this comes down to a need for investment and recovery. Now we also need to think outside the box about where we could hold trials.'

Kerry Hudson⁶⁵

'The work is there – police stations are at pre- COVID levels, Magistrates Court work is coming back up but there is a bottleneck at Crown Court which stops a lot of the funding. It is not profitable at the moment and lots of firms will struggle given trials at Crown Courts are being listed for 2021-22. The LAA should be paying firms fees for the trials that have been fully prepared but are listed for 2021-22 because the firms have done that work.'

Rakesh Bhasin⁶⁶

'The response at the beginning can be viewed through a lens of understanding, the pandemic was unexpected and unknown for all sectors. But it has now been months and the reaction, if there has been one, can be described as underwhelming ... The backlog is now amounting to just under 50k cases in Crown Court, we need to do more. Problems in CJS predated COVID. COVID is a spotlight showing on what happens when you cut a system to the bone and ask it to keep functioning. You cannot expect it to.'

Joanna Hardy⁶⁷

The role of the Legal Aid Agency

57. When speaking with witnesses over the course of the Inquiry, certain themes emerged regarding the role of the LAA and its impact on practitioners and client access. As an executive agency of the MoJ, the LAA administers both civil and criminal legal aid in England and Wales. The agency was formed on 1 April 2013 as a replacement for the Legal Services Commission, a non-departmental public body of the MoJ. Unlike its predecessor, the LAA is enabled to bring about greater ministerial control over the government's legal aid budget as part of LASPO.
58. Providers have previously criticised the LAA for allowing the growth of advice deserts throughout England and Wales⁶⁸ and their well-publicised handling of ECF applications made under section 10 of LASPO. The MoJ and the LAA had anticipated 5,000 to 7,000 applications for ECF in the first year post-LASPO, but only received 1,520, of which 69 were granted.⁶⁹ This figure has risen in the intervening years but still remains far lower than was originally expected. Further general criticism of the LAA stems from the legal aid fee structure and rates, and the LAA's perceived treatment of legal aid providers. These concerns

were reiterated during the pandemic by the representative bodies, which pushed for assistance from the LAA regarding cash flow problems experienced by providers. We look at these and more specific concerns in further detail below but note the recommendation of the Bach Commission to replace the LAA with an independent body that is not subject to direct governmental control.

59. Practitioner concerns about the LAA ranged from the general to more specific issues. The recurring theme across all practice areas is the administrative burden placed on already over-stretched providers, and the LAA's desire to manage perceived under-performance and risk by means of contract management. Witnesses noted that the relaxation of certain compliance requirements as a response to the pandemic had alleviated some of the administrative burdens but that while these changes are useful, they do not remedy the fundamental issues undermining sustainability.
60. Witnesses raised a host of specific issues as well. These included querying the need for matter start limits when the take-up of Legal Help has decreased so dramatically. Others raised the bill assessment process and the LAA's ability to recoup overpayments made to providers and asked why there was an additional need for arbitrary costs limits. What came across time and again was that fixed fees are too low and that time spent on overly complicated administrative processes is unpaid rendering the work even less financially viable. Those providers that we heard from simply want to get on with their urgent, complex casework, but feel inhibited and constrained by what they see as unnecessary bureaucracy.

'The stark reality is that there are so few legal aid practitioners left, that what is needed is a root and branch stripping out of unnecessary admin which serves no benefit to the taxpayer and only detracts from the time which is spent on advising clients in need. The pandemic has shown us all how things can be done differently, and this is the opportunity which should be grasped so that we can all focus on the real task in hand.'

Nicola Mackintosh QC (Hon)⁷⁰

61. Several witnesses spoke of a perceived 'culture of refusal', especially apparent in a reluctance to grant legal aid for complex or 'borderline' cases. They alluded to an institutional default position to refuse funding in the first instance and, for example, a sharp fall in the number of housing cases reaching the higher courts since LASPO. This, in turn, they explained, has adversely impacted on thousands of applicants and arrested the development of housing law. Barrister James Stark gave an example of a recent case that he was involved with, *Samuels v*

*Birmingham City Council.*⁷¹ There, he told us, the LAA refused funding for the permission to appeal hearing on three separate occasions as it claimed it had little prospect of being granted. The permission application was made pro bono, granted and ultimately the Supreme Court granted the appeal in favour of the applicant.

62. We note the perception of this culture across civil legal aid in all categories where certificated work is necessary and the work of various representative bodies around this including Garden Court Chambers and Legal Aid Practitioners Group on behalf of the legal aid sector. This point was expanded upon by barrister Marina Sergides, who told the Inquiry:

*'[This attitude] affects not only the way barristers get paid, how long it takes and how much they get but that it also affects morale. The publicly funded Bar are public servants, paid from the public purse, performing a public function and yet not considered to be public servants. In contrast to others in the public facing world such as teachers or doctors, publicly funded barristers are attacked for the work they do by the government - that damages the Bar and causes morale to plummet ultimately resulting in barristers leaving the profession entirely or leaving legal aid work behind.'*⁷²

The role of technology in delivering services

63. Technological innovation has long been vaunted as the future for access to justice throughout the UK. Its proponents argue that it reduces costs and empowers individuals by providing them with access to free and reliable information online. Increased use of technology has been proposed by the MoJ as a means of improving access to justice, particularly in the more remote areas of the country. Its 2019, Legal Support Action Plan committed up to £5 million of funding to support technological solutions to improve access to justice on the basis that 'technology can play a huge role in opening up services for those who are geographically or otherwise isolated and may not be in a position to access face to face support'.⁷³
64. Even prior to the pandemic, HMCTS estimated that by 2023 2.4 million cases each year would be dealt with outside physical courtrooms.⁷⁴ Between March 2020 and May 2021 an estimated 1,166,200 hearings were conducted or due to be conducted remotely. COVID-19 has proven a baptism of fire for this approach, necessitating large-scale implementation of technological solutions beyond those previously envisaged by the MoJ or HMCTS. Yet what began as an emergency response evolved into a year-long pilot in which the court service delivered everything from a 12-week trial in the High Court to a complex jury

inquest in Kent on a remote basis. It was a shock to the legal aid sector, but we heard a wealth of evidence as to the resilience of providers in adapting to the post-pandemic landscape and the benefits of technology over the course of the lockdowns in order to keep advice services open. Some of the changes were probably overdue and some have modernised outmoded arrangements. Before we look at this in further detail, we would like to take the opportunity to express our thanks to the courts, law firms and other organisations throughout England and Wales and all of their staff for their herculean efforts to utilise technology and keep the wheels of justice in motion over the course of the pandemic. Huge steps have been taken in this area over the past year and a half and these will continue to have a positive impact upon justice and our ability to access it in the years to come. Many have identified this as one of the few strong positives of the pandemic for these reasons.

65. Below, we look at the role of technology (i) operationally, in administering access to justice, and (ii) in the provision of services to clients.

The use of technology in administering the legal aid system

66. We heard from witnesses that while they wholeheartedly support the use of digital technology where this works for clients, providers and the LAA, the bureaucracy that sits behind the legal aid scheme and the technology involved with it, namely the Legal Aid Agency's digital Client and Cost Management System (CCMS) has been beset with problems from the start. Witnesses report dealing with inadequate fees and huge amounts of bureaucracy, and a system that isn't fit for purpose is arguably pushing the supplier base to an operational precipice. Their profitability has been reduced and it is a poor example of digitalisation efficiency. An urgent review into the operation of legal aid with the aim of simplifying the system, removing unnecessary and costly hurdles to clients accessing legal aid services and suppliers providing them. We are aware that the LAA is currently developing a new digital interface for administering legal aid, to replace CCMS, and welcome the improvements this should bring for both providers and clients seeking to access legal aid.

The use of technology in providing services

67. We saw prior to the pandemic an increased centralisation of reliable information on websites with the purpose of empowering the user through public legal education, information and advice. These websites are increasingly user-friendly, developed through user-centred design, and can even include monitored chatboxes to tailor the advice provided. As a society, we have reaped the benefits of these moves towards digitalisation as we make appointments, check symptoms and increasingly conduct much of our lives online. For those

of us who are sufficiently tech-savvy, there is a huge benefit to the speed and efficiency achievable through educating, informing and serving the individual in this way.

68. The huge potential benefits of accessing justice services online rather than in person include a more accessible and understandable way of interacting with the courts, increased convenience, reduced cost and arguably the ability to stay better informed of the progress of a case.⁷⁵ Indeed, we have seen the many advantages to virtual meetings over the past year. A huge amount of travel time has been saved and legal professionals have all seen the benefits of being able to appear for their clients in hearings throughout the country on the same day. This has had hitherto unexpected benefits for those with childcare or parenting commitments and also disabled practitioners⁷⁶. As MPs, we have also seen the benefits for those constituents living in legal aid deserts or in areas with poor transport links and we can all agree that the use of remote hearings has become an important weapon in the access to justice arsenal.
69. We would add that there are further steps that remain to be taken that would hugely improve the user experience and assist practitioners in providing a service. While the courts have moved online, there remains a need for court systems to be digitalised and moved from a paper-based system.
70. However, we are acutely aware of the downsides that accompany the positives of the move to remote hearings during lockdown. Remote justice is not yet suitable for all cases. Where the honesty of a witness is in issue, it's harder to access credibility on a screen. Digital exclusion is also a huge issue and was something stressed by witness after witness, as were the needs of clients with social welfare law issues. We explore these issues in more detail below.

The client perspective

71. A significant proportion of clients assisted by legal aid practitioners are vulnerable as a consequence of issues such as poverty, and physical and/or mental health problems. We were told by witnesses that as a result of these vulnerabilities clients find it difficult to properly understand information and provide their solicitors with documents and instructions, even when services are delivered face-to-face.
72. Many of these clients will be deemed digitally excluded from accessing online services. In 2018, the Office for National Statistics estimated that, in the UK, 11 million adults lack basic digital skills⁷⁷ and 5.3 million adults are non-internet users.⁷⁸ It also appears unlikely that the pandemic resulted in widespread digital upskilling, despite personal and professional life moving online, with 83% of UK adults saying they had received no support to improve their tech skills.⁷⁹ Users

of legal aid and advice services are often susceptible to digital exclusion due to a lack of financial means, a lack of stable housing or a lack of understanding. Clients with limited finances may not have access to the internet, or even have sufficient funds to top-up credit on their mobile phones. Homeless clients may have nowhere to charge their phones. Those detained in prison or hospital, or resident in care homes, will have limited access to telephones or the internet, or perhaps no access at all. With limited telephone access, clients cannot always instruct a solicitor or provide instructions to an existing solicitor. Access to the post will be similarly limited, with some being unable to send mail.

73. Groups that are likely to suffer from digital exclusion include older people,⁸⁰ people with disabilities,⁸¹ homeless people and those on the lowest incomes.⁸² These are groups that are also likely to need access to free legal advice.
74. Online video hearings and meetings raise other issues too. The Equality and Human Rights Commission has said that they can significantly hinder communication and understanding for people with learning disabilities and mental health conditions,⁸³ while the Lord Chancellor, Robert Buckland QC MP, raised concerns about the impact of video meetings on 'the client's ability to give instructions in a confidential way'.⁸⁴ Further, we heard evidence that organising video meetings with prisoners became incredibly difficult and delayed due to insufficient and inadequate video calling facilities. Dr Laura Janes of the Howard League described waiting over three months to speak to her client in prison, adding that such delays are commonplace.⁸⁵ Professor Jo Delahunty QC, a family law barrister specialising in hugely sensitive cases, spoke of the difficulties in acting for clients when her sole means of communicating with them is via a small mobile phone screen.⁸⁶ Building a rapport, reading body language and being able to protect a client from the gaze of an alleged abuser are all a necessary part of a representative's role but rendered immensely difficult in remote hearings. Professor Delahunty also raised her concerns at the invasion of privacy for clients brought about by the use of computer screens. She spoke of victims of abuse attending hearings from their rooms in a refuge and the subsequent intrusion into their safe space.
75. The success of implementing video hearings in the family courts has also come 'at a price' according to the President of the Family Division, Sir Andrew McFarlane, who also said 'we must get back to face to face as soon as possible' for substantive hearings.⁸⁷ We have heard of practitioners feeling that a disservice was done to, for example, parties at home alone on the phone when they gave evidence to the court and the removal and future of their children was being decided.⁸⁸ Not all clients have access to facilities to enable them to join a remote hearing and some courts have claimed that this is their solicitor's responsibility, but we cannot agree that it should be for law firms or NfPs to buy

laptops to lend to their clients. It is can also be very difficult to accommodate access in solicitors' offices when they are closed, not available or unsuitable for social distancing. Evidence heard by the Commission also emphasised the increased fatigue caused by remote hearings and desire to return to in-person hearings for substantive (rather than procedural) hearings or where digital hearings prejudiced the needs of clients. Witnesses expressed particular concern about the difficulty of advising and representing vulnerable clients when the in-person connection is lost. Practitioners also reported clients feeling removed from the hearing process and queried their satisfaction with the outcome.

76. The widespread use of technology also causes issues for providers. Like most businesses, firms and advice centres were forced to implement remote working, which resulted in providers and practitioners incurring costs at a time when many reported a substantial drop in income. Nevertheless, while a number of providers initially struggled with this transition, particularly NfPs,⁸⁹ procedures and facilities are now in place across the sector for most providers to work remotely.
77. Additionally, the advice sector has always relied heavily on volunteers in the delivery of services. Some of our witnesses suggested that it would be hard to predict the participation of volunteers if there was to be a permanent shift to remote working: while some volunteers increased their availability when working from home, others stopped entirely as they felt unable to provide advice without a senior supervisor in the room.
78. Remote hearings have also come at a cost for practitioners. Many providers have found 'remote hearings to be more tiring to participate in than physical hearings, particularly those that proceeded by video'.⁹⁰ Others have reported that the move online has resulted in a loss of privacy as they take part in proceedings from their own homes. Several witnesses reported having been required to give their private phone numbers out as a consequence of the move to remote working, and a number reported threatening messages and phone calls because of this. The Commission also heard that remote working negatively impacted on the training of junior lawyers, who miss out on vital office or out-of-courtroom discussions where juniors would learn skills, make connections and hear news.
79. What came across time and time again is that the use of technology, while extremely beneficial in some cases, does not reflect the reality of a lot of social welfare work. The case studies that were presented to us by an array of witnesses highlighted that many users of the legal aid system are particularly

vulnerable and require legal assistance as a direct result of that vulnerability. This could be for a variety of reasons, but when cases are so complex that they require a team of skilled professionals to unpick them over time, there remain very real concerns in the notion of the default moving to the remote provision of a service. One witness spoke of a client who had locked himself in his room for over four years. He left it only at night in order eat, but there were very real concerns surrounding his mental and physical health. Our witness stood outside the door for almost a day, speaking to him and building a relationship, something that would be far more difficult if the service provided were digital. When the door was finally opened, they found four years' worth of faecal matter, food debris and maggots. The client had kept his door locked because he was being sexually abused by his mother's partner. There will always be large numbers of people who need face-to-face, expert legal advice just as while many medical ailments can be diagnosed online, there will be large numbers of patients requiring physical access to a doctor.

Conclusions on technological solutions

80. The Commission recognises the important role that technological solutions have played in maintaining access to justice over the past 18 months and the part that they will continue to play as we move forwards. Where the circumstances are right, the benefits of technological solutions can be significant. Online hearings, client meetings and online advice hubs must be part of the solution to the current crisis. However, we have plainly seen that there cannot be a total shift to technology and front-line legal advice that is delivered face-to-face will remain necessary for many individuals. While the MoJ's Legal Support Action Plan committed £5 million of investment in legal support innovation,⁹¹ aimed at resolving legal issues including that of digital exclusion, this commitment was made prior to the massive shift online necessitated by the pandemic, and the Commission would urge further investment in support, infrastructure and training to tackle digital exclusion. Additionally, the development and application of adequate protocols and rules, especially regarding the use of online hearings for substantive matters, are essential if the shift towards technology is to be deemed a sustainable measure, and this must be balanced with a recognition that technological solutions are not suitable in every case and do not necessarily generate more effective outcomes or increase access to justice.



PART 3 – THE PUBLIC PERSPECTIVE

What do we mean by 'sufficiency' of legal aid services?

81. In 2019, and after two years of extensive consultation with the provider base, the MoJ published its long-awaited post-implementation review of LASPO. It said:

*'Overall it is clear that the market has changed, but that is to be expected given the wide nature of the changes that LASPO introduced. The market is currently operating at sufficient levels to meet demand, but more research is required to determine the long-term sustainability of the profession.'*⁹²

We look further at these themes of 'sufficiency' and 'sustainability' below.

82. What does it mean for a service to be deemed sufficient? We have used the term widely and in many different contexts over these long months, but essentially it must mean that the service is able to meet public need and respond to changing need, and is fit for purpose. It must also mean that those who need it are able to access it, in their local communities where necessary, and in a timely fashion. Without this, when Professor Delahunty's unexpected knock at the door occurs, many of us will not have someone to whom we can turn.
83. What, then, is sufficient in a legal aid system? We take as our starting point the rule of law and its role as a fundamental pillar of a just and equitable society. At its core, the rule of law is the notion 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'.⁹³ In practice, there is often the need for the law to be interpreted and for a professional to intercede on behalf of the individual. For some, this is a matter of paying for legal advice or representation. For others who are unable to pay for this advice, the Rushcliffe Committee created the legal aid scheme to provide the legal advice and representation required to fairly and effectively navigate the legal system.

84. The main focus of this particular Inquiry has been on those providing legal aid rather than those receiving the service. However, as part of our terms of reference, we sought to build as comprehensive a picture of the legal aid system from a user perspective as possible. In doing so, we asked ourselves how easy it is to access justice. In other words, how easy is it for individuals to access legal representation as the country emerges from decades of cuts and the COVID-19 pandemic?
85. Jenny Beck QC (Hon) described the position as:
- '... a three-tier system. We've got those who are able to pay that can get good lawyers to take their cases, those falling back on legal aid who have exhausted publicly funded lawyers that are trying to do their best, and then the third group of people who can't even get legal aid at all - who have been cast out of the system entirely and have been left to try to navigate the system on their own, with some horrendous miscarriages of justice as a result.'*⁹⁴
86. While our witnesses all spoke of the valuable role that legal aid plays in the justice system, and of the wider benefits to society at large, it is also clear that the public values legal aid as part of the state-funded safety net. A year to the day after the publication of the LASPO PIR, The Law Society issued a press release stating that the public overwhelmingly supports legal aid. The release cited a legal needs survey carried out by The Law Society in conjunction with the Legal Services Board, which showed that 92% of adults supported legal aid. It added that public backing was strongest for funding in domestic abuse cases (71%) and unfair police treatment (66%).⁹⁵

Access to assistance – narrow scope and practical barriers

87. In order for any individual to apply for legal aid, their problem must be deemed eligible under the scheme. Thus, whether they qualify will depend on whether: (i) their issue is covered by the scheme (or 'in scope'); and (ii) they are assessed as financially eligible because their income and capital is below prescribed levels. Many legal aid cases have additional qualification barriers, such as an assessment of the prospects of success or whether there is wider public interest to be derived from funding the case. However, we concentrate on the issues of scope and financial eligibility in further detail below.

Scope of legal aid

Pre-LASPO

88. Prior to April 2013 the availability of legal aid was defined by the Access to Justice Act 1999, which provided that legal aid was available for any matter of English/Welsh law unless specifically excluded by Schedule 2 to the Act. Excluded matters were:⁹⁶

- personal injury other than clinical negligence;
- conveyancing;
- boundary disputes;
- wills;
- trust law;
- defamation;
- company and partnership law; and
- business matters.

Post-LASPO

89. LASPO reversed the position of the Access to Justice Act and specified that legal aid is not available for any matter unless specifically included in Schedule 1 to the Act.⁹⁷ Criminal law remains effectively entirely in scope albeit subject to stringent means and merits test. The scope of civil legal aid was drastically cut with remaining areas often subject to further restrictions as well as tightened needs and merits tests.

A non-exhaustive list of included matters is set out below as Table 5 for reference purposes only.⁹⁸

Table 3:

Area of law	Restrictions
Community care	For the provision of community care services and of facilities for disabled persons.
Actions against public authorities	<p>Only for:</p> <p>(1) allegations of deliberate abuse of a person in the care of the authority and</p> <p>(2) where the public authority has the power to detain, imprison or prosecute: abuse of a child or vulnerable adult, deliberate or dishonest abuses of power by a public authority, breaches of human rights or advice to victims of sexual offences.</p>
Clinical negligence	Only where an infant suffers a neurological injury resulting in them being severely disabled during pregnancy, childbirth or the postnatal period.
Debt	Only where the person's home is at risk.
Discrimination	Only in relation to contravention of the Equality Act 2010 or other specified discrimination statute.
Education	Only for cases of discrimination or special educational needs.
Public family law	Only regarding child protection
Private family law	Only for cases with evidence of domestic violence or child abuse, child abduction, forced marriage, FGM, or where the child is a party to the case.
Mediation	In relation to family disputes.
Housing	Only for cases of homelessness/risk of homelessness, where the person's home is at risk, they are at serious risk of harm due to disrepair or appeals on a point of law relating to council tax reduction schemes.
Immigration	<p>Only where there are issues of domestic violence, human trafficking, slavery, servitude, forced labour, terrorism prevention and investigation or the proceedings are in the Special Immigration Appeals Commission.</p> <p>Also available for migrant children separated from their parents in non-asylum immigration and citizenship cases.⁹⁹</p>

Area of law	Restrictions
Asylum and detention	Advice on detention cannot cover the substantive issue unless independently in scope.
Welfare benefits	Only for appeals to the upper tribunal, Court of Appeal or Supreme Court and judicial review cases.
Public Law	Only for human rights and public law challenges, i.e. judicial review.
Mental health & Mental Capacity	Only in relation to the Mental Health Act 1983, the Mental Capacity Act 2005 and the para 5(2) of the Schedule to the Repatriation of Prisoners Act 184.
Miscellaneous	Only for specific areas covered in Schedule 1, such as: proceeds of crime, environmental pollution, gang and anti-social behaviour injunctions and non-family/housing relationship-based harassment cases.

Pre-pandemic

90. What does this mean in practice? The LASPO PIR found a significant reduction in legal aid spend in social welfare matters, which exceeded the estimation made in the original impact assessment.¹⁰⁰ In housing cases, Legal Help spend between 2012/13 and 2020/21 fell from £18.5 million to £6.5 million, while expenditure on civil representation fell from £25 million to £15 million. In debt cases, Legal Help expenditure was estimated to have fallen by more than 99%, from £17 million to less than £0.01 million; civil representation fell from £1 million to less than £0.11 million. Welfare benefit cases saw a reduction in legal aid expenditure of around £18 million per annum. The removal of employment cases from scope saw the estimated spend on both Legal Help and representation reduced from around £5 million to almost zero.¹⁰¹
91. The volume of legal aid cases declined more than anticipated in each of these areas. During the evidence gathering phase of the LASPO PIR, respondents expressed concern about the inability of potential clients to find a provider for social welfare law cases, even where those cases remained in scope. This was particularly prevalent in the housing sector.
92. As MPs, we have seen the effects of these cuts in our own constituencies. In 2018, the APPG on Legal Aid sent out a short survey to all MP offices in England

Wales, asking how the volume and nature of their casework had changed over the past year and past two years.¹⁰²

93. Half of all the 249 MPs who responded to the survey believed that the volume of constituency casework had increased over the past year and over half saw a noticeable increase in the complexity of this work.
94. Over the course of a month, four out of five MPs told us that they refer cases to Citizens Advice, five out of 10 to Law Centres and four out of 10 to local solicitors. Almost one in three said that they refer to the Bar Pro Bono Unit or another pro bono service. Many responded to the survey pointing out that funding has been lost for immigration services in particular, while some drew attention to other reductions in available services such as local Law Centres or Citizens Advice offices closing.
95. Nearly 90% of those surveyed were dealing with benefits issues and almost 75% were dealing with housing (rehousing, possession, homelessness, repairs) on a weekly basis. While we cannot be sure that this is due to the reduction in legal aid for early advice in these areas, it certainly indicates a key pressure point. Without swift and early intervention, such problems can escalate very quickly to the point where people are destitute or at risk of losing their homes, and all too often by the time the constituent reaches their MP the problem has become acute, complex and more difficult and expensive to resolve.

Pandemic

96. Three years after our original survey, we asked the members of the Commission for an indication of the problems that they were seeing in their constituencies. The results cannot be seen as reflective of the national picture but is a useful illustration of legal need. Those who responded spoke of health issues having significantly increased as would be expected given the pandemic. They also reported a large proportion of their work involving international affairs, animals and food. There was still a large number of queries around benefits and housing with others reporting an increase in community care and immigration matters.

Exceptional case funding

97. Where a case is not within scope, section 10 of LASPO created the ECF scheme. This was originally designed as a 'safety net' to ensure the funding of cases that would ordinarily be out of scope but where legal aid is provided to prevent a potential breach of either human rights or EU law. During the passage of the LASPO Bill through parliament, the Legal Services Commission estimated that there would be 5,000–7,000 section 10 applications per year. However, it

soon became apparent that the complexity of the application process and the eligibility criteria meant that access to the scheme was severely restricted.

98. In the first year of the scheme, the grant rate was just 1% and only 1,520 applications were made. At the end of 2019, it was confirmed that 2,601 applications had been made for the year 2018/19 with an overall grant rate of 66%. The most recent figures from the legal aid agency statistics show that there were 3,338 applications made in 2020-21 with 2,437 applications having been granted, a grant rate of 73%.¹⁰³ Whilst the number of applications and grant rate have significantly increased from the introduction of the scheme in 2013, nevertheless applications remain well below pre-LASPO predictions. It must also be noted that while some improvements have been made to the Scheme, these came about due to targeted policy work and litigation by Public Law Project in particular.
99. The Commission heard evidence on the amount of work required by the ECF application process and note that the analysis of whether legal aid is required to prevent a breach of either human rights or EU law in a particular case is often complex and resource-intensive. It seems to be accepted that the process is too complicated for individuals to undertake without the support of a legal professional, yet applications for ECF are made at risk, with funding only being granted if the application is successful. The process does not mitigate the fact that the scope of legal aid has been so drastically limited. Witnesses told us that the ECF application process is time-consuming, onerous and leads to delay (even when it is indicated that a matter is urgent). The system works on the premise that that when something is urgent, a solicitor would prepare and submit the funding application, and then proceed to work on the matter pending a decision, but practitioners stated that this was never realistic. A sensible practitioner, mindful of their financial responsibilities, will not take on work when they do not know how or if it will be funded. The result is that providers are unlikely to take on urgent or complex matters, or will decline to make ECF applications altogether. More than one witness made the point that practitioners are dis-incentivised from undertaking this work because of the financial risks involved. Those who attempted to engage in the ECF scheme in the first years after its introduction were also likely to have had a very negative experience, which would dissuade them from taking the time and risk of continuing to make applications, even after improvements were introduced to the scheme.
100. It is our view that the ECF scheme has failed its original purpose of providing a safety net for legal aid cases removed from scope. It is our recommendation that the process be reviewed as a matter of urgency and reformed. Providers

should not be expected to work at risk and the process should be simplified. There must also be recognition that if certain types of cases are routinely funded, they are no longer 'exceptional', and the government should take positive steps to identify these classes of cases and reintroduce them into the scope of legal aid.

The means test

101. Where a case is deemed within scope, another hurdle must be cleared in the form of the financial eligibility criteria. LASPO introduced capital testing in respect of legal aid, which has created further barriers to justice, with large numbers of people who would have previously been eligible now unable to obtain help. These individuals are unable to afford to pay privately for legal advice but are excluded from publicly funded assistance by the means thresholds. More than one witness commented that these changes have disproportionately affected disabled people and other disadvantaged client groups, raising concerns about unjustifiable discrimination against groups with protected characteristics.
102. It is fair to say that the number of people deemed eligible for legal aid was in decline long before LASPO and the pandemic. The proportion of the population eligible for legal aid fell from 80% in 1980 to 52% in 1998 and then to 29% in 2007.¹⁰⁴ The Commission heard a wide range of evidence that showed there is now a substantial gap between those who qualify for legal aid and those who can afford to pay privately for legal help and representation. We believe that there is an urgent need for action to halt the decline in eligibility and to ensure that access to justice is within reach of all those who need it.¹⁰⁵
103. One example is that the value of a person's home is now taken into account in the capital calculation for legal aid. This has resulted in people being ineligible for legal aid despite having no real access to funds to pay for legal advice. This has recently changed in respect of family law cases as a result of the case of *GR*,¹⁰⁶ where it was decided that the LAA may disregard property value if it is not possible for the applicant to access the equity in a property.
104. A further change to the capital assessment took effect from 28 January 2021, when the government amended the regulations in relation to the rules about mortgages in the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020 SI No 1584. Before this change, if you had a mortgage on your property, the LAA could only deduct up to £100,000 of the mortgage when calculating disposable capital. This meant that even if your mortgage was £250,000, only £100,000 of it would be taken into account and the remaining debt would be counted in the capital assessment. The changes

introduced from 28 January 2021 allow the LAA to deduct the full mortgage from the value of the property in their calculation of disposable capital. Nevertheless, in the vast majority of cases, people cannot raise funds on the equity in their main home, yet are treated as having 'disposable' capital.

105. Even people who are in receipt of means-tested welfare benefits such as universal credit are now also means-tested on their capital for legal aid. These are people who have already been means-tested by one government department and have been assessed as needing assistance, yet another government department applies a different test and may determine that they are not entitled to help. We believe that this needs to be urgently reviewed.
106. We note that while the means test has been under review as part of the LASPO PIR recommendations, and a report is due in autumn 2021, none of the thresholds have increased since 2009, despite £1 that year being the equivalent of £1.37 in 2020.¹⁰⁷ Similarly, the amount deductible for accommodation costs for those without dependants has remained at £545 since December 2001, even though the average UK rent has increased by 15.7% between January 2011 and March 2018,¹⁰⁸ and in March 2017 stood at £675pcm.¹⁰⁹ Finally, £100,000 has been the disregard for both mortgage and equity since April 2000,¹¹⁰ since when house prices have increased by over 200%.¹¹¹ A second change to the capital assessment is due to take effect from 28 January 2021.
107. The Government has amended the Regulations in relation to the rules about mortgages in the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020. Before this change, if you had a mortgage on your property, the Legal Aid Agency could only deduct up to £100,000 of the mortgage when calculating disposable capital. This meant that even if your mortgage was £250,000, only £100,000 of it would be taken into account and the remaining debt would be counted in the capital assessment. We are calling this 'imaginary' capital because it is not real money, it is actually debt.

The changes introduced from 28 January 2021 allow the LAA to deduct the full mortgage from the value of the property in their calculation of disposable capital.

108. This failure to increase the financial thresholds in real terms has produced a situation that is unduly severe on all types of applicants for legal aid. Research conducted by Professor Donald Hirsch of Loughborough University in 2018 found that all household types who were assessed to have disposable income just above the upper limit already had a shortfall in the funds required to afford a decent life.¹¹² He found that many people who were eligible for part of their legal costs to be paid via legal aid, but who must pay the remainder themselves,

have incomes that are too low to meet the minimum income level believed necessary to maintain a 'socially acceptable standard of living'. For example, people on incomes at the maximum level at which legal aid is available typically have disposable earnings that are between 10% and 30% too low to allow for a minimum budget for living expenses. Those individuals would only have part of their fees paid by legal aid, but would be unable to take advantage of legal aid at all as they can't afford to pay the remainder themselves. There are large sections of society who are therefore denied vital help to address potentially life-changing legal issues.

CASE STUDY: SALLY'S STORY

Sally ended her marriage following allegations of sexual abuse and opposed her ex-husband's application for contact with her sons on account of the risk that he posed to their safety. A one-day fact-finding hearing in the Magistrates Court was listed to establish the risk that her ex-husband presented to the children. Sally applied for legal aid, but while she easily passed the merits test, her income of £18,000 a year exceeded the means threshold and she was deemed to be ineligible. Meanwhile, her ex-partner was able to afford to pay both a solicitor and barrister to represent him.

Sally was aware that she was required to prove that her ex-husband was abusive at the hearing, but was unfamiliar with the terminology used by the court or indeed what evidence was required to satisfy the legal tests. Without legal support, she was required to cross-examine her ex-partner herself, an experience that she found extremely distressing and something the Magistrates Court clerk acknowledged put her at a disadvantage.

Sally tried to obtain support from various NfP advice services and contacted her local Citizens Advice office, which, while supportive, could not provide the help she needed as its staff were not lawyers. After many hours of phoning solicitors firms in the hope of obtaining a free half-hour of advice, she contacted Beck Fitzgerald, which was able to take her case on a pro bono basis, one of only three such cases that the firm can take annually. Sally's solicitor realised the case was too complex for a one-day Magistrates Court hearing and it was instead listed in a higher court for four days. Sally was also able to obtain pro bono support from a barrister. With this support in place, she was able to prove that her ex-husband presented a real risk to

her children's safety. Four years after Sally's original application, the judge found that her ex-husband should have no contact with the children until they reach adulthood and are able to protect themselves.

Sally's case is not unusual. If she had not been lucky enough to obtain pro bono support, she believes that she and her children would have been at real risk of harm.

109. We recommend that, as part of its review into the means test, the government should consider a significantly simpler and more generous scheme for legal aid that takes into account the current median income and cost of living.
110. We are also conscious that simply increasing the means thresholds may mean that more individuals are deemed financially eligible for legal aid, but it does not mean that more will actually receive advice and representation. If the government's intention in conducting the means test review is to widen the pool of people with access to legal aid, it must also take steps to reverse the diminishing supplier base. A failure to do so will create a section of society whose legal issues are in scope and who are financially eligible for legal aid, but who cannot find a practitioner to provide them with the assistance they need to resolve their legal problem. We cannot believe that the government intends such an outcome from the means test review, so we urge a multi-faceted approach by government to remedy the advice provision deficit.

This issue is explored in further detail in the next section.

Advice deserts and advice droughts

111. One of the consequences of the reduction of legal aid providers post-LASPO has been the expansion of 'advice deserts' (areas where there is no legal aid provision at all for a particular category of law) and 'advice droughts' (areas where there are providers but they have limited or no capacity to open new cases, thus resulting in a very restricted supply).¹¹³ This has come about due to 'funding ... being squeezed from all directions ... leading to reductions in levels of services and also closure of law centres and advice agencies'.¹¹⁴ So an individual may have a problem that is within scope, be financially eligible for public funding but still be unable to find any advice or representation in their local area.

112. As noted above civil and legal aid provider numbers have decreased sharply post-LASPO. This reduction was also particularly felt by the NfP sector as many Citizens Advice offices and Law Centres were forced to close or roll back their provision of free legal aid due to funding constraints. In 2013/14, 94 local areas had NfPs providing legal aid services, but by 2019/20 this number had fallen to just 47.¹¹⁵
113. The reduction in providers has been acute across civil and family legal aid including welfare benefits, clinical negligence, family, immigration, housing¹¹⁶ and community care,¹¹⁷ and has disproportionately impacted rural areas. The Law Society has published updated heat map infographics showing the distribution of various legal specialisms across England and Wales. They show that almost 40% of the population of England and Wales do not have a housing legal aid provider in their local authority area, a figure that has grown by around 2% since 2019 and that only 39% of the population have access to more than one provider in their local authority area.¹¹⁸ This means that many people across the country facing serious housing situations including eviction, will struggle to get the local face-to-face advice that they're legally entitled to. This was echoed by Refugee Action, which warned that since 2005, 56% of firms specialising in immigration and asylum law have left the market, creating geographical gaps in legal aid provision.¹¹⁹ The LASPO PIR was told the sparsity of legal aid providers was a particular problem in much of Wales.¹²⁰
114. The scale of the legal aid deserts can be clearly seen in heat maps produced by The Law Society and Dr Jo Wilding that show the number of housing, community care and immigration providers across England and Wales.

Figure 2: Housing law providers heat map produced by the Law Society (2021)

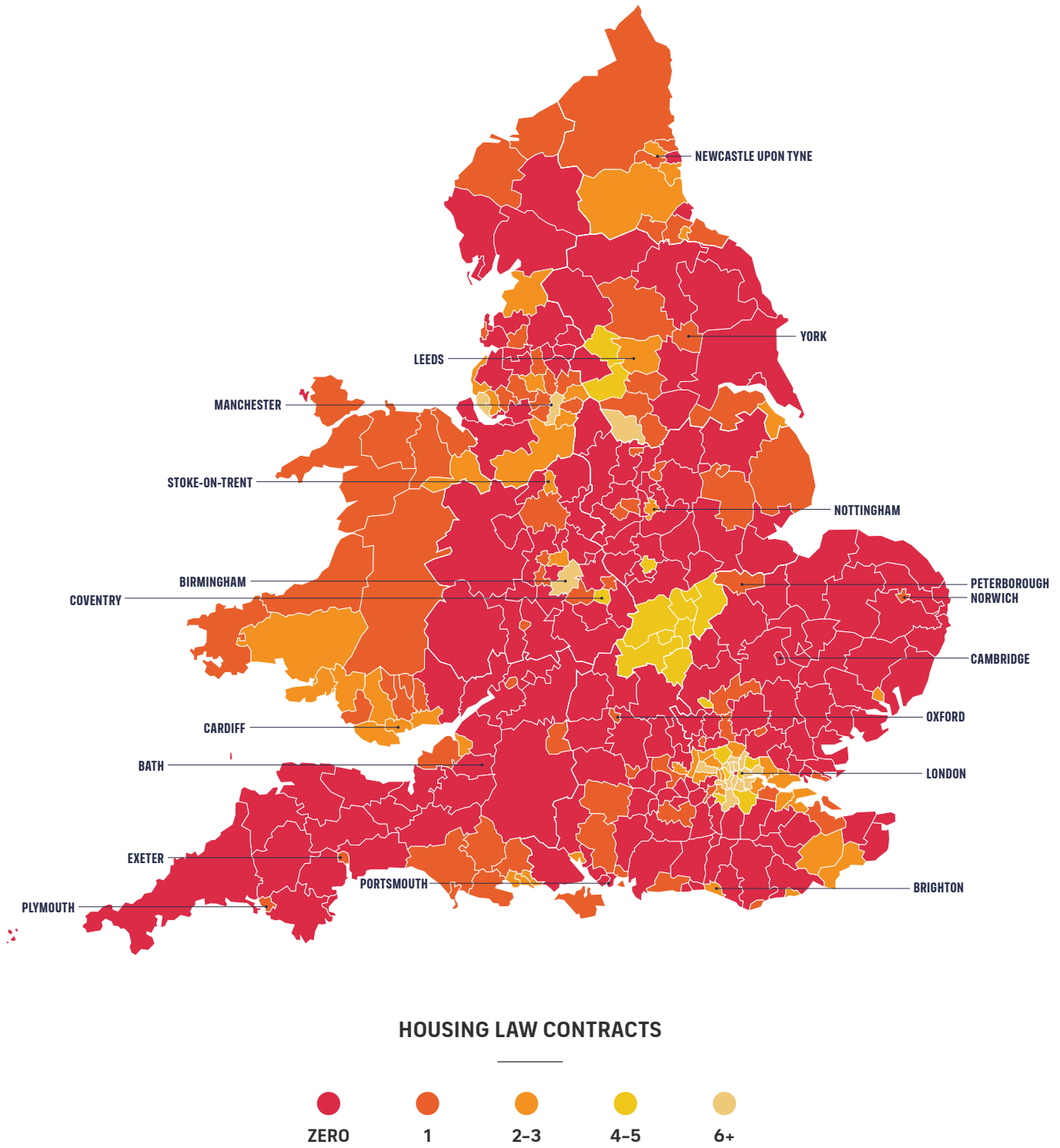


Figure 3: Education law providers heat map produced by the Law Society (2021)

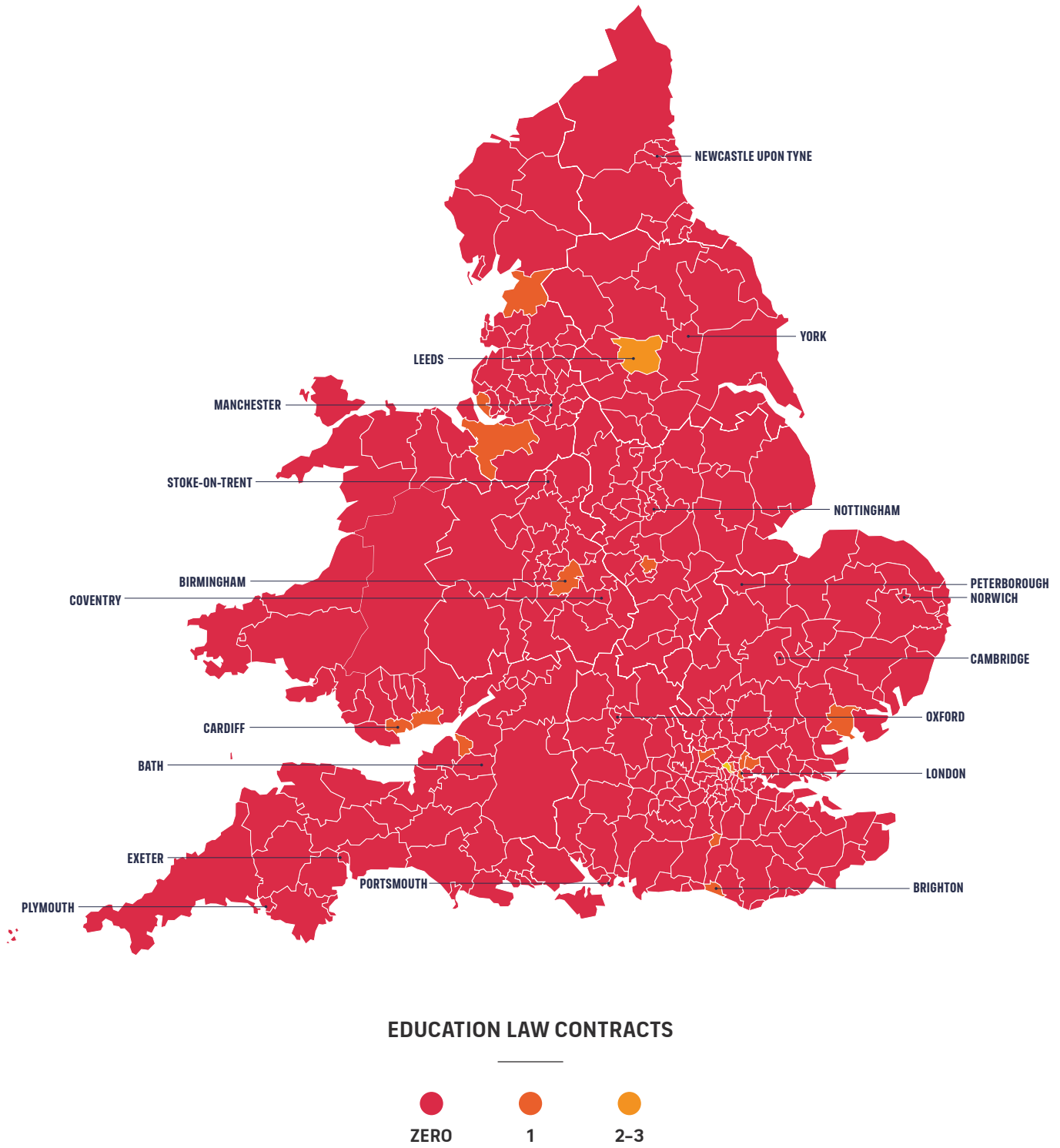


Figure 4: Community Care providers heat map produced by the Law Society (2021)

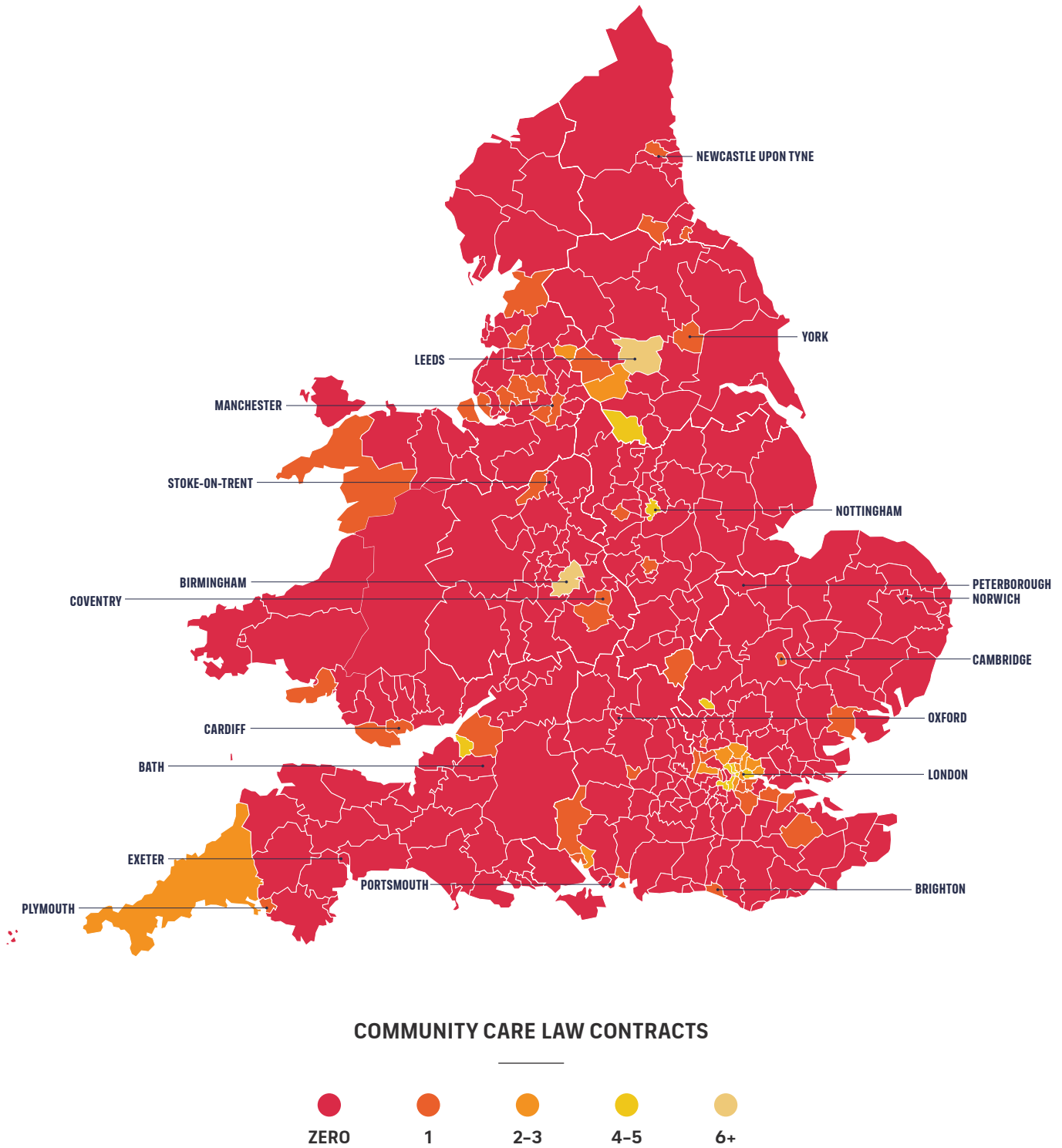


Figure 5: Welfare benefits providers heat map produced by the Law Society (2021)

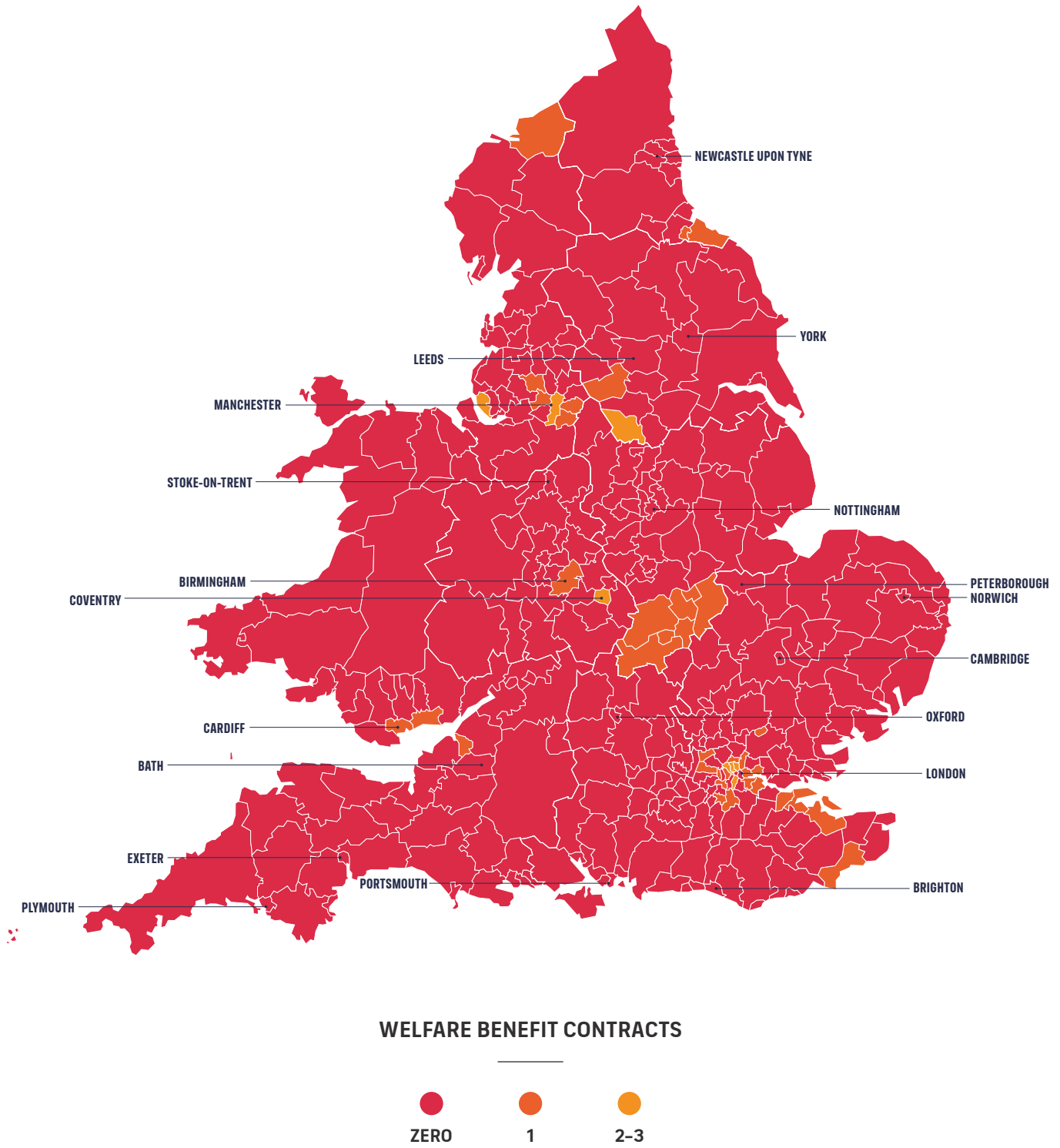
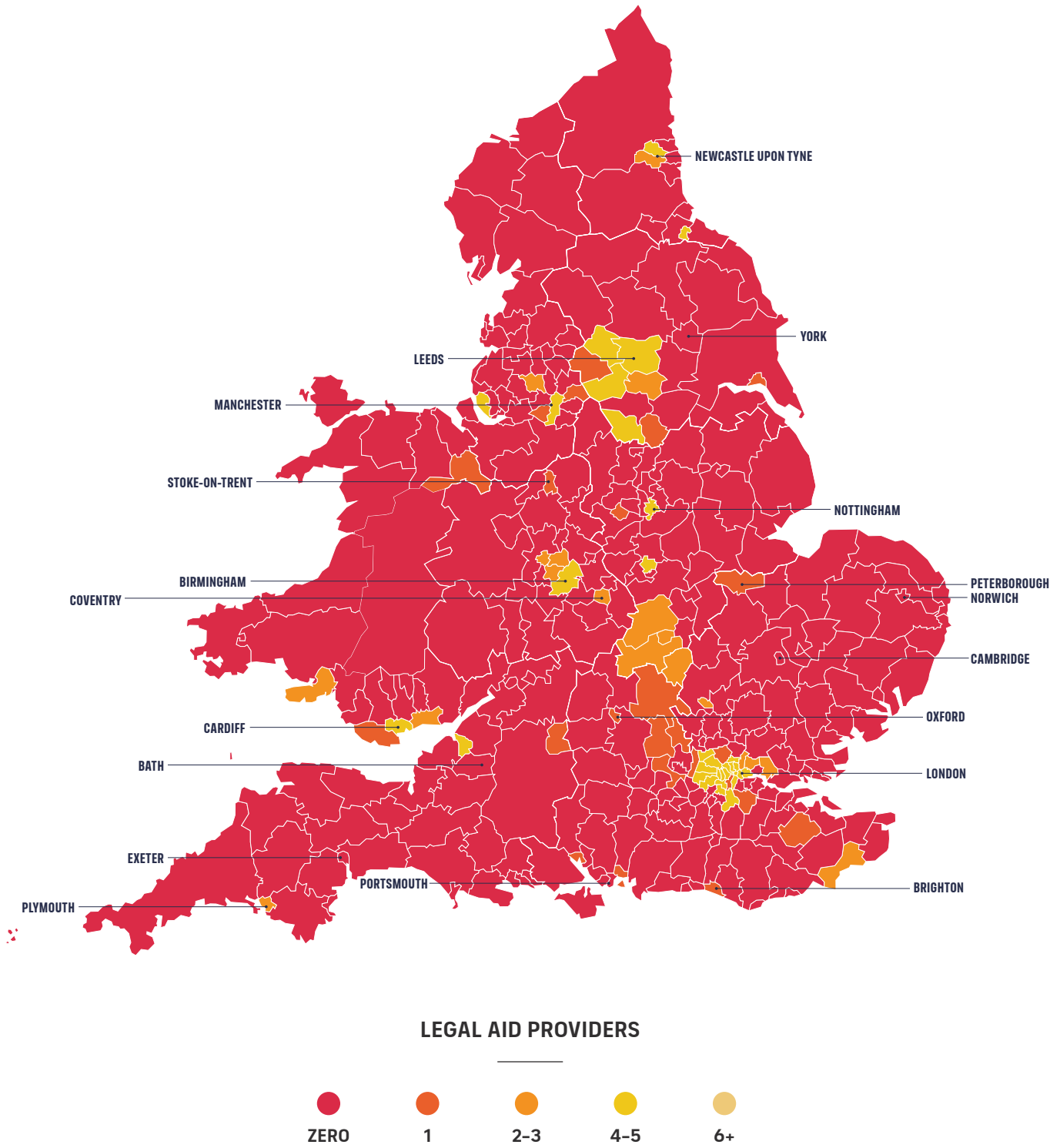


Figure 6: Immigration and Asylum legal aid providers heat map produced by the Law Society (2021)



115. Advice deserts and droughts result in clients being unable to obtain advice in their area. They are often forced to travel to obtain assistance, for example a client unable to obtain assistance for an immigration matter in Devon would be forced to travel to Somerset, Wiltshire or Hampshire.¹²¹ Those needing assistance are often the poorest and most marginalised members of our communities, without the means or the support to travel to obtain advice. They are often vulnerable (and often rendered more vulnerable as a result of their legal issue) and many will struggle to access online services, if appropriate online services even exist to address their legal needs. Those unable to travel are forced to resolve their issues alone as litigants in person, a difficult and stressful prospect that usually results in poorer client outcomes.
116. Former Supreme Court President Lady Hale's 2019 speech to the Legal Action Group captured this, charting the impact of advice deserts and legal cuts by posing an imaginary scenario of a woman in¹²² rural England suffering domestic violence. While in the past there may have been face-to-face legal advice, now there was just a local library and the internet. Putting herself in the shoes of the woman in need, she had been online to see what advice was out there. In her search, she reported a total absence, from the information available, of the fundamental principle that the welfare of the child is paramount.
117. The Inquiry also heard real accounts from providers and clients about the impact of advice deserts and reduced availability of legal advice:

'[In education law there are] just eight law firms nationally across the whole country ... so it's really hard for clients to be able to access legal advice ... And it genuinely is heart-breaking that you can see a legal issue and you can do something to help, but you just don't have the time. And so you suggest other firms, but you know they will be facing exactly the same challenges. And you never quite know what happens to those clients.'

Polly Sweeney¹²³

'We are turning people away who are in desperate need of advice and I know that those people won't be picked up by other firms, so they will simply not get advice.'

Nicola Mackintosh QC¹²⁴

'"[It was] not easy at all [to find a lawyer]. We looked through the Yellow Pages and found some lawyers who dealt with hospitals and the NHS but not on similar issues [community care] ... we struggled to find another lawyer in the South West that could help and [we had to] get in touch with a firm from London.'

Pam Coughlan¹²⁵

118. There have been tentative movements over the past few years towards providing services remotely where no local providers are available. University House Legal Advice Centre (based in East London) established a webcam advice clinic in partnership with a community organisation based in Falmouth. The bulk of the advice provided by the service is given by London-based lawyers via webcam. The organisation also runs a 'family law duty desk' at Truro Combined Court Centre. This duty desk provides assistance with section 8 private child arrangement cases and domestic abuse. It runs a similar scheme in Bodmin County Court and Family Court and a further remote employment law clinic in Plymouth.
119. We see huge positives in the role of technology in connecting the public with advice providers, particularly in more remote locations, and we applaud the LAA's decision to allow providers to bid for digital delivery of services in the last housing law tender round. However, there will always be vulnerable people who are unable to access technology in this way and who will be left behind. We are also concerned by the need for providers to deliver services digitally to cover those areas where providers have left the market and what this tells us about the economic viability of the work itself.

Inquests

120. Inquests are legal inquiries into the cause and circumstances of a death, and are limited, fact-finding inquiries; a Coroner will consider both oral and written evidence during the course of an inquest. The purpose of an inquest is to establish answers to four key questions:
- who someone was;
 - where they died;
 - when they died; and
 - how they came to their death.
121. The inquest system does not seek to establish who was responsible for a death and cannot make conclusions in terms of civil or criminal liability, but will explore the facts that could have a bearing on any future civil or criminal liability.
122. Article 2 (the right to life) of Schedule 1 to the Human Rights Act 1998¹²⁶ brought in an 'enhanced' type of inquest with a wider remit, to consider not just by what means someone died but 'in what circumstances'. This applies to deaths while under the care or protection of the state, or while in state custody or where the state has failed to take steps to protect individuals from an appreciable 'real and immediate' risk to their lives. An Article 2 inquest may involve a higher level

of scrutiny than a non-Article 2 inquest, as there is an enhanced duty to fully involve bereaved families and ensure detailed and transparent investigations.

123. The coroner's duty to hold an inquest is contained in section 6 of the Coroners and Justice Act 2009.¹²⁷ It has long been argued that automatic non-means-tested legal aid should be available for bereaved families to have legal representation at inquests where the state is funding one or more of the other parties. Recent recommendations to this effect have been made by (among others) former Lord Advocate Dame Elish Angiolini¹²⁸ and by Bishop James Jones¹²⁹. The charity INQUEST has also been instrumental in campaigning on this issue for many years.¹³⁰
124. The current government position is that the relative informality of inquests and their inquisitorial (as opposed to adversarial) nature does not (save in exceptional cases) require bereaved families to be legally represented. Following a recent review of legal aid for inquests,¹³¹ it confirmed that it will not be introducing non-means-tested legal aid for inquests where the state is represented. It will, however, 'be looking into further options for the funding of legal support at inquests where the state has state-funded representation'.¹³² Inquests have also been considered as part of the government's review of the means test and thresholds for legal aid entitlement, due to report in autumn 2021.
125. Under the current system, there are two schemes that potentially apply in relation to inquests. They are limited, both in terms of the cases they can be used in and what they provide for.
126. The first scheme is Legal Help. This allows solicitors to give early advice and assistance to bereaved families. If Legal Help is granted, a solicitor will be able to help with the initial work necessary to prepare for an inquest. For example, they will be able to assist with the preparation of written submissions to the coroner setting out the family's concerns and to prepare witness statements.
127. The second type of legal aid funding available for inquests is ECF, which is only granted in very specific circumstances. ECF can cover representation at pre-inquest review hearings and at the inquest hearing itself (but not any other preparatory work).
128. The Legal Help and ECF schemes are both merits- and means-tested, however the government is in the process of removing the means test for applications for ECF in relation to legal representation, and enabling non-means tested legal help in relation to an inquest for which ECF has been granted for legal representation.

129. Merits testing means that funding is only granted if the case warrants it. The LAA will consider whether there is a risk of a breach of human rights if funding is not granted or if there is a wider public interest in the case that makes funding necessary.
130. If the case is deemed to have merit, funding can still be denied if the means test is not met. The LAA requires comprehensive financial information from applicants before it will consider an application, which can be hugely onerous for families, particularly when dealing with a recent bereavement.
131. Under LASPO there are two grounds for granting exceptional funding for representation at an inquest:
 - where representation is necessary for an effective investigation into the death, as required by Article 2 of the Human Rights Act; or
 - where the Director of Legal Aid Casework has made a wider public interest determination that the provision of advocacy for the bereaved family at the inquest is likely to produce significant benefits for a wider class of people.
132. Applicants for Exceptional Case Funding must also satisfy financial eligibility rules for legal aid. As of 2021 the financial eligibility limits are, generally:
 - Gross monthly income of £2,657; or
 - Monthly disposable income of £733 and disposable capital of £8,000.
133. The Legal Aid Agency can decide to waive the means requirement in circumstances where the state is involved, and under certain obligations to investigate the death or where there is a significant public interest.
134. Under these circumstances the family may be granted full legal aid funding at no cost or could, instead, be asked to pay a contribution towards their legal costs. The specific contribution would depend on the total likely costs of the legal representation and the family's financial means.
135. The LAA publishes a quarterly statistics bulletin. This sets out the number of inquest cases helped each year under Legal Help and under ECF, together with the cost to the public purse in assisting these families.¹³³

Table 4: Inquests, closed case volumes and costs met by the LAA for 2013/14 to 2020/21

	Legal Help		Civil representation	
	Volume	Value (£'000)	Volume	Value (£'000)
2013/14	88	301	3	43
2014/15	90	453	27	206
2015/16 (r)	99	386	55	489
2016/17 (r)	110	736	75	752
2017/18 (r)	138	792	75	703
2018/19 (r)	144	960	111	1,050
2019/20 (r)	219	2,036	167	1,741
2020/21 (r)	192	1,122	136	1,137

136. We were unable to find a figure that represented the entire cost of legal representation for public bodies, but noted the ongoing work of the campaign organisation INQUEST in this area and figures which show that in 2017, the MoJ spent £4.2 million on HM Prison and Probation Service legal representation at prison inquests. In the same year, we were told that families were granted just £92,000 in legal aid through the ECF scheme. We also note that the £4.2 million spend by the MoJ is only a partial figure of the total spent on representing state and corporate bodies at inquests, as private prison and healthcare providers, NHS and other agencies are often separately represented.¹³⁴
137. We asked witnesses what this meant for families and practitioners. They made several points clear. Henrietta Hill QC told us¹³⁵ that in practice many families are simply out of scope for legal aid. She added that legal aid is most easily available in cases where an individual has died in prison or in detention, because in those cases are nearly always covered by Article 2 of the Human Rights Act 1998 and thus the LAA will accept that the case merits legal aid funding. This does, however, leave a vast swathe of difficult, sensitive and upsetting inquests, where someone has died in other circumstances and where legal aid is simply not available. Ms Hill added that in her own experience as both a barrister and a coroner, she has seen this most often in cases of mental health where the individual was still living within the community. Here, the primary challenge for the families seems to be the inability to get legal aid at all.

138. We asked why families need representation during an inquest, referring to Mr Andre Rebello OBE's evidence to the Justice Select Committee.¹³⁶ Mr Rebello, a senior coroner, asserted:

'[T]he vast majority of people do not need representation. If we are dealing with article 2 and deaths where the state is involved, such as deaths in prison or police custody, I can fully understand why people feel they need to be represented, but even in those proceedings the coroner takes the lead and has to determine who the person is who has died and when and where that person died, by what means and in what circumstances.'

Ms Hill replied:

*'[H]aving represented families in inquests for the best part of 20 years, I cannot accept the proposition that the coroner can do the family's lawyers job for them ... The role of the lawyer in an inquest is multifaceted. If you imagine a typical inquest involving a death in custody or detention, there will be a lawyer for the state. For the prison, there will be possibly a lawyer for the mental health trust, there may well be a lawyer for individual prison officers or for the Prison Officers' Association. So immediately you're in a scenario where the family, if they are unrepresented, is faced with lawyers for all those parties who almost certainly know more about what happened to the individual that's died than they do. And so, there is an immediate inequality ... The family or the people who need to know [what happened] should be at the heart of the process. So, I think the role of a lawyer is important to give the family sufficient support in an inquest. Also, very many of these inquests, although they are described as inquisitorial in nature are very complex. You're often dealing with very heavy factual evidence, very complex medical evidence, very complex expert evidence, and the lawyer needs to be able to explain that to the family and frankly protect the family from the most difficult elements of that. They are inherently vulnerable by their status as the bereaved.'*¹³⁷

139. Deborah Coles, executive director of INQUEST, added that no one has a greater interest in establishing what happened and improving the system than the family:

'The inquest system is what families have been given to find out how and why their loved ones died. The fact that at a time of grieving they have to go through an intrusive, distressing and very protracted process when they know the state agents are funded through the public purse is really traumatising. In my experience, inquests are assisted by the presence of a lawyer on behalf of the family. No one has a greater interest in uncovering the truth and identifying

areas that need to improve, than families do. Too often we see lawyers for the public bodies shutting down areas that need to be uncovered with the aim of damage mitigation. The need for lawyers on both sides is key.’¹³⁸

140. We also heard evidence on the logistical challenges faced by families in applying for legal aid in the current system. Ms Coles spoke of the multiple hoops that families were required to jump through, answering extensive personal questions and finding it a ‘protractive intrusive and distressing process at an already intensely painful time’.¹³⁹ These included, for example, having to provide details of all family members’ income.
141. As a Commission, we were also privileged to hear evidence from Angela Pownall, the mother of Adrian Jennings, who died aged 32 in Tameside General Hospital, two weeks after his discharge from an inpatient mental health unit. She shared with us her experiences from Adrian’s death through the inquest proceedings. An ex-nurse and a social worker, Ms Pownall described feeling prepared for Adrian’s pre-inquest meeting, but discovered upon her arrival that she would be facing three barristers for the other side instead of the team managers she knew and had previously interacted with. Greater Manchester Police, Pennine Care NHS Foundation Trust and the Pennine Acute Hospitals NHS Trust were all individually represented while the bereaved parent stood alone and had to find the words to ask about her son’s death. She added that she had been unaware that she could bring someone with her.
142. We asked Ms Pownall how she had found the process of applying for legal aid. Ms Pownall told us that two working days before the inquest, which was planned to last over nine days, she had been told by her barrister that her legal aid application had not been processed and that without this the barrister would be unable to represent her. Angela instructed the barrister to contact the Coroner saying that she would not attend the inquest unless she was accompanied. The Coroner pushed the Legal Aid Agency to explain why the application wasn’t funded.
143. Ms Pownall explained to us that the LAA granted her application on a part-funded basis. This required her to pay her barrister using a loan that had been given to her by a family member. This was a loan that had been intended to cover the funeral costs for her son.
144. Adrian’s inquest concluded that his death was drug-related, contributed to by a failure to put in place and communicate an effective support plan following discharge from hospital. We asked Ms Pownall if she felt that she could have achieved that outcome without the involvement of lawyers. She told us the following:

*'No, I absolutely could not have done that by myself. There were days I couldn't even shower or get myself dressed and my life was complete whirlwind. If I had represented myself, I would have had to go to court and hear about my child's autopsy and last moments and then to ask the witness giving the report questions. Could anyone physically stomach doing that about their child? ... After the evidence had been heard each day I would go into the corridor and husband would have to physically hold me up to stop me from collapsing...I couldn't have asked questions of those witnesses and without a barrister those questions would not have been answered.'*¹⁴⁰

Litigants in person

145. LASPO's removal of large areas of civil law from scope was intended to encourage people to resolve their issues outside the court, thus reducing the cost and strain on the court system by reducing the number of applications.¹⁴¹ This aim was not fulfilled in practice, and the Public Accounts Committee's report on reforms to civil legal aid was heavily critical, observing that the MoJ 'does not know whether the reduction in spending on civil legal aid is outweighed by additional costs in other parts of the public sector as a result of the reforms'.¹⁴² Thus, while there is little reliable data available on litigants in person (LiPs), family court statistics and anecdotal evidence from practitioners and the judiciary indicate a substantial rise in self-represented parties. In the family courts, for example, in 2020, about 75% of private family law cases involved at least one side being unrepresented, an almost 15% increase on the pre-LASPO figure. The proportion of cases in which both parties are without representation has increased from around 18% to 38% in the same period.¹⁴³
146. Prior to LASPO's introduction, it was acknowledged by the MoJ that reducing the scope of legal aid would 'lead to an increase in the number of litigants representing themselves in court in civil and family proceedings' and that this may lead to 'delays in proceedings, poorer outcomes for litigants ... implications for the judiciary, and costs for HMCTS'.¹⁴⁴ Unfortunately, these predictions seem to have been borne out in practice.
147. The National Audit Office's 2014 report into the cost of the legal aid reforms estimated the financial impact of increases in LiPs. It found that:
- the increase in LiPs in family courts had cost the MoJ £3.4 million in 2013/14;¹⁴⁵
 - the impact of increased numbers of LiPs on court costs in family courts alone could be £3 million; and¹⁴⁶
 - the loss to the Treasury in lower VAT revenue through reduced payments from the LAA to providers could be £60 million in 2013/14.¹⁴⁷

148. Concern about increased costs to the system was also expressed by the Low Commission, which argued the reduction in the scope of legal aid would push up the numbers of LiPs and have knock-on costs.¹⁴⁸
149. We note that the MoJ has spent or committed over £12 million to supporting LiPs through the legal system since 2015.¹⁴⁹ Funding is part of the government's Litigant in Person Support Strategy, which is co-run by the MoJ and the Access to Justice Foundation, and provides online and telephone legal advice hubs, funding for NfPs providing free legal advice and support for LiPs at court via Support Through Court.
150. While additional support for LiPs is certainly necessary and welcome, its impact is uncertain. The number and proportion of unrepresented parties in private family law cases has increased year on year between 2013 and 2019¹⁵⁰ and practitioners cite several concerns arising from this, including a lack of equality of arms in proceedings where one party has access to representation and the impact that this has on parties at an already incredibly stressful time. Indeed, we note that Lord Neuberger has expressed concern that a rise in LiPs threatened the rule of law itself.¹⁵¹ Further, research commissioned by the Legal Services Board and The Law Society, surveying 28,663 people on their experiences of the justice system, found that of those who did not obtain professional help for their legal issue, 47% felt the outcome of their case was not fair and 35% felt that the outcome was worse than what they hoped for. This can be compared with those who did receive professional help: 66% felt the outcome was fair and 76% felt it was better or the same as they hoped for.¹⁵²
151. Research by the MoJ on the characteristics of LiPs found that the major reason they appeared in person was inability to afford a lawyer, that the majority could not competently represent themselves, that they may create difficulties for the court in refusing to engage with proceedings and that around half had one or more vulnerabilities that impacted their ability to represent themselves.¹⁵³ These characteristics create difficulties for both lawyers and the court. The Judicial Executive Board stated that LiPs harm the courts' administration and efficiency, mean cases take longer and that cases are going to court that would have been settled/dropped at an early stage if legal advice had been obtained.¹⁵⁴ We also heard from witnesses that LiPs resulted in lawyers having to undertake more, unpaid, work to assist the unrepresented party:

'[In cases involving litigants in person] the judge relies on the publicly funded party who is the child's representatives to meet that gap ... that's something that is not sustainable. It means that you have a lot more to do for no more income because what you're doing [filling the gap caused by the unrepresented party] isn't being paid for.'

Lorraine Green¹⁵⁵

152. The Justice Select Committee's report into the implementation of LASPO found that while the MoJ had made significant savings in the cost of legal aid, this was at the expense of harming access to justice for LiPs and that the MoJ had also failed to discourage unnecessary and adversarial litigation, target legal aid to those who need it most or deliver better value for money for the taxpayer.¹⁵⁶
153. These concerns cannot be viewed in isolation from other worrying statistics. As LASPO sought to discourage unnecessary and adversarial litigation, it would seem sensible then that parties to a dispute post-LASPO would be encouraged to participate in alternative forms of dispute resolution. However, the removal of private family law from scope also led directly to a significant drop in referrals to legal aid mediation. Mediations peaked in 2011/12 (pre-LASPO) at 15,357. In 2013/14 (post-LASPO), this figure had dropped to 8,438 and mediation starts continued to decline for the following six years. Despite a slight recovery, in 2019/20 there were just 7,562 starts, less than half the pre-LASPO peak figure.¹⁵⁷ Practitioners are clear that the reduction in mediation starts is directly linked to LASPO scope cuts as family practitioners were one of the main sources of referrals for mediators.

Legal need

154. One issue that we have come across in our work as a Commission has been a lack of awareness as to what constitutes a 'legal' issue. As MPs, a constituent may approach us with an issue that they deem to be 'unfair' or 'stressful', but they may just characterise it as a housing problem or a debt issue. The Equality and Human Rights Commission reported that 62% of individuals faced with a discrimination problem did not know their rights, and a similar number were unaware of the procedures involved with bringing a claim.¹⁵⁸ Therefore, although discrimination cases remain in scope for the purposes of LASPO, there are concerns that individuals will struggle to understand that their issue is legal in nature and will have low awareness of how to access appropriate and affordable help. Such difficulties often arise in the context of employment cases, which are out of scope, and so the person experiencing discrimination may well consider that they cannot access legal aid at all. Similarly, we heard evidence from Jenny Beck QC (Hon) in relation to the take up of mediation services in family law cases which reinforces the concerns set out above.
155. In 2019 the Legal Services Board and The Law Society published the findings of a major legal needs survey for England and Wales.¹⁵⁹ The study was one of the largest of its type, with data collected from 28,663 people. It must be noted that this survey did not concentrate solely on the crime, family and civil issues that remain within the scope of legal aid. However, the findings are a useful indication of broader legal need and help us to understand some of the significant gaps between legal aid provision and the needs of the public.

156. The survey found that 64% of respondents experienced a legal issue in some form in the past four years. Roughly a third (32%) experienced legal issues related to employment, finance, welfare or benefits, and just over a quarter (28%) faced an issue related to property, including housing problems such as anti-social behaviour by neighbours, issues with rented property, as well as dealing with construction and planning.¹⁶⁰
157. The report also stated that when faced with a contentious or non-contentious issue, 65% of adults successfully received some form of help: 55% sought professional help and 11% sought help from family or friends. Of the 34% who did not receive help, 21% didn't try to obtain help and 13% tried but failed to obtain help.¹⁶¹
158. It added that certain groups were more likely to try but fail to obtain help:
- 17% of those with low legal confidence against 11% with high;
 - 18% of those who believed justice is inaccessible against 11% who believed it is accessible; and
 - 18% of those from a BME group against 13% from a white British group.¹⁶²
- Of those who do obtain help, certain groups are considerably less likely to obtain professional help: 54% of those with low legal confidence did not obtain professional help vs 47% of those with high legal confidence.¹⁶³
159. As to why people did not receive professional help, 31% of those who think justice is inaccessible thought it would make no difference vs 8% of those who think justice is accessible; 21% reported perceived expense as the primary barrier.¹⁶⁴
160. The type of help received depended strongly on the legal issue:
- 55% of those with an employment, finance or welfare benefits issue reported their main adviser as being from the not for profit advice sector with only 5% saying their main adviser was a solicitor;
 - for family issues, this was more split, with 33% saying their main adviser was from the NfP advice sector and 37% saying their main adviser was a solicitor; and
 - a stark difference exists when compared with wills/probate, where 57% had a solicitor as their main adviser, or conveyancing, where 44% had a solicitor as their main adviser.¹⁶⁵
161. Of those people with legal problems in social welfare law (e.g. housing, immigration, mental health, community care etc.), we know from official legal

aid statistics that in 2012/13 there were 573,770 new cases (legal help and controlled legal representation) but only 142,556 in 2019/20.¹⁶⁶ It is very unlikely that the circumstances generating these legal problems have improved in the intervening years. There was a sharp decline in the numbers of organisations providing free legal advice (whether this was funded under the legal aid scheme or through alternative funding) during this period, which begs the question – where did these clients go to obtain help with their legal problems? Even before the pandemic, there seemed to be a large disparity between the number of clients who needed legal assistance and the capacity of the legal aid and advice sectors to respond.

162. Legal help matter starts from the beginning of the pandemic in April–June 2020 were down in comparison to the previous four quarters by about 10,000 to 25,337.¹⁶⁸ The decrease in numbers will be due to a variety of reasons – furloughed staff, reduced opening hours, the moratorium on evictions, a transition from face-to-face to remote hearings – but they are worrying nonetheless, as there is nothing to suggest that legal need declined during this period. Indeed, figures from domestic abuse charities and online sources of legal information show severe spikes in many areas of family and civil law.¹⁶⁹ They also point to a sharp reduction in funding for legal aid providers, with practitioners telling us that this reduction was not offset by government financial relief measures.
163. The pandemic has also raised questions about the ability of the legal aid and advice sectors to respond to changing legal need, where those changes are a result of the pandemic, and because it is accepted that advice organisations did not have the resources to meet demand before the pandemic. New legal issues have arisen in relation to human rights and personal freedoms, in relation to employment disputes as employers have reacted to disruption, uncertainty and new methods for managing staff, in relation to access to welfare, housing support and social care, and in relation to massive increases in personal debt, rent and mortgage arrears.
164. We return, then, to the original question about sufficiency of provision: are enough individuals able to access justice when they need it? Given the concerns around scope, the means test, and ECF, together with problems accessing legal advice and representation in many areas of England and Wales, we have serious reservations about the conclusions reached by the LASPO PIR. We also see a real need for targeted research to help shape the provision of legal services and ensure that government policy is formulated on a comprehensive, evidence-based understanding of legal need.

165. We would add that we disagree with the central premise of the LASPO PIR, which assumed that meeting demand for legal aid services was simply a matter of having enough firms spread across the country to take up the matter starts available for new cases.¹⁷⁰ The evidence that we heard from witnesses suggests that the truth is rather more complicated than this. The government must improve its understanding of the scale of legal need and of the consequences for individuals, society and public services of failing to meet legal need. Services should then be designed and commissioned to meet this need, and the organisations delivering the work must be sustainable and have the resources to adapt to changing need. We look at this and issues around the sustainability of practice in further detail in Part 4, below.

PART 4 – THE PROVIDER PERSPECTIVE

What do we mean by ‘sustainable’ legal aid services?

166. In reaching its conclusions as to the sufficiency of legal aid provision, the LASPO PIR echoed the Bach and Low Commissions in calling for further independent research into the sustainability of the legal aid profession.
167. In the years since LASPO, some research has been undertaken in this area, with the frequently cited Otterburn and Ling report¹⁷¹ into the viability of criminal legal aid firms in 2014. According to their report, most legal aid firms operated with a 9% profit margin overall but only 5% in crime but they noted that at ‘this level of profitability the supplier base is fragile and vulnerable but most firms have survived.’¹⁷² They concluded that this existing 5% level should be taken as a minimum level required for viability.
168. Until this year, however, no independent research had been undertaken that attempted to map the legal aid market in its entirety or to see the interplay between the various practice areas. It has been the aim of this Inquiry, and the closely-aligned Legal Aid Census, to ask these questions and to establish a baseline of data for use by government departments in the years to come. It is our strongly held belief that there is a need for further research to be conducted in this area. As the need for legal advice is predominantly driven by factors such as poverty, migration, debt and family breakdown, this research must be carried out on a regular basis to reflect changing need and changes to the drivers of legal need.
169. In hearing evidence, and making our recommendations for this Inquiry, we wanted to take the opportunity to ask about more than the economics of the system. As an Inquiry, we wanted to ask not only what the system looked like but what it should look like, and we found ourselves returning again and again to the question: what is enough? What sort of access to justice is enough for the individual to have their rights protected? What is enough in terms of the type of provision and geographic location of that provision? And how have those ideas changed over the past year when so much has, out of necessity, been done

remotely? We explore these and other themes below in relation to the economic viability of the legal aid sector.

170. So what does it mean to be a sustainable legal aid organisation or firm? We considered this issue at length in preparing each of our oral evidence sessions and in the questions that we put to our witnesses.
171. We also noted the overlap of our work with one of the key aims of Sir Christopher Bellamy's Independent Criminal Legal Aid Review,¹⁷³ which sets out:
- 'To reform the Criminal Legal Aid fee schemes so that they:
[...]*
- *support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce ...'*
172. We used these concepts as a starting point, but it is our opinion that any working definition of 'sustainable' in relation to a legal aid provider must include the ability to:
- i. make a profit and to provide an income to the business owner that is commensurate with their skills and seniority as a lawyer and a reasonable commercial return on the business. For NfP agencies, sustainability in this context should enable them to generate a surplus that ensures they can operate with sufficient reserves to satisfy guidance provided by the Charity Commission;
 - ii. cover the costs of the service with no further need for subsidisation;
 - iii. offer salaries that are competitive within the legal market and provide employees with a reasonable standard of living;
 - iv. be able to recruit new lawyers into the system and to attract graduates from a wide range of socio-economic backgrounds;
 - v. retain those lawyers within the firm – or at least within the sector – by means of realistic career progression; and
 - vi. be economically viable now, and for the foreseeable future (five to 10 years).
173. We asked providers at every level of qualification and from as many different legal aid practice areas as possible how their lived experiences measured up to these six central tenets.

Fees and profitability

174. The myth of the fat cat lawyer has been tabloid fodder for over a decade. The reality is very different: fees that have not increased in over 20 years; fixed fees and cuts from scope that removed much bread-and-butter work from legal aid; legal aid work that must be subsidised with grant funding, inter partes costs or more lucrative private work. Indeed, panel member James Daly MP spoke about his experiences as a criminal legal aid solicitor for 16 years, adding that he was forced to give up his work as he was unable to 'earn either sufficient money to pay the partnership or to pay [himself] a sufficient salary'.¹⁷⁴
175. Over the course of the Inquiry, we discussed a wide range of topics – scope, barriers to entry into the profession and working conditions within it. At the heart of each of these lay the issue of fees. We heard evidence as to how this fed into other concerns such as an inability to recruit, issues around retaining staff, career progression and the economic viability of this work, and we look at each of these in turn below.

Fixed fees and complex work

176. What became apparent from witness testimony, time and again, was how complex and specialised social welfare law can be. Nicola Mackintosh QC (Hon) spoke of her community care practice and the vulnerability of her client group. Disputes in community care are wide-ranging and generally include vulnerable individuals who are unable to obtain services (from basics such as shopping for food and other essentials such as personal care) or who need to challenge decisions imposed on them (decisions to move vulnerable people from home to a care placement or reductions in care packages). Advising in this area is extremely legally complex and involves a comprehensive knowledge of legal duties and powers applying to different statutory agencies. Clients are often disabled, always vulnerable, and exceptional skills are required to advise and represent them. Often, this will require extra time on the part of the practitioner – time that is unpaid under the current fee structure.
177. Ms Mackintosh explained that the majority of this work (short of issuing court proceedings) is done under Legal Help rates,¹⁷⁵ so reading papers, meeting with the client (generally at their home), identifying the legal issues, corresponding with the other side and preparing the legal arguments will all be done within a fixed fee of £266. As with other practice areas, an escape fee threshold applies. This means that should the practitioner's 'profit costs' exceed three times the fixed fee, they will be eligible to be paid on an hourly rate. In practice, however, providers told us that a significant proportion of cases required work

that exceeded the fixed fee rate but remained below the escape fee threshold, resulting in huge amounts of legal aid work being done on a pro bono basis.

178. Jenny Beck QC (Hon) also discussed the effect that fixed fees had on her boutique family practice.¹⁷⁶ She explained that when fixed fees were introduced in 2007, the fund that had been used to pay for legal aid was divided for the different practice areas. The fee structure worked on a 'swings and roundabouts basis' so that where providers would lose money on some matters the fixed fee would cover their work on others. Ms Beck added that the fees were then cut in 2011 resulting in a further exodus of legal aid providers. LASPO then removed the simpler cases from scope leaving only those more difficult and time consuming matters within the fixed fee. This made it very difficult for practices such as hers to sustain a business and necessitated subsidising the work with private cases.

'There needs to be an overhaul of fixed fees. The complexity of the work done on fixed fees has increased in a way that it could have not been anticipated by the fixed fees system. As an absolute minimum, there needs to be an independent review board for fixed fees.'

Kerry Hudson¹⁷⁷

179. We also heard from Polly Sweeney, of newly established firm Rook Irwin Sweeney, who specialises in education law.¹⁷⁸ She explained that the primary remedy for special educational needs (SEN) and discrimination cases lies with the First Tier Tribunal (Special Educational Needs and Disability), and therefore this work is funded under the fixed fee Legal Help scheme with no opportunity for inter partes cost awards. Initial work for Judicial Review cases is at Legal Help level and can progress onto a legal aid certificate (and paid at hourly rates) if proceedings are issued (which is very rare) or if Investigative Representation is required.
180. Ms Sweeney added that government data published in 7 May 2020 showed a huge amount of legal need in the education field: there were 390,109 children and young people with education, health and care (EHC) plans in England – an increase of around 10% from 2019.¹⁷⁹
181. The latest data from 13 May 2021 shows this figure has again increased by 10% from 2020, so that now 430,697 children have EHC plans in England in May 2021.¹⁸⁰ In its latest report about the EHC plan process, the Ombudsman has revealed it is now upholding nearly nine out of every 10 (87%) cases it investigates – a startling figure compared with its uphold rate of 57% across all cases it looks at, discounting SEND cases.¹⁸¹

182. Against this backdrop of increasing need for advice and support for thousands of families, there are just eight organisations in England and Wales that have legal aid face-to-face contracts for education, which includes SEN advice. Ms Sweeney told the Inquiry that this contract has recently been subject to a tender round (there are now 10 organisations holding such contracts following the tender¹⁸²). However, there is a significant shortfall in supply. She added that it appears that this tender will not significantly increase supply and that her understanding is that so few providers tendered because the work is financially unsustainable. Ms Sweeney submitted the relevant fee tables as evidence low fees undermining sustainability.

**Table 5: The Civil Legal Aid (Remuneration) Regulations 2013 (Schedule 1, Table 7(a))
Immigration and asylum escape fee cases, mental health, actions against the police,
public law, education and community care
Legal Help, help at court and family help (lower)**

Activity	London rate	Non-London rate
Preparation, attendance and advocacy	£52.65 per hour	£48.24 per hour
Travel and waiting time	£27.81 per hour	£27.00 per hour
Routine letters out and telephone calls	£4.05 per item	£3.78 per item

183. Ms Sweeney explained to the Commission that the maximum a practitioner outside of London can claim for a legal aid case, regardless of their seniority or experience, is £48.24 per hour. In comparison, the HMCTS guideline solicitor's rate (which has itself not been uplifted for over 10 years) is £217.00. In London, for solicitors with over eight years' experience, that figure would be £409.00 per hour.¹⁸³ This is a strong disincentive for practitioners to take on legal aid work.
184. In addition, because the First Tier Tribunal (Special Education Needs and Disability) is a 'no costs' jurisdiction, even if the parent or caregiver is wholly successful in their appeal, there is no opportunity for counsel to recover inter partes costs. The difference in the rates payable at market (or inter partes) rates¹⁸⁴ and legal aid rates is illustrated in table 11 below:

Table 6: Selected Guideline Hourly Rates for Summary Assessment of Costs¹⁸⁵

Average guideline hourly rate for a qualified solicitor in central London	Average guideline hourly rate for a qualified solicitor in national grade 2	Hourly rate paid for a County Court claim at legal aid rates (irrespective of grade)
£251.67	£174.67	£63.00

Inflation

185. Witnesses informed us that not only has there been no increase in legal aid rates since the 1990s, but that civil practitioners suffered a 10% fee cut in 2011 and criminal defence practitioners suffered a 8.75% fee cut in 2014. As a result, providers have suffered actual cuts and reduced income in real terms, year on year, over the past 25 years or so. Because of the impact of inflation, the legal aid fees that practitioners receive are worth a fraction of what they were 25 years ago. In the interim, we have seen the cost of living and the cost of delivering services rise steeply.

'I have lived through the period where legal aid barristers were paid a decent rate, lived through the reductions and I'm now living through a period where the rates are static. I am now probably earning less on rates than I was when I started.'

Marina Sergides¹⁸⁶

186. We prepared the fee tables below as part of this Inquiry to give some indication of what the fees in various practice areas would be had they been adjusted in line with inflation. We have included the 1996 rates and 2020 rates. These are intended as snapshots of the work that is done in relation to a case and an indication of the difference between existing fees and inflation-adjusted fees.

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Table 7: Criminal legal aid – Magistrates Court proceedings

Class of work	1996 rate in London	2020 rate	Inflation adjusted rate	Percentage loss
Preparation	£47.25	£45.35	£89.36	49.25%
Advocacy	£56.50	£56.89	£106.86	46.8%
Attendance at court where counsel assigned	£30.50	£31.03	£57.68	46.2%
Travelling and waiting	£24.75	£24	£46.81	48.7%
Routine letters written and routine telephone calls	£3.60 per item	£3.56	£6.81	47.7%

Table 8: Criminal legal aid – Crown Court and Court of Appeal proceedings

Class of work	Grade of fee-earner	1996 rate in London	2020 rate	Inflation adjusted rate	Percentage loss
Preparation	Senior solicitor	£55.75	£50.87	£105.44	51.75%
	Solicitor, legal executive or fee-earner of equivalent experience	£47.25	£43.12	£89.36	51.75%
	Articled clerk or fee-earner of equivalent experience	£34	£31.03	£64.30	51.75%
Advocacy	Senior solicitor	£64.50	£58.86	£121.99	51.75%
	Solicitor	£56.00	£51.10	£105.91	51.75%
Attendance at court where counsel assigned	Senior solicitor	£42.25	£38.55	£79.91	51.75%
	Solicitor, legal executive or fee-earner of equivalent experience	£34.00	£31.03	£64.30	51.75%
	Articled clerk or fee-earner of equivalent experience	£20.50	£18.71	£38.77	51.75%

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Class of work	Grade of fee-earner	1996 rate in London	2020 rate	Inflation adjusted rate	Percentage loss
Travelling and waiting	Senior solicitor	£24.75	£22.58	£46.81	51.75%
	Solicitor, legal executive or fee-earner of equivalent experience	£24.75	£22.58	£46.81	51.75%
	Articled clerk or fee-earner of equivalent experience	£12.50	£11.41	£23.64	51.75%
Routine letters written and routine telephone calls		£3.60 per item	£3.29	£6.81	51.75%

'In the majority of legal aid matters, papers are received the night before, [there are] long nights and it is stressful. One example, I was in court a few days ago and my client had 15 charges against her. Prison definitely an option. I spent two-and-a-half hours prepping, two-and-a-half hours travelling, a 45-minute conference as it was a complex case, co-defendant also, in court for six hours in total with first appearance concluded. Travelled home two-and-a-half hours and then spent 40 minutes sorting my notes and sent to my solicitor. I was paid £50+VAT for all of that work because it is a fixed fee irrespective of the complexity of the work.'

Aqsa Hussain¹⁸⁷

187. These figures are for illustrative purposes only, but we note the loss of 46–52% in real value of each hour of work or item of work done. We believe that for the profession to be truly sustainable, legal aid work should be seen as financially viable and not loss-making on a number of fronts.

'10 years ago I never turned anything away but now I am a lot more conscious as to the type of case involved and potential fees. I would not necessarily turn it away from the firm but I do have to see whether it is viable for us to keep doing certain types of work.'

Rakesh Bhasin¹⁸⁸

188. We also include below a table of fees prepared for us by the Family Law Bar Association (FLBA). These have been included to compare private rates with those payable under legal aid for junior barristers (up to five years post-call). We understand that these have been approximated for the purposes of

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comparison and in reality will vary hugely. FLBA has provided the following explanatory notes:

- A one-day hearing will usually start with a conference at 9.30 am, with the hearing starting at 10.00. This may finish at 4.30 pm with a conference to follow.
- Domestic violence (DV) injunction one-day hearing – five hours' preparation.
- Private law leave to remove case one-day final hearing – five hours' preparation.
- Five days private law case fact-finding and welfare combined – 12 hours' preparation.
- Legal rates for a public law case for a similar five-day combined fact-finding and welfare hearing – 12 hours' preparation.

Table 9: FLBA comparison of legal aid fees and approximated private fees

	Family Advocacy Scheme	Private (Outside London)	Private (London)
DV injunction	£361.17 District judge/circuit judge	£750-1,000	£1,250-1,500
Private law leave to remove	£576.60 District judge/circuit judge Two hearing units – £172.40 x 3 Court bundle to read 350-700 pages – £59.40	£1,000-1,500	£1,750
Private law five-day fact-find	£2,859.80 District judge/circuit judge Final hearing x 5 £436.73 Expert bolt-on x 5 £436.75 Court bundle to read 701-1,400 pages £239.40	£4,000-5,000 Brief fee £2,000-2,500 Refresher £500-625	£7,000-7,500 Brief fee £3,000-3,500 Refresher £1,000
Conference	£125.37	£350-500	£850-1,000

In addition to the above the FLBA provided us with the following indication of costs:

Public Law five-day composite hearing – £3,719.90

District judge/circuit judge

Final hearing x 5 = £2,784.40

Expert bolt-on x 5 £696.10

Court bundle 2 701-1,400 pages £239.40

What it costs to provide a service

189. We spoke at length with witnesses about their business models and the cost of providing a legal aid service. Answers varied hugely, with some organisations obtaining grant funding and others subsidising their work with private income. We set out some of the answers in further detail below with our commentary.
190. Julie Bishop, Director of the Law Centres Network, told us that on average just 30% of a Law Centre's income comes from legal aid contracts. The vast majority of the rest is derived from local authority or grant funding. She added that the additional income is necessary as it costs a Law Centre between £75 and £100 per hour to employ a solicitor or caseworker, well above the average legal aid rate of £63 per hour paid for complex litigation.¹⁹⁰
191. This was echoed in family law, where Jenny Beck QC (Hon) spoke of paying her newly qualified solicitors a higher than industry standard¹⁹¹ of £30,000–32,000. She explained that when overheads such as national insurance, IT, lighting, heating, practicing certificates, etc. are factored in, the cost of each solicitor is around £50,000 a year. If each solicitor works a 37-hour week for 46 weeks of the year they would achieve 1,702 chargeable hours. Under the average hourly rate for legal aid, each practitioner would net £40,000 per year, a loss of £10,000 each.¹⁹²
192. Ms Beck added that in order to be financially viable, the practice must set individual billing targets of £80,000–100,000. On legal aid rates, solicitors must work double time to meet this target, with 10-hour days being commonplace. Her team report their contemporaries who qualified at non-legally aided firms starting on salaries of £40,000–80,000 depending on their specialism. This work would command fees of around £150–200 per hour, making this a much more attractive option for both employers and employees and making it more possible for fee earners to meet reasonable, sustainable billing targets.¹⁹³
193. In crime, Commission member James Daly MP explained that the business model of his firm in Bury had been that no money was made on work in the Magistrates Court and the hope was that Crown Court work was sufficient to cover costs and to provide some profit.¹⁹⁴

Rakesh Bhasin, partner at Edwards Duthie Shamash echoed this view, adding that:

'There are certain areas of our criminal team that are loss-making, certain offences that involve time and effort that make representation not worth it, particularly matters where a client elects trial by jury

*as we are at risk of simply getting a fixed fee for that work ... Profit, if there is any, tends to be in the Crown Court but even that is being cut. Within the firm I still have to justify how the criminal department makes its money and supports itself. It is not as if we can look to other areas of the firm to support one another, we are carrying a lot of employees and of overheads that we have to pay for.'*¹⁹⁵

194. While all law firms and legal advice agencies have to generate sufficient income to cover personnel costs and other overheads, legal aid providers incur additional costs that are directly linked to the legal aid contract requirements. It is not possible to list all of these legal aid specific overheads, but they can be summarised as:

- The need, in most cases, to have an office within the specific geographic location to hold a contract to deliver services in that locality. By contrast, non-legal aid firms can set up anywhere and deliver services to clients based in any location. Non-legal aid firms can opt for any mode of delivery (outreach, face-to-face, online) to meet their clients' needs and can adapt as they see fit. The mode of delivery for legal aid firms is dictated by the LAA and any adaptations to meet the changing needs of clients are slow to enact, with contractual provisions unlikely to change materially until new contracts are introduced as part of a periodic tender round. Legal aid providers are less agile than their non-legal aid counterparts as a result.
- Supervision of staff, with strict rules on supervisor/supervisee ratios, the designation of supervisors for each contract area, and the method(s) of delivering supervision and file review. These contracting requirements are over and above the requirements of quality standards (such as Lexcel) or the Solicitors Regulation Authority.
- Audit, compliance and quality assurance – despite legal aid fees being significantly lower than standard private fees, there are heavy compliance and administrative burdens on legal aid providers, which also include issues such as quality standard accreditation and specific panel member/qualification requirements for some practice areas.
- Administrative tasks, many of which are not unique to legal aid practice but cannot be claimed as billable work, despite being integral to file management, client care and compliance.
- The need to provide regular training to staff to maintain compliance and ensure they understand the legal aid scheme, over and above the training required to maintain competence in relation to legal practice skills and subject specialism(s).

'Over the 12 years I have been working it has become increasingly impossible to live within the lower crime work, and at one point we saw hardly any work at all during the lockdown. At any point I fear we could get another cut and yet we still have those overheads. Moreover, our LAA contract is very tight, saying that we need an office in the City of London. So we are paying 2020 rent rates but we are paid 1990 income rates.'

Kerry Hudson¹⁹⁶

The legal aid workforce – recruitment, retention, retirement

195. All of our witnesses described a palpable crisis in relation to the health and vitality of the legal aid workforce: perceptions of an ageing demographic, difficulty with succession planning, fewer juniors coming through, declining numbers of positions and an inability of firms to justify the costs associated with training the next generation given the current fee structure. We look at each of these areas in further detail below.

An ageing demographic – concerns over recruitment and succession planning

196. Witnesses consistently reported issues with the pipeline of new practitioners entering and remaining in the legal aid sector. It is becoming more difficult to fill vacancies, with fewer applicants and in some cases vacancies being advertised repeatedly before any suitable candidates apply. This lack of a steady pipeline of new recruits flows through into every level of legal aid providers and, at the latter end, is impacting on the ability to plan for the future and ensure a smooth transition in senior, management and ownership positions when practitioners retire.
197. Research carried out by The Law Society in 2018 found that the average age of a criminal defence duty solicitor was 47,¹⁹⁷ which underlines the crisis in the recruitment and retention of legal aid practitioners.

'A couple of years ago I joked that I may become part of the Young Legal Aid Lawyers again because the average age is so high. Around the courts I worry about the solicitors at the younger level – whilst we do train solicitors and recruit young paralegals, the way criminal law is battered in terms of fees and public perception – people are not incentivised to remain as criminal lawyers.'

Rakesh Bhasin¹⁹⁸

198. We await the results from the Legal Aid Census to build a comprehensive picture of the average age of legal aid providers but a source of data has recently

become available in relation to criminal legal aid in the form of the data compendium. The MoJ describes the data as 'not intended for the lay reader'. Indeed, it's not the most user-friendly of sources. It does, however, provide some useful insight into the criminal legal aid market, aspects of which are set out below.

The position for juniors

In firms and not-for-profit providers

199. One issue that became immediately apparent upon speaking with practitioners at different stages of their careers is how much more it now costs to qualify into legal practice than it did a generation ago. Several of our more senior witnesses commented on having entered the profession with minimal amounts of debt by today's standards. They spoke of qualifying earlier, the cost of living and house prices being lower and the profession providing a comfortable lifestyle at a relatively early stage of their careers.
200. By contrast, those junior practitioners starting now can expect to incur debts of between £50,000 and £70,000 depending on their undergraduate degree and postgraduate qualifications. We heard from Stephen Davies,²⁰⁰ a junior criminal defence solicitor for Tuckers based in London, who explained that salaries for trainee practitioners can be minimum wage, while newly qualified criminal defence solicitors often earn between £24,000 and £26,000. For those without family support to fall back on, the prospect of such little return on their investment is a daunting one.

'When I left university over 12 years ago I was saddled with around £40,000 of debt. Because the legal aid fees are so low, based on 90s levels, firms cannot pay beyond minimum wage. A young person saddled with twice my debt would find practising legal aid in central London unaffordable.'

Kerry Hudson²⁰¹

'I did my law degree, after which I accepted a job as a paralegal with a view to a training contract. You are not offered security for a training contract but the firm say they will think about whether they will offer you one. I was one of 900 applicants for that position which paid around £17,000. My parents paid my LPC fees which I did at the evenings and weekends. I lived outside London and commuted in on an annual season ticket costing £4,000. I was working all hours of every day to get funding.'

Rose Arnall²⁰²

201. The data compendium tells us that in 2014/15 there were 5,460 trainee solicitors in England and Wales. By 2018/19 there were 6,340.²⁰³ In 2014/15, there were 230 criminal legal aid firms with trainee solicitors. By 2018/19, there were 260 firms.²⁰⁴ However, in 2014/15, there were 620 trainees who went on to work for criminal legal aid firms. This had dropped to 570 by 2015/16 and 380 by 2016/17.²⁰⁵ These reductions demonstrate a more general trend.
202. The Data Compendium also looks at the numbers of criminal legal aid solicitors and their average post qualification age.²⁰⁶ In 2014/15, there were 14,790 solicitors and 53% had over 10 years' post-qualified experience (PQE)). By 2018/19, the overall number had dropped to 11,760 and 61% had over 10 years' PQE.
203. We can see this overall reduction in numbers in those joining criminal legal aid practice as well.²⁰⁷ In 2015/16, 1,890 practitioners joined. By 2018/19, this had dropped to 1,500 (of whom 228 were returners).
204. While the data compendium indicates that fewer juniors are looking to enter the criminal legal aid profession, witnesses also told us that firms are struggling to justify the costs in bringing them in as profit margins are so low (some witnesses told us that there are not profits in legal aid). Prior to 2010, the government provided training contract grants for legal aid firms, which had supported, on average, 85 trainees a year with sums of over £20,000 each.²⁰⁸ This ceased in 2010 and firms must pay the cost of training themselves unless they are part of a scheme such as The Legal Education Foundation's Justice First Fellowship scheme. This scheme provide grant funding for firms or organisations which covers the trainee's salary (which generally ranges from £18,000 to £28,000 depending on the organisation) and on-costs over the course of two year training contract or pupillage. The grant also covers supervision, mandatory external training and associated costs to ensure that host organisations have the capacity to supervise properly.

'It is virtually impossible to recruit if there are even any firms looking to recruit. Recruiting adds an overhead to the business and in the situation we are in at the moment it is difficult to justify adding that overhead. This is mostly because fees from additional recruits won't be seen for some time. Secondly, I would like to underline how my department has seven solicitors in it and the youngest is 39, and the last trainee solicitor we took in for crime qualified at 27. The average age in the department is 53. We know from the Law Society heat map²⁰⁹ the national average age is 47, and this would have only increased as new recruits are not coming in. And it is easy to

understand why new recruits are not coming in, as their prospects are very uncertain. I have lost numerous solicitors over the years, not to other firms, but rather to the CPS or [local authorities] or qualifying in some other line of work.'

Bill Waddington²¹⁰

205. This difficulty in finding and recruiting juniors doesn't seem to be limited to criminal legal aid. Julie Bishop of the Law Centres Network told us that Law Centres used to have 80 or 90 applicants for each role advertised. Now law centres, even those in London, will be lucky to get five or 10 applicants.²¹¹ Law Centres do still take on trainees but the number is falling and there is a huge issue with retention.
206. This was echoed by Marcia Willis Stewart QC (Hon) of public law specialists Birnberg Peirce, who mentioned that two members of her team retired recently and the firm received only three applications to those roles. She told us that this would have been dozens a few years ago.²¹²

'We need to be able to retain and recruit staff. And at the moment there aren't any community care lawyers out there. We recruit and we train our own. I've taken on three trainee solicitors, and I'm very proud that they're now qualifying as community care and mental capacity solicitors. But you know, this isn't about me as one firm. This is about an entire system that needs addressing so that everybody who needs advice about these very fundamental issues is able to access it when they need it.'

Nicola Mackintosh QC (Hon)²¹³

At the publicly funded bar

207. Witnesses at both our Publicly Funded Bar and Future of the Legal Aid Workforce evidence sessions commented on the financial hurdles faced by juniors at the bar. They told us that it takes up to a decade of university, postgraduate training and work before young barristers can start to see a reasonable income and standard of living. The Bar Council cite the average age of those who begin to earn a return on the huge debt levels they have built up as being 33 years old.²¹⁴ For the years that precede this, individuals incur all of the risks of the economic investment in a career at the self-employed legal aid bar, with no insurance in the form of pension, sick pay, or regular salary.

'The real difficulties begin to be seen at the junior end of the bar. For example, if I have conducted a serious criminal trial, but I cannot

return and do the sentence for a reason beyond my control, in that situation I return the brief for sentence and a more junior barrister will probably get the brief. The junior has to read all the paperwork and consider all relevant factors for sentence, they have to get to court, which can take multiple hours. The conference may last an hour with a vulnerable person who needs reassurance. They will then perform the advocacy, see the client after to make sure they understand the sentence. Travel back and report the sentence. They will be paid £126 for all of that. If it is a local court, they will have to pay their travel, food, percentages to chambers, and they are not left with enough to make a living. Those hearings are what junior barristers pick up daily, it is one example of many showing that professionals dealing with the liberty of other human beings are being asked to work for fees that simply do not reflect any of those factors.'

Joanna Hardy²¹⁵

'I started pupillage in 2014/15, I had a £12,000 pupillage award. £6,000 in my first six months and £6,000 guaranteed earnings in my second six months. During my second six, I did a lot of magistrates work at extremely low fee rates which have not changed since then. The rates were £75 for a half-day trial, £150 for a full day trial and £50 for all other hearings. If you were in court for 3 hours or for a hearing other than a trial you may be lucky to get £100.'

Natasha Shotunde²¹⁶

208. More than one witness commented that the low fees sometimes led to colleagues taking on a high volume of work which can lead to burn-out and also not having enough time to prepare cases. This may have consequences for the quality of the work.
209. Others spoke of the difficulties that juniors had faced over the pandemic. One witness cited colleagues who had to claim universal credit or grants from their Inns of Court benevolence funds due to their drop in income. We were told that many junior barristers did not qualify for the government's self-employment support as they did not have three years of tax returns. One of our witnesses described her fear at being forced to attend court regularly over the course of the lockdowns:

'There were huge issues in the beginning with how the magistrates were not allowing CVP [Cloud Video Platform] hearings to take place.

In the beginning of 2021 there was a decision that CVP would be a default hearing unless all parties would need to attend. Before that, we were expected to still go to Magistrates Courts that had no PPE in the cells, no hand sanitisers, no social distancing etc. It felt like a game of Russian roulette running the risk of getting COVID when we went to court. Many of my colleagues have picked up COVID through attending court and I myself picked it up last summer, though of course I cannot say whether that was from court. Things have got better though so credit where credit is due.'

Aqsa Hussain²¹⁷

Retention

210. We see similar patterns in the data around retaining staff. The data compendium tells us that in 2015/16 3,970 solicitors left the criminal legal aid market (28% of whom were under 35, and 45% of whom were based in London). In 2018/19, 2,880 solicitors left the criminal legal aid market (26% of whom were under 35 and 49% were based in London).²¹⁸ Thus we can see that a significant proportion of the younger members of the profession are leaving criminal legal aid practice for other areas of work. This is echoed in the numbers of duty solicitors.
211. The Law Society has reported on the ageing population of the criminal duty solicitor with the average age in 2018 being 47²¹⁹ and large areas of England and Wales where the majority of duty solicitors were over 50. While all criminal defence solicitors are not duty solicitors, it is our understanding that many do obtain this further qualification and the opportunity it provides to generate additional work, so the figures can be seen as indicative of an ageing population. The data compendium reports the following figures:
- there were 4,360 duty advice solicitors in total in 2019,²²⁰
 - 1,540 of these individuals identified as female and 2,810 male,²²¹
 - of these, just 1,640 are under 45,²²² and
 - 54% had 18+ years' PQE and 21% had 28+ years' PQE.²²³
212. The total number of duty advice solicitors who left in 2017 and 2018 was 1,000. Almost 10% of the 1,000 duty solicitors who left had joined the CPS.²²⁴
213. We asked witnesses what they thought lay behind these figures. They each pointed to low fees leading to low salaries in legal aid work. Many reported losing juniors or colleagues to local authorities and the CPS where salaries are higher and there is a perception of more stability and a better work/life balance.

'I believe this is a twofold issue. First of all, we can't afford recruitment at the moment. We could offer jobs to people but we cannot afford to pay them. Solicitors are time-poor, being told that good candidates can't work for you because the salary is too low is crippling. Moreover, we can't cut costs and corners because of the bureaucracy that exists to comply with the LAA regulations. Even if you recruit somebody, people very quickly move on – either to the CPS because of a better salary, work-life and security, or they leave completely. These are often experienced, caring solicitors that are being pushed into a corner.'

Kerry Hudson²²⁵

'My best friend is three years younger than me. He works for BT doing broadband maintenance work. He earns £40,000 a year and £120 per call-out in the North East. If he was London-based, his call out would be £150+. I earn £30,000 and my call-out as a criminal defence solicitor in London is £90. It would be £50–£70 in the North East. I'm proud of my friends but it's very hard to stomach at times given the £60,000 debt that I've incurred in training and qualifying.'

Stephen Davies²²⁶

'The rates of attrition are high. All of my friends who have left the bar are women coming close to 30 worried about lack of financial security. It is definitely something I worry about all the time, I have been told it will get better if I stick it out over a few years. It will get better but how much will I miss out on by sticking it out those few years waiting for it to get better. It is women and others from non-conventional backgrounds who cannot stick it out until things get better.'

Aqsa Hussain²²⁷

Diversity in the legal aid profession

214. Publicly funded law is renowned for welcoming practitioners of every race and background. It is a rich and diverse community reflective of the clients that it serves and we saw this time and again in our evidence sessions.
215. However, despite this diversity, concerns in this area were threefold and pertained to both ethnicity and socio-economic backgrounds.
216. Turning first to financial barriers, many witnesses expressed concerns that the high costs of entry and low fee rates rendered it harder for those from less affluent backgrounds to make their living in publicly funded work. These are themes that we have explored elsewhere in this report, but we heard over and

over again that those from poorer backgrounds are less likely to choose social welfare law because of the cost of qualification versus the rates paid for this work. Without an extra cushion of support, these individuals may also be less able to remain within the profession once they have joined it. More than one witness told us that the junior end of the profession was only open to those who could afford to work for nothing. All thought that the system as a whole would be poorer for the loss of those from broader socio-economic backgrounds.

'My generation is the most diverse for pupils and it is the legal aid sector that has attracted the bulk of that diversity. If we cannot afford to stay in that sector because it is not financially viable then both my colleagues miss out and also the public miss out on having a profession that is diverse and reflects the reality of the world.'

Aqsa Hussain²²⁸

'In London at the moment, the area is diverse, but the issue is that those lawyers at present are mid-40s, mid-50s. Those of us who qualified as lawyers were able to get grants for studying law and training, we could take a chance. The issue now is that BME graduates are often from a lower socio-economic class and don't have those grants we had, or the bank of mum and dad to fall back on. If a graduate leaves university and undertakes the LPC leaving with a £60,000-70,000 debt, to enter the profession where the starting salary in London is £25,000-26,000 in London, the maths does not add up. The concern is that given those from a BME background may not have sufficient financial support, they won't be interested or able to enter the profession.'

Anthony Graham²²⁹

217. While the sector was generally held to be an ethnically diverse one, certainly more so than in other areas of the legal profession, witnesses noted that in many instances BME members of the profession may also be those from less secure socioeconomic backgrounds and so less likely to be able to train and qualify into the legal aid sector and weather the first few years within it.

'The issues of huge debts, fees remaining static and an ever-reducing number of solicitors practising in legal aid really weigh against those who want to enter the profession. My additional worry is that as the legal aid Bar has a proud history of better representing BME communities than other parts of the Bar that this too could be lost. My experience coming to the Bar in debt is far different to that faced by young practitioners today.'

Marina Sergides²³⁰

218. Practitioners also cited concerns with the treatment of practitioners from ethnic minorities by court staff and the judiciary. The first of our oral evidence sessions coincided with the publication of barrister Alexandra Wilson's book *In Black and White*, which speaks of her experiences as a Black woman at the bar and the discrimination that she faces in court. Sadly, we heard from our witnesses that such comments and discriminatory remarks were not uncommon. Witnesses reported being mistaken for the client in criminal proceedings, or a relative in family proceedings. This behaviour has no place in our courts or our legal system.

'Incoming junior barristers are hugely diverse but [this is] still nowhere near good enough. Recently we have seen junior barristers from mixed-race backgrounds being mistaken for defendants in court: that is appalling. We also saw only 48% of barristers responding to demographics survey responded about their educational background. Even if everyone answering that went to their local state school, the bar would still be disproportionately overly private school-based. The risk we run at the bar, which is a brilliant job, is that we don't get many thanks or very much money and that the job will still attract people when you cut the pay. Back in the day, being a barrister was deemed to be something of a hobby profession for wealthy white men and we do not want to see the profession returning to that. We should be able to look kids in the eye and say you can work in the publicly funded bar, you won't be rich but you will be able to do it. I'm reaching the stage where I cannot say that to young people.'

Joanna Hardy²³¹

219. Finally, it was noted that while much had been done in this area, and that the sector is diverse and multicultural, more work is needed. Natasha Shotunde of the Black Barristers Network shared with us research that the organisation had undertaken highlighting issues of diversity and progression within the profession.²³² The Bar Standards Board reported that around 3.2 per cent of the Bar, 5.3 per cent of pupils, 3.4 per cent of non-QCs, and 1.3 per cent of QCs are from a Black/Black British background. This compares to around 3.4 per cent of the UK working age population.²³³ As of 1 December 2019, there were just over 1,000 QCs at the bar, three of whom were Black women and 18 were Black men. Ms Shotunde added that in the beginning of 2020, the news that six Black females had taken silk provided a lot of hope for her. However, these numbers fell once more at the end of the year with only 14 BAME QCs appointed. She informed us that to her knowledge, only one of those individuals was Black.

While it is true that those being made QCs now have been in practice for many years, our concern as a Commission is with the pipeline of talent currently coming through the profession and the barriers that they may experience in entering it. It is also our responsibility to continue to work towards a position where those reaching the higher echelons of the legal profession are more representative of the communities that they serve.

The economic viability of legal aid work

220. The overwhelming consensus from the evidence that we heard throughout the Inquiry was that legal aid work and the rates payable are not financially viable for practitioners. What came across was that for so many the work is a vocation not just a career. However practitioners are forced to leave legal aid in order to make a more comfortable living and improve their work/life balance and wellbeing. Some practitioners remain in legal aid but choose to undertake more privately paid work in order to pay their bills and turn a profit.

'Firms are not managing. In family law firms are turning to more private work in order to balance. 80% of my team do publicly funded work. However, the spread of our income is 50/50. So, 20% that do private provide 50% of fee income. This is the only way we can survive.'

Jenny Beck QC (Hon)²³⁴

221. Other organisations are reliant on charitable grants or alternative sources of income in order to cover their overheads and the real cost of delivering legal aid work.

'The fixed fee is £259 [which includes] all the work before you move to formally issue proceedings. So potentially quite a lot of work. The nominal hourly rate on which that fee is premised is, or was then, £51.18, and our internal modelling suggested that our actual recovery for fixed cost work was less than £36 an hour ... And I've said before we do generate some income through our sort of legal aid contracts and through our fees, but we subsidise our casework very heavily through charitable income from other sources. And that's just not an answer for the vast majority of the sector. So, the sums that are now available are not economically viable in a for-profit model.'

Jo Hickman²³⁵

222. While both of these models (mixed practices and cross-subsidisation) work to some degree in that they allow providers to stay in business and earn a salary,

we are of the opinion that the work itself cannot be said to be economically viable when it is loss-making in so many respects and needs to be subsidised in this way. It cannot be right that legal aid services are not financially viable in and of themselves, as this is a wholly unsustainable model.

Why do practitioners remain in legal aid?

223. One of the intentions that we had as an Inquiry was to build a comprehensive picture of the legal aid market in the wake of the LASPO cuts and the COVID-19 pandemic. Practitioners and legal commentators have long described legal aid organisations as being driven towards a cliff edge, yet while a number of organisations have ceased delivering services over the course of the pandemic, many still remain. With serious concerns over the economic viability of these business models and the rates that underpin them, we wanted to know why.
224. From the evidence we have seen and heard through the Inquiry and the soon to be published Legal Aid Census, we believe the answer is a combination of the following:
- i. Providers are committed to the needs of their clients and the work that they do – for many practitioners legal aid is a vocation, a calling, not simply a career.
 - ii. Official data many create a misleading picture on the actual number of providers carrying out legal aid work: LAA data suggests that the total number of providers is not the same as the total number of providers who are actively carrying out work. The LAA is carrying out a review of a large number of 'dormant' contracts.
 - iii. Many providers have told us that they can only maintain legal aid work by reducing the proportion of it that they carry out and increasing the proportion of privately paid work. So official data on provider coverage may mask a reduction in the number of clients that can access services in any given area.
 - iv. Some practitioners have remained in the market because they expect to retire relatively soon and have accepted lower-than-market returns as an alternative to retraining late in their careers. The evidence in relation to an ageing demographic in the data compendium and the Legal Aid Census support this.
 - v. Many practitioners are working longer hours and performing more administrative tasks personally as they cannot afford to employ staff to share the burden.
 - vi. Some practitioners have drawn capital out of their firms to make up for reduced income, perhaps in the hope that if the firm survives for long

enough, the government will recognise the need to invest if this market is to survive.

- vii. Providers also gave evidence that some sub-categories of legal aid are so unviable that they can no longer take on those cases – so they remain in legal aid provide a more limited services out of necessity.
- viii. Every firm that we spoke to told us that they had made use of some or all of the government financial measures to assist them over the course of the pandemic. All raised concerns about how they would survive when these measures were withdrawn.

It is clear that all of these factors, and the strategies employed by practitioners, provide little confidence that the legal aid market is sustainable in the medium- to long-term.

Conclusion

- 225. We are deeply conscious of the fact that the current government faces challenges arising from COVID-19 the likes of which have not been seen for generations. Funding is needed for every sector if we are to repair the damage wrought by the pandemic and build back as a society. Yet a crisis in the justice system has been building over a number of years and has only been exacerbated by the challenges of the past 18 months. The reduction in incomes, the difficulties in delivering services remotely for both client and for practitioners, an inability to pay for back-office support – they all sit atop of a lack of investment in crime, family and social welfare law over decades. Attempts have also been made by those in power to fix this crisis, to invest in the use of technology, in reform. To address the existence of LiPs and the need for alternative means of assistance. While these initiatives are to be applauded, it is our belief that they do not go to the heart of the matter.
- 226. In setting about the creation of the legal aid system, the Rushcliffe Committee recognised that it was essential for individuals to have assistance when they sought to navigate the law and for this assistance to be available to all those who were unable to afford it. The value of our legal aid system can only be fully appreciated by looking at how it contributes to society as a whole. It is our belief that by giving every individual the ability to understand and enforce their rights, we build stronger, more resilient communities and we are a richer society for it. If we are to truly ‘level up’ as a society then we must see access to justice as a public service and ensure that it is available to individuals throughout England and Wales and not just in the major cities. This would allow members of the public to access justice when and where they need to, and also ensure that talented individuals see a viable career in legal aid, both in major metropolitan areas and in regional towns and cities. To those individuals in practice, and

those managing small and medium sized firms and charities, we also believe that we have a duty to ensure that they are able to continue to undertake this work. We have been told many times throughout the course of this Inquiry that the work is a vocation, but we must recognise that there is an inherent value in a legal profession which fairly remunerates training, skill and expertise.

227. We have an opportunity now, as we emerge from the pandemic and rebuild our industries, to invest in the legal aid system. We hope that this investment will be made and made soon because all the evidence that we have heard indicates that it is sorely needed.

APPENDIX 1 – A BRIEF HISTORY OF LEGAL AID IN ENGLAND AND WALES

Rushcliffe Committee (1945)

1. Legal aid's 'founding text'²³⁶ is derived from Lord Rushcliffe's 1945 Committee, which was set up following a national justice crisis. From today's perspective, the committee's cross-party consensus and speed of reporting are particularly striking. It was set up in May 1944, and reported on 31 May 1945 to a bankrupt and bombed nation still at war with Japan.
2. Its remit was:
*'... to enquire what facilities at present exist in England and Wales for giving legal advice and assistance to poor persons, and to make such recommendations as appear to be desirable for the purpose of securing that poor persons in need of legal advice may have such facilities at their disposal, and for modifying and improving, so far as seems expedient, the existing system whereby legal aid is available to poor persons in the conduct of litigation in which they are concerned, whether in civil or criminal courts.'*²³⁷
3. The committee remarked that 'a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in future to provide that assistance to a considerable section as a voluntary service'.²³⁸
4. It recommended a comprehensive scheme under which legal aid, administered by the legal profession and funded by the state, would be available in all courts. The cost of this publicly funded legal aid system was to be borne by the state and administered independently.²³⁹
5. Crucially, it was thought that Barristers and Solicitors should receive adequate remuneration for their services,²⁴⁰ before the committee concluded that they were satisfied that it would be impossible for a Solicitor adequately to prepare a case without being seriously out of pocket at the present rate of remuneration.²⁴¹

The Legal Aid and Advice Act 1949

6. The post-war Labour government accepted the recommendations of the Rushcliffe Committee, saying in a White Paper in 1948 that legislation would be introduced "to provide legal advice for those of slender means and resources, so that no one would be financially unable to prosecute a just and reasonable claim or defend a legal right; and to allow counsel and solicitors to be remunerated for their services".²⁴²
7. Under the Legal Aid and Advice Act 1949, legal aid was to be available in all courts and tribunals where lawyers normally appeared for private clients. Eligibility was to be extended to those of 'small or moderate means' who would receive free legal aid; above this, recipients would make contributions on a sliding scale according to their means. There was an annual budget approved by Parliament, but if the budget was exceeded, a supplementary grant was always obtained. This applied to both civil and criminal legal aid. However, the focus of civil aid provision was still mainly on family matters.

The development of legal aid 1945-2012

8. For a comprehensive exposition of the development of the legal aid scheme in England & Wales we would recommend Sir Henry Brooke's *History of Legal Aid 1945-2010*, produced for The Fabian Society as part of the Bach Commission on Access to Justice.²⁴³ Sir Henry Brooke separated the history of legal aid into six distinct periods up to 2010, as follows:
 - i. 1945-1970. The foundation of legal aid. The emergence of the first challenge to its structure through the law centre movement.
 - ii. 1970-1986. The opening of the first law centre in North Kensington. This period witnessed the absorption by the private profession of the law centre threat.
 - iii. 1986-1997. Lord Hailsham, as Lord Chancellor, initiated the first intended cuts to civil legal aid eligibility. The Conservative Government began to prioritise the restraint of the legal aid budget in the face of unprecedented rises in cost. A Consultation Paper was published in 1995 and a White Paper in 1996. The Labour Party, which won the 1997 election, had a looser commitment to future policies, but it was determined to live within the Conservative party's spending estimates.
 - iv. 1997-2005. The Access to Justice Act 1999 created a new Community Legal Service and a Criminal Defence Service. The former represented an attempt to plan the provision of poverty legal services through Community Legal Service Partnerships, but this ambitious project had failed by 2005 when

- new policies had to be adopted. The latter created a structure for the provision of criminal legal aid, which was continuing to increase in cost at an exponential rate. It also saw the absorption of criminal legal aid in the Crown Court and the higher courts into the mainstream legal aid budget.
- v. 2005-2010. The legal aid budget had now been brought more or less under control at a figure of £2.1 billion, but Community Legal Advice Centres (or Networks), a new venture, were showing no signs of becoming firmly established, and there was a long-running dispute between the Government and the legal profession over the former's desire to introduce arrangements for price competitive tendering for legal aid contracts.
 - vi. 2010-2016. The austerity policies of the new Coalition Government required significant cuts to be made to the legal aid budget. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made very substantial changes to the arrangements for civil and family legal aid, introducing for the first time the concept that legal aid would only be available for those legal topics which came within the scope of the new statutory scheme. Lawyers' fees were reduced, and the dispute about the appropriateness of competitive tendering in the criminal courts continued to rumble on.
9. Sir Henry's history of legal aid recounts significant upheaval for the scheme throughout the fourth, fifth and sixth periods, including a proliferation of 30 separate consultation exercises between 2006 and 2010 on proposed changes to the scheme. Many of these initiatives were being pursued in an effort to control the legal aid budget including, in 2007, the introduction of fixed fees for civil and criminal legal aid work, as recommended by the 2006 Carter Report.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012

10. The 2010 coalition government introduced a wide range of policies to curtail public expenditure in response to the 2008 global economic crash. LASPO was introduced to implement this decision and is seen by many in the justice system as something of a watershed moment. In truth however, legal aid had been something of a political football for some time and cuts to justice have been made under both of the main political parties during their time in power.
11. The introduction of LASPO also saw the abolition of the Legal Services Commission and the create of new executive agency of the Ministry of Justice – the Legal Aid Agency was formed on 1 April 2013 for the purposes of administering the legal aid scheme. Responsibility for formulation of legal aid policy was now solely vested in the Ministry of Justice.

Changes introduced by LASPO

12. LASPO amended the way that civil legal aid funding is awarded and limited the scope of issues eligible for civil legal aid funding. Under the previous scheme, set out in the Access to Justice Act 1999, the general approach was that any civil legal matter would be eligible for legal aid provided that it was not one of the 'excluded' matters listed in Schedule 2. Individual applications for legal aid funding were assessed by reference to a 'Funding Code', which set out general principles on eligibility for legal aid. LASPO effectively reversed the 1999 Act's general approach: civil legal matters are excluded from the scope of legal aid unless they are one of the matters listed in Schedule 1 to the 2012 Act. Many areas of civil law were therefore removed from the scope of legal aid. Debt cases were almost entirely removed from scope, except where there is an immediate risk to the home; there was a 100 per cent reduction in the availability of legal aid for employment law cases; private family law was entirely removed from scope except in cases where there is evidence of domestic violence or child abuse; housing matters, except homelessness assistance and cases where the home is at immediate risk, were also removed; non-asylum immigration cases were entirely removed; and welfare benefits cases were also entirely removed apart from appeals on a point of law in the Upper Tribunal.²⁴⁴
13. ECF was introduced under section 10 of LASPO as a 'safety net' to protect those who would not qualify for legal aid under the new rules but whose human rights would be breached under the Human Rights Act 1998 or an enforceable EU right relating to the provision of legal services if funding was not made available.

Changes to the eligibility criteria for civil legal aid

14. When a person applies for legal aid, not only must their matter be in scope of legal aid (or otherwise exceptional and applicable for ECF), they must also satisfy both a merits test and a means test. Broadly speaking, the merits test considers the likelihood of success of the case and whether it justifies the use of publicly funded legal advice and/or representation. The means test considers the applicant's financial situation and whether they qualify for legal aid.
15. Regulations under LASPO made four changes to the civil and family legal aid eligibility criteria:
 - applying a capital eligibility test to all legal aid applicants (in addition to consideration of gross and disposable income) and removing the rule whereby an individual in receipt of certain benefits automatically passed the eligibility test;
 - increasing income contributions for contributory clients (applicants assessed as having a disposable monthly income above the set upper limit

(£316) are required to make a monthly payment to contribute towards their legal costs over the length of the case);

- capping the subject matter of dispute disregard at £100,000; and
- removing legal aid in cases with 'borderline' prospects of success.

Fee changes in civil legal aid

16. Regulations under LASPO also reduced the fees paid to lawyers in civil and family matters. In addition, the uplifts for some hourly rates were capped or removed and remuneration for pre-permission work on judicial review cases was limited. Fees were seen as an area for reducing the overall spend on legal aid. The LASPO review estimated that the policies saved a combined £110 million in 2017/18.

The 8.75% cut to criminal legal fees (2014)

17. The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014 SI No 415 were made and introduced under Part 1 of LASPO. The purpose of these regulations was to cut litigators fees by 8.75% for cases in the Crown Court (other than Very High Cost Cases), in the Court of Appeal, and in other cases covered by the Standard Crime Contract (such as Magistrates Court cases, police station attendance and Parole Board cases). Reports by Oxford Economics²⁴⁵ and Otterburn and Ling²⁴⁶ were prepared on behalf of The Law Society, which opposed the cuts, with the MoJ instructing KPMG²⁴⁷ in relation to procurement and modelling.
18. It should also be noted that LASPO was one of several recent changes to the legal system in England and Wales that have affected individuals' demand for and ability to access justice, and should be considered in this context. Related policies include the introduction of employment tribunal fees (now abolished by the courts in the UNISON case),²⁴⁸ other increased court fees, and changes to judicial review, such as largely restricting legal aid payment to challenges that are successful. Also relevant are significant changes introduced by the Welfare Reform Act 2012, such as the transition from disability living allowance to personal independence payments and the introduction of universal credit and the so-called 'bedroom tax', which have increased the demand for legal advice services. These measures remain outside the scope of this Inquiry but are mentioned here for the sake of providing a more comprehensive background to our work.



APPENDIX 2 – THE LOW COMMISSION AND THE BACH COMMISSION

The Low Commission (2014)

1. The Legal Action Group (LAG) established the Low Commission on the Future of Advice and Legal Support in October 2012 against the backdrop of the UK government's austerity programme initiated in 2010. The intention of the commission was to develop a strategy for the future provision of advice and legal support on social welfare law in England and Wales. Its main report²⁴⁹ called for urgent reforms to ensure that ordinary people can access the help they need to deal with employment, debt, housing and other social welfare law problems.
2. Some of the key principles underpinning the Low Commission's suggested approach were:
 - early intervention and action rather than allowing problems to escalate;
 - investment for prevention to avoid the wasted costs generated by the failure of public services;
 - simplifying the legal system;
 - developing different service offerings to meet different types of need;
 - investing in a basic level of provision of information and advice; and
 - embedding advice in settings where people regularly go, such as GP surgeries and community centres.
3. The commission called for greater use to be made of new technology and helplines for those who can manage to access these forms of communication and are not digitally excluded, and for more emphasis to be placed on public legal education throughout the national curriculum.

The Bach Commission (2017)

4. Lord Bach published his report, *The Right to Justice*, in September 2017.²⁵⁰ The report's main proposal was that there should be a statutory right to justice

which would codify and supplement our existing rights and establish a new right for individuals to receive reasonable legal assistance, without costs that they cannot afford. This right would be equal to our existing rights to healthcare and education. It also proposed to establish a new, independent body to promote, develop and enforce that right.

5. The Bach Commission on Access to Justice reviewed the impact of LASPO and concluded that the government must pursue immediate reform in three key areas in order to ensure the right to justice. First, it proposed that support for early legal help be restored to pre-LASPO levels for the majority of civil law on the basis that this would help prevent problems developing and becoming costly for both the individual and the state. Second, the commission proposed that the government should widen the scope of funded legal representation in several areas, including elements of housing, family and immigration law. It also proposed that all matters concerning children should be brought back into scope. Finally, the commission urged that the ECF scheme be urgently reviewed.
6. In terms of criminal law, the report recommended that the government should consider how to simplify and clarify the means-testing process in criminal courts. It also recommended that the evidence requirements for civil and criminal legal aid applications should be simplified and relaxed, in order to prevent people from being forced to abandon their legal aid applications.

APPENDIX 3 – THE IMPACT OF COVID-19 ON CIVIL AND CRIMINAL LEGAL AID PRACTICE AREAS

In conducting this Inquiry and writing this report, we sought to create a comprehensive picture of the legal aid sector as it emerged from the COVID-19 pandemic. We heard a wealth of evidence from a broad spectrum of practice areas of how life on the front-line had changed over the course of the past eighteen months and in the years preceding that. We have attempted to include as many areas of legal aid practice as possible based on the evidence we heard and the research which we have undertaken, but this is a non-exhaustive list legal aid categories.

Family law

Pre-pandemic

1. In its consultation on proposals for the reform of legal aid in 2010,²⁵¹ the government explained its proposals to remove areas of social welfare law from scope on the basis that the issues concerned related the 'personal choices' of the individual and therefore were not suitable for public funding. Where a matter was the result of an individual's personal decision-making, there should be no call on the state to support any resulting dispute resolution.²⁵² In family law, private law matters were essentially removed from scope other than those instances where domestic abuse had been evidenced, which remained eligible for legally aided help.
2. What remained in scope was child protection under public law (i.e. where local authorities seek care, supervision or emergency protection orders regarding children, or place children for adoption) or the matter concerns contact with children who have been subject to such proceedings. Private law child cases were excluded, even though some of the high-conflict contact cases border on child protection. It was hoped that people would be more likely to use alternative dispute resolution services, particularly mediation.
3. The Commission heard evidence from family practitioners throughout England and Wales at various stages of their careers and with different specialisms. We

wanted to hear about the changes that LASPO had wrought on the practice area and how the clients were affected. We put to witnesses a series of questions, depending on their roles, experience, geographic location and specialisms. One of these was: why is mediation thought to be so advantageous in these circumstances? Their evidence suggested that family mediation is usually much cheaper than going to court. The process is intrinsically less adversarial and often more successful than court judgments, with both parties more likely to adhere to agreements made when they have both had an input.

4. Instead, with 80% of the family law cases being removed from scope, applications to court increased without legal aid specialists being in a position to direct appropriate cases to mediation and deter unnecessary litigation by, for example, warning clients of the difficulties of litigation in family matters. Evidence from witnesses is supported by official data which shows the number of publicly-funded mediation assessments plummeting from 30,665 in 2012/13 to 12,674 in 2020/21, a drop of 60 per cent. The number of publicly-funded mediation starts also fell, although not as dramatically, from 13,609 in 2012/13 to 7,695 in 2020/21, a drop of 43 per cent.²⁵³
5. What is the effect of this on families? Divorce is one of the factors taken into account by researchers who study chronic stressful experiences in childhood – now collectively termed ‘adverse childhood experiences’ and commonly known as ACEs. This is not because divorce in itself is seen to be harmful, but because it is used within ACE research as a marker of substantive or long-term familial conflict. It is recognised that it is the effects of long-term conflict that can be detrimental to health over time.²⁵⁴
6. Family breakdown can be stressful, sad and confusing; at any age, children may feel uncertain or angry at the prospect of parents separating or divorcing. Professional support to families during the time of separation and divorce, to help deal with the resulting distress and work to reduce the likely conflict, can help the parents to focus on putting their children first and to limit their involvement in disputes and arguments between the adults. This support can help parents move to working towards solving problems together rather than trying to ‘win’. Ultimately, practitioners assert, it will be more cost-effective for the state to provide families with support at this early stage of conflict. Effective communication is a vital skill within this process that parents can easily lose sight of within the trauma of the ongoing conflict.
7. What, then, has been happening at the coalface in the wake of the cuts? The family courts in particular have been hard hit, with about 80% of private family law cases in 2020 involving at least one side being unrepresented.²⁵⁵ Concerns arising from this include a lack of equality of arms in proceedings where one parent has access to representation and the impact that this has

on families at an already incredibly stressful time. Witnesses raised particular concerns about those who may simply give up and lose contact with their children or do not pursue legitimate applications as they cannot cope with being alone and involved in court proceedings. Organisations such as Families Need Fathers have long been campaigning around this. Others find themselves unsupported in the court process and dealing with contested allegations, fact-finding processes or a generally obstructive opponent without the knowledge to be able to focus their case to the relevant issues and achieve the best outcome. The impact on those amongst lower socio-economic and vulnerable groups who do not have family or others who can fund them or guide them is all the greater. Unrepresented clients can also mean long and difficult court hearings with a need for increased amounts of judicial intervention.²⁵⁶ It has been argued many times over that this approach is more costly than parties having legal aid lawyers representing them.

The pandemic

8. With the vast majority of the population 'staying home and saving lives' over the past year and a half, familial and domestic dynamics have been under the spotlight in ways hitherto unimagined. We asked our witnesses how this had affected their client groups. Witnesses were unequivocal in telling us that the impact of COVID-19 on those legally aided clients (and indeed all clients) involved in private children or financial remedy proceedings has been severe due to adjournments, indefinite delay and uncertainty. We were informed that the family justice system was already having difficulty in managing delay before the pandemic and that adding more cases with LiPs into the mix has had a knock-on effect on all cases.
9. Practitioners added that the three lockdowns necessitated by the pandemic had created a perfect storm. For domestic abuse survivors, avenues for escape were closed off by the restrictions placed upon refuges and on family members left able to support them. This, coupled with an increase in the types of stress that exacerbate domestic abuse situations (such as economic pressure), resulted in huge increases in those seeking support.
10. During the first lockdown, the National Domestic Abuse Helpline reported traffic to its website having increased by 700% between April and June 2020.²⁵⁷ Before COVID-19, there were a horrifying two women dying every week at the hands of a violent partner²⁵⁸ and this number nearly trebled in the first month of the March 2020 lockdown.²⁵⁹ There has also been a significant increase in the number of children being taken into care in the past year.²⁶⁰ With schoolchildren at home and exposed to increased amounts of conflict we will continue to see this past year's impact for many years to come.

11. Family law practitioners report that, despite their best efforts, many of these individuals will have real issues in accessing legal help, exacerbated by the rise in remote hearings and online meetings. Significantly, we were also told of the deterioration in the mental health of this client group, leading to lawyers needing to manage anxiety and additional needs in ways that would have been unimaginable just two years ago. This need has placed more demand on the more senior and experienced practitioners already juggling larger caseloads and additional managerial responsibilities, often on top of duties to family members at home. Conditions also deteriorated for their junior counterparts, with those at the bar reporting a loss of income as hearings were adjourned and the courts moved online. With no travel time, individual barristers found themselves able to conduct more hearings on any given day thereby giving clients greater access to experienced counsel. This move had the effect of taking bread-and-butter work away from more junior members of the profession (see Part Four for further details about the efficacy of government measures to help junior practitioners).

Housing law

Pre-pandemic

12. LASPO removed some vital areas of housing work from the scope of legal aid, including most cases of housing disrepair. Only those cases deemed to be sufficiently serious were kept in scope. This included where there is a risk of homelessness, repossession or eviction (including unlawful eviction), housing disrepair that poses a risk of serious harm to an individual, accommodation provision to asylum-seekers, injunctions, antisocial behaviour, judicial review and housing possession court duty scheme work. As with other categories of law, one of the areas removed from scope was early advice, meaning that clients must wait until a problem has reached a sufficiently serious stage before lawyers can become involved. What was intended as a cost-saving measure may have rebounded as without the early resolution of problems, more cases have ended up in court and with arguably more expensive outcomes for the state. In addition, the removal of welfare benefits advice from scope has stopped the resolution of problems caused by delays to benefit payments, which in turn increases the likelihood of tenants ending up in rent arrears, facing court proceedings and becoming homeless. There is little advantage to this for either citizen or state.
13. As MPs ourselves, we know that legal problems rarely occur in isolation. Life is complex, and the interrelationship between benefits, debt and housing issues often reflects this. The inability to give legal advice around benefits, debt

and employment law (all removed from scope under LASPO) both hamstrings providers and results in clients not getting the holistic service that they need in order to fully resolve their issues.

14. Providers describe being left unable to challenge benefit decisions or to pursue disrepair claims for clients and they told us of the real injustices caused by this even before the pandemic. Witnesses added that there are also no other organisations able to step in for those unable to afford representation. The pre-LASPO option of seeking welfare benefits and debt advice from Citizens Advice or a Law Centre has been drastically reduced by LASPO and coincided with reductions in other forms of funding for advice, largely linked to central government cuts to local authority funding. Citizens Advice and other agencies do still carry out some of this work under other forms of funding but appointments are hard to come by. The cuts brought in by LASPO also coincided with the roll-out of universal credit and the benefit cap, so much-needed advice has become largely unavailable.
15. The Housing Law Practitioners Association (HLPAs) provided us with written evidence on the effects of the restrictions on funding disrepair cases.²⁶¹ This seems to have been threefold. First, LASPO removed from scope funding for the damages element of a claim. This has meant that legal aid is only available to fund a claim for specific performance – in other words, to force the landlord to remedy the disrepair. It also introduced a new threshold, making funding available only where the disrepair presents a serious risk of harm to the health or safety of the occupants. These restrictions have led to a dramatic decline in the number of publicly funded disrepair claims and a corresponding loss of income for housing legal aid providers.
16. Finally, we were told that successful disrepair claims usually result in an order requiring the landlord to pay the costs of the litigation. These costs are paid at market rates and provide income that can then be used to subsidise other non-profitable areas of work such as homelessness advice and representation, which is often loss-making. The removal of all but the most serious disrepair claims from the scope of legal aid funding took a large chunk of income from many housing law providers given the significant drop in disrepair cases. This was an important part of a provider's ability to maintain an economically viable business and has been described as one of the driving factors in the declining numbers of specialist housing law providers. And, given that landlords, rather than the Legal Aid Agency, would routinely pay the costs in these cases, removing them from the legal aid scheme did not generate a saving for the Agency.

17. The difference in the rates payable at market (or inter partes) rates and legal aid rates is illustrated in the table below (London rates):

Table 10:²⁶²

Activity	London rate	Non-London rate
Average guideline hourly rate for a qualified solicitor in central London	Average guideline hourly rate for a qualified solicitor in national grade 2	Hourly rate paid for a County Court claim at legal aid rates
£251.67	£174.67	£63.00

18. Legal aid is also still available for the provision of housing possession court duty scheme services for individuals facing possession hearings. To those unfamiliar with the term, court duty schemes are available in county courts in England and Wales and provide non-means-tested legal aid to defendants who come to court unrepresented. This vital service provides the last line of defence for defendants who may, for variety of reasons, have been unable to find their own representation. In our opinion, the court duty scheme is a very obvious manifestation of legal aid's role as a social safety net and it is vital then that the schemes are maintained and that barriers are not put in place to restrict client access.
19. Currently around 64% of the schemes are operated by the NfP sector (e.g. Citizens Advice, Law Centres and Shelter).²⁶³ Those witnesses to whom we spoke were from the private sector and described relying on the delivery of certificated work and the ability to obtain inter partes costs to subsidise fixed-fee work such as duty schemes. Others rely on alternative funding that can be used to support and advise those in housing need outside the legal aid scheme. Prior to the pandemic, the fixed fee was £75.60 in London and £71.55 outside the capital for each client seen on the duty advice scheme. If no clients were seen, the provider would receive a payment for their attendance that equated to the fee for a single client. The duty adviser might have to spend most of a morning or afternoon session in attending court, together with travel time, for the equivalent of one client fee.²⁶⁴ Providers told us that this was wholly unsustainable and it has a direct cost and takes the adviser away from other fee generating work.
20. In April 2019, there were 295 organisations with legal aid contracts for housing law. This was a reduction of 51 from the 346 that held a contract in 2012. The most recent figures (September 2021) show that there are now just 238

organisations holding a legal aid contract in this legal aid category around England and Wales.²⁶⁵

Pandemic

21. On 27 March 2020, the Master of the Rolls issued a Practice Direction suspending all ongoing housing possession action in England and Wales for a period of 90 days.²⁶⁶ On 5 June 2020, the then Secretary of State, the Rt Hon Robert Jenrick MP, announced an extension of the moratorium on possession actions for a further two months.²⁶⁷ The government confirmed that the courts would start to process repossession cases again from 24 August 2020, but on 21 August a further four-week suspension to 20 September was confirmed. Claims brought during this period were put on hold by the courts and a new court process was put in place in respect of these cases from 20 September 2020 until 30 July 2021.²⁶⁸ While significant concerns existed about the viability of the duty advice scheme²⁶⁹, providers unanimously supported the need for the moratorium. From many providers duty advice schemes generate a significant proportion of a housing lawyer's income. Providers reported an immediate reduction in income from all of their court duty scheme work. Rosaleen Kilbane, a housing solicitor, told us that her firm, Community Law Partnership, helped around 300 clients per month via the court duty schemes, providing about fifty per cent of the firm's income. Overnight, this workflow disappeared, with no measures introduced to compensate providers for the loss of this income stream.²⁷⁰
22. Nearly all of the housing providers who gave evidence to the Inquiry cited concerns about their ability to sustain legal aid services over the next five years, with the majority saying they were looking for other streams of work.
23. Against this backdrop, housing lawyers face a substantial upcoming threat that will reduce the number of housing providers further. The MoJ has proposed to fix the amount of costs that can be recovered in fast track cases (most possession cases are allocated to the fast track). The subject of a consultation in 2019,²⁷¹ this would limit the recoverable costs at inter partes rates and barrister fees would not be treated as a disbursement, i.e. the fixed figure would be inclusive of profit costs and barristers' fees. Recovery of inter partes costs (at market rates in successful cases) from opponents is crucial given that there has been no increase in legal aid rates since 1998/99 and also a 10% cut to fees in October 2011. Limiting inter partes recovery would be a significant cut via the back door.
24. A final point that we noted was that, unlike other areas of social welfare law such as family, it remains extremely difficult for housing law providers to subsidise their legal aid work with more lucrative privately funded work. Most

clients in need of specialist housing advice are tenants or individuals who are homeless or facing homelessness. By their nature, these clients tend to be vulnerable and on low incomes, so unable to pay privately for legal advice where their cases do not qualify for legal aid or where they themselves are not financially eligible for legal aid.

25. It is also hard to exaggerate the importance of housing law to civil legal aid. It remains the bread-and-butter work of many high-street firms and NfP organisations, and a lifeline to those in need.

Mental health, mental capacity and community care

'[Legal aid] was vital support. People who cannot fight and speak up for themselves need support from the legal system to speak up and have them noticed. Without someone to help them speak up they are just a tin of beans to be pushed around.'

Pam Coughlan²⁷²

Pre-pandemic

26. At some point in our lives, we may need social care or be involved in looking after an older relative, a sick friend or a disabled family member. Old age and vulnerability comes to us all and good social care enhances quality of life immeasurably. But witnesses in our civil evidence session told us that, increasingly, the public bodies such as local authorities which are usually responsible for arranging social care, cannot meet the growing demand. Indeed, this is something that we see in our own casework. Mental health, mental capacity and community care are all discrete areas of practice. We group them here for the sake of convenience and to acknowledge the considerable overlap in work and issues.

Community care

27. Community care law is concerned with rights to health and social care services arising from disability, vulnerability, or other needs such as physical or mental illness. Since the welfare state was created in the post-war years, legislation has been introduced seeking to address the needs of different vulnerable groups in society. This has been largely responsive to the different societal issues and needs of particular groups, and was introduced in a piecemeal fashion. In 1993, the NHS and Community Care Act 1990 was implemented and gave people in potential need of services the right to a needs assessment followed by a decision as to whether any of those assessed needs required services to be provided. This was the start of the need-led approach, but it has been beset by difficulties particularly during austerity, when demand for services far exceeded

the available and allocated resources. The Care Act 2014 was a consolidating piece of legislation that set out fundamental principles of well-being as well as a detailed statutory regime and eligibility criteria for assessment and service decisions to people in need.

28. Even in the early days of community care practice, the numbers of legal aid providers were low due to its complexity and its unusual holistic approach crossing social welfare, healthcare, mental health, mental capacity, welfare benefits and housing law. Advising in this area is extremely legally complex and involves a comprehensive knowledge of legal duties and powers applying to different statutory agencies. Clients are often disabled, always vulnerable, and exceptional legal and client care skills are required to advise and represent them.
29. There is a dearth of community care providers, with significant problems in terms of recruitment, retention and training of the next generation of community care lawyers. In 2021, The Law Society published an infographic showing numbers and the spread of community care providers throughout England and Wales. It showed that more than 40 million people or 67% of the population in England and Wales live in a local authority area without a single community care legal aid provider and that only around 15% of the population have access to more than a one community care legal aid provider in their local authority area.²⁷³

Mental capacity

30. Until the Mental Capacity Act 2005 came into force in 2007, there was no up-to-date statutory scheme for decision-making regarding the vast numbers of adults who may or do lack the mental capacity to reach decisions. There was no legal voice for the thousands of people with learning disabilities, dementia, autism, mental disorder, head injuries and others with impaired cognition. The Act set out fundamental principles of autonomy, the presumption of capacity and the test for capacity to reach a decision. Where a person lacks capacity, the Act also sets out the important factors to which those making decisions on behalf of such people must have regard, in their best interests.²⁷⁴
31. Before the Act, the remit of the Court of Protection was limited to disputes, often between family members, about property and financial affairs. The court now plays a fundamental role in considering questions of capacity and best interests decision-making on behalf of people who are found to lack capacity, across a range of disputes – from health and welfare to their property and affairs. It also plays a vital role in reviewing and hearing challenges to a person's deprivation of liberty in care homes, hospitals and other settings, such as supported living. Property and affairs cases fall outside the scope of the legal aid scheme.

THE WESTMINSTER COMMISSION ON LEGAL AID

32. Certificated work with vulnerable clients in the Court of Protection is intensive, and witnesses told us that the rates bear no relation to the skills and expertise required to manage a caseload of such complexity. In contrast, we heard that private guideline hourly rates for managing a person's property and affairs who lacks mental capacity are usually more than three times the rate paid for legal aid welfare work, despite the latter being invariably more complex.²⁷⁵
33. Once again, we heard evidence that fees in this area of work are of concern. As with education law, the majority of the initial advice work is done at Legal Help level. As part of the Inquiry, we had fee tables prepared for this practice area and compared the current rate with what it would be had the legal aid rates been adjusted in line with inflation.
34. For certificated work in the higher courts, county courts and s' courts, the following fee table applies. It is worth noting that, currently, work done to obtain permission is not funded under the scheme. Witnesses informed us that much of this work is done at risk.

Table 11:

Activity	Higher courts (2011)	Higher courts (2019 – adjusted for inflation)	County court and Magistrates Courts (2011)	County Court and Magistrates Courts (2019 – adjusted for inflation)
Routine letters out	£6.75 per item	£8.28 per item	£5.94 per item	£7.29 per item
Routine telephone calls	£3.74 per item	£4.59 per item	£3.29 per item	£4.04 per item
Preparation and attendance	£71.55 per hour (London rate)	£87.86 per hour (London rate)	£63.00 per hour (London rate)	£77.36 per hour (London rate)
	£67.50 per hour (non-London rate)	£82.88 per hour (non-London rate)	£59.40 per hour (non-London rate)	£72.94 per hour (non-London rate)
Attendance at court or conference with counsel	£33.30	£40.89	£29.25	£35.91
Advocacy	£67.50 per hour	£82.88 per hour	£59.40 per hour	£72.94 per hour
Travelling and waiting time	£29.93 per hour	£36.75 per hour	£26.28 per hour	£32.27 per hour

35. Practitioners described concerns about both the financial viability of the current system and the lack of a new generation of lawyers coming into this highly specialised and demanding area of work.
36. Nicola Mackintosh QC (Hon) described legal aid rates failing to cover the basic costs of employing staff, and explained all the enhanced expectations of what practitioners have to do in this complex area of law. She added that there are no private community care cases and so no possibility of cross-subsidising her legal aid practice to make it viable. As a result, her firm has had to move away from community care work because they can't afford to practise in just this area. This trend has been reflected throughout England and Wales with the reduction in the number of providers and a 92% drop in Legal Help matters starts for non-family, non-immigration and non-mental health cases between 2009/10 and 2019/20.²⁷⁶ Ms Mackintosh echoed the words of a number of other witnesses by adding that while there is a dearth of suppliers, there remains a huge number of individuals in need. A lot of work is done on a pro bono basis and because of the complexity of the cases in this area, much of the work done on legal aid cases is not remunerated by the LAA.
37. This reduction in providers, coupled with the costs of judicial review and the lack of legal aid funding, have had the knock-on effect of rendering it very difficult to access judicial review as a means of redress. In practical terms, it is very difficult for citizens to challenge what is clearly unlawful government action. Witnesses told us that this is a particularly vulnerable client group, who need the law to protect them from poor and unlawful decision-making by the public bodies on which they rely for social care. Practitioners reported being extremely worried that reforms to judicial review are being proposed without adequate consideration of the impact on the lives of people with social care need and their families.

Pandemic

38. As with so many other areas of social welfare law, this client group faced particular challenges over the course of COVID-19. Practitioners reported being busier than ever before, but that this in turn necessitated turning down more cases than ever due to a lack of capacity. They also reported that clients came to them in more dire need than they were previously, because disabled people tend to be more disadvantaged from the very start and the restrictions brought about by the three lockdowns had hit them disproportionately hard. Where individuals have reported that accessing essential social care and health services was difficult before the pandemic, since it began things have been far worse. We have all seen images in the media of vulnerable people in care homes who are more isolated than they were before, with visits being stopped

or restricted, but we were told that what has not come across as starkly is that other people living in the community – those with learning disabilities and those in supported accommodation – have also been badly affected. Witnesses described individuals who desperately need human contact with their loved ones and are less able to cope without it. Practitioners also voiced their increased concerns about poor decision-making and people being moved from their homes as a response to the pandemic, leaving them isolated and without legal protection. The real risk is of an entire vulnerable group being left without any real voice or access to justice to enforce their rights.

39. Finally, there are specific concerns in this particular practice area about the impact of the means test on clients. If somebody is being deprived of their liberty in a care home or a hospital, they are deemed eligible for non-means-tested legal aid. However, if they are in their own home in supported living and there is an application to remove them and deprive them of their liberty, they are only deemed eligible for means-tested legal aid. As a result, many vulnerable clients have completely missed out on any legal representation and any voice at all – any right to be heard before the court – simply because of where they live.

Immigration and asylum

Pre-pandemic

40. LASPO did not remove asylum cases from the scope of legal aid, but removed most non-asylum cases. There are, however, a number of exceptions, such as challenges to immigration detention (legal aid for bail, temporary admission or release) and certain domestic violence and trafficking cases, which remain within scope. More than other areas of social welfare law, there has been a negative portrayal of immigration lawyers by both the press and the government. Lawyers have been vilified in the tabloid press and by some senior ministers for 'last-minute' applications for injunctions and judicial reviews to prevent removal/deportation and there appears to be much work to be done to rehabilitate the public perception of immigration lawyers.
41. As with other areas of social welfare law, witnesses explained that legal aid at an early stage in immigration cases benefits all those working within the immigration and asylum sector – applicants, the Home Office and the court or tribunal. A well-prepared case at an early stage can play a vital role in assisting the Home Office to make the right decision first time and to do so in a timely manner. We heard, in both evidence sessions and the research that we undertook, that it is in all parties' interests for the MoJ to put resource into the sector in order to build capacity and to make sure that there are still firms

prepared to undertake work at legal aid rates. The Lord Chancellor has a range of powers under section 2 of LASPO with which to do so.²⁷⁷ Early access to legal advice was a point raised by the Public Accounts Committee as recently as July 2020, and accepted by the Home Office as a relevant factor in preventing late asylum claims in its recent report on immigration enforcement.²⁷⁸ The Home Office accepted that better quality legal advice at an earlier stage may influence its ability to successfully remove people from the UK.²⁷⁹

42. How does the picture look at an organisational level? There are currently 257 offices with contracts in immigration and asylum across England and Wales.²⁸⁰ Some of these are multiple offices of a single firm, while others are single-office practices. Jawaid Luqmani of Luqmani Thomson and Partners told us that the reduction in fees (and current fixed fee) and the removal of most non-asylum cases from the scope of legal aid has made it extremely difficult to firms to remain financially viable.²⁸¹ As with other practice areas, the consequence of this is that organisations are choosing to take on less legal aid work, and to replace it with private work. Witnesses also reported the increased shifting of the work into the public law realm rather than immigration.
43. This, in turn, makes it increasingly difficult for many people to access a lawyer to assist in their immigration and asylum matter, and the South West, Wales and the East of England in particular have suffered as a result of the legal aid cuts. We were told by Dr Jo Wilding that demand outstrips provision even for cases within the scope of immigration legal aid in every region of England and Wales. In her report, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London*,²⁸² she estimates that there is capacity for just over 10,000 immigration and asylum legal aid 'matters', and a maximum of 4,500 pieces of specialist immigration casework outside of the scope of legal aid per year in London.
44. On the demand side, she estimates that at least 238,000 people who are undocumented in London would be eligible to make an application to regularise their immigration status;²⁸³ 23,000 individuals need to extend their leave to remain; and an unknown number of EU citizens who did not apply for settled status before the deadline on 30 June 2021 will need specialist advice.²⁸⁴
45. The report also identifies infrastructure challenges for the immigration advice sector, including a lack of trained advisers and a recruitment crisis.
46. This recruitment crisis was referred to during the evidence sessions. Some organisations have opted for more of a pyramid structure, with caseworkers and paralegals doing the majority of the legal aid work. This renders the work more financially viable, but given its complexity, more than one witness raised concerns about it being managed by juniors. Mr Luqmani also flagged issues

around career progression as the fees payable for immigration and asylum cases under legal aid were insufficient to justify the promotion of junior staff into more senior roles.²⁸⁵

47. We were told that many people arriving in the UK are unable to access a lawyer at an early stage as there is so little capacity in the sector, and indeed there is research being undertaken in this area by the Immigration Law Practitioners' Association and other academics – we refer to Dr Wilding's report, 'Droughts and Deserts: A report on the immigration legal aid market,' published in June 2019 and her book, *The Legal Aid Market*, published in September 2021. The result of this lack of capacity is that the first time many people are able to access legal advice is when they are detained pending removal. This situation does not assist the Home Office, the courts, the lawyers or those who are facing removal that is potentially unlawful.
48. Witnesses also cited concerns with the ECF process and its effects on the number of applications made. One observation made during the course of the civil evidence session was in relation to advice within this particular practice area in terms of value for money and accountability. Checks and balances are already in place with regard to immigration work because in order for any lawyer to receive legal aid funding in the immigration sector, they must meet a certain objective standard – the Law Society immigration and accreditation scheme.²⁸⁶ If practitioners do not meet this standard, they are unable to charge any of their work to the public purse, thereby providing a safeguard against the spurious claims that were feared when LASPO was passed.
49. As with other practice areas, practitioners recommended that, given the high volume of grants and widely acknowledged complexity of immigration law, this area should be brought back into scope. It is perhaps worth noting that this area remains in scope in Scotland and Northern Ireland, so there is not the same difficulty in accessing support in those countries (although there are still geographical gaps or legal aid deserts and other concerns about fee rates).

Pandemic

50. As with other practice areas, the impact of COVID-19 was felt acutely by those in immigration law. Witnesses explained that the ability to bill cases immediately came to an end because, as with many areas of civil legal aid, a matter can only be billed at its conclusion. With the lockdowns came a wide-scale slowdown, if not a cessation, of decision-making within the Home Office and a large number of cases were suspended or delayed. As a result, witnesses reported that it simply was not possible for matters to be completed and the pinch was felt across the practice area.

51. As a consequence of this slowdown, the LAA introduced some new stages to billing processes to enable work to be billed prior to the conclusion of the case. The new ways of working brought about by the pandemic also presented unique challenges with this particular client group, who may not have had access to technology and for whom English is often a second language
52. During the course of the pandemic, new standard fees were put into place for immigration and asylum appeals, and we asked about the impact of these. Prior to this change in fees, we were told that the fee structure in this area was based on fixed fees, with an 'escape fee' mechanism for billing the full value of the case if the total time spent was three times the number of hours covered by the fixed fee. We were told that while some cases did 'escape' and result in practitioners being paid for the work that they had undertaken, the vast majority did not, despite many additional, unpaid hours of work being completed.
53. Changes were introduced over the past year in response to a decision of President of the First-tier Tribunal (Immigration and Asylum Chamber) to require all appeals to be submitted through the online appeal process, unless not reasonably practicable.²⁸⁷ This meant that lawyers were required to advance their cases at a far earlier stage, which necessitated skeleton arguments and other papers being filed at an earlier point in the process. The more effective that their work was, the more likely it was that the case would settle and they would end up with a lower fee than if it had gone to trial. Now the whole fee is paid at an appeal stage and using an hourly rate rather than the standard fee.

Criminal defence

Pre-pandemic

54. The first of our oral evidence sessions focused on the experiences of criminal legal aid providers throughout England and Wales from organisations following very different business models. These ranged from larger firms (with commercial departments) to small firms with two or three fee-earners. We heard evidence from a range of crime practitioners in both that session and our sessions on the publicly funded bar and the experiences of junior practitioners, all of whom cited issues that have roots stretching through the past two decades.
55. The Law Society has reported on the ageing population of the criminal duty solicitor with the average age in 2018 being 47²⁸⁸ and large areas of England and Wales where the majority of duty solicitors were over 50. While all criminal defence solicitors are not duty solicitors, it is our understanding that the majority do obtain this further qualification and the enhanced income that it

provides, and so the figures can be seen as indicative of an ageing population. This was echoed in the evidence sessions, with witnesses citing an ongoing recruitment crisis within criminal legal aid.

56. Some of our witnesses expressed concern that their organisations are unable to afford to take on juniors as it will be a number of years before they bring in more revenue than they cost. Others, such as Kerry Hudson of Bullivant Law, explained that current students are entering the profession with £40,000 or more worth of student debt.²⁸⁹ Legal aid firms are unable to pay their trainees much more than the minimum training contract salary of £22,794 in London and £20,217 outside it²⁹⁰ because it simply is not viable under the current legal aid fee rate.
57. A source of data that has become available since our oral evidence session on criminal legal aid has been the crime data compendium. As part of the CLAR, a data-sharing agreement was signed between The Law Society, The Bar Council, the LAA, the CPS and the MoJ to combine some of their key datasets.²⁹¹
58. The figures make for stark reading and help to fill in some of the gaps in this practice area. They echo The Law Society's findings in relation to ageing populations and show that only 4% of criminal defence practitioners are currently under the age of 35. Stephen Davies of Tuckers Solicitors was one such practitioner who gave evidence to the Inquiry.²⁹² AS juniors are commonly saddled with between £55,000 and £70,000 of debt, he explained that the primary barrier to those looking to enter the profession is undoubtedly financial. A legal education is expensive and when married to low salaries and complex and often antisocial work, the proposition ceases to be an attractive one. Only 2% of students end up doing any sort of crime work when training and even less will go into the profession itself.
59. This issue of the yawning salary chasm was highlighted in respect of both the Crown Prosecution Service (CPS) and with those in commercial practice. Salaries within the CPS can be double of those in legal aid with better benefits and working conditions. While it is undoubtedly right that other lawyers are fairly remunerated for their expertise and the work that they do, witness after witness asked why such a low value is placed on the important, life-changing work that they do under legal aid with clients whose liberty is at stake.
60. The recruitment crisis is compounded by a further crisis in retention. We heard that defence firms are simply unable to compete with CPS salaries. Almost 10% of the 1,000 duty solicitor leavers have joined the CPS.²⁹³ As with areas of social welfare law, criminal defence law has always been a diverse practice area. However, witnesses feared that should we reach a point where only those with independent means can afford to practise in this area, our justice system will be

far poorer for it. Criminal defence in particular needs women and BME members so that the lawyers delivering the service reflect the clients coming into contact with the justice system.

61. Lawyers, as we have seen from CLAR and the government's data, have been tracked and shown moving from defence to the CPS, where it is far more attractive to do this sort of work. This leads to a diversity issue. The profession has come on leaps and bounds compared with a decade ago but it has got to the point that only those with means can afford to do this job. We cannot go down the path of the profession only being for the privileged and those with means. When considering issues of diversity and sustainability the same issues arise time and again and the primary challenge for government remains one of investment, particularly in relation to rates of remuneration.
62. Each witness cited the lack of investment in the criminal justice system by successive governments and the additional 8.75% cut made to litigator's fees in 2014. Bill Waddington of Williamsons Solicitors added that in certain areas of the country, it has become very hard to find a criminal provider. For the accused, this will mean travelling some distance to find somebody who could represent them in court. The research and travelling required to find help usually put tremendous pressure on a situation that is already very stressful for the individual.²⁹⁴

Pandemic

63. In crime, we were told that the pandemic intensified the strains on a practitioners already struggling after more than a decade of fee cuts, falling prosecution rates and a declining provider base. Income streams under the COVID-19 crisis have, at best, been delayed and diminished, and, at worst, disappeared from the system altogether, as fewer cases have entered the courts in the past year. The Treasury's furlough scheme has been instrumental in sustaining the sector, but this can only ever be a temporary fix.
64. The reduction in workflow for criminal lawyers has become particularly evident since many firms have been operating using mainly remote working methods and since the first national lockdown, which was instituted on 23 March 2020.
65. The most recent LAA statistics²⁹⁵ (April–June 2021) show that overall Crown Court expenditure decreased by 40% in 2020-21 compared with the previous year. This shift has been driven by a falling volume of completed trials in the Crown Court, with trial expenditure in the graduated fee schemes falling significantly over the same period.

66. The advice issued by the government to the public to 'stay at home' resulted in there being fewer police arrests over the course of the pandemic. Advice and recommendations regarding social distancing meant that there were far fewer custody and voluntary police interviews taking place.
67. There were, therefore, fewer occasions when prospective or existing clients were seeking to access criminal defence legal services.
68. Safety measures were implemented within the criminal justice system as a result of current government guidance. These measures have significantly reduced the number court hearings that are taking place. Jury and other trials and court hearings have either been vacated or postponed until dates far in the future. For the most part, only remand cases are currently being dealt with in many courts. Practitioners told us that existing court and police station cases are being postponed to dates in either 2022 or 2023.
69. Consequently, criminal law practices have experienced a significant drop in anticipated income and workflow. Their incomes are likely to continue declining for the foreseeable future. Most of these firms obtain the bulk of their workload from legal aid public funding sources.
70. Those practitioners who have worked throughout the pandemic have, for over a year, been forced to spend more nights in police stations and cover more remand hearings in the day, all the while knowing that their Crown Court caseload only expands with each vacated trial or new listing in 2022. Meetings with vulnerable clients are conducted over video – when the technology works – and we heard evidence of distressed remand prisoners who found salvation from 23½-hour lock-ups only by making calls on the phones installed in their cells. Some of these clients were just children. The data compendium shows defence practitioners leaving defence in droves²⁹⁶ for the CPS, where we were told the pay is better, the work-life balance more manageable and the prospects rosier.
71. As of 17 September 2021 there are only 1,080 firms holding criminal legal aid contracts, which is 572 fewer than there were in April 2012; a reduction of around 35%. During that same period criminal legal aid firms closed 753 offices, bringing the total number of offices down to 1565 – a significant reduction in public access to advice.²⁹⁷ While some firms have merged in that time, the evidence that we heard from witnesses indicated that the vast majority of that reduction is firms that have decided that legal aid does sustain a viable business model.

72. Practitioners told us that release under investigation (RUI) is one of the worst things that has happened to the criminal legal aid sector, as it requires firms to manage hundreds of cases that now sit in drawers for years at a time. It often means that a firm has to attend multiple times at the police station in cases that would previously have been concluded in a single attendance. Regardless of the number of attendances, the solicitor will only receive the single police station fee.
73. Many called for formalised deadlines to be introduced for the police to complete cases, alongside independent and judicial oversight of the process. By building up a large bank of unresolved and unbilled casework, RUI is causing a significant cash flow crisis for defence firms already under severe financial pressure.
74. All eyes in crime are on the Independent Review of Criminal Legal Aid, which is scheduled to report this year, some three years after promises were first made to invest in criminal legal aid. For many, this will be a pivotal moment for the profession.

Prison law

Pre-pandemic

75. In December 2013, the Criminal Legal Aid (General) Regulations 2013 SI No 9 were amended to restrict the ability of firms holding a legal aid contract to provide assistance with a number of areas in prison law. These included issues surrounding categorisation, sentence planning, licence conditions, mother and baby units and most prison disciplinary hearings. From this point on legal aid only covered the following issues:
- parole – where the Parole Board had the power to direct release;
 - adjudications before the independent adjudicator; and
 - sentence calculation – where the internal complaints procedure had been exhausted.
76. What this has meant in practice is that some issues which could have been addressed during a lengthy sentence are often only flagged as part of the parole process at the end of the person's minimum term.
77. In 2018, following litigation by the Howard League and the Prisoners' Advice Service,²⁹⁸ some areas were brought back into the scope of legal aid on the basis that the Court of Appeal found that fairness required legal advice and representation.

78. Since June 2018, the following issues have been covered by prison law legal aid:
- all matters before the Parole Board;
 - all independent adjudications and disciplinary matters that have been permitted by a governor;
 - minimum term reviews;
 - categorisation cases concerning category A (or equivalent) prisoners; and
 - sentence calculations where the release date is disputed and the complaints process has been exhausted.
79. In addition, there is the option to apply for Exceptional Case Funding in cases such as those concerning mothers and babies where human rights issues are engaged. However, we are told that such applications are rarely made or granted²⁹⁹. Critical areas of work that were in scope for a modest fixed fee before 2013 remain unavailable. These include sentence planning cases that previously ensured prisoners could undertake crucial risk reduction work before automatic release or parole.
80. At the same time, prison law has become more complex following new layers of work that have arisen from the Worboys case.³⁰⁰ This created a new system of reviews of parole decisions, the production of summaries of cases, and the need to establish findings of fact where there are unadjudicated allegations by means of pre-hearing case conferences or 'mini hearings'. Clients themselves are often highly vulnerable and the work often requires knowledge of multiple other areas of law such as mental health law and community care.
81. Remuneration for prison law that involves a complex range of low fixed and standard fees was also subject to the two sets of 8.75% cuts applied to wider criminal work in 2014 and 2015, although the second set of cuts were also reversed in 2016 (back to the 2014 rates). However, despite this reversal, practitioners tell us that fees remain low: for example, a practitioner could spend up to 14 hours on a complex written parole case and only get paid £200.75. In exceptional circumstances, where work on the case amounts to more than three times the fixed or higher standard fee in an advocacy case, a claim may be made for all the actual costs of the case. This is based on an hourly rate for preparatory work of either £42.80 or £51.24. In practice, however, we were told that this was very rare and the application and assessment process exceedingly bureaucratic. Dr Laura Janes explained that in over a decade of work in this area, she has only twice been able to bill above £1,450 for advocacy work completed. Practitioners told that in reality the provision of a good service for clients necessitates hundreds of extra hours of unpaid work.

82. What this has meant in practice is that even before the pandemic, prison law itself had become impoverished as the range of issues with which prisoners could be assisted shrunk and providers experienced a great deal of change and uncertainty. It is not surprising, then, that the number of providers has plummeted during this period.

Prison law (offices, not individual organisations) reporting work³⁰¹

83. As with other practice areas, witnesses add that this has led to regional advice deserts and disincentives for providers taking cases in certain locations. The legal aid contract for prison lawyers still contains a 'distant travel' rule (whereby special justification must be provided by the practitioner for taking on cases at distances over an hour from the office).³⁰² Practitioners explained that this was often unrealistic given the dearth of providers in some regions and the more rural location of several prisons such as Dartmoor and Channing Wood.

Table 12:
Prison law (offices, not individual organisations) reporting work²⁹⁰

2011/12 (r)	485
2012/13 (r)	353
2013/14 (r)	307
2014/15 (r)	258
2015/16 (r)	225
2016/17 (r)	217
2017/18 (r)	211
2018/19 (r)	169
2019/20 (p)	146

84. Statistically, we know that people in prison are more likely to suffer from mental health problems than those in the community. Research and published data suggest that most people in prison have current or previous mental health needs.³⁰³ A recent study suggests that more than half of adults in prison have had contact with mental health services, while Youth Offending Team practitioners recorded concerns about the mental health of nearly three-quarters of the children given custodial sentences in 2019/20.³⁰⁴ Research suggests that most people in prison have experienced trauma and that the prison environment has a re-traumatising effect.³⁰⁵
85. Yet these same individuals are less able to manage their mental health conditions because so many aspects of their day-to-day life are controlled by the prison. These difficulties are exacerbated by issues within the prison estate, for example the numbers of prison staff and the increased prevalence of drugs within the prison environment. These issues all add to the complexity of working with this extremely vulnerable client group.

Pandemic

86. In March 2020, HM Prison and Probation Service modelling (undertaken with Public Health England) indicated the possibility of high numbers of deaths in custody and suggested in the region of 10 times the number that we would normally see, at circa 2,500–3,500, based on the reasonable worst-case scenario.³⁰⁶ This is due to a combination of factors including close proximity caused by overcrowding, the movement of prisoners in and out of prison, and the fact that people in prison often have underlying health problems or other risk factors that increase the likelihood of severe disease. To date, there have been far fewer deaths than this, with 233 deaths related to COVID-19 among people in prisons in England and Wales between March 2020 and August 2021³⁰⁷. This was, in large part, due to the measures taken over the past year, which reduced the time spent out of cells to about 30 minutes a day, suspended prison transfers and forced new arrivals to be quarantined for 14 days. We asked what practitioners had seen in relation to both the work and their clients over the course of the pandemic.
87. Witnesses described a huge increase in isolation with little means of progress – no (or almost no) interventions/programmes had been offered over the course of the past 18 months. Dr Janes explained that, for a period of 200 days, many prisoners were put in solitary confinement for up to 22 hours a day. Other practitioners added that they had found it very difficult to contact clients in prison, as prisons have generally been ill-equipped to deal with remote consultations. We were told that video links existed but were difficult to access in practice, with practitioners sometimes waiting up to three months for an appointment. A response to this in some cases was to provide increased phone credit for prisoners to call on an ad hoc basis – often in non-private settings and almost always in circumstances in which it was impossible to take meaningful instructions. Witnesses discussed the realities of examining reports of several hundred pages and discussing highly sensitive matters with their clients that, if overheard, could lead to assaults or serious problems with other prisoners. Several prisons have now ceased providing remote facilities and have insisted that face-to-face (in-person) consultations are the only option. Others witnesses spoke of the absence of release on temporary licences, which resulted in all parole hearings being switched to video link. As with the use of other forms of technology, this may have led to additional difficulties for vulnerable clients following these hearings.
88. What came across from the evidence that we heard was the lack of co-ordinated approach, with the needs of prisoners for meaningful engagement with their legal counsel not being seen as a priority in the face of a multitude of competing demands on the prison service.

Public law

Pre-pandemic

89. Public law is the part of law that governs relations between legal persons and a government, between different institutions within a state, between different branches of governments, and relationships between persons that are of direct concern to society. Public law principles mean that public bodies should act lawfully, rationally, fairly, and compatibly with the human rights of those affected by their actions. This accountability of the state and the legislature – the checks and balances that we impose on decision-making – is an essential part the rule of law.
90. Judicial review is often seen as a means of challenging the decisions and actions (and sometimes the failure to act) of a public body that are unlawful. However, it is also a means of giving effect to parliamentary sovereignty in that it looks at what Parliament intended and checks that those decisions being made in its name are fair and lawful. It is a court procedure brought either in a branch of the High Court known as the Administrative Court, or, in relation to certain types of case, in the Upper Tribunal, and is a remedy of last resort in cases throughout the social welfare spectrum.

'Everyone benefits when governments are accountable to the people they serve. That is why people need access to an effective system of redress when governments act unlawfully. Judicial review is such a system.'

Jo Hickman³⁰⁸

91. We spoke to witnesses in mental capacity and community care, education, housing law and actions against the police about the role of judicial review in their work. Each made clear that judicial review is a mechanism of last resort, used where remedies available via complaints procedures and ombudsman schemes have been exhausted. They also highlighted its importance in cases where there is a clear illegality of decision-making or the person's needs are so acute, and they are immediate risks to themselves, that very urgent action is necessary. More than one referred to it as highly effective, but in reality used in only a small number of cases. All witnesses raised concerns about the fee structure in judicial review cases and the barriers that this places in front of members of the public seeking to bring a case.
92. One of the changes to the legal aid regime brought about by LASPO was the amendment to funding in judicial review cases.³⁰⁹ These introduced a form of 'payment-by-results' regime, whereby legal aid providers would not be paid

for any work done in a judicial review if permission was refused. This is despite the need for the LAA to be satisfied that the basis of the claim appeared solid (given the documents available) and that the case had a reasonable prospect of success prior to the granting of a certificate for the work.

93. We asked providers how this change had impacted upon the numbers of judicial review cases brought and upon their practices. They told us that numbers in this area of law are low and have decreased significantly in the years since LASPO. In the first quarter of 2021, there were 610 judicial review applications received, down 23% on the same period in 2020. In 2020, there were 2,800 applications received in total, down 16% on 2019 (from 3,400) and a very small proportion of the cases heard by the courts across England Wales in any given year³¹⁰. We were also told by Jo Hickman, Director of the Public Law Project, that 'analysis suggests that up to 60% of cases settle on a pre-action basis. And the majority of those settle in favour of the claimant'.³¹¹ Thus, while the numbers remain small in judicial review, witnesses impressed upon us the efficacy of the mechanism as a check on problematic and poor decision-making.
94. We also asked witnesses about the types of clients and cases that may involve judicial review. Nicola Mackintosh QC (Hon) spoke of her community care clients, many of whom face cuts to care packages, leaving these extremely vulnerable people without essential services. Such cases often involve important legal principles about where the line is drawn in relation to state obligations to the individual. We met with Pamela Coughlan who gave evidence about her legal battle in relation to a NHS promise of a 'home for life'. Ms Coughlan's landmark case³¹² established the right to 'NHS funded continuing health care' which has benefited thousands of other disabled people in the years since. Yet, Ms Coughlan told us of the difficulties that she faced in securing legal representation in Devon. Eventually, she contacted a firm based in London, which put her in touch with Ms Mackintosh. Ms Mackintosh explained that it would be even harder for individuals such as Ms Coughlan to secure representation now because not only is there a dearth of community care providers but practitioners are reluctant to take on judicial review cases such as these. She explained that the Coughlan case, for all its merit, is an example of a case which providers may no longer take because of the sheer amount of work necessitated in preparation that would have to be done at risk: under the current fee structure, the provider would not be paid anything at all until the case won at permission stage.³¹³
95. Rosaleen Kilbane of the Birmingham-based Community Law Partnership spoke of housing standards declining as public bodies are not being held accountable for poor or incorrect decision making. She described a recent judicial review

case that the firm had brought on behalf of a client placed in temporary accommodation by a local authority. The client was a wheelchair user but the property that she was put into was unsuitable for her needs and she was unable to manoeuvre her wheelchair into the lavatory. She had an ongoing medical condition which meant that she had to irrigate her bowels daily, but was unable to do so because of the property that she was in. Ms Kilbane explained that when the client approached her firm, she was starving herself so that she didn't need to go to the toilet. The local authority had told her that it was unable to do anything because of the COVID-19 pandemic. Judicial review in this case meant that a mandatory order was procured to rehouse the client in more suitable accommodation, which was then found. For such clients, the work is vital, but Ms Kilbane agreed with Ms Mackintosh in that fewer providers are prepared to take these cases on.³¹⁴

96. Education lawyer Polly Sweeney explained that a large part of her work consists of judicial review cases. This can range from failures to provide a child with education, through to challenges to a local authority's policies or to budget cuts, all the way up to national challenges. However, with only eight firms across England and Wales currently holding a legal aid education contract and a reluctance to undertake work at risk, there are very real legal aid deserts in this area.³¹⁵
97. What, then, can be done to stop practitioners moving away from this area of work? In our publicly funded bar evidence session, barrister Adam Wagner highlighted the vast difference between acting for and against the government in publicly funded cases. He pointed out that the vast majority of public interest cases with legal aid have the government or a public authority on the other side. The public authority is represented by its choice of lawyer, who will be paid on time for their work. In contrast, he told us that the publicly funded bar has been hollowed out following decades of cuts, offering the individual far less choice. He added that the difference with legal aid-funded work is that the payment is far less certain and far more delayed.³¹⁶ Alluding to the work done at risk, Mr Wagner added that very often legal aid is not available for a case and the lawyer may not find this out until quite late in the process. He pointed to the difference between how the legal teams on each side are treated as a clear indication of a structural imbalance in publicly funded work. Both sides are performing a public service but there is a huge variation in the way that they are treated, which will continue to erode the workforce unless it is resolved.



APPENDIX 4 – JUSTICE SELECT COMMITTEE – THE FUTURE OF LEGAL AID – THIRD REPORT OF SESSION 2021–22

(HC 70) published 27 July 2021

Conclusions and recommendations

Criminal legal aid

1. Reform of criminal legal aid must prioritise a whole justice system approach, to ensure that there are incentives for everyone to work towards the fair and timely resolution of criminal cases. (Paragraph 15)
2. The changes made as part of the Criminal Legal Aid Review are positive and show that the Government recognises the need to make improvements to the criminal legal aid framework. It is particularly welcome that the Government has acted on pre-charge engagement. However, much more needs to be done to make criminal legal aid sustainable. (Paragraph 22)
3. Without significant reform there is a real chance that there will be a shortage of qualified criminal legal aid lawyers to fulfil the crucial role of defending suspects and defendants. This risks a shift in the balance between prosecution and defence that could compromise the fairness of the criminal justice system. (Paragraph 26)
4. There appears to be a growing imbalance between the ability of criminal defence firms to recruit and retain staff and that of the Crown Prosecution Service. It is fundamental to our adversarial justice system that criminal defence services have sufficient resources to provide high-quality representation to suspects and defendants. We recommend that the Government consider linking legal aid fees to the rates of pay of the Crown Prosecution Service. (Paragraph 32)

5. The lack of any increase to criminal legal aid fees for solicitors over the past 20 years needs to be addressed. Sir Christopher Bellamy's current review, commissioned by the Government, gives an opportunity to do this. Thereafter, fees and rates should be regularly reviewed in line with inflation, otherwise the gap will build up over time and become harder to address. (Paragraph 34)
6. The criminal justice system will be stronger if able and experienced advocates at the criminal bar are able to do publicly funded legal aid work. The gap between private and public rates has grown substantially in the past decade, and while a significant gap is to be expected, we agree with Criminal Bar Association's interim submission to the Independent Review of Criminal Legal Aid that there needs to be a connection between the two. Further, in assessing the fees paid to advocates, it is important to remember that the total fees do not translate directly to earnings, as barristers have to pay considerable overheads, expenses and chambers fees out of the gross fee. The Government should take this into account when considering how to reform the criminal legal aid system. (Paragraph 37)
7. There are serious problems with the current fee schemes for criminal legal aid. The fees and rates do not reflect the work required. The schemes should be reformed to ensure that they offer a fair rate for the work required and are subject to regular review. (Paragraph 38)
8. The justice system needs talented lawyers from all backgrounds to choose to practise criminal law and for the professions to be able to retain them. In 2018, our predecessor Committee stated 'that current difficulties in recruitment to the Criminal Bar could have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts'. This Inquiry's evidence has reaffirmed those concerns. (Paragraph 40)
9. The predominance of inadequate fixed fees in the current framework is problematic. The structure of the fees does not reflect the complexity of the work required, nor does it incentivise firms to take on the most difficult cases at an early stage. The Government should reform the fee structure to prioritise quality over quantity and to allow criminal defence lawyers to spend more time on the most difficult cases at the earliest possible stage. There is a risk to the fairness of the criminal justice system if lawyers are not willing to take on the most complex cases because of the low rates of pay. There are also clear benefits for the operation of the criminal justice system if more work can be done at an early stage to make progress on a case. The Government should reform the fee structure to prioritise quality over quantity and to allow criminal

defence lawyers to spend more time on the most difficult cases at the earliest possible stage. There is a risk to the fairness of the criminal justice system if lawyers are not willing to take on the most complex cases because of the low rates of pay. There are also clear benefits for the operation of the criminal justice system if more work can be done at an early stage to make progress on a case. (Paragraph 47)

10. The Committee's Inquiry on court capacity has focused on the Crown Court where the delays are the most acute. In that context, it is imperative that the criminal legal aid system should be structured to facilitate resolution of cases at the earliest possible stage in the process. (Paragraph 51)
11. The criminal legal aid system should be restructured so that it enables legal aid lawyers to provide effective representation at every stage of the process, works for complex cases and sustains providers in all areas of England and Wales. The Government should reduce the role of fixed fees within the legal aid system to ensure that high-quality work at every stage of proceedings and on complex cases is fairly remunerated. (Paragraph 52)
12. The current criminal legal aid system does not provide enough incentives for legal representatives to take early action to progress cases through the system as quickly as possible. The legal aid fee structure should incentivise early engagement between defence lawyers and the police and the CPS. We note that the Government has sought to make changes to pre-charge engagement, but more changes are needed. The current system does not do enough to recompense lawyers for taking on complex cases at the police station and at the Magistrates Court. Investing more in early engagement will lead to savings to the public purse, as cases would be resolved at an earlier stage, which could free up capacity across the criminal justice system. (Paragraph 53)
13. The Government needs to ensure that the legal aid framework is able to respond and adapt to changes in volume and practice over time in the criminal justice system. (Paragraph 58)
14. Our 2019–21 Report on the effect of Covid-19 on the legal professions discussed measures taken to provide additional income during the early stages of the pandemic. The impact of Covid-19 means, however, that the need to take action to improve the criminal legal aid framework is now even more urgent than it was when the Government set up the Criminal Legal Aid Review in 2018. (Paragraph 61)
15. The Government should evaluate whether the money saved by the means test is justified when weighed against its impact on the fairness of criminal justice

system. If the means tests for the Magistrates Court and the Crown Court are to remain then the current eligibility thresholds should be addressed and thereafter automatically updated every year in line with inflation. (Paragraph 67)

16. The Government's response to our report on private prosecutions concluded that the rules should be changed to level down what private prosecutors can recover from central funds. Our view is that this is the wrong approach. The right approach would be to make the system fairer by levelling up and removing the cap on what reasonable costs acquitted defendants may recover from central funds. (Paragraph 69)
17. We recommend that the Government implement the recommendations of the Taylor Review of Youth Justice: to review the fee structure of cases heard in the youth courts in order to raise their status and improve the quality of legal representation for children and to introduce a presumption that children should receive free legal representation at the police station. (Paragraph 73)
18. The Government should consider how technology can be used to increase the accessibility of legal advice to suspects and defendants. The Government should also consider developing a scheme to enable criminal legal aid providers to upgrade their digital capacity. (Paragraph 77)
19. Successive governments have prioritised efficiency and costs over the quality of the criminal justice system. The Committee's Inquiry into Court Capacity has highlighted the difficult situation facing the courts at the start of the pandemic. Unless there is significant change to criminal legal aid, there is a real risk that the balance between defence and prosecution, which is at the heart of our adversarial justice system, will be unfairly tilted in favour of the prosecution. The fairness of criminal justice system depends on a criminal legal aid system that is properly funded and that is structured to enable lawyers to provide high-quality work on the most complex cases at every stage of the process. The Government's response to the independent review of criminal legal aid must ensure that criminal lawyers are paid for all the work they do to represent their clients and that fees and rates are regularly reviewed so that the profession can remain sustainable for the long-term. (Paragraph 79)

Civil legal aid

20. It is frustrating, and yet unsurprising, that many of the concerns raised over the operation of the civil legal aid system by our predecessor Committee in 2015, and by Government's post-implementation review in 2019, have been highlighted in evidence to this Inquiry on the future of legal aid in 2021. (Paragraph 86)

21. The Government should take a whole justice system approach to the reform of the civil legal aid framework. The provision of early advice can help to make the courts work more effectively. (Paragraph 88)
22. The Government should consider whether the model of the possession duty scheme should be used in other areas of the civil justice system where there are significant numbers of litigants in person. Non-means tested advice at court on the day of hearing could provide an economical way of offering some legal support to vulnerable litigants. We commend the Government and the Legal Aid Agency on their work on the duty scheme, but ask that they learn the lesson that schemes which are 'assertive and flexible', as Simon Mullings described the possession duty scheme, are what is needed. (Paragraph 92)
23. The Committee welcomes the introduction of the Family Mediation Voucher Scheme. It is a positive step and recognises that more needs to be done to help separating parents. We believe that if early legal advice was available alongside mediation, this would result in an increase in the numbers using mediation successfully. (Paragraph 97)
24. We suggest that the civil legal aid system needs an updated version of the Green Form scheme, which was introduced in 1973, that would allow individuals to understand their rights and be directed to the services that are most appropriate for their situation. One suggestion we have received is that the Government could develop and pilot an ambitious and economically viable early advice scheme, that enables individuals to access timely legal and expert advice. Rather than being constrained by issues of scope, such a scheme should be strategically targeted at those who would most benefit from early advice. (Paragraph 98)
25. The weight of evidence, however, is that inaction on the rising number of litigants in person is not an option. Many of the policy responses to the issue involve increasing the resources of the courts or other agencies involved in the system. With the impact of the pandemic likely to lead to greater number of litigants in person in the family courts and in tribunals, we urge the Government to consider providing more accessible and effective forms of support. (Paragraph 103)
26. We continue to be disappointed with the Ministry of Justice's approach to gathering data on access to justice. From the evidence we heard, the data they hold may not adequately reflect the impact of litigants in person on court time and throughput. We remain concerned that the inability to produce high-quality data on the impact of legal advice on access to justice means that the chances of the Treasury granting additional funding for legal advice and representation are slim. (Paragraph 104)

27. We welcome steps to support litigants in person. We encourage the Government to consider whether the scale of these projects and grants should be increased. (Paragraph 107)
28. We recognise that the Government is making progress in improving legal support and information for litigants in person, but we caution the Government that such measures should not be seen as an alternative to tailored legal advice. We are aware that in areas such as benefits, non-legally qualified specialist advisors can provide appropriate assistance. However, as long as our system is characterised by complex legal frameworks and an adversarial justice system, the availability of individualised legal advice and support will remain necessary. (Paragraph 108)
29. We welcome the decision to remove the £100,000 cap. However, we regret that it was ever necessary for a victim of domestic violence to have to litigate to obtain legal aid because of the Government's failure to ensure that the means test is regularly updated. (Paragraph 110)
30. We welcome the Government's decision to review the means test for both civil and criminal legal aid. There is a strong consensus among witnesses that any revised means test for civil legal aid should be simpler, for example by using passporting, should be set at an objectively defined poverty line and should be regularly updated. The vast majority of taxpayers are not eligible for civil legal aid, and for those that are, it is often difficult to access. (Paragraph 114)
31. The Exceptional Case Funding system should be reformed. (Paragraph 118)
32. We recognise the strength of Richard Miller's suggestion that judges should be empowered to make a direction that an individual needs representation and that it should be binding on the Legal Aid Agency to provide exceptional case funding in that case. Such an approach could increase access to justice for the most vulnerable litigants and improve the efficiency and effectiveness of court proceedings. (Paragraph 118)
33. Civil legal aid, like criminal legal aid, needs the Government to take decisive action to change the approach set by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at the start of the last decade. Without such a step, the sector will continue to struggle to attract new recruits. (Paragraph 120)
34. The Government should collect and publish more detailed data on the providers of civil legal aid, in particular it should capture how much publicly funded work each provider is doing each year. (Paragraph 122)

35. Sustainability issues for civil legal aid providers are sufficiently serious to justify a complete overhaul of the system. A number of witnesses have highlighted that a combination of number of fundamental problems rather than one or two specific issues contribute to the unsustainability of civil legal aid. Furthermore, this lack of sustainability is having a knock-on effect on the ability of those entitled to legal aid to access lawyers to provide advice and representation. We welcome the fact that the Government is undertaking a review to look at these issues in the round. That said, the success of that review will depend on whether it is able to put forward the radical solutions needed to make civil legal aid sustainable again. We received evidence to suggest that an internal review may not be adequate to that task. If that proves to be so, an independent review may be required, along the lines of the Independent Criminal Legal Aid Review, to acquire the evidence base needed for far-reaching changes. (Paragraph 127)
36. The basis for the radical change required in civil legal aid requires the Government to establish the level of need for civil legal aid services in England and Wales. Once that is established, the Government needs to ensure that suppliers of legal aid services have the capacity to meet that need. We agree with a number of witnesses that the current model of predominantly funding services by funding individual cases, often via fixed fees, will not enable providers to meet the need or demand for legal aid services. As Richard Miller told us 'it is a bit strange that we have a system where the Legal Aid Agency makes decisions on each individual case, leading to extensive bureaucracy, which of course has a cost in itself'. Instead, a more flexible and proactive approach is required. The Government should fund more training opportunities for legal aid lawyers to ensure that there those willing to pursue a career in publicly funded work are able to. The Government should provide more direct grants to organisations who can be relied upon to provide a high-quality and economical viable service. The Government should set up and run more duty schemes to help the vulnerable litigants within the justice system who have not been able to secure the services of a lawyer. The Government should ensure that fees for publicly funded work are regularly updated in line with inflation. (Paragraph 128)
37. However, it is not a question of simply raising fees, but rather making better use of the resources available. We believe that the best way of ensuring value of money is to focus on expanding the capacity of those providers who are able to offer a high-quality service to the public at a relatively low cost when compared to the private sector. By doing this, we can reduce backlogs and help people solve legal problems more quickly. In certain areas of civil law, in particular immigration, community care and housing, we are concerned that the impact of Covid-19 will lead to a growing need for legal aid work, but that there will not

be sufficient providers able to help. In those areas, we recognise that unless the civil legal aid review produces very speedy results, it is likely that individuals will be prevented from pursuing meritorious claims. The Lord Chancellor should consider using his powers under section 2 of LASPO to make direct grants to organisations to fulfil the statutory duty to ensure that legal aid is made available. (Paragraph 129)

38. Online legal services should not be seen as a replacement for traditional face-to-face services, especially when such a high proportion of those who qualify for legal aid do not always have reliable access to digital technology. That said, we agree with a number of submissions that have suggested that there is a significant opportunity to use technology to both expand the capacity of providers and to extend the reach of legal aid providers to more people. The Government should support legal aid providers to upgrade their digital infrastructures. This should include helping smaller providers and Not-for-Profits procure the necessary hardware and case management software that could help them expand their capacity. The Government should also establish an Online Platform for Legal Advice, as suggested by JUSTICE, that is given prominence by HMCTS online that directs people to advice provided by legal aid providers. Expanding the availability and accessibility of online advice by legal aid providers, particularly at an early stage, could serve to both enhance existing face-to-face services and extend the reach of providers. The Government should support legal aid providers to upgrade their digital infrastructures. This should include helping smaller providers and Not-for-Profits procure the necessary hardware and case management software that could help them expand their capacity. The Government should also establish an Online Platform for Legal Advice, as suggested by JUSTICE, that is given prominence by HMCTS online that directs people to advice provided legal aid providers. (Paragraph 137)

Legal Aid Agency

39. We commend the Legal Aid Agency for its work supporting legal aid providers since the start of the pandemic. The approach taken by the Agency and its staff shows that it can be flexible and proactive if the circumstances allow. We recommend that the Agency continues with this approach in the future. We would also suggest that the Agency considers whether any of the changes made to deal with the pandemic should be made permanent. (Paragraph 140)

40. We welcome the Legal Aid Agency's work to respond to legal aid providers concerns in relation to the 'culture of refusal'. We also recognise their commitment to ensure that taxpayers' money is managed properly. We acknowledge that the staff and leadership at the Legal Aid Agency have limited scope to alter the fundamental dynamics that determine their role within the broader legal aid system. Nevertheless, we believe that the evidence submitted indicates that the Government and the Ministry of Justice need to reevaluate the Legal Aid Agency's priorities. By asking the Agency to prioritise the 'error rate' over other considerations, particularly access to justice and the sustainability of providers, the Government risks missing the wood for the trees. The Government's work on the sustainability of both criminal and civil legal aid should consider how to empower the Legal Aid Agency to take a more flexible and proactive approach to funding legal aid. The Government should ensure that providers are not required to conduct disproportionate amounts of unpaid work to apply for funding. (Paragraph 150)
41. The Government should consider creating a system of earned autonomy that places more trust in the decision making of providers with strong records of high-quality decision making. The Agency's processes should have some incentives for providers to work towards gradually reducing the burden of administrative requirements. Given the difficulties facing legal aid providers, placing greater trust in their ability to decide on eligibility would expand their capacity which would be beneficial for access to justice. (Paragraph 150)
42. The Government should consider enabling the Legal Aid Agency to provide specific support to legal aid providers to bring in trainees. This support should be targeted to areas where there is a particular shortage of specialist advice. (Paragraph 153)
43. If the Government were to accept the recommendations we have made on how to approach criminal and civil legal aid it will be necessary to address the Legal Aid Agency's priorities, its institutional capacity and how it uses its resources. The Government should consider whether the Legal Aid Agency should expand its data collection and publication in order to better inform the development of legal aid policy. (Paragraph 155)



APPENDIX 5 – GLOSSARY OF TERMS

Advice: we use the term advice (alternatively education, information and advice) to refer to the spectrum of non-means tested services available to improve people's ability to understand the law, identify a problem as legal in character, and make informed decisions as to a sensible course of action to resolve the problem.

Area of practice: The area of law in which a practitioner mostly works. Most legal aid lawyers would tend to have one primary area of practice, for example crime or family law.

BME/BAME: Black & minority ethnic / Black, Asian and minority ethnic.

Call/Year of Call: The year in which a barrister is formally recognised by their Inn of Court to have passed their training and been 'called to the Bar'.

CCMS: The Legal Aid Agency's Client and Costs Management System, through which the majority of civil legal aid applications and bills are submitted.

CLAR/IRCLA: The government's Criminal Legal Aid Review and the Independent Review of Criminal Legal Aid.

CPS: Crown Prosecution Service.

Early legal advice: We use this term to describe advice provided before representation at a court or a tribunal, which can help to avoid the escalation of disputes into costly and stressful court cases.

ECF: The Exceptional Case Funding Scheme. Operated by the Legal Aid Agency as a 'safety net' to enable public funding of cases that fall outside of the scope of the legal aid scheme but where a failure to access advice and/or representation could lead to a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998) or any rights of the individual to the provision of legal services that are retained enforceable EU rights.

Judicial review: A court proceeding in which a judge reviews a decision or action made by a public body and considers whether the public body has acted in accordance with the law or whether the failure of a public body to act breaches the law.

LAA: The Legal Aid Agency, the executive agency of the Ministry of Justice responsible for the administration of legal aid.

LASPO and LASPO PIR: The Legal Aid, Sentencing and Punishment of Offenders Act 2012, and the government's Post-Implementation Review of that Act, published 7 February 2019. LASPO was introduced to reduce the budget of the Ministry of Justice. It removed from the scope of legal aid a wide range of legal problems in areas like housing, welfare benefits, debt, employment, immigration, private family and clinical negligence; and replaced the non-departmental Legal Services Commission with the Legal Aid Agency, under the control of the Ministry of Justice.

Legal aid: Government-funded legal support for people who are unable to pay for legal advice or representation. Access to legal aid is subject to certain eligibility criteria, primarily based on the 'merits' of a case and the financial circumstances of the client. It is made up of criminal legal aid for criminal cases and civil legal aid for non-criminal cases (such as family, housing, mental health).

Legal Help: The term the Legal Aid Agency uses to refer to legal advice and assistance, but not representation in court, for a legal problem.

Legal representation: We use the term legal representation to refer to the work undertaken by legal practitioners to prepare for and represent their clients in a court.

Matter starts: A term used in the legal aid system to describe an individual act of assistance or 'case' commenced under Legal Help. Each provider has a prescribed number of matter starts in each category of law within a defined period (usually a year).

MoJ: The Ministry of Justice

Pro bono: Latin phrase that describes the voluntary provision of professional services for no fee.

Pupillage: A period of training at chambers for prospective barrister. Usually paid at a relatively low wage and usually lasting one year. Securing pupillage is highly competitive.

Providers: we use the term providers to refer to the law firms and not-for-profit organisation with one or more legal aid contracts. Note also that a provider might have multiple office locations but will be referred to in this report as one provider. Post-LASPO the LAA's data collection has been focused on provider offices – i.e. each location from where a provider delivers services. This is because legal aid contracts are attached to separate offices. This is an important point to note when considering the detailed data available through the Office for National Statistics:

<https://www.gov.uk/government/collections/legal-aid-statistics>

SEN: Special Educational Needs

Social Welfare Law: A general term that is commonly applied to categories of law that impact of the everyday lives of individuals. The term is often used to refer collectively to advice and assistance on asylum, clinical negligence, community care, debt, discrimination, education and SEN, employment, housing, immigration, mental capacity, mental health, public law (as it relates to individuals) and linked issues such as actions against the state and inquests, and welfare rights. Occasionally use of the term can incorporate family law, particularly in relation to 'public family law' where the state is seeking to intervene in issues relating to a family. Commonly abbreviated to SWL, this term is occasionally used interchangeably with 'civil' law, as opposed to criminal or family law, mirroring general distinctions recognised in the courts and tribunals system.

The Bar: The collective noun for barristers.

The Bar Council: The General Council of the Bar – the independent professional body for barristers in England and Wales.

The Law Society: The Law Society of England and Wales – the independent professional body representing solicitors in England and Wales.

The rule of law: the rule of law is an essential component of democracy requiring that both the governed and the government are equally subject to the law of the land. In a democracy, we are governed by a set of rules and principles rather than by the mere whim of those in authority or power. To quote Lord Neuberger: 'At its most basic, the expression connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied.'



APPENDIX 6 – WITNESS BIOGRAPHIES

Rose Arnall, Shelter is a solicitor working in Shelter’s strategic litigation team focusing on discrimination in the field of housing law. She trained at Shelter through the Chartered Legal Executive route to qualification. Prior to joining Shelter, Rose worked for a number of charities including Amnesty International, the Howard League for Penal Reform, Refugee and Migrant Justice, and Liberty.

Jenny Beck QC (Hon), Beck Fitzgerald is a co-founder of Beck Fitzgerald and practises in private family law, specialising in all aspects of divorce, separation, financial negotiations and arrangements involving children. Jenny is a member and former chair of The Law Society’s Access to Justice Committee and current co-chair of the Legal Aid Practitioners Group.

Sir Christopher Bellamy QC, Chair of the Independent Criminal Legal Aid Review is a barrister who specialises in competition and regulatory law at Monckton Chambers. Sir Christopher previously served as an employment tribunal judge and member of the Competition Appeal Tribunal, as well as working as Chairman of Linklaters’ global competition practice. He was chosen to Chair the Independent Review of Criminal Legal Aid in 2020 and will report back to the Lord Chancellor in 2021.

Julie Bishop, Director, Law Centres Network has served as Director of the Law Centres Network for 12 years. Julie was previously Director of the National Association of Community Legal Centres in Australia for over five years, and before that worked in the Australian legal aid sector for almost 20 years.

Rakesh Bhasin, Edwards Duthie Shamash Solicitors and LCCSA is a partner at Edwards Duthie Shamash, having qualified as a solicitor in 1996. He specialises in criminal law.

Alex Chalk MP, then Parliamentary Under Secretary of State (Justice) and now Solicitor General is the Member of Parliament for Cheltenham and from February 2020 to March 2021 was the Under Secretary of State responsible for legal aid. Since March 2021, he has served as the Prisons and Probation Minister. Prior to entering Parliament, Alex practised as a criminal barrister.

Dr S Chelvan, 33 Bedford Row Chambers is a barrister specialising in immigration and public law, and heads this team at 33 Bedford Row. Dr Chelvan is a champion of legal aid, having been named Legal Aid Barrister of the Year at the Legal Aid Lawyer of the

Year Awards in 2014. He is a globally recognised expert on refugee and human rights claims based on sexual or gender identity, and is instructed on cases in the UK up to the Supreme Court and the European Court of Human Rights. Dr Chelvan holds an LLM from Harvard and a PhD from King's College London.

Deborah Coles, Director, INQUEST is the Executive Director of INQUEST and leads the charity's strategic policy, legal and parliamentary work. Deborah has been an independent adviser to a number of committees and inquiries, and was the special adviser to Dame Elish Angiolini, the chair of the Independent Review of Deaths and Serious Incidents in Police Custody. Deborah currently represents INQUEST as a member of the Ministerial Board on Deaths in Custody and is a member of the Independent Advisory Panel on Deaths in Custody.

Pam Coughlan was paralysed after a road accident and needed full-time nursing care. She and 11 other disabled residents of a large NHS house were promised a 'home for life' if they moved to a new NHS facility, Mardon House. When, in the mid-1990s, the local health authority tried to transfer responsibility of her care to social services, Pam and the other residents faced losing their 'home for life'. Pam successfully brought a judicial review of the health authority's decision, which went to the Court of Appeal and established that nursing care was healthcare, not the responsibility of social services, and established the right to 'NHS-funded continuing healthcare', which has benefited thousands of vulnerable people.

Stephen Davies, Tuckers Solicitors LLP is a criminal defence solicitor, police station representative and duty solicitor practising at Tuckers Solicitors. Stephen is also involved in academia and is a policy adviser in relation to criminal justice and legal aid. He currently represents The Law Society's Junior Lawyer Division in relation to the ongoing CLAR.

Professor Jo Delahunty QC, 4PB Chambers is a barrister specialising in legally aided child abuse cases, for which she is ranked as a leading tier 1 silk by Chambers and Partners. Jo became a QC in 2006, a recorder in 2009, was made a Bencher of Middle Temple in 2011, served as Gresham College Professor of Law from 2016 to 2020 before being made an emeritus professor in 2020. Coming from a working-class state school background, Jo is a passionate champion of legal aid, diversity at the bar and access to the profession.

Michael Etienne, Garden Court Chambers is a barrister practising in public law and human rights, focusing on cases involving detaining authorities, particularly police forces and prisons, and where issues of systemic discrimination are engaged. Michael's experience of legal aid includes starting work as a paralegal in 2013, working for Liberty as an advice and information officer, before being called to the bar in 2018.

Anthony Graham, Amosu Robinshaw Solicitors and Black Solicitors Network is a duty solicitor with 18 years' experience, specialising in criminal defence, and is the co-director of Amosu Robinshaw Solicitors. Anthony also provided evidence on behalf of the Black Solicitors Network.

Lorraine Green, Miles and Partners is an associate solicitor at Miles and Partners having qualified in 1995. Lorraine specialises in family law matters concerning children and is recognised in the Legal 500 as a 'very experienced and confident solicitor'.

Joanna Hardy, Red Lion Chambers is a barrister specialising in criminal law and is described by the Legal 500 as an 'absolute star'. Joanna also volunteers with a number of organisations promoting social mobility and access to the bar.

Jo Hickman, Director, Public Law Project is the Director of the national legal charity Public Law Project, which works to ensure fair and lawful public decision-making and to improve access to justice. Jo is also a member of the Civil Justice Council and The Law Society's Access to Justice Committee.

Henrietta Hill QC, Doughty Street Chambers is a barrister with over 20 years' experience, specialising in claims against the police, inquests and other cases involving equality and human rights issues. Her notable cases against the police include representing the family of Jean Charles de Menezes and Victor Nealon.

Kerry Hudson, Bullivant Law and London Criminal Courts Solicitors' Association is the director of Bullivant Law and specialises in criminal defence. She is also the President of the London Criminal Courts Solicitors' Association.

Aqsa Hussain, No5 Chambers is a barrister at No5 Chambers having obtained tenancy shortly after giving evidence to the Inquiry. Aqsa specialises in criminal, public and regulatory law, practising in both private and legal aid work in equal measure. Outside legal practice, Aqsa leads the non-profit Human Rights Pulse, provides legal advice to a charity focused on hate crime, serves as trustee at an international human rights charity and is a steering group member of The Intersectional Women Barristers' Alliance – Themis.

Malvika Jaganmohan, St Ives Chambers is a barrister practising in all areas of family law. Alongside her practice, Malvika is active in promoting awareness of mental health and well-being among lawyers, and runs her own blog – Stiff Upper Lip – on the subject.

Dr Laura Janes, Howard League for Penal Reform qualified as a solicitor in 2006 and is a director at the Howard League, overseeing its legal service for people under 21 in prison. Laura is a committee member of the Association of Prison Lawyers, Chair of the Legal Action Group and a visiting fellow at London South Bank University.

Rosaleen Kilbane, Community Law Partnership qualified as a solicitor in 1989 and has practised in housing law throughout her career. She was a founding partner of the Community Law Partnership, which specialises in housing, public law and community care. Rosaleen has previously been a member of The Law Society's Civil Litigation Committee and Chair of its Housing Law Committee. Rosaleen also sits as a Deputy District Judge in the County Court.

David Lammy MP, Shadow Secretary of State for Justice and Shadow Lord Chancellor is the Member of Parliament for Tottenham and has served as Shadow Secretary of State for Justice and Shadow Lord Chancellor since April 2020. David held a number of ministerial roles between 2002 and 2010, including serving as Minister of State for Culture and as Parliamentary Under Secretary of State for Constitutional Affairs. David previously practised as a barrister.

Cyrus Larizadeh QC, Chair of the Family Law Bar Association is a barrister practising in family law and specialising in private and public children law. Cyrus is Chair of the Family Law Bar Association and a Bencher of the Inner Temple. During the pandemic, he and his team were responsible for safeguarding the family bar and helped set up the remote family court.

Jawaid Luqmani, Luqmani Thompson & Partners is a founding partner in Luqmani Thompson & Partners, which practises primarily in immigration law. Jawaid was Treasurer of the Immigration Law Practitioners Association for seven years, Chief Assessor of The Law Society's Immigration and Asylum Accreditation Scheme for three years and undertakes training for a variety of organisations on immigration law.

Cris McCurley, Ben Hoare Bell LLP is a partner at Ben Hoare Bell and practises in family law, specialising in childcare and international family law. Cris also regularly advises the MoJ on forced marriage and the human rights impact of legal aid cuts.

Nicola Mackintosh QC (Hon), Mackintosh Law is the founder of Mackintosh Law, which specialises in mental capacity and community care law. Nicola was appointed an Honorary Queen's Counsel in 2014 in recognition for her outstanding contribution to the development of community care law and access to justice. Nicola is co-chair of the Legal Aid Practitioners Group and a member of The Law Society's Council.

Richard Miller, Head of Justice, The Law Society qualified as a solicitor in 1992 and worked in a small firm in Kent for eight years before going on to work as the Director of the Legal Aid Practitioners Group and then the Head of Legal Aid at The Law Society. He became Head of Justice at The Law Society in 2016 and leads the Society's work on CLAR, the workstreams from the LASPO Review and HMCTS' court reform programme.

Sir Bob Neill MP, Chair of the Justice Select Committee is the Member of Parliament for Bromley and Chislehurst, and has served as Chair of the Justice Select Committee since 2015, where he has overseen numerous reports into legal aid. Sir Bob previously served as Parliamentary Under Secretary State for London, Local Government and Planning, and also practised as a barrister, having been made a Bencher at the Middle Temple in 2017.

Angela Pownall is the mother of Adrian Jennings, who died age 32 in Tameside General Hospital, two weeks after his discharge from an inpatient mental health unit. Adrian's inquest concluded that his death was drug-related, contributed to by a failure to put in place and communicate an effective support plan following discharge from hospital. The coroner also advised the court that she would be preparing a prevention of future deaths report.

'**Sally**' is a mother of young children who found herself going through the family law system for nearly four years in order to protect her sons from their abusive father. She was deemed ineligible for legal aid as she exceeded the means threshold despite earning only £18,000 as a single mother. Sally was initially forced to represent herself, while her ex-husband had the assistance of both a solicitor and barrister, before she obtained pro bono assistance from Beck Fitzgerald.

Marina Sergides, Garden Court Chambers is a barrister specialising in all aspects of social housing law, particularly cases involving tenants with mental health problems where capacity has been in issue and where the Official Solicitor has been instructed. Marina is co-chair of the Housing Law Practitioners Association and a founder member and Trustee of the Vicky Sergides Foundation, a stomach cancer charity.

Natasha Shotunde, Garden Court Chambers is a barrister practising across a number of areas including crime, extradition, family and human rights. Natasha is co-founder and chair of the Black Barristers' Network as well as an elected member of The Bar Council. She is passionate about social mobility and improving the working lives of Black barristers.

James Stark, Garden Court North Chambers is a barrister specialising in public and private sector housing law, human rights and public law, having taken a number of cases in these areas to the House of Lords and Supreme Court. James has worked as a barrister since 1998, previously working as a local authority solicitor for Sheffield City Council from 1992 to 1998. James is a member of the Administrative Law Bar Association and a coordinator for the North West Housing Law Practitioners Association.

Marcia Wills Stewart QC (Hon), Birnberg Peirce Ltd is the Director of Birnberg Peirce and specialises in inquest law, representing families in challenging and high-profile cases against the state, including the family of Mark Duggan and 77 of the 96 families of the deceased at the Hillsborough Inquest. Marcia currently represents many of the bereaved, survivors and residents in the Grenfell Tower Inquiry and their civil claims.

Polly Sweeney, Rook Irwin Sweeney is a partner and co-founder of Rook Irwin Sweeney, which was founded in April 2020 to specialise in public and human rights law. Polly is also the Chair of The Law Society's Mental Health and Disability Committee as well as a contributing author to the Legal Action Group's Disabled Children: a legal handbook. Polly was named Gazette Legal Personality of the Year by The Law Society in 2020 in recognition for her high-profile campaigning litigation to maintain the educational rights of children with special educational needs.

Siobhán Taylor-Ward, Vauxhall Community Law Centre is a solicitor practising in asylum, homelessness, housing and social welfare law at the Vauxhall Community Law Centre, having qualified at the Greater Manchester Law Centre through the Justice First Fellowship Scheme. Siobhán was awarded Legal Aid Newcomer of the Year Award at the 2020 Legal Aid Lawyer of the Year Awards. She is a committee member of Young Legal Aid Lawyers having served as Vice-Chair from 2017 to 2019.

Karl Turner MP, Shadow Minister (Justice) is the Member of Parliament for Kingston upon Hull and has served as the Shadow Minister for Legal Aid since April 2020. Prior to entering Parliament, he practised as a criminal barrister.

Stephen Tyler is a physically disabled father of three small children who has been wheelchair-bound since September 2017. The family were evicted from their private rented accommodation having asked for reasonable adjustments to be made to accommodate Stephen's disability. The family found themselves homeless and were repeatedly rejected in their attempt to secure new private accommodation on the basis that landlords refused to accept housing benefits. In March 2018, and with the involvement of Shelter, Stephen brought a case against one of the estate agents that discriminated against him on account of his benefits, and in September 2020 it was held this constituted unlawful discrimination.

Bill Waddington, Williamsons Solicitors and Criminal Law Solicitors' Association is a consultant solicitor specialising in crime, having qualified in 1980. He is the current Chair of the Criminal Law Solicitors' Association having previously held the role from 2012 to 2015.

Adam Wagner, Doughty Street Chambers is a barrister specialising in public law, human rights, public inquiries, police and inquest law. Adam initially practised at 1 Crown Office Row Chambers before moving to Doughty Street. He is also a visiting Professor of Law at Goldsmiths, University of London, and hosts the Better Human Podcast.

Dr Jo Wilding is a barrister who practised in immigration, asylum and public law work at Garden Court Chambers. She remains a tenant there, but has been on sabbatical since 2014, working in academic research at the University of Brighton.

Lord David Wolfson QC, then Parliamentary Under Secretary of State (Justice) is a Conservative Peer appointed as a government minister in the Ministry of Justice in December 2020. Prior to joining the government, Lord Wolfson was a barrister practising in commercial law at One Essex Court.



FOOTNOTES

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