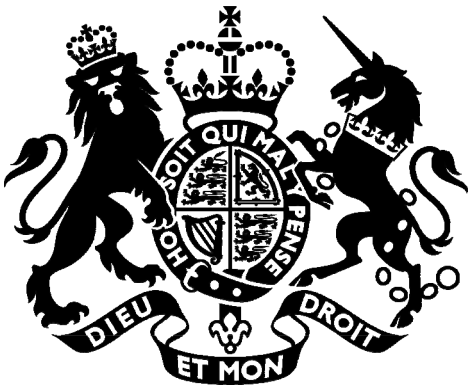
Ministry of Justice

Government Response to Justice Committee's Eighth Report of Session 2014–15:

Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

July 2015



Government Response to Justice Committee's Eighth Report of Session 2014–15:

Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

July 2015

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Introduction

We welcome the Justice Committee's Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This command paper is the Government's response to that report.

When the programme to reform legal aid commenced in 2010, the scale of the financial challenge facing Government was unprecedented. Very difficult decisions needed to be made rapidly. As the Committee recognises, the legal aid reforms set out in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) made a considerable contribution to the Ministry of Justice programme to reduce its spending and that we were on course to achieve our planned savings. The continued focus of this Government on reducing the deficit and on-going budgetary responsibility mean pressure to limited public spending on those areas where it is truly justified will remain.

While there have been challenges in implementing such a significant reform programme, we do not accept the Committee's assessment that we have largely failed to achieve our wider objectives for reform beyond achieving savings. By the very nature of the changes to the scope of civil legal aid, unnecessary and adversarial litigation at public expense has been reduced by excluding those matters identified as a lower priority.

Similarly, through those matters retained in the scope of civil legal aid, funding has been targeted at those who need it most. The reforms have also been expressly designed to make sure that we meet our legal commitments. The Exceptional Case Funding (ECF) scheme makes sure that funding will continue to be provided (subject to the statutory means and merits tests) where its absence would breach or would risk breaching an individual's rights under the European Convention on Human Rights or EU law. The aim of the scheme is not – and never has been – to provide funding more generally in cases which are no longer within the scope of the civil legal aid system.

The Government will carefully consider the judgment of the High Court in the challenge to the ECF scheme (IS v the Director of Legal Aid Casework and the Lord Chancellor). The Director of Legal Aid Casework considers current case law when making funding decisions and will take this judgment into account as appropriate.

In relation to delivering better overall value for money, in their study, the NAO were only able to estimate one wider cost during their audit, that of the increased costs of litigants in person to the courts. This estimate represented a very small fraction of the legal aid savings (around 1%). The NAO were not able to meaningfully quantify the impact of wider costs outside of the justice system.

As the Committee recognises, rapid action has been taken to address unforeseen consequences of reform. For example, when it became clear that reforms had not achieved the expected behavioural shift from courts to increased family mediation, the Government worked quickly with the mediation industry to develop policy solutions.

The Committee goes on to suggest that action should also have been taken in response to other unexpected outcomes. The Committee will be aware that elements of the changes introduced by LASPO and subsequently have been subject to extensive legal challenge. Under those circumstances it has not always been possible to maintain

relationships and hold constructive discussions with key stakeholders. However, it will be a priority for MoJ to shift the nature of its relationships with stakeholders.

The Committee acknowledges that it is early to be assessing the impact of reforms. The reforms have not fully reached steady state as cases that started prior to the reforms remain in the system, legal aid and wider advice sector providers have not had sufficient time to fully adjust to new funding realities. The Government will continue to closely monitor for impacts of reform as they emerge.

The government has committed to conduct a post implementation review of the legal aid reforms within three to five years of implementation (2016–2018). The precise timing and form of this review will be guided by our assessment of the extent to which the legal aid reforms have reached a steady state and informed by government and wider stakeholder research and evidence on the impacts of reform. As a matter of routine, the Ministry of Justice and the Legal Aid Agency closely monitor the operation of the legal aid scheme, taking action when issues or problems are identified.

In the following sections, the Ministry of Justice and Legal Aid Agency respond to the specific recommendations of the Committee and to wider points raised in the Committee's report.

Government underspend and access to legal aid

We recommend that the Ministry of Justice undertake a public campaign to combat the widespread impression that legal aid is almost non-existent. We are surprised that the Ministry of Justice did not undertake such a campaign at the time of the legal aid reforms given the magnitude of the changes to legal aid. The Government has a duty to ensure that the public are aware legal aid may be available as this is part of its commitment to ensure access to justice and cannot be left to legal aid providers who in any event may not have the resources to ensure it is effective. (Paragraph 18).

Before implementing the legal aid reforms we took various steps to raise awareness of the areas of law where legal aid would still be available and of changes to the process for accessing it.

We worked with other government departments, legal aid providers and referral partners (including Citizens Advice, Law Centres, and Shelter) to provide briefing and communication materials on the nature of the reforms, and placed particular emphasis on the need to signpost individuals to the Civil Legal Advice (CLA) gateway.

We have improved the information on legal aid on gov.uk and will soon be launching an enhanced digital service, which will allow individuals to check whether they qualify for legal aid. The digital service will provide comprehensive details of legal aid availability across all categories of law and information on local providers. It will also feature details of relevant advice agencies, including commercial options, for the benefit of individuals who do not qualify for legal aid.

Information on the availability of legal aid is generally only relevant to individuals with an existing legal issue, and it is difficult to reach such individuals with anything other than a tailored approach. We will use data collected through the online service (and the telephone helpline) to build the evidence base to inform a more targeted approach to raising awareness, considering how best to direct messaging at those whose need is greatest.

We recommend the Ministry of Justice and the Legal Aid Agency improve their communication with providers on eligibility for and scope of legal aid criteria and that they should respond to questions in a timely manner. Failure to do so runs the risk that a legal aid provider will not take on an individual who is eligible for public funding, potentially denying that person access to justice. (Paragraph 19)

The scope of legal aid and criteria for funding are set out quite clearly in the secondary legislation implementing LASPO and the Lord Chancellor's guidance.

The enhanced digital service will allow individuals to check whether they qualify for legal aid, which should also be of some assistance to providers.

The Legal Aid Agency responds quickly to provider queries, though it can only respond on the specific facts of a case and not on the general interpretation of legislative provisions. The Agency communicates with providers on issues of general concern as they arise and will consider whether it should be doing this more frequently.

We recommend that the Ministry of Justice undertake an immediate campaign of public information on accessing the gateway for debt advice, as well as for the other areas of law it covers. Again, we are surprised that a concerted campaign of public information was not undertaken when the legal aid reforms were brought in and the telephone gateway was introduced. (Paragraph 28)

We believe that we can best increase awareness of both the CLA gateway, and legal aid more widely, by working in harness with organisations that have direct contact with potential users.

We will continue to work with key partners, stakeholders and relevant agencies to improve their understanding of the CLA gateway and to increase awareness of the new digital service. We are particularly keen to make sure advice agencies have information about the gateway and that their websites feature links to CLA pages.

We will analyse the evidence (on usage of the gateway, potential unmet demand etc.) before deciding whether there is a need for communications covering a particular area of law, such as debt advice. Data gathered through the gateway will assist in building a more comprehensive evidence base.

In its response to this report we request the Ministry of Justice update us on its response to the recommendations in the research the department commissioned on the Civil Legal Aid gateway. (Paragraph 29)

The review of the CLA gateway recommended that we increase awareness of the gateway, manage people's expectations about the service and use adaptations to help those with additional needs.

We continue to work with key partners to increase awareness of the gateway and promote the enhanced digital service.

We manage the CLA contracts robustly to ensure that service levels are maintained. To manage users' expectations, CLA delivery partners describe the service on offer, making clear to potential users that they may experience a moderate waiting time between the operator and specialist adviser tiers.

CLA operators and specialists receive compulsory training on how to identify and meet user access needs. There is a clear contractual requirement for CLA delivery partners to ensure that all users are given the opportunity to discuss whether any standard reasonable adjustments or adaptations could be used to access the service.

As part of the Government's commitment to ensure full accessibility, especially for vulnerable clients, the following standard service adaptations and adjustments are available, delivered by fully trained CLA delivery partners:

- a free telephone interpreter service for over 170 languages;
- Minicom, text relay and British Sign Language delivered via webcam for deaf and deafened users, allowing an authorised personal or professional representative to contact the service and communicate on behalf of the user;
- a cheaper local 0345 telephone number for the service, together with calling the user back where the cost of the call may be an issue; and

- access to a free post system and provision of correspondence in accessible and alternative formats and methods.

The exceptional cases funding scheme has not done the job Parliament intended, protecting access to justice for the most vulnerable people in our society. This is because of the failure of the Legal Aid Agency, and the Lord Chancellor's Guidance, which was recently held to be unlawful, to give sufficient weight to access to justice in the decision-making process. The wrongful refusal of applications for exceptional cases funding may have resulted in miscarriages of justice. All agencies involved must closely examine their actions and take immediate steps to ensure the exceptional cases funding scheme is the robust safety net envisaged by Parliament. (Paragraph 45)

The exceptional case funding scheme was expressly provided for by Parliament under LASPO to make sure that funding will continue to be provided (subject to the statutory means and merits tests) in cases where its absence would breach or would risk breaching an individual's rights under the European Convention on Human Rights (ECHR) or EU law. The aim of the scheme is not – and never has been – to provide funding more generally in cases which are no longer within the scope of the civil legal aid system.

Decisions on applications for exceptional funding are for the Director of Legal Aid Casework at the Legal Aid Agency who must decide whether or not funding is required in accordance with the requirements laid down by Parliament.

We do not accept that there has been or would be a miscarriage of justice in any case where an exceptional funding application has been properly considered and refused. Where an application for funding is refused, an individual may seek to provide further information and/or challenge the Director's decision, including potentially by way of judicial review.

In reaching his decisions the Director must have regard to the Lord Chancellor's Guidance, case law and the facts of each individual case. The Guidance sets out the Lord Chancellor's view of the circumstances in which legal aid is – and is not – required under the ECHR and EU law but is not determinative. A Court of Appeal ruling in December 2014, to which the Director was a party, clarified the tests the Director should apply. The court did not hold that the Guidance was wholly unlawful. A revised version of the Lord Chancellor's guidance on exceptional funding in non-inquest cases was published on 9 June 2015 and is available on GOV.UK. This version takes into account the latest case law. Previous to this, ECF cases have, since the Court of Appeal gave its judgment, been determined in accordance with that judgment.

The Government will carefully consider the judgment of the High Court in the challenge to the ECF scheme (IS v the Director of Legal Aid Casework and the Lord Chancellor). As mentioned above, the Director of Legal Aid Casework considers current case law when making funding decisions and will take this judgment into account as appropriate.

We were surprised to learn that exceptional cases funding applications are not determined by officials with specialist knowledge of the relevant fields of law. We are particularly concerned by the impact this has on the accessibility of the scheme for vulnerable individuals seeking funding. We recommend the Legal Aid Agency revise the staffing of its exceptional cases funding scheme so as to reduce the time taken for lawyers to complete the form and so as to make the process more accessible to laypeople. (Paragraph 47)

The Legal Aid Agency considers that the ECF team is staffed by officials with the requisite knowledge to make determinations in this specialist area of legal aid work. The Head of High Cost Cases, which includes ECF, is an experienced public law lawyer and is supported by a senior solicitor who has more than 20 years' experience working in legal aid. In addition, the ECF team currently has 5 lawyers who lead on various categories of law including family and immigration. Beneath that sits experienced legal aid caseworkers who, with supervision, are able to make determinations on ECF applications. The ratio of legally qualified officials to non-legally qualified officials in the ECF team is almost 1–1 acknowledging the complexity of the area of law.

We consulted on the form with stakeholders prior to its launch. At the time, they supported the approach that the form follows the Lord Chancellors Guidance and identified to providers and direct clients the key components in any determination. It is important to stress that direct clients do not need to complete the form when they make an application for ECF. Regardless, the LAA is always looking to improve the customer and provider experience and has sought feedback on the form and will consider making changes to streamline the process.

We question whether pursuing an appeal in the 'residence test' case is a good use of public money. It seems to us that the residence test is likely to save very little from the civil legal aid budget and would potentially bar some highly vulnerable people from legal assistance in accessing the courts. There is no reference that we can trace in the debates on the LASPO Bill to use of secondary legislation under the Bill's provisions in order to introduce such a test. We recommend that, if the Government wants to pursue this issue, it would be better to introduce primary legislation which can be properly debated and is open to amendment in both Houses of Parliament. (Paragraph 56)

As a matter of principle and basic fairness we believe that individuals should not be able to benefit from taxpayer-funded civil legal aid unless they have a strong connection to UK. We believe that the residence test we have proposed, with appropriate exceptions and safeguards in place, is the right one. We also consider that the residence test is consistent with LASPO and can properly be introduced via secondary legislation (subject to the affirmative procedure) made under LASPO. Legislation introducing the test was approved by the House of Commons in 2014 and we were disappointed with the decision of the Divisional Court. We are therefore pursuing an appeal to the Court of Appeal.

Children are inevitably at a disadvantage in asserting their legal rights, even in matters which can have serious long-term consequences for them. We are particularly concerned by evidence that trafficked and separated children are struggling to access immigration advice and assistance. We recommend that the Ministry of Justice review the impact on children's rights of the legal aid changes and consider how to ensure separated and trafficked children in particular are able to access legal assistance. We also recommend that further consideration be given to the provision of legal aid in private law applications for Special Guardianship Orders where applicants are members of the extended family." (Paragraph 62)

While we keep the situation under review, we do not believe there is a need for a specific review of the impacts of legal aid reforms on children outside of our planed post implementation review.

Legal aid is available to children in all the matters in which it is available to adults. In addition, children remain in scope for all family (public and private law) proceedings, whether as applicant, respondent or joined as a party to the proceedings.

In immigration matters, the majority of separated children will be seeking asylum and will therefore be in the scope of legal aid for those matters. Immigration legal aid is also available for recognised victims of trafficking. Exceptional Case Funding may be available in other immigration cases involving children, applying the tests as clarified by the Court of Appeal.

Where legal aid is unavailable, there is a range of potential support for unaccompanied children. This includes voluntary sector organisations, support provided by law centres, and the possibility that a local authority should (at least in more complex cases) consider whether it is in the best interests of the child to obtain private legal advice.

While considered to be private family law proceedings, legal aid is available in relation to Special Guardianship Orders sought in relation to and as an alternative to care proceedings. Otherwise, funding for Special Guardianship Orders is only available where there is evidence of domestic violence or child abuse. We believe that these are the correct circumstances, where there is an identified risk to a child, for public funding to be made available in these types of proceedings.

The domestic violence gateway

We welcome the Ministry of Justice's commitment to keeping the types of evidence required to qualify for the domestic violence gateway under review and – recommend the introduction of an additional 'catch-all' clause giving the Legal Aid Agency discretion to grant legal aid to a victim of domestic violence who does not fit within the current criteria. We also wish to see regular publication of figures on grants of legal aid made on the grounds of domestic violence. (Paragraph 68)

The aim of the evidence criteria for domestic violence is to ensure that limited public funds are targeted at those cases where publicly funded legal support is genuinely justified. The list of acceptable evidence is broad and accessible. We do not accept that there is robust evidence that large numbers of victims are excluded by the evidence criteria. The Ministry of Justice and Legal Aid Agency keep the operation of the evidence criteria under review and will make further changes if they are deemed appropriate.

The forms of evidence currently accepted provide a clear, objective test, enabling Legal Aid Agency caseworkers and providers to make accurate determinations of eligibility for legal aid. Discretion over evidence types, such as the 'catch-all' clause would make reaching consistent decisions difficult and it would be highly likely that decisions where the Legal Aid Agency did not exercise such a discretion would be legally challenged. Such litigation would not be of benefit to victims of domestic violence or the taxpayer.

The Legal Aid Statistics bulletin, published every three months, presents detailed quarterly figures on applications for, and grants of, legal aid in private family law cases on the basis of evidence of domestic violence or child abuse. The next bulletin will be published on Thursday 25th June.

We recommend Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012. Be amended to give the Legal Aid Agency discretion to allow evidence of domestic violence from more than 24 months prior to the date of the application in cases where the person who has suffered the violence would be materially disadvantaged by having to face the perpetrator of the violence in court. We make this recommendation in recognition of the potential artificiality of the 24 month time limit given the ongoing nature of familial relations that can be the subject of court proceedings and the lasting impact domestic abuse can have on victims. (Paragraph 70)

As the Committee recognise, the provision of legal aid in private family law matters has been retained for those who will be materially disadvantaged by facing their abuser in court. The time limit on evidence is an on-going test of the relevance of the abuse. It is important to note that the time limit applies to the production of the evidence. There are types of evidence, such as medical evidence of on-going conditions such as anxiety or depression, which, if an individual continues to be affected as a result of abuse, can be produced months or years after the abuse took place. The Government believes that 24-months is a reasonable period beyond which to test the on-going relevance of abuse.

As set out in relation to the recommendation for a 'catch-all' evidence clause, any discretion over the period for which evidence remains valid is highly likely to lead to legal challenges where that discretion is not exercised.

However, in line with our commitment to continue to keep the operation of the domestic violence provisions under review, we have identified two operational difficulties with the regime which we will now address. We will remove the requirement that evidence of domestic violence is reassessed at the point clients apply for representation at a final hearing, so as to avoid the risk that evidence is "timed out" during the conduct of a case. Changes will also be made so that conviction for relevant domestic violence offences remain valid as evidence for 24-months or until spent, which ever period is the longer.

We were pleased to hear from witnesses that the Ministry of Justice has published helpful advice to healthcare professionals on their role in providing victims of domestic violence with the evidence required to access legal aid. We recommend the Ministry of Justice consider further engagement with the representative bodies for healthcare professionals that all relevant parties are aware of their role in the domestic violence legal aid gateway. We also recommend that the Ministry of Justice take measures to ensure that victims of domestic violence are not expected to pay for the production of the required documentary evidence. (Paragraph 72)

A number of types of acceptable evidence of domestic violence are available without charge, such as notification of a criminal conviction or a police caution, or a letter from a domestic violence refuge. However, we are not able to compel organisations to provide evidence free of charge. Charges for services provided by GPs are set through the contractual relationship between GPs and the NHS for example.

The Ministry of Justice regularly engages with bodies, such as the Royal College of General Practitioners, to impress upon their membership the importance of timely and affordable evidence. Through the GOV.UK website, we provide full guidance and template letters to help organisations respond to requests for evidence promptly, but also to reduce the administrative burden upon them, thereby reducing the need for charges.

Sustainability and 'advice deserts' – the legal aid market

We urged the Government in 2011 to carry out research into the geographical distribution of legal aid providers to ensure sufficient provision to protect access to justice. Not only did the Ministry of Justice fail to heed our warning, it has also failed to monitor the impact of the legal aid reforms on the geographical provision of providers. We do not know for certain if there are advice deserts in England and Wales, and nor does the Ministry of Justice. This work needs to be carried out immediately because once capacity and expertise are lost the Ministry of Justice will find it difficult, and potentially expensive, to restore them. In some areas it may already be too late. (Paragraph 89)

The Legal Aid Agency advertises contracts for civil legal aid provision on the basis of procurement areas that are designed to establish a balance between sustainable contracts and geographic access for clients.

The Legal Aid Agency's procurement areas vary by category of law and are designed with each category in mind, including the expected volume of legal aid work and population demographics in that area.

In the vast majority of procurement areas we have active contracts in line with the intentions set out when they were tendered. Where this is not the case, for example where a provider has withdrawn from a contract, the Legal Aid Agency has taken action to find alternative provision either as an emergency measure or by inviting bids to undertake the work.

The Legal Aid Agency undertakes regular capacity reviews of supply. These reviews continue to show sufficient capacity in all categories of civil law in the majority of procurement areas.

The Ministry of Justice recognises it could do more and will continue to investigate geographical variations in the take up of legal aid. To support this, three pieces of research have been commissioned and are due to report later in 2015. Once the conclusions from the reports are available, the department and Legal Aid Agency will compare this to the provision of services by area and implement any appropriate action.

Litigants in person

We are concerned that it took the Ministry of Justice over a year to publish the report on litigants in person carried out by Professor Liz Trinder and her team. The report seems to us a thoughtful and high-quality piece of work containing unique information capable of informing not only Government responses to the difficulties faced and presented by litigants in person but also those of other stakeholders, including the Judicial Working Group on Litigants in Person. The lack of availability of this report during our inquiry has adversely affected our ability to have an informed debate on this issue. Early consideration of the report could have mitigated the £3.4million knock-on costs for the courts from the rise in litigants in person identified by the National Audit Office. We deeply regret the fact it took this Committee's intervention for the Trinder report to enter the public domain. We accept the Lord Chancellor's assurance that there was no ministerial involvement in the delay but still require an explanation for it. (Paragraph 95)

The research carried out by Professor Trinder and her team was published on the 27th November 2014 following a rigorous quality assurance process.

We received the first draft in September 2013. Initial re-drafts of the report clarified and enhanced descriptions of the evidence gathered. Between May and September 2014, the report was sent to independent peer reviewers for consideration, a final drafting round followed and a completed report was submitted to the Ministry of Justice in October 2014.

The quality assurance process followed standard practice for research reports commissioned by the Ministry's analytical directorate in line with Government Social Research standards. Ministers were not involved in the process.

The chair of the Justice Select Committee wrote to the Secretary of State on the 25th November 2014 to request a copy of the report. When the letter was received the report was already being prepared for publication and was published two days later.

Throughout the research project, provisional and emerging findings were used to inform policies designed to support litigants in person.

The family courts make decisions which often have life-long consequences for the children involved. The courts need the best evidence possible to make the right decisions; this will not be achieved by putting vulnerable witnesses through cross-examination by their abuser. On its own this is a powerful case for ensuring such cross-examinations do not occur and consideration of the trauma experienced by the witness in such a case strengthens it enormously. The rise in litigants in person in the family courts further strengthens the case for a statutory bar. We therefore recommend the Ministry of Justice legislate to prevent cross-examination of complainants by alleged abusers in the family courts while ensuring justice is done to all parties. (Paragraph 107)

We have every sympathy for vulnerable witnesses who face cross-examination by their alleged abuser. The Court of Appeal recently considered the issue of how a judge should deal with such cases. In the judgment in the case of Re K and H (children) the Court of Appeal, while recognising that these are difficult cases, sets out the options which should be considered by a judge when dealing with such circumstances.

'*The court has at its disposal a number of other possible case management options. These include: (i) a direction that the order that Y should give oral evidence is made subject to the condition that the father questions her through a legal representative (this may not be a viable option if the judge's finding about the father's inability to pay stands); alternatively (ii) Y should be questioned by the judge himself; (iii) Y should be questioned by a justices' clerk; or (iv) a guardian should be appointed to conduct proceedings on behalf of K and H.' (para 52)*

The option for the judge to conduct the questioning reflects current judicial guidance set out in practice direction PD12J which supplements the Family Procedure Rules.

We are pleased that the judgment agreed with us that courts do not have the power to order funding for legal representation beyond the circumstances Parliament has decided it should apply.

However, we recognise that the Court of Appeal recommended that consideration be given to the provision of an advocate in certain narrow circumstances, paid for by central funds. We are currently carefully considering our position on this. The Committee may be interested to know that Ministry of Justice Analytical Services have recently analysed management information to look at the prevalence of this issue in private family law cases to inform this consideration.

It is surprising to us that cases involving adults lacking capacity in which the Official Solicitor is involved do not appear to be differentiated from other cases by the Legal Aid Agency. Such cases, by their very nature, concern some of the most vulnerable people in our society, whose impaired understanding means they are barred by law from conducting litigation without assistance. It seems to us that access to justice for such litigants requires that such cases should receive special consideration by the Legal Aid Agency as these individuals cannot access the courts without the Official Solicitor's assistance. We recommend the Legal Aid Agency adopt a policy that ensures the Official Solicitor is able to properly represent people without litigation capacity, given the consequences for access to justice for highly vulnerable individuals if he cannot do so. (Paragraph 110)

The Official Solicitor acts as litigation friend of last resort. The court should always seek to appoint an appropriate person to act as litigation friend for a person who lacks litigation capacity before inviting the Official Solicitor to act.

It is the policy of the Official Solicitor to act only if funding for legal representation is secured, either through legal aid funding or private means. Amended guidance from the Lord Chancellor on exceptional funding in non-inquest cases, published on 9 June 2015, sets this out more clearly.

Generally speaking, people who lack litigation capacity are subject to the same legal aid eligibility requirements as everyone else. It should be recognised that a person may be vulnerable due to their mental capacity but this does not mean that they are also financially vulnerable. A number of exceptions are in place however. For example, individuals seeking legal aid for representation in proceedings before the Court of Protection on certain matters under the Mental Capacity Act 2005 are exempt from the legal aid means test.

More widely, we are taking steps to ensure that vulnerable people are able to participate in court proceedings in the most appropriate way. Recent changes to the rules in the Court of Protection require the court to consider in every case a range of formal and less formal options to enable a person lacking mental capacity to participate in cases in which they are involved.

We were concerned to hear that judges in some family law cases were struggling to access the expert evidence necessary for them to determine a case fairly due to the Legal Aid Agency approach to apportionment of expert fees when only one of the parties is legally-aided. Given that family courts are required to allow expert evidence only when it is "necessary" to decide a case in the best interests of the child we believe that, if the court says that evidence is required and the non-legally aided party is not in position to pay a contribution, the Legal Aid Agency will have to take financial responsibility in order to ensure the courts are able to try the case justly. (Paragraph 113)

LASPO provides the framework for eligibility for Legal Representation. As part of the provision of Legal Representation the client is able to obtain expert evidence where required. Often an expert is jointly instructed by the parties and the cost of obtaining the report will be apportioned between all of the parties including the legally aided client.

However, in similar terms to the Access to Justice Act 1999 previously, LASPO provides that the Court should not make a different order than it would otherwise have done on the basis that one of the parties is legally aided. In addition, legal aid Regulations and contracts with providers set out what expert fees can be claimed and the rates at which they will be paid. The Legal Aid Agency is required to consider both the legal aid framework as well as any relevant case law such as JG (a child) v Legal Services Commission & KG, SG, the Law Society and the Secretary of State for Justice [2014 EWCA Civ 656] when considering any claims for payment or applications seeking authority to incur the cost of an expert.

The funding and payment of experts in a timely fashion is an important responsibility of the Legal Aid Agency. We want to support the courts to ensure that there is no delay and assist in the resolution of cases.

We agree with the Low Commission that a comprehensive approach to legal information is absolutely crucial to ensuring litigants in person are able to represent themselves effectively. We note the Low Commission's conclusion that Advicenow and Adviceguide are the premier online resources and the Commission's concern that services that already exist might be replicated unless the Government took care to avoid this. We would like the Government to explain to us why it has changed its approach to funding Advicenow, what its future plans are for online advice and how it intends to ensure services are not replicated. (Paragraph 120)

The Ministry of Justice is currently funding a Litigants in Person Support Strategy. Advice Now are a key partner in the delivery of this strategy and receive funding from the Ministry of Justice as a result of their participation. This approach recognises the importance of their work providing online information, written and video guides and other resources providing practical guidance for litigants in person and wider public legal education, and ensures these are part of a more coherent package of support.

The Government recognises the importance of the work produced by Advice Now and that is why our Gov.Uk site 'represent yourself in court' provides direct links to the Advice Now website.

We recommend the development of a one-stop legal helpline able to divert inquirers to other services, whether online or over the telephone, or to assist with their inquiries. In particular, the helpline should be able to divert people to legal aid providers in cases where legal aid is available. This appears to us to be a cost-effective way to improve access to justice for litigants in person as well as being a significant step towards ensuring that people eligible for legal aid are able to access it. (Paragraph 121)

The government has improved the information available for citizens on gov.uk. This includes the launch of a new Digital Service 'Check if Civil Legal Advice can help you', which will replace the existing 'Check if you can get Legal Aid' in summer 2015.

The service enables people to check whether their problem is covered by legal aid and directs them to the most appropriate legal aid advice service.

Depending on the category people can use a simple postcode search tool to find the nearest legal aid providers. Or where it looks like Civil Legal Advice (CLA) may be able to help they can go on to complete a detailed means test and if it looks like they are eligible can request a call back. The information provided is made available to CLA Operators.

Users whose problems are not covered by legal aid, or who are financially ineligible, are given a tailored list of organisations that may be able to provide free assistance together with details on how to find commercial advice providers.

People who cannot access information easily online can still contact Civil Legal Advice directly by telephone in order to access the same information and help.

We recommend the Government consider and consult on whether there should be formal regulation of McKenzie friends who could be classed as engaging in professional activity, whether fee-charging or not. (Paragraph 131)

We have no current plans to regulate McKenzie Friends.

The court has existing powers to refuse to permit McKenzie Friends from assisting litigants and the judiciary are looking at updating judicial guidance on the role of McKenzie friends in civil and family courts. We await this report and will consider any recommendations that are relevant to the Government.

Fundamentally, the courts need more funding to cope with the numbers of self-represented litigants appearing before them and this is an area which should attract some of the underspend from the civil legal aid budget. Only with assistance will the courts be able to ensure access to justice. It is imperative that litigants in person are given every possible assistance to make their cases clearly and effectively. (Paragraph 138)

The Ministry of Justice is currently funding a Litigants in Person Support Strategy. Our key partners in delivering the strategy are the Personal Support Unit, the Royal Courts of Justice Advice Bureau, Law for life (incorporating Advice Now) Law Works who are supported by the Bar Pro Bono Unit and the Access to Justice Foundation. The strength of the strategy lies in bringing together the expertise and experience of these organisations into one coherent strategy which maximises the provision of support to litigants in person.

The strategy seeks to prioritise the provision of legal support in civil and family cases, through the co-ordination of local support and expertise via expanded personal support units, with pro bono and law centres delivering practical support and information including free or affordable legal advice. The strategy will also expand online and telephone support available to litigants in person and their advisors.

Mediation

The fall in the number of mediations in the family courts which took place after the coming into effect of LASPO will inevitably have had a significant impact on providers of mediation services. We were encouraged to hear that the Legal Aid Agency has extended the contracts for suppliers and is seeking new providers in anticipation of an increase in mediations. We recommend that the geographical distribution of mediation providers is kept under review to ensure all those who need to access mediation are able to do so. (Paragraph 154)

The recent tender for mediation contracts resulted in an additional 37 providers being awarded contracts to deliver services across an additional 171 locations. These locations are spread across all areas of the country.

The Legal Aid Agency will continue to monitor the availability of access to Mediation services as well as the sustainability of the individual contracts awarded where the volume of work is low.

We recommend the Ministry of Justice adopt the recommendation by the Family Mediation Taskforce that the Government fund all Mediation and Information Assessments Meetings for a year, to encourage behavioural change. The cost of this approach can be met from the money saved by the initial shortfall in the number of mediations. (Paragraph 157)

The Ministry of Justice wants to encourage more people to mediate in family disputes instead of pursing an application in the court, which can be slow, stressful, and expensive. We have already taken significant steps to promote mediation, including making it a legal requirement that anyone considering applying to court for an order about their children or finances is legally obliged to attend a Mediation Information and Assessment Meeting (MIAM) first, unless specific exemptions apply (for example domestic violence). However, it is important to focus on mediation as a whole process and not simply on the MIAM. In the past, there were concerns that many mediation providers were too reliant on MIAMs as their main source of income, thus reducing the incentive to convert these MIAMs into mediation starts.

As of 3 November 2014, the first single session of mediation is publicly funded, without being subject to the means test, in all cases where one of the people involved is already legally aided. In this scenario, both participants will be funded for the MIAM and the first session of mediation. It is hoped that the combination of the compulsory MIAM with the free first mediation session will prove effective in introducing more people to the benefits of mediation, and diverting them from the courts.

In addition, and in response to another of the Mediation Task Force's recommendations, the "First Stop: Family Mediation" communications campaign was launched on 2 January 2015 until the middle of March. The objective of the campaign was to improve public awareness and understanding of the benefits of family mediation, the legal requirements to consider it before court, and the availability of legal aid for those who are eligible. The campaign also directed people to the Family Mediation Council (FMC) website and the 'find a mediator' tool. Analysis of this campaign showed a 340% increase in visitors to the FMC website and a 45% increase to the 'find a mediator' page during the campaign.

The impact of the free first session of mediation will be reviewed once the family mediation legal aid statistics for the quarter Jan–Mar 2015 have been fully analysed and published. We are confident that mediation starts – the true litmus test for publicly funded mediation – will increase, in large part as a result of the free first mediation session and the success of the 'First Stop: Family Mediation' campaign

Value for Money

The Ministry of Justice has avoided quantifying the level of knock-on costs arising from the reforms. Without this information the Ministry of Justice is unable to say whether it has achieved its objective of significant financial savings to the taxpayer. We recommend that the Ministry of Justice conduct a post-hoc cost-benefit analysis of the legal aid reforms. (Paragraph 168)

The department has committed to conducting a post implementation review of the Legal Aid Reform programme between three and five years after implementation.

The department has reservations as to the extent to which wider costs can be accurately monetised. Bearing in mind the breadth and reach of the LASPO reforms, a meaningful estimate specifically attributing impact to the reforms would require isolating the impact of the reforms from a number of other departmental policies, such as reforms to family justice and tribunal fees. The reforms would also need to be isolated from policies implemented by other government departments, such as changes to the benefits system, and wider societal trends, such as divorce rates or possession claims.

As an indication of the difficulty in accurately estimating wider costs, the government notes that the NAO were only able to estimate one wider cost during their audit, that of litigants in person to the courts. This estimate was primarily based on anecdote rather than detailed analysis, and represented a very small fraction (roughly 1%) of the legal aid savings they identified. The NAO were not able to meaningfully quantify the impact of wider costs outside of the justice system.

Further, it could normally be expected that if other government departments had detected a significant impact on their spending as a result of the reforms, then the impact would have been raised with the Ministry of Justice.

We reiterate the recommendation from our Report on the Government's proposed reform of legal aid: that Government departments should be penalised for poor decision-making that leads to increased costs for the courts system. (Paragraph 173)

The Government agrees that accurate first time decision making benefits all. Better initial decisions will deliver better outcomes for those citizens affected by those decisions, and will be more efficient for the taxpayer.

The Ministry of Justice will continue to review the most effective systems in order to ensure decision making departments across central and local government get it right the first time and have accessible review systems to ensure courts and tribunals are the last resort.

The operation of the Legal Aid Agency

The reduction in the payment error rate which has been achieved by the Legal Aid Agency is highly commendable but we do not, realistically, think it would be imperilled by a policy decision not to investigate the origin of tiny sums of money. The Legal Aid Agency's duty is to administer public money responsibly, not to waste its resources on irrelevant or de minimis inquiries. We are concerned at the various examples we have seen of the Legal Aid Agency failing to give sufficient weight to its vital role in ensuring access to justice. (Paragraph 178)

The Legal Aid Agency continues to work through its Stewardship programme to further improve the level of accuracy it achieves on making payments to legal aid providers and in assessing the eligibility of legal aid clients. In line with Managing Public Money the Agency seeks to ensure the funds it is voted by Parliament are used correctly while making sure that it undertakes its work in a cost-effective manner.

Assessing the means of clients can on occasion be a complex process and because of the way it operates establishing the eligibility of clients, or otherwise, can sometimes revolve around very small amounts of money. This can require the Agency to seek more information about relatively small sums of money. The Agency is subject to National Audit Office scrutiny of all the decisions it makes on legal aid cases. This ensures that we apply the rules on assessing the eligibility of all clients in line with legislation and regulations. It is notable that although the resource dedicated to such enquiries costs the Agency approximately £0.5m annually, in 2014/15 this team identified a level of gross error quantified at £19.3m. The work of this team also drives and assists the recovery of overpayments; in 2014/15, recoveries of £12.1m were achieved.

The Legal Aid Agency is currently undertaking a short review of the way it assesses the means of clients seeking Civil Representation to ensure that while the relevant rules and regulations are followed that the burden on legal aid clients and legal aid providers is minimised as far as possible.

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