



PLP Research Briefing Paper

Family Law and Access to Legal Aid

Emma Marshall, Sue Harper and Hattie Stacey



The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

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Summary

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) significantly limited the availability of legal aid in civil and family law. Whilst public law family cases remained in the scope of legal aid under LASPO, most private family law matters became ineligible for legal aid, with the exception of funding for some victims of domestic abuse.¹ Public Law Project (PLP) has serious concerns about the limited availability of legal aid under LASPO, and the impact this has on people who cannot afford private representation and advice.² PLP shares these concerns with many other not-for-profit organisations, legal practitioners and academics.³

This briefing paper examines how the cuts to legal aid have created additional barriers to justice for many people who need to access advice and representation for family law matters. The paper draws on first-hand, empirical evidence collected through research conducted with family law practitioners and not-for-profit organisations providing support for family cases. It highlights the limitations of the Exceptional Case Funding (ECF) scheme - which was introduced under LASPO to provide legal aid for out-of-scope matters, where individual rights would otherwise be breached – and explains why ECF does not provide an effective safety net for those most in need of legal assistance.

Key Findings

- Law firms and not-for-profit organisations are concerned by the limited – and sometimes non-existent - availability of legal aid for many family law matters;
- The reduced scope of legal aid for private cases has also reduced the availability of advice, even where people are

automatically eligible for legal aid or can make an ECF application;

- The ECF scheme does not provide fair or sufficient access to legal aid for out-of-scope family law cases. The application process is too onerous, and most providers (and not-for-profit organisations) do not have capacity to make applications, particular without guaranteed funding in place regardless of whether ECF is granted;
- The absence of legal aid funding for initial advice prevents early intervention, prolongs disputes, and makes processes of alternative dispute resolution more difficult for people to access – and the problems with the ECF scheme mean that it does not provide a viable alternative;
- The procedural complexity of family law means that access to free advice and representation is essential for fair and effective access to justice, whether through ECF or other routes;
- The long-term social costs of the legal aid deficit are of particular concern, especially the detrimental effects on society where disputes involving children are not resolved.

Recommendations

- **Recognise the importance of legal aid**, in assisting people through complex and emotional family proceedings.
- **Simplify Legal Aid Agency application processes**, including the ECF application process for providers and individuals, and improvements to the payment system for legal aid;
- **Broaden the scope of legal aid**, bringing matters back into scope, including any proceedings involving children;
- **Reinstate early advice**, by reintroducing legal aid for early legal help;
- **Reassess the means threshold**, to ensure legal aid is accessible to those most in need.

Background

The aims of LASPO were to make significant savings by: a) discouraging unnecessary and adversarial litigation at public expense; b) targeting legal aid at those most in need; c) making significant savings to the cost of the legal aid scheme; and, d) delivering better overall value for money to the taxpayer.⁴ LASPO removed all private family law matters from scope, other than for parties who can produce prescribed evidence of domestic abuse.

PLP has a particular interest in ECF from its ongoing work to improve access to the scheme. PLP conducted research to assess whether the ECF scheme provides sufficient access to justice for family cases, in response to three key concerns:

- The low rates of applications for ECF in family cases, and the low number of successful applications;⁵
- The steep rise in Litigants in Person (LiPs) in family courts following LASPO;⁶
- The drop in mediation take up since LASPO.⁷

PLP was also aware of two significant issues with the ECF scheme, as a result of its casework and advocacy:

- Limited information - and consequently knowledge - among legal practitioners and the public about the eligibility criteria for ECF;
- Family practitioners being reluctant to make ECF applications due to the onerous application process and low grant rates.

Exceptional Case Funding (ECF)

Under LASPO, ECF was introduced for civil and family cases, but has been criticised for failing to provide a "safety net" to those whose rights would be breached if they did not have access to legal aid.⁸ Since the outset of the scheme, the number of applications made has dropped sharply for family cases and the success rate for applications that are made is very low. In comparison with immigration,

where applications have risen as well as success rates, PLP is concerned that access to ECF for family cases is at present very limited. As most family cases will engage Article 8 rights, the issue is of significant concern to PLP as an access to justice charity.

The application process for ECF applications is complex, and providers are only paid for the time they spend if the application is successful. Many family applications are refused, meaning that providers who choose to make applications do so at risk of not being paid.

About the research

PLP conducted research between October 2017 and March 2018 to identify the main issues around access to legal aid for family cases under LASPO and how to improve the system. The first phase of the research was a review of existing literature, and the second phase was an empirical study.

For the empirical study, PLP invited family law practitioners and other interested parties to complete an online questionnaire about access to legal aid. Researchers collected additional data through follow-up emails and telephone interviews with respondents. The findings presented in this paper include responses from 16 participants, including three telephone interviews:

- Ten respondents had experience of working as legal aid providers, and nine of these held current legal aid contracts;
- Six participants worked for charities or not-for-profit organisations;
- Nine participants worked for private solicitors firms, and one was a self-employed barrister.

Findings

The findings reflect previous research carried out by the Law Society, Resolution, the Legal Aid Practitioners Group, and many of the other organisations and academics referenced at the end of this report. PLP agrees with

recommendations made by the Law Society, Resolution and the Legal Aid Practitioners Group,⁹ and in publishing this briefing paper hopes to clarify more explicitly the link between the limitations of the current ECF scheme, and the wider problems with access to legal aid under LASPO. As such, this report is not intended to supersede the recommendations of the aforementioned reports, but to add PLP's perspective as an organisation that has done significant work to improve access to the ECF scheme.

The evidence addresses four key issues:

- The main challenges for family law under LASPO;
- The reasons for the limited availability of advice and representation;
- The impact of limited access to legal aid;
- How to improve access to justice.

Main challenges in family law

Survey responses

The main challenges at present are...

"...Increasing demand, commercial viability, and clients' ability to pay" (Judi, Advice and Volunteer Manager, Norwich)

"...Making family law accessible and affordable to the majority of the population, and the rise of the litigant in person" (Paul, Solicitor, London)

"...Many people struggle with a complex system and legal jargon, with no legal representation" (Matt, Charity Manager, Exeter)

The research revealed a range of interconnected barriers to justice within the family law sector:

Lack of legal aid for private family cases, including no early advice – There is high demand with little or no legal aid funding available. With no legal help available for initial advice on a legal aid basis, matters are often prolonged and individuals are not

signposted to the most appropriate services, including mediation.

The rise in LiPs – The sharp increase in people representing themselves puts pressure on the courts and increases the barriers to justice, particularly for the most vulnerable in society. This is compounded by the cuts to public funding in other areas.

Procedural complexity – Family law proceedings are complex for individuals to navigate, especially when factoring in the emotional dynamics of cases involving disputes within families.

Commercial viability – Providers report that the reductions in legal aid funding put additional pressure on company finances and make it difficult to maintain a sustainable business model, as much work ends up being carried out for free.

Limited availability of advice and representation

The research highlights a number of issues relating specifically to the availability of legal assistance:

Growing advice deserts - The cuts to the scope of legal aid have resulted in some areas of the country where there are very few providers available. This is not only due to scope of legal aid, but the drop in the number of providers as a result to the changes made by LASPO.

"In Norfolk and Norwich in particular there are very few legal aid providers, especially for private law cases, so even if a client is eligible it's hard to find a provider and/or one that has capacity" (Judi, Advice and Volunteer Manager, Norwich)

Providers reported that since most private family work has been removed from scope, legal aid contracts were no longer viable for many solicitors firms. For example, one provider - which now has a legal aid contract for family mediation only - reported that they



gave up the family contract in 2014 as it was "too onerous and not cost effective" (Anna-Jane, Family Solicitor, Mediator and Collaborative Lawyer, Hampshire). Others noted that a combination of low pay, difficult payment systems and bureaucratic processes made legal aid work unsustainable as a business approach.

Difficulties securing legal aid for private cases - The limitations of the ECF scheme for family cases mean that where there are providers with capacity, it may still be difficult to secure legal aid.

"We have only tried [to make ECF applications] on a couple of occasions and the procedure is too onerous and time consuming, taking into account the unlikely chance of it being granted, especially with the very low fixed fee rates for the work anyway" (Wendy, Managing Partner/Senior Solicitor, Southampton)

"We do not do legal aid assessments, but anecdotally don't know anyone who has got [ECF] awarded" (Judi, Advice and Volunteer Manager, Norwich)

Only two out of the ten law firms that participated in the research reported that they assisted with ECF applications. Of the six not-for-profit organisations that responded, none reported that they were able to offer assistance with ECF applications. One said that they did not have "capacity to undertake this work" (Paul, National Manager, Charity, Wales). Another charity that offers support to people with learning disabilities said that they had requested assistance with ECF applications from solicitors, but had "never been successful" (Mik, Independent Crisis Advocate, Bradford).

Lack of viable alternatives to legal aid – Some firms have started to offer more fixed fee work as a response to LASPO, but this means that much of the work that was funded by legal aid pre-LASPO is now carried out by private law firms at a loss. The firms offering

fixed fee advice reported that this was to meet client need, rather than it being suited to the practice.

"Since the reduction in legal aid we offer a free 15 minute clinic to assess legal aid eligibility or to advise on options to proceed. [The main challenge is] remaining cost effective to meet market needs whilst running a business" (Frances, Partner, Private Firm, Caerphilly)

"Clients who cannot afford the full service of paying for time spent on an hourly basis like the certainty of a fixed price. Plus, the firm can respond to poorly resourced clients and reduce fees to a level that works for the client" (John, Consultant Solicitor, Sussex)

"Clients prefer the certainty of the hourly rate" (Anonymous, Solicitor and Mediator, Yorkshire and Lincolnshire)

Seven of the private firms that responded, and the one self-employed barrister, reported that they offer fixed fee services as a more affordable option, but some voiced concerns about how those below the means threshold for legal aid - or close to it - could afford fixed fees if they were unable to secure ECF. Three firms offered some pro bono services as a replacement for legal help (e.g. a short introductory advice session), but respondents were keen to emphasise that this is not always viable for running a business.

"As a legal aid firm a lot of our work ends up pro bono, especially fixed rate private family cases where we only receive hourly rates if the costs are three times the fixed fee (never allowed by the LAA anyway!) We can't actually afford to offer free advice anymore" (Wendy, Managing Partner/Senior Solicitor, Southampton)

The impact of the cuts to legal aid

Effects of LASPO on the legal aid system - The legal aid system has been under increasing pressure for many years. In 2011, shortly before the introduction of LASPO, the



fee rate for all legal aid was cut by 10%.¹⁰ The further cuts to legal aid under LASPO placed acute pressure on legal aid providers and the courts, to the detriment of society. Whilst LASPO did not cause all of the problems in the family law sector, it has greatly exacerbated existing issues and significantly restricted access to justice.

Increasing pressure on providers – The current problems with the legal aid system, and the increasing demand for services with less funding available, is likely to cause further reductions in the number of providers with a legal aid contract. The results of the recent tendering process suggest that there are areas in which no providers are willing to take on a legal aid contract.¹¹ The financial viability of the system, including ECF work, needs to be urgently addressed to ensure that those eligible are able to access legal aid.

"It takes a non-fee-earner, experienced in using CCMS, an average of 3 hours plus to secure a certificate by normal process. This is to any partner not responsible for family work an enormous waste of money, even before looking at the poor return on normal legal aid rates. To take on an 'exceptional funding' application, whereby the time involved (as monitored by Resolution's casual anecdotal survey of solicitors writing in), takes at least twice as much unpaid time, and more likely 8-10 hours or more with a forlorn hope it will actually be granted. To have paid staff doing so much unpaid work is no business model for the continued provision of legal aid services" (John, Consultant Solicitor, Sussex)

The only barrister to participate in the research explained why he no longer gets referred any work funded by legal aid, and why the focus on legal aid and ECF in the research was not particularly relevant to his work or the work of family barristers more generally.

"I am now no longer doing any legal aid work because legal aid has been withdrawn from all of the areas where I work, the only exception is

in cases where there's been some domestic violence, and if the domestic violence exception applies then that litigant will qualify for legal aid and will be seen by a solicitor, but it's fairly limited the funding so the solicitor tends to do the advocacy as well. So I don't see those cases anymore at all since the reduction. Prior to that, probably about half my work was legal aid. And I would be doing legal aid cases both involving children - and they're a bit of a while ago now - but even divorce. Sorting out property used to be covered in low income cases, but that's gone now Over the course of my career I've done a lot of legal aid work but not recently" (Michael, Barrister, Cardiff)

Impact on specific groups of people and types of case - The research highlighted some of the groups most affected if unable to access advice and representation, for example people with learning disabilities or cases involving Special Guardianship Orders, and children involved in any type of family proceedings.

Fragmentation of families and impact on children - There are significant, long-term social costs where individuals are not able to access advice and representation for family proceedings, particularly when children are involved, and arrangements for contact or financial provision cannot be agreed upon.

"There will be plenty of relationships where people don't have domestic violence issues, they're simply separated but are earning either close to the threshold - or below the threshold - and they're unable to access solicitor's assistance in resolving division of the finances or divorce aspect matters. It can also lead people to make rash decisions about what they should do with regard to the division of the finances, because they can't access that advice" (Richard, Solicitor, Cardiff)

"There must be many people who do not divorce due to the cost. It is likely that children are not having contact with both parents if [the case] is not able to proceed to court. There are also likely to be parties in a separation who

cannot afford to pursue a proper financial settlement” (Frances, Partner, Private Firm, Caerphilly)

The gendered dimensions of barriers to justice - There are some issues that predominantly affect women, for example cases involving domestic abuse. Whilst the Legal Aid Agency recently took steps to resolve some of the issues around the evidence requirements for domestic abuse cases, there are still concerns about the implications of the restrictions to the scope of legal aid. There are many cases where the nature of the abuse means that individuals are unable to provide documentation, and whilst the issue predominantly affects women, there are also concerns about the impact on men. Legal aid being restricted to domestic abuse cases in private family law may also disproportionately affect women on issues such as pension rights, where individuals do not receive advice on their entitlements in pursuing financial agreements for separation or divorce.

Improving access to legal aid

Survey responses

To improve access to justice for family cases...

"...Re-introduce legal aid in certain circumstances. Particularly for divorce, child arrangements and financial provision” (Frances, Partner, Private Firm, Caerphilly).

"...Bring private law children cases back into scope” (Judi, Advice and Volunteer Manager, Norwich)

"...A return to an initial legal aid option, like an information meeting, common to all, as it will help clients choose the right route to the solution to their issues, including mediation” (John, Consultant Solicitor, Sussex)

"...Have legal aid and true accessibility for parents with learning disabilities and autistic people” (Mik, Independent Crisis Advocate, Bradford)

"Look again at financial eligibility, for example the impact of the rise in property values, tax credits and Universal Credit” (John, Head of Family, Charity, Coventry)

Simplify Legal Aid Agency application processes (including ECF) - The onerous processes for claiming legal aid limit the number of potential providers willing to tender for contracts. Simplifying the process – particularly for ECF applications – would ensure that more of those who need legal aid would be able to access it.

Broaden the scope of legal aid - Bringing specific areas of legal aid back into scope would help to make the sustainability of legal aid contracts more viable for providers, as well as improving access for specific groups, particularly as ECF is difficult to access.

Reinstate early advice - The reintroduction of legal aid for legal help matters would ensure that individuals are able to access the correct information and advice from the outset of their case, also providing better pathways for signposting and referrals where alternative methods of dispute resolution are available. ECF applications are too onerous, and do not make it viable for providers to apply in order to give initial advice.

Reassess the means threshold - Many people who do not qualify for legal aid due to the current means threshold are also unable to pay for advice and representation. Fixed fee work and pro bono assistance are not adequate remedies to address the gap in eligibility. Reassessing the means threshold is necessary to ensure legal aid is available to those most in need.

Acknowledgements

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