EVIDENCE OF THE PUBLIC LAW PROJECT TO THE LABOUR PARTY REVIEW OF LEGAL AID

1. This submission is made on behalf of the Public Law Project ("PLP"). PLP is an independent national legal charity which aims to improve access to justice and to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. To fulfil its objectives PLP undertakes research, casework, training and policy work. PLP is based in London but has a national presence and standing. It runs conferences and training events across England and Wales, undertakes and publishes independent empirical research, and conducts public law litigation, both in its own name (where appropriate) and representing others. PLP is recognised as having particular expertise in this area: in 2013 it was awarded the *Special Rule of Law* award by Halsbury's Laws and in 2015 received the Legal Aid Lawyer of the Year award for Outstanding Achievement and was shortlisted for the Liberty Human Rights Lawyer of the Year award for our work on legal aid.

2. In response to the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO"), PLP developed the Legal Aid Support Project ("LASP") to enable us to focus specific casework resources on the post LASPO legal aid scheme, with a view to mitigating, where possible, the anticipated impact on access to justice.

3. The LASP has allowed PLP to engage with the LASPO cuts on several different levels. On a policy level we responded to government consultations and prepared briefings for Parliamentarians. We produced an independent review of the mandatory Civil Legal Advice telephone line ("the Gateway"), introduced under LASPO. We focused particularly on 'Exceptional Case Funding' ("ECF") and between April 2013 and April 2016, assisted over 150 people make applications for ECF and provided support in relation to ECF to many others. Where appropriate, we have also brought litigation (both as instructed solicitors and in our own name) to challenge unlawfulness arising from the LASPO scheme. PLP's LASP project was time limited. It was initially intended to run for three years after the implementation of LASPO, but has been extended for one further year.

4. We welcome the opportunity to provide written evidence to the Bach Commission. The evidence sets out our direct experience of the impact of the LASPO cuts, and the conclusions that we are able to draw from that experience.

5. Our starting premise is that justice must be accessible to all, regardless of means, and that this requires the component parts of the justice system to be adequately funded and resourced. In an adversarial court system, this will necessarily include funding of lawyers.

LASPO Cuts

6. LASPO was borne of the 2010 Coalition government's drive for austerity. The stated intention in the November 2010 consultation paper "*Proposals for the reform of Legal Aid"* was to cut £350 million from the legal aid budget[1]. As is well known, LASPO introduced a fundamental shift in the legal aid scheme, from a presumption that a matter was "in scope" for legal aid, absent express provision otherwise, to the presumption that a matter was "out of scope", absent its express inclusion in Part One Schedule One of LASPO. In so doing, LASPO took many areas of law out of scope for legal aid. The matters retained in-scope were those identified as being priority areas in the context of access to justice. LASPO also moved the administration of the legal aid scheme away from the Legal Services Commission ("LSC"), an independent executive non-departmental public body, to the Legal Aid Agency ("LAA"), an executive agency within the Ministry of Justice headed by the Director of Legal Aid Casework, a civil servant appointed by the Lord Chancellor. The LASPO legal aid scheme does not, therefore, have the same level of independence as its predecessor.

7. The impact of LASPO on the number of civil cases funded by legal aid was dramatic: the November 2014 report of the National Audit Office ("NAO") observes that 28% fewer civil legal representation certificates were issued by the LAA in 2013-2014 than in 2012-2013, and that there was a drop in civil legal help (initial advice and assistance) matters funded of 70% in the same period[2]. LASPO came into force at a time when there had been no increase in civil legal aid fees since 1998-99, and a 10% cut in 2011. The NAO has calculated that this amounts to a 34% real-terms reduction in civil legal aid fees over

[1] Ministry of Justice: *Proposals for the reform of Legal Aid;* November 2010 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf
[2] National Audit Office: *Implementing Reforms to Civil Legal Aid*; 19.11.2014 https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf p.22

that 13 year period[3]. In these circumstances it is not surprising that the Law Society has warned that "*the future sustainability of legal aid practice is in significant doubt.*"[4]

Exceptional Case Funding

8. The common law right to access to the court has not yet been recognised to encompass a common law right to legal aid. Thus for now, and other than those contained in domestic statute, the only sources of enforceable rights to legal aid for individuals in England and Wales are the ECHR and EU law. Section 10 of LASPO provides for ECF to be made available in a case, which would otherwise be out of scope, where a failure to do so would breach, or risk breaching, an individual's Convention or enforceable EU law rights. The ECF scheme was introduced as the "safety net" by which LASPO was supposedly made compliant with the UK's obligations under the ECHR and EU law.

9. Through our exceptional funding project, PLP has had a unique insight into the operation of the ECF scheme, and we have played a central role in the litigation arising from the scheme, representing the Claimant *I.S.* in *Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622*,* and *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin)*.* In our experience the ECF scheme has been insufficiently accessible, particularly to unrepresented individuals, to provide a genuine "safety net."

10. In advance of the implementation of LASPO, the Government's best estimate of the annual number of ECF applications for non-inquest legal representation was 6,500, with further applications anticipated for legal help[5]. Legal Aid Agency statistics record that they received 1,315 "applications" for non-inquest ECF in the first year of the scheme, and 947 in the second year[6]. The figure given for "applications" includes both initial applications, and applications for a review of an initial decision. In the first year of the scheme approximately 1% of all applications for ECF were granted[7]. Not only were the numbers applying to the scheme a fraction of those said to be anticipated by the LAA, but those able to apply had a vanishingly small chance of succeeding.

11. Through our exceptional funding project, PLP assisted 25% of *all* applicants who were granted ECF between 1 April 2013 and 31 March 2015. We are, therefore, well placed

[3] National Audit Office: *Implementing Reforms to Civil Legal Aid* p.33
[4] House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 12 March 2015, HC 311 of session 2014–15, p 31
[5] Ministry of Justice: *Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment*; March 2012 pg. 9
[6] Legal Aid Agency statistics: https://www.gov.uk/government/collections/legal-aid-statistics
[7] Legal Aid Agency statistics

to understand the barriers that have prevented individuals from accessing ECF. In our experience the barriers have included: the complexity of the forms the LAA required to be provided with an application; the time-consuming nature of the ECF application process and onerous evidential requirements; the need in many cases to engage in pre-action correspondence before ECF would be granted; the lack of an emergency procedure; the lack of funding for providers to make applications and providers' consequent unwillingness to make them; and the LAA's decision-making when determining applications. Of particular note are the lengths that it can be necessary to go to for an applicant to obtain a grant of ECF. Of the 31 grants of ECF obtained with PLP's assistance in the first two years of the scheme, 23 required either a pre-action letter or the issuing of judicial review proceedings before funding was granted.

12. We have included below two case studies, taken from PLP's exceptional funding project, which are illustrative of some of the barriers to accessing ECF.

BXA

BXA was 52 years old and had been in the UK for approximately 16 years. She had a history of street homelessness, a diagnosis of paranoid schizophrenia, had been detained under the Mental Health Act 1983 on several occasions, and struggled to give a coherent account of her experiences. BXA required ECF to be represented in her immigration appeal in which she would need to argue that her removal would breach her rights under Article 8 ECHR.

An application for ECF was made for BXA, with our assistance, and marked as urgent. An immigration specialist had assessed the prospects of BXA succeeding in her appeal as good, but the LAA refused the application on the basis that, in their view, the prospects were poor. An application for a review of the refusal was submitted to the LAA, but they upheld the refusal, again on the grounds that the prospects were poor. The LAA's decision letter referred extensively to immigration case-law and asserted that the application had failed to demonstrate why BXA's Article 8 ECHR rights would be breached if she was removed. Following this, PLP instructed experienced counsel to prepare an advice, *pro bono*, on the merits of BXA's immigration case. Counsel advised that the case was meritorious. We sent this advice, together with a pre-action letter, to the LAA following which (nearly four months after BXA's first application was made) the LAA granted her ECF. We understand that BXA's immigration appeal was successful.

MM

MM is severely disabled, suffering from cerebral palsy, and is dyslexic. He cannot speak and relies upon a basic electronic voicebox to communicate. He required ECF to allow him to be represented in private law family proceedings that would determine the level of contact he would have with his children.

MM approached our exceptional funding project for help after an initial application for ECF had been unsuccessful and he had been unable to navigate the application process to apply again without legal assistance. We obtained a *pro bono* advice from counsel as to the merits, and complexity, of MM's family case, which confirmed that the case was both meritorious and complex. An application for ECF was submitted for MM, with our assistance. This application was refused on the basis that, in the LAA's view, MM's family case did not meet the merits or the ECF test (the decision was made before the high test used for ECF was disapproved by the High Court in *Gudanaviciene and ors*). An application for review was submitted to the LAA, again with our assistance, but the LAA maintained their refusal to grant ECF on the basis that the merits criteria were not satisfied. Shortly after this, the judge in MM's family proceedings made an order recording his opinion that MM should be granted legal aid. Notwithstanding these judicial observations, it was necessary for PLP, on behalf of MM, to issue judicial review proceedings against the LAA before they agreed to grant ECF. The grant of ECF was made over a year after MM made his first application.

In refusing to accept that MM's case was meritorious, the LAA argued that it was unclear how he could be granted contact without support provided by the Local Authority, but that the family court was not the appropriate forum for determining such issues, rather he should challenge any refusal to support through judicial review. MM requested such support from the Local Authority, and issued judicial review proceedings when it was refused, but the judicial review claim was certified as 'totally without merit,' on the basis that the correct forum to determine the support issues was the proceedings in the family court.

13. One reason for the startlingly low ECF grant-rate was that, from the outset of the scheme, the government contended for a very restrictive interpretation of section 10 LASPO, arguing that a Convention right to funding arose only under Article 6 ECHR, and that it was only necessary to provide such funding if its absence would make it *"practically impossible"* for the applicant to bring the case. ECF was not, therefore,

available in immigration cases that did not engage enforceable EU law rights, and the test to be applied in cases in which Article 6 ECHR was engaged was very high indeed.

14. PLP was instructed by the Claimant *I.S.* in *Gudanaviciene and ors,* to challenge the lawfulness of the government's interpretation of section 10, and we succeeded in both the High Court and Court of Appeal. The Court of Appeal confirmed that the need for Convention rights to be "*practical and* effective" meant that a right to funding could arise under Article 8 ECHR (and other Articles), and that funding would be required where it was necessary to enable an individual "*to present their case effectively and without obvious unfairness* (para 56)". The outcome of *Gudanaviciene and ors* was vitally important in improving access to the ECF scheme.

15. However, whilst clarification of the test for ECF eligibility improved access to the scheme from a legal perspective, significant practical barriers remained. Other factors affecting access to ECF were considered in *I.S. v Director of Legal Aid Casework and the Lord Chancellor*, a challenge to the operation of the ECF scheme. In *I.S.* PLP, on behalf of the Claimant, filed approximately 85 witness statements, including statements from legal aid providers who had made 20% of all ECF applications (and 44% of all successful ECF applications) setting out their experiences of the scheme. This included evidence of our own direct experience of assisting applicants through our exceptional funding project. The challenge was heard by the High Court on 10-12 June 2015 and in his judgment, handed down on 15 July 2015, Collins J found (inter alia) that the scheme was operating unlawfully because it gave rise to an unacceptable risk that an individual would not obtain funding when it was needed to prevent a breach of their Convention or EU rights. The Defendants' appeal against the judgment of Collins J was heard by the Court of Appeal on 21 and 22 March 2016 and judgment is awaited.

16. In response to the judgments in *Gudanaviciene* and *I.S.* the government has revised the ECF guidance available both for individuals and for practitioners, and introduced a new, shorter, application form, which provides for the possibility of applying for funding to investigate whether an ECF application is viable. The cases of *Gudanaviciene* and *I.S.* have also had a clear impact on the number of ECF applications that are being granted. The most recent LAA statistics for the quarter October-December 2015 show a grant-rate of 53%. Particularly striking is the impact on the grant-rate for immigration ECF applications which in October-December 2013 was 2.4%, but in the corresponding

quarter for 2015 stood at 77%[8].

17. However, the ECF application rate has remained relatively static compared with 2014-2015, and is considerably lower than 2013-2014.[9] The static number of applications suggests that providers and unrepresented individuals remain unwilling or practically unable to make ECF applications, notwithstanding the impact of *Gudanaviciene* and *I.S*. Our recent experience of the scheme suggests that there remain considerable barriers to access, particularly for unrepresented applicants who can struggle to get an application accepted as such by the LAA. We are, therefore, concerned that in practice large numbers of individuals who are *prima facie* eligible for ECF are still not able to obtain it.

Use of LASPO delegated powers

18. The implications for access to justice on the face of LASPO were profound enough, but a particular concern arises from a pattern of attempts to use LASPO delegated powers to introduce restrictions on legal aid which go beyond the scope of the statutory scheme as approved by Parliament. LASPO was a statute framed in the need to save costs, but many of the subsequent reforms have been ideological in nature.

19. In addition to our focus on ECF, PLP was involved in three major challenges to the government's implementation of the LASPO scheme: *R (oao Public Law Project) v the Lord Chancellor* [2015] EWCA Civ 1193**,** UKSC 2015/0255; *R(oao Ben Hoare Bell and ors) v the Lord Chancellor* [2015] EWHC 523; and *R(oao Rights of Women) v the Lord Chancellor* [2016] EWCA Civ 91.

20. In these three cases the government introduced (or attempted to introduce) considerable restrictions on legal aid provision, and hence access to justice, through secondary legislation, thereby avoiding the level of Parliamentary scrutiny that would be afforded to primary legislation. *Ben Hoare Bell and ors* was a challenge to regulations which meant that legal aid providers would go unpaid for work done on certain meritorious judicial review cases. *Rights of Women* was a challenge to regulations which imposed restrictive evidence requirements on those seeking legal aid as victims of domestic violence. The 'residence test' that we challenged in our own name would have restricted the availability of legal aid to those who could demonstrate that they met a

[8] Legal Aid Agency statistics
[9] In the quarter October-December 2015 the LAA received 251 applications for non-inquest ECF. In the corresponding quarter from 2014-2015, they received 225. However, during the corresponding quarter for 2013-2014 they received 341 applications, a decrease from the highest number of applications ever received per quarter: 414 received in July-September 2013.

requirement of 12 months or more lawful 'residence' in the UK. In *Ben Hoare Bell and ors* a Divisional Court, and in *Rights of Women* the Court of Appeal, ruled that regulations introduced by the Lord Chancellor undermined the statutory purpose of LASPO. In PLP's challenge to the proposed residence test, the Supreme Court has ruled that the test was ultra vires the enabling powers in LASPO that the Lord Chancellor proposed to use.

21. In our responses to the *Transforming Legal Aid* and *Judicial Review: Proposals for Further Reform* consultations PLP had expressed our concerns about the lawfulness, and the implications for access to justice, of the proposal to introduce the regulations challenged in *Ben Hoare Bell,* and the proposal to introduce a 'residence test' for legal aid. The recent ruling of the Supreme Court in relation to the residence test, and the judgment of the Divisional Court in *Ben Hoare Bell and ors* demonstrate that our concerns were well founded.

The Gateway

22. The LASPO scheme also introduced the Civil Legal Aid Gateway as the only way to obtain publicly funded advice and assistance for debt, discrimination and special educational needs matters. An individual seeking legal aid for such cases now must first telephone the Operator Service (manned by operatives who are not legally trained) who will determine whether the individual is financially eligible; whether their case is in-scope; whether their case is within one of the Gateway categories; and whether their case meets the merits criteria for legal aid. If the Operator Service assesses the matter as meeting those requirements, they will refer the individual to a Specialist Telephone Advice Provider to give telephone advice. The Specialist Telephone Advice Provider will also decide whether to refer the individual for face-to-face advice.

23. In March 2015 PLP published a report of our research into the operation of the Gateway.[10] Our findings indicated a risk that, contrary to the stated policy intentions, the Gateway hindered access to justice for those who had to use it. We found that there were significantly lower volumes of advice being given than had been anticipated and an ongoing reduction in volumes of advice being given[11]; that service users experienced difficulties in navigating and proceeding beyond the Operator Service[12]; that there was a

[10] Public Law Project: *Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway*; March 2015 http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf
[11] Keys to the Gateway; Chapter 6
[12] Keys to the Gateway; see e.g. pg. 41

very low level of awareness of the service amongst potential service users; and that significant numbers of matters resulted in 'outcome not known or client ceased to give instruction',[13] indicating that individuals were struggling to engage with it. Our findings further indicated that in some areas the Parliamentary and policy intentions in introducing the Gateway might in fact be being undermined, and that the system may not be achieving value for money (and could be more expensive than face-to-face advice) across its services[14].

24. Whilst technology can and should play a role in the future of legal aid, it is no substitute for face-to-face advice. Our research into the Gateway points to the risks posed by 'one size fits all' entry routes, particularly when manned with gate-keepers who are not legally trained. It must be remembered that many of those who require legal aid are vulnerable individuals who may struggle to engage with technology and, vitally, will not always have a clear idea of why they need advice or be able to provide a coherent account of their experiences. A legal aid scheme must be designed to be accessible by such people if it is to be genuinely accessible to all.

Conclusion

25. The Court of Appeal in *Rights of Women* referred to legal aid as "*the hallmark of a civilised society."*[15] The implementation of LASPO has created barriers to access to justice, as is borne out by PLP's direct experience with the ECF scheme, and indicated by our review of the mandatory Gateway. The development of 'advice deserts'[16] and increasing numbers of litigants in person appearing, particularly in family courts, are also indicative of a justice scheme that is failing to provide access to justice.[17]

26. Other respondents, such as the Law Society, have highlighted the importance of a working justice system to social cohesion and the rule of law, the social and economic value of early access to legal advice, and the significance of legal representation in enabling access to justice[18], and we will not make detailed submissions on this point. However, we do wish to emphasise the need for a legal aid scheme that is genuinely accessible to all. This has to be the start-point of any proposals for change. Unfortunately the current environment is such that, without the work that PLP has been able to do since April 2013, the barriers to access to justice would be far higher and far

[13] Keys to the Gateway; pg.4 and Chapter 7
[14] Keys to the Gateway; pg. 4 and Chapter 8
[15] *R(oao Rights of Women) v the Lord Chancellor* [2016] EWCA Civ 91 paragraph 1
[16] For example, the National Audit Office records that "in 14 local authorities no face-to-face providers based in the area started any legal aid-funded work during 2013-14" *Implementing Reforms to Civil Legal Aid* p.35.
[17] National Audit Office: *Implementing Reforms to Civil Legal Aid* pp 16-17
[18] The Law Society: *Submission of the Law Society of England and Wales to the Labour Party Review of Legal Aid*; February 2016

fewer individuals would find that a “safety net” prevented a breach of their fundamental rights.