



**The Law  
Society**

# **Civil legal aid: A review of its sustainability and the challenges to its viability**

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# 1. Introduction

This report provides an evidence base on the key features and historical development of civil legal aid covering the institutions, recipients and providers that make up the 'system'. The narrative is based on information from a range of literature and knowledge of the Law Society's Justice team.

Based on discussion between the Society's Justice and Futures & Insight's teams the focus for this evidence base was narrowed to four areas:

- Administration and governance of the system
- Fees paid to providers
- Practice area specific issues; housing, family law, immigration, education
- Role of Not for Profit organisations

The first two areas impact the supply decisions and commercial viability of all civil legal aid providers.

The approach here is to assess the evidence 'in the round' removed from day-to-day policy concerns, and to reflect on the key issues and historical changes that impact the sustainability of civil legal aid based on public documents and historical knowledge. The evidence will also help in identifying gaps in our knowledge, and further research to commission in the future.

Recommendations to improve the system following logically from the evidence appear throughout the report and are listed in full in section 2. A comprehensive list of references is provided in section 11.

This report complements a series of maps demonstrating the provision and demand for legal aid on a regional basis available here: <https://www.lawsociety.org.uk/en/campaigns/legal-aid-deserts>

## Defining ‘sustainability’

A clear definition of ‘sustainability’ is important to frame the collection of evidence – particularly in the context of declining scope and funding for legal aid seen over recent years following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Here we take ‘sustainable’ to mean delivery of legal aid on civil issues to the same or greater proportions of people that are eligible over the long term.

Provision is linked to the sustainability of solicitor firms supplying legal advice which, as highlighted by The Law Society (2021), involves their making a reasonable profit to re-invest to improve efficiency and efficacy, while offering competitive salaries. The not for profit sector also needs to be able to generate a surplus for similar reasons. This commercial viability is impacted by administrative issues and fees covered below and the areas of advice within the scope of legal aid.

In terms of overall demand, the number of individuals eligible for civil legal aid is driven by a range of socio-economic factors and government policy. Drivers of demand are often specific to practice areas – for example, housing affordability and supply will influence numbers of individuals requiring legal advice in relation to housing needs.

## 2. Recommendations

The Law Society first called for an independent review into the sustainability of the civil legal aid system in 2017.

The following recommendations based on our review of the features and historical development of the system will serve to help structure any review and ongoing improvements to the system.

1. Review the process via which solicitor firms gain entry to the civil legal aid market alongside fees paid for various types of work.
2. Map out the complex system of contracts as they apply to law firms seeking to provide different types of civil legal aid and assess the barrier to entry the contracting process presents.
3. Produce and maintain an evidence base to demonstrate the scale of legal needs of those eligible for civil legal aid using indicators of demand for different types of advice (for example housing repossessions and income for housing advice).
4. The MoJ and LAA to work jointly with other government departments to understand the full impact on public sector costs associated with changes to the civil legal aid system. This should include regular cost benefit analysis.
5. Simplify the audit process for legal aid providers such that it reflects other checks and balances in the system and administrative costs for providers.
6. Publish key performance metrics for the CCMS system on the LAA website to view by providers and clients.
7. Review and simplify fee structures so that they reflect the cost base and risk profile faced by providers, including a system to uprate fees by inflation.
8. HMCTS to collect data on litigants in person that enables separate analysis of cases with active LiPs.

### 3. Administration and governance

#### Contracts

Firms are only able to supply services funded by legal aid if they have signed a contract with the Legal Aid Agency (LAA) – the executive agency of the MoJ responsible for the provision of both civil and criminal legal aid and advice in England and Wales. There are two principle issues with the current contracting regime – the *tender process* and *complexity of contracts*.

#### The tender process

Tenders for each type of legal aid service are typically conducted every three to four years as noted by the Law Society (2019). The LAA can also hold ad hoc smaller tenders, for example if there is a gap in provision in a particular area. However, without any adjustment of fees (discussed below) the tender process itself does not support the ability for solicitor firms to address the levels of demand from those eligible for civil legal aid on a timely basis – where there is insufficient capacity from firms already with contracts to profitably meet demand.

This is a particular issue with changing economic and social conditions through the pandemic, which will have increased numbers within the scope of legal aid for family and other issues. A restrictive tender process may also limit the attractiveness of the market for firms with new business models that could potentially operate more efficiently.

**Recommendation:** Review the process via which solicitor firms gain entry to the civil legal aid market alongside fees paid for various types of work.

#### Complexity of contracts

The length and complexity of the standard civil legal aid contract, practice area derivations, and related guidance, has two effects:

- creating administrative burden and uncertainty for existing suppliers and
- deterring new entrants due to a lack of clarity and unattractive terms.

In reviewing the latest version of the standard civil contract (LAA, 2017) the following features are apparent as indicated with relevant examples:

Overall complexity is extended by elements that repeat standard regulatory or legal

obligations. *For example, clauses regarding client care and insurance requirements. The level of complexity within the contract is exemplified in the means test guidance. There is a 43-page Lord Chancellor's guidance on Controlled Work eligibility; a 137-page Lord Chancellor's guidance on certificated work eligibility; there is a 301 page means assessment guidance in addition to 5 other guidance documents on discrete means test issues. There are then numerous application forms requesting details of the client's income including on page 13 of the 25-page civil means 1 financial assessment form asking whether the client owns any horses worth more than £500.*

Expectations of providers being unclear, for example clauses regarding contract sanctions lead to subjective and inconsistent application.

Lack of flexibility to allow providers to deliver services in innovative or more cost-effective ways. *For example clauses prescribing the number of hours and days an office has to be open for, and the firm having to complete means testing forms as part of CCMS (see below) which involves time spent by the practitioner assessing financial eligibility not remunerated.*

This final feature has been overcome as a shortcoming in other public sector agreements in sectors from rail to education provision – which typically contain provisions to incentivise efficient delivery and drive down overall system costs.

The standard contract terms and provisions, along with practice area specific provisions, runs to over 200 pages. Combined with a range of separate information on fees listed in statute (2013) and how costs can be recovered – much of which is difficult to find and interpret – the contracts and associated detail present a formidable administrative burden.

The most comprehensive set of links to contracting and related information was found in the Civil Finance Electronic Handbook (LAA, 2020a). However, this source is by no means an intuitive guide to the range of contracts and fee schedules.

**Recommendation:** Map out the complex system of contracts as they apply to law firms seeking to provide different types of civil legal aid and assess the barrier to entry the contracting process presents.

## Operational issues

A range of issues with the way the LAA operates can be viewed as impacting the sustainability of the current system, from strategic objectives in a broad sense down to specific decision making about individual cases and providers, and systems to administer legal aid funding.

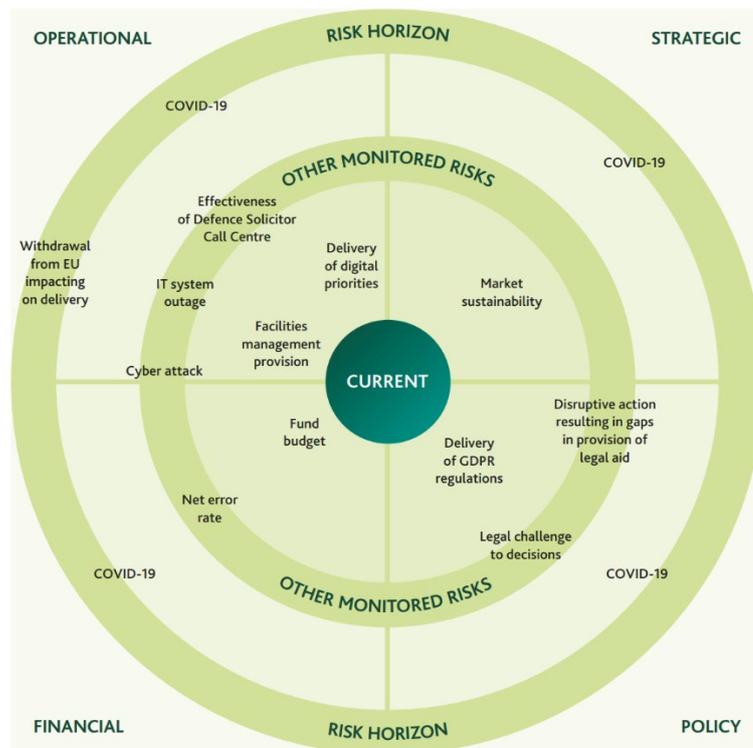
### LAA strategic objectives

As described in its annual report for 2019-20 the LAA has four strategic objectives:

- (1) Provide simple, timely and reliable access to legal aid
- (2) Build strong relationships across government and the justice system
- (3) Secure value for money for the taxpayer in all that we do
- (4) Achieve our full potential through being fair, proud, and supportive

In addition, LAA identified the following emerging risks in 2019-20 as they look to the future.

**Figure 1. LAA Emerging Risks (2019-20)**



Source: LAA Annual Report 2019-20

Key Performance Indicators (KPIs) are identified against objectives (1) and (3). However, indicator (1) does not reflect any measures that relate to the volume and timeliness of support provided to the eligible population. This issue is key to the market sustainability identified as a current risk by the LAA in diagram above – and was highlighted by the National Audit Office (NAO) report on implementation of legal aid reforms (NAO, 2014).

**Recommendation:** Produce and maintain an evidence base to demonstrate the scale of legal needs of those eligible for civil legal aid using indicators of demand for different types of advice (for example housing repossessions and income for housing advice).

Objective (3) uses KPIs that relate solely to LAA's internal operations – and not the wider opportunity costs that relate to potentially not serving all those that are eligible. The wider costs to the taxpayer may be borne by other government departments, including due to a lack of early legal advice. Measures to broaden the scope of KPIs for objective (3) to cover a wider range of costs was also a suggestion also featured in NAO's 2014 report.

**Recommendation:** The MoJ and LAA to work jointly with other government departments to understand the full impact on public sector costs associated with changes to the civil legal aid system. This should include regular cost benefit analysis.

### **Decision making and audits**

Reports from practitioners suggests that poor and inconsistent decision making at case level from the LAA has impaired operations of providers. Evidence from the Legal Aid Practitioners Group survey (2019) indicated most practitioners experienced the following in the prior 12 months:

- Incorrect refusals of substantive certificates and/or amendments to substantive certificates
- Delays in granting substantive certificates and/or amendments to substantive certificates
- Incorrect nil assessments of Escape Fee or other claims for costs
- Incorrect requests for evidence of means that may be impossible to obtain and/or not in compliance with the regulations
- Issues with the appeal or internal review process for challenging any of the above (or any other) decisions by the LAA

- Being forced to issue a claim or make an application ‘at risk’ (i.e. not knowing whether legal aid will be granted to cover the claim/application) while awaiting the outcome of an appeal)

These results were linked to a “culture of refusal” by LAA in granting certificates for licenced work such that legal aid providers could undertake work for vulnerable clients.

Separately a report by Wilding (2019) indicates that audits of immigration providers by LAA have been triggered by minor errors in billing or means testing – with undue delay and disruption to serving clients as a result.

A stringent audit and contracting process is likely to have been influenced by the LAA’s concerns not to have their accounts qualified by the NAO as happened to their predecessor the Legal Services Commission for the 2009-10, 2010-11, and 2011-12 accounts (NAO, 2010, 2011, 2012). Qualification indicates the auditor had reservations about aspects of the accounts which, in this case, related to payments to legal aid providers.

However, in their reporting NAO “identified the complexity of the Commission’s fee schemes as a major contributory factor toward the relatively high level of error in claims” (NAO, 2010). Simpler processes would be easier to implement and monitor but have not materialised in the intervening years, while related complex audit arrangements have been maintained.

It should be noted that the LAA recently explained what is being done to reduce the burden of the Agency’s auditing; increasingly adopting a more risk-based approach and reducing audit activity by 16% (House of Common Justice Committee, 2021). This is in the context of the LAA’s annual report for 2019/20 showing there is minimal fraud relative to the scale of civil legal aid spending, and a fraud action plan and counter fraud activity with other parts of government as prevention measures.

**Recommendation:** Further simplify the audit process for legal aid providers such that it reflects other checks and balances in the system and administrative costs for providers.

## Systems

The LAA operates the Client and Cost Management System (CCMS) as an online system for civil and family legal aid providers. CCMS covers the whole process for certificated civil and family legal aid work, from submitting legal aid applications to paying bills. A new tool named 'Apply' is currently being piloted promising a modern digital services platform designed to improve the efficiency of submitting legal aid applications.

Since use of CCMS was made compulsory in 2016, there have been regular performance issues as highlighted by the Law Society and the Legal Aid Practitioners Group.

Although the Civil Contracts Consultative Group<sup>1</sup> has sight of CCMS performance information, the publication of key performance metrics for the system would allow stronger analysis of the degree to which problems with the system inhibit delivery of legal aid to clients.

**Recommendation:** Publish key performance metrics for the CCMS system on the LAA website to view by providers and clients.

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<sup>1</sup> The Civil and Crime Contracts Consultative groups meet every two months as part of the Legal Aid Agency's commitment to partnership working with legal aid stakeholder groups.

## 4. Fees

This section addresses changes to the overall approach to fees paid to legal aid providers. Further practice area specific issues are discussed in the following sections. Along with the scope of the civil legal aid system, fees have a major impact on overall supply and commercial viability of providers.

### **Introduction of fixed fees**

Since the advent of contracting in 2000 there has been a marked shift from payment at hourly rates to fixed fees. In the initial phase, in limited areas of law Tailored Fixed Fees (TFF), where fees were 'tailored' to individual firms, were introduced. Subsequently the TFF scheme was replaced by a range of standard fixed fees for all providers. By the time LASPO came into effect in 2013, fixed or 'standard' fees had become the norm in most areas of civil legal aid with a general exception where successful legally aided litigants were granted inter-partes costs orders (where hourly rates can be claimed as considered reasonable on a case).

Initial fixed fee calculations were based on an average of hourly rate spend from a mixed caseload, a 'swings and roundabouts' approach, where in some simpler cases providers were rewarded with a surplus, and in some more complex cases providers lost out – but the stated intention was that overall it should average out. However, in 2010, the then coalition government introduced Legal Aid Reform (LAR) proposals in response to the credit crisis at the time and their austerity agenda.

### **Absence of rationale for current fee levels**

A cut of 10% to all civil legal aid fees was introduced in 2011, followed in 2013 by LASPO which introduced severe cuts to the scope of legal aid for many areas of civil law. For example, all private family law work was cut from scope apart from cases involving domestic abuse or child abuse. By their very nature remaining cases were the most complex and the simpler cases were effectively removed but the standard fee remained the same.

Although the introduction of fixed fees was originally said to be fair on a "swings and roundabouts" approach, the fact that only complex cases remained in scope with large amounts of simpler work taken out of scope, meant providers were disadvantaged in the absence of any compensating increase in fees (Fabian Society, 2017). A further example

was the removal of non-asylum cases in the field of immigration, with only complex cases remaining.

In assessing the impact of the LASPO reforms by MoJ and LAA, the NAO were critical of the approach to fees, stating “The Ministry reduced fees for providers without a robust understanding of how this would affect the market, and its monitoring has been limited” (NAO, 2014).

A major and continuing issue with fees is the lack of a systematic approach to assessing the amounts paid to legal aid providers in relation to their cost base and volumes of work completed – and absence of regular uprating of fees in line with inflation. These approaches are common practice in other publicly funded industries and their adoption would create a more stable economic environment for law firms and others to provide legal aid services.

**Recommendation:** Review and simplify fee structures such that they reflect the cost base faced by providers, including a system to uprate fees by inflation.

## 5. Family Law

### The provider base

#### Reduction in numbers of providers

Legal aid providers are often small businesses, and sustainability of the family legal aid market should be viewed considering the history of the fees scheme. LASPO cuts and the administrative burden described above have both impacted firms' economic viability.

The MoJ did not undertake an assessment of the impact LASPO would have on the sustainability of the provider base. Many firms specialising in family cases stopped undertaking private family legal aid work or focused their services on public family law cases.

Table 1 below demonstrates the significant reduction in provider numbers.

Whilst a reduction in the provider base and case volume was expected in the immediate years following LASPO due to reduction in scope and subsequent market adjustment, it is the continued annual shrinkage in firm numbers and cases subsequently that raises concerns regarding sustainability.

**Table 1. Number of offices providing Legal Help and Controlled Legal Representation in Family cases**

Year	Offices completing Family work
2011-12	2,401
2012-13	2,383
2013-14	2,262
2014-15	1,918
2015-16	1,627
2016-17	1,424
2017-18	1,282
2018-19	1,277
2019-20	1,257
2020-21	1,125

Source: Ministry of Justice, 2021a

The reduction in provider offices has made it increasingly likely that those who are still eligible for legal aid find it difficult to find a solicitor to represent them. Rights of Women

undertook a survey in 2015 in which 71% of respondents said it was either difficult or very difficult to find a legal aid solicitor in their area. 33% of respondents were having to travel between 5 and 15 miles to find a legal aid solicitor, and 23% had to travel more than 15 miles. Since the time of the survey numbers of providers have reduced further.

### **Supply of newly qualified solicitors**

The government previously ran a scheme of sponsoring the training of lawyers in legal aid firms so that there would be a supply of newly trained legal aid lawyers to provide continuity of provision in the future. However, the scheme was removed in 2010, heightening a problem for family legal aid firms not being able to offer competitive salaries. Whilst firms may still be able to find trainees, this is a challenge and trainees are not remaining in significant numbers once qualified given low legal aid salaries relative to the legal market.

## **Alternatives to legal help and representation**

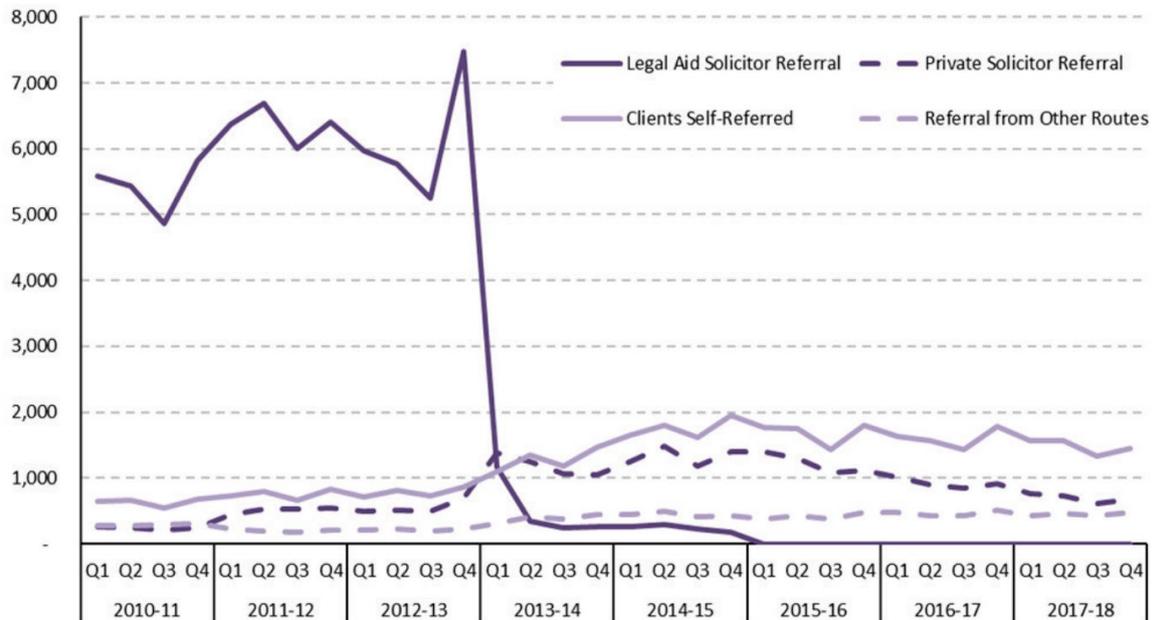
### **Mediation**

Legal aid for family mediation was excluded from the 10% cut to fees introduced in 2011 and was not cut from scope through LASPO. The government wanted to encourage mediation and anticipated that the removal of large areas of private family law from scope would incentivise mediation and out of court resolution.

However, prior to LASPO family mediation was largely dependent on referrals from family legal aid solicitors, and the removal of private family law from the scope of legal aid reduced the opportunity to refer cases towards mediation. As shown in Figure 2, the number of Mediation Information Assessment Meetings (MIAMs) fell by 66% between 2012-13 and 2017-18.

The loss of the primary referral routes to mediation is the most significant factor in the post-LASPO decline in MIAM uptake. This decline has had a marked impact on the provider base with the number of contracted legal aid mediation providers starting work during this period falling by approximately 50% from 228 in 2013-14 to 112 in 2020-21 (Ministry of Justice, 2021).

**Figure 2. Volume of Publicly Funded MIAMs by Referral Routes**



Source: Ministry of Justice, 2019

### Domestic violence gateway

Along with the scope cuts, a ‘domestic violence gateway’ was introduced in private family cases, to establish eligibility for legal aid by providing evidence of the abuse clients had experienced. However, there is no remuneration to firms for assisting the client with obtaining this evidence.

## Changes in demand for family services

### Population still eligible for legal aid

Despite the scope cuts there remains a significant population eligible for civil legal help and there are indications this has been growing. During the Covid-19 lockdowns there was a significant escalation in domestic abuse cases. During the lockdown period:

- Calls to the national domestic helpline increased by around 66%
- Calls to the NSPCC helpline about the impact of abuse on children increased by 32%
- The Metropolitan Police have reported making 100 domestic violence arrests a day
- 14 women and two children were killed in the first three weeks of the lockdown.

The family court statistics show an increase of 26% in domestic violence remedy cases started in the quarter from July to September 2020.

In addition, cases have been unable to progress due to lockdown and there has been a growing backlog in the court system as shown by Table 2.

**Table 2. Backlog of cases in the Family Courts**

	Family public law outstanding	Family private law outstanding
Pre-Covid baseline	12,295	42,305
May 2021	20,886	81,224

Source: HM Courts & Tribunals Service, 2021

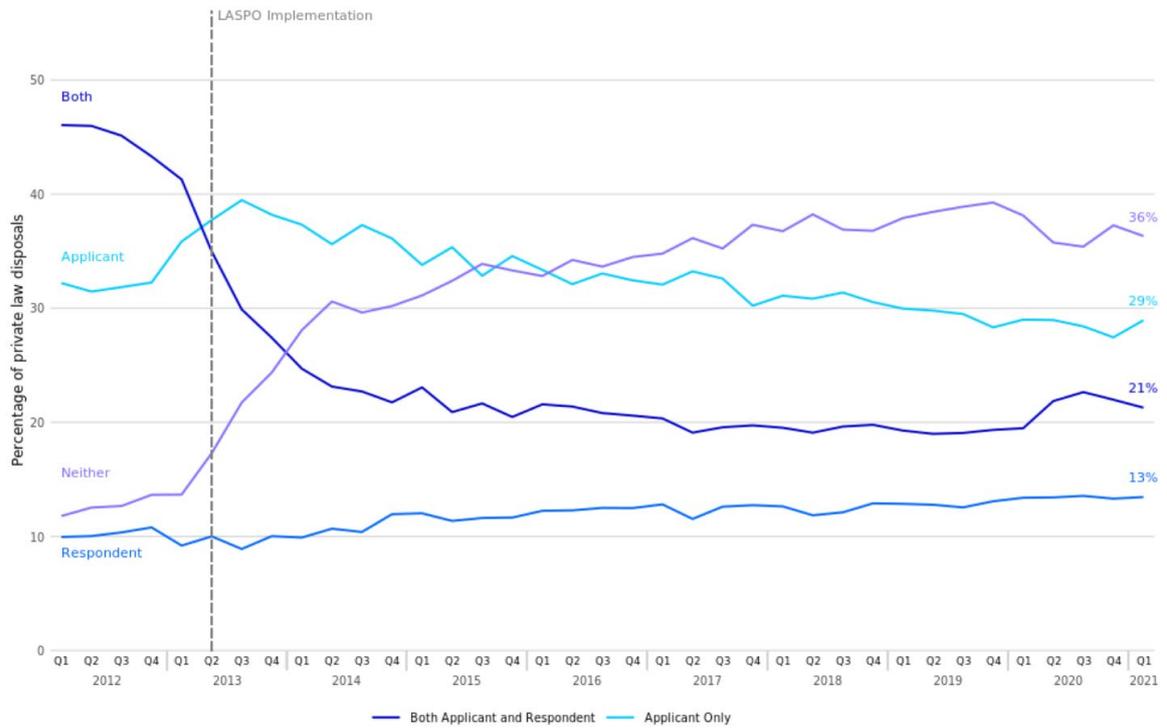
### Overall demand

The indicators show that, despite the significant drop in case numbers and providers undertaking family legal aid, the overall demand for family services has not dropped. The Family court statistics demonstrate that whilst there was a drop in private family law applications post LASPO, the figures have now risen to pre LASPO levels (HM Courts & Tribunals Service, 2021). There were 71,707 new cases started in family courts in January to March 2021, up 7% on the same quarter in 2020. This was due to increases in most case types: financial remedy (29%), domestic violence (15%), private law (5%), matrimonial (2%) and adoption (1%) cases. However, there was a decrease in public law (7%) case starts. There is no evidence that more people are resolving their family problems outside of court.

Meanwhile the nature of representation has changed as a far greater number are now self-represented litigants. Reflecting cuts to private family legal aid and the drop in mediation cases there has been a significant rise in the numbers of litigants in person (LiPs) in the family courts. Pressures on the court system have increased due to higher than expected case volumes and the potential for delays caused by LiPs being unfamiliar with court processes. Figure 3 below demonstrates the reduction in the numbers of cases where there is legal representation.

**Recommendation:** HMCTS to collect data on litigants in person that enables separate analysis of cases with active LiPs.

**Figure 3. Private law disposals by type of legal representation, 2012 to 2021**



Source: Ministry of Justice, 2021b

## 6. Housing advice

### The provider base

Since the main bid round for the 2018 civil legal aid contracts, the LAA has needed to issue multiple subsequent local tenders for Housing and Housing Possession Court Duty Scheme (HPCDS) contracts as existing providers have dropped out. The number of provider offices completing housing work for Legal Help and Controlled Legal Representation fell to 322 in 2020-21 from 755 ten years earlier (Ministry of Justice, 2021a).

The various factors affecting the numbers of housing providers are discussed in the following sections.

#### Low rates of pay for HPCDS providers relative to other areas

This problem is greater in rural areas where low numbers of clients on possession days may not cover the provider's costs of attending the court, particularly where the courts are at some distance from the provider's office.

#### Impact of Covid-19

The impact has been particularly strong due to the suspension of possession proceedings for several months in 2020. Although proceedings have resumed the number going through the courts is still very small (partly due to many social landlords holding back on proceedings during the pandemic) and it is envisaged that at some point the backlog will start to come through.

In the meantime, there is a risk that the reduced volume may result in it not being economically viable for existing providers to continue in the scheme. It is also becoming increasingly clear that the current HPCDS model is not going to be compatible with the way the courts are now listing possession proceedings and changes to the process being suggested by the Master of the Rolls working group on repossession. The HPCDS scheme is currently subject to review by the MoJ in the context the changed landscape brought about by the pandemic.

#### Fixed recoverable costs

Many providers effectively subsidise legal aid from cases where they can recover costs (inter-partes) from unsuccessful opponents at reasonable private paying client rates which

are significantly higher than legal aid rates. The Government's intention to introduce fixed recoverable costs (FRCs) in civil litigation potentially reduces this income stream as FRCs will in many cases be lower than current inter-partes costs orders. This is a particular concern for areas of housing litigation such as disrepair where the financial value of the damages claim is usually low, but cases can be time complex and time consuming. The proposed FRC rates do not factor in this level of complexity.

### **Changes in demand for housing advice**

Evidence suggests there has not been a fall in demand for housing advice overall. There was an increase in mortgage possession claims from just under 20,000 in 2015 to over 25,000 in 2019 (Ministry of Justice, 2021c). Although all possession claims fell exponentially in 2020, this was largely due to the Covid moratorium on evictions and is highly unlikely to represent a longer-term trend once claims once courts regain the capacity to deal with larger claim volumes.

There has also been a small decline in the number of statutory homeless, partly driven by the government Covid contingency measures to take rough sleepers off the streets.

However other indicators of housing need show a significant increase; the number of households in temporary accommodation increased to 93,490 at 30 September 2020 from 87,390 in September 2019, an increase of 7% (Ministry of Housing, Communities & Local Government, 2021).

With regard to disrepair there are concerns that the consequence of the scope cuts of 2013 denies those suffering disrepair the prospect of access to the courts and that the relatively low level of legal aided disrepair cases does not reflect a wider incidence of disrepair for which many tenants are unable to obtain any legal assistance.

## 7. Immigration and asylum

### The provider base

Unlike the housing and family contract categories there has not been a substantial decline in the number of immigration and asylum providers. This is partly due to the fact that even prior to LASPO the majority of casework was asylum cases, so the removal from scope of most non-asylum immigration matters did not have the same impact on providers as the scope cuts in several other categories of law.

**Table 3. Number of offices providing Legal Help and Controlled Legal Representation in Asylum cases, claims completed and Asylum applications**

Year	Legal Help and Controlled Representation		Asylum applications (main applicants)
	Offices completing Asylum work	Claims completed	
2011-12	280	45,124	19,826
2012-13	234	39,102	22,635
2013-14	348	34,156	23,812
2014-15	310	34,614	25,202
2015-16	277	37,816	34,986
2016-17	240	39,651	29,033
2017-18	225	35,609	26,739
2018-19	292	35,576	31,708
2019-20	300	41,344	35,256
2020-21	277	30,279	27,236

Sources: Ministry of Justice, 2021a, Home Office, 2021.

Controlled work claims exceed asylum applications as appeals count as a separate claim, so there can be more than one controlled work claim per applicant. The numbers do not directly reflect the increase in asylum numbers up to 2020 as claims figures represent appeals as well as advice on initial applications. This could be indicative of a reduction in the proportion of asylum applicants receiving legal advice.

Although the number of providers is an indicator of sustainability, it is not the sole factor for determining the sustainability of advice provision. There is concern that the current legal aid fees structure militates against the quality of service provision. A helpful analysis of this (and a discussion of the complex demand matrix for immigration advice provision) can be found in

the Drougths and Deserts report on the immigration legal aid market (Wilding, 2019). As well as the overall depressed level of fees for all legal aid work, Dr Wilding points out that fixed fee Controlled Work which constitutes the majority of legal aid funded immigration work systemically underpays providers for the work they have done and discourages quality service provision.

In 2020 a new online appeals procedure for first-tier tribunal asylum appeals was introduced. The MoJ set a new fixed fee that was widely considered to not represent the additional work required under this procedure. The fee was challenged by way of judicial review on the basis that the MoJ had not properly assessed the amount of work required or consulted with the profession. The MoJ agreed to settle on the basis that they would obtain better data on the actual amount of work required and the consult with the profession on the appropriate fixed fee. As an interim measure, online appeal procedure cases can be claimed at hourly rates.

## **Changes in demand for immigration and asylum advice**

While the number of legal aid providers for immigration work has remained relatively constant, Table 3 shows there has been a significant increase in asylum applications.

The Home Office policy of sending asylum seekers requiring accommodation to ‘dispersal areas’ around the country means that demand is likely to centre on these areas. These tend to be low cost accommodation areas outside of London and there are concerns that some asylum applicants housed under the dispersal policy may be placed in areas where there is no or insufficient immigration legal aid provision.

## 8. Education

### The provider base

#### Reduction in numbers of providers

After the removal of the mandatory telephone gateway for education in 2019 – which was introduced by LASPO but resulted in just two providers nationally – the Legal Aid Agency opened a new tender for face-to-face contracts in education. However, there were just eight law firms nationally across the whole country that bid for these contracts and can provide advice and assistance in this area of law, under legal aid. These firms account for 10 offices as shown in Table 4. There was an additional recent Legal Aid Agency tender round and there are now just 13 law firms available nationally to support almost 8,000 appeals to the SEND Tribunal each year. Even where a firm does have a legal aid contract, there will often only be a small number of solicitors within the firm who do this work.

**Table 4. Number of solicitor firm offices providing Legal Help and Controlled Legal Representation in Education cases**

Year	Offices completing Education work
2011-12	49
2012-13	33
2013-14	32
2014-15	24
2015-16	11
2016-17	4
2017-18	4
2018-19	1
2019-20	3
2020-21	10

Source: Ministry of Justice, 2021a

With the increase in demand given those eligible for education services (see below), the impact of depletion of the supplier base has been clients with an education case not able to access legal advice. Provision is not meeting demand and practitioners declining new inquiries, because they don't have capacity to take on the work.

The legal aid agency statistics show a downward trend in education cases. Following a high of 11,930 in 2006-07, matter starts for legal help fell to 3,775 in 2011-12 and remained below this level since with 1,653 starts in 2020-21. The reduction in education cases supported by legal aid has paralleled an increasing client market.

Remuneration under the current fee scheme has been cited as the key reason for firms not undertaking education work. The majority of Special Education Needs (SEN) work is funded under the legal help scheme. The tribunal offers no opportunity for inter partes costs, that is costs from the other side if the case is successful. The most a solicitor can recover for a very complex tribunal appeal is the legal help rate which for a solicitor based outside of London, would be £48.24 an hour. This level of remuneration does not cover overheads and means that firms are very often working at a loss with no potential to recover inter partes costs. In comparison, the HMCTS guidelines hourly rate for solicitor outside of London is between £146 and £217 depending on expertise.

As Polly Sweeney, Chair of the Law Society's Mental Health and Disability Committee, stated at the All Party Parliamentary Group (APPG, 2020) Commission on legal aid sustainability: 'We have a perfect storm at the moment of huge numbers of disabled children, whose rights are routinely being breached and just a very small number of practitioners who can offer legal aid in this area. And so there needs to be some urgent intervention to increase the provider base in education law.'

## **Changes in demand for education services**

There were 430,700 children and young people with Education, Health and Care (EHC) plans as at January 2021 according to Department for Education statistics. This is an increase of 10% from 390,100 as at January 2020. This follows similar increases in recent years since the plans were introduced in 2014. This is also an area where concerns have been raised regarding a crisis in the system with increasing complaints and problems with provision of services. In October 2019 the Local Government and Social Care Ombudsman issued a report looking at SEN complaints and found that nine out of 10 complaints (87%) involving education and health care plans were upheld. The Ombudsman is now investigating more complaints than it has ever done before. In 2018-19 it received 45% more complaints and carried out 80% more detailed investigations about EHC plans than in 2016-17. The knock-on effects of failure in provision is a significant impact on a child's education and attainment.

At the same time, the number of appeals to Tribunal continues to rise year on year. In 2020, there were 7,843 appeals to the Special Educational Needs and Disability (SEND) Tribunal (Ministry of Justice, 2021d).

### **Providing advice for exclusions**

Cuts to legal aid through LASPO removed advice and assistance regarding school exclusions. The figures for permanent exclusions pre-pandemic were just short of 8,000. From 2013/14 there was a year on year increase in exclusions with a rise of 60% in 5 years. The data shows that a disproportionate number of these children are living in poverty, have special educational needs, and are from ethnic minority groups. Children with special educational needs are five times more likely to be permanently excluded than their peers. Research shows that children who are excluded from schools are more likely to end up in the criminal justice system and to be exploited by criminal gangs (RSA, 2019). Legal aid for advice on exclusions ensured families were supported at a very early stage when a child was initially excluded from school before things escalate, but that funded support no longer exists.

## 9. Role of Not for Profit organisations

LASPO had a highly negative impact on the role of the Not for Profit (NfP) sector in providing services funded by legal aid, particularly reducing the NfP role in providing legal help. Prior to LASPO there was comprehensive legal aid coverage for social welfare law. The then Legal Services Commission had sought to increase advice in this area and targeted funding at NfP providers.

There was a dramatic change in direction with LASPO and most of the legal aid for social welfare law was cut from scope. The table below shows the dramatic drop in NfP provider offices from 483 in 2012-13 to 197 in 2020-21, a drop of 59 percent. Expenditure on work provided through NfP providers has dropped by 75 percent.

**Table 5. Number of provider offices of Not for Profit organisations**

	Provider offices completing legal aid work	Expenditure for completed work in £m
2012-13	483	47.8
2013-14	558	29.1
2014-15	353	22.3
2015-16	284	21.3
2016-17	259	19.9
2017-18	240	18.7
2018-19	251	18.4
2019-20	233	18.3
2020-21	197	12.0

Source: Ministry of Justice, 2021a

The cuts in scope to welfare benefits work, which many NfPs undertook, was the major impact of LASPO on the NfP sector. Just 18 NfP offices conducting welfare work remained in 2020-2021. In 2009-10 there were 141,625 matters started on welfare benefits this has reduced to just 133 in 2020-21 (Ministry of Justice, 2021a).

The impact on the network of law centres demonstrates the problems in this area. In 2005 there were 63 law centres. The numbers were initially impacted between 2007 and 2011 when the new civil legal aid contracts provided for payments to be made in arrears and those centres with inadequate reserves went under, their numbers dropping to 54 (Fabian

Society, 2017, Bach review appendix 6). The introduction of LASPO and the removal of large areas of work from scope, particularly in social welfare law, saw a further drop in numbers to 45.

The significant cut to scope in combination with the failure to increase legal aid fees, the administrative burdens and the problems of recruitment and retention, as demonstrated in other areas, have combined to cause serious concerns regarding the ongoing sustainability of the NfP sector.

The sector has been propped up by subsidising their income through grant funding. However, such grants are usually on an annual basis and lack long term security. When the first Covid lockdown occurred, 76% of law centres had less than 6 months of reserve funding (Law Centres Network, 2020). The Ministry of Justice provided a £3million grant to the Law Centres Network to avoid further centres closing but the pandemic highlighted a long-term issue that one-off grants, whilst welcome, cannot resolve.

## 10. Appendix – Context and LASPO developments for civil practice areas

### A1 Family Law

#### Context

Legal aid for advice and representation in family matters is provided under the family contract category. This covers advice on:

- **Private family law** which concerns disputes or issues associated with families and/or relationships, often conducted between individuals in connection with parental separation (although some cases involve financial disputes between people without children), and
- **Public family law** which concerns disputes between the State and a family, such as, care proceedings.

In addition to the above there is a separate contract category for legal aid to undertake **family mediation**. This is where an independent professional mediator helps individuals, that is, divorcing or separating couples, work out agreements relating to issues such as child arrangement, child maintenance payments and finances.

#### LASPO scope cuts

Private family law faced the most significant of the cuts to the scope of legal aid across all civil categories due to LASPO in 2013. All work was cut from scope apart from cases involving domestic abuse or child abuse, where evidence of the abuse had to be provided. All other ‘financial remedy’ cases or ‘children and family’ cases were removed from the scope of legal aid.

The impact was significant; a quarter of a million people received legal help in private family cases in 2009-10 but this figure fell to just under 9,000 by 2019-20 according to LAA statistics (Ministry of Justice, 2021a). At the same time the government introduced a form of service called ‘help with family mediation’. The remuneration for this work was very low and simply not viable to operate under, and for the whole of last year only 117 cases took place (Ministry of Justice, 2021a). These figures highlight the scale of reduction in the population able to access justice with professional representation.

## A2 Housing Advice

### Context

Legal aid for housing advice is provided under the 'Housing and Debt' contract category, but here we will refer to the category simply as Housing contracts. Legal aid provision for debt is limited but currently enables providers to advise on mortgage debt. Firms providing legal aid under housing contracts are also eligible to apply to provide services under the Housing Possession Court Duty Scheme which enables non-means tested advice to be provided at court on the day of the hearing for rent and mortgage repossession cases.

### LASPO scope cuts

The main effect of the LASPO scope cuts on housing was to take non health threatening housing disrepair cases out of scope and to prevent legally aided advice in repossession cases to be offered until the point where the home becomes at risk. At the same time welfare benefits advice was almost totally removed from scope which meant that advice on Housing Benefit problems could not be provided, so housing advisors could not assist their clients on a benefits issue that is a frequent cause of rent arrears. These changes severely limited the early advice for disrepair and repossession that could prevent these issues from escalating and creating greater costs down the line.

The impact on housing of the LASPO scope cuts and the failure to increase fees since the 1990s can be seen in the legal aid statistics for housing shown in Table A2 below. These show substantial declines in numbers of providers, new cases, and the value of legal aid claims.

It is also noteworthy that, whilst some contract categories took an initial hit after the implementation of LASPO and then levelled out albeit at a lower level of provision, the overall picture in housing been a year on year decline from 2013 to date.

**Table A2. Volume and value of Housing legal aid work**

	Legal Help and Controlled Legal Representation			Civil Representation	
	Providers completing work	Matter starts	Value of claims (£m)	Certificates granted	Value of claims (£m)
2011-12	755	101,905	21.2	11,914	25.1
2012-13	646	85,191	18.5	12,015	25.0
2013-14	709	47,231	11.4	10,889	24.0
2014-15	563	42,872	9.9	10,297	23.6
2015-16	488	39,294	9.2	9,155	20.5
2016-17	435	35,430	9.5	7,947	19.1
2017-18	399	35,786	9.1	7,850	18.3
2018-19	410	32,652	8.6	7,307	18.2
2019-20	385	28,990	7.8	7,691	18.9

Source: Ministry of Justice, 2021a

## **A3 Immigration and asylum**

### **Context**

Most immigration legal aid cases are asylum applications, and most casework below the upper tier tribunal appeal level is Controlled Work paid on a fixed fee basis. In addition to the main Immigration and Asylum Contract some providers also have contracts under the Detained Duty Advice (DDA) scheme to provide 30 minutes of initial advice to detainees in immigration removal centres.

All caseworkers undertaking immigration and asylum work under a legal aid contract must be personally accredited under the Law Society's Asylum Accreditation Scheme (IAAS).

### **LASPO scope cuts**

Prior to LASPO legal aid was widely available for most immigration and asylum issues subject to the usual financial means and merits tests. The 2013 scope cuts took most non asylum work out of scope, except for:

- bail applications,
- advice for victims of domestic abuse and trafficking,
- judicial review, and
- immigration advice for separated migrant children (recently restored to scope).

Immigration cases form the largest single category of cases that obtain Exceptional Case Funding (ECF) for cases that engage with human rights issues but are not within scope under LASPO. The ECF application process is both legally complex and administratively time consuming and can present a significant barrier to obtaining legal aid.

## **A4 Education services**

### **Context**

Legal aid for advice and representation in education matters is provided under the education contract category. This covers advice on:

- Special Educational Needs (SEN); this work is for disabled children and young people with complex needs. Local authorities discharge their duties towards this group of children and young people through an Education Health and Care plan that runs from birth to the age of 25. The plan outlines the support that will be provided by the local authority. Disputes regarding the EHC plans are resolved through the Special Educational Needs and Disability Tribunal.
- Disability discrimination cases within schools, these are also resolved through the tribunal.
- Judicial review, these can range from such cases as failures to provide a child with an education, through to challenges of local authority's policies, and budget cuts.

### **LASPO and subsequent changes – impact of mandatory telephone gateway**

Prior to LASPO advice on education law was provided on a face to face basis. Overnight that face to face provision was removed and LASPO introduced a mandatory telephone

gateway. The only way clients could access advice was through this telephone service. The number of providers dropped significantly to the point where there were just two providers nationally doing all the education work. Significant concerns were raised about the gateway. After the contract tender round in 2018 the legal aid agency announced that it would not award any civil legal aid contracts for the telephone gateway for education because there were insufficient compliant tenders. Finally, in February 2019 the mandatory telephone gateway was removed completely, but by that stage the legal aid provider base in this area of law had been vastly depleted.

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