



MAKING THE CASE FOR LEGAL AID: UPDATE

March 2019

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At the end of 2015, the Bach Commission on Access to Justice was founded with the aim of developing “*realistic but radical proposals with cross-party appeal*” for ensuring that the right to justice is entrenched as a vital public service alongside education and healthcare.

The Bach Commission’s November 2016 interim report found that the number of not-for-profit legal advice centres in the UK had more than halved between 2005 and 2015,¹ and that the government’s cuts to the legal aid budget had been “*at great cost to citizens’ access to justice*”.² Referring to the interim report’s findings, LCHR published a briefing in August 2017 making the case for why legal aid should be a political priority.³ Our briefing argued that legal aid is not only a necessity for justice, equality and the rule of law, but is also economically efficient, generating huge costs savings for the state in the long term.

The Bach Commission published its final report in September 2017.⁴ In this briefing, we summarise its findings and reflect on what has happened in the legal aid field in the 18 months since its publication. Building on our previous briefing, we make recommendations for how legal aid and access to justice can be pushed up the political agenda. We are calling on the Labour Party to treat access to justice as a fundamental human rights issue.

The findings of the Bach Commission: a justice system in crisis

After consultation with over 100 individuals and organisations, the Bach Commission found that our justice system is in crisis, with problems extending widely throughout the system.⁵ It found that the problems are “*so deep-rooted, commonplace and various that piecemeal reforms alone would simply be papering over the cracks*”.⁶

Combining new legislation and policy reform, the Commission’s recommendations seek to deal with the urgent problems, while also putting in place a longer-term plan to make access to justice a legally enforceable right. The latter is a bold and visionary step to cementing the right to access to justice as a fundamental cornerstone of our justice system – and a human right.

Long-term legislative change: a Right to Justice Act

The Commission’s first recommendation is the introduction of a new Right to Justice Act. The new Act would:

- codify existing rights and establish a new right to reasonable legal assistance, which would be legally enforceable through the courts;
- set out guiding principles to stand behind this new right, including principles on the importance of early legal help and public legal education; and

¹ The Bach Commission on Access to Justice, [The crisis in the justice system in England and Wales](#), 01/11/16

² *Ibid*

³ Labour Campaign for Human Rights, [Legal aid briefing](#), 01/08/17

⁴ The Bach Commission on Access to Justice, [The Right to Justice](#), 22/09/17

⁵ *Ibid*

⁶ *Ibid*

- establish a new Justice Commission tasked with monitoring and enforcing the new right.

A statutory right to justice would go further than the existing rights to effective access to justice developed through common law and contained in the Legal Aid and Advice Act 1949 and Article 6 of the Human Rights Act 1998. It would place access to justice at the heart of our legal system, and make attempts to undermine these rights, such as the recent cuts to civil legal aid and the introduction of Employment Tribunal fees, much more difficult to achieve. The Commission proposes that the Act would guarantee access to reasonable legal assistance which people can afford, intended to lower the threshold of effective access to justice. It also involves a broader conception of access to justice, which recognises that effective justice comes not just from the ability to access the courts, but from legal education, information, advice and representation.⁷

The report sets out the ways in which a right to justice would be enforced. These include enabling judges to halt proceedings and issue a certificate stating that a party should be granted legal aid in the interests of justice. It also suggests a declaration of incompatibility procedure similar to that contained in the Human Rights Act, whereby courts will be able to declare that legislation is incompatible with the right to justice contained in the new Act, and Parliament will then need to decide whether to amend the legislation.⁸

The proposed Justice Commission would be an independent non-departmental public body with a board of legal practitioners and experts, led by a chief commissioner appointed on a cross-party basis.⁹

The Bach Commission recognises that, although the introduction and implementation of new legislation is of the utmost importance in the long term, it takes time. It therefore states that pressing needs must be dealt with as a matter of urgency.

Short-term policy change: an action plan for government

The Commission's report sets out a 25-point plan for government, covering four key areas of need:

1. reforming the legal aid eligibility rules – i.e. the rules that determine who is eligible for legal aid;
2. broadening the scope of civil legal aid (in particular, bringing back early legal help);
3. reforming the operation of legal aid to deal with the administrative problems that plague the system, including by replacing the Legal Aid Agency and taking action to ensure the viability of the legal aid profession; and
4. introducing a national public legal education and advice strategy to improve the provision of information, education and advice in schools and the community.

⁷ *Ibid*

⁸ *Ibid*

⁹ *Ibid*

The late Sir Henry Brooke, the vice-chair of the Commission, described the Right to Justice Act as “*visionary*” and the proposed policy changes as “*down-to-earth*.” He said that the report is a springboard from which discussion can flow and real change can be effected; it is an “*outline design, not a blueprint*.”¹⁰

Our previous briefing set out the devastating impact that an ineffective legal aid system has on society’s most vulnerable. It deprives them of their right to redress when the state gets things wrong, whether by illegally withholding benefits or wrongly determining that someone does not have the right to live in this country and should be deported. The proposals set out in the Bach Commission’s report provide a comprehensive and realistic way forward. Although the report’s recommendations are not yet formal party policy, Labour’s Shadow Justice Secretary, Richard Burgon, has expressed his support for them and indicated that they will play a role in the formulation of Labour’s next manifesto.¹¹

The Commission stated that it hoped that its suggestions would be taken into consideration in the post-implementation review of the Legal Advice, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’), previously due to be completed by April 2018 but only released in February 2019. However, the review failed to properly recognise the devastating effects that legal aid cuts have had on access to justice across the country, and made no meaningful reference to the recommendations in the Bach report.

18 months on: where is legal aid now?

Since our last briefing in August 2017, the state of legal aid has further deteriorated. The number of civil cases started involving legal aid fell by a staggering 82% between 2010 and 2018.¹² Around a million fewer claims for legal aid are being processed each year, compared with 2011.

The legal aid cuts have put enormous pressure on staffing levels for cases and have forced many people to bring or defend cases on their own behalf. Analysis by the BBC’s Shared Data Unit shows that 1,000 fewer legal aid providers were paid for civil legal aid work in 2018, compared with 2011.¹³ These lost providers are being replaced by the litigants themselves (known as ‘litigants in person’), placing a huge burden of effort and understanding on ordinary citizens. Thousands of people have had to navigate the complex rules surrounding the court system with little to no legal advice.

This is undermining access to justice, especially in cases where one side is represented by a lawyer and the other is not. In family law, more than a third of cases now involve unrepresented litigants on both sides. As well as the burden this puts on the litigants themselves, it also places increased pressure on the court system and judges as they struggle to assist litigants unfamiliar with the relevant law and court procedure. The knock-on effect is a reduction in time available to hear other cases. The Personal Support Unit, a charity giving emotional and practical

¹⁰ The Law Society Gazette, [Justice is too precious for political football](#), 25/09/17

¹¹ The Guardian, [The fightback against the Conservatives’ legal aid desert begins today](#), 22/09/17

¹² The Guardian, [How legal aid cuts filled family courts with bewildered litigants](#), 26/12/18; House of Commons Library, [The future of legal aid](#), 31/10/18

¹³ BBC, [Legal aid advice network ‘decimated’ by funding cuts](#), 10/12/18

help to those left defending themselves, helped people without legal representation on nearly 7,000 occasions in 2010. By 2018, the number had increased nearly tenfold to 65,000.¹⁴

Legal aid deserts are also a huge problem. The BBC's Shared Data Unit found that up to a million people live in areas with no legal aid provision for housing, and that a further 15 million live in areas with only one provider.¹⁵ Only four legal aid providers for welfare cover Wales and the South West.¹⁶ Even then, the existence of a nearby provider by no means guarantees that they will have the time or resources to take on every case that comes through their doors. Legal aid solicitors are too frequently forced to turn people away, often with no alternative support left to direct them to.¹⁷

The impact of the cuts has unsurprisingly had a disproportionate effect on the most vulnerable in society. The UN's Special Rapporteur on extreme poverty and human rights said that the legal aid cuts overwhelmingly affect *"the poor and people with disabilities, many of whom cannot otherwise afford to challenge benefit denials or reductions and are thus effectively deprived of their human right to a remedy"*.¹⁸

LASPO review

The Ministry of Justice began a post-implementation review of LASPO in March 2018.¹⁹ Although the Justice Secretary, David Gauke, pledged to publish the review by the end of 2018, it was in fact only released in February 2019. In addition, the Ministry of Justice failed to meet its original target of publishing a review of LASPO within five years of its April 2013 implementation – i.e. by the end of April 2017.²⁰ Such delays further highlight that the current government does not see legal aid as a political priority.

The review was quick to highlight the savings made as a result of LASPO – for example, changes in scope have reduced legal aid spending by approximately £90 million in civil cases and £160 million in family cases.²¹ This seemingly justifies the legal aid cuts as a necessary cost-saving measure. However, putting aside the implications for justice and the raw human cost, this justification may fail even on its own terms, as Law Society research suggests that the cuts are a false economy.²²

The Law Society found that 25% of people who received early professional legal advice had resolved their problem within three to four months. Conversely, it took nine months for 25% of people who did not receive early legal advice to resolve their issue. That additional six months could have a detrimental impact in all manner of ways, from the emotional strain, to financial costs to the individuals and courts, to the impact on productivity at work and even retention of employment. Not to mention the negative impact on children when family cases are not dealt with

¹⁴ The Financial Times, [Justice for all? Inside the legal aid crisis](#), 27/09/18

¹⁵ BBC, [Legal aid advice network 'decimated' by funding cuts](#), 10/12/18

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ United Nations Office of the High Commissioner of Human Rights, [Statement on Visit to the United Kingdom](#), 16/11/18

¹⁹ Ministry of Justice, [Post-implementation review of LASPO](#), 08/03/18

²⁰ The Law Society Gazette, [LASPO review publication delayed again to early 2019](#), 13/12/18

²¹ Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#), 01/02/19

²² The Law Society, [Restoring state-funding for early legal advice could save cash](#), 27/11/17

efficiently. More research is needed to quantify the exact social and economic costs that have resulted from the cuts.

The accompanying Legal Support Action Plan promises up to £5 million to develop and test new technologies and methods of delivering legal support – for example, video conferencing software.²³ It also allocates an additional £3 million over two years to support litigants in person representing themselves through the court system. The plan puts forward other welcome changes, such as expanding legal aid to separated migrant children in immigration cases by autumn 2019, and reviewing the legal aid means test by the summer of 2020.²⁴

However, these plans came under immediate fire from the legal profession. The Bar Council stated that:

*“The report offers little of substance to ease the impact of LASPO on vulnerable individuals seeking justice... such monies are but a drop in the ocean given the impact LASPO has had on restricting individuals’ access to justice.”*²⁵

Further, Christina Blacklaws, President of the Law Society, said: *“the government must give urgent attention to amending the means test thresholds because the current levels are preventing families in poverty from accessing justice; and remuneration rates for solicitors undertaking this vital work must be reviewed...to address the medium-term viability of the system.”*²⁶

Both critiques reflect the lack of realism in the proposals resulting from the review and highlight the need to continue campaigning for systemic reform of and investment in the legal aid system.

The introduction of new technologies such as video conferencing software will be of limited use if there are not enough solicitors available to make use of them. The Action Plan commits the government to a comprehensive review of criminal legal aid fee schemes and structures by the summer of 2020, but makes no mention of legal aid remuneration rates on a wider scale.

The pledges contained in the Action Plan give only vague timescales and fail to deal with the urgency of the issues. There is little to no acknowledgment of responsibility for the human cost of the cuts or even a clear appreciation of the extreme difficulties faced day-to-day by those seeking to access legal aid and those working as practitioners in the field. References to ensuring that the legal aid system continues to be ‘accessible and efficient’ silence the experiences of those battling with an under-funded, inaccessible and inefficient system every day.

If the government is to be taken seriously in its pledges to reform and improve the legal aid system, it must set out a plan for immediate action. This must be accompanied by budget commitments and achievable timescales which recognise the urgency with which the problems need to be addressed.

²³Ministry of Justice, Legal Support: The Way Ahead, 07/02/19

²⁴ *Ibid*

²⁵ The Law Society Gazette, £8m pledged for 'innovative' and LiP support as LASPO review published, 07/02/19

²⁶ *Ibid*

Moving legal aid up the political agenda: what next?

There is clear potential support for real and meaningful reform, beyond the LASPO review. YouGov found that more people consider access to justice to be a more fundamental right than healthcare free at the point of use or the state pension – cornerstones of British society that politicians do not dare to question. It also found that, when people were told the definition of legal aid, 89% believed that its availability is important for ensuring access to justice for all income groups.²⁷ The issue may not be winning over the public so much as raising the importance of the issue, by making it clear to the public what is happening and emphasizing the urgent need for reform.

Further, the potential for cross-party support for reforms is particularly relevant given the current government's razor-thin majority.²⁸ LASPO has been called into question by some of the Conservative government's own MPs. Former Commons deputy speaker, Nigel Evans, called for funding to be restored to pre-2012 levels after his own experiences in court, and Bob Neill, chair of the Commons Justice Select Committee, has said that "*The evidence is pretty compelling that changes are needed*".²⁹ Although Lib-Dem peer Lord McNally still believes that the spending cuts were necessary at the time, he acknowledges that LASPO was not supposed to be so draconian as it is and that a cross-party review is now needed.³⁰

Given the current state of affairs and the evidence that reforms would be supported in and beyond Westminster, now is the time to act to restore and protect justice. We are calling on the Labour Party to take the following steps to push legal aid up the political agenda and treat it not just as an issue of social justice, but as a human rights issue.

²⁷ The Guardian, [Access to justice a greater concern than free healthcare – poll](#), 13/04/15

²⁸ The Guardian, [Stella Creasy's abortion law campaign showed practical politics at its best](#), 10/06/18

²⁹ The Guardian, ['It's completely wrong': falsely accused Tory MP attacks legal aid cuts](#), 27/12/18

³⁰ The Guardian, Lord McNally: ['We had to cut legal aid. It's not a bottomless pit'](#), 30/01/19

LCHR recommendations:

Recommendation 1 - The Labour Party should expressly support the findings and proposals of the Bach Commission and incorporate them into its next manifesto.

The Labour Party's 2017 manifesto stated:

*[Labour] will review the legal aid means tests, including the capital test for those on income-related benefits...Labour will consider the reinstatement of other legal aid entitlements after receiving the final recommendations of the Access to Justice Commission led by Lord Bach.*³¹

Immediately after the release of the report, Richard Burgon stated that it “will certainly play an important role in informing the debates around Labour’s next manifesto process and our vision of a fairer justice system”. He has since made the commitment that “the next Labour government will restore legal aid for making benefit appeals”.³² We believe that Labour should take a stronger stance on this issue and fully commit to the entirety of the Commission’s proposed legislative changes and action plan.

In particular, the Labour Party should expressly endorse the introduction of a statutory right to justice, and should declare that Labour views this as a human right.

Recommendation 2 - In order to highlight the false economy from legal aid cuts, Labour should invest in more research into the societal and economic impacts legal aids cuts have had.

LASPO is part of the Conservative government’s austerity agenda, and its primary purpose has been to save costs. Labour should clearly and consistently highlight that, even measured in these terms, it has failed. This is without even considering the human cost, impact on the poor and vulnerable, and long-term consequences on the functioning of our previously world-class justice system.

Recommendation 3 - Labour should support legal practitioners, charities and politicians across the political spectrum to continue to campaign to raise public awareness of the impact of the legal aid cuts – there is the potential for public outrage if the issue can cut through the noise of Brexit.

Recommendation 4 – Labour should reach out to the Law Society, the Bar Council and other charities and NGOs working in this area to build a broad coalition of support for the Bach Commission reforms.

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³¹ The Labour Party, [Manifesto: Safer Communities](#), 16/05/17)

³² The Guardian, [Labour will restore legal aid so all citizens have access to justice – not just the rich](#), 04/12/18)