

The Bach Commission: Call for written evidence

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, is an independent charity working in the United Kingdom and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information online and in guides; research and policy work; law reform; training; and international consultancy on child rights. Founded in 1981, CCLC has over 30 years' experience in providing legal advice and representation to children, their parents and carers and professionals throughout the UK. CCLC's Lexcel accredited Legal Practice Unit currently holds Civil Legal Aid contracts with the Legal Aid Agency (LAA) in order to provide legal aid funded services in the following areas of law: education law; family law, immigration-asylum law; public law; and community care law. As well as being a legal aid provider, CCLC has also experienced the effects of the legal aid cuts through our work providing free advice line services and outreach advice services to thousands of callers each year through the Child Law Advice Service (CLAS) and the Migrant Children's Project (MCP) advice line and outreach work. We have previously written on legal aid and the impact of LASPO; including consultation responses to both the 2011 consultation *Proposals for reform of Legal Aid* and the 2013 consultation *Transforming Legal Aid*. We have also given evidence on the impact of LASPO to the Justice Select Committee and this written evidence is available [here](#).¹

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In a sentence, what are your biggest concerns about the state of access to justice? Please provide up to three answers

Removing whole areas of law from the scope of legal aid has meant that children, young people and families, who are unable to pay privately for legal services, are not able to use the justice system to secure their rights or access services to which they are entitled. Children are some of the most vulnerable in the system and the least likely to be able to access any of the limited alternative provision. Young people who work in the system and are the future of advice provision are demoralised and poorly paid. We are also concerned that there will continue to be a loss of skills from the sector.

The legal aid system should be fair, transparent and accessible mechanism for enabling individuals regardless of status to enforce their rights.

¹http://www.childrenslegalcentre.com/userfiles/JCHR_legal_aid_inquiry_evidence_Coram_Childrens_Legal_Centre.pdf

Please outline in more details the way in which your organisation's work intersects with the question of access to justice, and the way in which current policy enables and undermines access to justice

Difficulties faced by children, young people and families in enforcing their legal rights

CCLC exists to promote access to justice for children and young people. CCLC has long raised concerns that the changes to legal aid brought in under LASPO are having a profoundly negative impact on access to justice, including for some of the country's most vulnerable people.

Children are the least able to navigate complex legal and procedural rules without a lawyer. However, the impact of LASPO has led to a situation in which families and lone children and young people are required to represent themselves not only in courts and tribunals but also prior to the court process in making applications, completing forms and responding to cases. Limited alternative provision exists and any alternative, free sources of information and advice that do exist are either unable to meet the scale of demand caused by the withdrawal of legal aid, or are unsuitable for individuals who require more intensive one-to-one services.

CCLC has provided detailed evidence on this issue to the Justice Select Committee and shares its deep concern that *"children were facing particular difficulties in accessing legal advice and representation"* and that:

*"Children are inevitably at a disadvantage in asserting their legal rights, even in matters which can have serious long-term consequences for them. We are particularly concerned by evidence that trafficked and separated children are struggling to access immigration advice and assistance. We recommend that the Ministry of Justice review the impact on children's rights of the legal aid changes and consider how to ensure separated and trafficked children in particular are able to access legal assistance."*²

The Justice Select Committee, Joint Committee on Human Rights and Office of the Children's Commissioner have all criticised the removal of legal aid from children's cases and called on the government to review this as a matter of urgency.

Through our advice lines we are able to monitor the impact of the lack of legal aid on children, young people and families. One of the very few alternative sources of free advice in out-of-scope child and family law and out-of-scope education law is CCLC's Child Law Advice Service (CLAS). In the year following the introduction of LASPO, calls to CLAS almost doubled.³ In 2014 we undertook an in-depth analysis of calls, looking at a sample of 250 calls, with 299 distinct legal matters. Of the 199 matters logged in which the caller would be financially eligible for legal aid, 76% of the matters (152 of 199 matters) are now outside the scope of legal aid, so the caller no longer has access to legal aid where they would have previously.⁴

² House of Commons Justice Committee, *Impact of changes to civil legal aid* (2015)

³ Unique callers to the line rose from 23,017 in 2012/13 to 40,192 in 2013/14

⁴ The analysis was carried out by legal matter, rather than caller (as some callers were phoning about more than one matter, some of which were in scope and some of which were not). An estimation of financial eligibility was determined using three indicators based on legal aid eligibility requirements: income, amount of assets (property); and amount of cash assets (money in bank account/s).

In November to December 2015, the MCP advice line dealt with 268 queries. Not all of these queries were about individual cases, as we also take general enquiries about the law, e.g. from social workers, but many of the calls were about specific cases of children, young people or families. Based on the information available to us, we estimated that at least 197 of the 268 queries involved children/young people/families who would meet the financial eligibility requirements for legal aid, including 98 regarding children supported by or in the care of a local authority. Of those 197 queries, there was a need in 110 of them for legal representation in an out-of-scope area, most commonly in immigration or nationality law (87 of the 110), with needs also evident in the areas of private family law, welfare benefits and housing.

CCLC holds a specialist help education law contract with the LAA. This is part of the legal aid “gateway” system, in which callers are triaged through a telephone system to ascertain their eligibility and are then passed on to a provider for advice. There is very limited scope for face-to-face advice, even where this might appear necessary to the client and/or the provider. The system is overly complex. The operator service helps callers determine if their query is in scope for legal advice. The operator does not (we believe) employ lawyers and we are concerned that there is a high risk of callers being diverted away from specialist legal advice because they are unable to fully explain the scope and nature of their problem.

Geographic loss of provision

The provision of high-quality legal aid remains London-focussed with scant provision in other areas of the country. In December 2015, the Government reported on not-for-profit organisations and found the majority of legal advice was provided within London.⁵ This matched the findings of the Justice Select Committee.⁶ This is a particular problem where children and families who seek asylum are dispersed across the country, and has become an increasing difficulty with the use of out-of-borough accommodation for homeless families and those supported under s17 Children Act. Looking forwards, if children are to be transferred to different local authorities under the Immigration Bill 2015, they will face critical difficulties in accessing legal advice to regularise their immigration status, ensure they have access to education provision and that they are adequately provided for.

Alternatives to Legal Aid

Although the charitable and private sector have adapted to make legal services available outside the provision of legal aid, this is not viable as a long-term solution, free advice provision is often limited to one-off advice, and increasingly is delivered over the telephone or digitally. We provide advice through telephone advice lines, and through the Child Law Advice Service, a digital first provision, but this cannot compensate in the most difficult cases for the provision of face-to-face advice and ongoing casework.

Thousands of people have been simply left without any option but to try somehow to find the money to pay privately, sometimes putting themselves at risk of exploitation. In one stark CCLC case,

⁵ Ames, Dawes and Hitchcock, “Survey of Not-for-Profit Legal Advice Providers in England and Wales”, MOJ 2015

⁶ Justice Select Committee Eighth Report on the Impact of changes to civil legal aid under Part I of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 4 March 2015
<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31108.htm>

a destitute young mother was forced to take on illegal work as a cleaner just two weeks after having given birth in order to try and get together the funds to pay for legal advice and representation. With immigration law, pushing more people into the private legal services market has increased the risk of people being exploited by firms providing a poor-quality service. Problems encountered include money being taken without a receipt being given and without a clear understanding of what will be done for the fee, lack of client care, and poor advice on someone's legal position.

Frustrations with the current system

We are deeply concerned about the capability of the legal aid sector to continue to encourage good lawyers into the profession and to grow talent, and the impact on young people who want a career in legal aid. The financial pressure on providers means they cannot offer job security or development opportunities to staff, including financing the career progress sought by most young people who will want to transition from paralegal to solicitor or barrister and this makes for a volatile working environment. Those who are unqualified are working for less than the Living Wage (£8.25 per hour) and the problem is particularly acute in London where rent increases have left many young legal aid lawyers unable to afford their living costs.⁷

Legal Aid remuneration

Remuneration for legal aid cases does not increase with inflation and therefore it is increasingly difficult for firms who have no, or limited, alternative funding streams to meet rises in other business, overhead and running costs.

Many providers have a difficult and complex working relationship with the LAA, in part as a result of the use of overly bureaucratic schemes which are burdensome and which increase costs, both to providers and the LAA itself.

TOPIC 2: Transforming our justice system

In a sentence, what practical steps could be taken to ensure access to justice for all was a reality? Please provide up to three answers

- 1) Within the current system, making clear an individual's entitlement to legal aid through existing provision and the Exceptional Case Funding (ECF) scheme and removing barriers to accessing legal services, for example the telephone gateway and complex evidential requirements to prove domestic violence / child protection issues in order to get legal aid for private family law matters.
- 2) Restoring some elements of legal aid – particularly for children – as outlined below.
- 3) Working with legal professionals to remove bureaucratic and time-consuming obstacles to their ability to provide a high quality service, removing burdensome application and costs extension procedures.

⁷ For further information, please see the Young Legal Aid Lawyers "Social Mobility & Diversity in the Legal Sector: one step forwards and two steps back", October 2013, which found 50% of their members were earning £20 000 or under. <http://www.younglegalaidlawyers.org/sites/default/files/One%20step%20forward%20two%20steps%20back.pdf>

Please outline in more detail ideas for practical solutions to the crisis in access to justice

Legal aid should be sufficient to meet the UK's international obligations, and that this should be a key pillar of any legal aid regime. Legal aid should be a tool to allow individuals to realise these rights. Currently, the limited provision of legal aid breaches the UK's obligations under the UN Convention on the Rights of the Child⁸, the Convention on the Elimination of Discrimination Against Women, and the Istanbul Convention.⁹ Our belief is that the rights and best interests of the child should always be a paramount consideration when considering access to justice and legal aid.

Provision for children and young people

Our highest priority is for measures to be put in place to protect children and young people's rights. There are two parts to this. First, something needs to be done to protect child and young person applicants for civil legal aid in their own right. Second, steps need to be taken to improve the situation in cases where a child is not themselves the applicant for civil legal aid but that child's welfare is directly affected by the legal case in question, notably in cases about a child's education (where it is generally their parent or carer who brings the case), private family law cases about arrangements for a child, and immigration law cases revolving around a child's best interests.

There are four main ways that this could be done, outlined below:

1. Reinstate civil legal aid for children and vulnerable young adults. Children and young people's cases could be brought back into scope under section 9(2) of LASPO. During the passage of LASPO, Parliament considered an amendment that would have protected legal aid for any child who is the applicant or respondent in proceedings and another that would have preserved legal aid for vulnerable young people aged 24 and under (defined as those who are care leavers, have a disability or are otherwise vulnerable).¹⁰ Both had significant cross-party support. Such protections should be reassessed in light of the evidence on the impact of the legal aid cuts on children's rights.¹¹ Such a reconsideration would be in line with the Low Commission's call for a 'sense check' review of the matters excluded from legal aid.¹²

The costs of bringing cases back into scope have been estimated as follows:

⁸ Joint Committee on Human Rights, The UK's Compliance with the UN Convention on the Rights of the Child, 18 March 2015 <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/14410.htm>,

⁹ Although the UK has not ratified the Istanbul Convention, as a signatory, the UK must not take steps which are in direct opposition to the aims and articles of the treaty.

¹⁰ *Hansard*, 27 March 2012, Column 1256, available at

<http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120327-0001.htm#12032757001721>

¹¹ Office of the Children's Commissioner, *Legal aid changes since April 2013: Child rights impact assessment* (September 2014), available at http://www.childrenscommissioner.gov.uk/content/publications/content_871. Joel Carter, *The impact of legal aid changes on children since April 2013: Participation work with children and young people* (September 2014), available at http://www.childrenscommissioner.gov.uk/content/publications/content_873. See also written evidence to the Justice Select Committee inquiry, *Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, from the Association of Lawyers for Children, the British Red Cross, Citizens Advice, Coram Children's Legal Centre, the Family Justice Council, the Family Law Bar Association, Gingerbread, the Immigration Law Practitioners' Association, the Judicial Executive Board, the Legal Aid Practitioners Group, Mary Ward Legal Centre, Refuge, Resolution, Rights of Women, Southwark Law Centre, Women's Aid and Young Legal Aid Lawyers.

¹² The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*, January 2014, available at <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>.

- Where the recipient of civil legal aid is a child under 18: c. £7m per annum.
- Where the recipient of civil legal aid is a young adult aged 18 to 24 who is a care leaver, has a disability or is 'otherwise vulnerable': c. £4m per annum.¹³

The advantages of this option include existing cross-party support and a relatively low administrative burden for the LAA. Existing legal aid providers in the relevant areas of law could provide otherwise out-of-scope services to children and young people.

2. Restore civil legal aid for children in specific categories of law. This option would involve undertaking an urgent review of priority areas in which children most require legal support. The Ministry of Justice (MoJ) should use its civil legal aid underspend¹⁴ to address some of the worst effects of the cuts. The MoJ should urgently reinstate legal aid in separated children's immigration cases (approximately 2500 children's cases per annum costing £1.1m).¹⁵ Other important areas include debt (approximately 280 cases per annum costing £100,000), housing (approximately 430 cases per annum costing £100,000), and welfare benefits (approximately 1330 cases per annum costing £300,000).
3. Improve the ECF scheme for children and young people.¹⁶ While the approval rate for ECF has increased over the last few months to a success rate of over 50%, the number of applications remains low, particularly from children and young people.¹⁷ Children and young people are much less likely to make an application unless there is someone available to assist them with gathering evidence and making their case.

The LAA should pay providers for all applications made for ECF, and at least for those made on behalf of a child (and preferably a vulnerable young adult) irrespective of the outcome of the application. Beyond this minimal improvement, we believe that the ECF scheme could be revised more fundamentally to include an in-built presumption for child and young person applicants for civil legal aid. In the immediate term, a question should be added to the CIV ECF1 form to ask about the rights and interests of any affected children. This presumption would operate so that a child or young person could expect to have their case for civil legal aid funding considered in line with children's rights standards. The government made clear its view that otherwise out-of-scope immigration cases would not be granted ECF,¹⁸ even in cases brought by separated children on their own, which is clearly wrong and does not conform to the UNCRC.

4. Create a new scheme specifically for children and young people. Alternatively and more ambitiously, a new scheme could be created that would be dedicated to providing accessible, quality, child-focused legal information, advice and representation. The advantages of such a scheme include the ability to look afresh at the legal needs of children

¹³ Based on data provided by the Ministry of Justice on 10 October 2011 in response to a Freedom of Information Act request made jointly by JustRights and the Children's Society.

¹⁴ See National Audit Office, *Implementing reforms to civil legal aid*, HC 784, Session 14–15, November 2014.

¹⁵ Based on data provided by the Ministry of Justice on 10 October 2011 in response to a Freedom of Information Act request made jointly by JustRights and the Children's Society.

¹⁶ ¹⁶ The High Court in *IS (by his litigation friend the Official Solicitor) v The Director of Legal Aid Casework* [2015] EWHC 1965 contains further commentary and examples relating to Exceptional Case Funding [§§65-67]

¹⁷ See Justice for the Young: A snapshot, JustRights (February 2015)

<http://www.justrights.org.uk/sites/default/files/Justice%20for%20young%20a%20snapshot.pdf>

¹⁸ Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) at <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellorsguideexceptional-funding-non-inquests.pdf>

and young people from a cross-departmental perspective and make best use of the remaining civil legal aid spend on children.

The changes detailed above would protect children and young people who need civil legal aid for cases in their own right and who apply independently for funding. Changes also need to be made within the main scheme, however, to protect children whose welfare is affected by legal cases brought by others, most commonly a parent or carer. This is obviously necessary in education law and private family law cases about arrangements for children, but is also relevant in other civil cases such as immigration, housing, welfare benefits or employment cases. Further recommendations to address access to justice for children in families are outlined below.

Exceptional case funding

Improve the exceptional case funding (ECF) scheme for *all* cases affecting children (including where cares are brought by parents or others): One simple and cost-free change that we believe should be implemented immediately is for the LAA to amend the CIV ECF1 form for ECF to include a question about the rights and interests of any child affected by the case. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children. Changing the form and producing guidance would be one practical first step that could lead to the ECF scheme taking account of children's rights. In addition, further work should be done to promote the use of the ECF to those working with children and young people, in an effort to counter the low proportion of applications from them.

Children Act proceedings

The family justice system has fundamentally changed over the last five years following the Family Justice Review.¹⁹ These reforms could go further, in particular, there is no power in the family justice system to award legal aid to litigants and this should be looked at again in light of *Re K and H (Children: unrepresented father: Cross-examination of a child)* [2015] EWFC 1 which established on appeal that there is no power to fund representation even where a child may be put at risk through cross-examination by a litigant in person.

Public law children matters

Further, in public law proceedings legal aid policy has not kept up with changes to the family justice system which has pushed the focus to what happens even before the formal pre-proceedings stage. At this juncture (before a letter before proceedings is sent to the parents qualifying them for non means tested Family Help (Lower)), parents are only eligible for legal aid on a means and merits tested basis (Legal Help stage). It is absolutely vital that as soon as a local authority starts to work with a parent or family in relation to child protection concerns (s. 47 Children Act 1989 investigations), legal aid is made available on a non-means tested and non-merits tested basis. Parents need legal advice at this early stage to stand the best possible chance of making changes, challenge any incorrect narrative from the local authority and to understand the gravity of the situation. There is a real concern that a factual matrix is established during the child protection process which becomes difficult for parents to challenge in the court process.

¹⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf

Private family law matters

In private family law, the MoJ should bring back Controlled Work funding for an initial consultation with a lawyer (£86 fixed fee) to equip parties with a better understanding of the mediation option and the process. Advice and assistance up to level 2 (Family Help (Lower)) should be allowed to advise and assist negotiations about child arrangements. These issues are often of the utmost importance not just to parents, but also to the children affected, and can include issues including who a child lives with, where they go to school, and what medical treatment they receive where this cannot be agreed by parents.

The rate of pay for Level 1 (Legal Help) is currently set too low to ensure that work can be carried out on the case and does not allow a provider to negotiate with the other party to avoid legal proceedings. Funding should be sufficient to allow for out of court agreements to be reached.

Domestic violence

The use of arbitrary time limits for evidence of domestic abuse ignores the nature of violence and the long lasting impact on children who are affected. The Joint Committee on Human Rights was concerned that the current regime was insufficient, and not compatible with the Istanbul Convention.²⁰ A parent should be assisted to put forward concerns about a child's best interests where there has been, or there is a risk of, abuse. This needs to include not only physical abuse, which the current regulations are predicated on, but all forms of abuse. A practitioner will test the merits of a case before granting legal aid, therefore an additional bar is unnecessary. Where domestic abuse is asserted, a regulated legal practitioner should be trusted to make a judgment on the truth of the assertion, rather than requiring a letter from a non-regulated professional in order to grant legal aid.

Immigration law

Where families, children and young people are unable to establish their immigration status, then they are at risk of destitution. Young people in care are at risk of losing access to leaving care services without immigration advice, and this can have a profound impact on their future. The Children's Society produced evidence relating to the extreme complexity that a young person's immigration case may involve.²¹ Given this, immigration law for children should be brought back into scope when considering either 1) or 2) above.

Cost-saving

Considerable costs could be saved through cutting bureaucracy within the current system. The LAA Legal Aid Agency could improve its relationship with practitioners by removing additional hurdles that have built up over time to monitor the system. This includes the following:

- Use of poorly trained caseworkers to assess applications meaning that legal aid providers frequently have to make further representations to achieve permission to instruct experts, amend the scope of a certificate or increase a costs limitation.
- Long delays in answering the queries, meaning that providers spend fee-earning time waiting to speak to the LAA.

²⁰ Human Rights Joint Committee: Sixth Report, 28 January 2015
<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/106/10602.htm>

²¹ Cut off from Justice, The Children's Society (June 2015)

- A cumbersome application process for both matters in scope and those which are subject to ECF, meaning that providers may be unable to provide assistance on urgent matters and must do so pro bono or turn a client away.
- A reduction in claimed costs based on the assessor's opinion and which contradicts the expert view of the instructed provider – for example the time taken to write a letter or speak to a client.
- A lengthy appeals process which requires the provider to scrutinise imposed cost reductions line by line, and write a further narrative account/appeal representations, reducing fee-earning time.
- The use of analysts and consultants employed or contracted by the LAA at considerable cost.
- A complex and unnecessary new matter starts process which is complex and requires great monitoring efforts on the part of the provider and the LAA. Whatever the outcome the matter start allocation process seeks to achieve, appears disproportionate to the costs of operating and monitoring the system.

Costs to both parties

We do not believe that a legal aid system in which only the applicant's costs are subject to restriction can be credible. Where an individual brings a case against an eminence of the state, then they should not be hampered by legal aid restrictions whilst the state has unfettered spending power. Figures in relation to the provision of legal aid should include all government spend, and individual departments should be subject to similar considerations as applicants, including only pursuing appeals where they meet the merits test and the prospects of success can be considered good, very good or excellent. Careful consideration should be given by the relevant government departments on pursuing all appeals, particularly when considering the government spent over £150k on pursuing appeals in relation to the residence test.²²

Conclusion

Where decision-making is robust and transparent, then the need for legal redress is reduced and there is a commensurate cost reduction. The state and local authorities can make decisions which are fair and which meet this criteria, reducing the need for challenge. Legal aid is a vital tool in holding the Government to account, particularly for children and young people who are at risk of abuses of their rights. Children and young people currently face other forms of discrimination that will make it harder for them to fund legal advice and assistance, and those without parental support will not find alternative ways to access advice. Young people are not eligible for the full national living wage for example. It is vital that the needs of the most vulnerable and least able to fund advice are considered when looking at legal aid and that young people are given an opportunity to meaningfully engage in judicial processes that relate directly to their lives.

²² <http://www.theyworkforyou.com/wrans/?id=2016-04-19.34548.h&s=%22legal+aid%22#g34548.r0>