

A low-angle photograph of St Paul's Cathedral in London, showing its iconic dome and classical columns. The sky is overcast.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On Final Report



The Bar Council
Integrity. Excellence. Justice.

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Acknowledgments

This report has been written by Sarah-Jane Bennett, Head of Policy: Legal Affairs, Practice and Ethics at the Bar Council. The Bar Council welcomes any comments or suggestions on this report. Any errors or omissions should be brought to the attention of Sarah-Jane Bennett (SJBennett@BarCouncil.org.uk).

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Foreword by Nicholas Lavender QC, Chairman of the Bar

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has brought about fundamental changes in the arrangements for obtaining access to justice and civil litigation costs.

When the LASPO Bill was introduced to Parliament three years ago, and during the course of its passage through Parliament, the Bar Council repeatedly warned the Government about the likely effects of drastic changes to the provision of civil and family legal aid, as well as the selective implementation of Lord Justice Jackson's reforms relating to the funding of civil litigation. This report, which examines the effects of LASPO in the first year of its implementation since 1 April 2013, is the result of a review which the Bar Council undertook to establish whether, and to what extent, the Bar's concerns were justified in the light of subsequent experience since the relevant parts of the legislation came into force.

Although it is too early to determine the longer-term impact of the Government's transforming legal aid agenda (of which LASPO forms a central part), this early research suggests that much of what we feared has come to pass, including:

- A significant increase in litigants in person, especially in the family courts
- Increased delays in court and additional burdens on already-stretched court resources
- Increased and likely unsustainable pressure on frontline providers offering free legal support, advice or representation
- A growing reluctance of solicitors and barristers to take on complex, low-value litigation, denying many access to legal advice and representation, and
- A growing number of barristers actively considering the viability of a long-term career at the Bar.

These developments, which have been widely reported by the media and others, will be of concern to all those who are involved in the administration of justice. They will be of particular concern to the Government having regard to the Lord Chancellor's role in relation to the rule of law under the Constitutional Reform Act 2005 and his responsibility to ensure the provision of resources for the efficient and effective support of the courts.¹ Without a properly resourced system of justice many citizens, including some of the most vulnerable in society, will be unable to obtain advice or to access the courts to uphold their legal rights.

Last year the Bar Council provided assistance to those facing what, for many, will be a daunting experience of representing themselves in court by publishing '[A Guide to Representing Yourself in Court](#)'.² But there is only so much that an initiative of this kind (and others like it) can do to address the areas of need which have resulted from the changes considered in this report. If our system of justice is to continue to be able to attract respect and admiration around the world, and to remain a national asset, we need to ensure that the arrangements for the effective administration of justice are

¹ Constitutional Reform Act 2005, ss 1, 17.

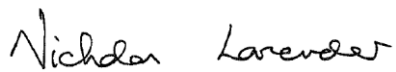
² Available on the Bar Council website:

http://www.barcouncil.org.uk/media/203109/srl_guide_final_for_online_use.pdf

properly resourced and that fair and realistic options are available to all who seek to access legal support, advice and representation.

This report is addressed to all who take an interest in the future of justice in our country. The legal profession itself plainly has a responsibility to examine how it can most effectively support the efficient administration of justice in these challenging times of financial austerity and I would like to thank all those who have taken time to participate in this research. I hope their voices will be heard clearly and that this report will also provide an opportunity for the profession to think further about how its advisory and advocacy expertise and skills can be delivered best in the future in the public interest.

The findings of this research will be a useful contribution to the evidence base which will provide the Government with valuable insights into how LASPO is working in practice so that lessons can be learnt from the past to guide policy making in the future.

A handwritten signature in black ink, reading "Nicholas Lawrence". The signature is written in a cursive, slightly slanted style.

Chairman of the Bar Council
September 2014

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Key terms and concepts

ADR	Alternative dispute resolution. Forms of dispute resolution outside of the formal court system which include mediation and arbitration.
ATE insurance	After the event insurance. Insurance taken out by claimants to cover for the possibility of losing their case and having to pay the other sides' costs (e.g. legal fees and expert reports) and their own disbursement costs if they lose.
Base fees	The total fees charged by lawyers for their services, excluding any uplift (success fee) for winning the case.
BME	Black and minority ethnic
CAB	Citizens Advice Bureau. A free, independent and confidential frontline service to help people resolve legal, money and other problems.
CFA	Conditional Fee Agreement. An arrangement currently used in much civil litigation, especially where the claimant has limited means and legal aid is not available, such as in almost all injury cases. Under the most usual type of conditional fee agreement (commonly described as a "no win, no fee" agreement) the lawyer charges nothing for their services if they lose the case, but receives their base fees, and possibly a percentage uplift on their base fees (a success fee), if they win. There are alternative forms of conditional fee agreement used in niche areas of practice. These include discounted rate conditional fee agreements (usually described as "no-win, low fee" agreement) where the lawyer receives a low fee in the event of a loss and their usual fee in the event of a win.
Civil legal aid	System of public funding made available for non-family and non-crime legal issues that is administered by the Legal Aid Agency. The scope of funding available is defined in LASPO, Schedule 1.
Civil litigation	The process of resolving a dispute between two or more parties where damages or specific performance of an obligation is sought. Civil litigation can be privately or publicly funded.
Claimant	The alleged victim of wrongdoing by the defendant.
DBA	Damages-based Agreement. A contingency fee arrangement, lawful use of which was expanded by LASPO s45 (amendment the Courts and Legal Services Act 1990 s58AA). Intended to be used in civil litigation where the claimant is not entitled to legal aid and has no means to pay for legal advice and where damages are sought. The lawyer charges nothing for their services if they lose the case, but receives a percentage of the damages awarded if they win. The percentage of the damages that can be awarded is subject to statutory limitation under the Damages-based Agreement Regulations 2013.

Defendant	The individual or entity against which the case is brought by the claimant.
Disbursements	Additional costs such as expert fees.
Family legal aid	System of public funding made available for resolving family legal issues that is administered by the Legal Aid Agency. The scope of funding available is defined in LASPO, Schedule 1.
Fees billed	The fees for work as billed but not yet received by a barrister.
Fee income	A barrister's gross income, combining fees billed and fees received.
Fees received	The fees for work that have been actually received by a barrister.
Fee security	Receiving payment for work in the amount and at the time agreed between the barrister and the paying party.
HMCTS	Her Majesty's Courts and Tribunal Service. Agency of the Ministry of Justice responsible for the administration of the criminal, civil and family courts and tribunals in England and Wales and non-devolved tribunals in Scotland and Northern Ireland.
LAA	Legal Aid Agency. Executive Agency of the Ministry of Justice established by LASPO which is responsible for the administration of legal aid.
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
Lay client	The individual claimant seeking legal support, advice or representation. In the context of a barrister-solicitor-client relationship, the lay client would instruct a solicitor. In the context of public access work, the lay client would instruct a barrister directly.
LiP	Litigant in person. An individual representing themselves in litigation.
Litigation	The act of bringing and resolving a contested legal action.
MIAM	Mediation Information Assessment Meeting. A meeting where a case's suitability for family mediation is assessed before the case proceeds to court.
Pro bono	Latin phrase which describes the voluntary provision of professional services for no fee.
Professional client	The professional, usually a solicitor, who instructs a barrister on behalf of their lay client to undertake work.

Public access	<p>Traditionally, barristers could only be instructed through a professional client, usually a solicitor. Barristers are, however, able to undertake additional training to allow them to accept instructions directly from members of the public. This is known as “public access”.</p> <p>When a barrister is instructed directly by a member of the public their role remains essentially the same as when they are approached by a solicitor or another intermediary. This means that there are limits on the types of work that a barrister can do and there are still some cases and situations in which an individual will need to instruct a solicitor or another intermediary as well as a barrister.</p>
QC	<p>Queen’s Counsel. A limited number of senior barristers become Queen’s Counsel (receive 'silk') as a mark of outstanding ability. They are normally instructed in very serious or complex cases. Most senior judges once practised as QCs.</p>
QOCS	<p>Qualified One Way Costs Shifting. A method of ensuring that losing claimants do not have to pay defendants’ costs if they lose, qualified to prevent application in cases of demonstrably irresponsible behaviour.</p>
Success fee	<p>An uplift on base fees that can be charged by claimants’ lawyers if the case is won. The fee is calculated as a percentage of base fees and its size is dependent on the level of risk taken in pursuing the claim. The size of the uplift is subject to limits provided for in the Conditional Fee Agreement Order 2013.</p>

Overview

1. In preparation for the implementation of changes to civil legal aid and civil litigation, the Bar Council published two practical information documents for barristers and clerks in March 2013 – ‘Changes to Civil Legal Aid: Practical Guidance for the Bar’³ and ‘Guidance for Barristers and Clerks relating to Privately Funded Civil Litigation’.⁴

2. Leading up to their publication, the Bar Council decided that these documents, as well as other lobbying and campaigning work undertaken by the Bar Council relating to LASPO, should be reinforced by research looking at the impact of LASPO one year after its implementation. It was recognised that the first 12 months was a limited window to consider the impact of the fundamental changes implemented by LASPO and that this initial piece of research may not provide coverage of issues expected to emerge or develop in a further one to three years. This research project, however, was developed to ensure that the concerns raised by the Bar Council and a multitude of other professional, representative and campaigning bodies were not forgotten and that an initial evidence-base was available for further representations to be made.

3. The research project was primarily focused on the post-LASPO experience of the Bar. It consisted of:

- An online survey of the Bar open from 1-22 April 2014
- Semi-structured interviews⁵ with barristers, clerks and representatives from organisations providing frontline services completed between May and July 2014, and
- Desk research identifying and drawing on secondary resources and research completed by other organisations.

4. This report provides an overview of the LASPO reforms. The results of the survey of the Bar and the semi-structured interviews are then considered. The final sections of the report look at the policy implications of the research findings before making recommendations.

Key findings and implications

5. The findings of the Bar Council survey and interviews draw a disheartening picture of the current position of the civil and family justice system and the Bar, as well as their future.

³ Available at: <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/remuneration-guidance/publicly-funded-civil-work/>

⁴ Available at: <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/remuneration-guidance/privately-funded-civil-litigation/>

⁵ A form of interview that has a framework of themes to be discussed but where the content of the interview is responsive to the issues raised. This is different to a structured interview where there is a strict set of questions that must be responded to regardless of the issues raised in the interview.

6. The survey results highlighted that barristers undertaking publicly-funded family and civil work, as well as privately funded civil litigation, believe that LASPO has adversely impacted the ability of individuals to access legal advice and representation and to enforce their legal rights. The barristers who responded to the survey also feel that LASPO has negatively impacted their case volume, fee income and fee security, with a significant minority indicating that the impact of LASPO has made them seriously consider the viability of a long-term career at the Bar.

7. In summary, the key views raised in both the survey and interviews were that since LASPO there has been:

- A preference for cutting costs over the provision of appropriate access to the courts for individuals to enforce their legal rights
- Excessive demands placed on under-resourced courts and judiciary
- A failure to provide appropriate funding mechanisms for low to medium-value complex cases
- A failure to provide appropriate funding mechanisms for cases without recoverable damages
- An increase in LiPs which is unsustainable without wider reforms to make processes and procedures more transparent and accessible
- A failure to value legal services, especially early legal advice
- A failure to value a diverse legal profession and judiciary, and
- A diminishing optimism in viability of long-term careers at the self-employed Bar, especially for family practitioners.

8. These research results have serious implications for both Government and policy-makers generally, as well as for the profession. In light of the Lord Chancellor's constitutional obligation to ensure the operation of a sufficiently-resourced justice system where individuals are able to enforce their legal rights, the post-LASPO landscape as described by our research participants raises significant concerns for Government. These include the need to determine how the impact of LASPO on access to justice can be best understood and analysed to allow for the development and implementation of evidence-based policy solutions.

9. The research findings also have implications for the profession. Concerns raised about the availability of work, remuneration for work and the increase in LiPs in the courts ensure that consideration of alternative ways of working at the Bar will be a critical part of the future provision of legal services.

What is the context? An overview of the LASPO reforms

10. LASPO implemented fundamental and wide-reaching changes to civil litigation and the provision of civil and family legal aid in England and Wales.

11. These changes followed years of consultation, consideration and debate focused on what reform would mean for access to justice. There was also considerable concern in the profession about what the reforms would mean for the future of the Bar.

Review of Civil Litigation Costs – The Jackson Review

12. On 3 November 2008, as a result of concerns held by the senior judiciary that the costs of civil justice were escalating unreasonably and were often disproportionate to issues being litigated, Lord Justice Jackson was appointed by the Master of the Rolls to lead “a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.”⁶

13. The Review of Civil Litigation Costs (The Jackson Review) commenced in January 2009 with the objective:⁷

“To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.”

14. The terms of reference for the Jackson Review were:⁸

- Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs
- Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements – ‘No win, No fee’, following the scoping study
- Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars
- Compare the costs regime for England and Wales with those operating in other jurisdictions, and
- Prepare a report setting out recommendations with supporting evidence by 31 December 2009.

⁶ Courts and Tribunals Judiciary, ‘Review of Civil Litigation Costs’, accessed 7 August 2014. Available at: <http://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs/>

⁷ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Final Report’ (2009), 2. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

⁸ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Final Report’ (2009), 2. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

15. Jackson LJ published his preliminary report on 13 May 2009. This was then followed by a final report on 14 January 2010.

16. The final report made 109 recommendations across 45 subject areas and put forward “a coherent package of interlocking reforms, designed to control costs and promote access to justice.”⁹

17. In the official media release, Jackson LJ’s key findings and recommendations were highlighted as:¹⁰

- Proportionality – the costs system should be based on legal expenses that reflect the nature/complexity of the case
- Success fees and after the event insurance premiums to be irrecoverable in no win, no fee cases (CFAs – Conditional Fee Agreements), as these are the greatest contributors to disproportionate costs
- To offset the effects of this for claimants, general damages awards for personal injuries and other civil wrongs should be increased by 10%
- Referral fees should be scrapped – these are fees paid by lawyers to organisations that sell damages claims but offer no real value to the process
- Qualified one way costs shifting – claimants will only make a small contribution to defendant costs if a claim is unsuccessful (as long as they have behaved reasonably), removing the need for after the event insurance
- Fixed costs to be set for fast track cases (those with a claim up to £25,000) to provide certainty of legal costs
- Establishing a Costs Council to review fixed costs and lawyers’ hourly rates annually, to ensure that they are fair to both lawyers and clients
- Allowing lawyers to enter into Contingency Fee Agreements, where lawyers are only paid if the claim is successful, normally receiving a percentage of actual damages won, and
- Promotion of before the event legal insurance, encouraging people to take out legal expenses insurance, for example as part of household insurance.

18. It was hoped that the implementation of the reforms would provide parties entering litigation greater certainty about costs. It was also hoped that the reforms would allow for and encourage greater use of mediation to have claims resolved earlier and without unnecessary costs being accrued.

⁹ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Final Report’ (2009), i. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

¹⁰ Courts and Tribunal Judiciary, ‘Jackson Review calls for a package of reforms to rein in the costs of civil justice’, accessed 7 August 2014. Available at: <http://www.judiciary.gov.uk/announcements/jackson-review-calls-for-a-package-of-reforms-to-rein-in-the-costs-of-civil-justice/>

19. On publication of the final report, the then Master of the Rolls, Lord Neuberger stated:¹¹

“The measures the report proposes will ensure that legal costs are reduced, and that civil justice will be more efficient and fairer. All interested parties have been fully consulted and their views have been reported and considered.”

20. Jackson LJ presented his report as a cohesive reform package where individual recommendations often relied on the implementation of complementary reforms within the whole package. The Government, however, chose to selectively implement reforms as well as to alter reforms from those initially proposed by Jackson LJ.

21. The proposals for selective implementation were first outlined in the consultation paper, ‘Proposals for reform of civil litigation funding and costs in England and Wales’,¹² issued in November 2010. The following Jackson reforms were then implemented by LASPO and came into operation from 1 April 2013:

- **Abolition of CFA success fee recoverability.** Prior to 1 April 2013, a successful litigant could recover the success fee paid to their solicitors and barristers from their unsuccessful opponent. Since 1 April 2013, only the base-fee charged by solicitor and counsel under the CFA is recoverable. Any success fee agreed by the client must be paid by the client.
- **Abolition of ATE recoverability.** Prior to 1 April 2013, a successful litigant could also recover the cost of any ATE insurance they had purchased to cover the costs of litigation. Since 1 April 2013, all ATE insurance premiums are non-recoverable from the unsuccessful opponent.
- **Significant expansion of lawful use of DBAs.** Prior to 1 April 2013, DBAs could only be used in Employment Tribunals and in non-contentious business by solicitors. LASPO provided for the expansion of the use of DBAs in any form of proceedings which are not criminal or family proceedings.

22. The changes implemented through primary legislation were also accompanied by secondary legislation as well as changes to rules of court. These included the implementation of costs management and qualified one-way costs shifting (QOCS), as provided for by the Civil Procedure Rules and Practice Directions.

23. Serious concerns were raised about the implementation of these changes to the operation of civil litigation funding. These included:

¹¹ Courts and Tribunal Judiciary, ‘Jackson Review calls for a package of reforms to rein in the costs of civil justice’, accessed 7 August 2014. Available at: <http://www.judiciary.gov.uk/announcements/jackson-review-calls-for-a-package-of-reforms-to-rein-in-the-costs-of-civil-justice/>

¹² Ministry of Justice, ‘Proposals for reform of civil litigation funding and costs in England and Wales’ (2010). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238368/7947.pdf

- Denying access to justice for individuals with valid but risky and complicated cases such as cases with high early investigation costs, cases involving disputed liability, cases involving emerging and contested points of law and cases involving complex and difficult expert evidence on causation
- Promoting satellite litigation due to significant uncertainties about the operation and enforceability of transitional and post-Jackson funding arrangements, and
- Promoting a de-skilling of the legal profession as litigation only remained viable where high volumes of work could be dealt with cheaply by non-qualified, poorly remunerated legal staff.

24. In his final report, Jackson LJ highlighted the importance of legal aid to the operation of an effective and just civil justice system:¹³

“I do not make any recommendation in this chapter for the expansion or restoration of legal aid. I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas. The statistics set out elsewhere in this report demonstrate that the overall costs of litigation on legal aid are substantially lower than the overall costs of litigation on conditional fee agreements. Since, in respect of a vast swathe of litigation, the costs of both sides are ultimately borne by the public, the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest.”

25. The Government, however, failed to recognise the fundamental importance of the continuation of publicly-funded legal services to the success of the Jackson Reforms.

Civil and family legal aid reform¹⁴

26. In April 2013, civil and family legal aid underwent fundamental reform. The driving force for change was the Government’s policy to reduce public spending.

27. The changes were first outlined in a consultation paper, ‘**Proposals for the Reform of Legal Aid in England and Wales**’,¹⁵ issued in 2010. The key aims of the proposals were to:

- Discourage unnecessary and adversarial litigation at public expense
- Target legal aid to those who need it most
- Make significant savings in the cost of the legal aid scheme, and
- Deliver better overall value for money for the taxpayer.

¹³ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Final Report’ (2009), 70. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

¹⁴ The following section is primarily drawn from the Bar Council’s guidance, ‘Changes to Civil Legal Aid: Practical Guidance for the Bar’. This document is available on the Bar Council website: <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/remuneration-guidance/publicly-funded-civil-work/>

¹⁵ Ministry of Justice, ‘Proposals for the Reform of Legal Aid in England and Wales’ (2010). Available at: <http://www.official-documents.gov.uk/document/cm79/7967/7967.asp>

28. There were over 5,000 responses submitted to the consultation, the majority of which rejected the Government's proposals. The Government's response to the consultation,¹⁶ however, advised that it would implement the reforms largely as originally proposed. LASPO was the subsequent legislative vehicle for the central reforms. It completed its Parliamentary passage and received Royal Assent on 1 May 2012. Since then the detail of the changes has been provided by a series of statutory instruments.

29. The 'headline' changes included:

- **Abolition of the Legal Services Commission (LSC).** The LSC was abolished on 1 April 2013. Decision-making on legal aid is now the role of a Director of Legal Aid Casework and administration of applications, claims and payments is now handled by the Legal Aid Agency (LAA) based within the Ministry of Justice. Responsibility for all policy sits with the Lord Chancellor and other ministers in the Ministry of Justice.
- **Reduced access to civil and family legal aid through means-testing.** There has long been an element of means-testing to determine who qualifies for legal aid. From 1 April 2013 the means-test has been tightened so that fewer individuals qualify for legal aid.
- **Tightened merits testing.** Before 1 April 2013, LSC officials decided legal aid applications by applying criteria in the Funding Code and Guidance.¹⁷ Since 1 April 2013 the basis on which civil legal aid will be made available has been circumscribed by statutory instrument.¹⁸ From 27 January 2014 the criteria have been further tightened in that it is no longer possible to obtain legal aid for a case with only "borderline" merits.¹⁹
- **Shift away from face-to-face access.** The Government is increasingly keen that publicly-funded legal services should be accessed otherwise than through the traditional 'high street solicitor' route. From 1 April 2013 there is a greater emphasis on call-centre provision under which legal advice is sought and provided by telephone, email and online from the Civil Legal Advice (CLA) service. Those call-handlers giving advice are not usually solicitors but the intention is that their work be supervised by solicitors. For some subject areas access to legal aid is only available by first passing through a telephone "gateway".
- **Reduced remuneration for undertaking legal aid work.** The first round of cuts in rates of pay for solicitors, barristers and experts handling civil legal aid work were implemented early in the process of legal aid reform and apply to all work done in legal aid cases where legal aid applications were made after 3 October 2011. The rates of payment in effect from 3 October 2011 were implemented by Schedules 1 and 2 of *The Community Legal Service (Funding) (Amendment No.2) Order 2011*. Rates of pay were, in effect, cut by 10%. From 1 April 2013, the rates of payment to solicitors, barristers and experts in civil legal aid cases have been

¹⁶ Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response' (2011). Available at: <http://www.official-documents.gov.uk/document/cm80/8072/8072.asp>

¹⁷ The Funding Code and Guidance had a statutory foundation in the *Access to Justice Act 1999*, ss8-9. A version of the Code and Guidance is available at the national web archives:

<http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/legal-aid/funding/funding-code>

¹⁸ See Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104 and its subsequent amending regulations.

¹⁹ See Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014 SI No. 131.

prescribed by new regulations.²⁰ A second round of even more significant cuts in rates of pay for junior barristers undertaking civil legal aid work came into effect for new cases on 2 December 2013.²¹

30. The primary concern, however, is the drastic reduction in scope of civil and family legal aid as a result of LASPO. Before 1 April 2013 the assumption was that civil legal aid was available to help on almost all aspects of English law, with narrowly prescribed exceptions. Since 1 April 2013 the situation has been completely reversed – civil legal aid is now only available for prescribed topics and types of legal work (“general cases”), subject to a narrow override for exceptional funding in other cases (“exceptional cases”).

31. General cases are now those cases in which the subject is brought within the scope of the civil legal aid scheme because it is described in Part 1 of Schedule 1 of LASPO and the Director of Legal Aid Casework (through LAA officials) has determined that the individual qualifies for civil legal aid services. Exceptional cases are those limited number of cases where civil legal aid remains available notwithstanding that they would not otherwise qualify as general cases.

32. The starting point in most cases will be to determine whether or not the case is of a type which falls within scope (i.e. is listed in Schedule 1 Part 1 and not excluded under Schedule 1 Part 2 or Part 3). The Schedule works by identifying a particular subject, describing which services within that subject are covered, and then applying a series of definitions, conditions and exclusions.

33. The fundamental concept is that if a case does not fall within the parameters of Schedule 1, Part 1,²² it is out of scope. The net effect is that the following matters are now outside the scope of civil and family legal aid:²³

- Asylum support (except where accommodation is claimed)
- Consumer and general contract
- Criminal Injuries Compensation Authority cases
- Debt, except where there is an immediate risk to the home
- Employment cases
- Education cases, except for cases of Special Educational Needs
- Housing matters, except those where the home is at immediate risk (excluding those who are “squatting”), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the County Court
- Immigration cases (non-detention)
- Appeals to the Upper Tribunal from the General Regulatory Chamber of the First- tier Tribunal
- Cash forfeiture actions under the Proceeds of Crime Act 2002

²⁰ Civil Legal Aid (Remuneration) Regulations 2013.

²¹ Civil Legal Aid (Remuneration) (Amendment) Regulations 2013.

²² The Lord Chancellor has power to alter, amend and add to Schedule 1 Part 1 and has already exercised that power. See, for example, Civil Legal Aid (Preliminary Proceedings) Regulations 2013. See also The Legal Aid, Sentencing and Punishment of Offenders 2012 (Amendment of Schedule 1) Order 2013.

²³ A summary of these areas is found in ‘Reform of Legal Aid in England and Wales: the Government Response’ (2011). This response was published prior to the Parliamentary passage of LASPO and some changes were made to scope, such as the minor provision for some welfare benefits work to remain in scope.

- Legal advice in relation to a change of name
- Actions relating to contentious probate or land law
- Court actions concerning personal data
- Actions under section 14 of the Trusts of Land and Appointment of Trustees Act 1996
- Legal advice on will-making for those over 70; disabled people; the parent of a disabled person; the parent of a minor who is living with the client, but not with the other parent, and the client wishes to appoint a guardian for the minor in a will
- Private family law (other than cases where criteria are met regarding domestic violence or child abuse)
- Tort and other general claims, and
- Welfare benefits, except for appeals on a point of law in the Upper Tribunal (but not advocacy in the Upper Tribunal), and onward appeals to the Court of Appeal and Supreme Court.

34. Even if a case is within scope, the qualifying criteria for civil legal aid remain governed by tests of means and merits.²⁴ The way in which the merits criteria are drawn means that it is not sufficient for a case to be within the scope of Schedule 1 Part 1. It must also meet the criteria set out in the regulations for the funding of such a case.²⁵

35. Failure to bring a case within the parameters of Schedule 1 Part 1 is not necessarily fatal to legal aid entitlement. Two types of exceptional case are provided for under section 10. The first and more limited class applies to inquests.²⁶ The second and broader class is set out in sections 10(2)-10(3) of LASPO:

- (2) This subsection is satisfied where the Director—
 - (a) has made an exceptional case determination in relation to the individual and the services, and
 - (b) has determined that the individual qualifies for the services in accordance with this Part,
 (and has not withdrawn either determination).
- (3) For the purposes of subsection (2), an exceptional case determination is a determination—
 - (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—
 - (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
 - (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

²⁴ See LASPO s11.

²⁵ Including Civil Legal Aid (Merits Criteria) Regulations 2013 as well as amending regulations such as Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2013.

²⁶ An exceptional funding process for inquest cases existed prior to LASPO.

- (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

36. The Lord Chancellor issued specific guidance to LAA officials on the operation of this category of 'non-inquest' exceptional funding.²⁷ Parts of this guidance, however, was held by the High Court to be unlawful.²⁸

37. These fundamental changes to the operation of civil and family legal aid also led to well-publicised concerns about their impact, including:

- Denying access to justice for vulnerable individuals without other avenues to resolve their legal issues
- Promoting the escalation of legal issues by failing to deal with situations sufficiently early, where individuals had to wait for their issues to be serious and urgent to receive necessary assistance, and
- Significantly increasing pressure on already-stretched court and judicial resources due to a predicted increase in litigants in person required to pursue their claims in person.

²⁷ Ministry of Justice, 'Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)' (2013). Available at: <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>

²⁸ See *Gudanaviciene & Others v director of legal aid casework and the lord chancellor* [2014] EWHC 1840 (Admin).

What do we know? Bar Council survey

38. The Bar Council launched a survey on 1 April 2014 to mark the first anniversary of the implementation of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO).

39. The survey was designed to look at the impact of the first 12 months of LASPO on the Bar. It was the first part of the wider Bar Council research project to collect information about the impact of LASPO and had questions looking at the impact on practitioners undertaking publicly-funded civil work, privately funded civil work, and family work.

40. The survey invited barristers to provide the Bar Council with their views on the impact of LASPO on their practice, their lay and professional clients and the courts. This meant that the survey was subjective as it called for barristers' perceptions and experiences. The survey did not seek objective measurements of the impact of reforms as this work was outside the scope of the project and resources available to the Bar Council.

41. The survey directed respondents through questions relevant to their own practice, meaning not all respondents answered all the questions. There were also questions which were optional to answer. When combined with the natural drop-off in respondents throughout the survey, the sample size for some questions is very small and the statistics discussed below should not be regarded as statistically significant. Instead, the survey results provide a strong indication of the experience of the Bar as of April 2014 and a starting point to investigate further issues and concerns.

42. The survey was available online from 1 to 22 April 2014 through SurveyMonkey. It contained closed and open-ended questions targeted at different types of respondents. Invitations to complete the survey were sent to all practising barristers. The survey was also advertised through Twitter and promoted by Specialist Bar Associations (SBAs) to their members.

43. The survey responses were analysed and are presented in this report in two overarching themes – access to justice and impact on practice at the Bar.

Respondents

44. There were a total of 716 survey respondents, of which 643 (89.80%) were barristers. This included 8.71% (56 of 643) who were QCs. This proportion is relatively reflective of the profession, with QCs accounting for 10% of the profession in 2012.²⁹

45. Of the 643 barrister respondents, 64.07% (412 of 643) indicated they undertook civil legal aid work, 33.13% (213 of 643) stated they did family legal aid work, and 64.07% (412 of 443) reported undertaking civil litigation.

46. Barrister respondents were asked to provide information about their age, gender and ethnic group. Just over half of barrister respondents provided this information.³⁰

²⁹ The Bar Council and Bar Standards Board, 'Bar Barometer: Trends in the profile of the Bar' (2014), 41. Available at: http://www.barcouncil.org.uk/media/287767/bar_barometer_report__updated_-_june_2014_.pdf

Figure 1 – Age of barrister respondents

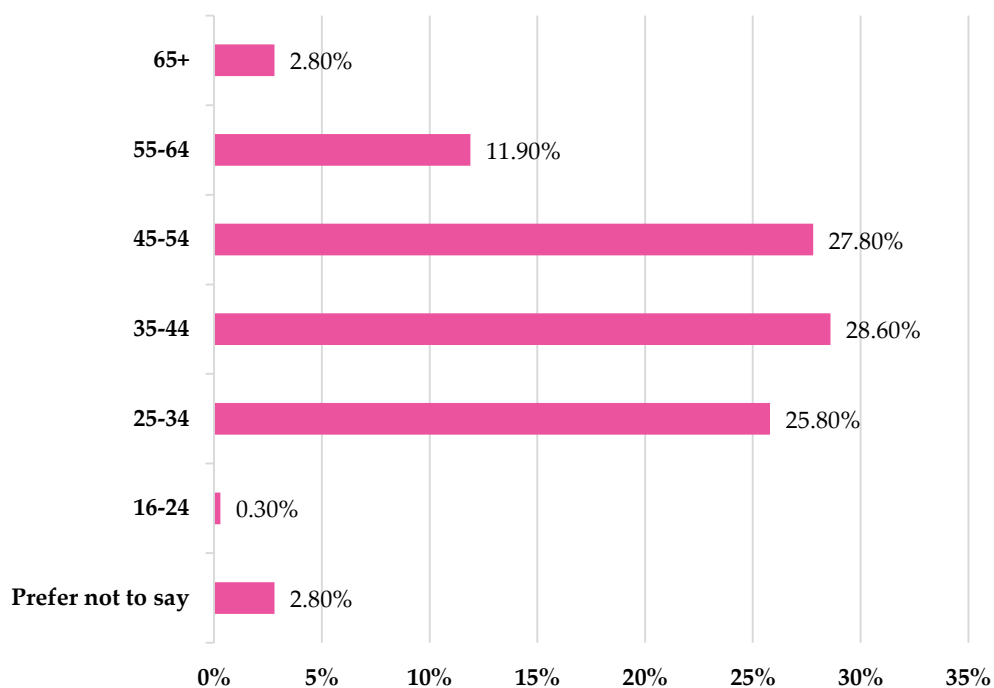
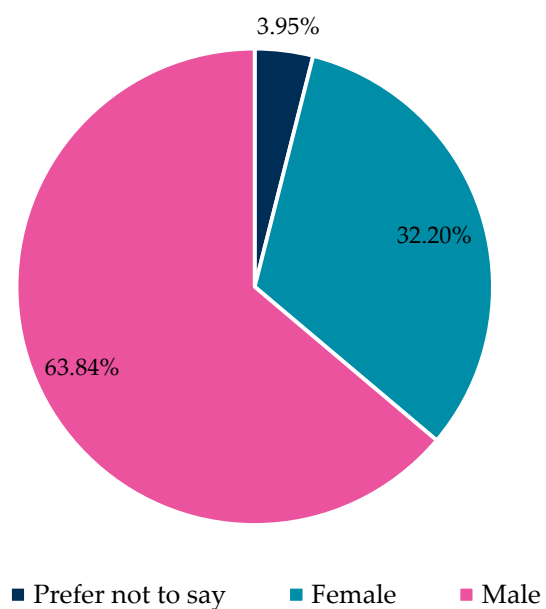
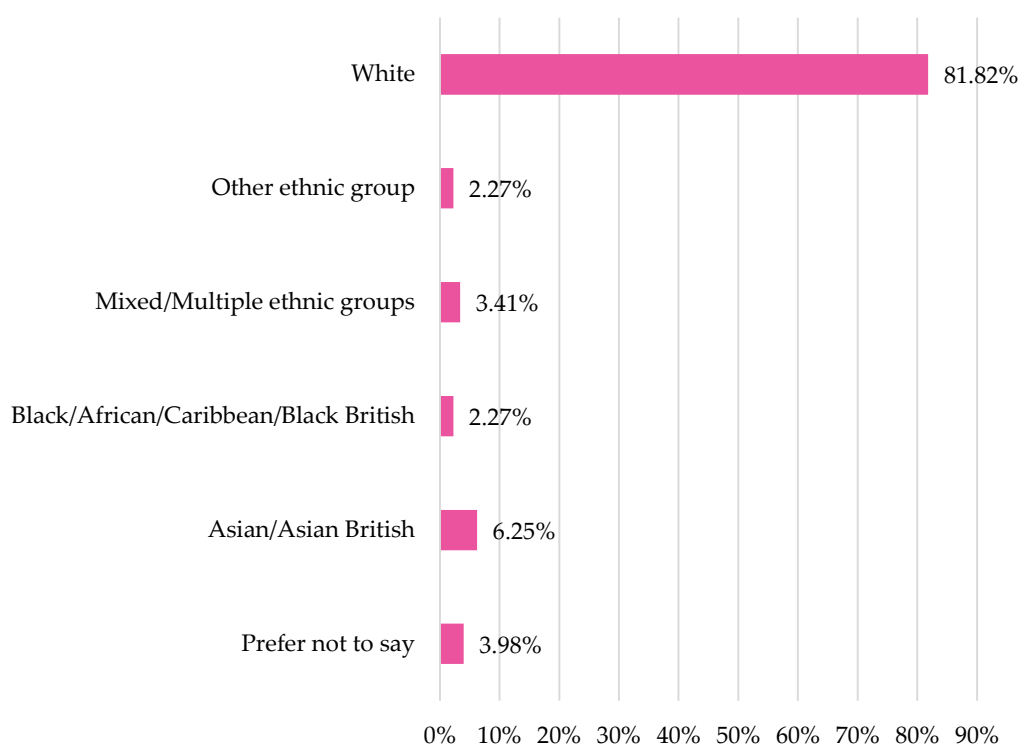


Figure 2 – Gender of barrister respondents



³⁰ Age: 55.99% (360 of 643), Gender: 55.05% (354 of 643), Ethnicity: 54.74% (352 of 643).

Figure 3 – Ethnicity of barrister respondents



47. These responses appear to generally reflect the age³¹ and gender³² demographics of the wider Bar. Respondents to the survey who provided information about their ethnicity, however, were slightly more likely to come from a BME background than the Bar generally.³³ There may be many reasons for this in light of the size of and self-selecting nature of the sample, but as the majority of survey respondents undertook some form of publicly-funded work this may reflect the position that individuals from a BME background are more likely to undertake publicly-funded work.³⁴

48. Almost all respondents were at the self-employed Bar (93.78%, 603 of 643), which reflects the focus of the survey on issues primarily affecting self-employed barristers.

³¹ See The Bar Council and Bar Standards Board, 'Bar Barometer: Trends in the profile of the Bar' (2014), 17.

Available at: http://www.barcouncil.org.uk/media/287767/bar_barometer_report__updated_-_june_2014_.pdf

³² Nearly two thirds of the Bar is male (63%). See The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), Appendix A. Available at:

http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

³³ At the Bar as a whole, 91% of barristers come from a white background, while only 81.82% (288) of respondents to the survey come from a white background. See The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), Appendix A. Available at:

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³⁴ At the Bar as a whole, 91% of barristers come from a white background, while only 81.82% (288) of respondents to the survey come from a white background. See The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), 59. Available at:

http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

Access to Justice

49. The primary concern arising from the implementation of LASPO was the effect it would have on access to justice for individuals with legal issues that required legal advice and/or representation. This included an individual's ability to find, instruct and afford professional legal services, as well as how individuals would access court services and whether this would affect the quality of court services available.

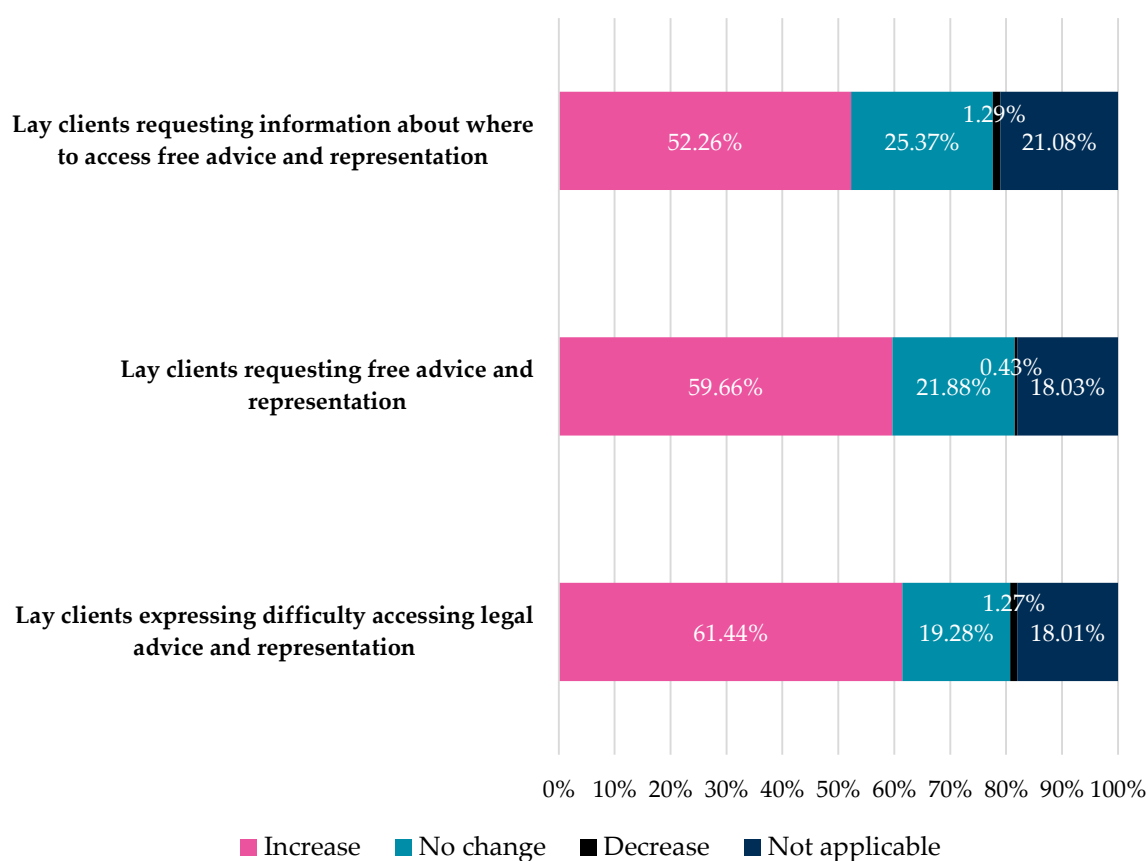
50. The survey covered access to justice issues by asking barrister respondents to consider how their relationships with lay clients and professional clients had changed (if at all), as well as how LASPO reforms had affected the effective operation of the courts.

Access to advice and representation

Lay clients

51. While barristers are often not the first point of contact with lay clients owing to the traditional referral nature of their work, the majority of respondents reported that since April 2013 they had perceived an increase in the number of lay clients expressing difficulty in accessing legal advice and representation, as well as an increase in the number of lay clients requesting free advice and representation or information about where they could access free advice and representation.

Figure 4 – Barrister perceptions of changes to lay clients' ability to access advice and representation



52. The survey responses also suggest that lay clients may be increasingly interested in accessing barristers directly, with 51.39% of barrister respondents reporting an increase in the number of lay clients requesting public access instructions. Of the respondents who actually undertake public access work, 65.57% reported an increase in the number of public access clients since the implementation of LASPO. While the increase in public access instructions may or may not be related to the implementation of LASPO, the responses could suggest that market awareness of public access work has increased and that it may be an expanding source of work for the self-employed Bar. This position is further reflected in the latest Biennial Survey of the Bar, where 20% of barristers indicated an intention to undertake public access training in the next two years, while a further 21% were considering doing so.³⁵

Professional clients

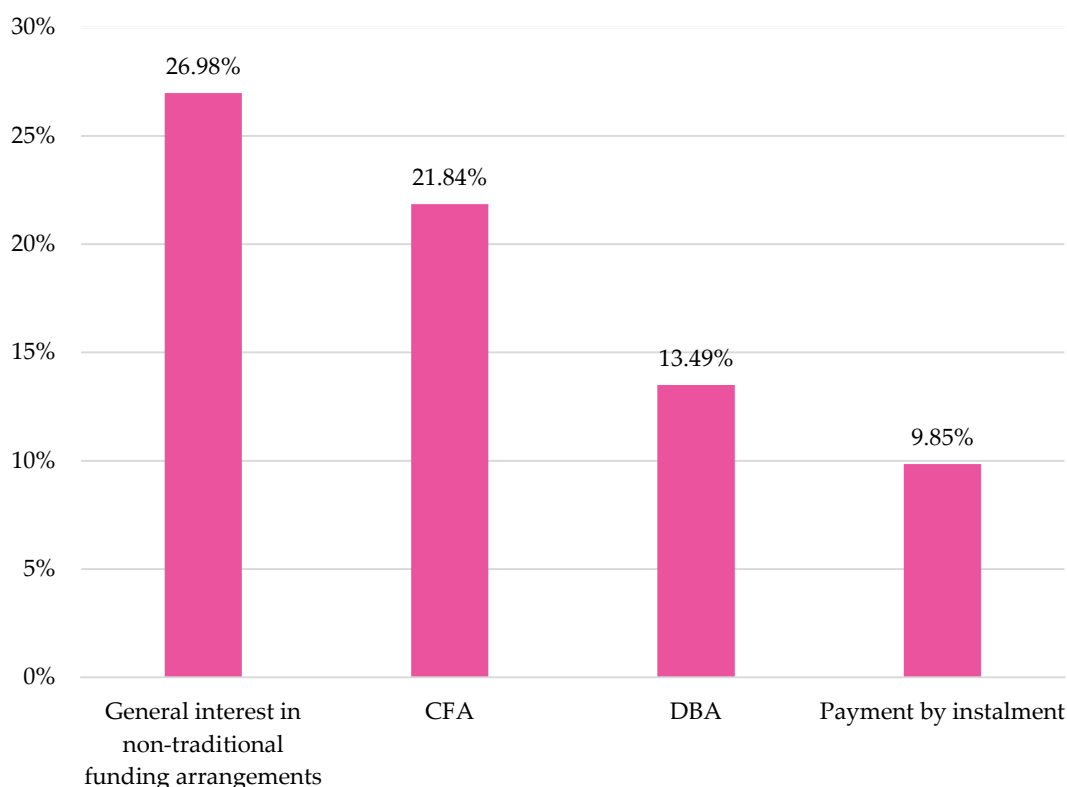
53. Respondents were also asked about their relationships with their professional clients, particularly whether there had been any change since 2013 in the types of funding arrangements which professional clients were interested in using when instructing barristers.

54. Just over a quarter of respondents reported an increase in a general interest from their professional clients in exploring non-traditional funding arrangements,³⁶ while slightly more than 20% of respondents reported an increased interest in CFAs following the implementation of LASPO.

³⁵ See The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), 76. Available at: http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

³⁶ The traditional funding arrangement between solicitor and barrister sees the barrister paid a brief fee (which usually covers preparation, client conferences and attendance on the first day of the trial or hearing) and refreshers for each day they are representing their client. A fee note is sent to the solicitor on a regular basis for payment of work already undertaken. Anything outside this arrangement can be understood as a 'non-traditional' funding arrangement.

Figure 5 – Barrister reported increase in interest of professional clients in non-traditional funding arrangements



55. The increased interest in CFAs is interesting in light of the removal of the ability to recover success fees and ATE insurance. The survey, however, did not cover whether the increased interest in CFAs was because there were no other alternative forms of funding available,³⁷ or whether the terms offered were in fact attractive to, or suitable for, barristers.

56. A significant consequence of the Jackson reforms has been the introduction of costs budgeting and costs management whereby both sides are required to submit budgets to the court prior to trial to provide for greater transparency of costs from the outset of litigation.

57. The majority of respondents (61.89%, 238 of 384) indicated they had been required to provide a costs budget. Of these, half reported experiencing issues with providing their professional client with the required information, including having insufficient information to estimate costs accurately before the commencement of a case. Some respondents even reported submitting budgets to solicitors without having seen the papers.

58. Just over a third of respondents (34.05%, 79 of 232) felt their work had been adversely affected by court-approved budget reductions, including no longer being instructed for work due to the budget failing to provide for their costs, or being required to work for free due to court reductions.

³⁷ See further, paragraphs 63 to 65.

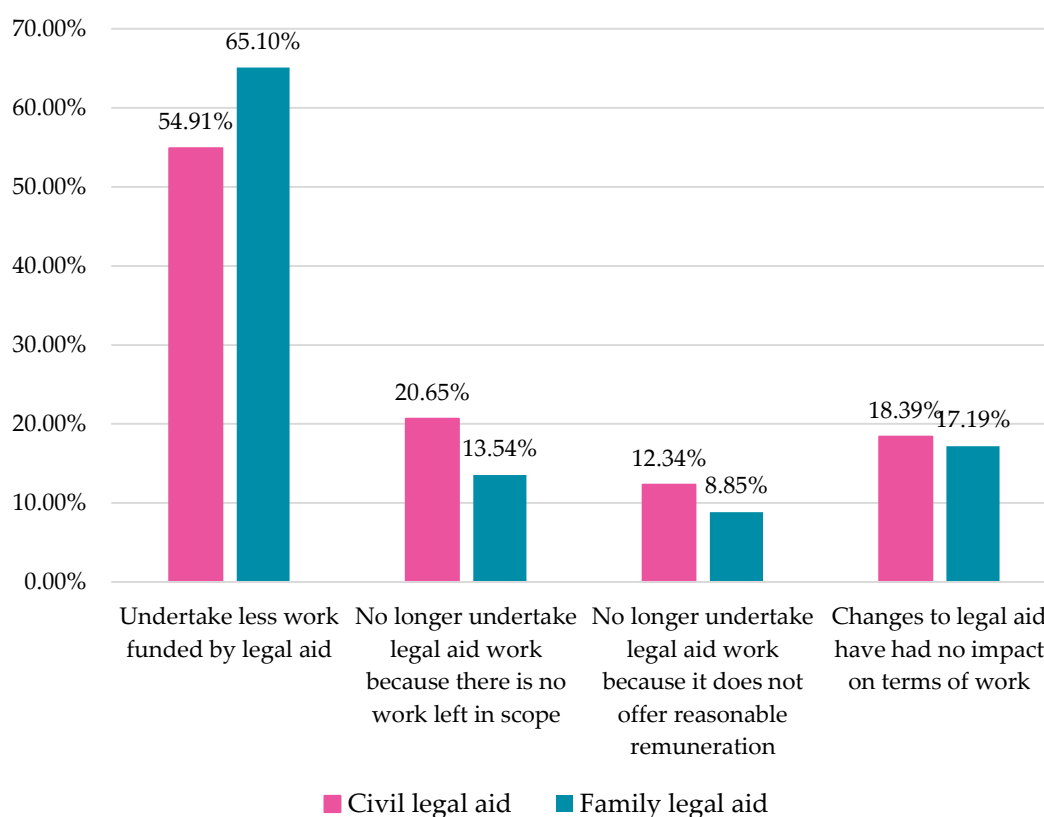
59. Furthermore, 29.44% (68 of 231) suggested that the recoverability of their fees had been affected by court-approved budget reductions. Many respondents who provided further comments felt that this was a likely possibility in the future, but it was currently too early to say.

60. The impact of costs budgeting on the relationship between counsel and their professional client is likely to become more obvious over the next 12 months. If counsel fail to receive sufficient information to provide accurate estimates of work it is likely that resentment will follow court-approved reductions to work which limit counsel's recoverability of fees. This would not be useful to the court as it creates mistrust between parties where working together is a crucial part of the litigation process.

Terms of work

61. Respondents were asked about the impact LASPO has had on the terms of work they are willing to accept. Those undertaking civil and family legal aid work were asked to indicate whether the LASPO reforms had changed the work they did under legal aid.

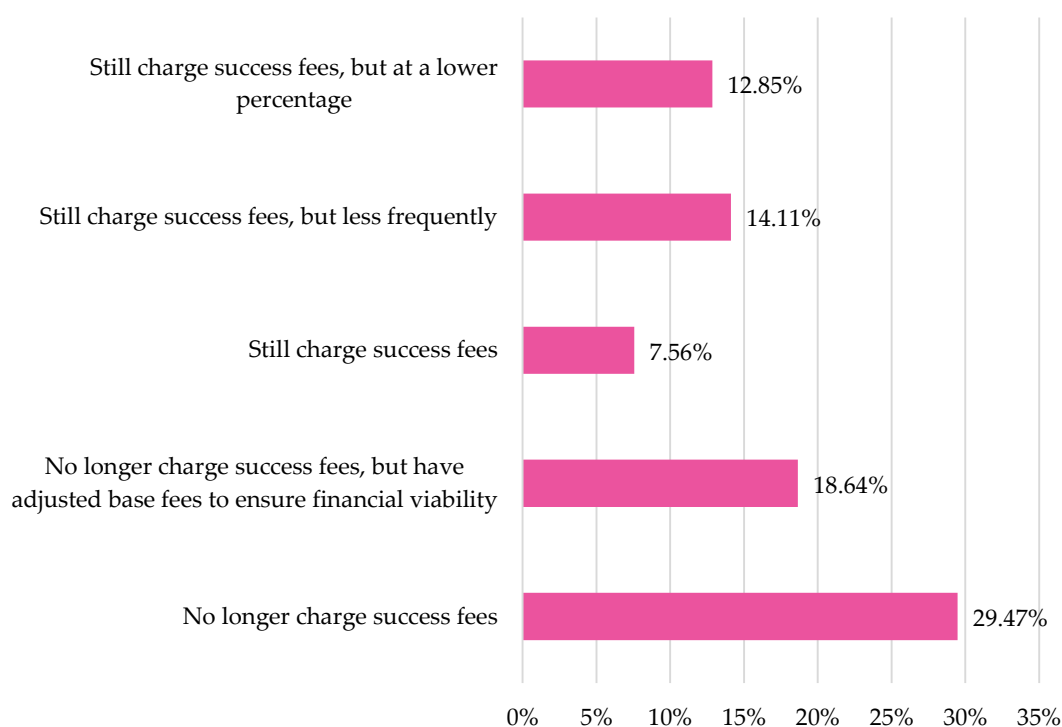
Figure 6 – Terms of work: legal aid



62. Respondents undertaking privately funded civil litigation work were asked how they had resolved issues arising from the implementation of the Jackson reforms. Just under half of respondents (42.54%, 171 of 402) reported experiencing issues with the transition from old-style conditional fee agreements (CFAs) to post-Jackson CFAs.³⁸ Of these, nearly three-quarters (75.72%) had experienced issues with solicitors on old-style CFAs while counsel was instructed on a new-style CFA and nearly half (46.82%) had experienced issues of a solicitor wanting to assign counsel's CFA after the original counsel instructed on an old-style CFA was unable to continue with the case.³⁹ In resolving these issues, over two-thirds (68.62%) of respondents had accepted instructions without a success fee.

63. The removal of the recoverability of success fees has required barristers to reconsider their terms of work for CFAs.

Figure 7 – Terms of work: CFAs

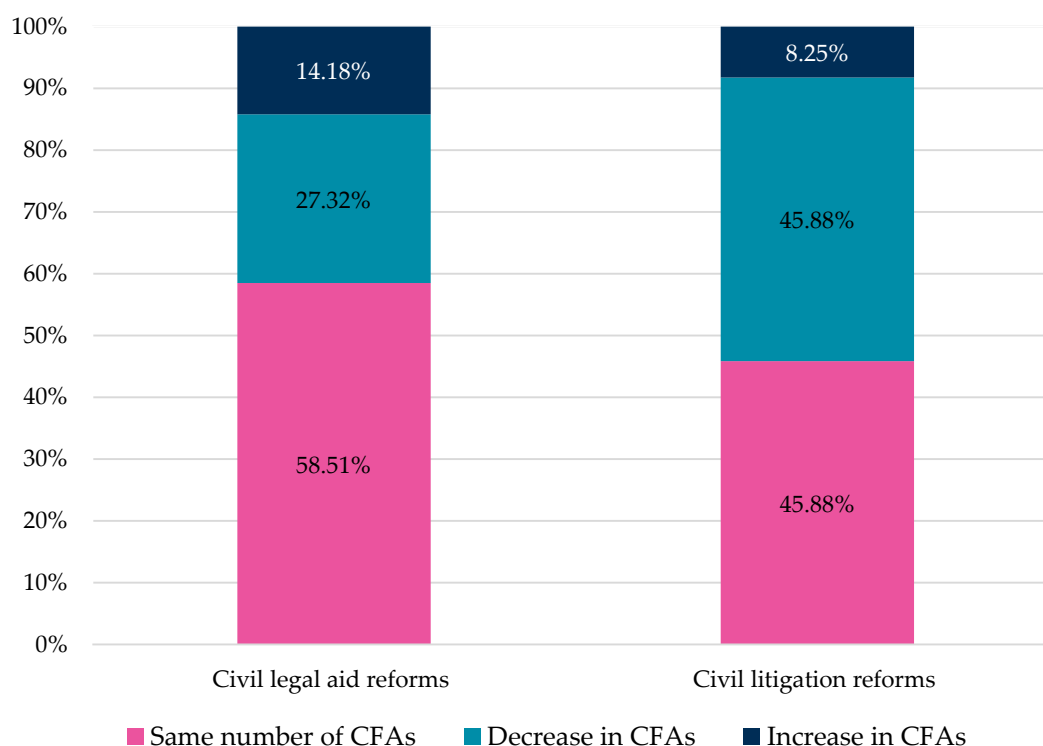


64. Respondents were also asked about whether following the implementation of the civil legal aid reforms and the Jackson reforms they had seen any changes in their volume of CFA work.

³⁸ Paragraph 21 summarises the changes to CFAs from 'old style' to 'post-Jackson'.

³⁹ This situation usually involves a solicitor wanting to move an existing CFA with counsel who was originally instructed under a pre-Jackson CFA to new counsel. The issue therefore arises as to whether the solicitor can assign the existing pre-Jackson CFA to new counsel or whether a new, post-Jackson CFA must be entered into.

Figure 8 – Volume of CFAs following civil legal aid and civil litigation reforms



65. The responses suggest that the Jackson reforms are likely to have had a greater impact than the civil legal aid reforms on respondents' volume of CFAs. This may be, however, due to the fact that there are fewer areas of work funded or previously funded by civil legal aid which lend themselves to CFAs. Conversely, in privately funded work where CFAs may have once been attractive due to the right to recover success fees and any ATE insurance premiums, they have now become much riskier to accept. Over a quarter (27.08%) of respondents indicated that they now require a higher prospect of success before accepting a case, while 27.86% of respondents suggested that the Jackson reforms had forced them to require a higher prospect of success as well as a higher quantum than they would have required prior to LASPO.

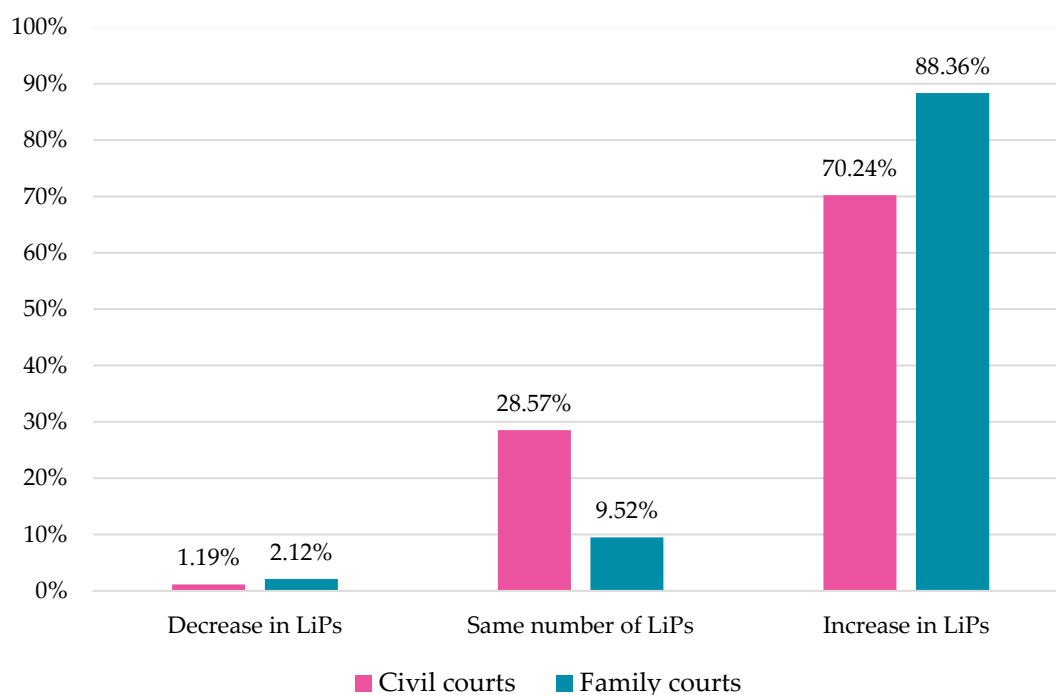
66. Very few respondents had accepted work under a DBA since they became more widely available on 1 April 2013. Only 3.39% (13 of 384) reported working under a DBA post-1 April 2013. Concerns about the use of DBAs still appear to be a significant stumbling block preventing their greater usage, with only 21.61% (83 of 384) indicating they would consider working under a DBA, while 32.03% (123 of 384) would definitely not accept work under a DBA. The further comments provided by respondents suggest that this limited uptake is for two key reasons – poor drafting of the DBA regulations creating uncertainty in the market, and professional distaste for accepting work on the basis of taking a share of the lay client's damages.

Court resources

Litigants in person

67. A substantial increase in the number of litigants in person has been a widely publicised immediately recognisable impact of LASPO. Respondents reported increases in both the civil and family courts.

Figure 9 – Litigants in person in civil and family courts post-LASPO



68. The majority of respondents (81.18%, 302 of 372) believed the increase in the number of LiPs was the direct result of the LASPO reforms, with only 2.15% (8 of 372) suggesting the increase was not related to LASPO at all.

69. In additional comments provided by respondents, key issues raised by those who had represented a client against an unrepresented party included:

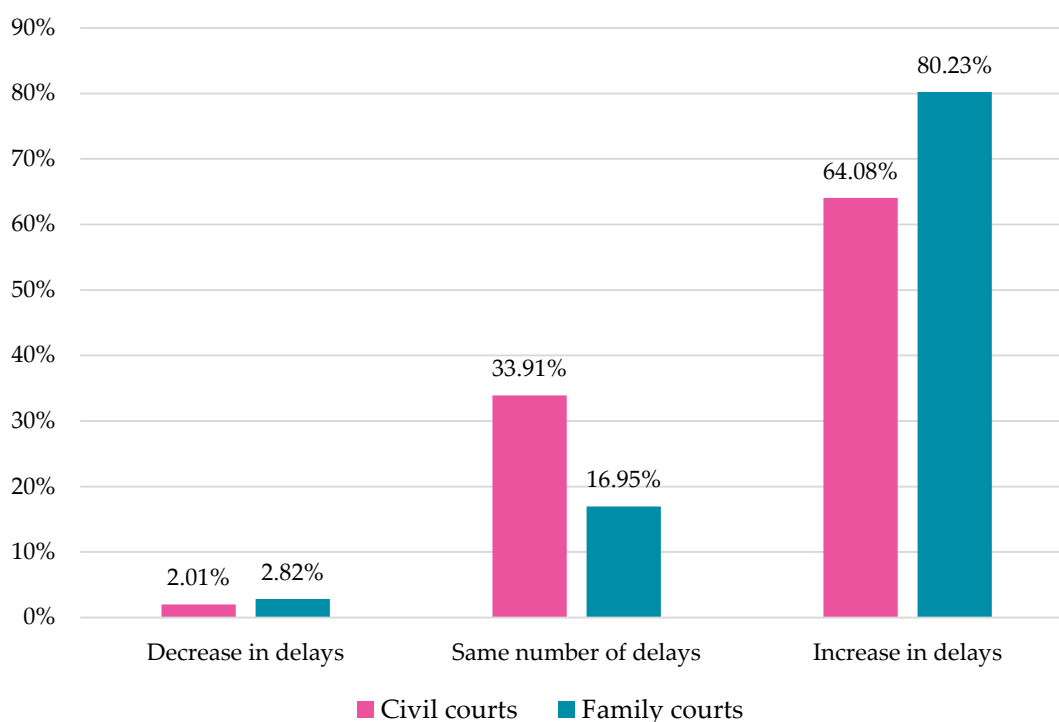
- Increase in workload and inability to focus on the interests and needs of your client
- Difficulties with appropriate disclosure
- Challenges focussing on key relevant issues
- Longer cases, including more time in court and more delays due to unfamiliarity with procedure and reluctance to negotiate outside of court
- Being expected or required by the courts to shoulder the entire burden of administrative tasks which would usually be dealt with by each party as required
- Physical and verbal aggression from LiPs directed towards counsel
- Increase in cost for represented party due to longer running cases and increased administrative requirements, and
- Failure of LiPs to follow court directions and adhere to court timelines.

70. All these issues increase pressure on court resources, which will likely have serious knock-on effects on court budgets and the quality of services provided by the civil and family justice system.

Delays

71. A further consequence of the LASPO reforms has been a suggested increase in court delays, which inevitably take up court resources and create additional court and legal costs. The clear majority of barrister survey respondents reported an increase in delays in both the civil and family courts.

Figure 10 – Court delays in the civil and family courts post-LASPO



72. The majority of respondents (66.39%, 241 of 363) believed the increase in delays was the direct result of the LASPO reforms, with only 6.06% (22 of 363) suggesting the increase was not related to LASPO at all.

73. Additional comments provided by respondents raised further concerns about the impact of LASPO on the courts, including:

- Members of the judiciary feeling unable to perform their role without support of appropriate qualified counsel in court and without necessary court resources and support staff. Court staff and the judiciary are now required to do much more with much less, and
- A shift in the culture from one where people tried to reach a sensible result in a sensible manner to one where solicitors and counsel no longer have the necessary working relationships to support the efficient and effective resolution of cases.

Impact on practice at the Bar

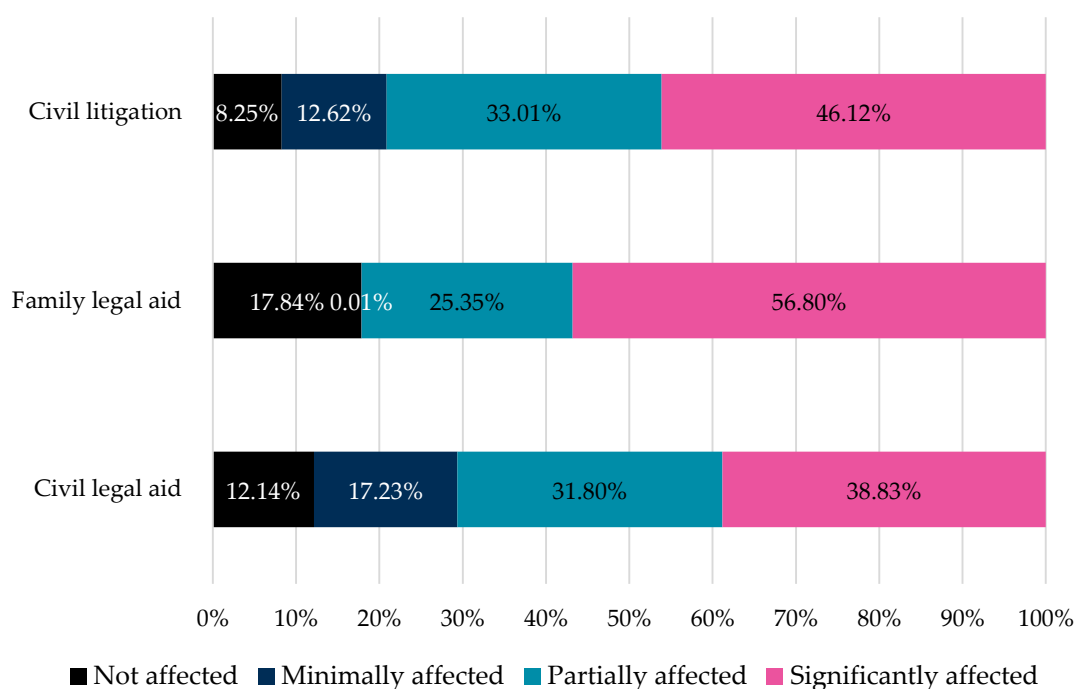
74. The second area the survey focused on was the impact of LASPO on different aspects of a barrister's practice – case volume, fee income and fee security. Respondents reiterated that it remains too early to fully understand the effects of LASPO. This is particularly the case in civil litigation where due to the timelines for litigation and recovery of fees, the full impact may not be tangible for at least a further 12-24 months. The responses, however, provide an important early insight into the current views and experiences of the Bar and provide a preliminary indication that case volume, fee income and fee security have all been negatively affected by LASPO.

The general impact of LASPO

75. Of the 643 barrister respondents, 412 (64.07%) indicated they undertook civil legal aid work, 213 (33.13%) stated they did family legal aid work, and 412 (64.07%) reported undertaking civil litigation.

76. At a general level, it was clear that the majority of respondents who reported undertaking civil legal aid, family legal aid or privately funded civil litigation believe their practice has been partially or significantly affected by the LASPO reforms.

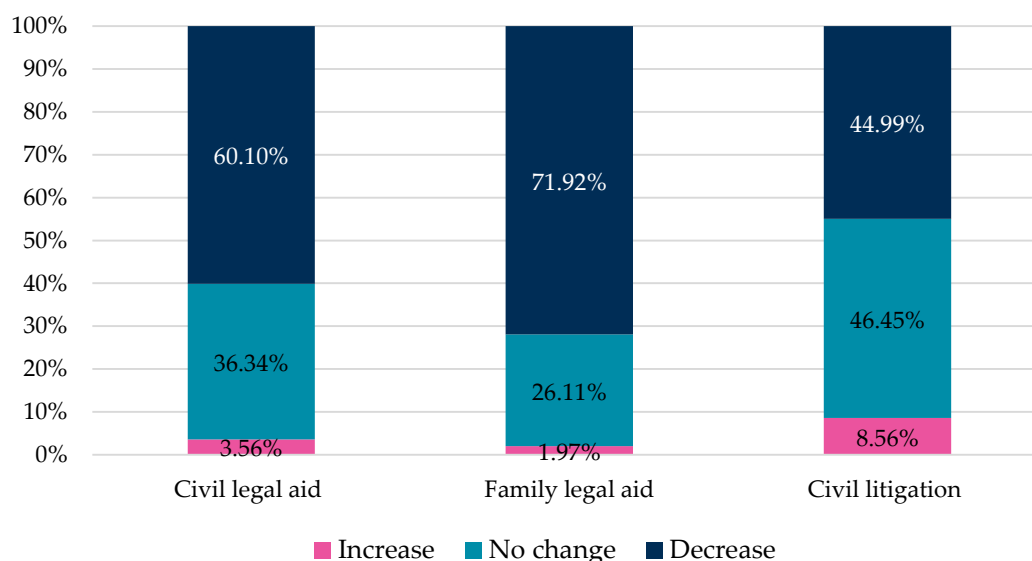
Figure 11 – General impact of LASPO by practice area



Case volume

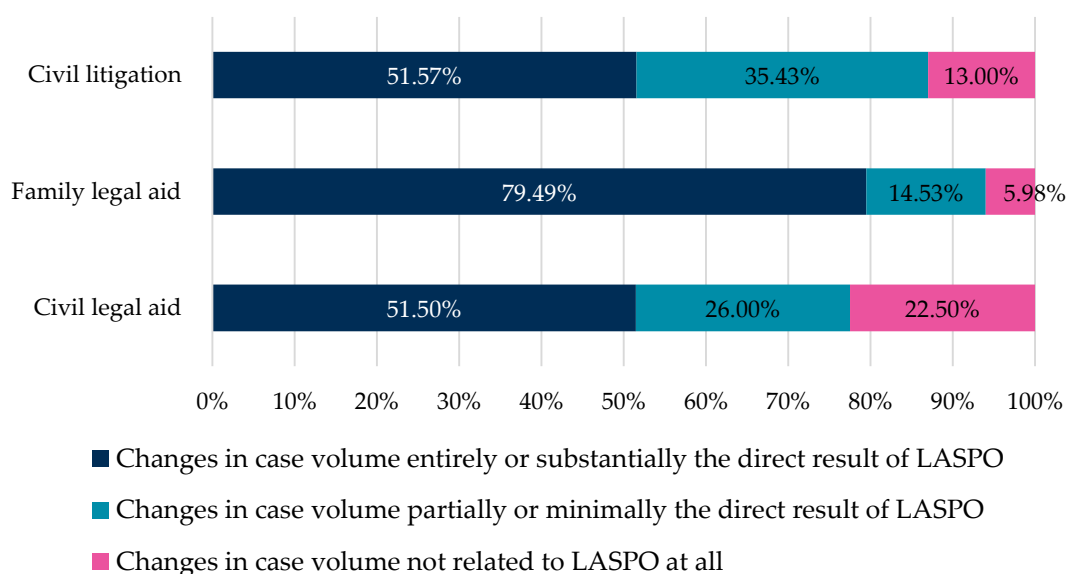
77. The majority of respondents who reported undertaking legal aid work, both civil and family, noted that they had seen a decrease in their case volume following the implementation of LASPO. Nearly half of those undertaking civil litigation also reported a decrease in case volume. Family legal aid practices have been particularly hard-hit in terms of case volume, with 71.92% of respondents reporting a decrease in case volume since 1 April 2013.

Figure 12 – Impact of LASPO on case volume by practice area



78. Family practitioners were also more likely to link changes in case volume between 1 April 2013 and 31 March 2014 to the LASPO reforms.

Figure 13 – Connection between changes in case volume and LASPO by practice area

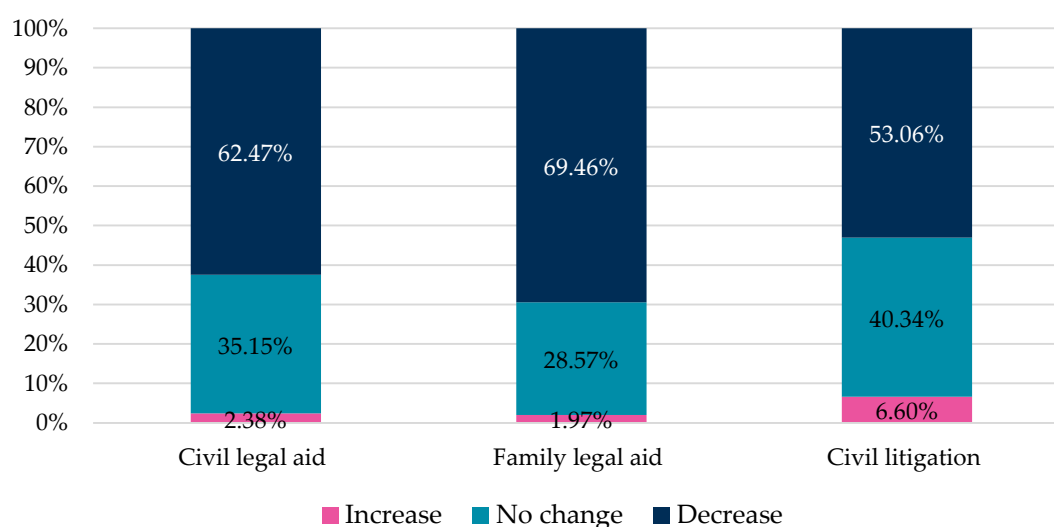


79. The fact that almost half of respondents felt that changes in case volume for civil legal aid and civil litigation work was only partially or minimally the direct result of LASPO, or not related to LASPO at all, is perhaps explained by the almost continuous state of reform which has taken place for civil funding since at least 2011. These reforms have included the implementation on 3 October 2011 of codified legal aid rates for barristers doing civil work, changes to eligibility and merits tests for legal aid, amendments to judicial review processes, and further fee cuts implemented from 2 December 2013. This has created a complex and unsettled market where barristers may themselves find it difficult to identify the precise source of change to their practice. Understanding the cumulative impact, however, should be just as critical as attempting to untangle which initiative is responsible for what changes in practice.

Income and earnings

80. The majority of respondents reported a decrease in fee income,⁴⁰ following the implementation of the LASPO reforms. Respondents affected by the family legal aid changes were most likely to report a decrease in fee income, while those undertaking civil litigation had the highest proportion of respondents who reported no change in their fee income as a result of the civil litigation reforms.

Figure 14 – Impact of LASPO on fee income by practice area



81. Respondents who undertook family work were also most likely to report that changes to their fees received and fees billed from 1 April 2013-31 March 2014, compared to 1 April 2012-31 March 2013, were entirely or substantially the direct result of LASPO.

⁴⁰ Fee income refers to gross income, combining both fees received as well as fees billed.

Figure 15 – Connection between changes in fees received and LASPO by practice area

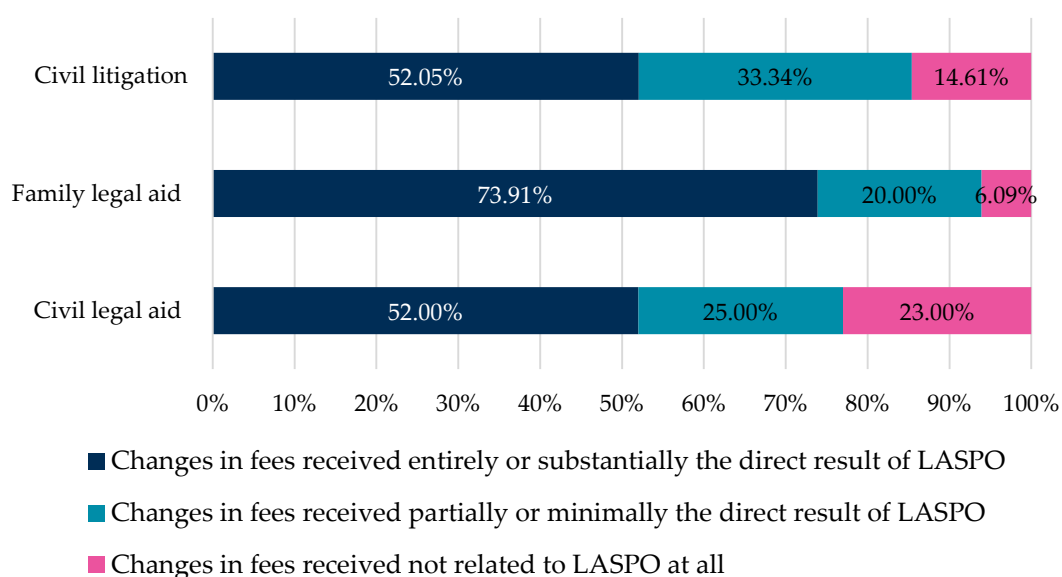
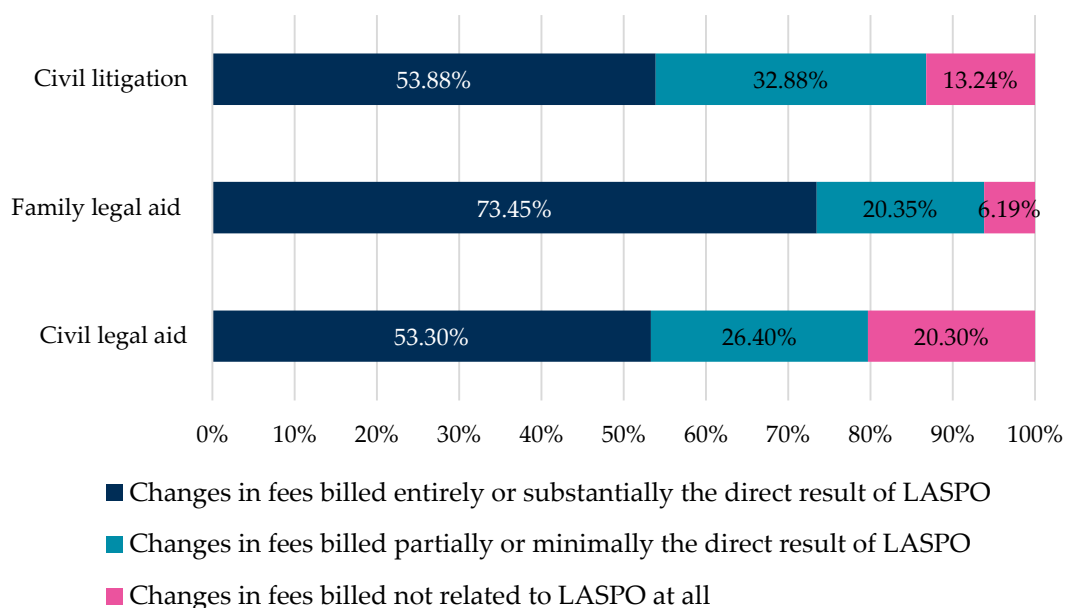


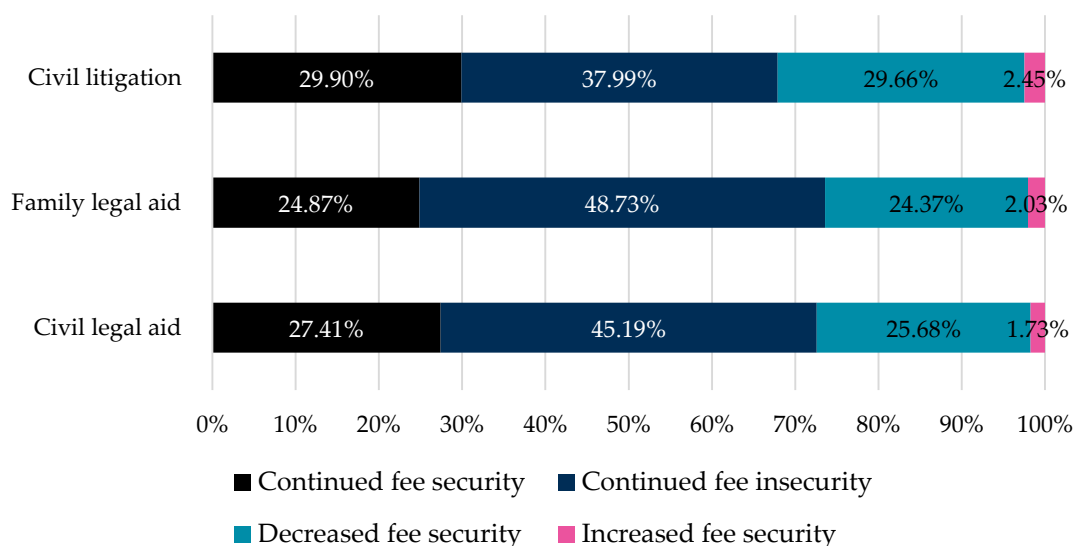
Figure 16 – Connection between changes in fees billed and LASPO by practice area



82. The complexity of the impact of recent changes to funding and eligibility arrangements for civil work, including those implemented under LASPO, is again suggested by the fact that nearly half of respondents doing civil legal aid or civil litigation work felt that changes in fees received and fees billed was only partially or minimally the direct result of LASPO, or not related to LASPO at all. This reflects the views expressed relating to changes in case volume.

83. In addition to the majority of respondents reporting decreases to fee income following the implementation of LASPO, the majority of respondents across all three areas – civil legal aid, family legal aid and civil litigation – reported either continued fee insecurity or decreased fee security since 1 April 2013. This means that the majority of respondents feel they are not regularly paid as agreed.

Figure 17 – Impact of LASPO on fee security by practice area



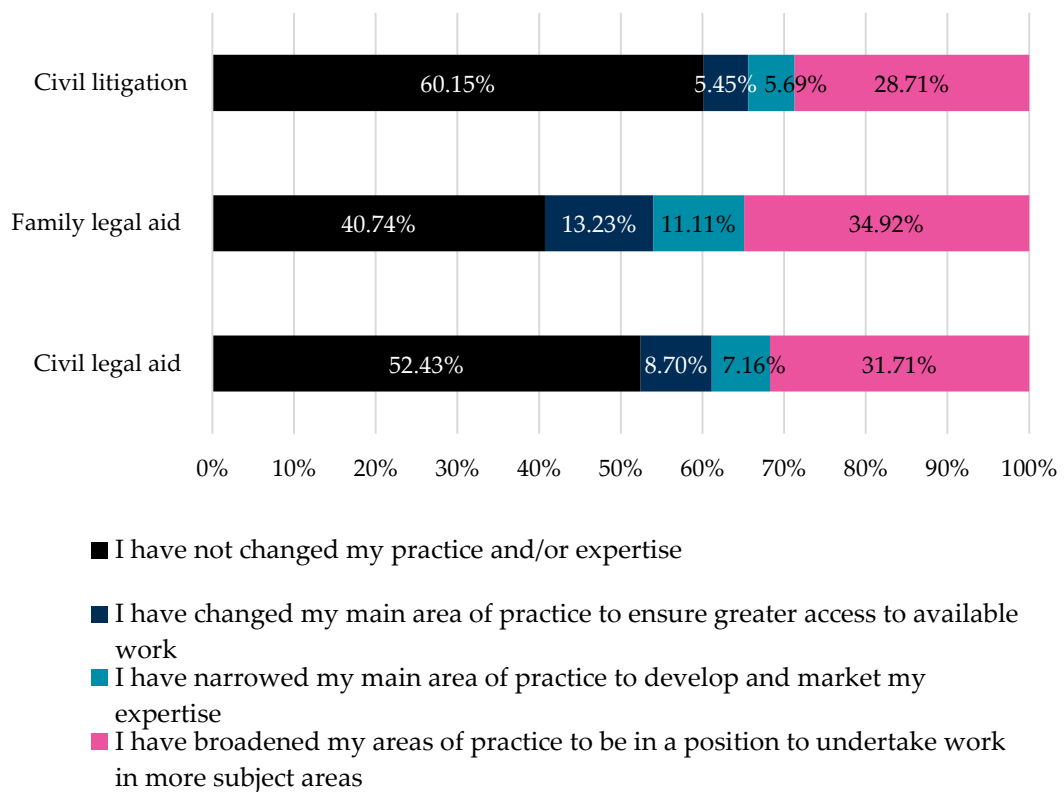
84. The additional comments provided by respondents suggest that this sense of insecurity arises from three common sources:

- Pressure from solicitors to renegotiate fees once a case is complete or the barrister has completed their contribution to the case, often on no grounds, sometimes to ensure prompt payment of fees
- Struggling solicitors firms failing to pay barristers' fees that then enter into administration where the administrator refuses to treat barristers' fees as client monies, and
- The uncertainty surrounding the recoverability of success fees and the treatment of conditional fee agreements caught in transitional provisions.

Career development

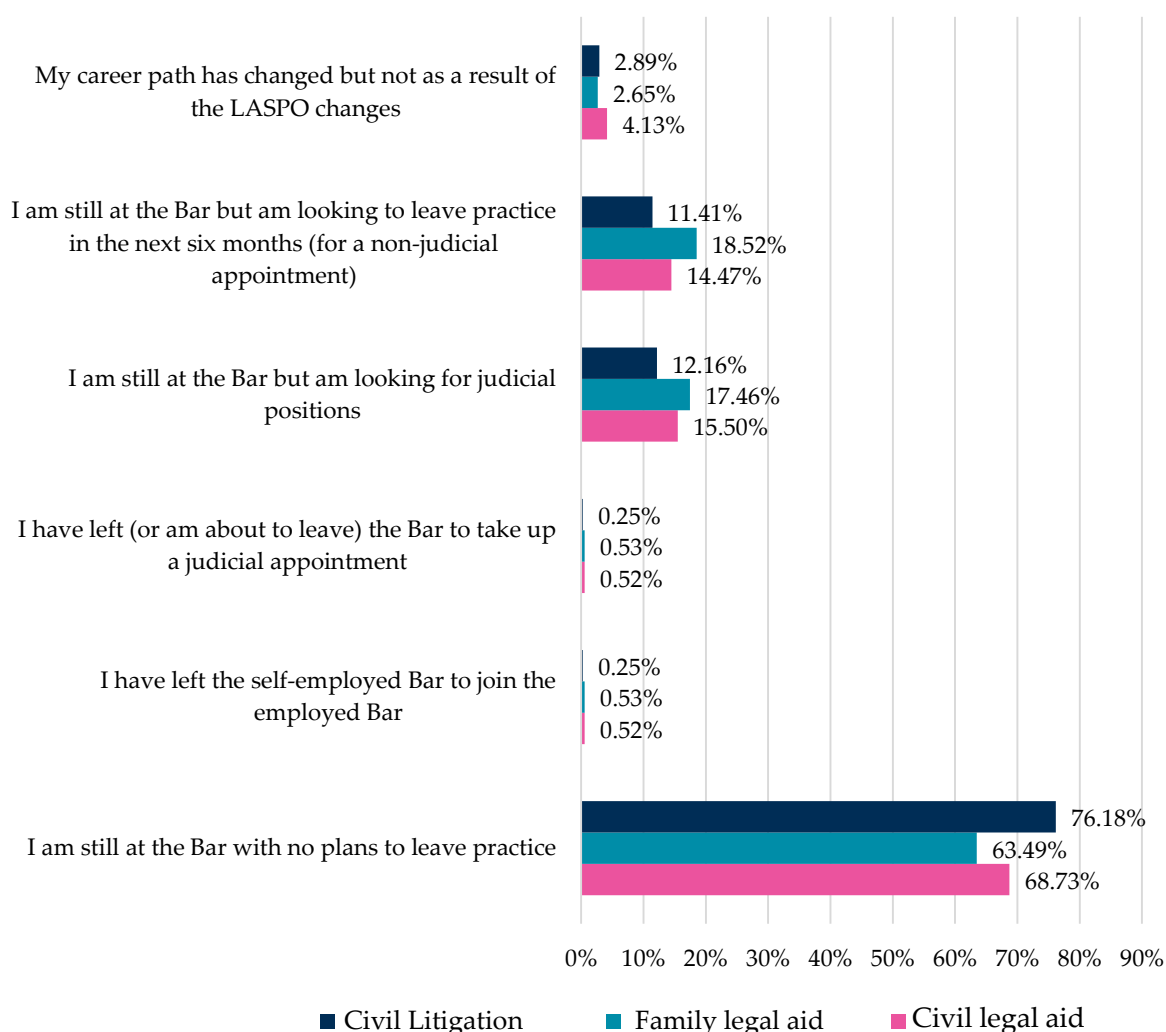
85. With continuing and new concerns about fee security by many at the civil and family Bar, and the removal of whole areas of work from the scope of legal aid, the survey sought to ascertain whether these concerns have influenced the career development of respondents.

Figure 18 – Impact of LASPO on area of practice and expertise



86. While the majority of respondents have no plans to leave the Bar following the implementation of LASPO, there was a significant minority of respondents in all three areas of practice who are looking for judicial appointments or who are looking to leave the Bar before 2015 for a non-judicial position.

Figure 19 – Impact of LASPO on career progression by area of practice



87. While there is obviously a multitude of influences that potentially affect decisions to leave the Bar,⁴¹ respondents that provided further comments suggested that LASPO had heightened their concerns about lack of work, dropping levels of remuneration and issues with the lessening of professionalism in the legal sector, all of which were key motivators to leave the Bar.

88. Further comments provided by respondents also indicate that individuals without immediate plans to leave the Bar now continue to actively review their career options, including both leaving the Bar entirely as well as looking at applying for judicial positions or retiring at an earlier point in their career than they would like to.

⁴¹ See, for example, The Bar Council and Bar Standards Board, 'Survey of Barristers Changing Practising Status: Exit Survey 2011' (2011). Available at: http://www.barcouncil.org.uk/media/18145/15_12_general_council_of_the_bar_leavers_report.pdf

What do we know? Bar Council interviews

89. The survey of the Bar was followed by semi-structured interviews, conducted both face-to-face and over the telephone.

90. The interviews were designed to provide further detail on issues raised in the survey as well as some issues not dealt with by the survey, including exceptional funding.⁴² The focus of the interviews was on the impact of LASPO on access to justice and they sought to provide examples of day-to-day experiences of barristers. The interviews were also an opportunity to meet with organisations that provide frontline services to understand their experience of the impact of LASPO on access to justice and whether these differed from the experience of the practising Bar.

91. Interviews were conducted with 19 individuals. This included 14 barristers, of whom three were QCs. This number of barristers ensured there was an adequate mix of seniority, practice areas, gender and geographic location. There were a further two barristers invited to participate in interviews who were unable to do so.

92. The barrister interview candidates were predominantly drawn from survey respondents who indicated in their survey response that they were willing to participate in an interview. This accounted for 11 interviewees. Where there were no relevant volunteers from survey participants, individuals with the required knowledge and experience for the interviews were invited to participate in an interview. This accounted for three interviewees.

93. Ten barrister interviewees had a civil practice and four practised in family law. Of the civil practitioners, two barristers did not undertake any publicly funded work, three had a practice dominated by privately funded work with occasional publicly-funded cases and five had a practice encompassing both privately and publicly funded work.

94. Of the 14 barristers interviewed, five were based outside London. In terms of seniority, five barrister interviewees were under ten years call, five were over ten years call and three were QCs. One barrister interviewed was a pupil undertaking pupillage at a chambers specialising in family law.

95. One clerk was interviewed. Five further clerks were invited to participate in an interview, but were unable to do so. The clerk interviewed was from a mixed set in London undertaking civil, family and crime work.

96. Interviews were also conducted with representatives from four organisations providing free legal advice, representation or support – the Bar Pro Bono Unit (BPBU),⁴³ the Personal Support Unit (PSU),⁴⁴ the Free Representation Unit (FRU)⁴⁵ and the Royal Courts of Justice Advice Bureau (RCJ

⁴² Exceptional funding was introduced by LASPO s10.

⁴³ Further information about the Bar Pro Bono Unit is available here: <http://www.barprobono.org.uk/>

⁴⁴ Further information about the Personal Support Unit is available here: <http://www.thepsu.org/>

⁴⁵ Further information about the Free Representation Unit is available here: <http://www.thefru.org.uk/>

Advice Bureau).⁴⁶ A further two frontline service organisations were invited to participate in an interview, but were unable to do so. The frontline services were selected to ensure views were collected from different types of free legal service providers with different geographical reach and areas of practice.

Figure 20 – Key of interviewees

Label	Seniority	Practice area	Region
Barrister 1	Under 10 years' call	Mixed civil	London
Barrister 2	Under 10 years' call	Commercial	Outside London
Barrister 3	Under 10 years' call	Family	London
Barrister 4	Over 10 years' call	Family	London
Barrister 5	Under 10 years' call	Mixed civil	London
Barrister 6	Under 10 years' call	Mixed civil	London
Barrister 7	Over 10 years' call	Personal injury	Outside London
Barrister 8	QC	Clinical negligence	London
Barrister 9	QC	Commercial	London
Barrister 10	Over 10 years' call	Commercial	Outside London
Barrister 11	Over 10 years' call	Personal injury	Outside London
Barrister 12	QC	Family	Outside London
Barrister 13	Over 10 years' call	Mixed civil	London
Barrister 14	Pupil	Family	London
Clerk 1	N/A	Civil, family and crime	London
Frontline Service 1	N/A	N/A	N/A
Frontline Service 2	N/A	N/A	N/A
Frontline Service 3	N/A	N/A	N/A
Frontline Service 4	N/A	N/A	N/A

97. The interviews were audio recorded, transcribed and made anonymous. They were then coded in a matrix to allow for analysis of the key themes raised.

Overview of the impact of LASPO

98. Each interviewee was asked to describe the impact of LASPO on access to justice in three words. The responses were similarly negative across all interviewees. Only Barrister 2 described the impact of LASPO in a slightly positive way – “initial chaos improving” – when considering that processes and procedures relating to the Jackson rules were beginning to be clarified through use and experience.

⁴⁶ Further information about the Royal Courts of Justice Advice Bureau is available here: <http://www.rcjadvice.org.uk/>

99. The word “devastating” was used three times, once each by a civil practitioner, a family practitioner and a clerk. The concept of access to justice being reduced or limited was raised by civil and family practitioners as well as frontline service organisations.

100. An overarching theme coming through the words and phrases used was a clear sense of the unfairness of reform and the belief that justice had been politicised to the point where ideology took precedence over the needs of individuals to resolve legal issues efficiently and effectively. Words used included: “political”, “regressive”, “wasteful”, “grossly unfair” and “unevenness”.

101. Asking the interviewees to summarise the impact of LASPO highlighted the fact that none had a positive experience of the Jackson or legal aid reforms, nor, except of Barrister 2, did their words indicate hope for positive change in the foreseeable future.

Figure 21 – Description of the impact of LASPO on access to justice by interviewee category

Civil practitioners	Family practitioners	Clerk	Frontline service organisations
<ul style="list-style-type: none"> • A bit disastrous • Dramatic reduction in access • Detrimental • Political • Regressive • Crippling • Uncertain • Wasteful • Devastating • Demoralising • Not beneficial • Restrictive • Does not assist access to justice • Reduces the likelihood of access to justice • Reduced access to justice • Damaging to lay claimants • Initial chaos improving 	<ul style="list-style-type: none"> • Decimation of the junior Bar • Filled the courts with litigants in person • Reduces, restricts and delays • Devastating 	<ul style="list-style-type: none"> • Devastating • Grossly unfair • Extremely concerning 	<ul style="list-style-type: none"> • Shafting the poor • Lack of access • Unevenness • We can't stem the flow of people • The numbers have gone up

Access to advice and representation

102. Interviewees were highly concerned that both the Jackson reforms and the changes to civil and family legal aid had severely restricted the ability of individuals to access necessary legal advice and representation. The LASPO reforms were largely felt to be a clear political statement against access to justice and the provision of legal services, where “cost cutting has overtaken access to justice”⁴⁷ and barristers and solicitors were no longer able “to assist people in a meaningful way”.⁴⁸ Barrister 6 stated that the reforms have “been detrimental to the justice system as a whole”, continuing:

“It has clearly restricted access to justice. It does not even pretend to do otherwise so it is reducing the availability of lawyers and legal advice to a whole range of people and it perhaps does not understand that when you take away legal advice you take away access to justice.”

The Jackson reforms

103. In relation to the Jackson reforms to the costs of civil litigation, barrister interviewees with primarily privately funded civil practices were happy to recognise that reform was required:

“I think everyone recognises that reforms were required. Before the reforms came in, I was involved with both claimants and defendants in quite a large number of claims that were funded in what is now the old fashioned way of CFAs and ATEs and I was left with a very uncomfortable feeling that some claimants’ lawyers were abusing those arrangements. That there were insufficient sanctions to deter that sort of abuse and that defendants were being deprived of effective access to justice or access to court because it was completely economically irrational to defend cases even where there was a very strongly arguable defence.”⁴⁹

104. Despite recognising this need for reform, barrister interviewees with primarily privately funded civil practice were deeply concerned that the reforms implemented had gone too far in that they had not restored balance to litigation but simply moved litigation from being overly claimant-friendly to excessively defendant-friendly:

“You have pendulum which swings for example, pre-Jackson I accept the pendulum would have swung to one particular side and lawyers did very nicely and in fact too nicely out of civil litigation. We are now right on the other side whereby the cuts or the reforms rather have simply cut too deep.”⁵⁰

105. There were concerns raised about the impact this dramatic shift in the market had had on the quality of legal advice and representation. Two barrister interviewees raised specific concerns about low value claims processed in high volumes without the necessary care and expertise. Concerns were

⁴⁷ Barrister 11.

⁴⁸ Barrister 13.

⁴⁹ Barrister 9.

⁵⁰ Barrister 11.

also raised about how a lack of appropriate funding created a severe limit on the ability of counsel to do their job properly and affected the type of service provided to individual litigants:

“I think the advice [individuals] get and the service they get following the reforms will not be at the level it ought to be if their case is to be managed properly. I think they can’t access it easily and I think when they do access it because of the limitation on the fees paid to solicitors, they are not going to get the level of service that their case requires.

“I have clients turning up at court who have only spoken to the solicitors once, the witness statement is poor, the schedule of loss is drafted badly and the bloody case is pleaded wrong and so claimants are losing their cases. Or even if I win the case they are not getting the value of the money because I can’t then rectify the schedule on the day of trial. I do not get the case until the day of trial or the day before trial and all of this is not a whinge about Counsel aren’t getting enough money, it is about the reason this has happened is not enough money is being put in the pot.”⁵¹

Post-LASPO funding mechanisms

106. Those with mixed practices, undertaking both publicly and privately funded work, were very concerned about what funding mechanisms remained available post-LASPO with both civil legal aid reforms and the Jackson changes being implemented at the same time.

107. Four barrister interviewees were particularly concerned about how the Jackson reforms had impacted the economic viability of undertaking work under CFAs. Some cases where damages were sought which were previously eligible for civil legal aid may have been picked up by a barrister under an old-style CFA with recoverable success fees and ATE premiums. With this recoverability now gone, the interviewees noted that they were looking more carefully at the likelihood of success and the quantum of damages, regardless of the merits of the case or an individual’s need for advice and representation. This had seen interviewees reject worthy cases as an unreasonable commercial risk, including cases with complex disputed legal issues where a court decision could very usefully add to the development of the law:

“For me it means that for example taking over success fees on CFAs suddenly means that I am much more wary about taking on the CFA because my understanding was that the whole point of a CFA was to insulate you against claims that were unsuccessful and without that insulation you are obviously far more exposed if you take on a case that does not go somewhere. I recently had to advise, shortly before trial, after a late disclosure that a case no longer had sufficient merits to justify the insurance and that case discontinued. That is obviously what happens with CFAs and I didn’t get paid anything. Previously that would not have been so disastrous as I may have had another case with a success fee which would give me ample pay to make up for that which I don’t have.”⁵²

⁵¹ Barrister 7.

⁵² Barrister 1.

108. Barrister 7 summarised the position simply: “I am much more reluctant to take cases on, solicitors are more reluctant to take cases on and therefore the only person who suffers there is the claimant.”

109. Barrister 8 was also concerned that that failure to provide for recoverability of success fees was contrary to the nature of the English justice system as it would force any success fee to be recovered from damages recovered:

“So there are two options, either people look at the case and think that it is not a bad case but I am not going to take it because I cannot afford to be out of pocket for seven years and I can’t afford to do that for no uplift at the end of seven years and suffer the financial hardship on an ongoing basis. Or they might take the case on anyway and then try to recover the money from the patient’s pain and suffering award at the end but that leaves the patient out of pocket and the fundamental premise of English justice is that the patient is entitled to be compensated. They are not compensated in that case ... it is bonkers.”

110. Interviewees with primarily publicly-funded practices were also concerned about individuals who did not qualify for legal aid, whose cases involved no or very little damages and were unable to pay up-front costs of legal advice or representation. These cases are not suitable for CFAs and would therefore be highly unlikely to be eligible for ATE insurance:

“Our major problem is looking for what you might call replacement mechanisms of funding when there is no legal aid either in civil litigation or judicial review. The first problem is the new types of conditional fee agreements. It is extremely difficult if not impossible to get after the event insurance.”⁵³

111. Concerns about the absence of funding mechanisms was not limited to non-damages cases. Barrister 9 provided an example of where it would be difficult to bring litigation in a case with medium-value damages but in an area of law that still required further court clarification:

“I have an individual who has arguably been wronged by a profession who comes to see me where the quantum of the claim is anywhere between £200,000 and £600,000. Unless the error is absolutely clear cut and liability issues are absolutely clear cut it is probable that I will have to advise that it is economically irrational to bring the claim. There are no satisfactory ways to fund such claims, and there are no satisfactory ways of limiting the potential liability for the other side’s costs. The consequences of failure will typically wipe out the individual financially and make such claims unviable.

“This is a case where the individual was entirely blameless and has been wronged by a profession and its regulatory body. It is a classic case of a piece of meritorious litigation which raises major public interest issues which cannot be brought under the current arrangements. Because I felt aggrieved on the litigant’s behalf I would have done it on a nil uplift CFA, I would have almost done it pro bono but the problem was the other side’s costs. The other side were not going to give cost capping arrangements and we were not going to agree to

⁵³ Barrister 13.

bear our own costs. The other side knew perfectly well what the result would be and the result has been there has been no litigation for this matter which is troubling.”

112. Without a suitable funding mechanism these cases would either simply remain unresolved or would force individuals to pursue claims as litigants in person. This has serious consequences for individuals looking to enforce their rights and obtain suitable remedies, as well as for the development of the law.

113. Barrister 9 also highlighted that DBAs had failed to be properly implemented by secondary legislation, thereby preventing the development of a viable alternative funding mechanism:

“The regulations make it almost impossible for sensible solicitors and barristers to undertake work on the basis of a DBA as they contain so many ambiguities and uncertainties and apply the nuclear sanction that, if you get it wrong, you recover nothing. It is absolutely outrageous. One is left feeling that if I get this wrong or some costs judge in due course takes a different view on these regulations to the view I have taken I am going to end up doing potentially two or three months’ work and get paid nothing for it on a technicality.”

114. The absence of appropriate funding mechanisms also has a serious impact on frontline service providers offering free legal advice and representation due to significant increases in demand for their services:

“We are seeing a 40% increase, and one month an 80% increase, in applications and that is massive. We are lucky that we have got a good reputation, but there is a limit and if applications carry on increasing the way they are at the moment we are going to get to the point where we are going to have to be stricter. It means a lot more people are going to go unassisted.”⁵⁴

“We have tried every way to be able to accommodate the demand on our service and we are trying desperately, we tried to increase our rotas, we have had another recruitment drive, we are desperately trying to help people but I suspect that we are mismatching service with the demand that is out there really.”⁵⁵

LASPO and the wider civil and family justice system

115. While barrister interviewees were very concerned about the impact of LASPO legal aid and civil litigation reforms, they were also quick to assess LASPO as simply part of a wider political process of reducing access to justice and limiting access to appropriate funding mechanisms through continuous civil justice system reforms:

“There has been a serious assault on access to justice, of justice itself, by the government round every six months for the past two and a half to three years so you have got LASPO then you have got the change to the immigration rules which were outrageous and then you have that followed by the latest round of cuts and that followed by the new changes to

⁵⁴ Frontline Service 1.

⁵⁵ Frontline Service 4.

judicial review and that is going to be followed by the Immigration Act, all of which is designed to reduce access to justice.”⁵⁶

116. A serious concern raised was that even when legal aid was available, the fee rates have been so decimated since LASPO was implemented that it is often uneconomic to take on the work:

“I basically turn down all civil legal aid. I generally turn it down unless I want to do the case, unless it’s the kind of case that I would be interested in doing pro bono anyway. The rates for most of my cases have literally halved.”⁵⁷

117. The low level of funding available for legal aid work also has an impact on the ability of individuals to determine whether they are eligible for public funding:

“A lot of people who I see in court unrepresented might be entitled to representation if a solicitor could talk to them for long enough to find out.”⁵⁸

118. Without appropriate funding to undertake this work, however, it is unlikely a solicitor would be able to justify discussing a legal issue for any considerable length of time if there is remunerated work they could be conducting instead.

119. The new judicial review remuneration reforms that followed the implementation of LASPO where work is completed at risk,⁵⁹ were also a serious concern for interviewees undertaking publicly-funded civil work:

“I think my judicial review instructions have dipped quite significantly and I think that is clearly because there is far too much risk involved. I see emails go round chambers saying is anyone available to take on this permission hearing and then explicitly stating if you don’t get permission you won’t get paid. Why would I leap out of my seat? You want to be doing a job where you can do the right thing and help people who need to be helped but if someone says to you there is this case, here is a three line summary, if you don’t get permission you won’t get paid, do you want to do it? Well no I don’t really. Why would I take that risk because it can be that the value of the case or the prospects of it succeeding and its complexity are all very separate things and take an awful lot of work.”⁶⁰

120. The changes to legal aid remuneration that were implemented after LASPO have therefore worked to compound the impact of LASPO by making what legal aid work remains in scope unattractive to practitioners.

121. Frontline service providers were also very conscious of the impact of market changes on their ability to carry out their work, especially for those that operate as referral services and are therefore reliant on organisations to refer work to them. Where referral organisations are no longer able to

⁵⁶ Barrister 5.

⁵⁷ Barrister 6.

⁵⁸ Barrister 5.

⁵⁹ The amendments were put in place by the Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014. These amendments provide that payment from the legal aid fund for some judicial review work is dependent on the outcome of the case.

⁶⁰ Barrister 1.

operate due to significant shifts in the market, this has the potential to disrupt the volume of cases captured by frontline services:

“People are still managing to access us which is something we had been concerned about but we are conscious the landscape is liable to change with referral agencies, you know, some survived but we are aware that that survival might be quite precarious so you are watching all the time as to what is going to happen.”⁶¹

122. Pressure on referral agencies also has an impact on the quality of work received by frontline services providers and which in turn has serious consequences for the workload of frontline service providers:

“Historically, solicitors used to refer to us the most, and a solicitor referral would be a very well organised bundle, then solicitors referred less and less, as did CABs who used to be our next biggest referral. Now MPs have come in, because no one can get an appointment at a CAB. We have tried to make it as easy as possible by telling referral agencies that they just need to sign an application form as a minimum, which means an applicant is then sending us an application form with nothing and then it is taking five or six emails for us to get across to them what documents they need to provide.”⁶²

123. This situation is also challenging for frontline service providers who themselves refer clients to other service providers:

“It is very difficult to refer people out. So it does often worry me about where they are going to go and what they are going to do at the end of it.”⁶³

124. Taken together, there was a clear consensus between barrister and frontline service provider interviewees that LASPO has had a deliberate detrimental impact on access to justice and that this has been exacerbated by other system reforms implemented after 1 April 2013.

Litigants in person

125. Interviewees were asked about their experience of LiPs following the implementation of LASPO. Barrister 2 and Barrister 10 felt largely unable to comment on the situation. This was also the case for Barrister 8 and Barrister 9 who noted they had little first-hand experience of the issue due to their seniority and the types of cases they were instructed in.

126. The remaining nine barrister interviewees, as well as the four interviewees from frontline service providers, all raised concerns about a perceived increase in the number of LiPs in court and the multitude of issues this gave rise to. Barrister 5 described the experience of watching and appearing against a LiP:

“It is irritating and really annoying sitting in court listening to people represent themselves for hours talking rubbish. It is essentially like the frustration a surgeon would feel watching

⁶¹ Frontline Service 3.

⁶² Frontline Service 1.

⁶³ Frontline Service 4.

somebody try to take out their own liver with a spoon. It is really annoying as you can't help, there is nothing you can do to help, particularly if you are representing somebody else as you will just wind up the Judge, but also you do not know the facts and there's very little you can do. It is very frustrating watching people wasting court time."

127. Interviewees raised specific concerns about the increase in LiPs. Barrister 12, who is a family QC and a Recorder,⁶⁴ described the difficulties of dealing with the cross-examination of a litigant by her former partner, who was unrepresented and who had been accused of domestic violence:

"The courts are full now of litigants in person. Last week I was sitting in a horrendous case where there had been lots of domestic violence and the father could not get legal aid, he was a litigant in person, it would have meant cross examining the woman who he had beaten seven bells out of over the last fifteen years but a barrister stood in and represented him pro bono. That should not be happening."

128. Barrister 4, Barrister 5 and Barrister 12 raised specific concerns about the ability of LiPs to sufficiently organise their cases to ensure that the necessary evidence and issues were put before the court. Barrister 12 gave an example of sitting as a Recorder where it was only by chance that they came across crucial evidence which went to the key issues within the case:

"I am not given the papers beforehand so I am then on catch-up trying to read the lever arch files of evidence. The mother was alleging that the father had raped her and she was represented by a barrister who referred to some evidence but did not take the father to that evidence but I looked as I was sat on the bench as I was not aware that it was in the bundle, and I found it and it showed that the mother was lying. If I had not found that evidence I would think that this mother was telling the truth and would probably make findings that the father had raped her. When you talk about the access to justice it is not just the vulnerable people having to represent themselves but some of them are facing really serious allegations, you can't get much more serious than rape and there is the danger that that finding would have been made because judges that aren't given the time either get these bundles and prepare."

129. Barrister 4 provided examples of where the court had been too generous to a LiP, but also where a LiP had been unable to represent themselves effectively:

"I have had to appeal a case because the other side was not represented and the judge allowed him to take certain steps that I don't think ever would have happened with a represented litigant. I have had other cases where I have won against a litigant in person where I think perhaps had they been represented they would have brought better evidence forward and it was a finely balanced case. I am not saying I won when I shouldn't have but it should not have necessarily been quite so easy."

130. The cost implications of these cases, as well as their impact on the quality of access to justice, are significant. Barrister 5 noted that it was illogical to pay more for court time when a legal aid lawyer could have dealt with the issue more cost-effectively:

⁶⁴ Fee-paid, part-time judge.

“People turn up with all the papers they have ever had and they just present them in a pile to the judge and there might be a case in there but there might not but it costs a lot of money and we do not have an inquisitorial system here. We cannot afford to pay for judges to go through that stuff as it costs a fortune. So you essentially have two choices. One is that nobody ever goes through the papers and the judge kind of glances at it and tells somebody well you do not have a case or you have presented your case insufficiently clearly to me to allow me to come to a proper decision on it. Of course the other possibility is that the judge essentially does the work of a legal aid lawyer for much greater expense.”

131. Interviewees raised further concerns about the costs incurred by court delays created by LiPs:

“Litigants in person in the District Court are blocking up the courts all the time as they can’t agree anything, whereas when you have Counsel or solicitors present they will agree many issues meaning there are fewer issues that the court needs to deal with. Litigants in person come into the court and they are there all day fighting.”⁶⁵

“When I have been against litigants in person all it does is prolong the case. The last time that I was against a litigant in person landlord, what should have been a one day trial turned into a four day trial, so that increased both the impact on court time, increased the draw on the legal aid budget because I had a legally aided client, and in the end increased the cost liability for the landlord. It shifts all the impact on to people.”⁶⁶

Court resources

132. A serious concern raised by barrister interviewees was court delays created by the implementation of reforms. For Barrister 8, the Jackson costs management reforms have been counter-productive:

“Far from bringing these cases to trial any sooner it is taking between six months and 12 months to get the first proper listing CMC brought forward. So the complaint is that the people who I am acting for, who need money not in a year or two time, who need money now in order to fund care, they are being deprived of that for an additional year. So it has had a completely counter-productive effect.”

133. Barrister 6 suggested that the current court delays will simply force litigants and their lawyers to “take a commercial view of it and what will happen is people will settle rather than wait years and years and years.” While removing cases from the courts will undoubtedly lighten court caseloads, there is also the possibility that people will feel forced to settle for far less than they may have been entitled to.

⁶⁵ Barrister 7.

⁶⁶ Barrister 13.

“Of course if the court caseload goes down because there are fewer cases then that will free up time but assuming that the cases are real disputes it can’t be a desirable aim to see people who seek justice dissuaded from proceeding with it because the access isn’t there.”⁶⁷

134. A key concern in relation to court resources raised by interviewees with a family practice was the impact that LASPO has had on the judiciary.

“I can see the whole thing imploding in some way because if the court is being filled up with litigants in person on the private law stuff how do the judges get the care cases in where they are under pressure to get them finished within the 26 week time limit. You get a sense of the frustration and the anxiety with the judges that how are we meant to do this? Judges are just too overworked or not overworked necessarily but their lists are so busy and now they are having to be judge, counsellor and adviser.”⁶⁸

“There seems to me to be quite low morale on the part of judges at the moment. The service, if you can call it that, from the Court Service is just so low now it tends to be virtually non-existent. Most courts I go to don’t even have a drop-in counter services, they have got rid of that which just seems completely bonkers and so frustrating if you need to do anything urgently and you can’t get hold of anyone. The service provided to judges by the court staff, such as their clerking, seems to have been reduced. Judges just seem really miserable.”⁶⁹

135. Barrister 3 also suggested that if there were to be more LiPs there would have to be more judges to meet demand. Even in a more inquisitorial-style system, though, lawyers would still be a necessary part of litigation, meaning there would be little likelihood of savings to the public purse:

“The current stock of judges can’t handle all of these people as litigants in person, there are going to have to be more judges. There will still have to be lawyers too because litigants in persons don’t see the woods for the trees, they do not know that the infidelity is not as important as the child’s wishes and feelings or that mismatched socks is not a sign of neglect. They do not know these things and they will say everything to the judge and the judge will take four or five times as long to get to the real issues, so they will still need lawyers and they still need to be paid.”

136. Ultimately, interviewees suggested that there has been a loss of expertise in the court systems that will be difficult to replace. Frontline Service 2 stated that it is not just legal aid that has been removed, that austerity reforms to the Courts Service has had a profound impact on court users:

“HMCTS has been cut to ribbons, so lots and lots of staff have been made redundant, I mean you are talking thousands of people so that is a huge loss of expertise to our system. Court counters are no longer, court counter times have been cut or it is by appointment only or instead of filing papers you now have drop boxes and this kind of thing. In terms of access to justice this has had profound effects that I don’t think anybody knows about.”

⁶⁷ Barrister 10.

⁶⁸ Barrister 12.

⁶⁹ Barrister 4.

Exceptional funding

137. One area of concern which the survey of the Bar did not address and which has emerged as a serious concern during the life of this research project, is exceptional funding. Exceptional funding was introduced by LASPO⁷⁰ and was passed through Parliament as a 'catch-all' provision for cases that needed public funding but which were otherwise outside subject matters covered by legal aid.

138. The reality of exceptional funding has proven to leave much to be desired. This is reflected by respondents, none of whom have had any experience of the exceptional funding process. Comments provided by barrister interviewees undertaking civil and family legal aid work included:

"I tried to work with it with some solicitors but now they just say it is not worth it, it is meaningless."⁷¹

"The solicitors just laughed at me and I said 'why what's funny?' and they said 'have you actually seen one of those forms'? The general feedback I have had is that it is not worth the paper that it is written on and all that it does is create further hours and hours of work for solicitors, unpaid, and so a lot of them don't even want to get involved in doing it."⁷²

Solicitor-barrister relationship

139. Barrister interviewees were asked about how LASPO had affected the relationships they have with solicitors. Barrister 8, Barrister 9 and Barrister 12 all reported little, if any, impact on their relationship with solicitors. They all suggested, however, that this was likely the result of their seniority and the nature of their cases.

140. For junior practitioners, however, the situation was different. Barrister 10, Barrister 13 and Clerk 1 reported poorer quality of work done by solicitors, while Barrister 13 and Clerk 1 noted increased pressure from solicitors to provide free initial advice as to whether or not it is worth starting a legally-aided case.

141. Barrister 6 noted that the Jackson reforms and sanctions for failure to meet court requirements had made them feel "much more likely to have to tell your lay client to take legal advice that the solicitors may have been negligent". They also reported being constantly called upon by solicitors to advise on points of procedure, largely because of worry about cost sanctions and professional negligence:

"I am worried that the professional client may blame me if they miss a deadline and I feel an increased responsibility for making sure deadlines are kept."

⁷⁰ Section 10.

⁷¹ Barrister 13.

⁷² Barrister 12.

142. Barrister 2, however, feels that the Jackson reforms and the introduction of costs management has been a positive change:

“I think that the impact of cost budgeting has probably meant that there is an earlier and closer dialogue about fees and costs and obviously a lot of it will happen in the first place with my clerks but it does mean that counsel and solicitor get talking about where the case is going in perhaps a bit more detail than they otherwise would and talk about which stages are going to cost. I suppose what has happened is that it has kind of forced clients who might otherwise have been inclined to start a case and let it run, have that conversation and from that perspective I think it probably is a good thing both for quality of service being provided to the client and for us acting professionally to make sure we have covered all the bases.”

143. From Clerk 1’s perspective the LASPO reforms have strained relationships between solicitors and chambers as the competition for a decreasing pool of work has increased and this has had an impact on the quality of work provided to barristers:

“One area that we have seen a big difference is solicitors are now taking cases in volume wherever they can and because of that the quality of instructions has markedly decreased. They take on so many more cases just to make ends meet but you are getting papers six, seven, eight o’clock at night poorly prepared, missing documents and that in turn does have an impact on access to justice because Counsel can’t be fully prepared.”

144. Clerk 1 also reported that even where a barrister is instructed, barristers often accept work without any certainty of payment:

“It wouldn’t be so bad if you actually got paid for the work you did but as most chambers will tell you, you can probably forget about a third of your aged debt because you are just not going to get it.”

Alternative dispute resolution

145. One of the predicted benefits of LASPO was that it should encourage increased use of alternative dispute resolution (ADR) processes, particularly mediation. Again, this has proven not to be so:

“People will not mediate anymore. Mediation was considered the big solution but it is not because it only really works in the context of litigation and only really works when people have legal advice and if they don’t it won’t work.”⁷³

“We have a mediation suite available, but it is just not walking through the door, it is not being referred. I think because people’s perception is that because there is no legal aid people don’t realise you can still get legal aid for MIAMs. It certainly just sort of vanished.”⁷⁴

⁷³ Barrister 13.

⁷⁴ Frontline Service 4.

146. Barrister 3 also highlighted that despite the hopes of government policy-makers mediation is not for all cases:

“The families that come to court to resolve their dispute were already in an extreme minority. They are, in the majority of cases, people who cannot sit in the same room and communicate, now the government says that they must all mediate. In some cases perhaps a mediator would help but by no means all perhaps, by no means even a majority.”

The future

147. A key area discussed in the interviews was what the future would look like, both for the Bar as well as for the civil and family justice systems more generally.

The Bar

148. All interviewees felt that there would continue to be a place for specialist advocacy. Interviewees, however, did raise serious concerns about whether there was sufficient work and remuneration available for the publicly-funded Bar to operate effectively.

149. Barrister 5 noted that the cuts in scope introduced by LASPO combined with fee cuts had made surviving at the publicly-funded civil Bar increasingly difficult and increasingly competitive:

“You have to be at the absolute top of the food chain because a lot of people are going to fall away. This is easier said than done but I think that is the only way that it is going to work. I was always very happy that I was going to be paid less because I was a legal aid lawyer but it is quite scary when you might lose your house. I just have to try and stop my income going through the floor.”

150. Barrister 13 highlighted that there is no easily available alternative source of work or funding available:

“People say why don’t you do private work, and I say well where do you find that private work? It is not like average members of the public have a pot of gold. There is money in commercial work but there is a limited pool of work there too. There is no magic pot of gold.”

151. This has had a serious impact on morale in the profession. Barrister 1 suggested that fall in remuneration has sent a clear message to the Bar that their work is not valuable or valued:

“I find it intensely stressful, preparing a case and going to court is not an easy thing to do and is quite intimidating. Then at the end of the day you are being told your work is just not worth much money. As a sole practitioner you are not part of a set up whereby you get a badge saying you are the employee of the month or even much feedback so if you get paid an appropriate fee that means you must have done a good job. By stripping away the money I think you lose a lot of your self-esteem and your feeling that your work is actually of worth. That is bad for the people who are deeply committed to their work and I think they will find that demoralising and make it harder to feel like what you are doing is worthwhile.”

152. This devaluation has an impact on people's willingness to undertake work. Barrister 13 described the reality of disenchantment with publicly-funded work:

"The reality is that not only in terms of LASPO but the fee cuts and the new regime on counsel's fees, what you are finding at the civil legal aid Bar is that people are moving more away from legal aid work. People are becoming disenchanted with it. You work ten hours a day and your remuneration is 40% of what it was, and not all cases that you do will recover costs from the other side. Then you are asking people to put just as much effort and energy into it, sometimes more because the quality of preparation of the case is not as good as it was. Sod that for a game of soldiers I am going to go off and do something else with my time."

153. Clerk 1 reiterated these views:

"Many barristers in my teams have already spoken to me about whether they see a future in the Bar and whether they are looking for a plan B. That will have a knock on effect with access to justice. Less people to do the work. So yes, the future is not bright, I think the future is, you can gloss it up and paint the big picture and say with the right business structures we can prosper, but it is not about prospering now, it is purely about survival and whether we can do it and I don't know the answer to that."

154. The disenchantment, however, is not limited to the publicly-funded Bar. Barrister 11 expressed a belief in a "very bleak future for the Bar" as there is less work available and less certainty of fee income:

"I would be a liar if I hadn't thought to myself over the last three or four months I am going to call it time and leave. I never thought I would have said that. I love what I do and I have always said I would never swap it for the world, but to be asked to go and do, for example, like today, 190 mile round trip knowing full well that I am not going to get anything back from it then it really does make you think what is it all for? It is just wrong. Because a dentist wouldn't get that, an architect wouldn't do that, they go out, they work, they get paid."

155. There were also serious concerns that the damage done by LASPO would not be made clear for a few years, but by that time it will be too difficult to return to the previous level of service and expertise:

"I just think that the real effects of LASPO are yet to be seen and it may take more time but by then the damage will be too great and we will have lost talented people from the Bar and the court system will be grinding to a halt."⁷⁵

156. Barrister 8 raised similar concerns, noting that some barristers are only starting to notice changes to their practices:

"A lot of this stuff like costs budgeting is only just coming to hit so I think that a review in a year's time might be even more telling than a review now, but the problem is the more water

⁷⁵ Barrister 12.

that flows under the bridge the harder it is to go back to what was a pretty sensible system beforehand.”

157. Barristers interviewed raised specific concerns about the future of the Bar in terms of the ability and desire of junior barristers to work in areas of work where work and payment of fees was sporadic. Barrister 8 gave an example of what life looks like for a junior and senior practitioner doing work funded by CFAs:

“I know I am not going to get paid for years. That does not matter so much for me because the work I did five years ago is paying now. The real concern for me is that the juniors when they look at the options, even though they will get paid more in the long run per hour for doing claimant work, if you carry out any rational assessment, would you do a case if you are trying to fund a mortgage, even buying a car and budgeting for that, are you going to want to do cases where you are going to have to wait five or six years to get paid to be paid slightly more per hour or you might not get paid at all as you might well lose the case? Or are you going to do something safe and maybe do some defence work? It is a complete disincentive.”

158. This situation clearly raises considerable concern about the expertise of future practitioners, as well as the diversity of the profession. This was particularly the case for barrister interviewees with a family practice:

“Work previously done by junior practitioners has all gone now, so it has had a massive impact on junior members of the Bar, mainly women because it tends to be the young females who are doing publicly funded family work. So ultimately it is going to change the demographic of the Bar. It is not just a question of they are not very busy at the moment, it is a question of will they be able to survive, will they be able to hang in for long enough to make the step up into more senior work and not all of them are going to be able to do that I don’t think. You will lose the talent that will become the judges of tomorrow and you can’t give a quick fix for that.”⁷⁶

159. Barrister 1 reiterated these concerns, but highlighted the difficulty of convincing policy-makers that the well-being of the profession is a serious issue impacting on access to justice:

“There is such an overlap between damage to the profession and damage to access to justice. I understand that is one of the reasons why disentangling those two things is very difficult. I don’t think there are many people out there who are too sympathetic to a barrister saying my hourly rates have been cut, but unfortunately that and access to justice is the same issue. If you want to cut hourly rates to £60 per hour then you are going to get the quality of person who is going to work for that rate. If the judge says spending five hours researching that legal issue until you get to the heart of it is disproportionate then you are going to get some idiot who is only going to do it in two hours and get it wrong. You are going to get worse people doing a worse job.”

⁷⁶ Barrister 12.

160. Changes in the volume and type of work as well as morale in the profession raises concern about what training is available to the junior Bar. Barrister 14, who was a pupil at a specialist family chambers, noted that they were disappointed with their pupillage training and felt that they would have received more advocacy training completing a solicitor's training contract. Junior counsel were simply not being instructed often enough, nor were other members of chambers sufficiently busy with court work for them to observe advocacy practice. Barrister 14 is now looking at alternative career options as independent practice without an independent income source was not financially viable. Barrister 14 noted that they had earned more working as a paralegal than they would expect to earn in the first two to five years of independent practice.

161. Frontline service providers were also concerned about the reduction of remuneration and work available to the Bar:

"We have barristers saying, why should we fill in the gap, we are doing pro bono every day with public-funding because I know I am not going to get paid, why should I then do pro bono."⁷⁷

162. In summary, all interviewees raised serious concerns about the future of the Bar and the viability of practice in publicly-funded civil and family work, as well as the likelihood of junior barristers specialising in areas primarily remunerated by CFAs. This therefore had negative consequences for access to justice, professional morale and the diversity and expertise of the profession and the future judiciary.

Civil and family justice systems

163. The view of interviewees of the future of civil and family justice systems was equally as bleak, particularly for individuals without significant financial resources who were seeking legal advice and representation:

"LASPO and the fee cuts that have followed are devastating both to access to justice in literal terms in terms of the ability of individuals to access the courts and lawyers, but I think that it is going to be looking forward that the real impact is going to hit as I think it is going to totally transform the quality of legal services available to people who don't have huge sums of money."⁷⁸

164. This was not just an issue for publicly-funded practice:

"In many cases there is now is no effective access to justice because the cases are simply not economically fundable. I think that there will be in the medium term a significant falling off in work and that is obviously bad for lawyers but if it means that people can't take genuine

⁷⁷ Frontline Service 1.

⁷⁸ Barrister 1.

grievances in front of a judge and get justice then that is a constitutional problem which the State ought to be worried about.”⁷⁹

165. There was also concern that any proposals for reform in light of experience of the profession, the courts and litigants since LASPO would be ignored as government policy-making processes belittled the experience of those delivering legal services. Instead, policy decisions were seen to be made on ideological grounds without consideration of the possible consequences, including severely limiting access to justice:

“You can’t spend money that you don’t have and there has been cut backs for everybody, we get that, we are not stupid. What we don’t understand is that when we are speaking to government and say there are other ways of doing this without damaging the system, they won’t listen. They won’t listen to the people who are on the ground, who are doing the job who understand how it works and they are bringing people who don’t understand who just say well we will cut all this money out without thinking of the bigger implications for the demographic of the Bar, for access to justice.”⁸⁰

166. Barrister interviewees did not believe that the government would be willing to make the necessary reforms to ensure necessary access to justice. Frontline service providers interviewed, however, suggested that small-scale reforms could have a big impact, if the government was willing to implement them. Frontline Service 1 suggested that legally aided advice and support at an earlier point than it is currently available could have a significant impact on access to justice:

“The very basic assistance that was offered in employment cases...at least individuals were getting some assistance. Giving more legal aid funding to the Citizens Advice Bureaux and solicitors who can assist in the initial stages of court action whether it is just knowing and advising someone what contact arrangement form to fill in for a family case or what forms they need to fill in for their immigration bill, if they adopt that model then I can see it working better.”

167. The simplification of court forms was an issue raised by Frontline Service 2 as something that would have an immediate practical impact on the experience of LiPs and the types of services that could be provided by frontline providers:

“I very much hope that there may be some outcomes which are of benefit, such as greater pressure to make the language of the courts accessible so that things might be written in plain English. For example, the C100 form that you fill out when you start divorce proceedings has been reviewed and the intention we thought was to make it simpler. But it is actually much more difficult and it is taking people a lot of time to do. The C100 is taking about two hours for people to go through and it is a very long form. If we have only got three volunteers on a day this has a real impact on the service we can provide.”

⁷⁹ Barrister 9.

⁸⁰ Barrister 12.

168. Even with possible small-scale reform, the complexity created by multiple and continuous changes to the family and civil justice systems is an issue that will be difficult for the legal service sector to meet:

“I just think it is early days and the problem is that LASPO is not something that is happening in a vacuum it is the way it interacts with all of the other challenges and threats which is particularly worrying. One problem people might be able to absorb but just not constant change and attack on all different fronts.”⁸¹

169. Frontline Service 3 also felt that the state of constant uncertainty has created a disincentive for individuals and businesses to provide publicly-funded services:

“How do government expect people to plan businesses and plan service provision? I think private practice have just decided it can’t be done and they opted out as much as they could really and I think for everyone else it is just desperate.”

170. Overall, it was clear that interviewees had little faith in policy-makers altering the current market to encourage access to justice and the wellbeing of the Bar.

⁸¹ Frontline Service 3.

What does it mean? Putting Bar Council research into context

171. The findings of the Bar Council survey and interviews draw a disheartening picture of the current position of the civil and family justice systems and the Bar, as well as their future. In summary, the key views raised were that since LASPO there has been:

- A concern that access to justice has become much more of a political issue in view of the fact that the Lord Chancellor is no longer required by statute to consider how changes to remuneration of publicly-funded work impact on the nature and quality of legal services available⁸²
- An elevation of cutting costs above enabling citizens to access the courts and enforce their legal rights
- Excessive demands placed on under-resourced courts and judiciary
- A failure to provide appropriate funding mechanisms for low to medium-value complex cases
- A failure to provide appropriate funding mechanisms for cases without recoverable damages
- An increase in LiPs which is unsustainable without wider reforms to make processes and procedures more transparent and accessible
- A failure to value legal services, especially early legal advice
- A failure to value a diverse legal profession and judiciary, and
- A diminishing optimism in viability of long-term careers at the self-employed Bar, especially for family practitioners.

172. Unfortunately, these views are not surprising, nor are they limited to the experience of the Bar since 1 April 2013. In many instances, what was predicted when the LASPO reforms were first debated has come to fruition. While it is too early to determine the full-impact of the legal aid and Jackson reforms, there is evidence available looking at the consequences of reform 12 months after implementation.

Access to justice

Access to advice and representation

Lay and professional clients

173. In both the survey and interviews, it was made clear that barristers believed that it had become more difficult for individuals to access appropriate legal advice, support and representation. This view is echoed in other research carried out following the implementation of LASPO.

⁸² See Access to Justice Act 1999, s 25(3) which provided that the Lord Chancellor, when making any remuneration orders, was required to have regard to the need to secure the provision of publicly-funded services by a sufficient number of competent persons and bodies. This provision was not replicated in LASPO.

174. The most recent legal aid statistics published by the Ministry of Justice show that the number of new matter starts fell by over 80% between 2009-10 and 2013-14.⁸³ While a significant fall in provision was predicted in the impact assessments published with LASPO, this drop is in excess of the 65% drop that was predicted.⁸⁴

175. The reasons for these changes in take-up of legal aid and how they can be addressed are difficult to establish. The current research available does not capture unaddressed legal need where people have not attempted to access legal advice or services. Nor does it provide reasons for why people may not be accessing the legal aid resource that remains. The Bar Council believes that the Ministry of Justice and the Legal Aid Agency have an obligation to ensure that legal aid should be adequately promoted as an available public service. There are currently no printed documents, supplied by the Government, outlining what services are available. This information is only available online, thereby excluding those without access to or unable to use devices with online access.

176. The inability of individuals to access legal services is also suggested by the most recent statistics available from the Bar Pro Bono Unit (BPBU). Between 1 April 2013 and 31 March 2014, the number of applications to the BPBU increased by nearly 50%. In 2012 the Bar Pro Bono Unit received 171 private law children applications, while in the first six months of 2014 alone 265 applications of this type were received. In the first six months of 2014 the BPBU received 99 Immigration and Asylum cases, which was 50% more than in the whole of 2013 (65 cases) and four times the number received in the whole of 2012 (27 cases). The BPBU also expect to receive 40% more housing cases in 2014 compared with 2013. Private law family, immigration and housing were all areas slashed by LASPO. They are also areas where individuals will continue to require legal assistance but are unlikely to be able to afford to pay for it privately. While the Ministry of Justice may wish to suggest that the greater than expected drop in the take-up of legal aid that remains available indicates a fall in legal need or a change in how individuals access legal services, the substantial increase in applications received by the BPBU clearly shows that the need for legal advice and representation has not disappeared.

177. The latest legal aid statistics also show that the number of civil and family legal aid providers has nearly halved since 2007-08, with the number of civil and family legal aid providers falling by almost a quarter in 2013-14 compared to 2012-13.⁸⁵ The impact of these significant market changes are reflected in recent findings from Citizens Advice, which has reported that 92% of Citizens Advice Bureaux “are finding it difficult to refer people to the specialist legal advice they need” since LASPO was implemented.⁸⁶ These difficulties were particularly related to housing, relationship breakdown

⁸³ Ministry of Justice, ‘Legal aid statistics: April 2013 to March 2014’ (2014), 2. The report and detailed tables are available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014>. New matter starts refers to instances of help given by a legal aid service provider to a legal aid client that covers legal advice and assistance, help at court and legal representation in front of Mental Health Review Tribunals and the Asylum and Immigration Tribunal. It does not cover representation at court.

⁸⁴ See Ministry of Justice, ‘Legal Aid Reform in England and Wales: Cumulative Legal Aid Reforms, IA No MoJ090 – Annex A: Scope’ (2012), Table 1.

⁸⁵ Ministry of Justice, ‘Legal aid statistics: April 2013 to March 2014’ (2014), 3. The report and detailed tables are available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014>

⁸⁶ Citizens Advice, ‘Nowhere to turn – Citizens Advice speaks out on impact of legal aid cuts’, accessed 14 August 2014. Available at: http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20140708b.htm

and employment disputes. With such a high proportion of legal aid providers leaving the market over the last twelve months, this difficulty is not unexpected.

178. Citizens Advice has suggested that without the right advice at the right time, individual's situations become unnecessarily complex and urgent, creating legal and court expenses that could have been avoided. One barrister interviewee over ten year's call with a mixed civil practice in London echoed these concerns when they reported feeling it was becoming impossible to assist clients in a meaningful way. This is a serious concern, particularly for vulnerable people with legal needs that cannot be easily divided into legal aid contract categories and where the cause of their legal issues cannot be addressed because legal aid is not available to cover either all of, or the cause of, their legal issues. The Bar Council believes that further consideration of increased funding for basic, initial legal advice would provide considerable value for money and alleviate the current and growing burden on over-stretched charitable and not-for-profit resources, such as Citizens Advice and the BPBU. Addressing people's legal issues at the earliest possible point means that issues can be prevented from escalating and becoming needlessly urgent and complex and an unnecessary burden on the court. This has the potential to offer considerable value for money by ensuring that issues are dealt with holistically and at a suitable point in time, instead of requiring issues to become more serious before people can access the assistance they require.

179. In reference to the Jackson reforms, there is more limited data available. For example, there is no information available on the number of cases that solicitors and/or barristers have refused to take-on despite being meritorious due to the financial risks involved in litigation. The shift in the personal injury market, however, is reflected in the number of firms that have closed in 2013-14. While the reforms were predicted to bring about the closure of claims management companies, many of whom were seen as taking inappropriate advantage of the claimant-friendly arrangements pre-Jackson, there have also been reports of many personal injury firm closures and mergers. While it is arguable that this simply reflects shifts in the market and businesses making commercial decisions about the most viable ways to operate, the removal of expertise and experience from the market impacts on an individual's ability to access necessary legal advice and support. The Solicitors Regulation Authority (SRA) provides numbers of firm closures, but unfortunately does not break this down by practice area or provide reasons for ceasing to practice, mergers or change of firm status.⁸⁷

180. While there has been limited time for the Jackson reforms to operate, the Bar Council believes that further independent research looking at the impact of Jackson is warranted in light of the views expressed by barrister respondents to the Bar Council survey, as well as the opinions of those who participated in an interview. The continued commercialisation of compensation and recovery currently sits uncomfortably with the obligation of the state to provide accessible mechanisms for dispute resolution. Better understanding the impact of the Jackson reforms on access to justice will help ensure that future changes to the civil justice system are evidence-based.

⁸⁷ Solicitors Regulation Authority, 'Regulated population statistics: Breakdown of firm closures by reason', accessed 14 August 2014. Available at: http://www.sra.org.uk/sra/how-we-work/reports/data/firm_closure_breakdown.page

Terms of work

181. An issue raised in both the survey and interviews in relation to the implementation of the Jackson reforms was the failure of the Ministry of Justice to provide for appropriate legislation which allowed for the use of DBAs. Concerns about the *Damages-based Agreements Regulations 2013* have been voiced by the Bar Council and other representative bodies and legal commentators since they were laid before Parliament.⁸⁸ At the Civil Justice Council conference on the impact of the Jackson reforms,⁸⁹ DBAs were referred to by practitioners present as “Don’t Bother Agreements”. This view was reflected by Professor John Peysner in his research for the Civil Justice Council, where he described DBAs as being “like the Yeti: they are believed to exist in practice but hardly any sightings have been made.”⁹⁰

182. The Bar Council will continue to press for amending the current legislation to provide for the suitable operation of DBAs. Given that the Government intended to make lawful new forms of litigation funding, such as DBAs, it is perverse to restrict their operation through poor legislative drafting. The Bar Council remains willing and ready to assist the Ministry of Justice in drafting suitable amending legislation that will help ensure that DBAs are made commercially viable for those practitioners who wish to use them.

183. Both the survey and interviews highlight concerns of barristers about the operation of CFAs and how the inability to recover success fees and ATE premiums have made barristers more reluctant to accept claims where success is uncertain, including cases where a court decision would help clarify the law. While these fundamental changes to recoverability are unlikely to be altered in the short-term, the reaction of the market to the reforms is a serious concern for those who conduct insolvency litigation, which currently has a two-year exemption from the changes to recoverability.

⁸⁸ See The Bar Council, ‘Bar Council continues its call for an Amendment Order to the Conditional Fee Agreements Order and Damages-based Agreements Regulations’, accessed 14 August 2014. Available at: <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/march/bar-council-continues-its-call-for-an-amendment-order-to-the-conditional-fee-agreements-order-and-damages-based-agreements-regulations/>

⁸⁹ Held on 21 March 2014. Lord Justice Jackson’s paper for the Conference is available at: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Jackson+LJ+paper+CJC+conference+21+March+2014.pdf> Submissions made by Conference attendees and other interested parties are available at: <http://webarchive.nationalarchives.gov.uk/20140423161113/http://www.judiciary.gov.uk/NR/exeres/70AFE8DC-CFD1-4CC4-971B-A5278AB1D1C2.htm>

⁹⁰ Professor John Peysner, ‘Impact of the Jackson reforms: Some Emerging Themes’ (2014), 10. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/impact-of-the-jackson-reforms.pdf>

184. Insolvency litigation was identified for an exemption owing to the failure of the Ministry of Justice to assess the impact of the proposed reforms on this type of litigation. While the exemption is likely to be revoked in April 2015, the Ministry of Justice has still failed to carry out an impact assessment. Research conducted for R3, The Association of Business Recovery Professionals, has shown that removing recoverability of success fees and ATE premiums will make the majority of insolvency litigation too risky to conduct.⁹¹ Professor Peter Walton has predicted that removing the exemption will have a serious impact on creditors, including HM Revenue and Customs (HMRC), and the public interest. Currently, CFA-backed insolvency litigation realises around £150-160 million each year, of which around £50-70 million relates to monies owed to HMRC.⁹² Removing the exemption for insolvency litigation is therefore likely to cost the public purse around £50 million annually. Disincentivising insolvency litigation also allows culpable behaviour by directors to go unpunished and undeterred. The Bar Council would encourage the Ministry of Justice seriously to consider whether, in the current financial climate where public funds are subject to austerity measures, it can justify removing an exemption which provides for the collection of public money.

185. One final high profile issue covered in the Bar Council interviews⁹³ and subject to much interest by legal representative and campaigning bodies is exceptional funding. Exceptional funding was implemented by LASPO to reflect the Government's policy of providing legal support for the most serious cases and most vulnerable individuals. Exceptional funding was made available for cases that fell out of scope where a denial of public funding would breach, or would risk breaching, an individual's Convention rights (within the meaning of the Human Rights Act 1998) or "any rights of the individual to the provision of legal services that are enforceable EU rights".⁹⁴

186. Access to legal aid through exceptional funding has been significantly lower than expected when the reforms were debated in Parliament, where the Ministry of Justice had estimated that up to 5% of proceedings in the majority of categories could be funded.⁹⁵ The exceedingly low use of the exceptional funding process was clearly reflected by the fact that only three interviewees had reported any experience of, or contact with, the process and that none had been involved in an actual application.

⁹¹ Professor Peter Walton, 'The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation' (2014). Available at: https://www.r3.org.uk/media/documents/policy/Jackson_Campaign/Jackson_Reforms_Insolvency_Litigation_April_2014.pdf A summary of the report is available at:

[https://www.r3.org.uk/media/documents/policy/Jackson_Campaign/Jackson_reforms_and_insolvency_litigation_-_Impact_on_HMRC_and_business_\(summary\).pdf](https://www.r3.org.uk/media/documents/policy/Jackson_Campaign/Jackson_reforms_and_insolvency_litigation_-_Impact_on_HMRC_and_business_(summary).pdf)

⁹² Professor Peter Walton, 'The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation' (2014), 6. Available at:

https://www.r3.org.uk/media/documents/policy/Jackson_Campaign/Jackson_Reforms_Insolvency_Litigation_April_2014.pdf

⁹³ See paragraphs 0 to 138.

⁹⁴ LASPO, s10(3). It is worth noting that to access exceptional funding an individual still has to be able to meet the financial and merit eligibility tests.

⁹⁵ See Ministry of Justice, 'Legal Aid Reform in England and Wales: Cumulative Legal Aid Reforms, IA No MoJ090 – Annex A: Scope' (2012), Table 3.

187. The Ministry of Justice had estimated that there would be 5,000-7,000 applications for exceptional funding each year, and that the majority of applications would be granted.⁹⁶ The reality has been very different. Ministry of Justice statistics⁹⁷ show that from April 2013 to March 2014, 1,519 applications for exceptional funding were made, and only 57 were granted. Only 16 applications for exceptional funding for non-inquest cases⁹⁸ were granted, which is a grant rate of 1.2%. This low grant rate has continued in April-June 2014, with only seven of 162 non-inquest applications being granted legal aid.⁹⁹ While this is a 4.3% grant rate, and therefore higher than the grant rate for 2013-14, it is still far removed from that anticipated when LASPO was passed.

188. A Legal Action Group report¹⁰⁰ suggests that the fewer than expected number of applications may be a combination of the Government's failure to sufficiently advertise what civil legal aid is available, and the fact that solicitors are not reimbursed for making these very time consuming applications, unless the application is subsequently successful. The unremunerated nature of the work was also an issue identified by interviewees, who noted that solicitors were unlikely to undertake hours of work at a very high risk of not being paid to do this work.

189. The small percentage of applications that were granted may be explained by the stringent nature of the guidance published by the Lord Chancellor and used by Legal Aid Agency case workers to make case determinations. The recent High Court decision in *Gudanaviciene & Others v Director of Legal Aid Casework and the Lord Chancellor* found that parts of this guidance were unlawful, set too high a threshold and created unfairness.¹⁰¹ While the Ministry of Justice have indicated they will appeal the decision,¹⁰² it is important to remember that when the exceptional funding arrangement was debated in Parliament, Ministers assured Parliament that it would be a safety net for meritorious cases. There is an urgent need to reassess the operation of the exceptional funding provisions as their low application and grant rate suggest that it is not fit for this purpose.

⁹⁶ See Low Commission, 'Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales' (2014), [1.31]. Available at:

<http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

⁹⁷ Ministry of Justice, 'Ad hoc Statistical Release. Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April 2013 to 31 March 2014' (2014). Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305843/exceptional-case-funding-statistics-apr-13-mar-14.pdf

⁹⁸ There was an exceptional funding process in place for inquest cases prior to LASPO

⁹⁹ Ministry of Justice, 'Ad hoc Management Information – Legal Aid Exceptional Case Funding Application and Determination: 1 April 2014 to 30 June 2014' (2014). Available at:

<https://www.gov.uk/government/statistics/exceptional-case-funding-management-information-april-to-june-2014>

¹⁰⁰ Legal Action Group, 'Civil Legal Aid – the Secret Legal Service?' (2013). Available at:

http://www.lag.org.uk/media/129682/legal_aid_secret_service.pdf

¹⁰¹ [2014] EWHC 1840 (Admin).

¹⁰² Catherine Baksi, 'Legal aid guidance unlawful, High Court rules', Law Society Gazette, 13 June 2014.

Available at: <http://www.lawgazette.co.uk/law/exceptional-funding-guidance-unlawful-in-part/5041681.article>

190. As the Bar Council highlighted in its response to the Government consultation on ‘Proposals for the Reform of Legal Aid in England and Wales’,¹⁰³ if the Government truly wishes to have an adequate mechanism to ensure that the most serious cases and the most vulnerable clients receive public funding, the test for exceptional funding must be wider than that provided by LASPO. Under funding arrangements preceding LASPO, the Lord Chancellor had the power to authorise funding for cases where there was a “significant wider public interest” or the case was of “overwhelming importance to the client.”¹⁰⁴

191. The removal of this power has had a serious impact due to the nature of the legal aid scope changes introduced by LASPO. For example, welfare benefits, education, private law children, certain housing disputes and non-asylum immigration matters have been removed from scope and there is usually no alternative funding available for these types of cases. It is highly unlikely that CFAs will be available, especially in the post-Jackson funding environment, as these types of cases often involve difficulties with costs recovery, no monetary damages and unsettled and complex legal issues. Removing legal aid therefore has the result of denying access to justice without any consideration for:

- How the issues have arisen, such as where a public body is at fault
- How many individuals have been or will be affected, or
- The need for judicial consideration of areas of law where a court decision would clarify rights and interests, both of individuals as well as public bodies.

192. This situation is of even greater concern in light of consequential reforms to judicial review funding and procedure which will further limit access to the courts for those challenging public bodies.¹⁰⁵

193. The Bar Council believes that the Government should amend the exceptional funding to include cases of “significant wider public interest” and those that are of “overwhelming importance to the client”. This would ensure that exceptional funding would truly operate as an appropriate measure to capture serious cases and meet the needs of vulnerable clients otherwise ineligible for funding.

194. The comments made by interviewees also suggests that the complex application form which must be completed to apply for exceptional funding is also a disincentive for solicitors to submit applications. Practitioners undertaking legal aid work are not in a position to provide hours of unremunerated work where there is a high risk that this work will not be remunerated. The Legal Aid

¹⁰³ The Bar Council, ‘Response of the Bar Council of England Wales to the Consultation Paper CP12/10: Proposals for the Reform of Legal Aid in England and Wales’ (2011), 86-91. Available at: http://www.barcouncil.org.uk/media/53749/bar_council_response_-_green_paper_legal_aid_reform_-_final_14_02_2011.pdf

¹⁰⁴ Legal Services Commission, ‘Funding Code – Chapter 27’ (2011), 3C-635. Available at: http://www.justice.gov.uk/downloads/legal-aid/funding-code/Funding_Code_Chapter_27_Exceptional_Funding_Oct_11.pdf

¹⁰⁵ See, for example, the *Criminal Justice and Courts Bill*, Part 4 <https://www.gov.uk/government/collections/criminal-justice-and-courts-bill> See also Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014.

Agency (LAA) should reconsider the requirements of the form to ensure that it is not so burdensome that engaging with the process is entirely disincentivised.

Alternative Dispute Resolution

195. When the LASPO reforms were introduced the Government hoped that individuals no longer eligible for legal aid would look to alternative dispute resolution processes, especially mediation, to resolve their legal issues. Interviewees expressed the view that this had been a futile hope and that individuals were unlikely to pursue mediation without legal advice in the first instance to identify whether or not their legal issue was suitable for mediation.

196. The view of interviewees is reflected in statistics available on the use of mediation for family cases where public funding remains available for MIAMs and mediation. While in 2012-13 there were 30,662 MIAMs and 13,609 mediation starts, 2013-14 saw only 13,354 MIAMs and 8,400 mediation starts.¹⁰⁶ This result is the opposite of what was envisaged by Government when pursuing changes to the scope of legal aid, and particularly family legal aid. This fall in the use of legal aid for family cases has seen the Ministry of Justice undertake considerable work to ensure greater use of legal aid. For example, from 22 April 2014 it is now compulsory for anyone applying to the family courts for an order in children or financial dispute family proceedings to consider ADR processes first by attending a MIAM.¹⁰⁷ The Ministry of Justice has also been working with the Family Mediation Council to develop materials for family litigants to ensure they understand the new legal requirements.¹⁰⁸

197. While this change in process may promote further mediation in family disputes, especially as legal aid funding remains available for MIAMs and mediation itself, there is no equivalent funding for those with non-family legal issues. If the Government wishes to promote mediation in areas of law outside family law it will be difficult to have people engage with mediation or other ADR processes if they have no access to initial legal advice that can clarify the issues involved in an individual's case and make a determination as to whether or not it is appropriate to resolve through mediation. We would therefore reiterate that Government should provide funding for initial legal advice to allow for earlier consideration of legal issues, which could include a determination of whether or not pursuing litigation or mediation is appropriate.

198. Finally, while mediation and ADR are valuable tools in the civil and family justice systems we remind the Government that mediation is complementary to, and not a replacement for, litigation. They are not a panacea for the ills of the civil and family justice system. As Lord Neuberger noted while Master of the Rolls:¹⁰⁹

¹⁰⁶ Ministry of Justice, 'Legal aid statistics: April 2013 to March 2014' (2014), 21. The report and detailed tables are available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014>

¹⁰⁷ Exemptions to this do apply, including where there is domestic violence or child protection concerns. See Family Procedure Rules, Rule 3.8 and Practice Direction 3A.

¹⁰⁸ Family Mediation Council, 'Marketing and promotion,' accessed 19 August 2014. Available at: <http://www.familymediationcouncil.org.uk/mediator-area/marketing-promotion/>

¹⁰⁹ Lord Neuberger of Abbotsbury MR, 'Has mediation had its day?,' Gordon Slynn Memorial Lecture, 10 November 2010.

“...there is a real question whether a concerted drive for an ever-expanding role for mediation, and indeed treating mediation as good and litigation as bad, is consistent with a commitment to equal access to justice. Uncritical encouragement, and ever increasing support of mediation and ADR, may well be antipathetic to our commitment to equal access to justice, to our commitment to a government of law. [...] If we expand mediation beyond its proper limits as a complement to justice we run the risk of depriving particular persons or classes of person of their right to equal and impartial justice under the law. Citizens are bearers of rights, they are not simply or merely consumers of services.”

Court resources

Litigants in person

199. One of the most widely-publicised impacts of the LASPO reforms has been the reported increase in the number of LiPs and the impact this has had on court resources as well as on an individual’s ability to achieve appropriate resolutions of their legal issues.

200. Both survey respondents and interviewees reported a perceived increase in the number of LiPs in the civil and family courts and drew attention to the difficulties faced by LiPs in presenting their case, as well as the impact the increase in LiPs has had on the ability of judges to fulfil their role and the capacity of barristers appearing against LiPs to fulfil their duties to the court and their client.

201. The increase in LiPs has been a particular concern for the judiciary. It was raised in detail by the Judicial Executive Board (JEB)¹¹⁰ in evidence submitted to the Justice Committee in April 2014. The JEB has pointed out that there “have always been LiPs who are users of the courts and tribunals” and that LiPs are not “a problem,” but rather that:¹¹¹

“The problem lies with aspects of the system that have not developed with a focus on unrepresented litigants and which are now faced with an unprecedented increase in their incidence.”

¹¹⁰ Judicial Executive Board, ‘Written evidence – Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (2014). Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.pdf>

¹¹¹ Judicial Executive Board, ‘Written evidence – Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (2014), 1. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.pdf>

202. Contributors to the evidence presented by the JEB reported an increase in the number of cases with LiPs in civil and family courts as well as tribunals.¹¹² The increase in LiPs has been particularly pronounced in the family courts, with the JEB reporting that judges describe legal representatives in private law family cases as “a rarity.”¹¹³

203. The JEB evidence highlights seven key impacts of increased LiPs following the implementation of LASPO:¹¹⁴

- Increased length of hearings, making timetabling and timely performance very difficult
- Inability of the court to assist LiPs beyond what is appropriate in an adversarial system, meaning evidence or issues may not be sufficiently explored
- LiP ignorance of relevant law and procedure, causing delays as judges must explain basic procedure and principles and undertake research typically conducted by legal representatives, and LiPs focus on often very inconsequential issues
- Absence of critical expert evidence as LiPs are not able to afford these services, leaving the court without necessary assistance, reliant on less-appropriate evidence sources or requiring further hearings to consider the relevant issues
- Increased number of cases going to trial due to reluctance of LiPs to negotiate prior to court, meaning court time is used unnecessarily
- Practical and administrative difficulties, including dealing with LiP correspondence and compiling orders where both parties are unrepresented, which creates additional burden on judges and court staff, and
- Security issues where small waiting rooms are required to accommodate disputing parties and their friends and family who have accompanied them for support, causing concerns for the safety of judges, court staff and members of the public where courts are not equipped to deal with violence.

204. These concerns reflect the views expressed by interviewees who raised issues of court delays, pressure on the judiciary and difficulties faced by LiPs in ensuring their cases were appropriately prepared and presented. This raises serious concerns about the current ability of the judiciary and court services to meet the needs of LiPs and ensure their legal issues are appropriately resolved. If LiPs are to continue as a large and growing part of the civil and family justice systems the

¹¹² Judicial Executive Board, ‘Written evidence – Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (2014), [5.1]. Available at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.pdf>

¹¹³ Judicial Executive Board, ‘Written evidence – Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (2014), [5.3]. Available at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.pdf>

¹¹⁴ Judicial Executive Board, ‘Written evidence – Justice Committee inquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012’ (2014), [5.4]-[5.23]. Available at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.pdf>

Government must consider ways to best ensure their needs are met without overburdening judicial and court services.

205. The increase in LiPs has been of particular concern to those working in the family justice system. While there are no statistics available on the number of unrepresented litigants in the civil courts, quarterly court statistics do record legal representation of parties in family-related court cases.¹¹⁵ The number of private law family cases where neither party was represented almost doubled in January to March 2014 compared to January to March 2013, while the number of cases where both parties were represented nearly halved.¹¹⁶ The court statistics also record the time taken to dispose of a case. There was an increase in the average time taken to dispose of a private law family case where both parties were represented, while the time taken to dispose of cases where both parties were unrepresented remained relatively consistent. There is nothing provided, however, to explain these trends, such as information about the nature and complexity of the cases or how they were dealt with by the court. For example, the increase in time taken to dispose of cases where both parties were represented may be due to the fact that only the most complex of cases continue to have both parties represented.

206. The concerns raised by the JEB, as well as by interviewees and survey responses clearly indicates that dealing with an increased number of LiPs in the family courts has complex repercussions for the family justice system that are not currently explained by available court statistics.

207. The President of the Family Division, Sir James Munby, has raised serious concerns about the absence of publicly funded legal representation for vulnerable litigants in family cases. In the decision of *Q v Q, Re B (a child) and Re C (a child)*,¹¹⁷ Sir James Munby noted that LASPO changes to the scope of legal aid funding has seen a “drastic reduction in the number of represented litigants in private law cases”.¹¹⁸

208. All three cases in *Q v Q, Re B (a child) and Re C (a child)* were private law family cases where the child resided with the mother and father was wanting play a role in their child’s life. In each case the mother was eligible for legal aid but the father was not. Each case dealt with serious allegations of rape or abuse against the father. Sir James Munby identified three key issues for individuals unable to access legal aid and who were unable to afford to pay for legal representation:¹¹⁹

¹¹⁵ Court statistics (quarterly) are available at: <https://www.gov.uk/government/collections/court-statistics-quarterly>. The statistical reports highlight that the statistics are drawn from records indicating whether or not an applicant or respondent had a legal representative at court. This means that “parties recorded as without legal representation are no necessarily self-representing litigants in person, for example in non-contested divorce cases.” See Ministry of Justice, ‘Court Statistics Quarterly January to March 2014’ (2014), 19. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf

¹¹⁶ Ministry of Justice, ‘Court Statistics Quarterly January to March 2014’ (2014), 20. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf

¹¹⁷ [2014] EWFC 31.

¹¹⁸ *Q v Q, Re B (a child) and Re C (a child)* [2014] EWFC 31, [11].

¹¹⁹ *Q v Q, Re B (a child) and Re C (a child)* [2014] EWFC 31, [43].

“...first, the denial of legal advice and of assistance in drafting documents; second, and most obvious, the denial of professional advocacy in the court room; third, the denial of the ability to bring to court a professional witness whose fees for attending are beyond the ability of the litigant to pay. Each of these problems is, of course, exacerbated if the litigant needs a translator to translate documents and an interpreter to interpret what is going on in court.”

209. The issue of lack of legal representation in court was of particular concern:¹²⁰

“The absence of assistance in the court room by a professional advocate causes obvious problems: most litigants lack the skills to represent themselves to best advantage, for example in examining and cross-examining witnesses or making submissions. But there is a further and even more serious problem: the acute tensions that may arise when an alleged perpetrator cross-examines the alleged victim.”

210. Without legal aid funding to provide for necessary legal advice and representation, as well as expert evidence and translators, Sir James Munby noted that as an order of absolute last resort the costs should be borne by the HMCTS as the case could not proceed without this assistance.¹²¹ This decision could have serious implications for public funding. The Ministry of Justice is currently considering the judgment. The issues raised by Sir James Munby go to the core issue of whether or not a court is able to fulfil its “overriding objective” to “deal with cases justly”.¹²² The cases of *Q v Q*, *Re B (a child)* and *Re C (a child)* are simply three examples of how limiting access to legal advice and representation has a serious impact on access to justice for individuals and the ability of the courts to operate as required.

Impact on practice at the Bar

211. The survey results highlighted that the clear majority of barrister respondents believed their practice had been negatively impacted by LASPO legal aid and Jackson reforms, with respondents indicating decreases in case volume and fee income, as well as increased uncertainty about the viability of a long-term future practising at the Bar.

212. When the survey responses are compared to the data on changes in barrister workloads and earnings presented in the most recent ‘Barristers’ Working Lives’ report,¹²³ the results of the survey suggest that LASPO may have had an appreciable impact on work available to the Bar beyond what would be expected in the usual course of practice.

213. ‘Barristers’ Working Lives’ provides data from two biennial surveys of the Bar on views of the Bar about changes to their workload from 2011 to 2013. The 2013 biennial survey was conducted

¹²⁰ *Q v Q*, *Re B (a child)* and *Re C (a child)* [2014] EWFC 31, [65].

¹²¹ *Q v Q*, *Re B (a child)* and *Re C (a child)* [2014] EWFC 31, [90]-[92].

¹²² Family Procedure Rules, Rule 1.1.

¹²³ The Bar Council and Bar Standards Board, ‘Barristers’ Working Lives – A second biennial survey of the Bar’ (2014), 43-44. Available at: http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

between May and July 2013, which only covers the first three months immediately following the implementation of LASPO. Generally, in civil, personal injury, chancery and commercial work, the majority or close to the majority of respondents to the biennial survey reported no changes in workload, with the remainder relatively evenly divided into those reporting either increases or decreases in workload.¹²⁴ For family practitioners, less than half reported having the same workload from 2011 to 2013, but the percentage of barristers reporting increases or decreases in workload in this period was nearly evenly divided.¹²⁵

214. While the responses to the LASPO survey were from a smaller and subjective self-selecting sample with differently described categories of work, when compared with the 'Barristers' Working Lives' report they suggest that LASPO may have had an impact greater than that which could usually be expected in the normal course of practice. As highlighted in Figure 11 – General impact of LASPO by practice area, 60.10% of respondents undertaking civil legal aid and 71.92% of respondents doing family legal aid work reported a decrease in case volume. Similarly, while nearly half (46.45%) of survey respondents undertaking civil litigation work reported no change in workload post-LASPO, 44.99% did report a decrease in workload. This contrasts starkly with the pre-LASPO data provided in 'Barristers' Working Lives'.

215. Similarly, the 'Barristers' Working Lives' report provides information about the earnings of the Bar. Generally, in civil, personal injury, chancery and commercial work, just over a third of practitioners reported in the biennial survey that their income remained about the same between 2011 and 2013, and with substantially more respondents reporting an increase in earnings than a decrease in earnings.¹²⁶ For family practitioners, 30% reported that earnings had stayed about the same between 2011 and 2013, while 31% reported increased earnings and 39% reported decreased earnings.¹²⁷

216. These findings again contrast with those of the LASPO survey. As seen in Figure 14 – Impact of LASPO on fee income by practice area, while around a third of respondents indicated that since LASPO their fee income had not changed, the clear majority in civil legal aid, family legal aid and civil litigation practice reported a decrease in fee income. While the results of the LASPO survey are not definitive, they do suggest that between April 2013 and March 2014, LASPO has had a clear and detrimental impact on the Bar.

217. This is of serious concern as without sufficient work or fee income barristers will be forced to consider whether they have a viable long-term career at the Bar. The loss of expertise from the Bar has serious repercussions for access to justice, including limiting the ability of individuals to access

¹²⁴ The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), 44. Available at: http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

¹²⁵ The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), 44. Available at: http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

¹²⁶ The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), 56. Available at: http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

¹²⁷ The Bar Council and Bar Standards Board, 'Barristers' Working Lives – A second biennial survey of the Bar' (2014), 56. Available at: http://www.barcouncil.org.uk/media/294152/biennial_survey_report_2013.pdf

necessary legal representation as well as impacting the areas of expertise from which the future judiciary may be comprised.

218. This in turn also has an impact on the ability to maintain and promote a diverse profession. Bar Council data shows that of those who leave the profession before retirement, female and BME barristers leave disproportionately for financial reasons.¹²⁸ The connection between finance and leaving was made explicit by the Bar Council in 2011, where research found almost two thirds (63%) of leavers said their decision was motivated by at least one financial factor including uncertainty over future levels of income (48%), level of income (44%) and the non-payment of fees (30%).¹²⁹ Further, the obvious link between financial uncertainty and the provision of legal aid was made quite explicit, with those working in publicly funded areas of the Bar being more likely to mention financial factors as a reason to leave.¹³⁰ This makes it clear that there was already a significant financial cause for persons leaving the Bar (including in relation to the publicly funded Bar) in 2011 and on this basis it is inevitable that any further decrease in the rate of pay for publicly funded work will exacerbate this position.

219. This situation has serious long-term consequences for the profession and the judiciary. It is important that it is recognised that the changes implemented by LASPO will diminish the pool of qualified women and BME barristers for judicial appointment.

¹²⁸ See The Bar Council and Bar Standards Board, 'Survey of Barristers Changing Practising Status: Exit Survey 2011' (2011), 38, [6.7] where it was highlighted that financial factors were cited more by women (66%) than men (59%); and to an even greater extent amongst BME leavers (77%) than whites (61%).

¹²⁹ The Bar Council and Bar Standards Board, 'Survey of Barristers Changing Practising Status: Exit Survey 2011' (2011), [6.5].

¹³⁰ See The Bar Council and Bar Standards Board, 'Survey of Barristers Changing Practising Status: Exit Survey 2011' (2011), [6.7] where financial factors were mentioned by 70% of leavers in publicly funded work, compared with 49% in not publicly funded work.

Recommendations

220. The Bar Council and the profession want to work with the Government and other bodies to find solutions that ensure better access to justice, promote more efficient court practice and meet the financial constraints of providing a public service within a defined budget. While the recommendations below highlight specific areas for change that have already arisen, the Bar Council wishes to make its interest in assisting Government clear. In particular, the Bar Council is ready to work with the Ministry of Justice and professional and representative bodies to ensure that the Government's future post-implementation reviews of LASPO are able to access and make use of necessary evidence and information.

Research

221. An underlying concern throughout this report is that it is too early to determine the full impact of LASPO, both for civil and family legal aid reforms as well as the Jackson reforms to civil litigation. While this report has highlighted some emerging concerns and themes, the Bar Council urge the Government to ensure its expected future reviews of LASPO are sufficiently well-resourced to make sure they provide detailed, statistically valid and wide-reaching findings that take into account the complex interaction of reforms implemented after LASPO. Further information from Government about current plans for research, monitoring and evaluation would be welcome as this would allow the Bar Council and other representative bodies to identify areas where they could assist Government, as well as highlighting current information gaps which need to be addressed before wide-scale research is undertaken.

222. It is hoped that future research will help inform evidence-based policy where the impact of changes will be understood and appropriately planned for. For example, considerable work is necessary better to understand the legal aid budget, including the net value of legal aid and its real cost-benefit. Without this type of information it is difficult to understand the impact of proposed reforms, nor the value of what is already in place.

Litigants in person

223. The increased number of LiPs in the family and civil courts are placing unprecedented pressures on court and charitable services.

224. The Bar Council urges the Government to collect more data on LiPs in the civil and family courts and how they interact with the system. This will help identify key concerns and how they may be best addressed to ensure greater access to justice.

225. The Bar Council urges the Government to further consider the simplification of resources and documents that LiPs are required to use or engage with.

226. The Bar Council urges HMCTS to consider working with local and national charities providing services to LiPs to provide for consistent and proactive sign-posting of LiPs to support that

is available. This could be achieved, for example, in any court correspondence or documents that is sent to litigants.

Legal aid

227. The drastic cuts in scope for civil and family legal aid have had serious impact on the ability of individuals to access assistance to resolve their legal issues. The Bar Council urges the Government to provide for funding of initial specialist legal advice and assistance to ensure that individuals do not have to wait for their cases to become urgent and complex before they are able to receive legal advice and assistance. The Bar Council believes this is imperative. Demand is currently far-outstripping what the pro bono community can offer in the way of assistance. Initial advice would allow issues to be dealt with more comprehensively, as well as more efficiently and effectively. Initial legal advice and assistance would also lessen the current unsustainable burden on charitable legal services as they would be more likely to receive complete and detailed referrals with organised documents and initial indications of the issues involved.

228. The Bar Council urges the Government to expand the parameters of exceptional funding for cases currently outside the scope of legal aid by allowing funding for exceptional cases that have “significant wider public interest” or are of “overwhelming importance to the client.” This change should be accompanied by the simplification of the current application forms to ensure that solicitors are not discouraged from assisting clients to complete applications. These changes would help ensure that exceptional funding was fit for purpose.

Jackson reforms

229. The Bar Council urges the Government to reconsider the current provisions that provide for the use of DBAs due to consistent views throughout the legal sector that DBAs are currently unworkable. The Bar Council is ready to work with the Government to ensure that DBAs meet the needs of legal services providers so that they are able to provide further funding options to their clients.

230. The Bar Council urges the Government to reconsider removing the current exemption to the Jackson reforms relating to recoverability of success fees and insurance premiums that was granted for insolvency work. Removing this exemption would have a considerable impact on the ability of HM Revenue and Customs to recover public funds and would see directors not held to account for their actions. The absence of Government research on the impact of removing the exemption is particularly concerning in light of the serious public policy and public finance issues involved.

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