



Review of Civil Legal Aid - Call for Evidence

The Bar Council's Response

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice (MoJ) call for evidence on the Review of Civil Legal Aid (RoCLA).¹
2. The Bar Council represents approximately 18,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Introduction

4. Since the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) came into force in April 2013, the nature of work and remuneration around civil and family legal aid have changed considerably. Many areas were taken out of scope, and changes to the means testing for areas still in scope meant that many people could no longer access legal aid funding for their legal issues. Coupled with real term cuts in remuneration, these changes have had a profound impact on the legal services sector, including the Bar.

¹ Ministry of Justice (2024) Review of Civil Legal Aid call for evidence

5. While the Bar Council would like to see, and has consistently campaigned for, a reversal of LASPO, we are reluctantly resigned to the fact that this is unlikely to occur for the foreseeable future.

6. Over the last decade, the Bar Council has repeatedly warned the MoJ about the damaging effect of LASPO on access to justice and the sustainability of the publicly funded civil and family bar: “LASPO: One Year On” (September 2014)², “LASPO: Five Years On” (October 2018)³, “Running on Empty” (January 2021)⁴ and “Access denied” (November 2022)⁵.

7. In those publications, we reported that under intense pressure of workload and poor remuneration, legal aid barristers have increasingly sought to diversify their practices away from legal aid work, and that that trend was expected to continue.

8. This response considers the issues that currently impact the Bar and subsequently the sustainability of the entire civil legal aid system. It draws upon the day-to-day experience of barristers specialising in each of the eleven areas of civil legal aid. It is also informed by financial data. Over the last two years, the Bar Council has been working with the MoJ under a data sharing agreement to compile a comprehensive dataset on those barristers who undertake publicly funded civil and family work. It comprises 8 years’ worth of data from 2015-2016 to 2022-2023. Alongside this document, the Bar Council publishes the “Bar Council Data Analysis: Review of Civil Legal Aid, The Family and Civil Legal Aid Bar 2015-2013” (the Bar Council’s Data Analysis Review).

9. We will highlight the urgent need to increase fee levels in order to ensure that barristers do not abandon civil and family legally-aided work, and to strengthen their recruitment and retention.

Overview

10. Two main themes arise when examining the experience of civil and family barristers with the civil legal aid system:

- Inadequate remuneration

² Bar Council (September 2014) ‘The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One year on Final Report https://www.familylaw.co.uk/docs/pdf-files/LASPO_One_Year_On_-_Final_Report_September_2014_.pdf

³ Bar Council (October 2018) ‘LASPO Five Years On: Bar Council submission to the Ministry of Justice LASPO Post-Implementation Review - [laspopirsubmissionbarcouncilfinal.pdf](https://www.barcouncil.org.uk/wp-content/uploads/2018/10/LASPO-Five-Years-On-Submission-to-the-Ministry-of-Justice-2018.pdf).

⁴ Bar Council (January 2021) ‘Running on Empty – Civil Legal Aid Research Report) [Running-on-Empty-Civil-Legal-Aid-Full-Report.pdf](https://www.barcouncil.org.uk/wp-content/uploads/2021/01/Running-on-Empty-Civil-Legal-Aid-Full-Report.pdf) (barcouncil.org.uk)

⁵ Bar Council (November 2022) ‘Access Denied: The state of the justice system in England and Wales’ [Access Denied: The state of the justice system in England and Wales in 2022](https://www.barcouncil.org.uk/wp-content/uploads/2022/11/Access-Denied-The-state-of-the-justice-system-in-England-and-Wales-in-2022.pdf) (barcouncil.org.uk)

- Unhelpful, time-consuming and unnecessary administration.

11. These issues are a clear disincentive for junior members of the Bar to begin undertaking civil legal aid work, and for more experienced members to continue to do so.

12. Whilst the publicly funded civil and family Bar is deeply committed to the social principles of justice for all, its commitment and goodwill are continually taken for granted in a legal aid scheme anxious to save every possible penny of funding even at the expense of short term effectiveness and long-term sustainability.

13. In short, the civil legal aid system is not sustainable in its current form.

Sustainability of the publicly funded civil and family Bar - inadequate remuneration

14. The MoJ recognises that a sustainable system is one that is able to attract and retain providers of sufficient number, quality and experience to provide effective legal advice, assistance and representation to all those eligible, ensuring provision to meet demand over the long term.

15. Sustainability of the civil and family legal aid system requires fee levels and administrative schemes that:

- remunerate barristers fairly for the work they undertake at all stages of seniority;
- remunerate barristers sufficiently by comparison to private work in the same practise area or other areas of practice into which they could reasonably undertake;
- allow publicly funded barristers who, although self-employed, function as quasi-public servants, to work in tolerable conditions;
- ensure good working lives for members of the profession.

16. The experience of barristers in all eleven categories of publicly funded work indicates that the current arrangements fall well short of meeting those criteria.

17. The National Audit Office's report "*Government's management of legal aid*" (09 February 2024) rightly stated that:

*"MoJ has not increased fees for civil cases since 1996, and it reduced fees by 10% between October 2011 and February 2012. In real terms, fees are now approximately half what they were 28 years ago."*⁶

18. It is important to emphasise that fees received by a barrister cannot be equated with earnings or a salary.

⁶ Report, page 48, paragraph 3

19. Gross fee income is total fee income (excluding VAT) before barristers pay the costs of their chambers. Those costs include clerking, administrative staff, accommodation, facilities etc, which typically amount to around 30% of gross fee income. After deduction of the costs of chambers, barristers also face the deduction of further costs more typically associated with self-employment such as tax, professional insurances, provision for periods of leave, and pension provision.⁷

20. The erosion of the value of civil and family legally aided fees has accelerated over the last decade.⁸ Using the measure of all prices in the UK economy (GDP deflator), this erosion has been approximately 23% in the last 10 years. In terms of what those fees can buy (using the CPI) the decline has been around 30% per cent. In the last 8 years (the time covered by the dataset used by the Bar Council in its Data Analysis report) using the GDP deflator the erosion of the value of the fees has been 21%, and using CPI the decline has been 29%.

21. As the Bar Council's Data Analysis Review demonstrates in relation to gross fees received:⁹

"... those barristers who report the highest proportion of their fees coming from legal aid also have the lowest overall fees"

"... each 1 per cent increase in legal aid (as a proportion of fees) reduces total fee income by £611. So that says that moving from say 40 per cent to 50 per cent legally aided work reduces total fees by £6,110 on average."

Table 5 in the report "*Legal aid Percentage by Average Fees*" demonstrates that for the years 2020-2021 to 2022-2023, the average total gross fees per annum for all barristers undertaking no legal aided work was £178,270, whereas for barristers receiving fees solely from legally aided work it was £117,202.

22. Low rates and fixed fees which do not reflect the amount of work carried out by barristers impacts the recruitment and retention of barristers who do civil legal aid work.

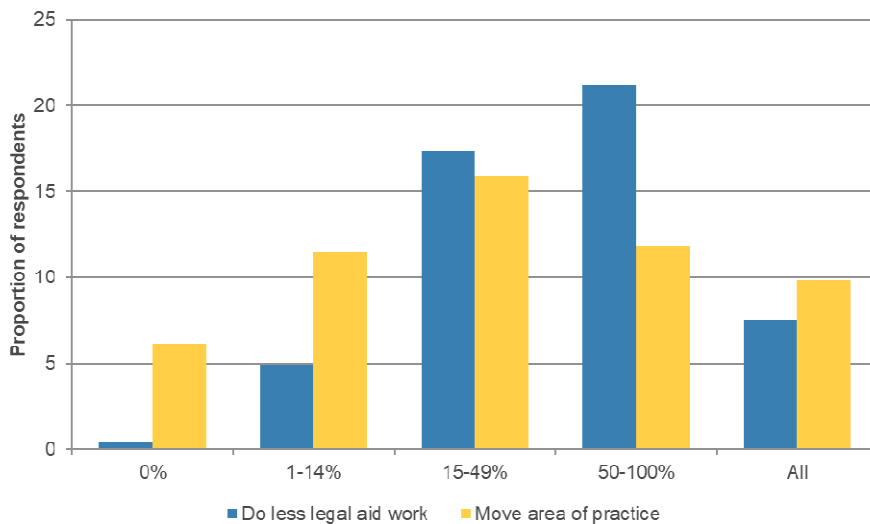
23. A 2018 Bar Council survey found that since LASPO, 25% of respondents had stopped doing legal aid work and 48% of barristers surveyed did less legal aid work than before.

⁷ This 29 per cent figure was established with the MoJ as part of the Criminal Legal Aid Review process in 2019. Accounting data were collected by the Bar Council for a sample of 950 self-employed barristers and average business-related expenses (predominantly Chambers rent but also training, technology and other expenses) were calculated.

⁸ The legal aid rates can be found in [Schedules 1-3 of the Civil Legal Aid \(Remuneration\) Regulations 2013](#). The family rates have not changed but regarding civil legal aid the government is set to uplift immigration legal aid fees by 15% for work under the Illegal Migration Act

⁹ Bar Council, 'Bar Council Data Analysis: Review of Civil Legal Aid' (forthcoming publication)

24. In the forthcoming Barristers’ working lives survey,¹⁰ it was found that the higher the proportion of publicly funded work undertaken by a barrister, the more likely they were to want to do less legal aid work (Figure 6.1).



“Looking now at barristers in civil practice, there is a clear relationship between the proportion of earnings from publicly funded work and the likelihood of barristers reporting that they wanted to do less legal aid work, as shown in Figure 6.1. Just over one in five respondents who received more than half of their earnings from publicly funded work wanted to do less legal aid work, compared with 17 per cent of those who received between 15 and 49 per cent of their earnings from publicly funded work, and five per cent of those who received between 1 and 14 per cent of their earnings from publicly funded work. The proportion wanting to change area of practice was highest among those with between 15 and 49 per cent of their earnings from publicly funded work (16%, compared with 10% overall) and was lowest among those with no earnings from publicly funded work (6%).”

Unhelpful, time-consuming and unnecessary administration

25. Barristers experience significant delays in payment, both generally, and because of the unavailability of, or inflexibility in the timing of, payments on account (POAs).

26. Practical issues, such as timescales means a barrister is often waiting to receive payment which is also a concern. One barrister reported:

“As an illustration it’s worth mentioning that although I left self-employed practice 7.5 years ago I still continue to receive income (although a dwindling amount) on work I did before leaving.”

¹⁰ IES/Bar Council, ‘Barristers’ Working Lives 2023’ (forthcoming publication), figure 6.1.

27. The delay in payments is a disincentive for junior members of the Bar to do civil legal aid work and is detrimental to retaining barristers who currently do legal aid work.

28. In our 2022 Report, *“Access Denied: The State of the Justice System in England and Wales”*¹¹ we said the lack of funding in the legal aid system has a snowball effect; unsustainable fee rates leads to lower retention and creates legal advice deserts in certain regions, which causes access to justice issues for users.

29. Our position on what can be done to ensure long-term sustainability of the civil legal aid system is to raise the rates of pay for barristers, widen the scope of practice areas that are eligible for legal aid, and remove practical barriers for barristers which are seen as a disincentive, such as delays in payment.

Answers to the overarching questions

30. The Bar Council responds to the overarching questions as follows:

1. Do you have any suggestions of changes that could improve civil legal aid both short-term and longer-term changes?
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31. Barristers undertaking family law legal aid make up the high majority of those undertaking civil publicly funded work. For instance, in 2022-2023, there were 4,561 barristers who received legal aid payments for civil work. Of that number, 73% (3,321) received legal aid payments solely for family work, 6% (260) received legal aid payments for family work and another area, and 21% (980) received payments only for non-family legal aid work.¹²

A. Family

32. The Bar experts undertaking such work have identified the following problems with the current regime for family legal aid:

- Scope and Grant of legal aid
- Low fees
- Growing level of unpaid work
- System of payment
- Impact on the Bar

¹¹ The Bar Council (2022), ‘Access Denied: The State of the Justice System in England and Wales’ <https://www.barcouncil.org.uk/static/88a28ac3-5866-4d73-99ecb9b05c03c815/2beb064f-0c2c-4408-aa037090e489c45e/Bar-Council-Access-denied-November-2022.pdf>

¹² The Bar Council (2023), ‘Bar Council Data Analysis: Review of Civil Legal Aid, The Family and Civil Legal Aid Bar 2015-2023’, Table 1.

- Impact on justice
- Downstream problems

33. *Scope and Grant of Legal Aid:-*

Reduction in pool of practitioners in public and private law children work

The reduction in the availability of firms prepared to undertake legal aid work is widely recognised. The NAO report identifies the need for the MoJ to work with providers and representative bodies to establish a workforce strategy that considers the pipeline of future legal aid lawyers and their training to ensure that future supply is sufficient to meet its objectives for access to justice, thereby enabling people who seek and are eligible for legal aid to access it in future.

Further, the LAA should continue to develop its contracting approach to improve the attractiveness of legal aid markets to experienced solicitor firms for civil legal aid. The ONA suggests they should look to reduce barriers to providers entering the legal aid market and to minimise the cost of contracting. Support is needed to ensure retention.

This is much needed as currently there is evidence of ‘down skilling’ of case oversight by caseworkers rather than lawyers in some solicitors’ firms. This is presumably to ensure firms can afford to provide a legal aid service. A consequence, particularly in complex cases, is that issues are missed due to inexperienced staff and picked up late by trial counsel when it might be too late to change course or obtain necessary evidence.

The solution again comes back to a properly funded system to enable the proper and fair division of work to those with experience.

The Bar Council agrees with the NAO recommendations set out above.

34. *Inadequate Remuneration:-*

Family legal aid rates have not increased since 1996, in fact they were cut 2011 with the introduction of the Family Advocates’ Scheme (FAS) which replaced the Family Graduated Fee scheme (FGF).

FAS differed to FGF in that in relation to the work to which it applied, it included all advocacy completed by junior counsel and solicitors, but not Silks. The scheme provides (largely) a flat rate of payment with little differentiation between more and less complex cases. There is a standard hearing unit / daily fee with limited bolt-ons for certain issues and for court bundles over 350 pages. The highest court bundle payment is for over 1,500 pages.

The FAS scheme had a further 10% cut in 2013, with the agreement that it would be reviewed in five years' time. That 10% austerity cut was never reinstated, and there has been no inflationary related rise at all to the scheme since.

The publicly funded family Bar is acutely aware of the extent to which their fees have fallen and continue to fall in real terms (see above).

In its response to the government's LASPO Post-Implementation Review,¹³ a Bar Council survey found that 25% respondents stopped doing legal aid work and 48% of barristers surveyed do less legal aid work than before.

In the 6 years since that survey was undertaken, many family practitioners have moved from legal aid practices into private work. Junior family barristers are leaving the Bar altogether, and there are obvious concerns about retention of women at the bar and diversity more generally within the professional. Those who remain feel burnt out and exhausted. Yet we serve vulnerable clients who need high levels of support. The Bar is committed to access to justice and practitioners work long hours often now undertaking unpaid work. However, this is unsustainable. After 28 years of a lack of investment, the system is broken. Investment is long overdue.

There is significant inequality in funding between those that do private law and public law. Private law cases often involve complex and serious allegations in a Fact Find, such as domestic abuse, rape and abuse of child(ren), yet the rate of pay is far lower.

This disparity has a disproportionate effect on the junior Bar who are often the ones undertaking private legal aid work. By way of example in FAS private cases, there are no bolt on fees. Therefore, there is no fee for advocates meetings, bundle payment or conferences.

A discrete and important example of the effect of inadequate fees levels is found in the scheme for Qualified Legal Representatives (QLR). The QLR scheme has not succeeded as the MoJ hoped, because the fees offered are insufficient to attract barristers in sufficient numbers to undertake the work involved.

The prohibition of cross-examination provisions contained within the Domestic Abuse Act 2021 came into force on 2 July 2022. The Domestic Abuse Commissioner in her Independent report *'The Family Court and domestic abuse: achieving cultural change'*, at her recommendation 8 states that *'The QLR Scheme was a flagship measure in the Domestic Abuse Act 2021 and is both victim-centric and court-centric. However, despite its evident need, the Scheme has had limited success likely owing to the low rates of pay'*. Even though now

¹³ Bar Council (October 2018) 'LASPO Five Years On: Bar Council submission to the Ministry of Justice LASPO Post-Implementation Review - [laspopersubmissionbarcouncilfinal.pdf](https://www.barcouncil.org.uk/media/10000/laspopersubmissionbarcouncilfinal.pdf).

travel costs are recoverable, in a real example case, a junior advocate described the following issues:

- A QLR was instructed to cross-examine an applicant who had made allegations of domestic abuse against the respondent.
- The Fact-Finding hearing was listed for 4 days.
- The QLR was instructed to cross-examine the applicant on day 2.
- The QLR therefore only attended one trial day out of 4 and was only paid for one trial day out of 4.
- The QLR's preparation was entirely disproportionate to the fee. The fee assumed that the QLR's preparation was commensurate with a 1-day trial, which was simply not right. The QLR had to read all papers, watch all CCTV/body worn footage that was relevant to the case, and was cross-examining a key witness.

The working example above is concerning when one considers the Domestic Abuse Commissioner's findings from a recent national survivor survey which shows just how important the Family Court is to victims and survivors, with 69% indicating that they wanted legal support or advice for Family Court proceedings compared to 42% who wanted access to legal support or advice for criminal court proceedings. The desire for such support is not met with provision as there is a lack of court support such as IDVAs, Qualified Legal Representatives and other specialist support workers.¹⁴

35. *Increasing level of unpaid work:-*

The nature of Family legal aid work has fundamentally changed since the introduction of FAS, and that has resulted in significant amounts of unpaid work for the family Bar both in FAS and VHCCs (Very High Cost Cases):

Generally

- A drive towards fewer court hearings (making every hearing count) creates an expectation on advocates to undertake more work outside of hearings. For example, if an adjustment to the court timetable is required or an agreed application is made to instruct an expert it might be expected that an order will be drawn up and agreed without a court hearing. This work is all unpaid under FAS.
- Clients and solicitors are increasingly requiring additional conferences beyond the two that can be claimed.

¹⁴ Pyper, D., Sturge, G., Lipscombe, S., Holland, S. (2020) Spending of the Ministry of Justice on Legal Aid, House of Commons Library.

- A change of advocates (often needed because courts do not now list for the advocate's convenience) means that new advocates find that the conferences have already been claimed. This is all unpaid work.
- Increasing pressure on court time means that cases are overlisted e.g. allowing 4 days when the hearing should take 5 days. As a result, the court will often sit early and late to achieve the necessary court hours. However, the advocate is only paid a flat rate for the day however long the day actually lasts.
- The introduction of the public law portal places a burden on advocates to respond to judicial questions raised on the portal in between hearings. This is all unpaid work.

Written work

- Position statements are now mandatory for every hearing. These documents are designed to save court hearing time, requiring work to be front loaded by the advocate who is only paid for court hearing time (in the form of units).
- Skeleton arguments are often requested for which no additional payment is due under the scheme. Skeleton arguments can take many hours to prepare, reduce court time under which fees are payable. This also highlights the point that there is little differentiation in the scheme for complex and more straight forward cases.
- Following on from this, complex cases in the High Court previously attracted a 33% uplift in recognition that such cases were complex, and more work was involved. This uplift was removed with the creation of the single Family Court.
- The requirement for written questions to be provided for vulnerable witnesses is time consuming and not paid for under the current scheme. Also, advocates who are required to cross examine the vulnerable witness do not receive an uplift. There is currently only an uplift for representation of a vulnerable party, not cross examination of one.
- Similarly, there is increasingly a requirement to put written questions to experts rather than them be called for cross examination at a final hearing (or before they can be called). Part 25 provides for questions to be put by way of clarification, but increasingly the courts require quasi cross examination by way of written questions. There is no fee for this under the FAS scheme, and if written questions are put in lieu of the witness being called the FAS uplift is no longer payable.
- Courts often now require the filing of detailed and agreed chronologies so as to shorten the hearing time. This is all unpaid work.
- At the conclusion of a case, again to save court time, written submissions are now routinely required. These are to be produced by the advocate at evenings / weekends and are unpaid under the scheme. This is particularly where the evidence

finishes on one day and the court directs the document to be produced in advance of judgment or other hearing the next day.

- The advent of the transparency scheme post-dates the FAS scheme being introduced. New orders under the pilot scheme and also anonymisation of judgments for publication are all unpaid.

Preparatory work (other)

- Multiple advocates meetings are requested/ordered by the court in most Events/FAS cases. The purpose of which is to narrow issues and save court time. These are directed prior to many hearings, but only two advocates meetings are paid in the context of cases paid under the VHCC scheme.
- Advocates meetings which are approved by the court retrospectively are frequently not paid on Events/ FAS cases. This situation arises because it is not always possible for Advocates Meetings to be contemplated and directed in advance of hearings - case developments occur; such as urgent need(s) to revisit a child(ren)'s placement in a family case (if placements break down or a child is no longer living in a regulated placement for example), or if a child has absconded from a placement. When such developments occur, it important for the advocates to be able to convene, plan, discuss and agree essential directions in the context of an advocates meeting in readiness for the hearing to ensure that listings are effective, and that court time is used in the most efficient way.
- As previously stated, multiple conferences are required in many complex cases but only two are paid. In particular, if a client has a disability, be it learning, mental health, communication difficulties. The evidence and discussion may need to be broken down in a way they can manage.

Bundle payments

- The use of technology has meant that there is greater and greater disclosure of voluminous material such as phone records and text messages not paid for under the current scheme. These can run to 1000's of pages. A bundle payment does not begin to address the long hours to review this and with Events there is no uplift at all. Unpaid 'preparation' days become a common feature in complex events cases, with medicalised issues, eroding the amount of fee paid considerably.

The current scheme does not pay for viewing of body worn footage, or ABE (Achieving Best Evidence) interviews the use of which has grown significantly in the last eight years. Additionally, when arrangements to attend Police stations for counsel to view sensitive material are directed by the Court, disputes often arise as to the purpose of such processes, leading to confusion as to what can and should be classed as a 'sitting' court day.

- With FAS the court bundle payments are payable only for case management conferences, IRH (Issues Resolution Hearing) and hearings otherwise listed on contested evidence. Removal hearings are now almost exclusively dealt with on submissions and not on contested evidence (as was previously the case). Contested interim removal hearings require the advocate to be absolutely on top of the material, and no court bundle payment is attracted for this type of hearing, which does not fairly reflect the work involved.
- Again, with FAS, bundle payments are limited to one case management hearing, one issues resolution hearing and one final hearing. Cases are increasingly listed for more than one case management hearing, particularly when complex evidence is awaited before a decision can be made about assessments. Pressure on court time often means that it is not possible for there to be continuity of counsel, which means counsel representing a client at a subsequent case management hearing is not remunerated for reading a large bundle. A change in the last eight years is the pressure on court time making continuity of counsel harder to secure.

The above are but a few illustrations of the amount of unpaid work undertaken by the Bar. It is not an exhaustive list.

The solution requires:

- Proper remuneration for work actually undertaken by counsel: the growing burden of unpaid work is unsustainable on top of the cut in fees in real terms as discussed above.
- Parity in the pay levels for private and public family law FAS cases, a private law fact find is no less complex than a public law, yet payments rates vary dramatically.
- Acceptance by the LAA that when the court approves extra sitting days and viewing processes to consider case material that such endorsement evidences their necessity. The fee scheme should be regularly reviewed to keep pace with the changing nature of the work and ensure that payments are appropriate for the type of work being done.

36. *Unhelpful, complex and unnecessary administration*

The lack of autonomy in counsel receiving payment for work has been a long-standing problem in family legal aid.

FAS payments are administered by instructing solicitors and where there are delays to the process of allocating counsel's fees, junior counsel in particular can experience cash flow difficulties. By way of example, in legally aided private law children matters, which is work most likely to be undertaken by the newest entrants to the family Bar, the rates

are low, the scope of LAA funding is limited (limited to cases with evidence of domestic abuse) and if one imports payment delay, to the lack of autonomy in counsel receiving payment, one can see the risk of reducing further the pool of legal representation to victims of domestic abuse.

These factors serve to limit the pool of representation open to those most at risk of re-traumatisation and fear for their children's safety is at odds with the MoJ's (May 2023) *'Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update'* and conflicts with the Domestic Abuse Commissioners recommendations as set out in her Independent Report *'The Family Court and domestic abuse: achieving cultural change'* (updated February 2024).

There is a significant and wide delay in payment of Rule 16.4 Guardian cases, paid on FGF. Cases are paid at the conclusion, and it can take years to receive payment. Not only does considerable delay attach to these payments, it is necessary to justify and provide detailed evidence as to why, on the facts of a case, percentage uplifts should be applied to reflect the volume and complexity of the work entailed. Despite detailed justifications being provided, uplifts rarely ever exceed 50%, notwithstanding the complexity of a given case. It also is worth highlighting that Rule.16.4 Guardians are often the only represented party in these complicated private law children matters (which often entail serious issues of physical emotional and psychological forms of abuse) because the introduction of LASPO changed the scope of family legal aid, meaning that participants cannot access legal aid for private family law proceedings barring some exceptions. This is also true of other areas of family work such as child abduction where cases are paid at the conclusion.

VHCCs are the most complex and challenging of cases, yet those essential payments on account (POA) to support the retention of high calibre practitioners, have largely vanished, and waiting times for payment has increased significantly. In order to maintain access to a fair justice system and retain skilled representation in these cases proper system of payment is essential.

The absence of regular POAs or a workable interim payment system in some cases leads to practitioners to regularly experience financial hardship, which includes personal loans, re-mortgages, or 'soft' loans. In some chambers 'hardship' funds have been introduced to counter the financial constraints frequently caused by delayed and sporadic payments.

The solution that is urgently required is retention of POAs together with a swifter payment system.

In the longer term, the MoJ should:

- Implement recommendation 9 of the Domestic Abuse Commissioner’s report on the Family Court and domestic abuse: the Government should remove the means test for legal aid for all victims and survivors of domestic abuse going through private family law proceedings. This would enable any party raising allegations of domestic abuse to receive legal representation throughout their proceedings and provide critical support for the victim or survivor to navigate the complex legal system.
- Make CCMS (Client and Cost Management System) fit for purpose. It currently requires repetition of information to be uploaded, it is slow and is prone to crashing requiring repetition of data input from clerks.

37. *Impact on the Bar*

The Bar Council’s “*Barristers’ Working Live Survey, Barrister Wellbeing (BWB) Analysis*” (January 2024)¹⁵ found that barristers working in Family Law had significantly lower overall wellbeing compared to all other Practice Areas, except for the Criminal Bar. There is little doubt, in our view, that the system issues set out above is a major contributor to this finding.

The impact on the family Bar of years of cutbacks and under investment has been;

- a) barristers leaving this area of practice and moving to privately funded work
- b) leaving the profession altogether
- c) suffering burn out and in some cases mental health issues
- d) suffering significant financial hardship particularly in London
- e) issues of diversity at the Bar if only those with private means can afford to undertake legal aid work.

In a proper civil legal aid system what is required to address these issues is fair remuneration for the Bar.

38. *Wider impact:-*

There has been a very real adverse impact to the fair administration of justice as a result of the inadequacies of civil legal aid system.

The removal of legal aid following LASPO for private children work, save for those that can apply under regulation 33 of the Civil Legal Aid (Procedure) Amendment Regulations 2016 where there is proof of domestic abuse or risk of domestic abuse or that fall into exceptional case funding section 10 [not in scope cases], has had a

¹⁵ [Wellbeing-at-the-Bar-report-2024.pdf \(barcouncil.org.uk\)](https://www.barcouncil.org.uk/Wellbeing-at-the-Bar-report-2024.pdf)

fundamental effect on access to justice and proper representation of many of the most vulnerable in society.

The safety net provisions do not provide that and many fail to secure legal aid. Victims of abuse amongst others remain vulnerable as the protective provisions are inadequate. The Government's 5-year review did not address this, but we invite this review to take the opportunity to make those adjustments.

There are more families in crisis than before and the system is unable to respond, within the 26 weeks, to identify and address care needs for societies' most vulnerable children.

There are more children coming to the attention of local authorities and safeguarding professionals in school and health services as a result of a failing system to support families at the break down of relationships. Those individuals are often left to try to navigate the family justice system alone.

Legal aid 'deserts', i.e. the reduction in the number of firms providing family advice at the earliest opportunity reduces access to good quality legal advice at the earliest stages of proceedings, and such leads delays, poor case management decisions and significant delay before resolution of children matters.

The pressures on the court system brought about by the downstream problems created by LASPO remain.

As set out in the National Audit Office's report, research by the MoJ and HMCTS has been limited to ad-hoc analyses of hearing durations in family courts in 2014 and 2018. The latest research in 2018, found that all private family law cases took longer in 2018 than in 2014, regardless of representation. Limitations in HMCTS data does not allow the MoJ to accurately understand the impact of litigants-in-person. This is because the analysis is based on estimated hearing lengths (HMCTS does not record actual hearing lengths) and does not control for the impact of case complexity on case duration.

We consider that the combination of the reduction in scope of family legal aid introduced by LASPO and the consequential delays in the court system likely means that there are more broken families, more pressures on safeguarding agencies, schools, and health services, including Adult Mental Health Services and Child and Adolescent Mental Health Services.

The solution is recognition of the wider costs brought about by LASPO and an introduction of properly funded early interventions, which should include greater access to early advice, increased availability and access to separated parenting programme and properly funded mediation or another form of funded ADR to achieve supported resolution.

B. Community Care

39. *Background*

It is critical to understand that the Community Care contract includes both cases about the provision of care and support to (disabled) adults and children and work in the Court of Protection (COP). These are radically different in terms of the nature of the work and the remuneration structure. COP work results in much more certificated work (as opposed to Legal Help) and enhanced rates.

Since LASPO, there has been a change in the nature of work for which legal aid certificates in Community Care have been granted: see "*Community Care Legal Career Pathways, Research Report*" (April 2022),¹⁶ which indicates that there had been a 75% increase in Legal Aid certificates in Community Care since LASPO, but that legal Help has reduced by 77%. See also the tableau public data as at 31/01/24:¹⁷ Community Care Civil Representation certificate funding applications numbered 275 in 2013 but 411 in 2022; Community Care for Judicial Review funding applications were 229 in 2013 but 83 in 2022. Because the increase above is not for judicial reviews (JR), it is highly likely certificates are for COP work and for COP barristers not adult social care barristers.

40. *Adult social care and support work is not financially viable*

The preference on the part of providers to do COP work is not a reason to make COP work less remunerative. Many would like to do much more care and support work - which is almost exclusively Legal Help and judicial review (JR).

Care and support work must be made financially viable. But Legal Help fixed rates for solicitors are so low as to be a clear disincentive. Barristers can charge hourly rates, but the hours available are limited and the rates very low. The only way barristers can make a living doing care and support work (as opposed to COP work) is if enough cases move onto a certificate and a significant proportion of those result in JRs being issued and inter-partes costs awarded. There are structural reasons why this does not happen and hence barristers have either stopped doing care and support work or don't want to do it in the first place (junior barristers).

The structural reasons are interrelated and include (a) very low volumes of work - many solicitors have stopped doing care and support work rates since LASPO (b) the decision making processes under the Care Act 2014 are such that cases rarely get onto a certificate or go to court - it is always easier and cheaper for local authorities to remake decisions and (c) hourly rates are very low and JRs in this area are too high risk as the claims are very fact sensitive (and therefore not suited to JR) and no fees are payable if permission is refused - they do not result in inter-partes costs often enough. This all becomes hugely demoralising over time.

¹⁶ [Adult+social+care+and+unmet+needs+May+2022.pdf \(squarespace.com\)](#)

¹⁷ [legalaiddstatisticstool | Tableau Public](#)

There are also problems with the very low threshold for High Cost Case Plans (HCCP). The amount of preparation that can go into a care and support JR often means that the case is on a HCCP at the very beginning of the legal proceedings, further increasing the level of risk for barristers.

Many of the firms that still do care and support work overuse paralegals in order to accommodate the funding constraints - this means there is even more work for counsel to do at the early stages, for the which they are never properly remunerated.

The solution is to make Legal Help and certificated work much better paid so that there is less risk involved. Enhancements or elevated rates would assist.

Alternative Dispute Resolution (ADR) is useful in this area of work. The problems above could be avoided if cases (in terms of ADR) were properly remunerated. Assuming that inter-partes costs will not be part of any ADR, legal aid must ensure there is adequate funding for solicitor and counsel to attend ADR. One of the current problems is that too many well-intentioned but inadequately qualified persons are involved, leading to intractable factual disputes when in fact the law provides a fixed decision-making structure that if properly applied ought to lead to fewer disputes.

Our Bar experts consider that the reliance on their good intentions and desire to serve some of the most disadvantage people in society has been abused to the point where many have stopped undertaking publicly funded work in this area because they cannot make a viable living from it despite their passion and commitment to justice. The payment levels and structure result in many of society's most vulnerable being denied access to justice.

C. Housing and Debt

41. *Scope and Grant of Legal Aid*

Housing legal aid is in crisis. LASPO removed significant aspects of this work from scope, particularly most claims for damages/repair orders. The number of legal aid providers offering housing legal aid has fallen by around 25% in the last 3 years (from 483 in March 2019 to 365 in October 2023), and even then a large proportion of those providers are not delivering legal aid cases.¹⁸ Legal help fees have been frozen for solicitors since 1996 (now 10 years for barristers practising in this area since the fee cuts

¹⁸ Inside Housing: "Legal Aid in Crisis" (05.02.24) [Inside Housing - Insight - How the housing legal aid crisis is impacting tenants and landlords](#)

introduced by the Civil Legal Aid (Remuneration) Regulations 2013).¹⁹ There is enormous unmet demand.

The removal of most disrepair cases from scope has meant that solicitors cannot cross subsidise the work in which inter partes costs orders are unlikely (possession proceedings) or difficult to enforce (private landlords). It has created a dilemma for tenants; either they try and find a solicitor who will act under a conditional fee agreement (CFA) to conduct the claim (which almost certainly involves reductions from the damages due to the solicitor's success fee), or to secure public funding fail to pay rent due so that the landlord brings a possession claim, for which full legal aid would be available to defend the possession claim (including by way of counter-claim for disrepair).

The serious decline in the number of community care legal aid providers also has a very serious effect in housing cases. Commonly, especially for those with protected characteristics, proper care and support is required for individuals to maintain their tenancies. Few housing solicitors also have community care contracts – a claim might be able to be successfully defended if support is available e.g. care and support for a person with a hoarding disorder to take steps to declutter their home, for an individual with anxiety and depression to manage their money, care and support for a tenant with alcohol problems to maintain a detoxification programme which means they no longer cause anti-social behaviour, but in face often of local authority cuts this support is not forthcoming and there are far too few community care lawyers to enforce it and we see our clients losing their homes unnecessarily.

42. *Inadequate remuneration - impact on the Bar*

The impact on the Bar has also been profound in a number of regards.

There has been a decrease in spend of 70% in normal fees paid to counsel between 2008-2009 (approx.£8.87 million) and 2022-23 (approx. £2.67 million) and a 63% decrease in high cost case fees (£918,966 to £338,401).²⁰

Gross fee income for barristers undertaking legally-aided housing work is lower than those undertaking other areas of civil legal aid. In 2022 mean and median fees were respectively 10% and 20% lower.²¹

The Legal Aid Agency has becoming increasingly unwilling to fund silks in housing cases.

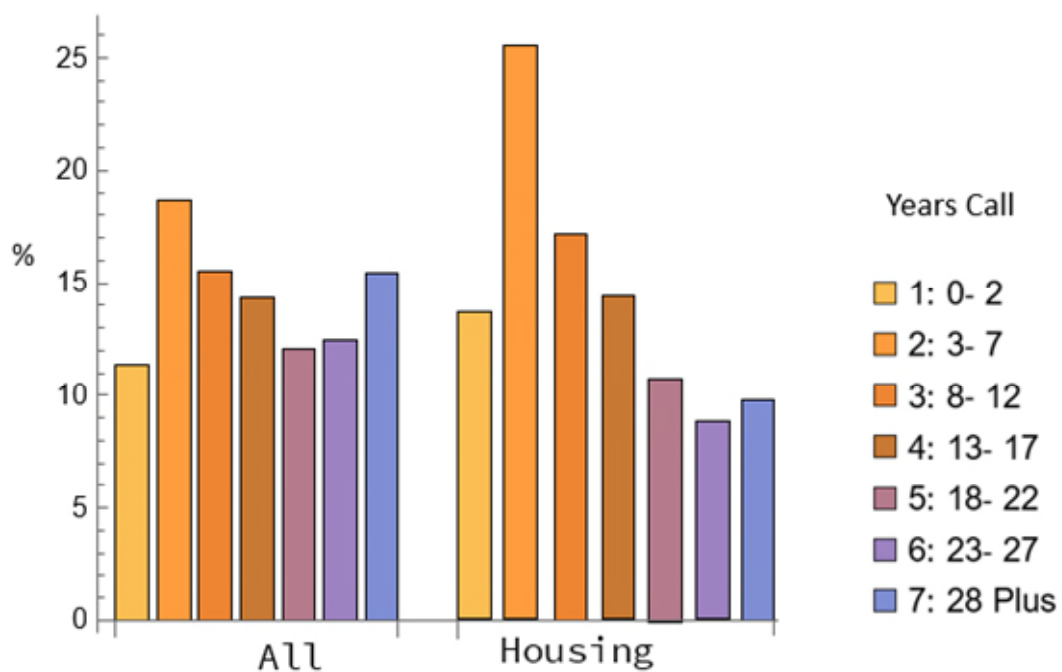
¹⁹ These fee rates remain at the same considerably reduced at risk rates for Very High Costs Cases too.

²⁰ Bar Council's Data Analysis Review, Table 7.

²¹ Bar Council's Data Analysis Review, Chart 3.

Our Bar experts' experience is that significant numbers of barristers who had mixed housing practices have stopped doing legal aid work. For instance, recently one of our London-based Bar experts took on a difficult mortgage possession case in Manchester notwithstanding significant pressure of work despite having previously rejected it because nobody else could be found and the barristers which he had recommended had ceased to do legal aid work.

This experience is supported by the Bar Council's data about the experience levels of barristers undertaking legally-aided housing work. The chart below sets out the percentage of barristers undertaking legally aided housing work by comparison with those undertaking all legal aided civil work:²²



There are low percentages in the highest experience bands. This suggests that newly qualified barristers spend some time doing this work, either from benevolent intentions or to secure experience (or a combination) then once they have some experience leave legally-aided housing work in search of better-paid work.

This trend raises concerns about the availability of any - and particularly experienced - counsel to work on these cases in the future, particularly as the more experienced barristers currently engaged in this work move towards retirement.

²² Taken from Chart 2 in the Bar Council's Data Analysis Review.

Immigration and Asylum

43. *Scope of Legal Aid*

The exclusion of pre-permission JR costs from Civil Legal Advice makes an already unpredictable and insecure area of work much worse. The amount of time required to investigate and prepare a JR case to issue and, possibly, to a renewal hearing, is very considerable. The risk of counsel not receiving any payment for such work if permission is refused is a significant disincentive to undertaking such work on potentially meritorious but riskier cases, especially given the low rates and payment issues set out below.

Applications for leave to enter or remain based on an individual's right to private and family life under Article 8 of the ECHR were amongst those areas taken out of scope. Often these individuals have meritorious cases but have had multiple appeals due to very poor/no representation, which unnecessarily inflates costs for HMCTS (and the Home Office, and often local authorities or others who are supporting these cases). Article 8 needs to be brought back in to scope.

Exceptional Case Funding (ECF) is routinely granted for Article 8 cases and it is a waste of providers' and LAA time and money to go through the Article 8 application process.

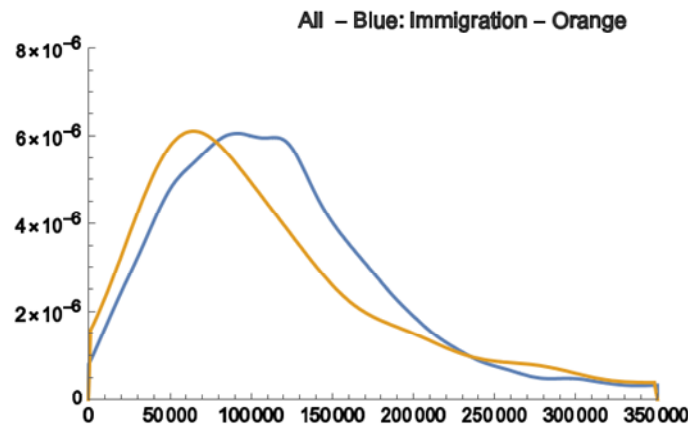
44. *Inadequate remuneration*

The patterns of LAA spending on fees for barristers for immigration and asylum cases has changed significantly since 2008-09. Of the approximately 1.9 million paid in that financial year, around 86% was in relation to Counsel fees. Post-LASPO, the position has changed, with around 53% being spent on Normal Counsel fees between 2014 and 2023. We still see a reduction in the total spend of 31 per cent between 2008-2009 and 2021-2022. The spend in 2022-2023 was higher, but it is unclear whether this is a temporary blip in the trend.

Low hourly rates for controlled work (FTT (First-tier Tribunal) appeals and any pre-action advisory work) have not been increased for very many years and are now completely unrealistic.

The application of fixed fees and the way that many solicitors approach payment of these to counsel is a real problem. For instance, the hearing fee for a standard asylum appeal is £302. This is only supposed to cover the work done on the actual day of the hearing but because the standard CLR (Controlled Legal Representation) fixed fee for preparation of an asylum appeal is so low solicitors cannot afford to share this with counsel so if the case does not escape the fixed fee, which may be outside counsel's control, counsel will be paid a paltry fee for what are difficult and complex cases.

The data reflects this experience. Gross fee income for barristers undertaking legally-aided immigration and asylum work is lower than those undertaking other areas of civil legal aid:²³



45. *Impact on the Bar*

Immigration and asylum work also experiences the same issues over the seniority of the practitioners undertaking the work as housing: the data suggests that newly qualified barristers spend some time doing this work then leave in search of better-paid work once they have some experience.

It would be a mistake for the MOJ to think that barristers can cross-subsidise; doing some better paid work in private areas of practice and combining it with legal aid. That poses serious issues with supply (there are not many immigration or asylum appeals) and is unrealistic for what are extremely specialist areas which barristers cannot simply dip in and out of.

Furthermore, the type of work that is done on legal aid is exceptionally stressful, often urgent, consistently requires substantial out of hours work, and is likely to involve high levels of vicarious trauma. Asking junior barristers who likely have a wide range of other areas of law that they could move to, to undertake this kind of work at low/no pay is inimical to ensuring that there are adequate levels of representation. The experience of our Bar experts is that even enthusiastic juniors have been put off by the combination of how pressurised this work is combined with how badly paid it is.

We therefore have significant concerns over the availability of counsel, and particularly experienced counsel, to work on these cases in the future.

46. *Unhelpful, complex and unnecessary administration*

Delay in payment is a serious issue.

²³ Bar Council's Data Analysis Report, Chart 4.

Timescales for payment for controlled work are very poor because of the fact that providers cannot bill for the majority of the case until the end of the matter, and even in cases that do escape the fixed fee, the process of preparing and submitting escape claims for assessment means that there is often even more delay in paying counsel who have no control over the timing of submission of the escape claim, or how quickly after receipt solicitors will pay counsel's fees.

Other than applying to the LAA for POAs on certificated cases, barristers have no control over the timing of payment as everything has to be done through providers. So even if counsel provides all the information needed for billing promptly, if the solicitor does not then prepare and submit the bill counsel will not be paid.

Our experience is that the requirement for legal aid bills to go to detailed assessment even where an inter partes costs order has been made, means that a high proportion of cases take well over a year to pay.

There should be a mechanism to circumvent this reliance on solicitors where they are slow in paying. When the fees are already inadequate, the absence of such a mechanism erodes goodwill still further.

This could readily be addressed by requiring payments on account to be made as a matter of course, potentially with a standard sum being paid out within 14 days of a costs order, then a percentage of the bill of costs being paid within 14 days of its service.

D. Mental Health

47. *Inadequate remuneration*

Mental health work is a specialist area of law, so much so that only those who have accreditation are able to represent patients at a tribunal.

Those who represent individuals are working with the most vulnerable people in society and have to cross-examine expert witnesses in order to challenge detention.

It should therefore be remunerated fairly, but is not.

Currently this work is on a fixed fee basis.

There seems to be an asymmetry with this work and broader community care legal aid work which is not paid by way of fixed fee.

The fixed fees are split into level 1, 2 and 3. Level 1 covers initial attendance (£129), level 2 covers preparation (£321) and level 3 covers attendance at the tribunal hearing (£294).

Clients will often require lengthy attendances to build a rapport or to elicit instructions on reports. Counsel will spend time considering expert evidence from psychiatrists, qualified mental health nurses and social workers and then prepare for a tribunal in which this expert evidence must be challenged.

The fixed fees are not sufficient to cover the volume of work undertaken on these cases.

It is often the case that if the 'escape fee' is not reached, then what would have been hundreds of pounds worth of work undertaken is lost, where there is no choice but to undertake the work in order to fully prepare the client's case.

Many practitioners do not undertake hospital manager's hearings due to not being paid for the work undertaken on them. They arguably require the same volume of preparation as a tribunal hearing, given that the representative is challenging the same evidence that they would in a tribunal. Again, this requires time, specialist knowledge and skill and will often take us far beyond the level 3 fixed fee.

Discharge can often be secured for patients at hospital manager's hearings, they are an extremely important avenue of appeal, but due to fewer practitioners undertaking these, this is having an impact on patient's access to legal representation.

If this continues, long term, the pool of counsel willing to practise in this area of law will evaporate; meaning that some of the most vulnerable members of our society, will not have access to representation to appeal their detention.

In respect of issues ongoing during their detention, if they have not submitted an application to the Tribunal then these issues would be covered by a non-mental health tribunal file for which pay is £253 for non-MHT files. These files are means tested and it can often be incredibly difficult to obtain evidence of a client's means who are detained in a psychiatric unit and presenting as incredibly unwell.

E. Discrimination

48. *Inadequate remuneration*

The key necessary and vital change is to reverse the trend in the reduction in the number of legal aid providers. The only way of doing this is to ensure that there is a properly resourced system with proper rates of pay which can sustain practitioners.

The reduction in legal aid rates and their erosion by inflation has had a very serious impact on the sustainability of a legal aid practice both for solicitors and barristers.

The effect is heightened when one considers how private rates have increased over this time. This has significantly impacted the health and sustainability of particularly the junior bar.

F. Education

49. *Scope of legal aid*

There are very few education law providers of services in England and Wales. Data from the Law Society show that nine in ten people in England and Wales do not have an

education legal aid provider –that is over 53 million people.²⁴ Even in very large urban areas (such as Birmingham, London) there are very few providers.

There are currently 389,171 pupils in schools in England with EHC (Education, Health and Care) plans (up 9% from 2022).²⁵ All of those parents have a right to appeal the contents and nature of the EHC Plan, which set out the provision to be met for their child.

The significant lack of legal aid provision means that appeals to the SEN (Special Educational Needs) Tribunal are largely made by those with sufficient money to pay for the expert evidence and legal representation.

Whilst legal aid is available for the collation of expert evidence to the SEN Tribunal, the significant lack of education legal aid providers, coupled with the low fees paid to experts for such reports, means that those without financial means can often not obtain this advice. The number of appeals to the SEN Tribunal has increased exponentially to 13,658 in the 2022/23 academic year, with an increase of 29% in 2022. The number of appeals is ten times higher than in 2014, but the amount of support for parents has declined considerably.

The decline in those undertaking legal aid in education law has led to a decline in expertise in this area, and thus difficulties in the entire sector being able to provide specialist advice.

Allied to this, the sums involved in legal help have not kept pace with inflation and therefore are very small. The standard fee is £272 with the threshold being £816 (Civil Legal Aid Regulations 2013). The complexity, range of advice and needs of parents are such that these sums are utterly insufficient to provide the sort of advice they require.

Many experts will not accept instructions on the sums payable by the LAA for expert advice, which is essential to present in cases involving SEN.

The diminution in numbers of providers allied to the increase in need has meant that many individuals go without legal advice that they could qualify for on financial grounds.

Education law advice also does not include exclusion from school. There are around 10,000 permanent exclusions from school in England in 2022/23.²⁶ Statistics collated in March 2022 (education, social care and offending, March 2022), shows that 59% of children that had ever been permanently excluded were also cautioned or sentenced for

²⁴ The Law Society (2024) [Education – legal aid deserts | The Law Society](#)

²⁵ Data from <https://explore-education-statistics.service.gov.uk/>

²⁶ As above.

an offence, and 22% of those children were also cautioned or sentenced for a serious violent offence. 80% of those children who committed criminal offences had SEN.

Those links show that timely intervention by way of legal advice at the stage of permanent exclusion (which could or should be bundled alongside other legal services that families often need – such as help in respect of threats to child criminal exploitation) could be valuable in preventing criminal offending where children are not in education. Research from London shows that those living in poverty, Black Caribbean, Gypsy, Roma and Traveller children in London are much more likely to be excluded than their peers.²⁷

The Committee on the Rights of the child made a clear recommendation to the UK government in 2016 to address the disproportionate use of exclusion for particular groups of children.

G. Public Law

50. *Inadequate remuneration and sustainability*

There simply is no area of legal aid work where any solicitor or barrister could expect to be paid anything approaching the market rates for comparable private work. The rates range from £71.55 per hour to £143.10 per hour,²⁸ with the highest end being reserved only for the most complex cases in the High Court. And in fact, once a case is treated as a high cost case by the LAA (when the total costs exceed around £22,500) the rates paid then tend to reduce, despite these tending to be the more complex cases.

A commitment to an inflation linked rise in the legal aid rates each year is required. Other areas of the public sector rightly demand and receive such rises and it would be a reasonable start for the government to make in redressing the current situation.

H. Claims against Public Authorities

51. *Scope of Legal Aid*

For the Bar, the main area of work which falls under this category is representation of family members at Coroner's Inquests.

Some inquests relate to an individual who has died whilst under the care of the state. It is not uncommon for many agencies to be involved in these (e.g. one or more of the ambulance service, an NHS mental health trust, an NHS acute trust, the police, the prison service, or a GP), all of whom are separately represented. It is not uncommon for

²⁷ Just for Kids Law, 'Race, poverty and school exclusions in London' <https://www.justforkidslaw.org/sites/default/files/fields/download/Race%2C%20poverty%20and%20school%20exclusions%20in%20London.pdf>, 4.

²⁸ Excluding Silks in the Court of Appeal or Supreme Court.

such inquests to last for many days and for the state agencies to be represented by specialist senior counsel.

As much of the work is done on a pro-bono basis up to the coroner ruling on whether the enhanced procedural obligation under Article 2 of the ECHR has been engaged. If they rule it has not been engaged, the work done is unpaid, and the client is left unrepresented in what can be often complex inquests when other bodies have legal representation.

Legal aid is only granted via ECF after the coroner rules on whether Article 2 of the ECHR has been engaged. Having to apply for legal aid in that way can often mean that funding is approved very late, long after significant preparation has already been incurred for which there is no guarantee of payment.

The Bar Council has long argued that representation should be granted for the family where the state has agreed to provide separate representation for one or more interested persons, irrespective of whether the enhanced procedural obligation under Article 2 of the ECHR is engaged.

I. Clinical Negligence

52. *Remuneration of expert witnesses*

Whilst a small minority of clinical negligence claims remain in scope (essentially claims involving severe brain injury before birth or in the neonatal period), the inadequate hourly rates paid to experts mean that experts of sufficient quality (generally obstetricians, midwives, neonatologists, paediatric neurologists, geneticists and neuroradiologists) will simply not accept instruction at legal aid rates. Many of these experts charge rates that are at double the rates allowed if legally aided.

Almost all of these most serious of claims therefore proceed under a CFA (conditional fee agreement).

Even if a claim starts with legal aid, once liability is established it is almost always transferred to a CFA at that point because in our experience solicitors find the bureaucracy involved in the VHCC stifling.

This has two consequences. First, there will be a cohort of meritorious cases which would otherwise have passed the 'merits' and 'cost-effectiveness' criteria which are not accepted by firms because they cannot afford to accept more difficult claims with the financial risks involved. Secondly, that claimants have their damages eroded (sometimes by hundreds of thousands of pounds) by deduction of the success fee that the CFA regime permits.

These consequences would be mitigated by reviewing and increasing the rates paid to expert witnesses and a 'lighter touch' in relation to the approval of VHCC plans.

J. Welfare Benefits

53. *Scope*

The welfare benefits system is complex and often raises profound questions of legal interpretation involving EU and Human rights legislation - for example, the current cases concerning the “right to reside” and the EU withdrawal Act. The complexity of the benefits system is well known (the current “standard” texts on Social Security legislation stretches to five large volumes) and often involves a good knowledge and understanding of disability and clinical ill health, alongside knowledge of tax and pensions law. Those claiming benefits provision (whether means tested or non means tested) are vulnerable – whether from poverty, ill health or disability, pregnancy, old age or other protected characteristics.

Despite this 83.6% of the population do not have access to a welfare legal aid provider, and even where there is such a provider, there is only a single firm available.²⁹

The current fees paid for welfare benefits advice are so low that providers have abandoned this work. Even where such is available, it is often advice provided by law centres or those in the not for profit legal sector who have reduced considerably because of the diminution of local authority funding for such provision since 2010.

The government already recognises the need for support in this area through the piloting scheme of early legal advice for debt, housing and welfare benefit matters (which started in 2022).

There are 250,000 appeals to the First Tier Tribunal every year, with legal help available to support them. Legal aid is available for appeals to the Upper Tribunal. But the lack of specialist legal providers means that very many appeals are not brought.

Furthermore, prompt welfare benefits legal advice should be integrated with that for debt and housing, as those issues are often intertwined. The provision of such advice would have considerable downstream benefits in (a) avoiding eviction and therefore the costs of homelessness provision (b) ensuring that individuals have access to the correct benefits (c) to provide a holistic service for those with disabilities

2. What are the civil legal aid issues that are specific to your local area? Please provide any specific evidence or data you have that supports your response

54. The Bar Council considers that other stakeholders will be better placed to detail where, and the extent to which ‘provider deserts’ have arisen.

²⁹ The Law Society (2024), [Legal aid deserts | The Law Society](#)

55. The Bar finds that this has real impact in a number of respects:

56. First, where there is a 'provider desert' the local Bar is unlikely to be instructed.

57. Secondly, this hinders cases where there is more than one category of law involved. For instance, a major problem in the North West is the lack of housing law advisers. Counsel are regularly asked to recommend solicitors who can deal with a housing issue that has arisen for a client they represent in some other legal proceedings. The reduction in firms who can manage to sustain numerous legal aid contracts means that in many cases a firm who deals with (say) a mental health case will not then be able to also deal with the same client's housing problems. This has arisen in cases where counsel is already representing the claimant in one matter where between them and the solicitor they have been unable to locate a housing solicitor: a homeless woman, fleeing serious harassment and living temporarily out of her usual area on police advice; and a young homeless man recently discharged from custody (where he had been held on remand) with a range of vulnerabilities. The number of firms specialising in housing law in the North West has reduced so radically that those left are full to bursting point and often unable to take on this kind of urgent referral.

58. Thirdly, the lack of legal representation caused by the 'provider desert' can lead to judges making mistakes. In housing one of our Bar experts reports they are often instructed in cases where there has been no advice available at early stages and judges make significant mistakes - recently a very experienced district judge made a possession order in a 'rent to rent' case (where the landlord rents to a company that rents to the tenant) when the landlord had terminated the mesne lease. Nobody was present to advise him of the effect of s.18 of the Housing Act 1988 that the tenant would become the direct tenant of the head landlord as it was an assured tenancy unlike at common law. Poor practice has built up over time that has never been addressed. There are chilling examples in housing law particularly in the area of anti-social behaviour injunctions as set out in the report of the Civil Justice Council on Anti-Social Behaviour that have led to significant prison sentences for contempt of court.³⁰

59. Barristers in Wales have reported that LAA casework is slow and cumbersome. In billing enquiries, if a request is received from the LAA and answered, the bill assessment goes to the bottom of the pile and there is a delay in payment. LAA decisions show a lack of sufficient understanding of legal issues, and the view of counsel are often second guessed.

60. We also add that our experience has been that the higher costs of living in the London area coupled with the low rates have made it difficult for the junior bar undertaking legal aid work to manage financially.

³⁰ [Anti-social behaviour and the Civil Courts - Courts and Tribunals Judiciary](#)

3. What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers? Please provide any specific evidence or data you have that supports your response.

61. In all categories of law, an increase remuneration to proper levels (see above).
62. Remuneration should be index-lined (see above).
63. The introduction of POAs for work undertaken under Legal Help.
64. More frequent POAs for work undertaken under Legal Representation (see above).
65. In family, payment for hearings cancelled at short notice. For example, complex multi-day hearings, which have required weeks and/or days of preparation collapse, for a host of reason(s) including, availability of judges, evidential issues and there is no mechanism to receive any payment for work undertaken. This is common with Events cases.
66. Funding needs to be approved more quickly to prevent the situation where either counsel are working at risk in the hope the funding will be approved or alternatively they receive last minute instructions which hinders the ability to prepare and advise
67. Over the years the quality of decision making by the LAA in relation to merits, scope and fee assessment has deteriorated. Decision makers have limited if any knowledge of the subject matter and (it would seem) little time to address the specific issues raised by counsel and others in the form of advice and justification for fees. This adds to the burden of doing this work and is dispiriting. Caseworkers should more readily accept counsel's views on the merits and appropriateness of public funding in a particular case and not seek to go behind the advice unless there are very good reasons to do so. There is no objection to having to account for work done and decisions made about cases: but the system would work better if the LAA would invest in training and higher quality decision making.

4. What potential risks and opportunities do you foresee in the future for civil legal aid: i) in general; and ii) if no changes are made to the current system? Please provide any specific evidence or data you have that supports your response.

68. *Family:-*

If no changes are made there will be a continued drain of talented and highly experienced barristers leaving the family Bar.

The removal of legal aid following LASPO for private family cases, save in cases with specified evidence of domestic abuse or child abuse, has resulted in a decline in the previous trend of disputes being diverted away from the courts to settlement via mediation. There are, by way of example, cases in which one party is unrepresented, by reason of non-availability of public funding, and the other has the benefit of very

expensive barristers to argue about trivial aspects of a child's life. The inability of an unrepresented party, to argue effectively against Counsel lengthens the duration of proceedings and, at times, results in more hearings. The proper funding of private family legal aid work would reduce the burden on the family courts, as full representation on both sides has the benefit of flushing out and dealing with unmeritorious arguments. Similarly, the pool of those prepared to undertake private law legal aid work is already small and reducing. By way of example, paralegal had to ring 49 sets of chambers to find a barrister prepared to take a private law case last week.

The pool from which the family Bar is drawn will be affected. Those that can afford to practice in family law will continue and those that can't leave or avoid family work. This could have a significant impact on diversity at the family Bar.

The quality of those drawn to publicly funded family work will dilute as more leave and others chose better paid areas of law.

69. *Other areas:-*

As we have set out, there are particular concerns over the sustainability of barristers undertaking legally-aided housing work.

It is a matter of concern that for some non-specialist chambers legal aid housing work, no doubt due to its low pay levels, is seen as junior work. Housing law, however, is in fact very complex. It requires a detailed knowledge of numerous overlapping fields. No housing lawyer can succeed without a clear understanding of the law of contract and of landlord and tenant that underpins what are numerous statutory regimes as to tenure. Housing lawyers must be good public lawyers to defend possession claims, act in judicial review proceedings and in homeless appeals. They must be expert in the law of tort to deal with many of the claims that arise from unlawful eviction and harassment. It is not an uncommon concern, especially outside specialist sets, to see cases where significant errors have been made by junior practitioners in cases which one would have regarded as complex and requiring a more senior advocate.

The work is also emotionally demanding and whilst barristers do not face those demands on an everyday basis from clients in the same way as solicitors these are cases of exceptional import to individuals; counsel are seeking to prevent the evictions of vulnerable and impoverished individuals often with all manner of other social problems. Their cases will also deal with those living in dreadful housing conditions, facing fear of violence from unscrupulous landlords and those who are homeless and facing life either on the streets or in unsatisfactory accommodation and in particular the consequences for children of those families. These issues can be tough to face and manage when barristers are young and at the junior end. Clients can be difficult, angry and aggressive.

Our Bar experts have noticed a shift of housing lawyers to other areas of legal aid that are either better paid (Court of Protection work is paid at High Court rates and frequently attracts 100% uprating) or into areas whilst they are also very demanding and similarly paid such as family law and inquest and inquiry work where there is not quite the need to be a specialist in so many different areas of law.

Those concerns are not confined to those categories of law. In particular, the Bar Council's data also indicates concerns over the sustainability of Immigration and Asylum publicly-funded practice.

Very few barristers have specialist experience in education and community care work from a legally aided perspective: the small number of cases means that very many unlawful practices by local authorities (who themselves are very short of money) continue for many years to the detriment of thousands of young people and the vulnerable.

5. What do you think are the possible downstream benefits of civil legal aid? The term 'downstream benefits' is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation. Please provide any specific evidence or data you have that supports your response.

70. In family law, the benefits of investing in a proper civil legal aid system will lead to:
- Alleviation of pressure on health, education, and police. All these services are drawn upon in increased measure in family breakdowns. This could be avoided/alleviated with early advice and intervention to support families at an early stage.
 - Downstream benefits are likely to include a reduction in local authority safe guarding interventions - e.g. involving domestic abuse within families leading to public law proceedings, the even increasing pressure on families at crisis with no legal advice is contributing to increased state intervention. It is noteworthy that legal aid statistics England & Wales for the period Jan- March 2022 compared to the same period in 2023 for public law family cases shows an ongoing increase in workload by 5% to 19,242 and a 13% increase in expenditure £167.6 m.
 - When individuals have access to legally aided advice, it tells them that they matter and that their children are important. This improves outcomes for families (who feel valued by the system and are able to negotiate better agreements, more quickly) and results in fewer services being required outside proceedings (for example, talking therapies, self-esteem work, PACE parenting training).

71. The consequences of a badly functioning social care sector are well known. When people do not receive the care that they are entitled to they are more likely to rely on the NHS in the form of hospital admissions or hospital bed blocking. Effective community care legal advice would often solve this problems quickly and timeously.

72. Moreover, the societal benefits off providing care and support in terms of prevention and well-being are equally well known. Keeping people in their own homes and avoiding deterioration in their mental and physical impairments ultimately saves money in the medium and long term. Equally, providing assistance to informal carers such as family members can sustain community based arrangements for longer and avoid disabled and older people moving into costly residential accommodation.

73. Budgetary pressures on local authorities have resulted in more short-term thinking in relation to care and support. This often raises legal questions. Having a properly resourced and available legal sector ensures people get the care and support they are entitled to and thereby contributes to the long-term benefits of a well-functioning social care sector. Cutting or not properly resourcing legal aid in this area is therefore a false economy.

74. Dealing with unaddressed SEN and providing quick legal advice to those excluded from school, as part of a bundle of support for a young person would lead to savings to the youth justice system, in respect of anti-social behaviour and lead to more young adults who leave school with qualifications and a sense of purpose, thus lessening the burden on the benefits system. For those with complex disabilities, access to education which meets their needs leads to less dependence on others in adulthood, a sense of dignity and independence which ultimately leads to less expensive care costs for young people in adulthood.

6. What are your views on the incentives created by the structure of the current fee system?

75. The structure of the current fee systems across all areas of publicly funded civil and family legal aid creates only disincentives (see above) not incentives.

6.1. Do you think these support the effective resolution of problems at the earliest point?

76. No.

6.2. How could the system be structured better? Please provide any specific evidence or data you have that supports your response and any views or ideas you may have on other ways of payment or incentives.

77. See above.

7. Is there anything in particular in civil legal aid that prevents practitioners with protected characteristics from starting and continuing their careers? If yes, how could this be addressed? Please provide any specific evidence or data you have that supports your response.

78. Yes.

79. Low rates of pay, which tend to bear harder on junior barristers with less established and regular sources of work, also bear harder on people from lower socio-economic backgrounds. Again, the solution lies in persuading potential entrants that these are sustainable and rewarding areas of legal practice. Frozen rates of pay, last set in the 1990s and subject only to a 10% reduction since then, is hardly the way to achieve that.

80. Women returning to the Bar after maternity leave, face having to rebuild a practice. The high cost of childcare with falling real terms income leads to many being unable to return.

81. For example, a lack of fair cancellation fees and underruns on FAS cases affects part-time workers/women/parents returning from parental leave disproportionately because they are less likely to have other work in their diary if a large trial collapses at short notice. If cases collapse, barristers are often left with no replacement work.

82. The ever increasing requirements for written work can place a greater burden on those at the Bar with neurodiversity (such as Dyslexia) increasing their preparation time disproportionality to income generated. The direction of travel works against subgroups such as these.

8. How can the diversity of the profession be increased in legal aid practice, including ethnicity, disability, sex, age and socio-economic background? Please provide any specific evidence or data you have that supports your response.

83. Through investment in civil legal aid. Proper payment for work undertaken will raise morale and attract a more diverse cross section to legally-aided civil and family law.

84. By way of example, a member of the Bar, who was a student from a low-income family, received the Isaac Newton Bursary at Cambridge and obtained a scholarship for the BPTC (Bar Professional Training Course) (although it did not cover the entirety of the fees which were, by then, over £16,000). Their award, whilst training as a pupil barrister, ensured that their living costs were covered during those 12 months. As a junior in practice, they struggled far more waiting at times 12 months for legal aid payment. These challenges are examples of hardship to basic living expenses and at times result in practitioners, from lower socio-

economic backgrounds (who do not have access to significant savings or financial support from family) deciding that it is unrealistic to pursue a career at the legally aided Bar.

9. What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid? Please provide any specific evidence or data you have that supports your response.

85. *Family:-*

Please see above comments in respect of the impact of LASPO and access to family justice.

There is a depleting pool of family solicitors undertaking publicly funded work, many continue for moral reasons and the retirement of stalwarts in family firms who have always stood by their vulnerable clients, are not being replaced as they reach retirement.

Barristers are often instructed on a case in which other parties, including parents, are unrepresented. There are many examples, at initial hearings, including removal of children at an interim care order hearing, when parents have no representation due to their being unable to find a solicitor from the increasingly limited pool of available family law solicitors who take legal aid work.

The PA Consulting Provider Survey Report in January 2024³¹ demonstrates this. Only 54% of legal aid contracts were reported to be profitable, and 40% of the professionals indicated that they were looking to leave the sector within the next five years. There was, however, an under representation of Family legal aid providers within this survey. The experience on the ground is that senior solicitors are leaving the profession, and less qualified and experienced solicitors are taking on higher caseloads. This has a knock on effect on Counsel, who are consulted and expected to provide unpaid advice and input on a week to week basis on cases on which they are instructed.

86. *Other areas:-*

First and foremost, lack of providers/legal aid solicitors.

For example, the experience of one of the Bar experts who reviews housing cases for Advocate (the Bar Pro Bono Unit) is that at least 40% of the cases they review qualify for legal aid, but there either is not a firm available or they are so busy that the client does not have time to wait for an appointment in, say, 6 weeks' time.

Effective outreach is crucial. Social care clients often don't know they need advice or how to find it. There are widespread communication and learning difficulties.

³¹ PA Consulting, 'Survey of civil legal aid providers in England and Wales' [2024].

The dearth of providers contrasts sharply with the increasing demand for advice in the context of care and support needs.

Those in need of care and support and social care generally are some of the most disadvantaged people in our society. Good client care requires providers to have the capacity to make home visits and spend the time with clients to properly understand the nature of their current support needs and the parameters of their dispute with the local authority. There are no shortcuts available in this regard. The fee structures makes providing the level of required client care in this sector very difficult if not impossible for most providers.

Finally, local advocacy services are oversubscribed and often badly run (because of a lack of resources). They are no substitute for suitably qualified legal advice, but obviously properly resourced advocacy services would assist nevertheless.

10. What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs? Please provide any specific evidence or data you have that supports your response.

87. A properly funded system to encourage an increase in the numbers of providers.

88. The Law Society has confirmed that over the last decade the number of legal aid firms has nearly halved, while the number of people struggling to represent themselves in the family courts has trebled and court backlogs are increasing. Millions now live in areas where there are no legal aid firms. Evidence demonstrates there is a statistical link between early legal advice and the speed with which legal problems are solved: Law Society (2017). Analysis of the Potential Effects of Early Legal Advice/Intervention. Therefore, if legal advice can be given at an early stage of a legal problem, then it can allow access to justice whilst being cost effective.

11. Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed? Please provide any specific evidence or data you have that supports your response.

89. Yes, see answer to Q9.

12. How do you think that people receiving civil legal aid can be supported in cases where they have multiple or 'clustered' legal issues and some of these are outside of the scope of civil legal aid? Please provide any specific evidence or data you have that supports your response.

90. Many barristers can offer holistic 'one stop shop' advice. Providing a fee structure that allows them to provide that advice would offer long term benefits. It is totally inefficient and counter-productive to make it so hard for clients to get simultaneous advice on social care, housing, welfare benefits, debt and sometimes family/immigration matters.

13. How do you think that the Exceptional Case Funding scheme is currently working, and are there any ways in which it could be improved? Please provide any specific evidence or data you have that supports your response.

91. Other stakeholders will be able to provide answers based upon direct experience.

14. What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid. Please provide any specific evidence or data you have that supports your response.

92. It is understood the criminal Bar are able to self-log attendance at Court. For the family Bar, this would avoid individual timings going to each fees clerk to log and chase manually. The functionality on the portal to log hearing start and finish times, with an extra hour by rote for Pre-hearing Discussions (PHD) and order drafting, and discretion to the judge to ask their court clerk to extend that time further if required would avoid huge amount of repetitive administrative work for barristers' chambers. This could come with a minimum guarantee of turnaround time for payment so that barristers do not waste significant time just having to try and prove they were present at Court. It would also mean that barristers would be responsible and have clear access to their own billing records much more easily than is currently the case.

93. Remote hearings should also be encouraged, when appropriate. This reduces travel costs and ensures that advocates have more preparation time which, in turn, enables them to take on more hearings. This developed during lock down enables case management hearings to take place more efficiently.

15. Remote legal advice, for example advice given over the telephone or video call, can be beneficial for delivering civil legal aid advice. Please provide any specific evidence and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.

94. There are of course benefits, both to a busy practitioner in delivering advice remotely, and to individuals using the service who may have difficulty, whether due to anxiety or other difficulty to attending an appointment. Remote advice should not however be seen as a

satisfactory method of delivery in every case. For example, in the context of parents with cognitive difficulties or those without access to electronic devices. It is also rarely appropriate for taking instructions on complex or sensitive cases, particularly from clients who may be traumatised. The building of trust between lawyer and client is significantly more difficult without face to face contact. In the context of immigration and asylum work, for example, it cannot be assumed that clients have access to a confidential space with adequate technology and internet access to be able to give instructions and receive advice in confidence, particularly where they are accommodated in large-scale accommodation centres or in shared hotel rooms. Further research is needed to understand the circumstances in which remote advice is beneficial, and those in which it is necessary to ensure that face to face advice can be provided.

16. What do you think are the barriers with regards to using technology, for both providers and users of civil legal aid?

16.2 Do you think there are any categories of law where the use of technology could be particularly helpful?

16.2 Do you think there are any categories of law where the use of technology would be particularly challenging?

95. See above.

17. What do you think could be done to encourage early resolution of and/or prevention of disputes through the civil legal aid system? Please provide any specific evidence or data you have that supports your response.

96. *Family:*

Front loaded advice followed by effective mediation. There were so many exemptions to the previous MIAMS (Mediation Information and Assessment Meetings) programme that meant many cases were taken out of the scheme rendering it less effective.

- a) Expanding the Separated parent information programme further.
- b) Extend the voucher scheme for mediation.
- c) Expanding the pool of trained mediators.
- d) Use of arbitration and lawyer led negotiations.

97. *Other:*

As stated above, current attempts at early resolution are stymied by the absence of properly qualified lawyers leading to intractable factual disputes that leave no one satisfied.

What must be avoided is a formalising of this process into some form of inadequately funded ADR that just extends this process (JR always being available as a long stop).

Early resolution could be achieved by a properly functioning and funder independent tribunal or mediation service that allows for equality of arms and clients, who are very often highly vulnerable and have multiple difficulties, to access high quality justice. Done properly this will avoid unnecessary and costly litigation - done badly and it will simply add another layer of cost and delay. There are no simple cost neutral solutions and pursuing one will prove a false economy.

18. Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.

98. No - all covered above.

Bar Council³²
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³² Prepared for the Bar Council by the Remuneration Committee.