

LASPO

FIVE YEARS ON

Bar Council • #LASPOstories

**Bar Council submission to the Ministry of Justice
LASPO Post-Implementation Review**



1. This paper is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice's (MoJ) Post Implementation Review (PIR) of Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO).¹
2. The Bar Council represents over 16,000 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 (BSB).

Overview of the Bar Council's Response

4. Part 1 of LASPO has met only one of the four objectives for reform identified by the Government when it was introduced¹: it has delivered significant savings to the cost of the legal aid scheme; but it has done so by
 - damaging access to justice by removing the ability of many who need advice and representation in civil or family disputes, to receive it;
 - overwhelming areas of the justice system with litigants in person, particularly the family courts; and
 - threatening the sustainability of the publicly funded legal profession.
5. Taken together, these issues mean that not only have the Government's other objectives for reform not been met, but that the precise opposite outcome has materialised. If nothing is done following the conclusion of the PIR, the future picture is a bleak one, in which just outcomes will continue to be threatened, and in which the MoJ's demands on the Treasury are likely to increase over the long-term, should the publicly-funded legal profession no longer be viable as a career path.
6. The Bar Council repeatedly warned the Government against the drastic reductions to the provision of civil and family legal aid and the selective implementation of Lord

¹ <https://www.gov.uk/government/publications/post-implementation-review-of-laspo>

Justice Jackson's reforms during pre-legislative consultation and whilst the LASPO Bill passed through Parliament.

7. Although the Bar Council welcomes the PIR, it notes that the MoJ has not sought to identify specific data which it considers individual stakeholders might provide to assist the review. For its part, the Bar Council conducted surveys of the civil and family Bar on the effects of LASPO in 2014 and 2018. Regrettably, their findings show that many of the detrimental consequences of which the Bar warned have come to pass.
8. The Bar Council calls upon the government to reintroduce a properly funded legal aid scheme to ensure that members of the public with civil and family disputes are able to secure appropriate advice and representation. That will require the reintroduction of legal aid for many or all areas of law removed from the scope of legal aid by LASPO, and more generous financial eligibility criteria.
9. The Bar Council believes that the government should aim to complete this reversal of the LASPO changes over the course of the 3-5 year period which will be covered by the 2019 Spending Review.
10. However, specifically, and as immediate priorities, the Bar Council calls upon the Government to do the following:
 - (1) *Crime*:- reverse the "innocence tax" upon those acquitted of criminal offences who are unable fully to recover the reasonable costs of a privately funded defence.
 - (2) *Family*:- reintroduce legal aid in a range of family law proceedings:
 - for respondents facing allegations of domestic abuse in applications under sections 33-41 of Family Law Act 1996 (occupation orders), section 42 (non-molestation) and section 8 of the Children Act 1989 (child arrangement orders for contact/residence);
 - for legal help and representation for private law children proceedings.
 - (3) *Civil*:- welfare benefit cases - reintroduce a legal help scheme.
 - (4) *Coroners Inquests*:- relax the criteria for exceptional case funding where the death occurred in the care of the state and the state has agreed to provide separate representation for one or more interested persons.
 - (5) *Means testing*:- introduce a simplified and more generous calculation of disposable income and capital so that the eligibility threshold and contribution requirements are no longer an unaffordable barrier to justice.

Predictions before the introduction of LASPO

11. This paper is not the place for an historic tour through the Bar Council's various responses to the MoJ's consultation "Proposals For The Reform Of Legal Aid In England & Wales" (2010), and the passage of the LASPO Bill through Parliament. Throughout its responses, the Bar Council consistently warned the Government of the likely effect of the proposals, and of the selective implementation of Lord Justice Jackson's reforms relating to the funding of civil litigation, including:
 - a drastic reduction in those with family, housing and social welfare problems who would be able to obtain advice and representation;
 - an increase in litigants in person, particularly in the family courts;
 - additional burdens on courts, resulting in increased delays;
 - increased burdens on frontline providers of free legal support, advice or representation;
 - solicitors and barristers less likely to accept complex, low-value cases, because to do so would be financially unsustainable;
 - a growing number of barristers actively questioning the viability of a career undertaking legal aid work at the Bar.
12. Notwithstanding grave concerns from stakeholders - including the Bar Council - about the inadequacies of the Ministry's impact assessments, LASPO and its subordinate legislation proceeded with dramatic cuts to the scope of legal aid in civil and family disputes, and reduced access to legal aid still further by more stringent means-testing.

The Bar Council's *"The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On Final Report"*

13. In 2014, the Bar Council undertook research on the impact of these changes:
"The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On Final Report" ('LASPO: One Year On')².
14. The research included a survey launched on 1 April 2014 to mark the first anniversary of the implementation of the LASPO. The survey was designed to examine the impact of the first 12 months of LASPO on the Bar. It included questions looking at the impact on practitioners undertaking publicly-funded civil work, privately-funded civil work, and family work. The survey invited barristers to provide the Bar Council with their views on the impact of LASPO on their practice, their lay and professional clients and the courts. 643 practising barristers responded to the survey.

²https://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014_.pdf

15. The survey results and practitioner interviews drew a disheartening picture of the position of the civil and family justice system and Bar, as well as their future.
16. Regrettably, the research demonstrated that the warnings of the Bar Council and other stakeholders had come to pass.
17. Key findings from LASPO: One Year On included:
 - A Government preference for cutting costs over the provision of appropriate access to the courts for individuals to enforce their legal rights.
 - Increasing difficulty for individuals to obtain appropriate legal advice, support and representation.
 - Excessive demands placed on under-resourced courts and judiciary.
 - A failure to provide appropriate funding mechanisms for low to medium-value complex cases.
 - A failure to provide appropriate funding mechanisms for cases without recoverable damages.
 - An increase in litigants in person, which was unsustainable without wider reforms to make processes and procedures more transparent and accessible.
 - A failure to value legal services, especially early legal advice.
 - A failure to value a diverse legal profession and judiciary.
 - A diminishing optimism in the viability of long-term careers at the self-employed Bar, especially for family practitioners.

The PIR Process

18. In its LASPO: One Year On Final Report, the Bar Council urged the Government to ensure that its expected future reviews of LASPO provided detailed, statistically valid and wide-reaching findings that took account of the complex interaction of reforms implemented after LASPO. The Bar Council invited the Government to liaise with it about its plans for researching, monitoring and evaluating the effects of LASPO, as that would allow it and other representative bodies to identify areas where they could assist Government, as well as highlight information gaps which needed to be addressed before wide-scale research was undertaken.

The MoJ did not take up the Bar Council's invitation, and there was no liaison about the process the Government would adopt in reviewing the effects of LASPO.
19. The Bar Council welcomed the PIR announced in March 2018, particularly its commitment to an evidence-based review of how the impact of the changes it introduced compare with the initial objectives and estimates outlined before that consultation.

20. For the purposes of the PIR, the Bar Council participated in the consultative groups for civil law, family law, and criminal law.
21. The consultative group meetings did not explain what data the Government already held about the impact of LASPO in those areas, or as to the 'knock-on' costs of LASPO to other Government Departments³. Nor did the MoJ seek to explore or collaborate with the consultative groups to identify what data existed outside Government or could be gathered by individual stakeholders to inform the PIR.
22. Overall, the Bar Council considers that the consultative group meetings are likely to have been of limited assistance in fulfilling the MoJ's stated aim of conducting an evidence-based review of the impact of the changes and how they compared with the initial objectives and estimates outlined prior to the enactment of LASPO. The Bar Council therefore has grave concerns over (1) whether the MoJ has gathered the necessary evidence about the direct impact of LASPO on all aspects of the justice system; (2) whether the MoJ has commissioned meaningful research about the consequential costs LASPO has caused to other Government departments, and (3) the efficacy of the PIR's engagement with other stakeholders in securing that evidence.

Bar Council 2018 findings in relation to the effects of LASPO on the civil and family Bar

23. The Bar Council has undertaken further research on the effects of LASPO five years on.

The process

24. A survey was devised which invited civil and family barristers to report on their first-hand experience of how LASPO had affected their practice, their lay and professional clients, and the courts. The survey questions were identical to, or developed from, the 2014 questions for LASPO: One Year On.
25. The survey was available online from 13 July to 4 September 2018. It contained closed and open questions. Invitations to complete the survey were sent to all practising barristers who have a civil or family practice. It was also advertised more widely. The survey directed respondents through questions relevant to their practice, meaning that not all respondents answered each question.
26. 511 members of the Bar answered one or more questions of which 145 answered the full survey. Some questions, due to their specialist nature, had a small response rate,

³ Despite an initial offer at the family law consultative group meeting of 18 April 2018 to provide 100 documents (or thereabouts) which formed part of its own assessment of LASPO's impact to that date, when the Bar Council subsequently requested that information, it was not forthcoming.

which limits the statistical significance of the response. They do however, provide valuable accounts of barristers' direct experience.

27. The survey was supplemented by semi-structured interviews, both face-to-face and over the telephone. Interviews were conducted with 13 barristers who work in areas of actions against the police, clinical negligence, community care, employment, education, family law, housing, immigration and asylum, inquests, mental health law, prison law, public law and judicial review and welfare benefits. The interviewees represented a mix of seniority, gender and geographic location.

Summary of key findings from 2018 research

28. The research highlights that in relation to the civil and family Bar:

- Barristers undertaking publicly-funded family and civil work continue to report that LASPO has adversely affected the ability of individuals to obtain legal advice and representation and to enforce their legal rights.
- LASPO has affected detrimentally those barristers who continue to undertake legally aided work, in terms of case volume, fee income and fee security.
- A majority of respondees have changed their main practice area or broadened their practice as a result.
- LASPO has been a significant factor in barristers, particularly from family sets, deciding to leave the Bar or change employment status.
- To cope with the changes introduced by LASPO, more barristers are working excessive hours (>60 per week) than previously.
- The impact of LASPO raises concerns over the longer-term sustainability of the publicly-funded civil and family Bar.

Demographics of barrister survey respondents

Figure 1 - Age of barrister respondents

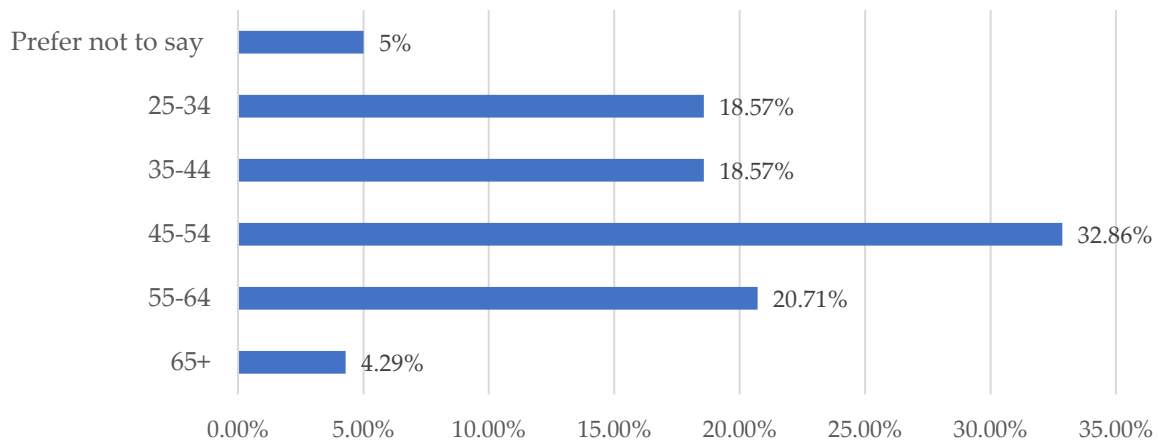


Figure 2 - Gender of barrister respondents

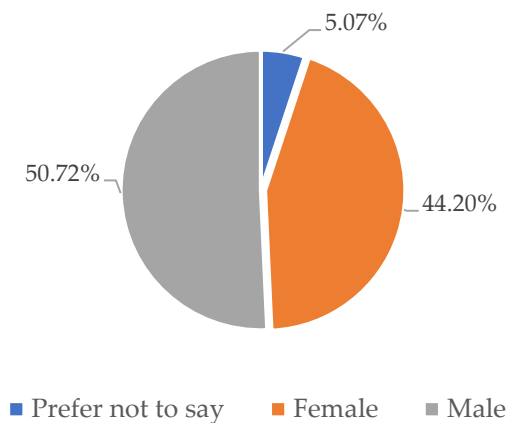


Figure 3 - Ethnicity of barrister respondents

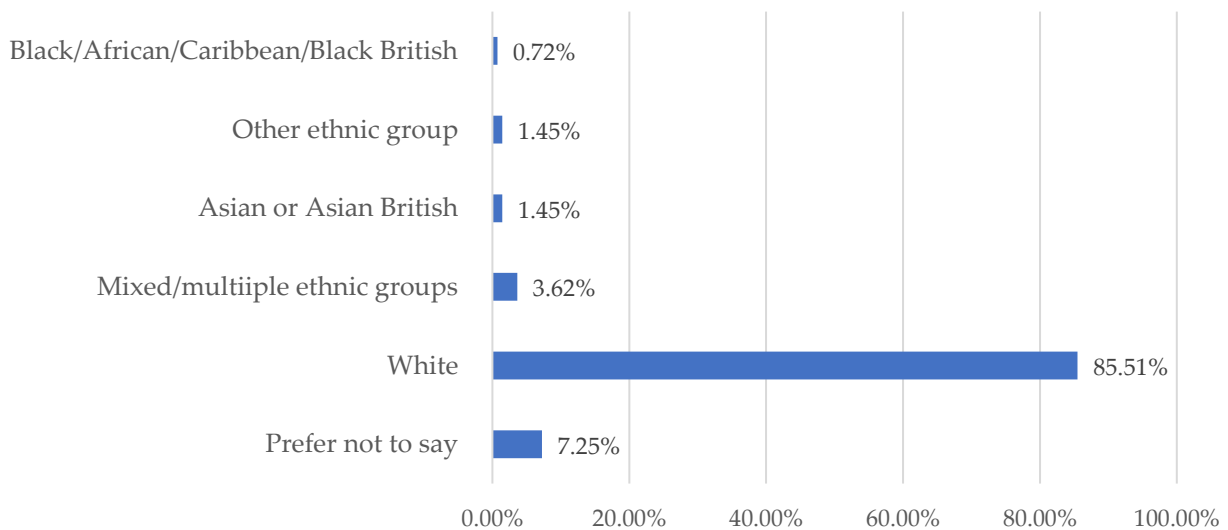
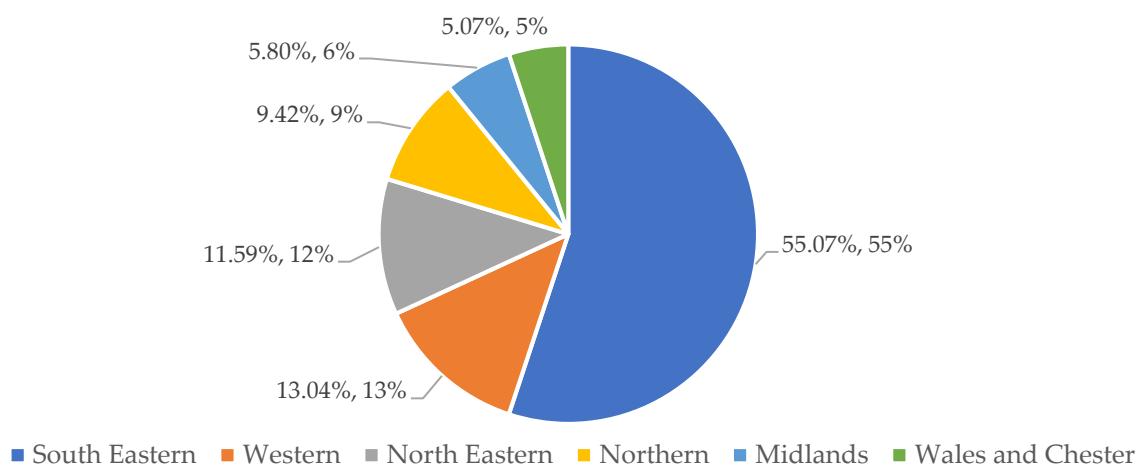


Figure 4 - Circuit that barrister respondents belong to



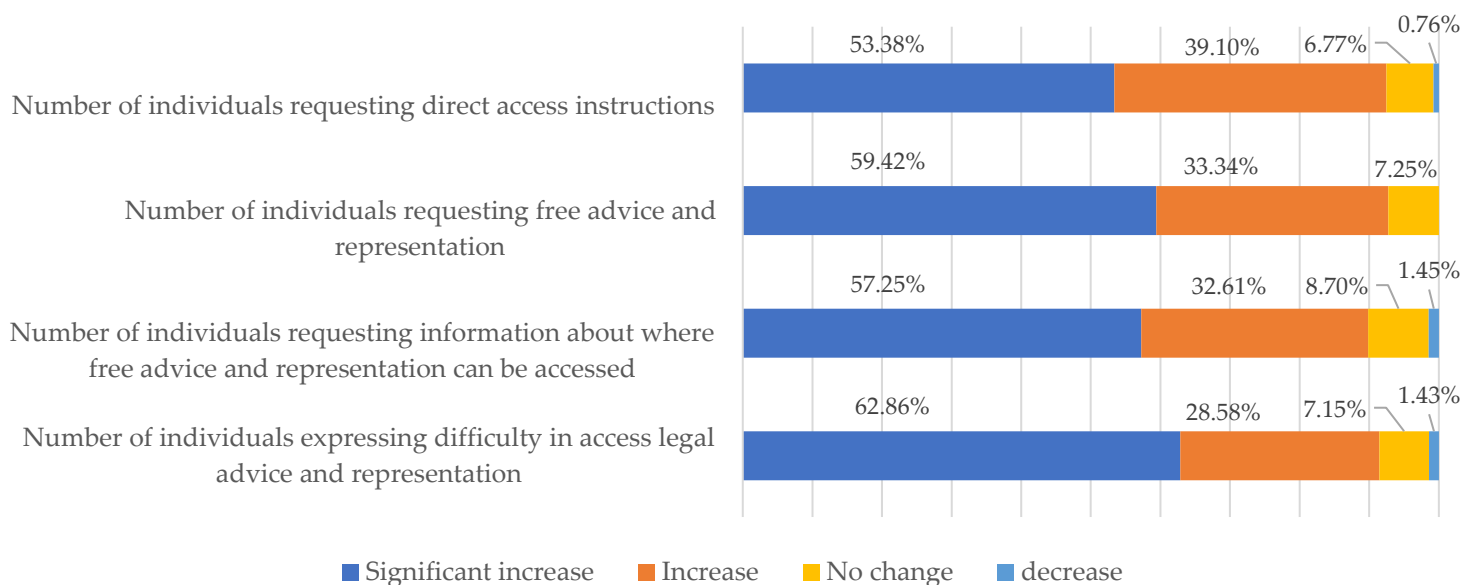
29. There were some differences between the demographic data responses for this survey and those of the 'LASPO: One Year On' report.
30. Respondents had an older age profile than the previous survey, age band 45-54 (28% to 33%) and age band 55-64 (12% to 21%).
31. The proportion of female respondents in this survey increased from 32% to 44%.
32. There was a spread of respondents across the circuits, which would suggest that the survey results are broadly representative of the effects of LASPO across England and Wales. Approximately 68.8%⁴ of barristers have a registered practising address in the South Eastern Circuit: London (61.7%) the South East (4.9%) and in the East of England (2.2%). Therefore, the 55% of respondents coming from the South Eastern Circuit was a smaller proportion than their representation in the Bar as a whole.
33. It remains to be seen whether the increases in the proportions of respondents who were (1) older or (2) female are indicative of a real change in the demographics of barristers undertaking legally-aided civil and family work. The survey results are not robust enough to determine those issues. The Bar Council does not gather information about the amount of publicly funded work individual barristers undertake at the time of their Practising Certificate renewal, so is unable to provide further data on this. The Legal Aid Agency holds data about which barristers were undertaking publicly-funded work before LASPO and those who continue to do so. The Bar Council therefore anticipates that the MoJ could undertake an analysis of the impact of the LASPO changes on the demographics and diversity of the publicly-funded Bar. It would be willing to assist the MoJ with such an analysis.

⁴ Barrister Demographics (collected 1 September 2018)

Access to advice and representation

Lay clients

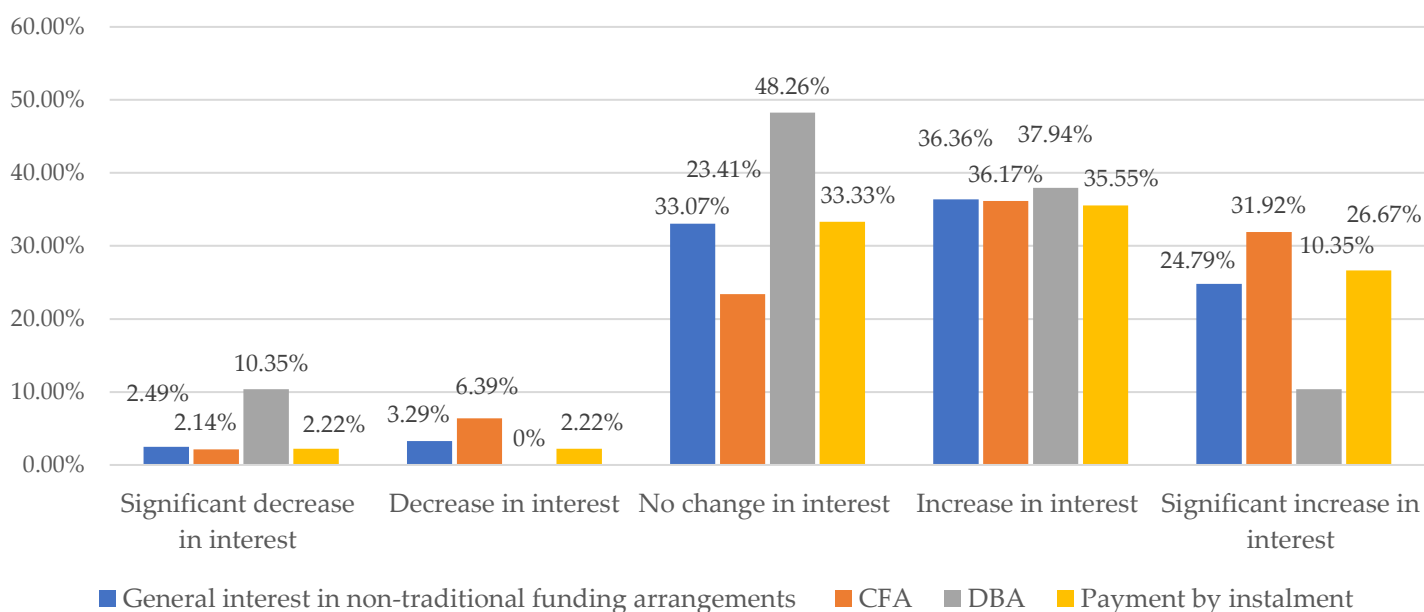
Figure 5 - Barrister perceptions of changes to lay clients' ability to obtain advice and representation



34. The majority of respondents reported a significant change in clients' ability to obtain advice and representation since the introduction of LASPO.
35. Requests for direct access (i.e. barrister representation without a solicitor) and for free advice and representation had increased significantly.
36. There was also a significant increase in individuals reporting difficulty in finding legal advice and representation.
37. The results indicate that barristers are encountering a greater number of clients who are struggling to obtain legal advice and representation, thus limiting their access to justice.

Professional clients

Figure 6 – Reported increase in interest of professional clients in non-traditional funding arrangements



38. Solicitors have made more requests of barristers for alternative sources of litigation funding. Requests for a barrister to take on a case on a Conditional Fee Agreement (CFA) – commonly known as ‘no win no fee’ and requests to pay by instalments have both increased.

39. Requests for the barrister to undertake a case on a Damages-Based Agreement (DBA) did not increase as much, which is likely to be due to the inadequacies in the Damage Based Agreement Regulations 2013, which have led to general uncertainty over the drafting, flexibility and enforceability of a DBA agreement.⁵

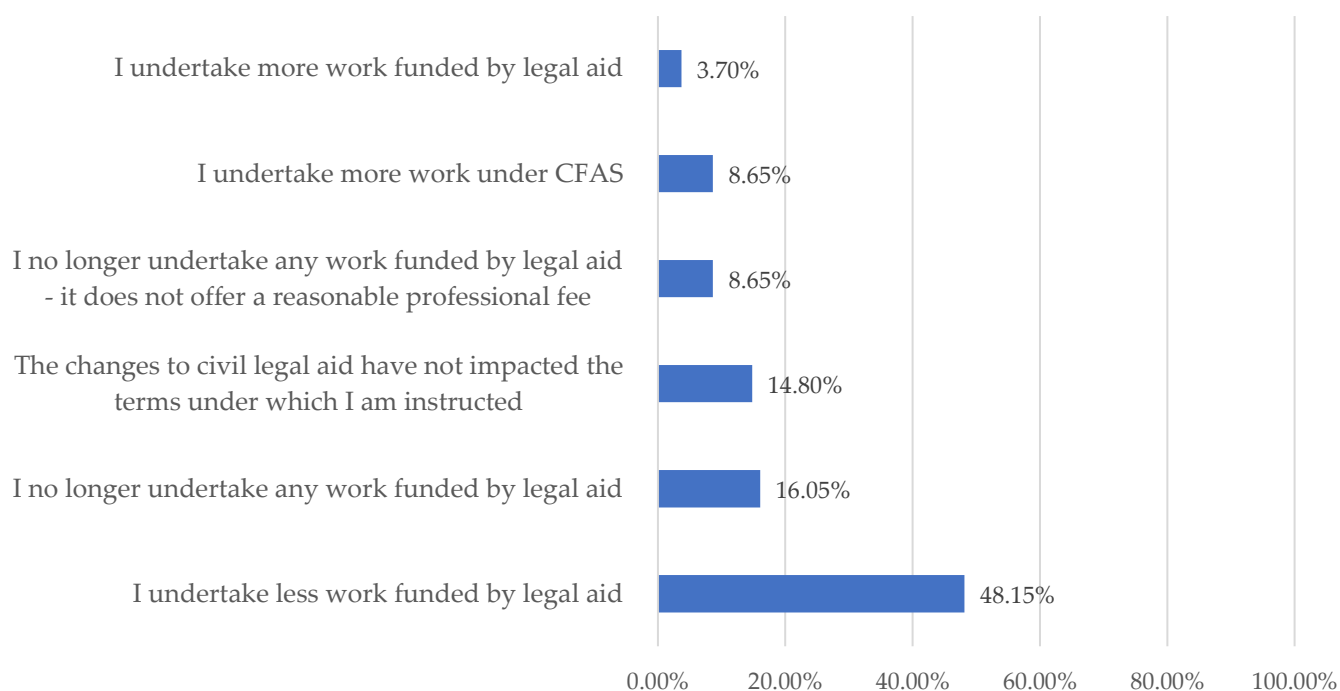
40. CFAs and DBAs cannot fill the gap in access to justice following the reduction of legal aid and the means testing of criminal legal aid. This is because barristers are prevented by law from undertaking family or criminal work on a CFA.⁶

⁵ Further information about the Bar Council’s response to ‘Part 2 of the LASPO Act: Litigation Funding and Costs’, published in August 2018. https://www.barcouncil.org.uk/media/678249/201808_bar_council_response_to_laspo_part_2_survey_final.pdf

⁶ Paragraph 58A of the Courts and Legal Services Act 1990 as amended by the Access to Justice Act 1999.

Terms of work

Figure 7 – Terms of work: legal aid

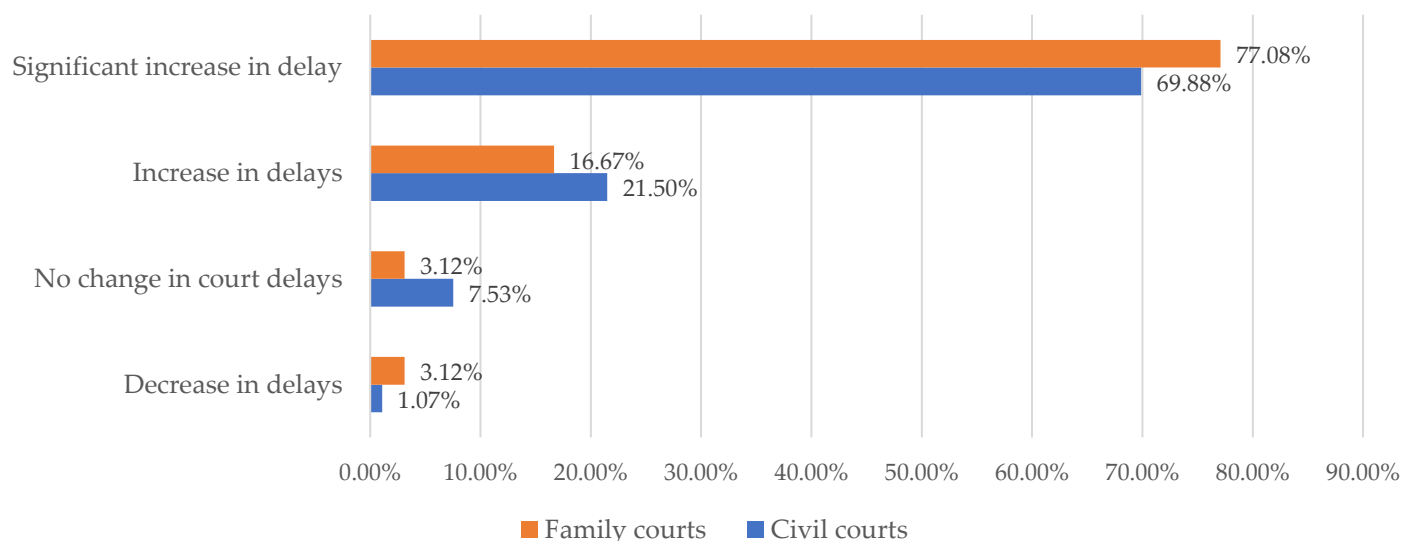


41. The above table shows that almost 25% of respondents have stopped undertaking legal aid since LASPO.
42. 48% do less legal aid work than before LASPO.
43. Only 4% of barristers have increased the amount of legal aid work they undertake.
44. The answers confirm that the removal of legal aid from many areas by LASPO and the reduction in fees of what remains, has led to a rapidly shrinking pool of barristers who still undertake legal aid work.

Court resources

Litigants in person

Figure 8 - Litigants in person in civil and family courts post-LASPO



45. Since the introduction of LASPO, there has been a substantial increase⁷ in litigants in person in the courts.
46. The survey results confirm that picture: 91% of respondents reported a significant increase in the number of litigants in person in family cases; and 77% of respondents reported a significant increase in the number of litigants in person in civil cases.
47. Recent figures in the family courts showed that in disposals in private law applications in only 20% of cases were both parties represented and in 37% of cases neither the applicant nor the respondent was represented.⁸
48. The Bar Council has on many occasions raised concerns over the increased risk of miscarriages of justice, as well as the unfairness of an inequality of arms when one party is represented and the other is not. Litigants can face unnecessary trauma when cross-examined by a family member.⁹ This process is prevented by law in criminal

⁷ There has even been an increase in the higher courts. For example, the Master of the Rolls in his lecture at the Liverpool Law Society on 15 March 2018 stated “*even in my own court, the civil division of the Court of Appeal, where the number of permission to appeal applications brought by litigants-in-person stood at 42% in the 12 months ended 31 January 2018. The comparable figure in 2007/2008 was just under 28%.*”

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695363/family-court-stats-oct-dec-2017.pdf

⁹ See, e.g. Hayden J in *Re: A (a minor) (fact finding; unrepresented part)* [2017] EWHC 1195 (Fam), §58-60 “*I have found it extremely disturbing to have been required to watch this woman cross examined about a period of*

cases, but is permitted in a family case apart from where a judge may undertake questioning of witnesses in fact finding hearings where domestic violence has been alleged.¹⁰ The Bar Council had understood that the Government was bringing forward legislation in order to prevent such situations, but this has so far failed to materialise. Further delay would be shameful.

49. One practitioner reported on the additional costs to the system created by the increase in the number of litigants in person, and a worse experience of the court process for all concerned:

“it is more difficult to resolve matters at an early stage, matters are more adversarial and there is an unpleasant atmosphere of antagonism throughout the court process. Everybody seems to be under significant stress”.

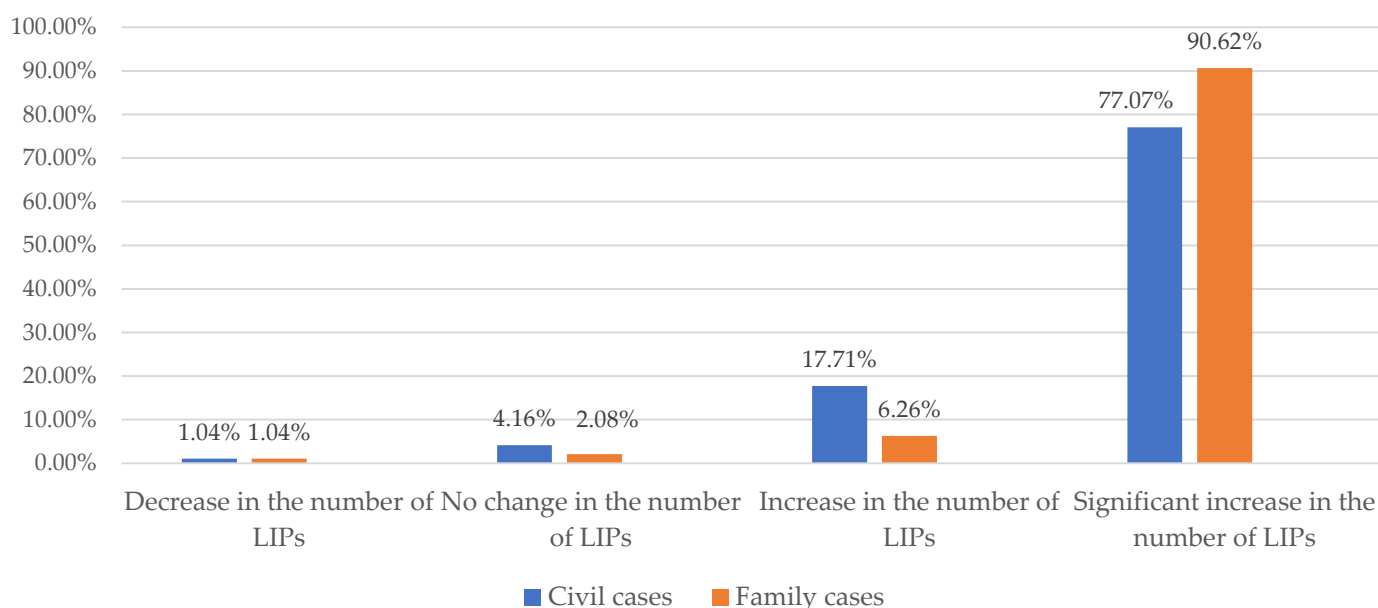
50. The increase in litigants in person also compromises the independence of the court system. One respondent summarised how they were having to not only represent their own client, but to make up for the lack of representation on the other side, “counsel [is] expected to assist LIPs”. This threatens the adversarial model on which the legal system of England and Wales is based, and places an additional burden on lawyers who are already over-burdened by the demands of individual cases, especially in the family courts.

her life that has been so obviously unhappy and by a man who was the direct cause of her unhappiness. ... Nothing of what I have said above has masked the impact that this ordeal has had on her. She has at times looked both exhausted and extremely distressed. ... It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator. ... I would go further it is, in itself, abusive.”

¹⁰ Paragraph 28 of Practice Direction 12J to the Family Procedure Rules 2010.

Delays

Figure 9 – Court delays in the civil and family courts post-LASPO



51. Barristers overwhelmingly reported a ‘Significant increase’ in court delays, particularly in the family courts. This corresponds with the reported ‘Significant increase’ in the number of litigants in person. The Bar Council warned before LASPO was introduced that the reduction in legal aid would result in an increase in litigants in person which would increase court costs as a result of cases taking longer. One barrister summarised, “at least part of the reason for the delays is the huge increase in litigants in person”.

Another barrister noted:

“hearings take much longer as LIPs often won’t talk to you outside court and want to raise many irrelevant issues in court. The Court gives LIPs much leeway as they want them to feel listened to so they are allowed to talk at length in court and use the opportunity to further ha[r]ass / belittle their ex-partners”.

“cases continue in the courts for much longer as LIPs don’t get advice and don’t settle”.

Another barrister reported:

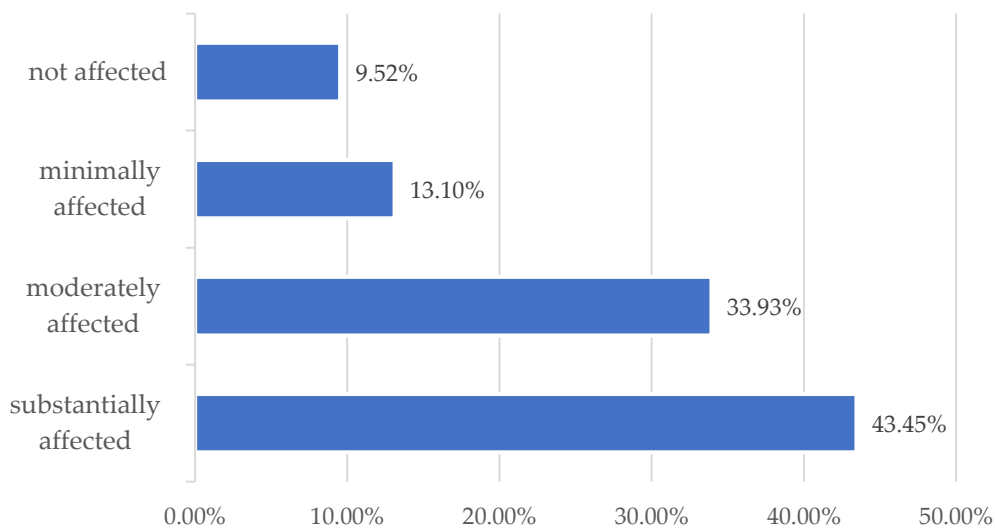
“cases take much longer, are much more difficult to resolve and are much more adversarial - I have experienced upsetting written and verbal abuse from litigants in person on the other side...”

52. There were many more respondents who explicitly noted the relationship between the increase in litigants in person and the increased length of cases in court. One respondent commented that “courts could be reluctant to apply the rules strictly” to

litigants in person, thus causing an increase in risks and costs, as well as “an almost chaotic level of uncertainty as to what the outcome of any given interaction with the court will be”.

Impact on Practice at the Bar

Figure 10 - General impact of LASPO on your practice

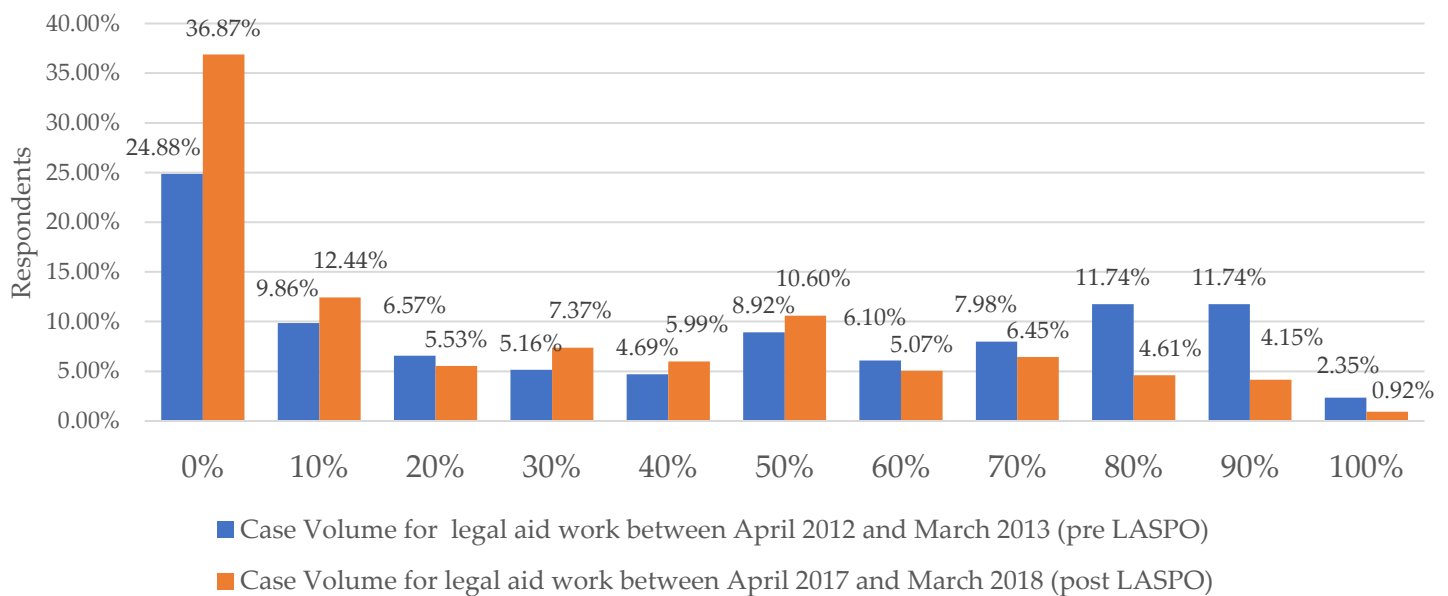


53. 43% of respondents reported that LASPO had substantially affected their career. Respondents who provided further comments noted that significant factors were:

- The reduction in access to justice for those who need representation
- The difficulties from the increase of litigants in person and resulting court delays, and
- The need to find alternative areas of work following the reduction in legal aid.

Case Volume

Figure 11 – Impact of LASPO on case volume

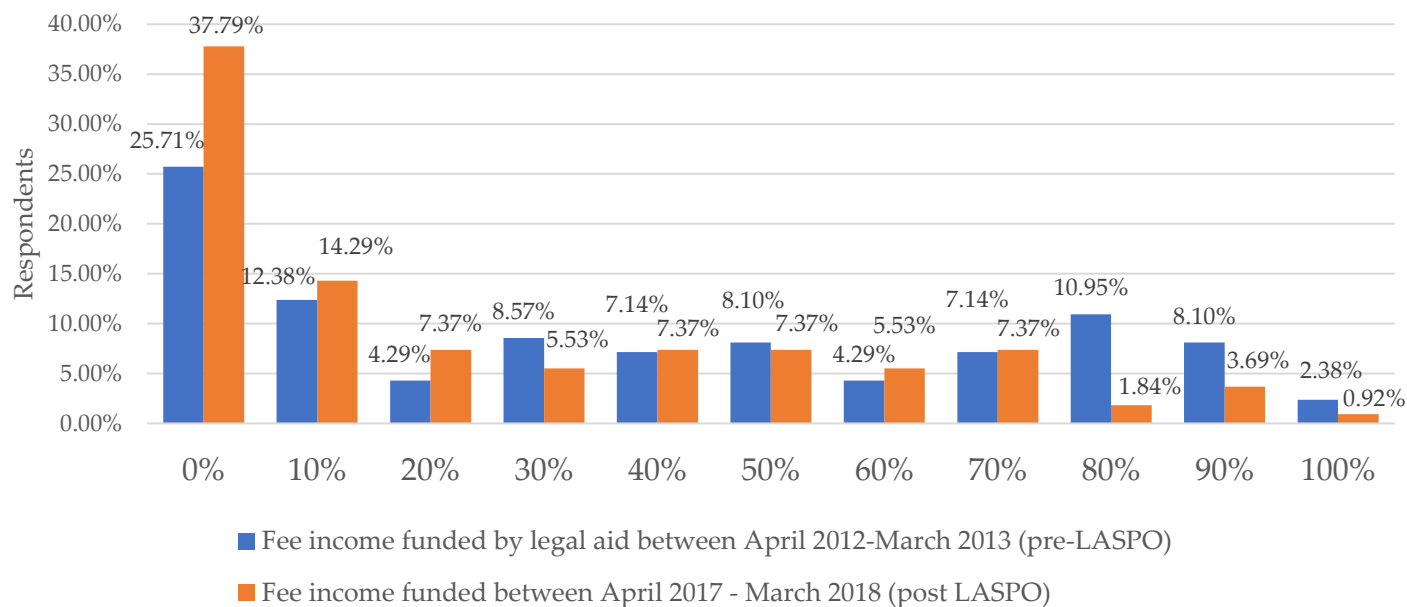


54. The survey responses show that the number of barristers who undertake 60% or more of their work in legal aid has halved from 40% to 21%.
55. The number of barristers undertaking no legal aid work at all has also increased post-LASPO. One respondent commented:

“I no longer do publicly funded ancillary relief – it is too low paid, but I feel guilty that there is a whole section of the population that struggles to get sufficiently senior representation”.

Income and earnings

Figure 12 – Impact of LASPO on fee income



56. The percentage of barristers who have no legal aid fee income increased from 26% pre-LASPO to 38% post-LASPO. There has also been a substantial decline in barristers whose fee income consisted of between 60–100% of legal aid funding pre-LASPO: declining from 33% to 19%.

57. There is often no correlation between the case volume of legal aid work that a barrister has and their total fee income from such work. One survey respondent noted that post LASPO for them the proportion of legal aid cases they undertook:

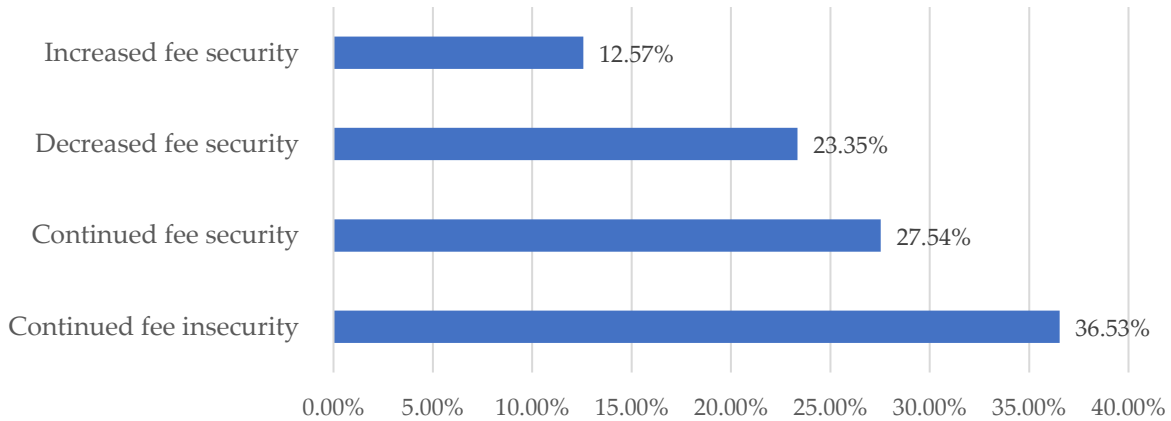
“fell from 72% to 65% (only 7%) but my income from legal aid cases fell from 64% to 30% (34%). This shows a huge reduction in my income from legal aid even though I was spending almost the same amount of time on legal aid cases”.

58. This illustrates that some barristers are undertaking more work for substantially less pay.

59. Another respondent commented that *“I might occasionally undertake a legal aid matter if otherwise quiet, but it is doubtful that what is being offered constitutes a proper professional fee”.*

Fee security

Figure 13 – Impact of LASPO on barristers' fee security



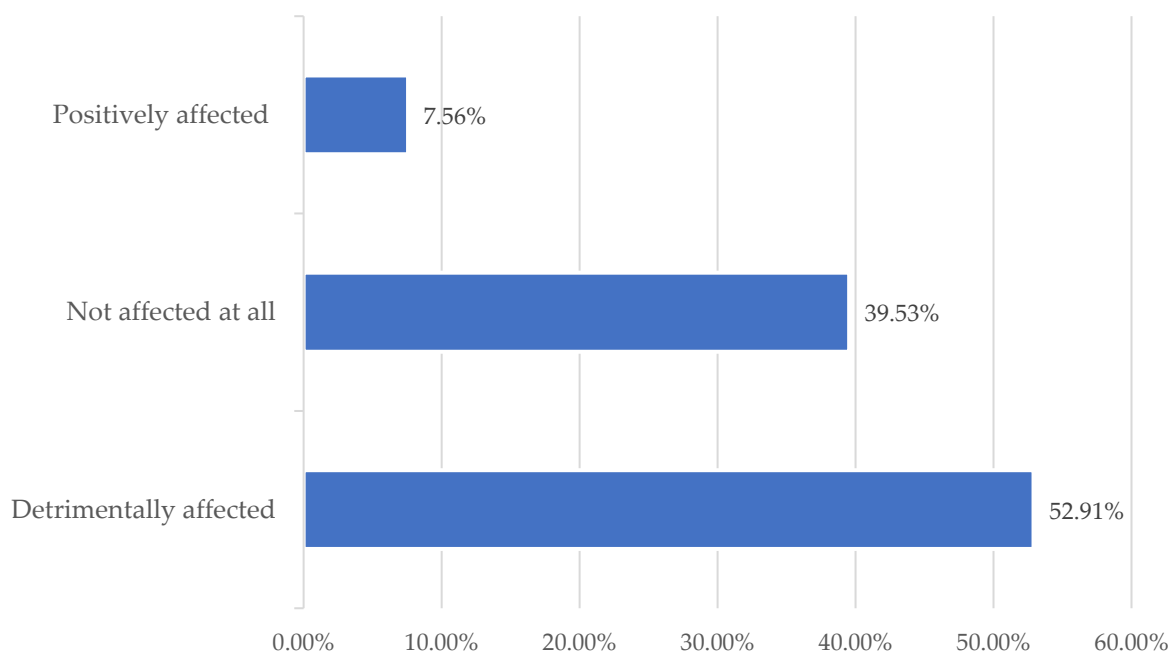
60. Most respondents reported continued fee insecurity since the implementation of LASPO. This trend had continued from when the question was initially asked in the Bar Council's LASPO: One Year On survey. Furthermore, the number of respondents who said that they had experienced decreased fee security was almost double the number of those that had experienced increased fee security.

61. Respondents comments about fee security included:

- Severe delays in legal aid fees being paid, particularly for family Very High Cost Cases (VHCCs).
- Solicitors refusing to pay barristers' fees when the solicitor fails to reclaim the sum from the defendant.
- Barristers taking on more privately funded work to have fee security.

Career development

Figure 14 – Impact of LASPO on barristers' careers



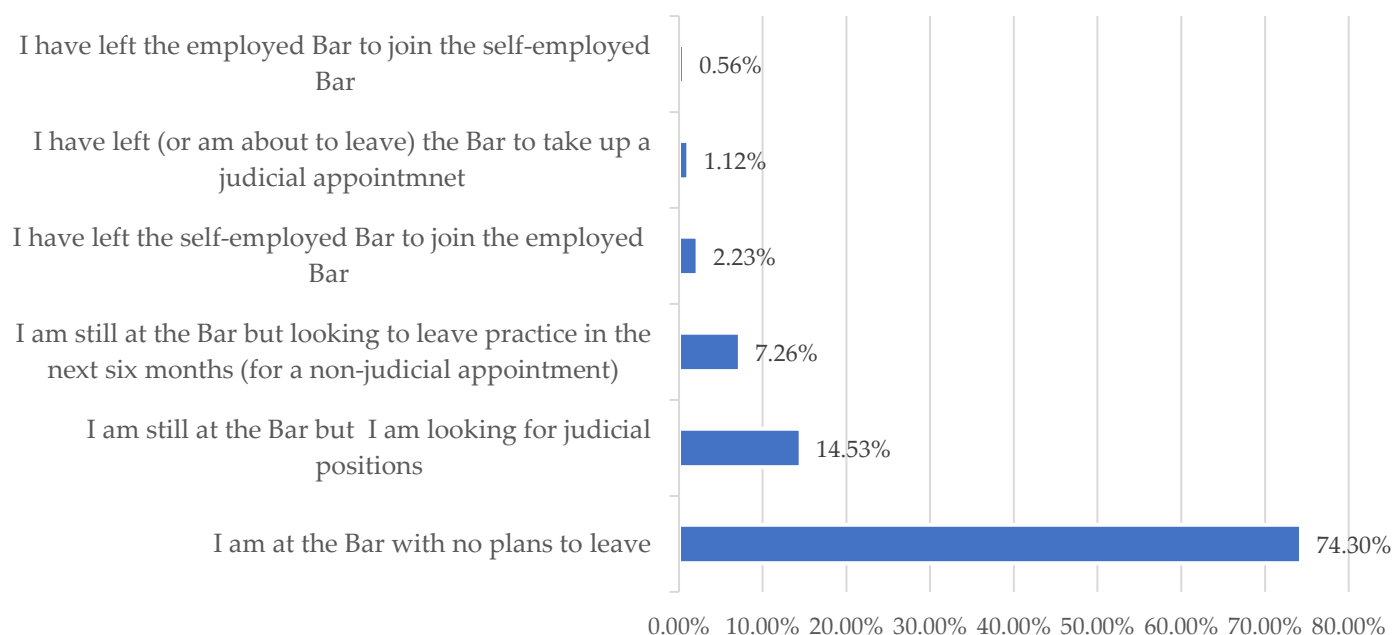
62. 41% of respondents had not changed their practice area or specialism. However, many had changed aspects of their practice to address the reduction in legal aid. For example, one respondent commented that although their area of specialism housing law – had not changed, they now more commonly represented the landlord.

Another barrister commented:

“Effectively, now, my private client income is subsidising my legal aid work. Were it not for a sense of the larger value and importance of the work, I would not do legal aid family cases at all, as the pay and working conditions are ridiculous”.

Recruitment and retention

Figure 15 – Impact of LASPO on barristers' career progression



63. 27% of respondents from Civil or Family sets of chambers reported a decrease in the number of pupillages offered post- LASPO, compared to 14% reporting an increase.
64. Concerning retention post pupillage, 166 responses were given for the question “Since 2014, how many tenants have left your Chambers because of changes to civil and family legal aid?”. Many respondents commented that several tenants had left chambers because of LASPO or had taken early retirement. One family practitioner noted:

“private law family work was bread and butter at the junior end of the family Bar. Once this disappeared there were a number of junior barristers who left the profession”.

65. Our survey responses suggest that LASPO has been directly responsible for some young barristers leaving the profession.

The Interviews

66. The following section reports information gathered from interviews of barristers who specialise in each area of civil and family work which had or retains legal aid. It is not intended to be a comprehensive or referenced review of the details of what legal aid is available in particular practice area, rather it summarises their first-hand experience.

Clinical Negligence

67. Currently, legal aid is only available for neurological injury at or around the time of birth – usually due to a negligent delay in achieving delivery. These are the very top end of claims and usually, the damages will be in the millions of pounds.
68. Even so, only a minority of baby brain injuries are being funded by legal aid, and this is due to the prohibitive cost of expert witnesses in such cases. Many of the high-quality experts who are needed to for a claimant to litigate such cases will not accept instruction at legal aid rates.
69. In theory, there is the possibility of Exceptional Case Funding for other clinical negligence cases, but the criteria are so restrictive that only about one case of this type is granted exceptional case funding per year.
70. In the absence of legal aid, some access to justice is made possible by private funding via Conditional Fee Agreements (CFAs). However, the changes in Part 2 of LASPO removed the ability for success fees to be claimed from the losing defendant and have threatened the sustainability of legal practice, even amongst specialist firms.
71. Quality controls went with legal aid franchising. Now that almost all cases are brought under a CFA, more non-specialist firms are dabbling, which has had a detrimental effect on the quality of advice clients receive.
72. Overall, there have been around 1,000 fewer claims reported to the CRU and notified to the NHS since 2013.¹¹ Whether - as seems likely - this is the result of the LASPO funding changes requires further research.

Community Care

73. Although the eligibility and scope for legally-aided community care cases have remained relatively untouched, often, the public is unaware that such cases are still eligible for funding.
74. There are now fewer solicitors' firms and providers for community care work even though the scope has not changed. Providers are usually available in large centres –

¹¹ NHS Resolution Annual report and accounts 2017/18 - https://resolution.nhs.uk/wp-content/uploads/2018/07/NHS-Resolution-Annual-Report-2017-2018_digital.pdf and Compensation Recovery Unit performance data - <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data>

such as London and Birmingham – but beyond these centres, it can be very difficult to find these services.

75. Austerity has left a disproportionate number of vulnerable people without the services they need from their local authorities. Without providers available to challenge these cuts, injustices will go and are going unchallenged.

Employment

76. Since LASPO there is no legal aid available to fund representation in employment law cases. The telephone service available for legal advice in discrimination cases is not fit for purpose. This affects the most vulnerable employees, including those with mental health issues, those who are pregnant and many others who cannot afford advice on how to bring a claim against their employer. Discrimination claims are often complex both factually and legally: in particular, race discrimination claims are notoriously difficult to prove. The lack of funding means that many employees who have been discriminated against are simply left without redress, so discrimination in the workplace goes unchallenged.
77. Litigants in person, trying to represent themselves against an employer and their legal team, often do not understand what is required of them in preparing and presenting their case. This places a greater burden on Employment Judges in trying to ensure a fair hearing and invariably means that employment tribunal hearings take longer.
78. Pro bono organisations are trying to fill some of the gaps, but funding cuts mean that there are fewer voluntary sector organisations that are able to take on employment law work. Previously, many would fund at least some of their pro bono help from what they could earn from legally-aided cases. The Employment Lawyers Association (ELA) are piloting an Employment Tribunal Litigant in Person Support Scheme (ELIPS) in conjunction with the Bar Pro Bono Unit, LawWorks and the Free Representation Unit to assist unrepresented litigants in Tribunal. A duty solicitor or barrister will sit in the tribunal or can be approached for assistance before the tribunal to provide free legal advice on Employment Law¹². However, this is currently only available at Central London and Cardiff Employment Tribunals and only covers assistance with Preliminary Hearings or simple claims (listed for one day or less). It is not available for complex or multiday claims, and cannot hope to get anywhere near filling the gap in legal advice and assistance.

Family

¹² <https://www.elaweb.org.uk/content/employment-tribunal-litigant-person-support-scheme-elips>

79. LASPO stripped most private family law issues from publicly-funded legal advice, including divorce proceedings, child contact and financial and property disputes.
80. Non-means tested and merit-tested legal aid is available when a Local Authority seeks Care orders, Supervision orders, secure accommodation orders and Emergency Protection orders in respect of children; and for children under the age of 18 who are party to family proceedings. Legal aid is means, and merit-tested for parties who seek contact with a child in care; discharge or variation of a care or supervision orders; Wardship cases; appeals in public law cases; placement orders and recovery orders. Means and merit tested legal aid may be granted in private law and financial proceedings, but only if the claimant can provide evidence of domestic abuse or child abuse.
81. Furthermore, there are many who will not qualify for legal aid but may suffer from some form of learning or mental health difficulty, or are simply illiterate. They do not have the advantage of legal representatives to explain the process to them and help them with case preparation. The cuts have had the greatest impact on the most disadvantaged in society. The ability of the judge to take on case management and assist litigants in person has an obvious limit.
82. The introduction of LASPO has had a significant impact upon the Family Bar. There has been a decrease in the number of barristers seeking to specialise in family law and who are willing to do private law legal aid work, due to low legal aid rates. It is not uncommon for counsel to be asked by the judge to draft complex and detailed orders (for which they will not be paid, as fees are fixed) when they are not the applicant, but the applicant is a litigant in person. It is also not uncommon for counsel or solicitors to be asked (again, without payment) to prepare witness and/or trial bundles, finalise indices, or photocopy documents for the court, in cases where all the other parties are litigants in person.
83. The family courts have been left at breaking point by the implementation of LASPO. Ministry of Justice statistics show that both sides are unrepresented in one third of family cases. Judges have to give greater time to litigants in person, which is unfair to both parties involved.
84. Court time taken up by the number of litigants in person is leading to significant delays in cases being heard. In one region it takes almost six months to list between hearings. In that time a parent may have no or limited contact with their child.
85. There are litigants who claim to have suffered domestic abuse, so they can obtain legal aid. Arguably, the current legal aid system encourages these claims. This can also result in the court then having to list a fact-finding hearing and perhaps several case management hearings prior to the hearing, to determine the veracity of the allegations

and whether they would have an effect on contact with the child. This leads to further costs and delays. In the meantime, the court will very likely not order contact between a child and parent until the factual matrix has been determined.

86. Serious allegations needing to have serious fact-finding hearings are not being properly prepared, and important evidence is not always gathered. Furthermore, victims who are represented may still be cross-examined by an abuser who does not qualify for legal aid and appears in person. Both parties need access to legal aid in such cases.
87. Early legal advice should be a priority as in many cases this could avoid proceedings altogether and lead to a negotiated agreement between potential litigants.

Housing

88. LASPO left some areas in scope: injunctions in disrepair cases (where there is a high chance of success, i.e. irrefutable evidence that the health of the client has been adversely affected due to disrepair), possession, unlawful eviction and homelessness.
89. There are knock-on effects of LASPO legal aid cuts for housing. People affected may have defences, but they do not know about them because of the reduction in available legal advice. This can lead to increased homelessness.
90. Matters relating directly to housing such as welfare benefits should be put back in scope. It is nonsensical to be able to have help to fight a possession order but not to fight an order made about how you are paying for that housing.

Immigration and Asylum

91. Access to legal aid for immigration cases has been taken away for everything bar asylum cases.
92. There is a disaggregation in the fact that legal aid is available for asylum cases, but it is not available where the case also makes a human rights claim. Many cases rely on Article 8.
93. If you are about to be deported and you cannot afford legal aid, legal aid should be automatic, but it is not. It was only very recently – after a five-year legal battle – that legal aid was made available for unaccompanied and separated children¹³.

¹³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730684/legal-aid-for-immigration-matters-unaccompanied-children.pdf

94. The lack of legal aid funding is making immigration and asylum work unprofitable and as such solicitors' firms are not putting themselves forward for the Legal Aid Agency's tenders. Some solicitors who have continued to work in this area have been put out of business, creating the so-called advice desert.
95. The Windrush scandal is the tip of the iceberg; deportation due to a lack of papers is happening to lots of people in a number of ways. Those who are vulnerable and/or have mental health issues are particularly ill-protected by a system where legal advice can come too late, if at all.

Inquests

96. The only legal aid available for inquest work is advice and assistance for preparatory work.
97. For Inquests, there is an absence of automatic means-tested legal aid and funding for representation. Awarding legal aid is discretionary. Additionally, the current system where litigants who apply first, get legal aid, is unhelpful and adds further pain to the grieving process¹⁴.
98. Public authorities, whose conduct may be open to criticism by the coroner, are often represented by experienced specialist counsel. This is in stark contrast with the family who will often be the only interested party seeking to highlight any failures of public bodies in the circumstances of the death, but must do so without legal advice and the necessary representation.
99. Lack of funding for families means that inquiries may not be as full as they otherwise would be, but it also leads to an inequality of arms, particularly given that public authorities have automatic funding available which is funded by the taxpayer.

Mental Health

100. A recent Mind report records that 50% of people who do not get legal aid because of LASPO have mental health problems¹⁵. Without legal assistance, it can be extremely difficult for already vulnerable patients to get across to decision makers the grounds for challenging the decisions which affect them.

¹⁴ Bar Council response to inquests consultation, p. 2.

¹⁵ <https://www.mind.org.uk/media/23652220/an-unjust-system-mind-may-2018.pdf>

101. For Mental Health work, the contracts are very specific and limited. For example, legal aid remains available to represent clients in a tribunal, but is limited to advice only on transfers for clients between hospital and prison. A separate Prison Law contract is necessary to enable clients to obtain representation at oral hearings before the Parole Board when the Board is empowered to direct release. The separation of contracts often prevents continuity of legal representation and can cause a delay for clients. This also applies to claims for unlawful detention which require a separate contract.
102. The LASPO changes did not affect the ability to bring civil claims, such as judicial review challenges to unlawful decisions, but the Government has recently introduced separate funding restrictions ('reforms') to judicial review, which can affect upon the ability to do so in particular cases.

Prison Law

103. Challenges to the treatment of prisoners in custody have been taken out of scope of legal aid for both adults and children.
104. Only around 2% of criminal legal expenditure is spent on prison cases, and hundreds of people have committed suicide in prison since LASPO.
105. There are currently 83,000 people in prison, and 4,000 of those are women. Women with a background of domestic abuse, hardship and mental health problems are the most vulnerable to bad custodial treatment and are in a poor situation to seek legal action against it.
106. Exceptional case funding only is available for mother and baby units, and even since this scope was extended, reportedly only 2 cases have been brought.

Welfare benefits

107. Welfare benefits is an area of legal aid work that has been highly affected by the cuts to the legal aid budget. Before LASPO, legal aid did not cover tribunal representation, but it would cover the preparation of cases for hearings. It was very modestly paid: a fixed fee of £167 for all work on a case. Much of the work was done by charities such as Citizens Advice. Ten years ago, about 140,000 people per year received legal aid under this scheme. It helped disabled people, people at risk of homelessness, children and many others to receive the financial support to which they were by law entitled.
108. Post-LASPO, what remains is a tiny legal help 'fixed-fee' scheme for advice on appeals raising points of law in the Upper Tribunal: on average about 350 cases per year, for which a provider can claim just £208 per case. There is no funding for advocacy or other representation unless the case meets the criteria for exceptional case funding

(and the total number of all grants of ECF in welfare benefits cases is 23). Legal aid is available for representation in the Court of Appeal, the Supreme Court and judicial review, but this represents a tiny handful of welfare benefits cases: on average fewer than 10 cases per year.¹⁶

109. At present, benefit claimants are left to navigate the complex and rapidly changing law of welfare benefits for themselves, including in all proceedings in the first-tier tribunal. Hundreds of thousands of people with legitimate legal claims may be missing out on the chance to secure what they are entitled to. The government does not seem even to have attempted to measure either the direct financial impact on benefit claimants or the incidental costs to the state of homelessness, health problems, a need for extra social services support and family breakdown. Legal help for welfare benefits problems should be brought back into scope.

Wellbeing among barristers

110. This section draws on information from three sources:

- The Bar Council report 'Barristers' Working Lives 2017: Barristers' attitudes towards their working lives' published in 2018;
- The 'LASPO: Five years on' survey;
- Interviews with members of the Bar Council's Wellbeing at the Bar Working Group.

111. These sources provide evidence of an increase in the number of working hours among practitioners, which poses a significant challenge to work-life balance and is leading to a risk of long term damage to the profession.

112. In 2017, 30% of respondents to the working lives survey in family practice indicated that they were working approximately 11-20 hours per week unpaid, and 20% were working more than 20 hours per week unpaid.

113. There is also a broad trend of barristers in practice areas affected by LASPO working significantly more hours in 2017, as compared to 2013¹⁷:

- 33% of respondents in family practice have working hours of 60 or more a week in 2017, an increase from 20% in 2013;

¹⁶ National Statistics, *Legal aid statistics: January to March 2018* (28 June 2018)

¹⁷ *Barristers' Working Lives* (2017), p. 30.

- 17% of respondents in civil practice reported working hours of 60 or more a week, up from 9% in 2013;
- 18% of respondents in professional negligence/personal injury practice reported working hours of 60 or more a week, up from 10% in 2013.

114. Reasons for working additional hours unpaid are wide-ranging, but several themes linked to legal aid cuts came to the fore in the survey¹⁸:

- 60% of family practitioners and 43% of PN/PI practitioners noted that the solicitor does less than previously, which many see as linked to the lower rates of legal aid that are available to solicitors;
- 42% of civil practitioners said that the client could not afford more, which may well reflect clients having to pay privately for work which they would previously have been granted legal aid;
- 33% of family practitioners and 20% of civil practitioners suggested that a reason for working additional hours was that litigants in person require extra work/support. When viewed in tandem with the reported increase in litigants in person in both family and civil courts, this would suggest that there is an increased burden on barristers' working hours due to LASPO's effect on the availability of legal representation.

115. Overall, only 40% of respondents reported that they were happy with their working hours, compared to 49% in 2011.¹⁹ One practitioner commented, "*[a]n increase in fees that would mean that I could take more time out of court to prepare cases. At present the pressure to be in court is intolerable...*".²⁰

116. One respondent to the "LASPO: Five years on" survey in family practice noted that "*[t]he salami slicing of FAS fees [for] care work, the disappearance of private law legal aid and [pathetically] low fees paid for emergency protection orders means that I have to work harder and harder for less and less. This is unsustainable... It is years since I recall a court clerk drafting a court order. Counsel is now expected to do [so] free of charge. These can take hours and are a significant burden.*"

117. Another family practitioner said that "*it is not viable to run a family-based practice as a junior practitioner based solely on legal aid work without working entirely unreasonable, unhealthy hours per week, and without being happy to undertake an unreasonable amount of work for no pay. Given that the work itself, involving the neglect and abuse of children, for*

¹⁸ Barristers' Working Lives (2017), p. 33.

¹⁹ Barristers' Working Lives (2017), p. 27.

²⁰ Barristers' Working Lives (2017), p. 24.

example, is among the most difficult work lawyers undertake, the stress of struggling to make ends meet on top of the stress of the work is unacceptable. I now do significantly less legal aid work as a result."

118. These experiences show that there is a significant increase in the number of barristers whose work regime is likely to have a detrimental effect on their well-being and that this has been caused both directly – e.g. lower numbers of cases with legal aid mean that more work needs to be undertaken – and indirectly – the increase in litigants in person means that individual cases take more work than previously – by the LASPO reductions in scope and eligibility.

This runs a real risk that the immense pressure on barristers to work more hours, will have an impact on the quality if the service provided to clients and the court.

119. One family practitioner on the Midland circuit noted that *"Because of the LASPO changes I have had to take on more cases putting me under immense pressure, and this has impacted my [wellbeing] and, to a degree, my mental health"*.

120. A practitioner in actions against the police and inquests noted that they *"had to have a period of a sabbatical (in employment) [from] chambers, to stabilise my practice & aged debt worries/pressure. I had a serious health issue which I believe was partly brought on by the worry of practice, debt & cash flow."*

A family practitioner on the South Eastern circuit reported that *"I deal with cases like this all the time [a child being unlawfully removed from their parent and placed in foster care for seven months], and the stress of it, matched with the poor working conditions and poor pay, mean I am choosing to do less for the benefit of my health."*

9% of respondents in civil practice who had indicated that they had changed employment status had changed because of funding or legal aid cuts.²¹ Furthermore, 14% of those in professional negligence or personal injury practice and 28% of those in family practice gave the same reason.

121. There is also a noticeable difference between views on practitioners' current work situation. While 27% of commercial and chancery practitioners said that *"It is ideal, all or nearly all my needs are met"*, only 9% of family practitioners, 21% of civil practitioners, and 21% of PN/PI practitioners agreed.²²

²¹ Barristers' Working Lives (2017), p. 31.

²² Barristers' Working Lives (2017), p. 30.

122. Conversely, 13% of commercial and chancery practitioners said, “I am not satisfied and am considering my options”, compared to 23% of family practitioners, 19% of PN/PI practitioners and 17% of civil practitioners.²³

Reliance on Pro bono/Charity sector

123. The Bar Pro Bono Unit has told the Bar Council that demand for its services has increased by 65% since LASPO.

124. In 2017 the Unit had 2,274 applications for help, the highest number ever and over 1,000 more than the number of applications the Unit received annually pre-LASPO. The Unit reports “it looks like the record high demand we saw in 2017 will be surpassed before the end of 2018.” In family cases, pre-LASPO the Unit received just under 200 applications for help every year on average. Since LASPO it receives around 600 applications for help in family cases every year. Requests for help in immigration cases increased from an average of 20 cases per year pre LASPO to just under 150 cases a year on average after the cuts.

125. One theme that frequently arose among respondents to the survey was that, while many barristers do pro bono work, this voluntary contribution cannot and should not fill the gaps left by legal aid cuts.

126. One family practitioner noted that “Bar Pro Bono Unit requests are more frequent and illustrate the demand and need for legal representation for the most vulnerable in our society”. Similarly, another suggested that they “do much less legal aid private law children work and do cases pro bono when vulnerable clients cannot get legal aid.” One family practitioner on the Northern circuit noted that “[m]ore persons are seeking pro bono assistance”. While legal aid cuts may in part have been intended to discourage unmeritorious claims, it appears that one of the main outcomes has been that many meritorious claims are not receiving adequate assistance. Pro bono work, while an important aspect of many barristers’ practice, is insufficient to plug these gaps – and even less so when greater workloads are lower pay are being imposed on them for their paid work.

127. One civil practitioner noted that “[s]ome of the work I used to do on legal aid I now do pro bono as no LA available.” Many of the cases that were now out of scope of legal aid still require professional legal assistance, so barristers often attempt to make up for these deficiencies in provision. As one civil practitioner highlighted: “I do more pro bono because people can’t get representation”.

23 Barristers’ Working Lives (2017), p. 30.

128. Despite pro bono work being undertaken by many barristers, there is still a huge gap between that which is available and that which is required. As one family practitioner on the South Eastern circuit wrote: *“I do an increasing number of Pro Bono cases and am also a reviewer for the Bar Pro Bono Unit, but this simply cannot fill the holes caused by removing any type of legal advice let alone representation from hundreds of thousands of people.”*
129. Another civil practitioner on the Western circuit highlighted that there was an *“impact to families with inquest representation & pro bono work to replace it”*. Although there are barristers acting pro bono, it cannot replace paid representation in terms of quality of service.
130. The Personal Support Unit – a charity which provides emotional support and advice for those without lawyer, in 20 courts – reported a 520% increase since 2011 in the number of people seeking support in court because they do not have a lawyer.²⁴

Alternatives to civil or family legal aid

131. It is right to be alert to alternative sources of funding to reduce pressure on the legal aid budget.
132. The Bar Council has been a leader in initiatives to look at alternative or supplementary sources of funding, such as research into the feasibility of a Contingent Legal Aid Fund (CLAF). The most recent consideration by a Joint Working Group indicates that while there may be some scope for a self-sustaining CLAF for some civil areas of work, it would be naïve to think that this could be a wholesale replacement for legal aid.
133. The Ministry of Justice’s promotion of mediation as an alternative to court in family cases is right in principle: it is preferable to avoid court where it is not needed. However, the removal of legal aid for early advice has meant that lawyers are no longer engaged to point individuals in the direction of mediation and to help them to understand and have confidence in the process, and to be realistic about settlement.
134. The Civil Justice Council’s November 2017 report into Before-The-Event (BTE) Insurance²⁵ is a helpful document for consideration of how this type of funding might be developed further alongside legal aid. However, BTE insurance cannot operate as a replacement for legal aid:

²⁴ <https://www.buzzfeed.com/emilydugan/a-record-number-of-people-are-representing-themselves-in>

²⁵ Civil Justice Council, The Law and Practicalities of Before-The-Event (BTE) Insurance: An Information Study, November 2017 <https://www.judiciary.uk/wp-content/uploads/2017/11/cjc-bte-report.pdf>

“legal helplines commonly available via BTE insurance policies [...] are filling a real ‘gap’ in the marketplace [...] However, legal helplines will not, for example, pay for a surveyor in the case of a social housing tenant’s disrepair claim, nor pay for a lawyer to draft correspondence and documents; it offers a far more basic advisory service than that. Hence, these helplines cannot be viewed as a substitute for legal aid.” (page 12).

135. The Bar Council’s position is firmly that there is no ‘magic bullet’ alternative to a properly funded legal aid system for civil and family law.

Legal Aid in Criminal Cases

136. Although the main effects of Part 1 of LASPO were to reduce the scope of and eligibility for civil and family legal aid, nevertheless, the MoJ have stated that the PIR will include criminal legal aid.

Eligibility for criminal legal aid

137. The MoJ recently referred to their 2015 research that 25% of the population were eligible for criminal legal aid²⁶. This is no comfort to the 75% of the population who are not entitled to legal aid. The means test threshold for entitlement to legal aid was last increased in 2008²⁷ which means that over the last ten years there has been a real-terms reduction in availability. Defendants who are not able to afford legal representation because they are just above the means test threshold face a serious risk of injustice.

138. For example, an unrepresented defendant may face applications such as to introduce evidence of bad character. The defendant is unlikely to understand the legal technicalities of such an application. On the one hand, there could be a miscarriage of justice if the defendant, through lack of knowledge, does not resist applications that would be resisted if they were represented. On the other hand, the prosecution might decide not to make the application because they know that the Judge will have to step in to try to assist the defendant in this respect, and as a result, the prosecution case may be weaker. Either way, there is an increased risk of a miscarriage of justice: of the innocent being found guilty, or the guilty not convicted (with the knock on impact that this has in securing justice and fairness for the victims of crime). Also, just as in family and civil cases, cases take longer where there is an unrepresented defendant, which increases court costs.

²⁶ Criminal Contracts Consultative Group (Criminal CCG) minutes 3 July 2018, to be published: <https://www.gov.uk/government/publications/contracts-consultative-groups>

²⁷ Criminal CCG minutes 15 May 2018.

139. This also hampers the use of new technology. For example, in the Crown Court, case papers are on the Digital Case System, which is designed (and available) for use by judges and lawyers, not litigants in person.

140. The Justice Committee's report of July 2018²⁸ summarised the MoJ's research in this area:

- *“Unrepresented defendants were seen as having a varied but limited understanding of the court process by the majority of interviewees and were considered less able to participate effectively in the process.*
- *A consistent theme was the perception that unrepresented defendants' cases had longer hearings and case progression was slower.*
- *Interviewees saw unrepresented defendants as a barrier towards achieving early guilty pleas because they had a less detailed understanding of the discount scheme.*
- *Interviewees also expressed concern about unrepresented defendants' effect upon witnesses, with particular worries about defendants undertaking cross-examination, including of their alleged victim.”*

Defendants' Costs Orders

141. The combination of the amendments introduced to Part II of the Prosecution of Offences Act 1985 and the introduction of a financial eligibility threshold for Crown Court legal aid from 27 January 2014, has meant that irrespective of whether higher defence legal fees were reasonably or necessarily incurred, a Defendants' Costs Order limits recovery to legal aid rates (which are unsustainably low – see below). That results in a defendant whose prosecution is withdrawn, or who is acquitted, having to bear a very high proportion of their own costs from their own funds. Through no fault of his/her own, these defendants are brought before the criminal courts and end up significantly out of pocket as a result.²⁹ The “the innocence tax” is not a misnomer for the effect of these provisions.

Court inefficiencies

142. The Bar Council continues to engage with the MoJ and HMCTS in relation to a range of problems in the criminal courts, including inefficiencies. We do not seek to repeat all of these here, but take the opportunity to remind the MoJ of the significant potential

²⁸ Paragraph 83, House of Commons Justice Committee, *“Criminal Legal Aid: Twelfth Report of Session 2017–19”* July 2018.

<https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1069/1069.pdf>

²⁹ See for highly publicised examples of this unfairness the failed prosecutions against Nigel Evans MP or Dr Stephen Glascoe, a GP wrongly accused of paedophilia by a fantasist.

efficiencies and improvement in the experiences of victims, jurors, witnesses and others that could be achieved by abolishing the “warned list” system. This is used in too many courts. It is a false-economy and wastes a huge amount of time for everyone, including the courts themselves.

Legal aid fees

143. The unsustainably low fees for criminal legal aid work remain a serious problem, which has been raised by the Bar Council and Criminal Bar Association on multiple occasions, of which the MoJ is well aware:

- Research undertaken by Professor Martin Chalkley into Crown Court legal aid defence fees under the Advocates’ Graduated Fee Scheme (AGFS) of fee cuts between 2007 and 2013, “My findings are that as of 2013 AGFS prices have been reduced by 21.0% in cash terms equating to 37% in real terms.”³⁰
- The Justice Committee of Parliament reported in July 2018 that “The general downward trend in expenditure on [criminal] legal aid [...] shows a fall of 33% in real terms between 2011–12 and 2017–18.”³¹

144. The current MoJ consultation³² would restore only a small proportion of the lost fees. A substantial further increase is still required to restore reasonable, and sustainable, remuneration for the criminal Bar.

145. The Justice Committee report concluded:

“86. [...] there is a common law right to legal advice, together with a right to legal representation for an accused person under Article 6 of the European Convention on Human Rights. We conclude that there is compelling evidence of the fragility of the Criminal Bar and criminal defence solicitors’ firms placing these rights at risk; we conclude that this risk can no longer be ignored.

87. We also conclude that current difficulties in recruitment to the Criminal Bar could potentially have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts.

³⁰ Page 52 of the Bar Council’s October 2013 response³⁰ to the Government’s “Transforming Legal Aid: Next Steps” consultation http://www.barcouncil.org.uk/media/235755/bar_council_response_to_the_transforming_legal_aid_next_steps_final.pdf Research from Prof Martin Chalkley stated, “My findings are that as of 2013 AGFS prices have been reduced by 21.0% in cash terms equating to 37% in real terms.” Inflation since 2013, takes the real terms cut to over 40%.

³¹ Paragraph 79, House of Commons Justice Committee, “Criminal Legal Aid: Twelfth Report of Session 2017–19” July 2018.

³² <https://consult.justice.gov.uk/digital-communications/amending-the-advocates-graduated-fee-scheme/>

93. [...] We conclude that the under-funding of the criminal justice system in England and Wales threatens its effectiveness, and in doing so undermines the rule of law and tarnishes the reputation of the justice system as a whole.

94. Our justice system is widely admired, and the UK is a jurisdiction of choice for many individuals and corporate bodies that need to resolve disputes; nonetheless, it faces competition from other jurisdictions. We conclude that the under-resourcing of the criminal justice system undermines the prospects of successfully promoting our legal system abroad, a stated objective of the Government.

95. We recommend that that the Government conduct an urgent cross-departmental review of funding for all elements of the criminal justice system, including criminal legal aid and the Crown Prosecution Service, with the aim of restoring resources to a level that enables the system to operate effectively; the details of this review should be published in advance, and its timetable must ensure completion in time to influence the conclusions of the 2019 Spending Review.”

The Bar Council fully supports the conclusions of the Justice Committee.

Conclusions

146. The Bar Council considers that the Government has a duty to provide a system which ensures that members of the public are able to obtain the advice and representation which they reasonably need in civil and family disputes, and that those who face unsuccessful criminal prosecution do not unreasonably bear the costs of their own representation. The effective operation of our system of justice also requires fair and sustainable remuneration for the lawyers who provide that advice and representation. The legal aid system left by Part 1 of LASPO and its subordinate legislation falls well short of achieving those objectives.

147. Guided by the experience of its members, its own research and published work of other stakeholders, the Bar Council does not accept that Part 1 of LASPO and the subordinate legislation has met the Government’s legislative aims. Whilst dramatic savings have been achieved from the MoJ budget, the Government is still unable to show that those savings have not been diminished or extinguished, or even outweighed, by consequential costs to other Government Departments and local authorities. Nor does the Bar Council accept that the reforms have discouraged unnecessary or adversarial litigation, or that they have targeted legal aid at those who need it.

148. On the contrary, Part 1 of LASPO and its subordinate legislation have produced a regime which impedes the public's access to justice, jeopardises the efficient operation of the justice system, and damages the future of the publicly-funded legal professions.
149. The Bar Council recognises the pressure on public finances which the Government faces. Reintroduction of an adequate and properly funded legal aid system may take time and will require more dialogue with stakeholders. The Bar Council remains willing constructively to engage with the government to identify areas of especial priority, and ready to liaise over the provision of further evidence from the Bar to assist. But the process must be started, and soon, if we are to avoid long-term, and potentially irreversible, damage to our system of justice, not least through the hollowing out and de-skilling of those parts of the legal profession on whom those needing advice and representation depend.
150. There are, however, a number of areas where the Bar Council considers that reintroduction of legal aid, or consequential reform, is required as a matter of urgency; either because they produce particular injustice, or because to do so is likely to ease strain or reduce costs in the justice system:

151. Immediate Recommendations

(1) Crime - the reversal of the "innocence tax":-

The changes LASPO made to Part II of the Punishment of Offences Act 1985 should be repealed. A magistrate or judge should be permitted to award the full legal costs involved in a successful defence of a criminal prosecution subject to a requirement that they were reasonably incurred and proportionate in amount.

(2) Family - reintroduction of legal aid where the respondent is alleged to have abused the applicant:-

Funding should be introduced for respondents to applications under sections 33-41 of Family Law Act 1996 (occupation orders), section 42 (non-molestation) and section 8 of the Children Act 1989 (child arrangement orders for contact/residence) where the applicant has alleged domestic abuse (any incident of threatening behaviour, violence or abuse whether psychological, physical, sexual, financial or emotional including coercive and controlling behaviour).

Where the applicant has provided evidence that she or he has been the victim of domestic abuse or violence, there is an entitlement to legal aid subject to contribution determined by means-testing.

152. The prospect of the victim/applicant being cross-examined by their alleged abuser in person is an inherent disincentive for the victim fully to plead the facts of abuse. Matters of abuse are very frequently relevant to injunctive relief, and to child welfare issues. Children's welfare is compromised where there has been any reticence in pleading in relation to abuse. The attendant risk is of orders being made which would not otherwise have been made or if there had not been a necessary forensic exercise at fact-finding.

153. The Bar Council proposes that the same entitlement to legal aid should be extended to the respondent in the applications identified above for three reasons:

First, it would have the effect of reducing or even eliminating the iniquity of an alleged abuser cross-examining an applicant in person with the trauma that involves. That situation has rightly been described as "*a stain on the reputation of our Family Justice system*".³³

Secondly, such a measure would minimise the risk of miscarriages of justice and the lengthening of hearing time when judges decide to question the applicant on behalf of the respondent pursuant to paragraph 28 of PD12J of the Family Procedure Rules 2010.³⁴

Third, proper representation is likely to reduce court hearing time, freeing up resources for other cases.

Family - reintroduction of legal aid for private law family cases:-

154. A very substantial proportion of the workload in the family courts involves private law cases where one or both of the parties are unrepresented.

155. The statements and evidence filed by litigants in person are often excessive and contain extraneous material, hyperbole and antagonistic-language which only harms the process. Due to litigants in person, hearings have increased in length and number and there is less communication between hearings due to a lack of legal representation.

³³ See footnote 9 and *Re: A (a minor) (fact finding; unrepresented part)* [2017] EWHC 1195 (Fam).

³⁴ See *PS v BP* [2018] EWHC 1987 (Fam) for an illustration of those difficulties.

156. The re-introduction of means-tested legal help to provide initial advice to parties is likely to reduce the number of contested cases, as the parties will be better informed in advance of mediation and as to the likely outcome of court proceedings.
157. The Bar Council considers that means-tested legal representation should also be re-introduced for contested private law family cases.
158. The need for this reform is especially pressing in section 8 cases where there are issues of high conflict and/or parental alienation. These cases are the exception and not the norm but due to their very nature such proceedings are extremely difficult to manage and resolve without proper representation on both sides. Without such funded representation these cases can make proceedings far more complex and lengthy, increase delay and clog up the Court system, as well as seriously effect the subject children and families and the outcomes for them.
159. The increase in hostility and complexity between the parties due to a lack of legal funding for at least one party if not both parties in a number of cases triggers the involvement of r.16.4 guardians (and its added expense to Legal Aid Agency) whereas this could be avoided if there is proper representation at an early stage.
160. Reinstatement of public funding would allow skilled early intervention between parties through the help of practitioners. Where one party is in person, discussions are very limited and guarded and essential negotiations happen rarely. The lawyer for one party is left discussing with a parent who is unable to process and talk properly. There is no legal aid for translation of documents and general communication for those who have difficulty in speaking English and acting in person. This causes huge problems in the resolution of cases.
161. A number of judges and district judges across the country have expressed very similar serious concerns about the negative impact of the legal aid cuts in these cases. They should also be consulted.
162. Reintroduction of legal help and representation would accelerate the resolution of disputes over contact and residence for children; an intangible benefit which cannot be measured in monetary terms.

(3) Civil - reintroduction of a legal help scheme for welfare benefit cases:-

163. The impact of a wrongful refusal of a means-tested or non-means-tested benefit on a welfare claimant is significant. It can lead to increased risks of homelessness, health problems, the cost of extra social services support or of family breakdown – essentially a plethora of additional costs to state agencies, quite apart from the injustice to the

individual. It is a false economy, as well as unfair and undermining of the rule of law, for individuals to be denied benefits that the Government and Parliament have decided they need and should have.

164. It is highly likely that the abolition of legal help for appeals against refusal of benefits will have led to an increase in those wrongly refused benefits; the rules on entitlement are technical, complex, changeable and difficult to navigate for claimants.

165. The Bar Council has no indication that the Government has attempted to quantify either the direct financial impact on benefit claimants or the incidental costs to the state of the unlawful refusal of applications for means-tested or non-means-tested state benefits. It anticipates that those costs could significantly outweigh the costs of reinstating the limited legal help scheme for pre-tribunal advice which was abolished by LASPO.

166. The Bar Council calls for the reintroduction of an appropriate scheme of legal help in dialogue with relevant stakeholders.

(4) Coroner's Inquests – relaxing the criteria for exceptional case funding where the death occurs in the custody of the state and it has agreed to provide separate representation for one or more interested persons:-

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

168. Unrepresented family members are at an obvious disadvantage in such inquests notwithstanding their inquisitorial nature.

169. Absent a “wider public interest determination” by the Director of Legal Casework, families can only receive legal aid for representation at the inquest under the exceptional funding scheme where the procedural obligation under Article 2 arises and, in the particular circumstances of the case, representation for the family of the deceased is required to discharge it. Even then, legal aid is generally means-tested.³⁵

³⁵ See the Lord Chancellor's Exceptional Funding Guidance (Inquests).

This can cause significant injustice, given the high bar for an Article 2 Inquest, particularly in the healthcare setting.³⁶

170. The Chief Coroner recommended in his Fourth Annual Report to the Lord Chancellor (2016-17) that *“the Lord Chancellor gives consideration to amending the Exceptional Funding Guidance (Inquests) so as to provide exceptional case funding for legal representation for the family where the state has agreed to provide separate representation for one or more interested persons.”*³⁷

171. The Bar Council agrees. It recommends that exceptional case funding should be made available to a member of the deceased’s family in the circumstances envisaged by the Chief Coroner.

(5) Reform of the ‘means test’ eligibility criteria:-

172. The Law Society has commissioned research into the legal aid means test and the extent to which people with limited resources are able to cover some or all of their own legal costs when required to do so under the means testing regulations applicable to civil legal aid.³⁸

173. The central conclusion of the report is that people on incomes up to 30% below the minimum income standard (an independent and accepted measure of what members of the public consider to be a minimum acceptable standard of living in the United Kingdom today) are still deemed ineligible for legal aid by the means test. In short, means testing for legal aid is set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living.

“It is widely acknowledged that working poverty is an important and troubling phenomenon. Whichever indicator one uses of low income, household income data show that it is not just a problem for non-working households. Indeed, the proportion of people in households classified as being in poverty where there is also someone working in the household has risen steadily in recent years, as employment rates have increased but so have the number of people working in part-time and insecure employment. Using the 60% of median indicator, and counting income net of housing costs, in 2015/16, nearly six in ten working-age adults in poverty were in families where at least one person worked.”

³⁶ This paper will not rehearse the extensive law on that issue.

³⁷ See paragraph 185.

³⁸ <http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/legal-aid-means-test-report/>

174. This illustrates that the current eligibility threshold for means that some of the lowest earners are not eligible for legal aid. Those required to contribute to their legal aid costs may have to forgo important life essentials, dig into modest life savings, or borrow money at high rates of interest, to make these contributions, or risk going without legal representation.

The MoJ notes in the Terms of Reference for the PIR that it is “committed to ensuring legal aid and other forms of legal support are available to those who need it”³⁹. The Bar Council would encourage the MoJ to introduce a significantly simpler and more generous scheme for legal aid and to reform legal aid contributions, with rules on user payments adjusted to reflect a more generous calculation of disposable income and capital so that the eligibility threshold and contribution requirements are no longer an unaffordable barrier to justice as suggested by the Bach Commission in their Right to Justice report.⁴⁰

Bar Council
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³⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686576/pir-laspo-terms-of-reference.pdf

⁴⁰ http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf