National Audit Office

157-197 Buckingham Palace Road

London

SW1W 9SP

20 July 2023

By email only: legal.aid.study@nao.org.uk

Dear Sirs

Value for money from legal aid study

The Association of Personal Injury Lawyers welcomes the opportunity to respond to the National Audit Office's survey on legal aid since LASPO. We have responded to questions within our remit as a membership organisation which campaigns for the rights of injured people.

What impacts, if any, have the changes in types of cases covered by legal aid since LASPO had on individuals with legal issues? Where possible please provide specific examples, without giving personal

All children, and protected parties should have access to legal aid- the scope should not be restricted to just those with cases that fall within the narrow requirements of s23 Schedule 1 of Part 1 LASPO. One member has a case involving a child born with Down's Syndrome and a serious heart condition. Medical records show that the child had a stroke, either during the birth or immediately afterwards. Luckily, he has not developed a complex neurological injury, but the case involves many complex issues such as whether if he had been delivered sooner or whether there were signs on an earlier scan that were missed, the stroke could have been avoided. There is no legal aid available to pursue this case because it does not fall within the extremely narrow requirements of s 23 of Schedule 1 Part 1. Another member provided an example of a child who required an amputation due to a congenital defect, but this did not fall within the narrow confines of s 23, and therefore no legal aid assistance was available.

Being awarded a legal aid franchise is a hallmark of quality, with firms offering legal aid being required to have accredited practitioners who are specialist in these cases. Due to the issues stated below, it is becoming increasingly the case that firms pursue cases under a conditional fee agreement, instead of trying to secure funding through a legal aid franchise. While conditional fee agreements allow for cases to be pursued, particularly vulnerable clients who should have had access to legal aid may lose out in a CFA arrangement, as they are required to bear additional costs under these arrangements that they would not be required to under legal aid funding. With a lower number of firms having a legal aid franchise, this also encourages firms who are not specialist in this area to pick up these cases and "have a go", leading to lower quality advice for clients.

Members report:

- inconsistencies with whether certificates are granted, and certificates are being rejected for arbitrary reasons, such as that timetables, based on timescales for other similar cases, are too long. See example 1 below

- Decisions on whether legal aid should be granted being refused because of arbitrary cut-offs, and despite cases being referred to the early notification scheme. While we understand the rationale behind waiting until two years to get a clearer picture of whether a child has disabilities, the rigidity of this even in cases where there is evidence of emerging disability before two years old, is having a harmful impact on families. See example 2 below

- difficulties when trying to call the LAA - simply being put through to customer services, and unable to speak to anyone with knowledge of the case. The LAA loses important documents, documents go to the wrong department, calls are not returned, and staff dealing with the case at the Agency do not understand the information that they get, often asking for the same documents repeatedly.

- often, after 6-7 months of waiting for a decision from the LAA, the solicitor has no choice but to sign the claimant up to a conditional fee agreement (CFA), with the accompanying drawbacks such as having to take money out of the clients' damages to fund disbursements. Also, because these cases involve children, the judge may not allow money to be taken from general damages.

- The rates allowed for expert fees remains a very real issue in legal aid cases. The hourly rate for an obstetrician to write a report in a legal aid case is £135, and for a midwife, it is £90. Unless an expert is prepared to write a report for that fee, as the solicitor already has an existing relationship with them and will provide other work to them for a reasonable rate, it is unlikely that the report will be of high quality. The defendant trust has their choice of expert, despite also being funded by the public purse. There must be equality of arms between the parties, and this includes parity in the level of expert accessible to each party. In reality, practitioners supplement the fees paid by the Legal Aid Agency out of the costs they receive. In some cases, this can mean that the solicitor is effectively working pro bono.

There are also issues because each stage of the case is assigned a block of funding, e.g. up to mutual exchange, quantum, negotiation. The amounts assigned to each block have not been revisited in around 15 years. Expert costs have increased hugely in that timeframe and it is increasingly difficult to obtain expert evidence without the solicitor subsidising the costs.

- Members also report that the legal aid hourly rate is too low and has not kept up at all with inflation or the commercial costs of private practice. There must be a review of the hourly rate.

- Being awarded a legal aid franchise was previously a hallmark of quality, but due to the issues stated above, it is becoming increasingly the case that firms pursue cases under a conditional fee agreement, instead of trying to secure funding through legal aid. While conditional fee agreements allow for cases to be pursued, particularly vulnerable clients who should have had access to legal aid may lose out in a CFA arrangement, as they are required to bear additional costs under these arrangements that they would not be required to under legal aid funding.

Example 1

This is an unusual and complicated case involving a birth injury resulting in severe memory loss. The APIL member had been conducting the case for 14 years, and following an admission of liability by the defendant in November 2016, quantum issues were being

resolved. The APIL ember recently moved firms, and the claimant and their family expressed a wish to transfer firms with them. The solicitor applied to transfer legal aid funding to their new firm, and the LAA refused, as they felt that it was not in the interest of justice to transfer. After much back and forth correspondence between the solicitor and LAA, where information sent by the solicitor was ignored and repeatedly requested by the LAA, the LAA refused to transfer the certificate, despite the solicitor setting out clearly the reasons the case was taking so long, and the timetable for the case being based on similar cases that had been given directions at a CCMC. The solicitor asked how to appeal the decision, but this correspondence was ignored.

Example 2 (timeframes are approximations, not precise timelines)

In this example, the case was referred to the early notification scheme, and an NHSR panel firm began carrying out investigations, when the child was around six months old. The claimant's mother approached solicitors, and they attempted to get funding through the LAA, but despite evidence of emerging disability in the form of seizures, the LAA refused to issue a certificate due to the child's young age, and the fact that genetic testing was being undertaken (despite genetic testing being undertaken in most cases where there may be a disability at birth). A decision to award funding was eventually made 12 months later, and an admission of liability was made around 6 months later. Sadly, the child passed away very shortly after. If a decision from the LAA had been made sooner, the family would have been able to access earlier interim payments to help them care for their son. There is a lack of joined up thinking, and rigidity to the rules, and despite the early notification scheme meaning that potential cases are flagged up earlier than they would have been previously, families are still struggling to get answers and obtain representation, because the LAA will not provide funding until the child is older.

Example 3

The client in this case had clearly suffered a hypoxic ischemic encephalopathy, shown on the brain scan. The LAA refused to issue a certificate, as they claimed that there was no proof of injury. This refusal took a month to receive, delaying the case, and ultimately, the compensation for the child.

Legal aid for abuse cases related to children in care

The financial eligibility rules need to be much more straight-forward. Many victims of abuse struggle to access legal aid because they live chaotic lives. These vulnerable people often find it difficult to keep up with day-to-day administration, and will struggle to provide the necessary information by the short deadlines required, which means that they fall foul of financial assessments. Where a client is likely to be financially eligible for legal aid, their solicitor will still encourage and try and assist them in applying for legal aid, but survivors of abuse can sometimes be worn down by the process by not having the evidence they need.

One of the main issues with legal aid for abuse cases relating to children in a care setting is that there is a reassessment of the child's eligibility for legal aid once they reach sixteen. A child will still be in care at sixteen, so it is nonsensical to require a re-assessment of their eligibility at this stage. Further, the information required to carry out the reassessment will often be held by the local authority looking after the child – and the local authority will often be the defendant in the case. The defendant local authority is often very slow to disclose the relevant information, which requires the claimant solicitor to apply to the Legal Aid Agency for an extension of time for the reassessment. As above, the child will still be eligible for legal aid, so this additional administrative work for all parties is unnecessary. Further, because these abuse cases must often be handled sensitively and with care to ensure that the child is

not re-traumatised, the child and/or their carer may not know the details of the case being pursued at the stage where funding is applied for. This may result in the child and/or their carer being contacted, seemingly out of the blue by a solicitor, asking them to divulge their financial information e.g. bank account details. This can cause anxiety and stress for the child and their carers.

The increased administrative burden for all parties, and the anxiety and stress related to this reassessment could be eased or avoided by setting the reassessment age at eighteen, instead of sixteen. Having a reassessment at eighteen would be far more logical – the child will have left care, is now classed as an adult and will have access to any money held in trust for them.

In your view, how is the government performing against its objective to target legal aid to those who need it most?

No. The objectives of the Act have clearly not been met, in particular to target legal aid to those who need it most. Members report great difficulties in trying to obtain legal aid for their clients, difficulties in communicating with the Legal Aid Agency, and overly complex financial eligibility rules. Expert fees in legal aid cases are also set at an unworkably low level.

The 'exceptional case funding' scheme is intended to fund cases outside the scope of legal aid, where a failure to do so would result in a breach of the applicant's rights under international law. How effective do you feel the exceptional case funding scheme is in its current form? Please include how, if at all, you feel the scheme could be made more effective

Representation at inquests can form part of a clinical negligence claim and as such can be funded through a conditional fee agreement. Families often, however, do not care about compensation, and are not interested in bringing a claim for negligence – they simply want to know the truth and for someone to be accountable for what has happened. There may be some families that do not wish to pursue a claim in negligence, or perhaps the civil claim has already been settled before the inquest, or liability is admitted before the inquest takes place. In some cases, a clinical negligence action will simply not be economical to run. In those scenarios, CFA funding will not be available and the families will need to seek legal aid to pay for representation. In these cases, families seek to obtain Exceptional Case Funding (ECF). We do not believe that the ECF scheme is effective or fit for purpose.

Our members report that the process of applying for legal aid funding for inquests is extremely difficult, and requires specialist knowledge on behalf of the legal representative. The process should be much more straight-forward. While we welcome the removal of means testing for exceptional case funding, this simply does not go far enough. ECF is rarely granted, and removing the financial means test alone is unlikely to make it any easier for bereaved families to obtain legal aid for inquests. These families will still be required to provide evidence that the case is in the wider public interest, or relates to a breach of Article 2 of the European Convention of Human Rights – both of which are incredibly difficult to prove.

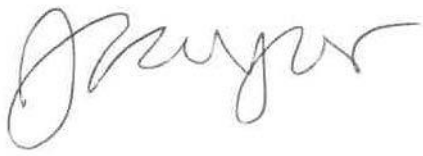
Bereaved families need access to legal representation so that they are able to engage fully with the inquest process, and obtain answers about their loved one's death. We recognise that the inquisitorial nature of inquests means that some coroners believe that it is not necessary to have legal professionals in court. Families will be unlikely to have adequate knowledge of the inquest process, meaning that they would benefit greatly from the assistance of a legal professional. Families will simply not feel part of the investigation

process if they do not have representation. Simply, bereaved families cannot be put at the forefront of the process if they are left to fend for themselves against a hospital which invariably has representation, often at the expense of the state.

Families will face hospitals, local authorities and other public bodies which have legal representation funded by the public purse. Even in cases where the state does not officially have representation, they are likely to have assistance to help them, either though in-house legal professionals or specialist inquest officers. At the very least, the witnesses called by the state to assist their case will be experienced professional witnesses such as doctors, who will have been provided with advice from a legal team prior to the inquest. It is not right that a family suffering a bereavement is likely to be refused the same publicly funded legal aid. We maintain that the Government should introduce non means tested legal aid for bereaved families at inquests where a public body is represented. We are disappointed that the opportunity to introduce provision for non means tested legal aid for bereaved families where a public body is represented has not been taken forward in the Judicial Review and Courts Act 2022, with an amendment by the House of Lords to that effect being removed by the House of Commons.

We hope that our comments prove useful. If you would like to discuss our response, please contact Alice Taylor, alice.taylor@apil.org.uk in the first instance.

Yours faithfully



Alice Taylor

Legal Policy Manager