Ministry of Justice

Review of Civil Legal Aid

A response by the Association of Personal Injury Lawyers

February 2024

Overarching questions

1. Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes?

1.1. Do you have any suggestions of changes – both short-term and longer-term changes – that could improve each of the following categories of law?

a. Family

b. Community Care

c. Housing & Debt

d. Immigration and Asylum

e. Mental Health

f. Discrimination

g. Education

h. Public Law

i. Claims Against Public Authorities

j. Clinical Negligence

k. Welfare Benefits

Please provide any specific evidence or data you have that supports your suggestions.

We are responding to this question with reference to (j) clinical negligence, and (i) claims against public authorities.

Clinical negligence

All children and protected parties should have access to legal aid. Section 23 Schedule 1 of Part 1 LASPO is too narrowly drawn, and creates huge unfairness. One APIL member reports 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 birth or immediately afterwards. Luckily, he had not developed a complex neurological injury, but the case involved 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 would have been avoided. There is no legal aid available to pursue this case, because it does not fall within the extremely narrow requirements of Section 23 of Schedule 1. Another member provided an example of a child who required an amputation due to a congenital defect, but this again did

not fall within the narrow confines of section 23, and therefore no legal aid assistance was available.

The rates allowed for expert fees remain a very real issue in legal aid cases, and these should be reviewed. 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, likely only in cases where the solicitors has an existing relationship with the expert and can 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 means 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.

Legal aid for abuse 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 that they need.

One of the main issues that needs to be addressed is that in these cases 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 that stage. Further, the information required to carry out the reassessment will often be held by the local authority looking after the child, and that 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 at which funding is applied. 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. This 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.

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

Members report numerous difficulties in the administration of legal aid. There are 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. One member reported a 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 member then moved firms and the claimant and their family expressed a wish to transfer with them. The solicitor applied to transfer legal aid funding to their new firm and the LAA refused, stating that it was not in the interest of justice to transfer. The solicitor set out clear reasons that the case was taking so long, but because some similar cases had been given a short timetable at a costs and case management conference, the LAA continued to refuse the transfer.

There needs to be greater flexibility and joined-up thinking in the administration of civil legal aid. Decisions on whether legal aid should be granted are being refused because of arbitrary cut-offs, and in spite of 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. In one example provided by a member, a case was referred to the early notification scheme and an NHS Resolution panel firm began carrying out investigations when the child was 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.

Members report that when they contact the LAA via phone, they are simply put through to customer services and unable to speak to anyone with knowledge of the case. It should be possible to be able to contact someone with knowledge of legal aid. Members also report that 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 receive, often asking for the same documents repeatedly. There should at the very least be more training of the administrative staff working at the LAA, so that they can understand the information received, and greater care needs to be taken to ensure that documents are not lost and are not sent to the wrong department.

Views were sought recently, in the Law Society's paper on 21st Century Justice, about whether the Civil Legal Aid helpline could be reformulated into local provision. We believe that the helpline should remain a national service. Regionalizing the service would create the risk of postcode lotteries, where certain locations might have a better service than others. It is also easier to ensure a uniform approach and provision of advice if the service is provided nationally.

4. What potential risks and opportunities do you foresee in the future for civil legal aid:

i) in general; and ii) if no changes are made to the current system? Please provide any specific evidence or data you have that supports your response.

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 in response to questions 3 and 6, 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, and they would not have been required to do so 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 these cases up and "have a go", leading to lower quality advice for clients.

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

Access to justice is a cornerstone of our society, and civil legal aid should play a vital role in ensuring access to justice. As set out above, we believe that the current scope of legal aid is too narrow, and as a result has a detrimental effect on, in particular, children and protected parties. While Conditional Fee Agreements allow for cases to be pursued, particularly vulnerable clients who should have 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. In cases involving children, there may be issues with securing CFA funding, due to the need to have court approval of any deductions taken from damages. This may mean that depending on the case, the child and their litigation friend may struggle to obtain legal representation. Legal aid should also be available to bereaved families for representation at inquests. At present, it is incredibly difficult to secure – see further at question 13, and families are often left without representation against a well-resourced defendant who is able to obtain legal representation at the public's expense. The current provision of legal aid simply does not provide for access to justice.

If the legal aid system did provide access to justice and ensured that those who should be entitled to legal aid were able to obtain legal representation, then it would lead to a greater number of people being able to secure rightful compensation to help put them, as closely as possible, back to the position they were in prior to their injury. Full and fair compensation would mean that they would not need to rely on state provision of benefits, which would be beneficial to the taxpayer. Instead, it would be the defendant who would foot the bill for care and other costs.

In relation to inquests, legal representation for bereaved families ensures that a full inquiry is carried out by the coroner. This means that the bereaved family gets answers, and from a wider societal point of view, proper recommendations can be made to ensure that the same mistakes do not happen again.

The existence of civil legal aid helps to ensure that those who require advice and support in a particular area receive such advice from an accredited specialist in that particular area. As above, the decline in the number of firms having a legal aid franchise encourages firms who are not specialist in the area to pick up cases and “have a go”, leading to lower quality advice for clients. Ensuring that claimants have access to accredited specialists means that they will receive full and fair compensation, and, as above, be less likely to need to rely on state funded benefits.

Fees

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

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

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

There are no incentives provided by the current fee system. The legal aid hourly rate is too low and has not kept up with inflation or the commercial costs of private practice. There must be a review of the hourly rate.

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

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

User needs

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

As above, individuals encounter issues with eligibility requirements, and administrative difficulties, which prevent them from accessing civil legal aid.

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

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 prior to the inquest, or liability has been 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 at 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 through 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. While we welcomed the removal of the financial means test for applications for exceptional case funding, this change did not go far enough. Even before the financial situation of a family was considered, it was rare for applications for exceptional case funding to be successful, especially in relation to health-care related inquests. Families are still 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 on Human Rights.

Use of technology

The Review aims to feed into MoJ's wider strategic objectives on the use of technology. Technology should enable users to engage with the legal process and support the smooth running of the civil justice system. These questions seek views on how the use of technology could improve civil legal aid, including through where appropriate, remote advice.

14. What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in

hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid. Please provide any specific evidence or data you have that supports your response.

APIL can see considerable advantages to digitisation, however, digital reform is complex. Reforms must have a user focused approach, be inclusive and provide the necessary user support. Reform should focus on the user's needs, learn from their experiences and be rigorously tested.

While we are supportive of the use of technology to improve the delivery of civil legal aid, steps must be taken to ensure that those who are digitally disadvantaged are able to access services. Digital technologies have the potential to make justice systems more accessible and efficient. However, ensuring access to justice for all is a huge challenge, one acknowledged by Lord Justice Briggs in his review of the civil court structure.

Justice is a key principle of the rule of law and must be accessible to all. Justice includes access to information, advice and remedy, whether that be through the court or another means.

It is essential that digital exclusion is tackled head on. There needs to be consideration for the members of our population that don't have access to the internet, have limited access to the internet, or need help to use it. Access to Justice will be seriously impeded if these issues are not considered as a matter of course across all digital reforms.

Whilst the trend is towards digital capability, we are not yet in position where such systems are easily accessible to all. It is crucial that reforms have a user focused approach, they are inclusive and when necessary, users are assisted. Research shows that in Great Britain in 2023, an estimated 7 per cent of households did not have internet access. Internet access varied significantly by age, and 31 per cent of those aged 65 an over did not have internet access in the home in 2023. There are also variations when looking at whether people live alone, or whether they have limitations or impairments that impact their use of communication services. According to a review of OFCOM's research on digital exclusion among adults in the UK in 2022, 23 per cent of those with limitations/impairments either did not use or did not have access to the internet. 40 per cent of those who were living alone with a condition that limited or impacted their use of communication services said that they did not use or did not have access to the internet at home. 60 per cent of those who were aged over 70, living alone with a condition that limited or impacted their use of communication services did not use or have access to the internet at home.

As well as access, it must also be considered that not all users can confidently use the internet. An OFCOM study on digital exclusion in 2022 found that 8 per cent of users said they were not confident in using the internet. 29 per cent of internet users were classed as "narrow" users, only ever undertaking between one and four of a designated thirteen online activities asked about in a survey. Narrow users are less likely to be confident in using the internet.

Especially in the context of civil legal aid, financial vulnerability must be considered. Those who are financially vulnerable are more likely to face digital exclusion – according to the 2022 OFCOM report, 11 per cent of those with a household income of less than £10,399, and 11 per cent of those receiving a means tested benefit, had experienced an affordability issue, such as having to modify or cancel their fixed broadband contract.

Digital systems must be designed to be inclusive, and these challenges must be addressed before reform is rolled out. We would recommend that any digital amendments to the legal

aid service should be properly piloted to ensure that they are fully accessible, and that there are alternative ways of accessing the legal aid service should this be required. Digital exclusion is a challenge to be tackled on three fronts: supporting those who want to get online; providing less confident users with essential digital skills; and ensuring that those who remain offline are not left behind, and any reform must consider all three. Any online process has to be properly resourced and developed so that any person on the street could use it. This means a combination of IT helplines and face to face support for users. Specialist support and assistance must also be put in place for vulnerable users.

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

As above, while the option for remote provision may increase availability, it must be borne in mind that there will be people who have accessibility issues, and these must be addressed prior to any change in approach.

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

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

Please refer to question 14.

Early resolution

The Review aims to feed into MoJ's wider strategic objective to encourage, where appropriate, the early resolution of disputes, providing swift access to justice through early engagement where appropriate. This question seeks views on what could be done to encourage early resolution of disputes.

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

APIL is supportive of efficient resolution of disputes, however the problems with the current administration of civil legal aid are leading to delays, rather than encouraging early resolution of disputes.

There has been a move recently towards introducing compulsory dispute resolution prior to trial, for example the plans to introduce compulsory telephone mediation in small claims. Compulsory forms of dispute resolution have a lower likelihood of success, and we would not recommend the introduction of any form of compulsory dispute resolution to be built into the legal aid system, though in lower value cases there may be a benefit in requiring parties to explore alternative dispute resolution – this could take the form of an "opt-out" process . In higher value cases, flexibility is needed, and any alternative dispute resolution process needs to be driven by the parties. Any dispute resolution should take place at a time when the parties have the necessary information to properly resolve the dispute.