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ACCESS TO JUSTICE IN THE 2020s

Recommendations for a joined up approach to Legal Aid, Funding and Procedural Reform in the Civil and Family Courts for the new Conservative Government

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About the author

Lord Sandhurst QC (who practised from One Crown Office Row under his family name as Guy Mansfield QC) was Chair of the Bar Council in 2005. Guy retired from practice on 31 March 2019. In 2009/10 he chaired a Bar Council working party which produced three reports into the potential viability of a privately funded Contingent Legal Aid Fund. Guy sat for many years as a Recorder and latterly as a Deputy High Court Judge.

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FOREWORD

The author of this paper practised at the common law Bar (as Guy Mansfield QC) for over 40 years, was Chair of the Bar Council in 2005 and chaired a Bar Council working party which produced 3 linked reports on the potential for a Contingent Legal Aid Fund ('CLAF'). He is well placed to write about legal aid and effective access to our civil and family courts.

The Legal Aid Act 1949 established that subject to means and a legal merits test, most civil and family work was eligible for legal aid. At that time, and for many years after, eligibility on financial grounds included 80% of the population. By 2009, the figure had dropped to 36%. The scope of legal aid has in recent years also been substantially reduced.

In ordinary civil litigation legal aid is no longer available for most damages claims. In most inquests, even those involving public authorities represented by counsel and solicitors, legal aid is rare. In the Family courts, other than local authority care proceedings, parties only receive legal aid in very limited circumstances. A consequence of the LASPO Act 2012 reforms, made under the pressure of austerity, was to increase greatly the numbers of unrepresented parties appearing in the family courts. In the civil courts there have been similar reductions in the availability of legal aid for housing and social welfare matters. Over the last Parliament, the Justice Committee heard compelling evidence of the extra pressures that the growth in litigants in person has placed upon an already overstretched court system. The author's conclusions align with our own.

As this paper shows, a further consequence of the reduced availability of legal aid has resulted in declining numbers of lawyers prepared to work in these areas of law. But, as the paper acknowledges, government does not have unlimited funds. If scarce funds are to be put to best use, it suggests how we can simplify procedures and argues for steps to make costs predictable and lower. It suggests improved means to fund litigation.

This paper makes a persuasive case for more legal aid in family, housing and social welfare law as well as inquests involving public authorities and some clinical negligence claims. It explains the need to review the Family Procedure Rules and Guidance to assist the many litigants in person in the family courts.

Recognising that substantial gaps in legal aid will remain, the paper makes the case for a proper review of the possibilities of three funding mechanisms: not-for-profit Contingent Legal Aid Funds, compulsory Before the Event Insurance (bolted onto household and small business insurance policies) and the expansion of Damages Based Agreements. Because these will not be practical in the fields of Family, Housing and Social Welfare, it makes the case for restoring a measure of legal aid in these fields. It does not ask for the impossible.

Finally, the author is right to place the genesis of our legal aid system firmly within the Conservative tradition of social reform. Realistic access to legal redress, regardless of means, is a fundamental civic right. A properly funded and working system to enable this should be seen as much a core social service as access to education or healthcare. This paper is a timely reminder of that.

Sir Bob Neill MP
Chair of the Justice Committee of the House of Commons,
Member of the Executive Committee, Society of Conservative Lawyers

INTRODUCTION

The history of the Conservative Party in developing the post-war programmes of social assistance is often ignored. This is most evident in the social welfare programmes launched by the Beveridge Report but continued, and in many cases expanded, by the post-1951 Churchill Government and the 1944 Education Act, steered through the Commons by Conservative Health Secretary Rab Butler.

Similarly, the Conservative Party should take pride in the fact that it was a Conservative, Lord Rushcliffe, who chaired the 1944 panel that led to the Legal Aid and Advice Act 1949 which set the framework for the system of legal aid in England and Wales. This action embodied a principle which we all acknowledge; that every man is equal before the law, but he has got to get before the law before he can attain that equality.

The legal aid budget was largely untouched during the Thatcher years (perhaps helped by the fact that Mrs Thatcher herself was a barrister, another fact often forgotten by history). It increased significantly from 1987 to 1997 but was brought under control following reforms introduced by both the Major and Blair governments. Contrary to many claims, the price of legal aid was not spiralling out of control.

However heavy cuts were made following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) under Chris Grayling (Justice Secretary and Lord Chancellor from 2012-2015 and the first non-lawyer to have served in the role for at least 440 years). This was done by reducing both the scope of what types of cases qualified for legal aid funding and the number of people eligible under means testing.

It is important to remember that this occurred under spending cuts introduced by the Coalition Government following the 2008 financial crisis, 'austerity'. Certain departments had their budgets ring-fenced, but the Ministry of Justice was not one of them. Even bearing that crisis in mind, cuts to the Ministry of Justice budget, and legal aid, went well beyond their fair share.

It is not difficult to determine why this was the case.

While everyone in the country knows they will require health services at some point during their lives, fewer people expect to require use of the civil courts. Further, lawyers are not always held in the same high esteem as GPs, nurses, police officers and members of the armed forces.

This paper argues that the cuts to legal aid have had profound negative consequences, the relatively saving in the civil and legal aid budget (c.£400m) being a large proportion (c. 34 per cent) of spend[1]. Unintended consequences, both financial and societal, have compounded that cost and have had a profound effect on the justice system and society as a whole.

Legal aid is simply unavailable for most of the population on personal financial grounds. Even for those who are in principle eligible, the subject matter is too often not within scope.

There are the ever growing legal aid deserts. A map compiled by the Law Society[2] puts the effect into brutal relief; while services are still available in some places, most urban areas, towns and rural areas (particularly the less affluent ones) have no providers at all. This denies people in these areas access to justice even if they are eligible by reason of their case and their means.

The effects are also seen in our creaking court system (see page 42 later). Overworked and underpaid lawyers, not to mention unprepared litigants with no representation at all, are clogging up a civil and family court system which is increasingly unfit for purpose.

The promise of a property owning democracy rings hollow if citizens do not have the opportunity to defend their property rights through the legal system. If we want to help children and families, we should offer support when those families are

[1] A reduction in real terms from £1,023m to £670m, see page 7.

[2] www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts

going through their most difficult time. If we want to help ordinary people, we should give them the means to challenge corporations or the state when they make mistakes that damage people's lives.

This paper argues that Government should address the problems of access to justice in the field of civil justice, including family cases, through an approach which integrates three prongs:

1. A modest increase in civil/family legal aid funding but of no greater an order than can absorbed within the MoJ budget.
2. The use of Government soft power to promote new funding sources from Before the Event Insurance, Contingency Legal Aid Funds and Damages Based Agreements. These proposals are not offered as a mere list of disparate suggestions. What is here suggested is dovetailing policy in these three areas[3].
3. Further reform of civil practice to build on the Jackson reforms[4] directed to further reducing the costs which a party needs properly to incur[5] and increasing efficiency.

This paper does not argue for the wholesale restoration of legal aid to where it was before LASPO. It argues that some cuts went too far and should be restored. Legal aid must be made available where it is essential because other methods of funding are not readily available to enough people. Nor does it focus solely on legal aid. In order to provide effective access to justice other methods of funding must be promoted.

Involvement in litigious process is too expensive for many. We must strive to improve this. Processes must be improved, and dispute mechanisms developed which may be less 'perfect' but will provide effective access to justice for the many who do not have it. This paper identifies routes to change and improvement. Such changes are essential if a property owning, law abiding democracy is to be maintained.

There are good reasons for the happy functioning of society why individuals should have a reasonable opportunity to obtain legal remedies. The payment of compensation is not simply about money but about redress and an individual's sense of fairness and being valued by society. This is a basic reason why we should strive to ensure effective access to justice.

In December 2019, the Conservative Party won a mandate to govern, in part following a pledge to end the austerity programme of the previous ten years, and on an election manifesto which included a commitment for "access to justice for ordinary people". They did so with the help of voters most affected by the cuts to legal aid.

There would be no better way for the new government to fulfil these commitments than by taking the opportunity to review and properly correct one of the most universally criticised elements of the austerity programme. Now is the moment to implement reforms to increase sources of funding and simplify court proceedings to enable greater access to justice.

At the least, modest increased spending on legal aid is essential, particularly (but not only) for family proceedings. In the longer term it requires a recognition that there must be a move back to the levels of spending which existed in 2010.

Matters not considered

This paper does not address Criminal Legal Aid. That is a huge topic which must be addressed in the context of the funding of the criminal justice budget as a whole – Crown Prosecution Service, Court Service (Crown Courts' and Magistrates Courts' estate and IT) and defence costs and funding. Nor can it explore the effect that vast quantities of digital data whether on mobile phones or relating to their whereabouts, or more generally from record-keeping, has had on the complication and magnification of evidence gathering and examination in many criminal matters. The nature

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[3] It is important to note that the alternative methods of funding discussed would not be appropriate in Family law cases, meaning the proposed increases in funding are even more vital in this area.

[4] Reforms instituted following Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report*', December 2009.

[5] As for the Family Procedure Rules, the reader will see later (page 29) that Sir James Munby, immediate past President of the Family Division has called for their complete overhaul and simplification.

of evidence in court proceedings has changed profoundly in recent years. Prosecution authorities and defence lawyers are being overwhelmed by "disclosure" issues, the product of ordinary activity, now commonplace, but not in contemplation even 10 years ago.

The effect of the rising complexity involved in criminal cases which previously were relatively simple and inexpensive to handle has been to increase the burden on the courts and prosecuting authorities, and thence on the costs borne by legal aid for criminal defendants.

But as the burden on the criminal legal aid fund increases year on year, the share of public funds to support deserving individuals in the civil and family courts should not be pro rata diminished.

While this paper focuses on the loss of availability of legal aid for much private law work and its impact on the family courts, it is not the right place, nor does the author have the specialist knowledge, to address more ways in which the family courts might be helped to operate more efficiently, and litigants might be supported. Those with a particular interest in this field should read the recent report[6] to the President of the Family Division by the Private Law Working Group chaired by Sir Stephen Cobb, a Justice of the Family Division.

Finally, attention is drawn to the matter of court provision and modernisation. This subject is most important but is also too large for this paper. Plainly, it is time for government to focus on the work of the court service, its estate and IT, and to link this to the modernisation of litigation practice and the effective and efficient provision within sensible financial bounds of funding, or the means to access funding, for appropriate antecedent advice and representation. The justice system can no longer be managed hand to mouth.

[6] June 2019, A Review of the Child Arrangements Programme. www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf

Specialist Support: an illustrative case study

2000–2012: The introduction of Specialist Support

Cuts to legal aid have had wide and far-reaching consequences across the civil justice system, making it difficult to describe the effects adequately. A useful microcosm of the impacts can, however, be seen in the example of the Specialist Support Service.

Specialist Support begun as a pilot scheme in 2000[7]. It was created in response to the report *Access to Legal Services: The Contribution of Alternative Approaches* by the Policy Studies Institute. The report suggested a need for alternative and innovative approaches to improve the delivery of publicly funded legal and advice services, in terms of both public access and quality. Following an evaluation of the pilot scheme, the Legal Services Commission (LSC) let mainstream contracts for Specialist Support services in April 2004.

Based on national provision and a tendering process, 17 organisations in England and two in Wales were granted contracts to provide specialist support running for a period of three financial years until March 2007 in England and January 2008 in Wales. Nationally, these consisted of 11 not-for-profit organizations, five solicitors' firms and three barristers' chambers. The budget totalled the modest sum of approximately £3 million per annum.

The services provided included advice via telephone, fax, email and letter as well along with casework, training events and supervision. Additionally, support was provided in the fields of community care, debt, employment, housing, human rights, immigration, mental health, public law and welfare benefits.

[7] The Constitutional Affairs Committee's report dated 28 February 2006, *The Legal Services Commission: removal of Specialist Support Services*.

In summer 2005[8], providers of Specialist Support Services together with stakeholders such as the Law Society were invited to give their views on the extent to which: Specialist Support Services met the LSC Corporate Priorities, were compatible with the LSC's vision for the Community Legal Services and demonstrated value for money.

Following the consultation, the LSC decided to end Specialist Support Services. The providers were given six months' notice and informed that the service would cease in July 2006.

In evidence to the House of Commons' Constitutional Affairs committee (CAC), the LSC conceded that during the consultation ***it had not received any complaints about the Specialist Support Services' service.*** The CAC concluded "*the current system … works well.*" There was no suggestion that these specialist suppliers had not delivered value for money[9].

Specialist Support, as a result, did not disappear altogether. The LSC, perhaps seeing the error of its ways, continued to fund nine Specialist Support organisations to provide a second tier, expert service in civil categories of law to eligible organisations.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Specialist Support comes to an end and numbers of legal aid lawyers fall

With the coming into force of LASPO in 2013, the surviving Specialist Support contracts came to an end. It had been an admirable and modest scheme. Among excellent providers was the housing advice charity, Shelter, which in 2012–13 provided expert advice to over 3.5 million people[10]. But in the same year Shelter lost much of its legal aid funding. This was cut from £5,271 million (2012/13) to £3,045 million (2013/14)[11]. It had to close nine offices[12].

The fields in which such funding was given are important for the persons concerned. Since April 2013, a range of civil cases – including most family, debt, housing, employment and social welfare cases – have not qualified for full legal aid, only for Legal Help (discussed in more detail below). The evidence (discussed below) makes it clear that deserving parties are missing out and the general administration of justice is being hampered.

The assumption on which LASPO is founded is that many of those in housing need are deemed 'legally capable' and, with the assistance of digital or telephone advice, can be expected to pursue their own legal remedies to enforce their rights. However, housing law is complex and often impenetrable, as is obvious from the five-volume Encyclopaedia of Housing Law[13]. Even those who are well-educated and articulate can find it difficult to present their case effectively when so much is at stake. Most people need or at least benefit from face to face advice. This is especially so if the advice given is not welcome to the recipient.

The cuts in legal aid brought about by LASPO had a major impact on Shelter. They led to a cut in funding of over 50% for its legal services. In March 2013, it was forced to close nine of its services in Rotherham, Ashford, Dover, Milton Keynes, Chester, Gloucester, Taunton, Hatfield and Kendal[14].

In April 2019, the Law Society analysed data from the Legal Aid Agency directory of providers (February 2019) and the Office of

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[8] 18 August to the 30 September 2005.

[9] See generally The Constitutional Affairs Committee's report 14 March 2006, *The Legal Services Commission: removal of Specialist Support Services.* https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/919/919.pdf

[10] Shelter Impact Report 2012/13, *Helping More People*, p.4. https://england.shelter.org.uk/__data/assets/pdf_file/0009/699219/Shelter_impact_report_201213.pdf

[11] Shelter Annual Report and Accounts 2013/14, *Helping More People*, p.39. https://england.shelter.org.uk/__data/assets/pdf_file/0008/924416/2013-14_Shelter_Annual_Report_and_Accounts.pdf.

[12] Shelter Evidence to the Statutory Review of LASPO: The impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. http://england.shelter.org.uk/__data/assets/pdf_file/0009/1596528/Shelter_response_LASPO_review_Sept_2018_final.pdf

[13] Published by Sweet & Maxwell.

[14] *Supra,* note 12.

National Statistics (2017) and published a map[15] using data from the LAA which showed that:

- 37% of the population of England and Wales live in local authorities which do not have a single housing legal aid provider;
- 59% of the population live in local authorities which have one or no housing legal aid provider;
- more than half of all local authorities in England and Wales – covering nearly 22 million people – do not have a single housing legal aid provider; and
- over three quarters of all local authorities in England and Wales – covering 35 million people – have just one or no housing legal aid provider.

This is a far cry from the aspirations of the Conservative peer, Lord Rushcliffe, and his committee, embodied in their Report[16] in 1945, or the provision available for many years. The changes introduced in 2013 reduced the areas of housing work that could be undertaken with the support of legal aid. At the same time the Law Society's research shows that fees paid for legal aid have in real terms decreased by 41% since 1998–99[17].

Further, in June 2019, the Supreme Court[18] (having ordered a council to reconsider its decision to declare a single mother of four to be 'intentionally homeless' because she was unable to afford the rent), specifically criticised the *"very substantial delay in bringing the case to court"* caused by the Legal Aid Agency's (LAA) initial refusal to support her appeal (even though she was in imminent danger of being turned out onto the street) and its belated change of mind.

For a homeless claimant and a hard-pressed local authority housing department to be thus delayed in arranging their affairs is inefficient as well as unhappy. Coupled with the evidence of lawyers leaving the field (legal aid housing deserts) there is an urgent need for restoration of at least some of the resources previously available in this field.

Housing problems covered by some form of legal aid include homelessness, possession proceedings and eviction. That help through legal aid is in principle available by phone, face-to-face and at court. But practical access to such help is often not available and as such the Specialist Support Service should be restored.

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[15] www.lawsociety.org.uk/policycampaigns/campaigns/access-to-justice/end-legal-aid-deserts

[16] To which we come later below.

[17] www.lawsociety.org.uk/policycampaigns/campaigns/access-to-justice/end-legal-aid-deserts

www.solicitorsjournal.com/news/201904/law-society-urges-government-rectify-%E2%80%98legal-aid-deserts%E2%80%99

[18] in Samuels v Birmingham City Council [2019] UKSC 28.

EXECUTIVE SUMMARY

This paper argues that Government should address the problems of access to justice in the field of civil justice, including family cases, through an approach which integrates three prongs:

1. A modest increase in civil legal aid funding, but of no greater an order than can absorbed within the MoJ budget.[19]
2. Government should promote new funding sources, namely: Before the Event Insurance, Contingency Legal Aid Funds and Damages Based Agreements. These proposals are not offered as a mere list of disparate suggestions. What is here suggested is dovetailing policy in these three areas.
3. Reform of civil practice to build on the Jackson reforms[20] directed to further reducing the costs which a party needs properly to incur[21].

Overall scheme of this paper

Access to the courts is a fundamental part of a civilised democratic society in which rights and freedoms can be enforced. That was recognised by Lord Rushcliffe's Committee, chaired by a Conservative peer and former Secretary of State, which reported in 1945 and whose cross-party report was the genesis of the Legal Aid Act 1949.

The paper provides a brief history of the provision of legal aid for civil and family work from the Legal Aid Act 1949 to LASPO 2012. That shows that Conservative governments played a leading role in the development of a properly funded legal aid system. As at 2012/13, *legal aid spending was not out of control*. In 2008/09 expenditure on civil/family legal aid was £1,044 million (using a real-terms comparator) and in 2012/13 it was £1,023 million. Following the full effect of LASPO, comparable expenditure in 2017/18 was £670 million. This was reflected in the number of starts: in 2017/18 there were 140,000 civil cases started which involved legal aid, compared with 785,000 in 2010/11 (a decrease of 82%)[22].

Part 1: Legal Aid from 1949 to 2012

A careful study of the history of civil legal aid is instructive and is set out in this paper. That reveals that Conservative Governments played a leading role in the development of a properly funded civil legal aid system: and that in the years of the Conservative Governments in the 1970s and early 1980s this provided excellent quality representation in all courts for that section of the population, that is a majority, which lacked the means to pay in full privately. No such system exists today.

Not all the causes of that increase are easy for public policy to address. The cost of all civil litigation has greatly increased. One reason has been the arrival of computers in every office, and the consequent explosion in the number of retained documents which parties can, and often must, disclose. The cost of cases for litigants of limited means has not been immune to these developments. At all levels, litigation has tended to get more complex.

History holds relevant lessons for everybody looking for ways to improve access to justice. One is that at different times over the last 20 years all three main parties in government have supported restrictions on both the fields of work within the now limited scope of civil legal aid, and on the section of the population whose means make them eligible for legal aid. In the medium term, restoration of more comprehensive civil legal aid

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[19] Ideally there should be a return to the levels of funding which obtained until 2012.

[20] Reforms instituted following Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report*, December 2009.

[21] As for the Family Procedure Rules, the reader will see later that Sir James Munby, immediate past President of the Family Division has called for their complete overhaul and simplification.

[22] See generally the House of Commons Library Debate Pack Number CDP-2018/0230, 31 October 2018.

Source: MoJ Legal Aid Statistics Quarterly April–June 2018, Table 1.0.

Notes: Resource DEL including depreciation. Based on the deflator series published by the ONS on 13 March 2018.

See too later the reference to the National Audit Office Report on the Ministry of Justice and Legal Aid Agency, 'Implementing reforms into legal aid' November 2014.

coupled (of course) with other methods of funding and robust procedures is the only satisfactory way to provide that level of access to justice to which believers in a property-owning and responsibilities-respecting democracy should aspire. But it is politically unrealistic to expect significant increases in legal aid spending in the short term. Placing such an aim at the centre of campaigns carries the danger of overlooking less spectacular, but nonetheless worthwhile, improvements which are attainable.

The decline in the quality of the administration of justice in Britain is now so serious that the best must not be allowed to be the enemy of the good. Government must move.

Another insight from the history of legal aid is that the finest period of civil legal aid coincided with that in which the legal profession was most closely connected with its administration. This paper does not promote major structural changes in the control of public funding, but we should encourage exploration of new (non-state) funding arrangements, such as not-for-profit contingent legal aid funds run by lawyers, and renewed legal aid funding for specialist voluntary sector agencies such as Shelter[23].

Part 2: LASPO 2012 – changes in Legal Aid from 1 April 2013 and their impact (including on family law)

When legal aid for civil and divorce matters was introduced by the Legal Aid Act 1949, court processes were simpler and cheaper, and policymakers' focus was on how to fund deserving potential litigants. In recent years:

- large areas of civil and family work have been taken out of the scope of legal aid altogether;
- there has been a steady tightening of financial eligibility: at the present time only those of the most modest means qualify for support in these residual areas;
- the overall budget and availability of legal aid outside the criminal courts has been greatly reduced.

[23] By renewed 'Specialist Support' – see above.

Provision of legal aid in the civil and family matters

Provision of legal aid in the civil and family field has been extinguished for all but the poorest. Even then it is available only in a limited range of matters. The ability of many who would not be considered wealthy to engage with the courts and to bring or defend meritorious claims has been impaired or effectively lost.

The first element in the policy response to the current crisis must be some restored funding for legal aid in private law family cases[24]. The Family courts have become a largely 'lawyer free zone'. Legal assistance (where it is available) in public law care proceedings is too little pre-action. In private law matters there has been a great rise in Litigants in Person. These together have led to a substantial rise in contested hearings. This has led to waste of resources on the part of the courts and local authorities.

Absent legal aid, there are no alternative funding sources, or procedural changes, which can resolve the problem encountered by family court judges today of the denial of justice to unrepresented parties. In former times adequate representation of litigants in family cases was achieved out of a smaller overall legal aid budget. It is unconvincing for Government to claim that it lacks the ingenuity to find some additional money. But such new funds must be provided if there is to be justice in the Family Court.

Part 3: New funding models

The government should support and encourage new funding models for the civil but not Family courts (see Part 4 below)[25].

Before the Event legal expense insurance (BTE), that is to say insurance policies taken out by individuals before any occasion for litigation has arisen[26]: premiums for such insurance can be relatively low, because only a very small percentage of the population is involved in litigation in any given year.

[24] That is family disputes between private parties, not care proceedings which are 'Public' law cases.

[25] Note: none of these are suitable to be adopted in the Family Court.

[26] Such as are sometimes attached to household insurance.

Damages Based Agreements (DBAs), that is to say, agreements between a prospective litigant and a lawyer under which a pre-agreed percentage of the recovery is made to the lawyer in return for undertaking the case at no, or reduced, fees.

Contingency Legal Aid funds, or what may better be described as charitable contingent funders (CLAF/CCFs). These would be pooled funds managed by the Legal Aid Agency or not for profit organisations which offered to prospective litigants to cover all or part of the costs of a case in return for payment of a percentage of the recovery if the case is successful.[27]

The advantage which all these models have over the conditional fee agreements (CFAs) which have been a feature of legal practice in the last 20 years is they incentivise the running of cases at low cost. Under CFAs the lawyer's success fee in the event of the case being won is a multiple, often 100%, of the costs incurred by the lawyer. There is a direct relationship between the amount of chargeable work and the success fee – the greater the former, the larger the latter. By contrast under a DBA, the lawyer's success fee can never be higher than the pre-agreed percentage of the damages recovered. The lawyer has every incentive to secure an outcome after less work rather than more. Cases run under some funding models cost less than cases run under others[28].

Part 4: Procedural Reforms

Family Courts

There is a need to address the Family Procedure Rules. Simplified rules and process will help all users of these courts, especially litigants in person (LIPs). At the least, better drafted guidance for LIPs would be a great benefit to them and promote more efficient process, to the benefit of the litigants themselves and the judges hearing their cases.

Note: Costs sanctions such as apply in Civil courts cannot be used (and would not assist) in Family cases, where, for good reasons, the courts do not ordinarily make costs orders against parties[29].

Civil Courts

The scope for procedural change to promote wider access to justice goes far beyond family courts. Its main application is in the realm of non-family civil cases. Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report* (see later) was ten years ago. In the light of subsequent experience, there is now scope for further simplification and for developments in funding arrangements. These should now be pursued holistically.

As already mentioned, the cost of all civil litigation has grown hugely over the last 30 years. The focus of procedural reform in those decades, overwhelmingly on more extensive pre-trial procedures to encourage settlement, has itself (ironically) contributed to rising costs. Radical thoughts are now emerging such as trying medium value cases without any prior exchange of witness statements, or at any rate with the length of such statements being confined to only a few pages. Central to these ideas is the imposition of severe limits on the costs which will be able to be recovered by winning parties[30].

Such procedural reforms can make a real contribution to access to justice. Parties who know that their recoverable costs will be limited to £x have every commercial incentive to find ways of running their case within such budget. Reduction in the costs recoverable by winning parties from losers has some effect in lowering of the costs which everybody spends. The lower the costs which parties feel they need to incur (and know they will recover), the lower the outlay for any

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[27] Those interested in this topic should read:
(1) The Merits of a Contingent Legal Aid Fund, first report from the CLAF working Group, 26 February 2009, www.biicl.org/files/4755_claf_-_1st_paper.pdf
(2) The Merits of a Contingent Legal Aid Fund, Second discussion paper, 30 July 2009, www.biicl.org/files/4756_claf_second_report.pdf. The author of this paper chaired the working party.
(3) Report of Europe Economics (November 2011).
All are discussed in more detail in the relevant section of this paper, later.

[28] See Lord Justice Jackson's Preliminary and then Final Report 2009 (Ch.7, [5.4]).

[29] The standard order as between parties is 'No order as to costs'.

[30] Fixing at an early stage the limit to the costs which a successful party may ultimately recover, 'Fixed Recoverable Costs'.

funder of litigation, whether government, commercial entity, or a funder in the voluntary sector. As procedural reforms limit costs, funding becomes more affordable and feasible. They march together.

Conclusions

These policies are, therefore, mutually supporting. Lower and predictable litigation costs make it easier for litigants and funders to predict their outlays, risks and potential recoveries. Procedural changes to reduce the cost of litigation, especially for small and medium value claims, reduce the risk incurred by funders for the cases which are lost. Lower risk for funders increases readiness to fund. Lower cost litigation also opens up the prospect in the medium term of the restoration of legal aid for ordinary civil claims.

Thus, the way forward for a government with a real determination to improve access to civil justice is an integrated policy drawn together from this range of dovetailed strands.

As Conservatives, we should agree with Sir Rupert Jackson (writing before LASPO was contemplated):[31]

> "Access to justice entails that those with meritorious claims (whether or not ultimately successful) are able to bring those claims before the courts for judicial resolution or post-issue settlement, as the case may be. It also entails that those with meritorious defences (whether or not ultimately successful) are able to put those defences before the courts for judicial resolution or, alternatively, settlement based upon the merits of the case."

That proposition cannot be overstated. The importance of effective access to the courts was trenchantly restated in June 2019 by Sir James Munby, latterly President of the Family Division [32]:

> "There is inadequate recognition both of the vital importance of the rule of law and of the equally vital need to ensure that our justice system is properly funded and resourced. Without the rule of law, and without a properly resourced justice system, there can be no democracy, no fair and stable civil society, and, indeed, no thriving economy. The rule of law, and its essential concomitant, a properly resourced justice system, is not some optional extra; at root, the first two responsibilities of any Government must be defence – protection from our external enemies – and a justice system adequately resourced to maintain and enhance the rule of law."

Effective access to the courts is a fundamental part of a civilized democratic society in which rights and freedoms can be enforced. That right is of little value if an individual cannot afford a lawyer. We should strive for effective access to justice. Real benefits, social, fiscal and economic, flow from a good legal aid system.

In the absence of legal remedies much of the fabric that maintains the remainder of our economic system would be damaged or destroyed. The sense of individuals that they live in a society in which harm done falls to be recompensed, or that obligations made will be honoured, is an extremely important contribution to the individual's sense of well-being and the value they place on the society in which they live.

Concern to find funding mechanisms for achieving legal remedy for those individuals who do not have the resources to achieve this for themselves, is a concern to preserve social value: it is the pursuit of the 'public interest'.

Where the market fails to provide, policymakers must think hard what kind of society they want and how to achieve it. A market economy in which individuals do not have effective access to justice and cannot enforce rights is not worthy of its name. The market ceases to operate fairly and efficiently. Regulators and Ombudsmen can help, but in many private law disputes they have no role to play. We must therefore seek new ways of delivering at least a substantial element of justice at

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[31] *Review of Civil Litigation Costs: Final Report,* Ch.4, para.2.2.

[32] *The Family Court in an Error of Austerity: Problems and Priorities* [2019] Fam Law 975, 25 June 2019, address to the Bloomsbury Publishing Family Law Conference, London.

reasonable cost. Courts and Tribunals must not be overwhelmed by LIPs. Real wrongs should not go without a remedy.

Parliament has added year by year to a mass of often fiendishly complicated legislation. That is unlikely to change. Accepting that reality, and in the face of the intervention of public authorities in all aspects of our daily lives, it is vital that the individual is not shut out from effective access to the courts.

SUMMARY OF RECOMMENDATIONS

Part 2 Restoration of Legal Aid	
Generally	1. There is an urgent need for increased funding across the board. Further steps should be taken to tackle legal aid 'deserts'. 2. Further investigation should be made into other specific areas disproportionally impacted by reductions in legal aid, such as serious personal injury and clinical negligence and inquests.
Housing and Social Welfare	There was no sound basis for ending Specialist Support. It is sorely missed. More funding in this field is required. The National Audit Office has identified the wider social welfare burdens which have accrued to the state on top of the hardship to individuals and the vicious circle which has resulted in a diminishing number of lawyers with the skills in this area of law: 3.1 Specialist Support should be restored; 3.2 Funding should be restored for representation in appropriate cases.
Family Law	LASPO has had counterproductive effects on the conduct of family disputes which damage the interests of all concerned – including those running the courts and trying to administer justice. In private law family matters, there must be restored funding, at least: 4.1 (Subject to means) for advice prior to and representation in Mediations; 4.2 For advocates to cross-examine parties in sensitive cases; 4.3 (Subject to means) for the respondent in every domestic abuse case where the applicant has been granted legal aid. This will enable the courts to come to better and speedier decisions. In family public law matters [local authority instituted care proceedings]: 5.1 More substantial legal aid by way of 'Legal Help' should be available pre-proceedings. It must be increased to fund proper advice at the outset which would enable litigants to take, and act on, advice the merits of their case to avoid unnecessary litigation, saving the resources of the courts and local authorities.

Part 3 Alternative Methods of Funding

Generally

Policy must be developed to fill the gaps where various forms of alternative funding are not suitable or attractive to the litigants, or in some cases lawyers, who would have to fund them:

6.1 Before the Event Insurance (BTE) – the government must actively encourage small businesses and householders to take up BTE insurance.

6.2 Damages Based Agreements (DBAs) and Conditional Fee Arrangements (CFAs) – the regulations must be re-drawn to permit hybrid DBAs in all civil (non-Family) matters and ensure they are attractive to lawyers while being fair to clients.

6.3 Contingent Legal Aid Funds ('CLAFs') and Contingent Charitable Funds (CCFs) – the government must adopt the recommendation of Sir Rupert Jackson to research properly the viability of CCFs and the means for setting them up.

Part 4 Court Procedure

The Family Courts

The Family Procedure Rules 2010 are lengthy and complex; the family courts are virtually lawyer free.

7.1 If the rules cannot be completely rewritten, then there is a need for much better written and presented Guidance in plain English, which ordinary people can understand.

The Civil Courts

Generally

8.1 To make potential costs liabilities more predictable, Fixed Recoverable Costs (FRCs) must be introduced more widely and should become the norm for the Fast track and much of the Multi-Track jurisdictions, and indeed where practicable in all but the heaviest civil litigation. FRCs should apply to civil claims valued up to £25,000 with a further fixed recoverable costs regime for some cases of modest complexity up to £250,000. Opt-outs should only apply to special cases.

8.2 Limits must be imposed (save in exceptional cases) on the parties without permission:

(i) setting out over-complex pleadings;

(ii) deploying witness statements, experts' reports and written submissions beyond a certain length;

(iii) producing a court bundle beyond a certain length (currently 350 pages in the Family court);

8.3 The length of cross-examination of witnesses must be controlled.

8.4 Limits must be imposed on disclosure.

The Civil Courts (continued)

Small Claims Track

9.1 A review should be conducted to address the increasing delays in a system which should be quick and inexpensive;

9.2 Government must carefully consider and look to implement the proposals by JUSTICE.

Fast Track

10.1 Consideration should be given to raising materially the Fast Track ceiling;

10.2 Fixed Recoverable Costs must be promoted;

10.3 Government must carefully consider and look to implement the proposals by JUSTICE

Multi-Track

Hand in hand with the use the existing regime of Costs Budgeting (and where appropriate of FRCs) there must be:

11.1 A renewed attack on excessive disclosure, excessive documentation and over-complex pleadings;

11.2 Research and pilot schemes to limit the length of witness statements and the amount of time spent on cross-examination, with the focus on presenting clearly the relevant documents.

PART 1
LEGAL AID IN ENGLAND & WALES TO 2013

Calls on the public purse always exceed resources. But in the fields of family law, social welfare and housing law and of course judicial review, legal aid remains indispensable. The loss of provision since 2013 has been too great. To remedy these deficiencies is simply to provide effective means to access the courts and to further the aspirations of the cross-party authors of the 1945 Rushcliffe Report (see next below).

This paper cannot provide a panacea or comprehensive final answer. It builds on the work of others. It identifies necessary tasks and pulls together the options. Government and legal policymakers must embark on this journey together if our system of civil justice is to be refreshed and made as reasonably accessible and fair to users as practicable. We cannot allow it to limp further downhill. The paper identifies methods of funding and means to improve dispute resolution in court. It identifies gaps in provision. It addresses the vexed matter of the costs involved. These must be addressed together as a whole.

First, however, a review of the history of legal aid in England & Wales is necessary to set the context.

The Rushcliffe proposals and the Legal Aid Act 1949

In 1944, the wartime coalition government appointed Lord Rushcliffe (a barrister and Conservative politician) to chair a committee to report on legal aid and advice and its funding. The Rushcliffe Committee contained two High Court judges, two women justices of the peace, two practising solicitors with special experience and knowledge of relevant matters, the Chief Metropolitan Magistrate, the Director of Public Prosecutions, Lord Schuster (permanent secretary to successive Lord Chancellors), another peer and two MPs, one Labour and one Conservative[33].

The Committee began examining witnesses in September 1944, held 48 sittings and examined 50 witnesses in addition to a very large quantity of memoranda[34]. In May 1945, the *Report of the Committee on Legal Aid and Legal Advice in England and Wales* ('the Report') was unanimously approved and presented to Parliament[35].

Prior to the war the country had a fractured set of systems, of varying levels of formality and effectiveness, for assisting the poor with the use of legal services and the courts[36]. The Report concluded that "a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in future to provide that assistance to a considerable section as a voluntary service".

Alex Elson[37], writing in the University of Chicago Law Review in February 1946, noted that four matters were identified in the Report as fundamental if the ideal of equality before the law was to be made a reality:

1. Legal aid is not a charity stemming out of private philanthropy but is a right which the state has a duty to foster and protect.
2. There is an obligation to establish a nationwide system for giving legal advice and for providing legal representation in all courts, the cost to be borne by the state.
3. The relationship of attorney and client should be maintained even though there is state assistance with all the protection surrounding the relationship and the professional obligations that go with it. This was assured through the administration of the plan by the organised legal profession.

[33] *Hansard*, HL Deb 18 February 1946 vol 139 cc648–63.

[34] *ibid*.

[35] Cmd. 6641/1945.

[36] *Legal Aid and Advice Act 1949: 70th Anniversary*, House of Lords Library Briefing.

[37] Vol.13, No. 2.

4. The obligation to provide assistance was not limited to the lowest income group but included persons who would not ordinarily under existing means tests be eligible for assistance.

The key recommendations of the Report were as follows:

1. Legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require.
2. This provision should not be limited to those who are normally classed as poor but should include a wider income group.
3. Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something towards costs.
4. The cost of the scheme should be borne by the state, but the scheme should not be administered either as a department of state or by local authorities.
5. The legal profession should be responsible for the administration of the scheme, except that part of it dealt with under the Poor Prisoners' Defence Act 1930.
6. Barristers and solicitors should receive adequate remuneration for their services.
7. The Law Society should be requested to frame a scheme on the lines outlined in the detailed recommendations providing for the establishment of Legal Aid Centres in appropriate towns and cities throughout the country.
8. The Law Society should be answerable to the Lord Chancellor for the administration of the scheme, and a central Advisory Committee should be appointed to advise him on matters of general policy.
9. The term 'poor person' should be discarded and the term 'assisted person' adopted.

Contemporaneously, Dr E.J. Cohn explained[38] how the scheme was to work in practice. He observed in respect of criminal cases that the matter of defence costs had been largely addressed since 1930[39], albeit payments to the lawyers should be put on a more appropriate level and more adequate time be allowed to the defending lawyers to prepare the defence.

Outside this criminal context, the Rushcliffe Committee produced detailed proposals for means testing, with contributions from those in the middle, to meet the cases where a party could not be expected to finance the entire costs of his or her case but could be expected to contribute something. The then named Assistance Board had the final decision on the question of what the adjusted income and property of an applicant was. The big expansion of scope was that legal aid was to be granted in every court in which audience was normally granted to barristers and solicitors, including the County Court. The only cases excepted from this rule would be judgment summonses cases of a defendant where the amount of debt was admitted, and the only question was as to method of payment.

With foresight, Dr E.J. Cohn noted: "even more important… is the fact that the opening of the Courts to whole classes of the population, so far excluded from them, cannot be without influence on the future development of substantive law. Legal questions that could never be brought before the courts will claim judicial attention. Questions that were lurking in the background will assume a new significance. Questions that appeared as minor topics of purely legal interest will be presented in their true social and economic setting. Bench and Bar alike will be brought into contact with problems that have so far succeeded in escaping their attention."

This would turn out to be prescient, as there has since the Second World War been a vast increase in the areas of law addressed in our courts. Although the availability of legal aid has been a significant factor, this expansion is fundamentally due to the vast quantities of primary and secondary legislation and the encroachment of public authorities in every area of life and the

[38] 8 Modern Law Review 58 (1945).

[39] Under the Poor Prisoners Defence Act 1930 (PPDA).

matching entitlements by way of statutory rights and public law judicial review remedies.

The Report was debated in the House of Lords on 18 February 1946.[40] Speakers from all parties supported it. The speech of Viscount Simon, who had been the Lord Chancellor to commission the Report, summarised its effect: there should be an organised scheme of legal aid covering the whole country under proper conditions, in which the state should bear the cost. The work done by voluntary organisations failed to cover the whole country and did not reach rural areas. It was necessary, further, to get good advice to the poor citizen who perhaps was served with a writ or with a demand with which he did not know how to deal. Further that person must be helped if the matter came into court.

The Legal Aid and Advice Act 1949, which set the framework for legal aid, was the product of the Report. Under the Act (and subsequent enactments) there was a two-fold approach to eligibility:

Financial eligibility – legal aid was extended to those of "small or moderate means" and above a free limit there was a sliding scale of contributions. Eligibility for legal aid originally included 80% of the population[41].

Legal Merits test[42] – for civil cases the applicant must have reasonable grounds for taking, defending or being a party to the proceedings; this did not extend to supporting cases which the client would not sensibly bring even if he or she had the means to do so. This became known as the 'private client test', namely that in general legal aid would only be granted in circumstances where a client of moderate means paying privately would be advised to litigate. Such notional private client was to be taken to be a person with adequate means to meet the probable costs of the proceedings, but not with overabundant means, so that paying the costs would be possible, although something of a sacrifice.

So, if a citizen with a legal problem could establish that he or she qualified for legal aid under the means test and the merits test, there would be an entitlement to legal aid.

1949 to 1970 – The Legal Aid Act 1964

Divorce work in the High Court was the first target of the new scheme, and there was then a gradual extension of the scheme into other areas of civil work. In the early 1960s legal aid was available in the county courts and in the magistrates' courts. In 1964, the Legal Aid Act introduced provisions which enabled the court to order that the costs of successful unassisted parties against claims by legally aided persons be paid out of the legal aid fund.

By 1970, overall legal aid expenditure was still low. There had been an annual rate of expansion of over 50% in terms of costs, but the scheme was still overwhelmingly concerned with the consequences of divorce and other matrimonial problems. A 1969 survey of legal aid certificates in Birmingham revealed 86% family; 9% personal injury, and 5% others[43]. Social welfare law[44] was largely ignored.

In 1969–1970 the Lord Chancellor's Legal Aid Advisory Committee[45] said that greater attention should be given to the needs of people appearing before tribunals. It called for some form of ancillary legal services in tribunals.

1970 to 1979 – further Acts and the introduction of the Green Form Scheme[46]

As noted above the vast amount of legal aid by the late 1960s related to family law. There was a soaring divorce rate, rising from 4 in 1,000 marriages in 1968, to 9 in 1,000 three years later,

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[40] *Hansard*, HL Deb 18 February 1946 vol 139 cc648-63.

[41] See Lord Justice Jackson's Final Report, December 2009, Ch. 7, para 3.1, cited in full later: see main text to footnote 66 on page 22 below.

[42] See Section 7, Civil Legal Aid Merits Test, pp 93 ff*, Legal Aid Handbook 1997/98*, Sweet & Maxwell.

[43] See *The History of Legal Aid 1945–2010* by Sir Henry Brooke, Appendix 6 to the Bach Commission Report on Access to Justice.

[44] This term included landlord & tenant, immigration, welfare benefits, consumer law, debt, and employment cases.

[45] Dissolved by the Legal Aid Advisory Committee (Dissolution) Order 1995.

[46] For more detail see *supra,* note 43.

and just under 13 in 1,000 in 1986. Social changes were driving activity in the courts. Legal aid was not available for the divorce itself from 1977 onwards, but the number of ancillary applications relating to maintenance and children continued to rise.

Under Lord Hailsham, a Conservative Lord Chancellor, the Legal Aid and Advice Act 1972 was passed which introduced the *Green Form Scheme* for the provision of 'Advice and Assistance' short of full legal aid (since replaced by 'Legal Help'[47]). This extended to giving general advice, writing letters, negotiating, obtaining counsel's opinion and preparing a written case to go before a tribunal. It was limited to 2 hours' worth of work or 3 hours' worth in matrimonial cases involving preparation of a petition[48]. These provisions were consolidated by the Legal Aid Act 1974.

The introduction of the Green Form scheme had originally been advocated by the Law Society for the purposes of the social welfare law work pioneered by law centres, but in fact over 50% of the Green Form bills in 1985/86 related to personal injury, crime and family matters. There was a growth in the number of Green Forms in social welfare law from 27,000 (1975/76) to 172,000 (1985/86), but as a percentage of the total number of all green form bills the increase in social welfare law advice increased from only 11% to 17%.

The first law centre was opened in North Kensington on 17th July 1970. In subsequent years the numbers of law centres steadily increased, first in London, and then in the provinces. In 1975 Central Government funding was made available for eight law centres which were in financial difficulties. So far as the advice sector was concerned, CABx had been established during the Second World War. In the 1970s, they increasingly found favour with local authorities, and their numbers doubled from 473 in 1966 to 869 by 1986. The volume of inquiries more than quadrupled (from 1.3 million to 6.8 million). Several hundred independent advice centres were also set up and there was a gradual development of local authority-funded specialist advice services, some provided by the local authority and some voluntary, mainly for housing, social security and debt.

There were a few small experiments in the employment of lawyers in the advice sector. A combined CAB and law centre was established in Paddington in 1973, and another in Hackney in 1976. Community lawyers (who gave advice and trained legal advisers) were employed by CABx in North Kensington, Lewisham and Waltham Forest. By 1977 ten CABx employed lawyers, and the National Association of Citizens' Advice Bureaux (NACAB) resolved to develop more posts. They developed the idea of "resource lawyers" who would assist the overwhelmingly lay workforce of the bureaux.

The Royal Commission on Legal Services (1976–79)[49] recommended no great changes. It favoured continuity, the orderly development of services, adequate resources, and proper administrative and financial control: law centres should be transposed into more manageable and better managed citizens' law centres. The Royal Commission said the division of function between the CAB service's paralegal work and the use of professional lawyers was now on a sensible and practical basis, and it should stay that way. CABx should not build up teams of lawyers to give legal advice to individuals.

The Legal Aid Act 1979 expanded the advice and assistance scheme to include 'Acts by way of Representation' (ABWOR). This provided representation for a limited purpose and extent without the full means enquiry required for a Representation Order. In 1979, the free income level to qualify for legal aid was set at about 40% above the level of income support. Around 70% of households were eligible for legal aid, either for free

[47] Legal Help includes advice and assistance about a legal problem but does not include representation or advocacy in proceedings. For detail, see the *User Guide to Legal Aid Statistics, England and Wales 2019*, updated 30 July 2019, page 5.

[48] See *Legal Aid Handbook, 1997/98* at paras 2-01ff for a full description of its operation at that point in time.

[49] Chaired by Sir Henry Benson GBE, FCA.

or on payment of a contribution[50]. It retained at least this level in the early 1980s before falling during the rest of that decade.

1979 to 1986[51]

Legal Aid expanded throughout this period both in its range of schemes and in expenditure. A new 'Green Form' scheme was introduced for advice and assistance on any matter of English law based on a simplified test of income and expenditure, which was carried out by the solicitor.

When the Conservative Government came to power in 1979, it continued the existing funding support for the eight law centres, but it said that law centres should generally be funded by local authorities. Until 1982, the Department of the Environment had funded many new law centres and other advice centres through its Urban Aid programme. After 1982, local government was increasingly the major funder of agencies giving advice in the social welfare law field.

From the 1980s onwards, the rising cost to the taxpayer of the legal aid budget became increasingly a matter of political concern. By 1986, total payments under all forms of legal aid were £319 million, and the net cost to the Exchequer (when client contributions and other costs recovered had been considered) was £342 million. Adjusted for inflation[52] for the period from 1 January 1987 to October 2019 these figures equate now to £923.6 million and £993.2 million respectively.

The impact of the rising cost of Criminal Legal Aid

While this paper does not consider criminal legal aid in detail, it would be remiss not to consider its effects in driving up the overall cost of the programme to the exchequer. The cost of criminal legal aid was now well over 50% of the total budget. In the magistrates' courts, the share of criminal legal aid had doubled since 1969/70. It was now 25% of all legal aid costs. The causes of the increase in legal aid expenditure included a massive increase in criminal work, with legal representation for criminal cases in magistrates' courts now being the norm: there was an increase from 20% in 1969 to over 80% in 1986 in the number of defendants represented on legal aid in indictable offences in the magistrates' courts.

1986 to 1997 – increasing costs[53]

In 1986 the Cabinet Office's Efficiency Scrutiny of Legal Aid laid the ground for the transfer of legal aid administration from the Law Society to a new Legal Aid Board (LAB) created by the Legal Aid Act 1988. This changed the structure for administration and set the new tighter basis for remuneration. It did not, however, change the scope of legal aid. This remained available, subject to means limits, for most categories of civil litigation for individuals. The only major excluded category was defamation. Virtually all other civil litigation was still within scope.

In 1985-86 the total cost was £319 million, and this had risen to over £1.4 billion by 1995-96 (civil – including family – £675 million; criminal £530 million; advice and assistance £272 million). In the decade between 1986/87 and 1995/96 the average annual increase in expenditure was 16%: in three years (1990/91, 1991/92 and 1992/93) the annual rise was 20% (in 1991/92 it was almost one third).

Lord Mackay of Clashfern, Lord Chancellor, said in 1994[54] that the Green Form scheme was "an important means of access to legal advice for people on low incomes. In 1993/94, over 1,600,000 people received help from the Green Form scheme… However the Government and the Legal Aid Board have become increasingly concerned about the opportunities for abuse which exist in the scheme."

Adjusted for inflation[55] for the period from 1 April 1996 to October 2019 by the factor of 152.6, these figures equate now as follows: total £2.19

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[50] Source: 4th Report of Constitutional Affairs Committee, 2004.

[51] For more detail see *supra,* note 43.

[52] See the ONS Table RPI All Items Index: Jan 1987 = 100. www.ons.gov.uk/economy/inflationandpriceindices/timeseries/chaw/mm23

[53] *Ibid*.

[54] *Hansard*, HL Deb 03 November 1994, vol 558 cc73WA.

[55] See *supra,* note 52.

billion (1996 figures, £1.4b); civil [inc. family] £1.03 billion (£675m); criminal £808 million (£530m); advice and assistance £424.9million (£272m).

During that period the number of bills paid increased, albeit not by the same factor.

	1986/87	1996/97
Green form advice (bills paid)	980,507	1,531,972
Social welfare green form advice[56]	356,272	744,936

Law Centres and not-for-profit agencies

There were 53 Law Centres in England and Wales alone in 1997. The increase in green form payments to both law centres and not for profit (NFP) agencies employing lawyers is shown in this Table:

Green form payments	1990/91	1996/97
Law Centres	£1.0m	£1.8m
Advice agencies employing lawyers	£202,000	£1.9m

The LAB also dispensed about £2 million to agencies (viz. CABx), which did not employ lawyers, as part of a pilot project. Although Law Centres received £2.1 million out of £2.4 million in 1990–91, five years later they received a much smaller share (£3.7 million out of £8.2 million) of the money paid to all NFP organisations such as Shelter. Law Centres gave high priority to serving ethnic minority communities, but they were dwarfed by the number of advice agencies.

In 1995–96, 900 organisations were members of the Federation of Independent Advice Centres. Within the CAB service there were over 700 separate bureaux (and over 1,000 outlets). CABx dealt with 6.5 million problems brought to them by 3.5 million people. The national government grant to NACAB was £12 million. In contrast the LAB grant to the Law Centres Federation was £67,000.

[56] There was some abuse of the Green Form system. For instance, a solicitor was jailed for five years in 2000 for defrauding the LAB of £2.5 million.

Quality control: franchising

In order to improve the quality of provision, the LAB created a system of legal aid franchises in which a firm's performance would be measured by agreed quality levels in return for receiving benefits in the way the LAB treated them. In its 1991/92 report it set out three major areas in which quality could be measured:

- General management – measured by the Law Society's Practice Management Standard;
- Competence at form filling – easily measured;
- Work done for clients: random files assigned a standard score.

This approach went some way towards developing a credible system for assessing the quality of legal aid firms' advice that was previously absent. The LAB revisited the practice of peer review and found it prohibitively expensive.

The introduction of a cap on Legal Aid expenditure[57] – cuts in eligibility[58]

Given the unprecedented rises in cost described above, the Conservative Government understandably began to prioritise the restraint of the legal aid budget. Lord Hailsham, as Lord Chancellor, initiated the first intended cuts to the financial eligibility for civil legal aid (but not to its scope).

Lord Mackay of Clashfern (Lord Chancellor between 1987 and 1997) made further cuts in eligibility and decided to move towards standard fees. As a result, by the mid-1990s the increase in the total number of cases was more or less equivalent to the increase in total cost. Criminal legal aid was more or less protected.

Under the cuts to civil legal advice eligibility, the contributory levels of qualification were totally removed, and the scheme was reduced to bedrock eligibility at income support rates. Legal aid increasingly became available only to those whose income was at the lowest levels, together

[57] Note that in terms of public expenditure, the Ministry of Justice is not a 'protected' department.

[58] See *supra,* note 43.

with those who had to pay contributions at higher rates for longer periods. This table shows the percentage of households eligible for civil legal aid on income grounds:

	% of households eligible
1979/80	77%
1994/95	47%

In July 1995, Lord Mackay responded to pressure from the Treasury in a Green Paper[59]. This outlined radical proposals for altering the existing legal aid scheme. By far the most important was the proposal that legal aid expenditure should be capped or subject to a ceiling. In July 1996 Lord Mackay's White Paper[60] broadly confirmed the plans he had outlined the previous year.

The Labour Government's *Access to Justice Act 1999* (AJA) created the Legal Services Commission to replace the Legal Aid Board. Certain areas of work were now excluded and not funded. Possibly, the most significant change was to exclude provision of help in proceedings for negligence where the alleged damage was to property or the person, other than for clinical negligence. This personal injury exclusion[61] did not exclude deliberate injury by public servants, such as policemen: "cases that have a significant wider public interest and cases against public authorities alleging serious wrongdoing, abuse of position or power, or significant breach of human rights".

The AJA also created a new Community Legal Service and a Criminal Defence Service. The former represented an attempt to plan the provision of poverty legal services through Community Legal Service Partnerships, but this ambitious project had failed by 2005. New policies had to be adopted. These created a structure for the provision of criminal legal aid, which was continuing to increase in cost at an exponential rate. It also saw the absorption of criminal legal aid in the Crown Court and the higher courts into the mainstream legal aid budget.

2004 – the Committee on Constitutional Affairs' report

In 2004, the Constitutional Affairs Committee (CAC) produced its report dated 16 July: *Civil Legal Aid: Adequacy of Provision*. The CAC concluded:

1. [there were] "parts of England and Wales in which the need for publicly funded legal services is not currently being met" and "There is significant evidence of unmet need for legal services by many in society".
2. "The Criminal Defence Service budget is demand led. Increases in spending on criminal legal aid reduce the availability of money for civil help and representation. Provision for civil legal aid has been squeezed"[62].
3. "Legal Expenses Insurance can be useful as a supplement to the Legal Aid system. It has the advantage of already being available for some areas of law or for specific purposes. If it were to be relied on as an important addition to the general system of civil legal cover it could to be part of the usual household insurance contract. This might require an element of compulsion"[63].

By 2005, the legal aid budget had now been brought more or less under control at a figure of £2.1 billion. In 2014, the National Audit Office (NAO)[64] observed: "from 1997 to 2013 spending on civil legal aid was pretty much constant fluctuating between £1.0 and £1.2 billion per

[59] *Legal Aid – Targeting Need* (Cmd 2854, 1995).

[60] *Striking the Balance* (Cmd 3305, 1996).

[61] See Schedule 2 of the AJA for this and other exclusions.

[62] Note further (2019) "since, in practice, expenditure on those aspects of the criminal justice system for which MoJ has responsibility is the first charge on its depleted resources, the impact has been disproportionately severe in relation to civil and, in particular, family justice." Sir James Munby (lately President of the Family Division), in *The Family Court in an era of austerity: problems and priorities*, an address to the Bloomsbury Publishing Family Law Conference, London 25 June 2019, [2019] Fam Law 975.

[63] This foreshadows the recommendation regarding BTE/LEI to like effect in the Jackson Final Report.

[64] NAO Report on the Ministry of Justice and Legal Aid Agency, *Implementing Reforms into Legal Aid*. www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf

annum adjusted to 2013–2014 prices". [emphasis added]. This is discussed further below.

Availability of providers

At the same time there was a fall in the number of providers. That had geographical implications for supply. In April 2000, there were 5,535 solicitors' firms and not-for-profit organisations with civil contracts. At the beginning of the year, April 2005, there were 4,263 providers – a drop of nearly 23%.

In 2005, the Department for Constitutional Affairs produced *A Fairer Deal for Legal Aid* [65]. This identified that:

- In the period 1997 to 2005, spending on criminal legal aid rose by 37%, but spending on civil legal aid (including family) fell by 10%. In fact, the spend on civil legal aid, if asylum cases were excluded, fell by 24% during that period.
- By 2005, advice and representation on family matters (private law) was the most significant element of non-criminal legal aid spending. Nonetheless overall spending on child contact and residence cases had declined in real terms by 16% between 1999/2000 and 2004/2005.
- Childcare (i.e. public law, local authority instigated care proceedings) and related proceedings however showed that volumes had increased 37% since 1999/2000 and expenditure had increased in real terms by 77%. This implied a very significant increase in cost per case as well as the increase in volume of such proceedings.

Since 1945, Conservative administrations had supported the concept of legal aid and recognised its importance to society. But no government had ever protected the budget. From at least the 1990s, the cost of providing essential legal aid to defendants in the criminal courts rose inexorably. This put more and more pressure on the discretionary spend on civil and family legal aid. That budget was further squeezed by the rising cost of supporting respondents to local authority initiated public law care proceedings.

By 2005, the provision of legal aid for civil and private law family matters was under strain. Parts of England and Wales already lacked adequate publicly funded legal services. They were becoming legal aid 'deserts'. So, to embark on further substantial cuts was inevitably going to worsen then existing problems and unlikely to be absorbed satisfactorily. Effective access to the courts in the face of further cuts risked becoming a chimera and the administration of justice devalued unacceptably.

[65] July 2005, Cm 6591.

PART 2
LASPO 2012: THE IMPACT OF CHANGES IN LEGAL AID FROM 1 APRIL 2013

Introduction: Civil and Family Legal Aid was not out of control

Lord Justice (now Sir Rupert) Jackson in his Final Report on the Costs of Civil Litigation (December 2009), before LASPO was even in Bill form, made the important points:[66]

"When the legal aid scheme was set up, approximately 80% of the population was eligible for civil legal aid. In 1986 some 63% of the population was eligible for civil legal aid. … By [2009] the figure had dropped … to 36%."[67]

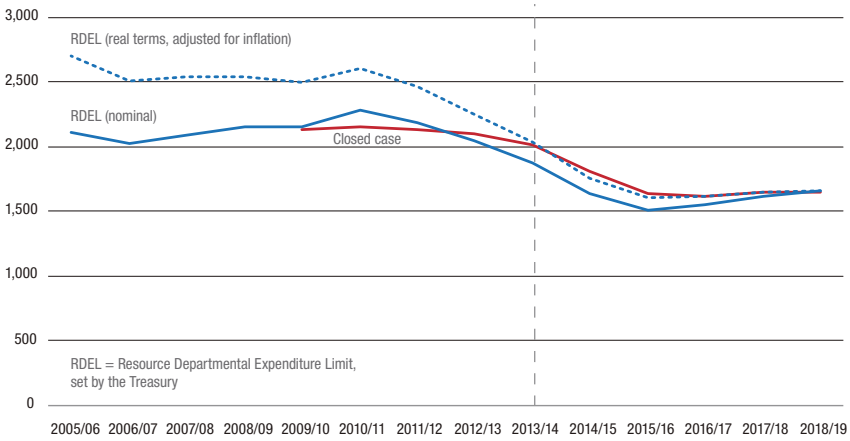
"The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas … the overall costs of litigation on legal aid are substantially lower than the overall costs of litigation on conditional fee agreements. Since, in respect of a vast swathe of litigation, the costs of both sides are ultimately borne by the public, the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest."

It is important to put to bed a myth that expenditure on legal aid was out of control. First, it is sometimes said that England and Wales have one of the most expensive legal aid systems in the world. But that does not address consideration of the UK's higher case volume and not compare like with like (e.g. by not considering the differing apportionment of costs of an adversarial versus an inquisitorial system – in the latter, the court and judicial resources and costs are higher).

Above all, the amounts spent had not for many years risen in real terms. When considering the matters identified below we should now look back to the reports of the CAC in 2004 and 2006 (referred to above) and couple these with the report of the NAO, *Implementing Reforms to Legal Aid*[68] in 2014, which identified that in real terms there had been no additional cost above inflation for 16 years in the provision of civil legal aid. The NAO report reveals that adjusted to 2013/14 prices, (i.e. in real terms), spending on legal aid had not increased between 1997 and 2013.

The statistics for 2019 do not show a marked increase in these numbers[69]. In fact, by 2019 following these changes, the real cost of the civil legal aid budget (including Family) had actually fallen over the last sixteen years. See Figure 1 with accompanying text from the LAA's *User Guide to Legal Aid Statistics 2019*.

Figure 1: Overall annual legal aid expenditure 2005/06 to 2018/19 (£ million)



"The implementation of the LASPO Act in April 2013 resulted in large reductions in Legal Help workload, with the overall trend falling to less than one-third of pre-LASPO levels."

Source: Legal Aid statistics tables January to March 2019 (Table 1.0)

[66] Legal Aid Ch 7, [3.1].

[67] Citing Ministry of Justice models of civil eligibility based on the Family Resources Survey, 2009.

[68] *Supra,* note 64.

[69] *User Guide to Legal Aid Statistics, England and Wales 2019,* updated 30 July 2019.

It is important to put this in context. Following the 2010 general election, the Coalition Government pledged to reduce public spending across the board. Certain departmental budgets were protected, meaning even deeper cuts in the spending of others such as the Ministry of Justice.

This paper will demonstrate that the cuts to legal aid were disproportionately damaging in relation to the amount of money saved (including very real increased costs elsewhere as a direct result) and the impact on the lives of potential recipients. As such, the new government elected following the 2019 general election should make it a priority to reverse this misguided decision.

Starting from the position that in fact in 2013 the legal aid budget was not out of control; it follows that the cuts made under LASPO were real and substantial cuts. In view of the CAC's reports of 2004 and 2006, it should have been no surprise to the Department that the impact of LASPO would be harsh.

As foreshadowed above, LASPO made very substantial changes to the arrangements for civil and family legal aid. Legal aid would only be available for legal fields within its scope.

The Government removed clinical negligence cases from scope with very limited exceptions for early stage work. Legal aid funding of clinical negligence claims ceased to be available to most claimants. Only children who suffer a neurological injury during pregnancy, at birth or within 8 weeks of birth are eligible to apply for public funding.

There have been further substantial reductions in scope in relation to legal aid in Family, Housing and Welfare matters. Most family, debt, housing, employment and social welfare cases no longer qualify for legal aid at all. As noted at the beginning of this paper the Specialist Support scheme has ended.

Financial eligibility for legal aid

Legal aid is means-tested. That principle is unobjectionable. This means the applicant's income and savings must be below a set level to qualify. We have seen how the numbers eligible have fallen.[70]

Currently (2020), an individual qualifies automatically if he/she receives any of these benefits:

- universal credit
- income support
- income-based jobseeker's allowance (JSA)
- income-related employment and support allowance (ESA)
- pension credit guarantee

In all other cases, income is assessed to see if the applicant qualifies. Allowances are made for certain housing, employment and childcare costs[71]. An applicant would not usually qualify if:

- total monthly income before tax is over £2,657;
- savings or assets are £8000 or more;
- the home is worth more than £208,000 (or £308,000 if facing mortgage repossession).

By any standards these figures show that even those of quite modest means are not eligible for legal aid[72]. If budgetary restraints mean that those limits cannot sensibly be increased, then Government has a duty to do all in its power to ensure that the means are provided in other ways to provide effective access to justice for the bulk of our population. Before moving to what can and should be done it is important to grasp where we stand now.

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[70] See page 22 above, per Lord Justice Jackson, Final Report, Ch 7., [3.1] citing Ministry of Justice models of civil eligibility based on the Family Resources Survey, 2009.

[71] There will have been minor up ratings in these figures.

[72] See the adverse impact of the strict application of these modest levels of resources in excluding legal aid in serious cases of complexity by Sir James Munby sitting in M v P [2019] EWFC 14 at paragraphs 116 to 122 (and cases there cited): "What I was faced with was … P does not qualify for legal aid but manifestly lacks the financial resources to pay for legal representation where … it was unthinkable that she should have to face the … application without proper representation".

The overall impact of the LASPO changes

As Sir Rupert Jackson said in 2009 (before LASPO had even been proposed):

> "Funding makes access to justice possible. Access to justice is only possible if both parties have adequate funding. If neither party has adequate funding, the litigation will not happen. If only one party has adequate funding, the litigation will be a walk over." [73]

Unrepresented litigants fail to achieve the results to which they may be entitled. They may incur liabilities they could have avoided with a minimal amount external advice. The judges' ability to manage hearings and cases generally in an efficient and fair manner is curtailed. The knock-on effects of this have a profound effect on the justice system as a whole. Unprepared litigants and overworked staff clog up the courts making justice a more distant prospect even for those who can afford it.

As we shall see, the changes since 2012 deny effective access to justice to the detriment of our society. As the NAO, Sir James Munby and the Review of the Family courts[74] have shown, there has been a material impact on the running of the Family courts. Unnecessary and prolonged hearings are the consequence. The lists and waiting times for litigants generally grow longer. The public loses respect for the courts and legal process. Society, not just individuals, is the loser.

As a start there must be reconsideration of the legitimacy of treating as 'too high' a legal aid budget of £2 billion which had not increased over ten years. The cost of providing legal aid at least by way of 'Legal Help' and (in appropriate cases) by way of 'Representation' is surely capable of being controlled and kept within manageable budgetary bounds.

Before legislating, the government had consulted. Its response[75] was: "The Government accepts that certain features of private family law, and particularly ancillary relief cases, may be complex in some instances. However, we do not consider that these cases are routinely as complex as other areas, and legal aid will remain available for exceptional cases". This was plainly a hopeless reading of the position. The number of Exceptional Case Funding certificates granted in any year is minimal and the evidence shows that too many unrepresented people are not coping. The effect on judges and the courts' administration can be imagined.

This paper establishes that the combination of cuts to legal aid fees and the scope of coverage has led to the current serious deficiencies in provision. An important consequence of the growth of legal aid deserts is the loss of expertise. Practitioners have argued plausibly[76] that there is a dearth of legal aid lawyers, and that those who wish to bid for contracts now find it difficult to get the staff to undertake the work and supervise the contracts. As a result, the tender exercises do not produce enough providers. Something must be done to remedy this.

There is no shortage of areas where cuts in legal aid have had a damaging effect. This paper began with an examination of the effects of withdrawing the Specialist Support scheme.

Clinical Negligence: Inquests

One example is personal injury and clinical negligence, where claims for damages for have been reduced to only one very restricted category of claimants; children who have suffered severe disability due to a neurological injury sustained during the mother's pregnancy, the child's birth or the first eight weeks of the child's life.

Another is the provision of publicly funded legal services to bereaved families at inquests, which, as governed by LASPO, is extremely limited. The

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[73] Lord Justice Jackson's Final Report, December 2009, Ch.4, para 2.4.

[74] The Review of the Child Arrangements Programme. www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf.

[75] *Reform of Legal Aid in England and Wales* Government Response, June 2011 paragraph 15, page 115.

[76] See the survey by Resolution referred to below at page 28, footnote 92 and *Manifesto for Legal Aid* 2nd Edition 2017, at pp 17, 30–34 www.lapg.co.uk/wp-content/uploads/LAPG_Manifesto_A5_FINAL.pdf

Government position is that the relative informality of inquests and their inquisitorial (as opposed to adversarial) nature does not, save in exceptional cases, require bereaved families to be legally represented. The costs of legal advice and preparation in the run-up to an inquest can be met by legal aid. However, the costs of representation at the inquest itself will only be met in cases deemed to be exceptional.

Under LASPO there are two grounds for granting exceptional funding for representation at an inquest:

- where representation is necessary for an effective investigation into the death, as required by Article 2 of the European Convention on Human Rights; or
- where the Director of Legal Aid Casework has made a wider public interest determination that the provision of advocacy for the bereaved family at the inquest is likely to produce significant benefits for a wider class of people.

Caseworkers in the LAA's exceptional case funding team follow guidance issued by the Lord Chancellor when deciding whether or not an application for funding will be granted.

[above emphasis in the original]

In February 2019, the MoJ presented its final report: *Review of Legal Aid for Inquests*[77]. It stated:

> 9. Evidence pointed to a number of concerns that stakeholders hold regarding the provision of legal aid and the role of the families in the application and inquests process…
>
> Having considered the impact of additional representatives on bereaved families, the financial considerations, and the impact of a possible expansion on the wider legal aid scheme, we have decided that we will not be introducing non-means tested legal aid for inquests where the state is represented. However, going forward, we will be looking into further options for the funding of legal support at inquests where the state has state-funded representation. To do this we will work closely with other Government Departments.
>
> The evidence we have gathered will be considered as part of a review into the thresholds for legal aid entitlement, and their interaction with the wider criteria.

In May 2019, the chairman of the Commons Justice Committee wrote to the Lord Chancellor, that the present policy of withholding legal aid funding for families at inquests was unfair because public bodies involved in inquiries into deaths were funded to instruct lawyers.

The current position is that under the Lord Chancellor's Exceptional Funding Guidance (Inquests):

> The Government has retained Legal Help, the advice and assistance level of legal aid, for inquests into the death of a member of the individual's family. Legal Help can cover all of the preparatory work associated with the inquest, which may include preparing written submissions to the coroner. Legal Help can also fund someone to attend the inquest as a 'Mackenzie Friend', to offer informal advice in Court, provided that the coroner gives permission.
>
> Funding for representation at an inquest is not generally available because an inquest is a relatively informal inquisitorial process, rather than an adversarial one….

This may be fair in simpler cases, but there is a real risk of unfairness to a bereaved family, faced with a legally represented public body, having either to raise money to fund legal representation[78] at a time of great stress or to conduct the inquest in person. That is a view shared by the Justice Committee.

[77] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777034/review-of-legal-aid-for-inquests.pdf

[78] It is true that lawyers do undertake representation at an inquest under a CFA in the hope that these inquest costs will ultimately be recoverable as part of the costs of later successful litigation where they believe they will go onto achieve a successful outcome in subsequent civil proceedings. But that is not always be the case. It may be unlikely that a claim for damages will follow (or succeed) but nonetheless appropriate for the role of the public body to be scrutinised d to be able to play a part in such scrutiny.

The cost of providing representation in a wider range of cases, particularly those involving a death in which a public body is involved should be capable of being kept within sensible bounds. Legal aid in such cases should be made available.

The Impact of LASPO on Family Law Matters

However, as described in detail in Part 1 of this paper, the history of legal aid is inextricably linked to family matters. As such there is no better area to take a deep dive into the consequences of LASPO in regard to legal aid. LASPO removed all private law family legal aid except in circumstances where an applicant has been the victim of domestic violence and meets the 'Domestic Violence Gateway' criteria for legal aid eligibility.

In November 2014, the NAO reported on the practical effects of LASPO[79]. It identified that:

- In the year following the reforms, there had been a 30% year-on-year increase in family court cases in which neither party had legal representation (with potential costs to the wider public sector).
- Fewer individuals were using mediation for family law proceedings as an alternative to the courts. Mediation assessments fell by more than 17,000 and there were more than 5,000 fewer mediations starting in 2013/14 than there were in 2012/13. The Ministry implemented the reforms without a good understanding of why people go to court to resolve their disputes.
- In 14 local authority areas, no face-to-face civil legal aid work was started in 2013/14.
- The Ministry reduced fees for providers without a robust understanding of how this would affect the market. It had not monitored the extent to which providers are choosing not to undertake civil legal aid work.

Comment: The NAO's concern that legal aid lawyers might leave the field has been borne out.[80]

The NAO Report established that the number of family court cases about child contact where neither parent had a lawyer rose by 89% in 2013/14 in England and Wales. Of family court cases starting in 2013/14 involving contact with children, there were 17,268 in which neither party had a lawyer – up from 9,158 in 2012/13. Overall, there were 79,747 family court cases where neither party was represented - up 30% from the previous year.

There had been a 38% fall in the number of mediation cases starting in 2013/14 compared with 2012/13. That is a fall of 5,177 cases – despite the government saying legal aid cuts would 'divert' people from courts to mediators.

A helpful explanation of its effects was given by the Law Society in June 2017[81].

- In June 2011 the MoJ had estimated that LASPO would reduce the number of private law family Legal Help cases by 210,000 representing an 84% reduction against the 2009/10 baseline[82]. That is a lot of people. This reduction in persons helped was predicted to generate a costs' saving of £50 million.
- Even prior to the implementation of LASPO, the number of family Legal Help matter starts declined significantly from the 2009/10 baseline by over 30% from 309,054 to 205,617 in 2012/13.
- After the implementation of LASPO, the figure fell to 42,798 for 2013/14, a reduction of 162,819 matter starts[83].
- When comparing the actual decline in Legal Help matter starts resulting from LASPO, it is likely to be more accurate to compare the 2013/14 figure of 42,798 with the immediate pre LASPO figure of 205,617 rather than the (higher) 2009/10 baseline, on the basis that the former was more likely to reflect the decline resulting from LASPO rather than other factors.

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[79] HC 784 session 2014–15, 20 November 2014.

[80] *Supra,* note 76.

[81] *ACCESS DENIED? LASPO four years on: A Law Society Review*, June 2017.

[82] http://webarchive.nationalarchives.gov.uk/20111121205348 and www.justice.gov.uk/downloads/consultations/annex-a-scope.pdf

[83] Legal Aid statistics April 2013–March 2014. Table 5.1, www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014

- Nonetheless the reduction was large. The number left in receipt of assistance was modest.

There have also been steep declines in Legal Help. Legal Help includes advice and assistance about a legal problem but does not include representation or advocacy in proceedings. As the LAA's own very recent (2019) reports state[84]:

> 1. The implementation of LASPO in April 2013 resulted in large reductions in Legal Help workload and expenditure. … at around one-third of pre-LASPO levels.
>
> 2. Workloads in civil representation fell … and now appear to be stabilising at around two-thirds of pre-LASPO levels. However, the number of certificates granted in the last quarter was down 6% compared to the same period of the previous year.

This picture confirms the concerns identified by the National Audit Office in 2014 after the first full year of change.

The effect of these statistics in human and practical terms was put in blunt terms in November 2018 by Sir James Munby (lately President of the Family Division)[85]:

> "The family justice system has, in effect, suffered a double whammy:
>
> First, the effect of LASPO, with its withdrawal of legal aid from most private law disputes, has been to make the family court an increasingly lawyer-free zone, with ever-increasing numbers of litigants having to appear unrepresented and without legal advice.
>
> Secondly, the Government's policy of promoting mediation and making MIAMS (Family Mediation Information and Assessment Meetings) compulsory, with various exceptions, in private law disputes has been a disastrous failure. … The almost unbelievable complexity of the MIAMS requirement – how is a litigant in person supposed to be able to understand and navigate all this? … The number of mediations continues to fall dramatically, with no real sign of any likely improvement."

And in other passages he said:

> "Many cases involving unrepresented people 'go short', because of lack of understanding. Proper assistance, before the hearing, for unrepresented litigants raises a fundamental issue of enormous practical importance. … The guidance and other explanatory literature available for litigants in person is sadly inadequate. … The court forms are very far from user friendly. … The Family Procedure Rules 2010 and associated materials are simply not fit for purpose and, from the point of view of the litigant in person, an obstacle to proper access to justice."

In June 2019, Sir James returned to the plight of the Family courts. Focusing specifically on the family justice system he said[86]:

> "The entire system is inadequately funded and resourced; in particular there are not enough judges to handle caseloads which, overall, continue to increase. … The system is already unsustainable and unless urgent action is taken things will only get worse.
>
> The withdrawal of legal aid has led to many parts of the family justice system becoming increasingly 'lawyer free zones', which has led to additional pressures on the system. This is … the consequence of a system whose rules are, for the typical lay person, of unintelligible complexity and which, even now, despite many useful initiatives, still provides far too little user-friendly information, guidance and assistance for the litigant in person." [emphasis added]

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[84] See the *User Guide to Legal Aid Statistics, England and Wales 2019*, updated 30 July 2019, page 5. See too Annex 5 of CAP. That annex, drawing on Legal Aid Agency data, shows that the number of legal aid certificates for private law Children Act applications fell from around 50,000 in 2010/11 to around 10,000 in 2017/18.

[85] Lecture: *Dealing with Parents' Conflict and Unreasonable Behaviour*, at the Annual General Meeting / Conference of NACCC, Amersham 24 November 2018 [2019] Fam Law 153; and see the judgment in M v P [2019] EWFC 14 at paragraphs 116 to 122 (and cases there cited) and the quotation above.

[86] *The Family Court in an Error of Austerity: Problems and Priorities*, 25 June 2019, address to the Bloomsbury Publishing Family Law Conference, London.

The effects are in some cases plainly counter-productive. The government hoped mediation – less expensive and less confrontational than court – would be a panacea in many cases. But LASPO removed legal aid completely from most private family law matters including contact and finance[87]. Legal aid remains available for the complainant[88] (only) where there is a risk of domestic violence. Applicants are granted legal aid funding for these cases if they can prove the incidence or risk of domestic violence or child abuse through a range of prescribed forms of evidence[89].

The consequences are patently unsatisfactory. The restriction of legal aid to such cases excludes those who cannot be said to need no legal assistance.

Private Law Family

In family matters, the policy is (rightly) to drive people to mediate rather than litigate. But many couples cannot mediate sensibly without advice from one who knows the field. Individuals without legal advisers are not susceptible to mediation. Many do not engage, as the NAO established. Further, mediators cannot give advice during the mediation process. So, two things have happened. The number of divorcing parties engaging in mediation has fallen and the ability of mediators to 'crack' cases has been diminished. The result is more contested private law family hearings involving one or both unrepresented parties.

Generally – problems with Litigants in Person (LIPs)

The effect of the LASPO and consequential rise in LIPs is summarised in the Review: recourse to the court has become the default option for too many unhappy separators[90]; in other words, the reaction of those who have had no or only inadequate advice is to turn straight to the court for help rather than to consider and try negotiation and conciliation. As the review establishes there have been many consequences which contribute to stresses in the system[91], such as:

- case volumes in private law increasing;
- preponderance of unrepresented litigants;
- insufficient information about the court system for litigants, leading to flawed or unrealistic expectations about what it can or should do for them;
- insufficient support for litigants to encourage take-up of Non-Court Dispute Resolution (NCDR);
- incoherent connections between support services, and poor-quality signposting of services.

Furthermore, a high incidence of cases returning to court, suggests (among other possibilities):

- reliance/dependence on the court in the absence of other affordable options;
- continued lack of trust of NCDR;
- that the original dispute between the parties was more far-reaching/fundamental than had been indicated by the issue previously resolved by the court; and
- vexatious litigation behaviour and systems abuse.

There has also been the knock on effect of a loss of lawyers doing legally aided work, and a resultant loss of capacity in the sector contributing to the phenomenon of legal aid 'deserts' and other disturbing unintended consequences.

A recent survey of members of the group of family law solicitors, Resolution[92], showed that since

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87 But since 3 November 2014 a first mediation session is paid for by the LAA for a non-financially eligible party where the other party is financially eligible for legal aid.

88 But not the respondent even where the complainant is legally aided.

89 *User Guide to Legal Aid Statistics*, England and Wales (updated 26 September 2019) p.7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834474/user-guide-legal-aid-statistics-apr-jun-2019.pdf.

90 Paragraph 5 of the Review of the Child Arrangements Programme. www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf adopting the words of the former Chief Executive of CAFCASS.

91 *Ibid*, paragraph 13.

92 See generally the article by Jo Edwards, chair of Resolution, in the *Barrister* magazine (Vol 81, 4 June to 31 July 2019).

LASPO came into force, one in five legal aid family practitioners had stopped doing legally aided work altogether. Further, a quarter of respondents to that survey said they were unable to signpost a client to a legal aid provider based within a reasonable distance. 93% of respondents reported seeing increased numbers of LIPs. Indeed, in the family sphere, for the final quarter of 2018, 81% of family court hearings involved at least one unrepresented litigant. 104 of those responding to the survey were legal aid providers. They estimated that they had had to turn away some 10,000 people over a 12-month period.

This bears out the concerns expressed by the NAO in 2014[93] identified earlier above. In the family courts, the absence of funding means (as described above) that husbands and wives are unrepresented in serious disputes and must cross-examine each other. This drove Mr Justice Hayden to observe in 2017[94]:

> "It was necessary, in this case to permit F to conduct cross examination of M directly…. F was not present in the court room but cross-examined by video link. Secondly, M requested, and I granted permission for her to have her back to the video screen in order that she did not have to engage face-to-face with F. … Despite these features of the case, I have found it extremely disturbing to have been required to watch this woman cross-examined about a period of her life that has been so obviously unhappy and by a man who was the direct cause of her unhappiness…"

This is not an isolated incident[95] despite a government pledge to end the practice. The pledge was repeated in a proposed Domestic Abuse Bill[96] (now to be re-introduced[97]); but, while this would be an important step in the right direction, it would represent a classic case of treating the symptom rather than the disease. The underlying problem is a failure of access to affordable legal advice.

This is not to say that the problems in family law are limited to the availability of legal aid. The Family Procedure Rules 2010 have also been identified by Sir James Munby[98] as requiring drastic simplification and a complete re-write. That is unlikely to practicable, at least in the medium term, but the fact remains that the family courts are virtually lawyer free. If the rules cannot be completely rewritten, then there is a need for much better written and presented Guidance in plain English, which ordinary people can understand.

That will benefit all court users, but especially the unrepresented litigants and the judges who must manage these people. Simplified procedures which are easy to understand lead to lower costs generally and less wastage. That benefits all litigants and will lessen the burden on the legal aid fund too. This will be discussed in a wider context below.

Public Family Law

There is a need for expanded 'Legal Help' at the outset, i.e. when a local authority has written to the parents to inform them of its intent to institute proceedings. This (at present) triggers the right to Legal Help, but the financial limits imposed on the solicitors are too tight to allow meaningful instructions to be taken, possibly substantial papers to be read and advice to be given. The lawyers rarely if ever are in a position (unless they do a quantity of work unpaid) to get on top of matters and to engage with their client and give firm advice. So, the case goes to the court (whereupon, subject to means) full legal aid is given, but it is too late to prevent a full hearing (following full preparation) at the expense of the LAA, local authority and court resources. Proper advice at the outset would (it seems) in many cases avoid a full trial and indeed a care order being made, as suitable alternative arrangements would have been negotiated.

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[93] Para. 14 of that report.

[94] Re A (a minor or) (fact-finding; unrepresented parties) [2017] EWHC 1195 (Fam) paragraphs 57 ff.

[95] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF

[96] www.bbc.co.uk/news/uk-politics-49676653

[97] See the Queen's Speech, 19 December 2019.

[98] For full citation, see the citation from the Lecture by Sir James Munby at page 27, notes 85 and 86.

Conclusion

All these matters have at their root the absence of lawyers to advise parties and achieve prompt and efficient disposal. The drastic removal of legal aid has exacerbated already difficult situations to the detriment of all concerned. It is simply inefficient as well as unjust. The removal of so much legal aid in matters of family law, as well as areas like housing and welfare, is inconsistent with a society which values the rule of law. Effective access to justice is not available for many in these significant areas of life. The wheel has come full circle to that described by the Rushcliffe Committee: 'a service which was at best somewhat patchy has become totally inadequate'. Action is called for.

RECOMMENDATIONS

Part 2 Restoration of Legal Aid

Generally

1. There is an urgent need for increased funding across the board. Further steps should be taken to tackle legal aid 'deserts'.
2. Further investigation should be made into other specific areas disproportionally impacted by reductions in legal aid, such as serious personal injury and clinical negligence and inquests.

Housing and Social Welfare

There was no sound basis for ending Specialist Support. It is sorely missed. More funding in this field is required. The National Audit Office has identified the wider social welfare burdens which have accrued to the state on top of the hardship to individuals and the vicious circle which has resulted in a diminishing number of lawyers with the skills in this area of law:

3.1 Specialist Support should be restored

3.2 funding should be restored for representation in appropriate cases

Family Law

LASPO has had counterproductive effects on the conduct of family disputes which damage the interests of all concerned – including those running the courts and trying to administer justice.

In private law family matters, there must be restored funding, at least:

4.1 (subject to means) for advice prior to and representation in Mediations;

4.2 for advocates to cross-examine parties in sensitive cases;

4.3 (subject to means) for the respondent in every domestic abuse case where the applicant has been granted legal aid. This will enable the courts to come to better and speedier decisions.

In family public law matters [local authority instituted care proceedings]:

5.1 more substantial legal aid by way of 'Legal Help' should be available pre-proceedings. It must be increased to fund proper advice at the outset which would enable litigants to take, and act on, advice the merits of their case to avoid unnecessary litigation, saving the resources of the courts and local authorities.

PART 3
ALTERNATIVE METHODS OF FUNDING

The paper now turns to look at the important subject of alternative methods of funding beyond conventional 'pay as you go' retainers or legal aid.

The methods considered below are:

Conditional Fee Arrangements (CFAs) – an arrangement where (in its simplest form, but see further below) the base fees are payable only at the end of the case and only if a pre-agreed definition of success in the case is achieved, plus an additional success fee comprising a percentage of the base fee.

Third Party Funders (TPFs) – commercial entities who fund litigation in return for a percentage of any damages recovered.

Damages Based Agreements (DBA) – an agreement between a representative and a client, whereby the representative's agreed fee is contingent on the success of the case and is determined as a percentage of the compensation (damages) received by the client.

Contingent Legal Aid Funds (CLAF) – an institutionalised and pooled not-for-profit Third Party Funder. Where it supports a claim, a claimant agrees to pay an agreed percentage of damages back to the fund in order to finance its continuation.

Contingent Charitable Funds (CCF) – another name for a not-for-profit CLAF to reflect its NPF status.

Any consideration of alternative methods of funding should also consider the potential of Before the Event Insurance (BTE), a form of legal expenses insurance (LEI). The potential value of BTE was advanced, as we have seen above, by the Constitutional Affairs Committee in 2004[99] and was investigated fully by Sir Rupert Jackson who noted its value to small businesses and households:

> SMALL BUSINESSES
>
> [4.5] … BTE insurance is beneficial for small businesses. The average small business is better able to negotiate with insurers than the average personal injury claimant and will have a better understanding of its rights under the policy. A substantial extension of BTE cover for small businesses, in respect of litigation costs as well as tribunal costs, would in my view be highly beneficial. On the basis that the many pay for the few and that most small businesses do not get embroiled in litigation in any given year, the premiums ought to be affordable at least by some small businesses, if they are prepared to attach sufficient priority to LEI. [Emphasis added]
>
> [4.6] … Both insurers and the Department for Business, Innovation and Skills should make serious efforts to draw to the attention of SMEs, and especially micro businesses, the forms of BTE insurance available and the costs. In my view, a greater take-up of BTE by small businesses would be one way of promoting access to justice.
>
> HOUSEHOLD INSURANCE COVER
>
> [5.4] … BTE insurance supports a significant number of clinical negligence claims. …. It can be seen that clinical negligence claims funded by BTE insurance have a reasonable success rate. It can also be seen that in clinical negligence claims supported by BTE insurance, costs are significantly lower than in clinical

[99] See paragraph 22 of the CAC's Report dated 16 July 2004. In 2007, the MoJ concluded that LEI was underused and that many consumers did not fully understand the availability of LEI, its potential for use in their legal disputes or understand their LEI cover where it had been provided. The MOJ recommended that both consumer and industry groups needed to do more to communicate the benefits of LEI to consumers and that there should be an extension of the LEI product to include employer provision of LEI to employees and housing association provision of LEI to tenants. The MOJ concluded that although 59% of the population had some form of legal expenses insurance, less than one in four consumers had ever heard of BTE or ATE insurance and lacked knowledge of the cover that they had. See: *The Market for 'BTE' Legal Expenses Insurance* (Fwd Thinking Communications, 2007). www.justice.gov.uk/publications/docs/market-bte-legal-expensesinsurance.pdf

negligence claims supported by CFAs. [Emphasis added]

[5.6] … BTE insurance as an add-on to household insurance is a beneficial product at an affordable price, established on the basis that the many pay for the few. … BTE insurance will have an increasingly important role in promoting access to justice. Therefore, the uptake of BTE insurance by householders should be actively encouraged.

Conditional Fee Arrangements and Third Party Funders

The explanation which follows describes the simplest form of CFA – the model can be and is often varied. (Note: for sound policy reasons CFAs are not permitted and are unavailable for Family matters.)

Where the retainer is governed by a CFA, the amount of the lawyer's base fee rates, 'base fees', is set in advance in the usual way. Generally (but not always[100]), the base fees are payable only at the end of the case and only if a pre-agreed definition of success in the case is achieved. On top of this base fee, the lawyers will be entitled to a further fee in the event of such success, the 'success fee'. This will be set in advance as a sum calculated as a percentage (up to 100%) of the base fees.

In the case of a claim for damages for personal injuries, the amount of the success fee and its relationship to the damages recovered is subject to provisions in the Civil Procedure Rules to ensure that it is not disproportionate to the general damages recovered in respect of pain suffering and loss of amenity. There are other rules to protect parties against inappropriate outcomes.

So, the base fee and success fee will (generally) be the same whether the damages recovered are £25,000 or £250,000. If the base fees are £24,000 and the success fee was fixed at 25%, then regardless of the amount recovered the success fee will be a further £6,000, making a total fee of £30,000. If the success fee was fixed at 100%, then it would be £24,000, making £48,000.

CFAs are the usual form of funding for Clinical Negligence and Personal Injury claimants.

Riding on the back of CFAs has been the rise in availability of commercial entities, third party funders, prepared to fund litigation in return for a stake in the outcome: in short, they take a slice of any damages recovered, a percentage of the winnings. As the matter proceeds, they pay the lawyers all or some of their costs and outgoings on experts' and other fees.

TPFs operating in the commercial market appear only to be interested in very large cases. In commercial litigation, TPFs receive substantial percentages in return for their funding.

With or without TPF funding, CFAs are now not uncommonly used in large commercial cases and in defamation. But much litigation is not clear cut and a disadvantage of CFAs is that they tend to result in only the clearest winners being supported. So, deserving cases are not funded.

DBAs – The need for regulatory change

Under a DBA, by way of example, if the client recovers £25,000 and the fee is fixed at 25%, then if the claim is won, the lawyer will be entitled to a fee of £6,250. But if the damages are £250,000, the lawyer will be entitled to receive £62,500.

At present, DBAs are used very little outside Employment litigation. In the field of employment disputes, DBAs are popular and very often the preferred choice of parties and their lawyers. That is because prior to amendment by LASPO, the law[101] only provided for the regulation of DBAs in employment matters. That regime is straightforward and simple to operate. Outside the field of employment law, the use of a DBA is subject to the Damages-Based Agreements Regulations 2010. The terms of those regulations have been restrictive in effect, not least because they have led to uncertainty on the part of solicitors

[100] There are many variations, thus sometimes the client agrees to keep the lawyers in funds by paying part of the base fee as the case continues. Further elaboration of the niceties of CFAs is not needed here.

[101] See section 58AA of the Courts and Legal Services Act 1990.

about what terms are permitted and what are not.

A hybrid DBA is one under which the lawyers agree to conduct the litigation based on a reduced fee win or lose but with an entitlement to a bonus, fixed as a percentage of the damages recovered. But it is unclear if the courts will interpret the regulations as permitting this to be enforceable. Solicitors are justifiably concerned by the current regulations because there is always a risk that they will have to take a matter right through, and then just before the judgment, the client would terminate DBA, and the solicitor would be unable to claim any fees at all, but the client would go on to receive the winnings.

That is unfortunate. But the situation may be about to change. Regulatory changes to make DBAs more attractive could be around the corner. A very recent report[102] (together with a draft of completely new regulations) has been presented to the MoJ recommending changes to make so-called hybrid DBAs viable.

This is important because there are cases where the lawyers will not be prepared to act on a purely speculative 'all or nothing' basis but will do on the hybrid basis described. If the parties are both content, not least because the client cannot afford full fees and the lawyers cannot risk substantial outlay if there is to be no compensation at all, and if the client is properly advised there can be no objection to such an arrangement. Without the hybrid option, it is difficult for solicitors to fund long-running commercial disputes on a DBA.

It is very much to be hoped that an effective change to the current regulations will be made without delay. The proposed changes would move to a 'success fee model' of DBA, would allow 'hybrid' agreements, contain specific termination provisions, and expressly allow for defendants to use DBAs. Suffice to say it is time for new rules to be implemented without delay.

A DBA can have advantages over a CFA in cases where TPF would otherwise be involved. Not least there are only two parties concerned in the arrangement, not three. Further even if they contingent fee charged by the law firm costs the same as with a TPF (in terms of the percentage share of the recovery), the DBA structure can offer a better return to the client over a variety of settlement scenarios especially at the lower end of the settlement spectrum. That is because the preferred/minimum return structure used by all litigation funders makes a TPF riskier for the client where the return is at the lower end of expected recoveries.

There is a simplicity inherent in the DBA – pro rata sharing of all recoveries with no built-in preference. This means that with a low or mid-level recovery, the client can keep a greater share while still compensating the law firm for its risk. Further there are fewer parties and therefore fewer moving parts to a DBA arrangement when compared to a TPF arrangement. The parties to the contract are already involved in the dispute and the DBA is a relatively simple document that is little more than a supplement to the client engagement letter detailing the fee arrangements. This simplicity will reduce the 'execution' risk and shorten the process of establishing the arrangement. Going forward a DBA should be less cumbersome to manage because there are no reporting obligations to the TPF. That also means that there are no risks of information leaking out to parties outside the arrangement.

Thus, there are fewer inherent risks to the litigation project and this should reduce the risk of disputes arising out of the way in which the arrangement is managed. It may also be that there are fewer professional ethical difficulties for the lawyers who with a TPF are brokering financial transactions between our clients and their funders. Finally, as matters stand the existence of a DBA does not have to be disclosed to the court or the opposing party. The existence of a CFA must be disclosed to the opposing party at the outset.

The reader should not forget that in Employment Tribunals where the regulation of DBAs is different, DBAs work acceptably and for many claimants are the only viable means of funding.

[102] 15 October 2019.

Contingent Legal Aid Funds and Contingent Charitable Funds[103]

As a result of the Jackson reforms, CFAs have been rebalanced to create a level playing field for claimants and defendants.

A funding mechanism which achieves a legal remedy for those individuals who do not have the resources to achieve this for themselves is in the 'public interest'. In 2009, in response to Lord Justice Jackson's Civil Litigation Costs Review, a Bar Council working party chaired by this author produced two reports[104] explored the possibilities for the concept of pooled funding of meritorious cases – colloquially known as a CLAF.

A CLAF is an institutionalised and pooled Third Party Funder. Where it supports a claim, a claimant agrees to pay an agreed percentage of damages back to the fund in order to finance its continuation. This is a pooled form of DBA. CLAFs can offer a valuable additional resource if the terrain is suitable. Such funds could be run on a not-for-profit basis 'Charitable Contingent Funds, (CCFs).

The CLAF pays the lawyers on a negotiated fee basis. The percentage paid to the fund may be less than the percentage that the claimant would pay under a CFA, and in these circumstances the CLAF has a competitive advantage over the CFA. So, the properly informed client will choose the cheaper option – see the discussion of DBAs above.

Alternatively, there is no reason in principle why a not for profit CLAF (in contrast to the position of lawyers under a CFA who have a conflict of interest with their client) should not be permitted to take a greater than 25% share of any general damages – the current limit under the CPR restricting the ultimate value of the success fee. That 25% cap applicable to lawyers who act on CFAs will deter support for some riskier cases where the client may nonetheless be prepared to forego a greater share of damages in return for getting any funding at all.

This is contingency funding through an appropriately incentivised body which has an interest in not funding bad claims. It differs from CFAs and pure DBAs in that it is essentially non-profit making. It has no reason to abuse or distort the litigation process. The lawyers will be paid on a non-contingent basis – subject perhaps to discounts on their fees where the case is lost; because of course the lawyers will have advised on the merits.

Further, the Bar Council's working party concluded that Claimants should wherever possible pay for the service they get. They are obtaining a service which they would otherwise not receive. Even if they are not contributing personally up front, the starting point must be that it is not unreasonable that they should contribute something if successful. For, without the service they would not be able to make a claim and would have nothing.

CFAs and pure DBAs are not pooled funds. Importantly all profit goes to the lawyers (or supporting TPF). CFAs as a funding mechanism rely on the funder being able to extract profit out of the legal process through increasing costs. But a CLAF offers an alternative approach by allowing public funding to be extracted from damages. This is a means to extract that value. Can we appropriate some of that value to get the system working? This is about access to justice. At present providers are the ones who appropriate the value. A CLAF recycles the money as a resource.

A CLAF's advantage over CFAs or individual contingency fees is the size of the pool. It evens out risk and reduces contributions. Against that are administration costs and cherry-picking by lawyers of 'winners' which may leave too few winnable cases to make the scheme viable. The relevant papers cited (in particular, the analysis by Europe Economics) give more detail of the pros and cons.

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[103] Those interested in this topic should read::
(1) *The Merits of a Contingent Legal Aid Fund, first report from the CLAF Working Group*, 27 February 2009, www.biicl.org/files/4755_claf_-_1st_paper.pdf

(2) *The Merits of a Contingent Legal Aid Fund, Second Discussion Paper, 3*0 July 2009 www.biicl.org/files/4756_claf_second_report.pdf. (The author chaired the working party.)

(3) The report from Europe Economics (November 2011) referred to at page 35.

[104] *Ibid*.

Lord Justice Jackson favoured the concept. In December 2009, he commented on the Bar's proposals[105]:

> "In principle, I support the creation of one or more CLAFs or CCFs, if a viable financial model for such bodies can be created. All the indications are, and indeed the CLAF Group accepts, that at least in the short term CLAFs or CCFs could only function as an alternative means of funding a minority of cases. That is no reason not to take the project forward, once decisions have been made by Government as to which recommendations in this report will be implemented. Any additional means of funding litigation, which promote access to justice for at least some claimants with meritorious cases, should be encouraged. However, the difficulty with a CLAF remains the risks of adverse selection by lawyers and clients choosing to proceed under CFAs or (if my recommendations in chapter 12 above are accepted) contingency fees."[106]

> "I recommend that financial modelling be undertaken to ascertain the viability of one or more CLAFs or a SLAS,[107] after and subject to, any decisions announced by Government in respect of the other recommendations of this report."[108] [all emphasis added]

CLAF Outline Feasibility Study for the General Council of the Bar: a report by Europe Economics[109]

In 2011, the Bar Council returned to the concept. It considered that a further working group (in which this author again participated) should consider in more detail the scope for a CLAF scheme or schemes in the light of the Jackson Report and changes made following its implementation. This working group's terms of reference were: *To consider and report on the possibility of market-driven sources for pooled funds to support litigants in civil litigation: to include consideration of viability, scope, operation and management.*

It was decided to invoke the assistance of independent external economics consultants, Europe Economics. This report by Europe Economics is the only time the viability of a CLAF has been subjected to external quantitative analysis. The Report demonstrated that the CLAF concept has merit and should be taken further. The Report concluded that the CLAF concept should be one of several potential funding sources for civil litigation in England and Wales; but its impact would be limited. It considered it was too early to conclude that the concept of a CLAF would take off in a substantial way. It advised a 'wait and see' approach for the next year or so. What would be effect of the changes to legal aid and CFAs?

It decided that the viability of any CLAF could only be assessed financially when the Jackson reforms to CFAs had had time to work in practice. The Report recommended that government should take some modest steps to facilitate the creation of CLAFs. That was nine years ago.

SUMMARY OF FINDINGS BY EUROPE ECONOMICS IN RESPECT OF CLAFS

By far the biggest problem encountered in assessing the feasibility of a CLAF (or CLAFs, since more than one could emerge) is a dearth of relevant published quantitative data. With these caveats, the report concluded that:

1. The types of actions most likely to cease to be attractive to claimants and/or solicitors on CFAs will be small cases which do not involve personal injury or clinical negligence. These are thus a potential market for CLAF funding. The report was more cautious in relation to personal injury cases because the CFA reforms bite somewhat differently on them.
2. There is no reason in principle why clinical negligence cases should not be funded by a CLAF, but there was far too little quantitative

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[105] See *supra* note 103 – *The Merits of a Contingent Legal Aid Fund, first report from the CLAF working Group*, 26 February 2009 and *The Merits of a Contingent Legal Aid Fund, Second discussion paper*, 30 July 2009.

[106] Final Report, Para 3.5.

[107] SLAS is a Supplementary Legal Aid Scheme such as operates in Hong Kong, whereby for certain types of claim legal aid funding is granted on that if successful the claimant pays a percentage of the recovery to the fund on top of his ordinary legal costs.

[108] Para 4.1.

[109] November 2011.

data on which to form a view.

3. Because of the absence of data, it would be a mistake to see the concept of a CLAF as one which will fill the gap if legal aid is withdrawn for clinical negligence cases. But further research might show that a CLAF could help in this area.
4. It is unlikely that only a single CLAF will emerge. Rather, several early CLAFs will emerge, and they will be small scale and specialist in nature, and somewhat experimental.
5. A CLAF need not fund only an entire case. A CFA could be used to fund the lawyers, while a CLAF could fund disbursements.
6. A cautious estimate as to the number of cases that may become available to and/or suitable for CLAF funding, was at least in the hundreds per annum and possibly in the low thousands. That estimate was made before Sir Rupert Jackson's reforms.
7. Provided it can show a convincing business plan, a small CLAF should not have difficulty in raising initial funding, whether as a commercial enterprise or as a charitable/not-for-profit entity.
8. The important thing is that CLAFs should be free to feel their way to what they see as a proper level of risk, what level or type of funding they might provide, and on what terms. They should not be strangled at birth by regulation.

So, the Report recommended no further research action at that point, until the effects of the reforms become visible, but then a review of what is happening to CFAs. That was in 2011. The time has come to look again:

The operation of Fixed Recoverable Costs (FRCs)[110] will assist the viability of CLAFs, enabling a funder such as a CLAF to budget and plan accurately. That should make the business plan more predictable and hence more attractive to its backers and operators.

In 2011 it was too early to assess what will happen to CFAs, post-Jackson reform. It was not possible to assess, in respect of their attractiveness to claimants and solicitors, the case types that will be most affected, and thus their numbers and availability.

There was uncertainty too about what a CLAF might be able to offer claimants, what risk it might wish to bear, and what its operating costs would be.

In 2016 Sir Rupert Jackson returned to the theme in his speech 'The case for a CLAF'[111]. He recommended further work.

To date no further published work has been done on investigating whether the time is now ripe. If FRCs are brought into play, there may now be real opportunities for a pooled contingent fund or funds. The concept should be re-visited now, and Sir Rupert Jackson's advice followed that Government examine it. The groundwork was done and the framework for an effective assessment of the merits of such schemes identified in the reports referred to above. A CLAF need not necessarily involve government funding.

But CLAFs have limitations. A CLAF will only apply to legal remedies involving payment. So, if we are serious about creating effective access to justice, we must also explore other avenues discussed above – some restored Legal Aid and BTEs.

[110] The court – or the rules – at the outset fixes limits to what a successful party may recover at the end by way of costs (and thus sets a ceiling on what the loser will have to pay to the winner: discussed in more detail at page 44 .

[111] 2 February 2016: www.judiciary.uk/wp-content/uploads/2016/02/lj-jackson-speech-clf-160202.pdf

Part 3 Alternative Methods of Funding

Generally

Policy must be developed to fill the gaps where various forms of alternative funding are not suitable or attractive to the litigants, or in some cases lawyers, who would have to fund them:

6.1 Before the Event Insurance (BTE) – the government must actively encourage small businesses and householders to take up BTE insurance.

6.2 Damages Based Agreements (DBAs) and Conditional Fee Arrangements (CFAs) – the regulations must be re-drawn to permit hybrid DBAs in all civil (non-Family) matters and ensure they are attractive to lawyers while being fair to clients.

6.3 Contingent Legal Aid Funds (CLAFs) and Contingent Charitable Funds (CCFs) – the government must adopt the recommendation of Sir Rupert Jackson to research properly the viability of CCFs and the means for setting them up.

PART 4
MAKING PROCEEDINGS SIMPLER AND CHEAPER

A joined-up approach to procedure, costs and funding

New funding (by restoring legal aid and facilitating new mechanisms) is not enough. There is an urgent need to develop and build on the Jackson reforms further and examine a range of different things which can be done to make proceedings simpler and cheaper. There is interdependence between effective funding mechanisms and simpler and cheaper proceedings.

Sir Rupert Jackson emphasised importantly:

> "It is wrong to regard 'funding' and 'costs' as separate topics which must be tackled individually, in order to provide access to justice. Some methods of funding tend to drive up costs and some methods of funding have the opposite effect. Some costs regimes reduce the need for funding (e.g. one-way costs shifting). Some costs regimes increase the need for funding (e.g. a regime that requires one party to pay double costs if it loses). Indeed, the costs rules themselves constitute one form of funding regime, namely that the loser funds the winner" [112].

This was echoed by Lord Neuberger, the former President of the Supreme Court in the JUSTICE, Tom Sargant Memorial annual lecture 2013[113]. In a wide ranging speech, he stressed the need for the courts to be accessible:

> "The rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves…
>
> "legal advice and representation cost a lot more than most people can afford, and, secondly, the Government is increasingly reluctant to pay what the legal profession charges." He raised the question: "In many smaller cases, there must be a serious argument as to whether disclosure should be ordered or whether cross-examination would be appropriate…
>
> "in many cases, quick and dirty justice would do better justice than the full majesty of a traditional common law trial. Parties to many disputes, particularly where small sums are involved, often just need a definitive answer, or to have their day in court."

So too, Lord Thomas of Cwmgiedd, the former Lord Chief Justice,[114]:

> "Our task is therefore to ensure that we uphold the rule of law by maintaining the fair and impartial administration of justice **at a cost the State and litigants are prepared or able to meet** … Our proper master is justice. And that means not only judges and lawyers, who are the servants of justice, but that all who live in countries committed to the rule of law, are such servants." [emphasis added]

In the Civil courts, cheaper procedures are crucial. Predictable levels of costs will make it more attractive for all funders, whether a (conventional) legal aid fund or a contingent legal aid fund[115] or third-party funder or lawyers on a DBA or a commercial insurer (BTE/LEI). As procedural reforms limit costs, so funding becomes more affordable and feasible and there is improved access to justice.

Where practicable, costs must be lowered and made more predictable to enable any funder to budget. But this must be way of genuine efficiency savings, as from procedural simplification, and not by arbitrary cuts to lawyer's reasonable remuneration. As noted later, there is a significant trial in progress of simplified procedure in the

[112] Paras 2.4 to 2.5.

[113] Given at Freshfields Bruckhaus Deringer LLP, London on Tuesday 15 October 2013.

[114] On 4 March 2014 at the launch of the new strategy for 2014–16 of JUSTICE.

[115] Or Supplementary Legal Aid fund such as operates in Hong Kong.

Business and Property Courts. But rising levels of cost which are outside the control of parties cannot be allowed to continue to diminish the ability of deserving individuals to exercise their entitlement to effective access to justice.

Pre-trial and court procedures must be simplified even if it means that for all, but the most serious and weighty matters, delivery may be less 'perfect'. Thus, Lord Neuberger has used the terms "*quick and dirty*" in this context. Perfection must not be the enemy of the good.

Fixed Recoverable Costs: savings and predictability; advantages for funding

Simplification of process must be linked with the introduction of 'Fixed Recoverable Costs' (FRCs). The MoJ has recently completed a consultation[116]. FRCs (whereby the court – or the rules – at the outset fix limits to what a successful party may recover at the end by way of costs). They already apply in most low-value personal injury cases. The government is now planning to extend them to more areas. They make much more predictable a potential litigant's assessment of the downside costs' risks involved.

The proposals are to:

- extend FRCs to all civil cases in the fast track (those cases valued up to £25,000 in damages that will last no longer than a day);
- expand the fast track to include simple 'intermediate' cases valued between £25,000 and £100,000 in damages;
- introduce a new process and FRCs for noise-induced hearing loss claims.

If procedures are simplified and cases brought to trial materially more cheaply with (more) predictable costs risks, then more people:

- might be able to cope better without lawyers, and/or
- (better) would be able to risk the cost of instructing lawyers, and/or
- (even better) find funders prepared to take the case.

For those who cannot afford lawyers at all and who would have to resort to some form of funding, the introduction of a combination of FRCs and simplified, i.e. cheaper procedures, is crucial. Predictable levels of costs will make it more attractive not only for the private paying client but for all funders, whether a (conventional) legal aid fund or a contingent legal aid fund[117] or third-party funder or lawyers on a DBA or a commercial insurer (BTE/LEI).

Fixed Recoverable Costs: a start has been made

Here, there have been encouraging developments. A recent government consultation ending on 6 June 2019, based on the 2017 report by Sir Rupert Jackson recommended that FRCs should apply to civil claims valued up to £25,000, with a further fixed recoverable costs regime for some cases of modest complexity up to £100,000.

That recommendation should be implemented without delay. It has the potential to benefit litigants in general and would make it more attractive for the LAA or other funder to enter the field and support litigation whether through a CLAF or CFA or DBA. The reasons are clear: if costs are modest and predictable to embark on or fund litigation is less hazardous.

A trial is now underway in the Business and Property Courts[118] in the case of claims up to £250,000 to limit the value of costs 'recoverable' from an opponent, with an overall limit of £80,000[119]. It is a pilot scheme and will last for two years starting on 14 January 2019 and finishing on 13 January 2021. There will be a cost attached to each stage of the litigation process.

This can make the prospect of litigation less intimidating and will mean reduced costs overall in business disputes. The pilot scheme also hopes to make the process easier to navigate for

[116] On 28 March 2019 – now closed.

[117] Or Supplementary Legal Aid fund such as operates in Hong Kong.

[118] These are multi-track courts: the London Circuit Commercial Court; the Circuit Commercial Court at Leeds and Manchester; the Technology and Construction Court at Leeds and Manchester; the Chancery Division in the District Registries at Leeds and Manchester.

[119] See the supplemental Practice Direction (CPR PD 51W: The Capped Costs List Pilot Scheme).

businesses. The aim is to speed up the process and to streamline procedures, allowing only limited factual and expert evidence and limiting the length of statements of case. The pilot scheme is to run for two years. It will be voluntary. Both sides will have to agree to be included in the trial. Once a party has agreed to enter the disputes scheme, that party will not have an unfettered right to leave the scheme. Cases which are not suitable for the scheme involving allegations of fraud or dishonesty or multiple issues will be excluded.

Summary

Valuable changes to the rules have been made pursuant to the Jackson report proposals. They should help to even the playing field between claimants and defendants, especially but not only in personal injury litigation. Further changes to reduce whiplash payouts and legal costs in such cases were introduced by the Civil Liability Act 2018. It is too soon to be able to judge their effect.

This paper does not argue for those changes to be reversed, but rather for them to be built upon. In short, we must devise means of providing support (funding) and simplifying procedures (reducing costs). The problems and the way forward have largely been identified by Sir Rupert Jackson. The task now is to build on his recommendations.

Sir Rupert Jackson recommended a large package of reforms to make the litigation process more efficient – moving on from where Lord Woolf left off. But it is the only the start. The judiciary, lawyers and policymakers must look for and implement further changes in litigation practice.

A new model of dispute resolution – the proposal by Justice[120]

In addition to the schemes identified above for fixed recoverable costs, it is time to look carefully at the new model of dispute resolution for civil courts and tribunals identified in the relatively recent report by JUSTICE, *Delivering Justice in an Age of Austerity* (April 2015). The working party was chaired by Sir Stanley Burnton a former Lord Justice of Appeal; its membership included the late Sir Paul Jenkins QC, a former Treasury Solicitor, and Professor Richard Susskind, an expert on IT and the law.

The model should be applicable in many first instance proceedings, but especially the Small and Fast Tracks (described next below).

It is not sensible to set out the report's contents in detail here, but the proposals are radical and significant.

In simple terms the report recommended:

1. The involvement of a primary dispute resolution officer – a 'registrar' – trained to specialise in particular types of disputes. The registrar would use an investigative or proactive approach in all cases where defences are lodged to identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case.
2. Based on this proactive case management, registrars would get to the heart of cases quickly drawing on their expertise and authority to resolve as many cases as possible using alternative dispute resolution (ADR) methods. Registrars would refer to a judge only those cases where no other resolution is likely to be effective or appropriate.
3. The model is designed to operate effectively and fairly, engaging directly with unrepresented parties, with the aim that most disputes will be resolved quickly and informally and that on the assumption set out in the report resources will be saved in the long term.
4. There should be a focus on how technology can be used to deliver legal information, advice and in assistance with the long-term goal of developing an integrated online and telephone service.

These are the carefully considered proposals of a group whose individuals had long first-hand experience of the system. They should be pursued. They will require investment but there could be resultant savings to the public (and to the public purse by reason of more efficient use of Court resources and time).

[120] The author is a member of JUSTICE and was for 12 years a member of its Council. He was not a member of this working party.

Small Claims Track

The Small Claims Track is for lower value and less complicated claims with a value of up to £10,000 although there are some exceptions.

Unfortunately, this forum which ought to be quick as well as inexpensive for the litigant is not operating as one would hope. The figures show that it now takes on average 36.9 weeks between a small claim being issued and the claim going to trial. This was almost 4 weeks longer than in the same period in 2018 and the longest mean time recorded since statistics started to be collected in this way in 2009[121].

Commentators on the Law Society website observed recently that the structure of the fixed cost system did not provide any incentive for defendants to settle after a particular stage in the litigation. Plainly it is necessary to look at the costs structure in this area, to ensure that perverse disincentives to settlement are minimised.

A review should be conducted to address the increasing delays in a system which should be quick and inexpensive.

In this context, and also Fast Track (next below), the proposals by JUSTICE apply.

Fast Track

The Fast Track is the regime which governs claims with a value of between £10,000 and £25,000. FRCs will be important. DBAs and possibly CLAFs can work to advantage here. Parties who get legal advice will act more confidently with a view to settlement. DBAs have been shown to work in Employment Tribunals. They should work equally well in this forum.

Consideration should be given to raising materially the Fast Track ceiling, so that simpler process and limitations on length of witness evidence and cross-examination can be promoted across a wider range of cases.

The proposal by Justice addressed below is of relevance to the Fast Track category.

Multi-Track

This is the term used for the civil procedure regime which governs all larger value claims above Fast Track. Here, Fixed Recoverable Costs together with a new approach to witness evidence and disclosure must be promoted – see next below.

Further Reforms: witness evidence and disclosure

There are moves afoot for a procedural overhaul in heavy commercial cases to reduce the volume of all court documents, with reduced pleadings. There is a need for an early focus on issues to be identified early by lists; this should be coupled with mandatory timetables setting time allowed for cross-examination and speeches etc. These and other steps – docketing judges and so on – can all help to make litigation more efficient and it is to be hoped less expensive. This is of course particularly relevant in, but should not be limited to, more complex matters.

Such moves will continue the reforms put in place following the Jackson final report. Indeed, Mr Justice Zacaroli has recently raised the fundamental question whether our trial process remains fit for purpose today in its principal purpose, that of finding the facts.[122]

His emphasis was on the heavy focus which are courts still place on oral testimony in a model still, as he observed, shaped very much by the Victorian trial process. In recent years the biggest development in the trial process has been the sheer volume of documents. It is his belief that notwithstanding what he identified as the growing evidence as to the lack of reliance that can be placed on recollection of witnesses, English courts persist in putting witnesses centre stage at trial,

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[121] See the article in the *Law Society Gazette*, 6 June 2019, by John Hyde, covering the first three months of 2019. The figures appear to show that cooperation between parties is in shorter supply. The number of claims defended increased by 2% to 75,100, with just 54% of these cases having legal representation for both parties. Mr Hyde suggested that the issue of unrepresented litigants is an extra problem because so many more cases are coming up trial. There was an increase of 8% year-on-year from 2018 to 2019 in small claims cases and an increase of 15% (to 4800) in the case of multitrack/FastTrack trials.

[122] In his lecture to the Chancery Bar Association Winter Conference, 18 January 2009 *Is the Trial Process in the Business and Property Courts Fit for Purpose in the 21st Century?*

with the result that those in court spend the largest portion of court time in watching them give evidence.

Speaking of course in the context of heavier litigation, Mr Justice Zacaroli has stated that he would like to see the time in the trial itself rebalanced away from so long listening to witnesses and more understanding what the documents have to say. Properly conducted court time could be freed up by reducing the time spent on witnesses for the advocates directly (not obliquely through witnesses) to persuade the court of their client's version of events.

Disclosure: the need for cultural change and tighter rules

The judge emphasised the merits of limiting disclosure so that initial disclosure by a party is limited to key documents relied on, and key documents that the other side needs in order to understand the claim or defence that they must meet. More extended disclosure must be justified and require a court order. This is being explored under a pilot scheme. It is too early to know how this will work in practice, but it must point the way forward. There is no merit in reducing the time spent with witnesses and witness statements if vast quantities of peripheral documentation are deployed and the court cannot see the wood for the trees.

It is recommended that steps be taken to implement provisions similar to those effective in the Family Court limiting the pages in the court bundle and length of witness statements, expert reports and written submissions, save in exceptional cases.[123]

Conclusions

These suggested changes, while desirable, will not by themselves address the more fundamental problem that some litigation will remain too expensive for most private individuals. For them, access to justice is more myth than reality. This is so for the large body of people who would never qualify financially for legal aid even if the subject of the dispute was in its scope. But that is no reason not to continue the good work of the Jackson reforms.

So, simplified procedures leading to lower costs and enabling FRCs must together be made a priority and action taken without delay. Litigation will only truly be less expensive and accessible if court users are made to accept more summary disposal of cases. That must apply to potential claimants and defendants. It cannot be done on a consensual basis because one side or the other is likely not to play ball. Cheaper litigation could make its funding more attractive because the downside risks for all funders (Insurers, CLAFs or DBAs, CFAs, TPFs and legal aid) will be less expensive.

The importance of addressing structural change has been made with force by two of our most senior judges, each with enormous experience of litigation, its complexities and costs.

Inextricably linked with the matters highlighted in this paper is the need for a fundamentally sound and well-equipped and staffed Court Service. Sir James Munby has highlighted the problems in The Family Courts in the two papers cited earlier herein.

Noteworthy too are the observations made in the most recent House of Commons Justice Committee Report, *Court and Tribunal Reforms* [124]:

> CONCLUSIONS AND RECOMMENDATIONS
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> 21. We received powerful evidence of a court system in administrative chaos, pointing to the harmful impact of staffing reductions on the experiences of victims, witnesses and legal practitioners as well as litigants and defendants. Staff shortages in many courts are so serious that they may undermine access to justice and threaten to compromise the fairness of proceedings.
>
> …
>
> 36. **We cannot ignore the Government's failure to provide enough publicly funded legal advice and representation to support court users who, for whatever reason, struggle to navigate the justice system**

[123] Family Practice Rules 2010, PD27A.

[124] Published 31 October 2019 https://publications.parliament.uk/pa/cm201920/cmselect/cmjust/190/190.pdf

without support. [emphasis added] The success of many aspects of the reform programme depends on this being addressed as soon as possible. *We urge the Ministry of Justice to ensure comprehensive delivery of its legal support action plan within the time frames stated in the action plan document*. [emphasis in the original]

There is merit in the extension of FRCs. Coupled with this would be further simplification of procedures at the level above Fast Track cases but short of major disputes. How can it be right that boundary disputes over small amounts of not very valuable land can be allowed to escalate with sometimes tens of thousands of pounds involved and financial ruin facing the loser? Hence Sir Rupert Jackson's recommendation to limit further the costs in fast track cases for claims up to £25,000, recommending setting the cap on costs at £12,000.

Lawyers talk of the risk that wrong decisions will be made, but too much can be made of this. Many litigants (and funders) might prefer a more 'rough and ready' procedure if they knew that their costs were going to be more manageable and predictable. Lord Neuberger speculated in his speech (cited above) how much of the expenditure on disclosure is justified by outcomes. Mr Justice Zacaroli has identified the over-reliance on witness evidence and the possibility of relying more on documents to tell a story. For most would-be litigants, access to cheaper, if more rough and ready, justice is likely to be more attractive than no access at all. Certainly, all potential funders (including the LAA) would benefit.

Reformers have been battling for 20 years or so since Lord Woolf first reported on Access to Justice. Progress has been made, but litigation remains too expensive for most people. Access to justice means access to a tribunal which will give a fair determination at a cost proportionate to what is at stake.

In the heaviest cases oral evidence and cross-examination coupled with disclosure will need to be deployed. But even here the strictures of Mr Justice Zacaroli should be heeded. If we are serious about effective access to justice for all, we must think again about radical measures. Save in the weightiest matters, we must abandon the concept of gold-plated standards of procedure. This means revisiting disclosure. Costs really must come down. It is wrong if people are unable to seek redress and recover compensation.

We must be positive and look for what can be achieved. The real injustice is if too many of our citizens never even have the luxury of contemplating litigation.

RECOMMENDATIONS

Part 4 Court Procedure	
The Family Courts	The Family Procedure Rules 2010 are lengthy and complex; the family courts are virtually lawyer free.
	7.1 If the rules cannot be completely rewritten, then there is a need for much better written and presented Guidance in plain English, which ordinary people can understand.

The Civil Courts

Generally

8.1 To make potential costs liabilities more predictable, Fixed Recoverable Costs (FRCs) must be introduced more widely and should become the norm for the Fast track and much of the Multi-Track jurisdictions, and indeed where practicable in all but the heaviest civil litigation. FRCs should apply to civil claims valued up to £25,000 with a further fixed recoverable costs regime for some cases of modest complexity up to £250,000. Opt-outs should only apply to special cases.

8.2 Limits must be imposed (save in exceptional cases) on the parties without permission:

(i) setting out over-complex pleadings;

(ii) deploying witness statements, experts' reports and written submissions beyond a certain length;

(iii) producing a court bundle beyond a certain length (currently 350 pages in the Family court);

8.3 The length of cross-examination of witnesses must be controlled.

8.4 Limits must be imposed on disclosure.

Small Claims Track

9.1 A review should be conducted to address the increasing delays in a system which should be quick and inexpensive.

9.2 Government must carefully consider and look to implement the proposals by JUSTICE.

Fast Track

10.1 Consideration should be given to raising materially the Fast Track ceiling.

10.2 Fixed Recoverable Costs must be promoted.

10.3 Government must carefully consider and look to implement the proposals by JUSTICE

Multi-Track

Hand in hand with the use the existing regime of Costs Budgeting (and where appropriate of FRCs) there must be:

11.1 a renewed attack on excessive disclosure, excessive documentation and over-complex pleadings; and

11.2 research and pilot schemes to limit the length of witness statements and the amount of time spent on cross-examination, with the focus on presenting clearly the relevant documents.

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