

Delivering Justice in an Age of Austerity

**A response by
The Chartered Institute of Legal Executives**

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INTRODUCTION

1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 22,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
2. CILEx welcomes the opportunity to assist JUSTICE in exploring ways to improve the delivery of civil justice in a time of austerity. A well-functioning civil justice system providing effective access to justice without delays and backlogs, is essential to any society and modern economy. It is important to safeguard these essential guarantees.
3. The UK has long been a model for others to follow in setting standards for guaranteeing access to justice. Our legal aid system dates back to 1949, a period also marked as an "age of austerity". Nevertheless, legal aid went on to become a cornerstone of our justice system, providing help and assistance for many of the most vulnerable members of society.
4. Of course, the provision of legal aid does not translate to unfettered access to public funding before the courts¹. In times of austerity, no government could afford to ignore spiralling legal aid expenditure from a limited pot of money. The state of the economy was the justification the coalition government used in November 2010 to issue proposals to reform the legal aid system with the aim of cutting legal aid spend by £350m a year by 2015².
5. The coalition government's failure to recognise that access to the courts is intrinsically linked to the ability of a party to present the necessary evidence to make their case and to be able to engage with the process, has been

¹ Airey v Ireland (1979-80) 2 EHRR 305, where the Court made clear that the State did not have to provide free legal aid for every dispute relating to a 'civil right' (para 26). The State had a free choice of means to ensure that litigants did have an effective right of access to the courts. A legal aid scheme was one.

² <http://www.bbc.co.uk/news/uk-11741289>

disturbing. Effective access to the court is an essential requirement of Article 6 of the Human Rights Convention (within the meaning of the Human Rights Act 1998).

6. In our response to the coalition government's 2010 Green Paper "Proposals for the Reform of Legal Aid in England and Wales" CILEx made the following points:
 - reductions in the provision of legal aid do not necessarily have to manifest themselves as cuts to the availability of legal aid to the poorest or vulnerable members of society, thus impacting on access to justice and the rule of law – there are alternatives;
 - indiscriminate "butchering" of the legal aid system is not a "quick fix" and may cause irreparable harm, not only to the supplier base (already shrinking), but to access to justice; and
 - there is a need for a more balanced approach to legal aid reform based on evidence where funding is not considered in isolation to other cost drivers and the rule of law.

7. CILEx was disappointed by the coalition government's reluctance to have regard to evidence-based research that might point to different conclusions and its indifference to concerns that many of the proposed cut-backs would impact on the most vulnerable members of our society.

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (LASPO)

8. The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO)³ restricted the availability of civil legal aid to certain prescribed areas. In social welfare law cases, legal aid was either removed or significantly restricted⁴. Similarly in family law, legal aid was removed save for cases involving issues of child protection or where there is evidence of domestic abuse. Despite continued availability of legal aid in these prescribed areas, the government's

³Received Royal Assent and became law on the 1st April 2013

⁴ Legal aid is only available in housing law cases where there is serious disrepair or homelessness, possession proceedings and for anti-social behaviour cases in the County Court.

2013/14 statistics indicate an 80% fall in the number of social welfare law cases, including a figure of 45% in housing cases⁵. In private family law cases, there has been a 60% per cent drop compared to last year⁶. There has been a far greater than predicted fall in the number of legally aid cases since the previous year. The reduction is far in excess of government predictions and not wholly explained by scope changes.

9. It is conceivable that the severity of the cuts in legal aid may have led to the general perception by the public that legal aid is no longer available save for very exceptional cases. Paradoxically, a misconception that legal aid is no longer available in all cases may have been compounded by the success of the Save Legal Aid campaigns.
10. Public perception combined with various evidential hurdles to access legal aid may be factors in the low take-up of legal aid in domestic abuse cases. This is a real cause for concern.
11. LASPO has fundamentally changed the legal aid landscape for the foreseeable future. Lord Bach described LASPO as “*outrageous legislation that will harm the disabled, poor and vulnerable, and those least able to defend themselves*”⁷. However, there has been no commitment by the Shadow Cabinet to reinstate the swaths of legal aid lost as a result.

MAKING LEGAL ADVICE, ASSISTANCE AND REPRESENTATION MORE AFFORDABLE AND ACCESSIBLE

12. Equitable access to justice is a cornerstone of a modern caring democratic society. Without it the rule of law is fatally weakened. “*That doesn't just mean access to lawyers and courts. It means access to ombudsmen, advice agencies and the police law. It means public authorities behaving properly. It means everyone having some basic understanding of their rights. It means*

⁵ MoJ: Legal Aid Statistics in England and Wales 2013-2014

⁶ Ibid page 20

⁷ <http://www.lawgazette.co.uk/65487.article>

making law less complex and more intelligible".⁸ The provision of legal advice is one strand in the concept of access to justice and is essentially twofold:

- access to law; and
- access to a lawyer.

13. Campaigns against LASPO primarily focused on access to justice as meaning access to a lawyer. But equally important is access to law.

14. Baroness Hale, Deputy President of the Supreme Court, recognised this in a speech in 2011 saying that a "*great deal of time, trouble and money is wasted when the law is complex and unclear*". She observed that if the legal aid system is cut we need to spend more on courts and on initial advice and assistance schemes⁹.

ACCESS TO LAW

15. The Legal Services Act 2007 has at its heart eight regulatory objectives that the Legal Services Board and the Approved Regulators must adhere to when exercising their functions¹⁰. Parliament made clear that the Act does not rank these objectives in order of importance. Two of the eight objectives are improving access to justice and increasing public understanding of the citizen's legal rights and duties. It is accepted that access to justice is a fundamental right. The justice system despite the fiscal pressures thrust upon it, works to ensure that the courts and legal procedures are open to everyone, regardless of their wealth or circumstances. At the very outset however, it is imperative to ensure access to law by increasing the citizen's rights and duties.

16. Making the law readily available to the general public is a basic requirement of ensuring access to law. This is particularly so given that people increasingly

⁸ Professor Richard Moorhead, Cardiff University Law School

<http://www.theguardian.com/law/2011/oct/06/access-to-justice-legal-aid-cuts>

⁹ Baroness Hale: Access to Justice in the Big Society, 2011. The Henry Hodge Memorial Lecture

¹⁰ Section 1 of the Legal Services Act 2007

choose to litigate in person rather than instructing costly solicitors and barristers; a growing trend in light of the LASPO changes. Sadly, the government's National Archives website is devoid of a guarantee that all legislation post 2002 is up to date¹¹. Currently, the only way to know for sure what law is on the statute books post-2002 is to subscribe to costly services such as Westlaw or Lexis Nexis Butterworths. This is beyond the means of most people, especially litigants in person.

17. Similarly, case law must also be readily available. Whilst the Supreme Court website has improved matters by providing useful press summaries of all its new judgments, up-to-date statute law is not similarly available. This can only be detrimental to access to law and ensuring that the public has the most up-to-date information.

18. CILEx accepts that free access to law is not a panacea. However there is plenty of scope for delivering more accessible law by leveraging not just access to legal materials free of charge but also the free legal web.

19. Improving access to the law must coincide with training designed to improve the judiciary's capability to deal with members of the public. If less money is spent on lawyers, "*you have to be prepared to spend money on the decision-makers – give them the right training, the right expertise, the right resources, and the right premises to be able to the job*"¹². CILEx is pleased to note that the government has committed to this training via the implementation of the new private law programme. A key focus of the training is to ensure that judges, magistrates and legal advisers are better equipped to support litigants in person through the court process.¹³

¹¹ <http://www.legislation.gov.uk/help#aboutRevDate>

¹² Baroness Hale, Sir Henry Hodge Memorial Lecture 2011 Equal Access To Justice In The Big Society

¹³ Lords Hansard 16th June 2014 col, GC5

ACCESS TO A LAWYER

20. LASPO removed many types of case from the scope of legal aid funding.

Other cases only qualify when criteria are met. In other words, access to a lawyer for publicly funded work has been severely curtailed for some of the poorest and most vulnerable members of our society. This has been compounded by reductions in local authority grant funding to law centres and Citizens Advice Bureaux¹⁴. Not for profit sector legal advice provision has been severely curtailed, having lost legal aid contracts as well as local authority grant aid. Many not for profit providers are surviving by making changes to service provision. Others have closed inevitably increasing gaps in access to justice in certain locations.¹⁵

Legal Aid Still Exists

21. As mentioned, LASPO legal aid campaigns have been primarily related to the public's right to access publicly funded lawyers in certain areas of law, including criminal law. However, evidence suggests that these campaigns (although well intentioned) may have been partly counterproductive in the sense that potential clients have assumed that there is now no legal aid left at all. Access to legal aid lawyers, for example in cases of domestic violence, is still available post LASPO and more needs to be done to highlight this message. Take-up campaigns could be organised by firms and the professions to ensure that potential clients do not miss out.

NEW WAYS OF SERVICE DELIVERY

Online services

22. Online legal services are important and offer another opportunity for smaller law firms (and the voluntary sector) willing to invest in interactive and client-friendly websites) to compete with the bigger brands, and thus increase

¹⁴ <http://www.lawgazette.co.uk/71033.article>

¹⁵ *ibid*

access to justice. For example, a survey of 2,266 adults commissioned by IRN from YouGov¹⁶, reported that a clear majority – 57% – agreed or completely agreed that good law firms should give their customers access to, and ability to use their services online in the next couple of years. Only 8% disagreed.

23. Traditional business models must change. The need to incorporate online services is one example. More subtle changes should also be considered to deal with the new competitive environment, for example flexible working hours to deal with consumer demands for convenience.

24. Legal services regulation must also strike the right balance and not restrict new emerging competitive challenges. Anti-competitive measures must be removed as a barrier to ownership and service provision. Chartered Legal Executives lawyers are at the heart of this change. The CILEx route to qualification as a lawyer will not only increase diversity within the profession but improve access to justice and consumer choice to the benefit of the consumer in an age of austerity.

PROVISION OF DUTY LAWYER ARRANGEMENTS IN CIVIL CASES, INCLUDING FAMILY

25. Duty provider schemes at nominated civil courts, akin to the duty scheme in the magistrates' courts, would increase access to a lawyer and provide much needed assistance to the court.

26. Evidence suggests that the civil courts are clogged up with litigants in person and that this is causing significant delays.¹⁷ The total number of litigants in person stood at 33,294 in 2012/13¹⁸. A civil duty provider could, at least initially, give guidance and advice to litigants as to the correct action to take to further their case, saving court time and expense. The proposed scope of any

¹⁶ Professor Steven Mayson

¹⁷ Lords Hansard 16th June 2014 col, GC5

¹⁸ <http://www.lawgazette.co.uk/analysis/comment-and-opinion/trusted-advisers-by-choice/5042311.article>

such a scheme could be developed with stakeholder engagement, in which CILEx would wish to contribute.

COLLECTION OF OUTSTANDING PENALTIES

27. A Ministry of Justice (MoJ) spokeswoman has confirmed that at the end of 2013/14 the total amount of outstanding financial penalties was £548.8m. This includes fines imposed in the magistrates' courts and Crown Court, compensation orders, costs orders, victim surcharge orders, unpaid fixed penalty notices (FPNs) and penalty notices for disorder (PNDs), which are registered as fines for enforcement.

28. This sum represents a significant revenue stream where the government needs to collect. It is far in excess of the £350m the government hopes to cut from the legal aid budget by 2015. Collection of the outstanding sums could give scope for the development of a civil duty provider scheme.

ALTERNATIVES SOURCES OF FUNDING

29. In its response to the 2010 Green paper, Proposals for Reform of the Legal Aid Scheme, CILEx maintained that restricting legal aid in order to save money as a result of the austerity agenda is a false economy. There are more litigants in persons, with a corresponding drain on court time and financial resources. Findings by Citizens Advice indicate that for every £1 spent on legal aid, £10 will be saved in costs to the welfare system. Without early intervention, manageable problems can become expensive and complex to resolve. In the context of social welfare law or debt advice for example, what begins as a small issue capable of being resolved with the early assistance of a lawyer, can become extremely costly. The court time, resources and legal fees involved in a possession hearing far outstrip the small sum necessary to secure legal help from a specialist debt caseworker¹⁹.

¹⁹ Robins, J; £10 saved for every £1 spent: The possible value of social welfare advice. Legal Voice 23 July 2014

30. Recent research findings show that legal aid not only pays for itself, but also makes ‘a significant contribution to families/households, to local area economics’ as well as ‘significant public savings’²⁰. Following these research findings, Lord Low commented:

*“It can no longer be argued that funding social welfare advice is too much of a burden on the state. Early and necessary interventions from advice and legal support prevent problems and expense further down the line”*²¹

31. In spite of this, there has been no commitment from any future Labour government to bring back the legal aid scope changes under LASPO²², so alternatives need to be considered.

32. The following are models that could supplement the existing provision of legal aid:

- extension of the Ombudsman principle
- mediation/alternative dispute resolution
- increased use of legal expenses insurance.

THE OMBUDSMAN PRINCIPLE

33. Ombudsman schemes have major benefits, in preference to reliance on the courts and/or arbitration. For consumers they offer a fair, impartial, speedy and effective service for resolving disputes. There are also significant benefits to private industry. Voluntary Ombudsman schemes have shown that they can:

- increase consumer confidence in the industry;
- protect and increase a member firm’s reputation and brand image;
- allow long-running intractable disputes to be resolved at a relatively low cost;

²⁰ <http://www.legalvoice.org.uk/2014/07/23/10-saved-for-every-1-spent-the-possible-value-of-social-welfare-advice/>

²¹ Ibid

²² http://www.huffingtonpost.co.uk/sadiq-khan/legal-aid-walk_b_5348650.html

- provide general advice to members, thereby assisting improvements to internal complaints handling procedures; and
- provide consistent, expert resolution on an impartial basis.

34. The core role of an Ombudsman is to investigate and resolve, determine or make recommendations with regard to complaints against those whom they are empowered to investigate, by the exercise of powers and in accordance with procedures described in a given code (statutory or voluntary).

35. Some schemes have gatekeepers which undermine their usefulness to consumers. Most notably, the Parliamentary and Health Service Ombudsman scheme has an MP filter in relation to complaints about a government department, government agency or public body.

36. Scope is usually limited to decisions in relation to maladministration and procedural errors. Investigations where the claimant has a remedy via the courts are normally excluded.

37. Notwithstanding this, Ombudsman schemes (or similar complaint-handling schemes, even if they do not use the title '*Ombudsman*') are proving increasingly popular as a free and accessible means of gaining redress for the citizen or consumer, as recipients of public and private sector goods or services. The points of entry to the various schemes could usefully be reviewed, together with publicity material, in order to address underutilisation²³.

MEDIATION/ALTERNATIVE DISPUTE RESOLUTION

38. The value of mediation is undisputed. It is acknowledged that for a case to go to court can have a detrimental impact on families, especially children. Relying exclusively on mediation is not an option as it does not lend itself to all disputes and one party may opt out. The MoJ has recognised this and is

²³ <http://books.google.co.uk/books?id=RqHq4SC1J3cC&pg=RA1-PA10&lpg=RA1-PA10&dq=underuse+of+ombudsman&source=bl&ots=2sE4SyB9bY&sig=sjKiVNaLDF9TZlqDBgHKXBT1fnc&hl=en&sa=X&ei=sFzjU83pGoOr0QW->

aware of the limitations of mediation. Clearly there is an increasing role for mediation to play, but it must be borne in mind that mediation needs to be under the aegis of the Court.

LEGAL EXPENSES INSURANCE

39. Legal Expenses Insurance (or before the event insurance) offers a relatively inexpensive mechanism for resolving a range of problems and legal disputes, particularly compared to the prohibitive cost of litigation. According to Office for National Statistics estimates, there were 25m households in the UK with this type of insurance in 2008.²⁴ There have been calls for increased promotion of such products, for example Lord Justice Jackson's review of the cost of civil litigation and Lord Young's review into health and safety regulation and the compensation culture.

40. LASPO cuts have led to suggestions that Legal Expenses Insurance (LEI) should fill the gap. Whilst obtaining LEI for future disputes may provide an element of protection for some, LEI within household insurance policies excludes many areas of law taken out of scope by LASPO changes. It would not be easily accessible to those on low incomes, or to those who have no household or motor insurance cover.

41. CILEx would also be concerned about limitations on the choice of representative where the choice of lawyer is determined by the LEI provider. That said, take-up of LEI cover should be encouraged and may be a useful resource for some. Of course, the lack of accessibility for those on benefits or low incomes, together with restrictions on scope and operation, render it an entirely inadequate alternative to legal aid. It can only ever be supplementary.

²⁴ Bello, L: In case of emergency Consumer analysis of legal expenses insurance. Consumer Focus March 2011

MAKING COURT AND TRIBUNAL PROCEDURES MORE EFFICIENT AND ACCESSIBLE

42. CILEx maintains that one of the cost drivers in the justice system has been lack of seamless integration of all participants. For example, there is a need to tackle inefficiencies in the court service, at Police stations, the Crown Prosecution Service, Social Services, the Department of Work and Pensions, and the MoJ. There is mounting evidence that government, in all its guises, generates a '*substantial slice of legal problems and makes them more expensive to resolve*'²⁵. We are pleased to see this recognised by the Lord Chancellor with the recently announced Leveson Review of efficiencies in the criminal justice system.
43. Further investments must be made by government departments to improve standards of decision making. However, given the austerity measures that resulted in the legal aid scope changes, this seems unlikely.
44. A costs neutral option for restricting expenditure in the system may be to reduce the number of cases reaching tribunals where the appellant seeks to overturn a decision made by a public authority. The most obvious example relates to the work of the Social Entitlement Chamber which deals, amongst other things, with Social Security and Child Support (SSCS) appeals. Figures show that in 2013 nearly 900,000 people had their benefits stopped - the highest figure for any 12 month period since Jobseeker's Allowance was introduced in 1996.²⁶ In recent months, however, 58% of those seeking to overturn Department of Work and Pensions (DWP) sanction decisions in independent tribunals have been successful. The evidence suggests that a high proportion of appeals were caused by mistakes and poor-quality decision-making by officials.²⁷
45. In view of the above, CILEx believes there is potential for the "polluter pays" principle to be extended so that the DWP (and other public authorities whose

²⁵ Moorehead R, System failure or broken Law? New Law Journal, 19th March 2010.

²⁶ <http://www.theguardian.com/society/2014/feb/19/record-number-sanctions-benefits-claimants>

²⁷ <http://www.theguardian.com/politics/2014/feb/20/people-stripped-benefits-charged-decision>

decisions impact upon courts and tribunals²⁸) would pay a surcharge in relation to the number of cases in which their decision-making is shown to have been at fault.

46. Focusing on making better initial decisions will deliver better outcomes for affected citizens and will be more efficient for the taxpayer. CILEx accepts that there would be red tape to negotiate the creation of such a system, but we think the potential benefits merit further consideration and that in the long-term, cost-savings could accrue, benefitting government and the citizen.

47. A permanent contraction of justice cannot be justified by the austerity agenda or by any philosophical mantra. Ultimately an efficient justice system is fundamental to the wellbeing of the country. CILEX will continue to work closely with the government and other stakeholders to help it mitigate the pain that that is being inflicted. As legal aid scope cuts continue to cause devastation, it is vital to ensure that alternative means of accessing the justice system remain available.

²⁸ For example Home Office statistics showed that 32% of deportation decisions and 49% of entry clearance applications were successfully appealed in 2012