



Justice Select Committee Inquiry:

The Future of Legal Aid

A Response by
CILEX (The Chartered Institute of Legal Executives)

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1. Introduction

- 1.1. 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 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.

- 1.2. As it contributes to policy and law reform, CILEX endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it. At these unprecedented times, the impacts of COVID-19 have necessitated changes to the consumption of legal services and the manner in which the court estate is currently accessed, alongside exacerbating pre-existing difficulties in legal aid provision following the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). It is important to recognise that the impacts of the coronavirus on legal aid is not solely one of a short-term public health crisis. The legal aid market has long been on the brink of collapse, and CILEX is gravely concerned that without a long-term reconfiguration of how legal aid provision is delivered, the events that are bringing our country to a standstill but temporarily, could see the justice system come to a standstill for the foreseeable future. With these considerations in mind, CILEX has collated the below evidence from CILEX professionals, to help aid the Justice Select Committee in its inquiry into the future of legal aid in England and Wales.

- 1.3. This response includes contributions from CILEX practitioners regarding their first-hand experiences of court and tribunal hearings during COVID-19; most notably, via use of audio-visual hearing technology as opposed to physical attendance. CILEX liaised with practitioners through its Criminal, Family, Civil and Court User Specialist Reference Groups, as well as engaging with the wider membership, on various impacts that legal practitioners have faced. Through a series of surveys and internal calls for evidence, alongside extant findings on the landscape of legal aid following LASPO, CILEX has collated the below feedback and evidence that directly relates to CILEX practitioner experiences of delivering legal aid services during the lockdown period. These are expanded in more detail below.

2. Summary of Findings

- 2.1. The impacts of the coronavirus on our justice system, risks bringing the legal aid market to a collapse. This sector was already struggling pre-COVID-19 following the passing of the Legal Aid, Punishment and Offenders Act 2012 (LASPO). (Para 3.1)
- 2.2. Various reviews into the impacts of LASPO post-2012 have been unable to meaningfully and holistically address the systemic deficiencies that years of underfunding in legal aid provision has caused. (Para 3.2-3.3)
- 2.3. Recruitment efforts for legal aid providers is increasingly more difficult as it becomes harder to attract new entrants to the market. For example, the costs associated with filling a new Duty Solicitor vacancy, in comparison to only a couple of years ago, is already substantially higher. (Para 4.1)
- 2.4. Retention of legal aid providers is also of increasing concern as practitioners and firms are incentivised to move away from legal aid work owing to unrealistic expectations in workload with no fair pay for work done. (Para 4.2)
- 2.5. Imbalanced funding allocation for legal aid work has seen a leaching away of legal aid providers from criminal defence work to the prosecution at the risk of comprising the proper administration of justice and equitable access to justice. (Para 4.3-4.4)
- 2.6. Political rhetoric of 'lefty lawyers'/ lawyer 'do-gooders' does nothing for the morale of a sector that is already rock bottom. These notions descend into an unseemly blame-game rather than proper analysis and correction of objectively identified systemic failures. (Para 4.3.1)
- 2.7. Legal aid compensation models are unable to accommodate effective financial management and planning in the wake of COVID-19, as firms face greater uncertainty in case/workload management and income flows. (Para 5.1-5.3)
- 2.8. Court reform efforts need to be alive to the need for timely implementation of digitisation efforts and the role that the court estate plays in the wider justice ecosystem. (Para 6.1-6.3) For example, the extended operating hours regime is an unsustainable model for legal aid providers, and only exacerbates aforementioned recruitment and retention issues. (Para 4.2)
- 2.9. Inconsistent implementation and adoption of remote hearing technology throughout the lockdown period is at risk of comprising access to justice and the proper administration of justice as limited training and support measures compromise court user uptake and utilisation of these new solutions. (Para 6.4-6.6)
- 2.10. Legal aid should be available for litigants having their case heard in the Employment Tribunal, especially as the need for employment advice and representation increases with furloughing measures coming to an end alongside economic downturn and mass redundancies. (Para 6.7)

Sustainability of the Legal Aid Market

Evidence on:

- ***How LASPO has impacted access to justice and for views on the post-implementation review and the criminal legal aid review.***
- ***Recruitment and retention problems among legal aid professionals.***
- ***What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.***

3. Impacts of LASPO

3.1. The cuts to legal aid, implemented by LASPO, cost more than they saved, not just in pounds, but in natural justice. A reduction of nearly £1bn worth of funding shattered the legal aid market and created a precarious and often unmanageable path for the poorest and most vulnerable members of society to tread when seeking justice. Issues of unmet legal need, alongside growing advice deserts, and threats to the proper administration of justice and access to justice were all realities facing clients, prior to COVID-19, and since then, the pandemic has but acted as a catalyst in widening these systemic rifts within our justice system.

3.2. CILEX was unconvinced by the LASPO Post-Implementation Review. Whilst limited attempts were taken to reinstate lost funding in certain parts of the justice system, such as with The Legal Aid for Separated Children Order 2019, the review failed to go far enough in laying the groundwork needed to make an effective case for a meaningful reinstatement of funding to Treasury. Rather the review misplaced its solutions in promises for negligible sums towards more information for litigants in person (LiPs) in the interests of self-representation, as opposed to providing access to the professional advice and representation that LiPs sorely need. Consequently, many pockets of our justice system are still in desperate need of increased public funding to revitalise lost resources.

3.3. Whilst subsequent initiatives such as the Criminal Legal Aid Review (CLAR) have attempted to resolve some of these issues, its second stage, an independent review, is still in development and not live and with therefore no proposals for substantive reform of the criminal legal aid market even scoped. Part 1 of the review, with its focus on an accelerated package of measures, generated some short-term solutions, but did not extend in its remit to a longer-term overview of the criminal law process at all stages of case progression (such as representation and investigation stages in police station work).

3.3.1. Against the backdrop of COVID-19, emergency legal aid provisions have similarly overlooked the need for greater support and resourcing towards earlier stages of case handling (for instance COVID-19 response measures from the Legal Aid Agency which focused on enabling interim claims for some Crown Court matters only). In the absence of holistic solutions to hand, and with CLAR Part 2 being at very early stages of conceptualisation, there is a growing concern that sector recovery hinges on additional financing sooner rather than later.

4. Recruitment and Retention of Legal Aid Providers

4.1. Feedback from CILEX members have indicated growing problems in recruitment efforts for the intake of new legal aid providers, alongside a gradual gravitation away from legal aid work by existing firms and professionals.

4.1.1. For example, one CILEX member anecdotally pointed to a recent example of salary expectations to fill a Duty Solicitor vacancy having risen by 50% in the last two years alone. Realities such as these, alongside the increasing age of Duty Solicitors (standing at 47 years of age as of 2019)¹, not only demonstrate a lack of motivation for new entrants and young lawyers to take on these roles, but also highlight the additional pressures that legal aid firms are currently facing in trying to keep the sector afloat. In this particular instance, as dictated by best practices for ensuring equal pay, the new hire resulted in salary increases for all other Duty Solicitors, costing the firm significant overheads, all while operating at a general loss due to COVID-19.

4.2. However, funding cuts caused by LASPO have not only compromised *recruitment* by disincentivising talented practitioners from pursuing career paths in legal aid provision but have also undermined *retention* efforts as underfunding and under resourcing leads to widespread issues such as incessant court backlogs. As a result, working arrangements within the legal aid market have grown increasingly dependent on a limited pool of providers to provide an unrealistic level of output, worsened by new initiatives, such as extended opening hours for the court estate. Without sufficient funding to resolve the root cause of these shortages, solutions such as extended operating hours are simply unsustainable. With longer hours to work, not only do these solutions continue to deny practitioners of fair pay for work done, but they also introduce an impediment for firms by increasing overheads making it harder to resource the justice system at a time where legal aid firms are notoriously suffering from limited cashflow (see paragraph 4.1 below for more information); a problem exacerbated in the past by inconsistently timed contract payments by the LAA itself.

4.2.1. In the wake of COVID-19, CILEX practitioners have further indicated administrative burdens alongside these financial hardships which have rendered this work unsustainable in the long term.

4.3. In the midst of these trends suggesting a gravitation away from legal aid provision, there is a particular risk that has come to the forefront in the context of the criminal justice system where inconsistent expectations on defence practitioners, and disproportionate allocation of funding in favour of the prosecution (such as the additional £85 million worth of funding announced for the CPS in August 2019)², has seen career prospects weighted in favour of the prosecution and a leaching of practitioners away from defence. Anecdotal evidence from CILEX practitioners indicates a gradual departure of talented professionals from the defence sector as they are attracted to the higher wages and greater job security offered by institutions such as the Crown Prosecution Service in comparison to the private sector.

4.3.1. CILEX is extremely concerned that further huge disincentives will arise from the most recent political rhetoric which seeks to categorise the legal profession into 'lawyers' and 'lefty lawyers'/'do-gooders'; favouring certain pockets of the profession, whilst discrediting others; this does nothing for the morale of a sector that is already rock bottom and descends into an unseemly blame-game rather than proper analysis and correction of objectively identified systemic failures. For the proper administration of justice, and in the interests of rule of law alongside fundamental human rights such as the right to a fair trial, it is essential that public

¹ <https://www.lawsociety.org.uk/en/campaigns/criminal-justice/criminal-duty-solicitors>

² <https://www.cps.gov.uk/cps/news/cps-response-additional-ps85m-funding>

funding allocations, that public legal education and that public access to legal services and legal aid is administered in an equitable manner that does not unduly favour certain classes of proceedings or categories of party over others.

4.4. With this in mind, CILEX continues to campaign for a reinstatement in Legal Aid spend and a heightened profile of the justice system more generally, but stresses that this must be realised in a holistic manner that recognises all component parts of the legal aid market, including all stages of legal aid provision and all parties in need of legal aid support and representation. Any sustainable solution shall rest upon a healthy and dynamic legal services market, of both generalist and specialist providers, to combat the recruitment and retention crisis apparent within our justice system and bolster competition. In a similar vein to the Competition and Markets Authority work on improving price and service transparency in legal services, CILEX stresses the importance of building a diverse sector with healthy competition so that we may rebuild trust in our justice system and incentivise practitioners back into the market.

Specific Impacts of COVID-19 on Legal Aid Services

Evidence on:

- ***The impact of Covid-19 on legal aid services and clients.***
- ***The impact of the court reform programme and the increasing use of technology on legal aid services and clients.***

5. Financial Longevity of Legal Aid Providers

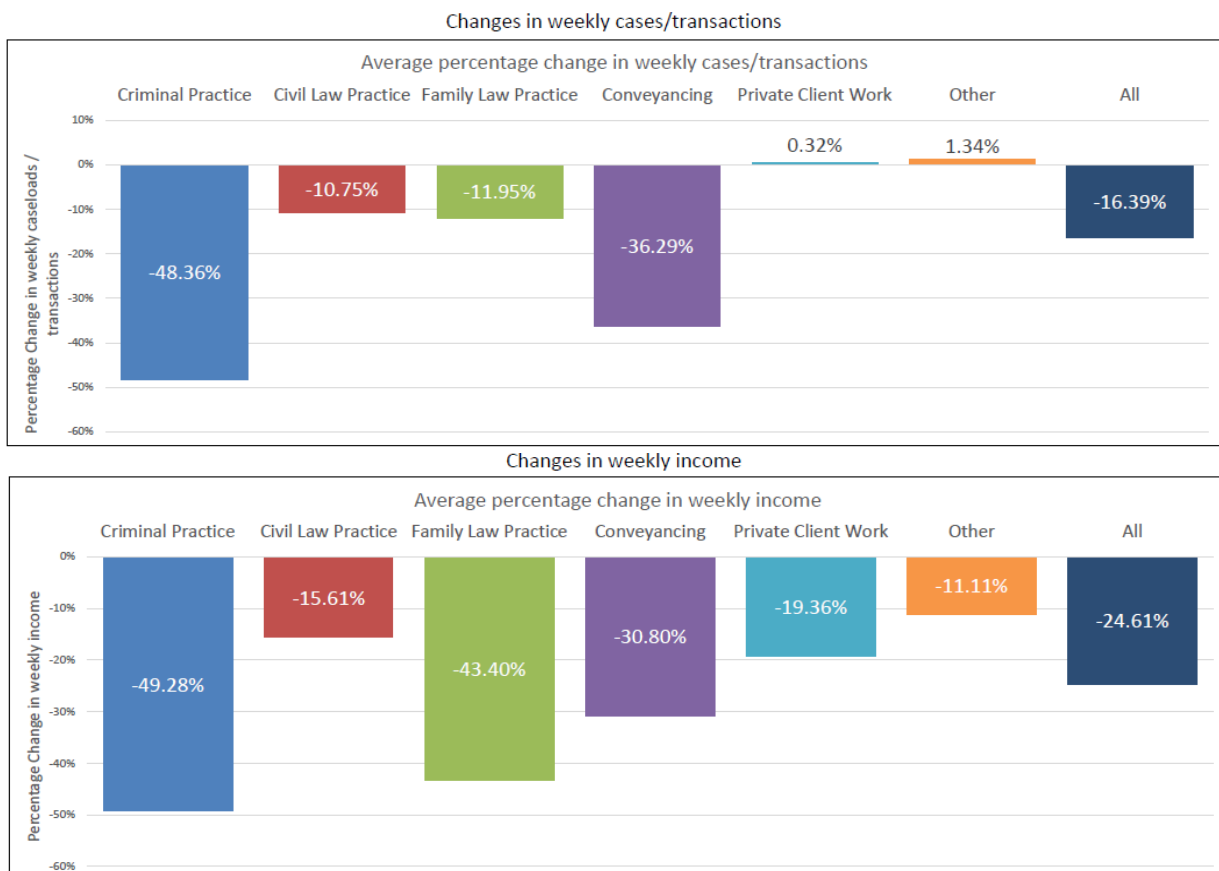


Figure 1: COVID-19 Impacts on CILEx Practitioners (April – August 2020)

- 5.1. Evidence collated from over 1,000 respondents submitting evidence to CILEX's weekly COVID-19 Impact Survey between April and August 2020 highlighted the quantifiable impacts of COVID-19 for legal practitioners. Much like many other sectors within the economy, the data obtained demonstrated that over this period the legal profession witnessed a general fall in both caseload and income over the lockdown period (see Figure 1).
- 5.2. Notwithstanding this drop in caseload volume, recent months have highlighted a rise in levels of case backlogs, attesting to increasing issues of lawyer supply shortage, whilst crucially highlighting the impacts of COVID-19 on workstream flow and efficient case handling. The net result is to instil greater uncertainty within case management, as court backlogs and general delays affect the pipeline of new instructions. As a result, neither the Standard Monthly Payment model nor Variable Monthly Payment model are able to sufficiently safeguard financial management and financial forecasting over the COVID-19 period.
- 5.3. In the case of Standard Monthly Payments, this uncertainty and drop in case volumes shall continue to see rising debts owed to the Legal Aid Agency for firms receiving excess sums to monthly actual figures (increasing outgoings); whilst Variable Monthly Payments, operating on the basis of sums billed, shall have a direct impact on incoming cashflow. Even for those firms accessing alternative government measures such as the Coronavirus Business Interruption Loan Scheme, there is little comfort as reliance on loan models for providing financial support simply delays the financial cliff edge facing firms that have little long-term prospect of being able to repay.
- 5.4. Taking into account the fragility of legal aid providers' financial circumstances even prior to the lockdown period, it is no surprise that the situation for these firms has become even more precarious. In order to help safeguard income streams, manage risk and protect the financial longevity of providers in supplying legal aid services, CILEX has received anecdotal evidence from members that earlier access to compensation for legal aid work in a greater variety of cases would be greatly welcome.

6. Impact of the Court Reform Programme: Increasing use of technology in accessing services

- 6.1. The impacts of COVID-19, alongside aforementioned case backlogs, have further warranted changes to court services during this period as social distancing measures have limited access to the court estate in the usual manner. CILEX commends the hard work undertaken by HMCTS in implementing measures for the safe physical attendance of court users during this time, alongside efforts to embed technology and accommodate remote hearings to enable court services to continue during the pandemic.
- 6.2. Nonetheless, effective funding and maintenance of the court estate was significantly needed pre-COVID-19. Whilst the Court Reform Programme was established for this very purpose, the premature closure of multiple court buildings as part of the £1bn Modernisation Programme without appropriate evaluation and research into the impacts this might have on the wider justice system, and in the absence of well tested digital alternatives, has played a fundamental part of the government's current need to invest heavily in rebuilding and expanding new court facilities such as the Nightingale

Courts; demonstrating that timely and effective implementation of court reform really is in the best long-term interests of the public purse.

- 6.3. In the interests of taking this learning forward, CILEX strongly advocates that to ensure meaningful change, ongoing court reforms need to look at the court and tribunal estate as the eco-system that it is. Whilst there has been much provided by way of funding to enable new court buildings and technological capabilities, there is still a significant lack of discussion around the funding of essential legal aid and court services to help support people when accessing newly digitised court processes, and the need for additional resources to ensure effective and consistent implementation of these services across the court estate.
- 6.4. For example, CILEX has heard from practitioners that inconsistent implementation and adoption of remote hearing technology throughout the lockdown period has led to delay and confusion in case handling,³ and notably led to a significant increase in adjournments justified on the basis that cases require physical attendance for the proper administration of justice.
- 6.4.1. Whilst CILEX recognises the need for flexibility and case-by-case assessments in determining the suitability of remote hearings, there has been a distinct lack of clarity behind these decisions to adjourn. Evidence obtained from CILEX practitioners note that judges have been adopting different approaches in conducting hearings from court to court, despite standardised guidance released by senior judicial figures such as the President of the Family Division.
- 6.4.2. A primary concern within these inconsistencies is the suggestion that decisions for remote versus physical hearing attendance may have been largely motivated by wider considerations relating to judicial confidence in new technologies⁴; as opposed to what would be necessary in the best interests of justice. In fact, decisions not to conduct a remote hearing have often resulted in adjournments of up to 3 months; an outcome that is not always in the best interests of the parties given the added stress and pressure this creates (exacerbating tensions caused by COVID-19 for many people in their daily lives).⁵ Indeed, with ongoing problems around court backlogs and delay, many litigants are in desperate need of a timely resolution.
- 6.5. A lack of confidence in technology has also seen remote hearings create additional challenges for parties to the proceeding where technical support is not provided for by the courts. This is particularly noted in the case of family law proceedings where the ability to navigate sensitive electronic bundles and ensure that everybody involved in

³ Relevant member quote: "Some courts have been more specific than others in what is happening – fee earners are spending valued time trying to work out what is happening with their court rather than it being in one place. We are relying on emails from others rather than official sources."

⁴ One Specialist Adviser informed CILEX, that drawing from personal observations, it is more common to see adjournments take place amongst District Judges than High Court/ Circuit Judges. It was suggested that this may well be due to the extra clerk support that High Court/Circuit Judges have access to; helping to set up remote hearings and provide additional tech-support.

⁵ Another CILEX Specialist Adviser shared experiences of: "A Judge in a local court [who] simply adjourned a 2 day fact finding hearing (where a father ha[d] not seen his children, aged 4, for a year, for 3 months despite detailed representations from our counsel saying why it could be dealt with remotely. [The Judge] simply adjourned it for 3 months, so instead of the hearing taking place in the last week of April it is now listed for the second week in September, a delay of over 4 months. That [same] Judge, who had previously reserved the case to himself, has [since] released himself from the case and sent the 2-day fact finding hearing to a different court."

the proceeding can be seen (including CAFcASS advisers and social workers etc.) in real time, may require additional screens and support.

6.5.1. In such instances, family law practitioners and their clients have been left trying to resolve technology-related problems themselves (distracting their attention from the matter at hand) and creating wider concerns around the administration of justice.⁶

6.5.2. With particular regard to Public Family Law cases, additional barriers have further presented themselves where parties do not have the appropriate access to technology. As a result, some Local Authorities have faced extra costs in resourcing parties with the necessary equipment (such as smartphones) so that they may attend a court hearing.

6.6. These issues are exacerbated in the context of Litigants in Person (LiPs) who must rely on self-representation when seeking justice. As a direct result of LASPO, the legal sector in both the family and civil law jurisdictions had seen dramatic increases in the number of LiPs attending court, and this has very much continued throughout the COVID-19 outbreak. With this in mind CILEx is especially sensitive to the impacts that these parties have faced when interacting with remote hearings and seeking to access legal aid and advice services.

6.6.1. As demonstrated by both rapid-fire reviews into the family and criminal justice system,⁷ LiPs have been particularly vulnerable when engaging in remote hearings due to: a lack of understanding/familiarity with court proceedings; reduced availability of court staff to provide pre- and post-hearing explanations, and poor technological interactions and accessibility.

6.6.2. Even prior to the hearing stage, there are concerns raised around accessibility of help and advice services in the absence of legal aid support for professional representation. Increased traffic to government and advice sector webpages have demonstrated increased public demand for legal advice and information during this time. Whether LiPs are provided with this much-needed support prior to or during their hearings is uncertain; and there is a risk that this demand could drive greater reliance on untrained McKenzie Friends. Indeed, confidentiality risks have already been raised by CILEX practitioners in respect of remote hearings, whereby unknown parties may be presenting help and advice off-screen during proceedings. As a result, the nature and standard of any advice given may not be subject to the necessary scrutiny or safeguards.

6.7. Nonetheless, the underlying remedy to these acute risks facing LiPs is the ongoing need to enhance access and availability to legal aid services within the justice system. For example, with the ramifications of COVID-19 already seeing a rise in demand for legal services in specific areas of law such as employment law, it shall become increasingly important for greater access to legal aid provision for those seeking to resolve their employment dispute; especially as the need for employment advice and representation increases with furloughing measures coming to an end alongside economic downturn and mass redundancies. Against this backdrop, CILEX is yet to

⁶ Relevant member quote: *"Parties dealing with a hearing remotely are not going to focus on issues and of course we still have the technical difficulties to sort... I feel that the parties who are probably not "tech savvy" will have some difficulty in coping with E bundles and examination by counsel via screens and seeking/giving instructions to their counsel at the same time."*

⁷ Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: A Rapid Consultation*, (May 2020); Civil Justice Council, *The Impact of COVID-19 Measures on the Civil Justice System*, (May 2020).

understand the rationale that denies litigants from legal aid funding where cases are brought in one leg of the court estate (the Employment Tribunal) versus another (the County Court). Integral to this is that the courts and tribunals are, and are seen to be, accessible to those who need them.

- 6.7.1. This specific call for reform has particular significance with regard to employment claims given the Government's Employment Tribunal fees regime that was found to be illegal in the Supreme Court's judgment in *R (UNISON) v Lord Chancellor* [2017] UKSC 51. That fees regime will inevitably have lingering deleterious effects, and the government will wish to assure itself that the perception that the employment tribunal prices people out of justice is not putting people off bringing legitimate claims at this time of growing need.

For further details

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