



The Law Society

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Introduction

1. The Law Society ('the Society') is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.
2. The Law Society has focused its response on three areas: the protection of human rights in the United Kingdom, legal professional privilege and the Investigatory Powers Bill, and access to justice.

The protection of human rights in the United Kingdom

3. The Law Society believes that the human rights enshrined in the European Convention on Human Rights (the 'Convention') should continue to be protected in the United Kingdom. Whether and how those rights should continue to be protected is under political debate in the UK.
4. The UK government has a manifesto commitment to abolish the Human Rights Act 1998 (HRA) and replace it with a Bill of Rights (BoR).
5. The Law Society is greatly concerned by suggestions made by leading figures in the government during the campaigning on the recent referendum on the UK's membership of the EU that the UK should leave the Convention.
6. The UK's historic recognition of human rights and the rule of law is respected across the world. For many years the UK has recognised the need to protect human rights as a check upon arbitrary government.
7. It is the articles of the Convention that set out fundamental principles of human rights including the right to life, the right to free speech, and freedom from discrimination. Any attempt to remove or limit these fundamental principles should be strongly opposed.
8. This view is supported by the recent report of the UN Committee on Economic Social and Cultural Rights, which recommends that the UK should '*undertake a broad public consultation on its plan to repeal the Human Rights Act of 1998, as well as on the proposal for a new Bill of Rights. It also recommends that the State party take all necessary measures to ensure that any new legislation in this regard is aimed at enhancing the status of human rights, including economic, social and cultural rights in the domestic legal order, and provide effective protection of those rights across all jurisdictions of the State party*'.¹

Legal Professional Privilege and the Investigatory Powers Bill

9. The state's ability to override the confidentiality of lawyer-client communications is particularly important in human rights cases, where questions about the limits of the powers of the state and the protection of the individual citizen may be at stake.
10. The UK's surveillance legislation – the Regulation of Investigatory Powers Act 2000 (RIPA) - allows the intelligence and security services and the police to intercept material that is

¹ United Nations Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc, June 2016

subject to legal professional privilege (LPP). The Law Society has called for review and revision of this legislation for many years.

11. In November 2015 the Government introduced a Draft Investigatory Powers Bill to replace RIPA. The Draft Bill failed to protect LPP. The Law Society's evidence to the Joint Committee undertaking pre-legislative scrutiny of the Bill emphasised the importance of LPP and argued for protection of privileged communications. The Joint Committee accepted that there should be protection on the face of the Bill and recommended that the government work with the Law Society and others to ensure its adequacy. When the Bill was introduced to Parliament on 1 March 2016 it contained a provision on its face that LPP material could be targeted for interception only in exceptional and compelling circumstances. We welcomed this attempt to protect legal privilege but the fact that Parliament would be invited to pass legislation that would explicitly allow privileged material to be targeted was deeply disappointing and worrying.
12. In our evidence to the Commons Public Bill Committee we argued strongly that privileged communications between a lawyer and their client should never be targeted or intercepted by public authorities. This position is in line with the position of the Joint Committee on Human Rights (JCHR). The Commons Public Bill Committee recommended on 2 June 2016 that the power to target confidential communications between lawyers and clients be removed from the Bill because it was unnecessary, given that privilege does not arise if the purpose of the communication is the furtherance of a crime or fraud.
13. The Bill remains unchanged and has now completed its passage through the House of Commons without, in the Law Society's view, LPP being adequately protected. Alongside the Law Societies of Scotland and of Northern Ireland, the Bar Council, the Faculty of Advocates, the Bar of Northern Ireland, the Chartered Institute of Legal Executives, Liberty and Justice we have drafted a joint briefing which sets out our common concerns about lack of protection for LPP and how we think the Bill should be amended. This briefing informed Second Reading and Committee stage in the House of Lords and will, we hope, lead to amendments to protect LPP.

Access to Justice

14. A combination of legal aid cuts and exponential increases in court fees has served to increase the hurdles faced by citizens trying to defend their legal rights, including asserting their human rights.

Civil legal aid scope cuts

15. Access to justice has been curtailed by the civil legal aid scope cuts implemented in April 2013 under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). The government's primary objective in implementing the scope cuts was to reduce the £2 billion legal aid budget by around £450 million. This reduction severely restricts access to justice, especially for the disadvantaged and marginalised.
16. The UN Committee on Economic Social and Cultural Rights called up[on the UK Government to '*review the impact of the reforms to the legal aid system with a view to ensuring access to justice and the provision of free legal aid services, in particular for disadvantaged and marginalized individuals and groups*'²

² Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, June 2016

17. The Law Society's view is that the LASPO legal aid cuts have deprived many citizens of access to justice for legal issues that can have a profound impact on their lives.
18. These groups often include the most disadvantaged and vulnerable people in society who have effectively been deprived of their ability to protect their legal rights.

Family legal aid for victims of domestic abuse

19. During the debates around LASPO, Parliament was clear that victims of domestic abuse should have legal aid for family law matters. Yet research from Rights of Women showed that around 38% of the victims of domestic violence who contacted them were unable to produce one of the forms of evidence the Ministry of Justice ('MoJ') decided to require. We welcome the recent Court of Appeal judgement which found that the regulation setting out those evidential requirements was unlawful because it frustrated the statutory purpose of LASPO.³ To access legal aid a victim should not have to provide prescribed forms of evidence, any test should be open as to how the domestic violence is proved.
20. The MoJ have introduced interim regulations to comply with the Court of Appeal judgment and are working constructively with us in conducting a review to determine the content of the final regulations. We believe that the test for whether a person qualifies for legal aid in cases where there is evidence of domestic violence could be markedly improved, and the judgement complied with, by allowing lawyers to certify that the individual is, in their professional opinion, a victim of domestic violence.

Exceptional Case Funding

21. [Section 10 of LASPO](#) provides for exceptional case funding for categories of law no longer in scope for legal aid *where failure to provide legal aid would be in breach of, or create a risk of breaching an individual's Convention* (our emphasis) or other EU rights to provision of legal services. We remain concerned that the ECF scheme is still not fulfilling its stated aim of providing a safety net to protect the Convention rights of applicants.
22. During the Parliamentary debates on LASPO⁴, Section 10 was described as a 'safety net' and the government informed Parliament that Section 10 would generate 5000-7000 applications per annum of which 53%-74% would be granted.
23. The reality has been that the applications were far fewer than estimated and the percentage of grants miniscule. Although there has been an increase in the percentage of successful applications the overall number of applications is still far below the original estimate. The scheme has been heavily criticised in reports by the [Justice Select Committee](#) and [The National Audit Office](#).
24. The most recent LAA statistic on ECF can be found in tables 8.1 and 8.2 of the main statistical tables⁵:

³ [Rights of Women. R \(on the application of\) v The Lord Chancellor and Secretary of State for Justice \[2016\] EWCA Civ 91](#)

⁴ Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31106.htm>)

⁵ Legal aid statistics quarterly: January to March 2016 - Publications - GOV.UK (<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-january-to-march-2016>)

25. The figures in table 8.1 show that 1344 ECF applications were made in 2015-16. This represents a slight increase over the 1172 applications made in 2014-15 but they are only around 20% of the number of the estimated 5000-7,000 ECF applications predicted by the government prior to implementation of LASPO.
26. Table 8.2 shows the number of applications and grants per contract category. It should be noted that ECF for inquests existed prior to LASPO. With regard areas of law previously in scope, the largest number of applications and grants relate to family and immigration matters.
27. ECF applications are difficult and time consuming. Solicitors only receive payment if the application is successful. Given the poor success rates there is little incentive for solicitors to take on these cases, resulting in a low number of applications, and there are very few that are prepared to take the risk.
28. The Legal Aid Agency will accept applications from applicants in person but very few have been made and still fewer have been successful. As the highly technical criteria of breach or risk of breach of Convention or EU rights need to be established, these arguments require a level of specialist legal knowledge that very few lay applicants possess.
29. The ECF procedure has been subject to test case litigation. The case known as [Gudanaviciene](#) was the lead case in six judicial review applications that were granted in the High Court on the basis that the process required too high a threshold. The government appealed but the Court of Appeal agreed that the Director of Legal Aid Casework's Guidance was unlawful. We are currently waiting to find out whether there will be an application for permission to appeal to the Supreme Court.
30. As a result of the test case litigation the Director of Legal Aid Casework had to revise the guidance issued to LAA caseworkers, and the ECF application form was 'simplified' but not to the level that would make it accessible for lay applicants.

Increase in litigants in person

31. There is clear evidence emerging that the LASPO cuts have created an increase in litigants in person, particularly in relation to family law. These individuals are representing themselves, often in difficult family cases involving issues of care, contact, and children welfare, the outcome of which has a huge impact on the family life and future security.
32. Figures issued by Cafcass ⁶ for disputes involving children show that prior to the LASPO cuts, 60% of cases began with one represented party and 22% with both parties represented. In 18% of cases neither party was represented. Following the cuts, up to December 2013, 42% of cases started with neither party being represented, whilst only 4% of cases had both parties represented. The report also states that there has been a 27% increase in applications for contact and residence suggesting an increase in contested proceedings linked to the cuts. This could be a consequence of the decline in mediation which we refer to below.

⁶ Quoted in The Law Society Gazette 7 April 2014

33. A response to a Freedom of Information request to the MoJ shows the impact on the courts of the removal of legal aid in most private law family cases since April 2013.⁷ The number of unrepresented parties, either parents or grandparents, in child-related proceedings has increased year-on-year by a third, from 25,656 between April and December 2012, to 34,249 between April and December 2013.

34. The data also shows that of the parties attending court in November 2013, 3,941 were represented while 4,174 were unrepresented. In December 2013 there were 3,481 represented parties and 3,840 unrepresented.

35. We believe that the government needs to:

- Properly consider how vulnerable people e.g. children and victims of abuse are protected
- Reinstate legal aid for initial legal advice to facilitate dispute resolution in family proceedings.

Advice deserts

36. The Society has serious concerns about the growth of 'advice deserts' which are geographical areas where there is non-existent or insufficient availability of free advice provision in social welfare law. People on low incomes may not be able to afford to travel to other areas to obtain advice. Advice deserts arise because of closure of not for profit agencies due to funding cuts or withdrawal of private law firms from social welfare law because the work is not economically sustainable following the LASPO cuts.

37. There is evidence of advice deserts in housing law; recent data shows that almost one third of legal aid areas in England and Wales have only one legal aid housing provider and three areas have no provider at all. The average population of these areas is around 200,000 to 250,000. Our concern is that in the current environment the number of advice deserts is likely to increase. This is extremely problematic as it means that vulnerable individuals will be deprived of advice as to their existing rights, or as to enforcing those rights.

Increases in court and tribunal fees

38. In the last three years there have been significant increases in court and tribunal fees:

- Employment Tribunal fees were introduced and set at a high level.
- There have been substantial increases in civil and family court fees with further increases proposed
- Proposals for to increase Immigration Appeal Tribunal fees by around 500% are currently under consideration by the Government.

39. The introduction of Employment Tribunal fees has resulted in a 70% fall in applications to the Employment Tribunal⁸. The Ministry of Justice has conducted a review of the impact of the fees but publication of the report has so far been withheld. In the meantime the

⁷ Written evidence from the Family Justice Council (LAS 82), The operation of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9268.html>)

⁸ Employment Tribunal Fees, Parliamentary Briefing, House of Commons Library (www.parliament.uk/briefing-papers/SN07081.pdf)

government is proposing further substantial increases in civil court fees and Immigration Tribunal fees.

40. The Justice Select Committee's inquiry into courts and tribunals fees and charges was critical of the government's policy on fees and charges, especially in the employment tribunal where the regime of fees 'has had a significant adverse impact on access to justice for meritorious claims'⁹.
41. The Government believes that 'enhanced fees' should be introduced in the civil courts. This means that fees would be set at a level that is higher than the actual costs incurred by the Court Service in administering a case. In other words the Government is seeking to make a profit out of civil litigants. With regard to the Immigration Tribunal the Government is seeking to increase fees to the level of 'full costs recovery'.
42. We believe that the magnitude of the fee increases and proposed increases is such that many litigants have been and will be, priced out of justice. This is of particular concern where individuals are unable to challenge actions of large corporations or decisions of the state, for example in the Immigration Tribunal.
43. The Law Society believes that the principle of access to the courts for all must prevail against any moves to 'full costs recovery' or 'enhanced fees'. Access to the courts is a fundamental right in a democratic society.

⁹ House of Commons Justice Committee Courts and Tribunals Fees, Second Report of Session, 2016–17