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# LASPO: Balancing Access to Justice with Legal Austerity in Private Family Law

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**LASPO: BALANCING ACCESS TO  
JUSTICE WITH LEGAL AUSTERITY IN  
PRIVATE FAMILY LAW  
(Best Project)  
*Anna Parsons***

**Introduction**

This article investigates the impact of the recent reform to legal aid, as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO/the Act), which has now been in force since 1<sup>st</sup> April 2013. Whilst it is noteworthy that LASPO has had widespread effects on civil and criminal law across the board, the focal point here will be on private family law.

The Act radically curtailed eligibility for legal aid ‘from most civil law areas’,<sup>1</sup> which prompted Nicholas Lavender, chair of the Bar, to comment that ‘these changes pose a significant threat to effective access to justice for some of the most vulnerable members of society’.<sup>2</sup> This article will provide evidence to substantiate this claim, and demonstrate how the Government were imprudent when drafting this Bill.

Prior to the implementation of LASPO, the Government pinpointed four main grounds for legal aid reform, which were:

to discourage unnecessary and adversarial litigation at public expense; to target legal aid to those who need it most; to make substantial savings to the cost of the scheme; and to deliver better value for money for the taxpayer.<sup>3</sup>

This article demonstrates how the Government has been unsuccessful in achieving all four of these objectives, which has resulted in the scales of justice being tipped significantly out of balance. It will be argued that the recent cuts to legal aid have

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<sup>1</sup> ‘LASPO Savaged by Justice Committee’, (2015) 165 *New Law Journal* 7645 at p.4.

<sup>2</sup> Miller, J., ‘LASPO Leaves a Legacy of Delays’, (2014) 164 *New Law Journal* at p.4 .

<sup>3</sup> Ministry of Justice, *Reform of Legal Aid in England & Wales: The Government Response*, (2011) at p.4.

impaired the right to gain fair access to justice in the family courts, as in many cases the only option of justice is to 'do it yourself'.

## **1 The Need for Reform and the Introduction of LASPO**

Following the Second World War, legal aid was established to give individuals access to legal advice and representation, allowing for a fair and principled scheme of justice. Recommendations from the Rushcliffe Report in 1945 initiated the implementation of the Legal Aid and Legal Aid Advice Act 1949, where 80% of the population would be eligible under this scheme.<sup>4</sup> This Act was the first statutory intervention governing legal aid, and since then, a number of reforms and recommendations have been made to meet the needs of an ever-evolving society. The enactment of the Legal Aid Act 1988 saw the first big change in legal funding since its creation, and established the Legal Aid Board, giving them sole responsibility in administering funding. However, following a change in Government in 1997, the Access to Justice Act 1999 was passed, which abolished the previous system and replaced it with a non-departmental public body of the Ministry of Justice (MOJ), the Legal Services Commission (LSC).

Shortly after the passing of the 1999 Act, the Government recognised the difficulties in the current system, and in 2005 they published a consultation paper, *A Fairer Deal for Legal Aid*.<sup>5</sup> This paper identified the direct relationship between the expansion in legal aid and the dramatic increase of legal practitioners. During the time frame of 2001-2011, the number of solicitors holding a practising certificate grew by 12,400<sup>6</sup>, which indicated that the increasing legal aid workload and the exponential growth of practitioners could not be balanced.

It became apparent that the budget for legal aid was becoming uncontrollable, with an annual bill of £2 billion each year,<sup>7</sup> it was described as 'one of the fastest growing parts of the public sector over the past 25 years'.<sup>8</sup> Consequently, it was undeniable that reform was needed to help protect the public purse. In May 2010 the coalition

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<sup>4</sup> Robins, J., 'Government Losing Argument Over Legal Aid', Legal Voice, July 2014, <http://www.legalvoice.org.uk/2014/07/30/government-losing-argument-over-legal-aid/> (accessed 22/02/15)

<sup>5</sup> Department for Constitutional Affairs, *A Fairer Deal for Legal Aid*, (2005) at para.2.11.

<sup>6</sup> The Law Society, *Trends in the Solicitors' Profession Annual Statistical Report 2011*, (2012), and The Law Society, *Trends in the Solicitors' Profession Annual Statistical Report 2001*, (2002)

<sup>7</sup> Ministry of Justice, *Transforming Legal Aid: Delivering A More Credible and Efficient System*, CP14/2013.

<sup>8</sup> Slapper, G., and Kelly, D., *The English Legal System*, 15<sup>th</sup> Edition, 2014/15, at p.719.

Government recognised the necessity for reform<sup>9</sup>, and initiated a review of the legal aid system.<sup>10</sup> Reforms were introduced, and on 1<sup>st</sup> April 2013, legal aid was transformed with the implementation of LASPO. This Act drastically reduced eligibility for financial support, abolished the LSC, and created the Legal Aid Agency (LAA), which operates as an executive body of the MOJ. The rationale for eradicating the LSC was to enhance ministerial accountability, by transferring power of administering legal aid to the Lord Chancellor, with the intention of curbing the ever-increasing legal aid budget, which the LSC had failed to manage.

As well as altering the structure and administration of legal aid, LASPO severely curtailed the eligibility scheme, making it far more challenging to qualify for funding, which has consequently left 'a gloomy picture of delays in the family and civil courts'.<sup>11</sup> The motivation for this was to save £220 million by 2018/19,<sup>12</sup> with the Government arguing that this would 'boost public confidence'<sup>13</sup> in the legal aid system.

Whilst the main objective of LASPO was to drastically cut the ever-increasing legal aid budget, the changes were also intended to encourage alternative dispute resolution, in order to avoid the courts' interference. Practice Direction 3A of the Family Procedure Rules 2010 sets out an obligatory pre-action protocol for mediation information and assessment ('MIAM'). The MOJ explains that 'family mediation allows a neutral mediator to help parties reach a mutually acceptable compromise'.<sup>14</sup> Settling a dispute before the matter reaches the courts allows for a quicker, cheaper and more flexible system, as opposed to drawn-out litigation. However, as Gibson observes, an unintended consequence contrary to Government intentions, is that LASPO has resulted in publicly funded mediation falling by a third.<sup>15</sup> Even where mediation has been opted for, the agreement made by both parties is not always adhered to, meaning that parties have to seek legal redress through the courts.

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<sup>9</sup> Cabinet Office, *The Coalition: Our Programme for Government*, (2010) at p.23.

<sup>10</sup> Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, (CP12/2010).

<sup>11</sup> Miller, *LASPO Leaves a Legacy of Delays*, 4(1).

<sup>12</sup> House of Lords Library Note, 'Debate on 11 July: Effect of Cuts in Legal Aid Funding on the Justice System', 5<sup>th</sup> July 2013 at p.2 .

<sup>13</sup> Ministry of Justice, *Transforming Legal Aid: Delivering A More Credible and Efficient System*, (CP14/2013) at p.3 .

<sup>14</sup> Ministry of Justice, *Legal Aid Statistics in England and Wales*, (2013-2014), at p.21.

<sup>15</sup> Gibson, K., 'What Lies Ahead?', (2014), 164 *New Law Journal* 7623 at p.12.

The unforeseen decline in the number of mediation assessments can be partly explained by the lack of referrals from solicitors to this channel of resolution. Following the cuts to legal aid, the involvement of publicly funded solicitors in private family law matters is scarce. In practice, this means that litigants are not able to access the appropriate advice on mediation, as they are less likely to be signposted to it by legal professionals. Sir James Munby, President of the Family Division, recognised that 'there is a desperate lack of information available to those coming into the system',<sup>16</sup> due to the loss of a publicly funded referral scheme through solicitors. Marc Lopatin<sup>17</sup> articulated that, 'the MOJ's hopes that family mediation would boom once legal aid lawyers were frozen out of the picture, are being dashed'.<sup>18</sup> Despite the Government fuelling an extra £10m into mediation services, centers are still being forced to shut,<sup>19</sup> due to the aforementioned shortcomings.

With swingeing cuts in legal aid, and since alternative dispute resolution is not always the most appropriate or effective means of resolving disputes, many people are now obliged to represent themselves as a litigant in person (LiP). Statistics released by Children and Family Court Advisory and Support Service (CafCass) demonstrate the dramatic impact of LASPO, where only 4% of cases involving both parties were legally represented by December 2013.<sup>20</sup> Comparatively, prior to legal aid reform, there were 22%<sup>21</sup> of cases where both parties were assisted by legal representation, illustrating a significant disparity since LASPO.

Whilst many criticise the adverse effects of LASPO, arguing that they have 'thrown family proceedings into chaos', the Government remains outwardly confident that reform has 'resulted in a quicker, cheaper and less stressful system'.<sup>22</sup> In a 2013 consultation paper, the Government asserts that 'LASPO reforms have done much to ensure that taxpayer funding is targeted at those who need it most and for the most

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<sup>16</sup> House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (2014-2015), at para.142.

<sup>17</sup> The founder of Lawyer-Supported Mediation.

<sup>18</sup> Bowcott, O., 'Mediation Services hit by legal aid cuts, Ministry of Justice figures reveal', *The Guardian*, September 2013, <http://www.theguardian.com/law/2013/sep/30/mediation-services-legal-aid> (accessed 19/02/15)

<sup>19</sup> *Ibid.*

<sup>20</sup> Robins, J., 'Family Courts Face New Generation of Litigants in Person Post LASPO', *Legal Voice*, April 2014, <http://www.legalvoice.org.uk/2014/04/04/family-courts-face-new-generation-of-litigants-in-person-post-laspo/> (accessed 23/02/15)

<sup>21</sup> *Ibid.*

<sup>22</sup> Beatson, K., et al., 'Family Law in Crisis: Pt II', (2014), 164 *New Law Journal* 11 at p.11.

serious cases',<sup>23</sup> demonstrating their faith in the new system. Conversely, the Bar Council, in a report published one year on from LASPO, identifies that the radical changes to civil legal aid has not only denied 'access to justice for vulnerable individuals without other avenues to resolve their legal issues', but also 'increases pressure on already-stretched court and judicial resources due to a predicted increase in litigants in person'.<sup>24</sup>

## **2 Access To Justice Denied?**

The radical change to legal aid has created an obstacle to an individual's right to fair access of justice. There are now over 5,000 people a month who are being denied legal aid, who would have previously qualified under the former system.<sup>25</sup> Such worrying statistics emphasise the shortcomings of LASPO, and how it is failing to provide adequate justice for an overwhelming proportion of society. The Legal Action Group<sup>26</sup> asserts that the reforms are the 'most devastating attack on access to justice policy since the founding of the civil legal aid scheme over 60 years ago'.<sup>27</sup> Such concerns are shared by members of the Judiciary, with Lord Neuberger expressing that where legal aid is being so ruthlessly denied, it 'will undermine the rule of law because people will feel like the Government isn't giving them access to justice'.<sup>28</sup>

### ***Litigants in Person***

Lord Dyson has advised Members of Parliament that the effect of LASPO has increased LiPs, which has resulted in miscarriages of justice.<sup>29</sup> LiPs are defined as those who appear unrepresented in court by a legal professional.<sup>30</sup> The expansion of LiPs in the family court is 'one of the most widely-publicised impacts of the LASPO reforms'.<sup>31</sup>

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<sup>23</sup> Ministry of Justice, *Transforming Legal Aid: Delivering A More Credible and Efficient System*, (CP14/2013) at para.2.5.

<sup>24</sup> The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On*, (2014) at para. 37

<sup>25</sup> Lavender, N., 'Achieving Excellence', (2014) 164 *New Law Journal* 18 at p.18

<sup>26</sup> An independent charity that promotes equal access to justice

<sup>27</sup> Legal Action Group, 'Picking Up The Pieces', (April. 2013), <http://www.lag.org.uk/magazine/2013/04/picking-up-the-pieces.aspx> (accessed 04/03/15)

<sup>28</sup> See Lord Neuberger's interview with Clive Coleman: Lord Neuberger, UK's Most Senior Judge, Voices Legal Aid Fears, *BBC News*, 5 March 2013.

<sup>29</sup> Hydge, J., 'Dyson: Miscarriages of Justice Likely Since LASPO', *The Law Society Gazette*, 1<sup>st</sup> December 2014, <http://www.lawgazette.co.uk/law/dyson-miscarriages-of-justice-likely-since-laspo/5045450.fullarticle> (accessed 04/03/15).

<sup>30</sup> Ministry of Justice, *Litigants in Person: A Literature Review*, (2011) at p.3 .

<sup>31</sup> The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On*, (2014), at para.67.

With the availability of legal aid now more limited since its establishment in 1949, it is not surprising that those who do not fall within the fine ambit of the new system have decided to take their case into their own hands. In 2013/14 the family courts were faced with 19,140 more unrepresented parents than the previous year.<sup>32</sup> This illustrates a huge discrepancy in Government intentions to encourage mediation, and discourage the use of the courts' intervention for private family disputes.

Sir James Munby in *Q v Q; Re B (A child); Re C (a Child)* asserted that 'the absence of assistance in the court room by a professional advocate causes obvious problems'.<sup>33</sup> It is inevitable that LiPs will struggle to effectively present their case to the court without knowledge of the complex proceedings behind the legal system. A report published by the MOJ focusing on the experiences of LiPs, found that 'even those with high levels of education and professional experience struggled with aspects of the legal process'.<sup>34</sup> Moreover, Lord Woolf identifies that 'only too often the litigant in person is regarded as a problem for judges...the true problem is the court system and its procedures which are still too often inaccessible and incomprehensible'.<sup>35</sup> It is therefore evident that with the upsurge of LiPs, more needs to be done to assist a litigant who is shouldering the legal process alone. Education through media, such as (*inter alia*) websites, leaflets and practise directions, all designed to assist a LiP, and written to their level of competence, are all likely to hugely benefit.

The archaic language used within the family court could also be adapted to take into account the perspective of a LiP. In order to deliver a fair trial, the challenge for judges is to avoid labelling LiPs as an encumbrance to the process, and instead, cooperate with them effectively by assisting them through the complex proceedings with support, whilst allowing them to retain dignity. The nature of the legal system is dynamic; laws are continually changing to meet the needs of a modern society, and it is therefore submitted that the legal profession should be capable of delivering a system with which the general public can cope with.

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<sup>32</sup> Dugan, E., 'Cuts to Legal Aid Force Parents to Defend Themselves in Family Court Cases', *The Independent*, July 2014, <http://www.independent.co.uk/news/uk/politics/cuts-to-legal-aid-force-parents-to-defend-themselves-in-family-court-cases-9608175.html> (accessed 04/03/15)

<sup>33</sup> *Q v Q; Re B (A child); Re C (A child)* [2014] EWFC 31 per Sir James Munby at para.65.

<sup>34</sup> Ministry of Justice, *Litigants in Person in Private Family Law Cases*, 2014, p.34.

<sup>35</sup> Lord Woolf, *Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System in England & Wales*, (1995), p.119.

### ***Rich v Poor***

The Bar Council Chair also recognises how LASPO has hindered access to justice, and asserts that ‘individuals with life changing legal issues are denied fair access to justice if they cannot afford it’.<sup>36</sup> The Shadow Justice Minister, Sadiq Khan rejects the merits of LASPO and suggests that the ‘Government’s actions are seeing access to justice becoming the preserve of the rich’.<sup>37</sup> In light of this statement, it is indicative that the extensive changes to legal aid have created an imbalance between the rich and poor, undermining the principle that ‘everyone is equal before the law regardless of social, economic or political status’.<sup>38</sup> Access to justice should *always* be underpinned by fairness. Those who neither fit the restricted criteria for funding, nor can afford to pay legal fees are left unaccompanied to face the daunting legal system alone, as well as having to deal with the emotional distress of the family dispute. These are people who have fallen through the ‘security net’ of the legal system, and are provided with little or no hope of accessing justice, as the Government has made futile attempts to safeguard them. These discriminatory and ethically questionable consequences have borne much criticism to the system for ‘hanging the most vulnerable out to dry’.<sup>39</sup> Concern remains that there is an ‘uneven playing field’<sup>40</sup> between those who are self-represented, and those more wealthy parties who can afford representation and expert evidence. This has triggered the question of whether access to justice is now determined by one’s bank balance?

### ***Human Rights and Exceptional Case Funding (ECF)***

The Government were undoubtedly prudent not to refuse *all* cases of funding where such refusals would jeopardise the UK’s obligations under the European Convention on Human Rights (ECHR). If an individual is unable to meet the cost of legal representation then this may undermine their protection provided by Article 6 which provides the right to a fair trial. Not only are Article 6 rights jeopardised, but applicants may also rely on their right to respect for private and family life, as guaranteed by Article 8 ECHR. *Airey v Ireland*<sup>41</sup> and *P, C and S v United Kingdom*.<sup>42</sup>

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<sup>36</sup> Miller, ‘Access to Justice Worse Than 1949’, p.4.

<sup>37</sup> Dugan, ‘Cuts to Legal Aid’.

<sup>38</sup> Dicey, AV., *Introduction to the Study of the Law of the Constitution*, (1885), at p.39.

<sup>39</sup> Waddington, B., ‘The Proposed Legal Aid Cuts Are a Threat to Britain’s Entire Justice System’, *The Guardian*, September 2014, <http://www.theguardian.com/commentisfree/2014/sep/26/legal-aid-cuts-britains-justice-system-legal-profession-reforms-fairness> (assessed 16/03/15)

<sup>40</sup> Law Careers, ‘Legal Aid: The Consequences of LASPO and The Implications of the Latest Proposed Cuts’, <http://www.lawcareers.net/Information/Features/09122014-Legal-aid-the-consequences-of-LASPO-and-the-implications-of-the-latest> (accessed 23/03/15)

<sup>41</sup> *Airey v Ireland* [1979] EHR 305.



established that in certain circumstances, where family legal proceedings are inaccessible, it constitutes a breach of Article 8. Moreover, Article 47 of the European Charter of Fundamental Rights provides that 'legal aid shall be made available to those who lack sufficient resources'. The Government must therefore be circumspect in ensuring that they uphold individual human rights in every case where legal aid is refused, so that their actions comply with the ECHR. In recognising Convention obligations and avoiding liabilities of non-compliance with European jurisprudence, the Government set up the 'exceptional case funding' (ECF) system to provide protection for cases which fall outside the ambit of legal funding. An ECF application can be made to the LAA under s.10 LASPO.

The Lord Chancellor's *Exceptional Funding Guidance (non-inquests)* (the guidance) states that section 10(3) LASPO enables civil legal aid to be

refocused...on the highest priority cases' to permit compliance with ECHR and EU obligations. However, the guidance heavily emphasises the rare nature of ECF, and how it will *only* be granted in extraordinary cases where it would be undeniable that refusal to provide legal funding would amount to a breach of Convention Rights. When the LAA apply paragraph 7 of the guidance, they are restrained from granting ECF 'simply because a risk (however small) exists of a breach of the relevant rights.'<sup>43</sup>

Although ECF does provide limited protection for those who fail to bring their case within Schedule 1 Part 1 of LASPO, statistics taken from 2013-2014 highlighted the harsh realities of ECF. Prior to LASPO being implemented, the MOJ anticipated 5,000-7,000 applications for ECF, with the majority of these being granted.<sup>44</sup> However, statistics from April 2013 to March 2014 emphasise the inherent flaws in the ECF scheme, as only 1,519 applications were made, with a mere 57 being successful.<sup>45</sup> In relation to family law specifically, between April and December 2014, 821 applications to ECF were made, and a dismal 9 were successful.<sup>46</sup> This represents a clear miscalculation by the MOJ in the expectancy of applications and success rates. The data has influenced the Joint Committee on Human Rights to conclude that 'the Government cannot rely upon the scheme...in order to avoid

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<sup>42</sup> *P, C and S v United Kingdom* [2002] 35 EHRR 31.

<sup>43</sup> The Lord Chancellor's *Exceptional Funding Guidance (non-inquests)*, at para.7.

<sup>44</sup> House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (2014-2015) at para.31.

<sup>45</sup> Ministry of Justice, *Ad hoc Statistical Release Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April 2013 to 31 March 2014*, (2014) at p.1.

<sup>46</sup> *Ibid* at p.27.

breaches of access to justice rights'.<sup>47</sup> Moreover, the Chair of the Bar Council has expressed that 'the safety net the Government created for...'exceptional cases' is not fit for purpose'.<sup>48</sup>

Whilst opinions differ as to whether the ECF scheme is operating as intended, the Minister of State, Lord Faulks, remains confident that the 'system is working in accordance with the sections' and that the Government acknowledge that ECF is 'working effectively'.<sup>49</sup> Conversely, such underwhelming statistics represent dissatisfaction in the ECF system by many academics and legal professionals. Sir James Munby, in *Q v Q*, submitted that 'it might be thought that the scheme is inadequate, for the proper demand is surely at a level very significantly greater than...9 cases a year'.<sup>50</sup>

One explanation suggested by a Legal Action Group Report advocates that the limited number of applications for ECF could be explained by, 'a combination of the Government's failure to sufficiently advertise what civil legal aid is available, and...that solicitors are not reimbursed for making these very time consuming applications'.<sup>51</sup> With such a disappointing success rate for ECF, it is hardly surprising that solicitors are cautious about acting on behalf of their clients to complete these complex applications, where there is considerable risk that the work will be unremunerated. Furthermore, the LAA have provided no assistance to LiPs who are completing this intricate application unaided, making it practically impossible for them to submit the form correctly before their case is even considered.

Alternatively, the lower than anticipated number of successful ECF cases may owe its failure to the unduly high threshold for breaching ECHR rights, giving the LAA greater margin to withhold ECF where there is only a small risk of breaching rights. The Guidance will only offer financial support under s.10 LASPO in cases where the risk of breaching EU or Convention rights is 'so substantial'<sup>52</sup> that it would be inappropriate to deny funding. When applying this rigorous threshold, the LAA are left extremely confined in their power to grant ECF applications.

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<sup>47</sup> Joint Committee on Human Rights, *The implications for Access to Justice of the Government's Proposals to Reform Legal Aid*, (2013) pp.4-5.

<sup>48</sup> Miller, 'Access to Justice Worse Than 1949', p.4.

<sup>49</sup> HL Deb, Vol 752, col 529. 11<sup>th</sup> February 2014.

<sup>50</sup> Sir James Munby in *Q v Q; Re B (A child); Re C (A child)* [2014] EWFC 31 at para.14.

<sup>51</sup> Legal Action Group, *Civil Legal Aid – the Secret Legal Service?*, (2013) at p.4.

<sup>52</sup> The Lord Chancellor's *Exceptional Funding Guidance (non-inquests)*, at para.7.

Coulson J in *M v Director of Legal Aid Casework & Others*<sup>53</sup> approved the 'so substantial' test set by the Lord Chancellor, and rejected the criticism for setting the bar too high, submitted by Paul Bowen QC. Alternatively, Coulson J articulated that the 'so substantial' reference 'broadly chimes with the interpretation of Section 10(3)(b)<sup>54</sup>, and refused to conclude that this test was unlawful.

Contrastingly, the recent immigration case of *Gudanaviciene & Others v Director of Legal Aid Casework & Another*<sup>55</sup> rejects the lawfulness of the guidance and recognises the merits of Bowen's QC submission in *M v Director*. *Gudanaviciene* challenged the legitimacy of ECF, and may have an impact on how the ECF scheme should function. Six claims were heard together, and all were refused ECF under s.10 LASPO. Consequently, the decision by the Director of the LAA was challenged. The Lord Chancellor's guidance enunciated that caseworkers are faced with the pivotal question of whether refusing legal funding would 'make the assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings'.<sup>56</sup> However, Justice Collins determined that this aspect of the guidance was 'unlawful' as it 'produces unfairness', and the threshold for breaching the ECHR is too high.<sup>57</sup> Steve Haynes, director of Legal Action Group welcomes the decision in *Gudanaviciene*; 'the ruling indicates that the exceptional funding scheme is not providing the human rights safety net that Parliament was led to believe it would'.<sup>58</sup>

Despite this case being very recent its long terms effects are yet to be seen, the decision is immensely important for those applying for ECF in the future. As Baksi writes, 'the ground breaking decision will be seen by many as a blow to the Government's flagship LASPO legislation'.<sup>59</sup> Although the Ministry of Justice are appealing the decision, the ramifications of this case are likely to increase the success rate for exceptional funding, resulting in more confidence in the system.

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<sup>53</sup> *M v Director of Legal Aid Casework & Others* [2014] EWHC 1354.

<sup>54</sup> *Ibid.* Coulson J at para.75.

<sup>55</sup> *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840.

<sup>56</sup> The Lord Chancellor's *Exceptional Funding Guidance (non-inquests)*, at para.18.

<sup>57</sup> *Ibid.* at para.51.

<sup>58</sup> Legal Action Group, 'Judicial Review Success for LASPO s.10 Cases', (July 14), <http://www.lag.org.uk/magazine/2014/07/judicial-review-success-for-laspo-s10-cases.aspx> (accessed 23/02/15)

<sup>59</sup> Baksi, C., 'Legal Aid Guidance Unlawful, High Court Rules', *The Law Society Gazette*, 13 June 2013, <http://www.lawgazette.co.uk/law/legal-aid-guidance-unlawful-high-court-rules/5041681.fullarticle> (accessed 26/03/15)

### **Domestic Violence**

Whilst LASPO has abolished legal aid for most private family law proceedings, paragraphs 12 and 13, Part 1 of Schedule 1 LASPO act as an exception, and allow public funding for those suffering from domestic abuse. LASPO defines domestic violence as ‘any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other’.<sup>60</sup>

Despite the Government’s intention to provide protection for some of the most vulnerable members of society by helping them ‘break free from the abusive relationship’,<sup>61</sup> the Ministry of Justice have put an onerous obstacle in the way of victims gaining access to justice. Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 (the regulation) prescribes that a victim must provide evidence of domestic abuse in order for their application to be successful. This evidence must be obtained prior to the determination of legal aid, meaning that funding will not be available to cover the costs of gathering such evidence.

The evidential requirements set out in Regulation 33 has attracted much criticism from Rights of Women<sup>62</sup> for being *ultra vires*, as it has arguably undermined the protection for domestic violence victims that the Government intended. A year after the implementation of the legal aid reforms, Rights of Women published a report which found that ‘43% of women....[who] had experienced or were experiencing domestic violence did not have the prescribed forms of evidence’.<sup>63</sup> Jenny Beck, from the Legal Practitioners Group, asserted that ‘it is...almost impossible for many people in crisis to obtain legal advice because of unnecessary bureaucratic hurdles’.<sup>64</sup> In light of this, it is apparent that the evidential requirements are too restrictive and are prohibiting domestic violence sufferers from accessing justice at a time when they undoubtedly need it most. These 43% of women face the dangerous prospect of having little choice other than to remain in abusive relationships. Emma Scott, Director of Rights of Women supports this, and claims that, ‘there are women who tell

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<sup>60</sup> Section 12(9), Part 1 of Schedule 1 Legal Aid, Sentencing and Punishment of Offenders Act 2013.

<sup>61</sup> Baksi, C., ‘Bid To Save Legal Aid for Domestic Violence Victims’, *The Law Gazette*, 19<sup>th</sup> September 2014, <http://www.lawgazette.co.uk/law/bid-to-save-legal-aid-for-domestic-violence-victims/5041609.fullarticle> (assessed 7/03/15).

<sup>62</sup> Rights of Women are a charity striving to achieve equality and justice for women.

<sup>63</sup> Rights of Women, *Evidencing Domestic Violence: One Year On*, (2014) at p.1.

<sup>64</sup> ‘LASPO Savaged by Justice Committee’, (2015) 165 *New Law Journal* 7645 at p.4.

us that without legal aid they are staying in abusive relationships'.<sup>65</sup> Furthermore, victims of psychological or emotional abuse will find it almost impossible to access documentary proof of their harm and are left with two options; fund the extensive legal fees themselves, or remain in a relationship where they risk further abuse, and in extreme cases even death.

Not only do evidential requirements hinder domestic violence victims from accessing funding, there is also an additional requirement that the evidence is brought within a 24 month period. This further constraint demonstrates limited understanding of the long term and often low level nature of domestic violence, where conduct over many years damages self-confidence and self-esteem. Is it really necessary to enforce this arbitrary time limit if there is a real risk that the victim faces future abuse from the perpetrator?

The inflexible requirements to provide evidence of domestic violence has nullified the rationale for preserving legal aid to these victims, as the hurdles they have to surmount are over burdensome. Rights of Women propose two fundamental recommendations, with the aim that these amendments will garner more confidence in this flawed system. They suggest that the evidential criteria 'must be extended to include other forms of evidence' and that 'training, guidance and awareness must be improved'.<sup>66</sup> Rights of Women are satisfied that these proposals support the intentions of Government, which were to safeguard victims of domestic abuse by providing them with access to legal funding, and to help them escape threatening relationships. Whether the Government will take these recommendations seriously is yet to be seen, but something needs to be done to 'better reflect the range of routes that women take to safety and the kind of evidence they might have'.<sup>67</sup>

With the above arguments relating to the erosion of access to justice, it is hardly surprising that the passage of this Bill through Parliament was tenuous. In times of austerity, and with the legal aid budget in this country being the most expensive in the world,<sup>68</sup> it is indisputable that the Government had to act in some way to reduce costs. The need for legal austerity has compromised the UK's ability to comply with

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<sup>65</sup> O'Hara, M., 'Women will die' As Legal Aid Becomes More Difficult For Victims of Domestic Abuse to get', *The Guardian*, 10 September 2014, <http://www.theguardian.com/society/2014/sep/10/women-die-legal-aid-rules-domestic-violence-victims> (assessed 24/03/15)

<sup>66</sup> Rights of Women, *Evidencing Domestic Violence: One Year On*, 2014, p.1.

<sup>67</sup> *Ibid.*

<sup>68</sup> Robins, J., 'The State of the Nation', (2014), 164 *New Law Journal* 7629 at p.7.

Articles 6 and 8 ECHR, which could potentially jeopardise our membership of the European Union. If the law relating to legal aid is to be redressed, Parliament will undoubtedly have a difficult job in harmonising the law in this area, striking a fair balance between access to justice and preserving budget.

### **3 Knock-On Expense**

As we approach almost two years since the sweeping changes to legal aid, the knock-on effects of the reform are beginning to emerge. One of the most influential purposes of LASPO was to make savings of £220 million per year.<sup>69</sup> However, evidence suggests that the savings made by LASPO have simply transferred expense to other public sectors, by increasing the burdens placed upon them.

The Court Service has been overwhelmed by the influx of LiPs since LASPO's implementation, who are 'clogging the courts and creating additional costs to the tax payer'.<sup>70</sup> LiPs inexperience in court has led to increased delays, putting additional strain on its already stretched-out resources. The Judiciary and others employed by HMCTS are now expected to go over and above their role in order to facilitate the journey of LiPs through proceedings by elucidating the process. However, judges must remain cautious to strike a fair balance between assisting LiPs, without appearing to show any bias, which may often be a fine line to determine.

A report conducted by Kings College London prior to the introduction of LASPO, predicted that a backlogged court system will 'generate longer waiting lists for hearing dates and a higher prospect of hearings being adjourned due to over-running cases'.<sup>71</sup> Since LASPO, the delays in family court proceedings have not gone unnoticed, as the Bar Council has reported an 80.23% rise in delays.<sup>72</sup> Knock-on effects like this will not only pose practical difficulties for the Court Service, but also have a pernicious impact upon families whose disputes can only be resolved through judicial intervention. Sadiq Khan<sup>73</sup> argues that 'the Government were warned three years ago that their cuts to legal aid would lead to chaos in the courts'.<sup>74</sup> If the

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<sup>69</sup> Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System*, (2013), at para.1.3.

<sup>70</sup> Miller, J., 'Access to Justice Worse Than 1949', (2014), 164 *New Law Journal* at p.4 (1)

<sup>71</sup> Kings College London, *Unintended Consequences: The Cost of the Government's Legal Aid Reforms*, (2011), at para.5.6.12.

<sup>72</sup> The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On*, (2014) at para.71.

<sup>73</sup> Shadow Justice Minister

<sup>74</sup> Dugan, 'Cuts to Legal Aid.

number of LiPs in the family court continues to inflate, it may become disproportionate to the capacity and resources the court has available.

As well as the Court Service, the future sustainability of the profit sector has also been threatened by the radical reform of legal aid, leaving family practitioners 'very demoralised'.<sup>75</sup> The cuts have resulted in a dramatic decrease in workload for legal professionals, as eligibility for public funding now represents an obstruction to legal advice and representation. The rise in LiPs means that there is far less demand for solicitors who specialise in the legal aid sector. Miller recognises the importance of a solicitor's role within legal proceedings, and claims that 'solicitors are the oil in the system...when you take the oil out, the system grinds to a messy halt'.<sup>76</sup> This pragmatic metaphor is arguably an accurate observation of what seems to be the reality in the court since LASPO. Solicitors are specially trained, and represent the backbone of litigation; their knowledge and competence in the court allows proceedings to operate efficiently.

The savage cuts to legal aid have been vigorously opposed by law firms specialising in this sector as their business is now jeopardised with the move away from public funding. If practices have any chance of survival they must make a swift commercial decision between downsizing, or abolishing departments reliant on legal aid, or re-focusing their work on the privately funded sector. The number of civil legal aid certificates has dropped by over 42,000 since 2012/13,<sup>77</sup> illustrating that professionals are seriously reevaluating their future within this ill-fated sector.

Legal aid reform is also putting huge pressure on the non-profit sector, as solicitors are referring clients who do not qualify under the rigorous eligibility scheme to these services. The Pro Bono community is 'at the heart of the legal profession'<sup>78</sup> and provides protection for people who require legal assistance but are unable to fund it.

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<sup>75</sup> Commons Select Committee, *8<sup>th</sup> Report – Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (2015) at para.75

<sup>76</sup> See: Robins, J., 'Time to Move On?, Is it Really Possible to Move on From LASPO Debate?' (2012) 162 *New Law Journal* at p.1359.

<sup>77</sup> Equality and Human Rights Commission, *Response of the Equality and Human Rights Commission to the Consultation*, (2014) at para.18.

<sup>78</sup> 'Pro Bono at Heart of Legal Profession as 12<sup>th</sup> National Pro Bono Week Begins', *The Law Society*, 4 November 2014, <http://www.lawsociety.org.uk/news/press-releases/12th-national-pro-bono-week-begins/> (accessed 29/03/15)

At a time of limited resources, the high demand for pro bono services is becoming disproportionate to what they can provide. Nine law centres have closed<sup>79</sup> since the implementation of LASPO, as legal aid cuts and lack of support from Local Authorities has meant they do not have the means to operate. Similarly to the Court Service, the pro bono community are also being backlogged by the influx of desperate people seeking their assistance. The Law Centres Network, which provided 120,000 people with free legal assistance last year, characterised the impact of LASPO as 'profoundly destabilising'.<sup>80</sup> Moreover, the Bar Council reported a 50% rise in applications to the Bar Pro Bono Unit between April 2013 and March 2014.<sup>81</sup> It is therefore apparent that the non-profit sector cannot operate as an adequate substitute for the cuts in legal aid, which has resulted in unmet need.

Whilst the long term impact of LASPO is yet to be seen, the Court Service, pro bono organisations and the legal profession have borne the brunt of these erratic reforms. The widespread cuts to legal aid have threatened the future sustainability of these public services, which have historically provided a cornerstone for accessing justice. Beatson *et al* scrutinise the legal aid reforms and discuss how it has 'thrown family proceedings into chaos' yet the 'Government continues to maintain that their recent changes to the family law system have resulted in a quicker, cheaper and less stressful system'.<sup>82</sup> But as explored here, the new system governing legal aid is evidently not 'quicker' due to a backlogged court system, it is not 'cheaper' as the expense has been transferred elsewhere, and it is certainly not 'less stressful' for professionals, nor clients.

Whilst the knock-on effects discussed above provide an early insight into the aftermath of LASPO, the magnitude of these ramifications is only likely to worsen. Prior to the Act, the House of Commons Justice Select Committee urged that the MOJ quantify the extent of the knock-on expenditure to the public purse. Despite research from Kings College London estimating that the unintended additional costs of LASPO will generate £139 million annually,<sup>83</sup> the MOJ overlooked the research. With the MOJ turning a blind eye to the financial repercussions of LASPO, they

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<sup>79</sup> Commons Select Committee, *8<sup>th</sup> Report – Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (2015) at para.78.

<sup>80</sup> Robins, J., 'Pro Bono: Making a Splash', (2013) 163 *New Law Journal* at p.9.

<sup>81</sup> The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On*, (2014) at para.176.

<sup>82</sup> Beatson, 'Family Law in Crisis', at p.11.

<sup>83</sup> Kings College London, *Unintended Consequences: The Cost of the Government's Legal Aid Reforms*, (2011), at para.5.6.12.



cannot be certain that the reforms are achieving the intended savings, meaning that the proposed savings of £220 million<sup>84</sup> are undoubtedly miscalculated. It is now vital that the MOJ reevaluates the issue of cost shifting, and carries out a detailed investigation into where the money is being transferred, with a view to quantifying the *actual* savings that LASPO is achieving.

## **Conclusion**

With Parliament's increasing desire to curtail the budget for legal aid, they have disappointingly failed to scrutinise the potential effects that this poorly thought out legislation would have, which has left a bleak future for private family law. The LAA's stewardship of the legal aid budget is inflexible, and fails to prioritise or safeguard access to justice. Instead, the LAA has prioritised the need for financial austerity.

As this article has explored, the Ministry of Justice has been unsuccessful in achieving their four objectives envisaged by legal aid reform, due to the practical shortcomings ingrained in LASPO. Firstly, the Act has failed to 'discourage unnecessary and adversarial litigation at public expense'<sup>85</sup> as the unforeseen aftermath has resulted in a rise in LiPs, and a decline in mediation. This has become the sole responsibility of the Court Service, who has been provided with no additional funding to meet these demands. Secondly, the erroneous implementation of the flawed ECF scheme is inadequate in targeting public funding to 'those who need it most'<sup>86</sup> as this intended 'safety net' appears to be illusory, owing its failure to the unduly prohibitive threshold for breaching rights. Thirdly, the taxpayer cannot be convinced that the reform is delivering 'better overall value for money'<sup>87</sup> because the Ministry of Justice are benighted about the knock on expenditure that has been relocated to other public sectors. Fourthly, whilst LASPO has irrefutably made 'significant savings'<sup>88</sup> to the legal aid budget, the MOJ could have achieved more substantial savings if they had foreseen and managed the financial knock on effects elsewhere.

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<sup>84</sup> House of Lords Library Note, 'Debate on 11 July: Effect of Cuts in Legal Aid Funding on the Justice System', 5 July 2013 at p.2.

<sup>85</sup> House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 2014-2015, p.3.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

### **Recommendations**

Taking into account the diversity of LiPs, who all broadly range in social class, education, age, sex, religion and experience of the legal process, there is no obvious reform that would meet the needs of this complex group. The House of Commons Select Committee has reiterated that there is no 'silver bullet'<sup>89</sup> that will solve the concern surrounding LiPs, and therefore specific proposals for reform are difficult to pinpoint. However, if the Ministry of Justice is to develop and implement a coherent strategy which aims to improve the journey of a LiP through the legal process, then they must firstly distribute more funding to the courts, to help them manage the inundation of self represented parties. At a time where technology is becoming the forefront of a modern society, the Government may consider making better use of IT services to help speed up the court system and thus conserve resources. Furthermore, it is recommended that the MOJ carry out a national campaign to promote publicity and education for those bringing their case to court unassisted.

To avoid non-compliance with ECtHR jurisprudence then the accessibility of the ECF scheme must be reconsidered. There remains no corroboration to substantiate the Government's submission that the system is working effectively and as intended. The fewer than anticipated number of successful ECF claims should be immediately investigated by the Ministry of Justice as their sweeping refusals have no doubt led to miscarriages of justice. One would hope that the seminal decision in *Gudaviciene* will rectify this scheme, making it more effective to act as a robust 'safety net', as intended by Parliament.

If the Government's motive to protect victims of domestic violence is to be achieved, it is recommended that Regulation 33 be revised, to give more discretion for the type of evidence that these victims may have, and abolish the 24 month rule for obtaining evidence. If these suggestions are endorsed then the law can show that it better reflects the sensitivity and nature of this type of abuse. More activism from the legal profession and protest groups, appeals for judicial review, and further investigations into the impact of LASPO may shame the Government into considering such recommendations, and consequently force them into reform.

Whilst this article is focused on the short-term effects of LASPO, the Government must now earnestly consider striking a fair balance between preserving the public

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<sup>89</sup> House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 2014-2015, p.74.

purse, and allowing access to justice for individuals involved in private family law disputes. If a comprehensive investigation into the effects of LASPO is considered, then the Government will have a far better chance of producing legislation that will generate long-term savings, prove more popular within the legal sector, and preserve the fundamental right of fair access to justice. However, it is clear that the Government have placed more importance on the need for legal austerity in the past, so it remains unforeseeable that they will consider the above recommendations. In absence of any further reform to legal aid, it is submitted that the enactment of LASPO was impetuous, and now requires urgent re-examination in order to re-balance the scales of justice for private family law.