

Rights without remedies:

Legal aid and access to justice for children

EXECUTIVE SUMMARY February 2018



There is a strong legal framework for the protection and support of children and young people in England, but if they are unable to actually enforce their rights then those rights are worth little more than the paper they are written on. If children, or those caring for them, cannot take steps to ensure the law is upheld, they can be left without a home, without status, excluded from education, and separated from their family. Key decisions about a child's future can be made without their views being put forward, or all the necessary information considered.

The legal aid system, introduced in 1949, was based on the belief that every person should have equal protection under the law, regardless of financial position or status. It was designed to ensure that those who could not pay were not left without legal advice and representation. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) overhauled the legal aid system: from April 2013 legal aid was no longer available for employment, education (except for cases of special educational needs), non-asylum immigration, private family law, many debt and housing cases, and most welfare benefits cases. In these areas of law, individuals must either pay privately for their own legal advice and representation or go without and deal with matters themselves (and as a litigant in person, if there are court hearings).

This report, drawing on evidence from Coram Children's Legal Centre (CCLC)'s legal advice services, assesses the impact of LASPO in England and the removal of areas of law from scope on children, focusing on family, education and immigration law. CCLC advises and represents thousands of vulnerable children, young people and families, many of whom quite simply lack the ability to negotiate legal processes effectively without the assistance of a lawyer.

Since LASPO's measures came into force in April 2013, at least 6,000 children each year have been left without access to free legal advice and representation in many areas of civil law – some estimates are as high as 15,000. However, this figure does not include the thousands of children in families affected: much of the impact of LASPO on children is felt in cases involving children, rather than the cases involving child claimants. The volume of calls to the Child Law Advice Service (CLAS) almost doubled in the year following changes to legal aid coming into effect, from 23,017 in 2012/13 to

40,192 in 2013/14. This number has continued to rise: between April 2016 and March 2017 the service was contacted by an average of 6,897 unique callers per month.

Private family law

Private family law cases have been removed from the scope of legal aid, except where there is evidence of domestic abuse or child abuse, despite such cases being of clear importance to the children involved: they determine who they will live with, who has parental responsibility for them, contact with family members and their standard of living. In the 2016-17 financial year CLAS dealt with 15,500 calls relating to private family law matters – analysis showed that around 73% of callers would have been eligible for legal aid prior to 2013.

This area of law has seen a significant increase in litigants in person – people who represent themselves in court. However, litigants in person often struggle to understand court procedures, with cases subsequently taking longer to resolve. Improving public legal education is important to address this, as is the availability of additional face-to-face advice from a legal professional for those who need early and specialist legal intervention. Adults with learning disabilities, language barriers and/or mental health issues will all struggle to engage with the legal system without specialist support. If a parent cannot understand the evidence requirements in a case, cannot effectively navigate the procedures and processes required, and cannot represent themselves effectively in a hearing by presenting their argument and advocating their position, judges are more likely to lack the necessary information to ensure that the outcome of a case is in the best interests of the child.

At the time of the 2012 legal aid reforms the Ministry of Justice anticipated that the need created by taking most of private family law out of scope would be met through the preservation of legal aid for family mediation, which would offer an alternative to lengthy adversarial proceedings in cases of family breakdown. But solicitors providing early family legal advice were a significant source of referrals to family mediation. The take-up of this service has continued to fall from a peak of 31,336 assessments in 2011 to 11,927 in 2016.

Legal aid has also been cut in cases where children are separated from their parents. In 2016-17, CLAS received 273 calls regarding Special Guardianship Orders and 296 calls relating to Child Arrangement Orders from non-parents, including wider family members, step-parents, and siblings. In these cases, where a child may be placed away from their parent/s on a long-term basis, it is essential that the child's birth parents are able to understand the process and put forward their views on the suitability of the placements. It is also vital that all carers and prospective special guardians are able to access comprehensive legal advice promptly and not just when a child may be taken into local authority care.

Education

Before 2013, legal aid was available for legal advice and assistance (but not for representation) in relation to school exclusion matters. Legal aid is now only available in Special Educational Needs cases, if an individual wants to appeal to the First-tier Tribunal for Special Educational Needs and Disability against the decision of the local authority to, for example, refuse to conduct an education, health and care (EHC) needs assessment of a child or to issue an EHC plan. However, it does not cover representation or expert attendance at a SEN hearing unless very exceptional circumstances apply.

In 2015-16 there were 6,675 permanent exclusions, 0.07% of the school population, but CCLC evidence suggests that these figures are just the tip of the iceberg, as unofficial or unlawful exclusions by schools are not recorded in that data. In the last 20 months, CLAS advised about school exclusions in 1,704 calls. In a quarter of the calls relating to primary school exclusions, the adviser concluded that the school may have acted unlawfully, either by not complying with procedures or because it did not adequately consider the child's special educational needs.

As with family law, access to early advice through a continuum of provision encompassing both public legal education and early legal advice would allow for better solutions for children. Early advice on a child's unlawful exclusion could ensure that families push for an appropriate assessment of their child so that SEN issues can be diagnosed.

Immigration

Many of the children and families CCLC works with have cases to remain in the UK on grounds of long residence and the right to respect for private and family life under Article 8 of the ECHR. The complexity of the law in this field means that people frequently do not have an adequate understanding of the substance of the law, how it applies to their case and how to articulate their arguments in writing or before a tribunal or court. This can be exacerbated by language barriers and difficulties with literacy and comprehension. The procedures, as well as the law, are complex.

Expertise and specialist knowledge are required to examine a case file, identify what evidence is needed and how it can be obtained and applied to the law. In addition, evidence gathering often costs money. The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators and expert reports, such as an independent social worker reports.

Without access to legal help and representation people struggle to advocate effectively for their rights and as a result risk having their right to a family life violated. The reality of this means either deportation to another country, which might for example involve the separation of a parent from their child, or people remaining with insecure immigration status in the UK, leaving them destitute and potentially open to exploitation.

The case for legal aid for separated children with immigration issues is particularly strong. Separated children are in the care of children's services (meaning that they are either looked after under section 20 of the Children Act 1989 or are formally in care) and are living in the UK with a variety of statuses. The laws, processes and systems governing their circumstances are complex. To realise their rights, they require specialist advisors that are experienced not just in immigration law, but also with working with children. Social workers have a duty to plan for the long-term future of a child in their care, but are rightly prohibited from assisting children in making immigration applications because immigration advice is heavily regulated.

As a conservative estimate, there are several thousand children in local authority care where immigration is the primary issue, not asylum or trafficking. The Ministry of Justice estimated that there would be almost 2,500 immigration cases each year involving children as claimants in their own right, which would no longer be within scope for legal aid. CCLC research suggests that this number is likely to be an underestimate. The MCP alone advised 234 separated children and young people with an out-of-scope immigration issue over the past year.

For those children accommodated under section 20 of the Children Act 1989, Department for Education statutory guidance sets out that local authorities' obligations extend to considering their need to have their immigration status issues resolved as well as their need for legal services. However, it is silent on how these services are to be funded. Usually this will be at private rates which are likely to be significantly more expensive than legal aid rates, resulting in a cost shift onto local authorities of an estimated £10 million a year. The restoration of legal aid for all migrant children in care would still result in at least an estimated £4 million annual saving.

There are now additional concerns about the status of European national children in care after Brexit, many of whom may not be eligible for settled status under the Government's current proposals and who may need to rely on their Article 8 rights under the immigration system that exists

for non-EU nationals. Is it essential that these children receive legal advice at the earliest opportunity, but not all will be able to afford to pay for it.

The legal aid ‘safety net’

LASPO provides for the Legal Aid Agency (LAA) to grant legal aid funding for so-called ‘exceptional cases’, where legal aid is deemed necessary to prevent a breach of human rights or an EU law right. However, as a ‘safety net’ the exceptional case funding scheme is woefully inadequate. Individuals are either expected to apply themselves, or a legal representation is expected to help them apply while running the risk that they may not get paid for the work. CCLC runs a grant-funded ECF pro bono project, and has made 100 ECF applications on behalf of families with immigration issues. Each application takes around three to six hours to complete, with the supervision of qualified solicitor, and typically runs to 20 pages of representations. 31 applications were refused, and half of these refusals have been successfully challenged.

CCLC is not the only charitable or pro bono project making such applications directly on behalf of the very vulnerable. It would therefore be wrong to assess the ECF application process as having been sufficiently simplified so as to enable individuals to apply alone – very few people are doing so. Urgent cases are also not being dealt with adequately: for all of CCLC’s applications marked urgent, the average waiting time for a decision has been 17 working days. The single fastest decision for any application in that time has been 11 working days – more than twice the five day deadline outlined in the LAA guidance.

Pro bono provision

The government has also suggested that the not-for-profit sector will step in to help ensure that vulnerable people can access the legal advice and support that they need. CCLC has explored a number of ways of filling the legal aid gap and breaking this cycle through pro bono advice and representation. The MCP provides free advice and representation and an ECF project, and is funded independently through trusts and foundations, but can only help tiny numbers of young people and families. A pro bono project run by CCLC working with private law firms giving their time on a pro bono basis was the first of its kind in the UK and has allowed us to realise the entitlement to citizenship of 51 children, but such support requires huge amounts of time even though the volunteers (in this case solicitors) are highly skilled. These cases have each taken an estimated 20 hours in pro bono lawyers’ time, resulting in costs exceeding £5,000 per case. These initiatives, and the not-for-profit sector in general, can provide valuable and necessary legal assistance or other forms of support. They cannot, nor can they be expected to, fill the gaps left by the removal of a statutory service.

In addition, there is growing evidence that the narrowing of the scope of legal aid has led to a reduction in the provision of services, as well as a loss in specialist and holistic advice. This, along with the increase in demand on providers, has made it more difficult for people to gain access to the legal advice and support that they need. For example, even where an ECF application has been successful, most cases still take around three weeks to refer, with some taking several months depending on the time of year and the complexity of the case. This is a serious issue which the ECF system does not address: legal firms and not-for-profit organisations with legal aid contracts are working within extremely tight margins and at maximum capacity.

The education law sector is an advanced case study of the impact of changes under LASPO to the remaining legal aid provision. In 2012 there were 49 provider offices completing work in the field of legally-aided education law. There are now just two legal aid providers of education advice, assistance and representation. If a future review of legal aid recommends, for example, the reintroduction of mainstream face-to-face provision in an area of law currently administered through the mandatory telephone gateway, it is unlikely that this would be possible, without further investment, as the infrastructure (including the human resource of a stream of new trainees in this field) is quite simply no longer there.

Conclusion

To ensure children’s rights are upheld we need a combination of public legal education, general advice provision, specialist advice, legal help and legal representation; legal aid is a vital mechanism for ensuring legal advice, assistance and representation can be provided. CCLC offers training, online guidance and information, advice by phone and email, outreach legal services, and end-to-end legal representation. But CCLC is a small charity and can only help a tiny proportion of the children and families that need support.

If we are to ensure access to justice for all children, especially the marginalised, socially excluded and most at-risk, the government must include a detailed assessment of the impact of LASPO on children and young people in its review of legal aid, and commit to amending the system as a matter of urgency so that children’s rights are protected.

LASPO’s changes were broad, and fundamentally altered the UK’s justice system. As such, the government committed to review the Act within five years of its implementation. Now that this review is underway, we urge the government to examine in particular the impact on children’s rights of the legal aid changes, and to take steps to address this impact through implementing the recommendations in this report. No child should be left without access to justice.

For the full report, including references, please visit:
www.childrenslegacentre.com/rights-without-remedies

RECOMMENDATIONS

- The government's review of civil legal aid must include a detailed assessment of the impact on children and young people.

Private family law

- Funded early legal advice, with the offer of follow-up in writing, should be provided in private family law cases, and widely advertised.
- The government should reinstate legal aid in all cases where there is local authority involvement in private law children proceedings, including in relation to special guardianship orders.
- Legal aid should be available in all cases in which a child is at risk of abuse.

Education

- The cost of experts attending SEN hearings should be covered by legal aid.
- Continued funding should be provided for public legal advice on education law issues.
- In the event of permanent exclusion, funded representation before the governing body and/or Independent Reviewing Panel should be available.
- The government should review the effectiveness of the current policy for accessing to face-to-face advice for SEN and whether the exemptions serve their stated purpose of safeguarding access to justice for the most vulnerable.
- The government should examine the impact of LASPO on the education legal aid sector more widely, as part of a wider review into the sustainability of the civil legal aid system.

Immigration

- The government should reinstate legal aid for all unaccompanied and separated migrant children in matters of immigration by bringing it back within 'scope' under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- Until legal aid is fully reinstated for children in immigration cases, local authorities should develop written policies that offer clarity to their social workers, and the children they support, on their decision making process in relation to securing immigration advice for children, identifying specific timetables and eligibility for advice and representation.

Exceptional case funding

- The Legal Aid Agency must reform the exceptional case funding system. In the immediate term, a question should be added to the CIV ECF1 form to ask about the rights and interests of any affected children. Where the applicant is a child, a presumption would operate so that a child or young person could expect to have their case for civil legal aid funding granted, in line with children's rights standards. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children.
- Further work should be done to promote the use of the ECF to those working with children and young people, in an effort to counter the low proportion of applications from them.
- The Legal Aid Agency should ensure that sufficient resources are allocated to allow for urgent cases to be decided within an appropriately quick time-frame.