

The “Lottery” of Justice: Exploring Some of the Consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

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The “Lottery” of Justice – Exploring Some of the Consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

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This is the first pass analysis by Linden Thomas of interview data from a project on family lawyers and legal aid led by Professor Hilary Sommerlad (now at the Law School, University of Leeds). The interviews were undertaken by Hilary, Linden and Lesley Griffiths (CEPLER). In due course, the interview data may form part of an academic publication.

Executive Summary

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force on 1 April 2013, heralding fundamental changes to the legal aid system in England and Wales. This study focuses on the impact of those changes on those delivering, and those in need of advice and representation, in the field of family law in Birmingham and beyond. Findings are based on interviews with 17 family law practitioners that took place in 2014. We were interested in how they viewed the impacts, current and future, of LASPO.

The key areas of concern highlighted during this study can be divided into the following key themes:

1. Litigants in person;
2. McKenzie friends;
3. Detrimental impact on the Court staff and system;
4. Detrimental impacts on specific categories of Court user;
5. Obtaining expert evidence;
6. Lack of access to exceptional funding;
7. Access to justice; and
8. Impact on the legal profession.

We explore each of these themes in further detail in this report. We begin with some context on LASPO and the changes it introduced to the legal aid regime in England & Wales.

LASPO 2012

The main changes to the family legal aid system brought into effect by LASPO in April 2013 were as follows:

- **The Legal Services Commission was abolished:**

A Director of Legal Aid Casework now has decision-making responsibility, whilst administrative matters are dealt with by the newly created Legal Aid Agency, which forms part of the Ministry of Justice.

- **Significant reduction in the scope of civil legal aid:**

The details of what remains in scope can be found in Schedule 1 to LASPO. In relation to family law, legal aid continues to be provided in the following areas:

- Public family law matters concerning the care, protection and supervision of children.
- Children matters falling under the inherent jurisdiction of the High Court (such as wardship proceedings).
- Private family law matters where there is evidence that there has been or there is a risk of domestic violence.
- Private law children matters where there is evidence of child abuse.
- Cross-border child abduction matters.
- Representation of children in private family cases.
- Legal help provided in connection with the mediation of family disputes.
- Domestic violence cases concerning home rights, occupation orders and non-molestation orders and injunctions following assault, battery or false imprisonment.
- Forced marriage protection order cases.

Family law matters other than those detailed above are now outside of the scope of legal aid. This means, for example, that there is no longer any legal aid for private family law matters such as divorce or child custody, unless one of the above provisions applies. As such, LASPO has significantly reduced the breadth of family law matters for which legal aid is available.

- **Means and merits testing tightened:**

This tightening of the means and merits testing reduces the number of people who will be eligible for legal aid.

- **Increase in remote access service provision:**

Legal advice is increasingly provided by telephone, email and online from the Civil Legal Advice Service (CLA). Advisers are not usually solicitors, but should be supervised by solicitors.

- **Reduction in rates of remuneration for solicitors and barristers undertaking legal aid work:**

Following a series of fee reductions in the preceding years, April 2013, saw the introduction of further cuts.¹ These were followed by more cuts to fees for junior barristers in December 2013.²

- **Introduction of a new Exceptional Case Funding Scheme (ECF):**

¹ Civil Legal Aid (Remuneration) Regulations 2013

² Civil Legal Aid (Remuneration) (Amendment) Regulations 2013

ECF allows cases which would not be eligible for legal aid under the new rules, to be covered in exceptional circumstances. For example, where failure to grant legal aid would result in breach of a person's rights under the European Convention on Human Rights.

- **Reduction in fees for expert witnesses:**³

As part of the changes introduced alongside LASPO, the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 and the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 introduced new rates for most types of expert. These rates apply to all work undertaken by experts in all civil, family and crime work with a case start date or representation order date of on or after 2nd December 2013. The Legal Aid Agency (LAA) cannot pay fees or hourly rates in excess of those listed in the Remuneration Regulations unless they consider it reasonable in exceptional circumstances and have granted prior authority to exceed the fees or hourly rates.

The Government's primary purpose in introducing the above reforms was to make financial savings.⁴ A report published on 12 March 2015 by the House of Commons Justice Committee concluded that whilst significant savings in the costs of the legal aid scheme had been made, the Ministry of Justice had failed to: deliver better overall value for money for the taxpayer; target legal aid to those who need it the most; and discourage unnecessary and adversarial litigation at the public expense.⁵ This study seeks to ascertain the cost at which the intended savings have been made.

The Study

We conducted a qualitative study which began in March 2014, nearly 12 months after LASPO came into force, and continued until November 2014. The study considers the impact of LASPO from the point of view of practitioners working in the field of family law. Its aim was to enhance understanding of the impact of the changes on providers and their clients and thereby, to contribute to the debate over legal aid provision. The study consisted of a series of semi-structured interviews which explored practitioners' current and anticipated experience of the impact of LASPO. The interviews considered the effect of the cuts to legal aid not only on the number of lawyers offering services or legally aided clients obtaining them, but on the nature and quality of service provided for the fee and the implications of this for clients, their lawyers, the legal process and decision-making in family cases.

Initially it was intended that the focus of the study would be limited to practitioners in Birmingham and that is where the majority of interviewees are based. However, opportunities arose to interview practitioners working elsewhere in England and Wales. The findings from these interviews have been included in this report as they give an indication of the picture on a national scale and allow comparisons and consistencies to be drawn between experiences in Birmingham and those elsewhere.

³ Legal Aid Agency, 'Guidance on the Remuneration of Expert Witnesses' (version 4, 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351193/expert-witnesses-fees-guidance.pdf> last accessed 26 April 2016

⁴ Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' (2010) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf> last accessed 26 April 2016

⁵ 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' (12 March 2015) <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>> last accessed 26 April 2016

We interviewed 17 practitioners from a range of professional backgrounds. The only commonality being that they all practice family law. We spoke with 1 full-time judge, 7 solicitors (of whom 2 were partners), 7 barristers (including 1 who was also a part time judge), one barrister's clerk, and one legal assistant.

Findings

1. Litigants in Person

A fundamental change brought about by LASPO, which was universally acknowledged by the respondents, is a sharp increase in the number of litigants in person navigating their way through the family Courts. Respondents expressed concerns that individuals representing themselves lead to delays in the Court system. A number of factors were identified as to why hearings take longer where one, or both, parties are without representation:

i. Litigants in person are unprepared:

Without a working knowledge of the legal system, litigants in person do not know what is required of them in Court proceedings. A senior barrister explained that, *'a litigant in person will turn up without having had the papers, not having produced a bundle, often arriving with plastic bags of papers for the Judge to look at. It is a concern for Judges because it brings the system to a halt. They have to give those people priority...If you have two lawyers in a hearing, you can often bring it to conclusion in half an hour, but with an unrepresented party it can take all day...'* [I14].

ii. Litigants in person struggle to narrow down the issues:

It was the experience of interviewees that, without the benefit of impartial, objective legal advice, litigants in person struggle to narrow down the issues that they wish to raise in Court. As a result *'they are likely to raise many more issues than the Court can realistically deal with...so if a person wants to raise four points, and three of those four are irrelevant, a lawyer would advise them of that and get them to drop those three, but a litigant in person will raise all four, thereby lengthening the case'* [I1].

iii. Litigants in person are less likely to agree to settlement:

Whereas historically lawyers often reached consensus on many issues before the matter goes before a Judge, interviewee's experiences were that this is not a realistic expectation of litigants in person. A family law partner spoke of the experiences of a junior solicitor in her firm who has often tried to explain what is happening to the unrepresented party in a number of matters, as is the solicitor's duty, but *'they have refused point blank to listen to whatever she is saying because obviously they don't trust her'* [I7]. Interviewee 8 echoed this experience, explaining that:

'It is a lot more difficult [where one party is a litigant in person] to get any progress made outside of Court. If there are lawyers on both sides, solicitor or barrister, everyone can define the issues, everyone knows where the key issues are, and you can sit down outside of court and either narrow the issues or settle the case completely. With litigants in person it's a lot harder: a) they don't trust you, they don't want to speak to you; b) their emotions are caught up in it, they are angry or

are keyed up for a Court hearing...so they are not ready to discuss things in a conciliatory way; and c) they are not able to understand what the law says needs to happen, or the law says what the relevant criteria are and to fit the law to the circumstances of their case and work out a reasonable position to be holding. And so most stuff goes into Court, rather than get settled outside of Court and that means that things take an awful lot longer'.

A senior family law barrister [I16] suggested that in response to these delays the Courts are now listing hearings for an hour, which would previously have been dealt with in 15 to 20 minutes. In addition to delays, some respondents reported experiencing aggressive encounters with litigants in person during proceedings. Interviewee 9 reported that *'I've never been physically [attacked]...but certainly very aggressive words and behaviour and certainly invading of personal space, which I wouldn't consider appropriate in any context, let alone at Court'*. Several respondents expressed concerns about the imbalance caused by one party being without representation. This issue is addressed further in section 7 below.

2. McKenzie Friends

Responses from interviewees suggest that a lack of funding for legal representation has also led to an increase in the number of McKenzie friends assisting litigants in person in Court proceedings, many of whom charge a fee for their services but may not be subject to any legal services regulation or associated quality assurance processes. Respondents' experiences of appearing against McKenzie friends varied and not all experiences were negative. As Interviewee 8 summarised: *'You get good lawyers and bad lawyers: you get good McKenzie friends and bad McKenzie friends'*. However, the majority of interviewees had not had positive experiences. As the barrister's clerk outlined, *'some [McKenzie friends] are getting rights of audience...I know of several solicitors and barristers who've been up against McKenzie friends who they've described as lunatics'* [I4].

Several interviewees had had personal experience of cases in which McKenzie friends were members of interest groups such as 'Fathers for Justice' and 'Families need Fathers'. For many of these McKenzie friends, their previous courtroom experience derived from participation in their own child custody battles. There were concerns that such affiliations undermine the impartiality of advice proffered by these individuals. One barrister found that her client's partner was assisted by a man who happened to be *'in a long running contact case I did several years ago, on the other side'*. He was an individual who had become known for dressing up as superhero and climbing a church in a city in the region several years ago to promote his cause. The barrister's concern was that *'...he obviously has his own axe to grind and is now a McKenzie friend for the husband in proceedings for contact, residence and financial remedy, and I'm representing the wife...this is dangerous...goodness knows what he advises'* [I5].

3. Detrimental impact on the Court staff and system

Interviewees expressed significant concerns regarding the impact of the increased number of litigants in person on the Court system, particularly when coupled with general cuts to Court funding. Interviewee 17 observed that:

'The building is full all the time of people who are overwhelmed and don't know where they're going or what they're doing; the courts are never open, we have real difficulty getting through to court staff, dropping off papers and bundles; court admin is in disarray and we're finding delays in getting hearing dates...'

One respondent [I10] had not noticed any difference in terms of staffing levels in the Courts.

However, the remaining respondents described a Court system that is *'in disarray' [I1], 'clogged up' [I2]* and *'an absolute nightmare' [I8]*. One person compared the chaos in her local Court as reminiscent of *'a Middle Eastern bazaar' [I11]*. A number of failings caused by the lack of administrative resources to manage the volume of cases and Court users were identified. These included: inefficiencies; inaccuracies; and poor service. For example, many respondents spoke of difficulties in getting through to courts by telephone, or finding members of Court staff in the Court building to speak to. Criticism was leveled at the introduction of telephone appointment systems, whereby Court users are required to ring through to an appointment system rather than go to a Court counter. The general consensus was that *'it's all so inefficient, leading to timewasting and all sorts of difficulties' [I15]*.

There were also numerous examples of a perceived drop in the quality of service when matters are eventually dealt with. As Interviewee 6 put it:

'I am not sure that having a system with one phone for the Court in the second biggest city in the country is appropriate! There are times when it is horribly frustrating...In terms of staffing levels we're finding that a significant percentage of Orders that the Court send out are wrong – one had nine errors in it, and that was the amended version.'

Similarly, Interviewee 4 noted that *'It's currently taking 28 days to answer a standard letter regarding non-payment of maintenance, which is needed for an application to have maintenance back payments, and after 28 days it's not even been processed – that's shocking'*. Concerns were also raised about the impact that the combination of increasing demands and dwindling resources is having upon Court staff. Many suggested that *'...it's an absolute nightmare for ushers, they are exhausted' [I16]*. As this Judge went on to explain [I1], some of the lowest paid members of Court staff are working longer hours, for no additional remuneration, to try and alleviate some of the pressure on the system:

'...the pressure of work means that people are having to work longer hours to get the work done – but they are not paid for that extra work. So, for instance, ushers start work at 8am, but some will come in at 7.30am and they don't get paid for that. So the Government is relying on people (who they pay peanuts in the first place) putting in the extra hours needed to get the work done, without any extra pay.'

Interviewee 4 suggested that as a result *'so many Court staff are on sick leave – they're under so much stress'*. The overall consensus amongst interviewees was that a reduction in Court staff and front of house services at a time of increasing litigants in person was a false economy. A senior barrister and Deputy District Judge [I16] explained that:

'Properly trained Court staff would sift through 80% of the stupid applications that people want to bring, and they would say "don't put your name in that box" or "don't bring this application, bring that application...". And so instead, you're paying for me, as a Judge, to sit and sift these applications and reject them because they haven't filled them in correctly. Now you tell me which is more cost effective, to have a sensible person of the Court, presumably on a different hourly rate from a Judge. It's just nonsense. Even if you put aside any consideration of looking after vulnerable people in society, leave all that aside, just look at the economic model.'

4. Detrimental impacts on specific categories of Court user:

Those interviewed expressed concerns about the specific detrimental impacts that the cuts to legal aid have had, and are likely to have, on specific groups.

i. **Women:**

Particular concerns were expressed by respondents for women who are victims of domestic violence. Individuals who can provide evidence that domestic violence has occurred within the last twenty four months will be entitled to legal aid. Those who cannot provide the evidence, or for those where the violence was more historic, legal aid is not available. Several respondents pointed to the evidential barriers that many women face in proving that there has been assault before they can claim legal aid. A Judge explained that

'it is well known that women have had injunctions but then go back [to their partners] for all sorts of reasons, such as financial insecurity, psychological dependence. In such cases it may be that they don't go and see a doctor or call the police and therefore have no evidence of being assaulted...the system doesn't protect women' [I1].

Many respondents were able to give examples of women they had encountered who were potentially eligible for legal aid but were unable to satisfy the evidential requirements. For example, one solicitor [I12] described having to turn away a woman who was profoundly deaf and a long standing victim of domestic violence. The woman was unable to access the police, who were not equipped to deal with her. As a result, she could not claim legal aid as she was unable to adduce the necessary gateway evidence. Her gender and her disabilities made her doubly disadvantaged in this instance. The same interviewee also spoke of barriers faced by women who are unable to pay when doctors or the police wish to charge for the written reports required to evidence abuse. Even where women are able to secure legal aid, they face the possibility of being cross-examined by their abuser, who is himself without legal representation.

Concerns were expressed also for women who are not victims of domestic abuse, but who will now fall between the gaps left by the cuts. These are the women who cannot afford to pay for representation themselves, but no longer qualify for legal aid. One Judge described the result when women are unable to secure legal aid as *'terrifying'* [I16]. She told us that:

'It's a travesty that there is no support for women who don't know how to present their case...wanting protection for them and their children, having not the first clue how to ask for help, they don't know what they are wanting, they don't know how to present their situation in an intelligible way. They are utterly desperate...'

Another Judge gave a stark example of what he referred to as 'an advice desert' leading to bullying inside the Court room:

'...you'll get a wealthy young businessman who picks up a girl who may not be very bright, they have a couple of children and then he leaves her. He can afford silks and junior counsel to represent him in his application for residence and property orders, but she has no legal aid and so very little chance of success. In other words people (generally women) can and are getting bullied' [I1].

Other practitioners echoed these concerns, noting the reality that, given the *'imbalance in financial resource often does work out [in the husband's favour], women are really affected'* [12].

ii. Men:

Conversely, there were also concerns amongst some respondents that a consequence of domestic violence being the gateway to legal aid is that it is leading some women *'into saying that they have been subjected to domestic violence to the appropriate person in order to get legal aid...'* [17]. In circumstances where a man is facing allegations of domestic violence, it was commonly felt that the *'...biggest thing that's really unfair about it is that...you can't get legal aid to defend yourself'* [17]. Whilst careful to note that this was based on his personal experience and he was not aware of any supporting statistics, interviewee 8 spoke at length about what he perceived to be a *'mushrooming industry'* in 'non-molestation' orders, which is one of the means by which women can satisfy the evidential criteria for legal aid. Applications for such orders can be made without putting the other party on notice where there is a compelling reason not to do so, such as physical risk to the applicant. The barrister expressed concern that in many such cases women are referred by domestic violence workers to legal case-workers, who are not qualified lawyers and who carry out the necessary work remotely, without ever meeting their clients. In his view many of these applications are often granted, despite being *'fairly thin and weak'*, thereby giving women access to legal aid. If these concerns are well-founded, this clearly risks injustices being carried out against the accused men. Several interviewees gave examples of men who would previously have been eligible for legal aid, but who no longer fell within scope post-LASPO and therefore found themselves unrepresented against a qualified lawyer because their ex-partner qualified for legal aid. Often the men in question were illiterate, or had severe learning difficulties. These scenarios are considered in further detail below at paragraph 6.

Two respondents spoke of increasing numbers of fathers giving up on contact with their children due to difficulties they face in overcoming the hurdles imposed on them post-LASPO. Interviewee 5 stated that this is because the men *'cannot, or will not, pay privately'* for legal representation. In the view of Interviewee 14 *'although courts and judges try to help them, it's almost impossible and I think they'll be put off from even coming to Court, with the result that more fathers will lose contact with their children and just give up'*.

iii. Children:

Multiple consequences of LASPO were identified by interviewees as being particularly detrimental to children involved in family court proceedings. The increased likelihood of loss of contact with fathers has already been considered above. One barrister [117] suggested that any delay in Court proceedings is unfavourable to the welfare of the child. Therefore, protracted proceedings involving litigants in person have a negative impact on the children involved. Another interviewee felt that due to *'huge swathes'* of people no longer being able to get legal advice for custody and residence applications there will be people who, due to lack of proper representation and access to necessary expert evidence, *'just won't see their kids, who might have done otherwise'* [18]. Again, these issues are addressed in further detail in sections 5 and 7.

5. Obtaining Expert Evidence

Nine of the respondents spoke of the difficulties they have faced post-LASPO in securing expert evidence. The reasons given for this were: (1) being unable to find experts who were willing to undertake the work for the reduced fee rates imposed by LASPO; and (2) the difficulty in agreeing which party will pay the fees if an expert is instructed. In many cases, the result is that, either: (a) experts are not instructed at all; or (b) less qualified or unspecialised experts are instructed because *'experts with the appropriate authority or experience are too expensive for the process'* [I11]. Interviewee 9 described experiences which were echoed by several of the respondents:

'...[the experts] will have set a rate which they will not go below, and if the legal aid continually sets that position below the market rate, not below the rate they are offering, but below the market rate for such specialist advice...I get lost in a trap which is, that I've proven it's necessary, I've proven we have to have it, the Court are going to order it, the Court have no expert to instruct...when I get to that point where the [legal aid] rate and my expert's rate are incompatible, [neither] I, nor the Court, have anywhere to go'.

Interviewees were concerned about the impact that lack of expert evidence can have on the result of a case and were able to give real-life examples in support of their concerns. These examples tended to involve cases where a determination as to whether a child should be permanently removed from its parents is, post-LASPO, being made without expert evidence on the parents' mental capacity and/or whether there has been any abuse of the child. One solicitor cited a case that she had been involved in prior to LASPO in which the intervention of expert evidence prevented parents from being wrongly found to have abused their children, thereby avoiding a grave injustice. As she explained:

'I acted for two children who were removed from their parents' care. The community pediatrician said they have been abused. I was able to bring in an expert from another part of the country who determined that was not the case and the children were returned. That expert would not have been able to be instructed now because of fixed rates and those children would have become wards of the state' [I12].

Respondents acknowledged that in the past the use of experts in the legal aid system had been open to abuse. However, it was suggested that now *'cases that need legal aid are just slipping through the system and...some very bad decisions are being made in respect of these cases'* [I15].

6. Lack of access to exceptional funding

Significant concerns were expressed regarding the difficulty that applicants encounter in obtaining legal aid on the basis of exceptionality. In its report entitled 'Legal Aid Statistics in England and Wales, Legal Aid Agency, 2013-14' the Ministry of Justice confirmed that of 1520 applications for exceptional funding received from April 2013 to March 2014, only 69 were granted. In relation to family law matters, 821 applications were made and 9 were granted.⁶

⁶ Legal Aid Agency, 'Legal Aid Statistics in England and Wales' (June 2014)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-

In the view of Interviewee 1, a Judge, *'it appears that the Legal Aid Agency are terrified and so they are more restrictive in their interpretation of Government provisions than they need to be'*. He went on to give an example of a case he had presided over some months ago in which a father was applying for a residence for his two children. The father stated that his wife had returned to Pakistan and not maintained contact. The Judge was suspicious and appointed a solicitor for the children under a rule which meant that the mother had to be found and served. At the next hearing, a solicitor who was uncle to the mother gave evidence that she had been taken to Pakistan by her husband, had been beaten, had her passport taken off her and had been left there. Her family helped the mother to return to the UK, whereupon she visited a solicitor who applied for legal aid on the mother's behalf on the basis of exceptionality. According to the Judge:

'The Legal Aid Agency refused the application, so I authorised the solicitors to apply again with more evidence. I expressed my concern at the refusal, despite her having submitted the required evidence...and given the exceptionally grave allegations and circumstances of the case'.

Interviewee 8 had a similar story to tell. He spoke of one case where a three day fact finding hearing had been listed to determine whether or not a father should be allowed to see his children. The mother had made allegations of violence. She qualified for legal aid and was represented by a barrister and a solicitor. The father was illiterate and unwaged, but was not entitled to legal aid. He was unable to read any of the police or medical evidence before him. The Judge's view was that the matter would take three days if both parties were represented, five to six days if the father was representing himself, and was literate but, as he could not read or write, the trial could not happen at all. In the end the matter was relisted a month later, with three barristers from local chambers covering a day each of the trial. In Interviewee 8's opinion

'...[the barristers] can't provide him with representation for the whole three days continuously, so they don't know what was said yesterday in Court, so it is completely unsatisfactory. It was such a mess...he was an exceptional hardship case, he must have been, but they still didn't give him legal aid.'

One interviewee suggested that a reason that exceptional funding is not the *'safety net for the most deserving cases'* as it was initially intended to be is that the application form is too complex: *'...if a lay person looked at that form they would think it was gobbledygook. The form asks: 'Can you explain case law to support your application?' Most lay people would be unable to attempt that, so it's an unreasonable expectation'* [113]. The same respondent went on to say that it takes her and her colleagues around two hours to complete the form, for which they will not receive any remuneration. For those respondents who addressed the issue of exceptional funding, the consensus appeared to be that the bar for eligibility is currently set too high and

[2013-14.pdf](#) > last accessed 26 April 2016.

It should be noted that the interviews referred to in this paper were conducted in 2014. Recent figures produced by the Legal Aid Agency's statistics team suggest that a higher proportion of applications for exceptional funding have been granted in recent months. See for example, Ministry of Justice, 'Legal Aid Statistics in England and Wales October to December 2015' (31 March 2016)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/512577/bulletin.pdf> last accessed 26 April 2016

there is a need to *'get more balance and relax these rigid rules and look at it on a case by case basis'*[15].

7. Access to Justice

It was widely agreed that LASPO has had a detrimental impact on access to justice. Many examples of this have been highlighted elsewhere in this report. Other key themes identified by the respondents are set out below:

i. Inequality of arms

Respondents gave numerous examples of the unfair consequences of having one unrepresented party in proceedings. There were considered to be disadvantages both for the represented and unrepresented parties. Interviewee 10 spoke of a case in which he represented grandparents in an application for special guardianship. The mother had been held to have capacity to represent herself, but it was a borderline case. She struggled to understand the questions that were put to her, as did the father. The parents were contesting the application and so the matter proceeded as a trial. The barrister went on to state that:

'...they needed such a lot of help in terms of representing themselves that it felt unfair to be doing a case against them. Obviously I had to and it was a bit like shooting fish in a barrel sometimes...it got to a stage where a witness had just finished giving evidence and [the parents] should have been cross examining them. There were questions that they needed to ask as they were opposing [the application], and they said they didn't think they want to ask any questions. It was obvious that they didn't really know what to do.'

Respondents had also come across cases in which they considered the outcome would have been different had the individual been represented:

'I've had litigants in person, who've started on their own and then have come to me for advice after decisions have been made by judges, because of the pressure they're under, that wouldn't have been made had the individual been represented' [15].

In addition to examples of actual inequality between parties in the Court room, several respondents raised concerns about perceived inequalities, suggesting that even where justice is done; it is not being seen to be done. For example, many referred to perceived unfairness where litigants in person receive additional assistance from the Judge. Respondents acknowledged that Judges are in a difficult position when faced with a litigant in person, as they must ensure that the person representing themselves understands everything that is happening and is given the opportunity to get relevant information, for example, out of a witness. This can lead to Judges cross examining the witness on behalf of a litigant in person, which several respondents felt:

'does seem a bit unfair when you are representing somebody who's either paying privately, or in receipt of legal aid, and the other person is representing themselves

and they are getting an awful lot of assistance from somebody who is going to be deciding the case' [110].

ii. Changes to the lawyer/client relationship

Our interviews suggest that LASPO has adversely affected the nature of the relationship between lawyers and their clients. Due to fee reductions many of the interviewees feel they can no longer dedicate sufficient time to a client's case to achieve the best possible results for that client. Interviewee 9 explained:

'I don't think I can offer a very good service to clients. I think my practice will be best described as damage control for the person sitting opposite me. I am no longer able to spend the time ...thinking outside the box...It is simply standing up, saying what your client has told you... Whereas I can spend three hours researching the law on that particular thing, find three cases in support of my opinion, put all that into a position statement, I now do not have time even to read those cases, I don't have time to search for them, because I'm frantically trying to put words onto a piece of paper, so that the Judge can go "oh this is a position statement, you complied". It's almost all about compliance as opposed to best arguing. I feel almost like I am being hampered in a race...that I can never win. I will do alright, that seems to be the goal, to do alright, as opposed to achieving your best'.

This impact was felt by both barristers and solicitors. Interviewee 7, an experienced solicitor, told us that:

'I think that the constraints that are put on solicitors by the changes must affect your professionalism...I don't think that the idea of professionalism allows for the idea of being constrained by what you do, what you are able to do, or what you are supposed to be doing.'

Other interviewees gave examples which supported this position. For example, one spoke of a post-LASPO child custody case in which a fact-finding hearing was required because there were allegations of violence. In that case, the mother could not afford to pay for legal representation at the hearing, which the interviewee said affected the solicitor/client relationship because it altered the advice the solicitor was able to give [16]. It appears that the lawyer/client relationship is not assisted greatly even where clients can afford to pay for some limited legal advice or representation. The same respondent described 'unbundling' (an arrangement in which solicitors undertake work at some points in the Court process only, and the client does the rest) as '*working with one arm tied behind your back*' [16].

iii. Changing established Court room practices and relationships

Respondents identified numerous ways in which the dynamics of the Court room had altered post-LASPO. A barrister explained that where the other side is unrepresented, it is not only the Judge that is required to adapt his/her approach; the opposing lawyer also has to temper how they handle things:

'So it can affect you detrimentally, whereas, if the other side is represented then obviously you can cross examine more forcefully. In other words, the whole theory of adjudication, all the rules, have become completely skewed' [I2].

Another explained that where she faces a litigant in person, she will report the other side's arguments to the Judge as well as her own client's *'because if you don't, the Judge will waste so much time going off on the wrong tack because the litigant in person doesn't know what they should be saying'* [I5]. Some respondents felt that where they were up against a litigant in person, Judges wanted them to go so far as to assist their opponent, which legal representatives have to be *'strong-willed'* to resist [I11].

iv. Inconsistency of judicial treatment

In an attempt to bypass restrictions imposed by LASPO, it appears that some members of the judiciary are prepared to be more *'creative'* than others. One judge we interviewed spoke of his willingness to interpret the rules in order to assist litigants in person requiring assistance where possible. He gave the example of a child custody case involving an Eastern European couple. The father spoke English and was working and so could afford a lawyer. The mother spoke no English and could not afford a lawyer. The father applied for care and control and his solicitor presented the order claiming that the mother had consented to it, having had the contents translated by the father. According to the Judge, the mother *'...clearly needed representation, but under LASPO could not get one'* [I1]. The Judge therefore appointed a solicitor under Rule 16.4 of the Family Procedure Rules, which requires the Court to appoint a guardian (who can be a solicitor) for a child where it is in the best interests of the child to do so. The Judge determined that in this case, the necessary criteria were met, and went on to say that:

'...the extent to which [litigants in person] receive fairness is likely to be a real lottery in that I think in the examples I've given you, it was my lengthy experience as a judge that made it possible for me to draw on the Rules to try to achieve equality of arms. This only appeared to be an option for me because of that experience. I honestly don't think that a recorder would have done it in that I think they might either not have thought of that way round the problem and/or been too cautious. Part-time judges are inevitably more cautious. I think I am more likely to see things outside the norm, and be prepared to act on that'.

Inconsistent judicial treatment was raised by other interviewees. For example, concerns were raised that some judges were better equipped than others to manage litigants in person. These factors suggest that it is *'luck of the draw'* for litigants as to the experience they have as they navigate the Court system.

v. The most vulnerable are the most adversely affected

Interviewees universally agreed that LASPO has had a particularly detrimental impact on the most vulnerable in society. This senior solicitor spoke of her belief that LASPO has created a two tier justice system in which those with money can afford access to the

Courts even on spurious grounds, whilst those in poverty cannot pursue their rights even in meritorious cases:

'You know, there are cases where people have got money and they will be as unreasonable as any parent and as harmful to their children as any parent, but they can skip around the High Court and be as useless as they like, because they have the money to do so. Then you've got all these hoops that people who haven't got money need to jump through, or they don't even have the opportunity to jump through hoops...It looks increasingly like justice is not a right as one would expect it to be. It's becoming more of a privilege, or a benefit, as opposed to something that everyone should be entitled to' [17].

By way of example, the same solicitor spoke of the removal of judicial review from the scope of legal aid: *'So now, if a local authority is doing anything wrong insofar as a family is concerned, we're not in a position to challenge it.'* Other respondents spoke of cases in which they were aware that individuals were being *'priced out of justice'*. Interviewee 6 said *'I have a client who can't afford to divorce the husband who raped her and that situation has endured for more than a year'*. References were also made to individuals, such as those who have drug or alcohol addictions and who find themselves in desperate situations but are not entitled to legal aid, due to the restrictive scope of eligibility under LASPO.

8. Impact on the legal profession

Respondents identified several detrimental impacts which LASPO had had on themselves and the wider legal profession:

i. Viability of future practice/business models

Several respondents spoke of law firms they knew merging, making redundancies and/or closing as a result of the cuts to legal aid. They spoke of the current rates for legal aid work as being neither viable in terms of business security, nor just in terms of the level of expertise it is funding:

'I've had a care case in the Court of Appeal and I was getting £32.60 per hour, it's a disgrace for a lawyer in excess of 25 years call...We were cutting new law in overturning a care order...For that level of complexity, the rate is an insult' [12].

The suggestion that the reduction in rates is linked to business closures is supported by statistics released by the Legal Aid Agency which reveal that between April 2013 and March 2014 the number civil legal aid providers reduced by almost a quarter compared to the previous year.⁷

ii. Changes to the solicitor/barrister relationship

⁷ Legal Aid Agency, 'Legal Aid Statistics in England and Wales' (June 2014) (n 6)

Our data suggests that the dynamic between the two largest parts of the legal profession is changing post-LASPO. Solicitors are increasingly retaining work that would have been sent out to junior counsel in the past in order to maximise their earnings and, as a result, barristers are being involved later in proceedings, if at all. This has impacted significantly upon the volume of work and income being generated by barristers who now find themselves much quieter than they have been in the past. Some respondent (particular barristers) noted a link between this development and a general drop in the standards of advocacy being conducted in family law cases (see below).

iii. **Fall in quality and standard of service provided to clients**

There was a general concern that the quality of service provided to clients is in decline post-LASPO. This was attributed both to the lack of time available to practitioners to dedicate to their clients (see paragraph 7) and to lower qualified staff performing roles previously done by qualified lawyers. One senior barrister said that:

'I've seen some appalling court work by people who are sent along to do advocacy. Because of the fee structure being the same, paralegals can go along and do the work and they're not qualified in the same way as a barrister is' [15].

This sentiment was echoed by a Judge:

'...we are in danger of having inadequate advocacy because of solicitors' skimpy preparation and/or taking on cases beyond their experience, which will mean important points will be missed and the wrong aspects of the case will be focused on and this will of course affect the outcome of the case' [11]

One solicitor who no longer does any legal aid work (due to the lack of profitability and the associated bureaucracy) spoke of his local legal aid practices in unfavourable terms. On the subject of referring legal aid clients on to local legal aid practices he said:

'I had to do so with a heavy heart because I've seen how they operate. I've seen their petitions for instance, full of mistakes, obviously done by one of the suite of paralegals they employ, and not checked. They clearly have a production line approach...one of these firms has six offices in surrounding towns – and just two partners – so they just rely, as I said, on young, inexperienced, poorly qualified staff'[12].

iv. **Professional deficit**

Moral was low amongst barristers and solicitors alike. The majority of barristers interviewed indicated that if they had the choice they would either change practice area, or leave the profession entirely. Similarly, several felt that if they were able to make their choices all over again, they would not enter the legal profession at all, or

else would not specialise in family law. These sentiments were shared by several of the solicitors we interviewed. Unsurprisingly, those individuals specialising in public law, for example, representing children in care proceedings, tended to feel that they were faring better in terms of workload (because such remains within the scope of legal aid) than those who had built their careers on publically funded private law matters (such as divorce and child custody) which are now out of the scope of legal aid.

Both sides of the profession expressed concerns that junior lawyers will no longer be able to 'cut their teeth' on appropriate cases. Without such a '*rigorous career at the bar or as a solicitor*' it was considered that the future will see a '*dumbing down the profession*' [I16]. In relation to junior barristers the concern was that with solicitors retaining more of the work they want for themselves, '*[junior barristers] are either going to be doing the low level work, or, if no one else was available, are given work that's much too difficult for them*' [I5].

Some respondents were concerned that people would be put off, or financially restricted, from joining the family or criminal bar altogether. Interviewee 14 foresaw the '*family bar being a "hobby bar" with practitioners treating it as a sideline*'. It was felt that this will also lead to a less diverse bar and ultimately, a less diverse judiciary because having the financial means to enter that area of the profession will become a determining factor. Others predict a professional deficit, as fewer junior barristers and solicitors opt to specialise in family law and, even those that do, miss out on the quality of training that today's senior practitioners have benefitted from. As interviewee 11 put it:

'What the Ministry of Justice and the Judges don't realise is that, when you take out our generation, there's not the quality coming through. We are holding it together and, within the judiciary, there's a frustration around the lack of skills and knowledge in young lawyers'.