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Helen Bamber Foundation
working with survivors of human cruelty

Helen Bamber Foundation Submission to UK Parliament on the Future of Legal Aid (October 2020)

Introduction

1. Who we are

The Helen Bamber Foundation (HBF) is a UK registered human rights charity. Its remit includes survivors of torture, cruel, inhuman or degrading treatment, human trafficking, slavery, war, and interpersonal violence, including domestic, gender or sexuality-based violence. HBF delivers a specialist Model of Integrated Care (MoIC), which deals with the complex needs of its clients that result from the trauma they have suffered. HBF is known for its expertise in producing medico-legal evidence in accordance with the 'Istanbul Protocol: The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.' HBF is widely regarded as a leading authority in the treatment and documentation of the physical and psychological impact of torture, human trafficking and severe abuse, and is considered by the Home Office and by the Courts and Tribunal Service as one of the foremost respected bodies in the field related to extreme human cruelty.

2. Scope of the call for evidence on the future of legal aid

The scope of this response is discreet and relates to HBF's experience of:

- clients who are represented by legal aid representatives in respect of their asylum and/or trafficking claim under an immigration contract;
- access to justice following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), including the availability of legal aid, quality of legal representation and access to early legal advice;
- the impact of Covid-19; and
- anticipated challenges over the next decade and recommendations.

Whilst much of our response to this consultation relates to our experience at HBF, we refer the reader to the report of Dr Wilding, *Droughts and Deserts: A report on the immigration legal aid market*, which assesses the supply and demand of legal aid, following the implementation of LASPO which has resulted in the exponential increase of advice deserts and droughts in large areas of England and Wales[1],[2]. Increasing numbers of advice deserts and droughts compounds issues of capacity and overwhelm for those remaining within the immigration sector. Coupled with the very real reduction in legal aid fees and lawyers leaving the profession in their droves[3],it is unsurprising that LASPO's implementation has adversely affected clients' access to justice and the quality of representation[4]. We note that these issues are not exclusive to immigration law, indeed the Bach Commission found that LASPO has *'seriously damaged the functioning of the justice system, especially for those most in need'*.

[1] http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf
[2] We have also seen ILPA's response to the consultation and agree with their recommendations.
[3] http://www.younglegalaidlawyers.org/sites/default/files/Soc%20Mob%20Report%20-%20editecad.pdf
[4] https://www.lawcareers.net/Explore/Features/25022020-Is-a-career-as-a-legal-aid-lawyer-viable-in-2020

Submission

3. How LASPO has impacted on access to justice?

HBF's interaction with legal aid

A key component of our holistic model of specialist care, is legal protection. In practical terms this means offering legal support to a client in collaboration with their lawyer. The majority of HBF clients have legal representation funded by legal aid. However, our 2019 referrals and acceptance data shows that approximately 30% either did not have legal representation or had privately funded representation despite being eligible for legal aid[5]. Extrapolated across the sector, this suggests that of those who meet our criteria and form part of our core client group, 30% do not have representation under legal aid.

Where a client does not have a lawyer or where they are no longer able to afford a privately paid lawyer, the legal team prepare a referral to a legal aid representative. This can often be a time-consuming process owing to the vagaries of a solicitor's capacity; the volume of papers to be obtained (i.e. by way of a subject access request to the Home Office) and organised and the gathering of documentation to demonstrate that the client is eligible for legal aid. Additionally, we provide a legal summary of the client's history in order to aid the representative in quickly understanding the basis of the claim for international protection, which may help to secure their interest in taking the case on. We find that without preparing a referral in this way, the case is much less likely to be taken on by a legal aid representative.

We believe access to justice should be a human right that is guaranteed; however charitable funds and resources are expended in order to ensure good quality legal aid representation is secured thus fillings gaps in the sector created as a direct result of LASPO.

Reduction in the availability of legal aid solicitors

A report by NACCOM[6] led by Refugee Action found that between 2005 and 2018 over half of the legal aid providers in asylum and immigration and 64% of not-for-profits were lost[7]. A significant factor was LASPO rendering whole areas of immigration outside the scope of mainstream legal aid provision. Exceptional Case Funding (ECF) was introduced to fill the gap for the cases where it could be shown that an individual's human rights were at risk of being breached unless legal aid was granted. The initial preparation for ECF applications is done 'at risk' without guarantee of payment. As shown by the subsequent challenges to the scheme[8], in essence ECF now operates to grant funding in *most* cases that fall outside the scope of legal aid with a grant rate of 65% up from 1% in the first year of operation in 2013[9]. This demonstrates an unnecessary hurdle in obtaining legal aid for 'out of scope' matters, placing a further administrative burden on lawyers who remain in practice.
As such, HBF now prepare ECF applications, obtaining the grant of legal aid before referring a case to a lawyer, to remove the administrative burden of making the ECF application from the lawyer.

[5] It is not always clear why someone eligible for legal aid chooses to pay for their legal representation but in some cases this is because there is no legal aid lawyer available to take their case on whether due to capacity or geographical location.
[6] The No Accommodation Network - https://naccom.org.uk/
[7] https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf
[8] *Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 and *IS (by way of his litigation friend, the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464.
[9] https://www.lawsociety.org.uk/en/topics/legal-aid/exceptional-case-funding-guidance-for-solicitors

It is reasonably well-known that those who work in legal aid and in particular the immigration sector are susceptible to vicarious trauma and burnout[10]. Cases are also becoming more complex[11]. However, as cases have become more complex requiring more and more evidence (including numerous expert reports despite the low standard of proof), it is a requirement to apply for prior authority for funding from the Legal Aid Agency (LAA)[12] before an expert report can be commissioned. This places an additional administrative burden on the lawyer to excessively justify the use of experts, rather than the LAA trusting the lawyer to use their best judgment in spending public funds to engage an expert in a client's case[13].

Droughts and Deserts clearly sets out the dual administrative pressure in representing those seeking international protection: the battle with the Home Office with its long-standing 'culture of disbelief'[14] consistently raising the evidential bar to secure a grant of status and the battle with the LAA for funding to obtain the expert report needed to support the claim for international protection.

Legal aid lawyers are leaving the profession in their droves[15] and as such there are fewer sufficiently qualified and experienced representatives remaining to take on increasingly complex cases. In HBF's experience we find it increasingly difficult to make successful referrals as the pool of lawyers able to take on complex cases, which often need a medico-legal report, reduces. The result is that many of our clients continue to be represented by lawyers who are privately funded even where they are eligible for legal aid, and/or the lawyer does not have the requisite knowledge or experience (or indeed trauma-informed ways of working) to adequately represent the client.

> *"Poor-quality providers are protected in the market. Clients lack information about the reputation of providers when they choose a representative and are prevented from changing provider if they discover the existing one is poor quality"[16].*

Where our clients are represented by poor quality lawyers, this results in significant intervention from HBF to assist the lawyer with the preparation and strategy of the case. A further result of the decreasing availability of good quality lawyers, is that HBF clients who are unrepresented (usually around 10% on acceptance), can often wait long periods until a lawyer of suitable quality and experience is available. This can be particularly difficult for the client who may be unable to properly engage in our service (for example in trauma-focussed therapy) until their legal claim is in progress. These factors contribute to increasing the burden on legal aid resources.

Delays in payments and complexity of cases

The reduction of cases 'in scope' under LASPO and the increase in cases becoming more complex and thus taking longer to conclude has had serious repercussions on lawyers' availability. It has resulted in fewer legal aid firms willing to take on difficult and complex cases, particularly where there are delays in payment either because the case is likely to become 'escape'[17] or because the complexity of the case means it will take a number of years to resolve (as is often the case in trafficking claims). In these examples payment is often

[10] https://theimpactlawyers.com/articles/lawyer-burnout-what-is-it-and-what-can-we-do-about-it
[11] http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf pg 17 & 21
[12] Such requests for prior authority to incur costs requires three quotes to be produced and a detailed explanation and justification for the expert's time.
[13] Ibid. pp 29-32
[14] https://freedomfromtorturestories.contentfiles.net/media/documents/Beyond_Belief_report.pdf
[15] https://www.lawcareers.net/Explore/Features/25022020-Is-a-career-as-a-legal-aid-lawyer-viable-in-2020; https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/windrush-crisis-underscores-legal-aid-need
[16] http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf pg 3
[17] This is where the profit costs of a case reach three times the fixed fee and 'escapes' to being paid at an hourly rate but is later subject to further assessment before payment by the LAA

delayed or made many years after the case is opened. Inadequate remuneration[18] and delays in payment are further factors affecting the availability of legal aid representation as often the practice's financial viability is considered when taking on a complex case which may take a number of years to receive payment. These unintended consequences are discussed in Dr Wilding's report[19].

Geographical availability of access to legal aid representation

HBF's MoIC service is predominately a London based service working with clients housed within the M25, however, we take on clients located nationally for the purposes of preparing a medico-legal report. Where we are unable to accept a referral due to location, and where they are unrepresented, we provide signposting advice to ensure that clients are directed to good quality legal aid lawyers. Depending on the location of the client, this can be very difficult as there are some areas where there are simply no legal aid providers within reach of their location[20]. These areas are referred to as 'advice deserts and droughts'

> *"The term 'advice deserts' has become familiar, referring to areas of the country where there is no legal aid provision at all for a particular area of law. But there are also advice droughts – areas where there appears to be provision, because there are unused matter starts in the geographical area, but in practice this is not accessible because providers have no (or limited) capacity to open new cases."*[21]

For example, there are no legal aid providers in Plymouth or Lincolnshire[22], clients must travel to another locality to obtain legal aid advice. Recently several of our clients have been housed in Essex, which is an advice desert. Whilst HBF clients are usually represented on referral, this raises a concern that vulnerable survivors of torture and trafficking are being housed in locations where there is no or limited access to legal aid lawyers. Where there is only one provider, as is the case in Devon and Surrey/Sussex, it is all the more worrying that there is a lack of choice in provider, meaning that there is a very real risk that the provider will either not have capacity or the requisite knowledge or experience to take the case on. In turn this means there is a risk that survivors will not obtain the legal advice they require to progress their cases[23] and which ultimately may affect their ability to recover from their traumatic experiences.

Accessing legal advice early

A particularly prevalent issue that we see amongst our referrals and accepted clients is in respect of early legal advice. We see a tangible link between access to early advice and front-loading of a client's case, and its swift resolution. Where clients have not received legal advice at the outset of their claim for asylum or trafficking and/or their cases are not front-loaded with relevant evidence prior to a decision being made, often we see these cases drawn out and taking much longer to conclude[24]. Notably, our experience mirrors the research published by the Law Society[25], which supports the position that early access to advice results in legal issues being resolved much sooner. Thus, simple issues are resolved prior to matters and costs escalating. The need for early legal advice was also identified in the Post-Implementation Review of Part 1 of LASPO, which found that improving access to legal advice earlier on, avoiding the matter and costs escalating once the case gets to court, was at the heart of legal support[26].

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[18] https://www.theguardian.com/law/2018/dec/26/legal-aid-how-has-it-changed-in-70-years
[19] http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf pg 25
[20] Ibid. pg 39
[21] Ibid.
[22] Ibid.
[23] https://www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/
[24] https://www.ft.com/content/894b8174-c120-11e8-8d55-54197280d3f7
[25] http://www.lawsociety.org.uk/news/press-releases/restoring-state-funding-for-early-legal-advice-could-save-cash/
[26] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf pg 4

There is a specific issue relating to cases which involve a trafficking claim: there is no legal aid available *prior* to an initial decision (known as a Reasonable Grounds decision) being made on the claim within the National Referral Mechanism (NRM). This means, if there is no asylum element connected to the trafficking claim, advice under the legal aid scheme is not available[27]. Given the complexity of trafficking claims, the specific vulnerabilities of survivors of trafficking and risk of further exploitation, it is quite incredible that trafficking survivors, who have not yet entered the NRM are expected to navigate the system without legal advice until they receive an initial decision on their claim. In practice most lawyers can establish an asylum claim alongside the claim for trafficking, however, there will still be a cohort of individuals who do not receive advice prior to entering the NRM. The effect on survivors of trafficking is that they do not receive early recognition of their experiences as a survivor, which then allows them to access the necessary support needed to rebuild their lives and recover from their experiences.

In short, we consider access to early legal advice imperative to the swift resolution of legal matters, thus avoiding escalating costs on appeal and allowing survivors to move on from their experiences and move forward with their recovery.

4. Impact of Covid-19 on legal aid services and clients

In May 2020, two months after the announcement of the global pandemic and lockdown in the United Kingdom, HBF and Freedom from Torture put together the briefing paper *'The Courts, Tribunals and Covid-19 Public Health Crisis'*[28], which suggested a series of interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework. The focus of the paper, and its subsequent recommendations, was to ensure that standards of procedural fairness were maintained for the most vulnerable individuals for the duration of Covid-19 and ongoing public health crisis. We have referenced this report for consideration, which comprehensively sets out the increased pressures on an already stretched legal advice sector.

5. Challenges over the next decade, reforms needed and what can be learnt from elsewhere?

The Government has achieved its objective of reducing the cost of legal aid, by £1bn but at what price? There have been numerous challenges to the cuts[29]and some provision has been reinstated[30] with more proposals to come following the Government's review of LASPO. In the seven years since LASPO came into effect, our experience is that some of the most vulnerable members of our client group, who would have been eligible for legal aid prior to LASPO, have been left to navigate a complex and hostile system without proper legal advice[31]. It is no surprise that the cuts have been described as a *"false economy"* by former President of the Supreme Court, Baroness Hale. The initial saving in costs are simply transferred elsewhere in the system i.e. to the court service, the Home Office and on to legal aid practices – both for profit and not-for-profit organisations.

Dr Wilding, states in her report,

> *"There is an urgent need for policy which takes a whole-system view and differentiates by quality, supporting the high-quality providers, and sanctioning or excluding poor-quality ones, while also reducing the volume of failure demand pulled into the system through the*

[27] https://atleu.org.uk/news/legalaidimmigrationadvice
[28] http://www.helenbamber.org/wp-content/uploads/2020/05/Tribunals-courts-and-COVID-recommendations-Final.pdf
[29] https://www.lag.org.uk/article/202652/rushed-reforms-spark-barrage-of-legal-challenges
[30] https://www.lawsociety.org.uk/en/topics/legal-aid/laspo-act
[31] https://www.theguardian.com/uk-news/2019/nov/01/dizzying-maze-uk-immigration-system-hostile-environment

actions of other agencies. There are significant areas of advice desert and advice 'drought', where there is a false appearance of adequate supply. Demand and supply have been misunderstood at policy level… Currently there are no effective feedback loops in place to obtain critical information about demand or functional supply."[32]

Challenges

The current Government faces several challenges post LASPO, not least in restoring faith that there is meaningful access to justice for those most in need. One major challenge that the Government faces, and that will greatly impact both the workload of the Home Office and the LAA over the next half decade at least is the current backlog of 40,000 claims for international protection (and other forms of human rights applications)[33]. The knock-on effects of this backlog will likely increase costs of asylum accommodation and support; add to the costs of court system as cases potentially take longer to conclude and impact on the Home Office's capacity to process the backlog, not to mention the impact on the numerous charities working with these clients whose cases are likely to remain unresolved for a number of years, thus redirecting charitable resources to assisting them for the foreseeable future.

What can be done now? We suggest the following recommendations in response to this consultation:

1) Facilitate the provision of **early legal advice**, to allow for the frontloading of case preparation (including expert reports), that enables lawful and time sensitive decisions to be made thus reducing the need for cases to go to court;

2) A thorough **review of supply and demand of immigration providers**, and the fees associated with immigration work increased to **ensure that representation is accessible and financially viable** for both the client and the provider respectively;

3) Expand **provision of legal aid contracts** in areas where there are advice droughts and deserts in coordination with Home Office dispersal areas;

4) Work with the Home Office to **initiate a system to identify and process cases that have expert medical evidence** quickly to ensure resolution for the most vulnerable;

We consider that these recommendations will have a great impact on improving access to justice for the most marginalised in society, reinvigorate legal advice services and ultimately reduce the long term costs of holding survivors in stasis whilst their claims for international protection are processed awaiting resolution.

[32] http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf pg47
[33] https://www.bbc.co.uk/news/uk-politics-53966024