

THE JUSTICE PAPERS

The Bar Council

Civil Justice



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Suppose you are facing the convoluted and well documented process involved in claiming a PIP (Personal Independence Payment) to which you are entitled. You are likely to be disabled; you may well have mental health problems. The process may appear intimidating. The quality of initial decision making is patchy, a fact evidenced by a high success rate for appeals against these decisions to the First Tier Tribunal. Or suppose you are a tenant involved in a dispute with your landlord; or an employee who wishes to pursue a claim for unfair treatment in the Employment Tribunal. How has your position altered since the last government's flagship changes to the availability of legal aid in the civil courts - and what does this tell us about the state of access to justice today?

The right to participate properly in the civil justice system is no less critical than the rights that are in play when we face a criminal charge; or where the fate of children is to be decided in the family courts. Complex legal rights are also involved in many apparently more mundane areas – the right to welfare benefits like PIPs; or employment support allowance (ESA); housing rights; rights before employment tribunals; and immigration cases. There are fully-fledged legal regimes in all these areas, which perhaps attract less public attention than headline cases from the criminal and family courts, but which also need

proper support to protect the rights they grant us.

This, of course, raises the issue of legal advice and representation in the sphere of civil law, and how and when we, as a society, provide these to people who cannot afford them without help. The legislation known to lawyers simply as “LASPO”¹ made major changes to legal aid in civil cases, and particularly to the availability of early legal advice and representation. The aims of all this may have been reasonable enough: to discourage unnecessary litigation at public expense, to target legal aid to those who need it most; to make significant savings to the cost of the scheme; and to deliver better overall value for money. However, it has become abundantly clear in the intervening years that the sweeping nature of the changes has created considerable problems in the effective enforcement of citizens' rights.

Before LASPO, the assumption was that civil legal aid was available to help with almost all aspects of English law, with some exceptions. Now, the situation has been completely reversed. Civil legal aid is now only available in those cases which are specifically set out as “in scope”. Accordingly, all of the following are out of scope – consumer law, help when being sued for unpaid debt, except where there is an

¹ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, available [here](#).

immediate risk to the home, cases where victims of violent crime are wrongly refused government compensation for their injuries, employment cases (except where a discrimination issue is involved), almost all housing matters (except where the home is at immediate risk, or homelessness assistance or cases against landlords for poor housing conditions involving a serious risk to life or health), and almost all appeals against decisions to withhold welfare benefits.

It should go without saying that the removal of such a large amount of law from scope has large practical implications. Civil legal aid is generally available in two forms: legal help and legal representation. Legal help can consist of initial advice and assistance with a problem, identification of the merits of a possible claim, or correspondence with the other party – for example the Department for Work and Pensions (DWP) in a benefits case; or the landlord or mortgage company in a housing case.

Before LASPO, much of this legal help was provided by agencies like Citizens Advice or law centres. But, as explained by the Equality and Human Rights Commission, the reductions to the scope of legal aid under LASPO have *“led to a corresponding reduction in funding for advice organisations, and limited their ability to provide specialist*

*help.”*² The report gives a figure of £19m for the loss suffered by Citizens Advice; and states that around half of local Citizens Advice services were previously funded to provide specialist advice on matters now out of scope.

A related point is that LASPO failed to recognise the importance of early legal advice in achieving exactly the reduction in unnecessary proceedings that it supposedly sought to achieve. So, if one takes the element of housing law that remains in scope, it does not include advice with the early stages of a housing dispute because of the normal requirement, contained in LASPO, that the home must be at immediate risk.

Many commentators observe that early advice and intervention in order to prevent a housing dispute from escalating into potential possession proceedings is highly cost-effective. Similar comments can be made about advice concerning mortgages; or with housing benefit payments. Early intervention can prevent escalation into potentially much more expensive (and, of course, distressing) issues.

And it is not only advice that is essential to both justice and efficiency in these matters, but representation too. To take employment law as an example, the employee

² Equality and Human Rights Commission (September 2018), *Research Report 118: The impact of LASPO on routes to justice*, available [here](#).

without representation will very frequently face an employer who has a lawyer – or someone from Human Resources – to put its case. This is an unequal battle; and the tribunal will have to shoulder the burden of helping an unrepresented person through the proceedings.

There is, however, a mechanism under which other areas can be eligible for “exceptional funding” - so does that mean that there is in fact an answer to all of this? The answer is a firm no. Take-up and successful applications have been extremely low; April to June of this year saw 765 applications, of which 462 were successful - both the highest quarterly number of applications, and the highest proportion of awards granted since the scheme began. These figures are negligible compared to those forecast as LASPO was taking shape, at which point it was anticipated that between 5,000 and 7,000 cases per year would be funded in this way. Although valuable, the existence of exceptional funding cannot disguise the scale of the retreat represented by LASPO.

In last year’s comparatively well-publicised *Unison* case, Lord Reed stressed on behalf of a panel of seven Supreme Court judges that: without full access to the courts “*laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the ...election of MPs may become a meaningless charade.*”³ The *Unison* case involved the charging of fees simply for bringing a case to the Employment Tribunal; but the ability to be properly advised before making or defending a civil claim in the first place - and to put your case effectively if you do - is of equal importance.

A functional democracy cannot accept a situation where the rights created by elected lawmakers become meaningless in practice because citizens cannot enforce them. The legacy of LASPO is that the future of our civil justice system may have more of a bearing on the integrity of our democracy itself than those of us working on these often unglamorous cases might once have had cause to suspect.

3 R (on the application of Unison) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51