**RESTRICTIONS ON LEGAL AID IN FAMILY LAW CASES IN ENGLAND AND WALES: CREATING A NECESSARY BARRIER TO PUBLIC FUNDING OR SIMPLY INCREASING THE BURDEN ON THE FAMILY COURTS?**

**Kayliegh Richardson and Ana Speed**

**Northumbria University, UK**

Ana Kate Speed

CCE1-103

Faculty of Law and Business

City Campus East

Northumbria University

NE1 8ST

Tel: 0191 243 7958

Email: ana.speed@northumbria.ac.uk

Solicitor Tutor at Northumbria University

Kayliegh Leanne Richardson\* (corresponding author)

CCE1-109

Faculty of Law and Business

City Campus East

Northumbria University

NE1 8ST

Tel: 0191 349 5539

Email: kayliegh2.richardson@northumbria.ac.uk

Senior Lecturer at Northumbria University

**Abstract**

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) resulted in significant cuts to the availability and scope of legal aid in family law proceedings. Some four years after the cuts were implemented, there has been a great deal of research about their devastating impact on vulnerable groups and individuals. This paper considers the other victim of the cuts, the family court itself. It is currently bulging under pressure from both an increase in applicants who have been forced to represent themselves in family proceedings and also from a rise in applications for injunctions linked to domestic violence. This paper will draw on case law to demonstrate that the reforms implemented through LASPO have seemingly only succeeded in passing the burden from one publicly funded agency, the Legal Aid Agency, to another, HM Courts and Tribunals Service. The family court system is currently at breaking point and further government review is urgently needed if people are going to be able to continue to use the system effectively.

**Key words**

LASPO, legal aid, access to justice, family courts

*Introduction*

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) resulted in significant cuts to the availability and scope of legal aid in family law proceedings. In the four years that have passed since the introduction of LASPO, the effect of the cuts on individuals and practitioners has been well documented. Women, ethnic minorities and people with disabilities have been disproportionately affected (Mostyn, 2015). The cuts have led to the creation of ‘advice desserts’ and a two-tier system where some of the poorest and most vulnerable members of society are denied access to justice (Amnesty International, 2016). Legal aid firms have felt their profit margins shrink as a result of reduced fees and areas being removed entirely from the scope of legal aid. Many firms have had to diversify their offering to include areas that still attract public funding. However, not all firms have survived and the figures demonstrate that the number of legal aid firms has fallen by 20% in the past five years, from 2,991 in March 2012 to 2,393 in March 2017 and by 5% in 2017 alone (Gyimah, 2017).

However, there has been another victim of these cuts: the family court system itself. This article will consider the ways in which LASPO has increased the burden on the family court system including the rise in self-representing litigants, a reduction in cases being disposed of through mediation and an increase in applications for injunctions linked to domestic violence. A particular emphasis will be placed on the case law which has arisen post-LASPO which has recognised the increasing strain on the family courts.

 This article will conclude that the reforms implemented through LASPO have seemingly only succeeded in passing the burden from one publicly funded agency, the Legal Aid Agency, to another, HM Courts and Tribunals Service. The article will conclude that the family court system is currently at breaking point. Whilst efforts have been made by law firms, University clinics and law centres to increase their pro bono offering, they are unable to fill the gap left by the cuts and ease the burden on the family courts. We conclude that further government review is urgently needed if people are going to be able to continue to use the system effectively.

*The History of Legal Aid*

The roots of the legal aid system in England and Wales family law, sit firmly in the general public’s need for advice and assistance with matrimonial matters. Until the Second World War, there was no formal legal aid system so advice primarily existed for those who could not afford it on a philanthropic ad hoc basis, with qualified lawyers (commonly referred to as the poor man’s lawyer) volunteering their time to provide advice on divorce and custody disputes on a pro bono basis. An exception to this was the Poor Persons Procedure, which was established by the Law Society in 1914. Under the Poor Persons Procedure, lawyers on local panels were expected to provide free assistance to those who satisfied a strict means test. Applicants were required to have capital savings of less than £50 and an income of less than £2 per week or £4 in exceptional circumstances (Cretney, 2005).

Although the work of the Poor Person’s Department was not limited to matrimonial matters, approximately 90% of the cases were divorces (Gibson, 1993). The Poor Persons Procedure could not be sustained during the Second World War, however, when the number of marriages breaking down rose significantly. According to the Office of National Statistics, in 1938 (the year before the Second World War began) there were 6,250 divorces, compared to 15,654 divorces in 1945 (the year the War ended) (Office for National Statistics, 2014, section 3). Two years later, whilst men and women were still dealing with the aftermath of the War, numbers reached 60,254 (ibid). To meet the rising demand, the Law Society established a temporary salaried divorce department which carried out pro bono divorce work for servicemen.

Following the end of the war, the coalition government set up the Rushcliffe Committee (chaired by the former Conservative backbench MP Lord Rushcliffe) to advise on the establishment of a comprehensive legal aid system. The Committee’s recommendations included that legal aid should be available in all courts to a wide income group and at a scale of contributions for those who could pay something toward costs but free for those who could not. The cost of the scheme would be borne by the state, however the scheme should be administered by the legal profession who would receive adequate remuneration for their services (Report of the Committee on Legal Aid and Legal Advice in England and Wales, 1946). The Rushcliffe recommendations were given effect through the Legal Advice and Assistance Act 1949 and the legal aid regime came into force in 1950. In its first year, 37,700 certificates were granted (Abel, 2003). This was an increase of 31,100 applications from those granted under the Poor Person’s Procedure in 1949 (ibid).

The initial scope of legal aid was wide-reaching. All routine family law proceedings including divorce, financial relief and children disputes were covered. Applicants were subject to a means and merit test, however this was generous and over 80% of the country were eligible for assistance (ibid). In the years that followed, family law continued to attract considerable legal aid applications. A survey of legal aid certificates granted in Birmingham in 1969 revealed that 86% of certificates were granted for family matters, 9% for personal injury and 5% for other areas (Legal Action Group, 1992). The entitlement to claim legal aid in family law proceedings was preserved in the subsequent Legal Aid Act 1988 and the Access to Justice Act 1999.

The importance of legal aid in ensuring meaningful access to the courts and full participation in the litigation process has been recognised by academics, legal practitioners and the judiciary. It is often regarded as the fourth pillar of the welfare state, alongside health, education and social security. Prior to the creation of the legal aid system, in his paper Legal Aid for the Poor: A Study of Comparative Law and Legal Reform, Cohn argued that legal aid is a fundamental right of citizens. He wrote that:

Legal aid is a service which the modern state owes to its citizens as a matter of principle… just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law (Cohn, 1943, p 250).

More recently, Steyn LJ mirrored these comments in the case of R v Secretary of State for the Home Department, ex parte Leech, noting that ‘the principle of our law that every citizen has a right of unimpeded access to a court…even in our unwritten constitution…must rank as a constitutional right. Such rights are a fundamental part of our legal system, providing access to justice and the right to a fair trial’ (1994, page 210).

The civil legal aid budget increased 14 times between 1966 and 1983 whilst over the same period the criminal budget rose from £550,000 to over £62 million (Abel, 1998). By 1998 the budget had reached £1.6 billion ([Brooke,](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf) 2017) and between 2005 and 2010, the average annual budget was £2.1 billion(ibid). The legal aid budget was the largest rising item of Government expenditure (Mostyn, 2015). At the same time, however, fewer people were qualifying for assistance as a result of the Government’s failure to increase the means test to take into account inflation. Whilst 80% of the population were financially eligible for assistance in 1950, this declined to 40 per cent by the mid-1970s and only 20% per cent of families with children qualified. In 2007, only 27% of the population were financially eligible (Mostyn, 2015).

In 2010, as part of wider cuts taking place within the public sector and necessitated by the economic crisis, the Government announced that it would implement a series of reforms to the legal aid regime. The reforms included removing large areas of law from the scope of legal aid; tightening the financial eligibility criteria; cutting fees paid to providers by 10%; and providing more legal advice over the telephone (Implementing Reforms to Civil Legal Aid, Public Accounts Committee, 2015). The reforms would be implemented through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The reforms had four objectives: to make significant savings to the legal aid budget; to discourage litigation at public expense; to target legal aid to those who need it most; and to deliver better overall value for money(Implementing Reforms to Civil Legal Aid, Public Accounts Committee, 2015). Financially, the reforms aimed to reduce the legal aid budget by 23%. This equated to cuts of £350 million in 2013 and annual cuts of approximately £268 million until 2018 (Ministry of Justice, Legal Aid Agency 2014). Culturally, the Government sought to discourage people from engaging in what was regarded as ‘unnecessary and adversarial litigation at the public expense and to encourage people to take greater personal responsibility for their problems by utilising ‘alternative sources of help, advice or routes to resolution’ (Ministry of Justice, 2010).

Despite widespread objections from the legal profession, LASPO came into effect on 1 April 2013 and removed from the scope of legal aid private family law cases except where strict criteria were met regarding domestic violence (including female genital mutilation), child abduction and child abuse or for children if they were made a party to private law proceedings (LASPO, 2012, Schedule 1 Part 1 Paragraphs 12 and 13). Even in cases where individuals are able to provide evidence of domestic abuse and are seeking protection from the Family Courts, they may still not be entitled to legal aid due to the strict means test that is applied. For example, an individual may be seeking a non-molestation order and may be living in a refuge with little to no income. However, they may still be prevented from accessing legal aid due to the equity in the family home they have fled from. This is an issue which will be discussed in more detail later in this article.

The Government justified the decision to restrict legal aid on the basis that ‘legal aid is not routinely justified for ancillary relief proceedings, private law family and children proceedings’ (Ministry of Justice, 2010). In relation to private law children cases, they argued that ‘the provision of legal aid in this area is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases which can have a significant impact on the long-term well-being of any children involved’ (ibid).

*Increase in litigants in person*

The most foreseeable impact of the restrictions in legal aid has been the increase in self-representing litigants (i.e. parties with no legal representation) in the family courts. Statistics demonstrate that between April and June 2017, the proportion of disposals where neither the applicant nor respondent had legal representation was 36%, an increase of 19 percentage points since the same period in 2013 (Ministry of Justice, April – June 2017). Correspondingly, the proportion of cases where both parties had legal representation dropped by 17 percentage points to 18% over the same period (ibid). The President of the Family Division, Sir James Munby acknowledged this in the case of Q v Q; Re B (A Child), Re C (A Child) [2014] EWFC 31. He said ‘there has been a drastic reduction in the number of represented litigants in private law cases. The number of cases where both parties are represented has fallen very significantly, the number of cases where one party is represented has also fallen significantly and, correspondingly, the number of cases where neither party is represented has risen very significantly’ (para 11).

The benefits of legal representation for the client and the family court cannot be overstated. Without a professional advocate, clients often lack the experience and skill required to identify the key issues in dispute and put forward their strongest legal arguments. In turn, their ability to fully participate in the proceedings can be compromised. This was exemplified in *Q v Q* where *Q*’s public funding was withdrawn leaving him unable to obtain funding to instruct an expert to challenge the expert report which was already before the court.

This case raises the question whether someone can really defend themselves against accusations if they do not have access to legal advice or representation? Although subject to means testing, legal aid is available for those individuals who raise allegations of domestic abuse or child abuse but no legal aid is available for those individuals who are accused. As Sir Munby raised in the Q v Q judgment, this creates challenges for Judges who preside over these types of proceedings and need to make determinations as to the accusations before them. It could therefore be suggested that, where allegations are made of domestic abuse or child abuse in proceedings, both parties should have equal access to legal aid. This would enable the proceedings to be determined fairly and would enable both parties to access funding for experts to either prove or disprove the case before the court.

Even in those family cases where no such allegations are before the court, the act of simply presenting one’s own case can be distressing and prevent full participation in the process. In the public law case of Re JC (Discharge of Care Order: Legal Aid) [2015] EWFC B39 HHJ Hammerton recognised the challenges in conducting a case where the subject matter is ‘grave and emotive’ (para 92). Referring to the conduct of an unrepresented father throughout proceedings, he said:

The absence of representation is particularly inappropriate and unfair. The advantage of legal representation is not confined to the presentation of the case. In family proceedings, there is an additional advantage that the advocate can protect the client from himself. Timely advice will prevent the party from behaving in a way that he might regret. In this case, the father has not had the benefit of such advice. His behaviour in court before me has, at times, been unrestrained. He has frequently demonstrated the worst aspects of his personality and his propensity to act with aggression (para 92 – 93).

Poor conduct was also addressed in Re A: Letter to a Young Person [2017] EWCF 48. The case concerned a teenage boy (*A*) who applied for an order to move with his father to Scandinavia. The application was eventually taken over by *A’s* father, who represented himself in the proceedings. The application was opposed by the child’s mother and step-father, with whom *A* lived. *A* received public funding and was the only party represented by a solicitor. Instead of giving a traditional Judgment, HHJ Jackson wrote a letter to *A* explaining his decision to refuse the relocation order. The letter is littered with comments about the father’s poor conduct throughout the proceedings, including that HHJ has seen the ‘self-centred way that he behaves’ (para 5) and that he ‘makes sure everybody knows how little respect he has for anybody who disagrees with him’ (ibid). ‘Even as a judge’, HHJ Jackson wrote, ‘I found it hard work stopping him from insulting the other witnesses’ (ibid). Whilst such behaviour could be indicative of a party’s parenting abilities which should form part of the decision making process, it may simply be evidence of a party’s frustration with the process. Equally it may be that they are finding it difficult to express themselves appropriately in such an emotionally charged arena. Parties with representation are generally protected from the damaging effects of their own behaviour because they have a reduced involvement in the proceedings. Undoubtedly, represented parties are able to capitalise on such behaviour (whether intentionally or not). It is also difficult to envisage a situation where such behaviour does not have any impact on the outcome of proceedings.

A further issue that has been raised by the judiciary is the length of time that it takes to dispose of proceedings where one or more of the parties does not have representation. HHJ Mostyn spoke of this at the National Access to Justice and Pro Bono Conference in 2015 when he said ‘lists of 12 cases which used to be completed in a day are now a far gone memory’ (para 42). Lord Neuberger also spoke of this during his welcome address to Australian Bar Association Biennial Conference on 3 July 2017. He said:

The substantial increase in litigants in person represent a serious problem for judges, for court staff and for other litigants and their lawyers. A trial or any other hearing involving a litigant in person is likely to last far longer and involve far more work for, and pressure on, the judge than a trial with legal representatives on both sides, and an inevitable result of longer hearings is delays to other cases. The effect on an undermanned and demoralised court staff of having to deal with more litigants in person can only be imagined (para 11).

This is having a visible effect on local family courts, where it can now take months to have a first hearing listed in a family case. For a parent who is being prevented from seeing their child this can be an unacceptable delay and could arguably heighten the animosity between the parties by the time they reach court. The Family Court Statistics demonstrate that between April and June 2017 private law cases took an average of 24 weeks to reach final resolution (Ministry of Justice, 2017). This is an increase from 14.7 weeks over the same period in 2015 (Ministry of Justice, 2015). Delays are often caused by Judges spending time to ensure that unrepresented parties fully understand the process and any agreement reached. The role of the Judiciary post LASPO therefore appears to extend beyond decision making, into providing limited legal advice to unrepresented parties, albeit in as neutral a manner as possible.

Guidance from the Law Society (June 2015) indicates that delays are also being caused because Judges are more willing to grant extensions or adjournments to unrepresented parties. This was exemplified in the case of Kinderis v Kineriene [2013] EWGC 4139 (Fam), which concerned the summary return of a ten year old child under the Hague Convention on the Civil Aspects of International Child Abduction. The child had been removed to England by her mother, who asked the court not to return the child because to do so would be against the wishes and feelings of the child and would cause her psychological harm. There was evidence that the Applicant father had been abusive towards the Respondent mother and the child. As the Applicant, the father benefitted from non-means and non-merits tested public funding. The mother’s application, however, was subject to both means and merits testing. Her application was refused on its merits because, at the time, there was insufficient evidence to support her case. By the time of the final hearing (and despite, by this stage, there being a Cafcass report supporting her case) she had not had the opportunity to appeal the Legal Aid Agency’s refusal. Holman J felt he had no choice but to adjourn the hearing. He said, ‘I wish to make absolutely clear that I understand and appreciate the need to be prudent with legal aid expenditure, which is also funded by the taxpayer. The merits test in screening legal aid applications is, in general terms, a necessary and appropriate one’ (Para 21). However, he recognised that ‘it is impossible for this mother, as it is for almost any self-representing respondent parent, to engage in such negotiations without an experienced lawyer who knows and understands the conventional framework and scope of such measures and arrangements, and who has the skill to negotiate’ (Para 19).

In the writers’ experience, delays are also caused by unrepresented litigants preferring all communication to take place within the courtroom on the court record. Understandably, litigants are untrusting about communicating with the opponent’s representative or engaging in out of court settlement negotiations for fear they act to their detriment. Similarly, representatives communicating with litigants in person may also prefer for this communication to take place on the court record so that they cannot later be accused of taking advantage of an unrepresented opponent. Previously, parties would be encouraged to use meeting rooms around the court to try and reach agreements between themselves and in the meantime the Judge/Lay Bench would hear other cases which needed determination. This enabled them to list many cases in one day. In cases where both parties are represented, sensible pre-hearing negotiations are possible meaning that the hearings are focused on discrete outstanding issues. This is unfortunately no longer possible with the increase in unrepresented litigants. Now pre-hearing discussions are more difficult and hearings become less focused. In addition to this, where a party is represented, Counsel will usually draft the court order for the Judge to approve. In a case where both parties are unrepresented, the onus will be on the Judge to draft the order, without the assistance of a Clerk. Court admin staff are also reported to have been asked by Judges to prepare bundles in cases where both parties have been unrepresented and have failed to do so themselves (see JY v RY [2018] EWFC B16). This takes up a significant amount of judicial time and resources in a system that is already bulging at the seams.

Of course, the impact of the court’s decisions in family cases can be far reaching. Notably, there is evidence that children are being impacted by the increase in self-representing litigants, directly as parties to the proceedings and indirectly as dependents of the parties and where their best interests are being decided. This was recognised in the case of Q v Q where Sir Munby stated ‘[I]t seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here’ (para 19). Despite stating prior to the introduction of LASPO, that as far as possible, legal aid would still be available in cases involving children the Government rejected calls to ensure that children and vulnerable young persons received an automatic entitlement to free legal aid (The Law Society of England and Wales, 2017). It is estimated that 75,000 children and young people have lost entitlement to legal aid year on year since the introduction of LASPO (ibid).

Such unfairness may be contrary to Article 3 (1) of the UN Convention on the Rights of the Child which requires the best interests of children to be the primary consideration in all decisions affecting them and Articles 6 and 8 of the European Convention on Human Rights which ensure children have the right to a fair trial and family and private life. Exceptional case funding is available in cases where a failure to provide legal services would be in breach of an individual’s convention rights (section 10, LASPO 2012). However, this ‘safety net’ has proved vastly ineffective, not least because solicitors are often unwilling to complete the application forms. This is because it takes an average of ten hours to complete the application with no guarantee it will be approved and the firm reimbursed for its time. The number of applications for exceptional case funding is approximately 1,200 per year (Ministry of Justice and Legal Aid Agency, Legal Aid Statistics, September 2013 – December 2015). This is substantially lower than the Ministry of Justice’s predictions that there would be between 5,000 and 7,000 applications per annum (National Audit Office, 2014, page 7). The Law Society has recommended that the Government should update the guidance for exceptional case funding to reflect that without legal advice, the rights of children and young people under the European Convention on Human Rights are likely to be breached(The Law Society of England and Wales, 2017).

A further difficulty for family courts is the complexity of disputes. Despite claims by the Government that private law cases ‘will not be routinely legally complex’, there is clear evidence of cases coming before the court where unrepresented parties are being expected to present legally complex issues. For example, the case of Lindner v Rawlins [2015] EWCA Civ 61 concerned a husband’s appeal to the Court of Appeal against a decision to refuse him an order for police disclosure. The court referred to the appeal as ‘technical and unusual’ and noted that the husband ‘could not be expected to have mastered this areaof the law in order to be able to present his appeal in a way that assisted the court’ (para 34). The husband approached the appeal on a mistaken legal basis. The judges had to spend a considerable amount of time locating and identifying the relevant documents and researching the law. Aikens LJ stated:

Yet again, the court was without any legal assistance and had to spend time researching the law for itself then attempting to apply it to the relevant facts in order to arrive at the correct legal answer. To do the latter exercise meant that the court itself had to trawl through a large amount of documents in the file. All this involves an expensive use of judicial time, which is in short supply as it is. Money may have been saved from the legal aid funds, but an equal amount of expense, if not more, has been incurred in terms of the costs of judges' and court time. The result is that there is, in fact, no economy at all. Worse, this way of dealing with cases runs the risk that a correct result will not be reached because the court does not have the legal assistance of counsel that it should have and the court has no other legal assistance available to it (para 34).

Again, this is yet more evidence of the Judiciary now being expected to perform the role of legal advisors and legal researchers, rather than simply decision makers. In a system where many Judges preside over areas of law in which they have no particular practice specialism, this is a big onus to ask. The time spent on these tasks which previously would have been undertaken by the lawyers presenting the case, removes the time that they have to carry out the role they were originally appointed to undertake.

The issue of complexity and human rights becomes more prominent in cases where one or more of the parties have a disability. The case of Re D (A Child) [2014] EWFC 39 concerned an unrepresented father who lacked capacity and applied to revoke a care order in respect of his son. The Legal Aid Agency only agreed to award legal aid following considerable pressure from Sir Munby. In his first judgment the President stated: ‘thus far the State has simply washed its hands of the problem, leaving the solution to the problem which the State itself has created – for the State has brought the proceedings but declined all responsibility for ensuring that the parents are able to participate effectively in the proceedings it has brought – to the goodwill, the charity, of the legal profession. This is, it might be thought, both unprincipled and unconscionable’ (para 31(vi)). Similar comments have been made by the President of the Supreme Court, Lord Neuberger who said ‘many people [are faced] with the unedifying choice of being driven from the courts or having to represent themselves…[it] verges on the hypocritical for governments to bestow rights on citizens while doing very little to ensure those rights are enforceable’ (Lord Neuberger, 2017, para 8, pp 4-5).

The recent case of JY v RY [2018] EWFC B16, illustrates many of the above points. The case concerned a father’s (*JY*) application for contact with his eleven year old daughter. It was heard at The Family Court at Middlesbrough before District Judge Simon Read. Ten serious allegations had been raised by the child’s mother (*RY*) as to why contact should be restricted, including allegations of physical, verbal and sexual assault. Some of the allegations were proved following a fact-find hearing however *RY* felt unable to be cross-examined in relation to the sexual abuse. As such, she asked the judge to form his judgment based on the evidence he had heard so far. There were difficulties in obtaining Police records and on multiple occasions, the police authority in question failed to comply with an order for disclosure of evidence because they had changed their email address for such requests and had failed to notify the court. Neither of the parties met the financial eligibility requirements for legal aid and therefore both appeared in person. *RY* was supported by a domestic abuse support worker. At the end of the fact-find hearing the judge made a serious of critical observations about the difficulties caused by the parties appearing in person. These are set out in full at paragraph 35 of the judgment, however some of the more poignant observations for the purposes of this article are listed below:

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1. Neither parent could afford a lawyer and neither was eligible for Legal Aid. I found this surprising in the mother's case in particular, given that I was told that she was dependent entirely on state benefits and yet failed the means test, despite the nature of the case.
2. Having professional representation and advice will tend to support and help an alleged victim of domestic abuse in a moral and practical way that goes far beyond what a voluntary support agency can or should offer. It can fortify a witness before questions are asked, be a reassuring presence during that process, and debrief them afterwards. It can reassure them as to outcomes, and act as a safeguard during what may be a hugely bewildering and scary experience. Its presence is the mark of a civilised society and a mature and balanced legal system… No English or Welsh criminal court would proceed as this court had to, in the absence of representation for parties dealing with such grave allegations.
3. As is his right, the father was not prepared to make any admissions. Yet upon hearing the evidence I later found him manifestly to be lying on the first 2 allegations.... In this case, pre-trial negotiation between advocates might have obviated the need for a fact finding evidential hearing entirely, had sufficient admissions been made upon legal advice.
4. I therefore think there is a very strong likelihood that the outcome of the fact finding would have been different, and most probably a truer reflection of what really happened, had the parents been represented. It would surely have concluded sooner, more fairly, and at far less expense to the public purse than ultimately was the case, with two wasted days at Court. It may also have been less painful for the participants”.

*Reduction in parties attending mediation*

Since 22 April 2014, all parties wishing to issue financial relief proceedings or Children Act applications must first attend a Mediation Information and Assessment Meeting (MIAM), unless they fall within one of the stated exemptions (Family Procedure Rules (2010), Rule 3.6). Exemptions include cases featuring domestic violence or child protection concerns, where proceedings must be initiated urgently or where a party simply wishes to file a consent order (Family Procedure Rules (2010), Rule 3.8).

MIAMs were not borne out of LASPO as since April 2011 clients have been encouraged as part of Pre-Application Protocol to attend a MIAM to learn about mediation as a potential alternative to court proceedings (Hamlyn, Coleman & Sefton, 2015). However, MIAMs did not receive statutory footing until the Children and Families Act 2014.

The party considering court proceedings will be required to pay for the MIAM unless they satisfy the legal aid means test, in which case it is free of charge. Individual mediators set their own fees but according to the National Family Mediation website the cost of a privately paid for MIAM can vary from £30 per person to £120 per person, with the average charge being around £65 per person. The policy rationale behind MIAMs was to divert appropriate cases away from court thereby alleviating the burden on the family courts and allowing parties to reach a speedy and potentially more cost-effective resolution (Block, McLeod & Toombs, 2014).

Arguably, MIAMs have failed to achieve the effect of diverting cases from the court. The number of parties attending the assessments since the introduction of LASPO has been lower than anticipated. The Ministry of Justice estimated that removing funding for civil legal aid for private family law matters, but retaining funding for mediation, would lead to an additional 9,000 mediation assessments and 10,000 mediation cases per year (Block et al, 2014). In contrast, however, there were 17,246 fewer mediation assessments in 2013-2014, a 56% decrease from 2012‑2013 (the National Audit Office, Ministry of Justice and the Legal Aid Agency, 2014).

The National Family Mediation Council has indicated that out of 112,000 private family law applications only one in twenty had been preceded by a MIAM (Ministry of Justice and the Legal Aid Agency, 2017). Accordingly, a significant amount of exemptions are being claimed. It is doubtful that all of these exemptions are valid. Rather, it is possible that overworked court staff are not effectively checking applications to ensure that parties have attended a MIAM or an exemption has been validly claimed. Alternatively, it is arguable that self-representing litigants are unaware of the requirement to attend a MIAM and may therefore be referred by a family court judge after the first hearing (or not at all).

Research conducted by the Ministry of Justice and the Legal Aid Agency and published in 2017 indicates that LASPO has reduced the contact that members of the public have with solicitors, who are most likely to inform clients about the requirement to attend a MIAM and the benefits of mediation. Prior to LASPO over 80% of referrals to publicly funded MIAMs were made by solicitors holding a legal aid contract. Following LASPO, however, this dropped to less than 10% (Ministry of Justice and the Legal Aid Agency, 2017). It was acknowledged in the Ministry of Justice report that whilst other sources of referrals have increased (for example, from third sector organisations or court referrals) this is not enough to compensate for the loss in legal aid solicitor referrals.

Mediators have also acknowledged what they perceive as the loss of an incentive for solicitors to refer publicly funded clients to MIAMs, given they no longer (except in a small proportion of cases) receive legal aid for representing them in court proceedings. Mediators believe these clients are being turned away from solicitors’ firms without being able to speak with a solicitor and without being informed about publicly funded mediation as an alternative option to litigation (Ministry of Justice and the Legal Aid Agency, 2017). Cynics may also query whether solicitors have become adept at drafting applications in such a way as to make an exemption apply, in cases where it should strictly not.

In any event, there does not appear to be a significant correlation between those who have attended a MIAM going on to further mediation sessions. In 2013-2014, the number of mediation cases starting after an assessment fell by 5,177 cases or 38% from 2012-2013 (Report for the National Audit Office, Ministry of Justice and the Legal Aid Agency, 2014). In the period 2015-2016, the amount of starts stabilised but they remained at around 60% of pre-LASPO levels (Ministry of Justice and the Legal Aid Agency, 2016). There were 1,600 mediation starts between April and June 2017, which is the lowest number since the LASPO Act was introduced (Ministry of Justice and the Legal Aid Agency, 2017). This suggests that MIAMs are simply viewed as an inconvenient administrative hurdle to comply with before proceedings can be started rather than as a serious alternative to court proceedings.

The key to why mediation is underutilised may lie in the joint claim by the Ministry of Justice and the Legal Aid Agency that mediation ‘is cheaper and quicker than using the courts and it also allows for a more flexible approach’ (Ministry of Justice and the Legal Aid Agency, 2016, p. 25). For self-representing litigants, the idea that mediation is cheaper than pursuing court proceedings can be a misnomer. In such cases, parties will not incur costs instructing a legal professional and they are likely to benefit from a reduction (or complete removal) in the court fee through fee remission. They may also receive assistance with meeting the costs of disbursements that may be incurred throughout the court process. For example, in Children Act cases, CAFCASS can now be asked to meet the cost of DNA testing (Munby and Douglas, 2015) and in divorce cases, an unrepresented party can ask the court for bailiff service rather than having to instruct a more expensive process server. The cost of pursuing court proceedings, for self-representing litigants can therefore be nominal. In contrast, however, if a party does not satisfy the strict means test for legal aid, they will be required to pay for an indefinite amount of mediation sessions at an average cost of £110 per person for children issues mediation or £130 per person for property and finance mediation (National Family Mediation Service, n.d), with no guarantee that a resolution will be reached. In 2016, only 61% of all family law mediation outcomes involved successful agreements (Ministry of Justice and the Legal Aid Agency, 2017). Even if an agreement is reached, some mediators will charge additional fees on top for drawing up an agreement, which is not legally binding. According to the National Family Mediation website the average fee charged for drawing up a parenting agreement is £22 and the average fee for drawing under a Memorandum of Understanding for a property or financial agreement is £100.

It is therefore unsurprising that despite the requirement to attend a MIAM, the number of family law cases being issued at court have not decreased. In the immediate aftermath of LASPO, the number of private law applications being issued declined by 25% to approximately 9,130 in the quarter April to June 2014 (Ministry of Justice and the Legal Aid Agency, 2014). However, applications gradually increased to 10,494 in the period April to June 2015 and by the same period in 2017 reached 13,029, which exceeds pre-LASPO levels (Ministry of Justice and the Legal Aid Agency, 2017). This suggests that the provision of legal aid in this area [private law cases] is not creating increased litigation, in contrast to the Government’s assertions.

*Increase in applications for injunctive protection*

As explained earlier in this article, one of the few exceptions to the rule that legal aid is not available in private family law cases is where evidence of domestic abuse or violence (referred to as gateway evidence) can be produced (Civil Legal Aid (Procedure) Regulations 2012). Despite considerable legal challenges, the type of gateway evidence Legal Aid Agency will accept is still quite restricted. Examples include a relevant unspent conviction for a domestic violence offence or a relevant police caution for a domestic violence offence, a domestic violence protection notice/order or a letter from the applicant’s general practitioner or domestic violence organisation confirming that the applicant is or has been a victim of domestic violence (Civil Legal Aid (Procedure) Regulations 2012).

The obvious problem is that in many cases of domestic abuse, victims are reluctant to speak out and the abuse therefore goes unreported, resulting in a lack of evidence which could be used to source legal aid. In turn this has previously meant that many victims have had no choice but to attend court without representation, and if the matter becomes contested, face the possibility of being cross-examined by a potentially abusive ex-partner. This issue has been raised in the Government consultation ‘Transforming the Approach to Domestic Abuse’ (2018). The consultation document acknowledges that unlike the criminal courts, the family courts do not have a specific power to prevent cross-examination of a victim by an alleged perpetrator. The consultation goes on to state ‘the government is committed to addressing this issue and will legislate to give family courts the power to stop this practice as soon as legislative time allows’ (p. 52) however no definitive time frame has been indicated.

In cases where survivors have not reported the abuse to the police, their medical practitioner or a domestic violence organisation, they are able to apply to the court for a non-molestation order against their abuser. Such injunctive protection is acceptable gateway evidence for the Legal Aid Agency. Provided the survivor meets the financial means criteria, they will also be able to obtain legal aid to assist them with making this application. The non-molestation order can then be used as evidence of domestic violence in other family law proceedings. For example, if a woman has been a victim of domestic abuse by her ex-partner but has no other evidence because it has never been reported, she could apply to court for a non-molestation order to protect her against further abuse. Once she has obtained this order she could then use this as evidence of domestic abuse to obtain legal aid for children proceedings to set out the arrangements as to who the children will live with and how they will spend time with the other parent.

Concerns could therefore be raised that since LASPO protective injunctions have been used for a purpose beyond that which they were originally introduced for (i.e. to evidence domestic abuse for legal aid purposes as opposed to simply provide a protective remedy). It has been reported that protective injunctions continue to be the most frequently used evidence of domestic violence (Ministry of Justice and the Legal Aid Agency, 2017). There were 6,827 domestic violence orders granted in April to June 2017, 91% were non-molestation orders compared to 9% which were occupation orders (Ministry of Justice and the Legal Aid Agency, 2017). This is compared to 5,405 orders granted in the same period of 2012 (Ministry of Justice, 2012). Court statistics also record an increase in domestic violence remedy order case starts and applications. Whilst of course this could partly be due to an increased societal awareness of domestic abuse and the protection available, it is also possible that since the introduction of LASPO, solicitors consider it is worth trying their luck at applying for a non-molestation order in order to secure funding.

The process for obtaining a non-molestation order or occupation order in England and Wales is relatively simple. The Applicant will often apply ex parte (without notice) to the Respondent and the only evidence before the court will be the Applicant’s witness statement, which will outline the incidents of abuse relied on. In the writers’ experience, judges are likely to err on the side of caution and grant an interim order. A return hearing will then be listed so that the Respondent can put forward their case. If the Respondent has access to legal advice then they will often be persuaded to give an undertaking that they will not molest the Applicant (which is also acceptable gateway evidence for the Legal Aid Agency) or to accept that the order will continue but prefacing it with a note that the Respondent disagrees with the allegations and no findings of fact are made about the truth of the allegations. Concerns could therefore be raised that the evidence in these cases are not being appropriately tested and this is therefore leaving the process open to manipulation from individuals who are wishing to source gateway evidence for other proceedings.

However, there are concerns about the testing of the evidence even if the applications do not settle at the return hearing and become fully contested. It used to be that this very rarely happened. However, because legal aid is very rarely available for a Respondent to an application under the Family Law Act, quite often the Respondent will not get advice at the return hearing regarding the benefits of not contesting the application. The Applicant may also not have access to legal aid if they have not passed the means test. As raised earlier in this article, this does not necessarily mean that they will have funds available to pay privately for legal advice. They may simply have not passed the means test because there is equity in the family home from which they have fled. This could potentially mean that the court has to list the application for a fully contested hearing with two litigants in person, one of whom is potentially very vulnerable. When listing the case for a contested hearing the court will give directions for evidence, which quite often in domestic abuse cases could include evidence from the police or from medical professionals. Unfortunately, this evidence is not available for free and if neither party is eligible for legal aid they will be responsible for paying for that evidence themselves. If they are unable to afford this then it could be argued that they are being prevented from fully putting forward their case. With regards to the final hearing itself, it is hoped that paragraph 28 of Practice Direction 12J will assist with the much controversial issue of both parties cross-examining each other without the help of representatives. However, whilst this provides additional protection to the parties themselves, it is likely that this will involve an increased role from the Judge in the case, who may have no choice but to take responsibility for asking the questions to each party. Again, this demonstrates a significant stretching of the judicial role to compensate for the lack of legal aid.

The burden for the family court system is twofold: they are having to deal with this increase in applications, however since LASPO the court fees for protective injunctions have been removed meaning the courts do not receive a contribution to their costs for hearing those applications.

*The financial burden*

There has also been a considerable financial impact as a result of the reforms. This cost has been estimated by the Ministry of Justice as being £3.4 million in 2013 and 2014 alone (Grimwood, 2016). This figure includes approximately £370,000 spent by the Ministry on various types of support for litigants in person (ibid). One such project to support litigants in person is the Litigant in Person Support Strategy, which was launched in October 2014 in response to the acknowledged increase in litigants in person. The Strategy is funded by the Ministry of Justice and supports a range of projects including Law for Life, LawWorks, Personal Support Unit, RCJ Advice, Bar Pro Bono Unit and the Access to Justice Foundation, funded by the Ministry of Justice. These projects help vulnerable people seek access to justice by providing online and self-help resources, providing practical and emotional support and where possible, providing pro bono advice. It is estimated that a further £2 million will be spent in further support in 2017 and 2018 (ibid).

The courts have also had to address the issue of who should pay for expert reports and other such disbursements when the client cannot and the Legal Aid Agency refuses to do so*.* In Q v Q[2014] EWFC 31Sir Munby considered that as a ‘last resort’ H M Courts and Tribunal Service could be ordered to pay the cost of legal representation, experts fees and interpreters and translators where the client was not eligible for public funding and Exceptional Case Funding was not awarded (para 90). He argued that this would be necessary where the parties’ rights to a fair trial under article 6, and private and family life under article 8 would be jeopardised. Sir Munby issued a stark warning that ‘the Ministry of Justice, the LAA and HMCTS may wish to consider the implications’ (para 92).

The issue of whether the court could assume such a financial burden was reconsidered by the courts in the private law case of Re K and H (Children: Unrepresented father: Cross-examination of a Child) [2015] EWCA Civ 543*.* The case concerned a self-representing father who sought contact with his child (Y) but against whom, Y had made allegations of sexual abuse. The allegations were disputed. The Judge considered that the child was a competent witness who should be cross-examined. The Judge stated that:

(i) it was not appropriate for the father to cross-examine Y (in fact he did not wish to do so); (ii) it was not appropriate for him (the judge) to put questions to Y to test her allegation against the father; (iii) the court should arrange for a legal representative to be appointed to cross examine Y on behalf of the father; and (iv) the costs of the legal representative should be borne by Her Majesty's Court and Tribunal Service ("HMCTS"). (para 3)

On appeal, the Court of Appeal disagreed that the judiciary had the authority to order HMCTS to provide funding. Instead, the Court placed a burden on the court to provide practical assistance, rather than funding support. The Court held:

In a simple straightforward case, questioning by the judge is likely to be the preferred option and it should present no difficulties. The judge will know what the unrepresented party's case is. It may be helpful for the judge to ask him or her to prepare written questions for the court to consider in advance. Sometimes, unexpected answers may be given to the judge. These may require the judge to ask the unrepresented party to comment on the unexpected answers and to suggest supplementary questions for the Judge's consideration. In my view, in the present case, which is fairly straightforward, the judge should probably have decided to conduct the questioning himself. I am in no doubt that the nature of this case is such that there were options available to the judge which would have ensured a fair hearing and vindicated the Article 6 and 8 rights of the father and K and H (para 60 - 61).

The Court did, however, accept that in cases involving complex medical or expert cases or particularly vulnerable witnesses, it may not be appropriate for the Judge to conduct the cross-examination. In such cases, it may be that the cases cannot be conducted without a breach of the Convention. It is arguable that this issue will become more prevalent in the coming months, following the introduction of the new paragraph 28 of Practice Direction 12J, which provides that in cases where domestic violence is in issue, the Judge ‘should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case’. In addition, the increase in cases with an international element in recent years means that questions about who pays for interpreting and translation will surely be encountered more frequently.

*Conclusion*

It is widely accepted that the current system of legal aid is unsustainable for the family courts. This year marks four years since the cuts were implemented and the Government has committed to reviewing the reforms. Many charities and organisations have already published case studies about the effects of the cuts on vulnerable litigants and made recommendations for improvements (The Law Society of England and Wales, 2017 and Amnesty International, 2016). It is considered unlikely, however, that the Government will renege on the budget cuts in any meaningful way.

The Ministry of Justice has been required to part-fund voluntary programmes to provide support to litigants in person. The Litigant in Person Support Strategy was set up as a collaborative project involving Law for Life, LawWorks, Personal Support Unit, RCJ Advice, Bar Pro Bono Unit and the Access to Justice Foundation. The aim of this collaboration was to provide assistance to litigants in person with the court and tribunal process by providing online resources (mainly through the Advice Now website); practical and emotional support; and where possible access to free or affordable legal advice.

One project funded (in part) by the Litigant in Person Support Strategy is the Personal Support Unit (PSU). The PSU is a voluntary organisation which sits in many court buildings up and down the country. It is staffed by volunteers who provide free assistance, although not legal advice, to self-representing litigants in civil and family courts. In the PSU Annual Report, 2009-2010, Lord Neuberger, President of the Supreme Court of England and Wales, stated that:

PSU volunteers perform the invaluable, sometimes even miraculous, task of calming litigants, going through their paperwork, and talking through their cases. This means litigants are cooler, calmer and more collected, and are therefore better prepared to present their arguments to the court… Consequently, justice is much more likely to be done (page 27).

Approximately 47% of the cases that the PSU deal with are family matters, which is an increase of 19% since LASPO was introduced (Personal Support Unit, 2014). Ultimately, however, the PSU does not operate in every city and litigants do not benefit from guaranteed assistance by the same volunteer at each hearing. Volunteers are also not able to provide legal advice or representation. The service provided is therefore not an effective replacement for legal aid.

Attempts by members of the legal profession have been made to fill the gap left by the cuts. Many law firms and chambers report carrying out more pro bono work than before LASPO was introduced. There have been calls for all firms to commit to providing a minimum level of pro bono hours for their staff. The top 100 firms would face a financial levy if they failed to comply. However, suggestions that pro bono activities should be mandatory for all firms have largely been dismissed as defeating the intention behind pro bono. For legal aid firms, it is also demeaning to suggest that they should now carry out work free of charge, which they would previously have been paid for.

Alongside the legal aid cuts, law centres, which had traditionally offered pro bono or reduced cost services suffered significant cuts as part of wider public sector austerity measures. Many law centres also had legal aid contracts and have therefore suffered double cuts. This resulted in a large number of closures. Those organisations which survived had to restrict the number of clients they could assist and had to spend valuable time raising funds by other means. The future is looking brighter for law centres with three more law centres recently opening, including one in Manchester which had previously been identified as a legal advice desert (The Law Centres Network, 2017). However, this is still not sufficient to meet the public demand for pro-bono work.

The combined effect of the cuts to legal aid and law centre funding is that people are now required to seek advice in less traditional forums including MPs offices and law school clinics. Whilst these organisations provide a valuable service they can by no means fill the gap left by legal aid because they are often unable to assist in complex or urgent matters. For example, the purpose of law school clinics is to provide a practical, educational benefit to its students, alongside providing free legal advice to the community. The cases those clinics take on therefore have to be suitable for students with little to no prior practical legal experience. Because the students will have to spend time researching the legal issues involved in a case and seeking supervision from a qualified solicitor, they are unlikely to be able to progress urgent cases at the speed they require. They are also restricted because their lack of a practising certificate means they are unable to represent clients in court where a case is listed in front of a lay bench.

By cutting legal aid, the government has seemingly only succeeded in passing the burden from one publicly funded agency, the Legal Aid Agency, to another, HM Courts and Tribunals Service. The family court system is currently at breaking point and further government review is urgently needed if people are going to be able to continue to use the system effectively.

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