

Consultation response

# Submission by Shelter to the Bach Commission on Access to Justice

May 2016

[shelter.org.uk/policylibrary](http://shelter.org.uk/policylibrary)

© 2010 Shelter. All rights reserved. This document is only for your personal, non-commercial use.  
You may not copy, reproduce, republish, post, distribute, transmit or modify it in any way.

This document contains information and policies that were correct at the time of publication.

Shelter helps millions of people every year struggling with bad housing or homelessness. We provide specialist advice and support on the phone, face to face and online, and our legal teams can attend court to defend people at risk of losing their home.

However at Shelter we understand that helping people with their immediate problems is not a long-term solution to the housing crisis. That's why we campaign to tackle the root causes, so that one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

## Summary

Access to justice is a cornerstone of civil society, and Legal Aid is a key mechanism within it. Legal Aid is the means by which people on a low income – who would otherwise be unable to access justice – can enforce their legal rights.

Britain is experiencing a housing crisis. In 2014/15, there were 112,340 applications for statutory homelessness assistance and 546,500 households accepted for statutory homelessness assistance: an increase of 33% in five years. Shelter research<sup>1</sup> shows that over six in ten renters have experienced at least one of the following problems in the past 12 months in their homes: damp, mould, leaking roofs or windows, electrical hazards, animal infestations and gas leaks.

Shelter has seen a large number of people calling our helpline and visiting our website for advice. 4.5 million people came to us last year - online, in person and over the phone. In 2014/15, we saw an increase of 12% increase in demand to our helpline and of 8.6% in the number of people who accessed our 'Get Advice' pages.

Legal Aid is crucial to prevent and resolve housing issues, helping people enforce their rights to housing, housing benefits and a decent service from landlords, and providing support to people at times of crisis so that a crisis does not become a disaster.

But changes to Legal Aid have meant that fewer households can get the timely advice they need, until they hit crisis point – by which time it might be too late to avoid homelessness. An increasingly crisis-driven approach to housing advice in general, and the removal from scope of housing benefit in particular, is leaving people to fall through the net.

If free legal advice and advocacy were available at a much earlier stage, it would be easier to negotiate a mutually-acceptable outcome to housing problems and many of the knock on costs – to the court system, local councils, the NHS and, most importantly, families and individuals themselves, could be avoided.

Shelter's biggest concerns about the current state of access to justice are:

- **The increasing complexity of the law, coupled with the complexity of accessing it, makes it burdensome, inefficient and expensive. Worse, it denies access to justice to many.**
- **There are significant practical barriers to access, including court fees, advice deserts, court closures, Legal Aid contract restrictions and bureaucracy.**
- **The reduction in scope of Legal Aid funding is driving an increasingly crisis-driven approach to housing advice. The lack of early prevention work adds to the cost and burden of the system, increasing costs to the wider public sector and causing additional, unnecessary distress to vulnerable households.**

Prevention is better than cure. It is more effective and less expensive. It is better to keep a person or a family in their home, rather than help them to find a new one. This is why free legal advice on issues including debt, housing and other benefits and disrepair is so important to the households who seek help from Shelter.

Housing law is enormously complex, and successive governments have continued to add to or amend existing legislation until it becomes virtually unreadable. **The law itself needs to be simplified.** This is a central aspect of access to justice, especially when many people are left to discover the law for themselves and have to decide how it applies to their case, even before they embark on the process of finding an effective remedy or working out how to defend a claim for arrears or for possession.

---

<sup>1</sup> Reynolds L (2016, forthcoming) *Results of the Shelter tenant survey* Shelter

In the meantime, however, we have to ensure people can find their way round this complex system. Shelter's recommendations for practical solutions include:

- **Make the means test for civil Legal Aid easier to apply**
- **Abolish the capital limit for Legal Aid**
- **Restore housing benefit, and any out of scope housing issues related to in-scope Legal Aid cases.**
- **Provide access to a housing advice and representation service in every court**
- **Reduce the bureaucracy imposed by the Legal Aid Agency and ensure the contract requirements are simplified addressing concerns over barriers to access and advice deserts**
- **Create a single stream of Legal Aid funding, across Legal Help and Legal Representation (certified cases)**
- **Review the funding provisions for Legal Aid for judicial review applications**
- **Abolish the risk element introduced by the Legal Aid Remuneration Regulations 2014**
- **Consider bringing the Judicial Review Pre Action Protocol in line with the Pre Action Protocol for Housing Disrepair**
- **Consider introducing a simpler procedure for judicial review in emergency homelessness cases.**
- **Establish an alternative dispute resolution process (Early Neutral Evaluation) in the courts**
- **Create a statutory duty on local authorities to provide a Tenancy Relations Service commensurate with the size of the PRS in their area**
- **Ensure that increasing access to justice by introducing more online processes does not disadvantage people who cannot use them**
- **Create 'Court Access' hubs to support people to use online courts**
- **Address the arguments for reductions in civil Legal Aid**

## **Introduction**

Shelter welcomes this opportunity to submit evidence to the Bach Commission on Access to Justice, three years after the implementation of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012.

Legal Aid is a crucial part of how we help people address poor housing standards, keep their home or find a new one if the worst happens and they become homeless.

Shelter Legal Services has 17 offices around the country and provides representation to those in housing need in many homelessness, possession, disrepair and unlawful eviction cases, as well as anti-social behaviour injunctions. We provide duty possession scheme representation in 26 court locations around the country.

At Shelter, we use Legal Aid to:

- **Defend possession proceedings (social and private landlords)**

- Appeal against adverse homelessness decisions, e.g. ‘intentionally homeless’
- Apply for judicial review of local authorities’ refusal to provide temporary accommodation
- Apply for judicial review of social services’ refusal to assist families and individuals under the Children Act 1989 and the Care Act 2014
- Assist 16 and 17 year olds and care leavers who are homeless or threatened with homelessness
- Provide advice to tenants coping with disrepair which poses a serious risk of harm to their health or safety
- Defend Anti-Social Behaviour injunctions and committals
- Take cases for those who have been unlawfully evicted

Shelter is seeing a large number of people calling our Helpline and visiting our website for advice. For households that come to Shelter and other providers of specialist housing advice, Legal Aid can be the difference between a roof over their heads or sleeping on the streets. For example, a household can end up in court, about to lose their home, because they were not able to get the free advice they needed to resolve a problem with their housing benefit: a major tool in preventing homelessness.

We regularly see cases via our court duty desks where households are facing possession because their housing benefit problem wasn’t resolved early on, and so their rent arrears grew until their landlord lost patience and sought to evict them.

If free legal advice and advocacy were available at a much earlier stage, it would be easier to negotiate a mutually-acceptable outcome and many of the knock-on costs to the court system, local councils and, most importantly, families themselves, could be avoided.

### **Topic 1: The current state of access to justice**

Shelter’s biggest concerns about the state of access to justice are:

- **The increasing complexity of the law makes it burdensome, inefficient and expensive. Worse, it denies access to justice to many.**
- **There are significant practical barriers to access, including court fees, advice deserts, court closures, legal aid contract restrictions and bureaucracy.**
- **The reduction in scope for legal aid funding is driving an increasingly crisis-driven approach to housing advice. The lack of early prevention work adds to the cost and burden of the system, increasing costs to the wider public sector and causing additional, unnecessary distress to vulnerable households.**

## Impact of LASPO on Shelter Legal Services

Cuts in Legal Aid funding have contributed to the closure of nine Shelter services, along with many law centres and local Citizens Advice offices. Many advice services that have survived do so with much reduced capacity. The increased cost, bureaucracy and risk of recoupments, coupled with the reduction in legal aid rates, makes it difficult if not impossible to make a legal aid practice pay for itself. This means that even people who are still entitled to Legal Aid find it difficult to find someone to provide the service they need.

In order to understand more about the impact of LASPO, we conducted a survey of Shelter solicitors.<sup>2</sup> Early findings confirm our fears that our ability to provide legal advice and representation has been severely compromised by the LASPO changes.

---

<sup>2</sup> LASPO survey of Shelter solicitors (25 of 40 responded, 22 responded to all questions)

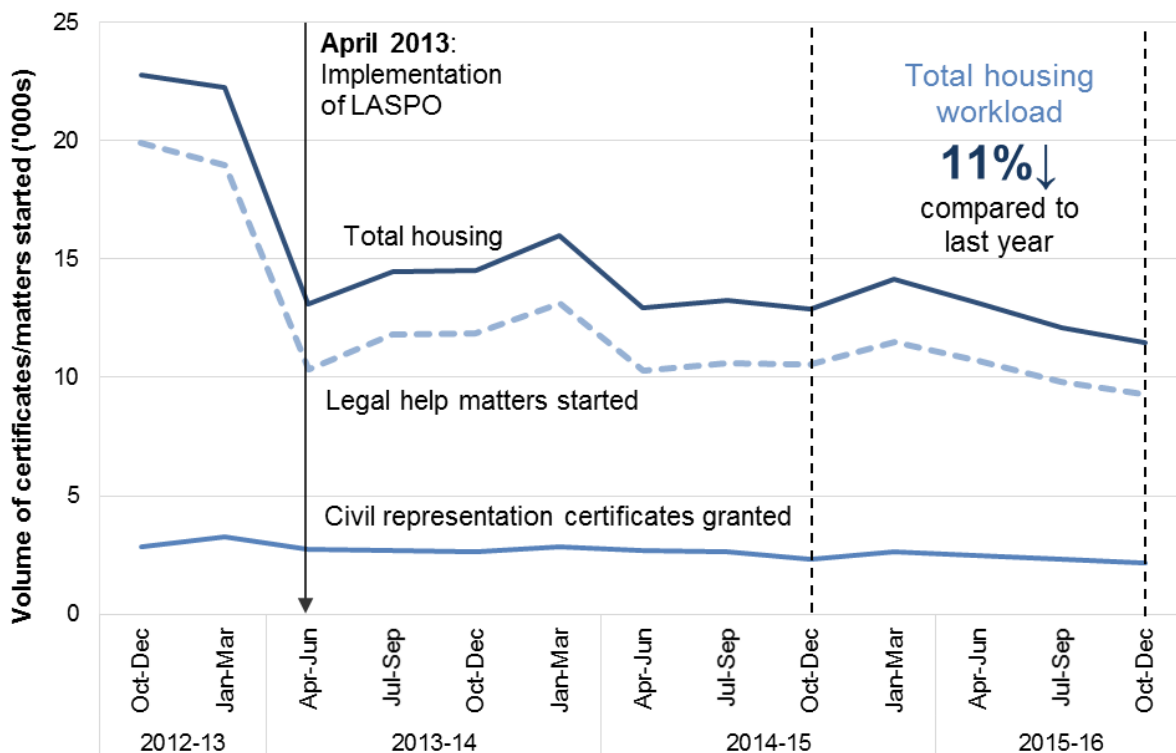
We are delighted to share our interim findings with the Commission. A short report is attached to this submission as an Appendix, which we would request remains confidential and is removed from our submission before publication.

## How does current policy enable and undermine access to justice?

Legal Aid provides support for people at times of need so that bad situations do not become disasters. Following the fundamental LASPO changes in 2012, people can no longer get Legal Aid to pay for advice to resolve problems with benefits, debt, allocation of social housing or disrepair, which could help keep them in their home. When a family does lose their home, councils sometimes fail in their duties to accommodate them. Legal Aid enables people in this situation to get legal advice to challenge the council and secure a home.

Some areas of housing law remain in scope. These include cases where there is serious disrepair or homelessness and possession proceedings. But the volume of Legally-Aided housing cases halved between July to September 2012 and July to September 2013, and in the last quarter, MoJ statistics show that there was an 11% decrease in housing cases compared to the same quarter the previous year. It is unclear where these people are going for advice – or indeed if they are getting the advice they need at all. **There is a need for research in this area.**

Chart: Workload in housing law, Oct-Dec 2012 to Oct-Dec 2015



Source: MoJ (2016) Legal Aid Statistics: October to December 2015

Note: total housing workload calculated using legal help matters started and civil representation certificates granted.

# 1. The complexity of the law and Legal Aid system

The complexity of the Legal Aid system makes it extremely difficult to navigate, resulting in a lack of clarity for those seeking to access it and for providers. It creates perhaps unintended difficulties for those seeking to prove eligibility, particularly at points of crisis, and those who are vulnerable or have complex financial situations. It also places a heavy administrative burden on providers, substantially adding to the cost of Legal Aid and running a Legal Aid practice.

Frequent changes in rules and inconsistent approaches on how the regulations and contracts rules should be applied make it extremely difficult for Legal Aid practices to survive. For example, there are 11 different documents to cross reference in giving advice via Legal Aid and solicitors often find it impossible to find reliable answers to essential questions, with very limited means to seek clarification.

## 2. Practical barriers to accessing Legal Aid

### Advice deserts

Despite Government assurances that the supply of Legal Aid would not be affected by the LASPO changes, it is already clear that there are areas of the country where it is almost impossible to get face-to-face advice.

Research commissioned by the MoJ at the end of 2015 found that, overall, the not-for-profit legal advice sector (if counted by the number of centres providing advice) has shrunk by over 50% in the ten years from 2005 to 2015 and that 54% of those surveyed were forced to make major changes to their service due to the cuts to Legal Aid.<sup>3</sup>

The MoJ report did not include a geographical analysis of the locations where advice services are available. However, our analysis of the Legal Aid Agency's own data suggests that the map of Legal Aid providers who provide housing advice in England and Wales looks like this<sup>4</sup> – leaving large areas of the country woefully under-resourced:



### Impact of Court closures

The programme of court closures announced by the Ministry of Justice (MoJ) in 2015 will, we believe, compound the impact of LASPO in housing and homelessness cases – leading to more households

<sup>3</sup> MoJ research on advice deserts; <http://www.lawgazette.co.uk/news/legal-aid-cuts-creating-new-advice-deserts/5054789.fullarticle>

<sup>4</sup> Shelter analysis of Legal Aid Agency data on the prevalence of Legal Aid providers who provide housing advice

being at risk of losing their homes or unable to tackle poor housing conditions. The extent of the planned court closures, and strain on existing facilities, is likely to have a detrimental impact on service levels because courts are already overstretched.<sup>5</sup> For people on low incomes, with pre-school children or mobility problems, travelling to another town or city can be financially, or practically, difficult.

### **An increasingly online offer?**

Proposals in the Briggs interim review<sup>6</sup> to create **online courts** might reduce some of these negative impacts for some people. Briggs does recognise that online courts will not work for all cases – suggesting that possession cases would not be suitable for online determination, because people should not be deprived of their homes without the opportunity to be heard in person.

However, there is a risk that a wholesale move in this direction would reduce access to justice for people who would be poorly served by an online process – people who need to speak to an adviser in person (a common preference with distressing cases, such as domestic violence) or who lack the technological know-how, facilities, confidence or financial resources to be able to use online or remote means of access. This is especially a problem for people who are street homeless or in temporary accommodation, as they often have no regular access to computers or the internet and so cannot keep up with an online process.

**Court fees** present a significant, and unjustifiable, barrier to justice, even with the possibility of fee remission in some cases. The civil justice system should operate as efficiently as possible, but ultimately it must be a public service. Current fee levels are an overwhelming hurdle in disrepair cases for people not eligible for Legal Aid and effectively mean that people renting homes that may affect their health or safety are unable to challenge their landlord's unlawful practice.

## **3. The reduction in scope for Legal Aid funding is driving an increasingly crisis-driven approach to housing advice**

It is a source of enormous frustration to Shelter that we are no longer able to provide legal advice (under Legal Aid) on most debt and welfare benefit problems and some **housing matters, including tenancy deposits, disrepair and social housing allocation decisions** – all of which can be precursors of threatened and actual homelessness – the point at which Legal Aid may finally become available.

Even at the point of threatened homelessness, we cannot use Legal Aid funding to resolve a housing benefit problem, or ensure that the household is getting all the benefits it should, which would prevent the situation from reoccurring. Our experience is that the introduction of the 'bedroom tax' and other welfare reforms has led to the increased issue of housing possession proceedings, so housing benefit advice is needed more than ever.

**There is an inherent link between housing benefit problems and homelessness.** Problems with a housing benefit claim can lead to rent arrears, a breakdown in landlord-tenant relations and eviction. Our evidence suggests that this is particularly the case in the private rented sector, where landlords will be even less tolerant of tenants who fall behind with their rent and may look to evict rather than wait for housing benefit to be reinstated. A landlord's attempts to gain possession of a property via the courts is likely to be frustrated if the sole reason for eviction is non-payment of rent due to housing benefit issues, in which case a possession order, if made, may be suspended.

**This is a fundamental flaw in the current dispensation of Legal Aid and should be addressed by Government as a matter of urgency.**

The Government's own homelessness statistics show a steady growth over the past five years in the number of cases at risk of being made homeless due to problems relating to their housing benefit. In

---

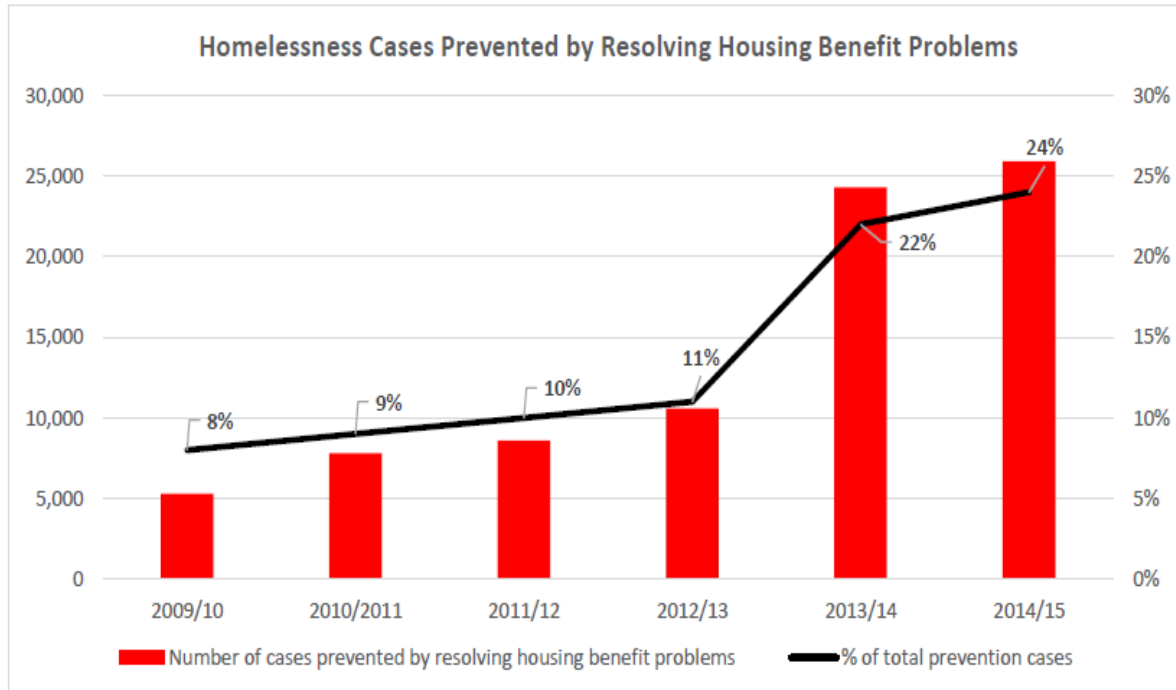
<sup>5</sup> Shelter (2015) Response to MoJ consultation on court closures

<sup>6</sup> <https://www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-interim-report-published/>



2014/15, local authorities in England prevented 25,900 cases from becoming homeless by resolving housing benefit problems, a figure that has increased by almost 400% since 2009/10.

Problems relating to a housing benefit claim were the most common reason for households requiring homelessness prevention services from local authorities in 2014/15, accounting for 24% of all prevention cases. This has grown steadily from only eight per cent in 2009/10. Fewer people would need to seek homelessness assistance if they had much earlier advice to resolve their housing benefit problem.



## Topic 2: Transforming our justice system

Shelter believes that the main practical steps that need to be taken to ensure access to justice for all is a reality are:

- **Improving access to Legal Aid for housing cases**
- **Simplification for providers of Legal Aid**
- **Improving the use of technology**

In order to ensure people have access to justice, housing law needs to be simplified. Housing law is enormously complex, and successive governments have continued to add to or amend existing legislation until it becomes unreadable. This is a central aspect of access to justice, especially when many people are left to discover the law for themselves and have to decide how it applies to their case, even before they embark on the process of finding an effective remedy or working out how to defend a claim for arrears or for possession.

In the meantime, however, we have to ensure that people can find their way round this complex system.

Along with the broad recommendations to simplify contractual rules, removing any unnecessary barriers to access, Shelter's specific recommendations for practical solutions are as follows:

# Improving Access

## 1. Make the means test for civil Legal Aid easier to apply

In our experience, the proportion of time spent assessing means is increasing. Legal Aid solicitors need to assess the client's means as quickly as possible and then immediately get on with examining the merits of their case and what can be done about it. Some proof of means is clearly necessary, but we believe the level of detail required by the LAA is unreasonable.

Many of our cases are emergencies, where we have to take the level of risk of being paid if we are to do the urgent work that the client needs. Although receipt of most means-tested benefits passports people through the means test for income for Legal Aid, they still need to prove that they have capital under £3000 in order not to pay a contribution from their capital towards their Legal Aid. If they have capital between £3,000 and £8,000 they have to pay a contribution; capital of more than £8000 would exclude them from Legal Aid entirely. People who are homeless, or facing possession proceedings do not always have easy access to full 'proof of means':

- Clients who are working and receive tax credits often have one item of 'proof of earnings' missing, even though their own testimony about their financial position is compelling.
- Clients who are self-employed, but whose income is low, are unlikely to be offered Legal Aid advice, especially in an emergency, because the LAA will be looking for accounts and it is just too risky for us, and the client, to start work without the protection of funding.
- Clients on a very low income might only have a basic bank account, from which they will find it difficult to get the statements required to evidence their means.

This means that we are often unable to tackle the presenting issue in a timely manner – for fear that the client has not, or will not be able to, produce every bit of evidence of their income or savings. The client risks a revoked certificate or not getting the help they desperately need to prevent homelessness.

## 2. Abolish the capital threshold for Legal Aid, for people on passported benefits

Getting three months bank statements from people who are in receipt of benefits because they have a mental health problem, for example, can be particularly difficult – particularly if they only have a basic bank account. The Post Office, for example, issues statements quarterly. Further consideration will also need to be given to how this will work under Universal Credit.

## 3. Restore housing benefit, and related housing issues not currently in scope, to Legal Aid.

Housing benefit should be brought back into scope, as a matter of urgency, plus any out-of-scope housing matter if it is connected to an in-scope housing matter, such as deposit counterclaims in non-money possession claims or declarations concerning unlawful rent increases related to rent possession claims.. There would need to be a clear test for this. This will avoid the current difficulty of only having part of a matter funded, and enable people to get the advice necessary to resolve their problem at the earliest opportunity.

## 4. Ensure access to housing advice and representation for tenants

If the law is not to fall into disrepute because people who are entitled to a remedy are unable to access it, people need to be able to get advice on how to draft their claims (pleadings) in the way the court expects, and on what evidence they will need in court, how to comply with court directions etc.

This applies to all landlord and tenant disputes in which people have to represent themselves.

This should be provided through a Legal Help/legally-aided advice scheme for those who are eligible, in every court. For those who are not eligible, but unable to afford a solicitor's private fees, there should be an advisory service, linked to the housing court duty scheme, in every court in the country, where housing legal advice and representation can be accessed. Each scheme would provide a limited

amount of help with drafting pleadings or correspondence, to each litigant who approaches them and may provide some urgent representation. This could turn courts into **mini advice centres for all housing issues** which might then assist people to access further legal advice for complex cases.

## Simplification

### 5. Reduce the bureaucracy imposed by the Legal Aid Agency

Housing and homelessness cases are often extremely complex, both in the level of detail involved and the legal issues to be argued. They are always draining and stressful, where a family or individual is facing eviction or actually homeless. We need to be able to get on with analysing the issues as soon as possible and actually provide the help that is needed.

Instead we have to navigate the layers of bureaucracy required to obtain Legal Aid, while worrying that payment will be denied or, worse, that we will be out of pocket when we have to pay for Counsel's advice, and/or to pay surveyors, doctors or other experts for their services. Yet any delay in preparation of their client's case could prejudice that case or indeed, where time is of the essence, defeat it altogether.

If the bureaucracy surrounding Legal Aid were reduced, providers might be encouraged to stay in, or come back in to, Legal Aid work. We would be able to take on additional cases – because we could devote the time saved to actual legal work rather than the business of form filling and financial data collection; and the next generation of housing lawyers would not be deterred from wanting to use their skills to the benefit of disadvantaged people by all the obstacles that the Legal Aid system places in their way.<sup>7</sup>

### 6. Create a single stream of Legal Aid funding

The present division between Legal Help and Legal Representation (certificated cases) appears irrational and creates even greater problems in those grey areas where it is not clear which of the two forms of service is the appropriate one. The provider then risks adopting the 'wrong' form when the fault lies with a lack of clear guidance.

A simple way to achieve this would be to introduce a single, continuous form of Legal Aid, rather than the two-tier system we have now. This would start with what we now know as Legal Help – which has a lower level of proof of means, and which covers advice and vital preventative work, and then lead seamlessly into representation on the basis of what we already know about the client's means.

### 7. Review the funding provisions for judicial review applications

The Legal Aid Remuneration Regulations 2014 introduced a 'risk' element into Legal Aid payments for solicitors/barristers because the Ministry of Justice believed that too many judicial reviews with insufficient merit were being issued in the High Court. The effect of the Regulations is that solicitors and barristers will not be paid unless permission to proceed with the judicial review has been granted by the court or, if the case is settled prior to a decision being reached on permission, only at the discretion of the Legal Aid Agency. We are not aware of any review of the operation of these Regulations which has shown that they are justified or effective in homelessness cases.

In Shelter's view, this risk element prevents solicitors from pursuing judicial review cases which meet the Legal Aid merits threshold for fear of the costs consequences. **The risk element creates a deterrent to take on justified claims and should be abolished.**

We would further suggest that **consideration should be given to bringing the Judicial Review Pre Action Protocol in line with the Pre Action Protocol for Housing Disrepair.** In disrepair cases, if

---

<sup>7</sup> <http://www.lawcareers.net/Information/News/Legal-aid-lawyers-dying-out-partly-thanks-to-challenges-facing-junior-lawyers-r>

following a formal letter before action the tenant's claim settles without litigation on terms that would have justified issuing proceedings, the other side will be obliged to pay the tenant's reasonable costs and expenses. A similar approach to costs in judicial review proceedings might make many local authorities take more care in their decision-making and result in considerable savings to the LAA budget.

The majority of Shelter's judicial review cases involve challenges to the refusal of a local authority to accept a homeless application and to provide interim accommodation pending enquiries into that application. In Shelter's experience, most of our 'judicial review' cases settle either following a letter before action or after further correspondence, just before issuing the claim in the High Court. In neither of these scenarios are the local authorities in question under any costs obligation, despite having accepted the arguments that their decisions do not comply with the law and despite the considerable amount of work that has gone into challenging their decision. **In our view they should be.**

In addition to these funding provisions, we would suggest that **consideration be given to introducing a simpler procedure for judicial review in emergency homelessness cases**, which reflects the urgency of the circumstances and which would overcome the logistical difficulties in some areas of bringing Administrative Court proceedings. Ideally, applications for interim relief should go before a specialist judge, supported by a detailed witness statement, copies of correspondence and a short skeleton argument. Such a procedure should lead to more timely, efficient and cost effective decisions.

## **8. Introduce an alternative dispute resolution process (e.g. Early Neutral Evaluation)**

We believe that there would be considerable merit in making housing cases less adversarial by building in alternative dispute resolution. One possibility is Early Neutral Evaluation (ENE), which has gained prominence in recent years as a method of Alternative Dispute Resolution. In essence, it involves the parties to a dispute putting their cases in outline to an independent third party, who gives them an objective view of the strengths and weaknesses of their respective cases. The parties would then take into account the evaluator's view in attempts to settle the case.

One form of ENE brings the parties together outside of the court process; the other takes place within the court process, whereby following the issue of proceedings there is a stay of the normal time limits to allow the parties to enter ENE. The second kind, which happens within the court process, is becoming more common. Having only previously been used within the Commercial Court, and Technology and Construction, Court, it has now made an appearance in the Civil Procedure Rules. At the same time, ENE has gained positive endorsement from the judiciary.<sup>8</sup>

This form of alternative dispute resolution could make a significant contribution to some housing cases, particularly where one or both of the parties is not legally represented.

ENE may not be suitable for all claims but, where one party is unrepresented - even in cases of legal complexity or high value – it should still produce benefits. In housing law terms, it would be suitable for cases involving disrepair, tenancy deposit disputes, contractual disputes or the correct interpretation of a tenancy agreement. It would not be suitable for cases involving harassment and illegal eviction or cases involving anti-social behaviour (although other forms of alternative dispute resolution might be appropriate for that).

It may also be appropriate for some possession cases where limited factual evidence is necessary, including cases brought on rent arrears grounds. A shorter form of ENE might be offered in cases of claims for possession of assured shorthold tenancies, where a defence has been filed.

In our view, ENE can offer tangible benefits because it is:

---

<sup>8</sup> In *Seals v Williams* [2015] EWCH 1829 (Ch), in which the High Court was asked to consider undertaking ENE in relation to an Inheritance Act dispute – Mr Norris commented favourably on the benefits of ENE.

- Suitable, not only for cases where the parties have developed entrenched positions but for most cases which do not turn on unusually complex issues of fact or law; and even in those cases, the evaluator may be able to guide the parties towards the most appropriate ways of assisting the court to determine the dispute.
- Designed to provide a more ‘hands on’ approach - the inquisitorial involvement of an ENE evaluator is more likely to lead to efficient disposal of a case, and in a way which better reflects access to justice, than mediation.
- ‘Without prejudice’ to the court action – unless the parties agree otherwise, nothing arising from the evaluation can be referred to in the court proceedings if they continue. Additionally, the judge/evaluator will take no further part in the proceeding. If the case goes forward, the actual hearing or trial would be dealt with by a different judge.
- Inquisitorial and facilitative – potentially including advice on procedural matters, explanation of the law and of evidential matters and assistance in reaching agreement. In the absence of agreement, the judge/evaluator would make appropriate case management directions.
- Conducted by specialist lawyers (usually housing or family law practitioners) trained in ENE who will be familiar with the legal background and can quickly grasp the legal issues.

If ENE is available, we would suggest that there should be a lower court fee to start proceedings, and that the claimant should only have to pay the balance of the full court fee if the ENE produces no resolution. This must be right in principle because, if settled the case will have taken up much less court time than a case which goes to a full hearing (although other fees have to be paid along the way when this happens).

We would recommend that a system of ENE should be piloted in a small number of county courts in different parts of the country, and that research should be carried out to monitor outcomes and assess its value before such a scheme is implemented more widely.

#### **9. Create a statutory duty on local authorities to provide a Tenancy Relations Service commensurate with the size of the PRS in their area**

The traditional roles of tenancy relations officers in intervening and prosecuting in harassment and illegal evictions would be extended more generally to include advising, conciliating and brokering settlements in disputes between tenants and private landlords.

## Technology

#### **10. Ensure that increasing access to justice by introducing more online processes does not disadvantage people who cannot use them**

Research undertaken for Shelter, by TNS BMRB<sup>9</sup>, helped us better understand the different roles played by face-to-face, telephone and online advice services play in getting people the help they need. We found that individual needs are complex and the context of people’s lives is critical for understanding the role that digital can play in housing advice and support and, just as importantly, where it can’t.

Three factors are key in determining what help people need – the severity or urgency of the housing problem; their personal, emotional and practical circumstances, such as mental or physical health problems, relationship difficulties, young children; and whether they have the skills, knowledge and confidence to tackle the problem they are facing.

A multi-channel strategy is needed to address everyone’s needs. The research clearly showed that person-to-person services are vital for people with more severe and urgent problems. However, developing digital services can help people to resolve their housing problems before they reach crisis

---

<sup>9</sup>[https://england.shelter.org.uk/professional\\_resources/policy\\_and\\_research/policy\\_library/policy\\_library\\_folder/report\\_down\\_the\\_line](https://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/report_down_the_line)

point and help people build their confidence around housing rights and responsibilities, increasing their capacity to resolve issues themselves.

## 11. Establish court access hubs

The Briggs Review rightly emphasises the need to ensure that alongside the Online Court, there is an "Assisted Digital Service" to provide comprehensive technical help to those who need it, and makes it clear that it will need to be publicly funded.

Any review of the Legal Aid system will need to consider how to ensure that clients who are unable to afford to pay for that support are nonetheless able to get it. It may be that some cases – such as the accelerated possession procedure in relation to assured shorthold tenancies – an online process might be appropriate unless the tenant has a defence, in which case the matter should be listed for a hearing in court, as at present. Organisations such as Shelter could provide 'court access hubs', able to provide the combination of legal and technical advice and assistance that clients will need.

## Addressing the arguments for reductions in Legal Aid

The Government based their reforms on two principles – to reduce the cost of, and improve public confidence in, the Legal Aid system. Shelter continues to challenge the premise of both, arguing that claims that the cost of the system have been growing out of control are unfounded and that, contrary to Government assertions, there is a healthy level of public support for Legal Aid.

*"One of the most generous legal aid budgets in the world"*

Ministers continue to insist that we have "one of the most generous legal aid budgets in the world"<sup>10</sup>. And, in his foreword to the first Legal Aid Green Paper, in 2010, Secretary of State for Justice, Ken Clarke, said that "expenditure on Legal Aid had "spiralled out of control".

Neither is true. A look at actual Legal Aid spend reveals that, although spending rose between 1970-80 and 1996-97, it then fluctuated for several years and began to fall in 2009-10, before the implementation of the LASPO reforms.

Spending on Legal Aid is difficult to forecast and manage because it is demand-driven. But the National Audit Office, in its report on the implementation of the changes to Legal Aid, criticised the MoJ for making no attempt to understand what caused these fluctuations, or the drop in spending, before embarking on the reforms.<sup>11</sup>

Similarly, comparisons with (many) other European countries do not hold water because we have a more adversarial approach than most, with both sides having to present evidence and arguments in Court. Despite this, reducing the spending on Legal Aid has been the key rationale for reform.

*"The public has no confidence in it"*

Contrary to the assertions of the Government, there is a healthy level of public confidence in the system. Successive opinion polls have found that public support for Legal Aid is strong, and getting stronger:

- 68% of people responding to a ComRes poll agreed that "at less than 0.5% of annual government spending, Legal Aid is a worthwhile investment in our basic freedoms" and only 11% disagreed.<sup>12</sup>
- 50% of people responding to a YouGov poll felt it should be possible to claim Legal Aid to pay for legal advice and representation if faced with eviction<sup>13</sup>

---

<sup>10</sup> Shailesh Vara, Justice Questions, 8<sup>th</sup> March 2016

<sup>11</sup> NAO legal aid report

<sup>12</sup> ComRes (for the Bar Council) 2013

<sup>13</sup> YouGov polling, June 2013

- LAG polling<sup>14</sup> found public opinion hardening against the Legal Aid changes; and
- Further YouGov polling<sup>15</sup> showed that the public views access to justice in a similar way to healthcare – free at the point of delivery – and state pensions, as a fundamental right.

For more information, please contact:

Vicky Pearlman, Policy Officer, Shelter t: 03440515 2045 e: [Vicky\\_Pearlman@shelter.org.uk](mailto:Vicky_Pearlman@shelter.org.uk)

---

<sup>14</sup> LAG polling, 2012, 2014

<sup>15</sup> <http://www.theguardian.com/law/2015/apr/13/justice-concern-free-healthcare-yougov-poll-legal-aid-cuts>

# Appendix – forthcoming research, please separate from our submission before publication

## **Interim findings of Shelter research: the impact of LASPO on the ability of Shelter Legal Services to provide Legal Aid-funded housing advice**

As a provider of legal aid-funded help and advice, Shelter has a unique insight into the impact of the changes brought about by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.

In order to understand more about the impact of LASPO, we conducted a survey of Shelter solicitors.<sup>16</sup> This gave us valuable new insights into the ability of Shelter to help people get the legal advice they need to resolve their housing problems.

We are delighted to share some of our interim findings in an appendix to our full submission to the Commission. **We ask the Commission to please use these findings for their own information and not to publish this appendix.**

Early findings confirm our fears that our ability to provide legal advice and representation – to prevent homelessness - has been severely compromised by the LASPO changes.

### **1. LASPO has made it more difficult for us to help clients resolve their problems**

Housing and homelessness cases are complex and require advice on a range of issues in order to address and resolve the underlying causes of their homelessness or bad housing. However, many of these issues – including debt, welfare benefits, most cases of disrepair and social housing allocation decisions - have been taken out of scope of Legal Aid.

Solicitors reiterated this. **83% of solicitors surveyed had a current case that included issues taken out of scope of legal aid by LASPO (for example welfare or debt).** This is not an unusual - **82% of respondents said that the cases they see in a typical week include issues taken out of scope.**

This makes it incredibly difficult to provide a service that truly meets the client's needs. **71% said they were unable to provide the same level of support to the clients they took on as they did before LASPO.** As one solicitor described:

*'Since LASPO was implemented... the way in which I deal with housing possession cases has changed as I am no longer able to advise in detail about Housing Benefit issues, which are often the main cause of the rent arrears.'*

We have also had to turn away clients as their case is not in scope for legal aid. **95% of solicitors surveyed have had to turn away someone who came to them for help, because their case was out of scope<sup>17</sup>.**

The removal of these issues from scope also means that time that could otherwise be spent providing legal advice, is taken up determining which aspects of the case can be advised on under legal aid and which must be referred out to other agencies (where this resource exists).

---

<sup>16</sup> Survey of Shelter solicitor. Survey was conducted using SurveyMonkey between 7<sup>th</sup> April 2016 and 21<sup>st</sup> April 2016. Out of a population of 40 solicitors, 22 completed the survey (55% response rate).

<sup>17</sup> The other respondents said they 'did not know' if this was the case. Some clients would not get as far as seeing a solicitor if their problem is out of scope, so in reality this number may be higher.



## **2. The reductions in Legal Aid are having a negative impact on our clients' outcomes and taking up unnecessary court time**

There are indications that an inability to get help for issues removed from scope is having a negative impact on our clients' outcomes. Where previously Legal Aid solicitors could assist with issues as they arose, Legal Aid is now only accessible at crisis point - we often first see a client when they are faced with immediate homelessness. **Three quarters (75%) of solicitors surveyed say they come across a case at least once a month where the client's issues could have been resolved earlier, had the issues involved not been removed from the scope of legal aid.** As one solicitor observed:

*'A major impact [of LASPO] is not being able to assist in housing benefit (HB) issues. I have a number of clients who have an underlying entitlement to HB but for a number of reasons benefit has not been paid and arrears have increased and they are now facing possession proceedings. I am sure that if Legal Aid was still available for HB issues there would be a lot less proceedings issued for rent arrears. These matters are clogging up the Courts unnecessarily.'*

Our survey suggests that this, and other issues are impacting on people's situation and our ability to help them: **86% of responding solicitors agreed that the cases they see in a typical week are harder to resolve than those they saw before LASPO was implemented.**

## **3. LASPO makes it more difficult and time consuming to deliver help**

Changes to how Legal Aid claims are processed and managed have also caused problems. Many solicitors highlighted how their time was increasingly taken up with administrative tasks, rather than actually providing legal help to clients. **90% of respondents agreed that the day-to-day administrative process of managing a legal aid case had become more difficult since LASPO.**

*'You need to be so careful exactly how you word things, to show exactly it is in scope – in file notes, App1 and App8 etc. Separating time out and recording under different charge bands. The LAA doesn't always understand scope and refuse your Legal Aid or query something and then you have to go back and argue with them.'*

According to solicitors surveyed, self-employed and part-time workers particularly struggle to provide evidence of means, as do people who only have access to basic bank accounts (such as Post Office accounts, where statements are sent quarterly). Clients have to provide all the necessary evidence to claim legal aid in one go, otherwise they need to return and restart the process – and many don't. **62% of respondents said that had turned someone away because they were unable to provide proof of means.**

**Overall, our research suggests that administrative changes and changes to the issues that people can get assistance with through Legal Aid are severely compromising our ability to help clients secure access to justice and resolve their housing and homelessness problems.**