Equality and Human Rights Commission Research report 99

Equality, human rights and access to civil law justice:

a literature review

Helen Anthony and Charlotte Crilly



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Executive summary

1. Background

A range of changes potentially affecting access to civil law justice in England and Wales have been introduced in recent years. These changes include: substantial reductions to the scope of civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO); proposals for further reforms to legal aid (including a residence test); reforms to judicial review; and the introduction of fees in employment tribunals.

The Equality and Human Rights Commission (EHRC) is a statutory body; its powers and duties are set out in the Equality Act 2006. It is the independent advocate for equality and human rights in Britain. The EHRC's (2014a) mid-term report on the UK's progress in fulfilling Universal Periodic Review¹ recommendations raised concerns about the equality and human rights implications of many of the recent changes to civil law justice. In order to inform its future strategy in this area, the EHRC commissioned a literature review to identify the reported potential and actual equality and human rights impacts of recent changes to civil law justice.

2. Methodology

This literature review explores:

- The reported potential or actual impacts of changes to access to civil law justice for people sharing characteristics protected by the Equality Act 2010,² including access to redress for victims of discrimination.
- The reported potential or actual impacts of changes to access to advice and redress for human rights breaches, regardless of protected characteristics.

During the period January to March 2015, the review looked at a range of relevant academic and industry literature, legal cases and secondary sources. It focused mainly on material published

¹ A review of the human rights records of all United Nations member states.

² The protected characteristics as set out in the Equality Act 2010 are: age; disability; sex; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; and sexual orientation.

since November 2010, although some earlier sources were also considered where relevant. As the reforms are relatively recent, quantatitive evidence and analysis that showed causal impacts on people with particular protected characteristics were found to be limited. The review is therefore necessarily focused on the impact of the reforms drawing on qualitative findings, including the recent experience of individuals and small groups who have been directly affected.

This literature review presents findings, notes gaps in knowledge and draws conclusions based on publicly available sources. These are listed in the Bibliography.

3. Key findings

- 3.1 The findings tended to highlight that disabled people, women and people from ethnic minorities are particularly affected by the reforms.
 - For disabled people, it was reported that there is an impact on access to justice in welfare benefits, community care, housing and discrimination cases.
 - For women, findings indicated an impact in family cases, where those who have experienced domestic violence are affected by the strict evidence requirements. There is evidence of an adverse impact on women in relation to discrimination cases, because of the introduction of fees in employment tribunals.
 - Ethnic minorities are potentially affected by the removal of many types of immigration cases from the scope of public funding.
 - The proposed residence test for legal aid is reported to have a disproportionate impact on non-British nationals.
- **3.2** Outside employment tribunals, there was very little reported evidence relating to discrimination because of age, religion or belief, or sexual orientation.
- **3.3** The review found no reported impacts with regard to gender reassignment or marriage and civil partnership.
- 3.4 The review identified the following reported impacts on the number of people seeking access to advice and/or redress for discrimination:
 - The number of discrimination inquiries handled by the mandatory telephone gateway is much lower than estimated.
 - There has been a drop in all categories for which there are records of discrimination claims in employment tribunals.
 - There are also barriers to bringing discrimination claims in the County Court.

- **3.5** The review identified the following reported impacts on people seeking advice and/or redress for human rights breaches:
 - Some people seeking redress for breaches of Article 8 of the European Convention on Human Rights (ECHR) (right to respect for private and family life) in relation to family, housing or immigration issues have experienced more difficulty following the introduction of LASPO. This is despite the existence of the exceptional case funding (ECF) scheme.
 - In some cases, being unable to access legal advice and representation may itself amount to a breach of Article 6 of the ECHR (right to a fair trial).
 - Children are particularly at risk of having their rights under the United Nations Convention on the Rights of the Child breached by recent reforms. This includes unaccompanied migrant children and children in family cases.

In some circumstances, other human rights instruments are relevant, such as the United Nations Convention on the Rights of Persons with Disabilities.

4. Gaps in evidence

The review showed that there are several gaps in evidence, including on:

- How often and how effectively the fee remission system for employment tribunal fees is used.
- Why the legal aid that is still in scope is apparently so underused.
- The impact of legal aid reforms for judicial review cases.
- The impact of the increase in the small claims limit.
- The extent to which mediation is used as an alternative, in particular by women of different religions or beliefs.
- What has happened to people who can no longer access advice, representation or the courts.

1. Introduction

Since 2012, a range of legal and policy changes have been introduced in England and Wales which concern access to civil law justice. The changes include reductions to the scope of civil legal aid through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and proposals for further reforms to legal aid, reforms to judicial review, and the introduction of fees in employment tribunals.

By introducing these changes, the Government's stated aims were to:

- 1. Save money, encourage people to use alternative methods of dispute resolution, and reserve taxpayers' money for the most serious issues (Ministry of Justice, 2010a).
- 2. Reduce the cost of litigation involving 'no win, no fee' agreements (Ministry of Justice, 2010b).
- 3. Reduce burdens on public services and remove obstacles to economic recovery (Ministry of Justice, 2012a).
- 4. Stop the inappropriate use of judicial review as a campaigning tool, and reduce the cost and delays of judicial review being used to hinder the Government's work (Ministry of Justice, 2013a).
- 5. Reduce the burden on businesses by deterring employees from going to employment tribunals unless necessary, thereby encouraging business growth (Ministry of Justice, 2011a).

The Equality and Human Rights Commission (EHRC) is a statutory body; its powers and duties are set out in the Equality Act 2006. It is the independent advocate for equality and human rights in Britain. The EHRC aims to champion equality and human rights for all, work to eliminate discrimination, reduce inequality and protect human rights, and ensure that everyone has a fair chance to participate in society. It has responsibility for nine 'protected characteristics' — age, disability, race, sex, gender reassignment, religion or belief, sexual orientation, pregnancy and maternity, marriage and civil partnership — as well as for the promotion of human rights.

The EHRC's (2014a) mid-term report on the UK's progress in fulfilling Universal Periodic Review³ recommendations raised concerns about the equality and human rights implications of many of the recent changes to civil law justice. The purpose of this literature review is to inform the EHRC's future strategy in this area, by providing an evidence base for the potential and actual equality and

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³ A review of the human rights records of all United Nations member states.

human rights impacts of recent changes that may have affected access to civil law justice. It covers:

- The reported potential or actual impacts of changes to access to civil law justice for people sharing characteristics protected by the Equality Act 2010, including access to redress for victims of discrimination.
- The reported potential or actual impacts of changes to access to advice and redress for human rights breaches, regardless of protected characteristics.

2. Methodology

A review of relevant literature and secondary sources was conducted during the period January to March 2015. These sources included academic journals and other academic publications, books, voluntary and community sector publications, Government papers and statistics, legal cases, legislation, legal professional publications and blogs, and press articles.

Sources were evaluated by considering who wrote the information, and when and why it was written. The review explored reported evidence of the actual or potential equality and human rights impacts of recent changes relating to access to civil law justice. Because of the timing of the main proposals for reform, the review focused mainly on material published since November 2010. However, some earlier sources were also considered where relevant.

The review considered whether there were any relevant findings relating to the following main questions:

- To what extent have people with particular protected characteristics been affected by recent changes?
- 2. Have recent changes had an impact on people seeking access to advice and/or redress for discrimination, and what has this been?
- 3. Have recent changes had an impact on people seeking access to advice and/or redress for human rights breaches, whether or not this relates to particular protected characteristics, and what has this been?
- 4. To what extent are individuals (particularly women with different religions or beliefs) using alternative dispute resolution mechanisms?

The review did not consider the direct impact of recent changes (including legal aid reforms) on legal aid firms or on their employees.

The report summarises the findings of the literature review, notes gaps in knowledge and draws conclusions based on publicly available sources.

It should be noted that at the time of the literature review a substantial amount of direct statistical evidence related to the reforms, and analysis of the effect of this on people sharing particular protected characteristics, had not been published, and therefore does not form part of this review.

Consequently, the literature review sought primarily to describe the impact of the reforms on individuals and groups that had been reported. The reported experience of directly affected individuals and small groups provides an indication of the impact of the reforms. Where sources expressed a view on the equality and human rights impacts of recent changes to civil law justice, the majority of these views were critical and identified a range of actual or potential adverse impacts. Anything in this report which is not directly referenced is either from the authors' own knowledge and experience or it has been inferred from the documents reviewed for the report. The Bibliography lists all of the sources referred to.

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⁴ Alongside evidence from small scale studies and official reports, this can also be anecdotal evidence or opinion expressed by experts in the field.

3. Relevant reforms

3.1 Legal aid

In 2012, Parliament passed LASPO. Schedule 1, Part 1 of LASPO sets out the areas of civil law for which legal aid funding is now available. As a result, the scope of civil legal aid is now considerably narrower than it was. For example, public funding is no longer available for the majority of private family, housing, debt, welfare benefit, employment and clinical negligence matters. The reduction in scope of legal aid has resulted in a significant drop in the number of publicly funded cases. The year before the relevant provisions of LASPO came into force, legal aid was granted in 925,000 cases; the year after it came in to force, assistance was given in 497,000 cases. This is a drop of 46 per cent (Ministry of Justice, 2014a).

There are two main types of legal aid. 'Legal help' is funding for legal advice or assistance. It is often given to people in the early stages of a potential court case, including assessing the prospect of a case succeeding, corresponding with the other party in the case, and during negotiations. The majority of legal aid cases fall in to the 'legal help' category. 'Civil Representation' is legal aid for representation in court or upper (appeal) tribunals. Both these types of legal aid have been affected by the LASPO reductions to scope.

A telephone gateway service, called 'Civil Legal Advice' (CLA), is now mandatory as the first point of call for legal advice on discrimination, debt and special educational needs (SEN).

In addition, LASPO introduced stricter means testing requirements for applicants. It made legal aid for private family law matters conditional on the applicant providing evidence of domestic violence.

LASPO introduced a more restrictive scheme for exceptional funding of cases that are normally out of scope.⁷ Legal aid can be granted under this scheme when it would not otherwise be available, but the Legal Aid Agency determines that funding is necessary to protect a person's

⁵ Including legal help and Civil Representation.

⁶ This is also often known as 'Legal Representation'.

⁷ Prior to LASPO, the exceptional funding scheme meant it was possible for legal aid to be granted for cases that would not otherwise have qualified if: it was in the wider public interest for the case to be funded; if the case was of overwhelming importance to the client; or if there was convincing evidence that without public funding it would be practically impossible for the client to bring or defend proceedings, or it would lead to obvious unfairness in the proceedings (Ministry of Justice, 2011b).

rights under the European Convention of Human Rights (ECHR), or under enforceable EU rights.8 There are concerns, however, that this scheme is not operating as intended (see section 4).

3.2 Civil legal funding reforms (excluding legal aid)

As of 1 April 2013, Part 2 of LASPO and amendments to the Civil Procedure Rules⁹ (CPR) introduced changes to the way in which private individuals pay for civil cases. Key changes include those relating to conditional fee agreements (CFA) (one type of 'no win, no fee' agreement). This means that successful claimants may have to pay their solicitor's legal fees out of the damages they recover, rather than the fees being payable by the losing party.

A number of other changes were made to the CPR to try to reduce the costs of cases. These included raising the small claims limit from £5,000 to £10,000 for all non-personal injury money claims.

3.3 The introduction of fees in employment tribunals

From 29 July 2013, claims made to employment tribunals or to the Employment Appeal Tribunal (EAT) attracted fees for the first time. The fee is either £160 or £250 when a claim is issued (depending on the type of case) and a further £230 or £950 if it proceeds to a hearing. Discrimination claims attract the higher fees. Additional fees are payable for other applications, such as to dismiss the claim following settlement (HM Courts and Tribunals service, no date).

3.4 Judicial review

There have been changes to the legal aid rules for judicial review proceedings. Legal aid is now only available for a permission application 10 either where permission is granted, or in a restricted number of other circumstances.

The Criminal Justice and Courts Act 2015 introduced reforms to judicial review, most of which took effect on 13 April 2015. If a judicial review application is based on procedural defects, the court must normally refuse permission (or refuse to grant a remedy) when it is highly likely that the outcome for the applicant would have been substantially the same if the defects had not

⁸ s.10 LASPO.

⁹ Rules of court for the Civil Division of the Court of Appeal, the High Court and the County Court. The CPR set out the practice and procedure to be followed in these courts.

The court's permission to proceed is required in a claim for judicial review.

happened. (However, in cases of exceptional public interest, the judge may use his or her discretion to grant permission.) In addition, the Act introduces changes to the rules on costs.

3.5 Prospective reforms

The Government took steps to introduce a residence test for those applying for civil legal aid. This would require applicants to be lawfully resident in the UK and at some point in the past to have been lawfully resident for 12 continuous months. A judicial review of the proposal to introduce this test found that the Government could not introduce it by secondary legislation, as it had intended to do (*R* (on the application of the Public Law Project) v The Secretary of State for Justice). The Court also ruled that the test, if introduced, would be unlawful and discriminatory. The Government is appealing this decision.

3.6 Availability of legal advice

As well as a reduction in case volumes (see subsection 3.1), changes to legal aid have led to fewer law firms carrying out publicly funded work. Non-governmental organisations (NGOs) that give advice have also lost legal aid funding. This, combined with reductions in funding from local authorities (many of which have traditionally funded advice services), has led to a reduction in the number and capacity of law centres and legal advice agencies (EHRC, 2014a). For example, out of 51 law centres, ten have now closed due to a lack of funding since the implementation of LASPO in April 2013 (Law Centres Network, 2014).

3.7 General themes in access to justice

A number of general themes are relevant to the question of access to civil law justice and the impact of changes to the law. These include an increase in the number of litigants in person,¹² the fact that many of those with legal problems have a range of related issues to resolve (known as a 'clustering' of legal problems) and a widespread perception that legal aid is no longer available (Legal Action Group, 2014).

3.8 Recent developments

Two relevant recent developments have not been considered in detail, because of when the literature review was undertaken:

¹¹ [2014] EWHC 2365 (Admin).

¹² A litigant in person is someone who is not represented by a solicitor or barrister at some or all stages of legal proceedings.

- 1) In March 2015, court fees for civil claims were increased significantly for claims over £10,000. The new fee is set at five per cent of the value of the claim. Previously, fees were fixed for particular bands of claims, on a sliding scale. The Civil Justice Council (2014a) noted that to make a £50,000 claim, the court fee would now be £2,500. Under the former rules, the fee would have been £910. This is an increase of 174 per cent. The Civil Justice Council has calculated that some fees will increase by over 600 per cent. Legal professional bodies suggest that these fees may have an impact on access to justice.
- 2) The Joint Committee on Human Rights¹³ published its report concerning the UK's compliance with the United Nations Convention on the Rights of the Child. This report reiterated the Committee's earlier concerns about the impact of legal aid changes on the human rights of children and called for any new government 'to look again at the reforms and reverse some of the harm they have caused to children' (Joint Committee on Human Rights, 2015).

¹³ A Parliamentary Select Committee which considers human rights matters in the UK (excluding individual cases).

4. Impact of LASPO reforms

This review discusses the reported wide-ranging consequences of the LASPO reforms by areas of law, with a focus on how the reforms have affected people's ability to enforce their human rights and the impact on people sharing protected characteristics. Three reforms which affect several areas of law are also explored: the exceptional funding scheme; the telephone gateway; and the proposed residence test.

4.1 Discrimination

Discrimination cases remain in scope for legal help, although initial advice must be obtained through the telephone gateway service, CLA. As legal aid is not available to fund advocacy in employment tribunals,¹⁴ in cases of workplace discrimination individuals must find other sources of funding for representation or represent themselves; only 33 per cent of claimants are represented at employment tribunal hearings, as opposed to 67 per cent of employers (Department for Business Innovation and Skills, 2014).

The mandatory telephone gateway system works as follows: clients call CLA and speak to an operator, who assesses whether their problem falls within the scope of the service and whether they are likely to pass the means test. If the operator considers that they qualify on both grounds, and their case is suitable for telephone advice, the client will be passed on to a specialist adviser who will reassess their eligibility and their suitability for telephone advice (Ministry of Justice, 2014f). If they qualify, the adviser can give them up to two hours' advice over the telephone, which will be followed up in writing. In appropriate cases, this may include completing and submitting a claim form, if the client has an imminent deadline. After the initial two hours, the client can continue to receive advice if their case has merit and they can produce documentation to show they pass the means test, provided they sign a legal help form (Wiggins and Fowler, 2013).¹⁵

¹⁴ This is not a new restriction as legal aid was not available for advocacy in the employment tribunal before LASPO.

¹⁵ The author, Clare Fowler, works for Howells LLP, one of the three firms to have been contracted to provide specialist discrimination advice via the telephone gateway.

Although legal aid is not available to fund advocacy in employment tribunals, it may still be available for representation in the EAT for discrimination cases that go to appeal. However, there has been a drop of 77 per cent in the number of legally aided EAT cases since the introduction of LASPO (from 52 cases in 2012/13 to 12 in 2013/4) (Legal Aid Agency, 2014a).

Subject to the means and merits test, public funding for advocacy may be available for discrimination cases in the County Court, for example with regard to the provision of services.

The Public Law Project¹⁶ has identified a 60 per cent shortfall in legal aid awarded for discrimination cases, in comparison to the predictions adopted by Government (Hickman and Oldfield, 2015). The Legal Action Group¹⁷ (2014) has suggested that the shortfall may be explained by a widespread belief that legal aid is no longer available in employment cases. Whatever the cause (and note that shortly after LASPO came into force, employment tribunal fees were introduced) there has been a recent, considerable drop in discrimination cases being taken to employment tribunals. The Ministry of Justice (2015a) reported a 73 per cent drop between August 2013 and December 2013.

Although legal aid for discrimination cases is still in scope, individuals experiencing problems at work may not in fact be aware that any unfair treatment they experience is caused by discrimination (EHRC, 2014b). For example, an analysis of the English and Welsh Civil and Social Justice Survey showed that nearly 62 per cent of people who faced a discrimination problem did not know their rights. A slightly larger proportion (66 per cent) did not know the procedures involved to seek legal redress (Balmer *et al.*, 2010). This situation may have implications for the number of people contacting CLA with regard to discrimination cases.

4.1.1 Human rights

As discussed below, some groups may find telephone advice to be more convenient than other methods of delivery. However, it has been suggested that introducing a mandatory telephone gateway for advice on discrimination law may have human rights implications for certain groups.

The EHRC (2012a) has expressed the view that, for people with certain impairments, having a single telephone gateway could amount to a breach of Article 6 of the ECHR (right to a fair trial), read with Article 14 (prohibition of discrimination) in relation to disability.¹⁸

¹⁶ A national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

¹⁷ A national charity which promotes equal access to justice for all members of society who are socially, economically or otherwise disadvantaged.

¹⁸ The EHRC's (2014f) view was expressed in relation to the proposal that there be a single telephone gateway as a remote access point for four areas of civil law: discrimination; debt; special educational needs (SEN); and community

The United Nations Convention on the Rights of Persons with Disabilities, which the UK has ratified, protects the rights of disabled people. Article 5 of that Convention concerns equality and non-discrimination. It sets out that:

- 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
- 4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

In order to meet its obligations under the Convention, the UK must ensure that disabled people are not discriminated against in the provision of legal services. As a recent study explains, 'the degree to which people with disabilities "are equal before the law" is to some extent dependent on the accessibility of legal advice and representation when it is needed. Further, equality before the law is an important basis for safeguarding the other rights of persons with disabilities which constitute the Convention.' (Swift et al., 2013, page 8)

Mind (2014) suggested that people with mental health conditions may face additional barriers in using the CLA telephone advice service, including the need to provide financial information before obtaining advice and perceptions about a lack of empathy by advisers. It said 'we know that [a telephone advice service] fails to reach a proportion of people with mental health problems because of the communication difficulties associated with their condition, or because those people may not have the capacity to use the means of communication offered' (Mind, 2014, section 6.2).

The Law Society (2014a) supported this view, in part:

The Law Society agrees that for some clients telephone advice will be more convenient than attending an appointment for face to face advice. Our main concern is that telephone advice is not a viable option for some clients, such as clients with mental health and cognitive disability issues, literacy issues or limited English who need a level of reassurance and interaction that can only be provided by face to face advice. For these clients, the

care. The gateway was introduced for the first three of these areas, but not for community care law due to the high number of these cases that would require Civil Representation.

unavailability of face to face advice may mean that they cannot obtain effective help (paragraph 7.4).

Smith and Paterson (2013) looked at the expansion of the use of technology at a time of reducing costs in legal services. They found that advice hotlines work best for 'better educated, more settled clients and worst for those who have complex problems, communication difficulties, mental problems or are otherwise vulnerable or lead unsettled lives' (p.85).

The consequences of the telephone gateway not operating properly, or not being accessible for some people, may be that access to justice in discrimination cases is inhibited. This issue is discussed in detail in section 4.13. This problem may be compounded by there now being less advice available for discrimination cases through Law Centres. The Law Centres Network (2014) said that in 2013/2014, it 'felt the full impact of the changes in the political and funding landscape for discrimination advice. Availability of frontline discrimination legal advice and representation continues to diminish, resulting in people in some parts of the UK being unable to access legal advice and representation on discrimination issues' (p.16).

Changes to the rules about 'no win, no fee' agreements have also had a significant impact on access to justice in discrimination cases (Unity Law, no date). Prior to LASPO, claimants making discrimination claims in the County Court could agree a CFA¹⁹ with their legal representatives so, whether they won or lost their case, they would not be out of pocket. In practice, solicitors would agree a basic fee with a claimant. An additional percentage uplift or 'success fee' would be payable if the claimant won the case. This reflected the risks taken on by the solicitor – that is, not being paid until the case is finished if their client won, and not being paid at all if their client lost. Furthermore, solicitors would also arrange for claimants to take out an 'after the event' (ATE) insurance policy, to protect them from having to pay the defendant's costs if the claim failed. Following a successful claim, the defendant would pay the claimant's solicitor's costs, together with the success fee and the ATE insurance premium. However, following the LASPO reforms, successful claimants can no longer recover either the success fee or the ATE insurance premium from losing defendants.

In personal injury cases, claimants now benefit from 'qualified one way costs shifting' (QOCS). This means that — in most circumstances — a losing personal injury claimant is protected from having to pay the defendant's costs. However, QOCS does not apply to discrimination cases taken in the County Court, as it was introduced by revisions to the CPR to contain the costs of personal injury cases. If a discrimination claim is unsuccessful, the claimant may be ordered to pay the defendant's costs, which could amount to tens of thousands of pounds. An ATE insurance policy

¹⁹ Agreements where a claimant agrees to pay their lawyer a percentage of any damages they win. Claimants who have these agreements are also at risk of having to pay a winning defendant's costs.

could protect against this risk, but the claimant would need to pay the premium themselves. If a discrimination case is successful, the claimant can expect to be awarded damages and the defendant may also be ordered to pay their legal costs, but would not have to reimburse any ATE insurance premium. If the claimant's solicitor is working under a CFA, the success fee would have to be met out of the damages awarded to the claimant.

The difficulty for claimants in discrimination cases is that damages are usually relatively low and the cost of ATE insurance premiums often significantly exceeds the amount recovered. So, irrespective of paying success fees, claimants taking cases in the County Court face losing more money than they may win in damages as a result of needing to pay for the other side's costs or for an insurance premium (Unity Law, no date). Similarly, damages based agreements²⁰ are unlikely to be viable for County Court discrimination cases. They could be an option for employment tribunal cases where it is unusual for the tribunal to order that a party pays the other side's costs (Citizens Advice, no date).

Unity Law²¹ (no date) has produced a number of pre-LASPO case studies, illustrating how difficult it would be for victims of disability discrimination in the provision of services or education to enforce their rights to equality under the new rules. One example is the case of 'Sam' who was discriminated against at college. He won £7,000 and was allowed to continue his education unimpeded by the issues which had arisen in the discrimination against him. His insurance premium was £12,000; under the pre-LASPO rules, this would have been recoverable from the college.

Unity Law explained that, following the LASPO reforms to the costs rules, a disabled person would find it difficult to bring a discrimination claim in the County Court because it would cost them money to do so, regardless of the outcome. Because of this financial risk, the firm could not advise a disabled claimant without significant resources to commence legal proceedings, no matter how strong their claim was.

With relatively low damages awarded for discrimination claims in the County Court, the new small claims limit of £10,000 may be an important factor. If a claimant expects damages to be below this level, the claim is likely to be allocated to the small claims track. Under this procedure, a claimant cannot recover significant costs, but neither are they exposed to the risk of paying the defendant's costs. In this situation, the concerns identified by Unity Law would not be relevant.

²¹ A firm of solicitors specialising in equality law.

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²⁰ Agreements where a claimant agrees to pay their lawyer a percentage of any damages they win. Claimants who have these agreements are also at risk of having to pay a winning defendant's costs.

4.1.2 Impact on people with particular protected characteristics

If the telephone gateway is not operating as intended (see section 4.13), there is a potential negative impact on certain people who might make a discrimination claim. It may mean that some groups of individuals who face disadvantage relating to their protected characteristics cannot access the legal aid they need to settle disputes, or to bring a claim under the Equality Act 2010.

For example, there may be a specific impact on disabled people, particularly people with learning disabilities who are more likely to be discriminated against (Swift *et al*, 2013). They are therefore more likely to need to use the mandatory telephone gateway. However, due to the concerns set out above, they are the very people who may find it harder to use the gateway system.

There is evidence of a shortfall in the take-up of legal aid for discrimination cases, compared to figures provided in the former Legal Services Commission's²² tenders for gateway services (Hickman and Oldfield, 2015). This low uptake may mean that people who are victims of discrimination or harassment are missing out on advice to which they are entitled.

There has been a considerable drop in the number of discrimination claims made in employment tribunals. The percentage falls in employment tribunal claims between the first quarter of 2013/14 (no fees payable) and the first quarter of 2014/15 (fees payable) were: 37 per cent in relation to age; 63 per cent in relation to disability; 75 per cent in relation to equal pay; 61 per cent in relation to race; 64 per cent in relation to religion or belief; 91 per cent in relation to sex; 66 per cent in relation to sexual orientation; and 46 per cent in relation to detriment/dismissal because of pregnancy (Ministry of Justice, 2015a). As recently reported in the Observer:

Stark figures published by the justice ministry have shown a fall in the number of sex discrimination cases at employment tribunals from 6,310 in the three months before the charges were introduced in July last year to 591 – a 90 per cent fall – during the same period this year. The success rate of the claimants has not significantly changed, suggesting that claims of a high number of frivolous claims under the old system was overstated (Boffey, 2015, online article).

The fall in employment tribunal claims is discussed in more detail later, when considering the impact of the introduction of fees (see section 6).

 $^{^{22}}$ The non-departmental public body sponsored by the Ministry of Justice that administered legal aid before the formation of the Legal Aid Agency.

4.2 Housing

Following reforms in LASPO, housing matters are now largely out of scope for the purposes of legal aid. Legal aid is only available for cases that involve homelessness, the risk of homelessness, eviction, repossession, Anti-Social Behaviour Orders and housing disrepair that risks serious harm (LASPO 2012, Schedule 1, Part 1).

The drop in the number of housing cases funded by legal aid has been greater than expected by the Legal Aid Agency. For the first eight months of the 2013/14 financial year, there was a 43 per cent drop in the number of instances of housing advice and assistance provided, compared to the previous year. This may be because of a belief that legal aid is no longer available for housing cases. There was also concern among groups such as the Legal Aid Practitioners Group and the Housing Law Practitioners Association that the information that was previously online, giving contact details of legal aid practitioners, had become very difficult to find. This information is now available on the Government's website (Brookes, 2014).

There is also a concern that as Law Centres and other legal advice centres have closed, there are fewer places where tenants can get advice (the closure of advice agencies is discussed in section 8). Shelter (a national housing charity), for example, has closed nine housing advice centres (Griggs, 2013). A Joseph Rowntree Foundation report (2014) also noted that since 2009/10, there have been large falls in the number of legally aided housing cases. Over this period, the number of cases per year went down by 94,000 (67 per cent) (MacInnes *et al.*, 2014).

The Low Commission²⁴ (2014) recommended that legal aid should be reinstated for cases involving housing disrepair and the right to quiet enjoyment. This is because these cases are litigated in the County Court rather than in tribunals. This means that representatives (for example, from advice agencies) need to have rights of audience to appear before the Court on behalf of their clients. Restoring legal aid would, the Low Commission argued, be the most practical way to ensure that people could get the necessary assistance in these cases.

4.2.1 Human rights

The exclusion of many housing matters from legal aid may have potential implications for human rights. This is because Article 8 of the ECHR covers the right to respect for one's home. If

²³ An executive agency of the Ministry of Justice, that provides civil and criminal legal aid and advice in England and Wales.

²⁴ The Low Commission was established to develop a strategy for access to advice and support on social welfare law in England and Wales.

individuals are not able to get advice and assistance at the early stages of their housing problem, it may escalate into possession proceedings. This may place their home at risk.

A recent Justice Committee (2015) report noted evidence from Shelter, which said that 'the restriction on scope with LASPO means that people now cannot get legal advice on a range of landlord and tenant and housing issues, such as tenancy deposit schemes, rent increases, joint tenancies, relationship breakdown...It is that preventative element that has now gone.' The Law Centres Network told the Committee that 'the current system allows problems to escalate...you are not getting in early as you were able to do previously' (p.60).

The ECF scheme is also relevant to housing (see section 4.12). In the first three months after LASPO, there were 18 applications in housing law cases for exceptional cases funding, but the only (non-inquest) cases to be granted funding were one family law case and one immigration case. In other words, there were no housing cases (Spurrier, 2013).

In May 2014, it was reported that just one housing case had been granted exceptional funding since the Government reduced the range of cases eligible for legal aid on 1 April 2013. The case concerned a tenant with schizophrenia who was facing eviction (Douglas, 2014).

By August 2014, two more exceptional funding applications had been successful in housing matters. One concerned a Gypsy client seeking planning permission for her one-caravan site. She was unable to represent herself at a public inquiry. After two judicial review applications were made to review the refusal of ECF, it was eventually granted. The second case involved a client who faced demotion of her tenancy.²⁵ The client argued that her son had a disability and that she required greater support. The Legal Aid Agency initially refused ECF but later granted it after her solicitors wrote a judicial review pre-action protocol letter to them²⁶ (Legal Aid Handbook, 2014).

The most recent statistics show that there were 300 applications for ECF received between July and September 2014. Ten applications were received in housing law. Of these, eight were refused, one was granted and one was withdrawn (Ministry of Justice, 2014b).

4.2.2 Impact on people with particular protected characteristics

The reported findings show there are potential impacts on disabled people, older people, women and ethnic minorities arising from excluding most housing cases from legal aid.

²⁵ Meaning she would have had less security of tenure.

²⁶ This is a letter stating the intention to bring judicial review proceedings to challenge the legality of the decision.

The Government accepted in their consultation paper (on the LASPO reforms) that, compared with the civil legal aid client base as a whole, people with the sort of housing cases that it proposed to exclude from scope were more likely to be ill or disabled. It considered, however, that, as many of these cases were about money or property, they were not as important as cases involving homelessness and that alternative sources of advice were available (Ministry of Justice, 2010a). Some respondents to this consultation noted that by excluding disrepair claims from the scope of legal aid, there was the potential for adverse impacts on children or older and disabled people. This was a consequence of poor living conditions (Ministry of Justice, 2011c).

The Government's equality impact assessment provided some statistics that showed potential impacts on women, ethnic minority groups, disabled people, and those between 25 and 64:

- 1. Housing clients are more likely to be female than the adult population as a whole, accounting for 61 per cent of clients compared with 51 per cent of the general population aged 16 and over, and 56 per cent of all affected clients. Those expected to be affected are more likely to be ethnic minorities, accounting for 32 per cent compared to 11 per cent of the general population over 16, and 25 per cent of the overall legal aid caseload (excluding those categorised as 'unknown').
- 2. Those who are ill or disabled are expected to be over-represented relative to the population aged 16-64 as a whole. Specifically, 29 per cent of those with affected cases (excluding 'unknowns') were ill or disabled compared with 19 per cent of the general population aged 16-64.
- 3. Those with cases in the housing category, as with all other categories removed from scope, are also more likely to be aged between 25 and 64 than the general population aged 16 and over (Ministry of Justice, 2011c).

Shelter produced a case study which indicated the important role played by legal aid in helping the disabled person's family to successfully challenge the local authority's decision not to rehouse them when the son (who had severe autism) became the target of stone-throwing and death threats by local bullies. The harassment was having a serious effect on the family's mental health. Legal advice on housing allocations is now excluded by LASPO (Shelter, 2011).

The Low Commission (2014) noted a potential impact on women of restricting public funding for housing cases. Because legal aid is now limited in certain other areas (such as family law), women with housing and welfare benefit problems arising from relationship breakdown could find that all of their advice needs are excluded from legal aid.

The Community Law Partnership (2014) stated there would be an impact on Gypsy and Traveller communities in the context of evictions of unauthorised encampments. It pointed out that LASPO:

excluded trespassers such as Gypsies and Travellers residing on unauthorised encampments from scope. As a consequence, Gypsies and Travellers who have grounds to defend possession proceedings on grounds that the decision to evict was unlawful now have to lodge a judicial review claim in the high court and seek a stay of the county court action [that is, ask for the case to be put on hold], which increases delay and expense – assuming of course that they can find a legal aid provider who is still willing to take on such a case. (p.1)

They also identified a potential impact in that Gypsies and Travellers will not be able to enforce new rights under the Mobile Homes Act 1983. This is because LASPO restricted the scope of legal aid to possession actions and serious disrepair cases (Community Law Partnership, 2014).

4.3 Immigration and asylum

It has been argued that immigration is the area of law hardest hit by the LASPO reforms (Armstrong, 2013). The areas that are still within the scope of legal aid after LASPO are: asylum claims; immigration detention; asylum support cases where the individual is seeking help with accommodation; and proceedings before the Special Immigration Appeals Commission (where issues of national security are at stake). Civil legal aid is also still available for people who have been trafficked, people who have experienced domestic violence, and victims of domestic violence who are applying for indefinite leave to remain. Family reunion cases are not within the scope of legal aid. However, they may be more likely to be considered for ECF following the Gudanaviciene case, which is discussed below.

Judicial review of immigration matters²⁷ is still within scope, but with some limitations:

- 1. No legal aid is available for judicial review in immigration cases which have already had at least one full oral hearing on the same (or substantially the same) issue within the period of one year (with some exceptions).²⁸
- 2. There is no legal aid to judicially review a removal direction where the direction was given not more than a year after the decision to remove, a refusal of leave to appeal that decision, or a determination of an appeal of that decision.²⁹

Appeal rights in immigration cases have also recently been restricted by the Immigration Act 2014. Under the Act, there is only a right of appeal against a decision of the Home Office to refuse a protection or a human rights claim, or against a decision of the Home Office to revoke a protection status. Other immigration decisions made by the Home Office will not attract a right of appeal, with

²⁷ Judicial reviews for immigration cases have now been moved from the Administrative Court to the Upper Tribunal.
²⁸ LASPO 2012, Part 1, Schedule 1.

²⁹ LASPO 2012, Part 1, Schedule 1.

the remedy in those circumstances being administrative review and/or judicial review. In a report on the (then) Immigration Bill, the Joint Committee on Human Rights 'expressed concern that the Bill's significant limitation of appeal rights against immigration and asylum decisions is not compatible with the common law right of access to a court or tribunal in relation to unlawful immigration decisions, and the right to an effective remedy' (Joint Committee on Human Rights, 2013a).

4.3.1 Human rights

The Government recognised that there would be immigration cases where important issues arose, such as the right to respect for family life under Article 8 of the ECHR. However, they argued that individuals would generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate (Ministry of Justice, 2010a).

Respondents to the Government's legal aid consultation in 2010 argued that:

- 1. Immigration cases are complex and can engage Article 3 (prohibition of torture or inhuman or degrading treatment) and Article 8 (right to respect for private and family life) where it is difficult for people to represent themselves.
- 2. There would be an inequality of arms³⁰ between the State and applicants without legal aid.
- 3. Legal aid should also remain available for refugee family reunion cases due to the importance of family life and the complexity of case law on Article 8 of the ECHR.
- 4. The proposal risked breaching the Council of Europe Convention on Action against Trafficking in Human Beings (Ministry of Justice, 2011d).

Other commentators have discussed the impact of the reforms on people with cases involving Article 8 rights in the context of immigration proceedings. In 2013, it was suggested that the extent to which the Immigration Rules properly reflect the balance required by Article 8 would generate some important human rights cases. However, such cases would have to be developed without the benefit of legal aid unless they also engage Article 3 or involve a claim for asylum (Armstrong, 2013).

Particular issues around equality of arms in immigration cases have been raised. It has been suggested that there will be a particular disadvantage because of the disparity between the individual's resources and the resources and expertise of the State (Meyler and Woodhouse, 2013).

³⁰ Equality of arms means, for example, that both parties have a reasonable opportunity of presenting their case to the court

4.3.2 Exceptional case funding

Apart from inquests, immigration cases engaging human rights have been the main area where applications have been made for ECF (Ministry of Justice, 2014b).

The 2014 case of *R* (on the application of Gudanaviciene & Ors) v Director of Legal Aid Casework³¹ concerned the Legal Aid Agency's refusal to grant ECF under section 10 of LASPO in six immigration cases. The Legal Aid Agency's guidance on ECF for immigration cases was held by the Court of Appeal to be incompatible with Article 8 ECHR (right to respect for private and family life). The Court recognised that procedural rights arise under Article 8. In the circumstances of these cases, the procedural rights which arise under Article 8 are similar to those that arise under Article 6 (right to a fair trial). Whether Article 8 requires legal aid in immigration proceedings will depend on factors which include the importance of the issues, their complexity and the ability of the individual to represent themselves without legal assistance.

The following features of immigration proceedings were said by the Court of Appeal to be relevant:

- 1. There are statutory restrictions on the supply of advice and assistance in immigration law.³²
- 2. Individuals may have language difficulties.
- 3. The law is complex and rapidly evolving.

The Court noted that deportation cases will often engage rights under Article 8 of the ECHR, and this is a relevant factor in considering applications for ECF. The Court also considered refugee family reunion cases, which are outside the scope of legal aid under LASPO. It held that family reunion is a matter of vital importance for refugees. In the cases at issue, the Director of Legal Aid Casework ought to have concluded that failure to provide ECF would amount to a breach of Convention rights.

The Government has issued a statement saying that: 'Exceptional case funding for refugee family reunion work remains available under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012' (Legal Aid Agency, 2014b).

4.3.3 Human rights impacts on children

The exclusion of non-asylum immigration cases from legal aid would have a disproportionate impact on children, who cannot be expected to present their own cases (Ministry of Justice, 2011c). Children are protected by human rights instruments, in particular the United Nations Convention on the Rights of the Child. Under the Equality Act 2010, the protected characteristic of age applies to all groups and children are protected from age discrimination in some sectors, for

³¹ [2014] EWCA Civ 1622.

³² Under section 84 of the Immigration and Asylum Act 1999.

example, employment.³³ Concern has been raised about the position of lone/unaccompanied child migrants, who either have not made a claim for asylum, or whose claim has been unsuccessful. If these children have any non-asylum immigration issues, these will be outside the scope of legal aid (Meyler and Woodhouse, 2013).

Research by the Office of the Children's Commissioner raised similar concerns in their report on the impact of legal aid changes on children since April 2013 (Carter, 2014). The report sets out a number of case studies of children who would have struggled in accessing justice for immigration matters without legal aid or other representation. The report found that for the children interviewed, it seemed highly unlikely, if not impossible, that they could have ever progressed their cases to the stage of legal or quasi-legal proceedings as a litigant in person and without legal support.

Children who were interviewed were asked how they would have felt if they could not have accessed legal support. Many would have found this to be a difficult and upsetting experience and several spoke of drastic actions they felt they would have been forced to take (Carter, 2014).

Bail for Immigration Detainees carried out a small scale monitoring exercise involving families separated by immigration detention. Case studies demonstrated the impact on children of their parent's removal or deportation, in particular on children's mental health. The report argued that because people are having to represent themselves in deportation appeals when they are unable to do so adequately, their case and the best interests of their children cannot be properly considered by the court (Bail for Immigration Detainees, 2014).

The recent Justice Committee (2015) report noted that the Committee was 'particularly concerned by evidence that trafficked and separated children are struggling to access immigration advice and assistance'. The report recommended that 'the Ministry of Justice review the impact on children's rights of the legal aid changes and consider how to ensure separated and trafficked children in particular are able to access legal assistance' (p.25).

4.3.4 Impact on people with particular protected characteristics

Those who responded to the legal aid consultation in 2010 argued that the proposal to limit legal aid in immigration cases would have a disproportionate impact on people from ethnic minorities given the nature of their cases (Ministry of Justice, 2011c). The Government's own estimates suggested that 92 per cent of clients (excluding 'unknowns') affected by the proposal were likely to

³³ Under 18s are not protected from age discrimination in services, and age is not a relevant characteristic for education.

be from ethnic minority groups. The biggest impact on these groups arising from the legal aid reforms came from the changes relating to immigration (Ministry of Justice, 2011c).

The Low Commission (2014) heard repeated concerns about particular impacts on ethnic minority groups as a result of the loss of immigration advice from legal aid.

Research conducted jointly by Coventry Women's Voices (and others) provided a 2009 case study from Birmingham Law Centre. The Law Centre had helped a number of successful asylum seekers left destitute because of the failure of the Department for Work and Pensions to issue them with National Insurance numbers, thus preventing them from claiming benefits. All the cases were resolved by the Law Centre writing to Jobcentre Plus and, if necessary, following this up with a pre-action letter threatening judicial review. The report went on to note that the withdrawal of legal aid for immigration and welfare benefit matters meant that there was now no funding to write such letters for refugees experiencing problems (Sandhu *et al.*, 2013).

The British Red Cross (2013) discussed the impacts of legal aid reforms on refugee family reunion cases (which involve people with refugee status bringing to the UK the families they had left behind). These cases were removed from the scope of legal aid by LASPO, although exceptional funding may now be available under section 10 as a result of the *Gudanaviciene* case discussed above. The impact on refugees (who may share the protected characteristic of race) was that they had to either pay for advice privately, seek support from charities that offer legal help or represent themselves. They are often reliant on friends, churches or high interest loans to fund an application, and there is a very real risk of exploitation as a result. There is also an impact in the risk of damage to people's mental health as a result of a lengthy time away from their families. This can lead to high levels of stress and anxiety. Individuals therefore are less able to gain employment and fully integrate into society.

The British Red Cross found that the refugee family reunion form is complex; it is difficult to find and must be completed online and in English. This means that people are struggling even to begin an application without support. There are often issues which contribute to the complexity of such cases. These include adoption, destroyed or missing documents and the absence of a UK embassy in certain countries. In addition, the overwhelming majority of clients applying for refugee family reunion have little money. Many have used what little savings they had to fund their journey to the UK.

The British Red Cross (2013) carried out a survey of 69 people who had undertaken family reunion cases. Of the survey respondents, 55 said that their cases would be very difficult without legal advice. All of those (52) who were funded by legal aid (pre-LASPO) said that without it they

would not be able to afford legal advice. Only one respondent said they could finance a case out of their own savings. Given the size of the survey, these findings are indicative only.

The British Red Cross examined the process of applying for exceptional funding for legal aid for refugee family reunion cases in South Yorkshire. The results showed the exceptional funding provisions were a 'highly complex' set of rules that are 'inaccessible to service users'. They stated that in South Yorkshire alone, they were receiving around 20 family reunion enquiries a month. With the support of the Public Law Project, they helped three service users make applications for exceptional funding. One individual decided not to continue with the application process because of the length of time it would take and the uncertainty of a positive outcome. Both other applications were refused on the grounds that this would not amount to a breach of their rights under Article 8 of the ECHR (McCabe, 2013).

Findings from Bail for Immigration Detainees noted the impacts on people who were removed or detained without their families. Bail for Immigration Detainees noted that the ECF scheme was not working for their clients, who often spoke limited English, or had learning difficulties and mental health conditions. They also dealt with unaccompanied children in detention whom the Home Office had incorrectly assessed as being over 18. The organisation concluded it was wholly unrealistic for many of these people to make effective applications for ECF by themselves. They found it difficult to find solicitors who would take on referrals for these applications (Bail for Immigration Detainees, 2014).

The EHRC's 'Human Rights Review 2012' noted that removing legal aid for asylum support cases (apart from cases involving accommodation) could lead to destitution for asylum seekers with valid claims for support. The EHRC argued that the urgency of such cases, where the client is already facing, or will soon experience, severe hardship, means that they are ill-suited for the delays likely to be involved in making an application for exceptional legal aid funding (EHRC, 2012a).

The Legal Action Group produced a report about people who discovered (after living in Britain for a long time) that they had no legal right to be here (Bawdon, 2014). Their problems were compounded by there being no legal aid for immigration matters. The report discussed the case of a man who was turned away from his local Law Centre. Luckily, the receptionist printed off some Home Office forms for him and asked the solicitor to give him some pointers about relevant documents. The man commented that the process would have taken a lot longer without this brief and informal advice, and went on to say: 'The form is complicated. It's long and if you make one mistake they will send it back to you. Without the benefit of that advice, it would have been like you are climbing a hill forever'.

The Legal Action Group also gave the example of a long-term resident who did not qualify for legal aid to help him resist deportation, owing to the LASPO reforms. He lived in West London but was advised by a local Citizens Advice Bureau to try Hackney Migrant Centre, in the East End. He and his daughter travelled across London for a drop-in session, only to be told that the solicitor could only give them general advice about what he needed to do, as her huge caseload prevented her from taking him on.

It has been suggested that the LASPO reductions in scope of legal aid may have more of an adverse impact on women asylum seekers, although there is limited evidence about this. Although asylum cases remain eligible for legal aid, it is said that many solicitors use immigration work to subisidise asylum cases and that excluding immigration cases from legal aid stops this cross-subsidy. Legal Voice (Davidson, 2012), an online magazine about access to justice, suggested the effects on women asylum seekers would be very serious. They reported the concerns of a solicitor at Rights of Women, who explained that women may initially be reluctant to talk about their experiences of sexual violence; however, if they later bring it up (in relation to their asylum claim), they may be wrongly assumed to have changed their story or contradicted their original evidence.

The article also quoted Asylum Aid as saying that women refugees often have more complicated cases, because they involve not just state persecution but also persecution from family or community members (Davidson, 2012).

4.3.5 The availability of advice in immigration cases

It has been noted that alternatives to legal aid for immigration for people affected by recent changes are more limited than in any other types of case. This is due to the highly regulated nature of immigration services (Meyler and Woodhouse, 2013). Under the Immigration and Asylum Act 1999, immigration advice and services in England and Wales may only be provided by those who have been properly authorised, and there are criminal offences linked to non-compliance. This means that charitable and voluntary groups will be prevented from providing immigration advice services, unless properly regulated. The organisations in this sector which are already regulated may well be facing multiple funding cuts. These will have an impact on their ability to provide immigration advice (Meyler and Woodhouse, 2013).

The All-Party Parliamentary Group on Migration (2012) found that the majority of not-for-profit advice providers are registered only to provide generalist immigration advice at Level 1.³⁵ There are fewer providers registered at Level 2; several of these only do asylum work, which is still within

³⁴ The regulator is the Office of the Immigration Services Commissioner.

³⁵ As set out by the Office of the Immigration Services Commissioner.

the scope of legal aid. There are some matters that only Level 2 or 3 advisers can handle, including removal and/or deportation from the UK, illegal entrants or overstayers, appeals and family reunion. This could result in advice gaps within the not-for-profit sector, with particular difficulties for those seeking advice on complex immigration cases in the East of England, South Wales, the North East, and the South West (All-Party Parliamentary Group on Migration, 2012).

Respondents to the Government's 2010 consultation argued that removing immigration from the scope of legal aid would threaten the viability of legal aid providers currently dealing with both immigration and asylum. A further consequence of this would be a reduction in the quality of asylum legal aid providers (Ministry of Justice, 2011d).

4.4 Welfare benefits

Following the legal aid reforms, all welfare benefits cases are outside the scope of legal aid except for cases under the Equality Act 2010 and appeals to the Upper Tribunal on a point of law. According to the Joseph Rowntree Foundation,³⁶ the number of debt, employment and welfare benefits advice cases has fallen by almost 100 per cent (by 144,500, 32,000 and 143,500 respectively). Most of these falls occurred in the last year, following the LASPO changes in scope (MacInnes *et al.*, 2014).

Despite welfare benefit appeals remaining in scope for legal aid in the Upper Tribunal, there has been a drop in the number of cases where Civil Representation has been granted since the introduction of LASPO. Only eight such cases received funding for Civil Representation in 2013/14 (down from 16 the previous year, representing a 50 per cent drop) (Legal Aid Agency, 2014a).

The Disability Law Service brought a judicial review of the decision to remove legal aid from welfare benefits cases on the grounds of non-compliance with the public sector equality duty.³⁷ However, permission to apply for judicial review was refused (*R* (on the application of Disability Law Service) v Secretary of State for Justice).³⁸

4.4.1 Human rights

The EHRC (2011) has acknowledged concerns about welfare benefits cases being removed from scope in relation to Article 6 ECHR (right to a fair trial). Where an individual has a right to a welfare

³⁶ Using legal aid statistics from the Ministry of Justice.

³⁷ Under Section 149 of the Equality Act 2010.

³⁸ [2012] EWCA Civ 1032, Case no C1/2012/0305 (unreported).

benefit that can be asserted under domestic law, this qualifies as a 'possession' for the purposes of Article 1, Protocol 1 of the ECHR.³⁹

4.4.2 Impact on people with particular protected characteristics

As discussed below, a number of sources have stated that the reforms to legal aid for welfare benefits would have a disproportionate impact on disabled people.

The Government accepted in its initial legal aid consultation that withdrawing legal aid for legal advice about certain benefits would have a disproportionate impact on disabled people. These benefits include: Disability Living Allowance (DLA) or Attendance Allowance, Incapacity Benefit, Income Support and Housing Benefit. It recognised that the class of individuals bringing these cases is more likely to report being ill or disabled, in comparison with the civil legal aid client base as a whole (Ministry of Justice, 2010a). The Government argued that tribunals are easy to access, therefore people can present their case without assistance. It stated that help and advice are available from a number of other sources and voluntary sector organisations.

A Government equality impact assessment noted some of the points raised by respondents to the 2010 consultation about impacts on disabled people. These included:

- 1. Entitlement to DLA was the only way in which some disabled people could ensure that their mobility and care needs were met.
- Disabled people might be placed at a substantial disadvantage in other areas of their life if put
 at a further disadvantage in challenging the decision to award such benefits. For example, the
 higher rate mobility component of DLA leads to an entitlement to the disabled parking 'blue
 badge'.
- For many disabled people, welfare benefits (including DLA, Attendance Allowance, Incapacity Benefit and those benefits replacing them under welfare benefits reforms) would be their only source of income and as such it would be unjust to deny them access to challenge decisions which could damage their health and wellbeing.
- 4. Barriers to challenging benefits decisions could lead to social exclusion.
- 5. People with learning difficulties might be especially disadvantaged in relation to understanding the benefits thresholds or process for challenging a determination in the tribunal (Ministry of Justice, 2011c).

The Government accepted in its equality impact assessment that a greater proportion of welfare benefit clients — 58 per cent of the total, excluding 'unknown' cases — are expected to be ill or disabled compared with clients in any other category of law. This means that those who are ill or

³⁹ Article 1 of Protocol 1 of the ECHR sets out the right to the peaceful enjoyment of possessions. The EHRC's point was therefore that welfare benefits are protected as they can be considered as 'possessions' under this provision.

disabled are expected to be substantially over-represented among welfare benefit clients, relative to the population aged 16 to 64 as a whole (19 per cent of which is ill or disabled) (Ministry of Justice, 2011c).

The former Legal Services Commission (2011) noted that the impact of these changes is likely to be particularly serious for disabled people.

A report by the Justice Committee (2011) discussed the Government's recognition that removing welfare benefits cases from scope would affect disabled and ill people more than others. The Committee noted three case studies submitted by legal aid providers. For example, a case study from Ty Arian Ltd. (Solicitors), stated:

Let's take a client who has a welfare benefit appeal which relates to his or her disabilities or his or her housing costs and without that welfare benefit income the client will not be able to pay their housing costs to protect their family home or have any income upon which they can feed their family so as to ensure their family's health and well-being. If they receive no financial assistance with their housing costs, no financial assistance which reaches subsistence levels and no means of redress via access to justice then as a society — we are leaving families with no choice other than to turn to other perhaps illegitimate means of feeding their families and keeping the roof over their families heads e.g. to crime... (Justice Committee, 2011, p.45)

The Justice Committee (2011) further noted evidence that problems, if not dealt with at an early stage, can be exacerbated. They cited the evidence of Riverside Advice which stated: 'a welfare benefit issue for someone with a mental health problem, unresolved through expert means, can soon turn into a debt and homelessness or hospitalisation situation'.

Scope (Sarb *et al.*, 2011) also considered that the removal of legal aid for welfare benefits cases would have a detrimental impact on disabled people's lives. In addition, it could offset the measures being put in place by the Government to support disabled people to get into work and out of poverty. It argued that without the safety net of legal aid, disabled people would be left to deal alone with any potential problems with the new welfare benefits system. The need for advice, both now and in the future, is also driven by the complex nature of the law in this area. Scope (Sarb *et al.*, 2011) argued that:

Legal aid improves the prospects of accurate outcome of appeals. Based on tribunal data, it
was clear that a huge discrepancy exists between the initial assessment and the result of
appeals. This is demonstrated by the number of disabled people who have been found to
qualify for Employment Support Allowance (ESA) after being inaccurately allocated
significantly fewer points when first assessed. Statistics indicate that between October 2008

and February 2010, there were 122,500 appeals heard, out of which 48,000 found in favour of the claimant. Disabled people, who would become ineligible for legal aid under the proposal to remove welfare benefits cases from scope, could miss out on crucial support. The failure to be placed in the correct benefit group could delay the provision of work-related support to people who have a limited capability for work and require additional help to get or keep a job. In the absence of legal aid, disabled people could be denied access to the benefits to which they are entitled and which, in turn, 'passport' them (that is, trigger an automatic entitlement) to support from other benefits.

- 2. Legal aid helps overcome barriers arising from the complexity of social welfare law. Studies suggest a significant knowledge gap between disabled and non-disabled people in relation to being aware of their rights. As revealed by the Civil and Social Justice Survey, disabled people are more likely to report that they do not know their rights compared to other respondents (69 per cent versus 63 per cent) (Balmer *et al.*, 2010, cited in Sarb *et al.*, 2011, p.13).
- 3. Scope also noted that changing benefit entitlements is likely to lead to an increase in demand for advice on welfare benefits.

This trend was also highlighted by Citizens Advice, which reported a substantial recent increase in demand for advice on welfare benefits. Local Citizens Advice Bureaux have seen an increase of over 40 per cent in the numbers wanting help with disability-related benefits since the introduction of ESA (Citizens Advice, 2010).

Scope's report notes that a high proportion of appeals arising from new claims – 38 per cent – overturn the original decision in favour of the claimant (Tribunal Service, 2010, cited in Sarb *et al.*, 2011, p.35). The evidence shows that disabled people are now likely to miss out on the support they need if a new claim for DLA is made and turned down. The same report included a number of case studies, which showed how getting legal advice had helped disabled people in different situations (Sarb *et al.*, 2011). They gave the example of a woman who was turned down for DLA. She found specialist legal help and pursued an appeal which led to her being awarded the low rate for the DLA care component and the high rate for the mobility component. She commented on the negative financial impact of being refused DLA, which prevented her from paying for essential help, for example, to pick up her children from school. Being refused DLA also meant that she lost access to certain passported benefits.

This concern that the impacts for disabled people would be disproportionate was also noted by Shelter (2011). It argued that 'welfare benefits law is complex and very often claimants are elderly, ill, disabled or otherwise vulnerable', and they rely on their benefits for food, clothing and housing and to participate in society.

Shelter (2011) also stated that the civil legal aid changes could prevent problems being dealt with holistically and preventatively. For example, a client with a housing possession case arising from a benefits problem would still be able to get the possession proceedings dealt with under legal aid. However, the legal aid provider, who would previously have been expected also to deal with welfare benefits issues, would be prevented from doing so under LASPO.

Respondents to the 2010 Government consultation suggested that there could be impacts on ethnic minorities if welfare benefits cases were to be removed from scope. The Government accepted that welfare benefits clients are more likely to be from ethnic minority groups (27 per cent) when compared with the adult population (11 per cent)⁴⁰ (Ministry of Justice, 2011c).

It was suggested that there could be impacts on older people if they did not receive advice sufficiently early to enable them to apply for relevant benefits at the earliest opportunity (Ministry of Justice, 2011d).

4.5 Family law

LASPO removed much of family law from the scope of legal aid. While public law family cases can still be funded, legal aid for private family law cases is excluded from scope. This is except for applicants who can show they have experienced domestic violence. Legal aid is also available for mediation (and for assessments of whether mediation is appropriate) in private family law matters.

As will be seen below, several concerns have been raised with regard to the effect of LASPO and other recent legislation on private family law cases. These include the high incidence of mental health conditions among people involved in private family law proceedings (and related concerns about their capacity to effectively present their cases as litigants in person). It also includes parents who risk losing contact with their children not having access to legal representation, and the suitability of compelling everybody to consider mediation. Another concern is the requirement to provide prescribed forms of evidence of domestic violence as a passport to obtain legal aid in private law family cases. This is preventing people from obtaining funding. All these issues can affect people with particular protected characteristics or impact on people's human rights.

⁴⁰ Excluding unknown cases.

⁴¹ Introduced by the Children and Families Act 2014. Legal aid is available assessment of whether mediation is suitable and for mediation itself, subject to a means test, but not other advice/support.

4.5.1 Human rights

As discussed below, several commentators have noted the prevalence of vulnerabilities, including mental health conditions, among adults with family law problems. There does not appear to be any literature/evidence to suggest that this amounts to discrimination against disabled people. This may be because the observation of mental health conditions is not recorded in detail and does not note the nature of the conditions. In particular, no distinction is made between short term and long-term conditions. However, Miles *et al.* have suggested that issues do arise in relation to Article 6 of the ECHR (right to a fair trial) if a person cannot represent themselves in private family law cases because of a mental health condition. In theory, this might qualify the person for ECF under section 10 of LASPO (Miles *et al.*, 2012). However, as noted below, there are problems with the operation of this scheme.

Furthermore, the Justice Committee (2011) noted that:

The Family Law Bar Association (FLBA) does not believe that many parents will be able effectively to access a court or represent themselves in it. They told us that 'many parents in the throes of relationship/family breakdown suffer from learning disabilities, or mental ill-health, or have lives affected by abuse of drink or drugs, or do not speak English as a first language. Many people are from cultures where accessing a court would be uncommon, even unacceptable'. They further argue that many people concerned 'suffer acute anxiety, stress and depression; it is reasonable to predict that many of these people will be deterred from seeking relief through the courts if they know that they will have to represent themselves. (p.114)

Miles *et al.* (2012) pointed to data which showed that mental health conditions feature in a substantial minority of family disputes. They noted that previous studies have shown that 'a significant minority of self-represented litigants in family cases ... had a specific vulnerability indicator, such as being victims of violence, or having depression, a substance abuse problem or mental illness' (Moorhead and Sefton, 2005, cited in Miles *et al.*, 2012) and that in studies of complex family litigation, mental health conditions are one of several factors that add to the difficulty of those cases (Hunt and Trinder, 2011, cited in Miles *et al.*, 2012). The latter study recorded that over three-quarters of parents scored above the threshold on the General Health Questionnaire, which showed they experienced some mental ill health.

Litigants in person are individuals who represent themselves in court, without professional representation or advice; they can be applicants or respondents. Recent Government research showed that around half of the litigants in person who were observed had one or more vulnerabilities, 42 which presented a wide range of individual difficulties and disadvantages. These were of varying severity and had a greater or lesser impact on the capacity of litigants in person to

⁴² Vulnerabilities included: physical disability, ill health, behavioural disorders, learning difficulties, dyslexia, difficulties controlling emotions and language difficulties.

represent themselves. The research showed that, in general, vulnerabilities were more likely than not to compound the legal and procedural challenges of their case. The research also noted that multiple vulnerabilities appeared to be associated with experiences of violence, abuse, harassment and mental health problems (Ministry of Justice, 2014c).

In a separate article, Miles (2011) discussed relevant case law, including *Airey v Ireland*.⁴³ Here, the European Court of Human Rights ruled that Mrs Airey needed legal aid in order to be able to properly present to Court her application for judicial separation. Miles highlighted that means and merits testing can be compatible with Article 6 of the ECHR (right to a fair trial), and, importantly in relation to LASPO, that it is compatible to exclude whole areas of law from scope provided that this is not done in an arbitrary way.

Miles went on to say that despite this, the *Airey* case made clear that family law was one area where legal aid may be required, as parties are emotionally involved in the case. She said:

The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively...

It was also held [in *Steel and Morris v UK*⁴⁴] that Art 6 does not demand total equality of arms; but each side must be 'afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis à vis the adversary. (p.4)

On this basis, Miles asserted that in considering applications for ECF (a function that falls to the Director of Legal Aid Casework), the Director must look at *Airey*. Miles listed the factors to be considered as follows:

- (1) whether this litigant in person can cope with the relevant substantive law;
- (2) whether this litigant in person can cope with the procedural rules;
- (3) whether expert or other witnesses will be required, and whether this litigant in person can manage the resulting additional procedural burdens and practical challenges inherent in examining and cross-examining those witnesses; and
- (4) crucially, whether this litigant in person will have the emotional detachment necessary to represent him or herself effectively, bearing in mind Strasbourg's acknowledgement of the

⁴⁴ Application no. 68416/01 in the European Court of Human Rights.

⁴³ (1979-80) Application no. 6289/73, 2 EHRR 305 in the European Court of Human Rights.

fraught nature of family proceedings and that judicial assistance and the latitude afforded to litigants in person will not necessarily be enough to cure any or all of the difficulties arising. (8.q)

The Lord Chancellor's guidance on ECF highlighted similar issues that are to be considered when determining applications for public funding of private family law cases. However, it stressed that emotive or complex issues being present are not enough to warrant ECF: cases need to be unusually emotive or complex to qualify for this (Lord Chancellor, no date).

The review identified concerns that the lack of legal aid in private family cases could in practice lead to breaches of Article 8 ECHR (right to respect for private and family life). As the Law Society explained, this is one of its most significant concerns about LASPO:

Private law matters are out of scope even where they relate to the actions of a local authority. An example is where the local authority wants to remove a child from the care of parent A but has no concerns about parent B and may even encourage parent B to apply for a residence order (Law Society, 2014a).

In Re D (A Child)⁴⁵ the parents, who both had learning disabilities, were opposing an application for a removal order in respect of their son. The father had a modest income which disqualified the couple from legal aid. The Court said it was unthinkable that the parents should not be represented. It delivered a scathing attack on the lack of availability of legal aid:

It would be unconscionable; it would be unjust; it would involve breach of their rights under Articles 6 and 8 of the Convention; it would be a denial of justice. [...] 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. Why should the State leave it to private individuals to ensure that the State is not in breach of the State's—the United Kingdom's—obligations under the Convention? (paragraph 31)

The Court ordered that there be a further hearing at which it would decide whether the costs of the parties' representation should be funded by the local authority, the legal aid fund, or the court service. The judge made clear he had the power to order all of the above to pay. He made appropriate directions, so that all relevant parties could make their position known to the Court. Upon returning to Court, the parties had received legal aid funding. The judge ordered that the

⁴⁵ [2014] EWFC 39.

court service pay for an intermediary to help the parents communicate with the Court (*Re D (A Child)* (No 2).⁴⁶

The following example (cited in an evidence session of the Public Accounts Committee by David Burrowes, MP) gives rise to arguments that funding should be available where there is a risk of a breach of Article 8 ECHR (right to respect for private and family life):

A mother had to flee the home with the children because of domestic violence. As it happens, the father applied before the changes and got legal aid for the proceedings, interestingly, but the mother had to flee. No further action was taken by the police, for whatever reason, and because of that, she has not been able to access legal aid, and she is now left with a five-day fact-finding hearing at the family division, unrepresented against a represented person. English is not her first language. She is going to have to set up her case. That five days is going to be problematic. She has reported a long history of domestic violence. CAFCASS⁴⁷ has recommended that contact should be with her. Despite all that, she is not eligible for legal aid (Public Accounts Committee, 2014, Question 159).

Much like immigration cases which concern family reunion (see section 4.3), these cases raise issues under Article 8 ECHR, and may be eligible for ECF. However, as noted in section 4.13, there are reported problems with this scheme.

4.5.2 Impact on people with particular protected characteristics

Domestic violence

As discussed below, there have been repeated warnings that the changes introduced by LASPO have had an adverse impact on women who have experienced domestic violence. Subject to the means and merits test, people who have experienced domestic violence are entitled to legal aid in respect of private law family proceedings when facing the perpetrator of that violence (Schedule 1, LASPO Act 2012). In order to be granted legal aid, however, they must also produce evidence of having experienced domestic violence in one of the forms specified by regulations (Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012⁴⁸).

Several organisations have reported people facing difficulties obtaining the prescribed forms of evidence. The Law Society (2014a) had said that among those who are worst affected by changes to legal aid are 'Victims of domestic abuse who cannot satisfy the strict MOJ [Ministry of Justice]

⁴⁶ [2015] EWFC 2.

⁴⁷ The Children and Family Court Advisory and Support Service.

⁴⁸ SI 2012/3098.

evidence requirements for establishing domestic abuse/violence, and are consequently excluded from legal aid for family law disputes with an abusive ex-partner or relative'.

Citizens Advice and the Magistrates Association have said they have anecdotal evidence that it is difficult for people to be able to evidence domestic abuse and violence (Public Accounts Committee, 2014). Women's Aid, in its evidence to the Justice Committee, said that the most common forms of domestic abuse are particularly difficult to evidence. The Justice Committee (2015) asked the Government to publish regular figures on grants of legal aid made on the grounds of domestic violence.

Rights of Women, Women's Aid and Welsh Women's Aid (2014) have been campaigning for a change to the evidential requirements. They have monitored the numbers of women able to meet these requirements since they were introduced. The requirements were widened slightly in April 2014 to include, for example, the perpetrator of the domestic violence being on police bail for domestic violence. In November 2014, these organisations published their latest findings, six months after the rules had been changed. The research found that women were still being denied legal aid through lack of documentation. 38 per cent of respondents (who had experienced or were experiencing domestic violence) were unable to provide the required documentation to access legal aid.

Some of the problems that have been identified with the revised requirements are the difficulties in getting evidence of psychological and emotional abuse. This also applies to evidencing any threats of violence before it actually happens. One of the biggest problems is that the Regulations specify that documentation must not be less than two years old. Rights of Women have argued that this is unduly restrictive, given that LASPO allows legal aid for family proceedings for people who have experienced domestic violence, irrespective of when this occurred (see below). The Justice Committee (2015) has also voiced its concern that a large proportion of victims do not have any of the types of evidence required – in particular, because of the strict requirement that evidence cannot be over two years old. The Committee considered this should be a matter for the discretion of the Legal Aid Agency.

Rights of Women pursued this point in court (R (on the application of Rights of Women) v Lord Chancellor and another⁴⁹) in a judicial review of the Regulations. They argued that the Regulations were outside the scope of the Lord Chancellor's powers. It was claimed that LASPO entitles women to legal aid if they have experienced domestic violence perpetrated by the other party in the case, irrespective of when that domestic violence happened. Because the Regulations – introduced by secondary legislation – were more restrictive than the primary legislation, the Lord Chancellor had exceeded the powers that Parliament had given him. The Court rejected this

⁴⁹ [2015] EWHC 35 (Admin).

argument and held that LASPO conferred powers on the Lord Chancellor that were wide enough to enable him to bring in the Regulations.

The evidential requirements may also have a disproportionate impact on women from ethnic minorities. According to domestic violence charity Coventry Haven, 'The criteria of having to prove domestic abuse by having had a non-molestation order, reported to police or been in a refuge excludes the majority (70 per cent) of women who do not report their abuse to the police. It has an even greater impact on [ethnic minority]⁵⁰ women who have additional language, immigration and cultural barriers to reporting' (Sandhu *et al.*, 2013, p.49). Panahghar (which provides specialist services for women from ethnic minorities who experience violence and abuse in Coventry), said that there are now fewer solicitors available to support women who come to its refuges, particularly women without children (Sandhu *et al.*, 2013).

4.5.3 Mediation

Although legal aid is not available for advice and representation in private family law matters (unless there is proof of domestic violence), it is available for mediation and assessment for mediation. This approach supports the Government's position that separating couples ought to try to reconcile their differences through mediation rather than have them decided by the courts. This position has been cemented by the Children and Families Act 2014 (s.10), which requires people to have attended a family mediation information and assessment meeting (known as a MIAM) before applying to the Court in private family law cases. Proponents of family mediation argue that it can be less emotionally draining, cost considerably less and be substantially quicker than taking a case to Court. 52

Since the LASPO changes, there has been a fall in the number of mediations that have taken place. This is despite public funding being available under legal aid.

The Low Commission (2015) noted National Audit Office (NAO) figures from 2013–14 that showed mediation assessments fell by more than 17,000 compared to 2012-13 and there was a fall of

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⁵⁰ Sandu *et al.* (2013) uses the term 'BAME', meaning Black and minority ethnic. This term has been replaced by the equivalent 'ethnic minority', in line with the Commission's editorial policy.

⁵¹ Subject to means testing.

See, for example, The Family Mediators Association (2015). Available at: http://thefma.co.uk/. Figures included on the Family Mediation Association site (cost of family court cases were £2,823 compared to figures of either £535 or £675 as an average cost of mediation) are also cited across a number of sources, including by the Ministry of Justice (MOJ, 2011); these are often attributed to 2012 ONS analysis. This review was unable to substantiate this evidence but analysis in 2007 did show that a mediated case takes 110 days to resolve, and costs £752 compared to 435 days and £1,682 in cases where mediation is not used. In the sample of cases it reviewed, the NAO found that over 95 per cent of cases settled through mediation were resolved within 9 months and all within 12 months. However, only 70 per cent of cases completed by non-mediation routes were settled within 18 months (ONS, 2007).

more than 5,000 in the number of mediations started. This is said to be an effect of cuts to the availability of legal advice, because 'legal advice feeds mediation'. The NAO report noted that the requirement for all parties to have attended a MIAM before applying to the Court in private family law cases came into effect in April 2014, and also noted that in the April-June quarter of 2014 the number of MIAMS increased by 12 per cent from the previous quarter (National Audit Office, 2014). The same report noted that the Ministry of Justice was implementing some recommendations made by a mediation taskforce in order to try to increase the take-up of family mediation.

Outside the remit of this review, there is considerable literature on the substantial merits of mediation. It should be noted, however, that there are concerns that mediation is not suitable for everyone, even in cases where domestic violence is not an issue. Cobb argued that this would include parties with learning disabilities or others who need support to function or reason independently. It would also include parties where there is a significant power imbalance between them. Cobb (2013) expressed particular concern that the recent reforms do not address the fact that a power imbalance which exists between the parties affects their abilities to mediate. He concluded:

Enforced mediation will thus have a disproportionately negative effect on women, particularly those from ethnic minority groups when cultural pressures have a part to play in the parties' abilities to negotiate on issues of money and children post separation. (p.16)

Cobb's concerns that women from ethnic minority groups may face cultural pressures which affect their ability to negotiate in mediation are not reflected in a (albeit relatively old) Scottish study. This study found that mediation services 'are relevant and required by minority ethnic families in Scotland and that the concept of family mediation does not conflict with the religious or cultural norms of any community.' The study also made a number of recommendations that could improve the accessibility of mediation for ethnic minority families (Pankaj, 2000).

Gingerbread (2011), a charity for single parents, has also said that, in their opinion, mediation is not suitable in every case, even if domestic violence is not an issue. It argued that an equality of bargaining power between the parties is critical. It said that an over-reliance on mediation could result in unsustainable and inequitable agreements, arrangements that could compromise the safety of children, or those that fail to secure adequate financial support.

There are also concerns that not enough time is allowed during mediation assessment meetings to screen for domestic violence. This may have an adverse effect on women (Morris, 2013).

The Family Mediation Council's (2015) code of practice does, however, seek to prevent manipulative, threatening or intimidating behaviour by either participant during the mediation and to be alert to the likelihood of power imbalances. Mediators must ensure participants take part in the mediation willingly and without fear of violence or harm, and in all cases mediators carry out sufficient screening for domestic abuse or other harm, providing information about available support services whether abuse is alleged or suspected.

4.6 Debt

The majority of debt claims were removed from the scope of legal aid by LASPO. Cases only remain in scope where a person is at immediate risk of losing their home. However, clients must access legal aid for these types of cases through the telephone gateway system. Concerns about debt fall into two main categories. First, those relating to the operation of the gateway for cases in the scope of legal aid, and second, those relating to access to advice for cases out of scope.

It should be noted that the increase in the small claims limit is relevant to debt cases. Claims up to £10,000 are now normally allocated to the small claims track, including debt cases up to this value. In small claims, the Court only orders losing parties to pay very small amounts in costs and litigants are expected to represent themselves. Our analysis of the implications of the increase in the small claims limit suggests it is likely to lead to an increase in litigants in person in debt cases.

4.6.1 Human rights

Large numbers of people who need advice to assist with debt problems are no longer eligible for legal aid. In addition, even where individuals are eligible for legal aid (in cases where their home is at risk), they may face barriers in accessing telephone advice as a result of their protected characteristics (see sections 4.1 and 4.13 for further details). Where a person cannot get a fair hearing to determine their civil rights, this raises issues under Article 6 ECHR (right to a fair trial). In our analysis, without adequate advice, there is a risk that the right to a fair trial may be compromised in complex debt cases.

Legal aid contracts for specialist debt advice were mainly concentrated among advice charities, such as Citizens Advice Bureaux. However, 87 per cent of all bureaux which had previously held debt contracts have reported a reduction in capacity (Citizens Advice, 2014b). One bureau said:

We did have access to CLS [Community Legal Service] funded specialist debt advisers and they were able to help clients to apply for debt relief orders, bankruptcy and offer specialist advice in this area. We were able to triage clients and make best use of this resource combined with our own resources in the bureau. The loss of this service has meant that

more clients have had to be referred down self-help routes...and some of these clients have struggled to cope. Our own resources are under pressure and we have to prioritise vulnerable clients for intensive help in the bureau. (paragraph 4.7)

As a consequence of the reduction of debt providers with legal aid contracts, agencies that are still able to provide debt advice have seen a significant increase in demand for services. The StepChange Debt Charity saw an 82 per cent year-on-year increase in demand for people seeking advice about payday loan debts. This is despite the fact that only 17 per cent of people with debt problems seek advice (The Money Advice Service, 2013).

Just Rights (no date) believes that 9,040 children and young people (those aged 18-24) will miss out on legal aid for debt advice following the exclusion from scope of most debt matters. They cited an example of 'a 19 year old with mental health problems whose bank account was used without her knowledge by a thief to launder £20000, [who] would have been unable to challenge the bank's insistence that she was liable for the sum.'

Such concerns are compounded by the apparent lack of uptake in legal aid that is still available. Funding is still available for people in danger of losing their homes, homelessness cases and for some disrepair matters.⁵³ However, the Public Law Project reported that, compared to predictions, there have been 90 per cent fewer calls about debt cases made to the telephone gateway (Hickman *et al.*, 2015).

People seeking publicly funded legal advice on debt relating to the potential loss of their home must use the telephone gateway. However, the evidence suggests that some have been unable to access this. LawWorks' helpline (set up to offer non-legal, practical advice to those in debt) has received many calls from people eligible for legal aid but unable to access it due to problems with the telephone gateway service for such claims. The problems people described included long periods on hold, dealing with staff who were not helpful or having their call disconnected. Such evidence is anecdotal, due to the fact that LawWorks does not have the resources to record this properly (Moses, 2014).

4.6.2 Impact on people with particular protected characteristics

The Government's recent assessment of the telephone gateway service found that those seeking debt advice tended to be older (Ministry of Justice, 2014d). This contrasts with research which showed that the number of people who are over-indebted drops off significantly when looking at people aged 55 and above (The Money Advice Service, 2013).

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⁵³ Legal aid for such cases could be categorised as either debt or housing cases.

The Government's analysis showed that 'clients affected by the proposed changes to the scope of the debt category of law are more likely to be ill or disabled than the population aged 16 to 64 or the overall legal aid caseload affected. Specifically, 27 per cent of clients are ill or disabled (excluding unknowns) compared with 19 per cent of the population'. Debt clients are also slightly more likely to be from ethnic minorities than the adult population (Ministry of Justice, 2011c).

The Government's equality impact assessment drew attention to potential adverse impacts on people with mental health conditions (with debt being identified as a cause of some mental health conditions and people with mental health conditions being more likely to get into problematic debt). It also identified potential adverse impacts on women, in particular those who are from ethnic minorities. The assessment reported that 'In general terms, many respondents suggested that the beneficiaries of advice in this particular category are likely to be vulnerable, by virtue of old age or disability status, and as such the proposals would have an adverse impact on these particular groups' (Ministry of Justice, 2011c).

The restrictions on legal aid for debt are likely to have a greater impact on women than on men. This is because research has shown that 64 per cent of people who are over-indebted are women (The Money Advice Service, 2013).

4.7 Community Care

Community care law deals with provision of health and social care services by local authorities and the NHS. It remains within the scope of legal aid, perhaps because the Government has recognised that potential clients are more likely to be disabled or older (Ministry of Justice, 2010a).

4.7.1 Human rights

Despite the fact that community care law remains in scope, as discussed below, there are concerns that people are not able to access the advice they need on community care issues. Solicitors appear more cautious about taking some cases on. One firm specialising in community care law (which is still within the scope of legal aid) were critical of the more rigorous administrative requirements of the new Legal Aid Agency. As a result of these requirements, they report that they are more reluctant to take on cases from this client group, many of whom are vulnerable.

There is also concern about a lack of take-up in the legal aid that is available. The Legal Action Group (2014) has estimated that there is a 40 per cent shortfall between the take-up of legal aid for community care cases compared to that predicted. It believes the reasons for this are the same

as for SEN cases: a shortage of suppliers around the country and a lack of awareness about the availability of legal aid.

Echoes of these problems were shown in research conducted among people with learning disabilities and people who support them. This showed that:

Participants in the study reported difficulties in getting specialist advice about those aspects of the law that are particularly relevant to people with learning disabilities, such as community care, welfare rights and public law. Law centres and legal aid firms were valued for offering services in these areas but concerns were expressed about the future coverage in the shadow of changes to legal aid and reduced public funding for law centres and Citizens Advice Bureaux. (Swift *et al.*, 2013, p.3)

This research also stressed the importance of early specialist advice. The manager of a Law Centre explained that, as community care law was poorly understood, people often accepted the refusal of care services because they were not aware of their entitlements. For this reason, the Law Centre worked with a range of organisations who could identify problems at an early stage and refer clients to them for legal advice (Swift *et al.*, 2013).

4.7.2 Impact on people with particular protected characteristics

Community care law affects more disabled people than non-disabled people. Recent diversity statistics published by the Legal Aid Agency have not been broken down by civil legal sector. However, in 2011, the agency's predecessor, the Legal Services Commission, submitted data to Parliament which showed that 68 per cent of community care clients were disabled (Legal Services Commission, 2011). The impact of less specialist community care advice being available is therefore likely to be felt by more disabled people than non-disabled people.

4.8 Education

Post-LASPO, the only area of education law which remains in scope for legal aid is that of SEN. Clients with SEN cases must access advice through the mandatory telephone advice gateway.

4.8.1 Human rights

The European Court of Human Rights has now confirmed that education law cases invoke 'civil rights' and therefore the principle of a right to a fair trial under Article 6 ECHR.⁵⁴ Recent case law

⁵⁴ Previously the European Court of Human Rights had said that education law cases fell outside the scope of Article 6 ECHR (*Simpson v United Kingdom* [1989] 64 DR 188) because the European Convention did not guarantee the right to education in a particular institution.

held that this right applied in relation to both higher education (*Arac v Turkey*⁵⁵) and primary education (*Oršuš and others v Croatia*⁵⁶) (Armstrong, 2013).

The Government has repeatedly said that the right to a fair trial is not the same thing as the right to legal aid and there is undoubtedly a distinction. Swift et al. (2013) argue that 'Access to legal advice and representation is an important aspect of citizenship and of the rights to justice enshrined in the Human Rights Act and various international conventions'.

The Office of the Children's Commissioner produced an example of an education law case in which legal aid played an important role. The case involved a mother whose son, with undiagnosed attention deficit hyperactivity disorder (ADHD) had experienced difficulties in school that led to permanent exclusion. The mother commented that, without advice and representation from a solicitor experienced in education law, she would have been unaware of her son's rights and did not think that the decision makers would have listened to her. In the end, her son was provided with an SEN statement which facilitated his admission to a new school.

4.8.2 Impact on people with particular protected characteristics

Keeping cases concerning SEN in scope has the potential to help disabled people. However, the Public Law Project has noted that 45 per cent fewer cases have started (through the telephone gateway) than the former Legal Services Commission predicted (Hickman et al., 2015). The Legal Action Group (2014) has argued that the shortfall:

is caused in the main by a shortage of suppliers around the country and the CLA [Civil Legal Advice] telephone gateway service. The shortage of services, which pre-dates the LASPO Act changes, is now much worse since the legal cuts were introduced. This contributes to a general lack of awareness about the availability of legal aid for SEN cases. Potential clients are therefore unlikely to approach the CLA for advice. (p.4)

4.9 Clinical negligence

LASPO has excluded the vast majority of clinical negligence cases from the scope of legal aid. 'Only those people who have suffered a neurological injury believed to have been caused as a result of negligent treatment occurring in utero, during birth or within the first 8 weeks of life are eligible for legal aid' (Action against Medical Accidents, 2014).

^[2008] Application No. 9907/02 in the European Court of Human Rights.

^[2010] Application No. 15766/03 in the European Court of Human Rights.

4.9.1 Human rights

Following LASPO, concerns about access to justice in clinical negligence cases fall into broadly two categories. The first is that people cannot gain access to the courts because they cannot afford representation, experts' fees or relevant insurance policies to protect themselves against the risk of adverse costs orders. The second is that even if claimants are able to secure access to the courts, their rights to compensation are being eroded because they have to pay legal costs out of their damages. The Association of Personal Injury Lawyers (2014) and Action against Medical Accidents (2014) set out these two areas of concern in their submissions to the Justice Committee.

Article 8 (right to respect for private and family life) of the ECHR is relevant in clinical negligence cases. The European Court of Human Rights confirmed this in *Solomakhin v Ukraine* [2012].⁵⁷ It stated: 'according to [the court's] case-law, the physical integrity of a person is covered by the concept of "private life" protected by the Convention'.

In addition, Article 2 of the ECHR (right to life) may be relevant if the negligence leads to a loss of life (English, 2009). There are also rights which relate to other articles of the Convention, such as the right to a fair and effective remedy.⁵⁸

It has been argued that access to justice is being eroded because people with clinical negligence claims are not able to find and fund proper representation and this may interfere with their ability to enforce their rights under the ECHR. A primary concern is that legal aid that is otherwise available would be refused if the Legal Aid Agency believed the claimant could obtain suitable alternative funding, for example through a CFA.⁵⁹ The Association of Personal Injury Lawyers (2014) said:

the most striking change is that legal aid is likely to be refused where suitable alternative funding is available. The Lord Chancellor's guidance on Civil Legal Aid states that 'the test of suitability for a CFA is an objective one, rather than a question of whether an individual provider is willing to act under a CFA'. Therefore, the Legal Aid Agency in theory could deem a case suitable for funding on a CFA even if the applicant has been unable to locate a solicitor willing to pursue a claim on their behalf under a CFA. (paragraph 4)

Difficulties which claimants may face in trying to obtain a CFA include: funding costs such as experts fees (or an insurance policy to cover these); funding an insurance policy to protect themselves from exposure to legal costs;⁶⁰ and finding a suitably qualified solicitor willing to wait

Both Article 13 of the ECHR (right to an effective remedy) and Article 41 (just satisfaction) are relevant here.

60 In the event that costs protection usually offered by the CPR does not apply.

⁵⁷ Application no. 24429/03.

⁵⁹ In common with other legal aid applications, one factor that the Legal Aid Agency can take in to account in clinical negligence cases is the availability of other funding sources (LASPO 2012,s.11(3)(f)).

for years to be paid. In addition to this, claimants represented through a CFA (rather than legal aid) will almost certainly have to pay part of their damages to their solicitors by way of legal fees.

One experienced barrister who specialises in clinical negligence suggested that his colleagues would either decline the case (because the delay in payment of the fee would no longer be offset by any uplift) or would accept the case but attempt to recover the fee from the 'pain and suffering' element of the patient's damages. However, the latter approach would leave the patient out of pocket and could be viewed as unjust (Bar Council, 2014).

Action against Medical Accidents (2014) also said 'A low value claim can be as costly to run as a higher value claim. As a result lawyers are now far more circumspect about investigating and or bringing clinical negligence cases in claims where the value is relatively low.' The same source noted that some solicitors would not take on claims valued at less than £50,000 or £100,000, depending on the circumstances of the case.

The Association of Personal Injury Lawyers (2014) was concerned about the lack of solicitors willing to take cases on, saying 'access to justice for vulnerable people is being destroyed as those genuinely injured but with complex, riskier cases will in time find it more difficult to find a solicitor prepared to invest the time and money pursuing a case on their behalf'.

Just Rights (no date) was concerned that 1,090 children and young people a year will be left without access to justice, following the removal of clinical negligence from the scope of legal aid. In some cases this could lead to children being unable to secure compensation required to meet ongoing care needs.

The Civil Justice Council (2014b) has also expressed doubts about the availability of advice in clinical negligence cases, as many cases take time and expense to prepare and assess. The Council suggested that 'the number of cases in this field should be monitored'.

The Association of Personal Injury Lawyers (2014) said 'Government reforms were not intended to remove access to justice; signs are that this aim has failed. It is fundamentally wrong that our legal system should make it impossible for injured claimants to obtain the compensation they deserve' (point 26).

4.9.2 Impact on people with particular protected characteristics

In its equality impact assessment that preceded the LASPO reforms, the Government said that many people 'identified the potential for a disproportionate impact on disabled clients' under the

proposal to remove most clinical negligence cases from the scope of legal aid (Ministry of Justice, 2011c). It reported that:

Many respondents suggested that legal aid for clinical negligence cases was mostly granted to children and those who lack capacity (or were disabled) as a result of injury. As such, there is the potential for those individuals to suffer a particular or substantial disadvantage or to require reasonable adjustments/auxiliary aids...

Other respondents observed that across the class of litigants, clinical negligence claimants were more likely to be disabled, elderly, frail or too young to bring proceedings on their own behalf, and that this inherent vulnerability should mean the retention of funding for this category of work...

Respondents also noted the particularly severe consequences of failure to obtain redress in these matters. It was suggested that, given the remedy in clinical negligence cases would usually be damages to assist in making adjustments to deal with a resulting disability (as well as loss of earnings), the absence of redress would compound the marginalised position of these individuals and have real impacts on quality of life and participation in public life (Ministry of Justice, 2011c, p.52).

The equality impact assessment also identified that:

compared with the population aged 16 to 64, clients with a clinical negligence case are more likely to be ill or disabled. For example, excluding those for whom details were not available, 57 per cent of clients were ill or disabled while ill or disabled people represent only 19 per cent of the population aged 16 to 64 and 25 per cent of the overall caseload affected. There is also likely to be a sub-group of the more serious cases where the claimant is inherently likely to be disabled (Ministry of Justice, 2011c, p.53).

The assessment also pointed to a potential impact on a higher proportion of ethnic minorities than in the rest of the population, based on figures from existing caseloads (16 per cent compared with 11 per cent of the adult population) (Ministry of Justice, 2011c).

4.10 Criminal Injuries Compensation Scheme

LASPO removed claims to the Criminal Injuries Compensation Authority (CICA) from the scope of legal aid. In its response to the 2010 consultation on the LASPO proposals, the Government reported that consultees argued that victims of violent crime are more likely to be disabled and vulnerable. Consultees also expressed concerns that the CICA forms are complex and require articulate responses to ensure victims receive the right compensation (Ministry of Justice, 2011d).

Just Rights (2013) cited a case study where the absence of legal aid for a CICA claim appears to have had an adverse impact on the claimant:

E, 16, was the victim of sexual abuse whilst in the care of her local authority. She needed to collect highly sensitive evidence about her sex abuse for a Criminal Injuries Compensation appeal. No longer able to get legal aid, her only option was to rely on the support of the very local authority that had failed to protect her from the abuse. (p.3)

Despite the potential impacts highlighted to the Government ahead of the introduction of LASPO, very little research is available which sets out what is happening in practice.

4.11 Actions against the police

Actions against the police remain in scope for legal aid, ⁶¹ for those who meet the means test

Prior to LASPO, if legal aid was not available, some people chose to fund actions against the police by way of CFAs. As noted above, successful claimants now have to pay their solicitor's legal fees out of the damages they recover, making these agreements less attractive. The Police Action Lawyers Group (2014) identified similar problems in actions against the police: even if people can afford to fund their own representation through CFAs, they cannot afford either the risk of paying the other side's costs or the premium for an insurance policy to protect against that risk. It said this was undermining access to justice in actions against the police. The Group called for QOCS to be extended to these cases, in order for people to be able to gain redress for human rights abuses perpetrated by the State.

4.12 Exceptional case funding

As stated earlier, LASPO makes provision for the Legal Aid Agency to grant ECF where failure to do so would breach the person's rights under the ECHR or rights under European Union law, or in certain inquest cases. The Government stated that the ECF scheme would only be available where it was satisfied that some level of legal aid was necessary for the United Kingdom to meet its domestic and international legal obligations. This includes those under the ECHR, in particular, Article 2 (right to life) and Article 6 (right to a fair trial), or where there was a significant wider public interest in funding legal representation for inquest cases (Ministry of Justice, 2010a).

The Government has also said that:

⁶¹ LASPO 2012, Schedule 1, s.21.

the exceptional funding mechanism for cases that are outside the scope of legal aid will also help to mitigate the impact on some clients with particular protected characteristics. For example, some disabled people who are unable to represent themselves could be granted legal aid under the criteria if this were necessary to avoid a breach of their Convention rights (Ministry of Justice, 2011c, p.16).

However, there is evidence that the ECF is not providing the 'human rights safety net' that was intended. The most recent criticism of the scheme has come from the Justice Committee. It noted that the scheme has not worked as Parliament intended and not protected access to justice for the most vulnerable. It said that:

We heard of a number of cases where, on the facts available to us, it appears surprising that exceptional case funding was not granted. Details of cases refused exceptional cases funding include: an illiterate woman with learning, hearing and speech difficulties facing an application which would determine her contact with her children; parents with learning difficulties who wished to contest their child's adoption but were £35 a month over the eligible financial limit; a women with 'modest learning difficulties' who the judge in the case told us was unable to deal with representations from the lawyer on the other side as a result of which she 'now faces possibly not seeing her child again'; and a destitute blind man with such profound learning difficulties he lacked litigation capacity (Justice Committee, 2015, p.14).

The Justice Committee (2015) also stated that 'all agencies involved must closely examine their actions and take immediate steps to ensure the exceptional case funding scheme is the robust safety net envisaged by Parliament' (Justice Committee, 2015, p.20).

The Joint Committee on Human Rights noted the following:

- 1. The process is onerous and highly detailed. It requires the submission of evidence, for example medical evidence, which may attract a fee, and means and merits forms.
- 2. There is no legal aid funding to complete the form, unless ECF is granted. This is paid retrospectively, meaning that it is completed at risk by solicitors; it is suggested that solicitors are reluctant to make applications because of the low success rate.
- 3. Litigants in person may apply for a 'preliminary view' from the Legal Aid Agency which they can then take to a legal aid provider, but so far no such views have been positive. It is also questionable whether the vulnerable people whom the scheme is meant to assist are in fact able to present their case to the Legal Aid Agency, even at a preliminary stage.
- 4. There is no procedure for urgent cases.
- 5. There are no exemptions for children or people who lack capacity.
- 6. No (or inadequate) training is provided to Legal Aid Agency employees to apply the test.

(Joint Committee on Human Rights, 2013b).

The Joint Committee on Human Rights (2013b) cited an example (from the Public Law Project) of an applicant who was registered blind. He had a cognitive impairment that meant he functioned at the level of a dementia sufferer. Without a solicitor to help him, the applicant would be completely barred from exercising his right to make an immigration application. This is because he did not have the capacity to make the application on his own. The applicant could not be advised by anyone who was not an immigration solicitor because it is a criminal offence for someone to provide immigration advice who is not legally qualified or regulated to do so. The Legal Aid Agency refused funding under the ECF scheme. The conclusion drawn by the Committee was that:

the evidence we have received suggests that it is not working as originally envisaged. The number of applications made is far below the expected number envisaged, and very few grants have been made. Whilst the types of cases that were expected to receive grants were always intended to be 'exceptional', we do not believe that the number of applications or grants is representative of a properly functioning scheme. (p.44)

They also commented that 'the Government cannot rely upon the scheme as it currently operates in order to avoid breaches of access to justice rights' (Joint Committee on Human Rights, 2013).

The Legal Action Group reported on a study by the British Red Cross in September 2013. The results showed that the ECF provisions are not a 'safety net', but in fact a 'highly complex' set of rules that are 'inaccessible to service users' (McCabe, 2013).

The EHRC (2012a) has also noted that the ECF scheme:

may not provide sufficient protection because clients may still be deterred from seeking advice in the first place, or be turned away by advisers, if their problem appears to be outside the scope of the legal aid scheme. It could also lead to delayed decision-making about funding. Many clients would need expert legal help in preparing an application for exceptional funding. (p.254)

Mourby (2014) studied the ECF scheme within family law proceedings. It was noted that 601 applications for family law ECF were processed between April 2013 and January 2014. Only eight of these were granted. She noted that the Government envisaged it would grant at least 50 per cent of all applications. However, within family law the success rate has been 1.3 per cent. The study also attempted to quantify the number of family law litigants who would require public funding to avoid a breach of their rights under Articles 6 (right to a fair trial) and 8 (right to respect for private and family life) of the ECHR. Domestic violence and child protection cases may be particularly relevant. However, much will depend on the complexity of the case, the ability of the party to put their case effectively and the seriousness of the issues at stake.

The study went on to note that publicly funded cases involving non-molestation, occupation and prohibited steps orders⁶² totalled 19,947 in 2013. From April 2013 to January 2014, 2,031 legal aid grants were made in cases involving domestic violence or child protection. Assuming this pattern continued, there would be about 2,500 grants by the end of 2013-2014. The previous year's figures indicate that a further 17,000 cases would be excluded from public funding by LASPO. It was suggested that certainly more than eight of these would have required ECF to ensure fair and effective access to the courts. Thus, many litigants are falling through the gap between the scope of legal aid and the ECF scheme. Mourby (2014) raised serious concerns that these individuals are not being afforded access to justice as envisaged by the case law of the ECHR.

The Joint Committee on Human Rights (2013b) noted that the Government's estimate of the predicted number of applications for ECF was between 5,000-7,000 in the first year after the LASPO changes took effect. However, the most recent statistics from the Legal Aid Agency showed that:

- 1. There were 300 applications for ECF between July and September 2014.
- 2. Of all ECF applications received from July to September 2014, family (130 applications), immigration (81 applications) and inquest (60 applications) were the most requested categories of law.
- 3. Five of these applications (two per cent) were made directly by the client, without solicitors formally submitting applications on their behalf. The remaining 295 applications (98 per cent) were made by legal aid providers.
- 4. Of the 300 applications, 291 were determined by the Legal Aid Agency, with nine awaiting assessment (as of 30 November 2014).
- 5. 44 (15 per cent) of applications were granted and 179 (62 per cent) were refused.
- 6. Where ECF was granted, 24 were for inquests, 11 for immigration, five for family, one each for housing and tribunal/inquiry cases and two for 'other' cases.
- The number and proportion of ECF applications being granted has increased every quarter since the introduction of ECF in April 2013

(Ministry of Justice, 2014b).

It should be noted that these statistics relate to applications made primarily after the Lord Chancellor (2014) directed that the Legal Aid Agency should take note of relevant case law, including that of *R* (on the application of Gudanaviciene & Ors) v Director of Legal Aid Casework.⁶³ Here, the Court of Appeal found that the Legal Aid Agency's guidance on ECF was too restrictive and breached Article 8 of the ECHR (right to respect for private and family life).

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⁶² A non-molestation order comes with an injunction and orders one person to stop using violence or threatening, harassing, pestering or intimidating another. An occupation order is an order made by the court controlling who may occupy property. A prohibited steps order is an order used to prevent something from happening.

^{63 [2014]} EWCA Civ 1622.

One possibility for the low take-up of ECF is that legal practitioners are not prepared to apply for exceptional funding. This may be because they have no guarantee of payment for the work unless the application is successful. The Legal Action Group reported that, although the Community Law Partnership in Birmingham had submitted a number of exceptional funding applications, it could not afford to continue doing so on a pro bono basis (Bawdon, 2014).

There is an impact on people with particular protected characteristics. The Public Law Project (2013a) has stated that:

for litigants in person the process of applying for exceptional funding is impenetrable. There is no accessible, foreign language or disabled-friendly information about exceptional funding provided by the Government. This is in spite of the fact that the Lord Chancellor's own guidance accepts that questions of literacy, English language ability and disability will be relevant to the assessment of whether someone is eligible for exceptional funding, thereby admitting that the vast majority of exceptional funding applicants will have at least one protected characteristic. The Public Law Project's conclusion is that that these proposals will have a significant adverse and disproportionate impact on people with particular protected characteristics.

4.12.1 Inquest cases

Legal help for relatives of deceased people, to help prepare for an inquest into the deceased's death, remains in scope for legal aid. Public funding is also available through the ECF scheme for representation of relatives of the deceased at inquests. Here, issues concerning Article 2 ECHR (right to life) arise, or if there is a wider public interest in representation being funded.

The likelihood of a successful application for ECF for inquest cases is higher than in non-inquest cases. 40 per cent of applications received between July and September 2014 resulted in Civil Representation being granted for inquests (Legal Aid Agency, 2014c). Despite this, the scheme has still been subject to criticism; the co-director of campaign group Inquest has said 'Applying for exceptional funding is complicated, intrusive and unfair' (Inquest, 2015).

A recent judicial review may result in these criticisms being addressed. In *R* (on the application of *Joanna Letts*) v *The Lord Chancellor*,⁶⁴ the Court found that the Lord Chancellor's guidance (Lord Chancellor, no date) on when ECF should be granted was inadequate, included an error of law, and was materially misleading. The Court said that in deaths involving the State, there is a duty under Article 2 to carry out an effective investigation. Therefore, there should be a lower threshold

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^{64 [2015]} EWHC 402 (Admin).

for ECF to be made available to families in certain circumstances to allow them to participate in the inquest.

4.13 Mandatory telephone gateway

As stated above, from 1 April 2013, anyone seeking advice and assistance on debt, discrimination and SEN must do so through the Legal Aid Agency's telephone gateway (CLA). Children are exempt from having to use the telephone gateway. However, as noted below, this method of delivery may be problematic for people with some protected characteristics.

In the Government's own assessment, there is:

the potential for a disproportionate impact on clients and providers based on their sex, race and disability or illness as a result of the proposed change. This is a result of the demographics of service users and differences in the volumes of specialist cases in particular categories of law where it is envisaged that advice will be provided by telephone (rather than face to face) and the consequent impact on providers. (Ministry of Justice, 2010c, p.9)

The Government said that this does not amount to indirect discrimination, because the measures are a proportionate means of achieving legitimate aims. These are: increasing value for money of legal aid expenditure; streamlining the process of and providing more immediate access to obtaining legal help; directing people to the most appropriate source of help and resolving problems at an early stage (Ministry of Justice, 2010c).

The EHRC (2011) expressed its concern about this approach in a response to the Ministry of Justice:

When considering whether the proposal is objectively justified, the MoJ cites costs savings and also suggests that there would be benefits derived from streamlining the process for people seeking legal help, routing clients quickly to the most appropriate source of help, and resolving problems at an early stage. However, there is very little evidence to support these assertions, nor any attempt to balance them against the potentially negative effects of the proposals, as the objective justification test requires. (p.18)

In addition, the EHRC (2011) said that by introducing the gateway and not allowing for an alternative provision of face-to-face advice for clients who might reasonably need such an adjustment to be made, the Ministry of Justice was putting disabled people at a disadvantage. This is particularly the case for those with mental health, learning or cognitive impairments.

Furthermore, the EHRC (2012a) has warned that:

Requiring disabled clients to use a mandatory telephone gateway could in some circumstances amount to a breach of Article 14 (enjoyment of rights without discrimination) in conjunction with Article 6(1) in relation to disability. The requirement could also be in breach of Article 5 of the Convention on the Rights of Persons with Disabilities (non-discrimination) when read with Article 13 (access to justice). (p.255)

4.13.1 Problems with the operation of the gateway

The evidence identifies a range of reported impacts resulting from the introduction of the gateway.

For example, research by the Public Law Project has shown that there is a lack of awareness of the gateway and that promotion of the service has been limited (Hickman *et al.*, 2015). It reports that the number of cases resulting in legal help being given were lower than predicted. Debt matters were 90 per cent lower, discrimination cases 60 per cent lower, and SEN cases 45 per cent lower. Research commissioned by the Government found that the gateway was easier to find in internet searches if people had already identified their problem as a legal issue (Paskell *et al.*, 2014).

Another reported impact was that fewer cases of referrals for face-to-face advice were made, compared to the numbers expected. These referrals can be made to facilitate access to the service. The study above found that face-to-face advice referrals were being made in only 0.2 per cent of discrimination cases. No referrals have been made in SEN cases, compared to a predicted 10 per cent. The research suggested that 'This may be as a result of Legal Aid Agency guidance setting out a face-to-face referral threshold which is only met in "exceptional circumstances" (Hickman *et al.*, 2015, p.3).

Furthermore, the Public Law Project research stated that users of the gateway found the experience of the gateway confusing and bureaucratic, and were sometimes only referred to specialists after getting legal advice elsewhere first. Operators were found to be over-reliant on scripts, with certain 'buzzwords' resulting in a referral to specialists (Hickman *et al.*, 2015). The research also reported that matters handled by the gateway are not necessarily resolved in the best way. 'Around a third of all Debt and a quarter of all Discrimination matters handled by the Gateway and completed in the first half of 2014/15 resulted in "outcome not known or client ceased to give instruction". This does not compare favourably with other channels of legal aid advice provision, for example by not-for-profit advice services or solicitors' firms, or with previous service delivery data in those areas of law' (Hickman *et al.*, 2015, p.4).

Other organisations have reported impacts resulting from the gateway. For example, LawWorks set up a helpline to offer non-legal, practical advice to those in debt. It has received many calls from people who were eligible for legal aid but who reported being unable to access it due to

problems with the telephone gateway (Moses, 2013). The Law Society Gazette reported a case study:

One of my colleagues described the following, apparently typical, situation: 'Mr B contacted the LawWorks helpline alleging that his former employer failed to make reasonable adjustments for his disability at work. He was unemployed, in receipt of income support and had no savings. Prior to contacting LawWorks, Mr B visited his local CAB [Citizens Advice Bureau] for advice which, in turn, referred him to the MoJ telephone gateway to check if he was eligible for legal aid.

After contacting the telephone gateway, Mr B was informed that he was eligible for legal aid and should look at The Law Society website to find a solicitor in his area. Due to his disability, Mr B was unable to travel far for a solicitor and found he could not find an appropriate legal aid solicitor in his area (North Yorkshire). Confused by the process of finding a legal aid solicitor, he contacted the gateway yet again, and subsequently embarked on an endless loop of blind referrals. Along the line, he was given the telephone number of the CAB (again), Disability Law Service and even, confusingly, the Solicitors Regulation Authority. Eventually, he got in touch with LawWorks, incredibly frustrated and confused by what appeared to him to be an inaccessible and not transparent legal aid system (Moses, 2013, online article).⁶⁵

Smith *et al.* (2013) reported that face-to-face services lead to a broader range of outcomes for clients than telephone advice. In addition, telephone cases did not progress as far as face-to-face cases. The authors urged further research before a restructuring of legal services which makes telephone advice the only, or principal, route into publicly funded legal advice in family matters.

Research by Buck and Smith (2013) assessed the benefits and accessibility of both face-to-face and telephone advice. They reported the following:

for many clients there were potential intellectual barriers to accessing advice, such as difficulties in completing paperwork, accessing the information and advice needed, understanding the advice given and carrying out the actions given to them by advisors. [...] Given the vulnerability displayed by some clients, face-to-face advice appeared a critical mode of delivery, although both advisors and clients recognised the benefits that telephone services could provide as a complementary part of advice provision. (p.109)

Balmer *et al.* (2012) reported that under 18s are less likely to use telephone advice. However, a relatively high percentage of older people sought advice over the telephone. They found that ethnicity did not appear to be a barrier to accessing telephone advice. In contrast to previous

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⁶⁵ This is known as referral fatigue, which means that 'people become increasingly unlikely to obtain advice on referral as the number of advisers they use increases.' (Pleasence *et al.*, 2010)

research which suggested that people with reduced mobility preferred telephone advice, they found that people with physical ill-health were less likely to use the telephone. They reported that there is a significantly reduced likelihood of people with mental ill-health using telephone advice:

More generally, for vulnerable clients where the development of a personal relationship between the advisor and client may be crucial to the successful progress of a case, the telephone may be an inadequate substitute for face-to-face services. This is acknowledged in the referral practice of the existing CLA telephone service, and other telephone advice services such as National Debtline, where clients who are assessed as particularly vulnerable by the operator service are referred to face-to-face provision. (p.23)

Balmer *et al.* (2012) set out a caveat to their findings, and said that lower levels of telephone advice use may be explained by a lack of awareness about telephone services.

Smith *et al.* (2013) reported that ethnic minority clients were overrepresented among telephone cases (19.5 per cent, compared to 10.8 per cent for face-to-face advice). They also reported that younger clients used face-to-face services more than older groups. However, in contrast to Balmer *et al.* (2012), they found no difference in modes of advice used by those reporting illness or disability. There was also no difference for male or female clients.

Government-commissioned research has shown that users of the gateway have reported differing experiences of adjustments being made when calling the service, to make the service accessible to the diverse range of callers (Paskell *et al.*, 2014). The research gave examples of good practice (an operator offering to call back somebody calling from a pay phone) and bad (refusing to offer adjustments which would make the service more accessible for a caller who had difficulty hearing).

4.13.2 The Government's review of the mandatory telephone gateway

The Government conducted a review of the telephone gateway (Ministry of Justice, 2014d). It concluded that some users and staff found the gateway to be a useful tool, saying that some of the benefits of telephone advice were longer opening hours, not having to travel, being able to access e-mails at night and, importantly, 'instant access' to specialist advice without an appointment.

There were other people, however, who sought more face-to-face provision. These included specialists who wanted more discretion to refer users to face-to-face provision. Users who found it difficult to communicate remotely also wanted more face-to-face advice, expressing doubts over whether solicitors took remote cases seriously. The report picked up on concerns about awareness of the service, saying there is a perception that it is not well-publicised or easy to find online. Providing more information to advice agencies about the services the gateway could offer would also help increase referrals.

The report indicated that the telephone service received 53,048 calls relating to the mandatory types of cases (that is debt, discrimination and SEN cases). Of these calls, 7,261 (13.7 per cent) were referred to a specialist. ⁶⁶

With regard to reasonable adjustments for users, both operators and specialists felt the range of adjustments available was sufficient. Users felt that they facilitated contact with the service. In addition to the importance of adjustments:

many participants also stressed the importance of soft skills, particularly when dealing with vulnerable individuals. Engagement participants [people who worked for advice agencies] suggested these skills could only be obtained through specific training and experience of delivering services to such individuals. Operators agreed that soft skills were very important and acknowledged that training and ongoing monitoring of the application of soft skills did occur. Adaptations were used in a quarter of contacts to the CLA service, most commonly call back and third party contacts (both accounting for about one in ten calls), online advice and language line [a translation service]. The use of other types of adaptation was comparatively was relatively infrequent. (Ministry of Justice, 2014d, p.16)

Very few cases have been referred for face-to-face advice (3.1 per cent in the first year). In debt cases (the only category in which enough referrals were made to analyse):

Users with learning difficulties/disabilities, mental health issues and/or mobility impairment were more likely to be assessed as telephone advice not appropriate when compared to other groups. Issues brought by Users aged 65 and over were also more likely to be considered inappropriate for telephone advice, when compared to younger individuals. The analysis suggested that there was also some variation by User ethnicity with 'Chinese & Other' Users more likely to be assessed as telephone advice not appropriate compared to 'White British' Users (no significant differences were found among other minority ethnic groups)'. (Ministry of Justice, 2014d, p.17)

This is perhaps not surprising given that the Government has itself assessed that in the categories of debt and welfare benefits, clients were more likely to gain a substantive benefit from face-to-face advice, as opposed to family and education cases where clients of the telephone service were more likely to gain a substantive benefit (Ministry of Justice, 2011 in Balmer *et al.*, 2012).

The Government's research has been criticised by the Public Law Project, which also carried out its own review of the telephone gateway. The Public Law Project said:

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⁶⁶ This figure shows the proportion of cases that were referred to a specialist by an operator, not the percentage of calls that actually resulted in specialist advice. This is because specialist advisers must reassess callers' eligibility for advice, and would have determined that some cases were ineligible for legal aid.

Our gap analysis also indicates the following additional major ommissions from the MoJ review:

- Consideration of the impact of the Gateway on individuals who did not access it but who would have been entitled to do so;
- Consideration of the impact on individuals 'exempt' from having to use the Gateway;
- Assessment of the accuracy and quality of the Operator Service; and
- Evaluation of the costs and savings produced by the Gateway.

(Hickman and Oldfield, 2015, p.2)

4.14 The proposed residence test

In its Transforming Legal Aid consultation paper, the Government set out a proposal that applicants for legal aid would have to satisfy a residence test for civil legal aid to be made available. The person would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid was made. They would also be required to show lawful residence for 12 continuous months at any point in the past. The Government argued that this would exclude foreign and British nationals outside the UK from obtaining civil legal aid. It would also have the effect of excluding those they termed 'illegal visa overstayers, clandestine entrants and failed asylum seekers'. The test would not apply to armed forces personnel or to asylum seekers until their appeal rights had been exhausted. ECF would continue to be available even for those who did not meet the residence test (Ministry of Justice, 2013a).

Some amendments were made to this policy in response to the consultation, which meant that the residence test would not apply to: detention cases; victims of trafficking; domestic violence and forced marriage; protection of children cases; and cases before the Special Immigration Appeals Commission. Children under the age of 12 months would also not be required to show at least 12 months of previous lawful residence (Ministry of Justice, 2014e).

The Government had intended to bring in this reform, through secondary legislation, in early 2014. The draft legislation was the LASPO Act 2012 (Amendment of Schedule 1) Order 2014 (Ministry of Justice, 2014e). However, in the case of R (on the application of the Public Law Project) v The Secretary of State for Justice, 67 the Administrative Court ruled on 15 July 2014 that the residence test was unlawful. This was, first, on the grounds that it could not be introduced by secondary legislation (that is, legislation the Government has introduced under delegated powers). Second, it constituted unlawful discrimination against non-British nationals, contrary to Article 6 (right to a fair trial) read with Article 14 (prohibition of discrimination) of the ECHR. The Court confirmed that

^{67 [2014]} EWHC 2365 (Admin).

equality before the law is not comparable to a welfare benefit. It also held that discrimination cannot be justified where all are equally subject to the law and equally entitled to its protection, resident or not. The Government is appealing this judgment.

The Justice Committee (2015) criticised the residence test, stating that it 'seems to us that the residence test is likely to save very little from the civil legal aid budget and would potentially bar some highly vulnerable people from legal assistance in accessing the courts' (p.23).

4.14.1 Impact on people with particular protected characteristics, and on human rights

Many groups who are at risk may be unable to satisfy the residence test. This includes: unaccompanied migrant children (who may be disabled or have SEN); victims of trafficking whose status is disputed; victims of domestic violence (without proof of abuse); and refused asylum seekers (EHRC, 2014a). The Government accepted that the proposed residence test had a disproportionate impact on non-British residents. However, it confirmed that exceptional funding would be available in respect of persons who did not meet the residence test. In addition, the Government stated that the proposed exception for asylum seekers would minimise any impacts on people with particular protected characteristics (Ministry of Justice, 2013a).

The EHRC argued that the residence test may impact on the rights of people living outside Britain (including foreign nationals). In particular, their right to a fair trial under Article 6 of the ECHR may be compromised. It suggested that issues could arise in relation to foreign nationals whose human rights were breached by agents of the state (EHRC, 2013a). This potential effect of the residence test was expressed forcefully in a letter by various concerned parties to the Attorney General: 'to prevent people bringing legal proceedings who are subject to the actions of the UK acting abroad, often in ways which are alleged to be contrary to the most fundamental human rights, is in our view impossible to reconcile with the rule of law' (Treasury Counsel, 2013). An example that has been cited in case law is Al Skeini v United Kingdom⁶⁸ (cited in R (on the application of the Public Law Project) v The Secretary of State for Justice). 69

The Joint Committee on Human Rights (2014a) criticised the application of the residence test to children. It referred to the UK's obligations in the United Nations Convention on the Rights of the Child, in particular Article 2 (non-discrimination), and Article 12 (respect for the views of the child). Article 12 gives the child the right to be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, in a manner consistent with the procedural rules of national law. The Committee noted that children could not be expected to represent themselves adequately in any court proceedings. On this basis, the proposed residence test cannot be

^{[2011] 53} EHRR 18.

compatible with Article 12 or Article 3 (best interests of the child). The Committee concluded that the residence test would inevitably lead to breaches of the Convention on the Rights of the Child and in particular Articles 3 and 12. Elsewhere, the Committee recommended that the Government should exclude all children from the residence test (2013b).

An article in *The Guardian* (Khaleeli, 2013) quoted Kalayaan, a charity supporting migrant domestic workers, many of whose clients have little or no education and are isolated because they work in private homes. Kalayaan gave an example of a domestic worker from India who discovered that her employers were docking her wages and pretending the deductions were for tax and national insurance. She was also prevented from taking her days off. When she insisted on attending an appointment to renew her visa, her employer dismissed her without pay or a P45. Funded by legal aid, she won her case at an employment tribunal. Having been in the UK for less than a year when she was dismissed, this domestic worker would not have satisfied the proposed legal aid residence test.

The Constitutional and Administrative Law Bar Association (2013) argued that the proposal was likely to impact particularly harshly on the homeless and destitute. This included homeless families who were awaiting a decision on their status in Britain, such as on a fresh asylum claim or some other claim for leave to remain. In these cases, the law and facts are often complex. These claimants are not in a position to represent themselves.

Solicitors Deighton Pierce Glynn (2013) gave examples of the impact that the test would have. For example:

A Guyanan man who came to the UK in 1965 is currently ready to leave a West London hospital, where he was admitted from street homelessness due to paranoid schizophrenia and physical disabilities. We have legal aid to challenge the social services' decision not to support him; assuming we succeed, he will be able to be discharged from hospital where he is 'bed-blocking'. He has not managed to access legal aid advice to regularise his immigration status because of the April 2013 exclusion of immigration advice from scope. Under the new regime he would not be entitled to assistance despite living in the UK for 58 years, resulting in ongoing costs to the NHS and/or a risk that he will be returned to the streets.... (p.4)

The Joint Committee on Human Rights (2013b) stated that it was 'concerned that refugees may be unable to access civil legal aid during their first few months of lawful residence in the UK. We recommend that any proposal excludes refugees as well as asylum seekers, in order to ensure that the UK's international obligations are met' (p.4)

Although people who have been trafficked would not have to prove residence under the current draft legislation, the Joint Committee on Human Rights (2013b) has concluded that this exemption does not go far enough. It said that exemptions should be extended to cases where the status of a person who has been trafficked is contested, and to legitimate challenges to failure to prosecute or investigate.

The Joint Committee on Human Rights (2013b) also noted a concern about individuals who lack mental capacity being able to satisfy the residence test without having assistance. This might particularly affect individuals who are deemed by the Court to lack specific capacity, within the meaning of the Mental Capacity Act 2005, to conduct their own affairs including litigation.

4.14 Multiple impacts on people with particular protected characteristics

Some of the literature below has noted impacts on people with certain protected characteristics that arise across different areas of law.

4.14.1 Disability

Mencap published a report on the impact of recent changes on people with learning disabilities. They found the vast majority of these people did not have the means to pay for legal advice, other than through legal aid. There was a concern about the potential impact of cuts to legal aid and local financial support for Citizens Advice Bureaux and Law Centres upon people with learning disabilities. These were people who already had to struggle to access appropriate legal advice (Swift *et al.*, 2013).

The Justice Committee report in 2011 referred to evidence that highlighted the adverse impact of changes on disabled people. Shelter's evidence was that 'the proposals would exclude large numbers of vulnerable people, including many who are ill or disabled. They may have complex, inter-related problems relating to housing and homelessness, welfare benefits and debt. By definition they will be poor, as they would have been eligible for legal aid'. Scope gave evidence to the Committee that 'disabled people will be disproportionately affected by the removal of areas of social welfare law from the scope of legal aid and by the tightening of the eligibility criteria. There is no real scope for restricting legal aid further without denying access to justice for disabled people'.

4.14.2 Race

It has been suggested that ethnic minority tribunal applicants find it more difficult to represent themselves as litigants in person during proceedings (Genn, 2013).

4.14.3 Sex

A report (by the Centre for Human Rights in Practice, University of Warwick and Coventry Women's Voices) examined the human rights and equality impacts of public spending cuts on women in Coventry. It stated that Coventry Law Centre has had roughly equal numbers of cases brought by men and women in the last year. However, particular areas such as housing and community care have seen far greater numbers of women (Stephenson and Harrison, 2011).

A second report (by the same organisations) quoted Coventry Law Centre, which explained the impact of the changes to legal aid for older women. It said that:

The proposed cuts to legal aid will mean we will be unable to provide assistance to some of the poorest and most disadvantaged people in Coventry. 32 per cent of the people we assist on social welfare law matters are over 50 and over half of our clients are women. Older women will be particularly badly affected by the withdrawal of legal aid for welfare benefits casework: 48 per cent of the clients we assist to appeal benefits decisions are over 50. The long term costs to the State of the loss of this support will be significant. The Government wants to promote positive health outcomes by promoting independence amongst older people: it is these benefits that allow older people to live independently and to pay for the help that allows them to do this (Stephenson *et al.*, 2012, p.50).

A further report stated that 'A disproportionate number of [ethnic minority]⁷⁰ women will be affected by cuts to civil legal aid' (Sandhu *et al.*, 2013, p.69). The report stated that this is because ethnic minorities are disproportionately likely to claim civil legal aid, citing figures from the Government which state that 'of all civil legal aid clients, 64 per cent are white, 26 per cent are [ethnic minority] (the ethnicity of the remainder is unknown)', and that 'nationally... 57 per cent of legal aid clients are women, compared to 43 per cent of men'. These do not reflect national population figures.

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⁷⁰ Sandu *et al.* (2013) employs the term 'BAME' meaning 'Black and minority ethnic'. This term has been replaced by the equivalent, 'ethnic minority', in line with EHRC editorial policy.

5. Impact of judicial review reforms

In addition to the LASPO reforms to legal aid, changes to the law have been made in a number of other areas, including legal aid for judicial review cases. Most recently, the Criminal Justice and Courts Act 2015 received Royal Assent on 12 February 2015. Part 4 of this Act restricts when permission will be granted to apply for judicial review, and makes changes to costs rules (Ministry of Justice, 2015b). Most of these provisions came into effect on 13 April 2015.

The most relevant changes to judicial review can be summarised as follows:

5.1 Judicial review and legal aid

- There have been changes as to when legal aid is available for judicial review. Under LASPO (Schedule 1, Part 1), judicial review cases remain within the scope of legal aid, but funding is only available for legal services that benefit the individual, their family, or the environment.
- The Civil Legal Aid Regulations 2014⁷¹ restricted the availability of legal aid in judicial review cases, and following a legal challenge these regulations have now been slightly amended.⁷² Legal aid is now only available for work carried out on a permission application either where permission is granted, or in certain other restricted circumstances. These include when the defendant withdraws their decision, or when the case settles and the Lord Chancellor considers it reasonable in all the circumstances for legal aid to be granted to the claimant.

5.2 Reforms under the Civil Procedure Rules

The CPR(Amendment No 4) 2013 (SI 2012/1412) have introduced the following changes to the Court Procedure Rules for judicial review:

1. The time limits for bringing certain types of judicial review have been reduced from three months to six weeks in planning cases and to 30 days in procurement cases.

⁷¹ Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014 (SI 2014/ 607).

⁷² By the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898).

- 2. Where a judge refuses permission without a hearing and records the application as being totally without merit, the claimant no longer has the right to request that the decision be reconsidered at an oral hearing.
- 3. A new fee has been introduced for oral renewal of a judicial review permission hearing. The fee is £215.

5.3 Reforms under the Criminal Justice and Courts Act 2015

A number of reforms to judicial review procedures were introduced by the Criminal Justice and Courts Act 2015.

- 1. Previously, the Court could refuse to grant permission to apply for judicial review or refuse the remedy sought if it was satisfied that the outcome would **inevitably** have been the same, had the defendant body taken the decision properly. This threshold has been lowered (Section 84). The Court must now refuse permission or refuse to grant a remedy if it considers it would be **highly likely** that the outcome would not have been substantially different. However, the Court may disregard this requirement if it considers it is appropriate to do so for reasons of exceptional public interest.
- 2. Applicants for permission for judicial review must now provide the Court with any information about the financing of the application that is specified in rules of court (Section 85). The Court must also have regard to this information in order to consider making costs orders against those who are not a party to the judicial review.
- 3. Costs capping orders (or 'protective costs orders') are orders that protect the unsuccessful claimant, and sometimes a defendant, against having to pay some or all of the other side's costs. Under Section 88, in non-environmental cases the Court can only make a protective costs order once permission to proceed to judicial review has been granted by the Court. All information about financial resources must be made available and the proceedings must be in the public interest (Section 88(7)). If a costs capping order removes or limits the costs liability of the applicant, the liability of the other party to pay the applicant's costs must also be removed or limited (Section 89(2)).
- 4. Interveners (frequently NGOs) are not parties to the proceedings. They are granted permission to file evidence or make representations in judicial review proceedings in order to assist the Court. Interveners now face a great risk of paying costs in certain circumstances for example, if they raise matters not relevant to the case, or behave unreasonably (Section 87). In these circumstances, on application by the claimant or defendant, the Court must order an intervener to pay costs that the party has incurred as a

result of the intervener's involvement in the proceedings – unless there are exceptional circumstances that make it inappropriate to do so.

Additionally, in 2013, most immigration judicial review claims were transferred from the Administrative Court to the Upper Tribunal.⁷³

5.4 General impacts of the changes to judicial review

There are concerns that the changes to judicial review will have a negative impact on the ability of individuals and organisations to hold the State to account by this means. The EHRC has emphasised that judicial review is the principal means of testing the compatibility of administrative decisions with rights under the ECHR. In relation to civil rights and obligations, where an internal complaints procedure does not qualify as an 'independent and impartial tribunal' under Article 6 ECHR (right to a fair trial), judicial review may provide the independent scrutiny that is required by the Convention (EHRC, 2013b).

Liberty (2014) has said that the judicial review reforms, combined with the residence test (which would apply to judicial review claims) will make it increasingly difficult for vulnerable individuals to hold the State to account. Combined with changes under the Immigration Act 2014, these factors may lead to a disproportionate impact on migrants, who may share the protected characteristics of race and religion or belief. Many migrants who would rely on the safety net of judicial review to challenge an unlawful decision would be left with nowhere to turn, even if their case had merit (Moffatt and Thomas, 2014).

The EHRC (2013b) has noted that the Ministry of Justice does not collect information on the protected characteristics of court users generally, or specifically those involved in judicial review proceedings. It recommended that steps are taken to undertake proportionate monitoring of court users by reference to relevant protected characteristics.

The Government has highlighted data showing that 23 per cent of judicial reviews are brought by young people aged between 18 and 25. This group makes up only 11 per cent of the population of England and Wales. As its aim is to tackle only weak cases, the Government did not expect an adverse impact to be likely (Ministry of Justice, 2013b).

An article in *The Guardian* (Khaleeli, 10 June 2013) discussed some case studies illustrating the effect of changes to judicial review. It said the changes could affect child victims of trafficking and

⁷³ Lord Chief Justice's Practice Direction of 21 August 2013.

unaccompanied children who come to the UK to seek asylum. This is because judicial reviews are often used to challenge a local authority that has incorrectly classed a minor as an adult. It quoted the Eaves' Poppy Project (which provides support, advocacy and accommodation to trafficked women) as saying 'Children might be given false documents [by their traffickers]...In those cases it can be hard to get the local authority to treat them as a child, and ensure they have the education and accommodation they are entitled to'.

5.5 Impact of changes to legal aid for judicial review

There was a general concern that legal aid service providers would be much less willing to take on judicial review claims because they were at risk of not being paid if permission was refused. For example, the Government noted a concern by consultees that their proposals would affect a large number of cases that have merit which conclude prior to permission. There were also concerns that providers would no longer take on this work if made to act 'at risk' (that is, take on a case with no guarantee of payment) in cases where the outcome is difficult to predict (Ministry of Justice, 2014e).

The EHRC (2013a) has pointed out that restricting legal aid funding to cases where permission to apply for judicial review is granted by the Court may deter those with cases that have merit from issuing them. This may breach Article 6 ECHR and raise concerns about access to redress for equality law or human rights breaches. The Joint Committee on Human Rights (2014b) took a similar view, stating that this provision is not justified by the evidence and constitutes a potentially serious interference with access to justice.

The Community Law Partnership (2014) noted that Gypsies and Travellers may need to challenge unlawful decisions by local authorities by way of judicial review. For example, these might concern stop notices, direct action against a site without planning permission or eviction of an unauthorised encampment. It stated that challenges would be very difficult due to the new rules on legal aid for judicial review. It highlighted case studies, including people who were Welsh Gypsies/Travellers, who wanted to bring a judicial review of a possession action by the local authority. By the time a solicitor had been found who was willing to take on such a case 'at risk', a possession order had been obtained and there was a date for eviction. The solicitor made an urgent application to the Legal Aid Agency to obtain legal aid to apply for judicial review. However, by the time the Legal Aid Agency had dealt with this, the eviction had already taken place.

The lawfulness of this policy was recently challenged by a judicial review brought by several firms of solicitors (R (on the application of Ben Hoare Bell Solicitors & Ors) v The Lord Chancellor⁷⁴).

⁷⁴ [2015] EWHC 523 (Admin).

The Court found that the regulations which introduced this provision were unlawful. They were incompatible with the purpose of the primary legislation under which the order was made (which was to provide legal aid in cases that have a good chance of success for people who cannot afford it, in specific areas of law including judicial review). In response to this case, the Government has introduced new regulations which re-impose the same conditional funding rule as before, except that payment is now permitted in two more situations (Legal Aid Handbook, 2015).⁷⁵

5.6 Reform of the threshold test for procedural defects cases

The Immigration Law Practitioners' Association (2014) (in written evidence to the Public Bill Committee) stated:

Rights to procedural protection are not to be lightly denied. The propriety of lowering the threshold from inevitability to 'highly likely' has not been tested against the requirements of Article 6 of the European Convention on Human Rights and, for matters within the scope of EU law, Article 47 of the Charter of Fundamental Rights of the European Union. Although Article 6 does not apply to decisions on the entry, residence and expulsion of migrants, there is no such restriction on Article 47. Moreover Article 5(4) of the European Convention on Human Rights provides protection to persons in immigration detention and there are implied procedural rights in Articles 3 and 8 of the Convention. (paragraph 44)

The Association therefore argued that this provision was unlikely to be immune from challenge on EU and/or human rights grounds under the ECHR.

5.7 Financial orders in judicial review claims

Changes to financial orders in judicial review claims relate to cost capping orders and provisions on the costs of interveners. It has been argued that these changes might cause fewer claims to be brought or arguments raised by (or on behalf of) individuals with particular protected characteristics. In relation to the proposal to reform other financial measures, it was argued that this might disproportionately affect those in lower income groups. It was also suggested that these groups tend to have certain protected characteristics (Ministry of Justice, 2013b).

The Immigration Law Practitioners' Association noted research (by the Public Law Project and the University of Essex) which found that between July 2010 and February 2012 there were only

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⁷⁵ The new regulations are the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898). As amended, the circumstances where legal aid may be granted are: (a) that the Court grants permission; (b) the case settles and it would be reasonable for legal aid to be paid; (c) that the defendant withdraws the original decision; (d) the Court orders an oral hearing; or (e) the Court orders a 'rolled up' hearing (that is a hearing at which the permission application is consolidated with the hearing of the substantive case).

seven cases decided by the Administrative Court at final hearing where a protective costs order was granted. Only three of these were non-environmental cases. The organisations concerned were the Child Poverty Action Group, Medical Justice and the Children's Rights Alliance for England. They were all working with individuals ill-placed to bring a challenge themselves. The Immigration Law Practitioners' Association (2014) also considered that there may be cases where costs protection is necessary for a State to give effect to its positive obligations under, for example, Articles 2 (right to life), 3 (prohibition of torture) and 13 (right to an effective remedy) of the ECHR.

The Legal Action Group has said that the changes to the rules on costs will expose NGOs to enormous cost risks. It said that 'if the proposals for judicial review go through, litigation in the public interest will be a commercial liability for the sector; there is no way that NGOs will be able to take the risk of being involved in litigation'. It saw further problems too, saying that 'when combined with the dismantling of legal aid that will restrict most ordinary individuals from bringing claims, the changes to judicial review will prevent civil society from getting the law to do anything about the systemic problems we face' (Janes, 2014).

The Equality and Diversity Forum considered that the reforms on the costs of interveners would inevitably deter organisations from seeking to intervene in cases. They suggested this would be likely to reduce the quality of decision making. They argued that this provision creates an expectation that a costs order will be made against an intervener unless they can show 'exceptional circumstances' why this should not happen. They argued that if the EHRC and other relevant bodies are at risk of a costs order they may become significantly more reluctant to intervene. This could jeopardise the good administration of justice (Equality and Diversity Forum, 2014). This view was echoed by the Immigration Law Practitioners' Association (2014), which stated that:

An intervener that will struggle to bear its own costs may for that reason be reluctant to intervene if it has no prospect of recovering them and this may lead to the most useful and desirable interveners being reluctant to participate. The courts should retain powers to allow interveners to claim their costs. (section 64)

According to the Public Law Project (2013b), the proposal to limit the availability of protective costs orders is an attempt to use financial disincentives to prevent organisations acting in the public interest from accessing the courts. It will act as a complete bar to NGOs, charities and campaigning groups being able to bring judicial reviews in most cases. This may include circumstances where the Court considers it is in the public interest for the organisation to bring the case.

Just Rights gave examples of a number of public interest challenges where organisations have supported children's and young people's rights. They noted that this kind of intervention in support of vulnerable children and young people would be jeopardised by the Government's changes to judicial review. For example, they cited the case of *R* (on the application of *SO*) *v* London Borough of Barking & Dagenham, ⁷⁶ in which the Children's Society intervened. The case provided important guidance about the kind of support available to children leaving care. It also gave guidance on the relationship between these provisions and the asylum support provisions. Just Rights (2014) stated that the changes 'will have a highly damaging impact on children and young people's access to justice and, thus, their safety and wellbeing'.

5.8 Other judicial review reforms

Further proposed reforms to judicial review are a new Planning Chamber and a new permission filter in planning cases. Consultees stated that reducing time limits for judicial review in planning cases may reduce access to justice. Of particular concern were people and groups in disadvantaged or vulnerable situations, for example, disabled people — including those with mental health conditions. There was also a concern that such changes may have a particular impact on Gypsy and Traveller communities. The Government has acknowledged concerns that this proposal has the potential to affect disabled people, people with mental health issues and learning difficulties, as well as Gypsy and Traveller communities (Ministry of Justice, 2013b).

In relation to provisions removing the right to an oral hearing where a case is assessed as being totally without merit, consultees pointed out that vulnerable groups, and specifically children, might be affected. They said that many children bringing claims against local authorities for failing to provide adequate education provision were disabled (Ministry of Justice, 2013b).

⁷⁶ [2010] EWCA Civ 1101.

⁷⁷ Under section 288 of the Town and Country Planning Act 1990.

6. Impact of employment tribunal fees

Since 29 July 2013, people lodging a claim with an employment tribunal have had to pay a fee. Prior to this, no fees were payable. The level of fee depends of the category of claim. For Category A claims (including unpaid wages, redundancy payment and breach of contract), the fee upon making a claim is £160. For Category B claims (including national minimum wage, discrimination and unfair dismissal), this fee is £250 (HM Courts and Tribunal Service, no date). In addition to these fees, claimants have to pay an additional fee if their case reaches a hearing. Hearing fees are either £230 (Category A) or £950 (Category B). Additional fees are payable for cases which reach the Employment Appeals Tribunal.

The tribunals operate a fee remission scheme which enables applicants to apply for a partial or full waiver of fees if their household income is low and they have no (or low) levels of savings.

6.1 Human rights

The EHRC has expressed the view that fees for employment tribunals are compromising access to justice in breach of people's human rights. Fees also have a potentially disproportionate impact on women, ethnic minorities and disabled people (2014a). This is because there is no effective remedy when the fees payable are more than the amount to be recovered (even if the fee may eventually be recovered from a defendant employer). This has been borne out by research by Citizens Advice, who found that 'People with strong employment claims are immediately defeated by high costs. The cost of a case can sometimes be more than the award achieved, and people can't afford to fight on principle any more' (Doward, 2014, online article). For example, Citizens Advice cited 'the case of a man who worked 40 hours a week for more than two months as a kitchen porter and was entitled to holiday pay of just under £300. On learning that the fees to access the tribunal would be £390, he abandoned the claim'.

It is clear that the cost of pursuing a case is putting people off. For example, research carried out by Citizens Advice demonstrated that in over half of claims assessed as having a very good, good or 50/50 chance of success, fees or costs were cited as a reason for the claimants being unlikely to proceed (Citizens Advice, 2014a).

Employment tribunal fees are regarded as a 'barrier to justice' by Citizens Advice, among others, who found that nearly half of workers with employment issues would have to save for six months in order to afford them (Boffey, 2015). The TUC (2014) said 'It is clear that the introduction of fees has had a major deterrent effect on individuals who consider taking valid cases to an employment tribunal.' (p.5). This deterrent has an effect on people's ability to seek redress for discrimination at work. It may also have an adverse effect on the enforcement of other civil employment rights, such as recovering unauthorised deductions from pay.

The significant drop in number of applications to employment tribunals since the introduction of fees also indicates that they are acting as a deterrent. The following figures (Ministry of Justice, 2015a) show the percentage fall in employment tribunal claims between the first quarter of 2013/14 (when no fees were payable) and the first quarter of 2014/15 (when fees were payable):

Table 6.1 Percentage fall in employment tribunal claims between Q1 2013/14 and Q1 2014/15

Overall	76%
Age discrimination	37%
Breach of contract	69%
Disability discrimination	63%
Equal pay	75%
National minimum wage	58%
Part time workers	71%
Race discrimination	61%
Redundancy (inform/consult)	81%
Redundancy pay	68%
Religion or belief discrimination	64%
Sex discrimination	91%
Sexual orientation discrimination	66%
Detriment/dismissal – pregnancy	46%
Transfer of an undertaking (inform/consult)	79%
Unauthorised deductions	74%
Unfair dismissal	74%
Working time directive	90%
Written pay statement	81%
Written statement – reasons for dismissal	62%
Written statement – terms and conditions	71%
Others	-9% (that is, an increase)

Despite this drop in claims, success rates for employment tribunals remained broadly the same in the year before and after the introduction of fees⁷⁸ (Ministry of Justice, 2015a).⁷⁹ It should be noted, however, that many of the cases finalised after the introduction of fees would have been started beforehand. A longer term consideration of the statistics would therefore add value to considering whether the introduction of fees in the employment tribunal has achieved one of the Government's stated aims of reducing the amount of unmeritorious claims made.

Unison, one of the UK's largest trade unions, brought a judicial review challenging the introduction of employment fees in the courts. They argued that the introduction of fees was unlawful (*R* (on the application of Unison) (No.2) v The Lord Chancellor). The Court gave the EHRC permission to intervene and submit legal arguments. One of the grounds on which Unison brought its case was that the introduction of fees breached the EU principle of effectiveness. In other words, the procedural requirements for bringing a case before an employment tribunal make it virtually impossible (or excessively difficult) to exercise an individual's employment rights. Unison, supported by the EHRC, was able to raise this argument, as many employment rights, such as those regarding discrimination, derive from EU law. However, the High Court did not agree. It said that:

the difficulty with the way the argument has been advanced is that the Court has no evidence at all that any individual has even asserted that he or she has been unable to bring a claim because of cost. The figures demonstrate incontrovertibly that the fees have had a marked effect on the willingness of workers to bring a claim but they do not prove that any of them are unable, as opposed to unwilling, to do so. (Unison No. 2)

Unison was granted permission to appeal this decision (Fouzder, 2015). The case was due to be heard in Summer 2015.

6.2 Impact on people with particular protected characteristics

The EHRC (2012b) is not the only organisation to have warned that fees in employment tribunals will have an adverse impact on people with particular protected characteristics.

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⁷⁸ For the four quarters before the introduction of fees, success rates were 10 per cent, 10 per cent, 10 per cent and nine percent. For the four quarters after the introduction of fees, success rates were nine per cent, nine per cent, five per cent, and 13 per cent. These success rates are taken from those reported as 'Successful at hearing' by the Ministry of Justice. Rates for those cases being 'Unsuccessful at hearing' have also remained broadly stable in the same quarters. Cases can be disposed of by other means; many are withdrawn upon being settled, for example.

⁷⁹ These figures do not include the high proportion of cases that are settled before a hearing. A Government survey reported that around 54 per cent of all cases were settled in 2012 (Department for Business, Innovation and Skills, 2014).

^{80 [2014]} EWHC 4198 (Admin).

Unison made this argument in support of its application to the Court to have the policy quashed as unlawful. It said that the policy indirectly discriminated against women and several other groups sharing particular characteristics. The Court was not convinced that the statistics 'show that there has been discrimination' and said 'even if it has [resulted in discrimination], the extent of any adverse impact is very small'. In addition, the Court decided that 'each of the objectives relied upon in this case is a legitimate one and that the scheme taken overall, particularly having regard to the arrangements designed to relieve the poorest from the obligation to pay, is justified and proportionate to any discriminatory effect' (Unison No.2).

Statistics have shown that 82 per cent of those bringing sex discrimination and equal pay claims are women, so they will be disproportionately affected by the introduction of fees (Trott, 2012). Over half (52 per cent) of discrimination claimants have an illness or disability (Department for Business, Innovation and Skills, 2014). The EHRC and others have therefore argued that the introduction of fees breaches Articles 6 (right to a fair trial) and 14 (prohibition of discrimination) of the ECHR. This may also compromise the principle of people being able to give effect to their rights under EU law (EHRC, 2012b).

The fees also have an impact on women with the protected characteristic of pregnancy and maternity. Maternity Action (2014) has called for the abolition of employment tribunal fees, saying they present an obstacle to justice. They reported that unlawful pregnancy and maternity-related dismissal, discrimination and detrimental treatment were now more common in UK workplaces than ever before.

Maternity Action (2014) argued that the introduction of tribunal fees, together with the fact that legal aid continues to be unavailable for representation in employment tribunals, meant 'It is also harder than ever to challenge such discrimination.' (p.6). They pointed to the dramatic reduction in the number of sex and pregnancy discrimination claims, and argued 'that the fees regime is little more than a charter for rogue employers.' (p.6).

Maternity Action also identified an unmet demand for advice: 'Each year, Maternity Action's helpline answers some 2,200 calls from pregnant women and new mothers experiencing problems at work. But for every call that we answer, there are another 15 calls we cannot, and we simply do not have the funds to expand our service to deal with that unmet demand – we receive no government funding for this work' (Dunstan, 2013, p.5).

The TUC (2014) was concerned about the impact of the introduction of fees on women bringing claims for pregnancy-related discrimination. It explained:

The fall in pregnancy-related claims is also a matter of serious concern, given the evidence of widespread discrimination. Between January and March 2014 just 288 claims for pregnancy-related dismissal or detriment were submitted, compared with 388 in the same quarter in 2013. The Equal Opportunities Commission's landmark study into pregnancy discrimination in 2005 found that nearly half the pregnant women in the UK said that they had experienced discrimination simply for being pregnant or taking maternity leave. Yet the majority of women take little or no action to assert their rights. Around 3 per cent of those who lose their job will attempt to seek financial compensation for their dismissal at an employment tribunal. (p.6)

The reasons for this are clear. Many women do not want to face the anxiety or stress of taking an employment tribunal claim. Others simply cannot afford the cost at the time when their earnings have been reduced and household expenditure is increasing. The introduction of fees has made these barriers to justice even higher. (p.7)

The TUC (2014) also argued that women have been the 'principal losers' since the introduction of fees in employment tribunals. It went on to point out that there has been 'a serious drop in other discrimination claims' (p.7). It observed that 'During the first three months of 2014, the number of race discrimination and sexual orientation claims both fell by 60 per cent when compared with the same period in 2013, whilst disability claims experienced a 46 per cent year on year reduction' (p.8). Although the fall has been less dramatic in relation to age discrimination, the TUC noted that young workers were more likely to be influenced by the requirement to pay a fee than those aged 65 or older.

In contrast to the analysis advocated by organisations such as Maternity Action and the TUC, the Government argued that people with particular protected characteristics would be unlikely to be disadvantaged by the introduction of fees in employment tribunal cases. This is because, on the Government's analysis, '[Ethnic minority] groups, women, younger people and disabled people are more likely to fall into the lower income brackets and therefore these groups would be more likely to qualify for partial or full fee remissions' (Ministry of Justice, 2012b). It went on to say 'Our analysis also suggests that mid to higher earners may experience the greatest negative impacts of the new fees and these people are more likely to be those aged 25 and over without children and people from a White ethnic group. These people are unlikely to qualify for full or partial remissions' (Ministry of Justice, 2012b, p.7).

The counter-argument to the Government's position is that the complex nature of the remission system itself disadvantages people with language difficulties and/or health or disability issues. This makes it harder for them to apply for remission, which may in fact be discriminatory (Trott, 2012).

7. General themes in access to justice

A number of general themes run throughout the issue of access to civil law justice and the impact of recent changes. These are discussed briefly below.

7.1 Clusters of problems

The Civil and Social Justice Survey highlighted the fact that problems do not tend to occur separately. Rather, certain problem types often 'cluster' together, both generally, and for those eligible for legal aid. For example, there is a family cluster, an economic cluster, a homelessness cluster and a discrimination/clinical negligence cluster. Family problems, relating to domestic violence, divorce and relationship breakdown, have been shown to cluster together strongly. Renting and homelessness problems also cluster together (the homelessness cluster), as do consumer, money/debt, employment, and neighbours problems (the economic cluster) (Pleasence et al., 2010).

In family law, it has been noted that cutting legal aid for family problems 'was likely to create a domino effect of problems as citizens who have problems do not tend to have one problem; they tend to experience clusters of problems. One problem leads to another: family breakdown often casts one party onto welfare benefits, and creates housing issues, which in turn leads to mental health difficulties' (Cobb, 2013). This has important implications for how people experience legal problems and how they resolve them.

7.2 Litigants in person

One of the impacts of the changes to legal aid and other reforms has been that there are more litigants in person. The Public Accounts Committee (2015) stated that:

In the year following the reforms, there was an increase of 18,519 cases (30 per cent) in which both parties were representing themselves in family courts. Within this, there were 8,110 more cases involving contact with children in which both parties were LIPs in 2013-14. This is an increase of 89 per cent from the previous year. Judges have estimated that

cases involving LIPs can take 50 per cent longer and many legal professionals have said that they place additional demands upon court staff. (p.13)

There are reported concerns about the increased number of litigants in person in family cases, as a result of legal changes. For example, the most recent report by The Low Commission (2015) noted that:

The most pressing problems following on from legal aid reforms have occurred in the family justice system with increased flows of litigants-in-person... In the year following the reforms, there has been a 30% year-on-year increase in family court cases in which neither party had legal representation. (p.18)

It has been noted that litigants in person face challenges in using the justice system (Genn, 2013). It has also been observed that there are many wider benefits to the provision of professional representation, such as the fact that representation facilitates equality of arms between privately funded and legally aided parties (Cobb, 2013). In the 2005 case of *Steel and Morris v the United Kingdom*,⁸¹ the Court held that a denial of legal aid had deprived two individuals of the opportunity to present their defence effectively before the Court. This had also contributed to an unacceptable inequality of arms. In this case, the individuals were members of a small organisation who could not afford legal representation without legal aid. They were defendants in a libel case brought by McDonalds, who had legal representation in Court. The European Court of Human Rights found that there had been a breach of Article 6 (right to a fair trial) because of the inequality of arms in the case.

Zuckerman (2014) said that:

In order to protect their rights persons need to know the relevant substantive law and what the rules of procedure require in order to take a dispute to court. Persons who lack legal knowledge are therefore poorly placed to defend their rights in court, as well as outside it. If obtaining justice calls for legal expertise, then those who cannot afford to pay for it are in effect denied access to justice. We may refer to this aspect as the justice deficit. (p.355)

The Office of the Children's Commissioner discussed the effect on children of being litigants in person. For the two child interviewees in their survey who had this experience, it was a profoundly negative one, with long-term consequences. Being a litigant in person had a negative impact on proceedings as well as a long-term impact on wellbeing (Carter, 2014). Ministry of Justice research showed that about half of the litigants in person in their study sample suffered from one or more vulnerabilities. These included: physical disability/ill-health; behavioural disorders such as ADHD and Asperger Syndrome; learning difficulties; and language difficulties. The research found

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⁸¹ Application no. 68416/01 in the European Court of Human Rights.

that the vulnerabilities of litigants in person were more likely than not to compound the legal and procedural challenges of their case (Ministry of Justice, 2014c).

The Justice Committee (2015) was especially concerned about the particular characteristics of some litigants in person, stating that:

We believe, however, that it is of more significance that the rise in litigants in person constitutes at least some people who struggle to effectively present their cases, whether due to inarticulacy, poor education, lack of confidence, learning difficulties or other barriers to successful engagement with the court process. It is vital that the difficulties of such self-represented litigants are at the forefront of the minds of Ministers when developing and implementing measures to assist litigants in person... It is surprising to us that cases involving adults lacking capacity in which the Official Solicitor is involved do not appear to be differentiated from other cases by the Legal Aid Agency. Such cases, by their very nature, concern some of the most vulnerable people in our society, whose impaired understanding means they are barred by law from conducting litigation without assistance.' (p.38)

The Civil Justice Council (2011) made a series of recommendations to try to make courts more accessible to litigants in person in civil cases because, it said, litigants in person faced a system designed for lawyers and which was too complex for people representing themselves. It recommended better organisation of the self-help advice that is already available, a systematic review of the accessibility of court forms, encouraging early case management by judges, and extending the network of Personal Support Units in courts. However, it also sounded a note of caution that 'Even if all the recommendations we make are acted upon, they will not prevent the reality that in many situations, as a result of the reductions and changes in legal aid, there will be a denial of justice. There must be no misunderstanding about this. Put colloquially, the recommendations are about making "the best of a bad job" (p.9).

7.3 The perception that legal aid is no longer available

The recent Justice Committee report (2015) noted that since the LASPO reforms, there has been a significant underspend in the civil legal aid budget.⁸² It suggested that this was because the Ministry of Justice failed to ensure that people who were eligible for legal aid were able to access it. In particular, the Committee noted that there was very low awareness of the telephone gateway and that this was very difficult to find online. The Committee recommended 'that the Ministry of

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⁸² For example, the Committee stated that there has been a shortfall of 85 per cent in the number of cases of debt advice.

Justice undertake a public campaign to combat the widespread impression that legal aid is almost non-existent' (p.11).

The EHRC (2014b) has also suggested that one reason for a shortfall in the take-up of legally aided services may be explained by a mistaken public perception that legal aid is no longer available. The Legal Action Group (2014) has similarly observed that the shortfall in uptake of legal aid post-LASPO suggests that there is a lack of publicity, awareness or understanding as to when legal aid is still available. They commented 'the information which is available does not provide clear guidance to the public about what is covered by legal aid' (p.5).

There is some increased marketing of the telephone gateway as well as a programme by the Ministry of Justice to increase awareness of mediation in family cases. The Ministry of Justice (no date) has published material to publicise mediation which includes leaflets and a video. The Justice Committee (2015) noted that 'since the introduction of the changes, the Ministry of Justice has introduced an online eligibility calculator for providers and a legal aid "checker" (p.11).

8. Funding for advice bodies

In its Mid-term Universal Periodic Review Report, the EHRC noted that the legal aid changes, along with freezes in legal aid rates and increased administrative controls, meant many law firms were ceasing to do legal aid work. It noted that funding for legal advice centres and Law Centres has been significantly reduced or terminated, and Shelter has closed down nine of its advice centres (2014a). Ministry of Justice statistics for 2013-2014 show that since 2007-08, the number of providers of civil legal aid has fallen by 39 per cent (as at the end of the 2013-14 financial year) and that in the last year the number of providers of civil legal aid reduced by 11 per cent compared to the previous year (2014a).

In November 2011, the Government announced a review of not-for-profit advice provision to assess the implications for advice services of changes to the funding landscape and the demand for advice. It noted that local and central Government are the main funders of the sector. For example, in 2011, Citizens Advice Bureaux received around 40 per cent of their income from local authorities and around 30 per cent from central Government.

The Government has acknowledged that reductions in public spending and reforms to legal aid mean that the sector faces new funding challenges. The Advice Services Transition Fund, a Big Lottery Fund programme, provided funding in 2013/14 and 2014/15 to help not-for-profit advice organisations in England to adapt and develop new ways to meet local needs. However, this funding runs out at the end of 2015 (Cabinet Office, 2012).

The Low Commission (2015) recently reported that 'Citizens Advice's statistics for the first three quarters of 2013-2014 showed an 8 per cent drop in the number of clients helped by Citizens Advice Bureaux (approx. 85,500 people) compared with the same period from the previous year and a 15 per cent drop in the number of issues dealt with' (p.20). Genn (2013) noted extensive reductions in staff numbers at advice centres, particularly staff who provided specialist advice (including welfare, debt and employment cases). This means there will be less advice available. The impact of this will be either that people will take no action to enforce their rights, or they will become litigants in person.

In Wales, it is estimated that the overall effect of changes to legal aid will be a reduction of face-to-face sessions from 19,841 to 3,144 a year. This is the equivalent of one-sixth of the previous advice provision (Welsh Government, 2013). Even before recent changes to the law, it was reported that there was a considerable lack of discrimination advice in Wales. There was a lack of information about rights and sources of advice, and a weak infrastructure for delivering advice, support and representation. This meant that there was already considerable unmet legal need in Wales (Williams *et al.*, 2003).

The Welsh Government Advice Services Review (2013) recommended that the Welsh Government invest in measures to help the not-for-profit sector respond to the significant increase in demand for specialist welfare benefit, debt, housing, and discrimination advice. These are required as a result of welfare reform and the ongoing economic downturn).

The Low Commission (2015) has argued that there is unmet legal need, noting that:

- 1. Legal needs studies have continued to suggest that around a third of the population experience civil law related problems.
- 2. Shelter has seen a 40 per cent increase in the numbers of helpline callers seeking help with housing costs, arrears and other debt issues.
- 3. Research from the Money Advice Service shows that only 17 per cent of over-indebted people are currently receiving advice to deal with their debts.

In an interview in *The Law Society Gazette*, Julie Bishop (Director of the Law Centres Network), said that 'across the board, the main thing Centres talk about is having to turn people away who they would have previously been able to help. On average, centres are taking on only one in four of the cases they would have conducted in the past' (Baksi, 2014b, online article).

The Low Commission (2014) noted a concern about impacts on those areas of social welfare law still in scope for funding. This included the viability of the asylum advice sector. This may have a greater impact on people with particular protected characteristics who need to access asylum advice. It commented: 'It has also been highlighted that those in need of immigration advice are often particularly vulnerable due to fear of being removed from the country and therefore can be easily exploited by those offering high cost and low quality advice services' (p.13). Asylum Aid has also expressed concerns about the availability of asylum advice, pointing out that it was common knowledge that funding for immigration work cross-subsidised asylum work. It argued that the loss of this cross-subsidy may threaten the existence of law firms that specialise in asylum (Asylum Aid, no date).

'Advice deserts' have arisen, that is parts of the country where there is an unmet demand for advice.⁸³ The EHRC (2014b) has highlighted that the reduced capacity of advice agencies has had an adverse impact on the number of clients to whom they can give first stage advice. There is a risk that reductions in the number of providers will exacerbate the problem of 'advice deserts' in parts of England and Wales.

The NAO (2014) has commented on the lack of information that the Ministry of Justice has on the network of face-to-face providers. The Ministry also lacks information about the sustainability of the market for legal aid services after the cuts to legal aid. The Legal Aid Agency is said to lack information about whether the face-to-face civil legal aid market is meeting demand. The NAO said that 'it appears that there are areas of the country that do not have any active providers. There is a wide variation in the amount of legal aid-funded work being started across England and Wales' (p.35). The NAO has found that 'in 14 local authorities no face-to-face providers based in the area started any legal aid-funded work during 2013-14. Legal aid providers in a further 39 local authorities started fewer than 49 pieces of legal aid work per 100,000 people' (p.35). It concluded that 'The Ministry does not know whether or not all those eligible for legal aid are able to access it' (p. 35).

The Justice Committee (2015) has criticised the Government for a lack of information about the geographical provision of advice. In its recent report, it noted that its earlier report in 2011 had also made this point, and stated that:

Not only did the Ministry of Justice fail to heed our warning, it has also failed to monitor the impact of the legal aid reforms on the geographical provision of providers. We do not know for certain if there are advice deserts in England and Wales, and nor does the Ministry of Justice. This work needs to be carried out immediately because once capacity and expertise are lost the Ministry of Justice will find it difficult, and potentially expensive, to restore them. In some areas it may already be too late. (p.35)

The specific impact on homeless people of a lack of advice provision has been considered. One respondent to a survey on the impact of cuts to civil legal aid on practitioners and their clients said 'The country has for years now had "advice deserts"; these can be expected to expand rapidly. There will be little if any help for the most disadvantaged when they are adversely affected by unlawful decisions of Local Authorities and Benefits Agencies. The homeless will find it particularly difficult to find expert advice' (Byrom, 2013, p.23).

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⁸³ These are not necessarily new, for example, they were highlighted in a report about advice provision in Wales in 2003 (Williams *et al.*, 2003).

There are also advice deserts in relation to discrimination law. The Law Centres Network (2014) said that discrimination advice continues to diminish at a notable rate. This means that people in some parts of the UK are unable to access legal advice and representation on discrimination issues (the telephone gateway was not specifically mentioned in this particular report).

There may be a particular impact on ethnic minority women. A report on the impact of changes in advice provision (on women in Coventry) stated that having to travel further for advice is likely to impact detrimentally on ethnic minority women. It said they 'may have particular requirements which dictate their choice of legal adviser; for example needing to access a provider within or outside of their own community for cultural reasons' (Sandhu *et al.*, 2013).

9. Gaps in evidence

This section sets out some of the gaps in evidence about the impact of recent changes to civil law justice on equality and human rights. It is worth noting that many organisations that would be well-placed to collect such evidence may currently be facing resource constraints: this is likely to have implications for the type and extent of monitoring activity that they are able to undertake (Low Commission, 2014).

There has been speculation as to why legal aid which is still in scope appears to be underutilised. The reason for this is still unknown but it may be linked to the perception that legal aid is no longer available (EHRC, 2014b). It is not clear what has happened to the large numbers of people who were expected to access legal aid (where it remains in scope), but who did not. This is particularly relevant in discrimination cases.

It is unclear what has happened to the large numbers of people whose cases are now out of scope for legal aid. It is evident that there are more litigants in person than prior to the various reforms, and also that advice centres are overwhelmed. However, the number of people who choose not to pursue cases or turn to alternative dispute resolution is not known. It would be useful to have statistics from the Legal Aid Agency showing legal aid granted by sector (for example, housing), broken down by protected characteristic.

With the exception of the statistics relating to applications made to employment tribunals, there was no evidence identified about the impact of reforms on people with a number of particular protected characteristics. These are: gender reassignment; marriage and civil partnership; religion or belief; and sexual orientation. Analysis of employment tribunal research (carried out by the Department for Business, Innovation and Skills) would be useful.

With regard to employment tribunals, the Government asserts that fee remission is available to people who cannot afford fees. Fee remission does appear to be relatively generous, with partial remission available up to a fairly high level of income. However, there appears to be no research into how effectively this system operates, or how often fee remission claims are made and granted.

Further information would be useful about the exposure of claimants in discrimination claims in the County Court to the risk of paying a winning defendant's costs. In particular, how does this affect claimant behaviour?

Relatively little evidence was identified about the impacts on people with particular protected characteristics and on human rights of changes to judicial review. Some of these changes are not yet in force (that is certain provisions in the Criminal Justice and Courts Act 2015). There is an absence of information from the Legal Aid Agency as to whether lawyers are being paid on a discretionary basis where the court does not grant permission to proceed with judicial review claims.

There was little literature available about the increase in the small claims limit from £5,000 to £10,000. This may be particularly relevant in debt cases.

Although mediation can be beneficial in many cases, it has been suggested that it is unsuitable in family cases where a power imbalance exists (see section 4.5). This concern may be particularly relevant to some ethnic minority families where mediation might have an adverse impact on women. More research is needed on this matter, however.

Swift *et al.* (2013) have identified a need for research into the impact of legal aid on people with learning disabilities. The Public Accounts Committee (2015) has called for research to be conducted in to the wider effects of changes to the law, including on people's health.

As a general observation, there is a lack of consistency in keeping and/or publishing details of the protected characteristics of individuals for legal aid applications and for different categories of court claims. For example, information from the Legal Services Commission was available about the protected characteristics of applicants for certain categories of case. However, no such information is available from the Legal Aid Agency.

10. Conclusions

In the chapters above, the literature review identified the reported evidence on the equality and human rights impacts of recent changes to civil justice.

10.1 Impact on protected characteristics

The literature reviewed indicates impacts on disabled people, ethnic minorities and women in particular. No evidence of impacts on the protected characteristics of gender reassignment or marriage and civil partnership was found, and little evidence in relation to the protected characteristics of age, religion or belief, or sexual orientation was identified.

In discrimination claims, which can potentially affect people with each of the protected characteristics, the evidence of the potential impact of recent changes to civil law justice is as follows:

- 1. In employment tribunals, every category of discrimination has seen a fall in the number of cases since the introduction of fees. (There are no figures on discrimination cases on the grounds of marriage and civil partnership.)
- 2. Take-up of the publicly funded advice and assistance available for discrimination cases (through the mandatory telephone gateway) has been much lower than expected.
- CFAs and damages based agreements are not a viable means of funding discrimination
 cases in County Courts. Without use of CFAs or access to legal aid, people with protected
 characteristics who may have a claim for discrimination could struggle to make a County
 Court claim.

10.1.1 Disability

The literature review has shown a considerable number of reported impacts of the legal changes on disabled people. This includes reported impacts on disabled people generally and also more specifically on people with learning disabilities. There is a particular impact in discrimination cases, especially on people with learning difficulties. In housing and community care cases, statistics show that the people affected are more likely to be disabled. In immigration law, there is some evidence that there is an impact on people with learning disabilities and mental health conditions.

A number of sources (cited above) stated that the reforms to legal aid for welfare benefits will have a disproportionate impact on disabled people, and this seems to be a particularly serious impact for this group. There are also some impacts in the areas of debt and clinical negligence law.

Disability discrimination claims have dropped by 63 per cent since the introduction of fees to employment tribunals. It is believed that the introduction of fees for all cases has had the effect of putting people off bringing valid employment tribunal claims.

10.1.2 Race

Based on the available evidence, in relation to race (a protected characteristic which includes nationality) the largest impact is reported to be in immigration law, now mostly excluded from the scope of legal aid. This review has noted particular impacts in refugee family reunion cases, and for people who are removed or detained without their families. In housing law, statistics show that ethnic minorities are more likely to be affected, and there are also impacts on Gypsies and Travellers. In discrimination cases, there is a suggestion of impacts on people with English as an additional language, and there may be a similar impact in welfare benefits cases.

The literature available suggested that the proposed residence test would have a considerable impact on non-British nationals, and thus in relation to the characteristic of race. This may include impacts on refugees, asylum seekers and migrants. It may also have an adverse impact on foreign nationals whose rights have been breached by the State. The changes to the availability of judicial review will also have an impact on Gypsies and Travellers in the context of planning law.

The number of race discrimination cases has dropped by 61 per cent as a result of the introduction of fees in employment tribunals.

It has also been suggested that ethnic minority tribunal applicants find it more difficult to represent themselves as litigants in person during proceedings.

10.1.3 Religion or belief

A limited number of commentators (cited above) have said that some changes will impact on people with the protected characteristic of religion or belief. Commentators tend to merge this with the protected characteristic of race. Discrimination claims relating to religion or belief have dropped by 61 per cent since the introduction of fees in employment tribunals.

10.1.4 Age

Overall, there is not much evidence of disproportionate impacts on people from particular age groups as a result of the reforms.

There is some limited evidence that there may be an impact on older people in housing cases, as older people are more likely to be living in poor conditions.

There is some, again limited, evidence that the judicial review reforms will have adverse impacts on young people.

Age discrimination claims have dropped by 37 per cent since the introduction of fees in employment tribunals.

10.1.5 Sex

The evidence available demonstrated that there are impacts on women in housing law, as statistics show that housing clients are more likely to be female than the adult population as a whole.

There are also important reported impacts in family law. This is the case with women experiencing domestic violence, who will be affected by the strict evidence requirements to qualify for legal aid. These women have been said to be among those who are worst affected by the changes to legal aid. There are also concerns that the requirement to mediate in family law has a disproportionate impact on women where there might be a power imbalance between the parties to the dispute.

There is some evidence that the proposed residence test, if implemented, may have an adverse impact on certain women who are victims of trafficking. Although the residence test would not apply to established victims of trafficking, there is no exemption for cases where the status of the person is contested, or for legitimate challenges to failure to prosecute or investigate.

A considerable number of sources indicate adverse impacts on women because of the introduction of fees in employment tribunals, in both equal pay and sex discrimination claims. It has been said that women have been the 'principal losers' since the introduction of fees. Sex discrimination claims in employment tribunals dropped by 91 per cent and equal pay claims by 75 per cent since the introduction of fees in employment tribunals.

There is some reported evidence that the changes in legal aid will have an adverse impact on older women and ethnic minority women.

10.1.6 Pregnancy and maternity

There is a reported impact on people with the protected characteristic of pregnancy and maternity because of the introduction of fees in employment tribunals, which makes it harder to challenge cases of pregnancy and maternity discrimination. Pregnancy and maternity claims in employment tribunals have dropped by 47 per cent since the introduction of fees in employment tribunals.

10.1.7 Sexual orientation

There is some limited evidence that there is an impact related to this protected characteristic because of the introduction of fees in employment tribunals. Discrimination cases relating to sexual orientation have dropped by 66 per cent.

10.2 Impact on human rights

10.2.1 Article 6 of the ECHR

There are widespread concerns that changes to the law have had an adverse impact on access to justice, and this raises issues about the UK's compliance with Article 6 of the ECHR (right to a fair trial). This report sets out circumstances where the denial of access to justice on a civil law matter may be so serious that it could amount to a breach of Article 6.

In relation to family law, it has been argued that the case of *Airey v Ireland*⁸⁴ made it clear that this was an area where legal aid may be required to comply with Article 6. This is partly because the parties are emotionally involved in the case. Consideration should also be given to the particular facts and circumstances of each case. This includes the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

In family law, human rights impacts were also found for people with conditions affecting mental health or mental capacity. This could give rise to Article 6 issues if people are not able to represent themselves. In the case of *In the matter of D (a child)*,⁸⁵ which involved two parents with learning disabilities who faced the local authority removing their child from the home, the Court said that to deny legal aid would involve a breach of both Article 6 and Article 8 of the ECHR.

The EHRC (2014a) has stated that the changes could have an adverse impact on individuals' ability to obtain redress for breaches of their rights under the ECHR, and that they generally risk

[∞] [2014] EWFC 39.

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⁸⁴ (1979-80) 2 EHRR 305 in the European Court of Human Rights.

undermining Article 6 rights. It points out that cases involving Article 6 rights may be linked to redress for human rights breaches under other Articles of the Convention.

Restricting legal aid to judicial review cases in which permission has been granted has been criticised as a potential breach of Article 6. There have been similar criticisms of the changes which will reform the threshold test for permission being granted for judicial reviews based on procedural defects.

10.2.2 Article 8 of the ECHR

Article 8 (right to respect for private and family life) also contains procedural protections that are similar to those under Article 6. Article 8 is relevant to family reunion and deportation cases. The Court of Appeal in the *Gudanaviciene* case recognised these procedural aspects of Article 8 in relation to immigration, with the result that legal aid might sometimes be required.

Family law is another area where there are adverse impacts on access to justice for human rights breaches. The lack of legal aid for private family cases has been noted as a significant impact of LASPO. The courts⁸⁶ have also raised concerns about the lack of legal aid funding in family cases, which might engage Articles 6 and 8 in certain circumstances.

Breaches of Article 8 can also arise in housing cases. It has been argued that failing to give resources for early intervention in housing cases could potentially have human rights implications later on.

10.2.3 Other rights under the ECHR

Issues relating to Article 14 (enjoyment of other ECHR rights without discrimination) may arise in relation to Article 6. Article 1 of Protocol 1 (the protection of property) may also be relevant to welfare benefits cases.

10.2.4 Human rights of children

Many of the reforms have had a reported adverse impact on children, who have rights under the United Nations Convention on the Rights of the Child and other human rights instruments. A report by the Office of the Children's Commissioner assessed the impact of the changes on children and stated that:

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⁸⁶ In Q v Q [2014] EWFC 7 and In the matter of D (a child) [2014] EWFC 39.

the responses of interviewees and the details of their cases together suggest that inability to access legal advice, legal help and/or legal representation due to the withdrawal of legal aid would have an impact on a range of substantive rights protected under the UN Convention on the Rights of the Child (UNCRC) and other instruments. (Carter, 2014, p.40)

The findings of this report were that:

issues that were resolved through litigation had a range of negative impacts on young people and their substantive rights. Interviewees reported negative impacts that were directly associated with the issue for which they required support as well as secondary impacts that arose as a result of those issues. Impacts included: homelessness and destitution; lack of education; family breakdown; reduced emotional and mental wellbeing; and reduced safety. (Carter, 2014, p.39)

Changes to legal aid in immigration cases may have a disproportionate impact on children. Lone or unaccompanied child migrants and families separated by immigration detention may be particularly affected.

It has been argued that the proposed residence test would breach a number of provisions of the United Nations Convention on the Rights of the Child. For example, the Joint Committee on Human Rights (2014a) pointed out that children cannot be expected to represent themselves in proceedings. The Children's Society (2013) has noted a number of categories of children who could be affected, for example, unaccompanied migrant children.

10.2.5 Other human rights instruments

The Court in R (on the application of Gudanaviciene & Ors) v Director of Legal Aid Casework⁸⁷ found that the Legal Aid Agency's ECF guidance was incompatible with Article 47 of the Charter of Fundamental Rights of the European Union (right to an effective remedy and to a fair trial). In discrimination cases, there may be breaches of the United Nations Convention on the Rights of Persons with Disabilities, in particular of Article 5 (equality and non-discrimination), and in immigration cases, it has been argued that the changes to legal aid create a risk of breaching the Council of Europe Convention on Trafficking in Human Beings.

10.3 Key findings

 As the changes are relatively recent, evidence is limited in some places. There is a particular lack of relevant statistics and consequential analysis of this.

^{87 [2014]} EWCA Civ 1622.

- Where sources expressed a view on the equality and human rights impacts of recent changes to civil law justice, the majority of these views made criticisms and identified a range of actual or potential adverse impacts.
- Some findings from the literature review showed particular impacts on disabled people, women and people from ethnic minorities.
- There has been significantly less demand for legal aid for discrimination claims than the Government predicted.
- There has been a large drop in all categories of discrimination claims in employment tribunals.
 There are also problems in bringing discrimination claims in the County Court, as claimants have no viable way to protect themselves against paying for a winning defendant's costs for claims above the small claims limit.
- There is a clear risk that, in some cases, being unable to access legal advice and
 representation may amount to a breach of Article 6 ECHR (right to a fair trial). Some people
 seeking redress under Article 8 of the ECHR (right to respect for private and family life) for
 family, housing or immigration issues have experienced more difficulty following the
 introduction of LASPO.
- There have been reported problems with the implementation of the ECF scheme. It should be available to prevent people whose human rights may be breached from having to represent themselves in person. The scheme has been described as 'largely theoretical'.
- Because of the recent changes, children are particularly at risk of breaches of their rights under the United Nations Convention on the Rights of the Child. Similarly, disabled people may experience breaches of their rights under the United Nations Conventions Rights of Persons with Disability, in particular Article 5.

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