

## **Legal Aid at 70**

**Legal Action Group, London**

**Lady Hale, President of the Supreme Court**

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Legal aid at 70? Oh dear, threescore years and ten. In the words of psalm 90:

‘The days of our years are threescore years and ten;  
And if by reason of strength, they be fourscore years,  
Yet is their strength labour and sorrow;  
For it is soon cut off and we fly away.’

As one who has already passed her threescore years and ten, that resonates with me. Might it be that we have enjoyed the heyday of legal aid, growing and developing in many ways until it reached middle age in the 1990s, since when it has been steadily declining, in eligibility, in scope and in what it pays the lawyers who still take part in it? Will it indeed, fly away altogether in another ten years?

Surely not, but we do need to take stock. There have been many casualties of LASPO, but private family law is amongst the most severe (perhaps because it had enjoyed comparatively good public funding from its earliest days). Last year, the Nuffield Foundation, which has funded so much valuable research and experiment in access to justice and in child protection and family law, celebrated its 75<sup>th</sup> birthday. Thinking about what work they might most valuably do now, I developed an imaginary, but not improbable, scenario of one family’s problems. It went like this.

I come from the small town of Richmond in North Yorkshire, the market town for Swaledale, the most northerly of the Yorkshire dales, a beautiful place but with pockets of very real deprivation. It is next door to Catterick Garrison, the largest army base in the country. Imagine, therefore, a young woman married to a soldier who suffers from post-traumatic stress disorder as a result of his experiences in Iraq and Afghanistan. They have three young children. They live in a nearby village. The young mother has no car and no computer, no wider family living nearby and little social support. The young man becomes violent towards her and she fears for the effect upon her children. The social workers tell her that if she cannot protect the children from the effect of his violence, they will have to bring care proceedings.

What does she need? First of all, she needs some reliable information about what remedies are available to her and some independent advice about which to choose – information is not enough. Then she needs a way to separate from her husband in the short term and in the longer term she needs a divorce. She needs either to persuade Richmondshire District Council to rehouse her and the children or to get an occupation order to exclude him from the home. In either event she needs a non-molestation order to prevent his harassing her and the children. She needs a child arrangements order to secure her care of the children and regulate his contact with them.

In the olden days, she might have made her way down into Richmond and found a solicitor who could offer her a comprehensive service dealing with all her problems. Now she's not so sure of that, so she goes into the local library – thankfully still there, at least for the time being – and tries to make some inquiries. It is relatively straightforward to find the way to apply online for a divorce (<https://www.gov.uk/divorce/file-for-divorce>). The website explains jurisdiction in simple terms and then what it calls the grounds for divorce – still incidentally falling into the 'linguistic trap' of calling fact (b) 'unreasonable behaviour'. It tells you that it costs £550 to apply on line or by post for a divorce. It doesn't have a link to explain how to claim exemption from the fee. You have to create an account to go on. This requires you to put in an email address. What if you don't have one?

It does direct her to the website dealing with child arrangements (<https://www.gov.uk/looking-after-children-divorce/apply-for-court-order>). This explains that you can agree arrangements. It mentions but doesn't push mediation and says that you can use a solicitor if you want to make your agreement legally binding. The section on making an application tells her that the court fee is £215 and that she might be able to get help. It also points out that she'll have to attend a MIAMs first. There's a link to a long guide on what orders the court can make and how to go about getting them – but unless I've missed it, the one thing it doesn't say is that the welfare of the child is the paramount consideration or explain what the court will be looking for in deciding that, i.e. the checklist - exactly what lawyers and mediators tell us they find useful in getting their clients to focus on their children rather than themselves. The guide gets pretty technical by the end, but the main message is not there. HMCTS are piloting on-line child arrangements applications, but not in North Yorkshire.

The divorce website also directs her to the website dealing with financial arrangements (<https://www.gov.uk/money-property-when-relationship-ends>), which is very similar.

Both of these also say that ‘you will not usually get legal aid to help with court costs unless you are separating from an abusive partner’ with a link to <https://www.gov.uk/legal-aid/domestic-abuse-or-violence>. This explains that ‘You might be able to get legal aid if you have evidence that you or your children have been victims of domestic abuse or violence and you cannot afford to pay legal costs’. It lists the evidence required and provides specimen letters which she could ask, for example, the social service workers to fill in. But that link is all about how to get legal aid. It doesn’t tell you what the remedies available in cases of domestic violence or abuse are. There is a government website: <https://www.gov.uk/guidance/domestic-abuse-how-to-get-help>. But this is a Home Office, not an MoJ or HMCTS website, so although it talks about getting help from the police or immigration authorities it doesn’t mention the civil remedies available.

Having ploughed through all of this, she may pluck up courage to get a letter from social services so that she can go to a solicitor – supposing there is one in Richmond willing to take her case (I think there is). But where can she bring proceedings? The nearest magistrates’ court is in Northallerton, 15 miles from Richmond with a very limited bus service. It is threatened with closure and the transfer of work to Harrogate, 40 miles from Richmond with no obvious way to get there, or Middlesbrough, which involves getting a bus to Darlington and a train from there. The nearest county court is also in Middlesbrough. If she does get legal aid for her anti-molestation application, her partner may not, and she may face being cross-examined by him in person. So, she feels defeated by the problems of going for a non-molestation order. If social services eventually bring care proceedings, she will have to go to Middlesbrough anyway, but at least she should get legal aid to defend those. The local press wants to report the proceedings, because they are particularly interested in the problems faced by soldiers traumatised by their wartime experiences.

I tried all of this because it seems fairly clear from the government’s recent review of LASPO that their ‘future direction must be focussed on supporting early resolution of people’s legal problems by embracing new technology and thinking innovatively about how we can improve services for people across England and Wales’ (Ministry of Justice, *Post-implementation Review of Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO)*, para 9). They have been bombarded with the message that people need support early on in their legal problems

rather than waiting for the crisis to happen which might qualify them for publicly funded legal services. So at least they're looking into whether this is correct.

But when they talk of support, in *Legal Support: The Way Ahead* (CP 40, February 2019) they mean 'the totality of support available to people from information, guidance and signposting at one end of the spectrum to legal advice and representation at the other' (p 5). They do acknowledge that 'professional legal advice and representation has an important role to play in supporting people resolve their legal problems'. They also think, however, that 'there may be circumstances when there may be other effective ways to support someone at early stages' (p 18). So, 'focussing funding on legal aid alone means opportunities may be missed to support people to resolve legal problems sooner and reduce conflict, stress and cost' (p 18). Perhaps they haven't yet grasped that that's what lawyers – especially family lawyers do. All the research tells us that they calm things down, negotiate with the other side and settle things in the great majority of cases. But at least the MoJ are going to 'proactively test, pilot and research the provision of legal support in a modern justice system' (p 20). And they're going to enhance support for litigants in person and improve their court processes, using 'nudge techniques' to help divert people away from the court system.

It may have been thought in 2012 that removing access to lawyers in family matters would discourage the use of courts – hence public funding is still available for family mediation and for lawyers to support it. But instead there has been a near-collapse in the use of family mediation. Many 'not-for-profit' services have had to close and I don't know how much work the 'for-profit' mediators are getting. This was all quite foreseeable at the time. Most referrals to mediation come from lawyers. If litigants don't go to lawyers because they can't get public funding, then they're not going to go to mediators. They're going to go to court. The explosion of family cases and the explosion of family litigants in person are no surprise.

But the government cannot be expected to restore family legal services to what they were before LASPO. What has been given up cannot readily be got back. So, they do deserve credit for trying to make the best of what many here will see as a bad job, by stream-lining court processes, making them easier to navigate by litigants in person and encouraging other forms of 'legal support'. I believe that the Secretary of State does understand the problems and his department is trying to think creatively about them.

The family justice system has always benefited from a great deal of socio-legal research. Two of the leaders in the field are Mavis Maclean and John Eekelaar, of the Oxford Centre for Family Law and Policy. They are about to launch their book, *After the Act, Access to Family Justice after LASPO* (Hart, 2019). In this they ‘try to put together a picture of the various attempts being made to fill the LASPO gap’.

They were encouraged by the government’s efforts to provide information and develop on-line court processes. But information by itself is not enough. People do need someone to help them to decide what to do – a ‘trusted intermediary’. The professions have done a lot - lawyers’ pro bono work has been increasing. But this is always going to be limited, by the number of hours available, by the difficulties of matching the expertise of those offering their services free with what the clients need, and by the pro bono pattern of working, which does not offer full end-to-end casework. It remains ‘far from filling the LASPO gap’.

This means that others have stepped in to fill the gap. There are McKenzie Friends, who can be extremely helpful, but are now turning themselves into an unregulated fee-charging service, which must raise serious questions about whether and how they might be regulated. There is also the PSU, the Personal Support Unit, of which I am a patron. The support they offered was originally moral and emotional support. But they do now provide information to their clients. But, as with mediation, they draw a distinction between supplying information and giving advice. This is not an easy distinction to draw and many would like them to go further. But that would of course bring its own problems.

Then there are all these University based student law clinics which are springing up everywhere. These are obviously a good thing, but the motivations are mixed – providing good and useful experience for the students involved is not the same as offering a full legal service to the clients. The models are very varied, but they mostly just offer preliminary advice rather than undertaking to conduct their cases, although some do that. Careful supervision is obviously required.

And then there is the advice sector, which didn’t have to do much about family law while legal aid was available but is now also having to deal with family cases. At least it may not agonise as much as others do about the difference between advice and information. It is, after all, the advice sector, but there is a difference between advice and legal advice.

It all adds up to a very patchy picture – patchy in geography, personnel and the level of service offered. Developments in on line information and filing may help to iron out the geographical differences. They have to be a good thing if they're done well. But, like so many of the other ways of trying to fill the LASPO gap, they do not make up for the lack of properly informed advice from a skilled person (I agree not necessarily a lawyer) who can not only give you advice as well as information but can then set about doing something concrete to help – writing the letters, making the phone calls, filling in the court forms, which people like my young mother in Yorkshire need.

Of course, family justice is not the only sector to have suffered as a result of LASPO. But we should not be too down-hearted. Our law is in a constant state of development, as it tries to adapt to new problems and new social conditions. My court plays a vital part in that, as we only deal in arguable points of law of general public importance. Very important cases are still being brought before us with the help of legal aid. We noticed that you were having a pitch for the greatest legal aid case of all time. So, we looked for the most important cases in the Supreme Court – those which had had an enlarged panel of seven or nine – where a party had been legally aided.

Some of those which you might expect to have been legally aided were not – like the important cases brought by foreign citizens as a result of the military operations in Iraq and Afghanistan (*Rahmatullah v Ministry of Defence* [2017] UKSC 1, [2017] AC 649; *Al-Waheed v Ministry of Defence*; *Mohammed v Secretary of State for Defence* [2017] UKSC 2, [2017] AC 821; *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964). Some of those which you might expect to have both an enlarged panel and public funding had neither – like the case brought by Unison to challenge the imposition of employment tribunal fees (*R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409). But I can think of at least two notable victories won by legally aided clients in the Supreme Court which will have made a difference to a great many people other than them. No doubt there are many, many more for you to debate this afternoon.

*Cheshire West* (*Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896) was about whether mentally disabled people living in various community settings were being deprived of their liberty within the meaning of article 5 of the European Convention on Human Rights and thus required safeguards to check whether their detention was lawful in their own best interests. We held that the 'acid test' was whether they were under continuous supervision and control and

not free to leave: if so, the fact that their living conditions were as near to normal as they could be was neither here nor there. They were entitled to the same protection against deprivation of liberty as anyone else. Anything else would be to discriminate against them on the ground of their disability. The decision has caused all sorts of practical problems, but I still think that it was right.

*Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430, has no doubt also caused practical problems. We held that doctors had to give their patients the information that they needed in order to make an informed decision about what medical treatment to have (or not to have). This was not a matter governed by the *Bolam* test of what a reasonable body of medical opinion would support. It was not a matter of medical opinion at all. It was a question of the patient's right to choose what happened to her own body. So, what mattered was what she would want to know, not what the doctors wanted to tell her.

Both of these were cases which could not have been brought without some form of public funding. They were factually and legally complex. The parties could not have been expected to do it for themselves. Both of them vindicated the rights to freedom and autonomy which are the most basic fundamental rights protected by our law and our constitution. If we lose the possibility of the poorest and most vulnerable members of our society protecting those rights, then we are all lost. The message must be that there is still a vital role for publicly funded legal services to play in our legal system.