

## Priority areas of law

### Introduction

The Legal Services Board's (LSB) Business Plan for 2015/16 details several potentially wide-ranging projects aimed at enabling demand for legal services to be met. Some of these are either in their early stages, or are new areas of work for the LSB, and it seems likely that a number of them will continue into the 2016/17 business plan period. Given these factors, the LSB has commissioned the Panel as follows:

*“Which areas of law should be the priorities for the LSB’s work on enabling the demand for legal services to be met?”*

The Panel's advice in response to this commission is likely to influence the LSB projects on understanding affordability, supporting increased accessibility, and helping consumers to make informed choices. It may also be a useful input to the LSB's likely on-going projects on understanding different types of providers (including unregulated providers) and emerging market risks.

The commission asks the Panel to focus on unmet need. In this context we have considered evidence relating to the impact of changes in the availability of legal aid. However our primary focus has been on how the market is responding and to then consider whether there is or could be a regulatory response. Where appropriate we have therefore included specific suggestions for the Legal Services Board to consider.

### Methodology

#### *Stage 1: Call for evidence*

In order to gain an understanding of the issues currently at hand, the Panel issued a call for evidence on 16 December 2015<sup>1</sup>. This invited organisations and interested parties to respond with information relating to areas of consumer detriment, areas of law, or groups of consumers that might benefit from further research with regard to affordability, accessibility and/or information deficiencies. These areas align with our consumer principles of access and information, but this report is viewed through the lens of all of the principles.<sup>2</sup>

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<sup>1</sup> <http://www.legalservicesconsumerpanel.org.uk/ourwork/documents/CallForEvidence.pdf>

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<http://www.legalservicesconsumerpanel.org.uk/ourwork/ConsumerEngagement/documents/UsingConsumerPrinciples2014.pdf>

### *Stage 2: Desk research*

The Panel looked at annual reports from some of the leading legal advice charities and foundations<sup>3</sup>. We also looked at trends in the Legal Ombudsman's data, and used all the information to identify areas of highest demand from people who are unable to purchase legal advice or representation.

In our research we were mindful that in some areas, such as criminal law and mental health advice, the lack of obvious demand for services may itself be an indicator of unmet need and therefore worthy of further research. However given the limited resources available for this project and clear evidence suggesting need in the three high-demand areas, it was not appropriate to pursue this line at this time.

### *Stage 3: Analysis using agreed criteria*

In order to effectively prioritise the areas identified, the Panel devised four criteria:

1. Is it an area in which further work will have a high impact?
2. Does it feature issues of affordability, accessibility and/or information asymmetry?
3. Has there been a recent policy change in the area?
4. Could regulatory intervention address issues relating to affordability, accessibility and/or information asymmetry?

Adding to this, the Panel considered the effects on more vulnerable consumers that may make the area more or less in need of prioritising. Here we are mindful that the organisations we consulted tended to deal with those consumers vulnerable enough to seek free advice and representation<sup>4</sup>.

In its selection of priority areas, the Panel was mindful of the current realities and the ability of the Legal Services Board (LSB) to effect change in any recommended areas through regulation.

Based on the information gathered by our research methods, the following areas best met the Panel's criteria:

- Family and relationships
- Housing
- Asylum and Immigration

### *Stage 4: Follow up desk research and engagement with relevant organisations*

Having identified three areas, we went on to engage with leading organisations within each area to gather more detailed information and explore the wider issues.

The responses to the call for evidence, listed in annex A, also prompted further desk research into the main areas of demand and added information on specific groups of consumers. This additional desk research identified the impacts on vulnerable consumers in these areas and how their vulnerabilities can be exacerbated.

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<sup>3</sup> The reports looked at came from: LawWorks Clinics Network, Personal Support Unit, Law Centres Network and Citizens Advice

<sup>4</sup> See annex B for further information

## Family and relationships

### *Evidence of demand*

LawWorks<sup>5</sup> cited a 150% increase in demand for advice relating to family law in 2015, and around half of all cases the Personal Support Unit<sup>6</sup> (PSU) saw during the same period related to this area also. In 2014/15 Citizens Advice saw 284,000 requests for assistance in this area at its bureaux, and a further 4 million hits on its online Adviceguide pages. It is the Legal Ombudsman's (LeO) second most complained about area, though LeO suspects a continued decline may be a consequence of legal aid cuts, with fewer people able to access a lawyer. LeO are planning further research in this area.

### *Recent policy changes*

Changes to the availability of legal aid introduced under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) have had an impact on families and couples seeking legal advice and representation. Although cases involving certain types of documentary evidence of domestic abuse remain in scope<sup>7</sup>, LASPO has meant that most private law children and family cases are now out of scope. According to the National Audit Office, there has been a 22% increase in cases involving contact with children in which neither party was represented, and a 30% increase across all family court cases in which neither party had legal representation.

Figures from the Children and Family Court Advisory and Support Service (Cafcass), which relate to family law disputes involving children, show that before the changes 60% of cases began with one party being represented, 22% with both parties represented, and 18% with neither party represented. By December 2013, only 4% of cases started with both parties represented and 42% with neither party represented. The report suggests that the legal aid changes resulted in more cases being contested, with a 27% rise in applications relating to access and custody, and lawyer-free cases taking longer.<sup>8</sup>

However, changes in the provision of legal aid should not be left to result in a lack of access to legal services in the long term. The question now is whether the market can adapt to fill the gaps. For example, firms might consider offering paralegal services, a lower cost alternative, or unbundled services for would be litigants in person. Research carried out for the Ministry of Justice on litigants in person, in the family courts, found that where reasons for self-representation were known, approximately half were due to cost alone<sup>9</sup>. It is also telling that over a quarter of all the complaints relating to family law seen by the Legal Ombudsman in 2014-15, related to costs being excessive, or cost

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<sup>5</sup> LawWorks is a charity working in England and Wales to connect volunteer lawyers with people in need of legal advice, who are not eligible for legal aid and cannot afford to pay and with the not for profit organisations that support them.

<sup>6</sup> The Personal Support Unit (PSU) helps litigants in person, their friends and families, witnesses, victims and inexperienced court users.

<sup>7</sup> This scope looks set to be broadened after the regulations which set out the documentary evidence were recently found to be unlawful after a successful campaign led by Rights for Women, see:

<http://rightsofwomen.org.uk/news/evidence-tests-for-domestic-violence-are-unlawful-says-court-of-appeal/>

<sup>8</sup>

<https://www.napo.org.uk/sites/default/files/The%20Impact%20of%20Legal%20Aid%20Cuts%20on%20Family%20Justice.pdf>

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf)

information being deficient. As court fees continue to rise, this problem will only be exacerbated.<sup>10</sup>

### *Mediation*

Legal aid does remain for family mediation, and changes in legislation during April 2014 mean that most divorcing couples must now attend a mediation assessment before a matter can go to court. However, contrary to expectations of more separating couples choosing mediation to resolve family disputes, publicly funded mediation figures have fallen.

Between April and November 2013, the total number of family mediation starts in England and Wales fell by over a third (36%), compared to the same period in 2012. There were 665 mediation starts in November 2013 compared with 1,173 in November 2012, a 57% drop.

Commentators have suggested that because separating couples are told legal aid for family cases is no longer available, they pursue cases without seeking legal advice and thus miss out on information about the opportunity to mediate, which would typically come from solicitors. This is an area where better targeted information could be beneficial in encouraging take-up of services. We would also like to see further research to identify why the current system sees such low take-up and whether there is value in encouraging use. The Panel recognises that mediation may not be the answer for every couple, but work could be done on identifying who is most likely to benefit, and how to engage them.

Resolution, an organisation of family lawyers, highlighted the value of mediation in their Family Matters project. The project involved creating guides, providing legal information (not advice), and working with parents to help them reach agreement and to deal with their legal, emotional and practical difficulties in a holistic way. Often this meant referring to other support services for elements such as financial or housing advice, which was better provided by specialists<sup>11</sup>. This project highlighted where a solicitor mediator acting neutrally for both parties could carry out (for example) drafting of consent orders, rather than referring the work to a separate solicitor. This flexibility needs to be supported by the frontline regulators, as ultimately it relies on there being appropriate regulatory guidance and support to navigate new methods of service delivery.

### *Further regulatory considerations:*

- How can the Approved Regulators be encouraged to promote price transparency in Family law?
- Could the Approved Regulators explore the regulatory barriers to, and facilitators of, widening the range of cases offered on a fixed fee basis?

## **Housing**

### *Evidence of demand*

Housing law advice was the second most demanded service from LawWorks in 2015, which saw an increase of 64% on the previous year, and it was the third highest for the Personal Support Unit. Housing encompasses issues such as possession of a rented home, unlawful eviction, disrepair, homelessness, and accommodation and support for

<sup>10</sup> The cost of obtaining a divorce rose by 34% in March 2016 from £410 to £550

<sup>11</sup> [http://www.resolution.org.uk/site\\_content\\_files/files/family\\_matters\\_research\\_final.pdf](http://www.resolution.org.uk/site_content_files/files/family_matters_research_final.pdf)

asylum-seekers. According to research from Shelter, the housing and homelessness charity, around 1.1 million people each year experience some form of civil legal housing problem<sup>12</sup>.

### *Recent policy changes*

After LASPO was introduced, around 60% of housing cases remained within scope for legal aid, but only where a person's home is at 'immediate risk, (such as possession hearings) or where housing disrepair poses a serious threat to health. Changes in the availability of legal aid have also impacted the number of specialists operating in the field. Housing law is a complicated area, in part due to an increasing divergence between English and Welsh law. A shrinking pool of lawyers therefore increasingly presents challenges particularly in less populated areas, for example in rural Wales.<sup>13</sup>

The most common housing problems relate to the disrepair of rented properties and eviction. Civil legal housing problems are also identified in the homeowner sector, but to a lesser degree. The incidence of housing problems is not uniform across all groups. In particular the groups most likely to experience housing problems are private renters, public sector renters, lone parents, and people with mental health issues. Problems are also disproportionately experienced by people on low incomes and younger people. Children under 18, and young adults whose capacity is restricted because of learning disability or mental ill health, cannot be expected to navigate complex legal processes. In many cases they will require the assistance of a lawyer (rather than a parent, litigation friend or non-legal advocate) to effectively participate in proceedings which affect them. In those circumstances, legal advice, assistance and representation are necessary in order for them to exercise their rights effectively in a wide range of circumstances.<sup>14</sup>

Age UK has raised concerns about vulnerable elderly people who are victims of discrimination or illegal treatment. They may not be able to access the justice system, either due to legal fees or cultural barriers. Age UK also cites evidence published by the Equality and Human Rights Commission that there may be a disproportionate need for housing law advice, as older people are more likely to be living in poorer conditions.

In addition to age-related vulnerabilities, it has been shown that black and minority ethnic (BME) communities face significant barriers to accessing advice on housing issues, despite being twice as likely as white British households to become homeless, and more than six times as likely to live in overcrowded accommodation. These barriers relate primarily to a lack of knowledge about their rights, but also practical issues such as needing an interpreter, limited opening hours of advice providers, and immigration status deterring them from seeking advice for fear of being reported to authorities. Cultural barriers also come into play, such as beliefs that problems should be resolved within families or perceptions that cultural needs will be misunderstood or disrespected.<sup>15</sup>

### *Cross-sector issues*

What is clear from this research and through engaging with Shelter, is that housing issues are often tied up with other issues such as welfare benefits, health problems, and debt. In 2014 the Financial Ombudsman reported record numbers of mortgage

<sup>12</sup>

[http://england.shelter.org.uk/\\_data/assets/pdf\\_file/0010/397459/Experiences\\_of\\_housing\\_problems\\_Research\\_Summary.pdf](http://england.shelter.org.uk/_data/assets/pdf_file/0010/397459/Experiences_of_housing_problems_Research_Summary.pdf)

<sup>13</sup> [http://www.lowcommission.org.uk/dyn/1458067475639/WalesManifesto\\_English\\_Print-2-.pdf](http://www.lowcommission.org.uk/dyn/1458067475639/WalesManifesto_English_Print-2-.pdf)

<sup>14</sup> Office of the Children's Commissioner, *Legal Aid changes since April 2013: Child Rights Impact Assessment* (London, OCC, 2014)

<sup>15</sup> [http://england.shelter.org.uk/\\_data/assets/pdf\\_file/0006/48543/Advice\\_Gap\\_Full\\_Report\\_BME.pdf](http://england.shelter.org.uk/_data/assets/pdf_file/0006/48543/Advice_Gap_Full_Report_BME.pdf)

complaints as financial difficulties increased.<sup>16</sup> It recorded a third of complainants as being in arrears with their mortgage, and increasing numbers at risk of losing their homes and seeking help too late. Although the ombudsman service is unable to provide figures on complaints which involved repossession or post-repossession charges, they have previously issued a plea for lenders to take a less ‘black and white’ approach to handling people going through difficult times, and stated that many cases where people face losing homes could potentially be avoided with earlier intervention.

Research has found that there is a lack of joined up thinking within the legal process in the area of repossession: in cases that end up going to court, information about the consumer’s circumstances which may have been important was sometimes not known to the judge<sup>17</sup>. Court forms are only concerned with the consumer’s financial affairs; key information about personal circumstances shared with the landlord or lender did not always make it into the case file.

It is important to note that, where the consumer participated there was more likely to be a positive outcome for them – but participation rates are low, with only half of the defendants in the survey turning up at the court hearing. Reasons for not turning up included people ‘burying their head in the sand’, or seeing little point in attending. In some instances landlords or housing officers told them not to attend, and some defendants had a fear or misunderstanding of the legal system.

Housing Possession Court Duty Scheme (HPCDS) advisers play a significant role in assisting occupiers<sup>18</sup> and could raise defendant participation. The Legal Aid Agency (LAA) funds HPCDS throughout England and Wales to provide on-the-day emergency advice and advocacy to anyone facing possession proceedings, regardless of their financial circumstances. Frequently this leads to a more favourable outcome than where there is no representation. Judges consider such schemes to be valuable, however the emergency legal advice offered by such schemes is not available in all courts, or for all users, and where it is offered, there is no guarantee that a duty solicitor will be available.

According to the research provided by Shelter, 7% of housing problems were caused by ignorance of legal rights, and frequently these problems were faced in conjunction with others, such as consumer problems, employment problems, neighbour related problems and debt problems.

*Further regulatory considerations:*

- Is there a role for the Approved Regulators in encouraging better information-giving on the availability of advice/HPCDS?
- Is there a role for the LSB in encouraging frontline regulators to address issues of diminishing specialisation and regional disparities in the availability of advice?

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<sup>16</sup> <http://www.financial-ombudsman.org.uk/news/updates/mortgages-and-financial-difficulties-2014.html>

<sup>17</sup> [https://www.law.ox.ac.uk/sites/files/oxlaw/housing\\_possession\\_report\\_april2014.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf)

<sup>18</sup> Recognising that accessibility and use of this service may change subject to the civil justice reform programme

## Asylum and Immigration

### *Evidence of demand*

Asylum and immigration advice was featured frequently in many advice bodies' reports as an area with increased demand for services. LawWorks Clinics reported a 106% increase in demand from 2013/14 to 2014/15. The Law Centres Network also cited difficulties in obtaining Exceptional Case Funding (ECF) as a factor in an increase of demand, as ECF was only available to 9% of people originally forecast to receive it. The UK has also seen a 29% increase in applications for asylum in 2015<sup>19</sup> which would suggest increased demand for services.

### *Recent policy changes*

Following changes to legal aid, normal immigration appeals, for example, against refusals of visa applications for students or spouses, will no longer be eligible for support. That is unless they raise issues under one or other of the treaties and Directives such as the Refugee Convention or the Temporary Protection Directive.<sup>20</sup>

### *Fragmented landscape*

In July 2012 the Panel produced a research note which summarised some of the key issues facing asylum seekers and where further research would be beneficial. We recognised the difficulties in accessing legal advice and finding advisors who specialise appropriately.<sup>21</sup> Our work focused primarily on asylum advice and services (as opposed to those targeted under the points-based visa system) as this was the area where the highest vulnerability arises due to the circumstances of those individuals in need of assistance. Existing research and statistics highlight that poor quality decisions may disproportionately affect the most vulnerable groups - for example women, unaccompanied children, and those who have experienced torture. Further, refugee women seeking asylum are more likely to suffer forms of harm such as trafficking, forced marriage, female genital mutilation, sexual violence, and 'honour killings'.

More recent research from the Solicitors Regulation Authority (SRA) found multiple instances of underqualified lawyers and that almost half of asylum seekers were not satisfied with their lawyer<sup>22</sup>. The research does identify some barriers to accessing legal advice and finding a good provider. Primarily, asylum seekers struggle to differentiate between provider types, and don't understand the differences resulting from different regulatory regimes. Further, there were concerns about community referrals to poor quality or potentially unregulated advice largely stemming from a lack of understanding of the process of obtaining asylum.

Access to translators was also raised as a problem, with examples of interpreters speaking the wrong language. Where interpreters spoke the correct language, the evidence raised questions about the quality of interpretation as well as the role interpreters were playing – in some instances acting as introducers to law firms. Given the frequency with which interpreters are relied upon in asylum and immigration cases (and a great many other types of case), better guidance is required around appropriate recruitment of interpreters and ensuring services meet acceptable quality standards.

<sup>19</sup> [http://www.refugeecouncil.org.uk/assets/0003/6984/Asylum\\_Statistics\\_Annual\\_Trends\\_Feb\\_2016.pdf](http://www.refugeecouncil.org.uk/assets/0003/6984/Asylum_Statistics_Annual_Trends_Feb_2016.pdf)

<sup>20</sup> <http://www.migrationwatchuk.org/briefing-paper/295>

<sup>21</sup>

<http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/2012%2010%2010%20Immigration%20desk%20research%20and%20scoping%20final.pdf>

<sup>22</sup> <https://www.sra.org.uk/sra/how-we-work/reports/asylum-report.page>

It is worth noting that along with the SRA, the Bar Standards Board (BSB) is continuing work in the area of immigration services, which we hope will lead to positive outcomes in respect of information available, training requirements, and enforcement. For example, as we highlighted four years ago, there is no coordinated system for finding a legal advisor, instead people must search one of three registers, none of which is easily accessible through search engines.

To complicate matters further, due to the historical regulatory framework, there is a group of immigration advisers which remain regulated outside of the Legal Services Act by the Office of the Immigration Services Commissioner (OISC). Some agencies are regulated by both OISC and SRA. As research mentioned above has shown, there needs to be consistency of approach across these services to ensure quality and understanding of the system, and it is worth exploring whether the LSB has a role in bringing this about.

*Further regulatory considerations:*

- Is there value in the LSB revisiting its 2012 review of regulation of immigration advice and services in the light of work carried out by the SRA and BSB? Could this be an opportunity to identify what risks have been identified and how they might be managed through better regulation?
- What can be done in partnership with OISC to ensure that there is a degree of consistency in the standards of immigration services providers across the two regulated areas?
- Is there a regulatory role for the SRA and the BSB to explore with the relevant regulators the role and use of translation services across the legal services market, and encourage standardised best practice or a code of conduct from those operating within it?

## **Conclusions**

The Panel has been asked to recommend areas of law for the LSB to focus its attentions on specifically in relation to unmet legal need. The areas we have identified feature high demand for services and impact large numbers of people. They are also areas which see disproportionate levels of detriment among more vulnerable groups.

In some instances these areas are open to possible regulatory interventions, albeit not always by the LSB but rather the individual Approved Regulators. In other instances scope for intervention is more in the remit of the representative bodies. This report therefore acknowledges the challenges that exist for the LSB to both effect significant change for consumers in these areas whilst respecting its statutory remit. The challenges are not insurmountable with sufficient will and new ways of working, but it will require creativity. The LSB will want to explore innovative solutions to effect the change it wishes to see in the market, working with other players collaboratively and persuasively at times.

### *Annex A – Respondents to call for evidence*

Age UK

Chartered Trading Standards Institute

CILEx

Law Society

Members of the Institute of Consumer Affairs

Youth Access

### *Annex B - Law Centres users*

Law Centres annual report provides a breakdown of its service users. In 2014-2015:

- 64% of clinic clients have a household income below the Joseph Rowntree Foundation Minimum Income Standard threshold which was £16,284.
- Over half of clinic clients are from ethnic minority groups, a proportion considerably higher than the 14% of the UK general population from ethnic minority backgrounds as identified in the 2011 UK census.
- Over half of clinic clients are aged between 25 and 45 with less than 8% under 25 and less than 5% over 65.
- 27.2% of clinic clients report having a disability, a proportion significantly higher than the 19% of the population estimated to have a disability.
- 20% of enquiries are returning clients