

THE INTERDISCIPLINARY ALLIANCE FOR CHILDREN

THE LEGAL AID SENTENCING AND PUNISHMENT OF OFFENDERS BILL 2011

Do Families Matter? Legal Aid Proposals Fail the Family Test¹

1 Introduction

By the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill, currently before Parliament, the Government proposes to exclude large sections of the population from publically funded legal assistance at the time of relationship breakdown or other family crises. Proposals are ill considered, fundamentally unjust, and offend basic principles of fairness. The government's legal aid reforms, if implemented as drafted, will undermine the domestic and international reputation of the English legal system. Our reputation is built on adherence to the rule of law and ensuring equal access to justice between people who wish to bring disputes before the court. Parents involved in family proceedings respect courts because they know that access to justice is not dependent on who they are, or what they earn.

The media appears to have limited understanding of this area. Media interest is typically focused on big money and celebrity cases or scare stories about local authority intervention in family lives. Notwithstanding relaxation of the rules to enable media attendance at court, the public has received little information and therefore has little appreciation of the inevitable impact of the legal aid proposals on ordinary parents and children (see attached, Alliance Evidence: **The Impact on Children and Families - Case Studies**). However family breakdown and disputes about children, money and housing affect many people in society; it is common, not unusual. Few people have lives untouched by such disputes either because of family, friends or personal experience.

The proposals to cut family legal aid in private law family proceedings will impact hardest on parents and children experiencing the negative effects of family breakdown. Quite apart from the distress ordinarily associated with a traumatic life-event, many parents show specific indicators of vulnerability, for example, depression or other mental health problems. The planned legal aid cuts will also remove direct free legal advice and support services for 6,000 under 18 year olds and 69,000 young people aged between 18-24 years, who need advice on employment, education, homelessness, welfare and debt issues.

Evidence in family cases does not support the view that cases are brought unnecessarily, on the contrary, family courts and family lawyers provide solutions to otherwise intractable

¹ David Cameron (15 August 2011, Oxford) 'Broken Society Agenda: Families and Parenting' "I want the family test applied to all domestic policy...if it hurts families, if it undermines commitment, if it tramples over the values that keeps people together, or stops families from being together, then we shouldn't do it." (See <http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots/>).

problems in a fair and child-centred way. Loss of legal aid will exacerbate the trauma of divorce/separation and disputes about children and will hurt those least able to bear the impact. Large numbers of cases are presently settled through negotiation between lawyers; without lawyers, little if any attempt will be made by parents to negotiate or settle their disputes. Those which are not resolved through mediation will propel parents to struggle through legal proceedings without advice as to their interests and best options, let alone their legal rights or how the system operates.

For many the experience of seeking a resolution through the courts unrepresented will be rendered yet more traumatic if they are pitted against a more powerful partner who is also able to afford to pay for legal representation. In addition the greatly increased number of litigants-in-person will mean extra court time will be necessary to assist people to put their case (and thus extra costs will be incurred). The interim report of the Family Justice Review (March 2011) warned Government of the potential impact on courts and families of forcing parents to represent themselves.

It is likely that many parents will not even embark on such a difficult journey; some who start may give up. **The consequences?**

- Parents lose contact with their child(ren), or ignore the obvious signs of risk or abuse at the hands of the child's other parent, or
- The parent fails to take the necessary steps to bring concerns about their child before the court and thus the opportunity to gain the court's protection of the child
- Women who have suffered domestic violence may face cross examination in court by a more powerful and violent ex partner
- Older children who have been abused may face cross-examination by their abuser.

Many cases involving disputes about the care of children in private law proceedings involve serious child protection concerns. Where there are concerns for a child's safety or for a vulnerable adult, swift and decisive action must be taken to protect them.

It will be an enormous disincentive to victims of domestic abuse to seek family court interventions when they fear not just an encounter with the abuser in the court building, but direct questioning by the abuser, face-to-face, eyeball-to-eyeball, in court. Mediation is not appropriate where there is a serious imbalance of power between parties, where there is domestic abuse, or where there are child protection concerns. The report of the Justice Select Committee (June 2011) has already called on Government to rethink its decision to use domestic abuse, as the only means of accessing legal advice and the interim report of the Family Justice Review March 2011) warned Government of the potential impact on courts and families of forcing parents to represent themselves.

Legal aid is built on the principle of ensuring 'equality of arms' – regardless of status or income – between people who seek remedies through family courts.² To lose that principle

² 'Equality of arms' is one of the elements of the broader concept of a fair trial. It requires each party in proceedings to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a procedural disadvantaged vis-à-vis the other party(ies).

in a democratic society means that we will no longer protect the weaker and more vulnerable party facing a richer, more powerful and more resourceful opponent. The legal aid proposals will return many parents and children to the very circumstances (of imbalances of power and resources) to which they have sought family justice as the solution.

2 The Government's proposals on legal aid:

- **Are not child centred**
- **Are not family friendly**
- **Do not recognise the impact on children caught in the middle of their parent's disputes and their rights under the UNCRC, the ECHR and the Human Rights Act 1998**
- **Fail to recognise the impact on people where they have to represent themselves in proceedings (Litigants in Person)**
- **Ignore the impact on victims of domestic abuse; this includes being subject to cross examination in court by the perpetrator**
- **Result from a failure to listen to the reasoned concerns of a broad range of stakeholders on the family-related aspects of the bill**
- **Demonstrate a failure to listen to public opinion about legal aid; some 5,000 people responded to the consultation paper: over 90% opposed the proposals. It is inconceivable that these responses have been given full and proper consideration in the time available**
- **Will impact on ordinary people.**

3 The Interdisciplinary Alliance for Children calls on the Government:

- **To include in the Legal Aid Sentencing and Punishment of Offenders Bill a specific provision requiring the Lord Chancellor, in the exercise of his powers to ensure practical and effective access to justice.**
- **To amend the Bill to ensure that public funds are made available to enable children and young people under the age of 18 years to access appropriate legal advice, support and representation.**
- **To make provision for a sufficient supply of competent people and bodies to enable parents and children to exercise their right to representation in bringing an issue before the family court for a resolution.**

- To extend the provision of legal aid in exceptional cases to all cases where there is an actual or threatened injustice (Clause 9), and to consult interested parties on the relevant guidance as to the exercise of the Director’s discretion in this regard.
- To amend the Bill to ensure that public funds are made available (subject to eligibility) for legal advice and representation for all parties in all cases where:
 - the child has been joined as a party in proceedings (under Rule 16 Family Proceedings Rules as amended 2011)
 - the court is considering making findings of harm/abuse (whether to an adult or a child)
 - The court is considering making a section 37 direction or a section 38 order.
- To extend the definition of domestic abuse (Schedule 1) to include “any incident of threatening behaviour, violence or abuse (whether physical, mental, financial or emotional)”.
- To accept as evidence of abuse for the purposes of entitlement to public funds that:
 - the individual has been admitted to a refuge or an outreach service for persons suffering from domestic abuse; OR
 - the individual has obtained medical or other professional services or police assistance relating to the consequences of domestic abuse; OR
 - an assessment for the purposes of possible mediation of a family dispute has concluded that the parties need not engage in mediation as a result of domestic abuse”.
- To ensure legal aid is available where domestic violence proceedings are issued and result in undertakings from the Respondent.
- To specify urgently what plans it has made for ensuring that those who need acute crisis advice will receive such advice.
- To set out in detail how family courts will be supported to manage the rise in litigants in person.

The Interdisciplinary Alliance for Children is made up of socio-legal and medical organisations concerned with children's rights and welfare, it includes:

Adoption UK

British Association of Adoption and Fostering (BAAF)

British Association of Social Workers (BASW)

National Youth Advocacy Service (NYAS)

Royal College of Paediatrics and Child Health

Great Ormond Street NHS Hospital for Children NHS Trust, Parent and Child Team

Women's Aid Federation – England

The Catholic Children's Society

The Trade Union and Professional Association for Family Court Advisers and Probation Staff (NAPO) - Family Court Section

VOICE

Office of the Children's Commissioner - England

The National Children's Bureau

The Association of Lawyers for Children (ALC)

Professional Association for Children's Guardians, Family Court Advisers and Independent Social Workers (NAGALRO)

Family Law Bar Association (FLBA)

The Aire Centre, Human Rights, Family Law and European Convention on Human Rights

The Law Society

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