



HOUSING LAW
PRACTITIONERS' ASSOCIATION

**Response of the Housing Law Practitioners Association to the All-Party Parliamentary Group
on Legal Aid inquiry into the sustainability of Legal Aid**

November 2020

About HLP

The Housing Law Practitioners Association (HLPA) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law. Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. HLPA has existed for over 20 years. Its main function is the holding of regular meetings for members on topics suggested by the membership

and led by practitioners particularly experienced in that area, almost invariably members themselves.

The Association is regularly consulted on proposed changes in housing law (whether by primary and subordinate legislation or statutory guidance). HLPAs Responses are available at www.hlpa.org.uk.

The negative impact of LASPO on housing providers is now well recognised. The terms of reference to this inquiry themselves set out that “Evidence shows that there are fewer lawyers entering the field and increasing numbers of firms forced to either take on private work to remain commercially viable or leave the sector entirely”.

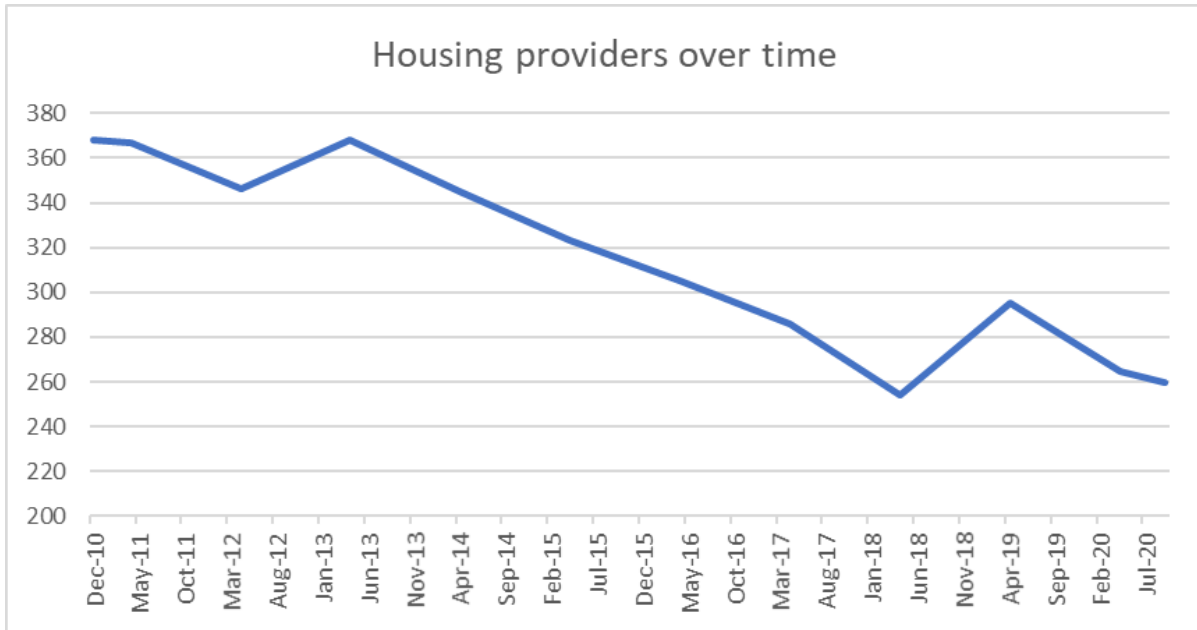
We recently surveyed our members and asked for their views about legal aid, with a particular focus on the impact that LASPO had had on their practice and the sustainability of the housing law profession. 93.6% of providers stated that LASPO had had a mostly negative effect on the scope of the work that their organisation has traditionally done for clients. 90.5% said that LASPO had had a mostly negative impact on the outcomes for their clients. 93.2% said that LASPO had had a mostly negative impact on their organisation’s income.

Sustainability of the profession

HLPAs members are increasingly pessimistic about their ability to continue to provide legally aided services, with particular concerns expressed about recruitment and retention of staff and the ability of organisations to remain financially viable. In a recent survey of our members, we asked them how easily they are able to recruit to meet their organisation’s aims for legal aid services. More than half (52.3%) said it was hard, about a third (31.8%) said it was neither easy nor hard, with the remainder saying that they did not have any plans to recruit. The other response that was available was “easy” – no one chose this option.

64% of responders said they were worried about their ability to retain staff to deliver legal aid services over the next year, while 84% were worried about their ability to retain staff over the next five years. 62% said they were worried about their ability to sustain legal aid service at all over the coming year, rising to 96% for those who were worried about their ability to sustain legal aid services over the next five years. 85.7% said they were looking for other streams of work (with 73.8% saying that this was, to a significant extent, because of LASPO).

Figures released by the Legal Aid Agency to the Civil Contracts Consultative Group (of which HLPAs is a member) in September 2020 show a marked decline in the number of firms providing housing law advice under a legal aid contract since LASPO. The figures are represented in the graph below and show that there was a rally in numbers in September 2019, coinciding with the latest tender round, but that the numbers have already almost fallen back to the pre-September 2019 level.



There are a myriad of issues facing housing providers, however, we have decided to focus on what we consider to be the main issues.

Housing and Disrepair:

LASPO introduced two main restrictions to disrepair work. Firstly, it removed from scope funding for the damages element of the claim meaning that legal aid was only available to fund a claim for specific performance. Secondly, it introduced a threshold such that funding was only available where the disrepair in the property represented a serious risk of harm to the health or safety of the occupants. Whether by design or by accident, these restrictions have led to a dramatic decline in the number of publicly funded disrepair claims.

There was (and remains) no logical basis for restricting LA for disrepair. The cost to the public purse of funding these types of cases is minimal. In almost all successful cases, the legal costs are ultimately recovered from the landlord. Any portion of the legal costs which are not paid by the landlord are taken by the Legal Aid Agency from any damages awarded to the client by means of the statutory charge. Thus legal aid funding for these cases effectively acts as a loan, which is paid back in full at the end of the case.

Furthermore, the restrictions on funding disrepair cases is one of the driving factors in the declining numbers of specialist housing law providers. The removal of disrepair claims from the scope of legal aid funding removed a large chunk of income from many housing law providers, which was often the only way that providers had previously been able to maintain an economically viable business. This is because successful disrepair claims usually resulted in an order requiring the landlord to pay the costs of the litigation. These costs would be paid at market rates; income that could then be used to subsidise other non-profitable areas of work such as homelessness advice and representation, which is often loss-making.

The difference in the rates payable at market (or “*inter partes*”) rates and legal aid rates is illustrated in the table below:

Average guideline hourly rate for a qualified solicitor in central London	Average guideline hourly rate for a qualified solicitor in National Grade 2	Hourly rate paid for a County Court claim at legal aid rates
£251.67	£174.67	£63.00

The figures used to calculate the average guideline hourly rates have been taken from the Government’s website: <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>

Lastly, the inquiry should be aware that there are no realistic alternative sources of income for providers. Some organisations have been able to continue to bring cases by offering clients a Conditional Fee Agreement (“CFA”), sometimes known as a “no win no fee” agreement. However, CFAs cannot be offered by all organisations, and are particularly difficult for small firms and charities because of the high risks they entail. Furthermore, CFAs are not available for large numbers of clients because they will not pass the rigorous risk assessments which firms must carry out in order to maximise the chances that they will be paid for the work they have undertaken.

The above is a snapshot of the difficulties arising in disrepair cases since LASPO. At the inquiry HLPAs will voice the almost endless practical problems faced by practitioners when undertaking disrepair work.

Fixed recoverable costs in the fast track

Against this backdrop, housing lawyers face a substantial upcoming threat that will reduce the number of housing providers further. It is proposed by the MoJ to fix the amount of costs that can be recovered in fast track cases (most of which are possession cases). They consulted on this in 2019¹. This would limit the recoverable costs at *inter-partes* rates and barrister fees would not be treated as a disbursement, i.e. the fixed figure is inclusive of profit costs and barristers’ fees. Recovery of *inter partes* costs (at market rates in successful cases) from opponents is crucial given there has been no increase in legal aid rates since 1998/99 and also due to a 10% cut in rates in October 2011. Limiting *inter partes* recovery would be a significant cut via the back door.

¹ https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixdrecoverablecostsconsultationpaper.pdf

Use of counsel is crucial in housing possession cases as they involve questions of public law, human rights, discrimination etc. They are not typical fast track cases. Not using counsel is therefore not an option and clearly it would be discriminatory to say disabled/vulnerable tenants should not use counsel. Costs are currently only allowed now at a proportionate sum following assessment by the court. Housing possession cases often have significant documents to consider (housing files, repair files, housing benefit files, medical records etc) and clients often have mental and/or physical health problems which make attendances longer and may also involve interpreters or social workers. Housing possession cases are as a result not suitable for fixed rates.

The CPR tracks are based mainly around the amount of monetary relief, whereas in possession claims the home is at risk and this far exceeds, in terms of importance/value, the amount of any rent arrears or compensation.

The inquiry should note that it is extremely difficult for housing law providers to subsidise their legal aid work with more lucrative privately funded work outside of disrepair. Most clients in need of the specialist housing law are tenants or individuals who are homeless or facing homelessness. By their nature these clients tend to be too poor to be able to pay privately for legal advice where their case does not qualify for legal aid or where they themselves are not financially eligible for legal aid.

Legal aid fees

There has been no increase in legal aid rates since around 1998/99. Further there was a 10% cut in rates in October 2011. Barrister fees have also been cut significantly and reduced to the level of fees paid to solicitors.

Over half the population in England and Wales live in a local authority that has only one, or no, legal aid housing provider. Housing work has to be economically viable for providers to continue to do legal aid and also to encourage new solicitors and barristers to consider legally aided housing law as a viable professional specialism.² The cuts to fees and scope have resulted in the current situation. This is despite advice on housing problems being more crucial now than ever, post-Grenfell and during a pandemic.

We therefore submit that the 10% cut in rates should be reversed, the reduction in barrister fees reversed, and then consideration given to an appropriate increase in rates.

² <https://www.lawgazette.co.uk/practice/society-exposes-catastrophic-housing-advice-deserts/5070051.article>

The true impact of fewer housing lawyers

Legislation, such as the new Homes (Fitness for Human Habitation) Act 2018, which came into force in March 2019 and pushed through in the aftermath of the Grenfell disaster, will not have the effect Parliament intended. Despite being heralded as a way of making homes safe and fit to live in, this new Act is a meaningless piece of legislation if it cannot be enforced by the very people it is designed to protect.

Removing access to the protection afforded by the law by restricting legal aid risks a return to the dire living conditions prevalent in the 1960s, 70s and early 80s. A 2017 report found almost 1 in 7 of all social rented homes in England fail to meet basic health and safety standards³ with defects including exposed wiring, overloaded electricity sockets, dangerous boilers, leaking roofs, vermin infestations or inadequate security. The lack of scrutiny resulting from the removal of housing disrepair legal aid cannot be a coincidence.

There is consequently a real danger that the law becomes dead letter law.⁴ It is a contradiction in terms to acknowledge the need for legislation whilst simultaneously reducing the ability to enforce it.

Morale is low. Successive governments cannot continue to rely on the 'goodwill' of 'do gooder' lawyers to provide an essential service, whilst working in ever worsening financial conditions. The legal aid world is hemorrhaging brilliant lawyers who often provide the only mechanism by which people, and in particular poor people, have access to the law in the way that others do. It is largely accepted that no government will place legal aid on a par, financially, with the private sector. But, Legal Aid should, at the very least, be properly funded so that it is able to survive.

Housing Law Practitioners Association

³ <https://www.independent.co.uk/news/uk/home-news/uk-social-housing-health-and-safety-standards-failures-england-a7845961.html>

⁴ Disrepair and housing conditions are just one example of lack of funding leading to dead letter law – see <https://www.lag.org.uk/article/207304/homes-and--dis-contents--getting-full-value-out-of-the-homes--fitness-for-human-habitation--act> on this issue but also <https://www.lag.org.uk/article/204910/mortgage-possession-claims--the-changed-legal-landscape> in relation to mortgage possession proceedings where there has been a similar decline, leading to radical changes in the law being overlooked.