ANNEX 2

Social welfare law contextual issues

Introduction

For the purposes of our inquiry we have taken social welfare law to mean asylum, community care, education, employment, debt, housing, immigration and welfare benefits. During the course of our work we produced papers on each of these topics, highlighting the changes that would be introduced by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and setting out some of the contextual issues that we anticipated may impact on the need for and delivery of advice. These papers can be found on the Low Commission website (www.lowcommission.org.uk/Documents).

We consider that a number of the contextual issues highlighted in these papers, in addition to other developments during the course of our inquiry, may have a significant impact on the capacity of advice services, lawyers and others to implement our strategy. We outline some of these below.

Welfare reform

Throughout the course of our work, one of the most frequently raised issues was the forthcoming roll-out of universal credit and its likely impact on the need for advice. We were reminded that not only will the substance of welfare benefits and tax credits change, but so will the form for application as the government seeks to encourage a 'digital by default' approach.[1] We seek to offer no view on the merits of the government's proposals, but it seems to us inevitable that as people transfer to new systems and are subject to new rules and processes there will be some confusion. It also seems likely that those who find themselves disadvantaged by the new systems will want to seek advice and support and may wish to challenge decisions made about them. We feel supported in this view by the projections by Her Majesty's Courts and Tribunals Service (HMCTS) that the caseload of the First-tier Tribunal (Social Security and Child Support) will peak at 807,000 appeals in 2014/15.

Against this backdrop, the lack of funding for advice gives cause for concern on a number of counts. We consider that it is only fair that individuals are supported in transferring onto the new system, and the removal of legal aid funding suggests that to a large extent this will not be possible. We are also concerned that the efforts to move to the new system will be hindered by the lack of

1 *Government digital strategy*, available at: https://www.gov.uk/government/publications/government-digital-strategy.

systemic feedback from advice agencies to government about the flaws and gaps in the new system. Finally, we are concerned that the tribunals will have to deal with not only a significant increase in claimants but also with an increase in completely unadvised and/or unrepresented claimants, which may significantly reduce the speed with which decisions can be reached by judges.

Transforming legal aid and proposals for judicial review

When we started our project it was to investigate the impact of the LASPO Act on social welfare law advice. Through the course of our inquiry, the government has made a series of additional proposals for reform of publicly funded legal services, including the introduction of a 'residence test' for those who wish to receive funding, and changes to the way in which judicial review is funded. As outlined in our main report, we are gravely concerned by these proposals and we urge the government to reconsider them.

Declining to provide legal support to individuals on the basis of their immigration status appears to us to turn the rule of law on its head. Any concerns that the government has with the immigration system should be addressed by border controls, not the justice system.

We also consider that judicial review is of fundamental importance in the UK's constitutional set-up, providing individuals with the opportunity to hold the state to account for illegal action. In fact, the government acknowledges this much in its consultation paper, stating that 'judicial review is a critical check on the power of the state'.[2] We are gravely concerned that the suite of proposed changes will make it harder for individuals to be able to afford to bring cases and impossible for other individuals or charities to bring cases on their behalf. This strikes us as a dangerous position, exposing the government to claims that it is creating a situation whereby the state will be able to act with impunity.

On a practical note, we are concerned that the proposals will have worrying consequences for the strategy we outline in our report. The bureaucratic difficulties the residence test would create for lawyers and the Legal Aid Agency would surely be costly and may prove fatal for many advice agencies and law firms who are already struggling in the current financial environment but who we hope will form a central plank in the delivery of our strategy.

Viability of fixed fees, cross-subsidy in asylum cases

Our report largely focuses on those areas of funding that have been lost, but we have not forgotten that the way in which the remaining elements of legal aid are structured will have consequences for advice in those areas. A particular concern

2 *Judicial review: proposals for reform*, Consultation Paper CP25/2012 para 2.

we have heard relates to the way in which fixed and graduated fee structures impact on the delivery of good quality asylum advice. We understand that these concerns also apply to other areas, such as community care.

Legally aided asylum cases are funded on the basis of a graduated fixed fee, meaning that a fixed rather than hourly fee is paid per case but the fee may rise depending on the type of assistance required, namely from a lower legal help fee to a higher legal representation fee. This fixed fee applies regardless of the complexity of the case, and for some time there have been concerns that the fixed fee is not sufficiently high to cover the real expense to law firms of undertaking asylum cases. Some organisations have been able to find other ways to supplement their legal aid income and to allow advisers to spend longer periods of time working on a case. Asylum Aid attributes this supplementary funding to its capacity to deliver advice in a way that leads to them having a success rate of 80 per cent. However, not all organisations are able to cover their costs in this way, and there is deep-rooted concern that the fee structure does not permit the solicitor or advice agency to spend sufficient time on gathering all the necessary evidence and preparing a full claim. The legal aid money simply does not pay for all of the necessary work to be done.

The repercussions of this are then felt throughout the asylum system. Where a legal adviser has been unable to prepare a thorough claim for an individual, the government officer charged with reaching a decision may not have available to them all the relevant facts or an appropriate analysis of the law to support their decision-making. If an individual then appeals a refusal of asylum, this lack of evidence and expert legal analysis will create difficulties and costs further down the line for the judicial system. Most importantly, the impact is felt by the individual, stranded in a legal, social and economic limbo. It can be seen, then, that the current way of funding legally aided support jeopardises and in some cases frustrates the aims of the UK asylum system.

We have also heard concerns that the removal of funding for immigration cases may impact on the delivery of asylum advice. As of 2010, those organisations that wished to deliver asylum advice were required by the then Legal Services Commission also to offer immigration services on the payment basis of a fixed fee. Many organisations already provided their services in this mixed economy way, but under the 2010 tendering process it became mandatory. The consequences of this mixed asylum and immigration practice economy are twofold. First, in some cases, firms were able to cross-subsidise difficult asylum work with the fixed fee from some of the easier and faster to complete immigration cases. With the removal of immigration advice from the scope of legal aid, this possibility has been largely removed. Second, even if immigration cases were not sufficient to cross-subsidise asylum work, they still constituted a significant proportion of a firm's income. Firms now wishing to deliver asylum advice will have to restructure their practices in order to reflect the fact that

there is no longer legally aided immigration work, and it may be the case that they find it no longer possible to continue with only asylum work.

Concern that firms now delivering either asylum or immigration advice may find themselves unable to generate sufficient income to survive, let alone provide a quality service, have been emphasised to us. Even under the previous funding regime, two large national providers of advice in this area – Refugee and Migrant Justice; and the Immigration Advisory Service – went into administration.

We are therefore concerned that even in those areas where legal aid is still available, the funding structures will mean that it is very difficult for individuals to access the necessary legal advice. In view of the government's decision to keep these issues in scope due to their fundamental importance and human rights implications, we urge the government to keep a watchful eye on the survival of private practitioners and to take any necessary steps to ensure that there is not market failure.

Regulation of asylum and immigration advice

Those who give advice on asylum and immigration issues in the course of a business – whether or not for profit – must be a barrister, a solicitor or regulated by the Office of the Immigration Services Commissioner, otherwise they commit a criminal offence. This separates asylum and immigration from all other aspects of social welfare law advice, which are unregulated.

The Low Commission recognises that the complexity and consequences of advice in this area, combined with the potential to exploit vulnerable individuals, means that regulation in this area is necessary. However, regulation comes with new consequences in a post LASPO funding and delivery environment. As outlined under the 'viability of fixed fees, cross-subsidy in asylum cases' heading, there are real concerns that the new funding environment will jeopardise the quality and viability of many organisations delivering asylum or immigration advice. In other areas of social welfare law, if an advice organisation collapses then there may be other local organisations that can step in to provide support. However, due to the regulation of advice in this area, other advice organisations may not be in a position to pick up the pieces. Similarly, our strategy suggests that community and other non-advice organisations may be able to play an important role in the future. Regulation means it will not be as easy for them to do this in asylum and immigration as in other areas. We have heard from organisations such as the British Red Cross that this is already creating difficulties for individuals who cannot afford to pay for advice and for organisations who wish to support them but are not accredited.

Family law

Family law was outside the scope of our review, but we were aware from the start both of the drastic cuts that would be implemented in the area of private family law as a result of the LASPO Act, and of course of the link between family law and social welfare law problems. Over the past 12 months we have been often reminded that family breakdowns will almost inevitably lead to problems in other areas of life, such as housing or the need for welfare benefits. We have also heard that often these additional problems would be identified by the lawyer dealing with the initial family problem, who would then be able to refer the individual onto an appropriate advice service. As many people are now no longer able to access family law advice, we are concerned that one of the most effective funnels to social welfare law advice has been removed.

'Personal choice'

In its consultation on proposals for changes to legal aid in 2010, the government asserted that those pursuing a number of social welfare law cases, in particular immigration cases, were exercising 'personal choice'. It gave this as one of the reasons for declining to provide funding for advice. We would query this analysis and instead suggest that an individual requiring an immigration decision is in fact in an especially weak position, rendering their capacity to exercise choice and control almost nil. First, only the state can make a decision about an individual's immigration status or problem – there is no other way to challenge a decision other than through a legal process. Second, once an individual is subject to immigration control, the individual may be placed under restrictions meaning that he or she is unable to work. One consequence of this is that an individual will not have money to pay for a private lawyer to help him or her remedy and regularise the situation. This becomes a vicious circle and inevitably some of those with no control over their lives will go underground and will be vulnerable to exploitation in many ways.