

DELIVERING A PRO BONO CLINIC DURING THE PANDEMIC: SOME THOUGHTS ON ACCESS TO JUSTICE, EVERYDAY PROBLEMS AND THE CURRENT LEGAL LANDSCAPE

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Abstract

This article provides a snapshot of the modified pro bono clinic that the Mary Ward Legal Centre has been delivering since the start of the pandemic and contextualizes the work that the pro bono clinic delivers within a discussion on access to justice, everyday problems and the current legal landscape.

Keywords: pandemic; access to justice; vulnerable litigants-in-person; pro bono clinics; digitization of courts.

[A] INTRODUCTION

Everyday problems arising out of ‘common place transactions and relationships’ include anything from experiencing difficulties with rented accommodation, such as getting a landlord to carry out repairs, a relationship breakdown with a partner, or a mental health issue that could involve care, to struggles with money, products or services, problems with employers or welfare benefits. Yet, how do everyday troubles become transformed² into a perception when there are legal issues involved, that is, in a sense, possessing a legal consciousness? A question that Ewick & Silbey ask in connection with ‘legal consciousness’ and everyday problems is ‘How do common place transactions and relationships come

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² See Felstiner & Ors (1980–1981) and the dispute transformation process from perception of a problem, to naming the problem as a legal problem, blaming and then making a claim.

to assume or not assume a legal character?’ (1998: 22).³ For common place transactions and relationships to assume a legal character, a connection would need to be made between experiencing a problem and characterizing the problem as one that involves the law, with the idea that there could be a remedy that might be acquired by engaging with the law. The next step would be taking the problem to the external environment to find out exactly what remedy (or remedies) exists, and what actions would need to be taken to engage the law and its relevant procedures in order to obtain such remedy-seeking legal advice, assistance and representation. Moreover, who would most likely seek legal advice or take action to address problems using law? Or as Genn and colleagues point out, ‘[what] kinds of problem ... are taken to lawyers’ (Genn & Ors 1999: 6)? In his essay about the ‘welfare poor’, Sarat succinctly explains that, ‘Law is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives’ (1990: 344). This comment is appropriate within the context of the work of the Mary Ward Legal Centre (MWLC) and its clients. The centre’s services are for people on a low income, and it so happens that many of its clients are also in receipt of welfare benefits. Those who are on a low income could also be characterized as being financially vulnerable and would benefit the most from being assisted by the state with the expenses associated with seeking legal advice and assistance (for example, by provision of legal aid).⁴ In essence we may say that the role of the Legal Centre is to enable persons with a potential legal challenge, and who are often financially and socially disadvantaged, to understand the legal nature of their problem and, where appropriate, to assist them in the pursuit of their claim should they wish to take their case further.

Over time, in addition to the safety-net of government-funded legal aid services delivered by solicitors firms and legal aid providers of legal help, various pro bono services have been established. The pro bono clinics, in

³ Legal consciousness is the idea of problems becoming ‘juridified’ (Cowan & Ors 2003), the reframing of problems that people experience as legal problems (Pleasence & Ors 2017). Whether somebody has legal consciousness could be the vital factor in determining whether someone seeks legal advice and assistance (Silbey 2005). For Ewick & Silbey, legal consciousness is ‘to name participation in the process of constructing legality ... Every time a person interprets some event in terms of legal concepts or terminology—whether to applaud or to criticize, whether to appropriate or to resist—legality is produced’ (1998: 45).

⁴ Being financially vulnerable within the context of this article means that the clients who would fall into this category are likely to experience difficulties with money. The clients who are financially vulnerable might find that their outgoings exceed their income, which could impact on decisions they have to make between paying their utility bills or having sufficient money to pay for groceries, housekeeping costs or care and health costs. In the worst possible scenario, the money problems could destabilize the client’s housing situation if rent arrears are accrued, which, potentially could cause homelessness.

the main, are delivered by volunteer barristers and solicitors in a variety of settings, predominantly in the voluntary sector within advice centres and universities, as well as community centres, libraries and church halls (see Carney & Ors 2014; Drummond and McKeever 2015; LawWorks 2021). The pro bono clinics usually only assist people who are on a low income, who do not qualify for legal aid, and who otherwise would not be able to afford to pay for the costs of legal advice and assistance. So, for those experiencing everyday problems which assume a legal character how do they fare when seeking legal advice and assistance? This article focuses on what Genn and colleagues (1999) call ‘justiciable event[s]’ that are also ‘non-trivial’,⁵ as experienced by people whose level of income would be low enough to be equivalent to the financial eligibility level for government legal aid, or just over the amount, and who would not be able to afford to pay for legal advice.

Areas of law that could assist with the specific everyday issues raised above would include the ‘many areas of civil law that impact on poor and disadvantaged communities. Housing, welfare benefits, immigration, debt, employment, community care, education and other areas of public law’ (Hynes 2012: 33). Collectively known as social welfare law, these areas of civil law traditionally have been funded by legal aid, to ensure that some assistance at least is given to those who cannot afford the costs of legal advice and assistance.

However, since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter the 2012 Act), the scope has narrowed considerably in the areas of law funded by the Legal Aid Agency.⁶ Unfortunately, employment issues (unless they involve discrimination) are not currently funded. In addition to the aforementioned areas of law, the Legal Aid Agency also funds, albeit with very narrow criteria, cases concerning discrimination, family, immigration and asylum.⁷ For everyday legal problems that do not fall within the scope of legal aid, such as consumer cases, civil litigation—which includes the small claims procedure—family issues, as well as the areas of social welfare law that do not fall within the Legal Aid Agency purview, individuals will have to

⁵ ‘[A] matter experienced by the respondent which raised legal issues, whether or not it was recognised by a respondent as being “legal” and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.’ (Genn & Ors 1999: 12).

⁶ The Legal Aid Agency is an executive agency of the Government tasked to provide civil and criminal legal aid and advice in England and Wales to assist eligible people to address their legal problems.

⁷ See Schedule 1 of the 2012 Act.

seek advice from organizations that are able to offer free legal advice, or from a pro bono service.⁸

The 2012 Act, which was implemented during a period when the Conservative–Liberal Democrat Coalition Government applied austerity measures in relation to the public spending on civil legal aid, has continued to erode the availability of legal advice, assistance and representation⁹ for people on low income who are experiencing problems connected to social welfare law (see Low Commission 2014, 2015; House of Commons Justice Committee 2021).¹⁰ Despite pressure from legal advice providers, the Government did not review the impact of the 2012 Act until 2019 (see Ministry of Justice 2019a, 2019b).¹¹ The impact of the deep cuts on civil legal aid can broadly be viewed from three different perspectives, with issues related to the different positions that are, in fact, interconnected. First, in relation to difficulties experienced by people with problems attempting to secure legal advice and assistance. Secondly, the situation in terms of legal advice provision, and the impact on legal practitioners specializing in social welfare law funded by civil legal aid contracts. Thirdly, the digitization of courts leading to the provision of ‘remote justice’, and the impact on court users, both professionals and litigants-in-person (LIPs) or lay users. The Government’s plan to digitize courts began in 2016 and has continued to proceed while the fallout or impact from the 2012 Act continues to cause hardship to people who most need legal advice, assistance and representation. This article will focus on the position of LIPs.

Following this ‘Introduction’, the present article will begin with a description of the pro bono clinic that the MWLC delivers. The pro bono work of the Legal Centre is then contextualized in section [C] within a discussion of some of the access to justice issues. The impact of the 2012 Act on civil legal aid funding has been well documented, but some

⁸ Other than Citizens Advice, some voluntary sector organizations are able to offer free legal advice delivered by the staff who work for the organizations. This work might be funded by a local authority or by a grant-making charity.

⁹ In terms of the nature of assistance that could be gained through legal aid, see Ministry of Justice (2019a: paragraph 114).

¹⁰ See also Logan Green & Sandbach (2016). [The Low Commission on the Future of Advice and Legal Support](#), chaired by cross-bench peer and disability rights campaigner Lord Low, was launched on 4 December 2012 in order to develop a strategy for access to advice and support on social welfare law in England and Wales. It is reported that the Low Commission is the largest independent enquiry into social welfare law ever undertaken in the United Kingdom: see ‘[Low Commission reports on the future of advice and legal support](#)’.

¹¹ See also House of Commons Justice Committee (2021). In its 2021 report, the Justice Committee suggested the ‘Government should take a whole justice system approach to the reform of the civil legal aid framework’ (2021: paragraph 89).

comments are merited here.¹² Finally, section [D] of the article will consider some of the access to justice issues that have had a greater impact on people who are on a low income and have problems, and who needed legal advice and assistance during the pandemic and national shutdown. Suggestions will be made in terms of actions that could be taken to encourage greater inclusion or integration of vulnerable people who experience legal problems in the present-day digital legal environment.

[B] THE PRO BONO CLINIC AT MWLC

MWLC is part of the Mary Ward Settlement, which was established over 100 years ago to provide education and social services for the local community. The settlement provided a free legal advice service for the local community, known as the ‘Poor Man’s Lawyer’ service, a precursor to the post-war legal aid scheme. Today, the Settlement continues to provide legal advice to people who are on a low income, through its Legal Centre, as well as delivering education and training courses via the adult education centre.

The Legal Centre promotes access to justice, and its core legal services are debt, housing and welfare benefits casework, which involve tribunal or court proceedings, and comply with standards set by the Legal Aid Agency and Lexcel. The pro bono clinic at MWLC provides one-off legal advice to eligible clients, which is delivered by volunteer qualified solicitors and barristers.¹³ The areas of law the pro bono clinic might be able to assist with depend upon the specialist area of the volunteer lawyer. The areas of law the pro bono clinic is currently able to assist with are employment, contract, consumer, tax, family, housing and disputed debt—which includes initiating small claims proceedings. There are slight overlaps in the core service with the pro bono clinic in relation to two legal areas: housing and debt. However, the pro bono clinic will only assist with specific housing problems that are not within the scope

¹² See, for example, Hynes (2012). To contextualize the deep cuts made on civil legal aid, following the implementation of the 2012 Act, in previous years, there had been a steady decline in government funding in this area of public spending over the years (see Legal Action Group 1992, 1995; Smith 1997b; and generally Legal Action Group’s monthly publication, *Legal Action*). However, it was the 2012 Act, implemented during the period in which the Conservative and Liberal Democrat Coalition Government pursued a policy of austerity in relation to public spending, that has caused ongoing problems for people who are on a low income and in need of legal advice and assistance.

¹³ MWLC is fortunate to be able to work with high-calibre lawyers, who are often based in large solicitor firms, some of whom are senior practitioners. People who need legal advice and assistance benefit from the expertise of these lawyers who volunteer at the pro bono clinic, and such expertise would usually be out of reach for our clients because of the high costs involved if the Legal Centre had not connected the client to the lawyer through its pro bono service. This is also the case in relation to the experienced barristers with whom the pro bono clinic at MWLC works.

of legal aid. To this end, MWLC operates a separate pro bono housing clinic to assist clients with a limited range of housing problems, such as issues with a private landlord returning a former tenant's rent deposit, complaints against social landlords, including making a complaint to the respective Ombudsman services, and problems arising from Housing Register applications. Finally, clients with contentious disputed debts are assisted at the pro bono clinic because the Legal Centre's core legal service only assists clients with personal debts that are non-contentious. The Legal Centre also makes referrals to a pro bono clinic delivered by a Law School for people who are deemed not to be on a low income to be able to access the pro bono clinic at the Legal Centre. Should MWLC be in a position to offer a client a one-off appointment to seek advice and assistance at the pro bono clinic, clients would need to be able to continue to take full responsibility in relation to their case.

It is only LIPs who access the pro bono clinic, and the LIPs rely on the service to be able to participate in civil legal proceedings. The LIPs need much more support—in terms of guidance in the next steps in legal procedure—which could involve advice and guidance, assistance in completing court forms, gathering and organizing evidence during the different stages of legal proceedings. For example, in relation to a claim at the employment tribunal, the client would need to start working with ACAS on early conciliation before seeking legal advice about the merits of the claim prior to making a claim, which can be done online. This is followed by a preliminary hearing, organizing documents and witnesses, and complying with the different directions from the judge before a full hearing. In relation to civil litigation, from the claimant's perspective, there is the pre-action stage, followed by making a claim, which might involve the need to submit a Particulars of Claim. If the claim is defended, then the claimant will receive a Reply and details of the counterclaim, if there is one. The Case Management stage then follows before Disclosure, the drafting of witness statements and then the need to serve these statements on the other party. A bundle of documents will then have to be prepared and lodged at court before the trial or hearing. At every stage of the proceedings, the LIP will need to manage the submission of documents at court, which needs to be done within each deadline. Our experience in relation to pro bono clients is that many clients need assistance at every stage of the court proceedings. However, every time a client needs assistance, he or she will need to contact the Legal Centre to request an appointment. We will then assess whether we would be able to assist. The LIP lives with his or her case, from experiencing the problems in the first place, to struggling with seeking legal advice and assistance to

understand how to apply the law to the case, to attempting to make sense of the applicable court procedure and the legal environment within which he or she is operating. The LIP is very much the layperson competing against a qualified lawyer within a legal system that has been designed for litigants to be represented by legal professionals. For the person who has been able to instruct a solicitor, everything is done for that individual who will benefit continuously from assistance at every stage of the legal proceedings.

Individuals who approach the Legal Centre for assistance have diverse vulnerabilities or have special needs and often require additional assistance. The vulnerabilities or special needs could include communication complexities, including learning difficulties, where English is not the client's first language, or dyslexia. Some clients may have health issues, an illness whether mental or physical, severe or long-term, which could affect their ability to concentrate or remember, to process information, causes severe anxiety, or they may become overwhelmed very quickly. There are also clients who experience difficulty in articulating the problems they are experiencing. The struggles connected with articulating problems might not necessarily be associated with specific health issues, but might occur because of the length of time a client has had to endure the difficulties before being able to seek advice. The impact in the delay in being able to seek legal advice could lead to the client infusing facts with emotion and speculation in the narration of the legal problems and the manner in which the problems arose. Literacy could be a factor, too, and some could have verbal competence but not necessarily writing skills because English is a second or even third language. Some clients have special needs, such as sight impairment or profound deafness. Yet others may be experiencing abuse, whether physical, emotional, verbal or financial.

People who are on a low income who experience problems often approach the Legal Centre with multiple legal problems and many require assistance with unravelling these problems during the triage stage. As Genn and colleagues have noted: 'those who seek advice ostensibly about a single issue may have a bundle of underlying problems or difficulties that require unpacking before any viable resolution can be achieved' (1999: 36). Further, clients who approach the Legal Centre for advice, tend to experience 'clusters' of problems, now widely noted in the literature (see eg Pleasence & Ors 2006). For example, a client who has a consumer matter, who approaches MWLC for pro bono assistance, might simultaneously be experiencing problems with debts and housing; while a client who has a housing problem could also experience money

and welfare benefits problems.¹⁴ Genn and colleagues note that some of the problem clusters could include employment problems that have been experienced during the past five years, which might also result in money or consumer problems or problems concerning owning property; a person who had been involved in divorce proceedings within the past five years may also experience family problems, which could include children or money problems. While somebody who had been a victim of accidental injury or work-related ill-health within five years could also have money or employment problems (1999: 31-36).

Prior to the pandemic and national shutdown, MWLC delivered an in-person pro bono clinic. Clients brought their documents with them at the time of their appointment, ensuring they completed an initial enquiry form prior to their appointment. After the appointment, the lawyer would complete his or her attendance note. The Pro Bono Co-ordinator reviewed the note for each client and held onto the note where the lawyer had agreed to do follow-up work, so that any follow-up work and its progress could be monitored. The onset of the pandemic meant that MWLC could not continue to provide an in-person service. A solution had to be found as quickly as possible after the national shutdown had started, and decisions had to be made about the nature of service the Legal Centre could provide in the interim while emergency national restrictions were in place.

Since the start of the pandemic, apart from one session in March 2020 at the very start of the pandemic, MWLC delivered at least one pro bono session each week. The volunteer lawyers' commitment enabled us to keep the service running, and also enabled the Legal Centre to run two sessions in the first week of the month: an employment session on the first Tuesday, and a general session on the Thursday. The Legal Centre recognized that it was important for the pro bono clinic to offer a remote service that was reliable and accessible to clients in need of assistance, therefore advice was given via telephone. This was partly because many clients did not want to be given advice by video conference. In any case, video conferences would have required much more input from staff, in terms of ensuring that such conferences could take place for clients who needed assistance with technology. However, not all clients had the technology to be able to join a video conference. In making the decision to

¹⁴ MWLC has found that for clients who contact the Legal Centre to access the pro bono clinic, after triage, in addition to being assisted by the pro bono clinic, at the same time, they could be connected to the core legal services of housing, debt or welfare benefits. This seems to happen more frequently with people experiencing employment problems. A similar pattern occurs with clients who contact the MWLC wishing to be assisted by one or more of the core legal services, who are then referred to the pro bono clinic for assistance in relation to a non-core area of law, such as employment, a disputed debt or a consumer matter.

offer telephone advice, MWLC took into account clients with special needs: for example, some clients required written advice. Around the time of the appointment, the lawyer would call the client from a withheld number. Even then, some clients experienced problems, with some not having a strong signal on their mobile phones, and some clients did not realize that their phone could not accept calls where the caller's identity had been withheld. In addition, MWLC adjusted the service to the needs of the lawyers and clients. Prior to the pandemic, appointments were only offered at 6.15 pm and 7 pm on alternative Tuesdays and Thursdays. Although appointments are still offered on alternative Tuesdays and Thursdays, since the start of the pandemic, the Legal Centre has had the flexibility of being able to offer appointments on other days, as well as other times during the day, which includes evenings, from Monday to Friday.

There are some issues remaining in the provision of a remote service, especially in relation to gathering documents from clients. Many clients were not able to scan and email their documents. In this situation, and where possible, clients would email photographs of individual pages of their documents. The quality of the photographs varied. Sometimes it was not possible to read the text in the photographs, and time was needed to work with the documents before they became more readable so that they could be uploaded to the Legal Centre's casework management system. Even when clients were able to scan and email us their documents, sometimes we were just not able to open them. Some of the clients live close to the Legal Centre and wanted to drop off their documents. However, while staff were mainly working from home, it was not possible for us to receive hard-copy documents. Furthermore, it was necessary for staff who came into the Legal Centre to follow the Covid-19 guidelines for the Legal Centre. Factors that had to be considered included clients not being able to turn up whenever they wanted; PPE was required; and the client had to be well.

The reality was that only a limited service could be provided, which essentially meant that the pro bono clinic could only assist those who could receive telephone calls and would be able to email us relevant documents prior to their appointment. In addition, clients who faced a language barrier while shielding at the same time, and who did not have anybody at home who could assist were in effect excluded from the clinic. Even if a friend was willing to help in this situation, the client would need to be able to participate and would also need to have the technology to be able to set up a conference call. Finally, the delivery of a telephone service meant that the administration increased heavily before each session. The increase in administration was mainly connected to the gathering

of documents from clients and uploading them onto the system, as well emailing advance information to the lawyers before each session.

The work involved in the provision of a remote pro bono clinic session now included the following steps: after triaging the client, we book a provisional appointment with the most appropriate lawyer. We send an email to the client, with an initial enquiry form and privacy notice attached. We ask clients to complete the e-form and return it to us by email, along with any relevant documents that would assist the lawyer. We enter the client's details and upload their documents onto the casework management system because some lawyers have access to the pro bono part of our system. We then email advance information to the lawyers, along with any relevant documents clients have emailed us. Staff have to be available for the appointments in the event that there are problems. This means that both clients and lawyers can email us during the session. Usually, two staff members would be available to assist during the sessions. Lawyers aim to email us the attendance notes within 24 hours after the appointment. The Pro Bono Co-ordinator reviews the notes and uploads them onto the casework management system. The Co-ordinator retains the notes in order to monitor any follow-up work agreed by the lawyer, ensuring that the lawyers are assisted in such work as and when required.

Preparation for the telephone appointments is a much longer process. As a team, we are still refining the steps involved in the process. For example, we are trying to ensure that one person who books the appointment becomes responsible for following through the document gathering and uploading, and chasing clients to complete initial enquiry forms. Despite the limitations of the service, we have been able to assist clients who do not own a computer. For example, we assisted a client with the documentation-gathering process and completing the enquiry form, which was all done by post, which was only possible because there was sufficient time to do so before the client's appointment. The reality is that clients cannot always complete the initial enquiry e-form, either because they do not have the appropriate software or need assistance to complete e-forms or would prefer someone to assist with the form completion by phone.

Many of the clients were given legal advice and assistance during the 'pre-courtroom' stage in preparing for their claim or in defending a claim brought against them. Clients have been given varying levels of assistance depending upon the lawyer's experience and available time. The LIPs who approach the Legal Centre for assistance vary in their

abilities in preparing for their legal case, in navigating the court processes or completing paperwork. LIPs also have varying levels of digital literacy. Most clients who use the pro bono service are not digitally literate, with some requiring the assistance of family members to send and respond to emails. At MWLC, we found that LIPs experience different levels of digital poverty in terms of access to devices, with some having only smartphones, while others did not even have access to a smartphone or a computer, relying on being able to use the computers at their local library, which were closed for a long period. Still others were reliant on printing shops, and staff who worked there, who could assist with accessing the documents clients had stored on their phones.

Many more people requested assistance from the pro bono clinic than it has been possible to assist. Apart from demand exceeding the availability of such service, it has not always been possible for the Legal Centre to offer clients appointments before a deadline, such as completing and filing a defence. In addition, some people who request assistance might be described as not being ready yet to seek legal advice. These are clients who would benefit from advice to help them to understand whether they had a legal problem, at what stage their problem is at, and any action that should be taken, which might require clarification from the other party about what decisions have been made, and whether legal advice is now needed. For example, a client who is an employee with an employment problem might have been trying to obtain answers from his or her employer. However, the answers might be forthcoming only if the client took grievance action. Unfortunately, while waiting for an outcome to the grievance, other issues connected with the employment come to the fore. This then prompts the client to seek legal advice, but the situation might well involve both legal and non-legal issues. Again, it is general advice that would assist in defining which issues are legal.

Transforming an in-person service to a remote one, so that clients could continue to be assisted, was only one of the many issues that the MWLC and staff at other pro bono clinics experienced. A significant problem prior to the pandemic has been the need for digital support for vulnerable users following the digitization of court processes. A major concern associated with access to justice has been, and continues to be, the availability of legal advice, assistance and representation, as well as being able to obtain such legal assistance. Since 2016, the digitization of courts or 'remote justice' has fast become a connected and yet also a significant issue by itself. At this point, it would be useful to explore some of the access to justice issues that were a cause of concern prior to the pandemic.

[C] ACCESS TO JUSTICE ISSUES EXISTING PRIOR TO THE PANDEMIC

It is helpful at this stage to be reminded that the different areas of social welfare law would be a significant factor in the clusters of legal problems that many people on low income might experience. McKeever and colleagues found, in their study on destitution and paths to justice, that ‘the triggers of destitution tended to be justiciable problems—legal problems that could have a legal resolution’ (2018: 5). The authors comment that a major problem has been the difficulties people have experienced in identifying legal advice providers and securing an appointment in obtaining advice or in acquiring assistance in the range of problems they experience. Yet, although being assisted with legal advice or legal intervention is not in itself a solution, McKeever and colleagues suggest that ‘there is potential for legal and other forms of expert advice and support to help individuals experiencing destitution to improve their situation, particularly in the key fields of social security, debt and housing’ (2018: 8).

A critical access to justice issue, as has already been mentioned above, is the deep cuts made to civil legal aid and access to legal advice, assistance and representation, following implementation of the 2012 Act. Since April 2013, legal aid has been greatly restricted in terms of financial eligibility and scope. Yet, when the cuts to legal aid are considered within the context of the provision of public services then it could be argued that the significant reduction in public spending on civil legal aid would inevitably cause an increase in other areas of public spending. For example, not being able to resolve problems potentially has an impact on health (Low Commission 2015). Chris Minnoch (2020) has succinctly stated that: ‘I suspect the financial and resourcing impact on a number of public services (courts and tribunals, health, social services, education, housing and homelessness ...) far outweigh the cuts introduced by LASPO’.

While legal aid applicants who are in receipt of certain welfare benefits are ‘passported’ through the financial eligibility gateway, the beneficiaries are only assisted with an extremely narrow range of problems.¹⁵ The impact of the 2012 Act has resulted in an ‘advice deficit’ (JUSTICE 2015), with the

¹⁵ For example, in terms of housing, it is only possible to seek assistance in cases where there is a risk of homelessness, possession or eviction, housing disrepair that could cause a risk of serious harm to an individual or cases involving anti-social conduct. While in relation to debt, the three main areas where it would be possible to seek assistance are in connection with the loss of a home (owner-occupier). In terms of welfare benefits, Legal help is only available for appeals in the Upper Tribunal, Court of Appeal or the Supreme Court, where the case involves a point of law, or where there has been an error of law and the case involves an appeal to the First-Level Tribunal reviewing its own decision.

needs of those requiring advice often being unmet (Advice Services Alliance 2020). An additional problem has been the creation of legal aid ‘deserts’ (Pepin & Ors 2018) in housing law, community care law and immigration law, where people have struggled to access legal advice and assistance when they have been entitled to it because of the declining number of providers delivering a legal aid service (Low Commission 2015; Bach Commission 2017; McKeever & Ors 2018; Advice Services Alliance 2020).

The lack of available representation, particularly in relation to family matters not long after the implementation of the 2012 Act, had led to an increase in LIPs (Owen 2014). There is a need to understand the implications of the paucity of legal advice and assistance in relation to LIPs and the impact of their experience in court.¹⁶ There are a greater number of LIPs because of the lack of availability of representation through legal aid, and, yet at the same time, there has been a continuing lack of data on the experience of LIPs (Donoghue 2017). Unfortunately, the resulting impact of the restriction of legal aid has caused a tremendous pressure on pro bono clinics to be able to provide the necessary legal advice and assistance to LIPs (see eg Hynes 2020). However, pro bono services should only be viewed as a complementary service to ‘a properly-funded state system of legal aid’ (Hynes 2012: 8; see also LawWorks 2021).

Just as crucial an issue is the impact of the legal aid cuts on private solicitors’ firms with civil legal aid contracts, which had been a significant concern well before the 2012 Act. Commenting on the Ministry of Justice’s belated review of the 2012 Act, Carol Storer lists problems that her own firm experienced—that are common to many others—when she realized that it was not financially viable to run a legal aid practice in London in 2000: ‘Low rates, too much unbillable work, inability to retain staff as they could obtain higher salaries in firms not carrying out legal aid work, the failure of lawyers to have a decent work/life balance’ (2019). Storer goes on to add that the situation has since become much worse. An impact which flows from the difficulties experienced by firms with civil legal aid contracts has been the decreasing number of lawyers specializing in social welfare law (see eg Slingo 2021; see also Ministry of Justice 2019a: paras 48-50), which is part of the reason why people have been struggling to obtain legal help. In a recent report, the House of Commons Justice Committee acknowledged that, after almost a decade since the implementation of the 2012 Act, the sector is still ‘adjusting to the dramatic reduction in the level of civil legal aid’ (2021: paragraph 81).

¹⁶ Criticisms have been directed particularly at the Ministry of Justice for the limitations of its data, see National Audit Office (2014: 6-7); House of Commons Justice Committee (2021: paragraph 105).

A consequence of a paucity of affordable legal advice services led to the rise in fee-paying McKenzie friends, particularly in family proceedings, where many of the LIPs needed assistance (Owen 2014; Sorabji 2015)—an issue of concern being the lack of regulation of fee-paying McKenzie Friends (Legal Services Consumer Panel 2014).¹⁷ This was also the case in the United States (US), where a similar situation had arisen in relation to a scarcity of affordable legal advice from lawyers and the proliferation of legal advice from non-lawyers (Sandefur 2020). Finally, although more commonly used as a means to pay for legal fees by those with a personal injury case, conditional fee agreements are also being used by those with housing problems that are not in scope for legal aid, such as disrepairs which are significant but not detrimental to the individual's health, and for those with an employment case. Unfortunately, some have had to abandon their conditional fee arrangement-funded case for various reasons, including problems with paying certain expenses associated with the case, or a lack of understanding of how the contingent fee arrangement works in practice (see also Bach Commission 2017).

In England and Wales, the Government has embarked on an ambitious court modernization programme from 2016 onwards (Ministry of Justice 2016; see also Briggs 2016), which involved the closing of a great number of courts at the start of the programme, but with work barely started on the digitization of courts (Caird & Priddy 2018).¹⁸ As Donoghue puts it:

Government has simultaneously withdrawn funding for legal aid while closing local courthouses and eroding local justice, while anticipating that digital technologies will provide the 'transformative' panacea for improving efficiency and access to justice that will 'liberate tens of thousands of individuals from injustice' (2017: 1025).

At the same time, there has been a move from paper to online claims for some welfare benefits, such as universal credit and personal independence payments—also housing benefit, council tax support or reduction, discretionary housing payment.¹⁹

There have been concerns about the integrity of the justice system and the erosion of principles of legal justice, specifically in relation to

¹⁷ See also see Legal Choices, 'McKenzie Friends'.

¹⁸ This includes the development of an online court, to be separate from the county court, with an automated online triage stage, to ensure that LIPs would be able to use the court. The conciliation stage will be looked after by case officers. The determination stage—for cases that cannot be settled—would be determined by a judge, either at a face-to-face trial, by video or telephone hearing or even to be determined by documents, whichever method would be the most appropriate (Briggs 2016: section 6). Lord Justice Briggs proposed that the online court could resolve money claims up to the value of £25,000.

¹⁹ This has resulted in a greater demand for advice, see Advice Services Alliance (2020).

the situation of the online courts in England and Wales (Genn 2017). In the US, where the development of online dispute resolution (ODR) is at a much more advanced stage, concerns have also been raised in relation to remote justice, one of the questions being whether ODR would advance access to justice (Schmitz 2020). Sternlight pointed out that ‘human disputes are intimately connected to human psychology’, that ‘our human brains often function quite differently than computers’ and the question is ‘whether and how to incorporate technology to dispute resolution’ (2020: 2-4). Sternlight concludes that there is a need to test technological approaches empirically (2020: 29). A crucial concern has been the ability of the more vulnerable in society to be able to participate in the newly digitized processes (JUSTICE 2018), particularly when, for a number of years, it has already been a struggle for people who are financially eligible for legal aid to access legal advice and assistance in a timely manner (Donoghue 2017; Administrative Justice Council 2020). There have been calls for integrated services where more vulnerable clients are given legal advice and assistance at the same time as being assisted with the digital processes (Administrative Justice Council 2020).

The result of restricted government funding for civil legal aid, at the same time as the implementation of a programme of the digitization of courts, without adequate consideration of the needs of the more vulnerable court users, has led to difficulties in participation for such court users, many of whom are LIPs. Being an LIP without adequate access to legal advice and assistance when the other party has representation means that power between the two parties is unequally distributed. This affects the ability of the LIP to respond during the different stages in the legal proceedings, and in understanding the interactions between the parties during the different stages of the proceedings. The LIP has less power to negotiate, not having the same level of legal understanding as the other party’s representative or a comprehension of the legal framework within which the two parties are disputing. In short, the LIP is not able to participate effectively in the legal arena. As a guide, McKeever suggests that the different types of legal participation in relation to litigation can be ‘defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be managed or overcome’ (2020: 4). The intellectual barriers which could prevent participation are LIPs not being able to understand the legal language used in court documents and proceedings; and LIPs not comprehending how to apply legal rules to their case or the legal framework within which the judge would use to make decisions (2020: 3). Practical barriers include the lack of knowledge in terms of how to obtain assistance in order to be able to

manage the legal process and connected issues. McKeever mentions two main problems, the first being ‘a lack of information and resources to assist either with the general legal issues or the task of self-representation’ (2020: 3). The second main problem being ‘the information sources that existed were disparate, unknown and LIPs were unclear as to the extent to which they could be trusted’ (2020: 3). The emotional barriers are connected to negative feelings, which are related to the process as well as the issue being litigated, which could be exacerbated if the intellectual or practical barriers are not overcome.

The different types of legal participation can be viewed as a ladder with seven rungs, the higher up on the ladder, the greater the level of participation. The lowest of the rungs is ‘isolation’, with the participant ‘feeling excluded and unable or unwilling to engage with legal proceedings’ (McKeever 2020: 4). Moving upwards on the ladder, the next rung above ‘isolation’ is ‘segregation’. These two lowest rungs on the ladder also represent non-participatory experiences. The next two rungs, moving upwards, are ‘obstruction’ and ‘placation’, representing tokenistic experiences in participation. This is followed by the final three rungs of ‘engagement’, ‘collaboration’ and with the highest rung of the ladder ‘being enabled’. All three of the higher rungs represent participative experiences, when the participant feels able to be engaged with the legal process, as well as feeling confident in representing him or herself in court (McKeever 2020: 4).²⁰

Furthermore, an increase of LIPs as a result of the deep legal aid cuts has naturally led to an increase in more inquisitorial and investigative processes in English procedure (Sorabji 2015). Not long after the implementation of the 2012 Act, proponents of greater access to justice, including the Law Society, argued for the need for early intervention or early advice (Low Commission 2015; Bach Commission 2017; Ipsos Mori & Law Society 2017). The idea was to ‘[g]et in early before issues escalate, before one legal problem generates more complex and costly issues to resolve’ (Minnoch 2019). As the Bar Council explains: ‘Legal aid intervention at an early stage is cheaper than only having legal aid when the matter has escalated to crisis point and the matter is more

²⁰ Many of the clients who approach MWLC’s pro bono clinic for assistance could be viewed as hovering on the third from bottom rung of the ladder, ‘obstruction’ with participation being defined as tokenistic. The pro bono clinic would enable LIPs to be able to engage in the litigation process on a step-by-step basis at least. In reality, this might mean that at each stage of the litigation process, a client might contact us for assistance with completing a court form or to seek advice to be able to understand court documents they have received.

expensive to put right’ (House of Commons Justice Committee 2021: paragraph 91).²¹ In addition to the recommendation of early intervention, the Low Commission also argued for the need for prevention work and the greater provision of information along with advice (Low Commission 2014). The context of the recommendations made by Lord Low involved ‘measures to reduce the need for advice and legal support in the first place, while developing more cost-effective approaches to service provision, both centrally and locally’ (2014: viii). Meanwhile the Bach Commission recommended the creation of a Rights to Justice Act, among other things, to ‘codify our existing rights to justice and establish a new right for individuals to receive reasonable legal assistance without costs they cannot afford’ (Bach Commission 2017: 6). In addition, JUSTICE suggested a new model for dispute resolution designed to be accessed by unrepresented parties (JUSTICE 2015). When it finally reviewed the impact of the 2012 Act on legal services in 2019, the Ministry of Justice was willing ‘to pilot and evaluate several forms of early legal support’ (Ministry of Justice 2019c: 6), which included legal support through technology.

[D] ACCESS TO JUSTICE ISSUES ARISING DURING THE PANDEMIC AND NATIONAL SHUTDOWN, AND MOVING FORWARD

In some respects, the access to justice literature focusing on difficulties experienced by individuals attempting to secure legal advice and assistance during the pandemic and national shutdown has concerned those who are either already or potentially involved with court proceedings. A critical problem during the national shutdown has been the issue of job insecurity—people who have recently become impoverished now joining the ‘traditional’ poorer clients (Law Centres Network (LCN) 2020). The LCN identified an emerging new client group, consisting of people who ‘before Covid-19 lived in relative financial security but on losing their jobs discover that the systemic protections they assumed would be there “just in case” are not able to support them’. The LCN calls this emerging client group ‘Living Outside of Legal Aid’ (2020: 5). Unsurprisingly, the LCN reports that enquiries in relation to employment advice at law centres (across England, Wales, the Isle of Wight and Northern Ireland) have

²¹ See Minnoch (2019) for a discussion of the definition of ‘early advice’.

increased from 90% to 500% between March and June 2020.²² Secondly, in terms of the situation with legal advice provision, although it is not surprising that access to legal advice and representation would have been affected by the pandemic and national shutdown, the context of legal advice provision over the years should also be borne in mind. The House of Commons Justice Committee, as we noted above, acknowledged in its recent report that almost a decade after the implementation of the 2012 Act, the sector is still adjusting to the remarkable reduction in the provision of civil legal aid. The restrictions that were in place during the periods when the United Kingdom was shut down appear to have ‘shone a light’ on the struggles of legal advice providers. Thirdly, in relation to the digitization of courts leading to the provision of ‘remote justice’, implementation of the modernization of courts plan has continued, regardless of any negative impact on the LIPs or ‘lay users’ of the courts.

In gaining an understanding of the position of individuals in need of legal advice and assistance during the pandemic, it is useful at this point to be aware of some of the issues that arose in connection with clients who sought assistance from MWLC’s pro bono clinic. As other voluntary sector organizations have done, MWLC has been able to deliver pro bono clinic sessions remotely. Yet, it has not always been possible for us to be able to offer appointments to clients prior to their deadlines. Some clients have contacted us at a crisis point, when a first hearing has imminently been due, and they were in need of general legal advice, in terms of understanding what to expect during the hearing and how to prepare for the hearing. A significant problem has been clients not being able to secure an appointment to seek advice from a pro bono lawyer, either because they have not been able to contact us to request an appointment or there have been no appointments available prior to their deadline. Further clients who have been eligible for legal aid have approached the pro bono service at MWLC for legal advice and assistance: for example, in relation to employment discrimination, where the client had not been able to obtain legal help from any legal aid provider because the providers the client had approached had not been able to take on the case. Clients have also contacted us for assistance in situations where the client might have failed in obtaining legal help because the merits of his or her case had not been strong, but the client had disagreed. It is not always possible to assess clients’ evaluation of their own case in the

²² The number of clients with disability discrimination cases accessing legal advice and assistance at the MWLC pro bono clinic had also increased significantly between March and June 2020. Unfortunately, it is much easier for employers to dismiss an employee with a disability because of the costs involved in making reasonable adjustments. The increase in the number of employment queries was also connected with issues arising in relation to the Government’s furlough scheme.

situation where clients believed they had a strong case, but felt that the solicitor appraising the evidence in connection with their case did not fully understand their situation. Regardless, the pro bono clinic would not be able to offer a second opinion, although usually, clients who fall into this situation might have other legal issues that need clarification. Should a client's case have low or no merit, the lawyer will only give general advice and will also advise about costs implications.

In terms of the nature of some of the problems experienced, clients with special needs have required much more support during the pre-action phase of the claim, in addition to contacting courts and submitting forms and documents online. Further, the issue in relation to a client not understanding the legal framework within which he or she might need to make a claim impacts more significantly on clients whose first language is not English. In general, though, clients needed guidance in understanding the need to follow the pre-action protocol prior to making a claim, in terms of legal procedure. Clients also experienced difficulties in understanding legal terms, court procedure and the meaning or significance of different documents they have been sent or must complete. Some clients have ended up having a short deadline to return a form to court and needed advice to complete the form because they did not understand what the form was about. Yet others did not understand the decisions made by judges, nor the nature of action they had to take following the decision, nor the implications of the decision. Finally, in general, clients have needed assistance with digital aspects of accessing courts, with some needing guidance in completing an online form, particularly in relation to starting a small claim, and some of the lawyers have been able to assist with these issues.

In terms of areas of the literature focusing on access to justice during the pandemic, the onset of the pandemic drew attention to access to justice issues that had already existed prior to the national shutdown. In its rapid review on *The Impact of Covid-19 Measures on the Civil Justice System*, the Civil Justice Council found that the national restrictions brought about by the pandemic 'had reduced the availability and accessibility of legal advice, with the impact of reductions in advice disproportionately affecting those on low incomes' (2020: paragraph 1.10). While Creutzfeldt & Sechi pointed out that, since the onset of the pandemic, the advice landscape has 'dramatically' changed, with the provision of advice since then becoming 'a question of having the appropriate IT equipment for a home office, a reliable internet and telephone connection, and a new set of skills to provide remote service delivery' (2021: 3). Although the House of Commons Justice Committee 2021 report did not focus on the pandemic,

the 2021 report provides a very necessary connection to the different issues associated with civil legal aid and changes that need to be made. The report acknowledged recently that there are sustainability issues for legal aid providers, which are having an impact on the ability of those entitled to legal aid to access lawyers for legal advice and representation. As a result, there is a need for a complete overhaul of the legal aid system (House of Commons Justice Committee 2021: paragraph 126).

The continuing lack of data on LIPs was an issue that Donoghue raised in 2017 in her essay on digital justice and public participation, and McKeever, writing about remote justice and the participation of LIPs in court processes during the pandemic, emphasized this continuing lack of data on LIPs in 2020. Witnesses appearing in front of the Justice Committee to give evidence highlighted the impact on courts by LIPs, with a few witnesses indicating the need to collect data, as well as better data on LIPs and their experience of the justice system. Without such data, it would be harder to make a case for more funding for legal representation (House of Commons Justice Committee 2021: paragraph 105). Suggestions were made to improve the situation of the LIPs. There were arguments to reform court processes to make them more inquisitorial as a potential solution to address the increase of LIPs, yet there was also the need to be cautious at the same time, with the requirement for the judiciary to be retrained. Another possible solution being the provision of early advice (House of Commons Justice Committee 2021: paragraph 104).

In terms of the digitization of courts, the Coronavirus Act 2020 enabled, for a temporary period, certain aspects of the court modernization programme to proceed, such as remote hearings (Sorabji 2020). During the pandemic, the programme to modernize courts has continued, and it is possible now to access courts and tribunals digitally, to make an application online, and to manage the case digitally in the following areas:

- ◇ making a claim for money (Money Claims Court Online);
- ◇ in relation to domestic violence, for unrepresented applicants to be able to make an application for a Family Law Act 1996 injunction;
- ◇ family private law in relation to childcare arrangements;
- ◇ family public law in relation to making and managing care and supervision orders (available in some family courts in specific areas);
- and
- ◇ financial remedy—which is also connected to divorce.

In relation to tribunals, the following procedures can be handled digitally:

- ◇ appeals in terms of a welfare benefits decision (employment support allowance, personal independence payments, universal credit);
- ◇ employment tribunal claims;
- ◇ tax tribunal appeals; and
- ◇ appeals against a visa or immigration decision.

However, the online divorce and probate services are for use by professionals only.

The digitization of court processes and remote hearings is clearly here to stay, but work still needs to be done to increase the participation of LIPs. As mentioned above, the Administrative Justice Council, argued for the need to address the important requirement ‘for an integrated service [on digital literacy while] providing adequate legal advice and support, especially for those most vulnerable’ (2020: ‘Summary’). However, any significant and long-lasting changes to how courts are accessed need to be proceeded with great care. Denault & Patterson (2021) commenting across different jurisdictions—in particular, the US and Canada—and providing evidence-based data on nonverbal communication, caution against making remote hearings a permanent change. The authors argue that such a decision could harm the integrity of the justice system.

Given that the existing adversarial justice system has been developed ‘on the assumption that people will be legally represented’ (JUSTICE 2015) and taking into account the current impoverished state of legal aid and decreased funding for legal advice services—which has led to a decrease in providers of legal advice, assistance, and representation, thereby causing an increase in LIPs—what is needed to re-balance access to justice? Would the modernization of courts along with adequate digital support for people who need it be sufficient? The House of Commons Justice Committee cautions against the Government merely making available legal support and information, and notes that such measures ‘should not be seen as an alternative to tailored legal advice’ (2021: paragraph 108). Genn asserts that:

When we are looking at a fundamental rethink of the justice system, of making it cheaper for those with lawyers and more accessible and comprehensive for those who have to navigate the processes alone, the key challenge is always to find a balance between rules that will deliver uncomplicated, fair processes and the best chance of a substantive just outcome (2017: 7).

Genn and colleagues raised an important point in 1999, which is still pertinent today, which is that:

The central dilemma in the access to justice argument is whether the objective of legal policy should be to enhance access to legal forums for the resolution of disputes, or whether it should be aimed at preventing problems and disputes from arising, equipping as many members of the public as possible to solve problems when they do arise without recourse to legal action, and diverting cases away from the courts into private dispute resolution forums (1999: 263).

The Low Commission in 2014 argued for the reduction in the need for advice and support in the first place, which could partly be achieved by simplifying the legal system. Early intervention and action could prevent problems from escalating.²³ While investment in the basic level of provision of information and advice, and embedding advice in settings where people go regularly, could also assist. Five years later in 2019, and following an assessment of the impact of the 2012 Act on legal advice and assistance providers, the Ministry of Justice finally acknowledged the benefits of early intervention, with the Government agreeing to pilot early legal advice.²⁴ In addition to stating that ‘Digital services should not ... be inappropriately substituted for traditional advice, representation and support’ (2121: paragraph 4), in its recent report the House of Commons Justice Committee suggested that the civil legal aid system could benefit from an updated Green Form scheme. The Green Form scheme was first introduced in 1973, and the hope is that suitably refurbished it might enable ‘individuals to access timely legal and expert advice. Rather than being constrained by issues of scope, such a scheme should be strategically targeted at those who would most benefit from early advice’ (2021: paragraph 99).²⁵

The digitization of the courts is inevitable, given that society is embracing online technology. However, any court-modernizing programme should be balanced against the needs of the more vulnerable members of society,

²³ The Low Commission’s six overarching recommendations included giving higher priority in the provision of public legal education in schools, to be given alongside financial literacy, and in education for life. Also the development by the next UK Government of a National Strategy for Advice and Legal Support in England, preferably with all-party support, with the Welsh Government developing a similar strategy for Wales. As part of the recommendation, the Commission prescribed the need for a Minister for Advice and Legal Support. Another recommendation was the co-production or commission by local authorities of local advice and legal support plans with local ‘not-for-profit and commercial advice agencies’ (2014: x). To contextualize the Low Commission’s recommendations in relation to public legal education, this was an area that had already been raised as a necessity in the early 1990s by the Legal Action Group (1992: 113-115).

²⁴ Minnoch (2019) argued against the need for a pilot, suggesting that the Government already has sufficient data.

²⁵ See also Legal Action Group (1992) and Bach Commission (2017) report on *The History of Legal Aid* by Sir Henry Brooke (appendix 6: 8-9). Within the context of the history of legal aid and legal aid providers, see also Smith (1997a). For the Green Form scheme to work, adequate remuneration needs to be given to the scheme providers, see Pickup (2012).

the integrity of the justice system and legal justice principles. Crucially, there is an urgent need to address the important requirement ‘for an integrated service [on digital literacy while] providing adequate legal advice and support, especially for those most vulnerable’ (Administrative Justice Council 2020: ‘Summary’).

For those experiencing everyday problems, which assume a legal character, while there continues to be a lack of data on LIPs, it means that for now, the current legal landscape does not provide adequate resources to enable LIPs to feel supported and, therefore, better able to participate in legal proceedings from the highest rung of the participation ladder, ‘being enabled’. Without the support provided by pro bono clinics delivered by volunteer qualified lawyers, the current legal landscape would be far rockier, yet the pro bono services should really only be viewed as complementary to legal aid provision and should not be so heavily relied upon by LIPs. Nevertheless, without these clinics and without the volunteer lawyers’ dedicated assistance, ‘For the wronged party, too often the best course of action is to abandon justice, swallow pride and accept being the victim of the unlawful actions of a more powerful adversary’ (Bach Commission 2017: 11).

A final comment needs to be made in relation to the pro bono clinic at MWLC. Without the commitment of the volunteer qualified solicitors and barristers, the Legal Centre would not have been able to provide the level of assistance or achieve the many positive outcomes for its clients, many of whom had struggled during the national shutdowns in seeking legal advice and assistance. As with any voluntary sector legal service, increased and longer-term funding would ensure that the Legal Centre would be able to maintain an adequate number of staff to be able to continue to meet the continuing high demand for its assistance.

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