



Please send your response by 12:00 noon on 14 February 2011 by email to legalaidreformmoj@justice.gsi.gov.uk, or by post to Legal Aid Reform Team, Ministry of Justice, 102 Petty France, London SW1H 9AJ.

Scope

Question 1: Do you agree with the proposals to **retain** the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme?

Yes No

Please give reasons.

Although we understand the government's need to make savings from its current spending we believe that access to justice for the vulnerable of society is fundamental. Removing areas from the scope is not supported. The areas within the scope of the civil and family legal aid scheme as defined are essential to the provision of justice for these groups.

Some of the suggestions are not well defined making it unclear what is proposed. For example "Domestic Violence" is referred to (para 4.64) but clarification is required as to which definition is being adopted. There is a risk that by limiting the scope, false or exaggerated claims will be made to use the gateways remaining.

Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party?

Yes No

Please give reasons.

We agree that interim lump sum orders could be a useful power in appropriate cases. However, we do not think that it will be appropriate to many cases. Under the Green Paper proposals these cases would not qualify for public funding and it is unlikely that a litigant in person would be prepared to navigate through the financial disclosure forms required.

Question 3: Do you agree with the proposals to **exclude** the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme?

Yes No

Please give reasons.

1. Ancillary Relief

We do not agree that this should be excluded from the scope. Although statistics show that many cases do not have a court hearing, this is not to say that there has been legal input to make the application, provide advice, draft technical documentation and draft consent orders for judicial approval. Much of this work is done by lawyers working under public funding certificates.

Although its use is encouraged by our members, mediation is not an option for all. Where it is appropriate, settlements need to be finalised with court orders to provide legal effect to the agreement. Mediation cannot operate in a vacuum outside of the provision of legal advice.

There has been very little assessment of the financial impact of this proposal and the magnitude of any

savings once the statutory charge and cost orders are accounted for. There is little published information about the recovery of the statutory charge. It may be that if the system for recovering the statutory charge was amended, some funds could be recovered this way.

2. Clinical Negligence

Clinical negligence claims are determined by expert medical opinion. Whilst experienced practitioners can take a reasonably accurate view of the prospects of success, ultimately it is not until medical records and expert opinion are obtained that the prospects can be determined. There are usually complex issues of breach of duty and causation to be determined by medical experts, not just the extent of damage. Medical experts will usually charge at least £1,000 for a report and records costs £50 per set.

Clients currently eligible for legal aid are unlikely to be able to meet these costs.

Without Legal Aid, there will be no funding for scoping the case and this will have a severe impact on access to justice for those who cannot afford to proceed.

We are concerned that there are proposals to alter the Legal Aid funding in relation to Clinical Negligence cases whilst the consultation on Lord Justice Jackson's new regime for costs recovery is ongoing. Altering the success fee possibilities will have an impact on the legal aid proposals which makes commenting on these proposals difficult. Furthermore simultaneous consultation is against HM Government Code of Practice on Consultation, July 2008 - para. 1.2. The new regime for costs recovery should be established and in place before there is any consideration given to the removal of legal aid in clinical negligence cases. The combined effect of the removal of legal aid and the proposed reforms of civil funding will mean that a large number of people will not be able to take forward a claim at all because of the costs in doing so. This includes, for example, cases where someone has died as a result of negligent treatment where damages can be relatively low, but the importance to the family is very high.

Clinical negligence litigation has acted as a major incentive and source of learning to promote better patient safety. If people cannot challenge the standard of care they receive there is a risk that the NHS will become complacent and fail to learn lessons or seek to improve.

3. Consumer & General Contract

We do not comment on this proposal at this stage.

4. Criminal Injuries Compensation

We are concerned that this proposal will affect illiterate people who would struggle to complete the forms without assistance.

5. Debt Matters where the Client's home is not immediately at risk

We do not agree. Previous Ministry of Justice research has demonstrated that those requiring legal advice frequently have a host of problems e.g. family, debt, benefits and housing. Providing advice early stops these problems from escalating and means they are resolved at a reduced cost.

In the current economic climate, suggestions that the not for profit or voluntary sector could pick up the pieces seem inappropriate. Funding for this sector has already been reduced and they are struggling to maintain existing services without tackling an increased client group. Birmingham Citizens Advice Bureaux have already indicated that they will have to take steps to close their open door bureaux as funding from Birmingham City Council has been cut and they are therefore unable to sustain this service. CABx are already struggling to cope and deal with client demands.

If advice is not provided early debt problems will in time lead to homelessness. This will impact on the legal aid housing case budget, on local authority budgets for the provision of housing and care for children as well as the health and police sectors.

6. Education

We do not agree. Legal Aid for education cases accounts for a small percentage of the legal aid budget.

The Birmingham Law Society is aware of only two firms who are authorised to provide this advice and these cases frequently revolve around children with special needs who are amongst the most vulnerable members of society. Legal aid is the only funding option for this type of case which as it is already limited to post

First-tier Tribunal representation. As damages are not sought, funding by a CFA will not be available. Removing education from the scope will prevent children and their parents challenging their education provision. Removing this funding will be at the expense of other social problems. Education is similar to Community Care which is retained within the scope; we argue that education should also remain within the scope.

Research referred to by the Association of Lawyers for Children in their response states that 82% of cases are won by parents/carers after a hearing and in 30% of appeals the Local Authority concedes the case in advance. The need to challenge the Local Authorities' decisions in this area is essential to moderate the decision making.

7. Employment

We do not comment on this proposal at this stage.

8. Other Housing Matters

We do not agree. Financial, emotional and health problems are likely to manifest as a consequence of narrowing the scope.

The impact of removing funding for any disrepair unless it causes harm risks leaving tenants to suffer squalid housing on a daily basis until it reaches crisis point. It should be considered that most disrepair cases result in no claim on the fund as the landlord ultimately pays the cost.

Costly emergency housing will be required if homelessness cases are only given funding at appeal stage.

9. Immigration where the individual is not detained

We do not agree. In cases where immigration is only one component it must be addressed for the proper disposal of the case. For example, the family court is unable to exercise its duties under the Children Act 1989 if there are unresolved issues regarding a parent's whereabouts.

In situations where human rights are at stake we are concerned that there are ECHR obligations placed on the UK which must be upheld.

10. Private Law Children & Family Cases (where a domestic violence order has not been obtained)

We do not agree. As mentioned above, the absence of a court hearing does not mean that there has been no involvement with the legal system. Where legal proceedings are conducted practitioners deplore cases which are needlessly prolonged, acrimonious and damaging to the children concerned. These cases tend to be either privately funded or involving litigants in person.

The approach of contact arrangements being resolved by parents (para 4.210) "people should take more responsibility for resolving such issues themselves" ignores many issues. The complexity of cases of domestic abduction, allegations of sexual or physical abuse, removal from the jurisdiction, inaction by the local authority and the constant undermining of contact and breaches for no reason prevent parties resolving them without third party input.

These proposals will have a disproportionate effect on women who are the majority of primary carers of children.

We support the response of the Association of Lawyers for Children which addresses this point in detail.

11. Welfare Benefits

We do not agree. As referred to previously, a client with a welfare benefit issue is likely to have other family, debt, benefits and housing issues. For many, being in receipt of welfare benefits is as a result of being unable to cope without proper advice. Preventing access to legal advice will compound their problems. Failure to provide access to legal advice at an early stage will have a huge impact which will lead to debt, homelessness and family breakdown. The not for profit sector is already stretched, does not have the financial resources to supplement its current service provision and is likely to see its current funding cut.

12. Miscellaneous

We do not comment on this proposal at this stage.

Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases?

Yes No

Please give reasons.

This suggestion requires further clarification. We are concerned that given the amount of cases which under the Green Paper will no longer be eligible for Legal Aid many may try to claim under this exception. This will add an extra tier to the Legal Aid assessment criteria.

Formulating a coherent argument that a case falls within this category will require legal representation. However, how this will be funded is not addressed. Litigants in person are unlikely to be able to address the issue adequately.

If the discretion will rest with the Legal Services Commission further guidelines will be required and staff employed to administer the claims, thereby removing resources from the frontline.

Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement?

Yes No

Please give reasons.

The issue to be considered is not just whether an alternative source of funding is suitable but whether in practice it is available. In clinical negligence cases for example, it is unlikely that conditional fee agreements will be available in many cases particularly if Lord Justice Jackson's proposals on funding and costs are implemented.

Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.

The analysis of the research referred to justifying the impact of litigants in person is in our opinion open to interpretation. We would argue that this proposal must be properly researched before considered further. Anecdotal evidence of lawyers dealing with litigants in person on a daily basis in the courts demonstrates that there is an impact on the length of court hearings and the length of cases.

There is a persistent failure to comply with court directions by litigants in person. The publicly funded party ends up having to prepare documentation and bundles which would ordinarily be the responsibility of the litigant in person. Litigants in person, especially those who are already vulnerable struggle to deal with court documentation. Those with special needs, mental health problems and language difficulties may not be able to represent themselves.

Courts are already under pressure and listings delayed beyond what would be desired by Judges and

lawyers.

We argue that people who are unable to obtain legal representation will give up rather than resolve the legal problems they are faced with.

It is unlikely that a litigant in person in a clinical negligence case could prepare a successful case when pitted against the experience and resources of the NHS. Firstly most litigants in person would not be able to locate a suitable medical expert and most experts would be unwilling to be instructed by an individual. Secondly the law requires the Claimant to address both the issues of breach of duty and causation. Thirdly the NHS has on hand their own "experts" in the form of the consultants at the hospitals that provide the care and as such already have an advantage over Claimants. Claimant solicitors (at no cost to the NHS) already "sift out" large numbers of unmeritorious claims at an early stage. The NHS and the courts would be left to take on this role with the obvious resource implications.

The Community Legal Advice Telephone Helpline

Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?

Yes No

Please give reasons.

We support the idea of a Legal Advice Telephone Helpline being used as an optional, first port of call for those with a civil law enquiry. A frontline service could save money in the long term and provide an accessible service to those in need. We do not think it appropriate that the helpline be the only route to access legal support.

Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel?

Yes No

Please give reasons.

We envisage that such a service would provide an initial assessment of the caller's entitlement to legal aid and direct people to where they could obtain advice and the information they should provide. As a result, the first meeting would be more directed alleviating the administrative burden and time pressure from the lawyer. The helpline could start the administrative process and check the enquirer's entitlement to passporting benefits. However, we also have concerns about the quality of advice provided and that such a helpline would take funding from elsewhere.

Administering the helpline would be the responsibility of the government, who would need to ensure that the helpline assisted those to whom legal aid would be available. We acknowledge that those most likely to need the service: are on limited income; are without landline telephones; could be distressed; do not find formal telephone communication easy and that there may indeed be language difficulties to overcome. Problems relating to mental health should not be dealt with over the telephone.

The experience of our members is that the initial problem a client presents with is not necessarily the only legal issue which needs resolving. Such a range of problems only comes to light in a face to face interview, when all the facts and documentation is considered.

We cannot stress the importance of allowing access to face to face advice. We do not consider it appropriate that a telephone call be enforced on anyone who would rather meet their legal representative face to face. Some clients have established relationships with their lawyer and would prefer to be advised by a trusted adviser than over the telephone.

In situations where locality makes provision of specialist advice difficult a telephone helpline will be of

assistance.

Question 9: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

As stated above, we do not consider it appropriate to prevent face to face contact.

We envisage that in the following situations face to face contact will be more important:

When there are language or learning difficulties;

Mental health issues;

Where there are documents in existence which the person seeking advice thinks may be relevant to the problem in question;

When there is an indication of a child protection issue;

Immediacy of risk to caller and/or children involved;

Caller ambivalent as to whether a victim of domestic violence;

Caller is under legal disability (including a young person);

Caller is unable to read and therefore cannot provide the advisor with the details of documents, in order to assess whether they might be relevant.

Caller requests a face to face meeting

Where court proceedings are ongoing or imminent

Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

In its current format the telephone helpline proposal requires further consultation. Local community organisations are best placed to comment on the needs of their communities.

Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?

Yes No

Please give reasons.

If a person is not eligible for assistance from the Legal Services Commission they should be directed towards paying services in their region.

Financial Eligibility

Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants?

Yes No

Please give reasons.

Those who are in receipt of passporting benefits are so entitled due to their limited resources. The allowances are minimal and do not provide for anything beyond basic living costs. Creating an extra hurdle to access legal aid seems unnecessary. In comparison to the cost of administering such a system, the amount that would be recovered through this proposal is unlikely to be high.

The litigation pursued relates to matters of importance such as debt and housing, not trivial matters.

This approach will penalise those who have managed to save a very small amount for emergencies. It is unlikely that many of those receiving passporting benefits would have £1000 in savings. We would suggest that it is most likely to affect the elderly. Further consideration is required regarding how this would be administered without it leading to additional administration.

Question 13: Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution?

Yes No

Please give reasons.

Please refer to our reply to Question 12.

Question 14: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 15: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 16: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances?

Yes No

The Government would welcome views in particular on whether the conditions listed at paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 17: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme?

Yes No

Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

Please refer to the Law Society's response on this proposal.

Question 18: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 19: Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases capped at £100,000 for all levels of service?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 21: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 22: Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 23: Which of the two proposed models at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.

Please refer to the Law Society's response on this proposal.

Criminal Remuneration

Question 24: Do you agree with the proposals to:

- pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial; Yes No
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and Yes No
- remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee? Yes No

Please give reasons.

6.5 We agree with the principle of 'streamlining criminal justice procedures so that unnecessary costs to the public purse are avoided'. However, the criminal justice system must be transparent and understandable to victims, defendants and witnesses, as well as to the public at large.

These principles will inevitably add a cost to the system which it has to bear in order that the general public maintains confidence in the criminal justice system.

Two examples of areas of concern are contained in this section of the consultation paper:

'Limiting court proceedings to those matters that require a formal sanction'. Whilst we agree with 'using sentence discounts to encourage defendants to acknowledge their guilt at the earliest opportunity' a defendant remains innocent until proven otherwise and it is for the prosecution to prove its case, not for the defendant to prove his.

That does not mean that defendant should not be given credit for pleading guilty at the earliest opportunity but it does mean that the earliest opportunity is when the prosecution has presented the defendant with sufficient evidence against him.

It also means bringing court proceedings against defendants for apparently minor criminal offences. It is important that a defendant has the opportunity to defend himself in a court of law, where the criminal burden of proof lies on the prosecution. Equally, it means that the guilty should be punished publically.

The issue of disclosure has troubled Governments for some time. The problem is that there have been a significant number of successful appeals, in recent years, in the Court of Appeal (Criminal Division), as a result of the failure of the prosecution to disclose items which were harmful to its cases. A significant number of prosecutions in the Crown Court and Magistrates' Court have not resulted in convictions as a result of diligent defence perusal of prosecution documents too.

The burden of disclosure lies on the prosecuting authorities and lawyers, and the defence lawyers. It is a 'necessary evil'.

6.8 We agree that, 'the current structure of criminal fees has developed over time, but has become complex and cumbersome'. We have moved a long way since 1982, before which litigators at least were paid for the work which they had reasonable done, together with some increase to reflect the complexity of the case and/or the burden on the lawyer. The brief fee and refreshers system for advocates was always open to abuse. It is unfortunate that reform of it occurred at a time when payment for work actually and reasonably done was going out of fashion with the authorities.

6.9 We have no objection to (yet another) 'reform of criminal fees designated to promote swift, efficient justice'. It is absolutely essential 'that there remains a sufficient supply of good quality practitioners to undertake criminal legal aid work'. We are extremely concerned that any proposals encourage practitioners (litigators and advocates) who are paid for doing a job but not for doing it sufficiently competently or professionally. Our experience of the various auditing processes put in place since criminal contracting was introduced gives us no faith that any reforms will safeguard victims or defendants.

6.11 We note that the figures for committed for trial either way cases do not distinguish between those where the magistrates declined jurisdiction and those where defendants elected Crown Court trial. We are aware of criticism of magistrates, by Crown Court judges, of many cases in the Crown Court on magistrates declining jurisdiction which Crown Court judges feel were within the magistrates' sentencing powers.

The reduction in proceedings in the magistrates' courts is significantly a reflection of administrative disposals by police officers by way of cautions, fixed penalties and community resolutions. We have real concerns that many of these are not consistent with the principles we mention at 6.5, above.

6.12 Whilst it correct that many defendants receive community sentences in the Crown Court, it is not correct to criticise magistrates for declining jurisdiction in those cases. Often community sentences are imposed, in the Crown Court, as alternatives to custodial sentences greater than magistrates' sentencing powers.

6.14 Litigators and advocates are as keen as anyone to ensure that cases are 'resolved quickly'. The quicker they are, the quicker we are paid. However, this desire must be subject to the principles referred to at 6.5, above.

6.18 We note that no figures are provided for the number or percentage of cases that are discharged or discontinued pre-committal in those cases where defendants have elected Crown Court trial.

We oppose the separate fee pre-committal for cases committed to the Crown Court for trial. Just as it is important for police investigations to gather as much evidence as possible as early as possible to an alleged crime being committed, so it is important for the work on a defendant's case to be as front-loaded as possible. The separate fee, reflecting work done pre-committal, for cases committed to the Crown Court reflects the importance of this to the criminal justice system.

6.20 We do not oppose a single fee, payable to the litigator, for the litigator to negotiate fees with the advocate's clerk. This reflects the position outside legal aid.

6.21 We oppose a single fee for a guilty plea, whether or not that is to the original charge and always intended to be a guilty plea, or an initial denial by the client who changes his mind after a case is prepared for trial, or a denial by the client who is offered a lesser charge which he is prepared to plead guilty to, after the original charge is prepared for trial.

It seems to us that the payment system must reflect these three scenarios, particularly as all three are normally completely outside both the litigator's and the advocate's control. The client's position may change as a result of the prosecution accepting a guilty plea to a lesser charge which they had refused earlier on in the proceedings, the client's change of plea may arise as a result of late prosecution disclosure and the client may not be prepared to plead guilty until the day of the trial, no matter how overwhelming the evidence.

This proposal, in the consultation, runs the real risk of unscrupulous litigators and advocates not preparing cases as fully as they should.

Question 24

1. We do not oppose the proposal to pay a single fee, to cover litigator and advocate, in any one case, for the reasons given in 6.20, above.
2. We oppose the single fee structure for all cracked trials and guilty pleas where the magistrates accepted jurisdiction, for the reasons given in 6.21, above.
3. No, for the reasons given in 6.18, above.

6.25 We repeat the comments given in 6.21, above.

6.28 We believe that if there is to be a standard fee for all guilty pleas in either way cases, then provision for

'special preparation' needs to be much wider than currently allowed. It needs to cover work done which is significantly more than the work which would be done for preparing a case that was always instructed as a guilty plea.

Question 25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- the proposal to enhance the Litigators Graduated Fee Scheme and Advocates Graduated Fee Scheme fees for a guilty plea by 25% provides reasonable remuneration when averaged across the full range of cases; and Yes No
- access to special preparation provides reasonable enhancement for the most complex cases? Yes No

Please give reasons.

6.25 We repeat the comments given in 6.21, above.

6.28 We believe that if there is to be a standard fee for all guilty pleas in either way cases, then provision for 'special preparation' needs to be much wider than currently allowed. It needs to cover work done which is significantly more than the work which would be done for preparing a case that was always instructed as a guilty plea.

Question 25

1. We oppose the single fee structure for all cracked trials and guilty pleas, for the reasons given in 6.21, above.
2. It seems to us that if there is to be a single fee for all guilty pleas, then 'special preparation' fees need to be available for far more than 'the most complex cases', for the reasons given at 6.28, above.

6.30 Cases of homicide carry much greater responsibility on both litigators and advocates. This is reflected in the much higher percentage of life sentences given for those convicted of these offences. In addition, frequently there is very significantly more forensic defence work required which is not reflected in the volume of prosecution evidence.

Question 26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences?

Yes No

Please give reasons.

6.30 Cases of homicide carry much greater responsibility on both litigators and advocates. This is reflected in the much higher percentage of life sentences given for those convicted of these offences. In addition, frequently there is very significantly more forensic defence work required which is not reflected in the volume of prosecution evidence.

Question 26

For the reasons given at 6.30, above, we oppose reducing category A cases to category J.

Question 27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000?

Yes No

Please give reasons.

We accept the proposition that the complexity of all dishonesty cases do not increase, arithmetically, with the value involved. However, a significant number of them do. Frequently (though not always) the number and complexity of the transactions involved in an allegation of dishonesty increase as the value involved increases. If it is proposed to retain the graduated fee structure, then there needs to be arbitrary levels to try to reflect this. We believe that the current levels fairly reflect this. Reducing all alleged offences of dishonesty below £100,000 does not reflect this.

Question 28: Do you agree with the Government's proposal to:

- a) remove the premium paid for magistrates' courts cases in London; and Yes No
b) reduce most 'bolt on' fees by 50%? Yes No

Please give reasons.

- a) The current distinction between London and other urban areas does not accurately reflect the costs of running practices in some major cities outside London. The sensible system would be to follow the expense rates schedule for different areas issued by the Chief Costs Judge annually. In the absence of that, we find it difficult to argue against one urban rate and one rural rate.
- b) We believe that, in a graduated fee structure, 'bolt on' fees are necessary, for the reasons given by Lord Carter, in his report. We do not believe that they are generous. They resulted in a reduction in fees payable for similar cases pre- and post introduction. We would also propose a restructuring of the special preparation fees payable, for the reasons given in 6.28, above. This would be all the more important if there were to be a reduction in 'bolt on' fees.

Question 29: Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates?

Yes No

Please give reasons.

We believe that the skills involved in preparing a VHCC as a litigator are not always the same as for an advocate. Nevertheless, we agree in the sense of having a VHCC panel. The present system of having no panel at all creates a danger of having those without sufficient expertise dealing with cases outside their area of competency or experience. However, the panel cannot be a closed shop. It must provide for constant admittance to it of those who satisfy its criteria.

Question 30: Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases?

Yes No

It would be helpful to have your views on:

- the proposed role of the assessor;
- the skills and experience that would be required for the post; and
- whether it would offer value for money.

Please give reasons.

We believe that the current Crown Court costs appeal structure, to Re-Determining Officers and to Costs Judges (with further appeals on certified Points of Principle) works well and there is no reason why it would not work well in VHCCs.

1. Any assessor role would only be useful in authorising work to be done, akin to obtaining prior authority to incur disbursements.
2. It would be essential for an assessor to have had hands-on experience of conducting VHCCs for defendants.
3. There are advantages in having an assessor: He/she could give prior authority for undertaking specific items of work. Given the amount of work these cases involve, it creates certainty for litigators and advocates to know, in advance, that their proposed undertaking of work is going to be paid.

As to whether it would offer value for money, we are doubtful. At the moment the paying authority has the advantage, in non-VHCCs, of assessing the reasonableness of work done after the event and the litigators and advocates have the uncertainty of undertaking work not knowing whether or not they are going to be paid for it. The present system, in non-VHCCs, is unsatisfactory for litigators and advocates. In VHCCs, the present system has a prior authority system, but the gate-keepers do not have the experience of undertaking VHCCs themselves. We are not convinced that a gate-keeper with sufficient VHCC experience would prevent work being done sufficiently to justify the cost of him and his associated expenses.

Question 31: Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages?

Yes No

Please give reasons.

The preamble to this question omits any reference to unused prosecution evidence. Neither advocates nor litigators are paid for considering unused prosecution material. The volume of this often exceeds the volume of used prosecution evidence (combined statements and exhibits). Often the unused evidence is crucial to a case. The payment based on used prosecution evidence is supposed to include consideration of unused prosecution evidence. Taking this in to account, we believe that the second criteria for granting legal aid for two counsel should remain as it is, particularly as the first criteria has to be met in any case that any of the second criteria are met.

Price Competition

We note that there are no questions relating to this as a further consultation will take place in relation to it.

References to:

'let[ing] the market determine how those services were delivered' (6.52)

'Suppliers would be able to bid a price for a volume of work that suited their business model and which would allow them to deliver services innovatively and profitably' (6.52)

'selecting the most efficient providers' (6.52)

Fill us with great trepidation – not for ourselves but for our clients. Clients in the criminal justice system are frequently the most vulnerable in society. None of the auditing requirements since contracting began have removed those advocates or litigators who manage to 'tick the correct boxes' whilst doing the minimal amount – and often less than the minimum amount required to properly represent our clients. The overwhelming majority of advocates and litigators are conscientious and competent but any walk through almost any Crown Court or magistrates' court, any day will reveal examples of the competent and the incompetent, the conscientious and the less than conscientious. This is despite all the auditing by the Ministry of Justice and its agencies.

Any price competition (competitive tendering) to do work will lead to those who cut corners beyond acceptability succeeding, at the expense of those who have no qualms about trying to achieve efficiencies whilst remaining committed to upholding access to justice and the rule of law.

There is no place, in a fair system of criminal justice, when defendants are prosecuted by the might of the state, for 'the shape of the market following [price] competition should be determined through the individual decisions of participants on the basis that their bids offer the best price, and through an open and fair competitive tender process'. (6.58) In the overwhelming majority of criminal cases the defendants are not able to make informed decisions about which litigator and advocate they want to instruct, as a client would in the commercial field.

The present system has its defects, many of which can and should be remedied, but price competition is not the answer.

Indicative timetable

Before leaving this section, we would just mention the illusion that some providers are creating of being bigger providers than they really are. It is clear that some providers are creating the impression of having a significant presence nationally or regionally whereas a glance at their figures shows that whilst they may (or may not) have a significant presence from one office, the others are actually shells with little or no real work.

Civil Remuneration

Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees?

Yes No

Please give reasons.

Fees paid in civil and family matters have remained at their current level for nearly fifteen years. If the scope of legal aid is to be significantly reduced it is essential that the more limited remit of the scheme is paid at a sustainable level in order for practitioners to continue to provide a service and operate their businesses.

Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases?

Yes No

If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

It is not expected that this proposal would have major impact. The average enhancement is 30-50%. Enhancements is one mechanism which encourages experienced practitioners to remain within legal aid. Reducing enhancements will not encourage these lawyers to continue to work in legal aid, where they are paid at rates which have not increased since 1994.

Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction?

Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 35: Do you agree with the proposals:

- to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and Yes No
- to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage? Yes No

Please give reasons.

Please refer to the Law Society's response on this proposal.

Question 36: The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

Please refer to the Law Society's response on this proposal.

Question 37: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases?

Yes No

If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

In relation to family work, the hourly rates have not been increased for nearly fifteen years and have been eroded by inflation. Even with the "bolt on" uplifts, hourly rates are below the benchmark hourly rates for psychologist reports and below the hourly rate for junior counsel in a civil case. Experienced practitioners will not remain in legal aid if such enhancements are reduced.

Question 38: Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply?

Yes No

Please give reasons.

The current provisions are already very restrictive. Certificates are usually only granted where there is the accumulation of requisite factors; factors which are much the same as the Criminal Defence Service (General) (No 2) Regulations 2001. Appointing Queen's Counsel is not necessarily an unnecessary expense and their appointment can often serve to shorten a hearing for example.

Expert Remuneration

Question 39: Do you agree that:

- there should be a clear structure for the fees to be paid to experts from legal aid; Yes No
- in the short term, the current benchmark hourly rates, reduced by 10%, should be codified; Yes No
- in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates; Yes No
- the categorisations of fixed and graduated fees shown in Annex J are appropriate; and Yes No
- the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable? Yes No

Please give reasons.

8.2 We confirm that 'selection of the right expert ... [can] be critical to the outcome that they can achieve for their client. For example, in criminal cases, it can mean the difference between conviction and acquittal and does in a significant number of cases. This is reflected in the increase in the number of experts instructed by the prosecution.

Question 39

1. We agree that there should be a clear structure for the fees to be paid to experts from legal aid. This structure should be agreed by the Ministry of Justice and the relevant supervisory body of the experts concerned. Failure to do this will lead to cases where no expert is prepared to be instructed in his/her area of expertise for the fees stipulated in the specified structure.
2. We repeat our answer at 1, above.
3. We have no objection to the proposed structure, provided that the relevant experts' supervisory body is content too.
4. We have no view on the categorisations of experts at this stage.
5. We consider that 'exceptional' is too narrowly defined. It should follow the Oxford English dictionary meaning of "unusual" or "out of the ordinary", to which we would add those cases where it is not possible to instruct a relevant expert at the prescribed rates.

This fee structure does not include fees payable to Independent Social Workers.

We are concerned that expert witnesses are reasonably remunerated and continue to work in publicly funded work. However, the proportion of the legal aid budgets being spent on experts is rising and we acknowledge steps do need to be made to address this.

Alternative Sources of Funding

Question 40: Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts?

Yes No

Please give reasons.

We refer to the Law Society's response on this question.

Question 41: Which model do you believe would be most effective:

- Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or
- Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

We refer to the Law Society's response on this question.

Question 42: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:

- A) mandatory model;
- B) voluntary opt-in model; or
- C) voluntary opt-out model?

Please give reasons.

We refer to the Law Society's response on this question.

Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme?

- Yes No

Please give reasons.

We are supportive of measures which will result in additional money being made available for the Legal Aid Fund.

Question 44: Do you agree that the amount recovered should be set as a percentage of general damages?

Yes No

If so, what should the percentage be?

We refer to the Law Society's response on this question.

Governance and Administration

Question 45: The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.

10.10 We have significant concerns about whether the proposals will create sufficient independence and transparency in:

1. The provision of state funding of the defence of individuals who are being prosecuted by the state; and
2. The provision of state funding of individuals who have sufficient grounds to challenge the state or its agencies (nationally or locally) or to bring civil proceedings against any of them

10.17 The Consultation clearly envisages not only auditing by non-lawyers (arguably one of the reasons for the failure of the present auditing process) but also out-sourcing such auditing. There are many recent examples in both the health and education sectors which show the repeated failures of outsourcing companies in specialist areas.

Question 45

We agree on the need to have quality assurance. To be effective, this needs to have significant input by lawyers practicing in the relevant fields. It needs to audit those items which are relevant to the competence of the advocate or litigator to represent the client.

Question 46: The Government would welcome views on the administration of legal aid, and in particular:

- the application process for civil and criminal legal aid;
- applying for amendments, payments on account, etc.;
- bill submission and final settlement of legal aid claims; and
- whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

1. The application process for both criminal and civil legal aid needs the involvement of lawyers who practise in the relevant fields of law, even if only in an appeal structure. This is nothing new: Local law societies, followed by the Legal Aid Board, followed by the Legal Services Commission have been doing this for many decades.
2. Savings by increased use of electronic means are possible, such as the recent introduction of applying for prior authority on line. However, it must be remembered that at the end of the line, a human will need to make a decision and the decision making process will be most efficient if he/she has experience in the area concerned.
3. Non-means, non-merit tested applications are deemed to be the subject of exercise of devolved powers which only creates additional work for providers and LSC staff. Means testing in some areas could be abolished. Devolved powers could be extended so that time spent on such matters could be used elsewhere.
4. The same applies to bill submissions and final settlement of legal aid claims. Electronic submission could streamline processes.
5. With modern electronic methods there is no reason why payments as billed could not occur almost instantaneously. On that basis we would prefer this to the system of standard monthly payments imposed by the Legal Services Commission. The latter is a 'hit and miss' affair and does not carry the accuracy of the former. Cash flow is a major problem for solicitors paid by the LSC so payment should not move beyond monthly.

Question 47: In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

Where practicable, legal aid practitioners welcome and already utilise electronic working.

In the criminal justice system there will always be the need to have paper copies of the majority of the evidence. Most defendants do not have access to computers or the internet.

Question 48: Are there any other factors you think the Government should consider to improve the administration of legal aid?

Our view is that the administration of the duty solicitor schemes are a shambles. For many years they were administered by local solicitors without charge. It was taken away from them. They will not do it again without charge. However, the cost of paying local solicitors to administer these schemes may be cheaper and will certainly be more efficient than the present system.

LSC staff turnover is a concern. Better working relationships between providers and the LSC would be advantageous for everyone involved in the legal process.

Impact Assessments

Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Yes No

Please give reasons.

We ask that you refer to the Law Society's detailed response to this question.

We believe that the proposals underestimate the impact of the proposals on the criminal justice system. They do not display a full understanding of the delicate balance required to achieve justice in an adversarial system where the might of the State is on one side and a frequently vulnerable individual on the other.

We consider there to be significant impacts on health, police, the Ministry of Justice's criminal and family budgets, HMCS budget, Department for Education and Local Authority social services departments.

Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals?

Yes No

Please give reasons.

We do not believe that the proposals fully identify the issues of credibility and transparency necessary for the public to have full confidence in the criminal justice system.

The extent of the impact appears to be being minimised. We believe the wider social and economic costs are significant and the potential problems dealing with litigants in person will be greater than has been acknowledged to the detriment of the whole legal process.

Question 51: Are there forms of mitigation in relation to client impacts that we have not considered?

The thrust of the proposals should have been to seek efficiency savings whilst not jeopardising either access to justice or the rule of law. Whether this is done from a 'blank sheet of paper' or by 'tinkering with the present system' does not matter. However, we do not believe that the proposals have either of the two principles of access to justice or the rule of law at their heart, which they should. We see no benefits of the proposals to the client.

About you

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Job title (or capacity in which you are responding to this consultation exercise)

- ATE Insurer
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- Claimant Lawyer
- Claims Management Company
- Consumer representative organisation
- Defendant
- Defendant Lawyer
- Government Department / Non-Departmental Public Body
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Date

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