



Response of the Association of Costs Lawyers to the Consultation on Proposals for the Reform of Legal Aid in England and Wales

Introduction

The Association of Costs Lawyers represents some 750 to 800 members. Of that number some 150 are substantially involved in Legal Aid costs. Whilst our members' main expertise is on law costs our members have detailed knowledge of the operation of the Legal Aid system and the members of our society for whom the system provides access to justice. The proposals are said to have two aims. First, to discourage people from resorting to lawyers whenever they face a problem and bringing their problems before the courts too readily. Second, to deliver savings of some £350 million per annum from 2014–15 from Legal Aid.

This is expected to be achieved by removal of funding of many types of cases. Further proposals invite consideration of a reduction of 10% of fees and a cap on enhancement on hourly rates. The Association of Costs Lawyers has less expertise in specific areas covered by the proposals and defers where appropriate in these responses to the responses of bodies with greater expertise. In preparing this response we have seen the responses of such bodies and adopt the concerns raised by them. The Association of Costs Lawyers is deeply concerned at the proposals and considers that they are fundamentally flawed. They fail to reflect the nature and complexity of our society. We agree with others who consider that the proposals would have major regressive impacts. We further submit that the proposals should not be considered further until after the Family Justice Review has published its final report. In this response will urge that the proposals are not implemented.

Genesis

The foreword to the proposals contains the following statements:

“The modern legal aid scheme was established in 1949 with a laudable aim: to provide equality of access and the right to representation before the law. However, the scope of legal matters covered was very tightly drawn.

The current scheme bears very little resemblance to the one that was introduced in 1949. It has expanded, so much so that it is now one of the most expensive in the world, available for a very wide range of issues, including some which should not require any legal expertise to resolve.

We make no apology for a short history lesson. With respect the scope of Legal Aid under the original scheme was wider and not more restrictive than the current scheme. The proposals seek to remove the key legal matters that were the key matters covered under the 1949 scheme. The main author of this response has reread the second readings contained in Hansard relating to the Legal Aid and Advice Bill 1948. This bill was introduced with cross-party support at the time of the worst economic crisis that this country has faced. It surely is significant that even with this situation the provision of access to justice was considered a priority.

Until the 1949 Act, although pro bono services were provided by some solicitors and counsel, it was very difficult for the poor to find solicitors willing to provide legal assistance. There were “poor man’s” organisations providing legal services. These were mainly in London and in the major cities. The ability to access a solicitor or barrister was much restricted. In 12 out of 50 provisional towns with populations of over 100,000 there existed a “poor man’s” organisation. In the other 28 there was no such provision¹.

The quotes that follow from the second reading of the bill² are as significant and relevant today as they were then.

¹ Source: Legal Aid by Eric Sachs

² HC Deb 15 December 1948 vol 459 cc1221-327

The Attorney-General (Sir Hartley Shawcross):

"It is the charter of the little man to the British courts of justice. It is a Bill which will open the doors of the courts freely to all persons who may wish to avail themselves of British justice without regard to the question of their wealth or ability to pay."

"To no one will we sell, deny, or delay right or justice. -it is an interesting historical reflection that our legal system, admirable though it is, has always been in many respects open to, and it has received, grave criticisms on account of the fact that its benefits were only fully available to those who had purses sufficiently long to pay for them."

"But the Bill does go a very long way and it will open the doors of His Majesty's courts and make British justice more readily accessible to the great mass of the population who hitherto have too frequently, I am afraid, had to regard these elementary rights-as they ought to be-as luxuries which were beyond their reach."

"I commend this Bill to the House by saying that it really is an important and useful Bill, which marks, I think, an important step forward in the administration of our law; and a Bill which will, at last, remove the grave reproach that, excellent as our system of law and justice and administration has been in other respects, and admirable as are our courts, they were too often a luxury which was available only to the wealthier sections of the community."

Mr. Hector Hughes (Aberdeen, North:)

"This Bill as it stands will go a long way towards eliminating and making untrue the old gibe that there is one law for the rich and one law for the poor."

Mr. Emrys Roberts (Merioneth)

"This Bill is a great advance towards achieving the principle that all men should have equal facilities of access to the courts of law...it is a great advance towards social justice."

The Impact of the Proposals on those Needing Representation

Those entitled to Legal Aid represent the neediest and most vulnerable members of our society. The proposals would deny many access to legal advice and assistance. They will be those who are incapable of articulating their case before a mediator let alone a Court. The proposals will result in inequality where matters involve those who can afford to pay for legal services and those who cannot. In cases against state departments or local governments will those defendants no longer be legally represented? An individual without legal representation may not be afforded a fair hearing, no matter how courts seek to redress the balance. Settlement of cases involving the unrepresented may not be fair settlements. We agree with others that proposals would have a disproportionate effect on women; that 80% of women are primary carers, post separation and that the proposals do not address this. The proposals will have a very serious impact upon children and we can see a consequence being an increase in public law cases. Children should have contact with their parents and may suffer emotional harm that may impact upon him or her throughout his or her life. Parents must be afforded a mechanism that ensures that their rights in relation to their children are not infringed. Parties denied representation in financial disputes in family proceedings would quite simply be denied justice. Such proceedings are not straightforward and often involve difficult tax and pension issues. In such cases there are difficulties sourcing the materials needed for a fair settlement to be achieved and often subterfuge by parties. In these cases parties may face the loss of a home for themselves and their children or the chance of acquiring adequate funds to secure a home for themselves and their children . A proper resolution to a financial family law dispute can ensure that poverty is avoided. Whilst we welcome the continuation of mediation, it is not a solution in itself and can never be expected to resolve all disputes. A mediator cannot offer legal advice. Mediation is very different to arbitration. It may fail where the parties are not equal.. It may not assist those who have limited abilities. Where mediation fails people will be left to proceed through the Courts without legal representation. Resolution following many

mediations is often only temporary.

Where justice is not achieved further expense will arise from putting right miscarriages of justice. We agree with the author of an article in The Law Society Gazette that the proposals would be an absolute disaster for the poor.

A final consideration is how can litigants be expected to meet the cost of expenses of litigation such as court fees, fees of experts, interpreters etc.?

Impact on the Court System

The present court system will be unable to cope with the huge extra burdens placed upon it. Currently legal representatives act as a buffer between the parties and the judiciary. They facilitate the discarding of the meritless cases, the settlement of cases, the narrowing of issues and ensure that procedures are followed.. These proposals would result in fewer cases been resolved. There will be many more litigants in person bringing proceedings before the family Courts. How can how the court system be expected to cope? A large element of cost shifting from the Legal Aid budget to that of the Court Service will result.

The Impact on the Legal Profession

Two areas of reduction of remuneration are considered in the proposals. We address this later. However, we make the following observations here:

- The proposal of a 10% reduction in fees ignores the fact that there have been year in and year out reductions in solicitors fees for Legal Aid work because there have been no increased fees since 2001 for family cases and since 2001 in civil cases.
- A cap on enhancement would mean that for the most complex and demanding cases further inadequate remuneration would result.

We are concerned that the proposals could result in a reduction in quality of service. Much work may have to be delegated to the most junior fee-earner. The legal provider base will diminish.

In civil cases solicitors are unlikely to be willing to take clinical negligence cases under

conditional fee agreements except in cases with very clear prospects of success. How will this gap be filled? Solicitors will not be willing to take claims against the Police and Departments of State under conditional fee agreements. Such cases are extremely difficult to present. Legal expense insurance is not a consideration for the poorest members of our society. Pro bono representation will never be capable of filling the gaps. Advice agencies are overstretched and being closed they will be unable to cope with the extra demands.

Economic Impacts

The proposals if implemented will result in increased costs in the administration and running of the Court Service. They would also cause redundancies and with that loss of tax revenue and liabilities for social security benefits. The savings that the proposals aim to achieve must be seen in perspective. Based upon 26 million income taxpayers this equates to a payment per income taxpayer of £0.26 per week. Further, the proposed saving is less than a quarter of the annual fee income of the leading accountancy firms and a third of the annual fee income of the leading city law firms.

Conclusions

We submit that the proposals are flawed and in any event are premature. We believe that the consequences are so far reaching that a much wider consultation is required allowing the consumer to be consulted.. We acknowledge the need to address the fiscal deficit, but urge that Legal Aid be protected from cuts. A costs benefit analysis of cost compared to the benefits achieved in these areas of law will show money well spent. We should not be embarrassed by the expenditure. Legal Aid is an integral part of ensuring social justice. Alternative measures of funding the Legal Aid system should be considered with the involvement of all interested parties. We urge such considerations take place before any decisions that could prove enormously damaging and hugely expensive to correct be made.

Specific Responses

Question 1

We do believe that the types of cases and proceedings should be retained within the scope of the Civil and Family Legal Aid Scheme. We can do little better than refer back to our general response. We also endorse the responses of other interested bodies.

Question 2

This may require an amendment to the Family Procedure Rules. Courts already have the powers to require one party to fund the costs of representation of the other in ancillary relief cases by means of maintenance pending suit or by lump sum orders. This is very rarely exercised. This power could only be exercised where that other party had significant funds. In most cases the liability of one party in relation to legal costs has to be taken into account in determining the appropriate ancillary relief orders. Requiring one party to fund the costs of the other can reduce the funds available for distribution.

Question 3

We do not agree that the types of case and proceedings should be excluded. Ancillary relief applications require the input of a legal professional. Specialist legal advice and assistance is required for Funded Clients. In the absence of production of the data relied upon we are unable to properly comment on the statements made in the tables. In many cases mediation is not a practical solution. In many cases the statutory charge applies. It would be helpful for data to be provided showing the effects of the statutory charge in relation to the liabilities of the Fund.

In relation to funding of clinical negligence cases we see little attraction to solicitors to conduct such litigation without public funding. Solicitors will not be willing to conduct such cases under Conditional Fee Agreements unless it is believed that there are significant prospects of success. The cost to Claimants' solicitors where such costs cases fail where they are conducted under a Conditional Fee Agreement are substantial. A further difficulty

for solicitors prepared to consider conducting such cases under Conditional Fee Agreements is that fairly detailed investigations are required before merits can be assessed and a decision made as to whether or not a Conditional Fee Agreement is viable. We believe that the removal of funding here would result in many Claimants entitled to claim not being able to.

In relation to consumer and general contracts we defer to the comments of other bodies. Likewise in relation to Criminal Injuries Compensation. Also in relation to debt, education and employment matters we defer to the expertise of others. We disagree that there should be any changes in relation to funding for housing matters. Those requiring funding in relation to housing matters are some of the most vulnerable people in society. The welfare of children has to be considered a priority. Those entitled to funding in relation to housing matters are at a disadvantage in dealing with Landlords. Landlords have resources for legal representation. The proposals would result in inequality of arms. We maintain that there should be no change in relation to funding concerning immigration cases. Again these immigration cases involve some of the most vulnerable people in society. We are fundamentally opposed to any changes in relation to private law children and family cases. We have seen and endorsed the views expressed by other interested bodies. Rarely are these cases straight forward and many are extremely protracted. Mediation is rarely a solution in these cases. We further do not agree that Section 14 TOLATA cases should be excluded from funding. These are similar to Ancillary relief cases and to ensure justice representation is required.

Question 4

Here we defer to the views of and comments of other interested bodies that have greater experience. Having seen the responses we endorse the views expressed.

Question 5

Conditional Fee Agreements cannot be used in family cases. They would be contrary to public policy. For such to be permitted amendment to primary legislation would be required. In any event they could only be used where there is likelihood of monetary recovery of costs recovery.

Question 6

Our experience is that litigants in person are significantly disadvantaged when the opponent has legal representation. Our experience is that cases involving litigants in person occupy greater court time and increase the burdens on the Court Service. It is our experience that where one party is a litigant in person and the other funded costs are increased to the funded party. Litigants in person are rarely capable of dealing with court directions and complying with protocols and rules. Hearings last longer. Where an Applicant is a litigant in person inevitably Courts require the Respondent who is funded to prepare all bundles of documents and to deal with many of the procedures that should be dealt with by the litigant in person adding to the costs of the publicly funded party. It is inevitable that if the numbers of litigants in person increase so will the court time be increased and the administrative costs to the Court Service increased.

Question 7

We defer to the experience of other interested bodies. Having read those response we endorse the comments made.

Question 8

Our last response is repeated.

Question 9

Likewise.

Question 10

Likewise.

Question 11

Funding should not be provided to those that are capable of funding their own representation.

Question 12

We have no observation to make here.

Question 13

We question what this proposal would achieve compared to the expense in collecting the contributions both to the LSC and solicitors.

Questions 14 to 22

We disagree with these proposals. We are concerned of the impact that these proposals would have on those that can provide the service to families who are not entitled to non-means tested funding. It is also important that those joined in proceedings in care cases should not be put off being represented because of the financial implications involved. They provide a valuable service to society.

Questions 23 to 31

We defer to the comments of other interested bodies.

Question 32

The proposal is fundamentally wrong and unfair. Remuneration of solicitors has hardly increased in 15 years. Effectively solicitors have suffered a substantial reduction in remuneration.

The rates of remuneration have in civil cases not been increased since 1996 (and then only marginally). There has been no increase in family cases since 2001.

If these rates had been increased to reflect inflation they would for the sample types of case proceeding in a county court (Non-London rates have been used for illustration):

Civil Rates (From October 1996)

Rate	Rate	Rate Reflecting
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		Inflationary Increases
Preparation Rate	66	98.09
Letters written	6.60	9.81
Telephone calls	3.65	5.43
Advocacy	66	98.09
Hearings with counsel	32.50	48.31
Travelling and waiting	29.20	43.40

Family Private Law Rates (From April 2001)

Rate	Rate	Rate Reflecting Inflationary Increases
Preparation Rate	61	80.03
Letters written	6	7.87
Letters received	3	3.93
Telephone calls	6	7.87
Advocacy	63	82.65
Hearings with counsel	36	47.23
Travelling and waiting	31	40.67

Family Public Law Rates (From April 2001)

Rate	Rate	Rate Reflecting Inflationary Increases
Preparation Rate	64.90	85.15
Letters written	4.1	5.38
Letters received	2.05	2.69

Telephone calls	4.1	5.38
Advocacy	71.50	93.81
Hearings with counsel	36.30	47.62
Travelling and waiting	32.45	42.57

Regard and comparison must also be had to the current guideline summary assessment rates for civil cases. These are set out below:

	Band A	Band B	Band C	Band D
London 1	409	296	226	138
London 2	317	242	196	126
London 3	(229-267)	(172-229)	165	121
National 1	217	192	161	118
National 2	201	177	146	111

The overheads of Legal Aid solicitors are little less than those acting in civil litigation. We cannot see where solicitors undertaking publicly funded cases can reduce their overheads further. There can be no justification for any reduction in the remuneration paid to solicitors and indeed there are very strong arguments supporting a significant increase in the rates of remuneration. The proposal, if implemented, will drive solicitors away from undertaking public funded cases. This will result in a further reduction in the pool of solicitors willing to undertake public funded cases. A reminder of the situation before the Legal Aid Act 1949 is highly relevant here. We must not return to that situation.

Question 33

We do not agree. Our surveys confirm that enhancement in excess of 50% is quite frequently granted where it is merited. We invite consideration of the Unified Contract

documents. These set out the criteria for enhancement of hourly rates. Where the criteria is met justifying an enhancement in excess of 50% the solicitor should be rewarded/compensated for the special responsibility exercised. It must also be borne in mind that one of the key grounds of enhancement is where the solicitor has conducted a matter with great economy resulting in a saving of cost to the Fund.

Question 34

Here we defer to the responses of other interested bodies.

Question 35

Here we again defer to the expertise of other interested bodies.

Question 36

Again we defer to the expertise of other interested bodies.

Question 37

Here again we strongly object to the proposals and repeat the responses under question 33. It is accepted by the Legal Services Commission that where a Senior Family Lawyer is required as there are no differential rates for different grades of fee earner enhancement is a consideration. In many cases no enhancement is claimed or is limited to the panel member enhancement of 15%. It is only in limited cases that relatively high levels of enhancement are claimed and allowed. We suspect that the costs to the fund where enhancements exceed 50% is relatively small. Solicitors conducting complex cases and conducting cases extremely economically should be rewarded appropriately.

Question 38

We consider that the present Code is entirely suitable, if not unreasonably restrictive.

Question 39

Here we do agree that there needs to be control over fees paid to experts. It cannot be right that rates paid to experts should be far higher than allowed to solicitors. However, if the proposals are such that experts are unwilling to be involved in funded cases this could

reduce the pool of experts available and impact on justice generally. The rates should be fair and reasonable.

Questions 40 to 42

We defer here to the response of the Law Society.

Question 43

We again defer to the expertise of other interested parties.

Question 44

This proposals is worthy of consideration. We understand that it is being considered elsewhere and would seek to respond further once further information is available.

Question 45

We defer to the expertise of others here.

Question 46

We endorse many of the comments made here as to the way forward. We would welcome an extension of devolved powers to solicitors. We share the opinions of others that extending devolved powers would reduce the costs of administration and avoid the delays that we commonly see. We see little advantage in online billing. Our experience of the Pilot is indicative of the time expenditure being significantly greater than paper bills. We are also concerned at the cost of such billing. We would welcome sight of the feedback in relation to online billing before commenting further.

Question 47

Our experience is that when e-mails are sent by solicitors to the Legal Services Commission there is an immediate acknowledgment, but in many cases by a lack of follow-up action. This results in other communications often by telephone adding to the cost and expense involved. We believe that solicitors would be ready to move forward here, but question the ability of the Legal Services Commission to do so given the limited resources of the Commission.

Question 48

The administration of the Legal Aid system is failing by reductions in staff and in many cases lack of proper training of LSC staff. We would welcome an opportunity to work with the LSC in staff training particularly as to costs.

Question 49

Our earlier responses are relevant here. We do think that inadequate consideration has been given to the impacts of what is proposed. We believe that the proposals will increase public expenditure elsewhere. We are concerned that the proposals have not been properly thought out and costed. There appears to be an absence of impact assessments in key areas.

Question 50

We do not accept that there has been correct identification of the extent of impacts under the proposals. The social consequences of the proposals have not been thought out properly. We would be interested to see an impact assessment reflecting the increases in cases conducted by or involving litigants in person.

Question 51

We have seen the responses of other interested bodies and endorse the views expressed.