4th June 2013

Response of the Association of Costs Lawyers to the consultation paper of the Ministry of Justice "Transforming legal aid: delivering a more credible and efficient system"

Other organisations and bodies with greater resources will deliver more eloquent and detailed responses to the proposed reforms. The Association restricts its comments and observations to its key concerns.

Whilst we recognise the need to ensure fiscal control of public expenditure the amount expended needs to be looked at in the context of what that expenditure is in comparison to total public expenditure and the enormous service delivered at that cost. The legal aid budget in real terms is modest. The amount accounts for less than 0.1% of total public spending. We should be proud not embarrassed by the expenditure on public funded legal services.

It is worthwhile looking back to the creation of legal aid. The Legal Aid and Advice Bill 1948 was introduced with cross-party support at the time of the worst economic crisis that this country has faced. Surely it is significant that even in this situation the provision of access to justice was considered a priority. The quotes taken from Hansard that follow seem as significant and relevant today as they were then.

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."*
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> *"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."*
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> *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.*
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> *"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*

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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."

If there is an issue as to public confidence, (and we do not agree that there is, save in relation to isolated extreme cases picked up by newspapers of a certain type) then there has been a failure to create awareness and pride in the benefits and service that legal aid delivers.

The explanatory foreword demonstrates the fundamentally flawed premise of the proposed reforms in that it selectively cites a few extreme examples as justification for a massive reduction in service. The references to pay of senior public servants and the "hard-working public" needs to be balanced by the facts that most providers of legal aid do not command high incomes with most earning much less than senior public servants and most providers working extremely high levels of hours that few others do.

Whilst every system of this type will be the subject of abuse by a few, such abuses are in the absolute minority. There exist adequate mechanisms to prevent such abuse. Change is not required: the answer is resourcing the Legal Aid Agency adequately to prevent such abuse.

The example of wealthy criminals contained in the opening to the foreword to justify the proposed reforms is unhelpful. We need to remind ourselves that the vast majority of legally aided clients are vulnerable clients and not wealthy career criminals. The majority have the lowest incomes, capital and resources. They include:

a. those with mental health problems;
b. those with addiction problems;
c. those with special needs;
d. those with learning difficulties and little by way of communication skills.
e. those who do not speak English or where English is their second language;
f. those who have been the victims of violence;
g. children;
h. those who are living in poor housing conditions and dependent on benefits;
i. single parents.

We fear that these most vulnerable groups are most at risk from the proposed reforms. It is these vulnerable people that the proposed reforms put at risk of being denied access to justice. These are for whom access to justice should be a priority.

The proposals to reduce fees in criminal cases will inevitably reduce the number of lawyers prepared to undertake such cases. The quality of service provided to legally aided clients will undoubtedly be damaged, resulting in injustice and quite probably generate ancillary social cost. The proposed reforms risk forcing providers to be put

into the position of questioning what they can afford to do rather than questioning what they believe they should do in the best interests of their clients.
The proposed reductions in remuneration of public family law cases are unconscionable. Solicitors representing clients in such cases have received no increased rates of remuneration since 2001.
The number of practitioners willing to undertake public funding work has fallen dramatically in recent years and continues to do so. Evidence of the diminishing number of specialists can be drawn from comparing the number of specialist panel members now with those of 10 years ago.
A further reduction will result in only a tiny number of providers prepared to undertake legal aid work denying clients adequate access to justice and causing courts to be overwhelmed. Situations such as occurred in Cleveland in the 1990's could happen again. In his book "Legal Aid" Eric Sachs explained that before the Legal Aid Act 1949 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 provincial towns with populations of over 100,000 there existed a "poor man's" organisation. In the other 38 there was no such provision. The proposed reforms risk a return to that unhappy situation.
Whilst it is suggested that the proposed reforms will not reduce the quality of service provided or adversely affect access to justice for those entitled to public funded legal service there is no evidence in the consultation to support those conclusions. Real evidence indicates the opposite. The evidence of others to this consultation appears to confirm this.
We sincerely believe that these proposed reforms are a step too far. We should not be ashamed of the amount of public money spent on providing legal services for the most vulnerable. Instead we should feel a sense of great pride that this country strives to achieve social justice for all.

Response to Individual Questions

Here we restrict our answers to the questions that we are properly resourced to respond to. Otherwise, we adopt the persuasive responses of others.

4) Paying for permission work in judicial review cases
Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

The proposal suggests payment by results. In 1955 Sachs J. said that this was contrary to the best interests of justice. Payment by results is still (and should continue to be) contrary to the best interests of justice. The proposal also ignores the existing mechanisms available to weed out cases that have merit and those that do not. Funding is not available unless merits and costs benefit tests are met. If funding for cases that fail those tests is randomly granted this is something that should be addressed by those within the Legal Aid Agency which is charged with the responsibility for approving legal aid applications.

5) Civil merits test – removing legal aid for borderline cases
Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

We do not agree with the proposal. The existing merits and cost benefit tests remain appropriate.

Chapter Four: Introducing Competition in the Criminal Legal Aid Market
i) Scope of the new contract
Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

No. In general terms there has been no real increase in remuneration for this type of work for many years. A further reduction in fees will drive away more lawyers from this type of work to the detriment of the system and most importantly will deprive clients of adequate representation.

Q17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset?
Please give reasons.

We consider this totally unacceptable. It ignores conflict of interest, needs of specialist representation for clients with special needs and case specialisation required. Legally aided clients should have a reasonable freedom of choice similar to that which privately paying clients enjoy. Will government departments have similar restrictions imposed upon them?

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

The present system is quite adequate in the provisions for change of provider. That system has safeguards against abuse. Relationships between clients and providers can break down for any number of reasons. Where that relationship breaks down it is rarely possible for the differences between the client and provider to be reconciled. When there is an absolute breakdown of relationship it can never be appropriate for the same provider to continue acting.

Chapter Six: Reforming Fees in Civil Legal Aid
1) Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme:
Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

No. The present level of fees is currently inadequate.

Chapter Seven: Expert Fees in Civil, Family, and Criminal Proceedings
Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

Whilst control of fees of experts is absolutely correct it is surely essential that legally aided clients should be entitled to access the best and most suitable experts appropriate for their cases, and not restricted to those willing to accept the lowest levels of fees. In recent years we have seen a number of cases where huge miscarriages of justice would have occurred, but for the involvement of eminent experts.