



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?

[X] Yes [] No

Please give reasons.

The problem is not what will be retained: it is what will be cut.

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?

[X] Yes [] No

Please give reasons.

There is no reason why such funds should not be available for this purpose.

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 [X] No

Please give reasons.

As a matter of principle, we think that the Government's list of criteria justifying the retention of legal aid should be supplemented by acknowledging cases where the disparity of resources between the parties is such as to unduly restrict the effective participation of one party in the proceedings for redress (see further below).
The list will of excluded types of case will leave a fragmented and incoherent pattern of provision that will deprive 500,000 of the right to legal aid. There are three particular areas of difficulty which we would like to highlight:
(a)The removal of education cases is particularly harsh since cuts to local authorities is bound to lead to an increase in refusal to recognise and meet educational special needs. ACE is referred to as a potential source of alternative assistance for special needs case but the organisation has consistently documented the failure of local authorities to provide adequate information: as in its paper celebrating its first 50 years - from 1960 to

2010:

ACE gave evidence to the select Education and Skills Select Committee for the retention of Statements of Special Educational Needs, arguing for more accountability over special needs funding, better advice and advocacy for parents, and the end to exclusion of children with behaviour arising from their disabilities or special needs. The Lamb Inquiry, too, in its 2009 report on SEN information, recommended improvements to information for parents, quoting ACE's 2003 survey of 150 English LEAs which revealed that only a handful were providing the information on SEN on their websites as required by law.

The consultation paper also refers to the Independent Parental Special Educational Advice (IPSEA) as an alternative source of help but this is a relatively small NGO which relies on volunteers; heavily works with solicitors on individual cases and has no resources to take up the need if legal aid is removed.

(b) The removal of clinical negligence cases from legal aid will not be adequately compensated for by an extension of conditional fee agreements (CFAs), if these survive. The paper itself acknowledges that: 'there are likely to be cases, such as obstetrics cases, with high disbursement costs, which are currently funded by legal aid but for which clients may find it hard to secure funding under a CFA'. Removal of difficult but severe medical cases from scope will lead to injustice. Legal aid should be retained at least to cover the initial investigation of a clinical negligence case. This was the recommendation of Lord Justice Jackson.

(c) The removal of legal aid in ancillary relief cases will leave a minority of cases where the other party will abuse the position of the person (generally the woman) is deprived of assistance beyond basic mediation. The encouragement of mediation as the main way of resolving these cases is desirable. Legal aid should be retained for exceptional cases where there is persuasive evidence of non-co-operation in the proceedings by the other party.

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.

It is better than nothing.

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.

In the current context and as a principle, yes. Though the CFA should be a genuine alternative source of funding, not a conjectural one. A much more logical approach to the funding of personal injury cases, though it will not appeal to government, is to manage personal injury litigation by developing legal aid as a loan provided that sufficient steps are taken to assess the strength of a case and sufficient funds required of applicants to ensure that there is no cost to the legal aid fund. A further alternative would have been a contingency legal aid fund of the kind for which JUSTICE has argued for some time: we recognise, however, that the government will not be attracted to this kind of solution at the present time.

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.

Some potential litigants with meritorious cases will be discouraged.

Others will proceed through the courts - at the extreme, there will be more cases like that of Steel and Morris v MacDonalds in which complex litigation proceeded at a snail's pace through courts and tribunals at inordinate cost to the court system.

The effect on some courts and tribunals will be profound and will require a re-assessment on the judicial role which unavoidably need to become both more 'enabling' and more inquisitorial. This will require both training and resources. The 'knock on costs' of this have not properly been addressed in the paper.

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.

The Community Legal Advice helpline should be established on a non-exclusive basis, as is the model in other jurisdictions like Ontario in Canada where it has been a great success. The Government has already had to amend its proposal after publication of the consultation paper to indicate that the helpline is inappropriate for emergency cases. It remains to be seen just how helpful it will be for those with low language or communication skills. It should be piloted first. This idea has the potential to be a kind of Legal Aid Direct, similar to the NHS Direct, but it could also go disastrously wrong and become the target of secondary litigation if lowly qualified staff start to make difficult legal judgements on inadequate facts from clients who find it difficult to communicate by telephone.

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.

It would seem highly unlikely that the provider of the helpline will have the resources to employ specialists and even more unlikely that any specialist worth their salt would want such an unsatisfying job where they were divorced from both clients and cases. Specialists will be found in specialist organisations.

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

We would suggest that the helpline is opened on a non-exclusive basis to pilot services. Face to face advice could be required where, as the paper says, the case is too complex to be dealt with appropriately by telephone or where the client's specific needs would not be met (for example due to mental impairment). The Government accepted - after publication of the consultation paper - that face to face advice should be available for emergency cases. The Government may not be familiar with how much personal assistance is often required to help people present their case. Accordingly, face to face services should be available where the client would substantially benefit from such assistance in presenting their case or where the CLA has no immediately available qualified specialist in their type of case.

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

It would be important that the CLA helpline worked alongside the CAB and advice sector. There would be some advantage in having a not-for-profit provider both in terms of cost and in terms of potentially integrating the early advice service with existing advice provision.

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.

We would pilot the helpline as a non-exclusive advice facility before consideration of expansion. There is a clear issue of potential conflict of interest in linking the service to paid-for services particularly if there is a financial advantage to the service in making referrals.

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.

Yes and No.

It is logically difficult to justify a lower capital limit for legal aid than for the receipt of means-tested benefits. If the government wishes to reduce the limit for legal aid then it should do so for means-tested benefits. Legally aided clients rarely exercise a choice when encountering a legal problem. If their resources are such that they should retain capital for living expenses purposes then there can be little case for a lower limit in relation to legal aid. Implementation of this proposal which just exacerbate the problem of the poverty trap in which people can find that they lose more in benefits than they gain in increased income from working.

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.

This increased charge is justified as 'designed to help encourage a potentially more responsible approach to litigation' but the paper no cites no evidence to suggest that applicants manifest any irresponsibility of approach. It must be recognised that this charge will apply both to those initiating and defending litigation: it is not equitable.

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.

These changes will introduce even further complexity into the means-testing of the scheme and it is not clear that the government will receive a commensurate benefit. The existing disregards should be employed in emergency cases: there must also be a requirement that the applicant can actually get a loan to cover the cost where the value of real property is taken into account.

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.

This again adds massively to the cost of administration with, very likely, little practical benefit.

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.

The waiver should be mandatory in the circumstances set out in para 5.36 eg inability to obtain credit.

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.

An 8 per cent interest rate is penal and well above what the Government could obtain on the open market as a loan.

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.

But this is an indication of just how over complex these rules are becoming.

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.

This is an acceptable simplification.

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

Yes No

Please give reasons.

Every effort should be made to align benefit rules.

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.

This - and other eligibility changes - should be reviewed after a year to consider any unforeseen consequences.

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.

We would not alter the current level of contributions.

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.

Option 1 is more equitable in terms of a graded increase in contribution. Option 2 is more simple. The eligibility system will desparately need simplification if these measures are introduced but we would argue for Option 1 as more equitable to those on very low incomes. We are, however, opposed to either measure.

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.

This is a reasonable proposal provided that the CPS has complied with requirements of disclosure and that there has been no 'charge bargaining' so that the guilty plea must be in relation to the offence originally charged and not a lesser offence. We would be minded to retain a separate advocacy fee in relation to indictable cases.

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.

However, this fee should not be payable where the defence has offered a plea bargain and the CPS has not accepted it until after significant preparation has been undertaken as when it is accepted on the steps of the court or the night before the hearing.

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.

But only when the law relating to murder is aligned with that of rape and other sexual offences so that a life sentence is not automatic. There must be a coherence between the legal aid provisions and the law relating to sentencing.

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 agree that this makes a reasonable division point in terms of seriousness.

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.

We have no comment to make on this proposal.

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.

Our only comment on this proposal is that VHCC cost rates should be absorbed within an overall costs structure. We do think that there must be a separately calculated advocacy fee for serious cases - which would certainly include all VHCC cases.

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 think that the costs structure should be simplified so that VHCCs no longer exist as a very different entity.

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.

We have no comment on this proposal.

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.

This figure is necessarily arbitrary and has no justification other than the need to provide cuts in expenditure. In the longer term, there must be a commitment to review rates on a proper, commercial basis.

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.

We express no view.

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.

We express no view.

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.

We express no view.

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.

We express no view.

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.

We express no view.

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.

We express no view.

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.

We see no objection to setting out a clear fee structure subject to the continued availability to the defence of adequately qualified experts. This is again a provision which must be monitored closely if implemented.

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.

This is philosophically difficult to justify. The money actually should belong to clients. It is difficult to see why the state should take it. In addition, technological advances mean that solicitors will find it easier to account for small amounts to their clients. If any such scheme were to be implemented, there might be less resistance if the money was paid not towards the Ministry but to an independent body like the Access to Justice Foundation.

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.

The pooling of client accounts would be a massive undertaking fraught with potential administrative problems and is unlikely to be practical.

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.

The case for the state expropriation of client account interest is weak without client consent.

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

- Yes No

Please give reasons.

It is not really a supplementary scheme. It is simply a proposal to take more money from damages for the state. This will be more problematic than it appears because it will make a nonsense of detailed and reasoned awards of damages. It is also likely to lead to compensating rises in damage values, as is also likely in any contingency fee scheme.

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?

See above.

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.

Quality assurance will be absolutely crucial as remuneration is cut and contracts are let on a competitive tendering basis. Regulators have some responsibilities but the primary responsibility falls on contractors to ensure that service levels do not decline in response to unacceptable levels. There will have to be a much wider approach than hitherto with contracts specifying such matters as maximum caseload measures per qualified member of staff (something that has been developed in the United States).

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?

A crucial responsibility will be the decision-making on eligibility. This needs to be made independently of government. The call centre is likely to find itself the subject of multiple judicial review applications if there is no independent appeal mechanism.

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.

We have no comment.

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

Unfortunately, implementation of these proposals will add greatly to complexity and bureaucracy.

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.

A major reason for funding of legal aid is the constitutional duty to advance what in the US would be called 'equal justice' - a purpose carved on the US Supreme Court building. In other words, the state has a duty to provide procedures for the determination of disputes which deliver an acceptable equality of outcome as between those with resources and those without, particularly - but not limited to - those in dispute with the state. This is not acknowledged in the paper but it needs both to be recognised and then reforms tested against its criteria. For example, none of the four criteria in the impact assessment is concerned with any kind of output - such as a fair result - they all relate to inputs - eg streamlined procedures, better value for money, advice through the most efficient channel. This is a major weakness in the whole process.

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

Yes No

Please give reasons.

See above.

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

No. The effects will be worse because the paper does not take into account cuts made elsewhere eg to the CAB.

About you

Full name

JUSTICE

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

- ATE Insurer
- Claimant
- Claimant Lawyer
- Claims Management Company
- Consumer representative organisation
- Defendant
- Defendant Lawyer
- Government Department / Non-Departmental Public Body
- Insurer
- Judiciary
- Legal Academic
- Other – please specify

Date

14 February 2011

Company name/organisation (if applicable)

JUSTICE

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Address to which this acknowledgement should be sent, if different from above