Consultation Response

Shelter's Response to the Law Society's Access to Justice Review

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www.shelter.org.uk

Shelter

Introduction to Shelter

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people every year. Our services include:

- A national network of 30 advice centres offering specialist legal advice in housing, welfare benefits, debt and community care law, funded by legal aid contracts
- Specialist legal advice in housing funded through a range of local authority contracts and corporate or Trust fund sponsorship.
- Shelter's free advice helpline, which runs from 8am-8pm, providing generalist housing advice
- The Community Legal Advice helpline, providing specialist telephone advice and casework in housing, debt and welfare benefits, funded by legal aid
- Shelter's England wide mortgage advice line funded by Government, providing information on debt, possession action and a casework service.
- Shelter's website which provides advice online
- The Government-funded National Homelessness Advice Service, which provides second tier specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, which are approached by people seeking housing advice
- A number of specialist support and intervention projects including housing support services, the Shelter Inclusion Project,
- A children's service aimed at preventing child and youth homelessness and mitigating the impacts on children and young people experiencing housing problems. These include pilot support projects, peer education services and specialist training and consultancy aimed at children's service practitioners.
- We also campaign for new laws and policies - as well as more investment - to improve the lives of homeless and badly housed people, now and in the future

Almost 20 of our advice centres have solicitors on site providing specialist expertise and litigation services in housing and homelessness law. Our central legal services team also provide litigation services, policy and campaigning, our Children's Legal Service and

second tier support to housing lawyers via the Legal Services Commission's Specialist Support Service.

We employ over 30 solicitors and over 200 advisers providing legal services to the public.

Shelter is therefore a large national provider of legal aid services in social welfare law – we understand that approximately 20% of all housing matter starts in England and Wales are delivered through Shelter services, for example.

Introduction

We very much welcome the opportunity to respond to the Law Society on this issue. As a national provider of social welfare law, we are only too aware of the issues in legal aid at present. The announcement of the Ministry of Justice's "fundamental look" at legal aid, following on from the Magee Review, makes this a timely contribution to the debate over the future of access to justice and publicly funded legal services.

Shelter believes that everyone has the right to a home. That is at the core of our vision, and informs all the work we do both in service provision and campaigning. There are two aspects of this; the right to access housing of suitable quality, and the right to keep it. Good and timely advice is crucial to this. It can make the difference between having a roof over your head and being on the streets. Shelter has countless examples where the intervention of good quality advice and representation has made the difference.

It is therefore of vital importance to us and our work that there is proper access to justice. Shelter believes that an important part of ensuring access to justice is the provision of a properly funded legal aid system. In a system such as that in England and Wales, access to funding very often determines whether there is access to justice.

Response to Questions

Section 2

We agree with much of the discussion in this chapter. There are many costs drivers in the system, and more work needs to be done to identify them. The Cape and Moorhead research was illuminating when carried out; it is unfortunate that a similar exercise has not been carried out in the context of civil and family. However, it is clear that much of the recent pressure on the civil, and overall legal aid, budget has come from family law, in particular public law cases.

We also welcome, and share the views expressed in, the review's comments on complexity, bureaucracy and the need for a robust impact assessment.

Section 3

Family law is outside our area of expertise and we are therefore not able to comment on the substantive proposals. Given that it is an area that is consuming an expanding part of the limited legal aid budget it seems appropriate that it should be subject to review as to

whether such consumption is justified; however, we do not feel able to contribute to the substance of such a review.

Section 4

There are a number of interesting proposals in this section of the review. None are without difficulties, many of which are highlighted in the review. However, Shelter welcomes debate and exploration of new models which can be used to supplement existing legal aid funding – whilst stressing that continued state funding of legal aid should remain the core component of funding access to justice.

A loan scheme to an extent already operates in the form of the statutory charge, and that is not without its difficulties, in particular in enforcement in cases other than where a party recovers monetary damages. But the statutory charge only applies in cases about compensation or property ownership; many if not most of the cases funded by legal aid do come within this category.

Many clients with social welfare law problems are the poorest in society and in no position to repay a loan. Nor, in many cases, are they likely to be in the foreseeable future. Requiring contributions or repayment during the life of the case or immediately thereafter would cause substantial hardship, even if payment was set at very low levels – and in debt, housing or other cases founded on situations where the problem is caused by outgoings exceeding expenditure would exacerbate the very problem legal aid funding was seeking to solve. Conversely, postponing repayment unless and until a client reached a certain income level would require the creation of a bureaucracy to monitor and in due course enforce repayment, with the risk that the cost of administering the system would exceed the money saved (a situation not without precedent in legal aid; it was the reason contributions to criminal legal aid were abolished 10 years ago). From the standpoint of social policy, if repayments were set at too high an amount or too low an income trigger, there is also the risk that they would exacerbate the poverty trap, where it is not economic for someone to take work because the loss of benefits and the increase in obligations would leave them worse off. There is also the risk that such a system would deter people from applying for legal aid, leaving problems unresolved. There is already much research showing that many people do not recognise that they have a legal problem, and among those that do there is an unwillingness or inability to seek help and advice. A further barrier in their path would not be welcome.

A legal aid levy would cause similar problems. By definition, those eligible for legal aid are the poorest in society and those least able to pay a levy. Requiring payment may exacerbate the problems that led to the need for legal aid. A flat rate levy unlinked to ability to pay or the costs of the case would be a blunt instrument and unless set at a very low level, would in practice deter many people from applying for legal aid.

We do not support a CLAF. The review sets out some of the practical objections. In addition, we believe there is an objection of principle. Currently, damages are calculated to be compensation for loss. There is (in most cases) no additional element to punish the responsible party. If a CLAF is funded by a levy on damages, that would have to change. Either damages would increase to allow for a CLAF deduction, which would introduce a punitive element to awards by requiring the defendant to pay more than the value of the loss caused; or damages would not increase, which would result in the claimant being under-compensated.

Increased insurance provision, both before and after the event, could play a role in supplementing legal aid provision. However, we do not believe that insurance could replace legal aid. Most legal expenses insurance is currently an add-on to household insurance. However, most legally aided litigants are not home-owners, and even those in the rented sector may find insurance unaffordable at all, or cancel it as being expendable at times of financial difficulty. Shelter is aware that mortgage payment insurance is often cancelled long before people tend to seek advice. It is unlikely that those people most in need of social welfare legal aid would be able to afford or maintain regular insurance payments.

Compulsion – requiring people to take out separate legal expenses insurance – would be unlikely to work since there would be a whole class of people who could not afford to take out cover, or who would be deemed by insurers to be an unacceptable risk. At best, expanded legal expense insurance would assist those at the top end and beyond the legal aid eligibility limits. For that reason, it may be welcome to widen the scope and availability of insurance, and incentivise (whether through tax breaks or otherwise) its take up, but it would be welcome because it would increase access to justice to people currently beyond the scope of legal aid, not because it would replace or supplement legal aid.

A client account levy is a proposal that has been around for some time, and is one that we welcome. It would not generate sufficient monies to replace or substantially supplement legal aid, nor would it, given fluctuations in interest rates, be necessarily predictable, but

money raised through such a scheme could be used in specific non-core ways. For example, it could be used to establish a fund that could, on a discretionary basis, fund deserving cases that would otherwise be outside the scope of legal aid. Or it could be used to establish a fund that would provide low-cost or interest free loans to struggling legal aid providers whose failure would impact on access to justice – such as the recent cases of Refugee and Migrant Justice and a number of law centres – enabling them to buy time to resolve their difficulties and restructure into a more sustainable form. Such a fund would need considerable thought and safeguards but could be a way of preventing increases in advice deserts.

We wholly support the polluter pays principle, and although the review only discusses its impact in criminal cases there is considerable scope in civil cases too. Recent studies in Nottingham have shown that considerable legal aid costs are caused by poor decision making or system failure on the part of public authorities and others; that has also been our experience as a major housing and social welfare law provider. We welcome the proposal for a discretionary surcharge set out in paragraph 4.44. This should be on top of, not instead of, the successful party's ability to recover costs at inter partes rates. Whilst it clearly would not be appropriate in every case, where a body has acted in a way that was unreasonable, incompetent or negligent it seems right that it should suffer the consequences of its failures.

Section 5

We agree with many of the features of delivery set out in this section. We completely support client choice, the importance of location relative to the client and the importance of both face-to-face and web/telephone advice, quality and value for money. However, we have some concerns over the section headed "regulation and competence". As a national charity providing substantial social welfare law advice, we have a mixed model of provision, with in general advice being provided by non-qualified advisers and litigation by solicitors. Shelter is not a regulated body, nor are our advisers. Our solicitors are regulated by the SRA.

The review suggests that advisers who are not regulated professionals should be supervised by a regulated person, and that unregulated individuals providing advice to the public should be regulated. In effect, it seems that the Law Society is calling for the scope of reserved legal activities to be extended to all legal advice. That is a substantial debate

in itself, and this review is not the place for such a fundamental debate about the scope of legal services regulation.

We do not support this proposition. It is currently the case that providers of reserved legal activities are either regulated (personally or as an entity) or under the supervision of a person that is, and that is right and proper.

It is impractical because advice agencies and the not-for-profit sector make a substantial contribution to advice provision, through legal aid, other statutory and grant funding and charitable funding. Were that sector to disappear, there would be massive implications for access to justice. Were these proposals to be implemented, there is a real risk that large parts of this sector would disappear. Solicitors and regulated professionals are expensive to employ. Regulatory compliance is expensive to implement. Much of this sector does not have the resources to employ regulated professionals to supervise advice workers. Nor are there the regulated professionals available on the market to fulfil these roles. The review itself notes elsewhere the declining number of legal aid solicitors; who, therefore, would fill these roles? Similarly, who would do the regulating? We do not support the implication that advice provided by a solicitor is de facto better than that provided by an adviser. These proposals have massive implications for the not for profit sector, and substantial further discussion and debate is required before they can be taken further.

We support the existing model of provision, or something like it, whereby there is a range of providers in the private and voluntary sectors using different delivery models, with different specialisms, across a range of sectors. That enables the greatest degree of client choice and scope for innovation of provision. The Bristol Law Shop model has a place in that market as one of a range of delivery models. The Dutch model is interesting, but is something of a red herring in the very different legal system in operation in England and Wales, and is unlikely to be replicable here without substantial whole system reform. Neither does it appear to have successfully controlled costs in Holland. We do not support a nationalised model along the lines of the PDS, though the experiment has proved useful in demonstrating that quality costs.

Section 6

Future procurement of legal aid services is perhaps the most difficult issue of all. The review rightly recognises the fundamental problem that the LSC allocates capacity, but has no control over volume of delivery. It can award contracts but not guarantee any work – or control the volume of work that results. If client choice is supported – and we do

support client choice – that is perhaps inevitable, but does create real problems for both procurers and providers. The only way to deal with the issue is the creation of local monopolies, which CLACs and CLANs have gone some way towards, but they eliminate client choice and make re-tender difficult by closing off the market to all but one bidder for the duration of the contracts. It is therefore difficult to see what alternative there is to the broad scope of the current scheme – contracts awarded on the basis of permission to do the work but with no guarantee of volume.

That said, there is much about the current system of procuring and running legal aid services that could be improved. The scheme itself is an over-complicated bureaucratic mess, and we agree with the Law Society's analysis of this and the reasons for it. We also agree that the current contract is not fit for purpose and that the tendency of the LSC to seek to micro-manage providers is to be deplored.

The idea of an independent pay review body is interesting and worth further exploration. There is no reason why the current system of hundreds of different rates and fees is necessary – rationalisation is clearly required, as is setting the resulting fees at a rate that is sustainable in the market. We also see no reason why such a body should not set rates – indeed, the same rates – for all lawyers in public service or on government contracts, not just legal aid lawyers.

We do not support a direct application process. Many of our clients are vulnerable, distressed, or otherwise unable to present their own case. There is a real risk that many of the most vulnerable would not be able to argue their own case sufficiently, especially if they are doing so to a body that controls the budget and therefore has an incentive not to grant funding in cases of doubt. As stated elsewhere in our response, we do not support the erection of additional barriers to clients receiving funding.

Neither do we support a return to the pre-2000 position where any firm could take on legal aid work. The one great benefit of the last 10 years has been the encouragement of specialisation and the resultant driving up of standards; returning to a system where lots of providers take on very small numbers of cases risks diluting that.

Conclusion

We very much welcome the Law Society's Review. Whilst it does not have all the answers, and we do not agree with all the proposals, it is a very valuable contribution to the debate at this time. At such a time it is essential that new ideas are aired and for our part we would be very interested in further discussions on the ideas raised.