Consultation response

Shelter's response to the consultation Transforming Legal Aid

June 2013

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This document contains information and policies that were correct at the time of publication.

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Shelter

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people a year. This work gives us direct experience of the various problems caused by the shortage of affordable housing across all tenures. Our services include:

- A national network of over 20 advice services with legal aid contracts in housing and community care
- Shelter's free housing advice helpline which runs from 8am–8pm
- Shelter's website (shelter.org.uk/getadvice) which provides advice online
- The government-funded National Homelessness Advice Service, which provides specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, who are approached by people seeking housing advice
- A number of specialist services promoting innovative solutions to particular homelessness and housing problems. These include Housing Support Services which work with formerly homeless families, couples and single people. The aim of these services is to sustain tenancies and ensure people live successfully in the community.

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.

Summary

We consider this consultation to be flawed for lack of evidence and call on the MoJ to extend the consultation period and publish additional evidence allowing for a proper evaluation of the proposals.

Shelter is extremely concerned about the effect of further cuts to legal aid - particularly so soon after the last ones - on the most vulnerable people that we see. These proposals will take away a major part of the safety net that stands between families and the street and we urge the government not to proceed with them.

Through the twin approach of removing further people from scope and eroding the already fragile viablity of providers, they are likely to leave more and more people unrepresented and have unforeseen knock-on consequences both for the individuals affected and for government and society through increased poverty and homelessness and increased expenditure elsewhere in the system.

Issues of principle

The nature of this consultation is to take many of the broad principles as read, and only to ask questions on the detail of implementation. However, Shelter believes that there are a number of important wider issues that should also be addressed and we do so before responding to the individual questions.

According to the Lord Chancellor's Ministerial Foreword, these reforms are driven by two key factors: reducing cost, and improving public confidence.

The Lord Chancellor says:

"legal aid is the hallmark of a fair, open justice system. Unfortunately, over the past decade, the system has lost much of its credibility with the public. Taxpayers' money has been used to pay for frivolous claims, to foot the legal bills of wealthy criminals, and to cover cases which run on and on racking up large fees for a small number of lawyers, far in excess of what senior public servants are paid. Under the previous government, the cost of the system spiralled out of control, and it became one of the most costly in the world"[1]

Reducing Cost

When the Lord Chancellor says, in his Ministerial Foreword, that expenditure on legal aid has "spiralled out of control", this is simply not true. In 2011, the House of Commons Justice Select Committee said:

"Between 2000 and 2010 expenditure on legal aid rose by almost 3% in real terms. Spending peaked at £2,414 million in 2003-04 but has since stabilised at approximately £2,100 million in each of the last four years".[2]

Since then, expenditure on legal aid has reduced further (see Fig 1). The Legal Services Commission's Annual Report for 2011-12[3] says that expenditure in 2010-11 was £2,092million and in 2011-12 £2,078million. The Business Plans for 2012-13[4] and 2013-14[5] forecast expenditure of £1,996million and £1,828million respectively. This is before many of the impacts of the LASPO cuts are felt.

[1] Transforming Legal Aid, Ministerial Foreword.
[2] Justice Committee, Third Report 2011, The Government's Proposed Reform of Legal Aid: http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/681/68105.htm at para 12
[3] http://ftp.legalservices.gov.uk/docs/about_us_main/LSC_AnnualReport_2011-12.pdf
[4] http://ftp.legalservices.gov.uk/docs/about_us_main/LSC_Business_Plan_2012-13.pdf
[5] http://www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf

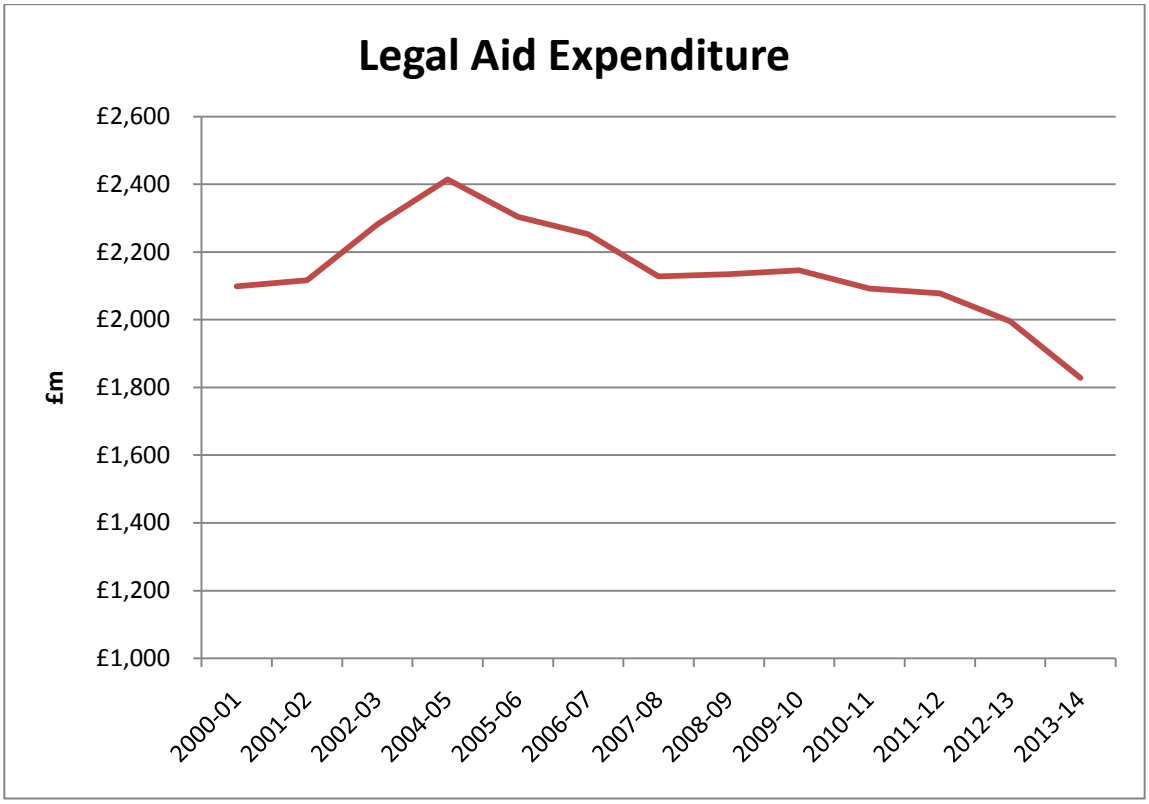

Figure 1 - Legal Aid Expenditure, 2000 - 2014

When the consultation paper says, at para 2.1, that "in the past decade our legal aid bill has risen dramatically", this is not a true reflection of the facts.

In fact, expenditure has fallen by 25% since its historic peak a decade ago, with yet further reductions due to the last round of cuts still to be felt.

Introducing further cuts before the market has had the opportunity to absorb the effects of Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) and to stabilise is dangerous and risks further undermining the already fragile viability of legal aid providers.

Public Confidence

No evidence is offered to support the assertion of a loss of public confidence. In fact, successive opinion polls have found widespread public support for the scheme, perhaps in recognition that it is a vital safety net, and that many people are only a short step – loss of a job, a sudden serious illness, eviction from rented accommodation – from needing it themselves.

In May 2013, 68% agreed that "at less than 0.5% of annual government spending, legal aid is a worthwhile investment in our basic freedoms" and only 11% disagreed, and 67% agreed that it was a price worth paying to ensure a fair society, regardless of cost[6].

In 2012, 92% of people agreed that good legal advice should be available free of charge either to everyone, to those on low incomes or those on benefits. Only 6% thought that good legal advice should not be available free of charge at all[7].

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[6] Comres for the Bar Council, http://www.barcouncil.org.uk/media/210826/headline_findings_-_comres_poll_-_may_2013.pdf
[7] What the public wants from civil legal aid, Legal Action Group, 2012, http://www.lag.org.uk/media/47770/social_welfare_law_what_the_public_wants_from_civil_legal_aid.pdf

It is asserted that "legal aid appears to have been provided for cases that do not justify it and to those who do not need it, which undermines public confidence in the scheme"[8]. This assertion has no evidence to support it – neither anecdotal evidence of the cases referred to, nor objective evidence of the state of public opinion. When asked for evidence at consultation events, officials could only say that ministers had received letters about legal aid expenditure. They could not say what these letters said, how many of them there were, whether what they said was correct, or whether they were representative of public opinion. Even if such letters exist in significant numbers, they are inevitably written by a self-selecting minority who care sufficiently about the issue to write to a minister about it, and so are hardly representative of public opinion as a whole. This does not constitute evidence.

Even if there were evidence of a lack of confidence, evidence that that was caused by the detail of the way legal aid was spent and evidence that these proposals would restore confidence, we would question whether public opinion is the right arbiter of legal aid expenditure. In a system based on the rule of law and equal access to and treatment before the courts, cases must be judged solely on their merits regardless of how unsavoury or unpalatable to public opinion they may be. Access to law in individual cases should not be determined by whether the recipients are sufficiently popular with the public to "deserve" it. Such an approach runs wholly contrary to basic principles of equality and justice and the rule of law.

Absence of evidence

Nor is the question of public confidence the only part of the consultation paper where evidence that respondents can consider and analyse is wholly lacking.

We have seen and endorse the points made by the Public Law Project in calling for the consultation period to be extended pending the publication of proper evidence[9]. We have ourselves submitted a Freedom of Information Act request for information regarding judicial review cases and have yet to receive a response, even though we made clear that our request was in order to inform our response to this consultation. There is a paucity of evidence throughout, particularly in respect of the judicial review proposals and the issue of public confidence (see above), as well as on the potential impacts. Without seeing the evidence on which the proposals are based, it is hard to respond.

We consider this consultation to be flawed for lack of evidence and call on the MoJ to extend the consultation period and publish additional evidence allowing for a proper evaluation of the proposals.

Timing

We note that this consultation was issued a mere 8 days after LASPO came into force and the Lord Chancellor signed contracts with civil legal aid providers to deliver services on the basis of LASPO and accompanying regulations. Those contracts were for three years and providers would have had an expectation that the Lord Chancellor intended them, absent some unforeseen future event (for which there is a contractual power of amendment) to honour them. In fact (assuming that this consultation did not go from initial idea to publication in 7 days), at the point at which he entered into those contracts the Lord Chancellor must have known that he would shortly bring forward proposals undermining the basis on which providers entered into them and the assumptions on which their business plans were based. We therefore question the basis on which the contracts were entered into.

Responses to Consultation Questions

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

[8] Transforming Legal Aid, para 2.1
[9] http://www.publiclawproject.org.uk/documents/PLP_Letter_to_MoJ_22_May_2013.pdf

Shelter will not respond to this question as it is outside our areas of practice.

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

Shelter will not respond to this question as it is outside our areas of practice.

Q3. Do you agree that the proposed threshold is set an appropriate level? Please give reasons.

Shelter will not respond to this question as it is outside our areas of practice.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

No, we do not agree with this proposal.

We do not, as a matter of principle, consider that a residence test should be introduced at all.

The current position, that where a person is entitled to bring or defend a case before the courts of England and Wales and if that case is within the scope of legal aid they are entitled to legal aid, is the right approach.

It is asserted “that individuals with little or no connection to this country are currently able to claim legal aid to bring civil legal actions at UK taxpayers’ expense”. No evidence is provided as to the extent of this “problem” – the number of people, the amount the cases cost, or (given that this is a “credibility” rather than “cost” issue) the extent of public concern about it. This lack of evidence is surprising and concerning. As it is, it appears that the policy is based not on evidence but on “common sense”, which is an inherently subjective proposition and not one based in rigorous analysis of evidence.

The reality is that this proposal will have a significant impact on the most vulnerable people in society. They are people who are entitled to legal aid under LASPO – it should not be forgotten that the government's stated intention was that LASPO would reduce the government’s commitments to legal aid to the minimum standards consistent with its international and human rights obligations but these proposals go still further – yet would be deprived of legal aid because of these proposals. Not because of the nature of their cases, not because of a lack of merit, but simply because of who they are.

Among the people who will be left unrepresented by these proposals are

- Victims of trafficking.
- Refugees.
- Victims of forced marriage and honour crimes.
- Victims of domestic violence.
- Children and families left in limbo by the bureaucratic incompetence of the Home Office. Children involved in care proceedings.
- Victims of child abduction.
- Destitute children and families.

These are just some of the people who public bodies will be able to ignore with impunity, who private agencies will be able to exploit unchallenged. Parliament intended that they would continue to get legal aid after LASPO because their cases were important and "high priority", yet the MoJ proposes to strip

them of the right to legal aid by delegated legislation, without debate or scrutiny, contrary to the will of Parliament.

The government does not appear, in the consultation, to have given any thought to its obligations under Article 14 (not to mention Articles 2, 5, 6 and 8) of the ECHR or to Article 47 of the EU Charter on Fundamental Freedoms, or the Equality Act 2010.

It has also failed to give consideration to the UN Convention on the Rights of the Child – Baroness Hale in *ZH (Tanzania)* [2011] UKSC 4 said (at para 23):

article 3(1) of the UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children.

Quite clearly from this consultation, no consideration has been given to the discriminatory effects of this proposal, its effect on the right to a fair trial, or on the interests of children.

The consultation says that legal aid would continue to be available where "necessary to comply with obligations under EU or international law" or s10 of LASPO. How this would be done, and which obligations it believes would engage legal aid and which not, are not set out. We consider that they should have been set out and consulted on.

According to the LAA, so far no applications for exceptional funding have been granted. The Lord Chancellor's Guidance[10] makes clear that that the primary consideration for a grant of exceptional funding is "whether it is necessary to grant funding in order to avoid a breach of an applicant's rights under Article 6(1) ECHR. As set out below, the threshold for such a breach is very high." (para 10). This "very high" threshold has failed to be crossed by any applicant so far. And even if it were to be crossed in future cases, there is no provision for emergency applications and so it is no help to those in immediate crisis.

Shelter is part of a group of leading NGOs concerned about these proposals and about issues of public law and human rights more widely. As a group, we have sought advice from Michael Fordham QC on the legality of the proposed residence test, and he concludes that it would be clearly unlawful; it would breach not only the government's human rights obligations, but also EU law, the Equality Act and common law principles of access to law. We append a copy of his opinion to this response and urge the government to take it into account.

Leaving aside the legality of the proposals, they would also have a severe practical impact. In our own area of practice, local authorities have a duty to protect and accommodate children, and their families, who have no other entitlement to housing or benefits, for example under the Children Act 1989. However, they sometimes fail to do this, and it is legal aid that holds them to account, preventing children from being on the streets. These proposals take that safety net away. Often families are only in this situation because their applications (eventually granted) take years to be dealt with by the Home Office, and in the meantime they are not allowed to work or to claim benefits. This is therefore a vital safety net to protect vulnerable children from destitution and the streets, but all too often it is only the threat or reality of legal action that forces a local authority to accept its obligations to protect them.

This proposal could therefore leave families with children homeless and on the streets with no ability to challenge refusals to help them.

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[10] http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf

We note that even responsible local authorities do not support this proposal. We have seen the response of the No Recourse to Public Funds Network, a network of authorities dealing with no recourse cases, and note their view that this proposal is unlawful and unjust[11].

Case Study

A young lady approached Shelter for assistance with a 2 month old baby. She had been trafficked from Nigeria by her abusive father when she was 16. After being sold to a woman in Manchester and forced to work as a prostitute she managed to escape to London. She met a man with whom she fell pregnant but had to move out when he became violent towards her.

When she had her baby they slept on the kitchen floor of a hostel her friend was living in but eventually she was asked to leave and they ended up sleeping on the streets. When she approached Shelter for help, we assisted her to get in touch with social services. The authority refused to help and we therefore issued urgent court proceedings. The court granted an emergency injunction, ordering social services to accommodate and support mother and baby so they were not sleeping on the streets.

She was placed into a refuge for victims of trafficking (and therefore the judicial review was withdrawn) and has now been granted Leave to Remain in the UK. She intends to enrol in college as soon as she can.

Others who are here lawfully – including even British citizens – but can not demonstrate 12 months residence will have no recourse to the law whatever is done to them. They may be renting in the private sector and exploited by rogue landlords; they will have no protection against harassment, unlawful eviction or squalid conditions. They may be homeless and refused accommodation by a local authority; they will be unrepresented when they appeal. This is a recipe for cynical exploitation of vulnerable groups, with consequent effects on other public services and on social cohesion.

The suggestion "We are also concerned that the availability of legal aid for cases brought in this country, irrespective of the person's connection with this country, may encourage people to bring disputes here"[12] is misplaced. The government is actively encouraging the rich to bring their disputes to this country, but leaving that to one side, to suggest that legal aid clients are, or are capable of, forum shopping is without foundation. They do not have a choice whether to challenge a local authority's failure to accommodate you in the courts of England and Wales or those of France. There is no option to defend possession proceedings in England and Wales or the US. Tenants can not contract with their landlord to have unlawful evictions heard in Dubai. Cases are brought in England and Wales because that is where the clients are, where the issues arose and where the applicable law is.

What is lawful residence is not a straightforward question, and can depend on individual circumstances and the application of the law as much as it can on an administrative grant by the Home Office. The guidance to employers on this question runs to 89 pages, yet employers still routinely get legal advice on the issue. In some cases, such as where rights of residence derive from European law, lawful residence is a matter of application of the law, not a question of Home Office grant. Such a client may have no document - passport, visa - granting them residence at all. Such a document may not exist, since their status is not determined by it but by whether their personal circumstances come within a very specific set of EU rules. We know from our experience of homelessness cases - where such matters are key to eligibility for assistance - that these questions are not easy to determine and not easy to prove.

[11] See www.nrpfnetwork.org.uk/SiteCollectionDocuments/Transforming Legal Aid Consultation local authority statement.pdf
[12] Transforming Legal Aid, Para 3.44

The proposal will require solicitors and legal advisers to act as gatekeepers to legal aid, by checking status, deciding if the person has it and whether legal aid should be granted. Yet they are not experts in such matters (outside immigration lawyers) and so will naturally err on the side of caution, meaning that there is a significant risk that those who are entitled to legal aid will not get it because they can not provide adequate proof. Many people, for example, do not have a passport. It is hard to see how 12 months lawful residence can be proved in many cases, especially where the client is chaotic, mentally ill, vulnerable, or simply hasn't kept paperwork. It appears to be the government's intention that everyone is required to prove status to access legal aid; this will deprive many vulnerable people who are British citizens and have lived here all their lives of legal aid simply because they can not provide proof.

There are particular problems with emergency cases – a client about to become street homeless, for example – where the client does not have proof immediately available. Further issues arise in relation to unlawful eviction cases. It is common in such cases for the landlord to dispose of or destroy the client's possessions, or simply deny access to them as they are still in the property from which the client has been excluded. Where such a client cannot access their proof of residence, what are they to do? It is entirely possible that they will be deprived of legal aid to contest the unlawful act of the landlord because of the unlawful act of the landlord.

This proposal will automatically mean that British citizen children less than 1 year old will never get legal aid because, as a matter of necessary fact, they will not have been lawfully resident here for a year. This is less of an issue in our areas of work, but not what Parliament intended when they legislated to keep representation of children – including babies – in scope in care proceedings and to retain legal aid for neo-natal clinical negligence. The government further acknowledges that British citizens will not get legal aid if they cannot show 12 months lawful residence - which would include the British children of parents living or working abroad who return to the UK at 18.

It is hard to see that administratively removing the right to legal aid from British children will strengthen the credibility of the legal aid scheme.

These proposals deprive an entire class of people – some British, many lawfully and properly in the UK, many others who would be were the Home Office able to deal with their cases efficiently – from access to the courts. They will subject others to unnecessary and intrusive bureaucracy which may delay their case or – wrongly – exclude them from legal aid altogether. They are unlawful, discriminatory and wrong. They will increase poverty, exploitation and destitution and are an affront to the rule of law.

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.

No, we do not agree.

We have seen and endorse the extensive draft response of the Public Law Project[13]. Judicial review proceedings are a vital tool in preventing street homelessness. Judicial review is a necessary – often the only – step where a local authority has refused to accept a homeless application, or has refused temporary accommodation pending a decision. It is also the only remedy available to challenge a failure to provide "safety net" support to families not owed a homelessness duty (including those who would fall foul of the residence test and be condemned to destitution on the streets by that means).

[13] http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf

This proposal is meant to ensure that frivolous cases are not funded at public expense. The government say that most cases are withdrawn before a full hearing, or even before the permission stage. They go on to conclude that this must be because those cases are without merit. However, the true picture is that a significant number of cases are withdrawn, not because they are without merit; rather it is because many settle in favour of the claimant before they need to go that far, either because the local authority concedes at an early stage, or because the immediate grant of an emergency injunction (for example, ordering an authority to accommodate a family) effectively resolves the case and it therefore does not need to go further. In fact, in some cases simply the threat of a judicial review prompts the local authority to provide the temporary accommodation to which homeless families are legally entitled, but often not before substantial work has been done.

Therefore, in our experience of homelessness cases most judicial reviews are settled before the permission stage. Far from being frivolous, this shows that the claims in question were sound, and that a good resolution of the dispute was achieved with limited or no use of court time. The governments misleading use of statistics to justify this proposal in the media has been comprehensively debunked by the Public Law Project[14]. We also support and endorse their analysis of the figures in para 2 of their draft response. We agree with their conclusion that, at most, 13% of cases – on the figures in the consultation – can be said to have ended at or pre-permission with an outcome not in favour of the client. This is not a success rate to be concerned at. We have ourselves requested further information from the MoJ on this issue by way of a Freedom of Information request but have yet to receive a reply.

However, it is likely that these proposals will make it much harder for clients to find providers to bring judicial reviews. The way that the test is structured – that funding will only be available both where the permission stage is reached and permission is granted – will deter settlement and promote disputes, including satellite litigation, about costs. However, this work will also be at risk, and therefore the risk and uncertainty that the claimant's lawyers will have to bear will be compounded. It will also massively strengthen the hand of the defendant – the state, ultimately the same body that is making this proposal – in settlement negotiations.

It is not uncommon now for local authorities to offer in settlement the outcome the client seeks but to make it conditional on there being no order for costs. This is likely to increase, and will create a clear conflict of interest between solicitors and their clients and may well prolong litigation. The result will be to create an intransigent attitude among defendant public bodies, who will come to realise that there is no reason to concede even a strong case during pre-action correspondence. They will be well aware that warnings of court action are likely to come to nothing because no solicitor will be able to take the risk of proceeding to JR in the knowledge that the defendant will then offer a `no costs' settlement. In the homelessness field local authorities will feel free to turn away applicants for entirely spurious reasons, safe in the knowledge that they are either immune from challenge or able to concede in an individual case without any costs consequences.

This proposal also pre-supposes that solicitors are able, at the start of a case – often late in the day in an emergency with an otherwise street homeless family before them – to make a clear calculation of the strengths, weaknesses and risks of a case. Whether permission is ultimately granted depends on many issues, including disclosure of the defendant's case, which may well not have happened at this point. In emergency cases it is most unlikely to have done. Solicitors may simply not have enough information to assess risk at this point.

At each stage the LAA require extensions to a legal aid certificate to be applied for, and require detailed advice from counsel to support the applications for extension. This has been supplemented by the withdrawal of devolved powers (now delegated functions) from most judicial review cases with effect from 1st April 2013. Those changes have not been given the chance to have effect and no analysis of their impact on the areas of government concern has been undertaken. It may very well be, therefore, that these additional proposals are redundant. Unfortunately, no analysis has been undertaken and no time has been allowed for the changes to take effect before introducing further changes.

[14] http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf

The proposal is also to remove funding from those cases which settle favourably pre-permission. This will have the perverse incentive of inducing solicitors only to take on cases of the middle rank; the weakest will not be taken because they risk not getting permission, and the strongest will not be taken because they risk being settled and not getting permission. This will result in those clients with the strongest cases, those who have been treated the worst by agencies of the state, having no remedy. The economics of legal aid work, and the slender or non-existent margins on which organisations operate mean there is no capacity to absorb additional risk. This is particularly true where no payment in "failed" cases is not offset by an additional uplift to the rates in successful case. The rational economic course is simply to stop doing this work.

It is not at all clear what is to happen with "rolled-up" cases – are the whole costs of the case to be at risk?

Case Study

Shelter recently acted for a couple evicted from their assured shorthold tenancy because the landlord wanted to sell the property unoccupied. The wife was suffering from cancer and undergoing treatment. They went to their local authority to make a homelessness application. The local authority refused to provide temporary accommodation for the couple while they made their decision, on the basis that she was not vulnerable (meaning less able to fend for herself than the average person if on the streets) because her husband could care for her. The council stated that since she had her husband to support her (even though he was working), she would not suffer more than the average homeless person if she were street homeless: her husband would make sure she had access to medication and kept her hospital appointments. Shelter made detailed representations, supported by medical evidence that she needed to be somewhere clean, dry and warm, and that if she was on the streets she would face a very high risk of infection, but they still did not change their position. Only when we judicially reviewed the local authority's decision did they back down and agree to accommodate the couple.

The local authority's position was entrenched, so it took court action to force them to back down. But their position was so unreasonable that they settled the case quickly, before the permission stage was reached. In future, therefore, Shelter would not be paid for the work undertaken for this couple.

The net result of these proposals is that it is much less likely that legally aided lawyers will be willing or able to bring judicial review cases. Local authorities and other government agencies will find it much easier to escape proper scrutiny and will be able to act unlawfully with impunity. Members of the public adversely affected by poor decision making by arms of the state will have no redress.

Judicial review is not brought lightly or frivolously; it is a vital constitutional safeguard in holding the state to account and ensuring it only acts lawfully and within its powers, and it is the last resort standing between a vulnerable family and the street. The state should not use its administrative power to limit access to the courts to protect its own unlawful decisions.

These proposals will significantly increase the number of destitute and homeless people and are an affront to the rule of law.

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.

No, we do not agree.

Predicting results at the start of a case is tricky: many families are still in their homes today because they won cases which were classed as borderline. In future they will be unrepresented and likely to be evicted.

Many possession proceedings in the County Court are borderline cases. It is not always clear at the outset with whether arrears can be dealt with, whether acceptable proposals for repayment can be put forward, whether the client will be able to persuade the Court that they are able to resolve their circumstances enough to prevent the need for a possession order. No-one should go unrepresented where their home is at risk and they have an arguable chance of success.

Many of the most important cases of recent years, those that changed and developed and extended the law and were fought all the way to the Supreme Court and beyond, were classed as borderline. Where you are seeking to change and develop the law through a test case, that will inevitably be borderline because there can be no guarantee that the Court will agree to develop the law in the way sought. These cases would not be funded, and this will result in the atrophy of the law with the removal of a vital mechanism for ensuring it reacts to changes in society. Even once the law is changed, applying it to individual cases remains difficult. A prime example in our field is the development of public law defences to housing possession proceedings, and we endorse the response of the Housing Law Practitioners Association (of which we are members) in this respect.

The Impact Assessment says that this affects perhaps 100 cases per year; given that every single one is of overwhelming importance to the individual concerned or about a significant issue impacting their human rights, or is of wider public interest, the costs savings are minimal and the impact on affected individuals disproportionate. If the costs projection in the Impact Assessment is right, then £1million is spent on these cases; 100 cases suggests £10,000 per case. The average cost per case is £5500 in family cases and £4,400 in non-family cases[15]. This again suggests that these are the most difficult and complex cases and those with the most impact on the clients involved. The Impact Assessment also says, as a wider benefit, that "it is expected that there will be an increase in public confidence in the legal aid system resulting from the removal of borderline cases from receiving civil legal aid". However, there is no evidence provided of a lack of public confidence in legal aid, no evidence that that lack of confidence results, even in part, from the funding of borderline cases, and no evidence that – if there is such a lack of confidence – that this proposal would restore it.

The assumption that "Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue)" is also wholly without evidence and seems to us most unlikely. As we have said, these are the most complex and important – to the individual – cases. Are they really likely to be just as successful as litigants in person as they are if they are represented?

This change would require an amendment to the merits tests set out in the Civil Legal Aid (Merits Criteria) Regulations 2013, which came into force a mere eight days before this consultation was issued. We refer to our earlier remarks on the process for introducing current contracts.

Case Study

Shelter recently helped a mother of three young children who had fled domestic violence. The family had lived in six homes in as many years, but the children were just beginning to thrive at school when she got into rent arrears. When her landlord sought to evict her, Shelter secured legal aid to defend the possession proceedings even though she only had a borderline chance of success.

[15] See tables CLS7 and CLS8. http://ftp.legalservices.gov.uk/docs/about_us_main/LSC-Stats-Pack-2011-2012.pdf

This meant we could adjourn the case giving us enough time to negotiate a settlement with the landlord that allowed her and her family to stay in their home. Without our intervention funded by legal aid, she would have been evicted. Predicting chances of success at the start is not an exact science and borderline cases win as often as they lose.

This proposal will remove legal aid from a group of the most vulnerable people, with the most pressing problems and the most complex cases, for the sake of saving a nugatory sum of money and placating a public opinion it is not even clear exists. The government should not proceed with it.

Questions 7 to 30

Shelter will not respond to these questions as they are outside our areas of practice. However, we support the fundamental principle – applicable to all areas of law – that clients must be able to instruct the lawyer of their choosing.

Question 31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the county court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

We support the principle that the same fee should be paid for the same work done to the same standard, regardless of who does it.

However, the reality is that even those few solicitor-advocates specialising in housing work who have higher rights of audience rarely if ever appear in the higher courts. Apart from anything else, the payment rates do not make it viable to do so. Even in the County Court most trial advocacy is undertaken by counsel.

We note that the fees paid to solicitors for all work, including advocacy, were set by regulation in 1994 and have not changed since, with the exception of the 10% fee cut imposed in October 2011. For example, if the solicitor preparation rate for work in the High Court, set in 1994 at £79.50 per hour, had risen by inflation it would now be £136.74 per hour. Instead, it is £71.55. It is hard to think of another profession paid less in real terms now than it was 20 years ago; surely there cannot be any other that is paid less in cash terms.

So the reality is that this represents not harmonisation between two broadly equal cohorts of advocates, but a massive – in some cases 50% or more – cut to the vast majority of advocates dealing with housing work in both the County and higher Courts.

We are concerned that the result will be a flight from legal aid by the specialist Bar, meaning that there will no longer be quality representation available to our clients, with the obvious impacts for access to justice. When their incomes are cut by 50% or more, they will seek other work.

We do support harmonisation, and the prospect of being able to call on a pool of specialist solicitor advocates to supplement counsel. However, harmonisation is not served by the slashing of fees paid to the vast majority; rather it is served by bringing the small minority into line and allowing it to grow so that the market can develop with competition between the professions. Therefore the appropriate way forward is to equalise the rates payable for advocacy by increasing those paid to solicitors to the level currently paid to the Bar.

Q32. Do you agree with the proposal that the higher civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

Shelter will not respond to this question as it is outside our areas of practice.

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

We note that the LAA does not have robust data on use of experts. This is certainly true in our experience. The rate set in 2011 for surveyors was based on Proceeds of Crime Act valuations, not housing disrepair surveys, but it took a year of lobbying by ourselves, the Housing Law Practitioners Association and others to get the rates amended (which resulted in them more than doubling in London). With that in mind, we cannot have confidence in the MoJ's understanding of the rest of the market.

It is our experience that it is increasingly hard to find expert witnesses willing to work for the current prescribed rates. That is likely to be compounded by a further fee cut. Yet good expert evidence is crucial to good justice. It can make the difference between winning and losing a case. And so a further cut which simply drives experts out of the market is likely to have a significant effect on the ability of legally aided litigants to achieve justice.

We have no desire to see experts paid more than is necessary. But nor do we wish to see expert evidence unavailable to our clients. It seems to us that a crude cut carries significant risk of this, and we think a better solution would be to look again at the whole system of expert evidence. The LAA could contract direct with experts, for example, and thereby provide certainty of work and achieve economies of scale that individual providers could not, as well as avoid the costs (to us and them) of dealing with the prior authority system. Or experts in the public sector, such as the NHS, could be required to do a certain amount of expert work per year as part of their NHS remuneration contract. There may be other suggestions and solutions. Our fundamental point is that simply driving through further cuts is likely to reduce the pool of experts to unsustainable levels, but that a proper and considered overhaul of the system of expert evidence could yield savings without the same impact on justice in individual cases.

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

No, we do not. Please refer to our answers above for the chilling effect these proposals will have on the ability to hold the state to account, and their impact on vulnerable people who are more likely to be forced on to the streets as a result.

We are particularly disappointed by the lack of evidence throughout the consultation, including in the impact assessments. No evidence of a lack of public confidence justifying these proposal is brought forward; there is no analysis of the impact of cuts previously implemented or their cumulative impact when combined with these cuts. The assessment dismisses as unreliable data from claims from providers, for example around equalities data from clients, despite knowing it is a requirement for it to be completed by or with and at the direct instructions of clients. The lack of any evidence or rigour renders the impact assessment wholly inadequate.

It is wholly incredible to state that individuals who would receive civil legal aid, but will no longer be able to do so, will achieve the same outcomes acting on their own.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

Please see our answers to the substantive questions for examples of those who will be impacted.

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

The only correct response to these proposals is to abandon them.

For further information, please contact:

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