

Commission of Inquiry into the Case for Legal Aid: The Panel's Response to the Government's Consultation Paper

We are a Commission of Inquiry into the Case for Legal Aid. As panel members tasked with delivering findings on the evidence adduced, we heard testimony on the 2nd February 2011, in Committee Room 10 in Parliament, from individuals whose lives had profoundly benefited by the provision of legal aid. We also heard from committed practitioners in the field and experts making strong representations as to the effects of the Government's proposals. They stressed not only the consequences they will have for those who rely upon the provision of legal aid now and in future, but the wider, longer-term social impact the proposals are likely to have. In their experience, legal aid is most often the quickest and most effective way of solving otherwise intractable problems. Our report will be published in due course but we felt it appropriate to respond to this Consultation in the interim.

Our concerns about the Government's proposals relate to efficacy, efficiency, and justice. We believe that the proposed changes to the scope of funding will leave many without effective means to pursue their rightful claims. The Government proposes to deny funding for cases in numerous areas of law which, from the testimony we heard, were of profound significance to those who receive it. We believe that the proposed changes will leave large swathes of the legal system far slower, less efficient and inadequately equipped to deal with the demands upon it. Furthermore, the proposals aim to separate areas of law that, from the testimony we received, are difficult in practice to separate.

We are aware of the current fiscal climate and its demands on public spending. However, £350 million is a comparatively small component of the budget, and we believe that the detrimental social impact of the proposals suggested by the testimony we heard risks making these cuts into a false economy, with legal problems being stored up and other government departments facing increasing costs to deal with these social effects.

As a panel, we believe that an improvement in decision-making by public bodies, use of mediation in appropriate cases (backed up by the involvement of qualified representatives) and the possibility of curtailing payments at the top end of criminal legal aid remuneration would better allow legal aid to fulfil its objectives, and be a fairer and more effective way of reducing public spending. Experience of civil legal aid funding in recent years and international comparison suggests that neither conditional fee arrangements nor insurance can be adequate replacements of publicly funded legal aid.

We also believe that there are better ways of addressing the non-financial arguments made in favour of these proposals, such as a supposed increasingly litigious society. The Legal Services Commission (LSC) currently screens out unmeritorious claims and if the Government believes this is not being done, then strengthening the LSC's processes would address this problem, if it exists, without having to reduce the scope of legal aid. We believe that the legal aid system is something of which we can be proud, as with the National Health Service. The legal aid system provides justice to those who so often need it most, those who have the least.

In response to the questions asked by the Government's consultation paper, we have identified relevant examples and points from the testimonies our Commission has so far received. We have paid close attention to the Green Paper proposals which would most affect those who gave testimony at the commission and the proposals which engage issues raised to us by the experts present. This will be followed by a further document to be released to the general public after a lengthier period of review and discussion, in which the findings enclosed here will form a part. Our reference to legal

aid in this response covers the various forms of public funding for legal advice and representation, and page references refer to the testimony booklet, attached.

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 of civil and family legal aid scheme? Please give reasons.

We believe that legal aid provides a crucial safety net to people who cannot afford to pay for legal advice and representation in the resolution of otherwise intractable problems. The testimonies we have received provide examples of immigration injustice, domestic violence, housing need, and disability discrimination that could not have been solved without the provision of legal aid. For example, legal aid helped Sami Azmi (pp 8-9) secure her home following eviction threats after her husband had secured loans and credit card bills against their house. She said, "We would be lost without legal aid and the lawyers who carry out this work. They got me my life back...Without legal aid...I would have been left homeless with my children". Further evidence is at the following pages: p. 6 (Ahmed, asylum claim); p. 21 (SH, abuse/assault); p. 10 (AB, community care); p. 13 (Caroline, housing eviction); p. 16 (Rosamund Daring, housing eviction); pp 24-5 (Mrs Hughes, disability discrimination); p. 35 (Vincent McBean, housing possession); p. 42 (Subera housing); Appendix 1 (Zoe Kealey). We strongly agree that the types of cases listed should retain legal aid funding.

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?

As a result of testimony we have received we are extremely concerned about the proposals listed at 4.148 – 4.245.

We believe that continuing to exclude inquests from the scope of legal aid provision leaves ordinary people seeking justice on an unequal footing to others present at the hearing. Our evidence suggests that these other parties may be very well-represented, whilst lay members of the public are left insufficiently aware of the legal issues at stake. They are often unable to participate for the benefit of their own interests and those of the inquest itself. Whilst we are aware of the inquisitorial rather than adversarial nature of an inquest, the imbalance of power which would have been present in the case of Zoe Kealey (Appendix 1), had she not had legally-aided representation, would have left her in a far weaker position than the other parties present, including those representing the police, the NHS, and SERCO. In her words, "It was incredibly daunting... I simply do not know how we would have been able to cope without our barrister Marina... The coroner was much better able to do his job because we were [professionally] represented." The evidence we heard suggested that legal aid should be available, subject to eligibility criteria, for inquest hearings and not just where a secondary 'wider public interest' test is met. The Government also proposes to repeal the provision (at 4.152), not yet commenced, to provide legal aid for categories of cases such as deaths in custody or active military service (proposed by section 51 of the Coroners and Justice Act 2009). We find it hard to imagine any such case that would not meet the 'wider public interest' test which the Government proposes to keep (4.255), and so we believe that this should not be repealed. The presumption in such cases should be that the wider public interest test is met and that legal aid should be available.

We agree that other areas not currently funded should remain excluded from legal aid (4.149).

Areas proposed for exclusion (4.154 – 4.245):

We believe that the achievements of the legal aid system should be firmly borne in mind when considering the scope of exclusions.

We have heard testimony of individuals and their children returning to a normal, happy life, from which they had been unjustly excluded (Stephanie, video evidence).

We heard from a young woman now able to study at university after securing her and her sister a place to live, thanks to the provision of legal aid in a case of threatened homelessness (Subera, p. 42 and oral evidence).

We heard testimony from Mrs Whitehouse (pp. 44-45) that, as a vulnerable elderly couple faced with an illegal eviction, she and her husband had no idea that “[her] landlord had no right to do this to [them]”. The problems such as those Mrs Whitehouse faced, if faced without legal aid, seem insurmountable.

In education and family matters, for example, the interests at stake and the emotional tumult surrounding them can make quick resolution impossible without professional assistance. L, who received advice regarding her son's education and care by the local authority, said, “In order to obtain a fair and reasonable outcome, I feel that a third party who is not emotionally involved and who is working for the neutral best interests of the child... is a provision that should not be withdrawn,” (pp. 28-9). We believe it is fundamentally right that the Government offer these crucial, life-changing opportunities. We believe these critical areas of law demand protection.

The effects of these proposals must be considered as a whole. Our evidence from practitioners (Kathy Meade, Tower Hamlets Law Centre, oral evidence) strongly suggests that these changes will cause many legal aid providers to close down or move to privately funded work. This will greatly reduce the number of specialist lawyers available for legal aid work, forcing many individuals to represent themselves (as recognised at 4.266). This bears, for one, a clearly adverse effect on the administration of justice, which we discuss further below.

Submissions we received strongly suggest that the areas of education and immigration law are procedurally and substantively too complex for lay members of the public to represent themselves effectively (Sarah Clarke, Child Poverty Action Group, oral evidence; Pierre Makhlouf, Bail for Immigration Detainees, oral evidence). Shami Chakrabarti of Liberty, moreover, that “welfare benefits law is one of the most complex areas of law”. We believe it is an area that in particular requires funding from legal aid.

In family law, we agree that there is a role for mediation in the resolution of disputes. However, the evidence we have heard suggests that mediation not only requires the backstop of litigation as a crucial safeguard, but requires legal representation between the parties to lead to a safe, effective, and efficient resolution of the problem.

Further examples of the necessity of the preservation of legal aid in areas that are proposed to be excluded under the proposals are at p. 34 (EM, housing), p. 44 (Mrs Whitehouse, housing), p. 26 (Kamaljeet, immigration), p. 15 (KD, family), p. 17 (JG, family), p. 41 (Steven, family), and pp. 48-54 (Immigration Law Practitioners Association).

We are also concerned that the proposals would separate areas of law that are inextricably intertwined, such as welfare, housing, and debt issues, some of which will be denied funding. Testimony we have heard suggests that it is unlikely that such issues can be disentangled and dealt with as discrete problems. Any changes to one area will have ramifications across other areas and be far more damaging as a result (Laura Janes, Young Legal Aid Lawyers, oral submission).

A theme running through the evidence we heard was the necessity and economy of high-quality decisions made by local councils and other administrative bodies. The testimony given by Subera (p. 42, oral evidence) attests to the ease at which legal expense could have been avoided: by the compliance of the local council with its statutory duty to provide her and her sister with emergency housing.

We are fully cognisant of the requirements of economy and efficiency. However, we believe that there are money-saving alternatives to the exclusion of whole areas of law from the scope of legal aid. This undoubtedly must include the improvement of the decision-making of administrative bodies in respect of whose decisions legal action is so often taken.

It is plain wrong to restrict access to legal remedy when the quality of decisions being made by statutory and other public authorities is so poor.

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?

Prima facie we believe it is wrong for the Government to introduce legal and policy changes that it admits could result in the UK not fulfilling its obligations under domestic and international human rights legislation.

We also believe that using a separate fund to meet human rights obligations adds a layer of complexity that would not exist if the substantive proposals for legal aid were wide enough to meet these obligations.

If the Government is of the view that decisions made by the Legal Services Commission (LSC) currently risk, and would continue to risk, preventing access to legal representation in breach of human rights obligations, then a strengthening of LSC decision-making would address this problem.

Despite this, it is clear that if the proposals are implemented, an additional fund to meet human rights obligations is more desirable than risking violations of individuals' human rights. We nonetheless find it puzzling, at best, that the government is proposing to introduce a fund for the protection of rights which they appear to admit will be breached were the proposals implemented.

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?

We believe that it is inappropriate to decide whether alternative funding, conditional fee arrangements (CFAs), for example, could replace funding for certain areas of otherwise legally-aided work when reforms to such funding remain under consultation. This risks the replacement of legal aid with proposed alternatives before it is known whether that alternative funding is adequate. In any case, the experience of recent years causes us to question the appropriateness of reliance on CFAs instead of legal aid.

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.

We have heard evidence, taken from studies undertaken in the context of asylum law,

that an increase in the number of litigants in person will have a substantial negative impact on the administration of justice (Pierre Makhlouf, Bail for Immigration Detainees (BID), oral submission). According to BID, individuals are three times more likely to succeed at bail hearings where they are professionally represented than where they represent themselves, and that this is not wholly due to such cases where they represent themselves being weaker cases. We believe that an extrapolation of this figure to other areas of law, such as those facing the proposed changes, is highly plausible. Self-representation inevitably risks the slowing of court proceedings and casework, and according to BID there is "no doubt [that] changes will increase correspondence to MPs' surgeries."

The risk of individuals not receiving the legal outcome that their case deserves was also made clear in the area of inquests, as our evidence showed that many failures in the action of public bodies only emerged when solicitors were available to ask the pertinent, penetrating questions the case required (Zoe Kealey, Appendix 1 and oral submission).

We believe that the protection of fair process is of crucial importance, independently of the results the process affords. We believe that the evidence cited at 4.266 – 4.269, citing the impact of litigants in person on court time taken by cases, and referring to the outcome of the case and costs to the courts service, incorrectly concentrates on the outcome of court proceedings, rather than the process itself. We believe, from the evidence we have heard, that the cuts will have a wide-ranging impact on the efficiency and economy of justice, and will leave deserving individuals unable to pursue their claims effectively and to the extent that their cases deserve.

Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?

The testimony and submissions we received suggested that transforming the role of telephone advice to that of a gatekeeper would significantly deter many from successfully claiming legal aid. We have heard testimony which suggests that many of those seeking legal aid advice would be unable to express themselves, or their complex legal problems, over the telephone. The issues at stake, we believe, are simply too important to be determined via a telephone call.

There is good evidence that the sizeable bundles of papers clients present to their lawyers often comprise years-worth of legal documents, detailing not simply one, but often very many, different kinds of legal problem. The bundles presented, we believe, are too complex for the problems they contain to be properly investigated over the telephone. Moreover, we have heard testimony that in certain cases, such as domestic violence, victims are often unwilling or unable to relate their issues without the expert prompting and guidance of a lawyer; often they are unaware of their importance or relevance. This, we believe, applies across the board: legal problems require expert coaxing from the client before they can be investigated and assessed. This, we believe, would be impossible without a face-to-face interview. Increasing the role of telephone advice to that of gatekeeper massively increases the burden on the Government to advertise the existence of telephone advice. We heard evidence that where phone helplines already exist (for children), negative perceptions of the law's influence in their lives deter people from phoning for legal help. (Laura Janes, Young Legal Aid Lawyers, oral submission). This problem is often averted when people access legal advice through trusted community groups (Mrs Whitehouse, oral evidence). A lack of trust or knowledge must not bar access to legal advice.

We do not deny that the introduction of a supplementary telephone helpline would assist individuals seeking legal advice, when it simply buttresses, rather than replaces, face-to-face assistance. The sweeping adoption of a telephone gatekeeper to

summarily assess an individual's legal issues and financial status poses an enormous risk.

MPs do not offer a telephone -based initial advice service for the advice cases they deal with, so it seems perverse for MPs in Parliament to be asked to approve such a provision in similar or more complex cases.

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?

We received strong support for the view that face-to-face advice is crucial to the legal process (Shami Chakrabarti, Liberty, oral submission). Our evidence suggests that practitioners rely on face-to-face meetings to isolate clients' problems quickly and effectively, which would take far longer if conducted by telephone, if they could even be conducted at all. We have also heard evidence that an increase in telephone advice would impact negatively on people whose first language is not English or people with disabilities (Kathy Meade, Tower Hamlets Law Centre, oral evidence). From the individuals who offered testimony, we agreed that the direct contact with a legal representative was key to properly exploring and investigating the complex legal problems they had faced. As a result, we strongly believe that telephone advice should be used to buttress, but never to replace, face-to-face legal advice.

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?

We are concerned that this proposal will deter important cases from being pursued. Cases remain subject to merit criteria, a test which we believe should be sufficient to prevent unmeritorious cases from receiving legal aid. We believe that if the Government is aiming to prevent unnecessary litigation, strengthening the application of this test is a far less injurious method of achieving the aim than forcing people to pay 3% - 10% of their money to fund a claim. From the evidence available to us, and the government's own Equality Impact Assessment, the worst-off will be most heavily burdened by the changes: to impose the £100 client contribution, we believe, will build another barrier between the worst-off and the pursuit of their rightful claims.

Question 24: Do you agree with the proposals to: a) 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; b) enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and c) remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?

We find the above proposals to be puzzling, at best. It is in the nature of legal representation, within a decent, democratic society, that the legal representative serves only the interests of the court and the client. We understand that the financial concerns of the representative should not in any way impact upon the advice a client receives and their direction of the proceedings in court. It appears that the government's proposals assume that legal representatives give advice to their clients with their own financial motivations in mind, contrary to the edicts of their code of conduct. It appears to follow also, and is all the more worrying, that the government must hope representatives would act on such motivations in response to the proposed changes in fees. We believe that the only plausible response to such a worry, if present at all, is to strengthen the already powerful code of conduct to which legal representatives must adhere.

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?

We are troubled by the government's focus on legal aid lawyers' remuneration in civil and family matters. From the testimonies we have heard, the role of a lawyer in legally aided work is crucial and can be life-changing. We took Kathy Meade, from the Tower Hamlets Law Centre, to be an example of a dedicated expert pursuing the interests of her client with the utmost commitment. She told us that legal aid law is already a demoralised profession, and that all practitioners face an "immense struggle". We heard also from Shami Chakrabarti that the proposed cuts to legal aid lawyers' pay will create a more divided profession, and that claims to 'derail the gravy train' made under the previous administration were a gross misrepresentation of practitioners in the field. We believe that there should be no measures taken to further demoralise those within the profession or to deter those seeking to join it.

Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate.

SEE 32

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? (Table 5 at pg. 119.)

SEE 32