



# Haldane Society of Socialist Lawyers

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Ms Annette Cowell  
Legal Aid Reform  
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Dear Ms Cowell

I enclose a response from the Haldane Society of Socialist Lawyers to the Green Paper on Proposals for the Reform of Legal Aid in England and Wales.

Yours sincerely

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## RESPONSE TO “PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES”

From the Haldane Society of Socialist Lawyers

### Introduction

The Haldane Society was founded in 1930. It provides a forum for the discussion and analysis of law and the legal system, both nationally and internationally, from a socialist perspective. It holds frequent public meetings and conducts educational programmes.

It is independent of any political party. Its membership consists of practising lawyers, law students, legal workers, academics as well as trade union and labour movement affiliates.

Our President is Mike Mansfield QC and our Vice-Presidents are Kader Asmal, Louise Christian, Tony Gifford QC, Tess Gill, John Hendy QC, Helena Kennedy QC, Imran Khan, Kate Markus, Gareth Peirce, Michael Seifert, David Turner-Samuels, Frances Webber and Professor Lord Wedderburn QC.

We publish *Socialist Lawyer* three times a year. Further information can be found at [www.haldane.org](http://www.haldane.org).

Together with Young Legal Aid Lawyers, we hosted an event “an inquiry into the case for legal aid” at Parliament on Wednesday 2 February 2011. We asked a three-person panel to consider the case for legal aid. The panel will make its own contribution to the consultation process. At the event, we heard and read vivid testimony from people for whom legal aid had made a profound difference: to allow representation at inquests, to retain a home, to assist in divorce and matrimonial difficulties and to ensure basic support and subsistence. In many of those cases, the state itself had acted in breach of its obligation. Legal intervention, with the assistance of legal aid, was required to ensure that the state complied with its statutory duties.

### Our response in general

We respond to the specific questions in the consultation below. However, we believe that proposals to cut legal aid in England and Wales are fundamentally flawed and represent a devastating attack on the most poor and vulnerable in our society, and on their ability to access justice.

Legal aid has already been the victim of profound cuts in recent years. These cuts have left the sector demoralised, with clients finding it harder and harder to find legal aid providers and receive the help they need. If these proposals are implemented, we are concerned that there will be in effect no legal aid scheme in England and Wales, or there will be a system of such low-quality advice, conducted mainly by telephone, that access to justice will be severely compromised. We believe that these proposals represent a turning back of the clock to pre-1949, when legal aid was introduced.

We note that the devolved governments in Scotland and Northern Ireland do not propose to cut their legal aid budgets.

We are aware that numerous representatives of the legal profession and the advice sector have responded in detail to these proposals. As a political organisation, we concentrate on the broad issues relating to these proposals, rather than respond to the technical details.

### Legal aid should be expanded, not cut

We believe that legal aid should be expanded, not cut. We do not agree that severe cuts in public services need to be made. When the legal aid scheme was first introduced, in 1949, around 80% of the population were financially eligible for legal aid. We believe that financial eligibility should return to those levels, rather than the current level of 36%. The cost can be recouped through taxation.

Ken Clarke MP said, when introducing the Proposals in the House of Commons in November 2010, that “the current system bears very little resemblance to the one that was introduced in 1949”. We agree with that statement, although not with Mr Clarke's intention. The current system is only available to those on very low incomes indeed. The cost of litigation means that, in effect, only the rich and the very poor have access to justice. We believe that legal aid should be available to all but the rich, so that no one is excluded from access to justice on the basis of his or her means.

### The proposed changes to financial eligibility

We strongly oppose the proposed changes to financial eligibility. Legal aid is already available only to the poorest 36% of the population (and that figure is higher than recent years as a result of the recession). The proposed changes will have the effect of limiting legal aid to those who are near destitute. Even those in receipt of welfare benefits will have no guarantee of being eligible for legal aid. The proposed changes to capital eligibility will exclude some whose incomes are low enough as to entitle them to welfare benefit, but may still have savings or equity above the legal aid capital levels.

We note that these cuts come in the context of other cuts which disproportionately affect the poorest in our society. Housing benefit is to be capped, so that housing benefit claimants will have to pay significant proportions of their income in rent. The reality is that most claimants will simply not be able to afford the shortfall between housing benefit and rent and will end up being evicted by their landlords for rent arrears. They will face the insecurity of moving from one unaffordable private rented tenancy to another, or possibly life on the streets. Significant cuts are being made to the NHS, to education and to local government. These all provide public services on which poor people depend, and which the rich can buy for themselves. The proposals to cut legal aid generally, and to restrict the financial eligibility, are all part of an attack on the rights and living standards of the poor.

It should also be noted that it is at times of recession that the poor most need advice and legal representation. There is more demand for advice to prevent homes being repossessed, to resolve employment issues and to ensure that welfare claimants are receiving all of their entitlements. Cutting legal aid in this climate is therefore particularly punitive.

The government's Impact Assessments to the Green Paper warn of the “*wider social and economic costs*” of these proposals, including reduced social cohesion, increased criminality, reduced business and economic efficiency, and increased resource costs for other departments. In short, legal aid provides a safety-net which saves the public sector money. We also note that the Impact Assessments make it clear that the effects of these cuts will be felt by the poorest 20% of our population and will fall disproportionately on black and ethnic minority people, on disabled people and on women.

## Proposals to reduce remuneration to legal aid providers

We comment in detail on the proposals regarding remuneration below. In general, we do not believe that remuneration should be cut to legal aid providers. We make this point not out for concern for lawyers but because, as practitioners who mainly work in publicly funded services, we have seen the demoralisation of legal aid providers and the increasing difficulties that legal aid providers face in making ends meet in recent years. We fear that cuts in remuneration may lead to legal aid providers being unable to continue in business. The result will either be that there are no legal aid providers remaining, or that legal aid services are provided at low-cost and low-quality. A shrinking of the sector will only further diminish access to justice.

We note that a significant amount of publicly funded legal services are remunerated at market rates, rather than at current legal aid rates. Lawyers are remunerated at commercial rates for representing the government, Primary Care Trusts, local authorities, police forces and other areas of the state. They are not confined to legal aid rates. We do not believe that there are any proposals to cut remuneration rates for lawyers representing the state and there are certainly not proposals to reduce their remuneration to legal aid levels. Equality of arms is a fundamental guiding principle to the rule of law and a key rationale for having a legal aid system. If these proposals are implemented inequality will continue to widen to the detriment of the poorer parties to disputes, as well as to society as a whole.

Lawyers providing services funded by legal aid do so not for commercial reasons but from a determination to use their legal skills to assist the more vulnerable members of our society. They are not “fat-cat” lawyers. Indeed we note that the Guardian's 2009 survey of public sector pay rates found that the average salary of a legal aid lawyer was £25,000, less than the mean salary for public servants.

## RESPONSES TO SPECIFIC QUESTIONS

We do not respond to every question below.

### Scope Questions 1 – 6

#### Question 3:

We do not agree with the proposals to exclude any of the following cases: ancillary relief where domestic violence is not present; clinical negligence; consumer and general contract; criminal injuries compensation, debt; education; employment; various housing matters; immigration where the individual is not detained; private law children and family cases where domestic violence is not present; welfare benefits; upper tribunal appeals. We address each area individually.

We note that all of these areas of law are subject to the merits test in the Funding Code and Guidance. In general, cases will not be funded if they have less than a 60% prospect of success (borderline or poor). In other words, it is more likely than not that funded cases will be successful. We believe that the means of ensuring that hopeless cases are not brought with the assistance of legal aid is to retain the merits test, rather than removing whole areas of law from scope.

We are not opposed to alternative methods of resolution of disputes such as mediation and use of the pre-action protocols. We believe that these mechanisms – rather than cutting legal aid – can help to reduce litigation. Further, we believe that these mechanisms are effective in resolving disputes where both parties are adequately funded and that legal aid should remain available for funding advice for mediation, other forms of ADR and for steps under the pre-action protocols.

Family cases – ancillary relief and/or disputes over children – where domestic violence is not present: we believe that legal aid should be retained for these cases. In relation to ancillary relief, the statutory charge already applies where there is capital including the former matrimonial home in dispute. We believe that separating couples already use the legal process as an option of last resort. We do not believe that if legal aid is withdrawn in these circumstances, fewer couples would litigate. Instead we believe that they would litigate with more hostility and less interest in seeking amicable resolutions. We believe that mediation has an important role to play in resolving family disputes but that mediation is successful when all parties involved feel that they are on a level playing-field and have the benefit of their own legal adviser. In short we believe that the presence of lawyers in matrimonial disputes usually make those disputes easier, not harder, to resolve.

We note that generally legal aid is likely to be available to the woman rather than the man in cases of relationship breakdown: reflecting the difference in earnings between women and men. We are concerned that if legal aid is withdrawn, it will be predominantly women litigants who will be unrepresented.

We are concerned that the test for whether or not domestic violence has been present in a relationship might be that the victim has obtained a non-molestation or occupation order, or that the perpetrator has been convicted (see para 4.64 Green Paper). We believe that such a high test does not recognise the reality of domestic violence. There is significant evidence that women subject to domestic violence do not seek help quickly and may not have brought civil proceedings or reported the violence to the police. Even if civil proceedings are brought, they are frequently compromised by undertakings (which involve no findings of fact). In our opinion, a woman's statement that she has been subject to domestic violence should be respected and there should be no requirement for further evidence.

Clinical negligence: these cases remained within the scope of the legal aid scheme when personal injury cases were removed from scope by the Access to Justice Act 1999. They remained within scope because the government at that time recognised that clinical negligence cases were complex, were not always suitable for Conditional Fee Arrangements (CFAs) and that considerable cost could be incurred in legal and expert fees before the claims were resolved by settlement or trial. We believe it would be short-sighted now to remove clinical negligence claims from scope. The opponents in clinical negligence cases frequently have large resources at their disposal: either publicly funded hospital or multi-national corporations.

There is already a pre-action protocol required for clinical negligence cases. Pre-action protocols are effective in reducing the number of cases issued and in focusing both parties on the merits of their, and their opponent's, case. They provide a mechanism for early identification of meritorious cases and settlement, when parties are acting in the spirit of the protocol. It follows therefore that clinical negligence cases are only issued when the pre-action protocol process has not resolved the issue, either because the issue is too complex or because there have been no realistic settlement proposals from the defendant.

Consumer and criminal injuries compensation advice: both of these areas of law currently attract legal help to assist an individual access his or her rights. The amounts of money involved are small. Early advice in these areas can represent the difference between an individual achieving redress quickly or having to embark in time-consuming litigation or tribunal claims. We believe that it is cost-effective to retain legal help for these areas.

Debt (where a home is not at risk): we repeat the point about early intervention. It is a false economy to make legal aid available to prevent a home from being repossessed, if there is no advice

available at an earlier stage to try to ensure that arrears do not accrue and that a person in financial trouble is assisted to make repayment agreements.

Education: education disputes can be complex and involve decisions about a child's future. Decisions taken by schools and local education authorities often have ramifications for the rest of the life of the child concerned, for example whether or not a child has special educational needs and receives appropriate services, or whether or not a child should have been excluded from school. We believe that early advice and intervention can help to resolve problems without recourse to tribunals. However, if the dispute continues to tribunal level, we note that, without the availability of legal aid, the parties will not have equality of arms. The school or local authority is almost certain to employ lawyers. We further note that removing legal aid from education cases will have a disproportionate impact on disabled parents and/or disabled children, and that many of the cases are brought by women (usually mothers).

Employment: legal aid is not currently available for representation in tribunals. People are assisted by legal help with advice and representation of their cases. It is our experience that legal advice can help resolve or settle cases and thus reduce the number of contested claims. We note that employers will almost invariably employ lawyers – sometimes using large City firms and specialist QCs. Employment law is notoriously complex and often impenetrable to the aggrieved employee.

Housing matters: we welcome the commitment to retain legal aid where a person's home is at risk. However, we believe that legal aid should remain available for other areas of housing law. In housing cases, the parties are inevitably not on an equal footing. The landlord can almost always afford legal representation. The proposal to exclude claims for breach of covenant of quiet enjoyment does affect a person's home: those claims are usually initially for an injunction requiring re-admittance after the occupant has been unlawfully evicted by the landlord (a criminal offence as well as breach of contract or tort) and is literally homeless and without a roof over his or her head.

We do not believe that CFAs can provide access to justice in damages claims involving housing matters. The amounts of damages are usually relatively small - £5,000 - £10,000. The recent case of Sibthorpe & Morris v Southwark LBC [2011] EWCA Civ 25 demonstrates the complexities involved in obtaining after the event insurance and the risks solicitors face when they are committed to representing clients in housing cases. The Jackson proposals, if implemented, will mean that success fees are no longer recoverable from defendants and therefore would normally be deducted from a successful claimant's damages. If that is the case, there will be a conflict between solicitors and their clients as to the exact amount of success fee to be deducted from a relatively small award of damages.

Immigration: in our view immigration law is one of the most complex areas of law. It is incorrect to assert that immigration cases not involving asylum or detention arise from a person's own choice. A person does not choose to opt out of the rule of law. Why should someone who has chosen to come to this country be deprived of his or her right to access to justice? Decisions regarding family reunions involve a basic human right: the right to respect for family life.

Welfare benefits: there is considerable evidence that advice which results in a claimant receiving all those benefits to which he or she is entitled assists society in general. Legal help is currently available to assist claimants. Legal representation is only available for Upper Tribunal and Court of Appeal cases, which by definition are test-cases affecting significant numbers of people. The government has recognised the complexity of the welfare benefits system in its proposals for a single universal credit. To deny claimants legal assistance in navigating the current complexities is an attack on the poor.

## Community Legal Advice Telephone Helpline questions 7 – 11

We do not agree that there should be a single gateway to access civil legal aid advice, nor should it be initially via the telephone. We believe that legal problems are complex and are usually bundled-up. It is typical that the complexity of a case cannot be disentangled without viewing and evaluating all the documentation pertinent to the case. A person may seek advice on matrimonial issues, for example, but within the matrimonial issues, he or she may also need advice on debt, welfare benefits, housing or immigration. The process of “triage” or identification of legal issues and appropriate specialist advice is complex. We do not believe that a telephone operator, presumably working with menus and checklists, will be able to identify the issues correctly and refer to the correct legal aid provider. We also note that the operator is to discuss with clients the range of options available to them and route to the services considered most suited to their circumstances, which might not include legal aid specialists. We would be extremely concerned at telephone operators effectively diagnosing and advising on legal problems and deterring people potentially eligible for legal aid from obtaining legally-aided assistance.

We note the finding of Legal Action Group's social welfare survey, published in December 2010, showed that persons from social groups D and E are less likely to seek legal advice by telephone.

## Financial eligibility questions 12 – 23

We are profoundly concerned at the proposals to reduce financial eligibility.

Firstly we believe that equity of up to £100,000 should continue to be disregarded. We note that the average deposit for a house in 2009 was £29,439. In other words, even first-time buyers are likely to have equity of £8,000 or more which would render them outside the legal aid scheme. Home-owners who have owned their home for any reasonable period of time will have acquired equity as house prices increase and they reduce the outstanding mortgage capital. This proposal will exclude virtually all home-owners from legal aid.

Home-owners may still have a low income that would have otherwise entitled them to legal aid. We do not agree that home-owners who have equity and a low income can “unlock” that equity by obtaining a secured loan in order to pay for legal representation. Equity cannot simply be unlocked and is not a liquid asset. Mortgages and other secured loans offered to home-owners on low incomes are often at very high rates of interest and punitive breach clauses. We believe that this proposal will simply deter home-owners from obtaining legal representation in order to protect their rights.

Second, we believe that reducing the minimum level of capital from £3,000 to £1,000 before contributions are required is wrong. We do not object to means-tested capital contributions. However, we consider that it is wrong to require people who would be entitled to full welfare benefits, without any sliding scale representing their capital, to have to pay towards their legal advice.

Third, we believe that the automatic “passporting” of those receiving income based JSA, Employment Support Allowance, income support or guarantee state pension credit should continue. In our view if someone is entitled to means-tested welfare benefits, he or she should also be entitled to full legal aid.

Fourth, we note that the level of contributions is to rise to up to 70% of disposable income. We believe that this will deter those on low incomes from receiving legal aid at all.

### Criminal remuneration questions 24 – 31

We are deeply concerned at the proposal to incentivise criminal lawyers in cases where a guilty plea is entered at an early stage in proceedings. We believe that this will lead to a conflict between lawyer and client. It is a fundamental principle of the rule of law that every person is innocent unless guilt is proved (or admitted). There are already sensible incentives within the sentencing scheme to enable early guilty pleas by defendants.

We leave the detailed responses to practitioners.

### Civil remuneration questions 32 – 38

We are concerned that a 10% cut in remuneration, alternatively requiring civil lawyers to conduct cases on risk rates, will squeeze existing legal aid providers out of the market. We have made the point above that legal aid lawyers have low salaries in comparison with other public servants (and even lower when compared to market rates for lawyers outside of legal aid). Over the last few years, we have seen specialist legal aid firms close or cease to provide legal aid services. We have seen law centres close or struggle through endless funding crises. We believe that these proposals will tip many legal aid providers over the edge.

These proposals will mean the end of specialist good-quality legal aid services. Instead, legal aid will be provided by large-scale suppliers, employing low-paid staff working from checklists and supervision. We do not believe that those systems provide adequate legal advice or representation.

Again we leave the detailed responses to practitioners.

### Alternative sources of funding questions 40 – 44

We agree with the current position whereby legal aid will not be granted if alternative sources of funding are available such as CFAs, trade union support or funding through household insurance. We make the point above that CFAs are not always appropriate for many areas of social welfare law.

We do not comment on the particular proposals save to observe that none of them would raise the money sufficient to fund a high-quality, widely-accessible legal aid scheme. We also note that there are no proposals along the lines of the “polluter pays” schemes. Many of the social welfare cases occur because public authorities have failed to make lawful decisions and/or failed to comply with their statutory obligations. Were those authorities to be penalised in costs, we believe that the standard of public authority decision-making would rise and there would be fewer challenges.