



The Law Society

Green paper response

Executive summary

07 February 2011

supporting
solicitors

Contents

Introduction.....	3
Scope	3
Telephone Gateway.....	4
Financial eligibility	4
Fee changes.....	4
Interest on lawyers' accounts.....	5
Our own counterproposals.....	5
Impact Assessments.....	5

Introduction

The Law Society understands the broader fiscal background to this consultation. Nonetheless, this does not change the fact that cutting legal aid is a political choice. If it proceeds with the proposed cuts, the Government runs the risk of reduced social cohesion, increased criminality, reduced business and economic efficiency, and increased resource costs and transfer payments for other Government departments.

In a time of economic difficulties, the demand for legal aid services increases. More people will qualify for legal aid as their household incomes drop. More people will need advice. Increased poverty and financial stress may lead to crime, and to abuse or neglect in the home, requiring intervention from social services.

However, we have no option but to accept that Ministers have made that choice. We believe that if cuts have to be made, there are better ways of achieving them than those proposed in the Green Paper. As well as being damaging to access to justice and the rule of law, the proposals in the Green Paper have an indirectly discriminatory impact on protected groups. We believe that our alternative proposals will have a significantly less detrimental impact, and would be a more proportionate means of achieving the Government's legitimate aims.

Scope

The Law Society supports the principle that litigation should be regarded as a last resort, and that people should be encouraged to make use of other means of resolving their disputes. However, the approach of taking large areas of legal aid out of scope, or (as in the case of family law) restricting scope to assistance with mediation only, is wrong.

Legal advice is often the means by which prospective litigants are steered away from Court, either through advice to the client that they do not have a valid case to pursue, or through lawyer-led negotiation. The consequence of removing legal aid may be that people who would otherwise be discouraged from pursuing litigation will instead go straight to Court as a litigant in person. The policy therefore has a significant risk of achieving the direct opposite of this stated goal.

The Government has set out a test by which it has judged which areas of law should remain in scope, and which should be taken out. The Law Society believes that it is wrong to judge whole classes of case on this basis, rather than individual cases. Moreover, even taking the Government's approach, we believe that in this paper, the Government is routinely misapplying its tests. For example, whether or not it is appropriate to argue that a Tribunal is an environment in which a person can present their own case, that does not justify removing from scope, the advice s/he needs on whether s/he has a legitimate case to bring before that Tribunal, and how to present that case.

If people do choose to act as litigants in person, this will have a serious impact on the Court service, the judiciary and other parties to the proceedings. The research cited in the Green Paper shows that the presence of a litigant in person leads to increased legal fees for represented parties, significantly more, and more serious, mistakes in court forms, and cases taking significantly longer.

The Government proposes reliance on other sources of advice. But those other sources are also facing serious cuts to their funding. They may well not be able to handle even the volume of work they currently do, let alone the additional volumes of work that would result from cutting legal aid.

One important factor that is completely missing from the Government's proposals for family legal aid is consideration of the impact on the children affected. If parents are unable to resolve their issues, or are put through the additional stress of acting as litigants in person in court, this will inevitably have an impact on the welfare of the children of these families. Some will lose contact with the non-residential parent. Some will no longer have financial provision that would otherwise have been made. Some frustrated parties will take the law into their own hands, which may include the increased criminality the impact assessment warns of, manifesting itself in the form of domestic violence and child abduction.

Telephone Gateway

We do not agree that the telephone helpline should be the single gateway, or, indeed, that there should be a single gateway, depriving clients of their choice to see a solicitor. A significant proportion of clients who qualify for legal aid find accessing services by telephone difficult or even impossible. The cost of calls may be a significant barrier. Having a single telephone gateway may be problematic if the system becomes overstretched and clients are unable to get through. A telephone gateway could have value, but it must not be the only way in which clients can access the legal aid system.

We do agree that for those clients who choose to access services in that way, a telephone service is a valuable part of the whole system, and we agree that there may be scope to expand the use of telephone services.

Financial eligibility

We set out our concerns that that the capital eligibility limits have been lowered for recipients of means tested benefits. This means that eligibility for legal aid is more restrictive than it is for entitlement to means tested benefits. We do not support the proposal that benefit recipients with little capital should pay a £100 contribution from their capital. We believe that the gross capital limit of £200,000 is particularly harsh in respect of benefit recipients who own a home worth more than £200,000 but have no other capital. We do not object in principle to the proposal that those clients who have substantial equity in the home should receive legal aid as a loan subject to a charge on their property,.

We do not support the proposal to increase contributions from income. A significant number of clients already decline offers of legal aid because they cannot afford the contributions and this number can only increase if income contributions are raised.

Fee changes

The Law Society will shortly be publishing research undertaken by Otterburn Consulting, which will show that the combined impact of the scope and fee changes will be to render the vast majority of the legal aid supplier base economically unviable. We therefore oppose the majority of the proposed fee changes.

We further oppose the principle underpinning the changes to the fees for guilty pleas and cracked trials, which depend on the assumption that the behaviour of clients can be changed by changing the financial incentives of the lawyers advising them. This ignores both the reasons why clients act as they do, and the solicitors' professional obligation to put their clients' interests ahead of their own.

Interest on lawyers' accounts

We do not support the proposal to divert interest from solicitors' client accounts to the legal aid fund. We do not think this proposal will generate a significant amount of money overall but the loss of income for individual firms could result in higher charges to clients. Additionally the possession of a client account enables firms to negotiate better terms with their banks including arrangements for interest earned to be set off against overdraft charges. Loss of client account interest may also damage a firm's capacity to carry out pro-bono work.

Our own counterproposals

We believe there is significant scope to make efficiency savings within the legal aid and the civil and criminal justice systems that will enable at least £400 million to be saved. These proposals are discussed in some detail within the text of our response and are summarised in the table at Annex A.

Impact Assessments

No attempt has been made to mitigate the discriminatory impact of the proposals, or to consider alternative means of saving costs to the MoJ budget which would have a less discriminatory impact. Moreover, given the acknowledgement that the proposals may cause increases to other Government departmental budgets, it is arguable that the proposals will not meet the stated legitimate aim at all. The proposals cannot therefore be said to be a 'proportionate' response to the need to cut the deficit, and the Society believes that the Government has failed to comply adequately with its statutory equality duties.

The Ministry acknowledges that its proposals will have a disproportionate impact on protected groups, and will therefore be indirectly discriminatory, but asserts that the proposals are a 'proportionate' response to the aim of achieving a 'reduction in expenditure to meet Government targets in response to deficit reduction'. Whilst the Law Society does not dispute the legitimacy of the aim to reduce the Government's deficit, we do dispute that the proposals are a proportionate means of meeting that legitimate aim.