



The Law Society

Transforming legal aid consultation

The Law Society's response to the non PCT proposals

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Transforming legal aid consultation - The Law Society's response to the non PCT proposals

Introduction

1. This is The Law Society's response to chapters three, six, seven and eight of the Transforming Legal Aid consultation proposals. Our response to chapters four and five is presented in a separate document.
2. The Society does not accept some of the government's fundamental assumptions that lie behind the current proposals. The first is that legal aid expenditure is rapidly increasing and needs to be brought under further control. According to the Justice Committee's Third Report of 2010-11, spending on legal aid has in fact been falling in real terms since 2003-04, when it was £2.141 billion. Moreover, the figures presented in Chapter 2 do not take into account the projected decrease in expenditure resulting from the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) or that fact that expenditure is falling anyway as a result of previous fee cuts and decreasing volumes. According to the Legal Aid Agency's business plan, published on 16 April 2013 the Agency's budget for 2013/14 is £1.8 billion, a reduction from £2bn the previous year. The premise that the costs of legal aid are increasing over time is untrue.
3. We do not accept that public confidence in legal aid has been undermined. This is a major theme that runs throughout the consultation, but there is no evidence either in the consultation paper itself or in any of the impact assessments that legal aid funding lacks credibility, much less any consideration of whether any negative public perceptions of legal aid are justified by the facts. We agree that there has been some negative reporting in the press about individual cases. There is nothing to suggest that those cases have been reported accurately or, even if they have, that they are symptomatic of a wider problem. The proposals in the paper are presented as responses to a problem (a legal aid system which has lost credibility) which is entirely unevicenced.
4. In view of the lack of good data, unclear information about costs assumptions, and confusion in the aims of the proposals (which oscillate between costs savings and 'improving confidence') we question whether this consultation is compliant with the government's own Code of Practice on Consultation.

Chapter 3: Eligibility, scope and merits

Prison law

5. In this section we only consider the proposed prison law scope cuts. Proposals affecting the scope of contracts and issues around who will conduct prison law, which appear in Chapter 4, are considered in our separate response to that section of the consultation.

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

6. We have had the advantage of reading the detailed response to this question by the Association of Prison Lawyers, and we endorse their comments.
7. It needs to be stated clearly that, simply because someone is in prison it does not follow that they have forfeited rights to have their basic human rights respected. They are also part of a system where it is very easy for those rights to be ignored with limited recourse. There needs to be proper, external accountability for the prison regime.
8. The figures provided in Table 1 show that prison law expenditure has already started to fall as a consequence of the significant prison law scope cuts implemented in 2010. There is a lack of clarity in the consultation about the savings that these further cuts will generate. Paragraph 3.15 refers to bringing down prison law expenditure to 2008/09 levels (£21m) but the Impact Assessment and footnote 17 refer to savings of £4m per annum, which on the basis of the 2011/12 figure of £23m would actually reduce expenditure below the 2008/09 level to £19m.
9. The proposal will effectively end legal aid for treatment cases. Following changes to the 2010 Criminal Contract, legal aid is only available for treatment cases where it is 'practically impossible' for the applicant to use the internal prison complaints system, and prior authority for funding is issued by the LAA. According to the Equalities Impact, there has been a significant decrease in the number of funded treatment cases. The consultation acknowledges that the removal of treatment cases may have an adverse impact on those with particular protected characteristics under equalities legislation, such as those with mental health issues and learning difficulties, which is why legal aid was retained for these clients in 2010. We are not reassured by the statement that NOMS will ensure that reasonable adjustments will be made to assist prisoners with learning disabilities or mental health issues to use the internal prison complaints system. There is no indication of the specific measures that will be taken to put reasonable adjustments in place, and we can therefore have no confidence that such measures will be effective.
10. We believe that specified and observable reasonable adjustments must be put in place before any further scope cuts are implemented. A significant proportion of the prison population have disabilities or addiction issues that will inevitably exclude them from obtaining redress for legitimate grievances in the absence of independent representation.

Imposing a financial eligibility threshold in the Crown Court

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

11. We do not disagree in principle with this proposal. There is little justification for legal aid being available for the extremely wealthy; even if the cost of legal aid is recouped via the defendant's contributions, there are still administrative costs that fall on the public purse. Unfortunately, as noted below, the proposal as it currently stands will fail to generate some of those administrative savings.

Q3 Do you agree that the proposed threshold is set at an appropriate level?

12. The proposed threshold of a disposable household income of £37,500 will exclude many of relatively modest means particularly where two incomes are aggregated, who are likely to have difficulties meeting the costs of private representation in the Crown Court. We therefore believe that the threshold should be set at a higher level.
13. It has been indicated that a defendant who pays privately will only be entitled to recover their costs on acquittal if they have applied for and been refused legal aid. We cannot see any good reason for this provision which creates wholly unnecessary bureaucracy and cost for the Legal Aid Agency to process legal aid applications which will obviously fail the means test and which the client does not wish to make.
14. This proposal is wrong in principle. It is a basic provision of English law that, where a person is wrongly accused by the State, then the State should pay the reasonable costs of their representation. The Law Society continues to believe that it is wrong that those costs should only be at legal aid rates. However, there is no reason to require someone to apply for legal aid, simply so that they can claim their costs.

Introducing a residence test

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

General comments

15. We strongly oppose the introduction of a residence test. There appears to be no evidence base for it. Insufficient consideration has been given to the nature of the clients who will fail the test. Its effect will be to nullify some of the express concessions made by Ministers to secure passage of LASPO. Many of those who meet the test may find it difficult to prove, and doing so will add substantial delay and cost to the system. Moreover, we believe that the proposal amounts to unlawful discrimination on grounds of nationality, and that there are other potential legal barriers to the introduction of such a test.
16. The consultation states that the government is concerned that 'individuals with little or no connection to this country are currently able to claim legal aid to bring civil actions at UK taxpayers expense'. The MOJ Impact Assessment provides no data on the number of civil cases brought by such individuals, the types of cases and client groups involved or any quantification of the savings or costs that this proposal will generate. We are left with an unsupported statement that there will 'be an increase in public confidence in the legal aid system resulting from the introduction of a lawful residence test.'
17. Those who will be ineligible for legal aid as a result of this proposal will include:
 - Parents and children involved in child abduction cases
 - Victims of human trafficking
 - Victims of domestic violence seeking protection under the immigration domestic violence rules
 - All babies under 12 months including those British-born, involved in, for example, care proceedings or clinical negligence cases
 - Homeless people, people threatened with eviction and serious housing disrepair

- Those in need of community care services
 - Those with mental health and mental capacity issues
 - Some victims of forced marriages
18. LASPO recognises that issues arising for the victims of trafficking, and for victims of domestic violence who need to rely on the immigration domestic violence rule, are so significant for victims that they should remain in scope for legal aid even though most other aspects of non-asylum immigration law were taken out of scope. Legal aid was also expressly retained for clinical negligence cases arising from negligence at or shortly after birth. Indeed, all of these provisions were concessions the Government had to make in order to secure passage of the Act through Parliament.
 19. The residence test will mean that virtually all clients who might need to take advantage of these concessions will be excluded from legal aid. We consider it inappropriate that, having made these express concessions to Parliament, the Government is now seeking to nullify them by the back door.
 20. It is likely that most of the rest of the affected cases will be transnational family disputes. The effects of removing eligibility for legal aid for some of the parties to such disputes while leaving others wholly within the scheme do not appear to have been considered. They are likely to have significant costs implications for the family courts. Indeed the knock on impact in cost terms for the parties that remain legally aided may well outweigh any savings.
 21. Paragraph 3.54 of the Consultation Paper suggests that exceptional funding can be granted to fund cases excluded from the scope of the normal legal aid scheme. The suggestion here appears to be that exceptional funding can therefore somehow mitigate the effects of the residence test. The Law Society disagrees. Exceptional funding will not be available to people who are disqualified; it only applies to case types that are prima facie out of scope of Schedule 1 Part 1 of the Act.
 22. The residence test will rule out most applicants for orders relating to children who have been abducted abroad and brought to this country. If we impose barriers to parents from abroad seeking to recover their children with the help of our Courts, there is a real risk that other countries will raise similar barriers to British parents seeking to recover children who have been taken abroad.

Issues of lawfulness

23. A requirement of residence in the UK (and other territories) is recognised to have a disproportionate adverse impact on people who are not nationals of the UK or its territories. The Government acknowledges that this amounts to indirect discrimination. We would argue that in fact this is direct discrimination.
24. Section 29 of the Equality Act prohibits discrimination (whether direct or indirect) in relation to the provision of services, including the services of public authorities; and none of the discrete exceptions appears to apply.
25. To the extent that entitlement to legal aid in civil proceedings engages Article 6 of the ECHR, (the right to a fair trial), the requirement to satisfy a residence test is likely to fall foul of Article 14 (prohibition of discrimination), which requires that there should be no unjustified difference of treatment, between people who are similarly placed, in relation to the enjoyment of the rights guaranteed by the Convention.

26. Various provisions of EU law prohibit unjustified discrimination. There is a general prohibition on nationality discrimination within the ambit of the EU treaty. Provisions on equal treatment of free moving citizens prohibit discrimination in relation to social advantages. Article 47 of the EU Charter of Fundamental Rights provides that legal aid shall be made available to those who lack sufficient resources to ensure effective access to justice in relation to the implementation of EU law.
27. The Charter also contains a non-discrimination provision. A requirement of residence within a Member State is likely to fall foul of the EU equality provisions – most residence requirements are therefore EU-wide rather than linked to the territory of one state. Council Directive 2002/8/EC provides that persons involved in cross-border disputes are entitled to appropriate legal aid to ensure their effective access to justice. Article 4 of the Directive also provides that Member States must grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State. The 12-month residency period would breach this provision.
28. With regard to trafficking Articles 12(2) and 15(2) of the EU anti-trafficking directive (2011/36/EU) provide a right to free legal counselling and representation for those who have insufficient resources to pay.

Administrative complexity

29. It is proposed that solicitors will be responsible for determining whether clients satisfy the residence test. This creates a number of problems that will make the residence test very difficult to implement:
30. There are a wide range of clients who will not satisfy the proposed residence test in addition to illegal entrants (who appear to be the prime target of this proposal), including:
 - British nationals who do not meet the 12 month residency requirement
 - Those with certain types of leave to remain
 - Certain EEA nationals who do not require leave
 - Those who have been here lawfully but have overstayed on a visa
 - Prisoners, including life sentence prisoners who were not lawfully resident when convicted.
31. Determining a client's immigration status can be a difficult task even for immigration lawyers, but the test will have to be carried out in every single civil and family legal aid case.
32. Once lawful residence is established, it is then necessary to satisfy the '12 months' requirement and this is likely to be even more problematic. At paragraph 3.51 and at footnote 30, the consultation suggests that documents such as British or EU passports will provide evidence of meeting the test but this is not the case. Passports may establish lawful residence but will not provide any indication whether the 12 month requirement is satisfied. To satisfy the 12 months rule, clients may need to produce other evidence such as employment or national insurance history. This will be time consuming and difficult, particularly where the 12 month period occurred in the past.

33. People who meet the test but are likely to have difficulty proving it include:
- Victims of domestic violence who have fled their home
 - Travellers
 - Homeless people
 - Children
 - People in hospital or residential care for less than twelve months, particularly those with mental health issues or disabilities
 - People in prison
34. It will be necessary to subject every legal aid client to the lawful residence test. This places an unsustainable administrative burden on solicitors that is wholly disproportionate to the unquantified (but likely to be small) number of clients who do not satisfy the test.
35. Solicitors will be unwilling to take on any case where lawful 12 month residence cannot be established as the cost of such a case would be nil assessed on audit. In effect, legal aid would only be available to those with easily accessible documentary proof of lawful residence of at least 12 months.
36. Solicitors also have a professional duty to maintain the trust the public places in them. Being made to act as quasi-immigration officers is likely to breach that trust and compromise the independence of solicitors in the eyes of the client. This would be a highly undesirable outcome for solicitors, their clients and the rule of law. The requirement could also make it difficult for solicitors to comply with their professional obligations with regard to conflict of interests.

Asylum seekers

37. We welcome the statement that asylum seekers will be exempt from the lawful residence test but we seek clarification with regard to those who submit fresh claims. Paragraph 3.57 states that 'only where they had made a fresh claim for asylum would they once again benefit from the exception for asylum seekers'. It is not clear whether this means legal aid will be available for advice on submitting a fresh claim, or whether it will only be available when the fresh claim has been submitted. As fresh claims are based on new evidence we see no reason why fresh claimants should be treated any differently to those making an initial claim.
38. We also disagree with the proposal that successful asylum claimants will have to be lawfully resident for 12 months from the date asylum is granted in order to be eligible for further legal aid on any issue, save for any ongoing proceedings at the date of the grant. It is likely that most asylum seekers will have been resident in the UK for at least 12 months before asylum is granted and, as stated in paragraph 3.57 they are normally granted leave to remain for five years. Moreover, the logic of the grant is that the claim for asylum was legitimate from the outset, from which date any period of lawful residence should be counted.
39. It is also not clear as to what status, if any, the children of asylum seekers will have under this rule. If care proceedings are started will that child be entitled to representation? If not then there is further discrimination.

Equalities Impact

40. We address the equalities impact in more detail below, but flag up here some points of particular relevance to this issue.
41. The Equalities Impact Assessment recognises at paragraph 5.3.1 that the residence test will put non-British nationals at a 'particular disadvantage'. This is 'justified' at 5.3.3 as being a 'proportionate means of 'achieving the legitimate aims set out in section 4'.
42. Paragraph 4.2 states clearly that the 'primary objective of the proposed reform package is to bear down on the costs of legal aid.' We have seen however from the general impact assessment that the primary driver for the residence test is 'maintaining public confidence' in the legal aid system, rather than costs savings, as there is no evidence that costs will be reduced.
43. We question whether maintaining public confidence is a real issue as there is no evidence presented for a lack of confidence other than the MoJ's unsupported assertion. The disadvantage to non-British nationals cannot be justified as a proportionate means of addressing a problem that has not been proven to exist.
44. The purported justification is undermined still further by the example the Minister gave when announcing this policy. On 9th April 2013, he was reported in the Guardian as having said, as a justification for this new test, "There have been examples of people who have come to the country for extraordinarily short periods of time who have had a relationship breakdown and then they end up in our courts at our expense to determine custody of the children." However, legal aid for such cases had been abolished in the previous cuts to legal aid which had come into effect only the previous week. This strongly indicates that when considering whether this policy was a justified response to a perceived problem, the Government misdirected itself as to the substance of the perceived problem.

Paying for permission work in judicial review cases

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)?

45. The statistics provided by the MOJ are problematic as they are incomplete and do not indicate that there is a major problem with unmeritorious cases that needs to be resolved. There is no analysis of the reasons why proceedings are not issued in 2275 of the 4075 cases which receive legal aid. In many cases, the reason would have been that the proposed defendant conceded or settled the case once legal aid was issued. It is said that 845 of the 1799 cases which applied for permission ended after permission was refused but there is no analysis of the reasons why permission was refused. In 330 of those cases providers recorded that the case was of substantive benefit to the client.
46. In short, what is known of the actual outcomes of the cases where permission was not granted demonstrates that the figures do not mean what the Government has interpreted them as meaning. More analysis of the figures is required in order for any respondent to this consultation to be able to understand the true current position, the

nature of the problem the Government is seeking to address, and the likely impact of the proposal.

47. An example of the type of case that is frequently settled before the permission stage is an application for judicial review by a homeless person who has been refused interim housing by a local authority pending the authority's determination of the applicant's eligibility for housing. These applications are always made on an emergency basis on behalf of families or vulnerable applicants who are either street homeless or facing imminent eviction. They are always urgent and they are often made out of hours. In these circumstances, once a court order has been made and accommodation provided, then the local authority will often concede prior to permission. Under the new proposals, solicitors would not be paid for such applications even though they would have been entirely justified in issuing proceedings. They will therefore be unwilling to undertake them and there will be no incentive for local authorities to comply with their duties.
48. In effect a successful provider, who issues proceedings and obtains the desired result for their client pre-permission, will not be paid if there is no need to apply for permission, whereas a provider who obtains permission but then loses the case will be paid. One likely result of the proposal is that it will discourage settlement unless costs are paid, and may generate satellite costs litigation in which claimants ask the court to grant permission and award costs simply in order to ensure that they are paid. If there are prospects of settlement after the application for permission is issued but before it is determined, claimants' representatives are likely to be far more assertive about seeking costs because the alternative is not being paid at all for most of the work associated with the claim. This will increase costs to both the legal aid fund and to defendants.
49. The proposal does not take any account of the Administrative Court's practice of holding "rolled up" permission and merits hearings where merits are unclear or the case is urgent. If the outcome is that in such cases, the whole of the costs of the case are at risk, that is in contradiction of the stated policy. If that is not the proposal, the Government needs to clarify how it intends legal aid to operate in such cases. Without such clarification, it is not possible fully to address the issues raised by this consultation.
50. If the Government does propose to leave the whole of the costs of a case at risk in such circumstances, then claimants' representatives will more frequently seek to persuade the judge to deal with the matter as a two-stage hearing, thus potentially increasing the overall cost of the case for the parties and the court.
51. Another potential consequence of this provision is that the proposal will lead to an increase in judicial review applications by litigants in person who are not familiar with the law and court procedures, resulting in greater administrative costs for the court system.
52. There is also a practical problem with the justification given for the proposal that solicitors' fees will only be paid where applications for permission are successful. The underlying assumption is that a solicitor can predict with a degree of certainty whether permission will be granted. This assumption is unwarranted. The outcome of judicial review cases is notoriously difficult to predict, for two key reasons. First, they often deal with very specific sets of circumstances, so that precedent is of little assistance in predicting the outcome. Secondly, the grant rate for permission varies considerably

between different judges. It is often said, only partly in jest, that a lawyer can predict the outcome once they know the identity of the judge hearing the application.

53. A likely consequence of the proposal is that it will have a significant chilling effect on applications for permission in cases where a solicitor cannot be sure to a very high standard that permission will be granted. The effect will be to build in an extra, pre-emptive, level of protection for public authorities, who already benefit from both the legal aid merits test and the requirement for permission, which will stop some legitimate claims from ever being brought.
54. As a result, this proposal raises an important concern about the rule of law. Judicial review is a form of redress against unreasonable and unlawful decisions of the State that have a fundamental impact on the applicant's life in relation to issues such as housing, mental health, community care and immigration. It is appropriate to have means of filtering out frivolous challenges. But when the State introduces protections for itself against the bringing of legitimate challenges to its decisions, this undermines the protection that all citizens in a democracy should have from State abuses of power.
55. The proposed change engages Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights. Because of the chilling effect of the proposals and the extra, unwarranted, protection it provides to public authorities, the denial of proper legal aid funding may mean that there is no effective access to justice in these circumstances. Particular issues may also arise in relation to environmental cases under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which has been incorporated into EU law.
56. The comparison at paragraph 3.73 with applications for permission to the Upper Tribunal (where this system of funding operates) is not appropriate, since in those cases the provider is much more likely to have been involved at first instance and will have a fully reasoned decision to consider. This means both that it is easier to make a reliable assessment of the merits and that the workload in preparing an application for permission to appeal will be correspondingly less.
57. The Government concedes in the impact assessment that the costs savings from this measure are negligible, generating around £1 million per annum. For the sake of this relatively small amount the reduction in access to justice for challenging decisions of the state cannot be justified. It is entirely feasible that these savings will in any event be negated because of the disincentive to accept a settlement without a costs order, and the impact of increased numbers of litigants in person.
58. As an alternative to the current proposal, consideration could be given to a system where solicitors' costs will be paid unless the judge certifies at the permission stage that the application for permission was wholly without merit. This would provide more certainty of funding for a greater number of cases whilst keeping a check on the less meritorious applications that have not been filtered out by the legal aid application process.

Civil merits test - removing legal aid for borderline cases

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?

59. As the consultation states, legal aid will currently only be granted for certain case types that are assessed as having 'borderline' prospects of success. It is acknowledged that these are 'high priority, for example cases which concern holding the state to account, public interest cases, or cases concerning housing' (paragraph 3.87). Given the significance of these cases we can see no compelling reason to abolish the borderline category. The Impact Assessment estimates minimal costs savings of £1 million per annum, a small price to pay to ensure access to justice where the case is of overwhelming importance to the client, and the outcome is difficult to predict.
60. Predicting case outcomes is not an exact science. As we have suggested, it can be particularly difficult in public law cases and test cases where often the prospects of success can only be assessed as borderline due to the uncertainty in the law the case is intended to clarify.
61. Whether prospects are assessed as 'borderline' or 'moderate' will in many cases be a subjective assessment so in practice the likelihood is that the abolition of the borderline category will see more cases assessed as 'moderate' on the one hand, and on the other, more applications for investigative funding on the basis that the prospects are 'unclear'. The consequence of this is that the actual costs savings are likely to be even lower than the MOJ's estimate.
62. Furthermore, the consultation implicitly accepts that the abolition of the 'borderline' category will lead to more appeals against refusals on the merits (3.88) which will generate further administrative costs for the LAA.

Chapter 6: Reforming fees in civil legal aid

Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%?

63. We do not agree with this proposal. There have been no significant civil fee increases for over a decade and in real terms fees are now considerably lower than they were in 2000. There has been no economic analysis of the ability of this sector to remain viable if it is subjected to a further cut on top of the cuts imposed in 2011. Without such analysis, the Ministry is unable to demonstrate satisfactorily that this cut is sustainable.
64. The reasoning behind the proposed cut is flawed. It is said that the amount of work to be undertaken in care cases will be reduced because of the new 26 week deadline and the reduction in the use of experts. There has been no analysis to demonstrate that the amount of work will decrease. The reality is likely to be that the solicitor will have to do a similar amount of work but within a reduced time, ie they will simply have

to work more quickly. Normally having to act very quickly is a reason for seeking an uplift on costs, not to justify a decrease. It is possible that there will be fewer experts instructed, but that is pure speculation, with no analysis of the current level of use of experts and how that is expected to change, let alone any analysis of what implications that has for the average amount of work required.

65. However even if it is right that the amount of work will reduce because of better case management, that still does not justify a reduction in the underlying hourly rates. The stated rationale for the reduction in the fixed fees, is that less work is required, not that solicitors should be required to do the same work for lower remuneration. The suggestion in the paper that solicitors might “overwork” cases in order to escape from the fixed fee is wholly unjustified, given that there will be no change whatsoever to the structure of the fee scheme, and therefore no increased opportunity to do so; and it is offensive both to solicitors and to the staff of the Legal Aid Agency who carefully assess claims for fees at hourly rates to ensure that this does not happen. Even if there were any justification for such an allegation, it still is not a rational justification for reducing hourly rates. It would be a justification for increasing scrutiny of bills.

Harmonising fees paid to self employed barristers with those paid to other advocates appearing in civil (non family) proceedings

Q31. 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?

66. The Law Society agrees that the fee differential between barristers and other advocates should not continue.

Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

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?

67. This proposal is estimated to generate a minimal saving of £1 million per annum.
68. We acknowledge that the uplift was originally introduced when retrospective funding was introduced which put the provider at risk in relation to the costs of the whole appeal. Although this arrangement no longer exists there is still some risk in relation to the permission application. Moreover Upper Tribunal appeal cases involve complex legal arguments and are akin to High Court appeals, yet the fee without the uplift would be significantly lower than the proposed basic standard advocates fee for High Court and other (non immigration) Upper Tribunal cases without any possibility of enhancement.
69. Immigration and Asylum legal aid work has traditionally been one of the lowest paid areas of legal aid work as it is predominantly Controlled Work which is paid at lower rates than Licensed Work. For some providers the enhanced rates paid for Upper Tribunal work have provided an income stream that has enabled them to survive.
70. In the circumstances, we believe that the 35% uplift remains justified. In the alternative, it would be logical for immigration and asylum Upper Tribunal Controlled

Work fees to be brought into line with the civil (non-family) High Court and Upper Tribunal fees.

Chapter 7: Expert fees in civil, family and criminal proceedings

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

71. This is mainly a matter for experts rather than solicitors to comment on.
72. However, the differentiation between London and non-London experts should be abolished. It has already been abolished for the most commonly used experts. It creates unnecessary paperwork and administration for the LAA and solicitors. It increases the possibility of applications for prior authority. Disputes arise over where an expert's "registered office" is. No assessment has been provided as to the costs of administering the scheme for the different rates and whether the costs saving justify the amount spent on extra administration. It is suspected that when the extra administration costs (for both LAA and for solicitors) are taken into account that the benefit of the differential rates is either non-existent or so small as to be irrelevant. If the overall rates are to be reduced then the need for the difference reduces even further.
73. We also take the view that the LAA should contract directly with experts. Solicitors could be required as part of their contract to inform the LAA of the terms on which the expert is instructed, whether the report was on time and provide feedback from themselves or from the court as to the quality or usefulness of the report if appropriate.
74. The LAA would then be responsible for paying the expert and would have total control over the terms of such contracts. We believe that this would reduce the following costs to the LAA:
 - i. Payments to several solicitors in care cases for the administration involved in submitting claims for Payments on Account (Usually 3 parties per case) and, reduce the LAA's administrative costs in dealing with those claims.
 - ii. Payments to solicitors for completing their CLAIM1As at the end of the case with the relevant details of the expert and, the costs to the LAA of having to process each claim when it has effectively been split between several certificates.
 - iii. Avoid the risk of one office allowing a claim and another refusing with the likelihood of appeals flowing from that inconsistency in decision making.
75. This is all likely to lead to savings in administration costs as well giving much better control over experts.

Chapter 8: Impact Assessments

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.

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

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

76. The Law Society has concerns about the impact assessments conducted by the Government. It holds the view that the Government has not adequately looked at the impacts its proposals will have or analysed whether the proposals are justified.

Credibility impact assessments

77. A number of general themes emerge from consideration of the impact assessments. These include:
- (i) A very heavy reliance on the suggestion that there has been a loss of public confidence in legal aid. There is however no evidence either in the consultation paper itself or in any of the impact assessments that legal aid funding lacks credibility, much less any consideration of whether any negative public perceptions of legal aid are justified by the facts. Nor is there any analysis of the extent to which these changes will be effective in addressing the alleged causes of loss of public confidence;
 - (ii) Although an element of uncertainty about provider response to the proposed changes is acknowledged, assumptions are consistently made that levels and quality of services will be unchanged, or that legal services will continue to be delivered (albeit often by more junior professionals) at “acceptable” standards; but no evidence is provided to underpin these assumptions;
 - (iii) Although it is recognised that the introduction of competitive tendering in criminal legal aid and, in particular, the removal of client choice, “may reduce the extent to which firms offer services above acceptable levels” there is no attempt to quantify the extent to which these services may be negatively affected;
 - (iv) The impact assessments do not address the potential loss of specialist legal services, or the implications of this for future legal aid recipients. By way of two examples:
78. Prison law work under the criminal law contract will only be undertaken by providers who are large and generalist enough to provide the general range of criminal services to clients across the entirety of a “procurement region”. Specialist prison law firms, which currently provide the highest levels of service by virtue of their years of accumulated expertise in this area, are unlikely to be able to secure such criminal contracts which will jeopardise the ability of prisoners to access such expertise.

Clients will lose the right to choose to instruct firms which currently specialise in particular areas of criminal work, such as terrorism or domestic violence cases. Defendants will be disadvantaged by the inability to access such specialist advice and representation. A similar point may be made for firms which have specialist expertise with clients from particular BAME groups, for example, or with clients having disabilities;

- (v) There is an absence of recognition of the fact that most judicial review cases are settled prior to the grant of permission (even prior to issue) with the effect that the removal of payment from the permission stage unless permission is granted is likely to impact on strong as well as (in fact, even more than) weaker cases;
- (vi) Generally the estimated savings, other than from the introduction of competitive tendering, are of modest or negligible amounts. For example, the removal of prison law from the scope of criminal legal aid and the judicial review change are each estimated to save less than £1m per year. These estimates are unreliable as they are premised on assumptions that no costs will rise as a result of alternative methods of dispute resolution being used, or by the courts and the lawyers defending such claims having to deal with unrepresented litigants whose cases are poorly pleaded and time-consuming to litigate. They also ignore the likely increase in satellite litigation on costs and in renewal applications in judicial review cases. It would take very little of such potential knock-on consequences to materialise for the savings to be more than outweighed by those additional costs;
- (vii) The economic and credibility impact assessments also assume that substantive outcomes for individuals will not be affected by the changes to legal aid. It is asserted that prisoners and those currently benefitting from civil legal aid in borderline cases will achieve the same outcome from internal prison complaints and “non legally aided means of resolution” respectively as they currently do from publicly funded legal action. No evidence is provided to justify this far from self-evident proposition;

Equalities impact assessment

General

- 79. A number of general points can be made about Annex K. The first concerns some obvious gaps as regards the protected characteristics engaged with. Annex K states at 3.2 that the statistics relied upon do not cover all “protected characteristics” so its “statistical analysis therefore only considers the available data on age, sex, race and disability”. There follow a number of caveats about the data relied upon, in particular the fact that LAA data on clients is recorded by providers rather than clients “and is therefore unlikely to be as accurate as self defined data, particularly in respect of disability/ illness and race” and that some of the data on providers rests on a survey with a 69% response rate.
- 80. We believe that the conclusions drawn in Annex K about the justification of disparately impacting proposals are flawed for the following reasons:
 - (1) the assertions about the nature and extent of such disparate impact (or the lack thereof) rest on the questionable conclusions mentioned above that the level and

quality of legal services will not be affected by these changes or that, at any rate, that quality will remain “acceptable”;

(2) the policy aim of the proposal to improve public confidence is not supported by evidence, and therefore it is difficult to justify any disproportionate impact as a legitimate means of achieving a policy aim;

(3) the evidence that costs will be saved by many of the proposals is unconvincing because of the marginal figures involved, the uncertainties recognised by the impact assessments and the highly questionable assumptions on which the calculations of savings rest.

81. In paragraph 4.6 it is asserted that notwithstanding the lack of information relating to protected characteristics of gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief and sexual orientation, “were any disadvantage to materialise, we believe it would be a proportionate means of achieving a legitimate aim and therefore justified for the reasons set out above.” It is also asserted that it is “unlikely that the changes will have any impact on the sustainability of the legal aid market resulting in adverse service provision” and that “potential impacts on clients are likely to depend upon the provider response and as such remain unquantifiable”.
82. These general conclusions do not appear to rest on any proper analysis of the impact of the individual proposals discussed in subsequent paragraphs of Annex K. Rather, they seem to drive that analysis. There are also the bare assertions at paragraph 4.4 that “we do not consider that the proposals give rise to direct discrimination, discrimination arising from a disability or a failure to comply with a duty to make reasonable adjustments” and at paragraph 4.5 that “we have considered the implications of the proposals for the advancement of equality of opportunity and the need to foster good relations. Our view is that where relevant, the proposals do not undermine attainment of those objectives and are justified in all the circumstances for the reasons set out”. The conclusions stated appear to us to amount to little more than bare assertion, rather than being the result of evidence and analysis.
83. In relation to the specific Equality Impacts we make the following comments:
84. Given, in particular, the lack of any focus in Annex K on the practical impacts of the proposals on those affected by them – particularly on legal aid clients – there is a general failure to engage in the kind of “hard look” at policies which compliance with the PSED requires.
85. The impact of some proposals on lawyers will have necessary implications for clients. For example, if the best providers of prison law services are driven out of business by these proposals, this will inevitably have an impact on prisoners both in the short and in the longer term. There is real concern that the judicial review proposals will have a serious impact on some of the most effective and successful public law firms, given the already limited funding of public law cases, the difficulty of determining which cases will get permission and at what stage, and the fact that funding will be removed from cases where public authorities concede before permission. It will therefore have an impact on the availability of their services to clients who need them.

Prison law

86. In paragraphs 5.1.2 & 5.1.3 of Annex K, there is little engagement with the effect that the unavailability of such legal aid will have on those prisoners affected by it. Lack of access to advice might change the outcome for a woman being denied access to a mother and baby unit. It might delay the release of a prisoner whose recategorisation is contested. The ability of clients with learning disabilities and/or illiteracy issues to engage with the internal complaints system will be severely curtailed.
87. The assertion that prisoners will achieve the same outcome regardless of the withdrawal of prison law is in our view untenable.

Residence test

88. At paragraphs 5.3.1 - 5.3.3 the Equalities Impact accepts that the proposal will have an adverse impact on those to do not satisfy the residence test, but asserts that it is “a proportionate means of achieving the legitimate aims set out in section 4”.
89. There is no attempt to engage with the nature of the impact of the proposal on those affected by it. It is assumed by the Civil Credibility impact assessment that they will achieve the same results that would have been achieved by legal aid, by other means. This group will contain a high proportion of the most vulnerable people who will be excluded from access to legal aid and will have no alternative remedy.
90. There is no discussion in Annex K or elsewhere of the vulnerability of many of those who would be affected by the proposals. The assertion that people in this category could access exceptional funding is wrong in law, as section 10 of LASPO only allows the Director of the LAA to grant exceptional funding for excluded services to eligible persons. It does not contain a power to grant exceptional funding to clients who are excluded from eligibility, such as by a residence test.
91. There is no consideration of the cost to the exchequer of the potential increase in unrepresented litigants without access to legal advice whose cases can impose serious burdens on the court system and increase by large measure the time taken by courts (and defendant lawyers) to deal with them.

The judicial review proposal

92. Paragraph 5.4.1 of Annex K states that the impact on clients is likely to depend on the provider response, and the “equality impacts remain unquantifiable”. It also states that this proposal may have a disproportionate affect on male clients aged 18-24 and BAME providers. Paragraph 5.4.3 asserts that any disadvantage to people with protected characteristics resulting from the proposal is “a proportionate means of achieving the legitimate aims set out in section 4”. For the reasons discussed above, we do not believe that the analysis here satisfactorily makes out that case.

Criminal legal aid

93. With regard to the proposal that clients will no longer have access to their solicitor of choice, there is a recognition that this could have a disproportionate effect on BAME and male clients. However this is justified as being proportionate to achieving the aims of the consultation. Moreover it is also argued that impacts on clients with disabilities will be minimal because providers will be required to have a diversity policy which will include what reasonable adjustments they will make for such clients.

94. This is manifestly inadequate. It takes no account of the impact of the proposed changes on the ability of clients to access appropriate (including, where necessary, specialist) representation, such as when a deaf client wishes to instruct a deaf lawyer, to ensure that the lawyer not only can communicate, but also has an understanding of the cultural and social issues facing the client. Similarly, clients from minority ethnic, cultural or religious backgrounds may well wish to choose to instruct a lawyer who shares those characteristics, but these proposals deny them the right to do so.
95. On the single rate for early and late guilty pleas and contested trials, Annex K asserts that the Government “does not anticipate any indirect impact on clients” (5.7.3). The new system sets up a conflict between the client and the solicitor, under which it is strongly in the solicitor’s financial interests to persuade the client to plead guilty. While the overwhelming majority of solicitors will comply with their professional duty to put the client’s interests ahead of their own, it would be naïve to assume that no lawyer will ever put undue pressure on clients to plead guilty. That is why it is considered wrong in principle to set up such ethical conflicts in the first place.

Welsh Language

96. We note the concerns of the Welsh Language Commission that the consultation does not make it clear that the proposals must adhere to the principles of the Welsh Language Act 1993 regarding the provision of services. We seek confirmation from the Government that the proposals are compliant with the Act.

Conclusion

97. We believe that the analysis conducted by the Ministry of the potential impacts, including the equality impacts, is superficial, is lacking in evidence, and fails to identify a number of obvious impacts as discussed above.
98. We would question whether the analysis is sufficient to satisfy an objective observer that the decision maker has done that which is required by s149 Equality Act 2010: to pay due regard to the statutory equality needs on the basis of “sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact.”