Civil Justice Council response to Ministry of Justice consultation paper Transforming Legal Aid

June 2013

Introductory remarks

Although the lion's share of this consultation paper concerns criminal justice, and then family justice, the Council wishes to provide a response in relation to the small but important aspects of the paper that apply to civil justice.

We have set out our thoughts on the civil elements below, although there will be some read-across with family justice issues.

It is of course understood that there is an overwhelming financial imperative on the Government to reduce public spending, and that the Spending Review later this month is due to see a further reduction in the Ministry of Justice's budget for 2015/16.

Nonetheless, the Council is concerned that some of the proposals in this consultation paper would, if implemented, erode important features of the civil justice system, and have an adverse impact on the quality of justice for those members of the public who have no alternative but to count on publicly funded assistance.

The proposal that 12 months lawful residence is a pre-requisite for publicly funded assistance raises particular concerns that go to the fundamentals of the justice system and the principle of accessibility of the courts to all. It diminishes the credibility of the UK's encouragement of the Rule of Law elsewhere in the world, just at a time when that is of considerable national and international importance. This is an area where enormous care and reflection is needed before a decision is taken.

Introducing a residence test

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

We are very concerned about the access to justice issues that arise from this proposal, and see force in the Bar Council's concern over how this measure may undermine 'the fundamental principle of equality before the law'.

The proposal that someone must have lived lawfully in the UK for 12 months before being eligible This raises the prospect of people being unable to bring or defend claims that are crucial to their lives, for example concerning domestic violence, housing.

A 12 month residence requirement would exclude far more people than described in the "case for reform" at paragraph 3.42 ("people who have never set foot in England or Wales, or those who have never paid taxes in the UK, … or are simply here on a visa as visitors, or because they have temporary admission"). The payment of taxes is not a requirement for access to justice for some of the most vulnerable who have long been resident in the UK, and should not be a requirement for others.

It is important to keep in mind that the proposal would deny legal aid to those who are involved in proceedings as defendants and thus without choice. As regards claimants, the asylum seekers exception rightly recognises that those who do not satisfy a 12 month residence requirement may be in particular need of access to the law and the courts. This position is not confined to asylum seekers.

The system already (a) limits the type of cases for which legal aid is available, (b) defines the cases over which the UK courts have jurisdiction, and (c) confines the availability of legal aid to those with very little means. These work in combination in a way that is more effective to safeguard against inappropriate use of public funds than a 12 month residence test.

The consultation paper offers no actual example of a particular case where legal aid has been provided but should not have been (the identification of an actual example would enable a more targeted measure to prevent recurrence of the situation in the actual example).

The consultation paper says (paragraph 3.53) that legal aid "would continue to be available where necessary to comply with obligations under EU or international law" but does not define these situations. It is essential to do so at this stage (a) in order that there is clarity, (b) in order to test whether the proposed 12 month residence requirement would in fact already offend those obligations, and (c) in order to avoid future satellite litigation over whether those obligations are being complied with when legal aid is refused to someone who does not satisfy the proposed 12 month residence requirement.

Placing the onus of proving residence on the legal aid provider, as is proposed, is

likely to be burdensome and problematic, and immediately creates a risk of conflict between lawyer and prospective client. It is uncertain how the lawyer will carry out the assessment.

The proposal for cases to still be eligible for funding in exceptional circumstances , does not – in our view – offer a sufficient or suitable safety net. It lacks definition, which will lead to uncertainty and delay, and to satellite challenges.

As we say in the Introductory Remarks, the proposal leading to Question 4 overall has the further effect of diminishing the credibility of the UK's encouragement of the Rule of Law elsewhere in the world, just at a time when that is of considerable national and international importance.

This is an area where enormous care and reflection is needed before a decision is taken.

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

There is an argument that this proposal will have a deterrent effect on cases with little or no merit being brought. However the proposal would deny payment in a case with real merit but that just failed to get permission. It is also important to keep in mind that cases "totally without merit" are already adequately controlled by the Court's ability to designate them as such. This existing procedure deals at an early point with cases that are "unarguable" (the target of the "case for reform" as expressed at paragraph 3.61 of the consultation paper). If more is thought to be required, the proposal should be limited to depriving the provider of payment if the case in certified "totally without merit" by the Court, rather than introduce a proposal of the width contemplated by the consultation paper.

If the proposal is implemented it is essential that (as proposed by the consultation paper) there is never a dilution of the availability of legal aid for investigating the strength of a case and for 'reasonable' disbursements such as court and expert fees.

The proposal carries the danger that it will act as a barrier to access to justice as lawyers and other advice providers will err on the side of caution where the appeal is ambitious but not one with little or no merit – perhaps only bringing cases with a predicted 70/30 or more prospect of success, when the proposal intends to remove funding only where the case fails at 51/49 or less.

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? Please give reasons.

It is understood that this proposal affects a relatively small number of cases, and ones weighted in the paper's own terms to 'high priority' areas of law and public interest cases. In these circumstances we do not agree. Borderline cases are ones that have prospects of success but it is not possible to apply a percentage. They are not assessed as having poor prospects (cf. the example given at paragraph 3.87). In any event the use of the word "borderline" assumes greater accuracy in predicting success than is possible in practice; and "borderline" cases can prove to be the most important ones in which the law is developed. As the consultation paper recognises they include cases of "disputed law"

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. Please give reasons.

This proposal carries the risk that it will drive yet more talented lawyers from the legal aid sector into more commercial work, creating imbalance in the justice system more widely. Although exceptions would be made for more complex work, it is not clear how this will be defined and applied.

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%? Please give reasons.

The main concerns here relate to the impact this will have on the number and quality of experts who will be willing to continue providing expert evidence which the courts need to help determine cases. These concerns are against a background of a 10% reduction effected in such fees in 2011, and further caps taking effect in April 2013.

The proposal does not take account of the fact that the courts have, and are exercising, more and more control over the number and use of experts. A reduction by a fifth of current rates risks reducing the quality of experts at a time when the family modernisation and Jackson reforms need experts to be of higher quality so that they can offer the best and most focussed assistance where they are used, thus allowing the number of experts and length of expert witness evidence testimony to be reduced.

The concerns are likely to be acute in areas where there are already concerns about the numbers and quality of experts, and it may be that in some fields the rates are too low to make leaving daily practice for uncertain periods of time too uneconomic to continue. This means 'professional' expert witnesses (who do enough cases to make them viable, but as a result spend less time in active practice in their field of

expertise) will become more frequent and the interest and therefore availability of people in active practice on a daily basis to serve as expert witnesses will be diminished over time.

A member of the CJC with particular experience in litigation concerning traumatically and catastrophically injured babies observes as follows:.

- Significant difficulties already exist as a result of the Community Legal Service (Funding) ('A' Amendment No.2) Order 2011 (SI 2011/2066) (The 'A' Amendment Order) to the Community Legal Service (Funding) Order 2007 (otherwise Table 14) rates which restricted the hourly rates applicable for all experts in all Clinical Negligence cases. Specialist clinical negligence lawyers have faced considerable difficulty in identifying appropriately experienced experts in the field of neurologically injured infants to provide opinions at the rates stated in Table 14. The proposal will increase these difficulties.

- Experts instructed in these areas are a relatively small number but are recognised leaders in their fields. The number of new entrants of calibre is very restricted and with the reductions proposed it will not be easy to increase and sustain numbers. The importance of the skill of the experts should not be underestimated or de-valued.

- The consultation proposal does not work from any data held in relation to suitable experts' rates in the relevant disciplines. The National Health Service Litigation Authority, the Medical Defence Union, the Medical Protection Society and other smaller defence organisations do not impose similar limits on the fees charged by experts. There is therefore a risk that experts will feel able only to accept defendant orientated instructions.

Equalities Impact

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?

The impact assessment in the paper is (by its own admission) narrowly drawn and not based on completely reliable data e.g. based on data held by providers.

As a general point, it seems clear that measures that will reduce funding for legal aid will have a disproportionately adverse effect on groups with protected characteristics as defined in the Equality Act 2010, as several Government and research body publications illustrate that many of these groups are over-represented among low income groups.

The paper itself at Annex K acknowledges that "We have identified the potential for disproportionate impacts on some persons with protected characteristics", but says that such considerations are effectively outweighed by the policy aims and the need

to drive costs down.

It is further important to note that these measures are likely to have a disproportionate effect on practitioners from protected characteristic groups, at a time when HMG seeks to advance diversity within the professions and social mobility at entry to the professions.