



**Young Legal Aid Lawyers briefing for House of Lords debate
Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015
7 September 2015**

1. On 7 September 2015 Lord Beecham is to move a motion that the House of Lords regrets that the Government is continuing with the Criminal Legal Aid (Remuneration etc.) Regulations 2015 (SI 2015/1416) without having undertaken a review of the impact and coherence of the cuts to litigators' fees. The motion will agree with the Secondary Legislation Scrutiny Committee's analysis that there is insufficient evidence to establish the effect of any fee reduction. Further, the motion will regret the government's lack of engagement with the profession and those affected by their reforms.
2. By this briefing in particular we seek to highlight the damaging impact these cuts are already having on the junior end of the profession – both solicitors and barristers – and the on-going impact on social mobility (see paragraphs 25 – 29).

About Young Legal Aid Lawyers

3. Young Legal Aid Lawyers (YLAL) formed in 2005. We are a group of lawyers committed to practising in areas of law traditionally funded by legal aid. We have around 2,000 members nationwide including students, paralegals, trainee solicitors and barristers, and qualified junior lawyers. Our members share a belief in the importance of legal aid in upholding the rule of law and of being able to hold the state to account through proper judicial process.

Background to Criminal Legal Aid changes

4. The previous government published a green paper on 15 November 2010 entitled '*Proposals for the Reform of Legal Aid in England and Wales*'.¹ This green paper set out the Ministry of Justice's aim of saving £350 million in the annual legal aid

¹<http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf>

budget by the year 2014-15. This figure includes both civil and criminal legal aid expenditure.

5. On the 9 April 2013, the Ministry of Justice published a consultation paper entitled '*Transforming Legal Aid: Delivering a credible and more efficient system*'.² This paper proposed a 17.5% cut in the solicitors' fees of those working on criminal legal aid cases (alongside reductions in certain barristers' fees).
6. Following the responses to this consultation, the Ministry of Justice published a response entitled '*Transforming Legal Aid: Next Steps*'.³ This set out how the proposed 17.5% cut in fees was now to be implemented in two stages with two 8.75% cuts. In addition, this set out the proposed new model for the way that firms were to tender for criminal legal aid work – “dual contracting”. These new contracts reduce the number of “duty contracts” – where a solicitor is on duty at court or at the police station to represent anybody who does not yet have a lawyer. Whilst there are over 1000 such contracts currently awarded, the proposals reduce these to 527 contracts.
7. The first 8.75% cut came into force for cases commencing on or after 20 March 2014 by way of the Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2014.
8. After the general election in May 2015, the Ministry of Justice sought information on the impact of the first cut from solicitors' firms, via email. However, less than 48 hours after this, on 10 June 2015 the government announced that it would be pressing ahead with both the second 8.75% cut and dual contracting⁴.
9. The second 8.75% cut came into force for cases commencing on or after 1 July 2015 by way of the Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015. Other changes coming in with these regulations included fixed fees for Crown Court litigation with 500 pages or fewer of prosecution evidence, for police station work and magistrates' case work.

Action taken by the profession

10. There has been a significant degree of legal challenge to the proposed changes by way of judicial review, particularly against the dual contracting proposals. The initial consultation process was found to be unlawful in 2014, but the Court of

² https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf

³ https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/transforminglegalaidnextsteps.pdf

⁴ <http://www.parliament.uk/documents/commons-vote-office/June%202015/10%20June/2.Justice-Legal%20Aid.pdf>

Appeal ruled against attempts to challenge the more recent consultation process in February 2015⁵.

11. After the second 8.75% fee cut was confirmed following the general election, firms announced that they would begin direct action. The first direct action was announced in Merseyside with a joint statement from solicitors and barristers on 24 June 2015. The statement confirmed that no solicitors would agree to carry out work at the new rates and that the Bar would have a ‘no returns’ policy for all existing Crown Court cases from 1 July 2015.⁶ Such direct action was also voted for in areas across the country including in Cardiff, London, Manchester and Kent amongst others.
12. On 15 July 2015, the Criminal Bar Association (CBA) voted to support the solicitors by agreeing to take no new legal aid work and to operate a national ‘no returns’ policy.⁷
13. The combined direct action of solicitors and barristers was suspended on 21 August 2015 as a “goodwill gesture”⁸.

The Secondary Legislation Scrutiny Committee Report

14. The Secondary Legislation Scrutiny Committee issued a report (the Third Report) on 11 June 2015 about the 2015 Regulations.⁹ The report made scathing criticisms of the Ministry of Justice’s evidential basis for making the further 8.75% cut. As it sets out as an initial observation;

“We acknowledge that these cuts are being made alongside a number of other changes. However, so little detail is given about the effects of the stage one cuts and the anticipated impact of this second stage of cuts that this Committee cannot form a view as to whether these Regulations will operate as intended.”

15. In particular, the Committee highlight how the Impact Assessment which accompanied the Regulations “offers nothing about quantification of the impact on legal aid providers”. The Law Society President Andrew Caplen has previously shared evidence with the Ministry of Justice informing them that over 120 firms

⁵ <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/law-society-v-lord-chancellor-judgment.pdf>

⁶ <http://clsa.co.uk/index.php?q=483>

⁷ <https://www.criminalbar.com/latest-updates/news/q/date/2015/07/15/cba-release-15-07-15/>

⁸ <https://www.lccsa.org.uk/lawyers-suspend-legal-aid-action/>

⁹ <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/10/1003.htm>

are suffering as a result of the first round of legal aid cuts.¹⁰ Given many of these firms are already on the edge of financial viability after the first 8.75% cut, it seems extraordinary that the Ministry of Justice would not address the impact on such firms of a further 8.75% cut.

16. The Committee recommend pressing the Minister for further information on;

“the effects of the cuts so far, the anticipated impact of the second decrease in fees and the effect of the introduction of the fixed fee system on the firms that provide Criminal Legal Aid and whether this may lead to any localised gaps in the provision of services to clients.”

17. There was then further correspondence between the Chairman of the Secondary Legislation Scrutiny Committee, Rt Hon Lord Trefgarne, and the Parliamentary Under Secretary of State, Minister for the Courts and Legal Aid, Shailesh Vara MP. This was published in the Fifth Report.¹¹ In this correspondence, the Minister stated there had been “no significant impact on the quality, promptness and reliability of the service as a result of the first fee reduction”.

18. In response to this, the Sixth Report from the Committee states how, when asked to provide evidence in support of the claim that the quality of legal services has not been affected, the Ministry of Justice admits there are no published figures in support of this claim. The report concludes;

“We regard the Ministry’s inability to provide evidence to support its policy assertions as very poor practice.”¹²

YLAL’s concerns

19. We share the concerns of the profession at large, as expressed through the recent direct action, that this latest cut, coming so soon after another very recent cut in fees, will be unsustainable for many solicitors’ firms. It was made clear in the Otterburn report prepared in February 2014 that criminal solicitors’ firms were operating at, on average, a net profit margin of 5% prior to the 8.75% cut in 2014¹³. We note that the recent strike was called because solicitors’ representatives felt that firms simply could not work at the new rate.

¹⁰ <http://www.lawsociety.org.uk/news/press-releases/law-society-response-to-moj-announcement-on-criminal-legal-aid-cuts/>

¹¹ <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/19/1905.htm>

¹² <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/21/2103.htm#note5>

¹³ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf>

20. YLAL is particularly concerned that the voices of the profession have not been taken into consideration in pressing ahead with this additional cut. In particular there has been no assessment of the impact of the first 8.75% cut before moving onto the second cut. We do not feel that 48 hours provides sufficient time for a meaningful consultation.
21. This absence of consultation is especially concerning where the changes are being brought in by way of secondary legislation, and have therefore not undergone the full scrutiny afforded to primary legislation.

Access to justice

22. YLAL is aware that firms were already struggling to provide a good service to legal aid clients on pre-July rates. Very low profit margins mean that firms must focus on quantity of cases, rather than quality of work undertaken.
23. YLAL is concerned that these new cuts will inevitably increase the risk of miscarriages of justice being suffered. Those accused of a crime are in a very vulnerable position and our criminal justice system relies heavily on criminal defence lawyers having sufficient time and resources to prepare cases thoroughly for their clients.
24. In addition, a number of firms have made clear that a combination of this further cut with the new “dual contract” tenders, where a majority of firms will lose the right to do duty work at court, will lead to large numbers of firms being forced to close. This will have a direct impact on access to justice in more rural areas. In addition, those firms that remain will be obliged to continue the trend of lawyers taking on an overly heavy caseload, and standards will inevitably slip.

Junior end of the profession

25. As an organisation representing lawyers at the start of their careers, YLAL is particularly concerned at the way these further cuts will impact on the junior end of the profession – both for solicitors and the bar.
26. In relation to solicitors, YLAL has warned of the impact on junior lawyers in its response to the *Transforming Legal Aid: Crime Duty Contracts* consultation. In that, YLAL stated:

“Both statistical and anecdotal data, including those contained within the report, have in our view demonstrated that firms are finding the decreasing volumes of work, along with the cut in fees, difficult to absorb. This has already led to reduced opportunities for younger members of the profession as they find it increasingly difficult to obtain training contracts and other work opportunities within this field of law. In addition, those who are able to secure these opportunities are being given increasingly high levels of responsibility at a very junior level, coupled with increasingly low levels of supervision, with lower-paid junior employees required to take on unsupervised fee-earning

work as firms struggle to maintain profitability.”¹⁴

27. In addition, the low rates of pay which are pervasive for junior solicitors will only become worse as fees are further cut. The barrier that this presents to social mobility should not be underestimated. Most junior lawyers have studied for many years, and have student debt in the tens of thousands of pounds. For many it is not viable to start a career in legal aid because of the low remuneration.
28. These cuts do not just affect junior solicitors, but also the junior bar. YLAL surveyed members prior to responding to the *Transforming Legal Aid: Crime Duty Contracts* consultation. One of our members’ responses was as follows:

“At the junior criminal bar, repeated legal aid cuts means that it is a struggle to get by day to day. We may be paid as little as £50 for a hearing, which is before tax, chambers fees, and travel. The only way to make ends meet is to ensure you are very busy and doing several hearings in a day. This is only possible because of instructions from small solicitors’ firms, who do not have the capacity to do all their small hearings themselves. Fewer contracts means fewer, larger, firms. They will inevitably continue the trend of doing small hearings in-house, leaving little to no work for very junior barristers. In practice, without this work, none of us will be able to continue.”
29. The comments above apply not just to fewer contracts but also to fee cuts, as those larger firms that do survive will do so by keeping work in-house. A contraction of the junior bar is not just a problem for the junior members who can no longer continue in this work, but for the future of the bar in general.

Conclusion

30. We have strong concerns about the impact of these Regulations both on access to justice and on junior lawyers, and we are concerned at the way they have been brought in. We endorse the concerns expressed in the regret motion in full.

Young Legal Aid Lawyers

September 2015

www.younglegalaidlawyers.org

ylainfo@gmail.com

@YLALawyers

¹⁴<http://www.younglegalaidlawyers.org/sites/default/files/TLA%20crime%20duty%20contracts%20YLAL%20response.pdf>