YOUNG LEGAL AID LAWYERS

Response to the Ministry of Justice Consultation on the Litigators' Graduated Fee Scheme and Court Appointees

24 March 2017

About Young Legal Aid Lawyers

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 2,800 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

2. YLAL's objectives are:

    a. To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
    b. To increase social mobility and diversity within the legal aid sector.
    c. To promote the interests of new entrants and junior lawyers and provide a network for likeminded people beginning their careers in the legal aid sector.

3. This is YLAL's response to the Ministry of Justice (MoJ) Consultation on the Litigators' Graduated Fee Scheme (LGFS) and Court Appointees. The LGFS is the scheme through which criminal defence solicitors are paid for publicly funded work carried out in the Crown Court.

Introduction

4. In a speech on 22 June 2015, the previous Lord Chancellor, the Rt. Hon Michael Gove MP, stated as follows:

> *"While those with money can secure the finest legal provision in the world, the reality in our courts for many of our citizens is that the justice system is failing them. Badly. There are two nations in our justice system at present.*
>
> *On the one hand, the wealthy, international class who can choose to settle cases in London with the gold standard of British justice.*
>
> *And then everyone else, who has to put up with a creaking, outdated system to see justice done in their own lives."*

5. Members of YLAL are those on a daily basis who seek to advance the rights of ordinary people in this *"creaking, outdated system"*. It is our clear view that the proposals set out in the consultation will, if implemented, worsen the division between the quality of the justice available to the rich and that available to ordinary people.

6. The foreword to the consultation states as follows:

> *"Subject to the outcome of this consultation the Lord Chancellor is minded to not reinstate the second fee cut, which was suspended for 12 months last April, while targeted and modernising fee reforms are taken forward. We will seek to confirm this once the Government has considered the responses to this consultation."*

The consultation therefore threatens the reintroduction of the suspended second 8.75% cut across the board to criminal legal aid fees, subject to the outcome of this consultation. The clear implication is that if criminal lawyers do not accept the MoJ's proposals for reform of the LGFS and Court Appointees scheme as set out in the consultation, the suspended cut may be reintroduced.

7. In a written Ministerial Statement on 28 January 2016 by the then Lord Chancellor it was acknowledged:

> *"In the last Parliament spending on legal aid was reduced from £2.4 billion to £1.6 billion.*
>
> *As a consequence of these decisions* [not to go ahead with the dual contracting] *the new fee structure linked to the new contracts will not be introduced."*

8. That new fee structure has nonetheless been revived in the shape of the proposed 8.75% cut, whilst the structural reforms which were purported to make that cut sustainable without adverse effects to the quality of advice and representation have been abandoned. Given our members' and their employers' outgoings have only increased with inflation since January 2016, it is clear that the reintroduction of a further 8.75% cut would lead to mass closures of criminal legal aid firms, with considerable adverse effects on the criminal justice system.

9. For the MoJ to premise a consultation on the basis that criminal lawyers have, in effect, no option but to accept the proposals, as otherwise they will be subjected to a fee cut which will cause many firms to close, is not an appropriate way in which to consult. It is a matter of deep concern to us that the MoJ considers it acceptable to engage with the profession in this manner.

10. We note the joint position statement in response to this consultation by the Law Society, Legal Aid Practitioners Group, Criminal Law Solicitors Association and London Criminal Courts Solicitors Association[1]. This states that those organisations oppose any further cuts to legal aid as proposed by the MoJ and that the "*published data cannot be considered in isolation and does not justify cuts in any form. These proposals ultimately pose a threat to access to justice, a fundamental right at the heart of the justice system*." The position statement concludes that "*a line must be drawn as the profession cannot absorb any more cuts*." We agree.

Part 1 – Litigators' Graduated Fees Scheme

Q1. Do you agree with the proposed reduction of the threshold of PPE to 6,000?

No

11. The Introduction states that the current system does not *"reflect fair payment for work reasonably done"*. It is axiomatic in any system of payment by fixed fee that the fee for each case does not reflect the work done on that case. The current Scheme is based on the proxies of offence type, trial length, the number of prosecution witnesses and Pages of Prosecution Evidence served, with an uplift for representing a co-defendant. It is in itself an inexact method of identifying payment for a particular case.

[1] https://www.clsa.co.uk/assets/files/general/17.02.23_Joint-Position-Statement--1-PDF.pdf (accessed 24 March 2017)

12. The consultation provides no suggestions for the *"fair payment"* of *"work done"* by litigators where the proxies of offence type, trial length, number of prosecution witnesses and PPE combine to ensure that much of the work done by litigators is not paid for on a routine basis. The proposal to reduce the PPE limit from 10,000 to 6,000 seeks to create a further proxy whereby the litigator does not receive *"fair payment"* for *"work done"* by removing payment for those 4,000 pages and importing it into the 'Special Preparation' regime.

13. It is submitted that if the prosecution serve 10,000 pages of evidence, for the defence to critically consider that evidence, schedule it into a usable format, cross reference it with other evidence served, take a client's instructions and any witnesses' comments on that evidence does not amount to 'Special Preparation'. It is instead the very ordinary business of adequately preparing a defendant's defence.

14. It seems difficult to justify a system whereby work done is already measured not in terms of a litigator's time but on pages served, then to arbitrarily limit payment to 6,000 pages.

15. The language of expanding the concept of 'Special Preparation' to include the reading of evidence over 6,000 pages itself implies a lowering of standards. The Impact Assessment itself assumes that between 20–80% of bills over 6,000 pages would claim special preparation, suggesting anywhere between 20-80% of cases where special preparation would not be claimed.

16. Firstly, it is clear from these figures that the MoJ is simply guessing at the amount of work undertaken by solicitors on the 4,000 pages currently included within the PPE limit, hence the wide scope between 20-80%.

17. Secondly, the MoJ anticipates litigators not claiming preparation for the work, thereby presumably either expecting them either not to be paid for the work or not to carry it out.

18. From the consultation Impact Assessment it appears the issue is identified as follows:

> *"Intervention is necessary to better scrutinise work reasonably and actually undertaken.*
>
> *The objective is to return LGFS expenditure to 2013-14 levels in the short term, while ensuring that we pay fairly for work actually and reasonably done".*

19. The policy objective is based on a premise that the LAA is paying for work which was either done unreasonably, or not done at all. There is nothing in the Consultation to support either of these contentions. The decision in *R -v- Napper* merely stated the principle that where evidence is served electronically, it nonetheless ought to be considered as evidence and, in a payment system based on PPE, designed by the MoJ, the litigator ought therefore be paid.

20. Overall therefore, this proposal, whilst couched in the terms of being a technical restructuring in order to ensure fair payment for work done is, in reality, a straightforward cut by another name. The government will be well acquainted with the fact that criminal legal aid firms are largely struggling to survive, and any further cut will not only diminish the quality of preparation on the individual cases it affects, but also has the potential to lead to closures of firms, impacting more widely on access to justice.

21. By contrast, *"those with money"* identified by the then Lord Chancellor on 22 June 2015 would of course be able to pay their litigators to read the 4,000 pages, and their litigators would be able to carry out that work without the fear of a Determining Officer later stating that the time taken to consider that evidence was excessive.

Q2. If not, do you propose a different threshold or other method of addressing the issue?

22. Further to our answer to question 1 above, YLAL rejects the premise that criminal litigators are being paid for work they have not in fact undertaken. The reality is that rates of pay are derisory across the board, and in many cases litigators will not be paid for work that was necessary for their client's defence. The issue identified by the consultation is therefore not one which needs to be, or should be, addressed.

23. In addition, the consultation does not take into account the following factors which may have affected LGFS expenditure:

    (a) The incorporation into the LGFS of cases previously dealt with under the Very High Cost Case regime, which will by their nature be expensive cases;

    (b) Changes in CPS charging practice and the vastly increased numbers of sexual offences, particularly historic offences, before the Crown Courts which can be characterised as being more likely to go to trial, more likely to contain significant amounts of historic material and therefore more likely to be expensive to fund; and

    (c) The consultation does not consider the impact of long-term trends which are resulting in a fall in the expense of the criminal justice system as a whole, as diverse as lowering crime rates to the impact of Better Case Management and the Digital Case System.

24. YLAL supports the longer term objective of creating a scheme that will reflect better the relative complexity of cases and to ensure fair payment for work done. It is submitted that rather than having separate consultations for the AGFS scheme and the LGFS scheme, and the promise of a further *longer term* consultation on the LGFS scheme, the issue of public funding and cost drivers in the criminal justice system should be considered as a whole.

Part 2 – Cut to s.38 YJCEA 1999 appointments

Q3. Do you agree with the proposed capping of court appointees' costs at legal aid rates?

No

25. The consultation states as follows:

> *"despite the fact that this can be a sensitive task, the work of court appointees under section 38 or section 4A is in reality no different to that undertaken by lawyers acting for a defendant under legal aid."*

26. This is incorrect for the following reasons:

    (a) Where a defendant has reached a criminal trial hearing without availing himself of legal representation, it is more likely that that defendant will be more challenging, difficult and unreasonable than the typical defendant. The work as an s.38 appointee is therefore an unrepresentative sample of legal aid work as a whole.

    (b) As the defendant is unrepresented, there is a greater than average chance the case will not be trial ready, whether owing to failures of the defence or failures of the CPS that have gone unnoticed.

    (c) The work can be distinguished from the work of a criminal defence lawyer as you are appointed to act on behalf of the court, not an individual. The legislation at s38(5) YJCEA 1999 makes it clear *"A person so appointed shall not be responsible to the accused"*. The retainer is with HMCTS, a public body, not with a private citizen. Why should lawyers acting on behalf of HMCTS in these proceedings be paid less than lawyers acting on behalf of HMCTS in other proceedings? We do not consider that the MoJ has provided a satisfactory answer to this question.

27. The work in itself is not attractive, even in the context of criminal legal aid. The rates of payment, which for a junior solicitor in London are between £196 per hour and £165 per hour, are the only significant attraction for lawyers to carry out this work.

28. Cross examining in the Magistrates' Court can take as little as 15 or 20 minutes. Were legal aid rates to be offered, based on time spent, the fee for conducting that cross examination could be as little as £20.

29. In such circumstances, it will be difficult for the courts to locate solicitors willing to undertake this work, leaving the defendant unable to have a fair trial and the prosecution therefore unable to proceed against him as a result. We therefore object to this proposal both in principle and for practical reasons.

Equalities Statement

Q4. Do you have any comments on the Equalities Statement published alongside this consultation and/or any further sources of data about protected characteristics we should consider?

Impact on YLAL members

30. We note that the Impact Assessment considers only the impact of these proposals on providers, not on their employees. The Equalities Assessment states:

> *"since the reforms are targeted at businesses and it is not known precisely how those businesses will adapt in response to the reform, it is hard to draw meaningful conclusions about the likely impact"*

This ignores the reality that these proposals will require savings on the part of those businesses, which will necessarily lead to salary reduction and stagnation at the junior end for those employed by law firms, and an increase in the amount of advocacy kept in house by solicitors, which will directly and significantly affect junior barristers' livelihoods.

31. In terms of the impact on YLAL members, i.e. the junior end of the profession, either the 8.75% pay cut or the £30 million cut the MoJ expects the limit to PPE to bring about will have similar, significant detrimental impacts. The MoJ is well aware from the Otterburn report[2] and the responses to the multitude of consultations on cuts to criminal legal aid over the past few years that criminal legal aid firms are operating at extremely tight profit margins. It is junior members of the profession who have borne, and who will continue to bear, the brunt of unsustainably low rates of remuneration for criminal legal aid work.

32. The government must understand the context in which these fee reductions are proposed. YLAL is concerned in particular with two relevant features: (1) social mobility and diversity in the profession; and (2) the sustainability of the profession.

33. These cuts are being proposed at a time where

    (a) The Trainee Solicitor minimum salary has been abolished by the SRA, allowing firms to pay the minimum wage to trainees;

    (b) The MoJ's AGFS consultation proposes a cut in the standard hearing fee for each hearing in the Crown Court which will result in a pay cut for the junior bar;

    (c) Undergraduate tuition fees and fees for professional qualifications have risen significantly; and

[2] Transforming Legal Aid: Next Steps, A Report for the Law Society of England & Wales and the Ministry of Justice, Otterburn Legal Reporting, February 2014 (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, accessed 24 March 2017)

(d) The rise in the cost of living namely housing, and particularly in London and the South East, continues to outstrip any increase in salary.

34. Working in the criminal justice system at publicly funded rates is therefore becoming increasingly difficult for our members.

35. In terms of social mobility, the present system of high postgraduate course fees and very low starting salaries already means that many of our members are reliant on family support in order to survive the early years of practice. This makes it extremely difficult for those from lower socio-economic backgrounds to enter the profession[3]. This problem will only be exacerbated by further cuts. It benefits neither the profession, the criminal justice system nor society as a whole for criminal lawyers to be solely individuals with independent financial support.

36. The Lord Chancellor has said that she wants "*to see more young people – from all backgrounds, schools and regions – aspire to a career in the law, confident that they have as good a chance as anyone to prosper and succeed*"[4]. The Lord Chancellor has also spoken of ensuring that the legal system "*draws from all available talent in our country*" and of "*working to break down barriers, to make sure people from all backgrounds can rise through the profession and that merit wins out*".[5] We agree that the legal profession must better reflect the community it serves. However, it is impossible to avoid the conclusion that these proposals will increase the barriers to accessing the profession, rather than breaking them down.

37. In addition, the young defence lawyers, prosecutors and judges of the future are being increasingly dissuaded from entering this line of work. Those who are within it are seeking to leave in ever greater numbers. The concern of the MoJ ought not to be in the futures of those individual members, but in the fact that as the supplier base becomes older and retires, they are not being replaced at the junior end.

Conclusion

38. In conclusion, YLAL is opposed to all three of the proposals contained or referred to within the consultation: the 8.75% cut, the reduction of the PPE limit and the cut to fees for court appointed advocates. We urge the MoJ to reconsider the impact of its proposals, in particular on junior lawyers. Concerns about social mobility in the profession, and about the long-term sustainability of the criminal justice system should be at the forefront of this government's mind. YLAL is dismayed that this consultation chooses to ignore these major issues facing the criminal justice system.

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[3] Social Mobility and Diversity in the Legal Aid Sector: One Step Forward, Two Steps Back, Young Legal Aid Lawyers, October 2013 (http://www.younglegalaidlawyers.org/onestepforwardtwostepsback, accessed 24 March 2017)
[4] Speech by the Lord Chancellor at the annual Lord Mayor Elect Ceremony, 17 October 2016 (https://www.gov.uk/government/speeches/approbation-of-the-lord-mayor-elect-ceremony, accessed 2 March 2017)
[5] Speech by the Lord Chancellor to the Conservative Party Conference, 4 October 2016 (http://press.conservatives.com/post/151334597895/truss-prisons-places-of-safety-and-reform, accessed 2 March 2017)