



## **Access to Justice Review – Defending Rights**

### **The Institute of Legal Executives**

The Institute of Legal Executives (ILEX) is the professional and leadership body representing Legal Executive lawyers and has a membership of 22,000 students and practitioners.

Alongside Barristers and Solicitors, Legal Executive lawyers are recognised under the Legal Services Act 2007 as qualified lawyers. Recent developments also mean that Legal Executive lawyers are eligible for prescribed judicial appointments, including eligibility as first tier judges of tribunals.

Moreover, Government legislation has recognised Legal Executive lawyers' significance in the legal system and has given them the right to run their own businesses in partnership with other lawyers and in future with other commercial legal services providers.

Fully qualified and experienced Legal Executives lawyers are able to undertake many of the legal activities that solicitors do. For example, they will have their own clients (with full conduct of cases) and they can undertake representation in court where appropriate.

Legal Executive lawyers must adhere to a code of conduct and, like solicitors, are required to continue training throughout their careers in order to keep themselves abreast of the latest developments in the law.

ILEX provides policy responses to Government consultations in order to represent its members and the public interest.

## **Consultation Response**

1. This response represents the views of ILEX as an Approved Regulator under the Legal Services Act 2007 (the 2007 Act hereinafter).

## **Executive Summary**

2. ILEX welcomes the opportunity to contribute to the legal aid debate and shares the Law Society's concerns that the current legal aid provision is wholly unsustainable. ILEX recognises, however, that we need a system that is not only financially sustainable in the long term, but meets the objectives of ensuring good quality service provision to those who need it the most, in order to protect fundamental rights and access to justice.
3. ILEX agrees that the cost drivers are varied, complex and inter-related: a downturn in the economy will invariably lead to a resulting increase in legal aid in social welfare law cases; legislation that creates criminal offences captures more people resulting in criminal sanctions; the complexity of the legal system itself (substantive and bureaucratic); and indeed family breakdown all contribute to this increase. Criminal legal aid, and to a lesser extent civil legal aid is substantially demand led, but is currently capped at £2 billion. As the paper rightly points out, the challenge facing government is the need to restrict legal aid expenditure where demand has to be met, but to balance any unavoidable increases with savings in other areas. Of late, criminal legal aid is an easy target, followed by lawyers' fees.
4. ILEX also continues to be deeply concerned that one of the cost drivers for legal aid has not been fully addressed. For example, ILEX is keen to see more being done to ensure better integration of all the relevant participants in the justice process. There is a need to tackle inefficiencies in the

system: for example, inefficiencies in the court service, at Police stations, the Crown Prosecution Service (CPS), Social Services and the Legal Services Commission (LSC). Indeed, there is mounting evidence that government, in all its guises, generates a 'substantial slice of legal problems and makes them more expensive to resolve'<sup>1</sup>. We are pleased to see this recognised by the Law Society.

5. Relatedly, government must recognise the importance of greater communication and integration between all agencies involved in the charging process. Successive governments have failed to give a firm commitment to review and tackle these wider inefficiencies in the system. It is wholly unfair to expect the legal profession to make significant changes to its practices (and fees) without similar commitments from other stakeholders in the justice system. This reinforces the view of practitioners that the legal aid sector is being disproportionately penalised for systemic inefficiencies as a whole. This must not be allowed to continue.
6. Subject to the above general points, ILEX addresses the issues raised in the paper in chapter order.

## **Chapter 2 - Is access to justice being achieved?**

7. In principle, ILEX agrees to the proposals for impact assessments for legal aid and access to justice as part of any proposed legislative reform. However, it must be incumbent on the government to carry out and publish these assessments. This ensures those interested in certain policies both understand and can challenge:

- why the Government is proposing to intervene
- how and to what extent new policies may impact on them
- the estimated cost and benefits of proposed and actual measures.

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<sup>1</sup> Moorehead, R., System failure or broken Law? New law Journal, 19<sup>th</sup> March 2010.

Impact Assessments also give those interested in the process an opportunity to identify any potential, but unintended, consequences.

8. Until recently the work of the LSC included proposing and implementing changes that have or will amount to a change of policy. For example, the recent paper, 'Refocusing on priority cases' was issued jointly by the LSC and Ministry of Justice (MoJ). However, this split of responsibilities contributed massively to the dysfunctional relationship between these two bodies managing the £2.1 billion legal aid budget.
9. ILEX welcomes the MoJ's proposals following Sir Ian Magee's recent review that the LSC be converted from a non-departmental government body to an Executive Agency of the MoJ, but with the following caveat: decision making of the new government agency needs to be at arms length and free of ministerial influence (decision making). However, the positive side will see stream-lined accountability and generate a 'one voice one policy' approach.
10. Moreover, recommendations should include separating policy aspects of legal aid from the administration of legal aid, leaving policy with the MoJ. ILEX reiterates that the legal aid fund must be independently controlled as a fund that is used for the provision of legal aid, including potentially the protection of individuals from unlawful acts of the state. It must, therefore, be seen to be isolated from government influence.
11. For this reason, key policy changes to legal aid must be the subject of proper parliamentary scrutiny and approval and not rest with the MoJ. Daily policy and administration must be retained by the independent administrative body. It is critical that any new administering body should have a set of clear and transparent principles from within which to work to ensure that policy decisions do not affect certain clients disproportionately. Further, it is essential that the legal profession continues to be consulted in respect of policy changes affecting legal aid.

### **Chapter 3 Funding Access to Justice**

12. ILEX recognises that in a time of finite public resources, no government can afford to ignore the spiralling cost of legal aid expenditure from what is essentially a limited pot of money. However, any proposed changes must be managed in a way that ensures continuing quality and choice for clients, while giving the professions time and, where appropriate, support to adjust to any new regime. We have seen the impact on firms of bulldozing changes through in respect of the Carter reforms. This must not happen again.

13. We share the Law Society's concerns that a substantial portion of middle England is financially ineligible for legal aid, yet could not afford to litigate. As the paper rightly states, failure to provide proper access to justice is a failure of the rule of law, because there can be no effective rule of law if there is no access to justice. This is in stark contrast to when the legal aid scheme was set, approximately 80% of the population was eligible for civil legal aid. In 1986 this was 63% of the population, and by 2000 had dwindled to 50%. In 2007 eligibility had dropped to a mere 29%. However, as a result of the downturn in the economy, this has subsequently increased to 36%<sup>2</sup>.

14. The availability of legal aid in clinical negligence, housing cases and judicial review (of government departments in all their guises) is vital in these areas. However, further restrictions in the financial eligibility so as to exclude people who could not afford to pay their own fees, will have an impact on access to justice in these key areas. As such, ILEX is of the view that further restrictions in the eligibility criteria for legal aid would be unacceptable.

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<sup>2</sup> Ministry of Justice models of civil eligibility based on the Family Resources Survey, 2009.

15. Further, the squeeze of lawyers' fees in legal aid has created an unprecedented exodus<sup>3</sup>, which will continue to increase. This will have huge access to justice implications. It is important that legal aid remuneration rates should be set at a level which enables competent lawyers to undertake such work.
16. ILEX would welcome the opportunity to assist in the development of any improvements in the way publicly funded legal services are procured by the state and in the implementation of any proposals themselves. ILEX recognises that we need a system that is not only financially sustainable in the long term, but meets the objectives of ensuring good quality service provision to those who need it the most.
17. It is important to bear in mind, however, that solicitors are not the sole providers of legal services in the legal sector. There is now a diversity of legal aid practitioners, including Legal Executive lawyers (Fellows) contributing to the provision of good quality legal advice to some of the most disadvantaged sectors of the community. Legal Executives, for example, are highly trained specialists undertaking a variety of legal work on behalf of clients. Their skills base is maintained by regular Continuing Professional Development (CPD) courses both in substantive areas and people skills training. Many Legal Aid recipients are amongst the most vulnerable members of our society with high dependency needs; they may be immigrants, dyslexic, incapable of expressing themselves clearly (orally or in writing) or have severe mental health problems. ILEX is of the view that it is not only the legal qualifications of the practitioner, but also the interpersonal skills required to support some of the most vulnerable people in our society. ILEX Fellows have the advantage of learning on the job and developing these important skills during the course of their accredited

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<sup>3</sup> This is particularly so in Family law which can also have an impact on diversity issues. See for example, FAMILY LEGAL AID FUNDING FROM 2010 A CONSULTATION Representation, Advocacy and Experts' Fees; Family Justice Council.

training. ILEX Fellows therefore have an important role to play in the future of legal aid provision with quality at the forefront of service provision.

#### **Chapter 4 – Funding Access to Legal Aid**

18. ILEX makes the following general comments:

##### **Contingency Legal Aid Fund**

19. Although in principle the Contingency Legal Aid Fund is a good idea, ILEX has concerns as to where the start up funding would emanate, in addition to long term sustainability issues. While it feels there is merit to the scheme, ILEX further feels it may be unlikely to succeed where conditional fee agreements (CFAs) are operating successfully. To this end, ILEX is of the view the above proposed scheme raises as many problems as it may solve. However, that said, the scheme cannot be dismissed out of hand and depending on the outcome of this Review may warrant very serious consideration.

20. In terms of the loan scheme proposals, again the start up funding may be problematic. This may be compounded by issues of administration and recoverability.

21. It is one of ILEX's fundamental messages that, in terms of social justice, the Polluter Pays' principle dictates that it is the person who causes injury (or other actionable wrong) to another through their negligence, for example, that should compensate the victim, and the cost should not fall upon the victim or society in general. This rule should not be departed from lightly.

22. It is arguable that civil litigation, in particular personal injury litigation can also be seen to benefit society as a whole because it operates as a deterrent, upholding standards of health and safety. It also encourages responsibility through the allocation of duty.

23. We do share the Law Society's concerns that one of the major sources of costs includes actions and decisions of third parties which either require action to be taken to defend a criminal charge or to challenge an irresponsible decision taken by a local authority or government department (in all its many guises).
24. Since the introduction of Lord Woolf's civil justice reforms on 26 April 1999, Civil Judges at every level now have unprecedented authority over the management of litigation from its inception, and the corresponding duty always to act so as to further the overriding objective articulated in Part 1 of the Civil Procedure Rules. Since 2 October 2000, section 6 of the Human Rights Act 1998 makes it unlawful for courts to act in a way which is incompatible with a Convention right. The County Court has moved from the backwater of the justice system that it might have seemed to be in not very many years ago, to the mainstream. The Court Case Management powers should be more widely utilised to ensure both claimants and defendants have arguable and meritorious claims or defences as the case may be. This should be supplemented by increasing the range of penalties currently available and not just cost sanctions, which would add to costs. The question then arises, why isn't the judiciary utilising fully their extensive case management powers?
25. The proposed cost sanction to require a prosecutor to pay from its own funds where a decision to prosecute was inappropriate or where the prosecutor has added unnecessarily to costs is inappropriate. The prosecutors (i) must have discretion to apply the twofold test whether to prosecute without fear of external financial sanctions (as the Law Society rightly point out, there are strong duties on prosecutors to ensure that prosecutions are in the public interest); and (ii) the decision to prosecute may be in the circumstances where it is a borderline case and should be for the jury to make up its mind. In any event, the penalty to pay from its own funds the costs incurred from an inappropriate decision to prosecute, would still be out of public funds.

## **Chapter 5 – Delivery**

26. ILEX finds it unacceptable for any individual to undertake legal work for clients and businesses without relevant education, training, qualification and proportionate regulation. To this end, we agree with the service qualities as highlighted by the review in chapter 5 of the Review.
27. It is an aim of ILEX is to secure sufficient lawyers and other qualified advisers and support staff to ensure that every individual and every business has access to excellent legal services.
28. The examination of the advantages and disadvantages of the existing model of legal service delivery is a fair assessment of legal services provision. However, the provision of legal aid by the private sector can be and is complemented by legal services delivery in the voluntary sector. The voluntary sector has gained a huge amount of experience in the esoteric areas of law like welfare benefits, debt and consumer issues. For example, it would be rare to find a solicitor or legal executive lawyer in private practice specialising in these areas of law. As long as the advisor has relevant education, training, qualification and is proportionately regulated, it does not matter whether the service delivery is in the private sector or the voluntary sector. There is scope, however, for both sectors to work more closely together to utilise their respective skills. We agree with the Review's assessment of in full (CLACs) as causing a monopoly provision likely to cause irreparable damage to service provision and access to justice.
29. In terms of a triage system, ILEX is also aware that certain Citizens' Advice Bureaux (CABx) are operating such a system. It is, however, a fair assessment to observe that this system at the outset requires the skills of a very competent advisor to diagnose accurately and quickly the client's problem and signpost accordingly. ILEX would recommend contact with CABx.

30. ILEX has already expressed for the very reasons contained in the Review its concerns in respect of the Legal Services Commission's desire to procure the provision of services from fewer, larger firms. We feel this would be detrimental to service provision and disproportionately impact on Black Asian and Minority Ethnic (BAME) groups.

31. There will be many different permutations of Alternative Business Structures (ABS). It would be difficult to second guess all of the different models that may be formed. However, it would be difficult to dismiss out of hand the inability of an externally controlled ABS to deliver a stream-lined publicly funded service to consumers to the required standards expected of the profession.

#### **Chapter 6 – Procurement of Publicly Funded Services**

32. We agree that the aim of any proposals should be to re-focus legal aid funding so as to target limited resources to the areas of greatest need. One of the options should be to encourage applicants for public funding to pursue other options before funding is granted. For example:

- Complaints and Ombudsman schemes
- Non-family mediation Conditional fee agreements
- Before the event insurance (BTE)

33. There should, of course, be no compulsion of the above but more public education on alternative remedies available. In his final Report on Costs, Lord Justice Jackson arrived at the conclusion that BTE, for example plays an increasingly important role in promoting access to justice, thus targeting the limited resources to those greatest in need and maintaining the safety net.

34. In terms of simplification, devolved powers would assist practitioners in making publicly funded work more tolerable and less bureaucratic. The Legal Services Commission has sufficient powers and procedures to

address any problems which may arise in respect of a particular case or particular suppliers.

35. ILEX does not feel that it has relevant experience to comment on the terms and conditions of the contract specification. However, it does seem sensible that the contract should be drafted from scratch, starting from basic commercial principles.

36. ILEX in principle did not oppose the concept of fixed fees. ILEX was of the view that the imposition of fixed fees was workable as long as they are fixed at a reasonable and sustainable level. ILEX advocated the following factors in determining suitability:

- Adequate supplier base
- Quality of service provision
- Equality of access
- Choice for clients
- Reasonable profits at market equivalent rates
- Attracting new entrants in the sector

37. ILEX also made the point that a fixed fee escape clause had to be pitched at the right level. We share the Law Society's concern that in some cases, a lawyer risks doing up to £6000 worth of unpaid work until the escape clause is triggered. Moreover, the lack of measurement of the nature of assistance and eventual outcome of a case needs to be addressed. ILEX agrees that that outcomes focused approach could be used to measure value for money and service provision for clients and local communities. That said, there would be difficulties in determining how such an approach can be applied to payments to legal aid providers.

38. In principle, ILEX has no objection to the creation of a pay review body for legal aid, similar to the NHS, the armed forces and prison service staff. However, we share the views of the Law Society that legal aid lawyers are not directly employed by the state.

39. The new government's coalition agreement promises us a "fundamental review" of legal aid. ILEX suggests this could be a chance to take stock and refashion the legal aid system so that it truly merits the description of a pillar of the welfare state. The task will be to persuade the Coalition Government and the public that legal aid is worth saving.