

Proposals for the Reform of Legal Aid in England and Wales

Consultation Paper CP12/10

November 2010

A Response by the Institute of Legal Executives

Introduction

1. This response represents the views of the Institute of Legal Executives (ILEX) as an Approved Regulator (AR) under the Legal Services Act 2007 (hereinafter "the 2007 Act"). This response follows a meeting by the Legal Aid Committee consisting of ILEX Council Members.
2. Legal aid remains the cornerstone of our justice system, providing help and support for many of the most vulnerable members of our society. For over 60 years, a significant proportion of such help and support (including representation) where individuals are unable to fund themselves has been funded by the state via the legal aid scheme. What is more difficult, however, is to ensure sustainability and efficiency of the scheme without impacting on access to justice and the rule of law. ILEX is committed to the principle that access to justice and the rule of law are inter-dependent and as such cannot exist without the other. To this end, we are also committed to working with the government and the legal profession to create a long-term sustainable future for Legal Aid in England and Wales.
3. That said, ILEX is realistic enough to realise the Government will have to make savings from the Legal Aid scheme. ILEX accepts that these are difficult times and the Ministry of Justice (MoJ) faces incredible difficult budgetary decisions. In this response to the Green Paper, ILEX believes that reductions in the provision of legal aid do not necessarily have to manifest themselves as cuts to the availability of legal aid to the poorest or vulnerable members of society, thus impacting on access to justice and the rule of law. Indiscriminate "butchering" of the legal aid system is not a "quick fix" and may cause irreparable harm, not only to the supplier base (already shrinking), but to access to justice. What is needed is a more balanced approach to legal aid reform where funding is not considered in isolation to other cost drivers and the rule of law.

4. ILEX is concerned, for example, that the Green Paper does not propose any contingency plans in the event of unforeseen consequences. Relatedly, there is no promise to reinvest in legal aid provision once times improve. Is ILEX to assume therefore that the shrinkage of legal aid is permanent? ILEX is concerned that a permanent contraction without contingency plans will cause irreparable harm to legal aid provision in England and Wales, thus impacting on access to justice issues.

Legal Aid Today

5. Successive governments over the last decade have chipped away at legal aid provision, limiting case starts, limiting lawyers' rates at the same low levels for years and introducing block contract fixed fees. The Lord Chancellor in introducing the Green Paper was right to despair that there have been more than 30 consultations in respect of legal aid since 2006. ILEX accepts that had a Labour government been re-elected, there would have been cuts to the legal aid budget. Over the past ten years the previous government reduced civil legal aid in real terms by 24%. Capping the fees paid to lawyers was also being considered, as well as better value for money for the taxpayer by examining the contracts and seeking economies of scale.
6. However, the scope of the Green Paper's proposals are breathtaking: seeking to reduce costs when there is really no scope for further cuts without inflicting serious damage to the system is inevitably going to result in severe injustices for the most vulnerable - children, the elderly, those with disabilities and those with mental health problems.
7. In addition to the above, the supplier base is shrinking and the age profile of legal aid practitioners is maturing; there is little incentive for indebted law students to be attracted by a legal aid career when rewards in the private and commercial sector are much higher¹. This in turn is damaging access to justice for many of the most vulnerable in society. However,

¹ Career Choices in Law A Survey of Law Students Study 50; and Career Choices in Law A Survey of Trainee Solicitors Study 51 February 2004.

taken with the Green Paper on civil litigation funding, this represents a “double whammy” for the most vulnerable clients in society.

8. That said, ILEX is committed in assisting the government to try and seek areas where savings can be made (without taking large areas of civil work out of scope) and to find ways of mitigating the impact of the Green Paper by seeking to advance alternatives to the present proposals. If the proposals are bulldozed through without full consideration of the impact on suppliers, services will be disrupted; criminal and civil – with lasting long term harm to clients. We are mindful, however, of the government’s obligations under Article 6 (3) of the European Convention on Human Rights which states:

“Everyone charged with a criminal offence has the following minimum rights.....(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”

9. The last point being of importance. In *Airey v Ireland*², for example, the European Court of Human Rights held that Article 6.1 might 'compel the state to provide for the assistance of a lawyer' - legal aid - 'by reason of the complexity of the procedure or of the case'

10. There are, however, many potential benefits of the proposals which will undoubtedly save costs, but government must not lose sight of the fact that justice is best served by offering access to it for those who are suffering injustice but cannot afford to defend themselves or assert their rights under the law.

11. ILEX is disappointed to note that the Green Paper makes various erroneous assumptions that Solicitors are the sole providers of legal services in the legal sector. This is simply not true. There is now a

² 1979-80) 2 EHRR 305

diversity of legal aid lawyers, including Legal Executives lawyers, contributing to the provision of good quality legal advice to some of the most disadvantaged sectors of the community. Legal Executive lawyers, for example, are highly trained specialists undertaking a variety of legal work on behalf of clients. The skills base is maintained by regular Continuing Professional Development courses both in substantive areas and people skills training. For the purposes of this submission, lawyers include Legal Executives, Solicitors and Barristers and other lawyers entitled to use the term lawyer under the *Legal Services Act 2007*.

12. ILEX addresses the issues in the Green Paper in the order that they are raised in chapter form. However, where we have answered directly we will refer to the question number.

Cuts in Scope

13. ILEX does not agree with the proposals in respect of the cuts in scope for the following reasons:

At a time when public finances are under severe strain; it is tempting for government departments to slash the scope of legal aid and or the eligibility conditions thus providing the bare minimum coverage. ILEX does not subscribe to this point of view. We believe this would be a false economy.

Value for money for the tax payer is essential. However, there appears to be a very poor business case for the Green Paper's proposals. Keeping so little in scope will actually undermine best value. It has been argued by the voluntary sector that between £2 and £10 is saved for every pound invested in the system. Indeed, the Legal Services Commission (LSC) outcomes data indicates a saving of £3 for every £1 spent on debt advice; an incredible £8.80 for every £1 on welfare benefits advice; and £7 for every pound spent in respect of

employment advice³. The indiscriminate shrinkage of coverage will not be value for money for the tax payer. A good example is housing and homelessness issues (which are to remain in scope); however debt and benefits advice is being taken out of scope. Those issues are always the preliminary problems that lead to homelessness. ILEX understands that delays in payments of housing benefit by the local authorities will invariably lead to landlords starting possession hearings. Also in light of the Department of Work and Pensions (DWP) proposed restrictions to housing benefit payments, there will be many claimants with a shortfall of housing benefit not covering their rent.

14. There are also issues about the speed at which and the manner in which legal aid coverage is withdrawn and the impact on the supplier base. If the proposals are pushed through without full consideration of the impact on the supplier base, services will be disrupted; criminal and civil – with lasting long term harm to clients.

15. Relatedly, there is also a presumption in the Green Paper that matters taken out of scope will not have a detrimental impact on law firms because they will simply pick up and deal with the other matters remaining in scope. The evidence from ILEX is that there is a real fear within firms that this will not be the case and firms will have little option but to simply close departments. ILEX believes that the impact on local legal services will be devastating. For example, the aborted family and civil contract arrangements meant that our lawyers are facing almost overnight unemployment and their clients a lack of any representation because insufficient consideration had been given to a transitional period.

16. Similarly, ILEX is not convinced with the government's mantra that other alternatives will be available, in addition to the several funding streams that feed the voluntary sector. The former is discussed in the following

³ Hansard: HC Deb, 14 December 2010, c189WH)

chapter suffice it to say at this stage, the alternatives proposed would not fill the gaping hole left by matters taken out of scope. In respect of the latter, a large chunk of the voluntary sector is funded by legal aid. The impact assessment accompanying the Green Paper states that there will be a cut of up to 92% in legal aid funding for the voluntary sector. Further, with Council's facing a 27% cut in the 29 Billion Formula Grant budget (which is the £29bn a year given by Whitehall to local government) over the next 4 years', funding of the voluntary sector will not be a high priority⁴. This will invariably lead to advice centres, Citizens Advice Bureaux and Law Centres closing. A case in point is Birmingham Citizens Advice Bureau which is set to close its doors (ironically in February 2011) following a council funding cut of £600,000⁵. It is not reasonable to expect the Access to Justice Foundation to fulfill this gaping hole left in the voluntary sector. Pro Bono legal work is always only an adjunct to, and not a substitute for, a proper system of publicly funded legal services and as such is not an option. ILEX would like further clarity as to what other funding streams the government has in mind.

Family Law and legal Aid

17. ILEX applauds the government's positive proposals in relation to mediation. No one disputes the value of mediation or the fact that in cases that do go to court, the court can have an extremely detrimental impact on families, including children. That said, relying wholly on mediation is not always an option. The MoJ has recognised this in the past and is only too aware of the limitations of mediation. It must be borne in mind that mediation needs to be under the shadow of the Court. ILEX does note, however, that collaborative law is increasing in popularity, but it did not warrant a mention in the Green Paper. In view of this, is ILEX to assume therefore that collaborative law has been removed? We seek further clarification.

⁴ <http://blogs.ft.com/westminster/2010/12/local-government-cuts-are-steeper-than-it-looks/>

⁵ <http://www.birminghammail.net/news/birmingham-news/2011/01/26/birmingham-citizens-advice-to-close-following-council-funding-cut-97319-28057342/>

18. ILEX is concerned about the disproportionate impact on women by taking Private family law (unless there is violence or forced marriage) out of scope. Even in cases in which domestic violence is not an issue, without the availability of legal aid in private law, there are real dangers that individuals, particularly those who have difficulty in being sufficiently articulate or have the confidence to navigate the court system, will lose access to their children. A case in point is a woman recently separated looking after her children unable to afford representation, but appearing against the ex partner who can afford to instruct lawyers. Just because the application for the children/child is made by the ex partner rather than the state (public law being in scope), does not mean the parent with care is any less vulnerable. Arguably, this may have the unfortunate consequence for the Government by breaching its obligations under the Human Rights Act, in particular Article 6 (1) of the European convention of Human Rights. This is because one of the rights the European Court of Human Rights has found inherit in Article 6(1) is the right to equality of arms, which requires each party to be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis their opponent: see *De Haes and Gijssels v Belgium* (1998) 25 EHRR 1. (This principle is echoed in the principle of ensuring that the parties are on an equal footing at *CPR Part 1.1(2)(a)*).

19. For the purposes of the Domestic violence test, ILEX has real concerns about the narrow definition proposed for “domestic violence”. This narrows considerably the current Home Office definition and that established by case law⁶. ILEX sees no valid reasons as to why the MoJ should seek to vary the definition. ILEX is concerned that the proposed definition would mean that cases in which legal aid could be accessed would be extremely limited. This limitation also gives rise to a potential unpleasant scenario where the ‘victim’ of domestic violence receives legal

⁶ See for example, the recent Supreme Court decision in *Yemshaw (Appellant) v London Borough Hounslow (Respondent)*.

aid, but the respondent does not, and in any subsequent hearing, the respondent could be in a position to cross examine the victim (this may be very unpleasant for the victim to be cross-examined by her alleged abuser). ILEX would like think that the MoJ had the foresight to envisage this scenario arising and having checks and balances in place to avoid it happening.

Ancillary Relief Cases (where domestic violence is not present)

20. The proposal to make changes to court powers in these cases to enable the Court to make interim lump sum orders against a party who has means to fund the costs of representation for the other party may have 'legs', but without further clarification as to how it will work in practice, it is difficult to comment whether or not it is workable. For example, the applicant would already have had to apply before any such order could be made. We therefore seek further clarification.

Jarrett Complexity (Question 4).

21. It is imperative for the government to comply with its Human Rights obligations to continue funding cases of an 'exceptional nature with significant wider public interests'. We do note, however, scope is not defined because it may now be different due to the proposals relating to scope. However, the new funding of these cases by their nature would be of a general application save for matters being excluded from the general legal aid scheme or scope.

22. We further note that the threshold for funding of exceptional cases is (understandably) very high and bearing in mind the proposals relating to scope, the threshold criteria may need revisiting⁷. We await clarification from the MoJ before advancing further comments.

Impact on litigants in Person and the Conduct of Proceedings

⁷ Regina (Patel) v Lord Chancellor [2010] EWHC (Admin) WLR (D) 240

23. ILEX has very real concerns of the potential impact on litigants in person and the court service. The impact is potentially huge.

24. Practitioner feedback suggests that unrepresented litigants will be longer in court; there will be more appeals; and there will be more dissatisfaction from the end user (the client). Clients may not be able to put their point across to the court in a way that they want the court to understand, which ILEX feels is going to lead to problems and delays in the courts and delays in the courts and possibly injustices. Indeed, the Government's own impact assessment on scope states:

'Wider social and economic costs may arise if disputes are resolved significantly less fairly for those no longer receiving legal aid'⁸

25. It is worth citing some of these in full:

- reduced social cohesion. For example, failure to apply the rule of law fairly may generate an inclination not to respect rules and regulations and not to comply with social norms and expectations, generating social costs. In relation to family cases, children would be affected as well as their parents;
- increased criminality. This may arise if unresolved civil or family disputes escalate, or if criminal means are used to resolve disputes, or if a known lack of legal aid encourages people to take advantage of others who might find it harder to defend themselves in future;
- increased resource costs for other departments. If civil and family issues are not resolved effectively, people might continue to rely upon the state, because failure to resolve one issue may lead to another arising. This may involve health, housing, education and other local authority services⁹.

26. It is clear from the above the Green Paper recognises that the proposals: may be unfair; may leave some unable to fight for their rights; may result in

⁸ Impact Assessment – Scope Changes: MoJ p2

⁹ <http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf>

worse outcomes; and may increase costs. And it recognises that the inability of people to seek legal help may mean they take the law into their own hands.

Provision of Advice and Information by Telephone and Internet

27. ILEX has no objections in principle to the provision of Advice and Information via the telephone. That said, it is essential that such advice is imparted to clients by suitably qualified lawyers and standards in quality are maintained. However, ILEX reiterates that telephone advice is not a universal panacea. Whilst there may be an intimation that members of the public want to speak to someone out of office hours, practitioner feedback indicates that clients want to speak to someone face to face. ILEX is also concerned that telephone advice would limit access for Black and Minority Ethnic groups for whom English is not a first language and people with learning difficulties.

28. For example, in many cases (including many asylum and immigration cases) a caller might be unwilling or unable to discuss sensitive and critical information over the telephone. A history of sexual abuse or torture, a physical condition such as AIDS/HIV or being gay are examples of subjects someone may not be prepared to talk about over the telephone. Other callers may be unable to make a call in private. However, it may seem to the adviser on a telephone call that the caller is free to talk about whatever they need to because the adviser cannot see that the caller is not alone or is not calling from a private place. This would be compounded if English was not their first language.

29. Calls can also be detached and indifferent to the full range of problems that the client might present.

30. A major problem is the risk of incorrect assessment by the operator or adviser of entitlement to Legal Aid or other problems. This would mean that some people who are entitled to Legal Aid do not receive it; and others who are not entitled to it and do not need it having their time wasted

(and at Legal Aid expense) by being referred unnecessarily. Of course, these are problems that face any gateway system. However, what this emphasises is the importance that any gateway needs to avoid the sort of problems outlined above.

31. The Green Paper proposals on face to face referrals seem to be based on a mythical capacity in the voluntary sector (where legal aid will be withdrawn) to deal with such referrals. The information on the ground appears to be that the voluntary sector will be all but wiped out by the combined cuts in Local Authority funding and the shrinkage of legal aid. ILEX also understands that the Financial Inclusion Fund (FIF) will be ended in March¹⁰. FIF pays for just under 500 debt advisors based in Citizens Advice Bureaux and other not for profit (NfP) advice centres.

32. ILEX is also hugely concerned with the Green Paper's constant reference to information being available on the Internet. This is worrying because; (1) it dumbs down the service offered by lawyers for the client; (2) the reliability of the information is questionable; and (3) there is no-one to interpret the information.

Financial Eligibility

33. ILEX welcomes many of the suggested reforms in this chapter which are potentially beneficial and will save costs. ILEX believes that it is appropriate for beneficiaries of the scheme to have a financial interest in their case. This is also consistent with Lord Justice Jackson's proposals in relation to the Civil Costs Review simultaneously undertaken by the MoJ with this Green Paper.

34. ILEX agrees that those who have the means to pay should pay or pay relevant contributions. ILEX is of the belief that every recipient of legal aid even those on means tested benefits like income support (and as such

¹⁰ <http://www.guardian.co.uk/law/2011/jan/21/financial-inclusion-fund-cuts>

passported) should make a financial contribution/investment in the funding of their matter, even if it is in the region of £2.50 per week.

35. For Housing Benefit purposes, even those claimants with £16,000 of disposable capital will be assumed to have income of £1 for every £250 above £3000 up to the maximum¹¹. This is known as tariff income and off-set against the housing benefit payable. Income Support and means tested Employment Support Allowance have similar rules but the cut-off capital is £8000. However a tariff income of £1 is assumed for every £250 up to the maximum and off-set against any IS/ESA payable. There appears to be an implication in the Green Paper that all means tested benefits have the same capital limits. This is simply not true¹². That said, if claimants of means tested benefits are assumed to have an income for benefit purposes, there is no reason why they cannot contribute to the funding of their case via the legal aid scheme.

36. Having a financial interest or investment in a claim would stop time wasters and the unfortunate, albeit small element of those claimants who will pursue a claim just because it is free for them to do so. In terms of recoverability, it could be implemented along the same lines as the £100 contribution being suggested in the Green Paper in respect of clients with over £1000 paying a £100 contribution, and then deducted at the end of the bill at the end of the matter. In the voluntary sector, this could be off-set against payments to providers.

37. ILEX has no objections in principle with the £100 contribution for legal aid recipients with £1000 or more in disposable capital. Similarly, ILEX welcomes the proposals in respect of the capital limits contained in questions 14 to 17. We feel these are long overdue and have not changed for some time and will help to save costs as well as target limited resources. There has been a backlash against legal aid perpetuated by certain sectors of the press, which does make it an easy target for huge

¹¹ Regulation 45 of the Housing Benefit (General Regulations) 1987

¹² Ibid and The Income Support (General Regulation)

cuts in difficult times and it may well be that the generous capital limits have contributed to this position.

38. We note, however, the impact of the proposed universal credit/benefit has not been factored into the proposed changes. We understand that the universal credit will consist of the current means tested benefits, working tax credits and elements for disabilities any proposed passporting would have to be aligned to the elements that replace the means tested benefits¹³.

Legal Aid Remuneration: Criminal Fees

39. It is critical to protect criminal legal aid. If it is not readily available at the right level and provided by professionals, justice will be denied. We are pleased that there will be no change to scope in respect of the criminal legal aid scheme and that the government is having regard to its obligations under Article 6 (3) (Right to Legal Representation and Legal Aid) of the European Convention on Human Rights.

40. ILEX welcomes the Green Paper's commitment to streamlining criminal justice procedures so that unnecessary costs to the public purse are avoided. This commitment is long overdue in light of the various inefficiencies in the court system, together with the administration of criminal legal aid. These generate costs for parties both the Crown and Defendant without any significant corresponding benefits.

41. The following are further examples where savings can be made:

- CDS Direct should be abolished: Evidence show that the CDS direct process is protracted and disturbingly telephone calls often remain unanswered at the police station. The consequence of this is invariably more court hearings in the process as defendants reconsider their positions once they have received advice.

¹³ Department of Work and Pensions: Universal Credit: Welfare that Works; Chapter 2.

- There should be better communication and co-ordination between the various participants in the charging process, including the courts. Listing requires a compromise between: delivering swift justice; keeping the court occupied; and the availability of those that need to attend - the witnesses (some of whom will be police officers), the defendant, the defence lawyer, the prosecutor, the court staff, specialist equipment and security. Often the process is complicated by the unpredictable nature of trials, which may last a full day but more often adjourn early. It is common practice for courts to book three cases to a courtroom on the same day in order to keep the court occupied
- Success relies on the skill of the court but it is almost inevitable that one or more of the parties will have to wait before a hearing commences. If this is the court, prosecutor, police or (in many cases) defence, waiting times are a waste of public resources. Where witnesses have to wait, they begin to lose faith in the system. This is made worse if the case is adjourned (sometimes repeatedly) before they give evidence and they have to return another day.
- Early guilty pleas will invariably reduce much of the waste highlighted above, but there is further room for improvement. For example, defence and prosecution being ready to proceed, with case papers that are sufficient and suitably disclosed; and IT systems to help the court keep in contact with witnesses so they do not have to wait at court during the day, but can be paged or sent a text message.
- ILEX does see merit in more consideration being given to cases being dealt with in the magistrates' courts. This would invariably generate significant savings for the legal system, but any changing

must be subject to appropriate safeguards. The defendant's right to trial by jury must not be tampered with lightly.

- ILEX welcomes proposals to reduce payments in Very High Cost Criminal Cases (VHCCCs). Payments for VHCCCs are disproportionate in comparison to the legal aid system as a whole.

42. Notwithstanding the above, ILEX has reservations about the removal of London weighting in magistrates' courts. This effectively means there is a 22% reduction in fees. We are concerned that this level of reduction (including the fixed fee of £565 in either way trials in the Crown Court) could have consequences on the work that is put into preparation for criminal matters. If, for example, only a fixed fee is payable it is questionable how much time and effort may be given when it all comes down to profit ability for a firm.

43. Removal of the separate fee for committal hearings under the Litigators' Graduated Fee Scheme may potentially lead to a danger that Defendants may be put under pressure by the provider not to elect for jury trial. It would be naïve for the Government to assume that providers will always be acting in the best interest of their clients when as pointed out above, it may come down to profit margins for a provider.

Legal Aid Remuneration: Civil and Family Fees

Reduction in all Civil and Family Fees by 10%

44. Following a recent Civil Contract Group meeting, representatives from the various stakeholders asked how the 10% figure was arrived at. The group was essentially told by MoJ staff that this figure had not been calculated as a result of any data collection, and it was actually a starting figure as they needed to state a figure. It was suggested to the group that this is a 'starting figure' and the MoJ were looking for evidence 'on the ground' or further suggestions. Whilst the perceived ad hoc nature of the proposal is somewhat surprising, ILEX is heartened to note that the

proposal is not a foregone conclusion and that the MoJ is open to further suggestions.

45. ILEX has no principle objection to the capping of enhancement fees (as these are over and above prescribed fee levels in any event). However, bearing in mind there has been no real movement on fee levels since 1996, in net terms, the reduction would amount to more than the 10% proposed. We are also not convinced with the notion that the initial 'swings and roundabouts' idea for fixed fees (that the easier cases will pay for more difficult cases), will have any role to play because the only likely cases to remain will be complex cases. If, on the other hand, the scope proposals were abandoned, providers may be able to absorb some of the cuts, but not in-line with the current proposals. In view of above, ILEX does not in principle support the 10% across the board cut in legal aid fees, but sees merit of a similar cut if there was no cut in scope and the amounts have been fully costed following a full data collection exercise. Our perception of this has been reinforced the by the recent findings of the Public Accounts Committee when it recommended that:

'Without combined financial and operational performance data and a full understanding of its costs, there remains a risk that in implementing its Spending review assessment, the Ministry will not achieve best value for money and will not understand properly the impact of cost reductions on frontline services'¹⁴

46. In terms of the proposal to restrict the use of Queen's Counsel (QC) in family cases, feed back from practitioners indicate that where there are a number of parties to a matter, for example local authorities, mother, father, guardian and a number of interveners, then the local authority will instruct a QC, and all parties will follow suit. ILEX has no objections in principle to restrict the use of QCs in family matters by the operation of a general rule which is subject to exceptions.

¹⁴ <http://publications.parliament.uk/pa/cm201011/cmselect/cmpublic/574/57404.htm>

Expert Fees

47. We note that there has never really been any effort to collect information on expert fees. However, we further note that recently the Legal Services Commission (LSC) is attempting to rectify this information gap by amending its forms to improve data collection. ILEX welcomes this move. We accept that expert fees and charges need to be reviewed, but more research must be undertaken to enable the commission to know how the market will cope. It is important to strike the right balance and avoid restructuring the fees to a level that does not undermine the availability of experts in legal aid cases.

48. Notwithstanding the above, judges have case management powers under the Civil Procedures Rules and ILEX sees no reason why this should not extend to the use of expert witnesses. The judicial office can use its powers to issue guidance on what is considered reasonable. There may be opportunities for savings to be made by cutting down travel times and the use of IT advances such as video link etc.

49. What is apparent is that there should be guidelines in respect of the use of expert witnesses and their charges. However, it would not be appropriate for ILEX to set or even recommend suggested level of fees. If the level of fees is set too low, it would be difficult to ensure the availability of experts. There should be a clear structure. However, we have noted that no 'benchmark' figures are available and further research is needed.

50. As a matter of completeness, we understand that the Family Justice Review is also being undertaken and we will not know the outcome until after the Green Paper on Legal Aid. It seems to ILEX that this being approached the wrong order.

Alternative Sources of Funding

Interest on client accounts

51. ILEX has no objection in principle to such a scheme being set to supplement the legal aid scheme and the idea may have merit. However, ILEX is not convinced that the MoJ has sufficient information to implement the scheme successfully. For example, ILEX is concerned that at present no complete and accurate assessment exists of the amount of money held in client accounts; the number of solicitors/firms who might participate in the scheme; and the interest which might be earned, hence the benefits have not been monetised. There appears to be an assumption that this proposal will only apply to solicitor client accounts. We seek further clarification. For example, will it apply to all legal practices that undertake reserved legal activities?

52. Given the lack of information, there is a very real risk that start up costs may be disproportionately large if (i) only a small number of firms join the proposed scheme; or (ii) the interest held is small (and subject to fluctuating rates).

53. Given that the viability of the scheme would be dependant on the number of practices who join the scheme, it would have to be a compulsory scheme. If it was otherwise, then it is likely a high number of practices would opt out.

Supplementary Legal Aid Scheme

54. Although in principle a good idea, ILEX has concerns as to where the start up funding would emanate from, in addition to long term sustainability issues. As such the above proposed schemes raise as many problems as they solve. However, the schemes cannot be dismissed out of hand and, dependant on the outcome of this Green Paper and The MoJ's proposal for Civil Costs may warrant serious consideration especially if success fees and ATE premiums are abolished.

Governance and Administration

55. ILEX has no objection in principle to the LSC being an executive agency of the MoJ for the reasons given in the Green Paper. However, adequate safe guards need to be put in place to distance ministers from day to day decisions being taken by the agency in respect of individual cases.

56. However, despite recent changes, we understand that the MoJ still spends approximately £2 million annually on legal aid policy work, which is in addition to the LSC's own administration budget¹⁵. The MoJ should review the level of staff input in legal aid policy formation in both organisations and look for opportunities to reduce the number. By its own admission, it appears that the MoJ has exercised insufficient control over its arms length bodies, including the LSC, together with not having a detailed understanding of the costs of its staff activities in its largest executive agency¹⁶. In view of the above, it appears the MoJ needs to bring its own house in order first before suggesting such fundamental changes that will impact on access to justice issues.

57. Further examples are as follows:

The MoJ, according to the Public Accounts Committee, has still not recovered the full cost of Family and Civil (Magistrates' Court' work via the fees charged to service users. There also appear to be little evidence of a sustained improvement in fine collection. Similarly, there is little evidence from the MoJ of the collection of the statutory charge. ILEX proposes that there should be a timetable imposed in terms of collecting the statutory charge, which is robust and tightly controlled¹⁷.

58. Although no doubt the proposals will make substantial savings to legal aid spend, it is important to stress from the outset that it is a crucial feature of any civilised, democratic society that individuals should not be denied

¹⁵ National Audit Office: The Procurement of Criminal Legal Aid: HC Session 2009-2010

¹⁶ <http://publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/574/57404.htm>

¹⁷ *ibid*

justice because they are unable to afford it. It is inescapable that it is expensive (more so in an adversarial system like ours) to bring or defend many legal actions and will remain so notwithstanding implementation of the Green Paper's proposals. In criminal cases, for example, the defendant will face the might of the police, together with the Crown Prosecution Service (CPS) and needs to ensure that where there are proper defences, they are adequately investigated and put forth. Many civil cases, especially clinical negligence, are complex and require a lot of resource, both in financial terms and expertise, even in relatively simple cases. However, the costs of this are likely to be out of reach of the ordinary man or woman on the street. It is for this very reason that the government must not lose sight of the importance of legal aid services in its implementation of the 'big society' otherwise it will 'be swamped by spending cuts'¹⁸ The government must understand that it is legal services and the provision of legal aid that can assist in helping to bring this policy to life.

59. Finally, it is apt to remind the government of the recent observation of the Legal Services Institute when it suggested a more balanced approach was needed in addressing legal aid:

"Although it is entirely reasonable that the government and taxpayers should continue to expect greater efficiencies and value for money in the delivery of legal aid, this must be subject to the further imperative that the supply of funding should not be considered in isolation. If efficiency savings in legal aid lead to any undermining of the rule of law, or compromise the administration of justice, while we might have achieved a degree of fiscal prudence, society will undoubtedly be the poorer for it"¹⁹.

60. ILEX cannot agree more with these sentiments.

¹⁸ The Times 8th February 2011: Speed and depth of cuts condemn Big Society to failure

¹⁹ Baksi, C., Law Gazette: Vicious circle in legal aid. 22/09/10

