



Consultation on draft Community Legal Service (Funding) (Amendment no.2) Order 2011
and draft Criminal Defence Service (Funding) (Amendment) Order 2011

Response of the Legal Aid Practitioners Group 8 August 2011

Contact details.

Carol Storer
Director
Legal Aid Practitioners Group
242 Pentonville Road
London
N1 9UN
Tel: 020 7833 7431
Email: Carol.Storer@lapg.co.uk

Legal Aid Practitioners Group.

LAPG is an independent membership organisation representing several hundred firms and organisations working under LSC contracts.

Our members are spread throughout England and Wales. They range from sole practitioners to large legal aid firms, from firms with a contract in one area of law to firms with contracts in all or almost all areas.

LAPG is represented on numerous Government and other stakeholder and advisory groups including the Legal Services Commission Civil and Criminal Contracts Consultative Groups.

LAPG's Response

Sustainability of the market

The proposed reduction in fees – ten per cent in some cases and higher than that in others – is a massive gamble with the viability of a declining legal aid supplier base. There has been limited research on profit margins but, although there may be some suppliers who operate on a margin of 10% or more, many organisations operate well below this level of margin; a significant and increasing number are struggling to break even at all.

Practices are carrying out work at rates of pay which have not increased since 1994 and now these proposals seek to reduce these to rates which are even lower.

The 10% cut is going to lead to providers deciding not to carry on with legal aid work but the cuts to the enhancements go further. This is a major unilateral amendment to the contract.

In crime one of our London based members worked out the losses they would have suffered in July if they had been on the new system and calculated them as follows:-

Litigators fees 10%

Advocates fees 14%

Magistrates courts cat 2 17%

There will be variations depending on types of work undertaken and which part of the country the provider is in, but it is highly likely that at least in some parts of the country and in some areas of law there will be a further decline in the number of providers and this will impact on the vulnerable clients served by committed practitioners.

In recent months, three particularly large providers have gone into administration – RMJ, IAS and Law for All. The Director of the Law Centres Federation has identified that law centres have very few reserves. It may be that not for profit organisations close down more readily because it is a rational decision to make when under financial pressure.

Equity partners in law firms face many financial pressures, not just the proposed changes in legal aid work. With difficulties obtaining overdrafts and with the competition proposed in alternative business structures, these are uncertain times. It is all too easy to underestimate just how much pain a small business owner is prepared to endure to keep afloat, but, however much sole practitioners and equity partners in law firms have been prepared to absorb in the past to keep their practices going (in deciding to close down a private practice many factors have to be taken into account including if you can afford to close down), there comes a point where they simply cannot afford to run a legal aid practice.

We ask the Ministry of Justice to undertake urgent research on the sustainability of the market and to defer the introduction of this unprecedented rate cut. This may only be a three or six month delay. Future Government plans are predicated on there being legal aid provision and face to face provision. A robust analysis now could prevent problems in future. It is difficult to coax people back into legal aid work.

It is important to note that since the introduction of fixed fees and the difficulty of reaching the exceptional cases threshold it is extremely likely that providers are not recording all work on files so caution will have to be taken in assessing information held by the LSC. Some sample files could be obtained and work carried out on them.

Quality

The profession has engaged with the LSC and MoJ and has absorbed many changes to the fee structures, including fixed and graduated fees. With constant downward pressure on fees, the profession has cut overheads, invested in technology and many have employed junior staff to deliver legal aid work.

There comes a point when fee reductions cannot be tolerated by a responsible profession delivering a public service – professionals have obligations which mean that they if they deliver a poor service or give negligent advice there are many personal implications. From disciplinary proceedings to being criticised in court, from fighting negligence cases to the stress for individuals of contesting allegations – there is no analysis by the Ministry of Justice of the problems professionals face when trying to deliver a cut-price service.

We fear that many excellent practitioners will walk away at this point. We do not know. But neither does the Ministry of Justice. What if the current proposals lead to a lack of providers? Once people leave legal aid work, very few return.

We fear that it will be those providing the better quality advice who will be unable to afford the cost of staff and necessary supervision.

We ask the Ministry of Justice to assess what reduction in quality will be delivered by the proposed fee cuts?

Expert fees

The Ministry of Justice should explain how the level of expert fees was set. While many practitioners believe that expert fees should be reduced, there has to be a level of fee that enables appropriate experts to be appointed. In housing cases for example the proposed fee for surveyors is below the rate charged by the Health and Housing Group of Independent Environmental Health Officers. These are experts in understanding the legal requirements to enable a case to be brought and at giving evidence. Many surveyors do not specialise in disrepair claims and the fear is that their expertise will not be appropriate. It is not clear if they are covered.

One of our members commented on expert fees:-

‘Just to confirm that the capping of the surveyor expert fee at £225 will probably end effective County Court litigation for tenants with substantial disrepair in this borough and surrounding area unless the existing surveyor experts will wear it’. They were not hopeful.

We ask the Ministry of Justice to outline its case for assuming that the right experts will be available for these fees.

LSC Contracts

Practitioners did not tender for contracts at these prices. Although the standard contract terms may ostensibly provide that fees can be changed, no-one would reasonably have anticipated such a significant cut. Practitioners would have anticipated a contract that allows for increases to take account of inflation rather than reductions especially given the relatively recent introduction of e.g. graduated fees. At the very least, practitioners had a legitimate bidding expectation that the fee rates would not reduce for the length of the contract.

In terms of contract efficacy, LAPG would argue that at least a year’s notice should be required for such changes so that current financial year annual budgets and fee projections for existing suppliers do not have to be adjusted.

We note LCCSA’s concerns about the need for a six week consultation and that the Funding Order is not a valid means of amending the contract.

Planning

Since Carter produced his report, indicating that bigger firms were the way forward, there has been great difficulty for the profession in working out how to plan for business survival. Large firms are paradoxically facing difficult times because of the way that work is allocated (‘new matter starts’ rationing). So small niche firms may be the most robust model for the future. Initiatives are pushing in different directions. However even now, it is difficult to work out which model may be the most likely to survive.

One of the ways of ensuring success in the past has been to deliver a good quality service. However with the limited new matter starts available, practices that use up their allocation (if

there are no more new matter starts allocated to them in the procurement area) have to send clients to competitor firms. There is no true market when there are NMS and allocation.

Conclusion. LAPG urges the Government to acknowledge that this proposal to reduce a public service is a rash and irresponsible step into the unknown. There is no evidence that practices (private and not for profit) can sustain this cut; indeed recent closures suggest the opposite. Our view is that no reduction is sustainable because many areas of law are already funded at 1994 rates. Rents, rates, salaries, I.T. expenditure – none of these is available at 1994 rates.

We call on the Government to defer any fee reductions until LASPO is through Parliament, particularly to enable the profession to identify what areas of law will remain in scope. By bringing these fee cuts in now, the Government may be faced with the loss of more providers than they have assessed.

Let the family/family and housing tender take place to assess numbers likely to drop out.

Most importantly, let the Parliamentary process run its course so that the outlook is clear. Give the 3000 or so providers who are left time to reflect on the prospects of survival so that they have time to protect clients and make the appropriate decision which may be to wind up in an orderly fashion, leave legal aid work or merge if they cannot see a viable future.