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Rt Hon Kenneth Clarke QC MP
Lord Chancellor & Secretary of State
Ministry of Justice
102 Petty France
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7 February 2011

Dear Lord Chancellor,

Re: Response to Green Paper 'Proposals for the Reform of Legal Aid in England and Wales' from Legal Services Commission Board

We recognise that LSC staff have been involved in the development of the proposals contained in the Green Paper 'Proposals for the Reform of Legal Aid in England and Wales' and we welcome the continuing close working between your officials and ours.

Nevertheless we value the invitation that you issued, when you attended our Board meeting on 24 November, to us, as Commissioners, to write to you setting out our views, as it gives us an opportunity to comment directly reflecting our collective and individual experience.

At the outset, we would wish to acknowledge that Ministers have difficult choices to make in relation to legal aid in the current economic climate. In preparing this response, we have sought to frame our comments and suggestions so as to assist you in meeting your strategic objective of using the available funding to help those citizens most in need, who could not otherwise afford legal advice and representation.

We support your proposals around expanding telephone services and encouraging the use of family mediation. We also agree with the rationale for the removal of Private Family law from scope and the introduction of price based competition. We believe that an open and competitive market allows new entrants into the market and new models for legal services to develop which can benefit clients. Based on our experience, we have some comments to make around practicalities, which are attached in a separate note but, in terms of strategic direction, we support all of these.



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There are, in our view, three areas where we consider there to be more scope for savings than the Green Paper currently envisages, which are consistent with the overall thrust of Ministers' proposals. These are experts' fees, QCs remuneration and the tandem model of funding in family public law, which are described in a little more detail in the following paragraphs. Current expenditure in these areas is £155m¹, £42m for Crime QCs² and £83m³ respectively. We also believe that there is scope for further savings in high cost crime cases (non VHCC), expenditure in this area (excluding court of appeal) was £627m in 09/10).

On experts' fees, we would recommend undertaking a radical review of the current system covering the broader issues, including what circumstances justify the appointment of experts, the types and levels of expertise required, as well as the fee rates paid. Such a review could look at benchmarking the fee rates, so that, for example, medical experts would be paid at NHS rates and social workers at local authority rates; as a minimum, CPS and LSC rates should be the same. Our understanding is that this area does not require primary legislation and that therefore a review would not need to delay other changes being made. We recognise that this would need to involve wider justice partners, including the judiciary.

We accept that where the expertise of a QC is required for a case, then a higher rate should be paid. However, QCs are currently paid at a higher rate than other barristers when performing the same function and when there is no specific requirement for a QC. We do not consider that there is a justifiable reason for this differential in the non-VHCC payment regime. Reducing the fees would deliver savings to the fund. Once the Quality Assurance for Advocates (QAA) scheme is introduced it is the LSC's intention to link payment of cases to the appropriate QAA level.

In the tandem model of funding, a child is represented by a guardian (funded by CAF/CASS or CAF/CSSS Cymru) and a solicitor (in the majority of cases funded by legal aid). The guardian is responsible for identifying the child's best interests and instructing the solicitor, who deals with the legal aspects of the case. Costs have increased dramatically in this area of law in recent years. We consider that changes to the funding arrangements could be achieved either through the removal from scope of child representation in certain public and private law family proceedings, so that the guardian is solely responsible for representing the children's best interests to the court or through the transfer of funds to CAF/CASS to provide combined guardianship and legal representation to the child where they consider it appropriate to do so.

We would also like to comment on the linked strategic issues of quality, access and engagement as they all impact on clients.

On quality, LSC has already made clear its intention to use a QAA scheme, providing it meets our minimum requirements, as the contractual basis upon which advocates wanting to practise in publicly funded criminal defence work demonstrate their competence. Given possible concerns about the impact of the Green Paper proposals on quality of advocacy, for example under price competition and the implementation of 'one case, one fee', we consider that the MoJ and LSC should take opportunities to refer to the intended use of the QAA scheme as a means of addressing those concerns.

¹ Gross spend on disbursements was £232.4m in 2009-10. It is estimated that expert costs accounts for about two-thirds of disbursement spend.

² Figures in Family are not available as spend on QCs in family cannot be isolated.

³ Figures calculated on basis of care certificates issued to children

On access, there may be a number of compounding risks associated with current proposals on civil fee cuts; the expansion of telephone services; price competition, together with the particular vulnerability of Not for Profit providers given the likely withdrawal of other sources of funding, including from local authorities. Our experience would suggest that these risks might best be mitigated by realism about the pace at which we and the sector can implement and absorb change; while incorporating pilot and evaluation phases in the plans, so that we can ensure that they are robust. We recognise that the expansion of telephone services present specific issues concerning access that require careful consideration. We support the statements in the Green Paper that 'face to face advice provision will be available where cases are too complex to be dealt with appropriately by telephone or where the client's specific needs would not be met (for example, due to mental impairment)' and that 'service will be designed to minimise the risk that clients with emergency cases experience delay in accessing the help they need.'

The sector, wider justice community and interested bodies, including client stakeholders wherever possible, need to be engaged throughout this process, which is resource intensive but is critical to shaping what happens on the ground. Nevertheless we recognise that this does not eliminate the risk that the representative bodies, as member funded organisations, will mount campaigns (and litigation) to resist changes that threaten elements of their membership, even when those changes will benefit other sections of that same membership and the long term sustainability of the sector. In our experience, it will be imperative that, at the appropriate stage, the MoJ, with support as appropriate from LSC, takes the initiative in communicating the agreed programme of reforms, rather than letting those resisting change to set the terms of the debate.

In any proposed arrangements independent decision making needs to be robust, particularly in cases that concern actions against the state. It is the preference of Commissioners for there to be an independent tribunal to hear legal aid funding appeals. In our view this will safeguard independent decision making and ensure it is free from political interference. An alternative position would be to appoint a Statutory Office Holder to perform this function with appropriate statutory safeguards against political interference. The present Section 20 provisions whereby disclosure of information is a criminal offence provides a valuable safeguard which should be retained if the government chooses the statutory officer role.

We know that LSC staff are committed to working with their MoJ counterparts to plan and implement the legal aid reforms that Ministers decide on, following the current consultation. As Commissioners we will do all we can to support them in this.

We have noted that the consultative Wales Committee is responding separately and so we do not intend to cover any Wales specific issues here, beyond noting that it has been important to recognise the differences between England and Wales, including the increasing number of laws passed directly by the Welsh Assembly Government (WAG) in for example health, mental health, education and housing, which impact on legal aid. The Commissioners recommend that the work of the Wales Committee is structured as a civil justice advisory forum for Wales, supported by MoJ officials with a policy brief for civil matters, thus ensuring transparent and inclusive arrangements that recognise the specific needs of Welsh clients.

We hope you will find this response (and the attached annex) useful.

If you would find it helpful, I would be very happy to meet with you to discuss any aspect of the response in more detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bill Callaghan', with a large, stylized flourish at the end.

Sir Bill Callaghan
Chair
Legal Services Commission

ANNEX

Note on Practical Issues & Concerns

1. Financial stewardship

LSC has necessarily had to focus on improving its financial stewardship of the legal aid fund this will need to continue into Executive Agency status. Delivery of robust new systems such as the Integrated Delivery Programme (IDP) are important from both a financial and business efficiency viewpoint. The implications of this on the proposed legal aid reforms are:

- Timing/resource conflict with planned work to strengthen financial controls and the implementation of IDP– this needs to be addressed through close liaison over the implications of the proposals, including any post-consultation changes (particularly in relation to system supported changes) as timetables are developed
- Increased financial control risk, for example, in evidencing eligibility under the minimum capital contribution proposals – this needs close working on designing a process that is robust and minimises complexity
- Additional system changes that may delay modernisation of LSC's increasingly fragile legacy systems, which are contributing to the Fund Accounts Audit Qualification.

2. Realistic timescales

Our experience in recent years has shown that working to unrealistic timescales has increased risks and resulted in poorer outcomes, as well as putting those most closely involved under considerable pressure (leading to more human errors being made).

We recognise the importance of securing the fund savings that are anticipated from some of the proposals being made but would note that a rushed implementation that may have to be halted (for example, in the event of a successful judicial review) and re-started may, in practice, mean that savings are realised later than they would have been under a more prudent initial timetable.

3. Piloting and evaluation

Constrained timescales have, in the past, tended to squeeze the time available for piloting, for which LSC has been criticised by the National Audit Office and the Public Accounts Committee. In particular, our plans for 'Best Value Tendering' (price based competition) in 2009 triggered unprecedented levels of feedback about the pace of the proposed roll-out and the need for a comprehensive evaluation of the pilot and operation of the service post-implementation. In the light of that experience, the timetable set out for crime price competition appears to be very ambitious, which may increase the resistance that will be mounted against what is being proposed.

4. Managing market entry/exit

The scale and scope of the changes being proposed are likely to result in some new entrants to the market (bringing service innovation with them) and some existing providers exiting from the legally aided market (including some Not for Profit organisations). These

processes need careful management and effective communication, if adverse impacts on clients, access and wider stakeholder confidence are to be avoided.

5. **Viability of 'Not for Profit' (NfP) bodies**

We have noted that these may be particularly threatened by the changes proposed, as these will coincide with funding reductions being made elsewhere. We consider that it would be a retrograde step to move NfPs away from being held to a standard contract (for example by reverting to grant funding), as this would reduce quality and the value for money improvements that we have secured through a focus on contract compliance and delivery of specified work to a required standard.

We believe the Government should look at the funding of NfP organisations collectively by the public sector to ensure that these valuable advice agencies are maintained at an appropriate level.

6. **Public procurement processes**

Following good procurement processes is important if we are to secure best value, for example, in expanding telephone services and in letting new civil and crime contracts. There is a limit to the capacity to manage multiple processes in parallel successfully.

As a result of the recent Public Interest Lawyers' vs LSC Judicial Review, we also have to build into any future tendering timeline, completing the process of verifying (that successful tenderers have not made misleading statements in support of their tender) before contract award.

7. **Provider sustainability**

Evidence on provider viability is limited, nevertheless we have concerns that fee cuts may result in market failure and premature exits from the market, where, for example a firm or Not for Profit organisation becomes insolvent.

To date, where this has occurred in isolated cases, we have been able to manage pro-actively the process of redistributing work to other providers, so as to minimise the impact on clients. There are potential risks around our ability to ramp up that activity sufficiently to cope successfully in the event of a significant market failure or sequence of insolvencies, without impacting on client interests.

8. **VHCC Assessor**

We have some concerns about the practicalities of the proposed VHCC assessor role and whether it would benefit fund control. There would also be additional administrative costs associated with this proposal which we believe would have an adverse impact on the fund. Our experience of judicial assessors has been that they are less likely to refuse funding than LSC counterparts.

9. **Eligibility and fee collection**

We would wish to see providers being charged with responsibility for the collection of any minimum capital contribution or fee, so that LSC would not get drawn into the complexities of administering and accounting for these sums. We would also hope that standardised requirements for evidencing clients' means in such circumstances can be designed and agreed, so as to minimise the added burden of satisfying audit requirements.

10. **Scope changes – boundary issues and exceptional funding**

Some of the scope reductions will leave LSC to make judgements (based on guidance) to determine boundary issues, particularly in family (where cases with an element of domestic violence will be within scope), housing (where the disputed issue may result in homelessness) and education (where the case may involve elements of discrimination). In addition some cases (particularly under Article 6 ECHR) may qualify via exceptional funding. In each of these categories, there is a risk that the administration costs of considering such cases (and defending challenged decisions in court) could erode revenue savings that MoJ has committed itself to in SR10.

11. **Family Mediation**

While we are supportive of the proposals, we also consider it is important that parties have access to legal advice in support of mediation where it is required, in order to support the reaching of agreements and to make any such agreements legally binding, either by drafting a formal signed contract or by turning the mediation agreement into a court order which is then enforceable through court procedures. We recognise that not all cases will require substantive legal advice and criteria as to when such advice is appropriate would need to be agreed.

ENDS

