

From the Chief Executive
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Dear Neil

Response to Consultation Paper

We welcome the opportunity to comment on this consultation.

Introduction

1. The Legal Services Commission, under the terms set out in the Access to Justice Act 1999, funds the representation of qualifying defendants in the courts in England and Wales at a cost of around £1.2bn a year. Total legal aid expenditure is £2bn annually with the balance spent on family and civil issues.
2. The LSC broadly supports the establishment of a sentencing commission and sentencing framework as we believe greater certainty in sentencing has the potential to reduce legal aid expenditure in a number of ways, including: by ensuring greater consistency in the application of the interests of justice test; by reducing the number of cases in which the defendant would qualify for free representation and; by, perhaps, encouraging more defendants to plead guilty and at an earlier stage.
3. Ensuring legal aid expenditure is focused on those who need it most (because they are genuinely at risk of a custodial sentence for example) allows us to make sure funding is available to deliver access to justice in areas of highest priority across the justice system as a whole.
4. We do not propose to comment on the detail of the process at this stage.

Interests of Justice Test

5. The application of the Interests of Justice test (as set out in the Access to Justice Act) establishes whether or not a defendant, bearing in mind their own circumstances and the circumstances of their case, has a right to publicly funded representation in the interests of justice. (There is a separate test to assess whether a defendant passes on means.) The test is carried out by HMCS staff under a service level agreement with the Legal Services Commission.



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6. One of the criteria for the granting of legal aid is that 'it is likely' that the defendant will lose their liberty. The 'likely' element can be hard to interpret by HMCS staff bearing in mind the complexity of the different elements – such as previous convictions and character - that affect the likelihood of a custodial sentence.
7. The cost of administering the process is around £7.6m a year. Greater certainty over whether or not a sentence was likely to be custodial would allow greater clarity of the administrative process thereby potentially reducing costs. It would also be likely to have the benefit of speeding up the grant of representation to the benefit of all court users and the whole justice system.

Reducing volume of cases funded by legal aid

8. Having passed the Interests of Justice test the LSC funds around 550,000 cases a year in the magistrates' courts. It is likely that in at least some of these cases a representation order would not have been granted if there had been greater clarity over the likelihood of a custodial sentence.

Reducing cost of cases funded by legal aid

9. It may also be the case, both in the magistrates' court and in the Crown Court, that greater certainty in sentencing would have the potential to reduce contested trials and increase early guilty pleas. The earlier the defendant pleads guilty the less the case tends to cost the legal aid fund. There would of course be benefits for the wider CJS.

Non-custodial sentences

10. The consultation paper suggests that a structured sentencing framework should encompass both custodial and non-custodial sentences and find an appropriate balance between the two. Where proposals emerge around non-custodial sentences, such as community orders, that, particularly in their breach, have the potential to bring the offender back before the court, where representation may be required, the impact on legal aid costs will need careful analysis.

I hope these comments are helpful. If you would like to discuss any aspect of this response in detail, please contact Freddie Hurlston, Head of Criminal Justice Initiatives at the LSC, on 020 7759 1079.

Yours sincerely



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Legal Services Commission