Haldane Society of Socialist Lawyers

Response to the 2017 Consultation on

"Litigators' Graduated Fees Scheme and court appointees"

About the Haldane Society of Socialist Lawyers

This is the response of the Haldane Society of Socialist Lawyers to the Government's consultation on further reforms to the Litigators' Graduated Fee Scheme and Court Appointees.

Since its foundation in 1930, the Haldane Society of Socialist Lawyers ("**the Haldane Society**") has provided a forum for the discussion and analysis of both national and international law and legal systems from a socialist perspective. The Haldane Society is independent of any political party but has trade union and labour affiliates. Its membership consists of qualified lawyers, academics, students and legal workers, as well as others with an interest in socialist legal issues.

The Haldane Society is an active member of the European Association of Lawyers for Democracy and Human Rights and the International Association of Democratic Lawyers.

For more information on our work, see www.haldane.org. Our previous consultation responses in relation to recent legal aid reforms can be found at on our "Consultation Responses" page.

General Observations

The consultation is inadequate in that it fails to address the central problems of the LGFS: it is systematically underfunded, and in the absence of any linking of fees to RPI there is an annual real-terms pay cut. This system is unsustainable. Fees are set at such a low level that many smaller criminal defence firms have already been driven out of practice, leading highly trained and qualified people to unemployment.

The following are necessary at a bare minimum to prevent the system moving towards a wholesale collapse due to exodus of skilled practitioners:

- An increase in fees for defence litigators to address the poor remuneration for small to medium sized firms;
- Index linking of rates to keep pace with inflationary rises in the cost of living and, by implication, the staff and supplier costs (currently predicted to be 2.7% by the end of 2017).

The proposals are to delay further the second 8.75% fee cut for defence litigators, and implement a new way of assessing fees. The proposal aims to depart away from using Pages of Prosecution Evidence ('PPE') as an indicator for the levels of remuneration for cases where the evidence served is over 6,000 pages. We are concerned that the consultation has not addressed whether or not the changes to the PPE scheme will rule out entirely the second fee cut of 8.75%.

We cannot accept a change in the structure in a move to continue to drive down fees for litigators, before imposing a further 8.75% cut in fees. This is not justified. It appears that the reforms to PPE and capping of court appointees' costs are a precursor before the final 8.75% fee cut.

For the avoidance of doubt, anything other than an immediate rise in litigators' fees will lead to continuing damage to the criminal justice system and an exodus of skilled practitioners.

We also do not accept the consultation's basic premise that the proposed cuts are necessary to reduce expenditure to 2013-14 levels. On this issue we note and adopt the points made in the LCCSA's response to the consultation; in particular that total criminal Legal Aid spend has fallen from £950m in 2013/14 to £878m in 2015/16 and £858m in 2016/17 (including projected figures from the first two quarters).

Combined spend on LGFS and VHCC in the same period comes to £348m in 2013/14, £367m in 2015/16 and £342m in 2016/17 (including projected figures from the first two quarters), demonstrating that expenditure relating to solicitors' work has remained consistent.

We are also deeply troubled that, if returning expenditure to 2013/14 levels is the real motivation for this consultation, the final date for responses has been set one week before the final figures for the 3rd quarter of Legal Aid spend are due (31 March 2017). These figures

would clearly be relevant to those wishing to respond to the consultation and could have a significant impact on the Government's decision whether to proceed with the proposed cuts. Refusing to delay the deadline for responses, so that these figures could be considered, inevitably creates an impression that the Government is deliberately hiding these figures.

Responses to Consultation Questionnaire

*Do you agree with the proposed reduction of the threshold of PPE to 6,000?**

No. The LGFS method of payment by page count was introduced by the Legal Aid Agency to simplify the system of assessment and payment. PPE is a marker of complexity, within the case. The increase in the served evidence allowed as PPE is a result of recent costs judgements overturning the Legal Aid Agency's inability to apply their own rules. When the LGFS scheme was modelled the PPE graduation was designed to reflect this additional work. The proposed reduction to 6,000 is completely arbitrary, with no basis or connection with the original modelling of the LGFS.

The proposal that the remuneration of work for beyond 6,000 pages can be covered by special preparation is to misunderstand the purpose of special preparation. Special preparation attempts to remunerate lawyers for ***analysing*** the additional material. It does not remunerate us for the actions that we will have to take as a result of the analysis of the material (for example, taking further instructions from the client, instructing counsel, tracing and interviewing witnesses, instructing experts).

We are concerned with the proposals that the work involved in reading PPE between 6000 – 9,999 can be remunerated through a claim under special preparation as this is not a feasible solution. The reduction of the PPE threshold from 10,000 to 6,000 will de-incentivise firms to consider served and used evidence. It is inequitable to expect lawyers to work beyond 6,000 pages in the hope that they may or may not be paid for the work properly done.

We ask that the evidence underlying the MOJ's reliance on 'anecdotal evidence from caseworkers that large volumes of served material can be less relevant or are capable of being searched electronically' is understood as anecdotal. The culture of firms and their practices may vary; in our view, client care and the proper preparation of cases are paramount. The

proposed changes seek to create an overall reduction in fees; before imposing the final cut of 8.75%.

Any reforms to take into account the totality of evidence should also include counting the pages served. This is because the principle work carried out by litigators includes considering the material, taking further instructions from the client, instructing counsel, tracing and interviewing witnesses and instructing experts. At present, cases are so poorly paid that any further cuts attempted will threaten the operation of small to medium firms who produce high quality work, and will also threaten access to justice.

Q2. If not, do you propose a different threshold or other method of addressing the issue? Please give reasons.

No

Question 3. Do you agree with the proposed capping of court appointees' costs at legal aid rates?

No. The use of means testing by the Legal Aid Agency in order to provide legal aid for criminal matters has reduced access to legal aid for those who work, and has led to the use of court appointees. The capping of court appointees' costs at legal aid rates is to indicate that legal aid rates are sufficient as remuneration for the work of a fully qualified solicitor in England and Wales. It is clear that the current rates for work under the legal aid contract are below the market rates for the general provision of legal services. Cross-examination is a task often involving some of the most difficult witnesses; as such any uplift is appropriate. The use of Section 36 to appoint lawyers should be done at the rate that adequately remunerates the conduct of work where a lawyer is appointed to consider and cross-examine a witness.

Do you have any comments on the Equalities Statement published alongside this consultation and / or any further sources of data about protected characteristics the MOJ should consider?

The impact of the reforms will to reduce the remuneration rates for work carried out under the legal aid contract, particularly in complex cases. It is clear that the Equalities Statement does not consider the impact of the proposals on firms operated by BAME providers; which are usually small to medium sized firms. The disregard by the MOJ of the protection of diversity within the profession will further the difficulties clients will have in their ability to choose a

firm of their choice. BAME-led providers generally capture a niche market involving a particular ethnic or racial group without the need for expensive translation services, the resulting cost saving of which is passed on to the Legal Aid Agency. To remove the small to medium sized firms that provide an excellent service through imposing further cuts or restrictions on fair remuneration is to prevent the advancement of equality of opportunity for lawyers from BAME backgrounds, and the ability of choice for clients.

In addition, the special care of clients who cannot communicate in English has not been considered either. The change to the LGFS scheme, in particular the PPE will not reflect the increased demand on time in dealing with minority clients who require more time from their legal team to understand the case and provide instructions.

Further Observations

We note that the Impact Assessment failed to consider fully the effect of the proposed policy on small/ medium sized enterprises and microbusinesses. These proposals will disproportionately negatively affect the smallest firms. We invite the Ministry of Justice to review the Impact Assessment to correct this error.

Haldane Society of Socialist Lawyers
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