The Bar Council

Bar Council response to the Legal Aid Agency's "Consultation on the proposed transfer of the assessment of all civil legal aid bills."

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) regarding the consultation[1] on the proposal for the transfer of the assessment of all civil and family legal aid bills of costs, other than those involving a detailed inter partes assessment, from Her Majesty's Courts and Tribunals Service (HMCTS) to the Legal Aid Agency (LAA).

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. This response has been drafted by members of the Bar Council's Remuneration Committee. Among the contributors are civil and family legal aid practitioners, including both leading and junior counsel in self-employed practice, clerks, and in-house counsel.

[1] https://www.gov.uk/government/consultations/civil-legal-aid-bills-consultation

5. We are mindful that the background to this particular consultation arises following an earlier decision of the Ministry of Justice ('MOJ') / LAA in June 2020 to implement these changes as matter of principle and in practice, without any prior consultation. The Bar Council responded to that decision in a document which can be found here: https://www.barcouncil.org.uk/uploads/assets/e4930dbf-ee41-4a9c-be52d7ae887a678d/Consultation-on-Amendments-to-the-Cost-Assessment-Guidance.pdf

6. The current proposal is to make the June 2020 changes permanent. Our overriding position is that it is too early to tell whether the changes that have already taken place should be made permanent, and whether the prior existing system of court based legal aid costs assessments be completely abandoned.

Question One - Do you agree with our proposal to transfer the assessment of all Court Assessed Bills to the LAA? Please give reasons for your view.

7. **No**. The short reason is that there is insufficient data available to make a value judgment on whether the proposal to fully transfer all such assessments to the LAA will be a better future outcome for our members. It is *possible* that the proposals may lead to more efficiencies and better outcomes, but presently there is no evidence to support that conclusion. This consultation is somewhat premature.

8. Our **headline submission** would be that the LAA should continue to run their proposed new system in parallel with the existing system within HMCTS, giving practitioners freedom of choice as to which system they elect to use to assess their costs. Then, after a reasonable period, practitioners and their representative bodies will be in a better position to provide informed feedback based on actual data.

9. It can be taken as a given that all barristers working within the legal aid system would greatly welcome the certainty of fees being paid more quickly. We recognise and welcome that one of the LAA's stated ambitions in June 2020 was to ensure speed of payments in circumstances where courts were temporarily closed owing to Covid-19. Whereas judges who lacked an IT infrastructure on a par with those enjoyed by the LAA, it was said by the LAA that LAA in-house assessors were more capable of working remotely on costs assessments than court-based judges. Nevertheless, our difficulty is that if this change is made permanent at this stage and the changes do not work out for the best in the medium to long term it is highly unlikely that they will be reversed. Indeed, it may be impossible in practice to do so for the reasons that are developed below.

10. We now take the opportunity to make the following observations:

10.1. Under the existing system, Judges have been impartial tribunals on all matters including the assessment of publicly funded costs. Our members are concerned about the perception that the LAA has a vested interest in the outcome of assessments of costs, because plainly if a costs claim is assessed down by the LAA on an internal assessment, the agency or departmental budget which stands to benefit from a lower payment out to a legal professional's costs is the LAA's own departmental budget.

10.2. As to the question of efficiency savings, we have considered the updating material published on or about 8 April 2021 when the consultation deadline was extended. The position described by the LAA in its updating material appears to be as follows. First, the LAA will save money (by not having to pay court fees to HMCTS). Secondly, the LAA says that there will be no further internal or external funding resources allocated to the process of the LAA assessing bills, now or in the future. The LAA suggests this is not needed because the LAA already check HMCTS' bills and therefore argues that the process of assessing bills rather than checking HMCTS's assessments will be a like for like re-use of existing resources. We consider this may be optimistic. We predict there is likely to be a difference in practice between an LAA caseworker *assessing* a bill, which involves exercising a degree of judgment, compared to *checking* the figures of a judge's existing assessment. We are somewhat surprised that it is thought that the two functions are so comparable that this change can be implemented without any additional resources. In our view, this adds to our call to not make these changes permanent until greater data is available to see how the proposed new system is working. In short, the impact of the proposal on outcomes of publicly funded assessments remains to be seen.

10.3. There is also the question of expertise. Judges who regularly deal with the assessment of publicly funded costs have not only built-up experience of dealing with these matters from years on the Bench, they came to the Bench with the prior experience of having practised either as a solicitor or a barrister prior to becoming a judge. They are therefore highly likely to have had wide familiarity with the assessment process. Once that link of experience is broken away from the assessment system, it may never be repaired. Judges will gradually lose the experience of dealing with publicly funded costs. The question remains to be determined – how capable will the in-house LAA assessors be of fulfilling the task formerly provided by experienced judges in the long term? We simply cannot tell. The updating information from the LAA dated 8 April 2021 does not provide much more information. While the independent cost assessors are said to be experienced solicitors or costs lawyers, what of the normal in-house LAA costs assessors who presumably will carry out the vast majority of day to day assessments? Several questions arise. What training will they receive? How experienced are they going to be? What will be their pay and retention rate?

Absent expertise and retention, are they collectively going to be capable of building up the knowledge basis that the judiciary presently command?

10.4. On the face of it, if this proposal is to take place in whatever form (see our suggestions below) it would in any event appear wise for the LAA to seek the assistance of existing costs judges to train their staff. That said whether it is desirable to ask judges to give up their time to teach their successors how to do the same function the judiciary already perform quite satisfactorily is another matter.

10.5. Remaining with the question of expertise, we have no real information or data about the capability and expertise of the LAA staff who will conduct first assessments, nor of the Independent Costs Assessors (ICAs). As set out at 10.3 above, the judiciary *do* have this expertise, because they deal with complex cases on a day-to-day basis and they are well placed to determine whether a case requires an uplift on grounds of complexity, or not. Ultimately, we do not know what training will be provided to LAA officers and we therefore cannot predict whether they are going to be able to replicate in the medium to long term the current experience and capabilities of the current costs judges. We therefore are bound to treat the proposal with caution until more data becomes available.

10.6. We would propose that whatever the eventual outcome of this consultation is, the LAA in assessing public funding costs should adopt the current practice favoured by district judges, namely of conducting a preliminary assessment on the papers of which the receiving party can request a more detailed assessment if they disagree with the amounts assessed.

10.7. The previous point concerning the existing practice of requesting a detailed assessment leads to the question of whether practitioners will be remunerated for challenging preliminary assessments, or indeed appealing to the ICA a final assessment. Put shortly, it would be an impediment to practitioners and a further disincentive to practice in this area of work if, having been informed that their costs have been assessed down, practitioners are expected to give up further valuable time for free in order to challenge that assessment. We therefore consider that a mechanism for fair remuneration for working on the assessment process (including the exercise of any right of appeal whether to an ICA or a judge at HMCTS) to be *crucial* to the fair and successful implementation of these proposals.

10.8. The concerns highlighted above - particularly as to perception of vested interest, expertise, and experience - underscore the critical importance of an independent appeal procedure where a dispute arises over an assessment. One potentially acceptable solution would be for ICAs to be serving members of the

judiciary. This may well be an acceptable compromise in the longer term. We would be hopeful that long term data may favourably support a system where the LAA conducts a first assessment, but practitioners have a right of appeal to a costs judge based within HMCTS. This has attractions in that if the MOJ is correct and its aims are borne out in the long term, there may well be a quicker and more efficient 'first assessment' *by the LAA* – which may of course be satisfactory to practitioners and represent the end of the process – but ultimately practitioners can have confidence in knowing that 'the route of appeal' *lies to an experienced and impartial judge*, who would be the ultimate arbiter in the event of a disagreement. Provided again that fair remuneration is available to undertake an appeals process, such a proposal would in the long term seem to us likely to meet both the government's stated objectives, and retain the confidence of practitioners. Ultimately while we wait for the data to support this hypothesis, we suggest a holding position that the two systems run in parallel, as to which see our further comments below.

10.9. Notwithstanding the above comments, one other possibility or permutation suggested by our members is that publicly funded assessments above a certain level of costs should permanently remain with the judiciary for detailed assessment and should not be undertaken by LAA caseworkers in the first instance. It may be that there is evidence to support an increase in the threshold above which assessments are carried out by the judiciary so that they continue to be the primary assessors for more complex cases.

10.10. In terms of the right to and route of appeal, as noted above this will be of critical importance to the fairness of the scheme. It would be helpful if there was a clear definition of what a 'dispute' is for the purposes of an appeal. If an item is allowed in full, there will plainly be no dispute. But what if, for example, the LAA allows a lower enhancement to the hourly rate across the bill but allows all hours at the lower hourly rate? Presumably that is a dispute? Presumably if the claim is for 6 hours and the LAA allows only 3 hours' work, that is a disputed item? We suggest that it needs to be set out clearly when the right of appeal arises even where the LAA allows some items in full as part of a wider assessment.

10.11. Our proposed solution to all of the above is not to say that change should not happen at all. Rather, we propose a middle ground whereby the two systems run in parallel until more data is available on which to make an informed decision. In the meantime, practitioners should be given freedom of choice as to which system to use. This would also prevent the link of experience provided by the judiciary from being severed prematurely before the changes are made permanent and potentially irreversible.

Question Two - From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

11. A disproportionately greater number of legal practitioners from BAME backgrounds practice in civil and family legal aid work, when compared to the number of BAME barristers in private practice who do no legal aid work whatsoever.

12. This consultation does not appear to have published an Equalities Impact Assessment.

13. In the absence of knowing what the long-term effects of the proposed changes will be if made permanent, there is no sure way of knowing what the impact of these proposals will be on individuals with protected characteristics.

14. All the more reason, in our view, to run the two systems in parallel, with an additional right of appeal from an LAA assessment to a costs judge, until a body of data can be established to ascertain that these proposed permanent changes are in fact for the better, and whether they have a particularly adverse impact on people with protected characteristics.

Question Three - What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please give data and reasons.

15. We repeat the answer to Question 2 above.

Question Four. What do you consider to be the impacts on families of these proposals? Are there any mitigations the government should consider? Please give data and reasons.

16. This question does not appear to be directly relevant to the issues underlying this consultation.

17. Indirectly, it is conceivable that there may be an impact on the families of those legal practitioners who undertake legal aid work, if they are not properly remunerated for the work that they do, or are not paid promptly at the conclusion of each legal aid case they undertake.

18. It is beyond the scope of this document to argue whether or not that is presently the case. What we can say in respect of this consultation is that we have no data at the present time from the MOJ or the LAA to consider whether the effect of this

consultation – if fully and finally implemented – would change any pre-existing effects on families of legal aid practitioners, or any other families. It is simply too early to tell.

Bar Council
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