



# Association of **Lawyers for Children**

Promoting justice for children and young people

**Response of the  
Association of Lawyers for Children to the  
Ministry of Justice's consultation on the  
Community Legal Service (Funding)  
(Amendment No 2) Order 2011**

**9<sup>th</sup> August 2011**

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## **ABOUT THE RESPONDENT**

The Association of Lawyers for Children (“ALC”) is a national association of lawyers working in the field of Children Law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members.

Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children’s law, and several hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

- (i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
- (ii) lobbying against the diminution of such mechanisms;
- (iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the welfare, health and development of children;
- (iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people;
- (v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice. The ALC is automatically a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.

## **A. SUMMARY**

1. The ALC has not been consulted directly with regard to this draft order. It appears that a request for comment has only been made to The Law Society of England and Wales and to the Bar Council<sup>1</sup>.

2. We respond, nevertheless, since we wish to place on record our strong disagreement to the proposed fee changes in family cases, and to express our dismay that, despite the overwhelmingly negative response to such proposals received in response to the government's consultation on its proposals for the Reform of Legal Aid in England and Wales, the government intends to proceed with those fee changes.

## **B. TECHNICAL ASPECTS OF THE FUNDING ORDER**

We have no comments to make, since our reading of this is that the drafting of the order is indeed in line with the policy intentions set out in the Government's consultation response.

## **C. THE APPROPRIATENESS OF THE FUNDING ORDER PROVISIONS**

1. We have no specific comment in respect of the amendments in relation to expert fees, though the proposed amendment of paragraph 5(2) of the Community Legal Service (Funding) Order 2007 by addition of article 5(2)(e). We leave any further comment on this to the representative bodies for such expert witnesses.

2. Our position on expert fees remains as stated in our response to question 39 of the consultation, namely:

“39.1 We deplore the fact that this structure does not include fees payable to Independent Social Workers, who have

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<sup>1</sup> Letter from Catherine Lee, Director, Access to Justice, Justice Policy Group, Ministry of Justice to those two organisations dated 13<sup>th</sup> July 2011.

a crucial role to play in assisting the court, in the absence of proper assessments by the local authority, and proper “hands on” involvement of a Children’s Guardian as is so often currently the case.

39.2 Whilst we support there being a clear structure for fees paid to experts from legal aid, we do not feel able to comment on the hourly rates described as “benchmark”. Certainly the rates of payment requested and obtained by expert witnesses have risen dramatically during the last fifteen years. We are obviously concerned to ensure that expert witnesses are reasonably remunerated and continue to work in publicly funded cases, but remain concerned about the proportion of the family legal aid budget which is currently spent on experts. In considering the “market” for certain types of work, such as psychological reports in family proceedings, or specialist medical reports in care proceedings, what evidence is there that the percentage of reports funded by legal aid is so relatively small a percentage of overall reports prepared as to be genuinely susceptible to the argument “I won’t work for that level of fee”?

39.3 We agree that, whatever rates are eventually decided upon for individual categories of expert, the LSC needs to retain discretion to authorise that these be exceeded in “exceptional” circumstances, as envisaged in paragraph 8.16.

39.4 We would support proposals, which have been made now for some time, for the centralising of payments to experts directly through the LSC (as with counsel) subject to experts providing information to solicitors as to fees claimed (as with

counsel)<sup>2</sup>. This would enable the LSC to collate proper statistics and exercise fair and reasonable control over expenditure on experts' fees across the country.”

3. We note that the House of Commons Justice Committee's recently published report on the Operation of the Family Courts supports the proposal that the Legal Services Commission should take direct responsibility for payment of experts' fees, and we hope that steps can be taken urgently to implement this long overdue change.

4. So far as cutting family legal aid fees payable to lawyers is concerned, we note that the Government considers that these changes are “likely to be sustainable” - *Legal Aid Reform in England and Wales : the Government Response* Annex H, paragraph 11. This is on the basis set out in Annex F to the Response “taking into account all the available data”<sup>3</sup>. We note, however, that in considering the independent analysis submitted by The Law Society, prepared by Andrew Otterburn, the Government Response “has a number of issues about the data used in this particular report”<sup>4</sup>, and that “None of the other consultation responses contained any form of detailed numerical analysis on likely sustainability”<sup>5</sup>. One can summarise this by stating that the plans being put forward by the government are being advanced on the basis of research which the government itself considers inadequate, and without the government having commissioned (as it was invited to do during the consultation<sup>6</sup>) any research of its own.

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<sup>2</sup> This is essential to enable solicitors to keep track of the overall costs incurred in a case so that costs limits are observed, and applications made for extension to the limit when this becomes necessary.

<sup>3</sup> *Legal Aid Reform in England and Wales : the Government Response* Annex H, paragraph 11.

<sup>4</sup> *Legal Aid Reform in England and Wales : the Government Response* Annex F, paragraph 19.

<sup>5</sup> *Ibid.* paragraph 22.

<sup>6</sup> At the meeting of the Civil Contracts Consultative Group on 19<sup>th</sup> January 2011, when it was pointed out to the Ministry of Justice (who indicated to that meeting that they did not see it as their responsibility to gather this data) that the Legal Services Commission had a vast amount of data available to it through provider accounts and that accordingly it would be possible for the Ministry of Justice to carry out meaningful research on this issue.

5. We repeat the observations that we ourselves made in responding to question 32 of the consultation:

32.1 We strongly disagree with this proposal. We answer this question in relation to family legal aid fees only, and leave it to other specialist practitioner and interest groups to respond on non-family civil fees.

32.2 As an organisation we have been involved in virtually continuous negotiation with the Legal Services Commission/Ministry of Justice for over four years on the restructuring of family fees. Part 1 of the fixed fee programme came into effect in October 2007. Part 2, dealing with almost all the remainder of family fees, was agreed in October 2009, and would have come into effect in October 2010 had the family tendering process not been substantially flawed, and consequently overturned through proceedings for Judicial Review. It will be brought into force, we understand, very shortly. There are very few types of case which are not covered by these fees, and continue to be paid for at hourly rates.

32.3 Family fees have accordingly been “radically restructured” over the past four years. Given that a great deal of thought and effort has been put into devising these schemes and reshaping them in the light of consultations with representative bodies and others, we do not see how the undertaking of a further restructuring, so hard on the heels of the Part 1 and Part 2 restructuring, can be regarded as a reasonable option.

32.4 Nor can we agree to fees, including these recently negotiated fees, being cut by 10%. There has been no increase in the payment rates upon which those fees have been calculated for nearly fifteen years. They have, in effect, been progressively eaten away by inflation during that period of time. The result is that lawyers dealing with publicly funded family work are already poorly remunerated, and there simply are not the margins available to be cut further in the manner which these proposals contemplate. There are no “opportunities for further efficiency savings ...to encourage providers to be efficient and innovative”<sup>7</sup> of which we are aware, and the Impact Assessment is silent as to what these might be. To make these cuts will seriously damage the development and sustainability of this market.

32.5 If these proposals are implemented, access to family justice will, in our view, be irreparably damaged. We see no basis for the “Key Assumption” that “the market can sustain these reductions without adverse implications for supply.”<sup>8</sup> We note the identified risks that service quality may decline, that customer choice might be adversely affected, and that there might be shortages in the supply of legally aided services in the event of market exit<sup>9</sup> and that the relevant Impact Assessment contains the observation that “the probability of these risks materialising might be high in some cases.”<sup>10</sup> We note that “The extent to which these effects should be viewed as likely impacts instead of possible risks is being assessed further over the consultation

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<sup>7</sup> Impact Assessment IA No: MoJ 029, paragraph 14 (option 1)

<sup>8</sup> *Ibid.* Page 2.

<sup>9</sup> *Ibid.* page 2

<sup>10</sup> *Ibid.* paragraph 25

period”<sup>11</sup> but we have not been informed as to how this assessment is being conducted.

6. We have seen nothing in the Government’s Response to the consultation which causes us to alter any of the views expressed above, and we regard the proposals to go ahead with these changes as breathtakingly risky, in terms of the potential effect on the supplier base, and accordingly on the clients also. We wish to make it clear that we remain fundamentally opposed to these provisions.

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<sup>11</sup> *Ibid.* paragraph 25