



Last month, just before the consultation period for the legal aid reform green paper ended, Steve Hynes, director of Legal Action Group (LAG), and Carol Storer, director of Legal Aid Practitioners Group (LAPG), discussed various organisations' responses.¹

LAG and LAPG: in conversation about the legal aid green paper

Carol Storer: This feels extremely sad, closeted in LAG's offices surrounded by draft responses to the consultation paper on legal aid.

Steve Hynes: I know, at least train-spotters get out in the open air. I do not envy the civil servants who will have to crunch through these papers over the next few weeks.

Carol Storer: Yes, it will be an arduous task, as has been writing them. I am sure that everyone who decided to respond to the green paper would agree with that. In drafting LAPG's response, I found myself envying people who were only interested in responding on, say, one area of law; some consultations run to over 100 pages.

Steve Hynes: It has been a difficult consultation due to its wide range of questions. Think how much work it would be just to answer one of the scope questions, for example, relating to whether or not respondents agree with taking welfare benefits out of scope. And that is just one section of one question, and there are 51 consultation questions altogether.

Carol Storer: Looking at the responses we have (and at the time of writing we have, in some cases, seen almost final drafts) it looks like most people have responded vociferously on the scope proposals and also on the proposed telephone gateway.

Steve Hynes: If we start with the telephone gateway, Advice Services

Alliance (ASA) does not agree that there should be a 'single gateway to access civil legal aid advice' (question 7), stressing that clients need to be able to approach face-to-face providers they have used before and trust, or to whom they have been recommended. ASA accepts that some more face-to-face work could be carried out, but that it will vary depending on types of cases, characteristics of clients and availability of providers.

Carol Storer: Housing Law Practitioners Association (HLPA) stresses the importance of client choice. Not surprisingly, HPLA is worried about those without access to a telephone, for example, a street homeless person, and those who cannot afford the call charges. HPLA raises an important issue about those who cannot find the privacy to make telephone calls, for example, an abused spouse.

Steve Hynes: Justice says that telephone advice should be on a non-exclusive basis, for example, as in Ontario in Canada. Justice warns of the lessons to be learnt from there, for example, it is inappropriate for emergency cases and may not work for those with low language or communication skills. Justice recommends that any telephone gateway should be piloted first.

Carol Storer: LAPG is pleased to note that Resolution highlights what a radical proposal this is and how significant the impact will be on members and their clients. Resolution flags up that the

consultation is vague and lacking in detail. At LAPG we are calling for a consultation on this if the government does want to proceed because we think that this is one of the biggest changes ever proposed for legal aid and should not be brought in based on a few paragraphs in this consultation.

Steve Hynes: It is significant that Shelter, a provider of telephone advice services, which recognises the value and benefits that telephone advice brings, does not agree with the proposal. It lists the types of cases and clients in which telephone advice is not appropriate: urgent cases, complex cases, cases with a large amount of documentation, vulnerable clients, clients who do not speak English or simply those who prefer face-to-face services.

Carol Storer: Immigration Law Practitioners' Association (ILPA) believes that applicants who are unable to understand the complexities of their case will not be able to explain it and fears that people will not be able to get timely assistance. ILPA also fears that the telephone gateway would achieve no savings because it is simplest and quickest to meet a client, see documents and be able to ask questions. While ILPA sympathises with the difficulty people have in finding a provider, the association thinks that going through a telephone gateway will in some cases be more stressful. The importance of client choice

comes over as a major theme.

Steve Hynes: As does the impact the telephone gateway would have on providers. The equalities impact assessment on the provision of telephone advice, which was published with the green paper, estimates that the average reduction in income for solicitors and the not for profit sector providing face-to-face advice will be a staggering 75 per cent and 85 per cent respectively.²

Carol Storer: I am sure that we will return to the sustainability of the provider base and who will be left doing legal aid work.

Steve Hynes: Absolutely. Turning back to scope, we have been through a lot of responses and have not found any agreement to question 3, which is: 'Do you agree with the proposals to exclude the types of case and proceedings [including personal injury, representation before most tribunals, ancillary relief cases except where domestic violence is present, consumer and general contract, education, employment and welfare benefits] from the scope of the civil and family legal aid scheme?'

Carol Storer: The Association of Lawyers for Children (ALC) covers the ancillary relief and private family law categories. There are niche arguments about ancillary relief, for example, because of the statutory charge and costs order, and how little money will be saved, but ALC also raises a number of important themes: the role of lawyers at present not being recognised in the green paper, the lack of an evidence base for introducing these proposals and how mediation is not always an option. Sometimes people will not compromise or an unreasonable party prevents mediation working. ALC stresses that mediation is enhanced by proper legal advice and needs such advice to be fully effective. Mediated settlements need to be drafted into formal court orders to have legal effect and protection for the parties involved.

Steve Hynes: ALC raises another of the major themes, namely, the effect on the Courts Service of litigants in person.

Carol Storer: Yes, and another theme that recurs is relevant to taking private law children and family cases (where a domestic violence order has not been obtained) out of scope, namely, the lack of a definition of domestic violence.

Steve Hynes: Resolution has put a lot of resources into setting out the position with domestic violence and highlighted that it thinks that the Association of Chief Police Officers' definition should apply:

Extracts from LAG's response to the legal aid green paper

LAG does not accept that adequate alternative provision for debt advice exists in the not for profit and private sectors to cover the loss of legal aid for debt cases. We also believe that early intervention in such cases is essential to prevent the threat of homelessness due to housing debt. LAG is suggesting that the provision of debt advice services form part of the cross-government review of social welfare law services ...

Education: due to the repeated failures of local authorities to fulfil their obligations to children with special educational needs, it is essential that these cases stay in scope. LAG is particularly concerned about the disproportionate impact of this cut on children with disabilities ...

Employment: this is a complex area of law. The provision of legal aid saves tribunal time by ensuring cases are properly pleaded and prepared. This also assists in the conciliation process. LAG believes that to remove legal aid for employment tribunal cases would be a false economy and might well lead to more discrimination cases being funded under the exceptional provisions ...

Decisions on eligibility should be subject to an independent appeals process. LAG is concerned that without this, decisions would be challenged under article 6 of the convention and that there is the danger of the appearance of bias which would undermine the rule of law, especially as the MoJ would be making decisions on the funding of legal challenges to decisions in other arms of government.

'Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.' I think that the definition of the term 'violence' is something that the government will have to consider carefully. In *Yemshaw v Hounslow LBC* [2011] UKSC 3, 26 January 2011, Lady Hale said that the definition of violence does not just refer to physical violence, but to threats or other behaviour which might lead directly or indirectly to psychological harm (see also page 27 of this issue).

Carol Storer: One of our members made

a very powerful point that if there is a limited definition, women would be at risk in her area of Devon, where domestic violence workers at the local authority and large numbers of police are being cut.

Steve Hynes: Many organisations raise concerns about the effect of domestic violence if the proposals go ahead as they stand, especially because legal aid will not be available where undertakings have been given under the Family Law Act 1996. Resolution believes that more domestic-related applications will be contested.

Carol Storer: Yes, and there is the problem of a victim of domestic abuse being cross-examined in person by the perpetrator.

Steve Hynes: Lots of responses refer to the Norgrove Review because respondents consider that the family legal aid reforms are linked despite the legal aid green paper saying that they are not.³

Resolution also flags up the green paper on strengthening families, which is consulting on how to ensure that parents are able to access appropriate support and information at separation.⁴

Carol Storer: Going back to the scope cuts, ILPA does not agree with the proposals. ILPA looks at the government's test, ie, the importance of the issue, the litigant's ability to present his/her own case, the availability of alternative sources of funding, the availability of alternative routes to resolving the issue and the government's domestic, European and international legal obligations. On every count, ILPA finds that the proposals are flawed. Clearly, the government sees immigration as an easy target, but when you read the examples of clients who will be outside scope, it is hard to understand how the government can sustain its argument. One example is a girl who was sent to the UK when she was 12. The uncle she stayed with sexually abused her until she ran away from home. He was arrested when she contacted the police, and he was convicted of rape of a minor. The young woman only realised that she had no immigration status when she wanted to apply to university and had great difficulty sorting this out. She finally received legal aid advice from a good immigration lawyer on the basis of article 8 of the European Convention on Human Rights ('the convention'). However, the UK Border Agency refused her application and after threatening judicial review she was granted discretionary leave.

Steve Hynes: HPLA, like ILPA indeed,

raises a number of concerns because it is not clear what is and is not going to be in scope. HLPAs also stresses how many of its members put a lot of resources into being able to bid as a consortium or to deliver housing, welfare benefits and debt advice to win a contract. After all that work, indeed within weeks of the contract starting, the government brought out these proposals to take welfare benefits and much of debt outside scope. HLPAs questions if significant cost savings would be achieved.

Carol Storer: We agree on how serious some of the omissions are. HLPAs raises serious concerns about the proposal to remove from scope actions for wrongful breach of quiet enjoyment. It may be that the Ministry of Justice (MoJ) did not think that these were harassment and/or unlawful eviction cases, but many of these cases start out as an application for specific performance for re-entry to the tenant's property so do not seem to fit within the government's priority of keeping in scope actions to prevent homelessness.

Steve Hynes: Regarding welfare benefits and debt; it is quite staggering after all the input on holistic services that all welfare benefit advice is removed and all debt except where 'as a result of rent or mortgage arrears, the client's home is at immediate risk of repossession'.⁵

Carol Storer: At £22m, welfare benefits will be the biggest cut in legal help after family, which is losing £50m. According to the equalities impact assessment on scope changes, published with the green paper, potentially this cut will have a 'significant disproportionate impact on ill or disabled people, female clients and [black and minority ethnic] clients'.⁶

Steve Hynes: Many organisations picked up on this. They made the general point that despite the government's equalities impact assessment making it clear that groups protected by equality legislation would be affected adversely, it was still going to implement the cuts.

Carol Storer: Yes, some good general points were made. The Law Society said that it did not accept the government's reasoning behind the cuts, commenting that they were a 'political choice' which it regarded as 'utterly deplorable'. The Law Society also points out that there are cost drivers which are outside the control of the legal aid system, such as the recession.

Steve Hynes: I thought that Justice nailed it in its response with lovely understatement. Referring to the government's justification, in the impact

Extracts from LAPG's response to the legal aid green paper

Profoundly objectionable is the government's idea that people are rushing to litigation and that lawyers in the legal aid system are encouraging this. There are all sorts of checks and balances in place. The government itself knows this and we think that some of the rhetoric in the green paper is unhelpful ...

The proposals will lead to a massive reduction in the cost to the government of providing legal aid. The proposals are estimated to have a cumulative impact of £395m–£440m ...

Unlike many areas of public expenditure, legal aid spending under the last government was controlled and the rates actually paid to practitioners have been reduced both in actual and real terms. The programme of reform without these proposals was designed to bring in savings and if continued would have done so, for example, the introduction of Stage 2 family fees and the Family Advocacy Scheme.

assessment of the cumulative legal aid reform proposals, for the cuts to the scope of legal aid, ie, it had 'expanded beyond its original intentions', Justice said that there were 'indications of a shaky grasp of history' in the government's green paper.⁷ This, of course, is correct, as the bulk of what it is proposing to cut has always been covered by legal aid. Also, other areas of work, such as welfare benefits, have been included for nearly 40 years.

Carol Storer: I noticed that some of the responses are suggesting that if the scope cuts go ahead, this could result in a legal challenge under article 47 of the Charter of Fundamental Rights of the European Union which states:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

In its submission, the Law Society states that it 'comes as some surprise' that this has not been addressed by the government. The Law Society goes on to quote the case of *Airey v Ireland* App No 6289/73, 9 October 1979, which established that representation can be necessary to ensure access to the courts.

Steve Hynes: It will be interesting to see where this goes. LAG believes that the government has included the exceptional cases provisions to try to reduce the chance of challenges under international law. We fear that what might be established is a safety net legal aid service which could expand quickly, with unpredictable consequences for the legal aid budget and access to justice. We believe that it is far better to codify what the system covers rather than this being established by precedent.

Carol Storer: The cost of litigants in person is another important issue discussed in many of the responses. Resolution points out that court staff are unable to offer advice to such people. Resolution fears that rather than going to court, many people will stay married but live apart, leading to greater reliance on benefits and complications over inheritance and other legal issues.

Resolution also makes the point that other services will not be able to fill the gap left by the withdrawal of legal aid funding.

Steve Hynes: The assumption that other services are out there to pick up the pieces has invoked the ire of many respondents. HLPAs makes some strong points in respect of this issue. The government refers to local authority in-house services and the Local Government Ombudsman as ways to resolve disputes in housing law. HLPAs points out that such services 'are unlikely to be inclined to advise a client that their own local authority's allocation scheme is unlawful' and that while the Ombudsmen can help resolve disputes, their decisions are not binding.

Carol Storer: On a related point, I noted that one of LAPG's members says that they would rather have a levy on law firms that could go to legal aid than have trainees from large firms carry out pro bono work, which they consider is really only a marketing exercise.

Steve Hynes: Many respondents have discussed the barriers to using clients' account interest to supplement the legal aid fund. The Law Society, for example, observes that it is unclear how much could be raised in this way, and suggests that City firms which were forced to give up the cash they earned in interest to legal

aid might decide to curtail their pro bono activities. The London Legal Support Trust, which receives donations from City law firms, is against a compulsory, client-account-interest scheme.

Carol Storer: A strong general point made by the ALC and other respondents is that the government is really putting the cart before the horse in cutting scope before law reform. The Norgrove Review of family justice is not due to report until August this year; however, it is anticipated that a bill which will include the scope cuts to legal aid will go before parliament in the spring.

Steve Hynes: A final point from LAG: we think that decisions on eligibility should be subject to an independent appeals process. LAG is concerned that without this, decisions would be challenged under article 6 of the convention and that there is the danger of the appearance of bias which would undermine the rule of law, especially as the MoJ would be making decisions on the funding of legal

Extracts from the Citizens Advice response to the legal aid green paper

The prioritisation of early advice makes good economic sense in the overall fiscal context as:

- 'legal help' advice can prevent expensive litigation from arising;
- problems left unchecked can trigger other civil law problems and/or bring about ill health or family breakdown.

Citizens Advice developed a cost-benefit analysis which sets off legal aid expenditure against the savings to the wider public purse from early advice (legal help) interventions showing that for every £1 invested, the state potentially saves between £2.34 and £8.80.

Withdrawal of legal aid will lead to a significant increase in far more serious problems for both citizens and the state as:

- there is an enormous need, some unmet, for advice on issues [the] proposals would remove from scope;
- the alternative sources of advice cited are simply not available, suitable or accessible for the overwhelming majority of our client group;
- the voluntary sector and pro bono [work] does not have capacity to fulfil the need currently met by legal aid, in terms of the potential volume of people seeking help or the specialism required for more complex cases.

Law Society's suggested savings

In its response to the legal aid green paper, the Law Society has produced a comprehensive list of savings in the MoJ so that the proposed government cuts can be avoided; many of which would impact on the Bar's earnings.* This table is a summary of these suggested savings.

More efficient prosecutions/reimbursement of legal aid fund	£79m
A shift of cases to the magistrates' courts, with safeguards to preserve the right to trial by jury	£41m
Single fee for the Crown Court	£30m
Robust enforcement of merits test for private law family contact disputes	£29m
Capping of fees to no more than £250,000 in earnings per year by an individual from legal aid	£16m
Review of Very High Cost Cases	£14m
Limit on advocates' travel expenses	£10m
Reduce waste and increase efficiency in the Courts Service	£9m
Funding from seized assets of defendants	£9m
Other savings	£12m
Total from MoJ savings	£249m
Savings in the green paper agreed by the Law Society including the £100 contribution from capital	£62m
Other wider savings including a levy on the alcohol industry and making the financial sector pay for its own fraud cases	£158m
Total savings	£469m

*See Annex A of the Law Society's response, available at: www.lawsociety.org.uk.

challenges to decisions in other arms of government.

Carol Storer: I can only be impressed by the time and effort many respondents have put into their submissions. Many of the responses have been completed by busy practitioners who have brought a wealth of detailed knowledge to them. I hope that the government will take sufficient time to consider all the points which have been made.

Steve Hynes: I agree. What the government has proposed is so dispiriting. Legal aid has been subject to constant changes over the past ten years, and the dedication of the practitioners who have remained within it never ceases to amaze me.

Carol Storer: What is most frustrating about these proposed cuts is the way in which the government is trying to justify them. Much of the impact of the cuts, as Citizens Advice and other respondents point out, will be to prevent people from resolving their problems at an early stage, before court action is necessary.

Steve Hynes: I agree that this is all about saving cash. It is not about clients or access to justice.

Carol Storer: The green paper says that access to justice is a 'hallmark of a civilised society'.⁸ If these proposals are

implemented, I fear for the poor and vulnerable clients who currently rely on legal aid: for them, society is set to become much more uncivilised.

- 1 *Proposals for the reform of legal aid in England and Wales*, available at: www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf. The consultation closed on 14 February 2011.
- 2 Available at: www.justice.gov.uk/consultations/docs/eia-telephones.pdf.
- 3 Visit: www.justice.gov.uk/reviews/family-justice-intro.htm. A call for evidence formed the first part of the Norgrove Review. It ran from June to September 2010. The review panel's proposals will be published as an interim report in spring 2011. This will then be subject to public consultation to inform the panel's final report, which will be published in August 2011.
- 4 *The Centre for Social Justice green paper on the family*, available at: www.centreforsocialjustice.org.uk.
- 5 See note 1, paras 4.63 and 4.179.
- 6 Para 7.36, available at: www.justice.gov.uk/consultations/docs/eia-scope.pdf.
- 7 *Legal aid reform in England and Wales: cumulative legal aid reform proposals. Impact assessment*, available at: www.justice.gov.uk/consultations/docs/legalaidiacumulative.pdf.
- 8 See note 1, para 2.2.