



A menu of civil legal aid policy options for a new government

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What is this paper for?

This brief paper sets out some policy proposals regarding civil legal aid, with the assumption that the ultimate aim is a legal aid system that meets the public's needs, maintains a healthy profession and pipeline, contributes to an effective courts and tribunals system, and commands public support, at proportionate cost.

We recognise that the legal aid sector is in crisis and does need increased funding but we also acknowledge the political imperative to create – at least initially – policy which does not increase costs.

Each of the proposals is very briefly described and justified, with a rough estimate of its likely effect on current costs – saving, neutral or increasing. We are happy to discuss any of these in greater detail. They are derived from our own research and from a review of recommendations in other researchers' and organisations' publications.

They are divided broadly into demand side, supply side, and overarching policy levers, though clearly there are overlaps.

1 Overarching Policy

1.1 Demarketise the system

The Carter reforms in 2007 implemented 'market-based procurement' of legal aid, including provider offices bidding for work in competitive tenders. The policy intention was to move towards price competitive or 'Best Value' tendering, but that objective has (rightly) been abandoned.

Nevertheless, providers are still required to bid for contracts at dates set by the Legal Aid Agency every 3 – 5 years (and wait until such a tender before they can enter the market). They are then awarded an allocation of matter starts, and are audited through a number of different schemes to ensure that they have only undertaken permitted work (not considering substantive quality). These proposals aim to demarketise the legal aid scheme, and to remove the policy debris of the abandoned push towards price competitive tendering.

I **Contracts and periodic tenders for contracts should be abandoned.**

The Legal Aid Agency could continue to control entry to the legal aid scheme through a registration process, but the restriction on opportunities to enter means that i) providers are prevented from meeting need when they are ready to do so, and ii) providers are compelled to bid for contracts before recruiting caseworkers (as they do not know if they will receive a contract, but may then find they are unable to recruit. This means some providers are unable to undertake any legal aid work once awarded contracts. The Scottish Legal Aid Board permits entry by registration at a time of the provider's choosing, subject to meeting certain requirements. This allows for new providers to enter the scheme and begin meeting need when they are ready to do so. We understand that the LAA is already considering ways to do this.

This proposal is cost-neutral or cost-saving.

II **Matter start allocations should be abandoned.**

Matter starts were a means of rationing supply and of ensuring enough work for all bidders, as well as a step towards fully competitive tendering. This is no longer a valid purpose. The legal aid scope cuts have rationed supply. Providers are no longer required to use all (or indeed any) of their matter starts. Unused matter starts do not indicate there is spare capacity, and in civil legal aid it is very clear that supply is not meeting demand. They are at best a distraction and at worst they skew the market.

This proposal is cost-neutral.

III As part of a public service model, it should be feasible to return to the previous position of having different funding schemes for not-for-profit providers, as part of a **mixed model of provision**. This is consistent with the powers in the LASPO Act to make different arrangements for different areas of law or different geographical areas where the availability of legal aid is inadequate. This does need to be undertaken with careful consultation across the sector, taking into account how the work is undertaken in reality 'at the coalface'. It may be that a similar model is appropriate for some private firms and is not appropriate for all NFP providers.

This proposal could be cost neutral as a block grant for casework would eradicate the need for some of the administrative burden on both provider and funding authority.

1.2 Defragment the structure and routes of advice

Currently, legal aid is tightly limited, meaning **i)** a legal aid adviser is unlikely to be able to resolve a client's problem in full, meaning need is only partially met and problems recur; and **ii)** clients need to go to multiple advisers and organisations to address different aspects or stages of their problems. This could be improved by removing the competitive element of the current legal aid market, and facilitating a collaborative sector which encourages (and financially supports) co-working and, where relevant, merging of organisations. This might involve collaborative funding between central and local government and the third sector.

This proposal is likely to incur some cost in the short term but may be cost-neutral if collaborative funding models can be implemented between departments.

1.3 Use data and research

The Legal Aid Agency has no mandate to research need or unmet need or to plan to meet need, because these tasks were effectively delegated to the market. It is now very clear that the market cannot do this. The Scottish Legal Aid Board does research need, and the Legal Services Commission (predecessor of the Legal Aid Agency for England and Wales) did so. The legal aid authority for England and Wales should implement a research programme and adequate feedback loops to understand need and provision on an ongoing basis, not only in occasional major reviews.

This proposal is likely to incur some cost.

2 Demand Side

There is considerable scope to reduce need in civil legal aid without reducing access for those who continue to need legal services. Much of this work would have to take place outside the direct remit of the Ministry of Justice, by improving decision-making in other departments but pressure could be exerted through the MoJ's policy decisions.

2.1 Implement a costs regime in a wider range of jurisdictions

Currently there is no financial consequence for poor quality decision making across many areas of social welfare and civil legal aid, at least at Tribunal stages, and therefore no financial incentive for other government departments (such as the DWP and Home Office) to improve the quality of their decision making. If the costs recouped were deployed directly into the legal aid fund, it would reduce the additional spending needed.

This proposal is cost-saving for the MoJ.

2.2 Extend legal aid for civil damages claims

In the same vein, legal aid should cover claims for civil matters such as housing disrepair. The current position is that, once disrepair is remedied or the tenant is rehoused, legal aid falls away. A tenant cannot pursue the claim for damages; the Legal Aid Agency pays the tenant's legal costs and the rogue (or negligent) landlord pays nothing – neither damages to the tenant nor the tenant's legal aid costs.

This proposal is cost-saving for the MoJ, and also potentially supports the sustainability of the legal aid sector by allowing providers to claim their costs from the losing party at market rates rather than legal aid rates.

2.3 Implement free early legal advice for private family law cases

This should increase the uptake of mediation (where appropriate) and concurrently reduce the number of litigants in person in the family courts. The evidence has shown that, without legal advice, parties opt for court rather than mediation and that cases take longer when the parties are unrepresented. Early advice is therefore essential in order to realise the benefits of mediation.

This proposal is likely to be cost-saving within a short period of time.

3 Supply Side

The overarching objective for the proposals in this section is to increase provision and improve retention in the legal aid sector.

3.1 Reduce the administrative burden for providers

Currently providers of legal aid face an extremely heavy unpaid administrative burden which is disproportionate to both the payments they receive for their work and any savings or recoupments it generates for the Legal Aid Agency. Reducing the burden of case-by-case admin and the auditing regime would allow providers to do more casework in the same period of time.

Since this bureaucracy has been cited by several 'market leavers' as a reason for withdrawing from legal aid, this is also important for retention of provider offices and individuals. This could include earned autonomy (expanded self-grant powers and reduced audit activity) for high-quality providers. The Legal Aid Practitioners Group has detailed proposals for this.

This proposal is likely to be cost-neutral or cost-saving for the MoJ depending on the alternative accountability mechanisms adopted.

3.2 Fair pay

Fair remuneration for legal aid work is essential to stop the loss of provision. This does require a funding increase immediately to preserve the remaining provider base, and should include regular independent review of rates of pay. There are a number of recommendations around how fee rates and systems could be changed. Essential components include paying more promptly rather than in arrears when the case closes, reconsidering fixed fees, and returning to different funding methods for not-for-profits.

This is likely to increase costs in the short term, but should be offset longer-term by savings from other proposals.

3.3 Pipeline

Fund social welfare traineeships to ensure that there is a continued stream of new lawyers. It is difficult for individual organisations to afford trainees, particularly given that many leave once qualified because of the low wages. This could include adapting apprenticeships or funding supervision to support the highest quality organisations and those in the least-served areas.

This is likely to increase costs.

3.4 Addressing advice deserts

The Lord Chancellor has a range of powers in s2 of the LASPO Act to enable him/her to fulfil the duty in s1 to secure the availability of legal aid. These advice deserts are well-mapped across different areas of law and an incoming government should take urgent action using the existing powers to make alternative arrangements such as grant-funding or other support to retain or attract providers in desert areas.

This will increase costs but is essential to meet a statutory duty.

3.5 Co-location

There is indisputable evidence that people experience clusters of legal problems and that legal problems impact on health and other aspects of life. There should be a strategic approach to co-locating free and low cost legal services with other services (especially trusted services) like primary and secondary health care, libraries and schools.

This has set-up costs but could draw on integrated care funds.

3.6 Holistic provision

Alongside co-location, there should be a strategic approach to holistic provision which takes account of the 'user journey' from end to end, with 'warm handovers' between organisations where one cannot deal with all issues or all stages of a problem. This might mean combining Citizens Advice and Law Centres to ensure that everyone in the country has access to local facility where they can receive advice on all civil legal issues, from early advice, information and legal education right through to representation in court if needed.

This has set-up costs but should consolidate (and streamline) existing spending in many cases.

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