Response of Legal Aid Practitioners Group to:

Proposed amendments to the Costs Assessment Guidance in respect of Court Assessed Bills

1. About us

1.1 Legal Aid Practitioners Group (LAPG) is a membership body for firms and organisations with a contract to carry out legal aid work in England and Wales. Our members are private practice firms, not for profit organisations, barristers and costs lawyers. Our members carry out civil and criminal work and cover the whole range of business models from smaller, niche and/or sole principal firms to many of the largest providers of legal aid services.

1.2 In preparing this response we have consulted with LAPG members and the LAPG Advisory Committee which is made up of legal aid practitioners, costs drafts people and practice managers. We have incorporated all views expressed, as far as has been possible. However, we are of the opinion that due to the very short consultation period (two weeks plus an additional two days on request), there has been limited opportunity to properly consult with our members and as such, this response reflects that position. Given the importance of the proposed changes to existing processes we believe that the Agency should have consulted representative bodies on the policy change before seeking agreement from HMCTS and spent more time consulting with providers, via the representative bodies if necessary, on the proposed policy change and its potential implications for providers, particularly during this period of extreme financial instability and uncertainty.

1.3 Along with this response, and in order to avoid repetition, we agree with and endorse the following contributions from other parties who are members of LAPG:

- The Association of Costs Lawyers Legal Aid Group response and table of amendments
- Irwin Mitchell Solicitors

We also agree with and endorse the response from Resolution.

Their contributions are exhibited for ease of reference.

2. Framework and Speed of the Consultation

2.1 We are told that this consultation is being carried out in accordance with Clause 14.7 of the 2018 Standard Civil Contract: Standard Terms.

2.2 The Legal Aid Agency (LAA) has advised us that it has already agreed with HMCTS that the assessment of all licensed work bills not involving an inter partes detailed assessment will be conducted by the LAA's civil finance team irrespective of the amount of the assessable costs or the venue in which proceedings were heard.

2.3 This marks a permanent change to the current operational practice where bills with assessable costs in excess of £2500 are assessed by HMCTS in accordance with arrangements made under s.2(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The proposal effectively removes the existing cap to enable LAA assessment of civil legal aid costs over £2500 by transferring that process from the court to the LAA.

2.4 Paragraph 6.36 of the 2018 Standard Civil Contract Specification ('the Specification') provides that, subject to the general discretion of the Lord Chancellor, licensed work costs will be assessed by the LAA in cases not involving an inter partes detailed assessment. Consequently, no contractual changes are being made in order to facilitate this change in practice. However, it is proposed that sections 14 and 15 of the Cost Assessment Guidance will be amended to reflect the change in process.

2.5 It is of note that no particular reason has been given to enact this permanent change during the COVID-19 pandemic and there is a question of fairness in insisting on the 14-day time limit for a consultation response during this period.

2.6 As set out in paragraph 2.4 above, the change is centred on paragraphs 14 and 15 of the Costs Assessment Guidance by reference to the discretion under section 2(4) LASPO 2012.

2 Arrangements LASPO

(1) The Lord Chancellor may make such arrangements as the Lord Chancellor considers appropriate for the purposes of carrying out the Lord Chancellor's functions under this Part.
(2) The Lord Chancellor may, in particular, make arrangements by—
  (a) making grants or loans to enable persons to provide services or facilitate the provision of services,
  (b) making grants or loans to individuals to enable them to obtain services, and
  (c) establishing and maintaining a body to provide services or facilitate the provision of services.
(3) The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part.
(4) If the Lord Chancellor makes arrangements for the purposes of this Part that provide for a court, tribunal or other person to assess remuneration payable by the Lord Chancellor, the court, tribunal or person must assess the remuneration in accordance with the arrangements and, if relevant, with regulations under subsection (3).
(5) The Lord Chancellor may make different arrangements, in particular, in relation to—
  (a) different areas in England and Wales,
  (b) different descriptions of case, and

(c) different classes of person.

2.7 The issue must concern a lawful, rational and proportionate exercise of the discretion in respect of the Lord Chancellor to make arrangements to provide for a court, tribunal or other person to assess the remuneration in accordance with the arrangements and relevant regulations.

2.8 The current contract specification is:

Court Assessment

6.36 Except where:

(a) it is or may be necessary for the court to carry out a detailed assessment of costs payable to the client by another party to the proceedings; or

(b) having regard to interests of the client and public funds, the weight or complexity of the case and all the other circumstances, we consider it appropriate to direct that the costs be subject to detailed assessment

your claim for payment for licensed work will be assessed by us.

2.9 Proposed amendments to the Cost Assessment Guidance have been tabled for consideration. The LAA has no power to assess Legal Aid costs when inter partes costs are payable: this process is retained in paragraphs 14.3 and 14.4 of the Cost Assessment Guidance.

2.10 The press release issued by the LAA on the 1 June 2020 claims that the motivation behind the change in process is that of speed and ensuring that providers are paid more quickly whilst the courts struggle to assess bills promptly during the COVID-19 crisis. Whilst it became in clear April 2020 that some courts lacked the resources to prioritise bill assessment as a consequence of the lockdown measures, this is an issue that we understood was being addressed by HMCTS. The picture was also a mixed one nationally, with some members reporting delays and others reporting no changes in the assessment capacity of their local courts. We are also not aware of any evidence to suggest that court delays prior to the lockdown were causing financial difficulty for providers. The LAA is therefore seeking to make a permanent change to remedy a temporary problem, without having properly consulted or considered the impact on providers.

2.11 We are of the view that if this is truly the motivation for this change, that objective could be achieved with a temporary transfer of bill assessments to the LAA, or by allowing providers to chose between the LAA and the court for the duration of the crisis. Information from providers suggests that there are problems in some courts but not in others. One provider told us that their bills are being assessed more quickly than usual as Judges are working from home and dealing with bill assessments rather than court hearings.

2.12 Furthermore, it is submitted that a more lengthy consultation process would be appropriate for a change of this magnitude, so that provider concerns can be properly formulated and addressed at an early stage.

2.13 It is submitted that there is no evidence base within the proposal or the amendments to the current Guidance that:

a. There will be any increase in resources within the LAA to accommodate this increased workload and meet a rise in demand;
b. If bill assessments are carried out by existing LAA caseworkers that these caseworkers will have either the skills or the training to assess these naturally more complex bills of costs;
c. The LAA has clarified how the more complex assessments will be carried out by the LAA and what information, evidence and representations will be permitted.

2.14 It is also submitted that the proposal, run concurrently with this consultation, to enable more frequent claims for Payments on Account (from two to four times per year) provides a satisfactory remedy to the current delays in bill processing time by some courts. This is particularly so if providers are enabled to increase the percentage of POA claims from 75% to 100%, as requested of the LAA repeatedly by LAPG.

2.15 We are seeking assurances and the time to adequately consult on the following as part of the consultation process:

- how the LAA will process bills in practice
- which staff will be involved and what training they will receive
- how the LAA intends to replicate those elements that current operate effectively within the court assessment processes, including the expertise and independence of the Judges
- how the LAA intends to maintain the existing approach of the court to assessments and enhancements
- specific assurances that LAA assessors will not be operating under KPIs or bonus schemes which would incentivise reducing costs claims
- a full and frank explanation as to why this change is being implemented at such speed
- whether the LAA has considered the inevitable damage to their relationship with the provider base that will occur if this change goes ahead without adequate consultation and without adequate safeguards in place. Providers and counsel cannot afford the adverse effects of experimentation while the LAA explores the realities of taking full control of this part of its service
- whether the LAA will consider the involvement of an external body which will to monitor and provide quality assurance (see further at 3.9).

2.16 There are concerns based on past practice that any adverse impact of such a change may not manifest itself immediately and/or there will be inadequate assessment of impact as there is no pilot period proposed. There is also a concern as to how any adverse impact, quality control and impact assessments will be carried out as proposals have not been put forward on these issues by the LAA.

2.17 It appears that the process of assessment and the appeals process by the LAA will not be amended in any manner to mirror the process of that provided by the court. For example, with complex bills, the court will make a provisional assessment on the papers and allow for the provider to make oral representations at the venue of assessment (which will often be the provider's local court). It does not seem that the LAA will be mirroring that process.

Further, the judicial process is independent of the LAA and the identity of the decision maker is known, i.e. the costs judge. Whereas, the identity of the LAA caseworker is not disclosed and as such their experience and training is not accounted for to the provider.

Decision-makers both at first instance and the second internal review will be employees of the LAA which may create a conflict between the financial and budgetary aims of the LAA and the fair assessment of claims by reference to guidance and regulations. Where an internal review is unsuccessful, the third stage will be conducted by an Independent Costs Assessor (ICA) who is chosen and paid by the LAA and who has no guaranteed amount of appeal work sent to them.

Also, at present ICA processes are undermined by a lack of due process. For example, we are aware of many instances where the LAA has failed to disclose all communications and representations to the ICA, and in particular where the LAA seeks to make additional representations to the ICA after the provider has submitted their appeal, without disclosing these representations to the provider. This lack of transparency and due process cannot continue and must not be replicated in any appeal system moving forward.

2.18 There appears to be deep suspicion on the part of some legal aid providers as to the LAA's motivation for this change. This is something that the LAA cannot simply ignore. Providers believe that the only reason for bringing this process in-house is for a financial saving. They query the reason why the LAA would increase their own administrative costs if this was not with a view to reducing overall expenditure.

2.19 One member questioned whether the actions of the LAA in this instance amounted to a breach of contract in relation to the 2018 Civil Contract Standard Terms, para 2.3:

'*In relation to this Contract, you and we will act in good faith*'

The provider noted that they fail to see how the LAA can claim to have acted in good faith given the way that the LAA has dealt with this issue. This will not be an isolated view among the provider base given the timing of this proposed change, the fact that the LAA has openly admitted that it has wanted to make this change for many years, and that the LAA failed to consult on the proposed change prior to seeking consent from HMCTS.

2.20 Without a more transparent assessment process, including transparent review and an independent 2-tier appeals process which mirrors that currently provided by the court, this amendment should not be introduced as it is likely that there will be many adverse decisions which lack proper accountability and transparency.

2.21 In summary, LAPG opposes this change. We do not think that it is necessary or proportionate to make this change when alternative arrangements could be made to cope with the current crisis and which would demonstrate that the LLA truly wants to support the supplier base. We also have concerns over the speed at which this consultation has been conducted and the lack of detailed information made available to consultee bodies. We believe that this change has the potential to have a significant and adverse impact on the sustainability of civil legal aid providers who are currently under immense financial pressures due to the COVID-19 crisis.

3. The Appeals Process

3.1 A great deal of concern has been expressed over the proposed appeals process and its lack of independence from the paying body.

3.2 Members have expressed particular concern over the transparency and fairness of the proposed new process and the potential impact on the finances of the provider base if more cases go to appeal or, as we fear, if providers decide that they do have the resources to challenge erroneous decisions.

3.3 It is not always clear what information and evidence is placed before an ICA and all evidence including any representations made by the LAA ought to be disclosed for comment by the provider before the decision is made. It is the case that the LAA, as a public body, operates under a duty of candour with respect of any decision and evidence on which it relied in making decisions. *R (on the application of Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 [105-106] provides the most recent exposition of this principle. Further the LAA and the provider are under a duty of cooperation and operation in good faith under the terms of the contract and thus all cards should be presented face up on the table in respect of evidence before the decision on costs is reached.

3.4 If this measure is to be introduced then a second tier of appeal, independent of the LAA (other than judicial review) ought to be introduced into the process and there needs to be more robust external scrutiny of the appeals process and outcomes.

3.5 Furthermore, the provider ought to be remunerated in respect of time taken for additional work on any appeals process as there is likely to be an additional unaccounted for adverse impact on the provider in respect of appealing a greater number of costs decisions by the LAA. Evidence collected during our 'LAA decision-making survey' suggested that many providers do not appeal LAA decisions on costs for this reason. This situation is likely to be exacerbated by the widely held belief that the proposed appeal process lacks transparency and is fundamentally unfair. LAPG's survey (which received over 540 responses, demonstrated that:

- 74% of respondents had experienced difficulty with a review or appeal process
- Only 5% of respondents found that appeals were dealt with promptly by the LAA
- 62% of respondents had been forced to work at risk while awaiting the outcome of an appeal in relation to a funding decision
- 95% of respondents had spent unpaid time dealing with appeals
- 57% of respondents stated that spending unpaid time dealing with appeals deterred them from challenging decisions
- 87% of respondents felt that appeal processes lacked transparency and were unfair
- Only 4% of respondents felt that decision-making across the LAA had improved in the 12 months to October 2019, with 26% stating that they 'strongly disagreed' and 38% stating that they 'disagreed' with the idea that decision-making had improved

The strength of feeling across much of the provider base cannot be ignored by the LAA as they consider making a change in operational processes of this magnitude. Further and irreparable damage to the relationship between the LAA and providers is likely to result from imposing a new system without adequate and extensive consultation and without independent and transparent assessment and appeal processes.

3.6 Many of our members have expressed the view that if bill assessment is to go over to the LAA, then appeals should remain with HMCTS to have any credibility and independence with the profession. In public law terms, the LAA must ensure that processes are not biased, and that there must be no appearance of bias.

3.7 One member pointed out that under the current court assessment process, they have the right to an oral hearing, and that over the years they had used this process with success in their local courts when challenging reductions to legal aid bills. If the assessment procedure was brought in-house by the LAA the right to an automatic oral hearing would no longer exist and that seemed to be a significant enough change to require a formal consultation on the policy imitative, not just the issue of amending the Guidance.

3.8 The same member expressed concern about the appeals process on CCMS, noting that it is incredibly difficult to prepare an appeal on CCMS and that they are doing this on a regular basis as the LAA regularly and incorrectly reduces bills on assessment. The larger the bill, the more difficult this will be.

3.9 If the LAA insists on introducing this change we would strongly advise that an independent panel should be established to scrutinise LAA decision-making. Given the concerns over the lack of transparency and fairness of existing appeal processes outlined above at 3.5, and the fact that the lack of proper remuneration deters appeals, we do not think that internal LAA management information or quality assurance systems will be able to properly determine the level of LAA caseworker error. We therefore suggest that independent scrutiny of decision-making should not be triggered by a provider initiating an appeal process and/or succeeding on appeal. A random sample of all reduced claims should be made available to the independent panel to assess whether the correct guidance has been applied. The external panel should be comprised of costs judges, costs specialists and senior practitioners.

4 The right of legally aided parties with a financial interest to be heard

4.1 Paragraph 6.58 of the Specification confers certain rights on a legally aided client who has a financial interest in the assessment inter alia to make representations concerning the legal costs which will form the debt they must satisfy due their level of financial means which has required them to pay periodical contributions towards their legal costs, money/property recovered/preserved, or revocation of a determination of legal aid.

4.2 Court assessments account for a large proportion, if not the overwhelming majority, of cases where a legally aided client will be contributing to or paying in full for costs of between £3000 to £30,000 including VAT. Under the court process, the client has the right to make oral representations regarding the costs claimed at the assessment which will usually be at their local court. However, paragraph 16.5 of the Costs Assessment Guidance predicates that the representations a client can make will be written, when in fact paragraph 6.58 of the Specification does not impose a requirement on what form those representations must be made. Paragraph 16.9 of the Costs Assessment Guidance specifies a procedure which affords the client no right to make oral representations, much less one at a venue they could reasonably be expected to travel to. They have no right to make any reply to the representations given by the provider and there is no right to appeal.

5 Sustainability of the profession

5.1 There appears to be a complete lack of evidence to support the assumptions that:

- payment to the provider will be quicker and
- bill assessments will be carried out with the same level of skill and independence

We have not had sight of any impact assessments in respect of this change on the sustainability of the provider base should the above assumptions fail.

It is submitted that without such assessments or measurements the change ought not to be introduced.

5.2 There is a widely held belief amongst providers that the LAA will act as a harsh arbiter of their work and are much more likely to reduce costs, particularly enhancements, without a full understanding of the complexities of the case and how these intersect with the legal principles which must be followed as set out in paragraphs 1.3-1.6 of the Costs Assessment Guidance and the costs law (both statute and case law) which affects them. This belief is based on provider experience of the LAA reducing costs to which discretion applies on claims under £2500 in a manner which is not consistent with the approach taken by Costs Judges.

5.3 Members have expressed their concern over what they perceive as the LAA's insensitivity to quality in assessing bills, and the likelihood of a high proportion of very high value work being downgraded by LAA staff lacking the experience and knowledge to understand it by applying a 'tick-boxing' approach to claims. This will drive quality down and undermine the provider base in the long term.

5.4 There is concern that the LAA lacks the staff resources, experience, skills and training in order to undertake the assessment of large bills at such an increased volume. It is unclear whether the LAA has obtained sufficient and detailed information from HMCTS in respect of the volume and types of cases in order to be confident that processing times will be maintained, or indeed match the processing times of the courts. There is concern that, in fact, the process under the LAA will be considerably slower and this will have a devastating impact on provider sustainability. During a recent meeting, the LAA tried to assuage this concern by stating that staff had committed to doing overtime for the next 10 weeks to meet the expected increase in demand. A sustainable system surely cannot be built around a commitment from staff to work additional hours and this indicates that either the LAA does not have sufficient core resourcing in place and/or does not have the data on which to assess the capacity required to meet demand and maintain target times. The very fact that the LAA has introduced an overtime system suggests that internal concerns exist about the ability of the Agency to maintain target times. This also suggests that the Agency is very aware that it will be under considerable scrutiny in the first months following this proposed change and is seeking to allay concerns about the potential impact on a fragile supplier base. We are yet to see how the Agency will maintain target times without relying on overtime.

5.5 Whilst we accept that there has been some evidence of bill assessments being held up in courts during the COVID-19 crisis, a temporary solution would have been far more preferable and acceptable to the provider base as set out above.

5.6 We do not believe that the solution being proposed currently is either realistic or sustainable for the LAA in the long term and presents a great deal of risk to the provider base. Even a moderate increase in bill reductions could devastate providers rendered fragile by many years of uneconomic fees and the impact of the COVID-19 crisis.