JUSTICE FOR WOMEN

RESPONSE TO MINISTRY OF JUSTICE CONSULTATION QUESTIONS TRANSFORMING LEGAL AID

Justice for Women was established in 1990 as a feminist campaigning organisation that supports and advocates on behalf of women who have fought back against or killed violent male partners. Over the past twenty years, Justice for Women has developed considerable legal expertise in this area, and has been involved in a number of significant cases at the Court of Appeal that have resulted in women's original murder convictions being overturned, including Kiranjit Ahluwalia, Emma Humphreys, Sara Thornton and Diana Butler. Most recently, in July 2010 we supported Kirsty Scamp to successfully appeal her murder conviction.

Justice for Women (JFW) contributes to the global effort to eradicate male violence against women, which includes sexual and domestic violence. Our focus is on the criminal justice system of England and Wales. Justice for Women works to identify and change those areas of law, policy and practice relating to male violence against women, where women are discriminated against on the basis of their gender.

Q1 Do you agree that criminal legal aid for prison law matters should be restricted to the proposed criteria?

A No we do not agree. The proposals will have the effect of denying prisoners a means of effective legal redress. The internal complaints procedures are no substitute for access to lawyers. This is made clear at paragraph 3.11. Combined with proposals for competitive tendering, this proposal will ensure that prisoners will have no access to advice and assistance from lawyers about any issues relating to their experience whilst imprisoned. For example, if a female prisoner is subject to bullying and or sexual abuse by other prisoners or guards (something that the women we have supported have complained of in the past), then there will be no legal aid available for them to access advice even if they have severe mental health problems or learning disabilities. When complaints are particularly serious, then our experience of supporting women in prison is that the internal prison complaints system provides inadequate remedies. Furthermore, prison officers and governors who are not

adequately trained often fail to understand or keep up to date with changes in prison policies and provide legally inaccurate responses to prisoner complaints.

In addition, the proposals for competitive tendering will result in poor quality representation which will make it less likely that mental disabilities will be discerned or forensically appreciated at trial. JFW believes that it is fanciful to conclude that prisoners with mental disabilities (many of which are undiagnosed at the time of trial[2]) will be able to access internal procedures, or that staff will have the time, training or resources to ensure such disabilities are diagnosed and accommodated adequately within the prison system.

These problems are compounded by the fact that women are a particularly vulnerable group of prisoners who are disproportionately likely to have suffered domestic and sexual abuse, mental health problems and self-harm, which impacts upon on their ability to cope within custody. At the same time, they are much less likely to utilise formal complaints procedures than male prisoners[3]. JFW believes that depriving women prisoners of access to legal advice and assistance will therefore disproportionately impact upon women in prison.

Q2 Do you agree with a financial threshold [for legal aid in the Crown Court]? please give reasons

A No we do not agree. A two tier system will be created by these proposals. People will not be able to afford proper and specialised representation. There will be an increase in people representing themselves with consequent inefficiency. The resulting delays etc. will ultimately lead to an increased cost to the taxpayer and place potentially intolerable pressure on the court system.

Q3 Do you agree that the proposed threshold is set at an appropriate level?

We do not agree with the proposals in Q2.

Q4 Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? please give reasons

---

[2] Our experience shows that many vulnerabilities and mental health conditions are not picked up on until the appellate stage.

[3] See eg. PSO 4800 'Women Prisoners'. In the case of foreign national women prisoners this reluctance to complain has been linked to fear of repurcussions.

No. This proposal is potentially in breach of the UK's international treaty obligations under CEDAW and is fundamentally discriminatory and largely unworkable as only a skilled immigration specialist will be able to determine who passes the residence test. The proposal is likely to exclude many victims of people trafficking, many of whom are women and children who have been subjected to serious violence and abuse including sexual violence. The proposal will enable organised crime groups who exploit these vulnerable people to be able to do so with even greater impunity than at present. All of the relevant international legislation on combatting human trafficking makes it clear that there must be a comprehensive approach. Such an approach means that the victims of trafficking should have access to legal advice and representation where necessary. The proposal will also lead to victims of domestic violence who fall foul of the one year rule, not only being excluded from access to benefits if they try to leave their husbands, but also being denied legal aid to obtain an injunction to protect themselves from violence. It will thus be a charter for violent partners to abuse their spouses with impunity where they fall foul of the residence test. Domestic violence unchecked will ultimately lead to an increase in serious assaults and domestic homicide.

Q5 Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal at the Court of Appeal if permission is granted by the court (but that reasonable disbursements should be payable in any event?)

A No. This will have the effect of denying access to justice. In so far as financial savings are concerned, JFW makes the following observations. The Government does not acknowledge (in the context of this consultation) that our legal system makes the country in excess of what is spent on legal aid every year. The present legal system has a reputation for "impartiality, integrity and enforceability" (Grayling speech to City Firms 16th March 2013). This comes from the training, standards and independence which are the result of a publically funded system of justice. These proposals will destroy that integrity and quality.

Q6 Do you agree that legal aid should be removed for all cases having been assessed as borderline prospect of success? Please give reasons

No. This provision is rarely used and is designed to assist in unique and ground challenging cases. Whilst there is likely to be an extremely limited saving to the public purse, it will

prevent challenges in novel or complex areas of the law raising important public interest issues. An example is the case of *Noone*[4] which challenged the Secretary of State's 'intolerable'[5] and 'absurd'[6] construction of legislation relating to sentence calculation for the purpose of the Home Detention Curfew scheme. The Claimant's claim for judicial review failed on the construction point at first instance and in the Court of Appeal, but succeeded unanimously in the Supreme Court.

Q7 Do you agree with the proposed scope of criminal legal aid services to be competed?

No, we do not agree with these proposals which will sacrifice quality in order to provide services at the lowest cost. There can be no justification for choice of representation being removed. The cases we do and about which we have campaigned, depend on specialist knowledge and skill which will not be available to those who bid successfully. There is an assumption on the part of Government that ABS' know about the challenges and skill required to represent people on criminal charges and the amount of work that it takes to represent such people properly. The Government does not recognise the moral or economic value of such matters. ABS' will not care about the quality of the services that they provide as their only motivation will be to provide a service for profit at the lowest cost.

Q8 Do you agree that given the need to deliver further savings, that a 17.5% reduction in the work which is not determined by the price competition is reasonable? Please give reasons

17.5 per cent is not reasonable on top of the present cuts. We do not agree with the Government's economic assessment. The consultation paper relies on misleading calculations to arrive at the figures cited and does not take into account the money that has already been saved from the legal aid budget or the money that will be saved by cuts to date. These savings have been made by the 2010 cuts which have impacted on lawyers. These savings are acknowledged in the LAA's Business Plan which predicts a reduction in spending even before more cuts are made. The amount spent on criminal legal aid is said to be over a billion pounds a year. These figures relate to work billed in 2011/12 and therefore relate to historic

---

[4] *R (on the application of Rebecca Noone) v (1) the Governor of HMP Drake Hall, (2) Secretary of State for Justice [2010] UKSC 30*

[5] *Ibid*; per Lord Brown at para 43

[6] *Ibid;* per Lord Brown at para 47, Lord Judge at paras 86-7

work billed in that period. The analysis does not provide an accurate spending figure for current rates and the reductions imposed since 2010. The latest figures available are contained in the Business Plan for the LAA (16th April 2013). The projected spend on Criminal Legal Aid is £941 million for 2013/14. The saving on the figures used in the CP is already £168 million. The aim of the Consultation is said to be to achieve savings from the Criminal budget of £220 by 2018/19. If the correct figures are relied on, then the required saving is £52 million.

The Government is aware that any further cuts will make it impossible for lawyers to be remunerated for the work they do. The complexity of the work is never acknowledged by the Government, nor the long hours required to do it properly. The proposals involve the Government manipulating the pay structure so that lawyers (and the non-lawyers) to whom it is proposed the work will be contracted out, will make more profit by persuading people to plead guilty. Once this is known by the public, confidence in the system will be lost. The proposals will be more disastrous and have wider ramifications than the PCT which was introduced for translator services.

Ultimately if any savings are made to the legal aid budget, they will have a huge knock on effect on other areas of public funding such as having to spend more on prisons and care proceedings because of more people being sent to prison.

Q9 Do you agree with the proposal under the completion model that three years with the possibility of extending the contract term by up to another two years and a provision for compensation in some circumstances for early termination is an appropriate length of contract? Please give reasons

We do not agree with the proposals in Q7 and 8 and so it follows that we have no views on the question of the length of the contract save to say, that the whole scheme is likely to be disastrous because it involves guaranteeing a flow of work to successful bidders regardless of their ability to do it well.

Qs 10,11,12 Geographical proposals for delivery

We have no confidence in the proposed scheme.

Q 13 Do you agree that work should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas?

No we do not agree, this emphasises the lack of choice. Work should be available on merit and quality.

Q 14 Do you agree with the proposal under the competition model to vary the number of contacts in each procurement area.

No

Q 15 Do you agree with the factors that we propose to take into consideration and are there other factors that should be taken into consideration in determining the appropriate number of contacts in each procurement area?

No

Q 16 Do you agree that work should be shared equally between providers in each procurement area?

We do not agree with 'tendering' in respect of legal aid.

Q17 Do you agree that clients should have no choice and be limited to the provider at the outset

No. We think the system is unworkable and will result in an increased number of miscarriages of justice. This will result in many cases of wrongful imprisonment and will cost far more than the present legal aid scheme. See our answer at Q20 below.

Q18 Which of the following police station allocation methods should feature in the competition model

Case by case;

DOB;

Initial;

Provider on duty;

Other.

We do not agree with the proposals and think that clients should have choice concerning their representation.

Q19 do you agree with the proposal that clients who cannot be represented by the contracted provider in one area should be allocated a provider in the next area?

We do not agree with the proposals.

Q 20 Do you agree that a client should have to stay with an allocated provider throughout their case subject to exceptional circumstances?

No we do not agree with the principle of removing choice from clients. It gives clients no recourse when the necessary preparation on their case is not done. We have no doubt that under the proposals, criminal (and other) cases will not be properly prepared for hearing by the successful service providers who will be motivated by cost and profit and who will not have any incentive to work conscientiously on behalf of clients. At present, lawyers are more likely to be instructed if they are good and/or if they have represented the same person in the past. It is proposed to replace a meritocracy with a system where service providers will not have to do a good job in order to retain the work. As an organisation which has specific experience in supporting women who have been victims of miscarriages of justice, we are acutely aware that such miscarriages often arise as a consequence of poor and inadequate representation. This situation will become far worse if a vulnerable woman has no recourse to specialist representation. All the cases we have supported turn on a background of sexual and physical abuse/domestic violence. Such defendants are in jeopardy of a life sentence if they are not able to instruct a solicitor who is an expert in this area of the law. Most of the appeals we have conducted involve cases of women who were represented at first instance by people who were not experts in domestic homicide. We have no doubt that the obtaining of relevant unused material, medical evidence, instruction of experts, tracing of witnesses will not be properly carried out under the proposed changes. It will not pay people to do the job properly. Neither will difficult and sensitive instructions be taken by lawyers who are trained and who specialise in this area. The MOJ (under the last administration) was responsible for the reforms to the partial defences to murder which it was hoped would benefit abused women who kill. These (legal aid) proposals would see a system where such reforms will have little effect because legal services will be provided by people who do not have the experience to work within this area.

Q 21 Do you agree with the following proposed remuneration mechanism?

We do not agree with the mechanism.

Q 22 Do you agree that applicants should be required to include the cost of any travel and subsistence disbursements under each fixed fee and graduated fee in their bids?

A fixed fee based on the lowest bid inevitably means that it will not be cost effective for service providers to prepare and present cases properly.

Q23 Are there any other factors to be taken into consideration in designing the technical criteria for the prequalification questionnaire stage of the tendering process?

The scheme has not been thought through.

Q24 Are there any other factors to be taken into consideration in designing the criteria against which to test the delivery plan submitted by applicants in response to the invitation to tender?

We think that the Government should heed what happened when translator services were outsourced. We understand that the Government has recently had to pay Capita ALS an extra 22% more on the contract to enable the company to do the job.

Q25 Do you agree with the proposal to introduce a price cap for each fixed fee and graduated fee and ask applicants to bid below it?

We do not agree with PVT. It does not take account of the true demands of the work.

Q26 Do you agree with the proposals to amend the advocates graduated fee scheme

- **To introduce a single harmonised basic fee payable in all cases based on the cracked trial fee;**
- **Reduce the daily attendance fee for all trials to between 20-30%**
- **Impose an increasing daily rate**

No, the work will be underpaid.

The Government are simply trying to ensure that it will not be cost effective (for successful bidders) to contest trials and therefore put pressure on people to plead guilty.

There will be an increase in people representing themselves and this will drag out trials. The cost of this will be borne by co-defending representatives or people who are paying privately

and by the CPS. The resulting chaos will take its toll on the Courts Service and will drive down efficiency.

Q27 Do you agree that very high costs case should be reduced by 30%?

No.

Q28 Do you agree that the reduction should be applied to current contracts as well as future contracts?

No because it takes away lawyers rights to refuse the work that they have agreed to.

Q29 Do you agree with the proposals to reduce the use of more than one advocate?

- To make the litigation team provide appropriate support in the CC
- To take steps to ensure that presiding judges apply the criteria robustly

No. Two counsel are only used when it is absolutely necessary. Litigators and counsel do different jobs.

Q30 Do you agree with a 10% reduction in family cases?

No. We are particularly concerned that the reduced fee is based on the unsafe assumption that as yet unrealised efficiencies in the court system will materialise.

Q31 Do you agree that fees for other civil barristers should be harmonised with self employed barristers receiving family fees

No. With no guarantee that enhanced rates will be routinely granted to counsel, the proposal amounts to almost a 50% reduction in fees payable. There is a clear danger that for many civil legal aid barristers this will no longer be a viable field in which to practice, making it much harder for people to access specialist advocates. This could have fatal consequences in the complex area of immigration law, for example, where genuine asylum seekers may be returned to their home country to face torture or death if they are unable to find an advocate with the necessary expertise to present their case effectively. For barristers specialising in public law, the proposed fee cuts will be compounded by the proposed reduction in funding for judicial review at Q5.

Q 32 Do you agree that the civil fees paid incorporating a 35% uplift in upper tier Immigration and Asylum cases should be abolished?

No – this is an important safeguard for asylum seekers and others seeking protection from persecution and abuse at home. It is a specialist area of practice which is already underpaid and will only lead to more specialist firms going out of business and hence victims of torture and violence in their home countries being denied effective representation.

Q 33 Do you agree with the proposal that fees paid to experts should be reduced by 20%

Our experience is that all the women we have supported who have killed violent partners have done so because of mental health problems often caused by the trauma of being victims of abuse. Specialist expert psychiatric reports play a crucial role in ensuring that the actions of those we have supported are fully understood to ensure that the criminal justice system treats them fairly. Aside from the fact that specialist practitioners will not exist to instruct the experts under the new proposals and standards will be so poor that this aspect of a defendant's case is likely to come into the ambit of essential preparation which will not be done, the reduction in fees will mean many of the really experienced experts will be unwilling to prepare reports at such reduced rates.

Q34 Do you agree that we have correctly identified the range of [equalities] impacts in the Consultation Paper?

No - see our response at Qs 4 and 20 above.

Q35 Do you agree that we have correctly identified the extent of impacts under these proposals?

No the proposals have not been thought out and will lead to a waste of tax payers money. Far more people will be wrongly convicted and go to prison and this will cost a huge amount of money. Worse still, a legal system which is underpinned by integrity will be destroyed.

Q 36 Are there forms of mitigation in relation to impacts that we have not considered?

See our response to questions above.

Justice For Women, 3 June 2013