



**PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND
AND WALES
2011**

RESPONSE OF THE CHANCERY BAR ASSOCIATION

About the Chancery Bar Association

1. The ChBA is one of the longest established Specialist Bar Associations and represents the interests of over 1,000 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.
2. Significantly much of the ChBA's membership specialises in the areas of property, wills and trust. In relation to this consultation it should be noted that, the Chancery Bar offers specialist expertise in advocacy, mediation and advisory work regarding claims under The Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and claims under the Inheritance (Provision for Family and Dependents) Act 1975 ('the 1975 Act'). The Chancery Bar is a significant stakeholder in the current Legal Services budget for the provision of advocacy, mediation and advisory work in the fields of TOLATA and 1975 Act claims, contentious probate and housing claims.
3. The ChBA has limited its response to those questions in which it has a direct interest.

Overview

4. The ChBA is extremely concerned about the sweeping generalisations which have been made within the consultation paper namely that: cases which are 'primarily of a financial nature' are less deserving of state intervention; that these cases are of 'low objective importance'; and that the class of individuals bringing these claims is generally unlikely to be vulnerable. To assert the same demonstrates a grave misunderstanding of claims which are brought under TOLATA, and the 1975 Act. In each of these cases legal aid is currently available to enable vulnerable individuals to retain their homes.

i) Claimants in TOLATA claims are often women who are the primary carers of young children and are left facing homelessness at the termination of a relationship. There is currently no statutory protection for cohabitants. The Government has recognised the need for cohabitants to be protected and is currently consulting upon the same. The Government has therefore already identified the need to protect these people and in the absence of any current statutory protection it cannot then be right to simply remove these claimants' rights to representation.

ii) Claims under the 1975 Act are claims brought because the individual upon whom the claimant was dependent has died. These claims are often brought by bereaved children or elderly dependents. They have had the financial support which the Deceased gave them terminated and are often facing the prospect of the family home being sold by the Administrators of the Deceased's Estate. By the very nature of the claim which can be made under the 1975 Act, the claimants are extremely vulnerable. To remove legal representation for these individuals cannot be justified.

5. It is of great concern that both of these types of claim have been put into a general 'miscellaneous' category of claims for which legal aid should no longer be extended, without any justification having been given. The extraordinary absence of written justification within the consultation paper, as to why these cases have been included within this category demonstrates a complete lack of understanding of these types of claims on behalf of the MoJ. If proper attention had been directed to them then it would be apparent that they clearly fall within the consultation's own criteria for claims for which legal aid should be retained. The simple fact is that if legal aid is not extended to these

cases these individuals will be denied access to justice.

6. It is false economy to withdraw funding and remove the means by which these claims can proceed. They are often claims which if successful would remove the need for claimants to look to the State for welfare and housing support and claims for which the costs are recovered.

Question 1

Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme?

Access to Justice is a fundamental right of individuals. The ChBA supports the proposal to retain legal aid to access justice for the types of cases and proceedings listed.

Question 3

Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of civil and family legal aid scheme?

For the reasons set out in the overview to this response the ChBA has grave concerns about removing legal aid from the following cases:

- TOLATA
- Contentious probate
- 1975 Act claims.

To demonstrate how these claims operate in practice the ChBA cites the following:

TOLATA

Upon a couple separating the ownership of the family home and the right to reside therein are often significant issues which need to be determined. It is frequently the case that the primary carer of the children (usually the mother) has not been a stakeholder in the mortgage by reason of her being the primary carer. The consequence is that she is not then cited on the legal title to the property. It is therefore often the vulnerable primary carer who must issue TOLATA proceedings to establish a beneficial interest in the

property and a right to occupy. The reality of this position has already been identified by the Government and a separate consultation process is underway to establish how cohabitants can be afforded greater protection. There is no statutory protection for the primary carer/ non breadwinner in this scenario. In the absence of statutory protection it cannot be right that these individuals and children are left without representation often facing imminent homelessness.

It is not appropriate for claimants to represent themselves in these types of cases. In the absence of statute regulation, which is of course available to married parties, the ownership of the property is left to be determined by legal property and trust principles which are complex and case-based. These claims are automatically allocated to the Multi track, a track preserved by Lord Woolf in 1999 for the more complicated high value cases. It is for good reason that these type of claims remain there as by their very nature they involve complicated areas of trust and property law

ii) Contentious Probate and 1975 Act claims

Claims under the 1975 Act are brought because an individual has died upon whom the claimant was dependent. These claims are often brought by bereaved children or elderly dependents that have been left no financial provision. It is not a procedure by which a disappointed beneficiary can challenge a Will. The deceased's Will may need to be challenged, an intestacy considered and grant of probate obtained before a 1975 Act claim can be brought. These are complex specialist proceedings. Probate proceedings must often be determined before financial provision can be granted under a 1975 Act claim. The claimant needs to be represented throughout. Those who have inherited under the Estate and the Administrators will usually have legal representation. If the claimants are unrepresented they do not stand on an equal playing field. The 1975 Act makes express provision for the court to consider the financial position of the claimant including their housing and income needs. It has to consider any physical or mental disability which the claimant may have. It is extremely likely that the Estate will be ordered to pay the costs of a successful claimant. Therefore these cases which often provide the claimant with a life line meeting their reasonable financial provision, are therefore often cost neutral and have the added benefit of often lifting the Claimant out of benefits.

Question 4

Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations or where there is a significant wider public interest in funding Legal Representation for inquest cases?

The current funding scheme already adequately defines what constitutes an 'exceptional' case and remains within the discretion of the Lord Chancellor. The ChBA sees no justification for narrowing the definition of an exceptional case in circumstances.

Question 5

Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding such as Conditional fee Agreement?

The ChBA is concerned that this is being proposed in circumstances where the very scope and recoverability of CFAs is being consulted upon separately by the MoJ's in its consultation on Reform of Civil Litigation Funding. The Civil Litigation Funding Consultation expressly considers reducing the scope and recoverability of CFAs. It is therefore not realistic that CFAs will be extended as an alternative funding source to replace legal Aid. Any CFA is likely to be dependent upon an insurance premium. It is perceived that there will be a significant problems with the vulnerable individuals identified in the response to Question 3 above being able to afford an insurance premium for a CFA. Secondly a CFA would not be practicable when the client is elderly or has deteriorating health as there is an increased prospect of the client dying. Elderly clients are often the vulnerable claimants in a 1975 Act claim. If an elderly claimant brings a claim for financial provision and then die during the course of the litigation (which could reasonably take a number of years) then any CFA entered into would not be enforceable as a claim under the 1975 Act dies with the claimant which is an important distinction.

Question 6

We would welcome views or evidence on the potential impact of the proposed reforms to

the scope of legal aid on litigants in person and the conduct of proceedings

It is of concern that to date there appears to have been no impact assessment carried out on the impact of the proposed reforms. It is obvious that litigants previously entitled to Legal Aid will no longer be able to access justice on an equal playing field. Vulnerable individuals such as those identified in the ChBA's response to Question 3 will not be capable of representing themselves in these complex areas of law.

i) A 1975 Act claim

To bring a claim under the 1975 Act will often requires the litigant in person to have knowledge of complex probate and trust law. It is extremely unlikely that an untrained litigant in person will have command of these principles

ii) A TOLATA claim

To bring a claim under TOLATA the litigant in person will have to have knowledge of complex trust law; know whether to bring their claim as a constructive or resulting trust; know whether they are entitled to rely upon the doctrine of proprietary estoppel.

Both of these cases are examples of claims which it is submitted cannot properly be dealt with by Litigants in Person. The burden of sorting the claim out if the claimant litigates without representation will fall upon the Judiciary. The courts will inevitable become clogged up with individuals trying to pursue these remedies with no legal training.

In a 1975 Act claim for example the Estate (the Executors) and the beneficiaries will usually be privately represented. While mediation and steps to avoid litigation are as a matter of course considered, it is impossible for the Executors and beneficiaries to deal with a claim without the claim being set out properly in law and properly argued. If Litigants in Person are unable to do this then all cases which involve a Litigant in Person will as a matter of course have to be litigated because they will be unable to properly particularise and advance their case in law at a mediation. Conversely a case which would have been able to be settled without protracted proceedings will find itself litigated.

iii) Interim remedies

Often claims of these nature require urgent or interim action to be taken.

By way of example a 1975 Act has a strict limitation period of 6 months from the date of probate. A Litigant in person will not have the sophistication to know how to register a caveat to prevent probate in circumstances where the validity of the Will for example is in question. A litigant in person will not know how to find out whether and when there has been a Grant of Probate. The court has no discretion to extend limitation for a claim which is brought under Section 9 of the 1975 Act namely to increase the net estate by bringing excluded assets back into the Estate. A potentially vital remedy may therefore be lost to the Litigant in Person through his or her's own ignorance of the law. An 'operator' will not be able to assess whether a Section 9 application for example needs to be made as a complex assessment of the Estate's assets and the claimants needs has to be undertaken first. It is worth repeating that the people who will lose out are the people for whom financial provision has not been made, those who were dependents of the Deceased and are therefore often children and elderly clients.

A further example would be interim injunctive relief in relation to a TOLATA claim. Injunctive relief to obtain occupation of the family home; prevent the sale of the property; preventing the disbursement of the net proceeds of sale. These decisions which often amount to preserving the home for children while the claim is being considered are vitally important. If legal aid is removed the parties will be left determining who should have occupation of the property; whether the property should be sold; how the net proceeds should be apportioned. It is the weaker party, the non-earner (previously entitled to get legal aid), the primary carer often not party to the mortgage who will lose out. Their rights will not be protected at the outset and the very subject matter of the claim exposed to being disbursed and the vulnerable wrongly being made homeless.

Question 7

Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?

No.

Legal advice is a specialist service it is not something which can be delivered by a

telephone operator who is not a specialist advisor. An 'operator' cannot simply 'diagnose' a problem unless they are a legal expert in the field for which help is sought. There is no evidence of the cost of extending the CLA service to include the employment and overheads of engaging an inhouse panel of operator experts. The 'operator' cannot even process their eligibility for legal aid effectively as they will simply not be able to determine the same without considering the facts in detail. The system is likely to get clogged with appeals and the opportunity for the operator advisors to be sued will be significant.

The 'operator' will be unable to establish a basic thing such as the client's mental capacity. Is unable to consider documentation a Will for example in a claim for financial provision under a 1975 Act claim

The second tier and the funding and manning of the 'CLA specialist telephone advice service' has not been costed or explained. The only advisors who should and would be competent to deliver the same are trained lawyers in the relevant specialist areas. It is unknown why this service would be more cost effective than the current face to face meeting which is carried out by High Street solicitors. Unless it is proposed that this service is operated on a 24/7 basis it is again unclear how this telephone service will offer a better service to the public? It is likely to be impossible to simply pigeon hole different cases into specific areas of law as there is often considerable overlap between different areas of law. The appointment of a cross discipline panel of legal experts must be cost prohibitive.

Question 8

Do you agree that specialize advice should be offered through the Community Legal Advice Helpline in all categories of law and that in some categories the majority of civil Legal Help clients and cases can be dealt with through this channel?

For the reasons set out in the response to Question 7 above - no

An advice line service is not able to:

- i) Assess a parties capacity
- ii) It is not able to assess the documentary evidence required to establish a claim in trust
- iii) Advise on urgent interim remedies or properly determine limitation for the purposes of

a 1975 Act claim

Question 9

What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

Face to face advice must always be required to assess a client's capacity. If there is a doubt then there must be an interview. The problems of assessing a person's capacity by telephone are obvious.

Face to face advice is required to consider the merits of the client's case and whether legal funding should be extended to litigate the claim. It is impossible to assess the credibility of the client's evidence without testing it face to face. A TOLATA claim cannot be properly assessed without considering the documentary evidence as the claim in trust is often factual. A 1975 Act claim cannot be advised upon without consideration of the probate documents and a breakdown of the client's needs

If face to face advice is not given then there is a significant risk that legal funding will be extended to cases where the prospects of success have not been properly assessed wasting public resources. Assessing the prospects of success must be frontloaded and can only properly be done in factual cases by testing the credibility of the client face to face.

Question 10

Which organizations should work strategically with Community Legal Advice and what form should this joint working take?

It is anticipated that the Citizens Advice Bureau and Law Centres will take a strategic role in referring the public to Community Legal Advice.

Question 11

Do you agree that the legal Services Commission should offer access to paid advice services for ineligible clients through Community legal Advice helpline?

No.

It would appear that the Government proposes to reduce access to legal aid and then fill

in the huge void left by the withdrawal of funding by providing its own profit making service or a panel of preferential suppliers. This raises significant issues about the role of Government and state aid and clearly raises issues of competition law. The general public would be denied the choice of the market place. It is the ChBA's position that it is not the government's remit to provide legal services.

Question 12

Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be the subject to the same eligibility rules as other applicants?

Yes.

It is understood that 'passporting benefits' are all under review such that this question is likely to become redundant. It is a matter for the Government the weight it wishes to give to the disposable capital of those in receipt of income based benefits. As a matter of principle we agree that if capital is being assessed as a test for legal aid eligibility it must be right that the capital assessment extends to all applicants including those in receipt of passport benefits. The present discrepancy of an allowance of £16,000 of disposable capital of applicants with the benefit of passporting benefits and the allowance of £8000 of disposable capital of those without does not appear to have merit.

Question 13

Do you agree with the proposal that clients with 31000 or more disposable capital should be asked to pay a £100 contribution?

No.

A £100 contribution on £1000 of savings represents a 10% contribution from what is likely to be an applicant's life savings; this is a disproportionately large sum. There is no data available as to the administration costs of collecting a £100 contribution. It is unclear why it is proposed to make an exception to the threshold of £3000 in immigration cases.

Question 14

Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases?

Assessing the equity in a property can be difficult particularly for pensioner cases. There can be third party interests in the property. A surviving spouse may only absolutely own 50%, 50% being passed under a will to surviving children for example. If the surviving spouse needs to challenge a will or bring a 1975 Act claim to secure their home, for the purposes of a legal aid assessment they may be credited with the full value of the property which is incorrect and may prevent eligibility for legal aid.

Question 15

Do you agree that the proposals to retain the mortgage disregard to remove the £100,000 limit and to have a gross capital limit of £200,000 in cases other than contested property cases?

It is essential that the mortgage disregard is retained. Particularly in the current economic climate many are saddled with extensive mortgages even negative equity having over borrowed. The gross capital limit is reasonable however it must be the individual applicant's gross capital limit not the applicant and partner.

Question 16

Do you agree with the proposals to introduce a discretionary waiver scheme for property capital limits in certain circumstances?

It is essential that a discretionary waiver is put in place for property capital limits. A further circumstance where an eligibility waiver would need to be exercised is where the property is jointly owned and the joint owner is not prepared to agree to use the property as security for a loan. The joint tenancy will need to be severed which will in itself require the assistance of a solicitor.

Question 17

Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case to that end to place a charge on property similar to the existing statutory charge scheme?

The deferred payments should not attract interests at the rate of the existing statutory charge scheme of 8%. It should not be a profit making venture. In cases where the statutory charge applies now the applicants have succeeded in their claim and are often therefore in a position to refinance and pay back the monies paying a lower rate of

interest. It is proposed that regardless of the outcome of a case any funding provided would be paid back.

Question 18

Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less?

Yes provided that the net value (net equity) of an individual's share in a property is calculated

Question 19

Do you agree that we should retain the subject matter of the dispute disregard for contested property cases capped at 3100,000 for all levels of service?

No.

In a TOLATA dispute about the beneficial ownership of a property it will be impossible to use the property which is the subject matter of the dispute as security for loans to release equity to pay legal fees. There is therefore a clear difficulty in liquidating the equity.

Question 20

Do you agree that the equity and pensioner disregard should be abolished for contested property cases?

The equity disregards should not be abolished. Regardless of the value of the property the issues facing the primary carer non breadwinner are the same. They still need legal aid to determine the dispute and unlock the equity to be used to provide a home for themselves and their children.

The pensioner disregard is likely to result in the property being sold. Those with the low income threshold would not be able to discharge a loan secured against the property.

Question 21

Do you agree that for contested property cases the mortgage disregard should be retained and uncapped and that there should be a gross capital limit of £500,000 for all clients?

Yes

Question 23

Do you agree with the proposal to raise the levels of income based contributions up to a maximum of 30% of monthly disposable income?

No.

Question 32

Do you agree with the proposal to reduce all fees paid in civil and family matters by 10% rather than undertake a more radical restructuring of civil and family legal aid fees?

If fees need to be reduced a global 10% reduction will produce a simpler system than a graduated fee scheme. Inflationary increases should be applied thereafter to reduction of fees.

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On behalf of the ChBA

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