This is the response of Garden Court Chambers' Housing Team to the Ministry of Justice Consultation "Legal Aid Reform: Application of the Supplementary Legal Aid Scheme".

About Us

Garden Court Chambers has one of the largest specialist housing law teams in the country (over 20 barristers) and has a reputation for excellence in this area. We cover all aspects of housing law including security of tenure, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit. We are particularly committed to representing tenants, other occupiers and homeless people.

Our work isn't confined to the courtroom. We also spend time training, advising and writing on housing issues. We were the first chambers to serve as a Legal Services Commission Specialist Support Service provider in housing law, and from 2004-2008 we offered specialist support and training under contract direct from the LSC.

More information can be found about Garden Court Chambers and all of our barristers at www.gardencourtchambers.co.uk.

Overview of the Supplementary Legal Aid Scheme

It is the Government's intention to establish a "Supplementary Legal Aid Scheme" (SLAS) whereby 25% of damages successfully claimed, other than damages for future care and loss, in cases funded by legal aid will be recovered by the legal aid fund (the SLAS levy). This reflects the fact that, in line with the Jackson reforms, success fees in cases funded by Conditional Fee Agreements (CFAs) will be limited to 25%.

The policy objectives behind the SLAS are to create an additional source of funding for civil legal aid and, at the same time, to ensure that CFAs are no less attractive than legal aid.

To this end section 23(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 allows for regulations requiring legally aided persons (in civil disputes) to repay an amount which exceeds the costs of the legal services which they have been provided with.

Views have been invited on the practical application of the scheme.

Our Response

The Ministry of Justice (MoJ) has outlined eight proposals which will underpin the SLAS. Our response to each of these proposals is set out below.

However, before responding, we wish to take this final opportunity to urge the Ministry of Justice not to proceed with the SLAS. Our view is that there should be no change in the system at all. We understand and support the concept of the statutory charge, whereby if a client receives damages as a result of having been assisted by public funding, and costs have not been recovered in full, then the statutory charge applies to the damages, so the Legal Services Commission is not out of pocket.

However, we consider it wrong that there should be any deduction from a client's damages which exceeds the cost of funding their case. As a form of indirect taxation, this is regressive. The principle underpinning a means-tested legal aid system is that legal services should be provided free of charge to those who can least afford them. In the words of the 1945 Rushcliffe Report[1] which presaged the Legal Advice and Assistance Act 1949, the idea was that legal aid should be provided to "those of small or moderate means" and those who are "normally classed as poor". In our view, the financial eligibility criteria for legal aid have tightened sufficiently over recent years that it is only those in the latter group who remain eligible for legal aid. While it is acceptable for this group to pay their own way by reimbursing their own legal costs into central funds from any damages which they are awarded, it is unacceptable for this group to subsidise the legal costs of others. The tax burden for funding the legal aid system, as with any other part of the welfare state, should fall squarely on the shoulders of those who are able to afford it.

Such a development would mean that legally aided clients are placed in a worse position then privately paying clients or litigants in person. It is a fundamental principle of the legal aid system that there should be a degree of parity between publicly and privately funded clients. Publicly funded clients should be able to litigate in circumstances where privately funded clients would do the same. This is reflected in paragraph 5.7.4 of the Funding Code:

> Full Representation will be refused unless the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances.

If publicly funded clients are liable for an amount which exceeds the costs of their case than they are placed at a considerable disadvantage in contrast to privately paying clients or litigants in person. In our view, this is to be avoided.

We are not convinced that the analogy with the Jackson proposals for personal injury cases – whereby any success fee would no longer be recovered in costs from the losing party but instead deducted from a claimant's damages – applies. First, Jackson also recommended that personal injury damages should increase by 10% in

[1] Report of the Committee on Legal Aid and Legal Advice in England and Wales (Cmd. 6641)

order to recompense the claimant for some of the deduction (although it remains unclear how this recommendation will be implemented). There is no equivalent provision in other areas of law where damages are to be claimed. Second, it is a matter between a claimant and his or her solicitor whether the success fee is deducted from the claimant's damages. The SLAS proposal, however, would be mandatory.

If the SLAS levy is brought in, we consider that the Government should make it clear that general damages will increase by 10% and how that will be achieved. We assume that general damages will be increased across the board, including claims for damages for disrepair and for breach of covenant of quiet enjoyment.

Finally, we note the conclusions of the Equality Impact Assessment that disabled people appear to be over-represented in publicly funded cases in clinical negligence, housing and public law cases, and may be over-represented in cases involving discrimination law; and that those from black, Asian and minority ethnic backgrounds may be over-represented in publicly funded actions against the police, housing, public law and discrimination cases. Our experience representing vulnerable clients confirms this. The concern is that these proposals will therefore impact disproportionately on people with disabilities and those from black, Asian or other minority ethnic backgrounds.

For these reasons we urge the MoJ not to proceed with the SLAS.

In the alternative that the decision is made to proceed with the SLAS, our responses to the eight individual proposals are outlined below:

(i) The SLAS levy should not apply where legal help only has been provided.

We agree with this proposal. It is our view that damages awarded in a case funded by legal help are likely to be moderate and the administrative costs of recouping the SLAS levy would be disproportionate to the revenue generated for the legal aid fund.

(ii) The SLAS levy should not apply to counterclaims in possession proceedings.

The consultation paper states at paragraph 8 that:

> [C]ounterclaims [in possession proceedings] may relate, for example, to disrepair or harassment, with a view to damages being awarded which can be offset against rent arrears and thus prevent a possession order being made. Taking 25% of such damages for the legal aid fund could therefore negate the purpose of providing legal aid funding. We therefore propose that the SLAS levy should not apply to such counterclaims.

We agree with this and endorse the proposal.

(iii) The SLAS levy should apply in full in cases which settle early.

We disagree with this proposal.

The idea that the SLAS levy might be reduced in cases which settle early is based on Lord Justice Jackson's hope that "a sliding scale" would provide an incentive to accept any reasonable settlement offer (consultation paper paragraph 10).

In response the consultation paper observes at paragraph 11 that:

> …the reduction… might give disproportionate bargaining power to the defendant, who might offer a significantly reduced amount of damages in the knowledge that a larger levy would be taken if the 'early settlement' point passed.

The consultation paper concludes that this is an issue which would best be considered in the light of experience once the SLAS levy and the new CFA regime have been established.

We see the force in Lord Justice Jackson's view and are inclined to accept it. We are unconvinced that this will give defendants a disproportionate level of bargaining power. If a Defendant makes an unrealistic offer then it is open to a Claimant to counter by making a realistic Part 36 Offer. There will be cost consequences if the Defendant refuses and goes on to lose at trial.

We do agree that this is a proposal which should be monitored once the SLAS takes effect. However, practically speaking, we take the view that this will be easier to do if Lord Justice Jackson's proposal is put into operation. This way, providers can report to the LSC when the sliding scale induced their client to settle. If it is ineffective then it can be abandoned. But without the sliding scale in place it is difficult to see what the LSC would be monitoring.

(iv) The SLAS levy should apply in full in cases which conclude with legal aid after having started without it.

We disagree with this proposal. We do not believe that those who start their cases, for example, on a CFA and conclude them with the assistance of legal aid, should at risk of paying both a success fee on the CFA and the 25% SLAS levy.

We note that the Ministry of Justice emphasises in the consultation paper that the instances where a client is able to obtain legal aid funding following the termination of a CFA are rare, particularly as legal aid should not be granted in instances where a CFA is available We disagree that instances are rare. In our experience, it is not unusual for a client's means to change during the progress of proceedings, so that someone who was not previously financially eligible for legal aid (and therefore had the assistance of a CFA) finds that he or she becomes financially eligible. Indeed, in the current economic climate, this is a particular concern.

Our only other comment relates to the specific scenario given at paragraph 14(c) of the consultation paper:

> (c) The claimant rejects the provider's opinion about making a settlement and the provider ends the CFA accordingly.

In relation to this scenario the consultation paper observes:

> 18. … Taking the full 25% SLAS levy where such a case became legally aided would result in the claimant having to pay both the 25% levy and a success fee and thus having to pay more than 25% of the relevant damages. As in scenarios (a) and (b), an element of responsibility on the part of the claimant is present, but the position is less clear cut as the provider's opinion about making a settlement may have been deserving of rejection.
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> 19. On the other hand, the CFA Law Society guidance makes clear, and we would expect the individual CFA contract to state, that the CFA provider will take the success fee if a recommended settlement is rejected. In effect, therefore, when entering a CFA agreement the claimant signs up to accepting a recommended settlement as a successful conclusion to the case.

In our experience as housing lawyers dealing with clients who are often vulnerable and who lead chaotic lives, it is unrealistic to expect individuals who are eligible for legal aid to have such a nuanced appreciation of any contract which they have entered into. Put more simply, the individuals will not always appreciate what they are signing up to. In such a case it is not necessarily reasonable for those individuals to be liable to pay the SLAS levy and a success fee.

(v) In cases which conclude without legal aid after having started with it (beyond legal help) the SLAS levy should apply only in proportion to the amount of the case funded by legal aid.

We agree. We do not believe that those who start their cases with legal aid and conclude them, for example, using a CFA should be in a worse position at the end of their case then those who use a CFA throughout.

(vi) Payment of any residual debt in respect of the SLAS levy if the funds awarded are exhausted by the statutory charge should not be enforced.

We agree. It would be wholly disproportionate to enforce any residual debt in such a case. It needs to be remembered that any individual who is financially eligible for legal aid will, by virtue of the strict eligibility criteria, be among the poorest in the population and will have very little by way of disposable income or capital. If the entirety of the funds awarded are subsumed by the statutory charge then that individual is unlikely to have sufficient money to make enforcing the debt a realistic option, and doing so may well exacerbate their difficult financial circumstances.

(vii) The SLAS levy should be calculated on the gross damages in cases where recovery of benefits or lump sums is offset.

We understand the desire to maintain parity between those litigants who have previously received recoverable benefits and those who have not. However, we take the view that the SLAS should be calculated on the net damages. We take this view solely on the basis that it would be undesirable to adopt a proposal which risks diminishing the compensation which a litigant receives for future care and loss.

Damages of this nature are vitally important to an individual's quality of life and the imperative to preserve these damages outweighs the need for parity.

(viii) Where an order or settlement does not indicate a specific sum in respect of future care and loss, the onus will be on the claimant to establish that any part of the payment is exempt from the SLAS levy.

We do not object to this proposal but we would recommend that LSC guidance is circulated to judges and advocates to ensure that orders are drafted appropriately and that clients do not lose out as a result of any inadvertent lack of specificity in the order.

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