



## Proposals for reform of Legal Aid in England and Wales

### Response from NAT (National AIDS Trust)

NAT is the UK's leading independent policy and campaigning charity on HIV. We develop policies and campaign to halt the spread of HIV and improve the quality of life of people living with HIV.

NAT is a member of the Equality and Diversity Forum (EDF), and we support the EDF submission to this consultation process. We are also a member of the Justice for All Campaign, which aims to ensure that everyone is treated fairly under the law, no matter who they are, how much money they have, or where they live.

NAT strongly supported the introduction of the Equality Act 2010 and increased protections for disabled people, including people living with HIV. We are now concerned that cuts to Legal Aid will prevent individuals from accessing these rights. Although discrimination cases will still be eligible for legal aid, these cases will often arise alongside another claim about, for example, employment or housing, which will no longer be in scope under these proposals. This will create a practical barrier to pursuing the discrimination claim. The loss of Legal Aid in these areas will lead to a reduction in the number of providers who advise on combined claims.

Statistics about who is currently accessing Legal Aid suggest that people living with HIV will be particularly affected by the cuts. Legal Aid is relied upon disproportionately by people with disabilities, people from black and minority ethnic backgrounds, and those on low incomes. HIV is a disability, and a significant proportion of people living with HIV are black African or black Caribbean. Many people living with HIV are also affected by poverty. Between 2006 and 2009, one in six people receiving HIV treatment experienced poverty so severe that they had to seek charity assistance in the form of cash payments. They are particularly likely to be disadvantaged by the loss of funding for legal help with debt, housing, welfare advice and asylum support.

NAT would like to raise particular concerns about the following aspects of the proposed reforms, which are especially relevant to people living with HIV:

- The removal from scope of employment, welfare benefits, asylum support, immigration, housing and debt advice.
- The establishment of the Community Legal Advice telephone as the single gateway to access civic legal aid advice.

We urge the Ministry of Justice to re-consider the equality impact of these proposals, and how the loss of Legal Aid will prevent people living with HIV from accessing their rights.

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Please send your response by 12:00 noon on 14 February 2011 by email to legalaidreformmoj@justice.gsi.gov.uk, or by post to Legal Aid Reform Team, Ministry of Justice, 102 Petty France, London SW1H 9AJ.

Scope

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?

[X] Yes [ ] No

Please give reasons.

NAT supports the retention in scope of these areas. However, we are concerned by the approach taken by the Ministry of Justice, that only the most urgent and serious proceedings should be left in scope, for example when there has been a "significant breach of human rights", or for "debt matters when the client's home is at immediate risk". It is often far more cost effective to provide advice earlier on. Intervening earlier could stop the inadequate provision of adult care by a local authority from becoming a "significant breach of human rights". Likewise, providing advice on welfare benefits, housing rights or managing debt before "the client's home is at immediate risk" is a much more efficient use of Legal Aid than waiting until they are facing a personal and financial emergency.

Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party?

[ ] Yes [ ] No

Please give reasons.

No comment.

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 the civil and family legal aid scheme?

[ ] Yes [X] No

Please give reasons.

NAT do not agree with the proposals to exclude the following types of case and proceedings from the scope of legal aid:

- Asylum support
- Clinical negligence
- Compensation from the Criminal Injuries Compensation Authority
- Debt
- Education
- Employment
- Family law (financial relief and private child law)
- Proceedings before the Higher Courts
- Housing

- Immigration
- Welfare benefits

While we welcome the intention to retain Legal Aid for discrimination cases, we are concerned that legal aid will be removed for cases in these areas which may be linked to a discrimination case. If it is not possible to obtain funding for these parts of the claim it will be very difficult to take action to pursue the discrimination claim.

As an HIV charity, we are best positioned to comment more specifically on the following in detail: employment, welfare benefits, immigration, asylum support, and housing.

#### Employment

People living with HIV still experience discrimination in the workplace due to their disability. NAT welcomed the Equality Act 2010, which increased legal protections for people living with HIV at work. We worked with the Terrence Higgins Trust, as well as mental health charities Mind and Rethink to ensure that the Equality Act also protected disabled people from discrimination in the recruitment process, by outlawing pre-employment health questionnaires.

However, now that these protections are in place, people living with HIV will have significantly reduced access to seek legal enforcement of these rights. Many discrimination claims arising from work are brought alongside a broader employment claim, but only the discrimination element will now be eligible for Legal Aid. In this new arrangement, it will be harder to find a lawyer for whom it is financially possible to pursue an employment case involving discrimination.

#### Welfare benefits

The system of welfare benefits is complex, and becoming more so. There is particularly rapid change around disability-related benefits, which are a crucial source of income for many people living with HIV. Research by NAT has found that people living with HIV face particular barriers in accessing Employment and Support Allowance, the benefit for people who cannot work due to illness or disability. However, those who receive expert advice are much more likely to succeed. This is illustrated by the appeals statistics for ESA: 40% of appeals are successful, but this figure is as high as 70% when the applicant has representation.

With a raft of further reforms to welfare benefits intended between 2011 and 2014, including a review of Disability Living Allowance (DLA), changes to housing benefit and the introduction of the Universal Credit, it is even more essential that people living with HIV have access to independent, high quality advice about their entitlement to welfare benefits.

#### Immigration

Immigration is a key dimension of the HIV epidemic in the UK. Over one-third of people accessing HIV care in the UK are black African, and most are migrants. We disagree strongly with the analysis of the government, which “does not consider that immigration issues are of sufficiently high importance in general to justify continued legal aid funding.” Immigration law is complex, and the provision of reliable advice early on in the process reduces the likelihood that migrants will end up staying in the UK illegally. For migrants living with HIV, residential status is crucial for accessing NHS care. Providing early immigration advice under Legal Aid is invaluable for helping migrants remain and settle in the UK in accordance with all relevant laws.

#### Asylum support

People living with HIV are also overrepresented in the asylum system. For this reason NAT is very concerned that Legal Aid will not be available to provide advice to asylum seekers about receiving support under Section 95 or Section 4. As asylum seekers are generally not allowed to work in the UK, and have no recourse to public funds, this assistance is the only income available to them. Research by NAT has found

that involvement in the asylum and immigration systems is the main driver of poverty for people living with HIV.

It is inconsistent to allow Legal Aid for advice for asylum cases, while not allowing help with advice that will ensure that these individuals do not experience destitution while awaiting the outcome of their cases.

#### Housing

Some people living with HIV have special housing needs. For example, damp accommodation with inadequate heating creates an unhealthy and potentially dangerous environment for people with respiratory infections and tuberculosis. A tenant living with HIV may wish to enforce their landlord's obligation to make repairs to reduce serious damp problems. Under the new proposals, they would not be able to access Legal Aid for this case. They would only be able to do so if they were at immediate risk of losing their home – for example, if they had withheld rent from their landlord and were threatened with eviction.

**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 (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases?

Yes     No

Please give reasons.

Yes, as this is the bare minimum provision which the Government must make available under its international legal obligations.

**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 a Conditional Fee Arrangement?

Yes     No

Please give reasons.

No comment

**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.

No comments.

## The Community Legal Advice Telephone Helpline

**Question 7:** Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?

Yes     No

Please give reasons.

NAT is concerned that the proposal to establish a Community Legal Advice telephone as the single gateway to access civic legal aid advice will adversely affect people living with HIV.

Having access to a telephone advice line will no doubt be preferable for some people, and should be available as an option for these individuals. However, a phone line where claims are assessed by a general adviser should not be the only point of access for Legal Aid. NAT has a number of specific concerns:

- People living with HIV who may have faced discrimination related to their disability will not always be comfortable disclosing the nature of their claim to a telephone adviser. This will deter them from accessing legal advice for their claim. They should be able to approach a Legal Aid provider, who is experienced in the sensitivity of disability discrimination cases, directly.
- Migrants who have English as a second language may not be able to access the phone line.
- Individuals will not always have detailed knowledge of what legal protections apply in their situation, and therefore what sort of case they have. For example, many individuals who in fact have a discrimination claim may not immediately raise this aspect but would call up with an 'employment' problem.
- Those who currently provide advice under Legal Aid have observed that sometimes it is necessary to view documentation before the true nature of a client's problem can be identified. Individuals will not be able to communicate the relevant aspects of this documentation over the phone, so may miss out of the assistance they are entitled to.
- Those who are distressed or frightened, for example individuals with immigration problems, will be even less likely to be able to express their problem over the phone.

**Question 8:** Do you agree that specialist 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?

Yes     No

Please give reasons.

See response to question 7 above.

**Question 9:** What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

We feel strongly that face to face meetings should remain an option.

At a very minimum, a face to face meeting should be available when:

- English is a second language.
- The claim relates to discrimination or harassment, which the individual wishes to keep confidential until they have received legal advice.
- The individual has any physical or mental impairments that would make it difficult for them to explain their problem to the telephone adviser.
- Documents need to be examined in order to understand the nature of the problem.
- The individual has not been able to sufficiently articulate or explain their problem.
- The individual is emotionally distressed or appears to be frightened or at risk of physical or mental harm.

**Question 10:** Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

No comment

**Question 11:** Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?

Yes     No

Please give reasons.

No comment.

## Financial Eligibility

**Question 12:** Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants?

Yes     No

Please give reasons.

No comment.

**Question 13:** Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution?

Yes     No

Please give reasons.

No comment.

**Question 14:** Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases?

Yes     No

Please give reasons.

No comment.

**Question 15:** Do you agree with 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 (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)?

Yes     No

Please give reasons.

No comment

**Question 16:** Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances?

Yes     No

The Government would welcome views in particular on whether the conditions listed at paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

No comment

**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 and, to that end, to place a charge on property similar to the existing statutory charge scheme?

Yes     No

Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

No comment

**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 (£300,000 in the case of pensioners with disposable income of £315 per month or less)?

Yes     No

Please give reasons.

No comment

**Question 19:** Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases capped at £100,000 for all levels of service?

Yes     No

Please give reasons.

No comment

**Question 20:** Do you agree that the equity and pensioner disregards should be abolished for contested property cases?

Yes     No

Please give reasons.

No comment

**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     No

Please give reasons.

No comment

**Question 22:** Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income?

Yes     No

Please give reasons.

No comment

**Question 23:** Which of the two proposed models at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.

No comment

## Criminal Remuneration

**Question 24:** Do you agree with the proposals to:

- pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;  Yes  No
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and  Yes  No
- remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?  Yes  No

Please give reasons.

No comment

**Question 25:** Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- the proposal to enhance the Litigators Graduated Fee Scheme and Advocates Graduated Fee Scheme fees for a guilty plea by 25% provides reasonable remuneration when averaged across the full range of cases; and  Yes  No
- access to special preparation provides reasonable enhancement for the most complex cases?  Yes  No

Please give reasons.

No comment

**Question 26:** Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences?

Yes  No

Please give reasons.

No comment

**Question 27:** Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000?

Yes  No

Please give reasons.

No comment

**Question 28:** Do you agree with the Government's proposal to:

a) remove the premium paid for magistrates' courts cases in London; and

Yes  No

b) reduce most 'bolt on' fees by 50%?

Yes  No

Please give reasons.

No comment

**Question 29:** Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates?

Yes  No

Please give reasons.

No comment

**Question 30:** Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases?

Yes  No

It would be helpful to have your views on:

- the proposed role of the assessor;
- the skills and experience that would be required for the post; and
- whether it would offer value for money.

Please give reasons.

No comment

**Question 31:** Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages?

Yes  No

Please give reasons.

No comment

### Civil Remuneration

**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?

Yes  No

Please give reasons.

No comment

**Question 33:** Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases?

Yes  No

If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

No comment

**Question 34:** Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction?

Yes  No

Please give reasons.

No comment

**Question 35:** Do you agree with the proposals:

- to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and  Yes  No
- to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?  Yes  No

Please give reasons.

No comment

**Question 36:** The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

No comment

**Question 37:** Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases?

Yes  No

If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

No comment

**Question 38:** Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply?

Yes  No

Please give reasons.

No comment

## Expert Remuneration

**Question 39:** Do you agree that:

- there should be a clear structure for the fees to be paid to experts from legal aid;  Yes  No
- in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;  Yes  No
- in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;  Yes  No
- the categorisations of fixed and graduated fees shown in Annex J are appropriate; and  Yes  No
- the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?  Yes  No

Please give reasons.

No comment

## Alternative Sources of Funding

**Question 40:** Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts?

- Yes  No

Please give reasons.

No comment

**Question 41:** Which model do you believe would be most effective:

- Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or
- Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

No comment

**Question 42:** Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:

- A) mandatory model;
- B) voluntary opt-in model; or
- C) voluntary opt-out model?

Please give reasons.

No comment

**Question 43:** Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme?

- Yes
- No

Please give reasons.

No comment

**Question 44:** Do you agree that the amount recovered should be set as a percentage of general damages?

- Yes
- No

If so, what should the percentage be?

No comment

## **Governance and Administration**

**Question 45:** The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.

No comment

**Question 46:** The Government would welcome views on the administration of legal aid, and in particular:

- the application process for civil and criminal legal aid;
- applying for amendments, payments on account, etc.;
- bill submission and final settlement of legal aid claims; and
- whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

No comment

**Question 47:** In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

No comment

**Question 48:** Are there any other factors you think the Government should consider to improve the administration of legal aid?

No comment

## Impact Assessments

**Question 49:** Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Yes  No

Please give reasons.

This consultation does not demonstrate adequate consideration of the impacts of the proposals on particular groups, including disabled people and people from ethnic minorities. These impacts are made very clear from the demographic breakdown given of those who are accessing the current Legal Aid system, but are completely disregarded by the justification for cuts presented in the consultation document.

Disabled and BME people represented 18% and 8% of the UK population respectively, but are 21% and 26% of civil Legal Aid clients. In the area of welfare benefits, which we have noted is especially relevant for people living with HIV, 85% of current Legal Aid clients are from a BME background. A quarter (27%) of housing claims on Legal Aid involve disabled people.

The Ministry of Justice's approach to these statistics is to recognise the possibility of harm for some under the proposals, but still conclude that because the changes apply to everyone, and that the government needs to reduce public spending, the result is proportionate. We think this is an insufficient consideration of the equalities impact of the proposals. The consultation fails to recognise that the importance of Legal Aid as a means of access to justice is different for different protected groups.

This is also at odds with the requirement of equalities law to consider how equality of opportunity can be promoted. This means treating persons who are similarly situated in the same way and those who are not similarly situated in a different way, to promote equality. As far as access to justice is concerned white people and the BME communities, and disabled people and able bodied people, are not similarly situated. On average, one is much poorer and less well resourced than the other.

The Sex Discrimination Act 1975 (SDA), the Race Relations Act 1976 (RRA) and the Disability Discrimination Act 1995 (DDA) require that all public bodies give 'due regard' to the equality impact of their actions. This means that MoJ should have due regard to the need to promote equal opportunities between men and women, between people of different racial groups and between disabled people and other people; to promote good relations between people of different racial groups; to promote positive attitudes towards disabled people; to encourage participation by disabled people in public life; and to take steps to take account of disabled people's disabilities, even where that involves treating disabled people more favourably than other people.

NAT believe that these proposals do not meet these obligations, and that MoJ have not properly assessed the equality impacts of these cuts to Legal Aid.

**Question 50:** Do you agree that we have correctly identified the extent of impacts under these proposals?

Yes     No

Please give reasons.

See comments to Question 49.

**Question 51:** Are there forms of mitigation in relation to client impacts that we have not considered?

Many legal aid cases are the result of Governmental administrative shortcomings and a failure to make accurate and appropriate decisions initially, for example, welfare benefit cases and some immigration cases arise as a direct result of administrative failures. If some of these areas were remedied less legal help would be needed.

## About you

Full name

Sarah Radcliffe

Job title (or capacity in which you are responding to this consultation exercise)

- ATE Insurer
- Claimant
- Claimant Lawyer
- Claims Management Company
- Consumer representative organisation
- Defendant
- Defendant Lawyer
- Government Department / Non-Departmental Public Body
- Insurer
- Judiciary
- Legal Academic
- Other – please specify Policy Officer, HIV Charity

Date

11 February 2011

Company name/organisation (if applicable)

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Address to which this acknowledgement should be sent, if different from above