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FROM: CLAIRE MCCORMICK

DATE: 9 FEBRUARY 2022

TO: CHRISTINE DARRAH

DRAFT BUDGET 2022-25 – IMPACT ON LEGAL AID PAYMENTS

Business Area: Legal Services Agency

Issue: To provide a written brief on the likely impact of the draft budget 2022-25 on legal aid payments and access to justice.

Restrictions: None

Action Required: The Committee is invited to note the update.

Officials Attending: N/A – this is a written Briefing

BACKGROUND

The Committee has already received briefing on the impact on the Draft Budget 2022-25 from the Department of Justice. A high-level summary of the impact on legal aid was included in the Department's Draft Budget 2022-25 Consequences Paper. The relevant legal aid extract is included at Annex A.

Following the Committee's evidence session on 03 February, when delays in legal aid payments was raised in the context of further courts delay, the Committee decided to write to the Department seeking further information. This written brief has been offered

in anticipation of the Committee's request and seeks to provide an overview in advance of the Law Society and Bar presenting a joint briefing on this issue on 10 February.

GENERAL CONTEXT

Legal aid is a demand-led service, in that, subject to satisfying statutory financial eligibility and legal merits tests, an application for legal aid will be granted without reference to the funding available to pay for the service delivered.

This means that legal aid provides advice, assistance and representation to individuals across a wide range of criminal, civil and family matters and will be authorised without reference to the cost of the services provided. Legal aid is regarded as central in providing access to justice to the most vulnerable people in society. by ensuring equality before the law, the right to counsel and the right to a fair trial.

There is currently good provision of services with 441 firms of solicitors currently registered to deliver services through legal aid, and 583 barristers registered to provided representation. The Law Society estimates that services are accessible in 65 locations.

The are no reported issues of individuals being unable to access services through the current network of providers and due to the level of funding secured during the pandemic and in-year services have been well maintained, supporting recovery in the court system.

LEGAL AID EXPENDITURE

In the financial years 2016/17 to 2019/20 legal aid expenditure was £82m (within a range of +/- 3%). This reflects a stable level of expenditure for demand-led services. Expenditure in 2020/21 was £75.2M reflecting the impact of covid and associated downturn in court business.

The projected outturn for 2021/21 is circa £93.9m (excluding payments in respect of legacy inquests) reflecting significant additional in-year funding secured to reflect return to levels of demand more akin to pre-covid levels as the justice system recovery continues.

While there is evidence that the funding for advice, assistance and representation should be circa £82m to deliver a sustainable level of payment to solicitors and barristers who provide services, the Legal Services Agency's opening 2021-22 budget for the provision of services was only £75.7m. In 2021-22 and other recent years, the shortfall in the allocation to known requirement has been addressed through in-year funding requests. The reliance on in-year funding bids to secure sustainable levels of payments has therefore been a feature of the legal aid over many years. While in recent years the Agency has been successful in securing additional funding, the timing of the funding is challenging as it requires something of a stop / start payment profile to ensure the Agency does not exceed its allocation and yet being able to respond to the availability of additional funding.

Expenditure of circa £82m per annum allows the Agency to pay standard fee bills (typically criminal cases) within eight weeks of the bills being submitted. Non-standard fees have longer payment profiles but have continued to be paid within set timeframes.

The additional funding received in-year means that the assessment times for standard fee bills currently stands at six weeks.

IMPACT OF DRAFT BUDGET 2022-25

Applying the Draft Budget allocation for the Department to the legal aid allocation, this would mean a 2% reduction on the £75.7m budget allocation to £74.18m.

If no additional funding is provided then across the three years of the budget period, the

Agency would have £23.4m less to pay bills that it would typically expect to pay against the historical payment level of £82m per annum. The only way the Agency can accommodate a reduction in funding is by reducing the time it takes to pay bills.

The reduction of the funding available would mean that instead of paying circa £1.57m per week (if the Agency had funding of £82m) we will only be able to pay £1.42m per week (based on £74.18m funding). At the start of the budget period, the Agency would have one day less processing capacity within the first two weeks. This would mean by the end of the first year the Agency would have lost 27 processing days; increasing to 55 days processing by year two and 83 days by the end of the third year. Put another way processing timelines would increase by five and a half weeks by the end of year one, 11 weeks by the end of year two and 16.5 weeks by the end of year three.

The above analysis provides a simple analysis of comparison between an £82m and £72.18m spend. The projection that payment delay could reach 47 weeks by the end of year three assumes no additional funding in the period and seeks to incorporate a number of other complicating factors including:

- (a) The agency will carry a body of unassessed payments into the 22/23 year and every year thereafter. The current estimate of the unassessed bills to be carried into 2022/23 is circa £17.5m;
- (b) Since September 2020, when the volume and value of bills increased significantly, the Agency received on average £7.6m of bills per month. This would equate to an annual demand of £92m per annum. It is not unrealistic to project this level of demand, certainly in the early period of the budget period, as there is a body of Crown Court cases in the system which are awaiting recovery; and (c) likely emerging pressures through new work.

While the assumptions behind 47-week delay by the end of year three will be subject to refinement, without an injection of in-period funding the changes to the overall timescales will not be significant.

If additional funding became available in-year this would of course improve the payment timescales. However, the time when the additional funding becomes available will impact on the profile of payments as if money is allocated too late there is insufficient capacity to significantly increase processing times.

The Agency works on the assumption that practitioners require regular and predictable cashflow to maintain their business and significant injections of funding late in the financial year does not assist in meaningful payment profiling.

LIFE CYCLE OF CASES

While the profile of payment timescales about is dealing with the time taken from the submission of a bill to payment, practitioners will have been working on cases for considerably longer.

For example, in criminal cases, the typical life cycle of a case from grant of certificate to payment will be between two and four years depending on the type of case and the court tier. As such the total lapsed time will extend significantly under the draft budget potentially by almost a further year. In the higher courts the civil and family cases will have longer life cycles, with areas involving children more typically having life cycles of four to five years. So the draft budget would further extend the total elapsed time to payment by up to a further year.

IMPACT ON PRACTITIONERS

The firms of solicitors and barristers which deliver publicly funded services will cover a wide spectrum from some who have a high dependence on legal aid to others whose dependence on legal aid is low.

If the draft budget is implemented as proposed, the delay in payment timescales will impact on the substantial number of suppliers. Significant reductions in payment timescales with impact on the cashflow of suppliers. Some may limit their exposure to

legal aid while others may not be able to continue to trade. Either of these options will have an impact on access to justice as the network of access points to publicly funded services will shrink. It could be anticipated that this impact will be most noticeable in rural communities.

While the Law Society and Bar will no doubt stress these points, it would be highly likely that a six-fold increase in payment times would have a significant impact on the number and spread of providers of publicly funded legal services, particularly given that fact that 25% of solicitors' practices are sole practitioners and 50% of firms have less than four partners.

The Agency and Department is working closely with the Law Society and Bar on the potential impact of the Draft Budget. The Agency operates in a transparent way by publishing payment targets and uploading monthly performance information on its webpage. This approach will continue in the incoming financial year.

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Legal Services Agency (LSA)

Summary of Impacts, mitigating actions, prioritisation and areas where work will need to be paused or slowed down:

The funding available to pay for legal advice, assistance and representation provided to individuals through legal aid will be reduced. This will mean that the payment times for the services provided will be further extended to reflect the funding constraints.

While legal aid expenditure on services provided is typically £82m per annum, the funding available will be £74.19m per annum. This means that the funding available will

cover just under 11 months of the traditional level of payments for services provided. Over three years, a 2% cut will mean the Agency will spend £23.43m less on legal aid compared to historical pre-Covid spend against the backdrop of increasing demand. By the end of the three years a cut of 2% per year could see payment times extended from the historic target of 8 weeks for standard fees to 47 weeks.

Furthermore, a 2% cut per year will force the Agency not to fill vacancies which will have a negative impact on processing capacity and further exacerbate delays. Critical work to address long standing audit recommendations and accounts qualifications will also be delayed as a result.

Delays of this magnitude could have serious implications for small businesses and self-employed individuals who undertake a significant amount of legal aid work. This in turn could impact on the individuals who are financially entitled to legal aid to easily access services if there is contraction in the network of providers of publicly funded legal services.