

# **Response of the Legal Aid Group of the Association of Costs Lawyers to: Proposed amendments to the Costs Assessment Guidance: for use with the 2018 Standard Civil Contract**

## **Response to the LAA's Consultation on the proposed changes to the Costs Assessment Guidance**

Further to the LAA's Consultation on the proposed changes to the Costs Assessment Guidance following the removal of the Court Assessment process the Association of Costs Lawyers' Legal Aid Group (hereinafter 'ACL LAG') maintain that insufficient information has been provided regarding the implementation of the change and questions remain, specifically:

- Who will be assessing the larger bills which are more complex not only in terms of calculating the quantum of the claim but legal issues and factual matrices;
- What training/experience the caseworkers will have, especially legal training;
- How many caseworkers will be involved in assessing bills and what targets / time pressures the caseworkers will have;
- How performance will be recorded;
- Most importantly the format of the large / complex bills.

The ACL LAG also have a number of concerns in relation to workability of the proposed assessment of all legal aid matters by the Legal Aid Agency. The aim of this paper is to help to identify the issues and provide some routes to a satisfactory long-term process for all concerned.

The ACL LAG recognises that the initial move of costs assessed by the Court to assessment by the LAA has only just begun, and we hope that the below concerns are considered and acted upon in order to avoid the potential problems we have identified.

### ***Capacity:***

At the Emergency Civil Contracts Consultative Group ("CCCG") meeting of the 2<sup>nd</sup> June 2020, Steve Starkey, Head of Civil Operations, indicated that approximately £5million was paid to the HMCTS in Court Fees to assess bills. This would indicate that in the region of 22,700 to 25,000 formal bills of costs are assessed by the Court each year which would now need to be assessed by the LAA. To take on these assessments the LAA have in the past awaited Treasury approval for adequate funds to expand and train its team, but there is no mention of such funds and this move appears to be on the basis of releasing outstanding payment to providers and counsel significantly faster than if HMCTS is used as body to assess the bills. There is a concern that the LAA does not have the capacity to efficaciously assess the number of bills, bearing in mind the volume and complexity of the bills, and that expediting all payments due to providers and counsel will not be maintained in the long term.

At the CCCG meeting of the 2<sup>nd</sup> June 2020, Malcolm Bryant, Head of Exceptional and Complex Cases, advised that the LAA were processing 475 CCMS Court assessed bills per week and had capacity to do an extra 200-300 per week. Currently, claims which are assessed by the Court are not assessed by the LAA (14.6 of the Standard Civil Contract 2018); the LAA simply check the claims to ensure that they are within scope of the funding certificate. Consequently, the ACL LAG are concerned that there is a significant difference between processing a Court assessed bill and assessing a bill with costs of up to £25,000.00 which can run to hundreds of items if prepared via the CCMS.

Utilising the number of Court assessed bills which can be processed as a benchmark to determine how many bills of up to £25,000.00 can be assessed is a false equivalence.

There is concern that if the LAA caseworkers are required to assess bills of up to £25,000.00 by targets designed for processing bills already assessed, it will lead to rushing / mistakes and therefore increased rejections and appeals. Both rejects and appeals affect both the LAA and providers, the former in terms of resources and the latter in terms of delay, lost time and impact upon cash flow.

***Experience:***

Until the 1<sup>st</sup> June 2020 the LAA only assessed matters with assessable costs under £2,500.00, those where proceedings were not issued or those where the matter concluded before the Magistrates. It is the ACL LAG's experience that the vast majority of these cases are low-value matters under £2,500.00 without significant complexity.

At the CCG meeting of the 2<sup>nd</sup> June 2020, in response to concerns about whether LAA caseworkers have the requisite expertise to assess Court bills, Mr Bryant responded that the LAA were assessing high cost case plans in excess of £25,000.00. Comparing a Court bill to a claim under a high cost case plan ("HCCP") is an inappropriate comparison.

For HCCPs, experienced caseworkers will liaise with providers to negotiate the costs to be allowed for each key stage; the plan is supposed to be agreed prior to the work being undertaken (on a small minority of cases, the case worker can opt for a Claim 1 form to be used in lieu of an HCCP) affording far greater time and opportunity for the more experienced and specialist caseworker within the VHCC/ECC Team to grasp the complexities and reasons requiring the vast amount of work. Thus, the parameters indicating what is reasonable and proportionate have already been determined before the claim is prepared and then assessed by the LAA.

The bespoke plan provides the caseworker with a set guideline to be applied regarding the costs to be allowed. Consequently, the caseworker tasked with assessing a VHCC claim requires less experience and there is also less burden upon them; this is shown by the nominal amount of times that an assessor will take issue with a claim which keeps within the price of each stage of the case plan.

In contrast, when assessing complex bills of up to £25,000.00, the caseworker will need to determine what is reasonable and proportionate without reference to any such pre-agreed detailed budget. The Costs Assessment Guidance and The Electronic Handbook are the only materials available to them and currently they are deemed inadequate for the more complex bills where experience of exactly what might have taken place during a case is invaluable.

Assessments by the Court are conducted by experienced Judges and Authorised Court Officers. These are legal professionals experienced not only in assessing costs of all values across inter partes and solicitor client costs and (within the SCCO) other costs payable out of a Fund such as those incurred in the Court of Protection, but for the vast majority, also in conducting and adjudicating upon legal proceedings; in many cases they have adjudicated the proceedings subject to assessment.

The Courts are acutely aware of the legal issues, everyday practical problems arising during the litigation process and especially the work required for all manner of proceedings due to their own extensive practical experience as practising lawyers. This allows them to consider and establish the issues in play shown on a bill and the effect on the costs incurred and claimed.

This is a very high bar to meet and the ACL LAG seek clarification as to what legal training and or experience the LAA caseworkers will be provided with to enable them to meet the required level of expertise.

If the LAA are to effectively and competently assess claims for hourly rate costs up to £25,000.00, it should possibly fall to the limited number of the more experienced caseworkers or a new team of more experienced

assessors. If the plan is to utilise those currently dealing with VHCC cases it is concerning to note that the current civil processing dates indicate the following position for Very High Cost Cases (family cases exceeding £25,000 using single Counsel – not including cases dealt with by the ECC team, in particular, 2 Counsel and Queens Counsel cases):

<b>Work Type</b>	<b>Current Position (working days)</b>
Case Plan	24 days
Claim 1 in lieu of Case Plan	19 days
Correspondence	11 days
Contracts	0 days

The ACL LAG therefore ask for clarification of these issues and concerns.

***Objectivity of the assessment:***

Assessing costs requires knowing when costs are reasonable and proportionate with regard to all of the circumstances with particular reference to CPR 44.4(3) (aka the Seven/Eight Pillars of Wisdom). The assessment of reasonableness and proportionality of costs must be made on an objective basis and the assessor should not be influenced by the fact that they administer the fund which is paying for the costs.<sup>1</sup>

Assessing (as opposed to simply checking) legal costs requires knowing when those costs are reasonable and proportionate with regard to all of the circumstances in order to use discretion. When an assessor is inexperienced and/or unknowledgeable about the work done for which the costs are being claimed, they do not know how to do this and genuine doubt becomes commonplace, meaning that they will place an overreliance on evidence they do not understand and reduce reasonable and proportionate costs in a misplaced belief that they are fulfilling their role. This issue is particularly common when the assessor must use their judgment on discretionary enhancement of the hourly rate based on the facts of the case.

The requirement for an assessor to have the appropriate knowledge and experience, and understanding of their role becomes even greater when, unlike the Court, they are not objectively independent but instead are part of the Government Agency who pays the very costs that they are assessing, and is bound by internal targets regarding remuneration and processing.

The safeguard for providers in assessments by the LAA lies in appeals to Independent Costs Assessors who can sit for no more than 10 years<sup>2</sup>. There is a decreasing pool of Independent Costs Assessors (“ICAs”) and they will face adjudicating on significantly more complex and higher value disputes. The ICAs will require a higher level of knowledge of both complex areas of law and the minutiae of legal aid policy and authority and intersecting costs law.

The organisation whose decision is being challenged (LAA) can choose which adjudicator (ICA) to use on any particular appeal, there being no robust system in place that can effectively prevent this. The appellant (provider/counsel) is completely reliant upon that organisation to forward all communications to the adjudicator and be afforded their contractual right of reply to any representations made to adjudicator by that organisation. The safeguarding process needs to be reviewed and changed to give greater oversight and transparency.

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<sup>1</sup> Paragraph 1.4 of the Costs Assessment Guidance: for use with the 2018 Standard Civil Contract

<sup>2</sup> Paragraph 9.3 of the Funding and Costs Appeals Review Panel Arrangements

The current procedure does not provide equality of arms for providers and Counsel in the assessment process and there are too few stages to adequately explore all remedies before litigation becomes necessary.

The ACL LAG are happy to work with the LAA to identify how a more appropriate processes can be implemented.

### ***Appeals:***

There is no available data from the LAA which identifies how many Court bills there are and the total value of assessable costs claimed and allowed therein but by the LAA's own model<sup>3</sup>, the total worth is around £70 million per annum, however, this is still conjecture and could be wildly understated and could be up to £625 million<sup>4</sup>. The LAA have not disclosed any of this data in any appropriate impact assessments. In any event, it is clear that there will be an exponential increase in hourly rate claims being assessed by the LAA; all high value with likely more reductions made at assessment, meaning that there will be a significant if not huge increase in the number of complex appeals.

Presently, work done in appeals to the Court is remunerable as assessment costs if the Court decides that it is reasonable and proportionate (barring completely unmeritorious appeals, in most instances it will), whereas the cost of an appeal to the LAA is borne by the provider. The non-payment of appeals for LAA assessments was on the basis that only a small number of low-value bills were to be appealed. In light of the size of the bills, complexity of the cases and the value which may be appealed, appeals of bills up to £25,000.00 is going to require a quality of work that justifies more time and greater experience.

The ACL LAG proposes that in preparing an appeal if it is to be on the CCMS, where it requires an additional claim to be prepared and uploaded with detailed justification, the time spent in appeals to the LAA be remunerated as it would be if the appeal had been to the Court and paid at hourly rates.

### ***Format of claim:***

The capacity, experience objectivity of assessment and appeals are all dependent upon the claim being presented in a way which effectively allows a reasonable assessment of the quantum therein. Current interim guidance allows providers to submit a formal Court Assessment bill of costs via a summary line CCMS claim, a full line by line CCMS claim or a Claim 1. It is not clear what the long-term plan will be for bills exceeding £2,500.00.

The current format of a CCMS bill does not lend itself to the assessment of complex claims up to £25,000.00 in any way. The CCMS bill report does not provide sufficient information to enable a caseworker to establish the reasonableness and proportionality of the work done e.g. explanations of time are only required for the "other" item descriptions. A formal bill of costs however provides detailed information regarding the work carried out and a breakdown of the composition of the routine items to allow Judges to carry out high level analysis of the work undertaken. The number of routine items in the more complex bills is inevitably higher than the smaller "£2500" cases and there are concerns that if they are included as one lump item there may be a blanket policy of reducing the numbers without adequate indication of how they are formulated; routine communications as one item prevents the assessor from establishing exactly what was happening and why the number of communications took place on each individual/organisation.

The most significant, although by no means only, issue is that CCMS does not preserve the sequence in which the line items are presented on a claim once they are entered/uploaded to CCMS and does not provide a unique identifier for a line item on a claim. This is a serious problem because firstly, the sequence in which

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<sup>3</sup> 15 weeks' of provider claims releasing £20 million as per Steve Starkey at the CCG meeting of the 2<sup>nd</sup> June 2020

<sup>4</sup> Calculated from 25,000 bills at a maximum £25,000.00 each

line items appear on a claim is crucial to understanding that claim e.g. the chronology of the case and resulting work done, especially for high value cases with so many line entries running over months and years and secondly, the line item cannot be properly referenced and therefore identified in communications between assessor and provider/counsel (the line numbers on the bill report available to the provider and counsel do not match those displayed to the LAA case workers). This has always been a problem with CCMS which has been acknowledged by LAA case workers, but on claims with so many line entries it is completely unworkable and will lead to additional work for both the LAA caseworkers and Costs Lawyers.

Furthermore, no guidance has been provided in relation to the assessment of claims which have been drawn on Precedent S (an electronic bill subject to phases of costs management) for *inter partes* and Legal Aid assessment but which settle before assessment and LAA only costs are claimed. Will the LAA accept a spreadsheet format for those bills?

The ACL LAG suggest that the only appropriate format to present claims of this size without reference to a pre-agreed budget to enable an assessment in line with the contractual requirements, is that required in detailed assessment proceedings under Part 47 of the CPR in the format set out in the accompanying Practice Direction i.e. a formal Court bill or possibly a variation thereon. The LAA are already familiar with the proposed format (as acknowledged by Malcolm Bryant at the CCCG meeting of the 2<sup>nd</sup> June 2020), when submitted after Court assessment for checking and payment. The use of CCMS format in the long term will only heighten the concerns raised in the preceding paragraphs of this paper.

#### ***Evidence in support of claims:***

It is not clear what the LAA's intention is in relation to documents to be provided in support of the claim in the long term. Courts are regularly able to effectively assess a myriad of costs claims, adjudicating on the protection of funds of a varying nature including over vulnerable persons and parties with a limited number of documents in support. Court procedure does not demand sight of just part of the file. To request just file notes from the file would require the Solicitor to effectively select and prepare the supporting documents as they would for a Court bundle within the principal proceedings of the case. The Court is able to assess the claims because a full bill of costs is sufficiently detailed and the Court assessor has the expertise to consider the claim with reference to just the detailed bill, invoices and fee notes.

The CCMS Provider: Advanced Guide – Bills Formerly Submitted Under Court Assessed Process Version 1.0 states that line by line CCMS claims will require file notes for ***any work exceeding 3 hours***. However, this is more evidence than would be required for a Court Assessment and will not be an easy or efficient process by any means with paper or more increasingly paperless files. Further, no mention is made of the supporting documents that were being considered or prepared as recorded in the notes. This will inevitably lead to many more document submissions to the LAA by providers who seek to justify their work and time spent. This will create a significant and unworkable burden on both the LAA (in receiving papers for approximately 25,000 files) and also legal aid providers.

The ACL LAG suggest that the requirement for supporting evidence be clarified and carefully worked out before publication of long term guidance. Further, it will be necessary to provide proper remuneration for the additional work to supply such documentation usually undertaken only after a certificate is discharged and the bill prepared.

#### ***Time spent preparing claims:***

The proposed changes to 15.12 of the Costs Assessment Guidance keeps the reference that for the majority of cases, 30-60 minutes to bill a claim will be appropriate. The time taken to prepare a claim for costs depends on a number of factors such as the number of documents, letters, e-mails, attendances, calls and file notes on

the file, the type of claim, the descriptions required, the detail in the narrative, the enhancement to be applied and the disbursements to be claimed etc. Cases with costs up to £25,000.00 require significantly longer than 30-60 minutes to claim.

The 2003 Civil Bill Assessment Manual gave the following guidance on reasonable time for claims that were within the LAA assessment limit:

*“It may be reasonable to make greater allowance where the amount of the costs reasonable to make greater allowance – **up to 3 hours where the amount of the costs claim exceeds £2,000 or where the preparation is made more complex by the nature or circumstances of the case. The allowance for preparation is in addition to the time allowed for checking and signing in compliance with the regulations.** [emphasis added]”*

There is no clear reason why the above was changed upon the introduction of 2007 Costs Assessment Guidance. Whilst the 2003 version provides further guidance, it is still insufficient guidance for hourly rate claims of up to £25,000.00.

The ACL LAG suggest that depending on the format of bill required, the reference to 30-60 minutes be removed and further guidance provided for higher value claims in conjunction with evidence based data that we will be able to collate. Further, any time spent identifying and selecting documents to be submitted with the claim be remunerated in addition.

#### **Data / Reports:**

As detailed above, the format in which the claim is presented and therefore assessed is crucial. Data should be recorded from 1st June 2020 when the new interim process was introduced. It is requested that the LAA regularly provide processing data to establish the following:

- The numbers and processing times for of each type of claim submitted for LAA assessment which would otherwise be assessed by the Court i.e. CCMS line-by-line, Summary level claim with Claim1/1A in support and Summary level claim with unassessed court bill in support and then the following data broken down by each type of claim submitted:
- The LAA’s targets for assessing these claims for any given period;
- How many hourly rate claims up to £25,000.00 are processed in any given period;
- How many appeals were submitted and the success of the same;
- How many claims were rejected, and the number of rejects successfully overturned via civil claim fix;

The ACL LAG are looking forward to working with the LAA and other groups involved in the process to achieve a workable solution to the problems identified for everyone concerned.

Dated 17/06/2020