Working with others to achieve excellence in the delivery of legal aid

Legal Aid Agency

Standard monthly payment reform

3 May 2023

Contents

About this engagement exercise

To: Legal aid providers

Duration: From 03/05/2023 to 30/06/2023

Enquiries to: smpreform@justice.gov.uk

Please send your response by 30 June 2023 to: smpreform@justice.gov.uk

Response paper: A response to this engagement exercise is due to be published in August 2023.

Introduction

1. All of the Legal Aid Agency's (LAA) current Contracts with providers of legal aid services contain a payment process under which the LAA pays providers either by way of a Standard Monthly Payment (SMP), which is a fixed advanced payment each month, or a Variable Monthly Payment (VMP), which is an amount based on claims submitted. The majority of civil and crime providers are paid by VMP.

2. This engagement exercise sets out a proposal that future Contracts will no longer include the SMP process and options for reconciling all SMP balances, including those held from a historical transfer from SMP to VMP.

3. Options include doing nothing and maintaining the current SMP process as agreed in 2008.

4. This engagement exercise is taking place now as only 10% of providers remain on SMP and less than 10% hold a balance on VMP. New Civil and Crime Contracts are currently being developed which makes now the time to consider implementing a Contract change in this area. This exercise will address the disproportionate application of the SMP system for a minority of providers.

5. Continued reliance on a manual process to administer SMP via a legacy system poses a risk to public funds and our ability to pay providers on time should we encounter system issues, or a member of staff leaves or have any unexpected absence.

6. Even though the LAA could introduce these proposals unilaterally within future Contracts, the LAA believes that it would be beneficial to understand the views of those affected before a final decision is made.

7. 19.3% of providers currently receive SMP and/or have a held balance on VMP (as of 21 February 2023).

8. The proposal is that the LAA will instead make variable monthly payments (VMP) to all providers. The payments will depend on the value of the work claimed in a particular month. The guidance governing VMP will not be changing.

9. The exercise is aimed at providers who currently hold a civil or crime Legal Aid Contract. We invite views on the proposals set out in this process.

10. An Impact Assessment is published alongside this engagement exercise. Comments on the Impact Assessment and the specific questions it contains are welcome.

11. Copies of the proposals are being sent to:
    - the Law Society of England and Wales
    - Legal Aid Practitioners Group
    - members of the LAA Civil Contract Consultative Group
    - members of the LAA Crime Contract Consultative Group
    - all current Contracted Providers

The proposals

Background

12. The Standard Monthly Payment (SMP) protocol was agreed with the Law Society in 2008.

13. SMP is a system for paying for Controlled Work where providers are paid a fixed amount each month. Over time this has resulted in a large gap for some providers between the actual value of work done each month and the amount paid out under SMPs.

14. Under the Protocol SMPs are paid 2 months in advance of claiming and create an aligned balance and unaligned balance for each provider.

15. A Provider is subject to a band (90% to 110% of aligned balance) and should they fall out of this band then a review is triggered. The Protocol dictates their SMP would be changed with the aim to bring the account to 100% reconciled within 6 months.

16. From 2011 providers were given the option at the time of transfer to VMP to hold the 2-months advance payments as a liability. This is known as the VMP held liability. This held liability had no express repayment terms, although some providers have since entered into voluntary repayment plans to clear the balance.

17. 1,667 (80.7%) of providers are paid via the LAA's Variable Monthly Payment Scheme (VMP) introduced in 2011 with no liabilities.

18. The remaining 399 (19.3%) providers are either paid via SMP on at least one account, have a held balance on at least one account or both.

19. 207 (10%) providers are currently paid via SMP.

20. 185 (9%) providers have a held liability on their VMP account, which relates to the 2-months advance payments on SMP at the time of the move.

21. 7 (0.3%) providers have both an account on SMP and a VMP account with a held liability.

22. 53 (28%) providers out of 192 with a held liability on their VMP account have an agreed repayment plan.

23. 193 (90.2%) providers on SMP are overpaid on a non-aligned basis.

Current position and rationale

24. The SMP process was intended to have a net neutral cost impact to Government, assuming that providers' accounts would fluctuate between being in an overpaid and underpaid state during the rolling review cycle that would largely offset each other across the piece. In reality, trends show that the rolling, non-aligned balance is consistently in a net overpaid state, and the aligned balance consistently overpaid across civil and crime. The overpaid non-aligned balance on Civil SMP accounts is 56.7 times as large as the underpaid balance and the overpaid non-aligned balance on Crime SMP accounts is 58 times as large the underpaid balance (as of February 2023).

25. The total financial impact to the LAA by continuing with these arrangements is £19.1 million, as of 21 February 2023. This liability breaks down as follows:

VMP/SMP	Crime/Civil	Value Net of liability £m	Held by how many providers? (Out of total number of providers with that Contract*)
SMP	Civil	2.9	55 of 1,324 (4.2%)
	Crime	8.4	182 of 1,120 (16.3%)
VMP (No Repayment Plan in place)	Civil	1	52 of 1,324 (3.9%)
	Crime	4.4	101 of 1,120 (9%)
VMP (Repayment Plan in place)	Civil	0.4	19 of 1,324 (1.4%)
	Crime	2	37 of 1,120 (3.3%)

* Providers may feature in both civil and crime (and both SMP and VMP) but are only counted once in the total providers with that Contract.

26. As a central government agency, the LAA has a fiduciary duty to protect public funds by rebalancing the payment position, and to reduce the risk of overpayments. HM Treasury's *Managing Public Money* (MPM) principles support and encourage compliance with that duty. SMP is a legacy arrangement which does not fit fully with MPM principles. The LAA has in particular considered the SMP and VMP position against the following relevant MPM principles:

    - The net liability is a form of advance payment. Payments in advance of need should be exceptional (MPM A4.8.5). As only a subset of providers are using such payments, and other providers are demonstrating that providers can operate without this, there is not a strong argument that there is an exceptional need to continue this position.
    - Different payment approaches could distort competition in the market. Only a subset of firms hold a net liability or have a held liability. Competition promotes economy, efficiency and effectiveness in public expenditure (MPM A4.6.7).
    - Continuation of the SMP method without consideration of an alternative risks failing to address the LAA's duties under the principles of HM Treasury's (HMT) MPM.

27. Administering the SMP process in accordance with the Protocol is a highly manual and labour-intensive method for paying providers. It is a complex and inefficient method to reconcile the payments and claims. It is currently managed across several platforms, including a legacy IT system (CIS) which is now used largely to manage historical work and which is increasingly costly and difficult to maintain.

28. The SMP process represents higher inherent business continuity risks, single points of failure and risks of error than more automated processes.

29. The proposed move to VMP aligns with the current digital environment that enables the more efficient and robust administration of legal aid payments. VMPs ensure payments are made once the service has been provided, enabling a more efficient and automated payment process that removes the manual reconciliations required for SMPs.

30. Providers can benefit from the move to VMP by avoiding scenarios where the SMP protocol reduces the monthly payment significantly once a provider goes out of banding to reconcile within 6 months.

31. Providers will be paid for work actually done, creating a more sustainable position in the long term without a reliance on SMP overpayments and the associated protocol reductions when a provider drops below 90% banding.

Proposal Options

32. The 4 options in relation to this proposal are detailed below.
33. Options 1, 2, and 3 are to remove SMP as a payment option from all future Contracts.
34. Providers currently on SMP will transfer to VMP and reconcile their non-aligned balance over a period of time. Providers with a held balance from a historic transfer to VMP to also reconcile their balance over the same period of time.
35. The options propose a number of transitional arrangements to ensure that providers have a reasonable length of time to repay any overpayments they have accrued.
36. The impact assessment published alongside this exercise has been utilised to develop the options below.

Option 1
Remove SMP and all VMP held liabilities. Any overpayment to be repaid within 3 years commencing at the start of the next relevant Contract.

37. This option will remove SMP from future Contracts for Civil and Crime and require repayment of the associated non-aligned balances.
38. It will also require repayment of all held liabilities (non-aligned balances) from the historical transfer to VMP.
39. Repayments would commence from the start date of the next applicable Contract.
40. Repayment plans would not go beyond the initial 3 years.
41. The monthly repayment figure will be determined by the total non-aligned balance divided by the length of the total repayment period in months at the time of transfer.
42. Providers can choose to transfer over to VMP and start repayments before the next Contract is in place, allowing reduced monthly payments.
43. Providers can also choose to pay more and reduce the balance quicker, or pay in one lump sum up front, if they choose.
44. Providers who are underpaid at the time of transfer, will be paid this figure on the next monthly payment run.
45. The transitional period of at least 3 years will allow providers with an overpaid balance enough notice and time to repay the balance,
46. Any provider with an outstanding balance at the end of the initial 3 year period, will have the outstanding non-aligned balance recouped over the next 6 monthly payments.

Option 2
Option 1 but with additional repayment scope for not-for-profit providers and those providers that had a repayment plan agreed before 21st April 2023.

47. This option is principally the same as Option 1 but with additional scope added for not-for-profit providers and the 59 providers with repayment plans voluntarily agreed before 21 April 2023.
48. This option takes into account the unique position of not-for-profit providers and the difficulties they may face in replacing these advance payments.
49. This option also gives providers who have actively entered into a repayment plan since transferring to VMP additional scope for repayment.
50. We welcome any further comments on the additional repayment scope suggested under this option via Q3 and Q7 of the questionnaire.
51. There are 6 not-for-profit providers currently affected by the proposals, one of which has a repayment plan in place.
52. The 53 providers with plans in place span 71 accounts in total.
53. Of the 71 repayment plans in place, 59 will be completed within 4 years. The remaining 12 plans span completion periods of 5 years to 16 years.
54. This proposal would allow an additional 2 years to repay for those not-for-profit providers and those who had voluntarily entered into an agreement.
55. Any current plans which go above the 5 year repayment period would be revised to a maximum period of 5 years.

Option 3
Remove SMP and all held liabilities. Repayments capped at 4% percent of total fund take or a maximum 10 year repayment period.

56. This option is principally the same as Option 1 but with repayments capped at 4% of a provider's yearly total fund take or a maximum 10 year repayment period, whichever comes soonest.
57. Any provider above 4% would have a maximum repayment set at 4% of their fund take or at the maximum 10 year limit.
58. Any provider below 4% would repay under the period specified in option 1.
59. This would provide a set repayment total for each financial year, adjusting repayments where fund take has increased or decreased.
60. This would involve additional administration for the LAA Reconciliation team and mean each provider would follow a different repayment timeline.
61. A total of 78 out of 399 providers are showing repayments as higher than 4% of total Legal Aid fund take if repaid over the smallest recovery period of 36 months.

62. This option will reduce monthly payments for these 78 providers but conversely, take a longer period of time to clear.

63. 6 providers repayments would be capped at the 10 year maximum under these proposals.

Option 4
Do nothing.

64. The process will continue to operate under the SMP protocol.

Public Sector Equality Duty (PSED)

65. We are required to have due regard to the Public Sector Equality Duty (PSED) under section 149(1) Equality Act 2010 when making decisions in relation to SMP/VMP. Decision makers must have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act; advance equality of opportunity between different groups and foster good relations between different groups.

66. In accordance with our duties under the PSED, we have considered the impact of these proposals on individuals sharing protected characteristics in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations.

67. As part of PSED, consideration has been given to the categories a provider undertakes and whether these proposals could affect a particular client group more than others should all providers withdraw.

68. It's important to note that note that this considers the position as a whole for those affected providers, and some of these authorisations are active on a VMP account with no associated debt for providers.

69. For Civil, this amounts to the following schedule authorisations potentially affected out of the total number authorised nationally. Context is then given for how many providers the potentially affected schedule belongs to.
    - Claims Against Public Authorities – 27 out of 90. Total of 18 providers.
    - Community Care – 25 out of 90. Total of 15 providers.
    - Housing & Debt – 63 out of 360. Total of 30 providers.
    - Education- 2 out of 18. Total of 1 provider.
    - Immigration – 53 out of 375. Total of 21 providers.
    - Family – 290 out of 1431. Total of 151 providers.
    - Clinical Negligence – 18 out of 152. Total of 13 providers.
    - Mental Health – 52 out of 165. Total of 43 providers.
    - Public Law –26 out of 114. Total of 16 providers.
    - Welfare Benefits – 4 out of 37. Total of 3 providers.
    - Mediation – 29 out of 110. Total of 26 providers.

70. For Crime, 331 providers are affected out of 1120 in total.

71. The above analysis, coupled with analysis of potential procurement gaps (see para 71 of the IA), concludes that no client group is disproportionately affected by these

proposals, however large provider withdrawal in certain areas could cause short term access issues in immigration, public law and crime.

72. Once we have considered the responses to this exercise, we will update the equalities statement as necessary.

73. With this in mind, we welcome responses on these proposals with regard to the potential impacts on diversity and equality, by addressing the relevant questions below.

Sustainability

74. The Greening Government Commitments and the impact of Sustainability has been considered throughout this work and will continue to be considered.

75. Removing the complex SMP process, heavily reliant on legacy IT systems and manual intervention, would assist with a move towards a simpler Digital payment system and meet the commitments set out in the Greening Government: ICT and digital services strategy 2020 to 2025.

Impact Assessment

76. An Impact Assessment is published alongside this engagement exercise.

Questionnaire

We are seeking views on the following questions:

Q1. Do you agree with the principles of the proposal to remove the SMP process and instead pay all providers via VMP on the basis of work actually claimed?

Q2. Please order the options by preference from 1-4

Q3. Please provide rationale for the chosen order of your preferences.

Q4. Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this engagement exercise and impact assessment? Are there any other impacts we should consider?

Q5. Have we correctly identified the extent of the impacts of the proposals as currently drafted?

Q6. Are there any forms of mitigation in relation to the impacts that we have not considered?

Q7. Do you have any other evidence or information concerning PSED that we should consider?

Thank you for participating in this engagement exercise.

About you

Please use this section to tell us about yourself.

Full name	
Job title or capacity in which you are responding to this engagement exercise	
Date	
Company name/organisation	
Email address	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Email to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details and how to respond

Please send your response by **30 June 2023** to:

Email: smpreform@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the engagement exercise you should contact the Legal Aid Agency at the above email address.

Publication of response

A paper summarising the responses to this exercise will be published in August 2023.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this engagement exercise, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.