CAMBRIDGE PRO BONO PROJECT

REPORT ON THE PRO BONO COSTS SCHEME

SUMMARY OF FINDINGS

RESPONSES

The number of responses was fairly low compared to the wide circulation of the questionnaire. This may in part be due to the timing of the research. Generally, more positive responses were received to more individual approaches rather than the questionnaire being circulated within professional bodies, organisations, law firms or chambers.

The report is based on a total of 36 responses (incorporating completed questionnaires, email exchanges and telephone conversations).

RESULTS

Considered thematically, as follows:

(1) Lawyers' awareness and understanding
(2) Judicial awareness and understanding
(3) Resources
(4) Deterrents to the pursuit of pro bono litigation
(5) Barriers to obtaining pro bono costs
(6) Extension of the pro bono costs scheme
(7) Suggestions for change

(1) Lawyers' awareness and understanding

There was a good general awareness of the scheme among practitioner respondents, but it was not universal - around 86% of practitioner respondents were aware of the scheme. Within that, the level of awareness ranged from 'very familiar' to 'very limited familiarity'.

Thirteen respondents specifically noted there should be greater awareness of the scheme or that it should be more widely publicised.

Some respondents noted that the nature of a lawyer's day to day work might affect the extent to which they are aware of the scheme. In particular, lawyers whose practice involves commercial clients may well not be aware of it. Increased publicity amongst associates at commercial firms was suggested. On the other hand, it was also noted that if there is a low number of applications from solicitors at commercial firms, this may be more likely due to the nature of their pro bono work being ineligible for pro bono costs rather than lack of awareness.

Some potential for misunderstanding was flagged, with one respondent framing the scheme as a party being liable for costs 'simply because their opponent has pro bono help'. On

understanding, see also the 2017 case *Oyensanya v The General Medical Council* [2017] EWHC 2825 (Admin), where the respondent's counsel framed pro bono costs as a 'donation to the nominated charity' (but was corrected by the judge).

Training

Three respondents stated that they had received training on the pro bono costs scheme. Most explicitly stated that no training had been received. Advocate and the Public Law Project were mentioned as training providers.

Three respondents suggested that training should be provided, although no more detailed suggestions were made as to what form that training might take. Given the small number of respondents that suggested training compared to the number that stated they had not received any, it may be questioned whether training is the most useful way forward. This is supported by the fact that some respondents who were aware of the scheme noted that it is straightforward based on the resources already available.

(2) Judicial awareness and understanding

Respondents' comments on judicial awareness were mixed. One stated that they had observed judges make positive comments about the scheme, while another noted that in their experience District Judges are aware of it.

However, lack of judicial awareness was also highlighted. One respondent stated that they had worked on a case where the judge was unaware of the scheme, although an order was made after the judge had been taken through the relevant provisions. Another said that they made an application before a judge who had never heard of pro bono costs. Because of that, the judge said they would entertain further submissions, and the outcome of the application was still awaited. Another respondent recommended that all judges have 'specific training on pro bono costs orders', but did not highlight any specific instances of lack of awareness.

One law firm highlighted issues with enforcing orders on behalf of the Foundation, in that they sometimes struggle to get the court to understand their position, but that they 'seem to get there in the end'. This suggests that increased understanding among court / listing office staff may also be needed.

One legal advice centre cited a case in which they were refused pro bono costs because they were not on the record. The representative from the centre (a qualified solicitor) was granted permission to be the client's litigation friend and acted in the hearing as an advocate would do. Section 194 LSA 2007 does not require a legal representative to be on the record. This incident raises the question as to whether there needs to be clarity and consistency of understanding as to whether this sort of arrangement amounts to 'legal representation' under LSA 2007.

On the extent to which judicial awareness may increase the number of applications and orders, it was noted that there is only so much a judge can do to encourage counsel to apply for pro bono costs (due to the need to maintain impartiality, and the fact that it may not always be clear whether an advocate is acting pro bono).

Three reported cases were identified as case studies on lack of judicial awareness or familiarity with the scheme:

- *R (Bewry) v Norfolk County Council* [2010] EWHC 2545
- *Paratus AMC Ltd v Lewis* [2014] EWHC 1577 (Ch)
- *Oyesanya v The General Medical Council* [2017] EWHC 2825 (Admin)

Training

The Judicial College costs training module currently includes a mandatory question on pro bono costs, however it appears that the module itself is not mandatory. One respondent suggested that it is rare that judges choose to take the costs module.

(3) Resources

One of the main resources used by respondents is the Foundation's website, with one respondent saying that the scheme was 'straightforward' having reviewed the materials on the website. Several respondents also referred to materials received from Advocate with case papers. Respondents also consulted the legislation, the CPR, the White Book and *Cook on Costs*. The general view was that between these various resources, no more is required.

We reviewed the content of the White Book and *Cook on Costs* (mentioned by one respondent) as it relates to pro bono costs. The former is more comprehensive, and directs readers to the Foundation's website. Neither mentions the possibility of including pro bono costs in settlement agreements.

(4) Deterrents to the Pursuit of Pro Bono Litigation

Two main, linked, deterrents were identified: the risk of litigation, and the merits of both the case and the pro bono costs application itself.

In terms of risk, the main concern highlighted was the risk of an adverse costs order being made against a pro bono client. One respondent went so far as to say it could 'arguably be seen as negligent' to allow a client to proceed with litigation where they are on a low income and have no costs protection. Efforts to obtain that protection may remove the ability to apply for pro bono costs from the case. Examples were cited where an appeal proceeded on the basis of an agreement that neither party would apply for costs, and where a client entered into a CFA after a pro bono costs order had been made but set aside.

The risk of adverse costs was not the only risk cited. Reference was also made to the risk of losing a contested hearing, with a resulting damages award and other potentially serious consequences.

One respondent noted that pro bono clients often face the added risk of bankruptcy, which can increase the severity of the risk.

In terms of merits, reference was made to both the substantive merits of the case as a whole and the merits of the pro bono costs application. Reference to 'lack of' and 'worries about' merits may suggest a distinction between objective lack of merits and a pro bono client's concerns about them.

Issues regarding risk and the merits will both serve to encourage settlement, which was the most common reason given as to why pro bono litigation is brought to an end before an application

could be made for pro bono costs. Several respondents noted that settlement will often be in their pro bono client's best interests. The way that pro bono costs are treated in settlement negotiations may reduce the funds received – on which see the 'barriers' section, below.

(5) Barriers to Obtaining Pro Bono Costs

Ineligible cases – based on the numbers provided, around 16% of pro bono cases taken on by respondents in the last 3 years were eligible for pro bono costs. Several respondents noted that their pro bono work is done in jurisdictions that are ineligible (e.g. Tax Tribunals, Valuation Tribunals, inquest work).

Several respondents noted that pro bono costs are often the first thing to be dropped in settlement negotiations. Settlement on favourable terms for the client may include a provision that there is no order for costs, or it may be agreed to 'roll up' pro bono costs into the overall settlement figure in order to maximise the client's return. One respondent highlighted the potential conflict between the client's interests and the Foundation's interests, and that as a lawyer they have a duty to protect the former. These responses suggest that the removal of pro bono costs from a settlement proposal is a common concession to an opponent which can be made without affecting a client's recovery.

Certain practical issues were identified. There may be difficulties with collating the relevant information needed to make an application for pro bono costs, particularly where a case has been passed between different lawyers at different stages. Time recording may not be as rigorous on pro bono matters as it is on fee earning matters. Two reported cases were also identified (*R (Bewry) v Norfolk County Council* [2010] EWHC 2545 (Admin) and *Oyensanya v The General Medical Council* [2017] EWHC 2825 (Admin)) in which improved administration regarding costs incurred might have made the application go more smoothly. It was also noted that some practitioners do not make the leap from treating pro bono cases as a 'philanthropic exercise' to a means of actually obtaining money.

It was noted that in adverse costs jurisdictions, litigants can often find lawyers willing to act on a CFA basis, which is why in one respondent's view pro bono work 'rightly' focuses on jurisdictions where adverse costs are not available.

One respondent identified the difficulty in obtaining adverse costs insurance as a barrier. They thought that ATE insurers should have an obligation to provide insurance on pro bono cases, without 'extortionate premiums' and the provision of complex information.

(5) Extension of the Pro Bono Costs Scheme

Comments as to whether the scheme should be extended were generally very positive, with some respondents providing lengthy and passionate responses as to why fairness required an extension of the scheme (with specific reference to the Employment Tribunal, the Welfare Benefit Tribunal, Immigration Tribunal, the Court of Protection and the context of healthcare deaths).

Only one respondent was specifically against extension of the scheme, because they saw 'no reason in principle why the other side should be liable to costs simply because their opponent has pro bono help'.

Some respondents caveated their positive comments on extension of the scheme:

- Extension should be limited to cases where legal aid is not available, of which there needs to be more awareness – too many cases are completed pro bono, when legal aid is available.
- Extension to the Coroner's Court would not be appropriate, as it does not attribute fault.
- Extension should not come at the cost of making costs-free jurisdictions subject to costs. This respondent thought that costs orders should be available against government bodies in what are otherwise costs-free jurisdictions, at least where they act unreasonably in opposing an application or otherwise, and in those circumstances a pro bono costs order should also be available.
- Extension should be limited to existing wasted or unreasonable costs provisions, as setting a precedent for adverse costs in tribunals generally may act as an additional barrier to access to justice.

(6) Suggestions for Change

Various respondents made suggestions:

- Training for the judiciary and practitioners.
- Increased awareness amongst practitioners, particularly those whose day to day work does not cover cases eligible for pro bono costs. As to how this might be done, republication by the SRA and Bar Council was suggested, and the provision of materials on pro bono costs with case papers by Advocate was singled out for praise.
- A change to the CPR, requiring that where a case is dealt with under an official pro bono organisation, the other party be required to pay a small sum towards the pro bono work, where in the court's opinion it has assisted the court, and/or reduced the hearing length.
- Finding a way for insurers to provide adverse costs insurance easily and without extortionate premiums.
- Having the procedure for obtaining pro bono costs covered by a separate costs rule. This could provide, for example, that pro bono costs are summarily assessed at any stage by way of an on-notice application and that the starting point for assessment of pro bono costs be the indemnity rather than standard basis.