



Legal Services Commission/Ministry of Justice Consultation

Legal Aid: Refocusing on Priority Cases

PUBLIC LAW PROJECT BRIEFING

Introduction

The purpose of the proposals is said to be to ensure that limited resources are allocated on more meritorious cases and to reduce the overall cost of legal aid. The anticipated savings if all of the proposals are adopted are stated to be £16m per annum (£8.5m from CLS and £7m from CDS) and the anticipated costs to be £800k per annum. However, it should be noted that all of the figures given by the LSC are 'gross' and take no account of the net costs, after inter partes costs recovery has been taken into account. Neither the consultation paper nor the draft impact assessment specifies the actual expenditure or anticipated savings.

Broadly there are two types of proposal contained in the paper:

- (1) Proposals that give to the LSC greater control over cases, in particular judicial review cases; and
- (2) Proposals that seek to remove legal aid completely from certain types of case and certain types of claimant, i.e. from individuals seeking to challenge the conduct of the government and other public bodies.

This paper seeks to summarise the proposals and to offer comment to assist groups and individuals in drafting their response.

Note that the deadline for responses is **8th October 2009**.

PART ONE: LSC PROPOSALS

1. Public Interest and other Borderline Cases

The Access to Justice Act 1999 introduced public interest considerations into legal aid decision making. As the paper states, 'Public interest considerations allow important cases to be funded even where the benefits to the individual litigant alone would not justify the likely costs.'

1.1 Wider public interest

Selecting a 'suitable vehicle' for test cases

Proposal: to 'refine' the "wider public interest" test so that LSC must be satisfied that the individual case, on its particular facts, is a suitable vehicle to establish the point and realise the expected public benefits.

Comment: We anticipate problems in how the LSC would determine what are 'good facts'. Public interest litigation is often brought in relation to individuals whose circumstances are not particularly sympathetic. The *best* facts on which to bring an important case with significant wider public interest may never arise, and when they do, such cases are liable to be settled before getting to trial so that no precedent is set.

Taking account of contrary public interest

Proposal: that the LSC would take account of whether or not a different section of the public would have a disadvantage or would not support the outcome being sought.

Comment: This is placing the LSC in the role of the court. It is for the court to balance competing public interests in cases that have a public interest beyond the private interest of the claimant.

The Impact Assessment states that enabling the LSC 'to take a broader view of the public interest by considering the disadvantages of funding a case for other parts of society will help to focus resources on cases which genuinely represent the public interest. This will help to ensure that limited public funds are used to benefit society as a whole rather than to advance one particular group's interests, with appropriate safeguards for minority interests.'

This is a dangerous proposal. The paper fails to state the principles by which the LSC will determine which cases 'genuinely represent the public interest', or how it is proposed that they will safeguard minority interests given that they want to focus funds to benefit 'society as a whole'.

1.2 Handling of Public Interest and Other Borderline Cases

Proposal: Special controls including the setting of an annual budget for cases that would only be funded because they have wider public interest (as opposed to following the usual assessment of the likely prospect of success and the likely cost).

Comment: does this mean that if the annual budget has been spent, important public interest cases will be refused funding?

Proposal: establishing a new LSC committee with responsibility for final funding decisions in these cases. The current independent adjudicator role would be subsumed into this committee. The chair of the Commission or the Director of High Costs Cases would make the final decision, the rest of the committee having an advisory role.

Comment: given the quality of decision making within the LSC, the proposal to abandon the independent adjudicator is opposed. This would mean that there would be no independent scrutiny of the LSC's decision making and we anticipate that this would lead to more challenges by way of judicial review.

2. Legal Aid for Damages Claims

2.1 Low Value Damages Claims

The proposal: In relation to claims covered by Section 8 of the Funding Code, to change the Code so that funding is no longer available for claims in which the damages are unlikely to exceed £5,000.

It is suggested that the benefit to the client may be limited because claimants may not obtain full costs recovery and the statutory charge may apply.

It is further suggested that claimants with 'small claims' against public bodies should instead pursue complaints through the bodies' complaints procedures.

Alternatively, that 'in some cases it may be more appropriate for those seeking damages to seek instead judicial review and declaratory judgements as alternative and more cost effective methods of resolving disputes.'

Section 8 of the Funding Code

Section 8 of the Funding Code sets out the criteria for granting civil legal aid for damages claims against public authorities. This includes claims against local authorities, the police, the prison service or CPS. It also covers claims for

misfeasance in a public office and claims against local authorities for damages for abuse suffered while in care.

The costs/benefit test, applied to all applications for legal aid, is more generous under Section 8 than the usual test. However, what the consultation paper fails to make clear is that Section 8 does not apply to all claims against public authorities. It applies only to claims which concern: **serious wrong-doing, abuse of position or power or significant breach of human rights** and which do not fall within the scope of judicial review claims (or housing claims).

It is baldly stated that "Many people who have been poorly treated simply want an investigation, and, where appropriate, an explanation and apology, rather than compensation." Research is referred to which suggests that claimants in clinical negligence cases, children, discrimination,, unfair police treatment and immigration cases are least likely to be primarily seeking financial compensation.¹ The Impact Assessment refers to the report's finding regarding clinical negligence claims that the majority of respondents were most concerned to understand what had happened, to obtain remedial treatment, prevent recurrences or obtain recognition and an apology. However, it is clear that these objectives are particular to clinical negligence claims, none of which are covered by Section 8.

It is stated that this proposal would be likely to reduce legal aid spending by £900k - £1.8m and would affect 375 cases per year.. However, all of the spending figures in the Impact Assessment are gross and what is not specified is the net amount that is spent/estimated to be saved.

In relation to costs recovery it is stated:

"While successful claimants may be awarded their costs, these are not automatically deducted from their liability to the LSC unless they are actually paid."

Firstly, given the usual costs rule, we would expect that in almost all successful cases costs will be awarded. It would only be in an exceptional case that the court would refuse to award costs to a successful party.

Secondly, while no-one could argue that costs are not deducted from liability (by way of the statutory charge) unless actually paid, there is no evidence that it is common for such costs not to be paid. Indeed, it is not asserted that this is the case. In our experience public authorities normally pay the costs that the court has ordered.

The LSC should produce its statistics regarding the numbers of such claims in which costs orders have not been complied with by the public body defendants and should specify its net spending on claims funded under section 8.

¹ The research is the report, Causes of Action: Civil Law and Social Justice, Pascoe Pleasance et al, 2004.

Response:

(1) In the absence of any evidence suggesting that non-payment of inter partes costs is common, there would appear to be no justification for this proposal in terms of savings to the Legal Aid fund. Given that the claims funded under Section 8 are claims against public bodies, including the government, it is hard to avoid the conclusion that the policy basis for this proposal is to reduce the numbers of claims brought against the government for serious wrong-doing, abuse of position or power or significant breach of human rights.

(2) We would question the effectiveness of complaints procedures and ombudsman schemes. Ombudsmen investigate a small percentage of complaints referred to them. Given that a large number of Section 8 claims are against the police, it should be noted that the ineffectiveness of the police complaints system and the IPCC is well documented.

Further, it is not the case that pursuing complaints as an alternative to litigation necessarily saves public funds. Proper investigation of more cases would necessitate an increase in resources both for the body complained against and for the respective Ombudsman services.

(3) Regarding alternative legal remedies, the suggestion that judicial review may be used as an alternative is misconceived. Firstly, as is clear from the Funding Code and Guidance, section 8 only applies to claims that are out of scope for judicial review.² Secondly, most claims within the scope of section 8 will not be capable of being brought as claims for judicial review. For example, freestanding claims for discrimination are covered by section 8 and such claims cannot be brought by way of judicial review. Thirdly, it is hard to understand how it can be said that judicial review would be a more cost effective method of resolving the dispute. Without figures for the comparative costs of damages claims and judicial review it is impossible to know whether there would be a saving.

2.2 Low Value Out of Scope Damages Claims

Mainly about Multi-Party Actions (MPAs). We leave this for others to comment at present.

2.3 Using Complaints Procedures before Litigation

² As section 17 of the LSC Guidance makes clear, judicial review claims are claims in which the court is exercising an administrative law jurisdiction, in deciding whether, as a matter of public law, a public authority has acted lawfully. "By contrast, claims falling within section 8 of the Code will almost invariably concern private law claims for damages against the public authority, although these will sometimes be combined with non-money remedies such as injunctions."

Proposal: to amend Part 8 of the Funding Code to make specific reference to the need to use the prison and probation complaints procedures and Ombudsman schemes.

This is stated that this is not a substantive change but intended to clarify existing procedures and to act as a prompt.

Comment: If this is not a substantive change we would have no objection to the proposal. Others may wish to comment on the effectiveness and capacity of the Ombudsman.

2.4 Considering Inter Partes costs against the LSC in Assessing Cost Benefit

This refers to funding 'appeals' under section 8 of the Funding Code. It appears to apply only to appeals against adverse judgments rather than all claims funded under section 8.

In considering the overall likely costs of a case at present, the LSC only consider the likely costs of the funded person's legal team.

Proposal: It is proposed that the Funding Code be amended so that the potential inter partes costs that the LSC may be ordered to pay are also taken into account.

Comment: In principle, it we would accept that a true assessment of the risk undertaken by the LSC should include an assessment of the likely inter partes costs liability that may be incurred. However, we would suggest that, in assessing the costs:benefit ratio, the LSC should also take into account the fact that the LSC costs incurred to date will not be recovered if no appeal is brought, whereas a successful appeal would usually result in costs recovery in the appeal court and in the court below.

3. Legal Aid for Judicial Review

3.1 Presumption of Funding for JR Cases Where Permission is Granted

Currently, if the court has given permission for a claim for judicial review there is a presumption that legal aid will be granted to the claimant.

Proposal: to remove the presumption of funding post-permission cases and have a single test. However, it is stated that judicial decisions will be given considerable weight by the LSC.

Comment: In the impact assessment it is estimated that the proposal would affect only 5-10 cases per year and that the cases affected: 'are likely to be complex,

potentially expensive claims, so this would reduce legal aid expenditure by £75,000-£150,000 per year (gross)."

Given that these admittedly complex cases will have been granted permission by the court, and that the court's decision will have to be given 'considerable weight', what criteria will be applied in deciding that the case should not be publicly funded?

The danger is that the quality of initial decision making will not be of the highest standard so that refusals of public funding will be appealed. Not only will this cause additional work for the LSC, it will cause significant delays to the court system and may necessitate multiple adjournments and solicitors undertaking yet more unfunded work.

3.2 Personal Benefit from the Proceedings

It is stated that 'it is not appropriate for purely representative actions to receive limited legal aid funds'. Reference is made to the need to ensure that proceedings cannot be brought about matters to which the applicant has no connection or direct interest.

Proposal: to tighten the tests for funding for judicial review so that funding can only be granted to an individual who will gain a personal benefit from the outcome of the proceedings, either for themselves or for their family.

Comment:

The Funding Code already provides that "an application will be refused unless it is for the benefit of the client who is an individual". Further, in relation to cases with significant wider interest the guidance states that "Full Representation may be refused unless the benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances."

It is unclear why these provisions are not sufficient to ensure that funding will only be granted where the applicant can show a potential personal benefit. The Impact Assessment states that this proposal is estimated to prevent 1 or 2 cases a year from receiving funding. It is not set out why or how funding can be granted to someone acting in a purely representative capacity.

3.3 Reconsidering Merits when Acknowledgment of Service Received.

Proposal: in future legal aid would only be extended after the acknowledgment of service and response is received and considered.

Response: the main problem will be delay by the LSC with the result that the claimant's solicitors will have to do yet more unfunded work. In any event, the solicitor always has an obligation to reconsider merits on receipt of the AoS.

It is our view that the additional work to be undertaken by the LSC and the solicitors will have the following consequences:

- The LSC will be required to weigh up the merits of the claim by considering the parties' submissions on paper. This will add to the burden of decision making by the LSC at a time when staff are being cut. Further, this is the role of the court, not the LSC. The LSC should have been in possession of the pre-action protocol correspondence anyway before granting funding (save in urgent cases when no such correspondence may have been exchanged);
- Delays in the courts and the need to seek multiple adjournments; and
 - Either extra unfunded work for solicitors which will further increase the unprofitability of publicly funded work and lead to more solicitors giving it up, or
 - If the solicitor is to be paid for the time spent reporting to the LSC and chasing decisions this will increase the overall costs, and those increased costs will not be recoverable from opponents as they will be 'LSC only costs'.

4. Changes to LSC Processes [these proposals relate to all civil legal aid]

4.1 SCU Management

Proposal: The main proposal is to widen criteria for referral to LSC Special Cases Unit (SCU) so that more cases would be subject to the requirement to provide a case plan. The proposal is lacking in detail.

Comment: the requirement to produce case plans places demands on both LSC staff and the conducting solicitors which increases overall costs. The principal way in which the requirement reduces overall costs is by imposing a lower hourly rate for such cases. Given that it is the more complex cases that are likely to be subject to this requirement we cannot see any justification for paying at a lower rate than the already uneconomic prescribed rates.

4.2 Inviting Representations before Funding is Granted

Currently, once a legal aid certificate is issued notice must be given to the opponent. The opponent may then make representations to the LSC as to why funding should not continue. This may be because it is alleged that the funded person has undisclosed assets or because of the merits of the claim.

Proposal: in future, before funding is granted, the other side and any relevant third parties will be notified and invited to make representations as to why funding should not be granted. Exceptions to this rule would include: Mental Health Act detention cases; parents and guardians in childcare or supervision proceedings; Children Act 1989 cases; child abduction; domestic violence; asylum; and housing proceedings where the client is at risk of losing their home.

Alternatively, it is proposed that the LSC has a discretion to invite pre-grant representations when they consider it appropriate.

N.B. This is a proposal in respect of all civil certificates, not just those for judicial review claims.

Comment: It is to be expected that almost all opponents would make representations as to the merits of the case which the LSC would have to consider. If representations/allegations are made, would the claimant be entitled to be notified and respond? If not, there would be obvious unfairness. If so, there would be potential for endless delay.

It is already the case that the solicitor making the application has a duty to disclose all relevant information to the LSC and to report on any change of circumstance or issue that affects his/her assessment of merits. Further, in most cases a letter before claim and response (whether under a pre-action protocol or otherwise) will be sent to the LSC prior to the grant of funding. We would expect that in all cases these should be sent to the LSC in support of the funding application. If this is not the case we would suggest as an alternative that the Funding Code is amended so that a funding certificate will not be granted in the absence of such evidence.

4.3 Independent Funding Adjudicator Decisions and the SCU

Currently, refusals of funding can be referred to the Independent Funding Adjudicator (IFA), who is an independent lawyer, for consideration of the merits of the case.

Proposal: that for cases referred to the SCU the decision of the LSC Case Manager be final so that there will be no appeal to the IFA.

Comment: this would remove an element of independent scrutiny of LSC decision making. We would oppose this. Further, we would anticipate that the absence of independent scrutiny of LSC decision making would lead to more decisions being challenged by way of judicial review which would increase legal aid expenditure.

4.4 Community Contributions towards Legal Action

It is stated "The LSC's experience is that in some cases there is an active interest group that seeks out an individual eligible for legal aid to bring the action."

In community actions the LSC usually expect some contribution to be made to the legal costs by the community likely to benefit.

Proposal: to increase the proportion of costs the community should contribute by taking as the starting point the proportion of the community eligible for civil legal aid.

Comment: We would not oppose this in principle but anticipate logistical problems in determining the correct level of the community contributions.

PART TWO: MOJ PROPOSALS

It is stated that proposals developed by MoJ to respond to:

- 1 rising costs of legal advice in prison law cases, and
- 2 "the significant increase in the number of failed judicial review applications, many of which are funded by legal aid."

5 Prison Law: Advice and Assistance on Treatment Matters

Currently prison law cases can be taken on by solicitors holding a criminal contract under the Criminal Defence Service (CDS) as well as those solicitors who have a separate prison law contract. Changes to the way prison law is funded will be implemented in July 2010 following an earlier consultation. The changes include a "strengthened sufficient benefit test" to be applied by solicitors in deciding whether the case justifies public funding. This consultation proposes further changes which will reduce the rights of prisoners to be advised and assisted by solicitors under the legal aid scheme.

"Treatment matters" refers to complaints about the way a prisoner is treated by the Prison Service and, as the consultation states, may include complaints about such matters as "mail, visits, food, property, healthcare and telephones."

The paper suggests that many of the complaints concern "relatively trivial complaints" that do not justify assistance from a solicitor and that these are distinct from cases where the prisoner has a "legitimate and serious grievance" where "it is appropriate that a prisoner can seek redress in order to put the matter right and to try to prevent such a failing recurring in the future". In respect of the latter class of cases it is stated that "These are the kinds of matters for which civil legal aid is available for advice and representation to bring a judicial review challenge, or a civil damages claim". (It should be noted that such civil damages claims are likely to fall with section 8 of the Funding Code, and the LSC proposal is to remove funding from all such claims where damages are unlikely to exceed £5,000, see above).

Treatment cases are stated to be distinct from discipline and sentencing cases for which legal aid would continue to be available.

Proposal: to remove advice and assistance for prisoners on treatment matters from the scope of the CDS.

The paper proposes that complaints about treatment should be resolved by way of the internal complaints procedure without the assistance of a solicitor. Reference is made to the use of the prison complaints system, the independent Prisons and Probation Ombudsman, the Independent Monitoring Board (a voluntary body) and the Parliamentary Commissioner for Administration.

Comment:

The 'strengthened sufficient benefit test' should ensure that public funds are not spent on trivial cases. The blanket removal of public funding from the CDS for all treatment cases means that prisoners will be unable to get advice and assistance for even "legitimate and serious" grievances, the suggestion being that such cases will qualify for full representation for a judicial review or damages claim.

The proposal ignores the importance of advice and assistance work to resolve complaints so as to avoid the need to issue a claim. In any claim for damages or judicial review solicitors are required to attempt to resolve the issue without recourse to litigation and are required to set out the basis of the claim in a letter before claim. What funding will be available for such work?

As with other suggestions that the use of complaints and Ombudsman schemes be used as an alternative to publicly funded legal advice and assistance, no reference is made to the limited resources of the Ombudsman or the limits to their jurisdiction (for example, they cannot deal with challenges to policy decisions or disputes about the legal interpretation of policy).

As with section 2 above, it is difficult to avoid the conclusion that the removal of access to legal advice and assistance for prisoners who wish to challenge their treatment by a government department is a politically motivated.

6. Delegated Powers to Self-Grant Judicial Review Funding

It is stated that "figures from HMCS show that over the last 15 years the number of applications for permission to bring judicial review has more than doubled, from approximately 3000 to 7000 per year. Over the same period, the proportion of applications where permission was granted has decreased from over 40% to just over 20%."

Although not explicitly stated, the implication is that the number of unmeritorious judicial review claims has increased and that a way of addressing this is to remove the powers delegated to LSC contract holders in urgent cases.

Proposal: to remove delegated powers in respect of all judicial review claims except for housing judicial reviews. It is stated that 'For other judicial reviews, where a decision on an emergency application was required, this would be referred to the LSC on an urgent basis.'

Response: PLP disputes the implication that the increased number of claims and the increased proportion of claims that do not result in permission being granted is because unmeritorious claims are being brought. See: Bondy and Sunkin paper, to be

published in the December 2009 issue of JR - draft attached. See also the PLP report: *The Dynamics of Judicial Review*, available on the PLP website:

<http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>

The use of devolved powers is particularly important in cases of urgency where interim relief is sought. These are the very kinds of cases which often do not go on to the permission stage, such as cases concerning the provision of emergency accommodation to homeless applicants or under community care provisions.

7. Restricting Civil Legal Aid for Non-Residents

Proposal: legal aid would not normally be available for those who did not reside in the UK. Funding would continue to be available for British citizens (whether they were resident in the UK or not), and for citizens of some Commonwealth countries who have a right to settle here.

Response:

It is important to note that, to be eligible for legal aid, the courts would only have jurisdiction to hear the case if the proposed defendant is within England and Wales, including therefore the UK government.

This proposal would exclude claims brought against the British Government under UK legislation, including the HRA, and claims brought by non-residents against UK individuals or companies.

The MoJ does not spell out what it means by referring to people who do not reside in the UK. However, consideration of the cases for which it is proposed that funding for non-residents remains available suggests that the proposal would exclude those deemed not to be 'lawfully' resident.

The proposal is that funding would remain available for non-residents in the following circumstances:

1. Cross border disputes in the EU, pursuant to the European Legal Aid Directive (2002/8/ESC);
2. Where the issue is whether the client should be entitled to enter the country. Funding would therefore continue to be available under the immigration category, to include applications for asylum;
3. "There are civil proceedings which concern the life or liberty of the client or where the penalties are so severe that funding should remain available. Therefore funding for proceedings concerning the detention of the client under the Mental Health Act 1983, childcare or supervision proceedings under the Children Act 1989, child abduction proceedings covered by the Hague Convention, domestic violence

proceedings, and housing proceedings where the client is at risk of homelessness.”

Given that the last category includes MHA detention, domestic violence proceedings and housing where there is a risk of homelessness, the proposal must be to remove legal aid from those who are deemed not to be *lawfully* resident in the UK.

This would include all asylum seekers as well as EU nationals not economically active in the UK.

Those who advise on housing, community care and/or welfare benefits law are aware of how complex such tests of lawful residence are (particularly in relation to EU nationals).

Moreover, the proposal would mean that, for example, an asylum seeker, while able to obtain legal aid to pursue the actual claim for asylum, could not obtain legal aid to take action in relation to an assault committed whilst in detention or to challenge a refusal to provide community care services. assessment.

Even if the proposals were limited to restricting public funding to those physically present in the UK, the cases that would be excluded from public funding would include cases such as those brought by the family of Baha Mousa and by Binyam Mohamed while resident in Guantanamo Bay. Given the constitutional importance of these types of claim, to remove these cases from the scope of legal aid suggests a government desperate to avoid scrutiny of its own conduct by the courts.

The Public Law Project

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