

Community Legal Service: Financial Conditions for Funding by the Legal Services Commission

Lord Chancellor's Department Consultation

The Public Law Project's Response

1.0 The Public Law Project

1.1 The Public Law Project is national legal charity. Its overarching aim is to improve access to public law remedies for those whose access is restricted by poverty, discrimination or some other form of disadvantage.

1.2 We undertake casework, research, policy and educational activities. Our three specialist public lawyers staff two helplines as part of their work, and accept complex case referrals which often involve public interest judicial review litigation in the social welfare field. We have a General Civil Contract in Public Law and a pilot contract as part of the Methods of Delivery Pilot

1.3 It is from this perspective, and on the foundation of this experience, that we are responding to this consultation paper.

1.4 We do not intend to comment on each and every proposal, but have selected those to which we can make a contribution drawing on our experience.

2.0 Financial eligibility - Income

2.1 PLP welcomes the proposal to remove the anomaly created by the different means testing regimes for Legal Help and Representation. The present situation where an

individual may qualify for Representation but not for Legal Help cannot be allowed to continue.

2.2 The consultation paper refers to the incentive for those caught in this anomaly to apply for Representation at an inappropriately early stage of the case. The greater problem is the complete bar on access. Those who cannot afford to pay for the initial work, on what may prove to be a case with merit and significant prospects of success, may find that they cannot access the early assistance they need at all. We advise and signpost/refer on a significant number of individuals. The initial advice on merits may be positive, but their financial circumstances suggest that they would be ineligible for Legal Help, although unable to afford legal costs. We advise on possible sources of free early assistance, but this is often difficult in the field of public law because of the relatively few solicitor not-for-profit agencies and the geographical restrictions on their services.

2.3 Although we support the policy aim of removing the anomaly, we are concerned that the proposed method of calculation of disposable income, combined with the levels of contribution, may have the same effect as the current scheme of barring access to early assistance. These issues are considered in section 4.

3.0 Financial eligibility - capital

3.1 PLP welcomes the proposed increase in the upper capital threshold for Legal Help.

3.2 In that the same means test is to apply to all levels of service, it is assumed that:

- the existence of dependants is to be reflected by capital disregards in the calculation of disposable capital rather than in variable capital thresholds;
- the additional capital disregards for pensioners will apply to Legal Help. This is of particular importance as - in our experience - elderly people with a limited amount

of life savings and who may be reliant on those savings to generate income find the existing capital thresholds for Legal Help a bar to accessing the legal system.

3.3 To ensure consistency and complete removal of the current anomaly, the capital threshold should be increased to £8000 alongside the increase proposed for Representation. The increase would be unlikely to create undue pressure on the CLS budget as capital contributions would be required from many of those who would be eligible.

4.0 Contributions - Representation and Support Funding

4.1 Three bands are proposed for Representation and Support Funding. One quarter of the first £1500 above the lower income limit (which will be reduced to £2625), one third of the next £1500, and one half of the remainder will be payable as a contribution.

4.2 This appears to improve the position of those with up to £3000 above the lower income limit who must currently pay one third of any excess amount. We are very concerned that this may not in fact be the case in light of the proposed “simplification” of the means assessment. For this reason the proposed changes to the means assessment are dealt with here.

4.3 It is - of course - the rules of means assessment which determine the type and level of expenditure which is deducted from income to reach a final figure for disposable income. The proposed new rules are not discussed in detail in the consultation paper but the following changes are set out:

- Actual housing costs allowance will be subject to a cap if there are no dependants.
- Work expenses will be limited to a standard allowance of £10 per week

4.4 Those who fall foul of the “housing costs” cap may well find themselves worse off even when the taper on proportion of excess income above disposable income is

taken into account. Those who do so may find themselves in an impossible position. Their housing costs will be already fixed by their living circumstances and be such that they find that they cannot afford either the contributions assessed, or the legal costs in full if they are rendered ineligible by the new rule. Their only remedy would be a reduction in their housing costs which would probably require them to leave their home. This would be completely disproportionate and unjust. In certain cases the Commission may find that themselves in breach of Article 6 (right to a fair trial). It is also likely to generate “post code” eligibility issues with those in high housing costs areas (such as London) being more likely to experience eligibility problems.

4.5 The cap will not apply in households with dependant children. However, other dependants are not taken into account. Many households have elderly relatives who are dependent in terms of care provided by a family member. They may not have the resources and will often not be eligible for welfare benefits to assist with housing costs.

4.6 Actual work expenses should be allowable as a deduction. £10 per week is likely to fall far below the actual expenditure in certain areas. For example, those who live in rural areas or large cities and must travel long distances to work will find that £10 falls significantly short of actual costs.

4.7 It is also of concern that no mention is made of many essential items of expenditure, including Council Tax, water rates, rent arrears, fuel debts and fines all of which are currently allowed as independent deductions. If such payments are not maintained the consequences for the individual may be very serious. They should be retained as deductible items in calculating disposable income.

4.8 If essential expenditure of this kind is not deducted, there may well be those who are currently eligible without payment of contributions (i.e. those who are amongst the poorest) who will find that they have to pay under the new scheme. For example, take an individual who under the current assessment has £2723 of disposable income i.e. they just fall on the lower threshold. If they have payments

of rent arrears and Council Tax of £30 per week which are taken into account in calculating disposable income under the existing scheme, but would not be so deducted under the new scheme, their disposable income would increase by £1500 and they will have to pay over £375 by way of contributions towards Representation.

4.9 No mention is made in the paper of the general discretionary disregard power. We presume that this will be retained. In its absence considerable hardship could result. For example, it is the main way that clients with extra costs associated with disability can seek to have these taken into account.

4.10 One further issue should be raised in relation to income means assessment. It is proposed that there should be an absolute eligibility cap of £20,000 gross. This appears to apply irrespective of the individual's circumstances e.g. dependants, special needs arising out of disability and so on. It is only right that full individual assessment should be undertaken to avoid cases of hardship and injustice. Again Article 6 issues could arise in some cases.

4.11 The paper asks whether contributions should continue to be paid throughout the life of the case or subject to a fixed end-point. If the latter approach were to be adopted, it is suggested that there would be no real incentive for clients to have their case completed quickly. From our experience, this problem is unlikely to arise in reality. It would be extremely rare to find a client who did not wish to have their case resolved, and to be free of the stress of their dispute as soon as possible, irrespective of whether they must pay contributions. Furthermore, often a client does not have a great deal of control over the speed of progress and contribution payments are probably, therefore, an ineffective means of encouraging early resolution. The open-ended payment of contributions is not only a heavy financial burden, but a deterrent to justified use of the legal process. We would urge adoption of the fixed end point for this reason.

5.0 Contributions - Legal Help

5.1 The same three bands for income contributions are proposed for Legal Help as for Representation and Support funding. Our comments on the assessment of disposable income in section 4 therefore apply with equal force here.

5.2 It is proposed that fixed contributions of £45, £150 and £300 apply in respect of the three bands.

5.3 These levels are too high. Take for example an individual with a disposable income of £2626 per annum. This is £1 per annum more than the threshold below which they would receive free assistance under the current proposals. This represents approximately £50 per week for all essential expenditure that is not deducted as allowable expenditure in the calculation of disposable income i.e. food, fuel bills, clothes and possibly, fines, rent arrears Council Tax and other debts. Savings cannot be made out of this kind of level of income, and yet, under these proposals, the client would be expected to find £45 as a contribution. In many of the priority areas of law, such as social welfare law or judicial review, it is not possible for the client to simply put matters on hold while they attempt to save the required payment, even if any level of weekly saving were possible. The urgency of their problem (such as threatened eviction) or time limits on action imposed (such as the “3 month” time limit for judicial review) would make this impossible.

5.4 Furthermore a new, significant anomaly between Legal Help and Representation eligibility would arise. The individual with £2626 in annual disposable income would be required to pay 25p per year for Representation but an unaffordable £45 to obtain Legal Help.

5.5 The bottom thresholds of the bands need to be raised, and the fixed charges reduced and made payable over a period of a number of weeks.

5.6 It is suggested that individual practitioners would be free to accept instalment payments, but it is they would run the risk of bad debts because the Commission would only make payments to the practitioner net of contribution. Where the level of contribution is so high relative to income that the issue of instalments will arise as a rule rather than an exception, this is inappropriate. It makes access to justice dependent on the commercial decisions of private businesses rather than on properly accountable public authorities.

5.7 The contributions would not be payable if the matter could be resolved quickly, provided that the costs incurred were no more than the equivalent of 2 hours work. Whilst this proposal is, in principle, to be welcomed, it would be fairer and easier to implement if all those who fall below the upper financial eligibility thresholds were entitled to an initial free two hours of assistance before any contribution became payable.

6.0 Special cases - Public Interest Cases

6.1 It is proposed that the Commission be empowered to waive the upper eligibility limit in group actions, but not in public interest cases at the moment.

6.2 The reason for so doing for group actions is cost effectiveness. However, the reason for lowering the merits and costs-benefits hurdles in a public interest case is the recognition by the Commission that such cases are cost effective in that they each will resolve a legal issue for a large number of people.

6.3 It is suggested that the distinction between group actions and other public interest cases is that, in the latter, the wider public interest is relatively remote. This is certainly not the position in many such cases. For example, the issue of the lawfulness of waiting lists for residential care for elderly people is one that clearly and directly impacts on a large group of vulnerable individuals. The “remoteness” of the benefit varies case by case and in any event is one of the factors that is taken into account in the decision whether or not to designate the case as one of

“significant wider public interest” status. Furthermore, given that the Commission would be exercising a discretion whether or not to waive the upper eligibility threshold, this factor could be taken into account again at that stage.

6.4 In the field of public law, significant public interest issues go unchallenged simply because an eligible client does not come forward. Where the issue affects a vulnerable groups such as the elderly, who are less likely to access the legal system in any event, it is particularly important to seize the opportunities which arise to provide access via a willing individual. The commitment of the Commission to further public interest work in priority areas will remain a partial one until the issue of limitations of financial eligibility is tackled.

6.5 PLP would urge the Commission to take the opportunity now of extending the discretion to public interest cases. There is no risk of floodgates being opened. It really would be a case of the many benefiting from the few.

7.0 Equity value of the funded client’s home

7.1 It is proposed that any equity over £3000 be taken into account when calculating capital contributions.

7.2 Two reasons are given for this radical change from the current disregard of £100,000:

- people with assets should have to contribute towards their costs regardless of the form of those assets;
- the funded client should be in the same position as a privately paying client

7.3 The consultation paper itself recognises that a home is a very different form of capital to any other. A home is a fundamental need. Its importance is recognised by the special protection it is given in the European Convention of Human Rights.

This is reflected in the regulations for the calculation of eligibility for social security benefits where full equity is disregarded.

7.4 Although partial recognition of the difference between a home and other assets is given, in that eligibility would not be affected and sale would not be forced, two problems remain. Firstly, the deterrent effect of the proposal cannot be underestimated. This is particularly worrying in relation to vulnerable groups. The elderly - many of whom, if home owners, will be caught by this provision - are, again, a good example. Secondly, there is to be no *right* to transfer of the charge if the affected individual were to sell and buy a new home. The Commission will have discretion to transfer. Often - if not invariably - owner-occupiers who move house need to simply transfer their equity to the new property. However, the existence of a discretion suggests that transfer of the charge would be the exception rather than the rule. This will add to the deterrent effect. Clients will be asked to put at the risk their future ability to be able to provide suitable housing for themselves and their families.

7.5 The deterrent effect is exacerbated by the proposed change to the disregard for the purposes of costs protection. The quantitative nature of the risk to the clients home is therefore, in broad terms, doubled. Furthermore, although the successful opponent would not be able to force sale, they would not be required to “transfer” their charge. Considerable hardship could result.

7.5 The second reason given for the change is the private client test. It is said that a private litigant would have to consider whether their case was sufficiently important to them to put their home at risk once their liquid capital had been exhausted. However, on the basis of the current rules, once they had reached this position, they would become eligible for public funding and so would not have to put their home at risk. This is because they would only be in this position if their income was insufficient to fund the case and they had no other capital. In short, the proposed change *creates* this private litigant comparator.

7.6 The proposal is of particular concern in the context of proceedings such as judicial review where it is common not to award inter partes costs to the claimant if the case is settled in the early stages. So, in fact, in these types of cases, the proposal would not be an incentive to early settlement as hoped, but could act as an incentive to pursue a case to a stage where costs can be recovered to repay the Commission “loan”. We note that the Commission ‘s intention is that the financial conditions should operate consistently regardless of the type of case. This is a clear case where the proposal would breach this principle in a very significant way.

7.7 For all of these reasons we would urge the Commission in the strongest possible terms to reconsider this proposal.

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