

Contracting for all Civil Representation

Legal Services Commission Consultation

The Public Law Project's Response

1.0 The Public Law Project

1.1 The Public Law Project is national legal charity. Its 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 The proposal to impose additional supervisor standard in relation to the conduct of judicial review proceedings is clearly of particular relevance to PLP and its work. Our intention is therefore to focus on this issue in our response to this paper.

2.0 Additional judicial review supervisor requirements – the Commission’s proposal

2.1 In summary the proposal is as follows:

- Judicial review cases in family, immigration, personal injury, or clinical negligence categories will be restricted to those organisations with a licence contract in the relevant category and with a solicitor who meets additional supervisor standards.
- Judicial review cases in the remaining categories can be conducted by any organisation with a licence contract in any field as long as they have a solicitor who meets the additional supervisor requirements. The “remaining categories” include most social welfare law work together with all cases which fall outside the contract categories.
- Those organisations with a Public Law Specialist Quality Mark may conduct JRs without the need to meet any additional requirements.
- The proposed additional requirements are:

For the immigration category:

- Undertaken at least 10 judicial reviews in the last 3 years
- At least 5 have gone to the permission stage
- At least 3 have been successful

For all other categories

- Undertaken at least 6 judicial review in the last three years
- At least 3 have gone to the permission stage.

2.2 We note that the Commission’s reason for taking this step is to respond to judicial criticism of the quality of a number of publicly funded permission applications. No detail is given about size of this problem, nor the areas in which it arises.

- 2.3 The majority of permission applications are drafted by Counsel. The focus of efforts to improve the quality of this work should, therefore, be the Bar. It is questionable whether restrictions on which solicitors can conduct judicial reviews will have any impact. The Commission has lent its support to the idea of an accreditation scheme for barristers working in this field. This is surely a more appropriate strategy. (See below.)
- 2.4 PLP is concerned that the Commission is proposing to adopt a scheme which will not directly tackle the “mischief” identified, but will exacerbate other current problems with the access/quality balance which are specific to the judicial review field. The Commission’s proposals target quality at the Representation level. In our view this is mistaken and risks severely damaging access at this stage of the judicial review casework process. However, there are significant quality issues at the Legal Help level which are not addressed at all by the consultation paper.
- 2.5 We note that the Commission recognises the need to achieve the right balance between access and quality.
- 2.6 This recognition is reflected in the proposals for contracting for all certificated work, which are set out elsewhere in the paper. Although certificated work in family, immigration, personal injury and clinical negligence will be restricted to those organisations with a Specialist Quality Mark, there is no such restriction in relation to the remaining categories. Any organisation will be able to undertake work in the latter areas as long as it has passed a quality audit in any category. For example, a firm audited in family work will be able to undertake certificated work in the community care, or employment fields.
- 2.7 The reason for not restricting “remaining category” work to those who have passed an audit in the relevant field is the adverse effects on access. Community care is used by way of illustration. Restricting provision of a service in community care to those organisations which had passed a quality audit in that

field is likely to cause access problems given that there are only 27 such organisations at the moment.

2.8 Paragraph 12 of the consultation paper sets out the general approach which has been developed in response to the recognition of the problem:

At this early stage in the introduction of contracts, our principal goal is to ensure that there is adequate access to quality legal services and to establish a base from which we can encourage greater specialisation. Over time, and as the number of specialist suppliers grows, we will seek to restrict CLS Funding for more of the remaining categories to offices that are fully accredited to the Specialist Quality Mark....

2.9 PLP is extremely concerned that the current proposals to restrict suppliers who will be able to undertake judicial review work to those who meet the judicial review specialist criteria fails to recognise the quality/access tension in *this* field. It focuses on quality at the Representation level at a potentially very serious cost to access.

2.10 In order to “unpack” the issues, it is necessary to look in more detail at the judicial review casework process at both Legal Help and Representation levels.

3.0 Early case spotting at the Legal Help stage:

3.1 The requirement that proceedings are issued promptly, and in any event within 3 months, makes swift diagnosis absolutely vital. Early consideration of other remedies and an understanding of how the “alternative remedies principle” works are also important. For example, if a client seeks advice on a failure to provide communities care services, the appropriateness of using the statutory complaints procedure should be considered. However, if the alternative remedies principle is misunderstood as requiring the client to exhaust *all* other remedies first, the client

could be sent down the wrong route and, in doing so, miss the judicial review time limit. This is not an uncommon problem.

3.2 If a solicitor is regularly undertaking judicial review cases at the Representation level then s/he is developing and maintaining familiarity with judicial review principles and competency in applying them. It is unlikely that early case spotting at the Legal Help stage will be a problem. This is more likely to be the position if the solicitor is specialising in certain areas of work (such as community care) rather than others. However, solicitors whose regular casework is not of this nature (for example, family solicitors) are likely to have greater difficulties. The fact that there may be another solicitor in the firm that does have judicial review experience will not greatly assist. It is the solicitor advising the client who needs the early case spotting skills. The proposal to exclude organisations who do not meet the additional standards from judicial review work at the Representation level, is likely to exacerbate the problem. It will limit the number of organisations who can develop and maintain diagnostic skills through Representation experience.

3.3 A significant proportion of Legal Help level work in a number of social welfare law areas is undertaken in non-solicitor agencies. Generally they will not have had the opportunities to develop experience of using judicial review principles through the conduct of cases, or have had the benefit of academic training in administrative law. It is vital that they have the very specific skill of spotting cases and understanding the alternative remedies and delay principles. This is a particular problem for agencies that specialise in areas such as debt work where judicial review arises less frequently, and which is underdeveloped in the use of judicial review in any event.

3.4 This is not to say that “case spotting” is a problem restricted to non-solicitor agencies (see above). It simply recognises that there are particular characteristics of such agencies which might tend to exacerbate the problem.

3.5 The current supervisor standards in some franchise categories require demonstration of ability to spot a potential judicial review case. Three points should be made about this. First some categories, such as debt and employment, do not even carry this criterion. Secondly, it only requires that the supervisor can demonstrate this ability. It is the caseworkers themselves who need the skill. There is no requirement of dissemination of knowledge and skills to each caseworker. Finally, the limited nature of the standard does not adequately reflect the priority given by the Lord Chancellor and the Commission to public law work.

An alternative approach

3.6 The basis of an alternative approach is to be found in the way that the early case spotting problem has been dealt with in welfare benefits work.

3.7 The importance of identifying potential welfare benefits issues, and referring for expert assistance when appropriate, was recognised early on in the development of franchising. Every franchised organisation is required by the quality standards to have in place a Welfare Benefits Representative. LAFQAS sets out this requirement in detail:

*B1.1 Organisations **must** have at least one employee who either:*

- 1. meets the Welfare Benefits supervisor standards; **or***
- 2. has attended an accredited welfare benefits' needs recognition course in the twelve month period before the pre franchise audit and subsequently maintains current knowledge through the acquisition of at least 2 CPD hours in welfare benefits annually.*

*B1.2 All fee-earners/advisers doing LSC funded work **must** be trained to recognise the need for welfare benefits advice **that is relevant to the category of law being practised and the specific needs of individual cases.** This training*

must be updated at least annually and cover changes and developments in welfare benefit legislation and entitlements.

B1.3 Some issues that arise out of B1.2 above will lead to a need for specialised welfare benefits advice to be made available. For this reason, all organisations must have a documented procedure that provides:

- *guidance to fee-earners/advisers on the steps to be taken when referring clients, both internally and externally, to an appropriate source of advice. This must include discussing the position with the client;*
- *a regularly updated list of appropriate external organisations or specialists to whom the case can be referred.*

B1.4 Referral must occur at the earliest appropriate stage in the case.

3.8 A Judicial Review Representative in every audited organisation would provide a means of addressing the case identification problem. The Representative would be required to demonstrate sufficient experience or training in the early stages of judicial review work – spotting a potential case, early considerations such as alternative remedies, and delay issues. It would be their responsibility to ensure that caseworkers had sufficient expertise to identify that judicial review might be in issue in their own field, and to seek assistance, if appropriate, from the Judicial Review Representative. The Representative would also be responsible for keeping up to date with changes or developments and for disseminating relevant material to caseworkers.

3.9 It is possible that the person who undertakes the Judicial Review Representative role may never have undertaken judicial review casework in practice. Given the complexity of some judicial review issues they may need the assistance of a second tier support service to assist them in that role.

3.10 PLP has experience of providing initial training of this kind and have found that it has generated appropriate enquires to our support service and referral of cases that might not have otherwise been identified.

- 3.11 If such a proposal were to be adopted organisations would, of course, need a reasonable period of time to reach compliance.
- 3.12 Improved expertise in identifying cases would be likely to lead to an increase in the number of cases dealt with by solicitors within the organisation or, if it is a non-solicitor agency, by solicitors to whom the cases are referred. This would offer improved opportunities for the development and maintenance of expertise in Representation and improve access at this level.

4.0 Representation in Judicial Review Cases:

- 4.1 Once a case has been identified the client will need access to a solicitor to conduct the case to conclusion. If the case is identified by a solicitor normally s/he will continue to act. However, non-solicitor agencies will need to refer on to a solicitor with appropriate expertise.
- 4.2 The Commission is proposing to limit the solicitors who can undertake judicial review cases to those who work in an organisation with a supervisor who meets the additional standards.
- 4.3 The paper does not consider the impact that this may have on access at the Representation stage.
- 4.4 There is some evidence that the impact in certain fields may be severe. Recent research found that 20% of the solicitors conducting judicial review cases (other than immigration or homelessness cases) in the Crown Office List indicated that they would deal with less than 1 case per year. It must be of serious concern that such a high proportion of representatives would not pass the proposed additional supervisor standards.
- 4.5 In short the cost to access of adopting the proposed quality standards is potentially high.

4.6 It is not just the quantitative aspects of the proposed criteria that are of concern.

4.7 The following comments are based on a number of assumptions about the meaning of the criteria (which do need clarification):

- “Undertaken” means a Certificate has been granted.
- “Successful” (in the immigration category) means that permission was granted.

4.8 The Bowman Review has led to a recent reform of the procedural rules of judicial review, the aim of which is to encourage early settlement. The claimant is required to serve the claim form on the defendant on issuing the application for permission. The defendant is required to file an acknowledgement of service in which they indicate whether they intend to contest the claim and, if they do, they must set out a summary of their grounds for doing so. The idea is that defendants are encouraged to consider the merits of any defence at a very early stage and concede appropriate case before the permission application is considered by the court. In the near future there is likely to be a pre action protocol - a working party is currently working on proposals – and, again, the aim is to encourage early settlement - in this case, before an application for a certificate is made.

4.9 The criteria as currently drafted would penalise the practitioner who made good use of the new opportunities for early settlement. Undertaking cases beyond the grant of a certificate, reaching the permission stage and, in immigration cases, success at that stage, are all criteria which might exclude a competent practitioner in this new context.

4.10 If any additional criteria are to be adopted based on numbers of cases taken statutory appeals should “count” towards the total.

An alternative proposal

- 4.11 In our view, the potential consequences for access are so serious that no audited organisation - at least at this stage - should be prevented from undertaking judicial review casework at the Representation level.
- 4.12 We propose a different approach would avoid the adverse impact on access whilst, at the same time, supporting the move towards quality. Additional supervisor standards could be developed but not used to exclude organisations from Representation. However, organisations which did not have the level of experience indicated by the additional criteria (or a Public Law SQM) would be required to obtain a written opinion on merits from an experienced barrister before the issue of proceedings.
- 4.13 The consultation paper proposes that a favourable written opinion from a barrister experienced in public law should be made a condition of *all* judicial review funding certificates.
- 4.14 In PLP's view, this would create an unnecessary costs burden on the CLS Fund. In this context it should be remembered that inter partes costs recovery is problematic in judicial review cases which settle early.
- 4.15 In most cases Counsel will be instructed to settle grounds. In the process of considering the papers s/he will obviously form a view on merits. If that view is unfavourable s/he is already obliged in publicly funded cases to inform the conducting solicitor who is, in turn, required to inform the Commission. To interpose a step of drafting a formal written advice in all cases is unnecessary.
- 4.16 We note the Commission's view that it would assist if the Bar were to adopt a "*robust accreditation scheme*" in this area of work. PLP supports the Commission's view. Counsel often has a more significant and on-going role to play in judicial review cases than in other forms of litigation, in part because of the speed of the process. Accreditation of barristers would address directly the concerns of the judiciary about the quality of permission applications. We would

urge the Commission to consider whether it could do more in relation to an accreditation scheme.

4.17 However, in the absence of a formal scheme, solicitors will need guidance on the definition of a barrister “experienced in public law”. The Commission will need to develop some indicators for this purpose.

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