

## CLS Support Practice Note 01

# Sufficient Benefit - Is it worth it?

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### Overview

This practice note is aimed at advisers working in Debt, Employment, Housing and Welfare Benefits. It discusses when to open a case under the Legal Help scheme and so covers the Sufficient Benefit Test and Separate Matters.

## Sufficient Benefit – Is it worth it?

*When to open a case under the Legal Help scheme*

### 1 Introduction

- 1.1 This practice note is aimed at legal advisers working in the main social welfare law categories<sup>1</sup> although the general principles should also be useful for advisers in other civil categories of work.
- 1.2 The Legal Services Commission (LSC) has not approved this document, although it has had sight of an earlier draft and we have incorporated a number of comments received from its Corporate Legal Team in the process of preparing it.
- 1.3 The LSC has recently published on its website a **Financial Stewardship Guidance manual** that touches on some of the issues discussed in this practice note. **It is our view that this Guidance manual is misleading in several respects.** These are outlined in section 6 below.
- 1.4 In our view, a caseworker thinking about opening a case should consider three basic questions:
  - Is there a legal issue?
  - Is it worth it from the client's point of view?
  - What do the rules say?

### 2 Is there a legal issue?

- 2.1 The *Causes of Action* research, on which the LSC relies heavily, adopts the concept of “justiciable” problems, originally propounded by Hazel Genn in *Paths to Justice*.<sup>2</sup> This defines a “justiciable” problem as

*“A matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being ‘legal’ and whether or not any action*

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<sup>1</sup> Debt, Employment, Housing and Welfare Benefits

<sup>2</sup> H. Genn (1999) *Paths to Justice: What People Do and Think about Going to Law*, Oxford; Hart Publishing.

*taken by the respondent to deal with the [matter] involved the use of any part of the civil justice system.”<sup>3</sup>*

- 2.2 The legal aid rules do not define “legal issues”. Advisers have to apply a bit of common sense here.
- 2.3 The “legal issue” does not have to be complex, or difficult for a specialist to answer, but there has to be a legal element to the question raised or the problem experienced by the client.
- 2.4 There may be some issues that are not “legal” enough to count. This is probably clearest in the welfare benefits category. All benefit entitlements are set out in regulations. Therefore, whether anyone is entitled to any benefit is strictly speaking a “legal issue”. It would however be very doubtful that one could justify opening a case to advise someone whether they are entitled to child benefit.
- 2.5 If in any doubt, the place to start when determining whether something is a legal issue would be to check whether it is included within the SQM Category of Law Definition for the subject category in question. These are set out in the Funding Code.<sup>4</sup>

### **3 Is it worth it from the client’s point of view?**

- 3.1 Although we ask whether it is worth it from the client’s point of view, it is the adviser who has to answer the question before beginning or continuing work for the client. This is what the legal aid rules refer to as the Sufficient Benefit Test (SBT)
- 3.2 Paragraph 5.11 of the current Unified Contract Specification states:  
*“A Matter Start should be commenced only where all applicable Funding Code Criteria are met in respect of opening the new matter. **In particular, each separate Legal Help Matter Start must satisfy the sufficient benefit test set out at Section 5.2.1 of the Funding Code Criteria.**”*
- 3.3 Funding Code Criterion 5.2.1 – the Sufficient Benefit Test – states:  
*“Help may only be provided where there is sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out.”<sup>5</sup>*
- 3.4 This is explained further at paragraph 4.11 in the Funding Code Guidance as follows [our emphasis in bold]:  
*“The sufficient benefit test . . . applies as a cost benefit test for Legal Help and Help at Court. It is primarily a test of whether a reasonable private paying client of moderate means would pay for the legal advice and assistance . . .*  
***The emphasis of the test, however, is on whether to continue work, rather than making an assessment at the start of the case. In particular, [the] test recognises that, at this level of service, even in a matter with poor prospects of success, it may well be considered worthwhile for a client to pay for initial advice, including the advice that the case is not worth pursuing further. The more Legal Help is provided, however, the more that cost benefit will need to be taken into account. For a purely financial matter, the test would require that the amount in issue must exceed the likely cost of Legal Help.***

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<sup>3</sup> Ibid p.12

<sup>4</sup> LSC Manual Volume 3, Part E

<sup>5</sup> LSC Manual 3A-025

*Whether the . . . matter is paid by hourly rates or by a fixed and standard fee, the costs to be considered . . . are calculated as the time spent at the appropriate Legal Help hourly rates, plus any disbursements to be incurred.”<sup>6</sup>*

- 3.5 Under a fixed fee regime, the SBT is mainly relevant
- At the beginning
  - If you are considering incurring a disbursement
  - Whenever some development in the case means you need to re-evaluate the extent of your involvement
  - If the case is likely to become exceptional.
- 3.6 At the beginning of a case, the SBT is unlikely to be a problem assuming you had identified that there was a legal issue and that pursuing it would be of real benefit for the client. The guidance within the *Contract Compliance Audit Working Group Report* (the ‘CCA Report’) published in October 2008<sup>7</sup> supports this by stating:
- “We would not expect to see many, if any, cases where there is not sufficient benefit at the outset but if an LSC auditor does come across such a case then he or she must seek guidance from the LSC’s Corporate Legal Team before making an audit decision.”<sup>8</sup>*
- “This means that it [the Test] is unlikely to have much relevance in a fixed fee regime unless the case is inappropriately continued and becomes an exceptional case.”<sup>9</sup>*
- 3.7 However, even though the CCA Report said that the Test was unlikely to have much relevance in a fixed fee regime, it did not say it would always be met in every situation.
- 3.8 A case might fail the test, for example, if an auditor concluded that the benefit the client expected to receive was something so trivial or intangible that a “reasonable private paying client of moderate means” would not pay for legal advice about it.
- 3.9 The “reasonable private paying client” test was easier to apply under the old system, before fixed fees, when the adviser could limit the work (and therefore the claim from the Legal Aid Fund) to the amount at stake, but the principle still applies.
- 3.10 It is most obviously applicable where the issue can be easily quantified
- Would the client pay for advice in a dispute over an alleged debt of £25? – probably not.
  - Would the client pay for advice in a dispute over an alleged debt of £100? – possibly, but they would not spend more than £100 on it.
- 3.11 This echoes the statement in the Funding Code Guidance, quoted above, which states:
- “For a purely financial matter, the test would require that the amount in issue must exceed the likely cost of Legal Help.”*
- 3.12 It is arguable, however, that a test based on the “private paying client of moderate means” does little to help us in relation to a client who is worse off than this notional

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<sup>6</sup> LSC Manual 3C-037.1

<sup>7</sup> The purpose of the Contract Compliance Working Group was to fulfill the requirements of Appendix 5 of the Deed of Settlement “A Commitment to joint working and objectives”. More here: [http://www.legalservices.gov.uk/civil/agreement\\_law\\_society.asp](http://www.legalservices.gov.uk/civil/agreement_law_society.asp)

<sup>8</sup> Para 18, Appendix G of the Contract Compliance Audit Review, available at [http://www.legalservices.gov.uk/docs/cls\\_main/Contract\\_Compliance\\_Audit\\_Review.pdf](http://www.legalservices.gov.uk/docs/cls_main/Contract_Compliance_Audit_Review.pdf)

<sup>9</sup> Ibid para 17

client. This will be the case in almost all welfare benefit cases with clients living on subsistence level incomes, where the benefit to such a client is likely to be of greater significance than it would be to a client of moderate means.

**How much work should you do, assuming you can quantify what is involved?**

- 3.13 It is important not to place all the emphasis on a comparison between the likely costs of the work you envisage and the amount that is at stake for the client. The likelihood of success in recovering the money would **also** impact on how much a reasonable client of moderate means would pay and may mean you limit your involvement proportionally.
- 3.14 Whilst it would be reasonable to assume a private paying client would pay for initial advice on the chances of recovering a couple of hundred pounds, they would most likely cut their losses at that if there were no other issues involved and the initial advice was that they only stood a 50/50 chance of recovering the money. They would be unlikely to pay you to take the matter forward or to pay for further advice in relation to it.
- 3.15 If this same situation were to present itself to you in the context of fixed fees then, whilst you may believe it is reasonable to open a matter in order to deal with it, it would also mean that you would limit your work on the same terms: initial investigation of the legal issue, your advice and confirmation of advice letter.
- 3.16 If you are in any doubt about opening a matter for a new client in such circumstances then consider talking it over with your advice network or CLS Support. Alternatively, you could run it by your Relationship Manager at your LSC Regional Office.
- 3.17 Importantly, if you are pursuing a case where the benefit is not readily apparent or easily quantifiable, and so believe there is a risk that an auditor may feel the case is not an appropriate use of public funds, then you should make sure your file makes the benefit to the client clear.

**4 What do the rules say?**

- 4.1 The Unified Contract Specification contains both general and category specific rules that are relevant to the question of whether and when you should open a Legal Help case. Similar rules appear in the Standard Contract Specification that comes into force in October 2010. These rules may mean that you cannot open a Legal Help case even if there is a legal issue and the case has Sufficient Benefit.
- 4.2 Where there is a possible conflict, the category specific rules take precedence over the general rules.<sup>10</sup>

**The category specific rules**

- 4.3 In welfare benefits, the category specific provisions say that
  - You should not do a “welfare benefits check” unless it is necessary and is required to deal with the presenting problem <sup>11</sup>
  - You must not open a matter start where the matter could have been easily dealt with by the client, such as by an enquiry to the relevant benefits authority <sup>12</sup>
  - You should not fill out forms unless an issue of law arises and it is important that the form is completed in the appropriate legal terms <sup>13</sup>

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<sup>10</sup> Unified Contract Specification – Preliminary paragraph 2, and Standard Contract Specification paragraph 1.10

<sup>11</sup> Ibid, paras 16.1 and 10.76 respectively

<sup>12</sup> Ibid, paras 16.2 and 10.77

- Legal Help on a review, revision, supersession or appeal counts as the same matter as previous advice in relation to the relevant benefit.<sup>14</sup>
- 4.4 In debt, the category specific provisions state very clearly when you can open more than one debt case for a client.<sup>15</sup> Unless specific circumstances apply that meet these conditions therefore, a client’s debts are treated as constituting one problem only.
- 4.5 In employment, the rules state that all claims arising out of “one set of circumstances” shall be treated as one case.<sup>16</sup>
- 4.6 In housing, there are specific rules
- Where both civil remedies and possible proceedings in the magistrates court under the Environmental Protection Act 1990 fall to be considered
  - In relation to homelessness cases.<sup>17</sup>

**The general rules**

- 4.7 The general rules set out when a Matter Start may be started and when it is legitimate to start more than one Matter Start for the same client.<sup>18</sup> The rules:
- state that you must not open more than one Matter Start for a client unless the client has more than one “separate and distinct legal problem”, and specify what that means<sup>19</sup>
  - state that each separate matter start must satisfy the Sufficient Benefit Test<sup>20</sup>
  - state that you cannot open a new matter start because circumstances have changed or developments have occurred, if the case is still dealing with “the same overall legal issue”<sup>21</sup>
  - specify the circumstances in which you can open more than one matter start “in relation to the same problem”<sup>22</sup>
  - specify when you can open separate matter starts for more than one client<sup>23</sup>
  - specify other circumstances when you cannot open a matter start or a separate matter start<sup>24</sup>
- 4.8 Where a client raises several issues at the first meeting the Unified Contract states as follows:
- “Where the Client raises several issues at the first meeting, a single Matter Start should be completed to identify the issues and provide general, preliminary advice. If one legal issue is identified then the original, single Matter Start should be used for the provision of further Controlled Work. However, more than one Matter Start may be opened at the initial meeting where this is justified under paragraph 5.8.”<sup>25</sup>*

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<sup>13</sup> Ibid, paras 16.3 and 10.78  
<sup>14</sup> Ibid, paras 16.6 and 10.81  
<sup>15</sup> Ibid, paras 13.2 and 10.7  
<sup>16</sup> Ibid, paras 14.1 and 10.14  
<sup>17</sup> Ibid, paras 15.4-15.9 and 10.24-10.29  
<sup>18</sup> Ibid, paras 5.6-5.22 and 3.40-3.60  
<sup>19</sup> Ibid, paras 5.8-5.9 and 3.42-3.43  
<sup>20</sup> Ibid, paras 5.11 and 3.41  
<sup>21</sup> Ibid, paras 5.14 and 3.46  
<sup>22</sup> Ibid, paras 5.15-5.16 and 3.47-3.48  
<sup>23</sup> Ibid, paras 5.18 and 3.50  
<sup>24</sup> Ibid, paras 5.19-5.20 and 3.58-3.59  
<sup>25</sup> Unified Contract Specification para 5.12; see also Standard Contract Specification para 3.44

- 4.9 Where you act for more than one client in relation to the same general legal problem, the Unified Contract states that separate matter starts can only be started if:

*“Where Legal Help is provided, there is sufficient benefit for each client in receiving Legal Help, having regard to the Legal Help provided to each other Client.”<sup>26</sup>*

- 4.10 The Standard Contract similarly states:

*“In considering whether there is sufficient benefit for the second or any subsequent client to receive Legal Help, you take into account the fact the Legal Help that is already being provided in relation to the same general problem.”<sup>27</sup>*

## 5 What does all this mean?

**Does the fact that I have to spend time deciding whether the SBT is met at the outset mean I can claim a fixed fee for the matter regardless?**

- 5.1 No. As we have said above, there may be times when you decide **not** to accept the client’s application and open a matter as the SBT is not met at the outset eg the matter is entirely trivial or is non-legal in nature. Inevitably, this decision will be after you have put some thought into whether or not you *should* open a matter.
- 5.2 This is just the same, in principle, as the time you would similarly spend deciding whether the category specific rules or general rules prevented you from opening a matter for the client or not.
- 5.3 However, this does not mean that you need to spend significant amounts of time determining all the issues in the client’s case, examining substantial documentation, or estimating the client’s chances of success, before you can open a matter start. It is about striking a reasonable balance between the advice the client believes they need, your determination of the situation as it presents itself to you and the fact that there will be a cost to the public purse should you accept the client’s application and proceed further.

**Can I open short one-off matters that conclude at first contact?**

- 5.4 Yes. There are many reasons why a matter might conclude at the first attendance on the client. For example, if you determined at the initial interview that the client’s case was likely to fail then the application of the SBT would tell you that you should not normally provide any further work beyond that interview and any confirmation of advice letter.
- 5.5 Similarly, you might limit your work to that done in the course of the first attendance because you believed that whilst the client had a case, the benefit anticipated did not merit more than the time taken to advise the client on how s/he might pursue it him/herself – limiting your work proportionally to the issue at stake, the capabilities of the client or the benefit the client expected to receive.

**Can I take on a case where I anticipate the benefit to the client will be less than the fixed fee I will be paid?**

- 5.6 Yes, you can. However, you should seek to limit the amount of work you do to an amount you believe is equivalent to the benefit the client expects to receive. **For the purposes of applying the SBT, you should be thinking about the profit cost figure you will be reporting on closure, plus any disbursements, not the fixed fee you will be paid.**

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<sup>26</sup> Unified Contract Specification para 5.18(c)

<sup>27</sup> Standard Contract Specification para 3.50(c)

- 5.7 Similarly, you may assist a client in debt where the sum of their debts is less than the fixed fee. However, remember that you should emphasise any other non-financial benefits attached e.g. an aggressive private bailiff who was causing the client significant distress even though the amount in issue was not significant. Given the associated benefits of your involvement in such cases, it may be possible to justify spending longer resolving the matter but do ensure that you make your reasoning clear on file.

**Is the “test” stricter if you are thinking about opening an additional matter for the client?**

- 5.8 Strictly speaking, the sufficient benefit test is the same, but the general and category specific rules do make the test stricter in several respects and advisers need to be very familiar with these rules.
- 5.9 The LSC has recently provided us with two reasons why it thinks the SBT is particularly significant when thinking about opening additional matters for the same client [our emphasis in bold]:

*“Specifically with regard to second and subsequent matters there are really two reasons why sufficient benefit may be particularly significant in this situation, one substantive and the other more practical*

**1. Sufficient benefit for any matter needs to be viewed in the context of existing legal assistance that is being provided.** *Therefore, if the client's housing benefit and council tax problem is resolved by establishing entitlement to income support they would not instruct a solicitor privately regarding housing and council tax benefit. This principle is referred to directly in the rules on multiple clients, where there has to be sufficient benefit in each client receiving assistance having regard to the assistance being given by other clients.*

**2. For a new Matter Start there is obviously the potential for dispute in general as to whether work in assessing a case forms part of the decision to grant Legal Help or not, or instead it relates to the substantive advice given to the client. Where there is an existing Matter it is clearly reasonable for the assessment of whether to pursue a separate Matter to be made under that existing Matter, not least because of the existing knowledge regarding the client's circumstances.”**<sup>28</sup>

**How is all this being considered at audit?**

- 5.10 We have had some feedback that auditors have suggested that cases should not have been opened because they believed the matter was something the client could easily have dealt with himself or herself. As we have noted above, the relevant provision in the rules applies specifically to welfare benefits cases. However, it is understandable that auditors may be applying the general principle more widely to other categories of work. In effect, they may be saying they did not believe reasonable clients of moderate means would have paid you for this assistance and would have instead dealt with it themselves, returning to you only if a significant legal issue became apparent as the situation deteriorated.
- 5.11 Similarly, we have heard that auditors have suggested that cases should not have been opened because they were “generalist” in nature. This is not a wording that appears in the rules. The auditors may however have been saying that the issue raised was one which could have been dealt with by way of “general” advice within the meaning of paragraph 5.12 of the Unified Contract Specification, as discussed above.<sup>29</sup>

<sup>28</sup> Email from LSC to CLS Support 15<sup>th</sup> March 2010.

<sup>29</sup> See section 4.8 above

- 5.12 What does appear clear however, is that the issue of there actually being a legal issue should be as paramount for the advisor when deciding whether to open a matter as it is for the auditor when deciding whether to allow the claim for that matter.

## **6 The LSC's Guidance Manual**

- 6.1 The LSC has recently instituted a process known as Financial Stewardship under which relationship managers are visiting providers and assessing files, using a Guidance manual that has been published on the LSC's website.<sup>30</sup>
- 6.2 In ASA's view this Guidance manual is misleading in several respects. In particular
- As to the circumstances in which separate matters can be opened in debt, welfare benefits and mixed categories
  - As to whether advice can be given in debt in relation to Magistrates Court fines.
- 6.3 In relation to welfare benefits, we consider that the manual is misleading
- in suggesting that advice on entitlement (where justified) is one matter, however many benefits may be available to the client
  - in suggesting that the only forms that are likely to fall within paragraph 16.3 of the Unified Contract Specification are forms relating to Disability Living Allowance and Attendance Allowance
  - in suggesting that separate matters will only be justified if there is a specific problem with more than one benefit, involving different factual or legal issues, or if there are separate appeals
- 6.4 We understand that there have been several appeals to Independent Costs Assessors on these issues. Further advice on these issues can be obtained from your advice network or CLS Support.

## **7 Where can we go for further help?**

- 7.1 If in doubt, contact your advice network or CLS Support.

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<sup>30</sup> Available at [http://www.legalservices.gov.uk/civil/civil\\_contracts.asp](http://www.legalservices.gov.uk/civil/civil_contracts.asp)