



**Legal Aid:  
Refocusing on Priority Cases**  
The Advice Services Alliance's response to  
the Ministry of Justice consultation paper

October 2009

## **1 Introduction**

- 1.1 The Advice Services Alliance (ASA) welcomes the opportunity to respond to this consultation paper.
- 1.2 ASA is the umbrella organisation for independent advice networks in the U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:
- adviceUK
  - Age Concern and Help the Aged England
  - Citizens Advice
  - DIAL UK (the disability information and advice service)
  - Law Centres Federation
  - Shelter
  - Shelter Cymru
  - Youth Access
- 1.3 Our members represent some 1,700 organisations In England and Wales which provide a range of advice and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising.
- 1.4 With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law').

## **2 Introductory Comments**

- 2.1 A number of the changes proposed raise questions of principle. A large number of them will in fact save very little money, according to the impact assessment. Of the projected annual benefit of £16m a year, nearly half (£7m) is attributable to one proposal concerning prison law advice on treatment matters.
- 2.2 Furthermore, as we understand it, the figures in the draft impact assessment are all gross, and take no account of the net costs to the legal aid fund after inter partes recovery has been taken into account.
- 2.3 As NfP agencies legal aid work is focussed overwhelmingly on social welfare law, we will restrict our comments to civil matters.
- 2.4 We have had the benefit of seeing draft responses and other comments prepared by the Law Society, the Immigration Law Practitioners Association (ILPA), the Public Law Project (PLP) and the Mental Health Lawyers Association (MHLA).

### 3 Consultation Questions

**Question 1.** *Do you agree that the definition of Wider Public Interest should be strengthened to ensure that a case will only qualify if it is a good vehicle on its facts to deliver those benefits? Do you agree that disadvantages to the public from the proceedings should also be taken into account in assessing public interest? What safeguards are appropriate for claims brought by minority interests?*

3.1 We do not agree to these proposals.

3.2 As others (including ILPA and PLP) have pointed out:

- There is a risk that cases will not be funded on the assumption, or in the hope, that a better case will come along.
- Better cases may not come forward because they are more likely to be conceded by opponents wishing to avoid a test case being successful.
- It is for the court, not the LSC, to seek to balance competing public interests.
- It is hard to see what safeguards could protect minority interests.

**Question 2.** *Do you agree with the proposed special controls and budgeting for public interest and borderline cases as described above? Do you agree that the existing committees should be replaced by a new committee? Do you agree that the new committee should include non-lawyers? Are there other groups who should be represented on the new committee?*

3.3 We are not convinced by these proposals. We do not think that a case has been made for the need for greater controls of such cases. We are concerned that a separate budget will restrict the number of cases that are taken. We are not convinced of the need for a new committee. It is our understanding that both the Public Interest Advisory Panel and the Independent Adjudicator have worked well. They represent important independent elements within the decision making process, and were established precisely for that purpose. We do not agree that “representatives of the public” nominated by the Local Government Association, regional health associations or Health Authorities should consider the public interest aspect of such cases, since these organisations will often have a contrary interest.

**Question 3.** *Do you agree that we should refocus our resources on higher value damages claims and refuse funding for investigative help and representation where the damages are unlikely to exceed £5000? Should we retain an exemption for low value cases which do attract significant wider public interest? Should we apply this to individual claims, MPAs or both types of claim?*

3.4 We are not convinced by this proposal, which concerns damages claims against public authorities. Such claims provide an important means of holding such authorities to account and deterring wrongful action by them.

3.5 Section 8 of the Funding Code applies only to claims which concern: serious wrongdoing, 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).

3.6 We are not aware of any evidence suggesting that victims of such extreme actions would be content with an explanation or apology, rather than compensation.

- 3.7 We are not aware of any evidence suggesting that public authority defendants who lose such cases are not ordered to pay costs, or do not actually pay the costs ordered against them.
- 3.8 We do not believe that complaints procedures or ombudsman schemes are likely to provide a suitable alternative remedy.
- 3.9 We note with concern the comment by MHLA that this proposal would take out of scope a significant percentage of claims for damages by psychiatric patients who have been unlawfully detained. We endorse their reasoning for objecting to this proposal on this basis.

**Question 4.** *Do you agree that where an out of scope matter is brought back into scope because there is significant wider public interest this should only be for damages cases where the damages are at least £5,000? Should we apply this to individual claims, MPAs or both types of claim?*

- 3.10 The Impact Assessment suggests that this proposal is directed at Multi-Party Actions, and would be likely to affect one MPA every one to two years. Without further information as to the type of case likely to be affected we cannot comment on this proposal.

**Question 5.** *Do you agree that we should add a specific reference to the prison and probation complaints procedures and the Prisons and Probation Ombudsman in section 8 of the Funding Code? Are there other complaints systems or ombudsman schemes which should be explicitly mentioned?*

- 3.11 The paper states that this is not a substantive change, but is intended as a clarification and a prompt. If this is correct, we have no particular objection.

**Question 6.** *Do you agree that we should include a specific reference to potential inter partes costs in assessing the cost / benefit of appeals in section 8 public damages claims?*

- 3.12 We are not convinced by this proposal. The paper suggests that it might affect 10-20 cases per year, where the cost/benefit test would have been passed under the current rule.
- 3.13 The problem with including potential inter partes costs is, firstly, that those costs would be at higher commercial rates, as the paper states. What might be a justifiable appeal against a decision concerning a public authority might therefore cease to be justifiable because of the commercial rates charged by the authority's lawyers. This would seem to be unfair, in principle.
- 3.14 The paper also states that "these would primarily be in damages cases on appeal, where the claimant and defendant costs would exceed the value of the claim." This suggests that the test would be deemed to be failed where such circumstances applied, without considering the actual likelihood of success on appeal, the wider public interest, or the fact that a successful appeal would usually result in recovery of the legally aided party's costs in the court below as well as in the appeal court.

3.15 We are concerned therefore that changing the test in this way would make it more difficult for many claims to pass the cost/benefit test and could in fact affect a significant number of cases.

**Question 7.** *Do you agree that we should remove the presumption of funding and have a single test for granting funding in judicial review cases?*

3.16 We do not agree with this proposal. No cogent reason seems to be put forward for it. The impact assessment suggests that it might affect 5-10 cases per year, which it describes firstly as “likely to be complex, potentially expensive claims” (para 3.39) and secondly as “weak cases” (para 3.41), which is not necessarily the same thing. It seems possible that this change is being proposed to enable the LSC to refuse funding in “complex, potentially expensive” claims, even though permission to bring a judicial review has been granted by the court.

**Question 8.** *Do you agree that we should clarify the requirements around personal interest, so it is clearer that applicants for funding must have a personal benefit in the proceedings?*

3.17 We are not convinced by this proposal. It seems to us that the Funding Code criteria on this issue are quite clear. The impact assessment suggests that it “could prevent 1 or 2 cases a year from receiving funding.” (Para 3.43)

**Question 9.** *Do you agree that further funding should not be granted until the receipt of acknowledgement and response, unless the court has granted permission? Do you think that the legal representatives or the LSC should carry this out?*

3.18 We do not feel that we have sufficient knowledge and experience of judicial review cases to enable us to comment fully on this question. We note however the suggestion by others (ILPA, PLP and the Law Society) that the change proposed would seem to have no apparent benefit, while creating additional work for the LSC and the claimant’s solicitors as well as possible delays in the courts.

**Question 10.** *Do you agree with extending the referral criteria for SCU case management? If yes, which cases would benefit from SCU case management? If no, please give reasons.*

3.19 We do not feel that we have sufficient knowledge and experience of SCU case management to enable us to comment on this proposal. We note however ILPA’s comments about the lack of value of case plans, and their (and others’) concern that the proposal could be used to pay a lower hourly rate for cases that are affected. We trust that this concern is in fact unjustified, given that the draft impact assessment assesses the benefits and costs of this measure as “negligible”. (Para 3.51)

**Question 11.** *Do you agree that LSC should seek representations before funding is granted? Do you think the 14 day period is too long or too short? Should this be a discretion for LSC to seek representations in particular categories of law or specific financial circumstances of applicants? In which categories of law or circumstances would pre-grant representations be more or less useful?*

- 3.20 We can see that there may be some merit in this proposal, given the proportion of representations that lead to funding being refused, withdrawn or revoked – currently 27% according to the draft impact assessment. (Para 3.53). We note however that this occurred most often where representations were received about a funded client's means. (Para 3.55).
- 3.21 We agree with the draft impact assessment that the implementation of this proposal is likely to increase the number of frivolous representations made. (Para 3.54)
- 3.22 We can understand that opponents of funded clients are likely to make representations if they believe that the assisted person is not financially eligible. If representations are invited in all cases, it seems to us likely that a higher proportion of representations will be about the merits of the case. However, the proposed defendant will have had an opportunity to respond to the claim in pre-action correspondence, often governed by a protocol. This should have been included with the legal aid application and taken account of when a decision was made that the application passed the merits test. It seems likely therefore that the great majority of representations as to the merits of the case are likely to rehash arguments already made and rejected, and are likely therefore to be unsuccessful.
- 3.23 There is a serious risk therefore that implementing this proposal, certainly on a blanket basis, will cause considerable extra work for the LSC and the applicant's solicitors, and the disruption of court proceedings (as noted in para 3.62), while producing little in the way of savings to the fund.
- 3.24 For these and other reasons, we are not convinced by the calculations in the draft impact assessment:
- The proportion of cases likely to produce representations (16%) is based on the Scottish scheme, although this seems to operate differently (apparently by inviting representations before a decision has been made that the client meets the means and merits tests for funding – see para 3.56 of the draft impact assessment).
  - The proportion of representations that are “successful” (13%) is estimated at half the rate under the current system. It seems to us that this is highly speculative, for the reasons set out above.
- 3.25 As far as the applicant's financial circumstances are concerned, we wonder what proportion of “successful” representations as to the assisted person's means were made in relation to clients who were passported to eligibility as distinct from passing a full means test. If “successful” representations largely concern the latter then there may be a case for inviting representations in appropriate cases from the potential opponents of such applicants, rather than those who are in receipt of passported benefits.

**Question 12.** *Do you agree that final determinations should be with Special Cases Unit for the cases they manage? Should this change be limited to the Special Cases Unit?*

- 3.26 We do not feel that we have sufficient knowledge and experience of Independent Funding Adjudicator decisions or the SCU to enable us to comment fully on this proposal. However, the paper does not explain why SCU case managers are better placed to make decisions as to the merits of a case than the IFA, whose role is to provide expert and objective advice regarding the merits of cases. In principle, we favour the retention of the independent element in decision-making represented by the IFA.

**Question 13.** *Do you agree that, in community actions, in considering the proportion of costs that the community should contribute, the proportion of the population eligible for civil legal aid should be the starting point? If not, what alternative would you suggest?*

3.27 The paper states that “we want to align the proportion of costs which are paid for by legal aid with the proportion of the local population who are eligible” (p.25). If that is what is proposed then the proportion of costs that the “community” should contribute would reflect the proportion of the local population that is ineligible for legal aid. If 40% of the local population are eligible for legal aid, then we assume that the proposal is that the starting point should be that the community contribution should be 60%. Care would have to be taken in deciding who the members of the “community” are. This would have to be done on a case-by-case basis. The proportion of the population that is eligible for legal aid varies considerably depending on the type of problem.<sup>1</sup> It also varies in terms of membership of different “communities”.

**Question 14.** *Do you agree with the proposal to remove advice on treatment from the scope of the CDS? Please provide supporting reasons for your answer. Are there any circumstances in which you believe prisoners should be able to seek advice on treatment issues and which would not be captured within the scope for civil legal aid funding? Please provide supporting information.*

3.28 We do not feel qualified to answer this question, since the NfP sector has very little direct involvement with the CDS or with prison law.

3.29 We are very concerned however that the Ministry of Justice is putting forward this proposal before the changes proposed by the LSC have had a chance to be implemented and evaluated.

3.30 We also fail to understand how a blanket removal of public funding for all treatment cases will enable prisoners who have what the paper calls “legitimate and serious grievances” to obtain advice, prior to making an application for a legal aid certificate.

**Question 15.** *Do you agree that we should remove the delegated powers of civil and crime providers to self-grant funding for judicial review cases, and that these funding decisions should be made by the LSC instead? Do you agree with the alternative proposal to grant delegated powers to individual approved providers? Are there particular types of judicial review for which delegated powers should be retained?*

3.31 We do not agree with this proposal.

3.32 We are not convinced that the addition of 2000 potential judicial review applications would be absorbable within the LSC’s current resources, as claimed by the draft impact assessment. (Para 3.78) We would have thought that these cases would be significantly more complex than the average legal aid application, and would involve the LSC in extra cost.

3.33 As the Public Law Project have pointed out in their response, based on detailed research from their Dynamics of Judicial Review research with Professor Maurice Sunkin, this proposal is not evidence-based.

---

<sup>1</sup> See the reports of the 2006 and 2007 English and Welsh Civil and Social Justice Survey, and Griffith, A. “Dramatic drop in civil legal aid eligibility”, *Legal Action* September 2008, 10.

- There is no clear correlation between the increase in the JR caseload and the decline in permission grant rates.
- The proposal fails to distinguish between immigration and non-immigration cases. The former are already partly excluded from self-grant powers and have significantly lower success rates.
- Fluctuations in permission rate grants became less pronounced since the post-Bowman reforms of October 2000 and the pre-action protocol (introduced in March 2002) took effect.
- The proposal overlooks the significant variation in permission rates across the various case categories. Those with above average success rates are mostly social welfare type cases.
- The proposal overlooks the high number of cases that were resolved after being issued but before being considered by a judge for permission. The great majority of such cases are resolved in favour of claimants.<sup>2</sup>
- The categories with the highest rate of pre-permission settlement are the categories that are likely to present a high rate of urgent cases.
- The use of devolved powers is particularly important in cases of urgency where interim relief is sought. These are the very kinds of cases that 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.

3.34 In the draft article which we have seen, Varda Bondy of the Public Law Project and Professor Maurice Sunkin conclude:

*“The case for removing devolved powers to self-grant emergency legal aid in judicial review cannot be made out on the basis of the existing statistical evidence on case-load trends and permission grant rates. The statistics cited by the Ministry of Justice in its consultation paper do not provide a reliable basis for assuming that devolved powers have been abused. Moreover, the LSC already possess adequate powers to monitor and control the quality of services provided by contract holders. The proposal could have significant adverse consequences for the availability of specialised representation in public law, and have the effect of penalising claimant solicitors for failure on the part of defendants to respond effectively to approaches made prior to issuing proceedings. As well as impacting upon the ability of claimants to obtain appropriate legal representation, this could adversely affect settlement and increase costs for the legal system as a whole.”*

**Question 16.** *Do you agree that there should be restrictions on legal aid for non-residents? What exceptions or safeguards should apply? Do you agree that funding should continue to be available for the proceedings listed? Are there other areas of law for which funding should remain available?*

3.35 We do not think that the case for such restrictions has been made out. In our opinion the government should be proud of a system that enables proceedings to be brought, via legal aid, in relation to the activities of British forces in Iraq, the detention of former British residents in Guantanamo Bay, or the right of the Ghurkhas to settle in the UK.

---

<sup>2</sup> See Bondy, V and Sunkin, M “The Dynamics of Judicial Review Litigation”, p.39: “our interview data indicate that the vast majority of cases that settled did so in favour of claimants”. Available at <http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>

- 3.36 Although the paper itself is not clear, we understand that this proposal is aimed at those who are not lawfully residing in the UK, and not just those who are not actually resident in the UK.
- 3.37 The impact assessment suggests that the proposals may affect 20-40 clients per year, but this figure seems to be based on the number of applicants from “non-residents in the UK”, based on their address (see para 3.81). This suggests that it is only considering those who are not actually in the UK, and is therefore an underestimate. It also gives no indication of the types of cases that might be affected.
- 3.38 The PLP have suggested that this proposal would exclude
- Claims brought against the British Government under UK legislation, including the Human Rights Act
  - Claims brought by non-residents against UK individuals or companies
  - All asylum seekers (save in relation to their actual claim for asylum)
  - EU nationals not economically active in the UK
  - Cases such as those brought by the family of Baha Mousa and by Binyam Mohamed while resident in Guantanamo Bay.
- 3.39 If this is correct, we would be fundamentally opposed to this proposal.
- 3.40 For the moment, all that we can say with certainty is that we do not feel that it is possible to give a proper answer to this question unless the Ministry of Justice spells out, in considerably greater detail
- The types of cases that might be caught and
  - The type of cases that would be excluded.

**Question 17.** *Do you agree with the initial impact assessment? Do you have any evidence of impacts we have not considered?*

3.41 We have no further comments on the initial impact assessment.

**Question 18.** *Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals with a have a disproportionate adverse impact on any group? How could any impact be mitigated?*

3.42 We have no comments on the Draft Equality Impact Assessment.

6th Floor, 63 St Mary Axe, London EC3A 8AA  
☎ 020 7398 1470    www.asauk.org.uk    info@asauk.org.uk  
The Advice Services Alliance is a company limited by guarantee, registered in England & Wales No.3533317, registered office as above. Charity no. 1112627