



'Making Legal Rights A Reality'

Response of the Public Law Project

Introduction

1. The Public Law Project, a national registered charity, was founded in 1990, with the object of providing assistance in matters relating to public law to people and groups who historically have had little or no access to public law remedies. PLP has been a feature of the legal and social policy landscape for some 15 years.
2. PLP defines public law as the framework and principles of law which govern the exercise of power by public bodies, including the administration of justice, the roles of central and local government, the provision of public services, the activity of major public corporations and institutions. It is particularly concerned with the processes of decision making and with the exclusion of significant groups of people from justice.
3. Our aim was and remains, to improve access to public law remedies, such as judicial review and non-judicial redress systems, for example, the statutory ombudsman and complaints procedures, for people whose access to them is restricted by poverty, discrimination or some other form of disadvantage. The Project has three aims:
 - to increase the accountability of public decision makers;
 - to enhance the quality of public decision making; and
 - to improve access to justice.

PLP saw its participation in the Methods of Delivery Pilot as playing a key part in the achievement of these aims, and wishes to continue its participation within the Specialist Support Service.

4. The Access to Justice Act 1999 introduced the current arrangements for publicly funded legal services. PLP proposed that public law should be a discrete category alongside others such as housing and employment, and

following extensive campaigning, this proposal was accepted by the Commission. This has resulted in a greater awareness of public law as a specialism amongst practitioners, and has undoubtedly resulted in an increase in access to this area of the law for disadvantaged and socially excluded groups.

5. PLP has also played a major role in the development of the Commission's Specialist Support Service, whereby solicitors and advisers working within the Community Legal Service can access specialist advice on complex matters from experts in their field. PLP has been involved as a provider of specialist advice since the service started as a pilot in 2000, and continues to provide advice and training on public law, (as part of a group of some 16 other providers, advising on 9 distinct areas of law). This has further raised awareness of public law principles and remedies amongst solicitors and advisers, better equipping them to provide advice to their clients.
6. The new legal aid system also changed the way in which "public interest" cases were treated within the scheme. Cases which raise issues which impact not only on the individual, but on a whole sector of the population, have enormous potential for protecting rights and for increasing and improving access to justice. This is of particular significance for vulnerable groups, such as elderly people, who are much less likely to be in a position to undertake litigation themselves. In conjunction with other members of the Public Interest Litigation Group, which it convened, PLP proposed a ring-fenced Public Interest Fund within the Legal Aid scheme. This proposal was given serious consideration by the Lord Chancellor's Department and the Legal Aid Board, and representatives from both attended a seminar on the proposal organised jointly with the Law Society, and other organisations, in April 1998. Although the proposal for a separate fund was eventually rejected, public interest cases have been given a degree of priority under the new Funding Code which provides the framework for Community Legal Service funding decisions.
7. As part of the new arrangements, the Legal Services Commission is now advised on the funding of public interest cases by a Public Interest Advisory Panel, with PLP having accepted an invitation to nominate a member of that panel.
8. Nevertheless, the number of contracted "suppliers" overall represents a drastic reduction on the number of solicitors firms undertaking Legal Aid work under the old scheme and this number continues to fall. Commission expenditure on civil legal aid is coming under greater and greater scrutiny, as are the ways in which legal services are being delivered. PLP continues to work in this area, participating in fora which allow opportunities for critical, but constructive, debate, and responding to consultations on various aspects of the new developments. PLP led and co-ordinated a response to a major consultation initiated by the Commission in 2004 ('New Focus') on behalf of

public law practitioners nationwide, meeting with Ministers and with members of the team responsible for the recent Fundamental Legal Aid Review.

9. We are now faced with yet another period of uncertainty as to the future of publicly funded legal services. The Legal Services Commission has published a fresh document consulting over the future direction of the system, (*Making Legal Rights a Reality*), and has also announced its intention to review the Specialist Support Service provided by PLP and the other specialist advice providers.

The Fundamental Question of Resourcing Publicly Funded Legal Services

10. PLP shares the concerns of many within the legal and advice sector as to the absence of any detail within the Commission's document in relation to resources and indeed, remuneration. We shall deal in detail with the former issue later in our response, but we will say that the Commission appears to be consciously stepping back from its position as the primary funder of legal services. On the one hand it aspires to provide 'clear and unambiguous leadership of the CLS'¹ but at the same time it wishes to draw in more funding from 'a wider range of funders'² many of whom, such as local authorities, will have their own spending priorities, and who will not regard themselves as accountable to any vision of seamless and joined up legal services save where it suits their own short term political objectives.
11. The issue of remuneration³ in the context of the difficulties experienced by some providers to deliver services 'within the current payment levels' is given a single mention. The Commission discusses the need for advisers that are 'well trained, competent and motivated'⁴, but appears unwilling to tackle head on the issues of remuneration which can and do frustrate such aspirations. The pay differentials that now exist between the private and legal aid sectors is growing and will continue to grow. Fewer lawyers are choosing to work within the legal aid sector, many of those that do are choosing to leave it. An issue of such seriousness clearly needs addressing in considerably greater detail.

Definition of the CLS (Consultation Question 1).

12. The role of the CLS has been defined by Parliament, and it is correct to say that it has been defined in terms of its functions. However, it is also true to say that it is for the Commission to establish, maintain and develop the CLS in order for it to achieve those objectives, and it is only the Commission that

¹ Paragraph 4.4

² Paragraph 6.3

³ Paragraph 3.10

⁴ Paragraph 5.25

is explicitly required to fund certain services within it.⁵ It is noticeable that Parliament has not explicitly obliged any other public body to fund legal and advice services, (save for certain minor exceptions). Thus, there is provision for the Commission to co-operate with other funders⁶, but the legislation clearly envisages the Commission as the principal funder and controlling body of the CLS, accountable to Parliament for its maintenance and development.

13. We are concerned that the Commission appears to be muddying the waters in relation to its role as lead funder and the body accountable to Parliament for the CLS. It is vitally important that it understands this role in order for it to be able to properly discharge the obligations placed upon it by Parliament. There is no one else charged with such a role.

The primary focus of the CLS (Consultation Question 2).

14. Broadly speaking we accept that these particular areas are deserving of priority. We would add that services in all three areas, (protection of fundamental rights in the face of action by public authorities, private law disputes and individual rights in the context of social exclusion), would potentially fall within Article 6 ECHR, not simply the first two.
15. We are also mystified why the document makes no mention of public law, given its crucial role in the first and third categories. Given the constitutional importance of public law, we feel it merits particular attention especially in the context of the areas seen as the primary focus of the CLS.

The proposed CLS vision set out in paras 2.1 to 2.16 (Consultation Question 3).

16. We do not disagree with the vision to develop the CLS as client focused and accessible, independent, cost effective and co-ordinated and quality assured. But it remains to be seen exactly how this vision is to be put into practice, as the document is short on detail and contains no costings. We also question the description of the first of the objectives listed at paragraph 2.6 as being the 'first priority.'⁷ Does this mean that the objectives are ranked in order of funding priority? If so, how and in what proportion?
17. We welcome the proposal to measure quality assurance more in terms of the quality of legal advice rather than on management strategies⁸. Such a change in emphasis is long overdue.

⁵ Section 4(1) Access to Justice Act 1999

⁶ Section 4 (6) *ibid*

⁷ Paragraph 2.2

⁸ Paragraph 2.13

18. However, we are particularly concerned at the composition of the proposed national stakeholder group (and the exclusion of service providers from it), in terms of the independence of the CLS and how it is to 'maintain a robust independence'.⁹

Main Challenges (Consultation Question 4)

19. We broadly agree in relation to the matters that are identified. However, it is self evident that there will be problems in meeting any challenges, if the service providers cannot attract or retain lawyers and advisers on account of poor remuneration, working conditions and morale.

20. The availability of funding is the key challenge. We fail to understand why the civil legal aid budget cannot be ring fenced and therefore protected from increases in the budget for criminal legal aid. Increases in expenditure in the latter area is often due to legislative or policy developments initiated by the Government and should receive extra funding from Government. The fact that the absence of ring fencing makes it easy for the Commission to subsidise increased expenditure in the criminal field out of the civil budget is not a proper reason. It also appears to show a lack of commitment on the part of the Commission to what it elsewhere describes as 'fundamental rights'.

21. We would welcome a far more proactive stance on the part of the Commission in relation to Government funding. We would remind the Commission of its obligations (see paragraph 12 above).

22. We treat with caution the proposal to develop 'effective purchasing mechanisms'¹⁰ as we have been provided with no information as to what these are.

23. Similarly we express considerable caution in relation to the proposal to determine the value of services in terms of 'positive impacts and outcomes'. An overemphasis on such matters will lead to the very 'cherry picking' of good cases that the Commission is so against.¹¹

A national stakeholders group & the planning function (Consultation Questions 5 & 6)

24. PLP reserves its position on the need for such a group. The Commission believes that such a group will assist it in 'providing national leadership and direction for the CLS'.¹² It would therefore appear to be no more than a consultative or advisory group (as it cannot usurp the statutory functions of

⁹ Paragraph 2.8

¹⁰ Paragraph 3.5

¹¹ Paragraph 7.24

¹² Paragraph 5.3

the Commission). Nevertheless, if such a group is to be established, it surely must have the benefit of the wealth of knowledge and experience that service providers possess – particularly from bodies such as Citizens Advice, other NGOs such as PLP as well as bodies such as the Law Society. Given that service providers are delivering services within the CLS, it is difficult to understand why they are also not considered to be ‘stakeholders’ and are thus excluded from this group. No explanation is offered.

25. So far as the responsibility for the planning and commissioning publicly funded legal services goes, we are very concerned that a group charged with the should be comprised solely of the (mostly) public bodies which fund them. We do not accept that service providers can be excluded on account of potential conflicts of interest. In our experience, such a problem is far more likely to arise for local authorities.
26. Sadly, too often, many local authorities equate their interest with the public interest. When push comes to shove (and in the virtual absence of any statutory obligations to fund legal and advice services), we have seen authorities changing funding priorities so as to fund only services that benefit themselves. Thus funding is either withdrawn from independent providers and/or provided to services which concentrate on reducing rent arrears of local authority tenants through debt services or maximising take up of disability benefits which are then clawed back through domiciliary care charges.
27. Longer term planning is also made difficult as local authority funding priorities are far more susceptible to changes on the grounds of political expediency or control. For example, we are aware of cases where the funding of advice services has been withdrawn and then channelled into leisure services following a change in political control.
28. We are also concerned at the apparent lack of accountability for the decisions made by groups such as Local Strategic Partnerships. These bodies range from unincorporated associations through to limited companies, (of which some are indemnified in terms of costs by local authorities and some not). It is all very well for the Commission to state that its work with other funders should be ‘open and transparent’¹³ but this will be of limited value without proper systems of accountability.
29. We repeat our point in paragraph 24 above also in this context - the exclusion of service providers from the planning and commissioning process deprives the Commission of the wealth of knowledge and experience they possess – particularly from bodies such as Citizens Advice or even the Law Society.

¹³ Paragraph 5.8

Appropriate Resourcing (Consultation Question 7)

30. See our comments at paragraph 15 above. We are also unsure where new funding will come from so as 'new long term commitments' on funding can be entered into¹⁴. We repeat our view that in the absence of obligations to fund legal and advice services that may be imposed by statute, any such commitments, if entered into, will be patchy and lead to 'post code lottery' type unfairness.
31. Overall, we await further detail on the proposals to ensure appropriate funding before commenting further, and again point to the lack of detail. We are also concerned that the Commission appears to concede that gaps in the provision of legal and advice systems under the CLS are inevitable. This admission sits in stark contrast to the other aspirational aspects of the document. We would like to see the Commission setting out clear targets on the coverage of advice services – what does the Commission think is the minimum level?

CLS Priority Work Areas (Consultation Question 8)

32. The areas identified are individual acts of advice, assistance and representation; strategic action and information about legal rights. We agree that these should be the priority work areas.

Telephone Advice (Consultation Question 9)

33. The Commission states that it must 'balance the need to target resources ... with our aim of serving the wider community. We will have to make some hard decisions about how we should prioritise expenditure in order to achieve this strategy. This could result in reducing some current services and not renewing funding for some existing projects'¹⁵. Given the apparent shift in resources to the expansion of the telephone service, PLP would wish to know – at the cost of what? Will it result in a reduction in expenditure on funding litigation?
34. There is nothing wrong in principle with any of the methods by which the Commission seeks to deliver within its priority work areas. However, we are not provided with any detail on the emphasis (and therefore amount of funding) placed on each method. There is a balance to be struck in the various service delivery methods but we do not know where the Commission intends to strike it.
35. Telephone advice has its place, but it is often seen as a cheap and effective option. In order to provide a good service, it must be properly resourced,

¹⁴ Paragraph 6.3

¹⁵ Paragraph 6.7

both in terms of the qualities skills and experience possessed by those receiving the calls, and in terms of the assistance available to those with disabilities or without English as a first language, (eg the ready availability of interpreters, minicom systems etc), or those with literacy problems unable to relate the content of extremely complicated letters, (eg a Tax Credit overpayment notification), to a telephone adviser. There is also no information as to how the Commission intends to avoid the service becoming used disproportionately by the better resourced, educated and articulate members of the public at the expense of the socially excluded.

Concentration of face to face services in the most deprived communities (Consultation Question 10)

36. In principle, there seems little that is controversial in such a proposition. However, again, the devil is in the detail.
37. When it is stated that it is 'unrealistic to expect every town to have a wide range of legal aid practitioners in every area of law,'¹⁶ alarm bells begin to sound. How large must a town be, or how poor? There are currently large urban areas down to only one (or fewer) providers of certain areas of work.

CLACs & CLANs (Consultation Questions 11 & 12)

38. Again, the establishment of Community Legal Advice Centres is unobjectionable in principle. However, there are several established legal and advice networks, eg law centres, Shelter Housing Aid Centres, CABx, etc. Most have suffered on account of a lack of resources, changes in the funding priorities of their funders or difficulties in recruiting staff of a suitable calibre. Lessons need to be learned from this so as to ensure the stability effectiveness and longevity of the CLACs. We await further information as to the proposed service specifications, and the outputs and outcomes. We would caution against any bidding/tendering process which places undue weight on cost over quality.
39. The Commission floats the possibility of employing CLAC staff members directly¹⁷. This is a major change in the current arrangements of independent advice provision and would merit a consultation exercise in its own right, informed by the experiences and lessons learned in the CDS.
40. The key activities set out at paragraph 7.26 are positive ones.
41. Similar comments apply in relation to CLANs.

¹⁶ Paragraph 7.21

¹⁷ Paragraph 7.25

Increasing presumption in favour of services working across several areas (Consultation Question 12)

42. We would however be concerned at any ‘increasing presumption in favour of providers that deliver services in several areas of social welfare law (rather than paying for services from numerous providers that offer one or two)’¹⁸. Although PLP has a contract in only on area of law – public law – it is seen as a centre of excellence.
43. There are other niche providers, (both in the private and NGO sector), that are similarly regarded and deliver their services in exciting and innovative ways. Although the Commission also states that there will be an increasing presumption in favour of providers that are able to deliver services across wider geographical areas,¹⁹ we are not sure whether it understands the purpose and role of organisations such as PLP. Paragraphs 4 – 8 of this paper shows the very positive role it has undertaken in the development of publicly funded legal services, and PLP has also developed public law in areas where it had previously been under used, (eg in the Community Care field). The quest for uniformity often results in standardisation and a reduction in innovation. We are sure that the strategy proposed by the Commission cannot be meant to undermine the role of organisations such as PLP, and would urge it to make this clear.
44. PLP would also welcome a clear commitment from the Commission to continue funding the Specialist Support Service. The Service was established in order to assist the Commission in discharging its statutory responsibility to develop the CLS, (under section 4 Access to Justice Act) as well as to help the DCA meet PSA targets 3 and 6 (2002 - amalgamated as target 5 from 2004), which were to increase access to advice and reduce the number of clients resorting to the courts²⁰.
45. The Specialist Support Service works on the basis that the user (the adviser) passes on advice that the client may not otherwise have been able to access (eg s/he may live in an area where specialist advice of this nature is unavailable). The adviser therefore becomes ‘skilled up’ and can then deploy the newly acquired knowledge to assist other clients that s/he would not have been able to assist otherwise, or would have had to refer.
46. The evaluation of the Service carried out by the LSC showed that the principal reason for advisers contacting the service was on account of the complexity of a particular case or because they were unsure how to progress a case. Very often, such a situation would come about when additional legal

¹⁸ Paragraph 7.33

¹⁹ Paragraph 7.33

²⁰ See Methods of Delivery Specialist Support Pilot - Evaluation Report’ (October 2003)

problems²¹ arose for a client already being advised in another area of law - for example benefits/housing within a family matter, public law remedies within a welfare benefits matter. Advisers were also able to access essential background resources such as case reports, journals etc, from the Specialist Support Services, which was a more effective use of their time than seeking these materials out for themselves.

47. It is clear that the ideas behind the introduction of Specialist Support Service, and the way that it is used in practice, dovetail extremely well with the strategy set out in 'Making Legal Rights a Reality'. A continuing theme within this latter document is the need for a seamless advice service to disadvantaged groups. It quotes research which shows that in context of the poor and socially excluded, where there is one problem, the client is likely to have others capable of legal resolution. The Specialist Support Service has been shown to²²:

- Help develop expertise in areas where it did not exist before;
- Reduce the need for referral;
- Assist the adviser to be able to deal with multiple problems.

Strategic Action (Consultation Question 12)

48. PLP is an organisation that undertakes a strategic role. It welcomes the Commission's recognition of the potential role of strategic action within the CLS. We would welcome the addition of resources into strategic action although we would equally wish to know what effect such an increase would have on the other services funded by the Commission.

49. That said, PLP would ask the Commission to consider funding organisations such as PLP to bring cases in their own name, on significant points of legal principle. Cases brought by NGOs cannot easily be settled by public authorities, and are not dependant on fact specific situations. Take an allegation of systemic unfairness within a decision making process. It would be necessary to have 10 or 12 individual cases for the court to look at in order to test whether the system is generically unfair. That would mean 10 different legal aid certificates, and perhaps 10 different solicitors' firms. One case brought by an NGO could deal with such an issue at a stroke.

50. In any event, PLP believes that the restriction of legal aid funding to individuals can amount to an impediment on an organisations' access to the courts, and may therefore be unlawful, both in terms of the common law right of access to the courts and Article 6 ECHR.

²¹ Para 1.16 supra

²² Para 1.2 supra

51. We are however, less than convinced that certain matters can be dealt with by litigation in the way the Commission suggests. Certain local government departments are chronically under funded and under resourced. Whatever litigation ensues is usually settled before any trial. The authority is aware that there is no defence. The cure is for the particular authority to be resourced adequately so as it need not take such a defensive attitude.

Promoting Legal Rights & Responsibilities (Consultation Question 14)

52. We have no further comments.

Links between the various areas of law (Consultation Question 15)

53. As above.

Public Law Project
13th October 2005