Joint Response to 'A New Focus for Civil Legal Aid' Legal Services Commission consultation paper

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About the Public Law Project

The Public Law Project (PLP) is a national legal charity, founded in 1990, which aims to improve access to public law remedies to those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision makers;
- enhancing the quality of public decision making; and
- improving access to justice.

Public law remedies are those mechanisms by which citizens can challenge the fairness and/or legality of the decisions of public bodies and so hold central and local government and other public authorities to account. They include non-court-based remedies such as complaints procedures and ombudsmen schemes and also litigation remedies, in particular judicial review.

To fulfil its objectives PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

A Joint Response

This response to the LSC's consultation aims to address the main proposals which have direct bearing on public law/judicial review advice work and litigation. It was drafted by the Public Law Project following discussions with experienced public law practitioners and drawing upon its own specialist knowledge as the leading NGO operating in this field. Its firm view is that the proposals, if implemented, will significantly frustrate access to appropriate public law remedies by disadvantaged groups, reduce the accountability of public bodies and curtail the development of public law.

There is a list of signatories to this response at page 12.

Introduction

1. In July 2004, the Legal Services Commission published a consultation paper 'A New Focus for Civil Legal Aid'. The paper's stated aims are to discourage unnecessary litigation and encourage early resolution of cases, so as to ensure that the limited resources of the CLS are better targeted to the areas of greatest need. The proposals are also expected to lead to savings where legally aided parties are opposed by public bodies also financed by the taxpayers. The consultation paper sets out a series of proposals. Some of these are of general application, such as controls on financial eligibility and removal of costs protection. Others are specific to certain subject areas e.g. family, clinical negligence, personal injury and criminal proceedings.

2. The introduction to the consultation paper sets out a perceived contradiction between the requirements to reduce litigation (as set out in the Funding Code section 4(4)(c) AJA 1999 and as expressed in Cowl), and the LSC's view that the method of remuneration makes litigation a more lucrative option for lawyers than other forms of dispute resolution. The payment rates for litigation are higher than for Legal Help. In addition, remuneration is based on hourly work. This, according to the LSC, encourages litigation, as rewards are greater for more adversarial processes. The consultation paper proposes to redress this by way of reforms in the Funding Code: making it harder to obtain a certificate where an alternative to litigation exists, removing the differential remuneration rates, and/or partially removing the publicly funded litigant's cost protection.

3. The paper also contains proposals for tightening up the existing funding of civil cases and warns that if the required savings are not achieved from the measures proposed in this consultation, they will need to come from other savings, such as taking whole categories out of scope and/or general reductions in financial eligibility.

4. We question the timing of this consultation in view of the fact that a fundamental Legal Aid Review has been announced, in which the DCA will be looking at the long-term future of the system including, presumably, the very issues that we are being asked to address in this consultation. We do not consider the proposals to be mere matters of detail in terms of the scheme, and question whether they can be lawfully implemented through amendments to the Funding Code alone.

5. The approach contained in the consultation paper appears to imply two underlying assumptions. The first is that lawyers as a rule are 'litigation happy' and that proceedings are issued inappropriately and unnecessarily, merely in order to maximize profit. The second assumption is that litigants prefer to engage in litigation rather than obtain a remedy through correspondence and negotiation. We are not aware of any existing evidence to support either one of these assumptions and we find it regrettable that the LSC seek to perpetuate these unfortunate myths. Many of the clients we represent in public law matters are vulnerable people for whom participation in court proceedings is disruptive and stressful. For them, as with many people, litigation is very much a last resort reached after protracted attempts to resolve their dispute by means including both formal and informal complaints. The unfortunate reality is that public bodies, as a general rule, react very differently to

litigation than they do to informal attempts at resolution or complaints. We suggest that the DCA and other appropriate government departments engage in a dialogue with public bodies to establish why this is so, and explore what steps those bodies should take in terms of improving their complaints procedures. (See also paragraphs 20-23 in this paper).

6. The proposals make no distinction between principles of private law and public law, thereby creating the impression that the impact of the proposals in the specific context of administrative law has not been given proper consideration.

7. We do not feel able to comment on possible savings in other areas of work, but believe that access to public law remedies must not be curtailed. Access to a court is a recognized constitutional right (see Judicial Review Handbook, Michael Fordham, third edition pp.189-190). The importance of such access cannot be overstressed. Judicial review was developed by the common law as a constitutional protection to curb the excess or abuses of executive power.

> *"The court…has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power"* (Sir Thomas Bingham MR in R v Ministry of Defence ex p Smith [1996] QB 517 556D-E)

Accordingly, we would view with great concern any proposal which might have the effect of restricting recourse to the court in matters concerning challenges to the exercise of executive power.

Moreover, we do not believe that any meaningful savings to the LSC would arise from these proposals. On the contrary, we believe that some of the proposals, if implemented, could lead to an increase in costs both to the LSC specifically and to the public purse generally. In any event, any possible savings resulting from any proposal referred to in this response are likely to be disproportionate to the negative impact in terms of access to justice and social exclusion.

8. The Commission claims in the paper to have considered the direct and indirect impact of the proposed reforms in terms of race, gender and disability, and provisionally assessed that the impact would be neutral. It is regrettable that no reasons were provided for this conclusion, nor was any information from the statistical data collected by the LSC to support this provisional assessment. The clients we advise and represent under CLS funding are more often than not from groups vulnerable to social exclusion, the poor, the unemployed, the homeless, lone parents, groups who tend to suffer more problems more often. In our experience, women, ethnic minorities and disabled people are disproportionately represented in these groups. It is difficult to see how measures which lead to a decrease in availability of legal aid and access to public law remedies can fail to have a negative and disproportionate impact in terms of gender, race and disability.

Q1. Does the Funding Code strike the right balance between funding early advice and contested litigation? How far should reforms go to re-focus CLS funding towards early resolution and away from litigation?

9. In our view, the Funding Code currently reflects the general pre-conditions required by the Administrative Court which need be satisfied before an application is made to issue proceedings, and which are included in the judges' consideration on whether to grant permission.

10. We consider the proposed measures of denying funding and for removing cost protection inappropriate in the context of public law challenges. Consideration of alternative measures and a requirement to negotiate whenever possible are already prerequisites to claims for judicial review.

11. The judicial review pre-action protocol outlines the practice that the parties must comply with prior to proceedings being issued. Para 2 of the protocol provides that:

> *"Judicial Review may be used where there is no right of appeal or where all avenues of appeal have been exhausted."*

Para 3 of the protocol stipulates that:

> *"Where alternative procedures have not been used the judge may refuse to hear the judicial review case. However his or her decision will depend upon the circumstances of the case and the nature of the alternative remedy. Where an alternative remedy does exist a claimant should give careful consideration as to whether it is appropriate to his or her problem before making a claim for judicial review."*

12. It is difficult to see how the Funding Code can be altered without resulting in a stricter test being applied to obtaining public funding than that required by the Administrative Court in deciding whether a claim for judicial review should be entertained, and without ousting the court's discretion in so deciding:

> *"An effective remedy for abuse or excess, whether effective or not, may be a factor… in the assessment of whether the discretion which the court absolutely has to grant or refuse judicial review should be exercised"*. (Leech v Deputy Governor of Parkhurst Prison [1998]AC 533 per Lord Oliver, at 580C-D).

13. The proposal partially to remove cost protection would further add to the existing imbalance of power between an individual and a public body whose decision is being challenged.

See also responses to questions 16, 20 and 25.

Discouraging Unnecessary Publicly Funded Litigation

14. The stated aim in section 4 of the consultation paper is to re-focus CLS funding so as to target limited resources to the areas of greatest need. This is to be achieved by encouraging applicants for public funding to pursue other options before funding is granted. The proposed provisions in this section to which we wish to respond are:

- Complaints and Ombudsman schemes (Q16)
- Non-family mediation (Q20)
- Conditional fee agreements (Q21)
- Before the event insurance (Q24)
- Cost protection (Q25)

Q16. In what circumstances should legal representation be refused on the grounds that an existing complaint or Ombudsman scheme has not first been pursued? What forms of complaint and Ombudsman schemes are most appropriate for such an approach?

15. Judicial review is a remedy of last resort, and presupposes that alternative remedies have already been considered, established as inappropriate for the case or exhausted. In addition, we consider that the provisions in the present Funding Code already require solicitors to demonstrate why an available procedure has not been used, and currently provide the Commission with sufficient power to refuse Legal Representation funding where an applicant has failed appropriately to pursue a complaint or Ombudsman scheme.

16. Although there is a degree of overlap between the Ombudsman and judicial review, Ombudsmen schemes serve quite distinct purposes from the courts and, as a general rule, it is a misconception to consider one as a substitute for the other.

17. Both Ombudsman schemes and judicial review are concerned with the legality, procedural propriety and reasonableness of decisions. There are cases which are clearly more suitably dealt with by an Ombudsman, such as cases requiring detailed investigation in order to deal with widespread administrative failures, where the cost of judicial review is disproportionate to the remedy sought e.g. an apology, or where the full facts cannot be obtained through court proceedings.

18. An Ombudsman cannot however deal with a dispute which turns on a point of law or statutory interpretation, grant interim relief in urgent cases, quash a decision, or make a binding decision. It may also be worth noting that complainants do not have an automatic right to access Ombudsman schemes, that many complainants cannot pursue a complaint without ongoing legal advice and assistance, and that the schemes are often already under-resourced.

19. To the extent that there is an overlap between judicial review and a complaint or Ombudsman scheme, such that this may constitute an appropriate alternative, or necessary prior step, this is already a key issue for practitioners contemplating commencing judicial review. That includes when representatives are conscientiously

considering any such point raised by the public authority in response to a letter before claim. It is also already a key issue for judges considering whether, in the light of any such alternative remedy point raised by the defendant in its acknowledgment of service, to grant permission for judicial review.

20. Internal complaints procedures must be exhausted before the Ombudsman can be asked to investigate a complaint. Yet these are notoriously too slow and ineffective to offer any adequate redress to most problems which are also capable of being challenged by way of judicial review. The Health Service Ombudsman commented on complaint handling in the 2003/4 Annual Report as follows:

> *"…poor complaint handling is a common theme in many of them. It remains the case, as in previous years, that some NHS organisations are not handling complaints to an acceptable standard".*

21. We are not aware of existing research concerning the use and usefulness of complaints procedures. Any future commitment to directing cases towards complaint processes should be underpinned by reliable data as to the efficacy of such processes.

22. If there is any evidence to suggest that public law practitioners fail appropriately to consider recourse to ADR, we consider that there are more appropriate ways of addressing this issue, such as training. We welcome the recent proactive steps taken by the statutory Ombudsmen to publicise their work and to liaise with the advice sector.

23. In general, experienced practitioners do not find a difficulty in distinguishing which is the most appropriate remedy under the current Funding Code, and are competent to do so. Moreover, providers of public law services under contract to the CLS are subject to regular reviews ensuring that they comply with their obligations and required standards. External control should be at a level to prevent abuse, rather than oriented towards day-to-day control of professional decisions made by competent and responsible practitioners.

Q20. How can the Commission encourage the wider use of non-family mediation and other forms of ADR? In what circumstances should the Commission require mediation to be pursued?

24. The present guidance to the Funding Code already strikes the right balance between requiring consideration of mediation/ADR and allowing solicitors to explain to the Commission why in the circumstances of the particular case mediation or ADR are either not possible or inappropriate.

25. We are concerned that the proposal to introduce what amounts to compulsion in the use of mediation as an alternative to judicial review is at odds with current judicial thinking. In Halsey v Milton Keynes General NHS Trust EWCA Civ 576, Lord Justice Dyson said:

'It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court'.

He also considered that compulsion could lead to increased costs, cause delay and bring ADR into disrepute.

26. It is acknowledged that in some circumstances ADR/mediation has advantages over the court process. It can offer a wider range of solutions than litigation, the process is more conducive in situations where the parties have an ongoing relationship, and it may offer a quicker and cheaper solution. But it can also have the opposite effect. It can cause more stress in adding another layer of delay and frustration to the process. High quality mediation, especially in a context as sensitive as that of a conflict between a public body and a vulnerable individual, can be more expensive than court proceedings.

27. At a conference on ADR in public law organized by PLP in April 2004, it was widely accepted by participants that access to legal advice was necessary throughout the process to ensure that parties are adequately advised on settlements and in order to redress the power imbalance between the parties. Concerns were also raised about the lack of publicity regarding the outcome of cases, creating a perception of lack of transparency and accountability of the mediation process. The conference concluded that more debate and research were needed in order to establish clear principles for identifying public law cases which are suitable for ADR.

28. Accordingly, it is premature to introduce measures regarding the use of mediation as an alternative to judicial review, especially as such measures would affect only persons in need of public funding, thereby creating a perception of a separate justice system for the rich and the poor.

29. We are also concerned that the LSC do not appear to make a distinction between mediation as it operates in the sphere of private law, e.g. in commercial disputes or disputes between individuals on the one hand, and in public law disputes on the other. Mediation assumes a degree of equality of bargaining power between the parties to a dispute, which is clearly not the case in public law disputes.

30. There are also practical difficulties in improving access to ADR:

- There is no adequate infrastructure in place for referral to mediation. It can be very time consuming for practitioners to find suitable mediators. Also, as there is no widely accepted system of accreditation of mediators, it is difficult for practitioners to ensure that the mediator is quality assured and possesses the required expertise. The LSC quality mark for mediation does not cover public law cases.
- Mediation works best when both parties are able openly to discuss the issues and possible options, and agree on a solution there and then. A public body will have to be represented at mediation by a person or persons with the power to negotiate and reach agreements on a variety of issues, not all of which are capable of being identified in advance of the process. This is likely to raise

vires issues, as it is unlikely that any one representative would have the authority to deal with all issues that may arise.

- The current requirement to issue judicial review without delay and at most within three months means that even when mediation is attempted, proceedings must be issued in order to protect the client's position should mediation fail.

31. There is also concern among practitioners that the removal of access to judicial review would undermine the efficacy of mediation, as it is the very availability of recourse to judicial review which helps to focus the minds of the parties on the need to reach a satisfactory resolution to the dispute.

Q 21. In what additional categories of case and in what circumstances should funding be refused on the grounds that a case appears suitable for a conditional fee agreement? To what extent should the availability of funding be linked to the availability of insurance in support of a CFA?

32. Conditional fee agreements have been in place since 1995 for a limited range of cases, and were extended in 1998 to include all civil cases with the exception of family proceedings. The Access to Justice Act provided that the success fee in a conditional fee agreement, and the cost of an insurance policy taken out in an individual case, could be recovered from the losing opponent. The rationale of these provisions was to enable access to the court to people of modest means who do not qualify for legal aid, without incurring the risk of unpredictable costs. The proposal to deny public funding in favour of CFAs, notwithstanding the unavailablity of insurance, would have the effect of preventing access to the courts, contrary to the original intention of the Act.

33. The consensus among those who participated in the joint response was that CFA agreements have no place in the context of CLS funding and public law.

- CFAs are generally suitable for cases where quantum of compensation is at issue rather than liability. In judicial review, liability (in the sense of responsibility for an unlawful act) is invariably contested, and damages are rarely awarded.
- A CFA is only viable when coupled with insurance, as protection against an adverse costs order. Before the event insurance is rare among legally aided clients due to unaffordability, and in any event excludes judicial review. After the event insurance (ATE) indemnifies a client in respect of the consequences of being "wholly unsuccessful". The complexity of defining success in judicial review proceedings makes both CFAs and ATE wholly unsuitable.
- ATE is not only unsuitable, but also either unobtainable (due to the difficulties of assessing risk of litigation) or prohibitively expensive. Very few insurers are willing to offer ATE for judicial review proceedings. One practitioner succeeded in obtaining ATE in a privately funded planning case, in which the prospects of success were predicted to be seventy percent. After contacting all the insurers on the Law Society's list and a well known broker, two companies expressed willingness to insure, one asking for a premium of £10,000 and the other for £17,000 to insure against a cost liability of up to £20,000. Such a

premium would be well beyond the means of anyone presently qualifying for Legal Representation. Without ATE, CFAs are not a practical funding option. As ATE is practically unavailable in judicial review, the proposal is unworkable.

- If CFAs were to become obligatory for litigants who would otherwise qualify for public funding, this would have a severely adverse effect on the way cases are currently concluded. It would no longer be possible to agree to settle a case at an early stage with each side bearing their own costs. Such settlements are a common feature of judicial review litigation in the social welfare law field, and are acknowledged to be of benefit by claimants and the courts, as well as the defendant public bodies themselves. The court could become overrun with costs-only hearings and with arguments over the definition of success. Many more costs orders would arise against public bodies. Any ostensible saving to the CLS fund would be likely to result in greater expense to other public bodies such as local authorities, the NHS, and so on.
- The removal of funding would further enhance the power imbalance between poor litigants and the establishment bodies whose decisions are being challenged. Delays would be an advantage to public bodies if funding becomes unavailable.
- The proposal that funding might be refused where a case is considered suitable for CFA, regardless of affordability and availability of insurance, would mean that most persons of modest means and some of the most vulnerable people in society would be denied access to the Administrative Court. We consider such an outcome to be unreasonable and contradictory to the purpose of public funding as stated in Para 1.12 of the Consultation Paper: "Legal aid exists to help vulnerable clients, especially those who would otherwise face social exclusion".

Q24. What steps should the Commission take to ensure that the availability of 'before the event insurance' is identified and considered in funding applications?

34. It is recognized by the LSC that only a small proportion of clients have legal expenses insurance, and the APP1 form already contains a section dealing with that question. In addition, it is our understanding that judicial review proceedings are generally excluded from legal expenses insurance policies. In light of this, it would seem wholly disproportionate to introduce new steps imposing additional administrative tasks upon practitioners for no apparent gain to the fund.

Q25. Should cost protection be reduced for non-family cases? If so what should the extent of liability be and are there categories of case or circumstances which should receive special attention? What should the extent of cost liability be and how strong a disincentive would it create for weaker claims?

35. The proposal that funded clients should be liable to the first £200 of any costs order against them, if implemented, is bound to deter clients in receipt of welfare benefits or of modest means from challenging decisions by way of judicial review,

regardless of the merit of their claim. Where clients are deterred from pursuing meritorious claims, increased social exclusion is likely to occur. This in turn could have, potentially, a significantly detrimental impact on their lives. There is also a risk of a negative equality impact, as we believe that women, ethnic minorities and disabled people are disproportionately represented among the poor.

36. It is also important to stress that their involvement in judicial review proceedings is often very frightening and stressful for many of our clients, and few would choose to engage in court proceedings if they could possibly avoid it. Hence, we do not consider that further deterrents are necessary. We wish to stress that we are anxious that any abuse of CLS funding or court proceedings be rooted out. We believe that the mechanisms for so doing are already in place, and introducing a deterrent aimed at an already vulnerable client group is misplaced. Furthermore, we are not aware of any evidence that judicial review proceedings are being misused by publicly funded claimants.

37. Clients in receipt of CLS funding have already been means-tested. State benefits are paid out at subsistence level. This is recognised in the many passport benefits provisions. The proposal that such clients be expected to meet a proportion of their opponents' costs in unsuccessful cases would reduce their resources to below subsistence level. This would be illogical and unfair, and would effectively amount to a denial of access to the Administrative Court.

Other Changes

Q34. In what circumstances should suppliers retain devolved powers to grant emergency funding in judicial review cases?

38. We consider that it is not necessary to change the present position. These powers were introduced together with the necessary guidance and safeguards, and we fail to understand why it is now proposed to reverse the process. Many practitioners consider devolved powers to be one of the aspects of publicly funded work which makes the day to day work tolerable. The Commission has sufficient powers and procedures to address any problems which may arise in respect of a particular case or particular suppliers.

Q35. In what circumstances may it be appropriate to refuse funding for a judicial review after the court has granted permission?

39. The Commission should have regard to a genuine alternative source of funding and may decide that a case should not be funded in the first place or funded only partly. However, the availability of such funding will generally be clear right at the start of the case. It will be a rare case when an alternative source of funding comes into existence between the grant of funding and the grant of permission approximately two months later. If such an exceptional case arises, we see nothing inherently objectionable about the continued funding of the case being reconsidered by the Commission. Nevertheless, we consider that the (rebuttable) presumption of funding should remain as a proper reflection of the fact that there will be very few cases where a genuine additional source of funding will come into existence following the grant of permission.

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