

## **LEGAL AID: REFOCUSING ON PRIORITY CASES**

Response on behalf of members of Matrix Chambers

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This response to the paper *Legal aid: Refocusing on priority cases* has been prepared on behalf of the Matrix barristers listed at the conclusion. It has been prepared at some speed and is therefore both briefer than might otherwise have been the case, and also has fewer signatories (some members being unavailable in the time available). This is because the main prompt for our response is the proposal with regard to non-residents, and the scope of what is intended there emerged very late in the day. We return to this point below because it has implications for the adequacy of this consultation.

We have however added some points in respect of the other 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.**

Our experience is that the present “wider public interest” test works reasonably well as it is, and takes account of whether an individual case is the right vehicle for establishing a point of law. The paper sets out no evidence that the test is not working, save for references to “some relatively weak cases” getting through and a specific reference to an action where a prisoner sought to challenge the destruction of his mobile telephone. As it happens, that claimant was represented by a member of these chambers. It is always dangerous to extrapolate from individual cases and therefore we should record that (a) this case was expressly put on the basis that it was not primarily about a single mobile phone but about prisoners’ property generally (i.e. whether there is a power to destroy); (b) that that affects all prisoners (indeed complaints about property are among the most common complaints heard by the Prisons and Probation Ombudsman); and (c) the claim succeeded so there was no LSC costs exposure in any event. We are a little concerned, therefore, that this case is being used as an example of a case that should not have been supported, particularly given that the MOJ (the author of this consultation paper) was also the unsuccessful defendant in that case. This was a properly brought piece of litigation, as the LSC recognised at the time, and the court’s judgement recognises that it was soundly based in law.

With regard to the question concerning competing groups of interest, and how to protect minority interests, our view is that the existence of competing public interests only increases the need for advice and representation. The more people affected, or the bigger the dispute, the greater need for ensuring the lawfulness of the relevant decision. The LSC is certainly not able to adjudicate, at the application for funding stage, between such competing interests.

Finally, and this is a general concern we have about many of the proposals made in this paper, public law cases tend to move fast and this proposal (like others) threatens to increase the level of investigation before legal aid is granted. That raises both cost/benefit, and delay, concerns. First, the public law spend is relatively modest so the need for greater administrative cost must always be carefully scrutinised. Second, delays

in obtaining legal aid do not, in England and Wales, stop the three month judicial review clock running. Delay by the LSC, therefore, may risk meritorious claims failing.

**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?**

We are concerned about capping the budget for public interest cases. Recent years have seen sudden and significant changes in policy and legislation which unexpectedly produce very large amounts of expensive litigation. The litigation surrounding control orders is one of many good examples. No-one suggests that this litigation was anything other than fully necessary; critical points of law and policy arose (and continue to arise). However, it is of significant note, and very serious concern, that when these changes occur the police and security services (to name but two) are granted an increase in resources to deal with them, but the LSC is not.

The risk with budgeting in this area is that a single serious development of this kind will exhaust the budget for the year. Plainly that must be avoided not least because that would inevitably give rise to claims of a violation of Article 6 and also EU law where such is engaged (in reliance on the principle of effectiveness). The LSC (and we suggest the MOJ which funds it) must remain flexible in this area.

**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?**

We have grave concerns about a £5,000 damages threshold. It is not always easy to establish whether a claim is “primarily” about damages. In human rights claims there is often a strong vindication interest. In discrimination, many, many important claims result in damages awards of less than £5,000 (see *eg* the important case of *R (Elias v Secretary of State for Defence* [2006] IRLR 934). This is, in part, because “injury to feelings” or “dignity” claims are not valued highly in this jurisdiction. However, the courts have regularly recognised the normative and deterrent impact of declaratory relief under the anti discrimination enactments (see *eg* Waite LJ in *Jones v Tower Boot Limited* [1997] ICR 254, at [31]). Vindication of claims under the anti-discrimination enactments is therefore generally as valuable as monetary compensation. Such claims cannot be measured, in value, exclusively by reference to their financial value. This is an especially important point having regard to the proposals that we address under question 16 below, which will, we consider, likely give rise to – but also if implemented, exclude – discrimination claims.

**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 £5000? Should we apply this to individual claims, MPAs or both types of claim?**

No: see question 3 above.

**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?**

We have no objection to there being specific reference to the PPO. The question must always be whether it is reasonable to use such routes but it is entirely proper for the LSC to ask if it has not been pursued.

**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?**

No. This carries too great a risk of the LSC refusing important public law appeals where it considers it would be expensive to lose. This applies even where an assisted person succeeds at first instance, as was recently seen in the *JFS* litigation in the Supreme Court. The ruling in the application for a protective costs order in that case shows, we suggest, that the LSC may sometimes already overestimate its costs risk and underestimate the public interest in important litigation. The proposal expressly to include the risk of *inter partes* costs in the cost/benefit analysis means that important litigation may not be funded at the appellate stage - even to defend a win in a lower court, potentially leaving a litigant who was formerly publicly funded with an unavoidable personal costs risk on appeal. This raises the prospect of significant Article 6 equality of arms challenges.

We think that if, as this question implies, the risk of *inter partes* costs on appeal creates a financial problem for the LSC then the answer is not the introduction of this rule, but rather the introduction of legislation to extend protection to an LSC assisted person against an opponents' costs at the appeal stage in the same way as it exists at first instance.

**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?**

No. A grant of permission to apply for judicial review is to be taken seriously. It deserves a presumption. Switching the test to simply "considerable weight" is meaningless chicanery. We would say the same of a grant of permission to appeal to the Court of Appeal or the House of Lords. The paper does not specify its concerns here: are practitioners regularly continuing to incur costs on post-permission judicial reviews that have become unmeritorious? The draft impact assessment suggests there may be 5 to 10 cases a year at the moment without saying more about the facts of those cases. We think that the existing sanction to simply disallow such costs on assessment is ample safeguard against what seems to be a very limited risk.

**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?**

We are concerned about the way this would impact on cases, particularly those arising in the health, education and discrimination context, where individuals raise points of genuine importance and during the course of the litigation – often on appeal – their own interest falls away. At the moment these cases are often still funded because of the public interest point involved. That should continue.

**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?**

It is again very difficult to see why this proposal matters. It is said that the LSC will not extend funding until after it has seen the Acknowledgement of Service (“AOS”). In our experience very little work is done between issuing proceedings and receiving the decision on permission. Where it is, it is because that work needs to be done, perhaps because there is a new development including a late response to a pre-action protocol letter. That work is often urgent. It should be funded. Claimants and their representatives should not be forced to wait for what is often a late or unhelpful AOS. Again, we think any problem arising here with regard to unnecessary work can properly be dealt with on final assessment.

**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.**

No. We have no objection in principle to SCU expertise being utilised, but we are concerned about any suggestion that SCU procedures should be applied to lower value cases. Case plans in high cost cases are very burdensome to prepare. It would be disproportionate to use them in straightforward lower value judicial reviews.

**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?**

No. We have no objection to the LSC having a discretion to do this, where a specific concern arises, but this will be rare and such referrals must not be routine. Our experience of defendant representations against the grant of legal aid is that they generate a lot of work and the representations are almost always rejected. There must be a very real cost/benefit concern with this proposal: we anticipate it would take up a disproportionate amount of LSC time and, as with other proposals, delay the grant of

LSC, delay proceedings and in urgent cases, and therefore potentially deprive deserving claimants of relief.

**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?**

No. Independent scrutiny is essential. These are crucial decisions affecting key policy areas and independent scrutiny is required to avoid the SCU becoming conflicted in the context of the tight budgetary control while being obliged to consider each case on its legal and wider public benefit merits.

We would also say that this question may betray another example of the “trust” issue arising (see further question 15 below): if representatives with respectable success rates say that a case is worth funding then the SCU should be very cautious in second-guessing that judgement in important public interest litigation.

**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?**

We are concerned about this. We have no objection in principle to this being a factor, but it can only ever be one of many things to consider, and the LSC must show flexibility. There are any number of reasons why not all members of a community come forward to support a community action. They by no means all indicate disinterest. Very often it is simply a question of being able to organise fast enough given very tight timescales (usually tighter than the three month long stop).

**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.**

No. We understand the concerns about trivial cases in this context, but we think such concerns are better addressed by strengthening the sufficient benefit test, and perhaps also the associated guidance. This is because some cases that might loosely be categorised as “treatment” cases need to be brought, and it is very difficult to be prescriptive. The mobile phone case is one example where the impact goes much wider than the individual matter (again, we consider that was a case properly brought due to its wider impact). In addition, however, we are very concerned about the impact this rule might have on discrimination cases.

It is clear that at the moment, the prison service (and indeed other detention services and other public authorities) are often behind with regard to discharging their disability discrimination and other equality duties. Many of these duties are relatively recent (the gender duties came into force in April 2007 with the DDA duties only in December

2006), they were deliberately intended to be culture-changing, and it is taking time for that to work its way through.

Being “behind” in this way tends to emerge in the individual treatment of individual prisoners. Thus a failure to provide a mattress, or a special chair (to use the paper’s examples) may be a manifestation of individual discrimination against a particular prisoner, but may also reflect a general lack of thought across the prison system as a whole. We see many cases of this kind, and they have tended to be settled in claimants’ favour. There are actions about toilet and bathing facilities, about access to offending behaviour coursework, to material in Braille, access to employment and therefore money, access to the gym, or to association, and access to subtitled television (absolutely crucial to prisoners with little else to do). All of these matters are sometimes thoughtlessly characterised as being “trivial”, but they are not for individual prisoners serving what may be long sentences, and they also reveal systemic failures.

Thus litigation in this area is important. It is litigation, more than anything else, which in our experience is forcing detention facilities (and other public authorities) to engage with their new duties. In our view, therefore, these matters ought not be left to arbitrary notions of what is and is not “treatment”. The sufficient benefit test, strengthened if necessary, is appropriately flexible to capture what should and should not attract funding.

**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?**

No. We have seen no evidence that the delegated powers are being mis-used. Equally, the delegated powers are extremely important in urgent cases where the LSC cannot move fast enough to grant funding. This is true of many cases including prison, community care, asylum support and education.

We would also add that the LSC speaks often of partnership with solicitors. We think that delegated powers are an important part of that partnership. Recent years have seen a significant deterioration in LSC/solicitor relations (not least through the operation of the civil contract and the auditing procedures). Trusting solicitors to take proper decisions is not only necessary given the LSC’s speed of response, but also demonstrates a degree of trust that is, we think, important.

**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?**

As indicated at the outset, this is the issue about which we are most concerned. Equally, our first concern is that it has not been properly canvassed in this consultation. The paper puts the proposal in terms of “legal aid would not normally be available for those who did not reside in the UK”. A natural reading of that is that it is concerned only with

physical residence. The draft impact assessment ("IA") seems to agree: the figures at paragraph 3.81 onwards indicate that the LSC was concerned only with applicants lacking a UK address (indeed only really with applicants without a EU address).<sup>1</sup>

On Monday 5 October 2009, however, we learned via persons who attended an LSC/MOJ meeting that day, that what was in fact intended was the withdrawal of legal aid from those who were not *lawfully* resident in the UK. It was said that the EU "right to reside" test would be employed for this purpose. This was three days before the consultation closed and clearly represents an entirely different proposal. It also represents one not considered in the draft IA.

Nevertheless, this is clearly what you now have in mind. The following day, on 6 October, and apparently in response to a letter from the Immigration Law Practitioners Association ("ILPA") written as long ago as 11 September and which raised a number of queries about the consultation of which this was just one, Stephen Jones of the MOJ said this:

In your letter you ask for clarification about the proposal to restrict funding for non-residents. We are minded to follow the wording of the European Legal Aid Directive (2002/8/ESC of 27 January 2003), which refers to "lawful residence". However, we would welcome your views on whether this was appropriate, and whether there are legal problems faced by those here illegally for which legal aid should be available (bearing in mind the exemptions we have already set out in the paper). The proposal would also apply to those who were only visiting, holidaying or passing through the UK, and it would apply to those who reside overseas but who seek to bring proceedings here with the help of our legal aid scheme.

Thus you are now concerned with persons physically but not lawfully present in the UK, and you have in mind a specific test for that. None of this is canvassed either in the consultation paper, nor in the draft IA. Having revisited the paper and the IA it seems to us that the closest these get to raising the possibility that persons physically present in the UK might be excluded from legal aid is in considering (briefly) some of the exceptions that might arise (mental health detention being one). Some of these would only attach to those physically present. However this is no more than a hint of what the LSC has in mind, and it is buried towards the end of the IA (paragraph 5.27).

This is not the way a consultation should proceed. This is a very significant and potentially extremely damaging proposal, requiring very careful thought. Had it been put in the consultation paper, we would have expected some detail about what cases the LSC had in mind. As it is, the proposal is absent altogether. The result, in our view, is that on this issue, the consultation is neither adequate nor lawful, and the impact assessment is neither adequate nor lawful.

Our following brief comments must be read in this context. We would have had very much more to say about this proposal had we had more time to do so, and we suggest

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<sup>1</sup> We note in passing that that is said only to concern 20 applicants a year (paragraph 3.83) and £70,000 of expenditure (leaving to one side whether such expenditure is recoverable). It does not seem to us right to assume that there may be another 20 who applied for legal aid using the address of their solicitors: there is no evidence for that and we have no experience of it occurring. Thus on the face of it this proposal only has a very limited impact.

that that must also be true for other consultees (including presumably any who responded before 6 October or who were otherwise unaware of what was proposed). For the moment, we restrict our comments to the following:

1. Without a proper IA it clearly breaches the general equality duties under (at least) the Race Relations Act 1976. Even leaving that to one side, because it is unlawfully discriminatory for reasons connected to nationality and national origins we consider it also breaches s 19B of that Act (duties on public authorities) and probably also s 20 (good facilities and services). This does not seem to have been considered in any IA which alone means that a new consultation and IA is required. We consider these measures would also be discriminatory in Convention terms (Article 14 read with various of the other Articles including Articles 3, 5, 6 and 8 at the very least).
2. The proposal potentially excludes access to advice and representation for the most vulnerable and socially excluded. We have in mind, in particular, those with community care, general care (including under the Children (Leaving Care) Act 2000) asylum support and health needs. These are often persons with significant problems who have been badly represented in immigration claims but are trying to resurrect them (and lack lawful residency for that reason alone). They are extremely difficult cases to unravel, requiring a great deal of solicitor time (in particular), and must be right at the heart of any social exclusion agenda.
3. There are too many serious cases in this bracket to set them all out. However the following are examples of cases that immediately occur to us and which would apparently now be excluded from legal aid. These are all “physically present” cases:
  - a. Many asylum support cases, i.e. those cases concerned with whether persons ought to be accommodated by local authorities rather than by the National Asylum Support Service (sometimes in order to access local facilities for mental health difficulties, or for children leaving care as former unaccompanied asylum seekers seeking access to education and care facilities).
  - b. These would seem to include cases such as *YA v Secretary of State for Health* [2009] EWCA Civ 225 (establishing whether failed asylum seekers should have access to free health care). Clearly that was a very important case.
  - c. Cases concerned with treatment in detention but not about release. These will include post-release damages claims, but also claims concerned with assaults, negligent healthcare, or discriminatory ill-treatment. Cases such as *Gichura v Home Office* [2008] EWCA Civ 697 (successful claim concerned with disability discrimination in Harmondsworth Immigration Removal Centre), and *AM v SSHD* [2009] EWCA Civ 219 (action concerned with whether Harmondsworth residents were entitled to an independent investigation into disturbances there) would now seem to be out of scope.
  - d. Cases concerned not with release, nor currently with mental health detention, but with transfer between the two. We are aware of a very

serious current issue about the alleged unavailability of mental health facilities for those currently held in immigration detention, which results in very long periods of detention for the very vulnerable.

4. To this list we would add cases concerned with persons who are physically abroad but who, we think, should nevertheless be funded. For example:
  - a. Cases concerned with the activities of the UK armed forces abroad. We are not aware that anyone is suggesting that cases such as *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 or *Al-Saadoon v Secretary of State for Defence* [2008] EWHC 3098 should not have been brought.
  - b. The LSC itself has (we think properly) expressed pride that it supported the successful Gurkha case: *Limbu & others v Secretary of State for the Home Department* [2008] EWHC 2261. That would seem now to be out of scope.
  - c. There are immigration detention damages actions (concerning matters such as assault and false imprisonment) that are occasionally completed from abroad after claimants have been removed. It seems to us that such cases must clearly continue to be supported because otherwise the Home Office would know that removal would in effect absolve them of all responsibility. Equally, and importantly, in many cases persons are only able to be removed because the Home Office is able to say that they can continue their actions from abroad (otherwise removal would breach their Article 6 rights). This will clearly not be the case if the act of removal removes their entitlement to funding: these persons would then, we think, be entitled to stay.
  - d. There are also cases concerned with unlawful removal. Thus *X v SSHD* [2009] EWHC 873 was largely conducted with the claimant abroad. Its result was that he was returned to the UK and, indeed, he has since been granted refugee status. On the present proposal, he would not have been lawfully resident whilst in the UK, nor physically present for most of the litigation.
5. It is important to remember that many substantive rights are already conditioned by residence status (for example, some NHS rights, as well as entitlement to certain social security benefits). At the level of principle, where rights *are* available to those who are not resident, and/or to those who are not lawfully resident, there can be no good reason for effectively preventing those whom parliament intended to have those rights from being able to enforce them.
6. Finally, on a purely practical level, the proposal raises an immediate issue about establishing lawful residence. This is often difficult to establish. That raises delay, cost and collateral challenge issues.

For all these reasons we consider that this, to be blunt, is a proposal which will violate the most fundamental of rights and will contravene the LSC's obligations under (at least) s 17 and 19B of the RRA. It is discriminatory, aimed at precisely the cases the LSC

ought to be supporting, and it has not been properly raised by this consultation. It ought to be rejected.

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

We have dealt with what we say is the inadequacy of the draft IA under question 16 above (as well as touching on it elsewhere).

**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?**

See response to question 16 above.

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**MATRIX  
12 OCTOBER 2009**