LEGAL AID: REFOCUSING ON PRIORITY CASES

RESPONSE OF THE COUNCIL OF HER MAJESTY'S CIRCUIT JUDGES

1. *Justice on Ration?*

While recognising the current urgent need for making savings in public expenditure, we consider that further cuts in the Legal Aid budget would endanger the effectiveness of the system which provides essential representation to those in greatest need. The Legal Aid system should be regarded as a "front line" service whose benefits to society go beyond the immediate benefit to individual litigants. If cuts have to be made to the Legal Aid budget, they should be made fairly and openly so that proper public debate on priorities is possible. The Council is concerned that the proposals in this paper conceal cost cutting where that should be openly proposed and are unnecessary and over complicated.

2. Providing claims are successful, and the primary responsibility of the LSC is to ensure that the successful claims are chosen, funding can be, effectively, cost neutral as the successful claimant will recover most of his or her costs from the other side.

3. Other areas of funding should be looked at before cuts are made in funding affecting public interest cases. The Ministry's own cost benefit analysis attached to this paper makes it clear that relatively small amount of money is likely to be saved by these proposals – that may, in itself, indicate that cuts in legal aid funding have gone as far as they practically can.

Question 1

4. The paper seeks to make changes in the civil Funding Code, particularly in relation to the funding of cases in which public interest is a decisive factor in the granting of funding. There is in the funding code considerable flexibility given to the LSC in determining whether cases where there is a public interest in the grant funding should receive that funding. In general, we do not consider that it is necessary to tinker with that code. The

LSC is primarily concerned to assess the strength of the case for which funding is sought.

5. The paper contends that "A number of cases with limited benefits or public interest have been funded under the present criteria and procedures that we would not consider appropriate. An example is a recent case in relation to the destruction of a prisoner's mobile telephone. This case had limited benefit to the individual and the limited wider interest to other prisoners." It seems to us that this is merely a decision on its facts, which may or may not have justified funding, but which in itself does not justify changing the criteria upon which public interest funding is made.

6. The LSC, under the funding code, ought not to take into account differing public interests when considering the grant of funding to an applicant or applicants, who represent a significant wider public interest (as defined in the code and explained at paragraph 5.3 in the Criteria). In our judgement, that would mean that the LSC would in general be prejudging issues that are likely to be considered by a court when considering the litigation in question. The views of a substantial minority, who may often be better informed than the majority, ought not to be prevented from being brought before the courts merely because of opposition from that majority.

7. As to the proposal that the definition of "wider public interest" in the Funding Code should be refined so that a case will only be regarded as having a wider public interest if the LSC is satisfied that the individual case, on its particular facts, is a suitable vehicle to establish the point and realise the benefits for public, as the LSC can already take account of the strength of the case, it is our view that this is an unnecessary proposal.

8. We also consider that the proposal to amend the code, which currently indicates that, in deciding whether a case has significant wider public interest, it is sufficient for a section of the public to derive benefits from the case, in order to allow the LSC to take account whether or not a different section of the public would have a disadvantage or would not support the outcome being sought, is vulnerable to the same arguments that we have referred to in paragraph 4 above.

Question 2

9. Our view is that there are already, under the funding code and guidance, stringent requirements for the granting of funding on the grounds of public interest. In cases in which an important public interest is established to the satisfaction of the LSC, we consider that the cost benefit analysis, which is appropriate in cases which only demonstrate a benefit to an individual litigant, is obviously inappropriate. The public interest itself is or should be the determining factor for the granting of funding. The LSC is entitled, and indeed is obliged, to consider the prospects of success in any case. The criteria for public interest funding recognise that there are certain types of case, which, by their nature, always exhibit a degree of public interest, for example, judicial review applications, because it is in the general public interest or public authorities to act lawfully. There is a similar general public interest for the police to be accountable to the public. In addition, there are, for example, consumer claims where individual claims are small, yet it is in the public interest for a large section of the public to be protected from exploitation.

10. We are opposed to the proposal that there should be a separate budget for high-cost cases which depend on public interest considerations for their funding or otherwise assessed as having borderline merits. That would include all group actions and other cases with borderline prospects of success, such as those with "overwhelming importance to the client" or which raise significant human rights issues. Not only do we think this is an unnecessary proposal, as the current scrutiny of the LSC ought to weed out unsuitable cases, but we consider that there is a danger that a new budget will be set restrictively and that it will not be clear to the public that a real cut has been made in legal aid funding. Thus, we consider that this proposal is open to criticism for obfuscating a policy decision to reduce funding for this type of case.

11. We can see no particular advantage in having a separate budget, unless it is to deflect public criticism of an overall reduction in legal aid funding.

12. The proposal to establish a new LSC committee to consider such cases is, in our judgement, wholly unnecessary and unduly bureaucratic. In particular, we considered, it is undesirable that the decision to grant funding should be vested in a Commissioner or the Director of High-Cost Cases with the rest of the committee having an advisory role only. The views of the public interest groups that would be represented on the committee could be overruled or ignored by a determined chair and the policy represents an undesirable concentration of power into one person's hands..

13. In our view, the existing criteria set out by the author of the paper at page 12 are already sufficient to impose rigorous controls on the granting of funding in public interest cases.

Question 3

14. We do not agree that the cost/benefit test for funding damages claims against public authorities should be changed. The distinction drawn in the paper's argument with other low value claims is spurious. Other low value claims do not possess the same inherent public value in ensuring that public authorities behave with complete propriety. The value of successful claims against public authorities lies less in the damages which are likely to be awarded (which often will be small) but rather in the disciplinary function such claims have. Increasing the ceiling for the amount which must be recoverable before funding is normally granted to £5000 is likely to remove a large proportion of otherwise meritorious claims against, for example, police authorities for wrongful arrest. We consider the restriction not to be in the public interest.

15. It is probably right that many people who have been poorly treated want an explanation and an apology rather than damages, but we doubt that the public would be confident that even that redress would be given to them without the threat of civil proceedings, damages and costs. It should be open to the public not simply to seek redress from ombudsmen but to have the option of a public hearing before an independent judge. Moreover, a mandatory order may be the relief sought from a court.

16. Constitutionally, we consider that that option should remain open to litigants without their having to establish that their damages claim would exceed £5,000. The number of cases that it is estimated that this change would affect (375 per year) is very small and we doubt that the savings justify the reduction in public confidence that the change would, in our view, bring about.

17. Representation in such cases generally also leads to more efficient use of scarce court time.

Question 4

18. Similar arguments apply to the proposal to restrict funding for low value out of scope damages claims where the case involves significant wider public interest and may include cases by individuals of Multi-Party actions. The examples given in the paper of MPAs (mis-selling of endowment mortgages, industrial deafness or pollution claims) aptly illustrate that the wider public interest test is sufficient for the purposes of funding. It is illogical and unnecessary to require the damages sought by each individual to be at least £5000 when the General Funding Code already includes a "proportionality" test for cost/benefit.

19. Moreover the £5000 test is likely to have a disproportionate impact on lower income groups and small consumers, where the number of people affected may be large and the public interest may, for that reason alone, be substantial. MPAs in cases of industrial deafness for example, may serve to improve conditions generally in an industry.

Question 5

20. We consider that the current criteria in section 5.4.3 of the General Funding Code is entirely clear and that the proposed change specifically to refer to other complaints procedures (the single reference to the police complaints procedure clearly being an example, with no intention to be exclusive of other procedures) is completely unnecessary. Nor is any similar alteration necessary to section 8 of the Funding Code. It is clear enough.

Question 6

21. We do, however, consider that there is some merit in an explicit reference being made in section 8 of the Funding Code to the potential inter partes costs of an appeal should the funded client lose, when considering the cost/benefit analysis. The definition of "likely costs" does appear to exclude those costs, which we think should be taken into account.

Question 7

22. As to the presumption of funding for judicial review cases where permission is granted, the decision in *R v Legal Aid Board ex p Hughes* merely indicates that where the test to be applied by the legal aid area appeals committee and by the single judge considering the grant of permission to apply for judicial review were essentially similar, the committee had misdirected itself in failing to take the possibility of a granted of legal aid limited to obtaining favourable counsel's opinion into account. However, given the constitutional importance of the remedy of judicial review and the fact that, as happened in Hughes, in most cases where permission to apply for review is granted the LSC will be applying the same test as the single judge, we can see no persuasive evidence for removing the presumption of funding where permission has been granted. In practice, it saves time and is unlikely to involve any substantial waste of public funds.

23. We are also concerned about the inequality of arms in such cases and the potential clash with Article 6 of the ECHR.

24. Paragraph 3.87 of the impact annexe indicates that this proposal will have a minimal impact on the Legal Aid budget.

Question 8

25. We consider that the requirements of personal interest in section 4.5 of the Funding Code are reasonably clear as they stand and need no amendment.

Question 9

26. We do not agree that a grant of full representation should only be extended in judicial review cases until after acknowledgement of service and response is received from the respondent. In our view the current requirement that the respondent has been notified and given a reasonable opportunity to respond is sufficient. The proposal would encourage delay by those acting for public authorities in cases which (such as immigration cases) are often urgent.

Question 10

27. We do not agree with extending the referral criteria for SCU case management. We can understand the need to monitor expensive cases and it seems to us to be a political judgment as to the level of costs in a case which trigger the involvement of the SCU (currently £25000 as the actual or likely costs). We do not consider that a properly argued case is set out in the paper for the SCU to manage cases which are merely complex or high profile.

Question 11

28. We do not agree that the LSC should seek representations before funding is granted. It is essential that there is proper funding in place to make proper investigation of a case in order that a client may properly meet representations against funding by a likely opponent, particularly as, in the main, the opponents will be experienced insurance companies or large organisations. We consider the current system is more just than that proposed

Question 12

29. The proposal that final determinations should be with the Special Cases Unit for the cases they manage is fundamentally undesirable. It removes any independent appeal process for an aggrieved litigant.

Question 13

30. We agree with question 13 for the reasons set out in the paper.

Question 14

31. We do not consider that the Council is qualified to comment on question 14 and the extent of advice and assistance to prisoners.

Question 15

32. We do agree that the delegated powers of civil and crime providers to self grant funding for judicial review cases (with the exception of housing cases) should be removed as long as emergency applications to the LSC remain possible in cases of urgency. We agree with the arguments in the paper.

Question 16

33. We do not agree that the restrictions proposed on legal aid for non residents should be imposed. Non residents are litigating in the courts of England and Wales because our courts have accepted jurisdiction. The litigant may have no effective choice in the matter. There may in many of such cases difficult issues of jurisdiction and service. Interpreters may often be necessary. We doubt that in many complicated cases a litigant without the resources to pay for representation is guaranteed a fair and public hearing, to which he or she is entitled under article 6 of the ECHR. The number of exceptions proposed to the basic position (and if this proposal is adopted we agree that those exceptions proposed should exist) are such that we see no great savings are likely to be made to this potentially discriminatory proposal. Moreover, the absence of legal aid to non residents, particularly if they need the assistance of interpreters and if they have to cope with interlocutory hearings from another country, is likely to cause considerable difficulties to a

court trying to manage a case efficiently. We consider that, in the interests of efficient use of court time alone, the proposal is misguided.

Her Majesty's Council of Circuit Judges

5th October 2009