

# **Proposals for the Reform of Legal Aid in England and Wales**

## **Ministry of Justice Consultation Paper CP12/10**

### **Response by HH Judge Robert Martin, President of the Social Entitlement Chamber**

**February 2011**

#### **Preface**

1. The Social Entitlement Chamber of the First-tier Tribunal was formed in 2008 pursuant to the Tribunals, Courts and Enforcement Act 2007. It draws together the jurisdictions of 3 formerly free-standing tribunal bodies, namely the Asylum Support Tribunal, the Criminal Injuries Compensation Appeal Panel and the Social Security and Child Support Appeal Tribunal. The Chamber comprises some 2,000 judges and tribunal members. In 2010-11 the Chamber will handle in the region of 400,000 appeals.

#### **The Consultation Questions**

2. This response is primarily directed at the proposals in the Consultation Paper to change the scope of the legal aid scheme. Under the terms of the present scheme, there is no provision for Legal Representation in any proceedings before Social Entitlement Chamber tribunals. However, eligible clients may qualify for Legal Help, which affords professional advice and assistance short of representation, in relation to legal problems that carry a right of appeal to the Chamber.
3. The Consultation Paper proposes to remove Legal Help from such cases. In short, we disagree. We believe that Legal Help should be retained. This response explains why.
4. The relevant questions in the Consultation Paper are No.3 (exclusions from scope), No.4 (exceptional funding), No.6 (impact on litigants in person and proceedings) and Nos.49-50 (impact assessments).

#### **Scope**

5. Against a background of pressure on public spending, the Consultation Paper aims to “develop an approach which provides access to public funding for those who need it, the protection of the most vulnerable in our society, the most efficient performance of the justice system and compliance with our legal obligations” (para. 1.7). We endorse that aim but consider that the proposals are neither an effective nor an efficient

method of achieving it, certainly in respect of asylum support, criminal injuries compensation and welfare benefits.

6. The principal flaw is the reliance on thematic categories of law as proxies for determining who is in need. These categories only have a loose association with real lives and real problems. Legal aid is granted to individuals. An effective and efficient scheme has, therefore, to be capable of taking into account individual circumstances.
7. To delineate which categories should be covered by legal aid and which categories should be excluded from the scheme, the Consultation Paper endeavours to apply a four-fold test. The 4 criteria applied are:
  - The importance of the issue
  - The litigant's ability to present their own case
  - The availability of alternative sources of funding
  - The availability of other routes to resolution

Yet these criteria do not properly reflect the Government's stated aim in refocusing the scheme. For example, the protection of the most vulnerable does not consistently register in the Consultation Paper as an important issue. The need for assistance in presenting a case (which should extend to recognizing, in the first place, a problem as capable of redress through legal process) has surely to be a function of an individual's ability and not, as the Consultation Paper would have it, an independent characteristic of the form of proceedings. The efficiency of the justice system is not addressed in the application of the test but is deferred with the observation that research is needed into the impact on the courts of an increase in litigants in person (paras. 4.266-269).

8. An examination of the way in which the test has been applied in asylum support, criminal injuries compensation and welfare benefits demonstrates anomalies, inconsistencies and sweeping generalisations inherent in the Consultation Paper's typological approach.
9. The structure of this response is firstly to examine the Consultation Paper's concept of "public law"; secondly, to consider whether excluding asylum support, criminal injuries compensation and welfare benefits from the scope of legal aid would serve to meet the Government's aim; and thirdly, to appraise, from the perspective of the efficient performance of the justice system the impact of that exclusion.

## **Public law**

10. There is a right of appeal to the Social Entitlement Chamber against prescribed classes of decisions taken by UK Border Agency, the Criminal Injuries Compensation Authority, the Department of Work and Pensions and local authorities. The Chamber's tribunals function as a key part of the statutory machinery to ensure that rights conferred (and in the case of child support, liabilities imposed) by Parliament are

fulfilled in accordance with the law. The tribunals, and the proceedings before them, come within the administrative justice system, which is, in turn, an area of public law.

11. The Consultation Paper acknowledges the particular constitutional significance of public law proceedings “because they are the means by which citizens can seek to ensure that state power is exercised responsibly” (para. 4.97) – the means by which the state can be held to account by way of appeal to the judiciary. For that reason alone, the Consultation Paper considers public law is of sufficient importance to be retained within the scope of the legal aid scheme. But then, inconsistently, it would limit that retention to a particular form of proceedings, namely judicial review. This is to give precedence to form over substance, i.e. over the importance of the subject-matter of the dispute. It leads to the anomaly that some challenges to proceedings before the Chamber’s tribunals would remain within the legal aid scheme, because they may take the form of a judicial review claim, while others would fall outside scope, on the ground that they take the form of a statutory appeal. The anomaly is accentuated because both judicial review and statutory appeal are likely to be dealt with in the same forum, namely by the Administrative Appeal Chamber of the Upper Tribunal.
12. Public law cases do raise important questions about equality of arms between the parties – the state vs the citizen – which may have the potential to generate challenges to the fairness of such proceedings under Article 6 ECHR, if the citizen, regardless of ability, is deprived of all forms of publicly funded assistance to enable his or her participation in the proceedings. In the absence of a power on the part of the tribunal to award costs, citizens who win their appeals must bear the expense of correcting the state’s errors.
13. In criminal injuries compensation and welfare benefit cases, the Chamber’s jurisdiction covers Great Britain: in asylum support it covers the UK. The unity of this justice system fragments if publicly funded access is significantly curtailed in England and Wales.

## **Asylum Support**

14. Asylum support is viewed by the Consultation Paper as “akin to support for other welfare benefits” (para.4.222). The general view of welfare benefits is that they are “(issues) of lower objective importance (because they are essentially about financial entitlement)”. However, the Paper is then compelled to recognize that “asylum support applications relate to issues which...are of high importance, since they enable successful applicants to access housing and meet basic subsistence needs” (para.4.222).
15. The Paper also recognizes “the particular vulnerability of asylum applicants as a group” (para.4.222).

16. What leads the Paper to conclude that Legal Help should be withdrawn from asylum support claimants is that “applications for asylum support are relatively straightforward and fact-specific, and do not require legal expertise to complete” and that “some voluntary organisations provide free independent advice on asylum support” (para.4.223).
17. That you do not need to be a lawyer to complete an application form does not mean that it is straightforward for anyone to fill it in. Setting “legal expertise” as the “relative” standard is surely too high a benchmark. Having acknowledged that asylum support claimants are likely to share the particular vulnerability of asylum applicants (English not the mother tongue, unfamiliarity with English culture and institutions, disorientation, traumatic personal history), it is inconsistent to discount those disadvantages by commending the clarity of the application form. The requirements of a person who has been refused asylum support lie not in completing the application form but in preparing a case for appeal. That is a more demanding task than form-filling. It may, for example, involve taking witness statements. The issue in the appeal is likely to be the destitution of the appellant. It is difficult to prepare a case if you are sleeping rough and without any means of support. The Consultation Paper proposes to retain Legal Help for “Housing Cases” involving homelessness but not asylum support cases where the claimant is without accommodation.
18. While there may, at present, be “some organisations (which) provide free independent advice on asylum support applications”, that almost incidental observation does not adequately address the question of which, if any, asylum support claimants can access them or the extent of the organisations’ resources and capacity to help.
19. There is no mention of whether the fourth criteria (the availability of other routes to resolution) is likely to be met or not in the case of asylum support claimants.
20. In summary, it appears that, irrespective of the importance of the issue, the vulnerability of the client and the absence of alternative routes, the existence of a relatively straightforward form is considered sufficient to remove Legal Help en bloc from persons claiming asylum support.

## **Criminal Injuries Compensation**

21. The application of the four-fold test to persons claiming Criminal Injuries Compensation is similarly superficial.
22. The importance of the issue is discounted as being of a “primarily financial nature” (para.4.175). That is a presumption that does not appear to have been validated against claimants’ views. Rather condescendingly, the Consultation Paper recognizes that “for those involved, obtaining compensation for the injuries they have suffered as a result of being a blameless victim of crime is of personal importance”

(para.4.173). What it fails to address is the social importance of recognizing the impact of violent crime on the victim. In particular, there is an important public issue of fairness, in that the Paper proposes to remove Legal Help from the victims of violent crime while retaining legal aid for the perpetrators of violent crime.

23. In purporting to apply the test whether a person can present their own case, the Consultation Paper acknowledges that some may have been traumatised by the injuries sustained. However, the “relatively straightforward” nature of the claim form is considered to override the individual circumstances of every claimant, regardless of their educational standard, self-confidence or state of health.
24. As in the case of asylum support, the focus of need is on filling in the application form rather than in preparing a case for appeal, following the refusal of a claim. Again, the existence of “some voluntary sector organisations” is mentioned as a sufficient alternative to Legal Help without any apparent attempt to verify with those organisations their capacity to provide assistance.

## **Welfare Benefits**

25. The Consultation Paper proposes to remove Legal Help from scope in respect of welfare benefits, on the ground that “these issues are of lower objective importance (because they are essentially about financial entitlement) than, for example, fundamental issues concerning safety or liberty” (para.4.217).
26. It would have been open to the Consultation Paper to propose that matters involving the safety or the liberty of the citizen were indisputable priorities for public funding and, accordingly, any proceedings in any court or tribunal concerning safety or liberty should be retained within the scope of the legal aid scheme. However, the thematic categories of law approach does not allow a comprehensive and systematic ranking of need. In practice, these twin overriding priorities are not applied consistently as a benchmark across the board. For example, they are not invoked to justify retaining legal aid for judicial review proceedings (which may, of course, have a welfare benefit dispute as its subject-matter).
27. “Objective importance” is a contested concept in its application to money, which has a value that is relative. Welfare benefits are essentially of two kinds. They provide a subsistence income to avoid poverty or they defray the additional costs resulting from disability. They are not financial disputes between citizens. Like asylum support and criminal injuries compensation, they are matters of public law and for consistency with other public law proceedings, they should be retained within the legal aid scheme to their present extent.

28. The Consultation Paper appears to concede that those claiming welfare benefits may be vulnerable but glosses over the point (para.4.217). In fact, the Impact Assessment acknowledges that the proposals to withdraw Legal Help from welfare benefits will have a significantly disproportionate impact on people with disabilities. The majority of social security appeals coming before the Social Entitlement Chamber are brought by claimants who are chronically sick or disabled.
29. Again, by focussing on categories of law not individual need, the Consultation Paper creates inconsistencies. The Paper proposes to retain Legal Help for “Community Care”, on the ground that it is concerned with “individuals who are unable to look after themselves because of age, illness or disability.” “The issues at stake in these cases are very important because they can substantially affect the individual’s ability to live an independent and fulfilled life” and they “will usually be cases against the state” (paras. 4.59-60). Attendance Allowance is a social security benefit for elderly persons who are severely disabled and unable to live independently. Claims for the benefit are brought against the state. But, being classed as a “welfare benefit”, the Paper proposes to exclude such cases from Legal Help.
30. In the Consultation Paper great weight is placed on the “user-friendliness” of the tribunal in concluding that Legal Help is unnecessary for welfare benefits. But that misses the point that the tribunal has no role to play in assisting the claimant to decide in the first place whether to appeal or not, nor in helping the claimant to prepare his or her case. The Paper’s reference to DWP as an alternative source of help is incongruous in cases where the claimant is in dispute with that body. Again, some voluntary organisations are identified which “may assist in some cases” (para. 4.218). But the organisations named in this connection are “second-tier” agencies, which depend on the existence of local first-tier advice centres to make appropriate referrals.

## **Summary of Effectiveness**

31. By adopting an approach based on thematic categories of law, the Consultation Paper has missed an opportunity to refocus the public funding of legal aid on those most in need. To target those most in need requires the application of a merits test in the individual case that evaluates the costs and benefits to the client, the vulnerability of the client, the practical accessibility of other forms of redress. Where the scope of legal aid is limited to Legal Help, the test would be applied by the service provider under the terms of the Funding Code and subject to audit.
32. By declining to look at the individual’s needs and competence in managing without professional assistance, the Consultation Paper has considered it prudent to have a safety-net that would allow funding of excluded cases in exceptional circumstances (para. 4.250-262).

However, the conditions for exceptional funding are so narrowly drawn that the likelihood of exceptional funding being granted in welfare benefits cases is conceded as negligible.

## **Efficiency**

33. The proposed exclusion of asylum support, criminal injuries compensation and welfare benefits from Legal Help will have an adverse impact on the efficiency of the justice system, as follows.
34. Legal help enables advice agencies to carry out a valuable triage role, sifting clients' problems with a view to channelling them into the most appropriate route for redress, if any. With the withdrawal of Legal Help, citizens who have a winnable against the state may be deprived of the information, encouragement and support necessary to pursue the case to appeal to the judiciary.
35. Conversely, citizens with hopeless cases may not be steered away from appealing and end up wasting both their own and the tribunal's time.
36. No matter how user-friendly the tribunal, it cannot step out of its impartial judicial role in order to assist a party to the proceedings to prepare his or her case. It cannot marshal evidence, take statements, procure documents. While the tribunal may enable a party during the hearing to present his or her case, the tribunal is simply not in a position to build that case as a professional adviser might. If the tribunal is not supplied with the best evidence, the quality of justice is likely to suffer.
37. A party who does not have the benefit of professional advice and assistance may well struggle to understand and comply with directions made by the tribunal or lack the knowledge to initiate steps in the proceedings by applying for specific directions. The result is less efficient case management, leading to extended hearings and more adjournments.
38. Little public funding is spent on informing prospective tribunal users about what an appeal entails, what to expect of the tribunal and what the tribunal expects of them. In consequence, a considerable amount of judicial time is expended at the hearing in explaining to a party who has not had the benefit of Legal Help, what the relevant issues are, what evidence is relevant, how the proceedings are conducted, what the tribunal can and cannot do to reach a solution. In welfare benefit cases, about 10% of the hearing time is consumed in explaining these basics. Compared to Legal Help, this is an expensive way of providing information, and rather late in the day.
39. It is not uncommon for an advice agency that has provided Legal Help under the scheme to a client in the preparation of an appeal to represent that client at the hearing on a pro bono basis, thereby

enabling the hearing to proceed more efficiently. The removal of Legal Help would end that service.

40. An appeal against the tribunal's decision in a welfare benefits case lies to the Upper Tribunal but only for error of law. In asylum support and criminal injuries compensation cases, there is no statutory appeal but a challenge to the tribunal's decision may be brought by way of judicial review. These limitations of further "appeal" are often not appreciated by parties without Legal Help, who may fruitlessly seek to appeal further simply because dissatisfied with the outcome.
41. The Consultation Paper does not address the absence of a comprehensive strategy for funding advice agencies. The legal aid scheme is a significant source of funding which can lever other funds from local authorities and charities. Removing a substantial tranche of Legal Help from the scheme may have the unintended effect of leaving advice agencies financially unviable and unable to provide a service in those areas of law remaining within scope.
42. In conclusion, the proposal to exclude Legal Help in asylum support, criminal injuries compensation and welfare benefit cases would produce very little in the way of savings. The current annual cost is about £22m for 113,000 cases, equivalent to just over 1% of the legal aid budget. (The cost has fallen in real terms by 40% since 2003-04 – Annex K, Table B.) This is not only a very economical outlay per case but it is also cost-effective. Early intervention may avoid more expensive legal costs down the line. For example, advice to secure housing benefit (which the Paper proposes to remove from scope) may prevent the need for representation in possession proceedings (which is to remain within scope). For example, advice to secure Attendance Allowance (to be removed from scope) may enable an elderly and infirm person to remain in their own home instead of requiring public funding from a different departmental budget for the greater cost of residential care. By enabling the poor and disadvantaged to have access to justice, Legal Help is a clear public commitment to social inclusion, which enhances the perception of the justice system as fair and equal.