

5. Public Interest

3C-038

5.1 Public Interest under the Code

1. The public interest of a case is a new consideration under the Funding Code which formed no part of the merits test in the Legal Aid Act 1988.
2. Public interest is a very wide concept. Different types of case may exhibit a public interest in different ways. For the purpose of the Funding Code, an important distinction must be made between two separate forms of public interest case:
 - (a) there are certain **types of case** which by their nature always exhibit a degree of public interest. For example, this could be said of all applications for judicial review because it is in the general public interest for public authorities to act lawfully. Similarly, actions against the police have a wider public interest because it is in the general public interest for the police to be accountable to the public;
 - (b) there are also **individual cases** which, on their own particular facts, can be said to bring benefits to a section of the public, i.e. persons other than the individual bringing the proceedings.
3. The Lord Chancellor's directions on scope (at 3.3.4 of this guidance) and the Funding Code recognise both forms of public interest, but the Code deals with the two forms in different ways. Types of case with a wide general public interest in the sense described in paragraph 2(a) above are, where appropriate, treated as priority areas in the Code. Therefore the Criteria for judicial review cases and claims against public authorities are less stringent in some respects than the Criteria in the General Funding Code. This type of public interest requires no separate definition in the Funding Code as it is already recognised in the Criteria themselves.
4. The Code also allows for **individual** cases which demonstrate a wider public interest, as in paragraph 2(b) above, to be treated differently from other cases in the same category in terms of the merits and cost benefit thresholds. A case with a significant wider public interest may be funded even if prospects of success are in the borderline merits category or if the individual case in question would not, by itself, be cost effective. In such cases, a more general cost benefit test applies in place of the strict cost benefit ratios in the General Funding Code. It is this concept of "significant wider public interest" in individual cases which is defined in the Code and is considered in the remainder of this section of the guidance.

5.2 Meaning of “Wider Public Interest”

1. “Wider public interest” applies to a case which:
 - (i) means has the potential ~~of the proceedings~~ to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question); and
 - (ii) is considered on its facts to be an appropriate case to realise those benefits
2. 7 This definition is set out at section 2.4 of the Code. The second limb of the test was added with effect for applications for funding made on or after 1 April 2010 (see paragraph 5 below). The words in brackets at the end of the first paragraph of the definition emphasise the point made above that wider public interest is concerned with the benefits to members of the public of the individual case, not with benefits which generally flow from a particular type of proceeding. For example, it cannot be said that all judicial review challenges to asylum decisions have a wider public interest; only the benefits to individuals of a particular case can give that case a wider public interest as defined in the Code. In a general sense, all legal proceedings have a degree of public interest in that they help to promote the rule of law, but this does not constitute a wider public interest as defined under the Code.

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32. The definition requires that a case must have the potential to produce “real benefits” for individuals other than the client. This is intended to be a wide concept which covers a great variety of different types of benefit, some of which may be directly quantifiable, while others are indirect or intangible. Benefits to the public may be placed in the following four categories:
 - (a) protection of life or other basic human rights – for example a challenge to a Government immigration policy concerning a class of asylum seekers, who allege that they face persecution if not allowed to remain in the country;
 - (b) direct financial benefit – for example where a challenge to welfare benefit entitlements leads to the Government thereafter making higher payments to a whole class of claimant;
 - (c) potential financial benefit – this is usually the situation for most test cases or group actions, such as those which establish liability of a manufacturer for harm caused by a dangerous product. It is also true of test cases to establish an important legal issue. Success in such litigation will not usually guarantee compensation for those outside

the litigation, who may still need to bring their own claims and prove their own issues on liability, causation and quantum;

- (d) cases concerning intangible benefits such as health, safety and quality of life – for example judicial review cases concerning education policy or healthcare provision.

43. It is sometimes said that a case has a wider public interest if it raises “an important issue of law”. This of itself does not form part of the definition of “wider public interest” in the Code. However, one of the ways in which a case might produce real benefits for individuals other than the client (and so come within the definition) is by establishing a new legal precedent which allows claims of a similar type to be pursued in the future. If so, it would count as having a wider public interest for the purposes of the Code.

5. The second limb of the test requires that the individual case on its facts is an appropriate case to realise the potential benefits. This ensures that the advantages of having a significant wider public interest under the Code only apply to cases which have a real rather than just a theoretical chance of benefiting the public. For example a case might not be regarded as having a wider public interest if:

(i) the case is likely to be determined by the court on grounds which do not determine the public interest issue one way or another;

(ii) the case is unlikely to reach a level where a determination of the issue will set a precedent that will influence or bind other cases;

(iii) the case has particular facts or features which make it less likely that the court will determine the issue in the way contended, compared to other potential cases raising similar issues.

6. If a case is held not to have wider public interest on its facts because of such considerations, the Commission would welcome further cases coming forward which might be a better vehicle to establish the issue. Where a case has been considered by the Special Controls Review Panel (see section 5.7 below) the decision will usually be publicised on the website in anonymised form identifying the underlying issue of potential public interest.

3C-040

5.3 Significant Wider Public Interest

1. Wider public interest as defined only has an impact in the Code if it is “significant”. A common sense approach must be adopted to decide whether a case has a significant wider public interest. Much will depend on the nature of the benefits alleged and how directly other persons may benefit from the case in question. The more intangible and indirect the

benefits are, the harder it will be to show that there is a significant wider public interest. Speculative and far-fetched public interest, or the mere possibility that a case outcome could conceivably benefit other members of the public would not qualify.

2. The Code sets no limit or minimum on the number of people who must benefit before significant wider public interest can be established. This will vary greatly according to the nature of the benefits. If the benefits alleged are general quality of life considerations, such as noise nuisance for example, the number of persons affected must be very substantial before a significant wider public interest can be established. Public interest carries with it a sense that large numbers of people must be affected. As a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome.
3. It may be particularly difficult to quantify the public interest in a case which seeks to establish a new legal precedent or issue of law. In such cases the people who will benefit will be future clients who are unlikely to be easily identifiable at the time the public interest case is pursued. In such cases it may be necessary to estimate how many such cases will come forward each year and to estimate for how long the legal precedent is likely to continue to have an effect.

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4. In deciding whether a case which raises a new point of law has a significant wider public interest, it is necessary to consider how likely it is that the court will change or clarify the law in deciding the case. The mere fact that an area of law is unclear so that it is possible that the court may clarify the law is not enough to establish a significant wider public interest. It is more likely that there will be a significant wider public interest if a case directly raises a specific point of law which the court will have to resolve one way or another.
5. Note that in deciding whether a case has a significant wider public interest it is only necessary to show that the case can produce real benefits for individuals other than the client, for example in the ways described in section 5.2 above. It is not appropriate at this stage to consider competing public interests or any disbenefit which the case may bring to other persons.

3C-041

5.4 Cost Benefit in Public Interest Cases

1. In the General Funding Code, cases with a significant wider public interest are subject to the following cost benefit test:

“Full Representation may be refused unless the benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances.” (Criterion 5.7.5)

2. The fact that a case has a wider public interest does not make it any less important that the benefits of the proceedings justify the likely costs. In assessing cost benefit, it is necessary to consider all the circumstances, including:
 - (a) how many people are likely to benefit from the case;
 - (b) the nature of the benefit they will receive;
 - (c) how directly they will benefit, for example whether the public will benefit straightaway from the outcome of the test case or whether it will simply give them an entitlement requiring each individual to pursue their own legal proceedings.
3. In weighing these factors, the nature of the benefit perceived is crucial. In the examples given in section 5.2 above it will clearly be far easier for a case of a type within description 5.2.2(a) or (b) to demonstrate cost effectiveness than the other categories.
4. Assessments of cost benefit in public interest cases necessarily involve a degree of subjective judgment, but, where possible, objective comparisons with other Criteria in the Code may be made. Occasionally, public interest benefits will be quantifiable, for example challenges to welfare benefit entitlements which affect a whole class of benefit claimants. At the very least, one would expect an aggregate of those benefits to outweigh the likely costs of the case such that the cost benefit ratios for quantifiable claims in the General Funding Code would be satisfied. If the number of claimants in the relevant category is large, this may be easy to achieve.
5. In the more usual case, where public interest is not quantifiable, it may still be helpful to consider the Criteria in the General Funding Code as a base for comparison. For example, take a public interest case with prospects of success in the range of 50%-60% and likely costs to disposal of £25,000. A quantifiable claim under the General Funding Code could only be funded if damages exceeded costs by a ratio of 4:1, so damages would need to be at least £100,000 before funding could be provided. In considering the cost benefit of the public interest case, it may be legitimate to consider whether the overall benefits to the public and the client would be a worthwhile use of public funds when compared to supporting an individual claim worth £100,000.
6. Such an approach will never produce precise answers because it is impossible to directly compare wholly different forms of benefit, but the approach may be a useful

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safeguard in ensuring that funding in public interest cases is directed to those cases which can show the most substantial benefits for the most people. The benefits of proceedings must be sufficiently worthwhile to justify the cost to public funds.

7. The relationship between prospects of success and cost benefit is as important in public interest cases as in any other type of case. A public interest case may be funded even if prospects of success are only borderline. The less certain the prospects of success the more difficult it will be for a public interest to demonstrate that it is cost effective. Public interest cases with only borderline prospects of success will only be funded where the potential benefits of the proceedings are very substantial.
8. Although competing interests are not relevant in deciding whether a case has a significant wider public interest, they can be taken into account in considering issues of cost benefit. Competing interests can take a variety of forms:
 - (a) there will be some cases where the outcome of an action will benefit one group of people, but will equally disadvantage another group, for example if a group of patients established a priority right to treatment under the National Health Service this may well cause other patients on the waiting list to have to wait longer for their treatment;
 - (b) in a more general sense, proceedings against public bodies responsible for providing services to the public may impact upon the ability of the body to deliver those services. For example, costly legal proceedings against the Health Service or the Police may directly or indirectly take money away from the general provision of healthcare or policing.
9. In general, competing interests will not be regarded as a decisive factor in cost benefit assessments. However, in cases where there is doubt as to whether a public interest case is cost effective, the existence of competing interests may be taken into account in deciding whether the case represents a worthwhile use of public funds. Competing interests are also relevant to decisions as to whether a high cost public interest case is affordable from available resources (see further guidance in section 15). Specific competing interests as described in paragraph (a) above are more likely to be taken into account in cost benefit decisions than competing interests of the general public as described in paragraph (b).

5.5 Alternative Funding

1. Standard Criterion 5.4.2 in the Code allows Legal Representation to be refused if there are other persons or bodies who might benefit from the proceedings who can reasonably be expected to bring or fund the case. This Criterion applies to public interest cases as to any others. However it is particularly important in cases benefiting the public to consider whether there are other ways in which the case could be funded. For this reason, every application for Legal Representation which asserts a significant wider public interest must also provide an explanation for why the proceedings cannot be funded privately by other means. This explanation should set out clearly what steps have been taken by the solicitor and client to identify and investigate potential sources of alternative funding and the outcome of those investigations. Solicitors should exercise caution in any exercise of devolved powers where alternative funding is likely to be an issue.
2. The solicitor should first consider whether there already exist other bodies or funds which could be used to support a particular case. For example, the Equal Opportunities Commission sometimes funds cases to establish precedents on issues of discrimination. It is legitimate to consider whether such a body might be prepared to fund a public interest case within its area of expertise. However, refusal on such a ground would be unusual. It is recognised that many bodies which support litigation are charities or otherwise have very limited funds.

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3. The Commission's preferred approach is, where possible, to work in partnership with other bodies with an interest in funding public interest litigation. Such a body may wish to approach the Commission with a view to funding a particular test case and with proposals for sharing the costs of so doing between the body and the Commission. If this agreement can be reached, a certificate can be issued in such a case on the basis of joint funding or subject to payment of a contribution towards the cost by the body in question under rule C18 of the Funding Code Procedures.
4. In the absence of any existing organisation which could be expected to fund the case, the Commission will need to consider whether any funding should be provided by those members of the public who stand to benefit from the outcome of the case, for example by all those affected getting together a fighting fund to finance the litigation. In these cases the Commission's normal approach will not be to refuse funding outright under Criterion 5.4.2, unless it is clear that the case can be funded privately in this way, but to consider whether public and private funding can be combined under a partnership approach between the Commission and those who have an interest in the case.
5. The Commission's general approach to this question will be as follows:

- (a) It is first necessary to decide whether there exists a reasonably ascertainable group of people who can reasonably be expected to contribute to the cost of the litigation. 'Reasonably ascertainable' in this sense is not restricted to an existing group, whether formally constituted or not, but would include a group who it would be reasonable and cost effective to trace or establish. For example if a number of streets were affected by a planning issue, it may be reasonable to contact or leaflet those streets to establish interest. If no such group exists, alternative funding does not arise and the case is likely to be fully funded out of the CLS. Typically if the wider public interest of the case stems primarily from its ability to develop the general law of England and Wales it is then unlikely that there will be an ascertainable group from whom contributions should be sought.
- (b) The Commission supports the setting up of action groups or committees to organise the community to raise any necessary funds. However when considering the appropriate level of private funding the issue for the Commission is always what level of funding can reasonably and practically be contributed from the whole local community affected by the case, not what level of funding can be raised by the individual members of any action group or committee, whose membership will inevitably be largely self selecting.
- (c) If a potential funding group does exist, the Commission's broad starting point will be to make an assessment of the likely economic circumstances of the group and the proportion of that group who are likely to be financially eligible for CLS services. That will indicate the proportion of the costs of the case to first instance determination that the CLS fund should bear~~presumption that the group should fund half of the likely costs of the case at first instance, leaving the CLS fund to fund the remainder.~~ That proportion will be varied from case to case taking into account all the circumstances of the matter, including any further information on the general financial resources of the group and the nature of the benefits they would gain from the litigation. ~~However, The Commission will consider any available information on the general level of resources of the group but~~ it will not usually be necessary or practicable to assess the means of each member of the group in detail.
- (d) The Commission is likely to expect a larger proportion of private funding in cases where either there appear to be a significant number of people within the group who have substantial assets, or where the litigation will produce direct financial benefit for those affected, such as an increase in property prices.
- (e) The Commission may accept a smaller contribution where the group concerned is small or consists predominantly of people with limited resources. Further, the Commission recognises that the more intangible the benefits to members of the

group, the less substantial contributions can reasonably be expected. For

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example the Commission will normally expect lower levels of private funding in cases concerning protection of the environment compared to, say, school or hospital closure cases.

- (f) When the Commission expects a contribution this will generally be fixed at the outset of the case taking into account any estimates of the likely costs of taking the case to a conclusion at first instance. As usual, potentially high cost cases will be subject to the discipline of costed case plans as explained in Section 14 of this guidance. Where costs unexpectedly rise beyond predicted levels, for example because an appeal to the Court of Appeal is pursued, the Commission will not usually expect additional contributions to be made from the public.
6. When an appropriate level of private contribution has been determined, there are two potential mechanisms for collection of that contribution. Either a capital contribution can be claimed under the certificate under regulation 38(3) of the CLS financial Regulations 2000 and paid by the group to the Commission, or alternatively the Commission can use its general powers to limit the extent of public funding (see Rule C33 of the Code Procedures) to take into account the appropriate level of private funding. The Commission will normally take the latter approach by granting public funding with a maximum costs limit which reflects the estimated costs to the CLS fund of taking the case to some specified stage or first instance trial, after deducting the private contribution. It will then be a matter for the solicitors and action group to arrange and agree the most appropriate method and time to raise the necessary funds. This approach will help to minimise any delay in the grant of legal aid in circumstances where urgent action may be needed to protect the client's position.
7. On this approach it will be important that risk is shared fairly at all stages between public and private funds. Unless otherwise agreed, if a case discontinues or settles earlier than expected without recovery of costs from the other side, the agreed private contribution should be applied first, with the balance of any costs falling to the fund. If the predicted costs and assessed private contribution take into account the possibility of the case proceeding to a contested first instance trial, as explained above it will not usually be necessary to revisit that contribution if the costs rise unexpectedly for example if the case proceeds to appeal.

8. The above approach to private contributions will often be relevant to cases concerning protection of the environment. The United Kingdom is a party to the UN ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (“the Aarhus Convention”). Article 9 of the Aarhus Convention includes a requirement that environmental challenges should not be prohibitively expensive to members of the public. As explained in the guidance above, environmental cases may be less likely to require significant private contributions compared to certain other types of public interest case, but in all cases the contribution will be fixed so as not to be prohibitively expensive, consistent with the Aarhus obligation.

3C-043

5.6 Financial Conditions

1. Financial conditions for public interest cases are the same as for other cases but with three important exceptions:
 - (a) As from 3 December 2001 the Commission has a limited power to waive eligibility limits within an MPA which has a significant wider public interest. See regulation 5B of the CLS (Financial) Regulations 2000, as amended. This is further explained at section 15.9 of this guidance.
 - (b) Under regulation 47 of the CLS (Financial) Regulations 2000 the Commission has a discretion to waive some or all of the statutory charge in a case which has a significant wider public interest.

As from 3 December 2001 under Regulation 38(9) of the CLS (Financial) Regulations 2000 the Commission has limited power to waive contributions.

2. The Commission’s aim is to ensure that issues with a significant wider public interest are brought to the court for determination in the most cost effective way. Often this will mean funding an individual test case to resolve the issue, even if the damages alone in that test case would not make it cost effective in itself. If the case is complex and not all issues are resolved in the client’s favour, it is quite likely that a public interest test case would have significant irrecoverable costs. In the normal event these would come out of the client’s damages. The powers under regulations 38(9) and 47 above exist to ensure that such a client is not unduly penalised in relation to the client’s own contribution or damages through having been chosen as the test case.

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3. Even though it will be made clear from the outset that a case is being funded as a test case, the formal discretion as to the statutory charge will only be exercised at the conclusion of the case when damages have been recovered. The existence of the limited power to waive

the charge under the above regulation does not diminish the responsibility of solicitors to seek to maximise the recovery of costs from the other side in a successful public interest case. The Commission would be unlikely to waive any amount of the charge if a case was settled without recovery of costs simply in the expectation that the waiver would apply.

4. Where contributions or the statutory charge are waived under the above regulation, it will not necessarily be waived in full. The aim of the regulation is to put the test case client in the same position as an individual claimant, who might still have some contribution or irrecoverable costs.
5. If a client's claim is funded as a test case to resolve an issue of principle, it may be undesirable for the opponent to deprive the court of an opportunity to resolve the issue by making a settlement offer to dispose of the individual case. The Commission will therefore usually require the client in such a case to sign an agreement before funding is granted, confirming that he or she will not settle the case without the consent of the Commission (rule C46.1 of the Code Procedures). Such consent will not often be withheld, but the Commission will consider the interests of the wider group of people affected by the test case in making the decision.

3C-044

5.7 The Special Controls Review Public Interest Advisory Panel

1. The Commission has established a Special Controls Review Public Interest Advisory Panel, one of the functions of which is to assist it on decision making in cases raising public interest issues. The Panel includes a member of the Commission as chairman and representatives from consumer organisations, legal representatives and experts in public interest litigation. ~~Under rule C47 of the Code Procedures, the Commission has a discretion to refer cases to the Panel. Reference to the Panel can be made in any case but may be particularly important in applications or certificates meeting the thresholds for referral to the Special Cases Unit, where assessing the degree of public interest in the case is important to decisions on cost benefit or affordability. The new Panel, which came into operation on 1 April 2010, replaces the previous Public Interest Advisory Panel. However the Special Controls Review Panel has a much wider jurisdiction, including consideration of legal merits of the cases within the Special Controls regime, which is described in more detail at section 14.2 of this guidance.~~

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2. ~~Referral to the Panel is only appropriate where the existence or extent of the public interest is material to the decision being made. For example, if an individual case is sufficiently~~

~~strong or cost effective so that it meets all relevant Criteria, even without considering the wider public interest, referral to the Panel is unnecessary. If a case has poor prospects of success, then referral is also inappropriate because funding will be refused in any event. Note that whilst it is not the Panel's function to decide on the merits of applications, in considering whether a case has a significant wider public interest it will sometimes be necessary for the Panel to give its views on the likelihood of arguments raised in the case succeeding. Arguments which have no significant prospects of success will not have potential to produce real benefits for the public. The new procedures for referral of cases to the Special Controls regime at rule C23A of the Funding Code Procedures include an obligation for cases to be referred where it is necessary to determine whether a case has a Significant Wider Public Interest to determine whether funding should be granted or continued. Therefore cases coming to into the regime and being referred to the Panel on this ground will be those where the existence or extent of public interest is highly material to the funding decision.~~

3. Membership of the Panel is governed by the Commission's ~~Public Special Controls Review Interest Advisory~~ Panel Arrangements 201000. Hearings are subject to Rules D7 and D8 of the Code Procedures. The Panel is over time developing its own practice and procedures. It usually considers cases on the papers but may exceptionally agree to have a hearing attended by the client and his or her advisers. Since members of the Panel represent consumers generally, rather than any specific sections of the community, the Panel is likely to establish a network of contacts with representative bodies and charities that may be asked for advice or representations in cases falling within their areas of expertise. However, care will be taken to avoid delays in decision making.
4. The Panel will report to the ~~Special Cases Unit Commission~~ in writing on all cases referred to it. The applicant will be given an opportunity to comment on such a report before the ~~Unit Commission~~ makes its final decision. The ~~Director of the Unit Commission~~ must take into account the views expressed by the Panel, but will not be bound by the Panel's report.
5. Reports from the Panel which relate to public interest contain such information as the Panel wishes to include but, in addition, each case is placed in one of the following categories:
 - (a) cases with exceptional wider public interest;
 - (b) high wider public interest;
 - (c) significant wider public interest;
 - (d) no significant wider public interest.
6. Whether a case comes within band (a), (b) or (c) is particularly relevant to considering the affordability of a high cost case from the central budget (see section 15 of this Guidance).

7. A summary of panel reports to date is set out in the Guidance section of our website (www.legalservices.gov.uk). As each case is different and is considered on its own particular facts, the summaries should be treated as broad guidelines only, not as formal legal precedents. For ease of reference the reports on the website have been divided into seven categories, namely:
- (a) Representation at Inquests;
 - (b) Tribunals and Enquiries;
 - (c) Environmental Challenges;
 - (d) Other Judicial Review Proceedings;
 - (e) Multi Party Actions;
 - (f) Other Personal Injury Claims;
 - (g) Other Proceedings.

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