

Welfare Reform Green Paper Consultation Team

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No one written off: reforming welfare to reward responsibility – Public consultation

Please find below our comments on the above consultation.

Background

Who we are

The Legal Services Commission (LSC) commissions £2billion of legal aid in England and Wales. Through around 5,000 legal aid providers, we help over two million people in England and Wales every year.

The LSC enables people to safeguard their rights and address their problems. Our work is essential to the fair, effective and efficient operation of the civil and criminal justice systems. It is also critical in helping to provide access to justice and fair trials for all. We commission the services people need from solicitors, barristers and advice agencies. The skills and commitment of legal aid service providers are essential to helping people resolve their problems. We deliver legal services through two schemes: the Community Legal Service and the Criminal Defence Service.

How we work with the government

We are a non-departmental public body sponsored by the Ministry of Justice (MoJ). We play a big part in helping the MoJ achieve its aims of:

- promoting justice
- protecting the public
- increasing confidence in justice
- providing access to justice for all
- upholding rights
- safeguarding and modernising our constitution.

The Lord Chancellor and Secretary of State for Justice is accountable to Parliament for our activities and performance. The MoJ agrees its overarching Public Service Agreement targets with the Treasury. We in turn set our objectives in discussion with the MoJ.

Consultation Response

Our responses are limited to how the consultation proposals might affect the provision of legal aid; particularly issues in relation to access for clients and additional burden on the legal aid budget. We also take a keen interest in the agenda of ending child poverty as well as the development of rights for disabled people and our response reflect this. In light of this, we are not responding to the specific consultation questions but have provided comments under individual chapters of the consultation paper.

Chapter 2 – An obligation to work

Para 2.13 – We would require clarification if claimants who are subjected to a sanction of loss of weekly benefit (owing to failure to attend fortnightly job review and interview) would have a right to appeal the decision. If sanction powers are increased, there is a potential necessity for claimants to get access to legal advice and assistance.

Although not all benefit claimants qualify for help under legal aid, we anticipate a huge proportion to be eligible. Hence, it would be useful to know based on historical information, approximately how many claimants might be sanctioned under the new conditional regime.

Para 2.20 – What is the extent of power given to the advisers? We would like more information on the criteria used by the advisers in order to determine if a claimant should take on full-time activity. Further, we would also like to know if and how the adviser's decision could be challenged.

Para 2.26 & 2.27 – Whilst we recognise the importance of eradicating benefit fraud, it is vital to be careful in terms of removing benefit entitlement, as the impacts on the dependant(s) of the offenders could be significant. The withdrawal of benefits would mean an inability to meet existing commitments; hence individuals would either become increasingly indebted or have to borrow more money to meet those commitments.

In addition, we would welcome the opportunity to discuss this with DWP as any furtherance of criminal sanction implies additional burden on the legal aid budget. Apart from requiring criminal law representation, the claimant might also require some form of advice and assistance on social welfare law.

Para 2.39 & 2.43 – We would welcome the opportunity to discuss this with DWP as any new sanctions implies additional burden on the legal aid budget.

Chapter 3 – No one written off

Para 3.3 – Stronger legal rights implies an increase in legal advice and assistance especially as the new rights are tried and tested at the courts of law. We would welcome the opportunity to discuss with you the development of these rights to ensure their effectiveness in the bigger scheme of things.

Chapter 4 – Ending child poverty

The LSC is committed to improving outcomes for children as part of the Every Child Matters agenda and is fully supportive of any measures that work towards ending child poverty.

It is widely accepted that improved access to early information and advice for parents can help them to achieve better outcomes for their children. The LSC seeks to improve the delivery of services and enable child-focused agreements to be reached.

The LSC works as part of the Relationship Breakdown Project Board to implement proposals around access to specialist legal advice and mediation. We have introduced pre-proceedings advice (Level 2) as a result of the Child Care Proceedings review and to support the Public Law Outline, ensuring those with parental responsibility have access to legal advice before public law proceedings commence.

We are currently piloting the delivery of family advice by telephone and anticipate rolling this out to a full service in 2009. Child Maintenance Options (the new helpline run by the Child Maintenance Enforcement Commission) will refer all callers with a legal problem to the LSC's family helpline. It is predicted that a significant number of these CMEC referrals will also have a family issue and will therefore benefit from this joined-up process.

Para 4.11 & 4.17 – The establishment of a new Child Maintenance and Enforcement Commission. This has a separate function in addition to the existing Child Support Agency. As with any enforcement arm, it would create a whole range of decisions which could be challenged. We anticipate that this would increase the need for legal advice and assistance and would welcome further clarification as to the scope, appeal process and numbers passing through the system.

Para 4.19 – The LSC is working with DWP in relation to any legal aid impacts of the proposals in relation to joint registration at birth. Whilst applications for parental responsibility might decrease, we need to ascertain what are the policies and procedures in the event that unmarried biological fathers refuse to assume parental responsibility and/or wish to fight not to have their names on the register.

Para 4.31 – Requirement for couples jointly to apply for JSA. The proposal does not tell us what would happen in the event that the couples separate and go their own ways. How would their joint claim be managed? There seems to be a potential for dispute and increased legal advice (and potentially litigation) if the DWP asserts that someone seeking benefits is part of a couple and accordingly requires a joint claim, where the potential claimant disputes this. We would require further information on how many couples there are who would be required to apply for joint benefit and how this process would be managed.

Chapter 5 – Delivering choice and control for disabled people

In Chapter 5 the DWP explores general principles for how disabled people may be given more control over their lives by giving individuals a right to request control over a range of public funding to which they are entitled, allowing greater choice over how best to spend this money to meet their needs.

Funding Stream

We note that one issue under consideration is what funding streams may be suitable candidates for a disabled person to have a right to control.

Legal aid is not a funding stream for which only disabled people are eligible. Disabled people are able to access legal aid on the same basis as non-disabled people. In common with other aspects of the justice system, it is not a funding stream for day-to-day care and services. Unlike other aspects of social care, budget for legal aid funding would be on an exceptional basis.

We do not think that it would be appropriate for legal aid funding for advice and assistance generally to be considered as a relevant funding stream itself for reasons relating to how the legal aid budget is administered. The LSC provides funding directly to contracted legal aid providers who are responsible for progressing the case in a way that is in the client's best interests, will ultimately be considered justified in outcome and in terms of the reasonableness of the costs incurred. If a right to control were to operate over legal aid funding it would require a parallel legal aid funding system that would be impossible to administer under present structures. Moreover the knowledge required to make informed choice is better made by qualified legal advisers. The introduction of control for legal aid budgets would require a major reform to the legal aid system, with unclear benefits for disabled people. It would therefore not be a rational policy option to include legal aid funding within the funding streams.

Reasonable adjustments

However, we do think that there is potential for a disabled person to be able to exercise some control over funding provided by the LSC for a reasonable adjustment that is provided for a legally aided client with a disability to enable communication with a legal adviser.

Here are our suggestions for how this may operate:

- What is funded: Where a contracted legal aid provider incurs an additional cost for the provision of legal services to a legally aided client, the LSC reimburses the provider for the additional cost. In this way funding is provided for a reasonable adjustment required by a legally aided client. By way of illustration, this may be for the provision of a British Sign Language interpreter.
- How it is spent: The legal aid provider is responsible for making any practical arrangements for the provision of a reasonable adjustment, for example, booking a British Sign Language interpreter.

- Who receives funding: Payment is made directly to the legal aid provider by the Legal Services Commission.
- Implications of control: The disabled person may be invited to choose or specify how the reasonable adjustment is provided so as to meet their particular needs; for example, what British Sign Language interpreter is hired. We do not have any empirical evidence about how this stream of funding operates in practice, however anecdotally we would expect that it would support best practice to allow a disabled person to indicate what sort of adjustment he or she requires.

In looking at how any proposals would operate, we would look at addressing the following issues:

1. It would not be in the client's interest if the right to control causes delay and risks prejudicing his or her case. Examples of these include where urgent instructions are necessary without which the client's case might be struck, or in intermediate situations, where delay might cause prejudice to the client or provider. If the client were to object to the only available interpreter the provider could find, there would be serious difficulties if the right to control budget were absolute or if there were a universal requirement that imposed the client's choice on the provider. For example, we are aware that it is sometimes difficult to find appropriately qualified BSL interpreters for legal interpretation.
2. The second issue would be how to control the cost of a client's choice if it appeared unreasonably expensive to the provider, whether because of rates charged or because of the distance that an interpreter or a representative advocate would have to travel. As a general rule it is the solicitor/provider who has responsibility for progressing a case in a way that will ultimately be considered justified in outcome and in terms of the reasonableness of the costs incurred. While we expect that any post-consultation proposals will set out how budgets may be controlled for value for money, we would expect to explore more fully what measures we could put in place.

We would welcome the debate about how a right to control may operate generally where a public or private organisation is required to make a reasonable adjustment for the disabled person for the purposes of the Disability Discrimination Act.

The consultation paper does not give any indication about how payments may be made for reasonable adjustments - it would be helpful to know more about what may be included in a possible budget that would follow the person if he or she is likely to have recurrent needs for ancillary services. If money were to follow the individual it may reduce administration costs.

Chapter 6 – Simplifying and streamlining the benefit system

The nature of the welfare system is that even with an effective simplified and streamlined process, it remains a highly complex system. We anticipate a proportion of benefit claimants to require in the very least, access to information on the new welfare system

and how it affects them directly. In more serious matters where their existing benefits are to be reduced or changed, claimants might also require legal advice to protect their interests.

Also, depending on the final details of the proposals, there might be an issue for the LSC to change existing regulations and guidance including those on eligibility for legal aid to reflect the changes made to the welfare system.

Summary

In general, the LSC supports the rationale and objectives of this consultation exercise. We also understand that DWP is only consulting on the principles of reforming the welfare system and is not yet in a position to share any details. We think this is an opportune time for the LSC to discuss it further with DWP so that we might be able to contribute to the development of the detail of the proposals. We would also urge DWP (for the concerns outlined above) to engage with the MoJ (and ourselves) and undertake a full Legal Aid and Justice Impact Test so that the proposed new welfare system does not place an unnecessary burden (including any administrative burden) on the already severely stretched legal aid budget.

We recognise that not all benefit claimants would qualify for legal aid and some would obtain welfare benefit information and advice from other public service funders like Local Authorities. However, should there be a need, we anticipate a significant proportion of them would be eligible for legal aid.

Finally, we are pleased to be involved in this topical debate about the rights of disabled people. Our participation in the early stage of this debate demonstrates our willingness to engage with cutting edge debate and make a practical contribution to the goals of the Government to improve the lives of disabled people.

If you have any queries about the contents of this response please do not hesitate to contact Lily Loke, Impact Assessment Coordinator, at 020-77837202.

Yours sincerely

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cc. Lily Loke
Gabrielle Kann, Ministry of Justice