



**Response to**  
**Ministry of Justice consultation paper CP12/09**  
***Legal Aid: Refocusing on Priority Cases***

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## Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists. JUSTICE is an influential commentator on legal aid policy.
2. JUSTICE has had serious concerns about the trend of legal aid policy in recent years and therefore welcomes the opportunity to respond to these proposals. In relation to the proposals on significant wider public interest, we should make clear that for some years the Public Interest Advisory Panel of the Legal Services Commission (PIAP) has included a member of JUSTICE staff. However, we respond to these proposals entirely on their merits.
3. This response is intended to highlight our main concerns regarding the consultation paper's proposals. Where we have not commented on a proposal, or answered a particular consultation question, that should not be taken as endorsement thereof.

## Part One: LSC and Ministry of Justice proposals

**Q1 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?**

4. We believe that some element of the 'good vehicle' test is already considered by PIAP in deciding whether a case has significant wider public interest (SWPI): depending on the nature of the SWPI claimed, a case where the merits were clearly poor so that a hoped-for judgment would be extremely unlikely to result, or a case which while likely to succeed, was very likely to turn on its facts so that no precedent affecting other cases would be created, would not be found to have SWPI. We have no objection in principle with this being made explicit in the test: for example, using the wording 'and that it is sufficiently likely that the benefits in question will result from this case'.

5. However, we would not support other additions to the test that might be under consideration. Firstly, the test should not specify or imply a particular merits level for the success of the case. Some cases may produce a judgment with SWPI even if the court finds for the defendant/respondent (ie valuable clarification of a point of law). Some cases may have strong merits, but because they turn on their facts this is irrelevant for SWPI purposes. Others with strong merits may be likely to result in settlement. Finally, PIAP is only asked to consider cases that would not otherwise attract funding, for example because merits are assessed as borderline. In many cases PIAP is not equipped to second-guess that merits assessment. Its membership is appointed on the basis of the value of the members' contributions on SWPI, not because the members collectively represent a high level of expertise across all areas of law that may come before PIAP.
6. Secondly, we would not support a test which set a high threshold such as requiring that the case be a 'good vehicle' or the 'best vehicle' to deliver the benefits constituting SWPI. Cases come before PIAP as they arise; PIAP is not in a position to know whether a more suitable case will arise in the next 6 or 12 months or not at all. Important benefits may be lost if PIAP is asked to wait for a case representing a very good vehicle to arise. If there is a better case that is already progressing through the system then PIAP can be informed of this by the LSC and can take this into their decision on SWPI.
7. Regarding 'disbenefits' to the public, we do not agree that PIAP (or its successor body) should take these into account in assessing SWPI. This would change the nature of PIAP's decision-making. Currently, PIAP decides whether benefits are shown to be likely to arise from the case to the wider public. A 'benefit' could be tangible or intangible; PIAP has to make value judgments in the sense of deciding whether say, greater media freedom constitutes a public good (although in most such cases this will be uncontroversial), but not in the sense of deciding whether it is better for one group or another in society to benefit or whether one benefit or another is more valuable (for example, whether job creation for one group is better than health benefits to another). In our view it would be inappropriate for PIAP or its successor body to make such judgments; they are for Parliament, government and the courts. Even the courts will sometimes decline to decide such issues where they are properly matters of democratic debate.

8. If it is decided to require PIAP or its successor body to take into account minority interests, we recommend that the membership (as now) has a substantial knowledge of and commitment to equality/non-discrimination and human rights principles, and that any requirement is worded so as to make clear that benefits or 'disbenefits' to the majority will not necessarily outweigh those to the minority and further, that the views of members of the public (actual or perceived) of what constitutes a benefit/disbenefit is not determinative of whether in fact it does so. For example, the fact that many people might object to a benefit to a minority (such as, for example, improved rights for an unpopular group such as prisoners or illegal immigrants) categorically does not mean that such a benefit is in any way less capable of constituting SWPI. Objections or the taking of offence cannot constitute a disbenefit.

**Q2 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?**

9. We believe that cases raising significant human rights issues and/or where there is overwhelming importance to the individual (such as those concerning life, liberty, etc) should never be the subject of a capped budget. The government has an obligation under Article 1 European Convention on Human Rights (ECHR) to secure the Convention rights and freedoms to all those within its jurisdiction. Litigation is an essential safeguard for rights and freedoms since without it abuses can go unchallenged, unchecked and/or unpublicised. Article 13 ECHR obligates the government to provide 'an effective remedy before a national authority' to anyone whose ECHR rights and freedoms are violated. Further, Article 6(1) ECHR provides that 'in the determination of his civil rights and obligations' everyone is entitled to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.
10. We believe that PIAP functions well, although there is a case for some refinement of the test that it applies. It is also not ideal that the body making the decision that in many cases will determine funding (since if funding depends on the existence of SWPI the determination of SWPI will usually determine the question of funding) is viewed as 'advisory', so that its decisions cannot be challenged. We believe that PIAP's decisions as to SWPI should be binding on the LSC unless they are clearly

irrational or *Wednesbury* unreasonable. We also believe that all PIAP members should be independent of the LSC and so, for example, Legal Services Commissioners should not be members. However, it is our opinion that the separation of consideration of the merits and SWPI allows for a decision on SWPI wholly independent of the demands of competing funding priorities and pressures to save money. We also wish to point out that it is our understanding that the case cited on p8 (prisoner's mobile telephone) of the consultation paper as a reason for reform of PIAP was actually found *not* to have SWPI by PIAP but that the LSC funded it in all events. We are concerned that erroneous examples are being used to justify the dismantling of current procedures.

11. We believe that expertise other than legal expertise would be helpful to PIAP or its successor body in assessing SWPI. However, the variety of cases (in terms of their subject-matter) before PIAP suggests that this may be better achieved by having a range of members who could be co-opted for a decision on a particular case or, as appropriate, by having independent experts who could be consulted by the panel/committee about particular cases. The key types of expertise which would be helpful are medical expertise (general and specialist including psychiatric) and expertise in public administration (eg civil servants and other public employees who could detail how the promulgation of a judgment, for example, could result in tangible benefits to individuals).
12. However, we do not believe that it would be helpful to have non-lawyers on the panel/committee merely 'to represent the public'. These members would necessarily be a small number of people and will not be publicly elected, so it is difficult to see how they can 'represent the public' in any meaningful sense. Would they deliberately be chosen from across the political spectrum? Would gender, racial and other aspects of diversity be ensured? Even if so, how can a small number of people (likely to be considerably smaller than, say, a Crown Court jury) hope to encapsulate the range of public opinion? Further, we emphasise that PIAP's judgments are not political and do not involve value judgments as to whether a group *should* receive a benefit or *deserve* to do so; the question is merely *whether* they would do so. We are concerned that this proposal represents an attempt to politicise the committee and that it would damage minority interests that must be safeguarded if the UK is to fulfil its obligations under the ECHR (not to mention domestic equality and human rights legislation).

13. We are particularly seriously concerned at the proposal that non-lawyer members of the panel should be nominated by bodies such as health authorities or the Local Government Association. This is startlingly inappropriate. Health authorities and local government are the defendants in a large number of cases likely to come before PIAP. It is absolutely essential that members of PIAP and its successor body are entirely without bias, in fact and in appearance. Even if a particular health authority defendant has not nominated a member to PIAP, the presence of one or more health authority nominees on the panel/committee considering SWPI in a claim against it would give the appearance of sympathy towards the respondent. The fact that the panel/committee is run by the LSC, itself a public authority sponsored by the Ministry of Justice, makes it of even greater importance that the membership is independent of government both central and local and other public authorities. If non-lawyers are to form part of the committee we recommend that they should be chosen for both their independence and their expertise.
14. Further, we believe that it is wholly inappropriate for decisions of the new committee to be made by any one person (as proposed it would be the chair of the new committee) – especially when that person is a representative of the LSC. This is even more inappropriate in human rights and overwhelming importance to the client (life, liberty etc) cases. We are concerned that the proposals discussed in this paragraph and para 13 above may be incompatible with Articles 6 and 13 ECHR.

**Q3 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?**

15. We do not agree with this proposal. Some claims for damages under £5000 will still establish principles and precedents that will require public authorities to alter their practices and procedures in order to prevent further successful litigation. These claims therefore provide a powerful safeguard against malpractice by public authorities, employers etc and an incentive to improve. MPAs where individual damages are low but the collective value of the claim is high can similarly have a significant impact on the defendant and provide a powerful incentive for change. Further and in particular, claims under £5000 may provide a remedy for threatened, ongoing or past human rights violations and prevent such violations from occurring

again. These violations will in some cases be significant (as the consultation paper itself recognises), including false imprisonment and abuse in care. The government has an obligation to provide a remedy to victims of human rights violations under Article 13 ECHR. We therefore recommend that if this proposal goes ahead, *at the minimum* all human rights cases and preferably also all cases attracting SWPI should be exempt from this proposal.

16. We emphasise that section 8 of the Funding Code provides that it applies to:

*applications for Legal Representation in relation to proceedings or proposed proceedings against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights... [other than judicial review or housing cases].*

In our view this section speaks for itself, and emphasises the impropriety of the LSC's preventing individuals from pursuing legal challenge, resulting in impunity for public authorities in cases of serious wrong-doing. We further emphasise that successful actions will result in the payment of costs to the claimant and that therefore should not entail considerable expenditure by the LSC.

- Q4 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?**

17. We do not agree with this proposal. See our response to question 3, above.

- Q5 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?**

18. We have serious concerns about this proposal. Ordinary complaints procedures, including the Prisons and Probation Ombudsman (PPO), cannot be equated with the procedures of the Independent Police Complaints Commission (IPCC). The IPCC has the authority to launch investigations that can culminate in disciplinary proceedings and/or the prosecution of police officers for maltreatment and other misconduct in

public office. The PPO has no such powers. Further, his decisions do not bind the National Offender Management Service (NOMS) or individual prison governors; he merely 'may make recommendations to the authorities within remit'.<sup>1</sup> The PPO's terms of reference contain no mention of the award of damages to individuals.

19. Individuals in the criminal justice system and in particular those in prison or other forms of custody or detention are particularly vulnerable and it is of paramount importance that detaining authorities are held to account. In some circumstances urgent litigation may be required in order to prevent or stop a threatened or ongoing rights violation including for example breaches of Articles 2 or 3 ECHR (re right to life and torture/cruel, inhuman or degrading treatment in custody). In others judgment is required in order to prevent future such breaches and award compensation for the victim. Article 13 ECHR requires that an *effective* remedy is provided for the victims of human rights violations; we believe that the PPO cannot offer an effective remedy in many human rights cases. It is also the case that a reasonable privately-paying client seeking urgent prevention or cessation of maltreatment or damages for past treatment would not, before commencing proceedings, explore complaints procedures that would not give him that remedy. Therefore, we believe that the PPO and probations complaints system should not be referred to in the funding code. We are concerned that if they are included this will be used as justification to deny funding for cases which should properly be before the courts.

**Q6 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?**

20. If this proposal is pursued it should not apply to claims against public authorities, since the payment of costs between the LSC and other public authorities simply involves the redistribution of public money, and there is a strong public interest in restraining executive malpractice through litigation. Further, this proposal should not apply to human rights claims or claims of overwhelming importance to the client (involving life, liberty etc).

**Q7 Do you agree that we should remove the presumption of funding and have a single test for granting funding in judicial review cases?**

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<sup>1</sup> PPO Terms of Reference, para 27. See [www.ppo.gov.uk](http://www.ppo.gov.uk).

21. We are unsure why this proposal is considered to be necessary, since judges of the High Court in considering whether to grant permission in judicial proceedings apply an exacting standard to ensure that cases do not inappropriately proceed to full hearings in judicial review proceedings. We believe that if permission has been granted this decision should not be second-guessed by the LSC.

**Q10 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.**

22. Our comment on this proposal is limited to the suggestion in the consultation paper that referral criteria should be applied to a case which is 'high profile'. In our view, this is a wholly inappropriate criterion for applying special procedures to a case. If special procedures are to be applied this must be on the basis of logically appropriate criteria such as the value of the claim and the complexity of the case.

**Q11 Do you agree that LSC should seek representations before funding is granted? Do you think that 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?**

23. We are cautious about this proposal. If respondents/defendants are invited to give representations and their opinion as to the merits and/or value of the claim differs from that of the applicant/claimant (as it is likely to do), how will the LSC resolve these differences? A fair procedure should be devised for doing so if this proposal is to be implemented. If necessary, independent advice should be sought.

**Q12 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?**

24. It is desirable that the safeguard of an independent decision maker should be retained. If IFAs do not currently possess the range of expertise necessary, the preferable course of action in our view is to seek to expand the number and/or range

of expertise of IFAs to ensure that cases can be referred to an appropriately expert adjudicator.

## **Part Two: Ministry of Justice proposals**

**Q14 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.**

25. We strongly disagree with this proposal. Please see our response to Q5 above. Treatment claims will often raise significant human rights issues, have SWPI or be of overwhelming importance to the client. Where none of these circumstances apply, the ordinary funding criteria of sections 7 and 8 of the Funding Code are sufficient to prevent the funding of wholly unmeritorious cases.

**Q15 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?**

26. At the minimum, delegated powers should be retained for any case where urgent actions may be needed to prevent human rights violations (threatened or ongoing) or other serious threats such as to life or health, liberty, the home, etc. We disagree on principle with the decision to withdraw such powers in immigration cases for this reason.

**Q16 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?**

27. We are seriously concerned about the human rights implications of this proposal. Claims by 'non-residents' have included some of the most important human rights

cases in recent years; in particular, those arising out of the war in Iraq (eg *R (Khuder Al-Sweady) v Ministry of Defence*), where civil litigation in the United Kingdom has provided the most effective way available of calling to account the armed forces and the government for alleged war crimes abroad. People in detention in UK custody abroad are within the jurisdiction of the United Kingdom for the purposes of the ECHR and therefore their rights under Articles 2 (right to life) and 13 (remedy) ECHR must be upheld by the British government, including by the provision in Article 2 cases of a proper investigation in which victims/their families can participate, and in all cases a remedy for victims/their families where ECHR rights have been violated.

28. Further, there are many people who are in the UK (sometimes for many years) without the status of 'residence'. 'Immigration' cases<sup>2</sup> are excluded from this proposal but this exception does not encompass claims of people without 'residence' status arising under asylum support legislation, or those regarding destitution, access to healthcare, housing or other amenities, or treatment in immigration detention. (We also seek clarification as to whether section 13 of the Funding Code includes onward appeals to the Court of Appeal and House of Lords, which should also be excluded from the proposal). Again, many of these cases raise important human rights; protection under the ECHR depends not on 'residency' status but (in these circumstances) on presence in the jurisdiction. Failed asylum seekers and others without residency status in the UK therefore have full rights under the ECHR; they are particularly vulnerable and it is therefore of great importance that their legal rights can be protected by the courts. To deny them on the basis of their immigration status may be incompatible with Article 13 ECHR in conjunction with Article 14 ECHR (non-discrimination), and in cases raising 'civil rights and obligations' is likely to breach Article 14 ECHR in conjunction with Article 6 ECHR.
29. In both these categories of case it would be wholly inappropriate to leave the decision on legal aid to the Secretary of State for Justice as set out on p31. Where a case involves an allegation of human rights violations by a public authority – particularly of such seriousness and high public profile as those in the Iraq litigation – it is not appropriate for a government minister to make the final decision on whether the

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<sup>2</sup> Section 13 of the Funding Code (Immigration) in fact deals only with cases before the asylum and immigration tribunal (AIT) and applications in the High Court under s103A of the Nationality, Immigration and Asylum Act 2002.

action should be funded. We therefore press for an exclusion to this policy for human rights cases in the strongest terms.

30. Another category of human rights cases for which we believe funding should remain available are those brought by non-residents against multinational corporations (in particular, those with UK parent companies or which are incorporated in the UK) for human rights violations or for workers seeking compensation for personal injury - for example, the *Lubbe and others v Cape plc* litigation.<sup>3</sup> In our view the government has a responsibility to ensure that its corporate nationals comply with international standards while operating abroad.

**JUSTICE, October 2009**

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<sup>3</sup> (2000) 1 Lloyd's Rep 139.