

BRIEFING ON ACCESS TO JUSTICE BILL AND WHITE PAPER

Introduction

1. There are two preliminary comments JUSTICE would wish to make. The Bill is both lengthy and extremely important, as it proposes a fundamental shift in the payment and provision of legal services. In our view, its publication, together with the White Paper, only a week before it is to be debated does not allow sufficient time to consider its full implications. We would urge the Government to ensure that such important legislation can be considered in draft, or in preparation, for detailed scrutiny.
2. Moreover, all Bills now presented to Parliament must indicate their compliance with the Human Rights Act 1998, under the provisions of s.19. In this Bill (and other Bills) this takes the form of a simple statement that the Lord Chancellor believes the Bill to be compliant. There is no further explanation or clarification. In our view, this is insufficient to ensure proper human rights scrutiny. We would expect a statement to include an indication of which provisions of the Human Rights Act might be at issue (in this case, for example, Article 6 of the European Convention on Human Rights, ensuring access to legal advice) with an explanation of why, in the Minister's view, the Bill does not interfere with this right.
3. In the Government's own phrase, we believe that these measures are necessary to promote 'joined-up', that is effective, scrutiny of legislation. The comments which follow are preliminary and general, and will be amended or added to once we have had the opportunity to consider the provisions further and to carry out a full human rights audit of the Bill. We do not, for example, comment in any detail on the exclusions, priorities and tests for legal aid funding or the working of the Criminal Defence Service. We will return to these matters in briefings at later stages of the Bill.
4. We support the principle behind the Bill: to create a more coherent system for the funding and delivery of legal services. The present legal aid system has not been able to deliver a service of consistent quality and adequate scope, or to control costs. We also support the Government's priorities for providing public funding in civil matters, as set out in paragraph 3.7 of the White Paper. We welcome the fact that, as we recommended, the Government is taking reserve powers to set up a Contingency Legal Aid Fund, in case conditional fees do not work as planned: though we consider that this fund should be quite separate from the Community Legal Service Fund, and not take resources from that fund, as is suggested in the White Paper (para 3.31) .

5. We have, however some concerns and queries about the scheme set up in the Bill and the White Paper. These concerns are in four areas
 - the mechanisms by which quality, as well as cost control, will be ensured
 - the process by which the priorities for the funding of legal services will be decided
 - the way in which legal services will be delivered, and the relative roles of the advice sector, the private legal professions, and salaried lawyers
 - some specific concerns about the provision of criminal defence services.

Quality and cost

6. The White Paper makes clear that one of the Government's chief aims is to control the cost of legal aid spending. Another objective is to improve the quality of those providing legal services. Both aims are to be achieved by contracting for the provision of legal services only with those who meet certain standards. The limitation of choice, and possible reduction of access, this will involve is justified on the grounds that the quality of advice will improve, or be ensured.
7. There is clearly a potential conflict between the objectives of cost control and quality. The emphasis in the White Paper appears to be on the first. For example, in paragraph 3.18, setting out the Government's objectives in relation to contracting, three of the bullet points relate to cost control, and only one to quality control. The new system is also said (3.21) to provide incentives for providers to act speedily and to reject unmeritorious cases; there is no mention of quality.
- 8 Aspects of the Bill reinforce this, for example:
 - the new Legal Services Commission (cl. 6(5)) has a duty to 'obtain the best possible value for money'.
 - the Lord Chancellor can give directions to the Legal Services Commission (cl.4) and the White Paper notes that these may include 'targets for reducing or containing the average cost of cases'
 - the proposals for contracting, on an individual basis, with a panel of specialist defence lawyers in large criminal cases include a provision that a client may be required to seek representation from another lawyer on the panel if the Criminal Defence Service and his or her preferred lawyer cannot agree a contracted price.
9. There can be no objection to the Government seeking to use public money responsibly and effectively, or to the argument that the present funding system provides no proper mechanisms for control or assessment of cost before the event. However, we consider that this needs to be balanced by a requirement that the services provided are of proper quality. This is necessary to protect the client both directly, in the service he or she obtains, and indirectly, in order to ensure that committed and skilled lawyers are able to obtain adequate remuneration from legally aided work and do not withdraw from it.
10. We would therefore urge that the Legal Services Commission's statutory duties should include a requirement to ensure that the legal services it funds are of adequate quality and sufficient to meet the importance and complexity of the case.

Deciding on priorities

11. The Legal Services Commission is charged with funding legal services through the Community Legal Service and the Criminal Defence Service. However, the Lord Chancellor is empowered (cl.4) to issue directions (which the Commission must observe) or guidance (which it must take into account). Directions may impose requirements on the kind of service to be funded and the allocation of funds to that service (cl.6(7)). The Legal Services Commission is required to produce an annual plan on how it proposes to fund those services (Schedule 1) and a code on the way it will apply the merits test for funding (cl.9); both of these documents must be approved by the Lord Chancellor and laid before Parliament.
12. The Legal Services Commission's budget will be allocated regionally, through regional offices (WP, 3.15) which will draw up detailed regional plans for spending, based upon local conditions and need.
13. The Government's current priorities for civil legal aid are set out in the White Paper (3.7)
 - social welfare cases connected with social exclusion, such as housing or benefits
 - other cases of 'fundamental importance to the people involved' such as childcare proceedings and protection from violence, where the Lord Chancellor can direct that these should always be funded, without further consideration of resources or merits
 - cases involving a wider public interest, either because they potentially affect a large number of people or a new legal issue, or because they are challenging the actions of a public body (including Human Rights Act cases)

These criteria are developed in the merits test proposed at para. 3.26.

14. In principle, we would not argue with those priorities, though we would wish to clarify and develop some points
 - funding of human rights cases. There is to be no specific public interest fund, but a power to fund (partly from a central budget) cases in the last of these three categories. We can foresee that large multi-party actions will quickly use up any fixed budget. We would like to see an addition to the priorities, and to the merits test to provide that any case that raises an arguable point under the Human Rights Act should also be a priority for funding.
 - the scope of social welfare cases should go wider than merely avoiding social exclusion, including employment matters such as dismissal and discrimination
 - we would want to examine further those cases which should be funded regardless of outcome and resources: such as, for example, asylum cases or representation at Parole Board hearings.
15. However, our more general problem is with the way in which these crucial decisions are made and secured. It is not clear from the White Paper which matters the Lord Chancellor will want to deal with by way of binding directions, and which by way of guidance. For example, will the priorities at 3.7 be issued as directions, or will directions cover only those priorities for which the Lord Chancellor wishes to ensure funding without

further merits-testing? As presently drafted, the Bill gives the Lord Chancellor potentially wide-ranging powers, and the Legal Services Commission potentially a very narrow area of discretion. What is more, the priorities as set out in 3.7, even if issued as directions, can easily be changed without reference to Parliament, the Commission, or its regional offices. The Commission, by contrast, cannot plan or decide its funding criteria without the Lord Chancellor's approval.

16. We consider that these provisions concentrate too great a decision-making power in the hands of the Lord Chancellor, without establishing any clear consultative process or any effective checks or balances. There would be two ways of providing such a process. One would be to give the Legal Services Commission a greater degree of independence to decide priorities, in the light of its regional and national assessments; or at least to require the Lord Chancellor to consult through that process before issuing directions. Alternatively, the priorities and other matters covered in directions could be issued by way of regulations, subject to parliamentary approval.

Delivery of legal services

17. We welcome the way in which the Community Legal Service will incorporate the advice sector, and seek to co-ordinate the provision of legal advice and assistance. We also have no problem in principle with some of the service being provided through salaried providers. We would want, however, to examine in detail the exclusions to CLS funding, in particular representation before tribunals, including immigration appeal tribunals where representation is at present funded separately by the Home Office.
18. However, we are concerned about some of the apparent underlying assumptions in the White Paper about the appropriate roles for lawyers and non-legal advisers. It appears at times (see para. 2.21) that it is envisaged that initial advice and assistance will largely be provided by the non-legal advice sector, with lawyers being only used as specialists and to conduct litigation.
19. We consider that this would be a dangerous assumption. In many cases, skilled legal advice is needed at an early stage to identify the real problems and issues and, if provided then, can cut costs and reduce litigation later on in the process. Some advice centres can provide diagnostic skills. But for many advice agencies, and in some areas of law, they are better able to provide a referral service, and ensure that clients are passed as quickly as possible to a skilled lawyer or paralegal. For example, advice agencies are unlikely to have sufficient knowledge of family or asylum law, and legal advice at an early stage will be necessary to assist in clarifying the issues and the law. We would not support proposals that eliminated or restricted the ability of private practitioners to provide initial advice and assistance, as well as law and advice centres.

Criminal Defence Service

20. The Criminal Defence Service Fund is to be a separate fund from civil legal aid provided through the Community Legal Service Fund. Unlike the latter, it is not limited by the Lord Chancellor's view of what is needed (cl 6(2)(a)), but by the funds required to provide advice, assistance and representation (cl 17(1)). The CDS Fund will combine the present duty solicitor scheme and the provision of funding for representation in all criminal courts. However, it will be provided only through exclusive contracts with approved suppliers, and, in those cases involving long trials, through individual case contracts with a smaller panel of specialist defence lawyers. The Legal Services Commission will also have the power to take on its own salaried staff lawyers to undertake defence work, though the White Paper indicates that this will not be considered until the results of the present pilot scheme in Scotland are reviewed. The Criminal Defence Service raises in a particularly

acute form the potential conflict between cost and quality that we refer to above, given the issues at stake and the resources available to the police and prosecution.

21. Though the total of the fund is not cash-limited, the Lord Chancellor and the Legal Services Commission have much greater powers to control costs in individual cases, with the power to fix costs in advance, to contract with a solicitor's firm on the whole case, and, in longer cases, to insist that a client changes lawyers if a price cannot be agreed with the Criminal Defence Service.
22. The Criminal Defence Service will also be able to set and enforce quality standards, if the Law Society fails to develop a satisfactory accreditation scheme. As far as client choice is concerned, the White Paper aims to ensure that as many as possible of the present providers are part of the CDS scheme, provided they meet quality standards (6.22). However, the amount of work a firm will be able to obtain will depend upon the competitiveness of its prices. There is no mention of the allocation of bids being dependent on quality. In certain cases, such as those where defendants cannot themselves cross-examine, the court or CDS will be able to assign a representative.
23. We cannot in principle see any objection to client choice being limited to those who are competent to provide criminal defence services. But there is a possible conflict if the choice is limited by considerations of cost, rather than quality. With the Criminal Defence Service and its approved solicitors having a monopoly of criminal defence work, it is extremely important to ensure that there are external, independent monitors of quality and need, to prevent costs and quality being driven down, and good suppliers (including good criminal barristers) driven out. This will even more important if a salaried component is introduced in order to provide a 'benchmark', as the White Paper envisages.
24. We are seeking further advice on the human rights issues, and the issues of quality and cost we raise.

February 2000