CONSULTATION RESPONSE

Legal Aid: Refocusing on Priority Cases

ILPA is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups including the Legal Services Commission's Civil Contracts Consultative Group.

General Comments

Whilst we acknowledge that the Legal Services Commission faces a difficult funding situation we consider that the legal aid budget should be a priority for any Government seeking to ensure that its policies are implemented with due regard for the law. Parliament enacts many laws, and Government sets up many schemes; Legal Aid acts as insurance policy to ensure that these are properly administered in accordance with the law. The general thrust of the proposals is that there should be cuts and that such cuts should principally be made from the budgets for cases that are effectively public law challenges. ILPA does not support this approach.

We consider it should be a priority of an independent Legal Services Commission that it should ensure that cases can be brought against public authorities, where the limited means of the applicant would otherwise mean that the actions of public authorities went unchallenged. This contributes to ensuring equality of arms between State and individuals of limited means. We consider it to be part of the role of an independent Legal Services Commission to make the case for funding in this area of public expenditure.

ILPA is particularly concerned at the proposals for restricting legal aid for those who are not resident in the UK, albeit with a number of exceptions. The Impact Assessment proceeds on the basis that this relates to persons living outside the UK, but the consultation is ambiguous and we have received enquiries from many practitioners and organisations on this aspect of the negotiations. For the reasons set out below, we do not consider that residence/non-residence is a good test on which to base eligibility for legal aid. The cases in question are for the most part cases against the UK authorities, designed to test the legal limits of the powers of the UK authorities. If those not resident are unable to bring such challenges, a

swathe of the UK authorities' powers will go untested. It is with this point that we begin.

7 Restricting Civil Legal Aid to Non-residents

Proposal:

That civil legal aid should be restricted for individuals not resident in the UK other than for matters concerning entry, resident or asylum or specified matters where their life or liberty was in issue, and other specified exemptions.

Response:

There is no definition of what is intended here by "non-resident". On 6 October 2009, two days before the consultation closed, we received a response from Stephen Jones of the Ministry of Justice to our letter of 11 September 2009 asking for clarification on the definition. This states that the Ministry of Justice is minded to follow the wording of the European Legal Aid Directive 2002/8/ESC of 27 January 2003 which refers to 'legal residence'.

As set out in Article 1(2), the Directive applies to civil and commercial matters and does not, in particular, apply to revenue, customs or administrative matters.

ILPA recalls the statement in the sixth Preamble to the Directive that:

> *'(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.'*

ILPA is mindful that, as set out in the eighth preamble, the purpose of the Directive is to establish minimum standards and that Member States are free to adopt higher standards.

In April 2008, ILPA provided comments on the draft Lord Chancellor's Direction on Cross Border Disputes' (implementation of Council Directive 2003/8/EC), 27 January 2008. These are available on the Submissions page of ILPA's website, www.ilpa.org.uk. Article Six of the Directive sets out that only legal aid applications for actions that appear 'manifestly unfounded'can be rejected, unless pre-litigation advice on legal aid is offered (see also Article 13(3) which provides for refusal only where applications are unfounded or outside the scope of the Directive).

The Directive specifies in Article 5(1) that member States shall grant legal aid to persons who are 'partly or totally unable to meet the costs of proceedings'. It further states at Article 5(5) that

> *'Thresholds defined according to paragraph 3 of this article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of*

proceedings referred to Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.

The Impact Assessment estimates that 20-40 cases per year will be affected and bases this solely on home address. This suggests to ILPA that the Impact Assessment was prepared on the basis that 'non-resident' referred to persons outside the UK rather than on the basis of 'lawful residence'. We should be grateful for clarification of whether the impact assessment was prepared on the basis of the definition in directive 2002/8/ESC or on some other basis.

We are aware that the definition of 'lawful residence' is not straightforward, and also that 'non-resident' is defined differently in different areas of law (for example tax law). Mr Jones' letter of 6 October indicates that those visiting, holidaying or passing through the UK would not be entitled to legal aid. In such cases the question is one of 'residence', rather than whether presence in the UK is lawful. In other cases, a person may arguably be resident in the UK but there may be questions as to whether their residence is lawful.

ILPA does not support a proposal to exclude those resident outside the UK from Legal Aid. We do not agree with the restrictions on legal aid for non-residents in principle. As set out in our general comments, the cases in question are for the most part cases against the UK authorities, designed to test the legal limits of the powers of the UK authorities. The Impact Assessment sets out that only a small number of cases involving people resident outside the UK that would be affected by the change are funded each year In some of those cases, matters of great gravity may be at stake. Although not directly related to the work of our members we note the comments of others (such as the Public Law Project) about the constitutional importance of the ability to bring cases such as those brought by the family of Baha Mousa and by Binyam Mohamed. As lawyers we would support strongly the arguments that funding arrangements must enable such matters of great importance to be brought before the UK Courts. It would be helpful to have examples of the cases of persons outside the UK that have been funded to date. To date, the case has not been made for denying them funding.

If a person has no or limited entitlements to particular treatment or to a particular service because of their immigration status then they will fail the merits test for legal aid in any event. Thus any proposal to cut off legal aid from persons within the UK because of their immigration status must be a proposal to deny them the right to challenge a failure to treat them in the way in which they are entitled to be treated under UK law. We have today received a letter from Medecins du Monde providing examples of the unlawful denial of health care and the potential breaches of human rights flowing from this. Members have also highlighted the questions of persons being able to bring *habeas corpus* proceedings and to challenge unlawful detention.

Immigration status is a matter of considerable complexity. Is it the intention of the commission that legal representatives in all areas of practice, including family, social welfare, community care and public law should be required to make an assessment of whether the person before them is 'lawfully resident'? Where immigration status is relevant to a matter in another area of law, ILPA members are frequently asked to provide legal opinions as to a person's immigration status. This is what implementation of a proposal to base entitlement on immigration status would entail.

We are also concerned at the consequences of wrongful refusals of legal aid, and at the prospects of legal representatives being wary of taking on cases of persons of whose immigration status they are not satisfied, for fear of not being paid. One consequence of this, as described, will be legal representatives seeking the reassurance of an immigration lawyer on immigration status. Another could be persons wrongfully refused legal aid, and thus of legal aid funding entrenching discrimination and unequal treatment rather than being a tool to be used to challenge discrimination and unequal treatment.

The Legal Services Commission has repeatedly stated that it wishes to focus funding on *'the most vulnerable people in society'*. The vision of the Commission includes that '*fair access to justice is a cornerstone of society'* and that '*legal aid facilitates that access for those who would not otherwise have it*'. The Commission has ample evidence in the cases that it has funded to date, that those under immigration control are among the most vulnerable people in society who do not always have fair access to justice.

We note that funding under the immigration category is proposed to be an exception to the exclusion. If, contrary to our representations above, persons who are not resident are excluded then the immigration exception should be drawn in broad and general terms so that there would be no difficulty with a supplier representing the applicant for most of their immigration case but then having to say that some other aspect (such as detention or terms of leave) could not be dealt with.

The exclusion of general Children Act proceedings such as contact applications illustrates the problems with the proposed exceptions highlighted above. Applications for leave to enter the UK to have contact with a child depend on either agreed contact or on a court order. There are also occasions when applicants seek to enter the UK on a limited basis in order to progress an application for a contact or residence order. In cases where there is no order or agreement in place the immigration application by the absent party will fail unless the proceedings have already commenced. In those circumstances the absence of funded representation may make the commencement or progressing of proceedings impossible. The differing levels of wealth in different countries mean that litigation in the UK may be prohibitively expensive for some persons outside the UK.

We anticipate that the numbers of such cases will be low but that the issues involved (which includes the Article 8 rights of the applicant and of the child in the UK) are of such importance that funding in those cases must be protected. Moreover, we fear perverse consequences of any exclusion. Many persons under immigration control are in family relationships with British citizens. One possible consequence of the proposed change is that cases may be brought by other family members (for example a child) because the most obvious applicant/claimant/appellant is not able to bring the case. Another potential consequence of the change is that cases will be brought as human rights cases rather than under the more obvious heading, because the one is barred, the other not. Such workarounds do not make for the efficient conduct of litigation.

We are also concerned as to whether the exclusion would prevent damages only claims for wrongful removal or assault in the course of removal as the affected person would be outside the UK. It would be necessary to exempt Section 8 of the funding code to avoid this result. ILPA members have seen cases of the wrongful removal of British citizens and others with a right of abode in the UK because their status has not been recognised. We have seen cases where persons have been wrongly removed and faced persecution on return and cases where it has taken over a year to effect the return of a person wrongfully removed. These are cases in which we consider it essential that the State be held to account.

We also consider that there has been an impact overlooked. Currently there are a number of immigration cases each year concerning whether removal of an individual would result in a breach of Article 6 of the European Convention on Human Rights in that they would no longer be able to effectively pursue other civil proceedings if removed. In some the UK Border Agency are currently successfully able to argue that the proceedings can be adequately pursued from abroad and the applicant is removed. If legal aid funding would be withdrawn as a consequence of the applicant being removed then the balance to be considered in their immigration case would be likely to shift back in favour of removal being deferred.

We do not have any access to figures as to how many such cases there might be in any one year. The impact of denying such people access to legal aid should be considered as the result of their staying in the UK may be that legal aid expenses are incurred in areas such as detention and support.

That may though mean that the anticipated saving in the Legal Services Commission budget is reduced and that there is a negative impact on other budgets (removal being deferred therefore costs such as detention, section 4 asylum support or other support increasing).

Those contemplating an exclusion should look with particular care at the effects of an exclusion on all Children Act proceedings, on cases where the assisted person was resident in the at the time that funding commenced; and at Section 8 actions against public authorities. These make a powerful case against excluding non-residents and also suggest that the question of exemptions from any exclusion has not been properly addressed.

Part 1

1. Public Interest and Other Borderline Cases

1.1 Wider Public Interest

Proposal A:

That the definition of wider public interest in the Funding Code be refined so that in addition a case will only be regarded as having wider public interest if the Legal Services Commission is satisfied that the individual case on its particular facts is a suitable vehicle to establish the point and realise those benefits for the public.

Response:

We are concerned by the proposal to extend the definition to include an express consideration of whether the individual case is a 'suitable vehicle' to 'establish the point'. On the face of it, in light of the limited information given, these words seem to be an unnecessary addition. If the case were not "suitable" for this purpose, then presumably the case would not meet the requirements of having 'borderline' prospects of success.

We perceive a risk that proper cases for funding may be declined on the assumption that a "more suitable vehicle" would be likely to come along at a later time. That would mean that the individual whose application is refused because something more suitable may come along later would be denied the opportunity to obtain redress. There is no guarantee that a "more suitable" case would come along at a later stage.

The role of the defendant in determining which cases go forward must also be acknowledged. ILPA members are very familiar with the UK Border Agency and other opponents conceding cases that appear to us strong on their individual facts without admitting to any error on the point of law involved, and it is a concern that the effect of such concessions is that strong cases do not go forward as test cases. The concession may come before or once proceedings have commenced. This process may at the very least frustrate any attempt to ensure that the most 'suitable' case goes forward.

ILPA can see scope for considering whether the Legal Services Commission should take an active role in identifying which out of a number of cases already in prospect should be taken forward as lead cases in circumstances where issues of wider public interest are at stake. This would only be possible if procedural safeguards and a method for considering all the relevant facts of each case could to be established. .

Proposal B:

That in deciding whether a case has significant wider public interest, rather than just finding it sufficient for a section of the public to derive benefits from the case, in future guidance for public interest would take

into account whether or not a different section of the public would have a disadvantage or would not support the outcome being sought.

Response;

[I agree with what you say on the whole but I don't actually think the problem is confusing different meanings of 'public interest'. Nor am I sure I agree that the fact that other members of the public might support a different outcome is not relevant – I think the question there is what 'support the outcome' means – if it just means 'agree with', yes, there are serious problems there – but if it means that a different group with a genuine interest in the outcome would argue for a different outcome, then the answer lies in the Court adjudicating between competing interests, as you say, or in appropriate use of intervenors or interested parties – AM]. We see no fairness in such an approach. It risks incorporating irrelevant interests and prejudice. Where there are relevant interests, it would entail the Commission usurping the role of the Court in adjudicating between competing interests of sections of the public. If a sufficient section of the public may derive benefits from an issue being brought before the Court, then they are entitled to ask the Court and not the Legal Services Commission to adjudicate on the issue.

We see a significant risk to the interests of minority groups if this proposal were to go ahead. There is insufficient detail in the consultation proposal to allow us to understand and to comment on how it is intended to work. In particular there is no explanation as to the principles that could guide the Legal Services Commission's decision- making in such cases.

As practitioners in immigration, asylum and nationality law, we have particular concerns as clients in the immigration and asylum category are a minority of the public at large and are at times presented as having interests contrary to the interests or desires of other sections of the population (often by particularly powerful or vociferous commentators supported by anti-immigrant reporting in the media). There may be a difference between what are at first sight perceived to be competing interests and a more informed understanding, which might lead one to conclude that the treatment of people under immigration control has broader implications for the relationship between any individual and the State, and what is deemed acceptable or unacceptable in UK society.

If there is sufficient public interest in an issue coming before the Court then the interests of opposed and/or positively disadvantaged groups may in any event be advanced by the Defendant in the course of the litigation. In some cases, members of opposed or disadvantaged groups may have standing to be represented as other interested parties or to seek to make submissions as intervenors. This underscores that it should be for the Courts, not the Legal Services Commission, to decide which of the competing interests should prevail.

1.2 Handling of High Cost Public Interest and Other Borderline Cases

Proposals:

(a) That there should be a separate budget (within the high cost case budget) for high cost cases in which those cases with borderline merits but which may be justified on the basis of significant wider public interest, overwhelming importance to the client or raising significant human rights issues.

(b) That the Lord Chancellor will set a budget for these cases and the affordability of a case will be considered in the light of that budget.

(c) The Lord Chancellor will set priorities for the budget.

(d) A new LSC Committee to be established to take responsibility for final funding decisions on these cases and multi party actions and public interest cases.

(e) The Chair of the Committee, being either a Commissioner or the Director of High Cost Cases, will have responsibility for the final decision with the rest of the Committee being advisory. Proposals are set out for membership, including that "representatives of the public" should be included (nominated for example by the Local Government Association, Regional Health Associations or Health Authorities).

Response:

This proposal appears to amount to a suggestion that the budget for high cost cases of particular importance, because of their significant wider public interest, overwhelming importance or the significant human rights matters that they raise, should be more tightly restricted. Such cases should be given particular priority by the Commission, rather than treated as a problem and a drain on resources.

Immigration and asylum cases will, as the Commission accepts, almost invariably be of overwhelming importance to the client and will very often raise significant human rights issues. We are very concerned that cases in those categories could be refused funding because the particular limited budget has run out or because the Lord Chancellor of the day does not view them as a priority. These are not cases that can be held over to the next funding year.

Our primary concern is a limited budget for these cases. We are also concerned that proposals d and e (arrangements for a committee) would be cumbersome and slow in many cases and that the Committee would not provide independent oversight, but rather the contrary. It seems possible that more negative funding decisions will result. One consequence of this is likely to be more judicial review challenges to funding decisions.

Consideration by such a committee process would not be feasible in, for example, a high cost, borderline judicial review or statutory appeal in which removal was in issue. In such cases, timescales are at stages very tight.

With regard to the proposal for public representation, we are concerned at the proposal that there be "representatives of the public" on the committee nominated by those who will frequently be the subject of proposed legal actions. This raises questions about the independence and perceived independence of the proposed committee. No suggestion has been made that the immigration authorities would have nomination rights; we should oppose this for the reasons given in this paragraph.

No information is given about the role of these "representatives of the public" beyond that they will "consider the public interest aspect". We do not understand how a small number of individuals nominated to a committee can serve the function of identifying what is in the public interest. As the consultation paper identifies, different sections of the "public" may have conflicting interests. No information has been provided as to how the Legal Services Commission proposes to decide whether, and if so which, representatives of the public are sufficiently a) impartial and b) knowledgeable to take responsibility for identifying what is in the public interest. Indeed, it is not made clear in the document that impartiality is intended or desired as a criterion for the selection of committee members. Our general concerns at the proposed approach also give rise to specific concerns that this approach could not protect the interests of minorities such as immigrants and those seeking asylum. Experience and the caselaw of the courts, including the highest courts in the land and international courts, provides ample evidence of the authorities having exceeded their powers or failed to respect their obligations where immigrants and people seeking asylum are concerned.

When legal representatives consider questions of public interest, as part of ascertaining the prospects of success in a case, they are assessing the situations in which the courts have been prepared to intervene and the situations in which the courts have decided that the balance to be struck between competing interests is one for the Executive. No attempt has been made to in the consultation to suggest how it is intended that 'representatives of the public' will be in a position to do this across a whole area of the law. The proposals are vague and ill-defined but appear to carry with them the risk of a Committee rather than the Court or the Executive with the approval of parliament determining the limits on State power and the balance to be struck between competing interests.

The Impact Assessment does not identify that the committee would give rise to additional costs but the costs of organising and administering such a Committee may be far from insignificant and the costs of challenges to its decisions should also be considered.

In respect of the further proposals (f) to (i), we note the suggestion that the Committee will seek the attendance of the Appellant's solicitors where appropriate and that the case will be reviewed by the Committee at key stages. Our only comment on these further parts of the proposal are that this will impose an additional burden on the applicant's solicitors and the work that is required to be carried out should have to be properly remunerated.

2. Legal Aid for Damages Claims

2.1 **Low Value Damages Claims**

Proposal:

The proposal relates to claims under Section 8 of the Funding Code, which are for damages claims against public authorities. This would include damages claims against the UK Border Agency in respect of unlawful detention or consequential financial loss from other unlawful decisions or actions, although these are not referred to in the expressly in the consultation document. The proposal is that the cost: benefit test will be amended so that a Funding Certificate will be refused unless the damages are likely to exceed £5,000.00.

Response:

ILPA members will, in the course of immigration and asylum work probably carry out relatively small numbers of these cases but such work for clients (arising out of e.g. challenges to unlawful detention, or delay) may be carried out under other categories and through other suppliers.

Section 8 of the funding code states:-

> "This section 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 cases falling within the scope of section 7 (Judicial Review) or section 10 (Housing)."

Part of the stated justification for withdrawing this funding is the suggestion that, as a result of the application of the statutory charge, the Applicant frequently receives little of the sum obtained in damages. The implication in the second paragraph on page 13 is that, although costs may be awarded against the defendant, they may not be paid and that enforcement proceedings may not be funded. We find that assertion to be astonishing in a category of cases against public authorities.

The Commission should consider and provide the figures on the overall net cost of these cases. That this has not been done to date is a significant omission in the consultation paper. The provision only of figures relating to the gross reduction on expenditure is misleading. After reading the consultation paper, we sought further information from the Ministry of Justice by an email to the Consultation co-ordinator about the lack of data provided about net costs but have received no reply.

No figures are quoted for success rates in these cases. This is another significant omission. In successful cases we should have anticipated that in only a few cases would the Defendant not pay any costs (the majority or all of the costs being met by them in most cases that succeed against them) and that the public funding costs would therefore be very limited. We expect that relatively little of the sum of damages awarded would be lost to the claimants by the application of the statutory charge, and that after application of the

statutory charge the net cost to the Commission of the successful case would be zero. Mr Jones does not dispute this in his letter to us of 6 October, and indeed acknowledges that in cases against public authorities there are unlikely to be the same problems as may arise when, for example, the losing party in a family dispute has no assets or is difficult to trace. We invite the Legal Services Commission to look at the overall success rate in such cases and to calculate the number of cases wholly funded by the Legal Services Commission and the projected net savings from this proposed change.

Where the opponent is a public authority and the issue is of serious wrong-doing (as set out in the definition in Section 8), there should be a more generous cost: benefit test than against a private individual or organisation. Damages claims against a public authority will in some respects have fewer risks, for example the identity of the opponent is rarely in doubt. They are also an important facet of ensuring that public authorities are accountable for misdeeds and thus encouraged/required not to repeat them. This is an essential element in ensuring equality of arms between individuals and the State.

The consultation suggests that "many" claimants (not further quantified) "simply want an explanation". However the document then redefines this in the next sentence as their not "primarily seeking financial compensation", which is a significantly different description. No evidence for this assertion is provided.

Even if a Claimant is not primarily seeking financial compensation, where they are entitled to that compensation, it should be paid. ILPA's experience of the UK Border Agency is that compensation will not be paid, (except in the most simple and straightforward cases of direct financial loss arising from an error), without the initiation of proceedings.

The proposal also ignores the additional benefit obtained by the "public" in having such litigation funded in that it holds public authorities to account for wrongful actions and poses a cost: benefit consideration for those authorities which may help to ensure that they do not act wrongfully in the first place or repeat wrongful actions in future. If the cost to the authority of these more "minor" (less than £5000) wrongs is nil then the incentive to repeat them is stronger. We should suggest for example that procedures for ensuring an immigration detainee is released at the earliest time could become more lax if there is no penalty on the authorities for administrative delay in release by a few days. Members are dealing at the moment with the failure by the UK Border Agency to address the implications of the decision of the Court of Appeal in *ZO(Somalia*) [2009] EWCA 442 which concerns permission to work for persons who have made a fresh asylum clam. Here applicants do not primarily want an explanation, or damages, they want permission to work. Damages claims may be a part of persuading the UK Border Agency to comply with the judgment, which is declaratory of entitlements under European Community law. A number of cases are ensuing, at considerable cost to the Legal Aid budget. Not only the individuals affected, but the Ministry of Justice and the Legal Services Commission, have an interest in seeing

Government persuaded to respect the rule of law. Lack of respect for the rule of law should not endorsed by the Funding Code.

If, contrary to the representations above, a minimum is to be set, then the figure of £5,000.00 is set too high so that wrong-doing that is still very significant to the individual can go unpunished.

The figure of £5,000.00 would mean cases of unlawful detention for 1 or 2 days (in the case of a detention which was unlawful from the start) or say 50 days (for unlawful detention after a long period of lawful detention) would be excluded. This may sound trivial to someone not him/herself at risk of detention, but to our clients, many of whom are extremely vulnerable, the effect cannot be underestimated. The shock and fear caused by being taken into detention is very great. By taking away any chance of recompense for that, the sense of grievance felt by many potential claimants will be unassuaged and others may be put at risk of similar treatment.

Many of our clients are surviving on minimal payments of asylum support. For them, a payment of amounts of a few thousand pounds represents a very significant amount of money (a life-changing amount for some).

It is of great importance both to individual clients and for purposes of holding the UK Border Agency to account, that these claims continue to be brought.

There is a suggestion that ombudsman schemes should be used instead as an alternative to proceedings. There appears to be here a conflation of cases that are essentially maladministration and those that are damages claims.

ILPA members' experience in the immigration category and related claims, is that although in cases of maladministration the principal desire of the individual may be for an explanation or apology or the setting right of the wrong in non-financial ways (for example ending a delay) that does not hold true for damages claims. If a client has been assaulted or wrongly detained then the client is likely to want compensation, if only as evidence that the wrong done to them has been taken seriously. An explanation or apology without more can seem cheaply given.

It may be appropriate to consider whether more cases of maladministration could be dealt with through the complaints system and Parliamentary Ombudsman system We should point out that there is no basis in those circumstances for the offending public authority to have to refund the legal costs involved in bringing the complaint, thereby potentially increasing net costs in some cases.

Members' experiences of the UK Border Agency and its complaints system backed up by the Parliamentary Ombudsman, for resolving maladministration are, at best, patchy Whilst the UK Border Agency complaints system has been significantly developed over recent years, there remain considerable difficulties in dealing with operational complaints adequately, effectively, appropriately or in a timely manner, as detailed in the last (2007-2008) report

of the Complaints Audit Committee[1] before its functions passed to the Office of the Chief Inspector of the UK Border Agency. The process for addressing accusations of assault or misconduct by staff members is more robust than before. The Complaints Audit Committee report illustrates that the UK Border Agency complaints system is not appropriate for dealing with matters which would lead to a potential compensation claim up to £5,000.00.

In those matters which might come within the remit of the Parliamentary Ombudsman's office we note that there are significant delays in the Parliamentary Ombudsman's conducting investigations. Further the Parliamentary Ombudsman can only be accessed with the co-operation of the Member of Parliament. For people under immigration control this results in uneven access to the Parliamentary Ombudsman with some Members of Parliament prepared to make referrals, others not.

We do not understand the suggestion that some of these matters may be more appropriate to be brought as judicial reviews rather than seeking damages on the basis that this would be more cost effective. Firstly, a damages claim can be included in a judicial review and if judicial review were the most appropriate form of proceedings, we should expect an application for permission for judicial review to be made. Secondly, the definition in Section 8 is specifically about those cases which cannot be brought by judicial review, so the choice cannot arise.

If, contrary to our representations above, this proposal is taken forward then we should support at the very least an exemption for low-value cases in which a public interest is at stake, be they individual claims or multi- party actions.

2.2. **Low Value Out of Scope Damages Claims**

Proposal:

For cases which are out of scope, they can only be brought back into scope through having a significant wider public interest if the damages sought by each individual are at least £5,000.00.

Response:

We have not identified any relevance of this proposal to our client base.

2.3 **Using Complaints Procedures before Litigation**

Proposal:

That the guidance for cases under Section 8 should include specific reference to use the prison or probation complaints system and the prisons and probation ombudsman before resorting to litigation.

---

1 www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/cacreports/cacreport0708.pdf?view=Binary

Response:

We do not see any particular role for the complaints system of the UK Border Agency or the Prison Ombudsman in preceding any Section 8 claims and none is suggested by the consultation. As described above, Section 8 claims involve serious wrong-doing, abuse of position or power or significant breach of human rights.

2.4 **Considering *Inter Partes* Costs against the LSC in Assessing Cost Benefit**

Proposal:

That Section 8 of the Funding Code is amended so that potential *inter partes* costs of an appeal should be borne in mind when considering the merits of proceeding to appeal.

Response:

In assessing the cost: benefit ratio the Legal Services Commission should also consider, against the risk of *inter partes* costs, the certainty that no costs already incurred could be recovered if no appeal is brought (whereas they would on a successful appeal).

3. **Legal Aid Judicial Review**

3.1 **The Presumption of Funding for Judicial Review Cases where Permission is Granted**

Proposal:

That the presumption of funding where permission has been granted should be removed and that there be one common test for funding of a judicial review at any stage.

Response:

The consultation document implies that the funding presumption is the only criterion that applies to the question of continued funding once permission is granted. This is not correct. We draw attention to the Post Permission funding criteria:-

> **"7.5 Post-Permission Criteria**
>
> **7.5.1 General Funding Code**
> The following criteria replace those in section 5.7 of the General Funding Code.
>
> **7.5.2 The Presumption of Funding**
> If the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues, then,

provided the standard criteria in Section 4 and Section 5.4 are satisfied, funding shall be granted save where, in light of information which was not before the court at the permission stage or has subsequently come to light, it appears unreasonable for Legal Representation to be granted.

7.5.3 Refusal on the Merits

Where the case does not appear to have a significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues, Legal Representation will be refused if:

(i) prospects of success are borderline or poor; or

(ii) the likely costs do not appear to be proportionate to the likely benefits of the

proceedings having regard to the prospects of success and all the circumstances."

No details are provided in the consultation of the justification for proposing this change. Would not the impact be negligible given that the current presumption is not unqualified and can in particular deal with new information? No examples are given of the criteria that could result in a case which would be funded under the existing criteria having funding refused in the face of a grant of permission by the Court when that grant is given "considerable weight".

Given that judicial review is a discretionary remedy, we cannot envisage any cases in which permission has been granted but where funding should be refused which are not already covered by the existing criteria. Criteria such as that there are sections of the public that would be opposed to the case or that it is considered too expensive to be funded are not objective and would be objectionable *per se.*

The presumption of funding when permission has been granted was introduced in response to the decision of the Court of Appeal in *ex parte Hughes* referred to in the consultation. That remains good law, which the Legal Services Commission has not challenged.. If introduced, this proposal will undoubtedly lead to funding challenges and potentially judicial review of a refusal to fund.

Such a change would increase the amount of work to be done by the representative and Legal Services Commission in getting funding in place for every case where permission has been granted (as neither will be able any longer to presume funding to be justified). If funding is refused then there will be further work for both. No financial case is made in the consultation paper for imposing this additional burden.

The argument that funding is not in the same way automatic for cases where leave to appeal has been granted to Court of Appeal and House of Lords (Supreme Court) is not an argument for changing the provisions in respect of Judicial Review. The presumption of funding ought to be extended to those cases too so as to facilitate less time consuming funding decision-making in Court of Appeal and House of Lords (Supreme Court) cases where leave to appeal is granted.

3.2 **Personal Benefit from the Proceedings**

Proposal:

To amend Section 7 of the Funding Code to "tighten the tests" for a Funding Certificate in judicial review so that funding can only be granted to an individual who will gain a personal benefit from the outcome of the proceedings, either for themselves or for their family.

Response:

The implication in the consultation paper is that this is not a change of substance but merely a clarification because there have been some inappropriate applications.

We do not see the need for the "clarification". However, if it is just clarification, then we see no objection if the Commission considers that the current definition is open to misunderstanding.

We would though caution that the application of the Code must retain the possibility of continuing funding of a case in which there is a significant wider public interest and in which the individual initially had a personal benefit but where the individual case but not the principle has been conceded. The UK Border Agency will often concede cases in this way, leaving the underlying principle unresolved. For example, when asylum seeker families were being refused the Family Indefinite Leave to Remain concession for minor (often traffic) offences the UK Border Agency for some time backed down on many individual challenges on an "exceptional" basis without conceding that it was their adoption of a blanket policy was wrong. Sometimes the process of conceding the individual case continues only until a case weaker on its facts (or less well prepared) comes forward. Sometimes it continues indefinitely, in which case no claimant is likely to retain a personal benefit in continuing to challenge the principle.

Such a process is detrimental to the individuals who will be affected by the underlying wrong, especially the unrepresented who may be unable to achieve a result in their individual case, but is also wasteful of Legal Services Commission funds as each wronged individual starts to challenge their individual decision to secure their concession.

If the Legal Services Commission is not able to fund cases where there is a wider interest and yet where the claim becomes of no further benefit to the individual, then it risks excluding some important issues from being resolved and instead repeatedly funding the initial preparation of claims on the same basis only to have each fall away on a concession.

3.3 **Reconsidering Merits When Acknowledgement of Service (AOS) Received**

We raised a question on the meaning of this proposal and in Mr Jones's letter of 6 October 2009 it was stated that the proposal is

> *'…to tighten the funding code so that in future full representation will be limited to issuing proceedings and dealing with the acknowledgement of service and grounds for defence. Either the acknowledgment of service*

could be passed to the LSC to consider whether funding should be extended…or the client's solicitor could assess the acknowledgement of service and notifiy the LSC if it adversely affected the merits of the case' ,

We see no scope for this producing any savings to the Legal Services Commission. Rather, it will require additional work by the Legal Services Commission and supplier and cause delays.

Once the Acknowledgement of Service is served (indeed at all times) there is already an obligation on the supplier (and advocate if involved) to reconsider the merits.

In most judicial reviews there is little to do between the service and consideration of the Acknowledgement of Service and consideration of the application by the Court on the papers. Therefore the savings to be made by curtailing funding on a case between the Acknowledgement of Service and permission decision are usually very limited. We do not understand the figures quoted in the impact assessment as being potential savings for this proposal. The figure of £3099 per case is quoted. But these cases presumably do not proceed beyond the permission stage as permission will be refused. How then is the saving to be made? It appears that this figure must be the gross average cost per judicial review for all the work carried out, not the saving to be made by stopping the judicial review after the Acknowledgement of Service but before the permission decision. If that is correct the use of this figure is misleading and unhelpful.

Of the small percentage of cases that do need substantive work between the Acknowledgment of Service and the decision on permission, we consider that there are unlikely to be any significant numbers of cases where the merits are below the threshold but where a supplier nevertheless wrongly continues to carry out that substantive work. Is the Legal Services Commission suggesting that there are many such cases?

We should suggest the value of the work the supplier would normally do to be saved by withdrawing funding pre permission is likely to be on average less than £50 (suggesting a saving on the predicted 200 cases of £10,000).

However, there would be additional costs (both administrative costs of the Legal Services Commission and costs of the supplier, some funded others not) to offset against that. There would be the preparation of all the additional applications for extending funding (which would be incurred in almost every funded judicial review and would probably be of the order of £40 - £50 of profit costs per application submitted) and all the additional appeals against withdrawal of funding (appeals are probably almost certain to be made in every case where funding is withdrawn pre permission whereas if permission has been refused by the Court a Claimant and supplier may be more ready to accept the merits are not sufficient). There may be additional costs of negotiating and submitting a withdrawal of the application (including payment of a Court fee). None of the additional profit costs incurred would be recoverable on an *inter partes* basis.

We therefore predict a net cost rather than any saving from this proposal.

The additional burden on the Legal Services Commission at a time when staffing levels are being reduced means that overall service levels will be adversely affected.

There may be additional delays to proceedings whilst funding extension is considered. For example a supplier may consider that an Acknowledgment of Service requires a response to be submitted before the permission decision is taken on the papers, but that will be beyond the scope limitation. The Court will have to be asked to defer the consideration (which may require a formal application to be made) whilst the Legal Services Commission considers the merits including the detailed explanation of the supplier as to why the grounds in the Acknowledgement of Service are wrong.

4. Changes to the LSC Processes

4.1 Special Cases Unit (SCU) Management

Proposal:

That additionally the LSC can refer the management of any case that is, or is potentially, either particularly complex or raises particularly important legal issues or which is high profile. These cases would be subject to the requirement of a case plan but not to the usual SCU affordability criterion.

Response:

This is a very loosely worded proposal and we therefore find it difficult to comment in detail.

Members do not report a good experience of management of cases by the SCU (although most of our members' cases will have been dealt with by the equivalent section of the National Immigration and Asylum Team, so our comments will generally relate to them). We anticipate that there will be no "improved management" of these cases as they are already managed within National asylum and Immigration Team without being special cases and if complex issues arise these are presumably referred to appropriately experienced staff.

Case plans are not considered by our members to be a useful tool. The cost (to the Legal Services Commission) of representatives having to produce these and the Legal Services Commission having to consider and approve them, is significant. They are time-consuming and our members do not report that they produce any advantage to them in planning their representation in the case. They are only of any potential use to the Legal Services Commission. We also doubt that in many cases they achieve any positive role in the ongoing management of the case as there are frequent reports of them

being finalised retroactively (sometimes long after the case has been concluded).

The only savings they produce are simply a product of the fact that a lower hourly rate is paid for these cases. It is unclear from the proposal whether the Legal Services Commission intends to impose these lower rates on these additional cases. If so we would object strongly to an open ended, loosely defined category of cases in which the Legal Services Commission will have a unilateral power to decide that the case should be funded at a lower hourly rate. Complex cases should be subject to an uplift not a reduction in the remuneration.

4.2 Inviting Representation before Funding is granted.

Proposal:

That apart from limited exceptions the LSC will not issue a funding certificate until the opponent has had 14 days to object to the grant of representation on the grounds of merits or means. There is an exception for asylum but not for immigration.

Response:

We do not understand why immigration is not excluded as asylum is. The opponent is the same (i.e. usually the Home Secretary) and is a "sophisticated" opponent aware of the right to make representations. There are equally significant numbers of non- asylum cases which are urgent and where the chance for representations is inappropriate. There will be equally few cases where the opponent has any information about the applicant's means. There will be equally few cases (other than emergencies) where there is information relevant to the consideration of the merits that is not known to the representative before funding is granted.

The Commission should provide further information to show which categories have significant numbers of cases in which representations lead to the revocation of certificates. If there is a statistical justification for introducing additional bureaucratic steps in a category of case then this measure may be more usefully directed at those categories. We do not anticipate that this will be the case in asylum or immigration.

Again the cost savings proposed are based on gross figures for average case costs. This is surely a misleading figure to consider. The cases where funding will be denied are currently subject to the right to make representations after grant and presumably most of those are currently cancelled after grant as a result of those representations. So the saving to be made is not the average case cost but the expenditure on the certificate that takes place under the current system between the certificate being issued and cancelled. Assuming 1100 cases that saving would have to be around £730 per case to break even on the predicted administrative cost of £800,000.

4.3 Independent Funding Adjudicator Decisions and the Special Cases Unit

Proposal:

That for cases within the SCU the Independent Funding Adjudicators would not have the final word on the merits and cost/benefit of a case referred to them. (Subject to proposal 1 above).

Response:

This proposal shows a disregard for the expertise of the Independent Funding Adjudicators and for the value of independent scrutiny.

The Special Cases Unit currently has, like the representative, the opportunity to put forward their view as to the merits of a case. If they cannot persuade an Independent Funding Adjudicator of their view of the merits then funding must proceed. That is the purpose of having an independent reviewer. We do not agree that Special Cases Unit case managers are better placed to make those decisions than Independent Funding Adjudicators. The Commission selects and appoints Independent Funding Adjudicators. If there is a perceived problem with the level of expertise and experience of Independent Funding Adjudicators (which has not directly been stated) then the Legal Services Commission should be addressing that problem. Our experience is that Independent Funding Adjudicators are experienced practitioners. There are no details given of the qualifications required of a case manager, who will, by definition, not be a current practitioner.

4.4 Community Contributions

This proposal relates to community actions. We do not identify a relevance of this proposal to our members.

Part Two MOJ Proposals

(Section 5 relates only to Prison Law, on which we do not comment. Our comments on section 7 appear above)

6 Delegated Powers to Self-Grant Judicial Review Funding

Proposal:

That within the current contract the devolved power to self-grant a funding certificate in a Judicial Review should be taken away from providers. There is an alternative that the power should then be re-granted to certain providers on the basis of performance within a category of law, or that they should only be removed for particular types of proceedings. The DP would not apply to any JR case considered borderline.

Response:

We start by correcting one possibly misleading statement – that the devolved power to grant funding in immigration judicial reviews has been withdrawn. It has been withdrawn but only to be re-granted to specific providers on the basis of individual performance. Therefore many of our members still have these devolved powers and rely on them for the ability to properly represent and assist their clients, particularly in urgent situations such as removals. We should not wish the impression to be given that there are no devolved powers in immigration Judicial Reviews and that suppliers get along fine without them. They do not and would not.

Further, we note that no costs have been allowed for dealing with any additional immigration/asylum emergency applications. However, if devolved powers are not to be re-granted to individual suppliers in other categories then we doubt that the current devolved powers arrangements within immigration/asylum would be allowed to continue.

This proposal comes in the name of the Ministry of Justice and would be introduced by statutory instrument so that the Legal Services Commission can then unilaterally amend the current contract because they have been "forced to" to comply with a legislative change. We do not consider that this device to bring in this change to the Code is within the spirit of the agreement that ended the Judicial Review brought by the Law Society and others of the lawfulness of the current contract.

We raised questions about the paucity of the data quoted in support of this proposal in our letter of 11 Septmeber 2009.

We refer the Ministry of Justice to the Public Law Project (PLP) report "The Dynamics of Judicial Review" and to their paper, by Bondy and Sunkin; "The Use of Statistics in Proposing Reforms to the Public Funding of Judicial Review Litigation: a critical view" to be published in Judicial Review Quarterly in December 2009 which we understand the Public Law Project to be making available in its response to this consultation.

The consultation looks only at those cases which have proceeded to and been granted permission as being meritorious claims. That is fallacious.

Our members are well aware that, of their cases that end before a decision on permission, the vast majority do so because they are strong cases and are therefore conceded by the defendant. In 2007 (the latest Administrative Court figures presented in the consultation documents) 2574 cases out of 6690 (in all categories) did not proceed to a decision on the papers. That is consistent with the Public Law Project research. Many of those will be concessions of the substantive case by the defendant with positive benefits for the claimant. More will be cases where the main purpose of the issue of proceedings was to obtain interim relief (such as homelessness interim accommodation Judicial Reviews). In immigration/asylum particularly some will be Judicial Reviews lodged (to protect the client's position) and then stayed whilst a test case proceeds through the Courts (perhaps to the Supreme Court or to the

European Court of Human Rights) and where the issues have finally been resolved in the test case perhaps months or years after the proceedings started. Some will have been withdrawn by the Claimant because the merits in continuing are insufficient. Of those some will be because the situation has developed so that a claim which was meritorious at the start no longer is. However, these are all lumped together as being "unmeritorious".

There are no figures for the proportion of this section that were unmeritorious at the outset and no figures for the proportions within publically funded cases. Some figures should be available to the Legal Services Commission through their case outcome data but none has been provided.

Based on the experience of our members and comments from other representative groups we think it is clear that cases which are unmeritorious from the outset are likely to be a very small percentage of the funded cases started.

We also note that as the future Contract terms have been consulted on only with the Law Society, Legal Aid Practitioners' Group and Advice Services Alliance, we have no information about those proposals and no previous opportunity to comment on them.

ILPA would be strongly opposed to the withdrawal of devolved powers in circumstances where there would be no re-granting of them to trusted suppliers. The removal of devolved powers is a major impediment to suppliers being able to represent clients in emergency situations particularly removals. The Home Secretary has policies in place that removal may take place at 72 hours notice or, in some cases, no notice to the individual or their representatives. There is also a requirement for full grounds to be submitted. A holding application will not suffice. The time involved in applying to the Legal Services Commission and awaiting a decision before any steps could be taken and then the possibility of having to appeal to an IFA could be crucial to the chances of making a successful application at least for an injunction. It would also mean more individuals would go unrepresented as more suppliers would take the view that, with that additional burden, they could not take on a case in the time available.

We are concerned that, at a time when the Legal Services Commission is being required to make significant savings in its administrative budgets, the time taken to obtain a decision from the Legal Services Commission will be unacceptable. We find the suggestion in the impact assessment that the additional workload can be absorbed within existing resources to be remarkably complacent. There is no recognition that emergency applications have to be dealt with urgently and that means that they each may take up more time than non-emergency applications. If there are delays then there will be an exponential increase in the chasing phone calls from representatives, and in the demands to re-prioritise and for complaints about delays to be handled. The Legal Services Commission does not work in a vacuum and its resources, if stretched, can quickly become overwhelmed.

The step runs counter to the general policy of the Legal Services Commission that its administrative costs should be reduced by increasing the delegation of decision making to suppliers.

ILPA has no wish to see unmeritorious Judicial Review claims being brought and funded by the LSC. Whilst in theory we would support a proposal that those suppliers who cannot demonstrate an adequate ability to assess the merits of a claim should not have devolved powers, we have significant concerns about the quality of the information and understanding of that information on which the Legal Services Commission might take such decisions.

There must be recognition in any assessment of suppliers in this regard, of the circumstances in which emergency funding certificates can be issued and the impact that has on outcomes. The Secretary of State for the Home Department (SSHD) seeks to detain and remove failed asylum seekers and others without lawful stay, at short notice. In those cases if a new representative has just been instructed an injunction may need to be sought so that a prima facie claim can be properly investigated. Those are the circumstances in which the availability of devolved powers is particularly important to enable a proper consideration of whether a breach of the Refugee or Human Rights Conventions will result from a removal. Those circumstances where suppliers are forced into a grant of funding to meet the SSHD's timetable could wrongly skew the success rate of a supplier.

Equally there should be no minimum number of cases that the supplier must do in order to have their competence assessed. Small providers may, through skilled and effective work on their cases, not often need to resort to issuing proceedings to achieve results for their particular caseloads.

Whatever criteria are used to re-grant devolved powers these must include the possibility that a supplier can put forward explanations to inform consideration of the raw data on their success rates. Rigid numerical assessment of "performance" is likely to lead to unintended, adverse consequences, as experience of immigration and asylum appeal success rate Key Performance Indicators has shown.

IMPACT ASSESSMENT

We have made frequent comment above about the inadequacy of the impact assessment and the statistical information underlying the proposals in this document. We find it surprising that such poor evidence has been made available and that the Minister has been advised to sign the assessment in the circumstances.

We have no specific further comments to make on the Equality Impact Assessment but given our comments above we do not consider any part of the assessment to be reliable.

Alasdair Mackenzie

Acting Chair
ILPA
8 October 2009