RESPONSE BY THE ADVICE SERVICES ALLIANCE TO THE LETTER FROM THE MINISTRY OF JUSTICE CONCERNING THE PROCESS FOR OBTAINING EXCLUDED CASES FUNDING

1. About ASA

ASA is the umbrella body for independent advice networks in the UK.

Full membership of ASA is open to national networks of independent advice services.

Our current full members are:

- AdviceUK
- Age UK
- Citizens Advice
- DIAL UK (part of Scope)
- Law Centres Federation
- Shelter
- Shelter Cymru
- Youth Access

Our members represent some 1,700 organisations In England and Wales which provide a range of advice and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law'). Approximately 275 of these organisations have legal aid contracts in one or more of these categories of law, all but one of which are affected by the proposals to reduce the scope of legal aid which are currently before Parliament.

We have sought the views of those of our members whose members have most experience in advising and representing clients under legal aid.

2. Introduction

The Ministry's letter of March 2012 and the accompanying Equality Impact Assessment (EIA) set out the proposed process for handling applications for excluded cases funding (ECF) together with an assessment of the potential impact of this process. We will consider these in turn.

3. How the process will work

The letter and the EIA propose that payment for the cost of making an ECF application will be made only if the application is successful.

The letter states that, when a caller does not qualify for legal aid the telephone helpline will, as now, signpost them to other potential sources of assistance. In particular, where a caller's case is out of scope the operator will advise them of the existence of ECF and that if they

want advice about whether ECF might be of help in their case they should contact a legal adviser.

The letter and EIA propose that the only remedies for someone dissatisfied by a decision on their application will be internal review (by a different person within the agency) or judicial review.

The letter and the EIA also make a number of assumptions

- That there will be approximately 6,500 applications for Legal Representation, the large majority of which will be in private family cases, and some applications for Legal Help.
- That all ECF applications will continue to be made through a solicitor or other legal adviser
- That setting out why the case meets the ECF criteria "should take no more than one or two hours at most"
- That, in some borderline cases, legal aid providers may not act on behalf of potential clients unless they agree to make a payment to the solicitor to cover the cost of preparing the ECF application
- That this potential cost would reduce over time as legal aid providers become better at identifying which cases are likely to be granted ECF.

These proposals and assumptions raise a number of questions.

As far as the number of applications is concerned, the Impact Assessment on the Legal Aid Reform Proposals suggested that, based on 2009/10 figures, the number of cases that would no longer be eligible for legal aid would be

- 210,000 family legal help cases
- 385,000 other civil legal help cases (including 135,000 in welfare benefits, 105,000 in debt, 53,000 in immigration, 52,000 in housing and 24,000 in employment)
- 45,000 family legal representation cases
- 5,000 other civil legal representation cases
- Totalling 645,000 cases altogether.[1]

The anticipated number of 6,500 applications represents just 1% of the cases that are predicted to be excluded from scope. The figure seems to us to be low. What is clear however is that the 45,000 family legal representation cases represent only 7% of the total 645,000 cases that are expected to be excluded. We do not see how it can therefore be assumed that the "large majority" of ECF applications will be for legal representation in family cases.

[1] Cumulative Legal Aid Reform Proposals Impact Assessment 21 June 2011 pp.20-21

This is particularly so given the statement made in relation to the telephone helpline. This suggests that anyone calling Community Legal Advice (or its replacement) seeking help in relation to private family, welfare benefits, non-housing debt, immigration and employment matters will (a) be signposted to other potential sources of assistance and (b) advised of the existence of ECF and that they should contact a legal adviser if they want advice about whether ECF might be of help in their case.

This assumes that legal advisers who are specialists in the relevant category of law will be available. This is likely to vary between categories of law, depending on the extent to which each category is affected by scope cuts and the availability of alternative sources of funding for such work. The number of specialist welfare benefits advisers, for example, will be dramatically reduced if welfare benefits is wholly or significantly removed from scope.

Applications will also take significant amounts of time. The letter points out that "any application will also need to satisfy the relevant means and merits tests, as now." It may take one or two hours to explain why the case qualifies for ECF, but that is only part of the application. The provider will have to take fairly full instructions about the case to see if the sufficient benefit test is met, and will have to check if the client is financially eligible.

There is a serious risk that a large demand for such advice will be created, which providers will not be able, and cannot be expected to meet. It will be simply uneconomic for organisations with contracts to run unfunded triage services to establish whether clients are potentially eligible for ECF.

We consider it likely that providers will be extremely wary of providing such advice save to their own existing clients, or in exceptional cases.

It is likely that providers will be prepared to make only a small number of ECF applications on the basis that they will only be paid if they are successful. Some providers may be prepared to make applications if the client pays for the work if the application is unsuccessful. However, we doubt if such an arrangement would be limited to "some borderline cases". Why should providers take the risk? It is possible that payment by the client (refundable if the application is successful) could become quite a widespread arrangement.

Where clients are unable to find a provider willing to make an application for them (with or without payment) they should be able to make the application themselves.

As the letter points out, the criteria which the Director will use to decide whether or not to grant funding will be published as guidance.

"In considering whether legal aid should be provided in an individual case engaging Article 6, the Director would need to take into account, for example, the importance of the issues to the individual concerned and the nature of the rights at stake; the complexity of the case; the capacity of the individual to represent themselves effectively; and alternative means of securing access to justice. Any application will also need to satisfy the relevant means and merits tests, as now."

In order to help people to make applications themselves, the Ministry should prepare an application form, based on their guidance, inviting applicants to state the merits of their case, their means, and the criteria from the guidance upon which they rely. The criteria listed above could, for example, be converted into separate questions on the form, asking applicants to state whether, and if so, how, they think that they apply in their case.

Callers to the telephone helpline could also be advised that they can make an application for ECF themselves, and could be directed to the form, which could be placed on the MoJ website, or have it posted to them if they prefer.

Inevitably however, good cases will fall through the net. It will be harder for applicants to make the case for ECF on their own. It is extremely likely that some people with protected characteristics, whose cases would qualify for ECF, will not be able to obtain the legal advice needed to unlock ECF.

An indication of the possible extent of the problem is provided by the Asylum Appellate Project conducted at Devon Law Centre between 2007 and 2010.[2]

The Project saw asylum seekers living in Devon and Cornwall who had been refused Controlled Legal Representation by their legal representatives.[3] Clients were interviewed for between one and three hours in order to discuss the reasons they were refused asylum. On the basis of their answers, the Project then challenged the refusal of Controlled Legal Representation. Challenges were submitted irrespective of merit.

The Project received a total of 75 eligible referrals. Of the 75 appeals to the Independent Funding Adjudicator, 59 (79%) were allowed.

The final report comments that

"The project's findings demonstrate that asylum seekers need the assistance of a lawyer to be able to effectively challenge any refusal of Controlled Legal Representation. Compared to the 79% success rate the project's clients obtained, the average success rate for such appeals is only 30%"

Finally, as far as the process is concerned, the lack of an independent review of decision-making is a serious concern. While it may not be appropriate for a tribunal system to be set up for a relatively small number of appeals, there should be an independent committee system, which is a well established approach to appeals in legal aid. The Ministry appears sanguine that clients would have to judicially review the Ministry to get a decision reviewed. This appears to run counter to government policy to resolve disputes outside the Court system. Clearly any dispute over refusal to grant legal aid could be dealt with far more cheaply and efficiently through a committee system. It is important for decisions to be seen to be impartial and non discriminatory. It is difficult to see how the Ministry can discharge its

[2] http://www.lawcentres.org.uk/news/detail/almost-80-per-cent-of-asylum-seekers-wrongly-refused-legal-representation-a/

[3] In practice, this meant that almost all referrals came from within Plymouth reflecting the local concentration of asylum seekers in Devon and Cornwall.

obligations under the Equality Act effectively without some mechanism to allow independent scrutiny.

The impact on people with protected characteristics

The letter and EIA

- note that clients sharing certain protected characteristics may be more likely than the general population to use the ECF process
- identify the potential for differential impacts on clients sharing the protected characteristics of age, disability, race and sex
- state that there is a risk in making clients bear the expense of unsuccessful applications in that disabled clients or those with mental health issues, learning difficulties or need of translators might require more work at the application stage and thus incur a bigger unrecovered expense.

It seems to us that these findings are an inevitable result of combining the scope cuts with the proposal that the costs of an ECF application will only be met if the application is successful.

It is clear that people with protected characteristics are differentially affected by the proposed scope changes. Notably:

- Women are more affected than men because they are over represented as clients in family and housing cases in particular[4]
- BAME clients are more affected than white clients because they are over represented as clients in immigration, housing and welfare benefits cases in particular[5]
- Disabled clients are more affected because they are over represented as clients in welfare benefits, housing and debt cases in particular[6]

Such clients are therefore extremely likely to be over represented amongst those who are affected by the scope cuts and who are likely to want to apply for ECF.

The Ministry seeks to justify the payment proposal by relying on three arguments

- That the proposal is in line with the position for the minority of existing exceptional funding cases where all levels of service are out of scope
- That paying for all ECF applications whether successful or not would encourage applications as a matter of routine, incurring costs which would ultimately be of no benefit to clients
- That providers will be expected as part of their contractual obligations to make reasonable adjustments for their clients, as well as complying with the freestanding legal duties that they themselves have as a service provider under section 29 of the Equality Act 2010.

We do not find these arguments to be very convincing.

[4] See Table 1 of Annex A to the EIA
[5] See Table 2 of Annex A to the EIA

The first argument suggests that a provision that applies when there are only 200 applications a year should be equally applicable if there are 6,500 or more. The situations are quite different. Providers making applications at the moment are accepting only a small risk, given the numbers involved. Under the position that is proposed the risk could be significant.

The second argument has some validity, but has to be weighed against the differential impact that will otherwise be caused. It may also be a danger that would reduce over time as legal aid providers become better at identifying which cases are likely to be granted ECF.

We are not convinced by the third argument. Providers do not have a professional duty towards someone whom they reject as a client. With regard to their obligations under the Equality Act 2010, providers could probably argue that their own indirect discrimination could be objectively justified given that the indirectly discriminatory application process creates a risk that they will not be paid for their work.

In our view the Ministry will have to reconsider its position and consider alternatives to its current proposal. These might include

- Paying providers for all ECF applications
- Paying providers for all ECF applications for an initial period, while the new system beds in, enabling providers to become better at identifying which cases are likely to be granted ECF.
- Paying providers for a percentage of the unsuccessful applications they make in a given period.
- Paying providers for all ECF applications for disabled clients or those with mental health issues, learning difficulties or need of translators.
- Some combination of the above.

Advice Services Alliance

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[6] See Table 3 of Annex A to the EIA