



Proposals for the Reform of Legal Aid in England and Wales

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- i. CPAG is the leading charity campaigning for the abolition of poverty among children and young people in the UK and for the improvement of the lives of low income families. CPAG aims to: raise awareness of the causes, extent, nature and impact of poverty and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty; and enable those eligible for income maintenance to have access to their full entitlement. We are a national organisation. We have an office in Glasgow which serves Scotland.
- ii. In line with our charitable aims, we produce publications, undertake training and second tier advice work, and carry out test case work in social security law. We also undertake policy work and we campaign in this field. CPAG currently has a legal aid contract in public law, and a contract to provide specialist support services. Our work has already been badly affected by reforms introduced by the last government; we previously had a solicitor's civil legal aid contract, but as a national organisation specialising in social security matters, we were unable to meet the criteria for a contract in social welfare law.
- iii. CPAG produces the leading publication on welfare rights; the *Welfare Benefits and Tax Credits Handbook*, which is updated annually, and is used as the standard text on social security by Citizens' Advice Bureaux, Law Centres and solicitors. The book is also used by local authorities and by the Department for Work and Pensions and HMRC. We also edit the *Social Security Legislation Volumes I-IV* and we produce the *Housing Benefit and Council Tax Benefit Legislation*, which again are standard texts on social security. We produce other associated rights-based publications. We are also one of the foremost providers of training in social security. Lord Bingham described CPAG as:

“.. a key player in making complex and impenetrable social security law work for children and families..”

Test case work

- iv. CPAG pioneered the strategic use of test cases in the UK, and has been undertaking work in this field since the 1970s. We have found this to be an effective means of promoting social justice through the courts. Low income has been shown to be one of the major indicators for a child's life chances. By helping to get better interpretations of the law relating to social security for claimants, and drawing attention to policy issues facing those in poverty, our test cases promote CPAG's aims of bringing about positive income changes for children in poverty and enabling those eligible for income maintenance to have access to their full entitlement. We would argue that this assists the government in meeting its statutory commitment to end child poverty.
- v. CPAG brought the leading case on the standing of organisations to bring cases on behalf of groups of claimants; *R v Secretary of State for Social Services ex p Child Poverty Action Group [1989] 1 AER 1047*, and we also brought the first case on the court's ability to grant protective costs orders in

public interest cases *R v Lord Chancellor ex parte CPAG* [1999] 1 W.L.R. 347, which remains an important authority. CPAG has brought some of the leading cases on social security law, including:

- vi. *Mallinson v Secretary of State for Social Security* (1994) 1 WLR 630 (HL)
This case concerned the entitlement of a blind person to disability living allowance, and it remains one of the main authorities on the interpretation of the statutory test for entitlement to this benefit generally.
- vii. *Howker* [2003] ICR 405 (CA): The court held that if the government misleads a statutory advisory body on social security regulations, the regulations then made are unlawful. This case was described by Michael Fordham as one of the top 20 cases of 2002, and illustrated “the logic of a meaningful principle of procedural ultra vires”:[2003] JR
- viii. *T and S v Secretary of State for Health and Secretary of State for the Home Department* (2002): This case was about whether failure to provide HIV positive asylum seeker mothers with milk tokens infringed the human rights of the mother and her baby. Breastfeeding risked transmitting the virus to the baby, and the only means of support to the mother was NASS payable at 70% of income support, in itself a subsistence benefit. This case, backed by a campaign by CPAG together with partner organisations and Neil Gerrard MP, produced a change in Home Office policy so as to include an additional payment to asylum seeker parents of children under 3.
- ix. *Hinchy* [2005] UKHL 16; [2005] 1 WLR 967: meaning of “failure to disclose” in test for whether an overpayment of a social security benefit may be recovered by the Secretary of State.
- x. *R(DLA)3/06* A tribunal of social security commissioners considered whether it was necessary for the claimant to have a recognised or diagnosed medical condition in order to claim DLA, and also set down guidelines on when, if ever, a child should be called to give evidence before an appeal tribunal.
- xi. *RJM* [2008] UK HL 63 - whether failure to pay the disability premium in income support to disabled claimants who were homeless was compatible with their rights under Articles 1P and 14 ECHR
- xii. *R(CPAG) v Secretary of State for Work and Pensions* - this case concerned about whether the DWP has the power to recover an overpayment under the common law in addition to their powers under section 71 Social Security Administration Act 1992. The DWP wrote to over 65,000 claimants between March 2006 and February 2007 asking them to repay overpayments. The letters accepted that the overpayment was not recoverable under social security law, but notes accompanying the letter said it could be recovered from the claimant through the courts under common law. The DWP continued to write similar letters until they gave an undertaking to discontinue this practice on 10th March 2008. CPAG challenged the lawfulness of this practice by judicial review, arguing that s 71 SSAA was a complete statutory code which did not allow room for recovery at common law. This argument succeeded before the Supreme Court in December 2010.

- xiii. *Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358

This case clarified the meaning of “dependent family member” for the purposes of Articles 2 and 3 Directive 2004/38/EC and established that dependency need not arise in the EU member state of origin.

- xiv. *Secretary of State for Work and Pensions v Lassal* [2009] EWCA

CPAG intervened in this case which was referred to the ECJ by the Court of Appeal. The ECJ held that an EU national who has resided in the UK “lawfully” for a continuous period of 5 years prior to 30/4/06 has a permanent right of residence in the UK provided they have not subsequently left the UK for a continuous period of 2 years.

- xv. *JS v Secretary of State for Work and Pensions*

The issue in this case is whether a woman who becomes temporarily unable to work due to pregnancy and childbirth and has no continuing employment rights has a right of residence in the UK. The appeal was dismissed by the Upper Tribunal. The case is now going to the Court of Appeal. We are waiting for a hearing date.

Welfare Rights Advice and Poverty

- xvi. CPAG therefore views advice on welfare rights and other areas of social welfare law as central to the government’s anti-poverty strategies, as well as to enabling people to uphold their rights as citizens. Consequently, whilst we welcome the opportunity to respond to this consultation, we are deeply concerned in particular by the government’s proposals to remove social security and other areas of social welfare law from the scope of legal aid. This comes on top of cuts to civil legal aid by the previous government of 24%.

- xvii. We believe that these reforms will have a negative impact on child poverty by reducing access to welfare rights and social welfare advice, and that this in its turn will have consequences elsewhere in government. We also believe that the costs of dealing with the consequences of cuts in legal aid are likely to outweigh any “savings” the government believes it is making. The Work and Pensions Select Committee inquiry into child poverty in the UK recommended that:

“A key feature of the national strategy should include poverty proofing of all department policies across Whitehall and the devolved administrations.”¹

- xviii. ***We recommend that the Ministry of Justice needs to test the impact these proposals will have on child poverty and ensure that any reforms are poverty-proofed.***

¹ Work and Pensions Committee, Child Poverty in the UK, 2004 HC 85-1 para 290

We respond in more detail below. We will respond only to those questions in the consultation in which we have relevant expertise.

1. **Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family scheme? Please give reasons.**
 - 1.1 We have no objections to keeping existing areas of law within the scope of the legal aid scheme, we are concerned about the areas which the proposals would exclude. We do not believe any of the types of case the government proposes to retain within scope should be “traded off” for any that the proposals seek to remove.
2. **Omitted**
3. **Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.**
 - 3.1 We do not agree with the proposals to exclude any areas of social welfare or family law from the scope of civil and family legal aid. Our response centres on welfare benefits or social security as this is our area of expertise.
 - 3.2 In its consultation paper; “Proposals for the Reform of Legal Aid”, the Ministry of Justice proposes to save £22 million by removing welfare benefits matters from the scope of legal aid funding. Social security is the largest subject area being removed from scope after family, with 113,000 cases (08/09) that will no longer be funded.
 - 3.3 It should be stressed at the outset that social security represents a safety net designed to provide some protection from poverty. Benefit levels in the UK already fall well below the poverty line. Timely advice on benefit entitlement can prevent claimants from falling into destitution and homelessness. The importance of prompt, good quality welfare rights advice in the lives of those living in poverty cannot be over-emphasised.
 - 3.4 Examples of cases we have had from welfare rights advisers calling us for specialist support on our advice line include:
 - A French national with a two and a half year old child, who had recently had a second baby by caesarean. She had separated from her British partner because of domestic violence. Her new baby had died and she was suffering from severe depression. She needed urgent advice on her entitlement to benefits. This was complex because it involved EU law and the right to reside test.

- A wife who had separated from her husband and kept custody of her two children, with her husband having contact with one of them. The husband had claimed and been awarded child benefit and child tax credit for the second child, and HMRC had awarded these to him without contacting the wife. The wife needed advice on her rights to challenge HMRC's decision. This involved complex rules on child benefit and child tax credit priorities.
 - The entitlement of a pensioner couple in receipt of state retirement pension to the severe disability amount where one was in receipt of carers' allowance for the other. This involved advice about the overlapping benefit rules, the rules on the severe disability amount where the claimant is cared for by someone receiving carers' allowance, and on whether it is possible to withdraw a claim for benefit, all difficult legal issues.
- 3.5 These are problems that are difficult for experienced advisers to deal with, let alone for social security claimants to try to manage on their own.
- 3.6 The social security legislation is an immensely complex and fast moving area of law. In 2010 alone there were 50 new statutory instruments in social security, housing benefit and tax credits combined, not to mention the extensive guidance which is produced by the DWP for its own purposes and for local authorities, and by HMRC in respect of tax credits.
- 3.7 The government proposes to simplify the benefit system by introducing a Universal Credit. There is scope for simplification, by combining the rules for what are currently separate benefits. However, large areas of complexity are likely to remain, rules on entitlement, claims and payments, backdating, overpayments, limitations on rights for EU nationals and persons subject to immigration control, non dependents in housing costs, treatment of childcare costs, disability conditions, labour market conditions, and sanctions to name just a few.
- 3.8 To take just one example, the right to reside test, introduced in 2004, has generated substantial litigation involving complex points of EU law, that unrepresented claimants could not hope to navigate. The complexity of the law in this area means that decisions taken by the DWP are often very poor, and have to be challenged by appeal.
- 3.9 Further, every new social security scheme generates administrative upheaval and additional complexity in the rules for a transitional period. There have been serious IT problems associated with the introduction of large new schemes. The introduction of Pension Credit and Tax Credits both were accompanied by delays, upheaval and administrative chaos, resulting in hardship for claimants and the need for advice services to take up their cases. These proposals to remove welfare benefits from the scope of legal aid are timed to coincide with what are potentially the most significant

changes to the social security system since the welfare state was created; just at the point when they most need advice, claimants are being deprived of it.

- 3.10 In addition, other major changes are being made to the benefit system, which are likely to result in more disruption; housing benefit is being reformed so as to “save” £2 billion. The Mayor of London estimates that households containing 20,000 children are likely to have to move house within London alone as a result of these changes. Mortgage interest relief is now ending after 2 years on jobseekers allowance, which is also likely to result in homelessness. Claimants affected by these changes will need advice on their options, on whether decisions are being correctly made in their cases, and on whether these decisions can be challenged.
- 3.11 The social security system has been developed over many years, with decisions from the Social Security Commissioners and now the Upper Tribunals clarifying and refining the meaning of legislation. The Department for Work and Pensions and Local Authorities as well as claimants, have been heavily reliant on test cases as a means of interpreting complex provisions.
- 3.12 The suggestion that alternative funding is available for social security advice is hopelessly unrealistic; local authorities are the biggest alternative source of funding and since their own funding is being cut, they in turn are cutting funding for welfare rights services.
- 3.13 The suggestion has been made in the consultation document that voluntary sector organisations, like CPAG could step in to fill the gap. This is simply not the case, the voluntary sector does not have the resources to fill this gap and is set to further contract over the next few years. We have written to the minister jointly with Disability Alliance, Age UK and the Free Representation Unit and a copy of our joint letter is appended to this response. Moreover, CPAG does not advise members of the public directly, nor do we think our limited resources are best used in this way. We take on a small number of test cases and otherwise provide second tier advice to advisers.
- 3.14 The government needs to clearly understand that there is no alternative source of funding for welfare rights services; if legal aid is cut, law centres, CABx and advice centres will shut down, local authorities’ welfare rights units will go. Claimants will have nowhere to go for advice. They are likely to fill the waiting rooms of their local MPs’ surgeries.
- 3.15 The government needs to do more to address standards of decision making by the DWP. The National Audit Office has raised concerns about high levels

of error in benefit decision making, as has the Work and Pensions Select Committee².

Why is welfare rights advice important in fighting child poverty?

- 3.16 Welfare benefits provide a lifeline to those in poverty, who can be some of the most vulnerable people in our society, including families affected by disability:

“Getting the higher rate of DLA made all the difference. We really would be on the breadline without it. If we were just on income support, we would not be coping at all.”³

- 3.17 But there are many barriers to successfully claiming benefits, including the complexity of the benefit system, poor decision making, and lack of awareness of entitlements. Legal advice fights poverty by helping people maximise their incomes through claiming the right benefits and challenging wrong decisions. A report commissioned by the National Association of Welfare Rights Advisers concluded that:

“Welfare rights advice services continue to play a key role in improving take-up and delivering significant extra resources to low-income households. The findings of the numerous studies discussed in the report are clear that the extra resources raised, even when these are relatively small, can have a sustained positive impact on individual’s experience of hardship and social exclusion. The studies point to extra resources leading to increased spending on; fuel, educational and recreational goods and services and transport – all critical to reducing household likelihood of falling into poverty and social exclusion.”⁴

- 3.18 The government’s own impact assessment makes clear that these reforms will have most impact on the poorest:

“Legal aid recipients are amongst the most disadvantaged in society, reflecting both the nature of the problems they face as well as the eligibility rules for legal aid”; 97% of legal aid recipients in 2008-9 were in the bottom two income quintiles, with almost 80% in the bottom quintile⁵.

² Getting it right, putting it right, improving decision making and appeals in social security benefits, National Audit Office (2003), Minimising the cost of administrative errors in the benefit system. National Audit Office (2010), Decision making and appeals in the benefits system, House of Commons Work and Pensions Select Committee 2010.

³ Claimant quoted in Preston; “Out of Reach; Benefits for Disabled Children” CPAG 2006

⁴ Talbot and Wiggan; “The Benefits of Welfare Rights Advice: A Review of the Literature, April 2006

⁵ See Legal Aid Reform: Financial Eligibility, Impact Assessment paragraphs 36-39

- 3.19 The proposals will deepen child poverty as families on benefit are already below the poverty line.

Value for money

- 3.20 Legal advice saves public money; the report quoted above goes on to point out that “the problems people experience involve costs not only to themselves, but also to public services and to society as a whole. Early and effective advice services help mitigate these costs.”⁶ Citizens Advice estimates that £8.80 is saved for every £1 spent on advice on legal aid⁷.
- 3.21 Bringing strategic test cases which benefit wider groups of people than the individual claimant is also a cost effective means of challenging systemic problems. This relies on the availability of legal aid.
- 3.22 Lack of access to advice on benefit entitlement at an early stage will inevitably increase poverty, debt, and homelessness where housing costs are involved. The government accepts in its Equalities Impact Assessment that the proposals are likely to impact disproportionately on female, BAME and ill and disabled clients⁸. These are also households where children are most at risk of poverty. In our view it is clear that the proposed cuts will hit the poorest and most vulnerable households. They will inevitably increase child poverty, and put at risk the governments’ ability to meet the targets in the Child Poverty Act.
- 3.23 We would argue that money spent on timely advice is money well spent, because it saves the future costs of dealing with the effects of poverty, which are estimated to be £25 billion per year according to research by the Joseph Rowntree Foundation. The DWP’s impact assessment on the Cumulative Legal Aid Reform Proposals accepts that: “resource gains might be more than outweighed by the total economic costs”⁹ and also foresees the possibility of “reduced social cohesion” and “Increased criminality” if disputes cannot be resolved by legal means.¹⁰
- 3.24 When viewed in this light, we would argue that these cuts will not result in any real savings at all.

⁶ Ibid p 13

⁷ Towards a business case for legal aid; Citizens Advice July 2010

⁸ See paragraph 7.13 Legal Aid Reform: Scope Changes; Equalities Impact Assessment

⁹ Paragraph 9

¹⁰ Paragraph 27(ii)

The citizen and the state

- 3.25 CPAG has recently succeeded in a test case in which the Supreme Court held that over 65,000 letters sent by the Department for Work and Pensions threatening to recover official error overpayments through the courts is unlawful.¹¹ Claimants in some of these cases were able to access advice services to help them to get these overpayments written off. There are many other examples of errors made by large government departments, such as the IT problems when tax credits were introduced, or changes in the benefit system, which have resulted in the need for advice services, such as the introduction of Employment and Support Allowance, following which social security appeals have risen from 250,000 to 500,000.
- 3.26 These proposals mean that in future claimants will not be able to access advice services when the state makes serious errors of this kind, or when complex and difficult new rules are introduced. These reforms mean that in future vulnerable social security claimants will be unrepresented in disputes against large government departments which have effectively unlimited access to legal services. This represents a gross inequality of arms, and a grave injustice for social security claimants.
- 3.27 In the context of public law which is protected from cuts, the consultation paper rightly recognises that:
- “In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means to which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.”*
- 3.28 But the government fails to recognise social security law also involves disputes between the citizen and the state. Taking this and other areas of social welfare law out of scope rolls back the hard won advances made in gaining rights for claimants to challenge public authorities through test case and other litigation by CPAG, PLP, Liberty, Shelter, law centres and solicitors since the 1970s.
- 3.29 Inexcusably, the proposals also characterise the issues involved in welfare benefits as “generally not of sufficiently high importance to warrant funding”. It is difficult to think of an issue which is of more importance to an individual than his or her means of subsistence. We hope we have demonstrated that test cases on social security will also have a wider significance than for the individual claimant concerned.

¹¹ The Child Poverty Action Group v Secretary of State for Work and Pensions [2010] UKSC 54. This case was brought in CPAG’s own name and was not funded by legal aid. This is another aspect of the scheme that is unfair, only individuals can get legal aid; organisations litigating on behalf of claimants cannot.

Funding in the Higher Courts

- 3.30 It is already a matter of concern that legal aid is not available for cases before social security tribunals, and in particular the Upper Tribunal, which is at the same level as the High Court. It has always been CPAG's view that legal aid for Upper Tribunal and First tier Tribunal cases should be within the scope of the legal aid scheme and therefore funded as of right.
- 3.31 Legal aid will no longer be available for welfare benefits cases in the Court of Appeal, the Supreme Court and the European Court of Justice¹². Highly complex issues can arise in these cases, including points of European law. Claimants will again be placed at a serious disadvantage in adversarial proceedings against the state. Only a tiny number of cases are affected, with a cost so low as to be estimated as negligible¹³ begging the question why this cut should be made. In the future, social security claimants who find themselves faced with an incorrect Upper Tribunal decision, or on the receiving end of an appeal by the DWP, HMRC or a local authority, could be facing the courts and the costs risks on their own or not at all.
- 3.32 This also means that the big social security test cases which reached the higher courts by way of the appeals process, such as *Zalewska* on the lawfulness of the Workers' Registration Scheme, *Hinchy* on the interpretation of the overpayment recovery test, *Pedro*, on the meaning of "family member in EU law", and *Mallinson*, the leading authority on the interpretation of the law on disability living allowance, will not be funded in future.
- 3.33 In view of the complexity of the relevant law and procedure, the importance of what is at stake for the claimant and others, and the fact that many social security claimants are vulnerable and may be disabled or may not have English as a first language, and therefore are particularly disadvantaged in presenting their cases, it seems that a lack of legal aid could breach the rights of claimants under Article 6 ECHR¹⁴.
- 3.34 The discretionary public funding scheme is also to be cut back to the point where it is unlikely to cover social security cases in future, so claimants will not be able to access this funding either. Welfare benefit claimants, some of the most vulnerable people in the country, will be deprived of any effective access to justice.

¹² Proposals for the reform of Legal Aid in England and Wales para 4.144

¹³ 10 cases were funded by legal aid in 2008/9 – see Legal Aid Reform: Scope Changes p 16

¹⁴ See *Steel and Morris v the UK* Application no. 68416/01 paragraph 61

3.35 There is an assumption in the proposals that legal aid “has encouraged people to bring their problems before the courts too readily”¹⁵, but this fails to recognise that timely advice can prevent unnecessary litigation.

3.36 We recommend that welfare benefits cases should remain within scope for legal aid at least to the level that is currently provided. We submit that legal aid must remain available for cases in the higher courts, to avoid breaching claimants’ article 6 rights. We further recommend that exceptional public funding should remain available to fund representation for social security cases in the Upper and First-tier Tribunals where appropriate.

4. Do you agree with the proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

4.1 If the government decides to take areas of law out of the scope of legal aid, then we would urge that the effects of this be mitigated by providing discretionary legal aid in a broader, rather than a narrower range of cases. At present, exceptional funding is available under s 6(8) Access to Justice Act 1999 for public interest cases.

4.2 CPAG has been successful in obtaining funding under this provision for cases involving human rights issues or complex areas of law in the Upper Tribunal on the basis that it was in the public interest for these to be clarified. We think it unlikely these types of cases will pass the new test for this type of funding. It will be important when the universal credit is introduced, that cases are brought before the Upper Tribunal to clarify the new rules. Claimants will need to be represented to ensure that these issues are fairly heard.

4.3 We recommend that the scope of discretionary scheme should continue to include public interest test cases.

5. Omitted

6. We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.

¹⁵ Proposals for the Reform of Legal Aid in England and Wales para 2.7

- 6.1 Claimants who appeal to the Upper Tribunal in a costs-free jurisdiction in social security matters sometimes find themselves the Respondents in an appeal by the DWP, local authority or HMRC to the Court of Appeal. In the Upper Tribunal there is no risk of costs being awarded against an unsuccessful social security claimant. In the Court of Appeal and Supreme Court there is a risk of costs being awarded against a claimant if they lose their case.
- 6.2 Under the government's current proposals these claimants will have no-one to represent them, and no costs protection. We doubt the courts will be happy to deal with complex social security matters in which one of the parties is at such a severe and obvious disadvantage. We think that it will be essential for the courts to appoint an amicus, which will carry its own costs. This will also be unsatisfactory because an amicus is unlikely to have the degree of specialist expertise a representative would have.
- 6.3 In addition, claimants who lose at the Upper Tribunal will have no further redress, no matter how important the issue, or how obviously incorrect the decision. This would render the right of appeal to the Court of Appeal otiose. We submit that taking legal aid out of scope in these circumstances would not comply with Article 6 ECHR.

The CLA Telephone Helpline

7. **Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.**
- 7.1 CPAG does not believe there should be a single gateway to advice services through the CLA. Clients need to be able to access face to face advice services directly. Vulnerable benefit claimants may build up relationships with advisers whom they trust.
- 7.2 Further, as a result of these proposals, many frontline advice services are under threat, but those remaining, will still be providing telephone advice services themselves, and will need to make their own local referrals where appropriate. It is possible that a single gateway telephone advice service could confuse claimants used to accessing advice directly, or could duplicate advice services that already exist.
- 7.3 As the impact assessment recognises¹⁶, some client groups may find it difficult to use telephone based advice services. There will be some claimants

¹⁶ Proposals for the Reform of Legal Aid in England and Wales; Provision of telephone advice; Equalities Impact Assessment paragraph 1.47

who cannot access telephone advice services, such as those with mental health problems who cannot make use of telephones, or claimants who are deaf, who will need direct access to advice services.

8. Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.

8.1 Whilst we welcome telephone advice services as a useful supplement to face to face advice services, and we recognise that they can be of benefit to some particular groups, such as those with mobility problems, who find it difficult to access advice services, we do not think that they are an adequate replacement.

8.2 It is clear from the consultation paper that the proposals would effectively mean that all welfare benefits advice would be delivered via the telephone. It seems that cost is the major reason behind limiting services in this way, on the basis that telephone advice is cheaper to provide than face to face advice¹⁷.

8.3 This would represent a considerable shift from current provision. In 2009/10 telephone specialists were responsible for 19% of all new cases started in welfare benefits¹⁸. Assuming the current CLS Direct service is currently running at its full capacity, it is not clear what, if any additional resources would be available for telephone advice services via the CLA to cover the additional 80% of matters not currently delivered by telephone, or whether the intention is simply to deprive claimants currently advised face to face of any access to information about their rights. Given that the intention behind these proposals is to cut funding for legal aid, it seems likely that there will be no more funding for the CLA.

8.4 There are many social security issues which are far too complex to be adequately covered by telephone advice. Claimants already struggle with so much of the DWP and HMRC operating via call centres. There are now 500,000 social security appeals. These often involve lengthy documentation which cannot be dealt with over the telephone, and requires face to face advice. Appeals can involve complex issues, and tribunals, whilst inquisitorial, often expect written submissions to be made.

8.5 In addition, as the Impact Assessment acknowledges, the telephone provider may not have local knowledge, say about the practices in the local Jobcentre, or the details of the local authority's housing benefit administration, or the state of the local social fund. This will mean they are not in a position to deal with systemic local problems in the same way as advice centres.

¹⁷ Currently the hourly rates are £53.86 per hour including VAT and £88.24 per hour including VAT respectively.

¹⁸ Face to face and telephone advice under legal aid, Adam Griffiths December 2010, Advice Services Alliance

8.6 We understand there is little independent research comparing telephone and face to face advice provision but a recent article in the LAG bulletin raises serious questions about the cost-effectiveness of telephone advice when dealing with more complex issues. The limitations of telephone advice in the provision of detailed instructions and dealing with paperwork can make it a cumbersome and inefficient means of providing advice¹⁹.

9. What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

9.1 Please see the answer to question 8 above. We believe that the complexity of the issue, whether the matter is one which is likely to generate paperwork, the vulnerability of the claimant are all good indicators of whether face to face advice services will be required.

10. Which organisations should work strategically with CLA and what form should this joint working take?

10.1 The CLA will need to work with existing suppliers of advice to staff its telephone advice line and ensure this complements face to face services. CLA will need to work with specialists in each subject area of law to ensure telephone advisers have access to the up to date resources they need to provide good quality advice services in each category of law, such as CPAG's welfare benefits handbook and training services.

10.2 We would recommend that advisers on the telephone advice line should have access to expert specialist support on complex areas of law as is currently the case.

11. Do you agree that the LSC should offer access to paid advice services for ineligible clients through the CLA helpline? Please give reasons.

11.1 We doubt whether a system for telephone means-testing is practicable, and would recommend that a telephone advice service is not means-tested at all.

Financial eligibility

11.2 The means-test for legal aid has fallen well behind the welfare benefits system. We understand it now only covers 36% of the population, whereas at its inception it covered 80%. If the government is to meet its stated aim of restoring

¹⁹ From face-to-face to telephone advice? Adam Griffith and Marie Burton Journal of Legal Action Group February 2011

the legal aid system to its original intentions, then the eligibility rules need to be made substantially more generous so as to include a greater percentage of the population. Particular areas of unfairness are:

- Those on low incomes who are not on means-tested welfare benefits are subjected to a harsher means test than those on benefits intended to be at subsistence levels. In our view, the eligibility rules should be updated, by increasing both the income and capital disregards in line with benefits.
- There are no income disregards matching the disability and severe disability elements in working tax credit. There are also no disregards for the 50 plus elements. This means that older and disabled claimants are effectively discriminated against by the legal aid means-test.
- There is no provision for waiver of the means test in public interest test cases. It is unfair to expect a financially ineligible claimant to pay for representation to bring a case which raises wider issues that need to be resolved in the public interest.

12. Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons.

12.1 We do not agree with this proposal for the reasons set out above. Capital limits for means tested benefits have been set at a level which is considered appropriate for subsistence level benefits. In our view the capital eligibility levels for legal aid for all claimants need to be increased to bring them into line with those for welfare benefits.

13. Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons.

13.1 We do not agree with this proposal. £1,000 is far too low a threshold to reasonably require a contribution at all. 10% represents a high proportion of so low a level of savings, and it would be disproportionate to require a claimant to pay such a comparatively large amount.

14. Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons.

14.1 We view it as unfair and unjustified to abolish the pensioner disregards. These are designed to compensate for the fact that those above working age are not in a position to earn an income, and will be relying on savings to support

themselves. The pensioner disregard is already only available to those with virtually no disposable income, and its abolition would result in an unacceptable choice between spending the only money the claimant has to safeguard his/her future, and going without legal help or representation to enforce the claimant's rights and protect their interests.

15. Do you agree with the proposals to retain the mortgage interest disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less?)

15.1 We do not agree with this proposal, which would remove all homeowners with equity over the general capital disregard limit of £8,000 from entitlement to legal aid, subject to the waiver proposal set out below. 68% of households in the UK own their own home, and we understand average equity is around £74,480²⁰, so this proposal is likely to instantly exclude a substantial proportion of the population from access to justice, unless they are prepared to put their homes at risk to fund this.

16. Do you agree with the proposals to increase a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

16.1 A waiver could mitigate the effects of the abolition of the mortgage disregard to some extent, depending on how broadly discretion was exercised. We think it would have to be a generous waiver to have much effect, and that it would be far preferable to retain the mortgage disregards as they stand. The statutory charge already operates in a way which is similar to the government's proposals, and it is difficult to see what this reform would add.

17. Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

17.1 We are not sure what this would add to the existing statutory charge. If the government accepted our recommendation to keep social security cases within scope, in the rare cases where the claimant owns his or her own home, it would

²⁰ This is taken from figures given by the Council of Mortgage Lenders which suggests the average mortgage given is £158,270 which is about 68% equity <http://www.cml.org.uk/cml/media/press/2811> The government should be in a position to model accurately what the effects of this change will be.

have a harsher effect than the statutory charge, from which social security cases are exempt.

- 18. Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 or less)? Please give reasons.**

18.1 Please see our responses to questions 16 and 17 above.

19. Omitted

20. Omitted

21. Omitted

- 22. Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.**

22.1 We do not agree with this proposal. The levels of contributions are already so high that they deter claimants from pursuing meritorious claims. A waiver provision should be retained for public interest test cases and other circumstances where it is unfair to ask a claimant to pay a contribution.

- 23. Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income based contributions? Are there other alternative models we should consider?**

23.1 Please see our answer to question 22.

Criminal Remuneration

Questions 24-31 Omitted

Civil Remuneration

32. **Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.**
33. **Do you agree with the proposals to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.**
34. **Do you agree with the proposals to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction? Please give reasons.**
35. **Do you agree with the proposals:**

To apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and

To apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?

Please give reasons.

36. **The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.**
- 33.1 We respond to questions 33, 34, 35 and 36 jointly. We are concerned that proposals to reduce rates of pay for legally aided cases, whether by way of a 10% cut or by the application of "risk rates" will deter solicitors from taking on cases, and will render them unable to meet their overheads. We are concerned that this will further diminish the supplier base of lawyers who are able to take on legally aided cases and reduce access to justice for claimants.
37. **Omitted.**

38. Omitted.

Expert remuneration

38. Omitted.

Alternative Sources of Funding

40. Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.

41. Which model do you believe would be most effective:

Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or

Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

42. Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:

- a) mandatory model**
- b) voluntary opt-in model; or**
- c) voluntary opt-out model?**

Please give reasons.

43. Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.

44. Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?

40.1 Questions 40, 41, 42, 43 and 44 are answered together. CPAG believes that legal aid should be funded by the state from general taxation at a level which

enables all citizens in all areas of the country to gain access to advice about their rights and entitlements and to have a good standard of access to justice. We have no objections to schemes to raise additional funding, but believe that any funds raised should be applied as additional funding, for instance for public interest cases where there is no claimant eligible for legal aid, or for tribunal representation, and not to cover cut backs in basic provision.

- 40.2 We would also point out that many areas of social welfare law do not generate large sums of damages. Welfare benefits secured through publicly funded advice to the claimant rightly do not attract the statutory charge, and they should not be regarded as money available to

Governance and Administration

45. **The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.**
46. **The Government would welcome views on the administration of legal aid, and in particular:**
- **the application process for civil and criminal legal aid;**
 - **applying for amendments, payments on account etc.;**
 - **bill submission and final settlement of legal aid claims; and**
 - **whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?**
47. **In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.**
48. **Are there any other factors you think the Government should consider to improve the administration of legal aid?**

45, 46, 47 and 48 are answered together.

- 45.1 The administration of legal aid is cumbersome and onerous for smaller organisations. CPAG would support proposals to reduce the administrative burden on legal aid suppliers, provided that these do not disadvantage smaller organisations.

Impact Assessments

49. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

49.1 The government's own impact assessments are extensive and already make a powerful case for not proceeding with the reforms. The Equalities Impact Assessment on Scope Changes says at paragraph 7.36:

“Our initial analysis of the impacts of the proposed changes on clients is that there is a potential significant disproportionate impact on ill or disabled people, female clients and BAME clients in that the proportion of clients affected adversely by the proposed changes that fall within these groups is likely to be high relative to the proportion of people in those groups in the population.”

49.2 The Impact Assessments also recognise the potential for:

- Reduced social cohesion brought about by failure to apply the rule of law fairly;
- Increased criminality; which may arise if unresolved civil or family disputes escalate;
- Reduced business and economic efficiency if failure to enforce rights and failure to apply the rule of law undermine work incentives, business uncertainty and the operation of markets;
- Increased resource costs on other Departments
- Increased transfer payments from other Departments, for example if people use their own savings to pay for legal aid, they may make themselves eligible to claim benefits.

50. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

50.1 We do not think that sufficient consideration has been given to the following issues in the various Impact Assessments:

- a) What impact providing telephone advice services rather than face to face advice services will have, and whether it is more or less cost effective. We recommend that research be carried out into this issue.
- b) What the additional cost will be of dealing with the wider social consequences of reductions in legal aid funding.
- c) What the impact of these proposals will be on the government's ability to meet its targets under the Child Poverty Act 2010.
- d) The impact of the changes to eligibility levels needs to be accurately modelled so that it is clear what proportion of the population would remain eligible under a reformed scheme.

51. Are there forms of mitigation in relation to client impacts that we have not considered?

- 51.1 The government could consider whether it would be more cost effective to block fund advice services or to provide a salaried service to deliver face to face advice in social welfare law.

About CPAG

CPAG promotes action for the prevention and relief of poverty among children and families with children. To achieve this, CPAG aims to raise awareness of the causes, extent, nature and impact of poverty, and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty; and enable those eligible for income maintenance to have access to their full entitlement. If you are not already supporting us, please consider making a donation, or ask for details of our membership schemes, training courses and publications.

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