

RESPONSE OF THE ADMINISTRATIVE LAW BAR ASSOCIATION TO LORD CHANCELLOR'S MAY 1999 CONSULTATION PAPER ON THE COMMUNITY LEGAL SERVICE

1 INTRODUCTION

1.1 This document sets out the response of the Administrative Law Bar Association ("ALBA") to the government's Consultation Paper on the Community Legal Service.

1.2 ALBA welcomes the opportunity to respond to the Government's proposals. ALBA is the specialist bar association for barristers and interested others (academics and some specialist solicitors) working in the field of administrative law.

1.3 Administrative lawyers often specialise in areas of social welfare law where damages are not the issue (hence no-win no-fee arrangements cannot operate), but where fundamental constitutional and social rights may be at stake. For example, mental health questions, community care decisions, immigration cases, determinations of entitlement to social security benefits and other decisions by public authorities affecting the life of the citizen.

1.4 By the nature of their work, administrative law practitioners are well placed both to understand the areas of legal need apt to be met by focussed community legal provision, and to have a realistic understanding of the ways in which, and the pressures under which, public authorities operate. Many of ALBA's members are on the Treasury Panel. They are also accustomed to a system in which much litigation is carried out on paper, and in which many resolutions are accomplished without the need to go to court.

1.5 ALBA welcomes proposals to make access to affordable legal advice a universal entitlement. But this must be on the basis of providing specialist services to meet identified needs on a co-ordinated basis, and using appropriately qualified advice as soon as it is needed.

1.6 We find it difficult to see how the model presently proposed will achieve this, since it would appear to create barriers between different "stages" of client needs which we do not think properly reflect the more usual "multi-track" approach to seeking to solve legal problems.

1.7 ALBA is concerned to ensure that the community legal service should not result in specialist "first-tier" legal services being replaced by untrained volunteer referral services. Particularly in the areas of administrative law in which they practice, time-limits are tight, and speedy access to a specialist solicitor can be critical. Just as the NHS could not operate if the only source of referrals to consultants were first-aid volunteers, so the specialist administrative law bar will not be able to offer a cost-efficient and effective service if a tier of specialist, local lawyers is removed.

1.8 We see the proper role of the CLS as to provide a smoother "filtering" system so that potential users are directed at an early stage to appropriate "first tier" specialist advice and assistance.

1.9 This response to the Consultation Paper has been prepared by ALBA's Community Legal Service Sub-Committee, which consists of Richard Drabble QC (Chair of ALBA), Nigel Fleming QC and Helen Mountfield. It has been approved by the ALBA Committee. Members of the Community Legal Services Sub-Committee of ALBA would be happy to offer any further assistance in developing these ideas.

2 COMMUNITY LEGAL SERVICE PARTNERSHIPS & THE PIONEERING EXERCISE

[CHAPTER 3 & ANNEX B]

2.1 What CLSPs are intended to deliver.

2.1.1 In ALBA's view, it is not possible to create the correct model for delivering a CLS until it is established what the purpose of the CLS is, and what it is intended to deliver. We do not consider that the consultation paper sufficiently identifies the intended remit of the CLS, nor how it is intended that CLS advisers and lawyers will work with those solicitors and barristers remaining in the public sector.

2.1.2 The examples given in the consultation paper are generally case-studies in which basic advisory work solves problems without recourse to litigation; but (particularly in fields of public law involving complex statutory construction) this does not always occur.

2.1.3 To achieve its objective of providing access to effective legal services for all, the CLS must provide real and timely access to courts and tribunals, with the support of appropriate expertise, when this proves necessary. In the fields of law in which ALBA's members practice, delay or under-qualified "first-tier" advisers can be fatal to establishing important rights.

2.1.4 If the CLS provides no more than a better geographical spread of the existing network of Citizens' Advice Bureaux (admirable though they are), there will remain a vast reservoir of unmet need for legal services in complex areas of public law. For example, no legal aid is available for representation in such legally complex and emotionally demanding fora as Social Security Appeal Tribunals, Social Security Commissioners, and Immigration Appeal Tribunals.

2.1.5 Unless some provision is made to meet these needs, it is almost inevitable that in due course, the government will be held to violate Article 6 European Convention of Human Rights (the right to a fair trial) in relation to some complex and/or emotionally demanding piece of litigation for which legal aid is not available. The availability of non-specialist "first-tier" advice and assistance is unlikely to be sufficient to obviate this danger: "the Convention is intended to guarantee not rights that are theoretical or illusory that rights that are practical and effective".

2.1.6 In the recent case of *R v Lord Chancellor's Department & Legal Aid Board ex parte Bourke*, a litigant sought to establish a right to legal aid in appropriate cases before Social Security Commissioners arguing that Article 6 would be violated if it were not available. It was said on affidavit by an LCD official that the government intended to provide appropriate specialist representation in tribunals through the CLS; but the consultation paper gives no indication of how this is to be achieved.

2.2 THE APPROPRIATENESS OF THE "TIERED" Model

2.2.1 ALBA has found it difficult to see how the proposed "tiered" model would correspond to provision of services to fulfil needs for legal services on the ground. For example, we agree that an active referral between generalists and specialists and/or between differently qualified providers of legal services is necessary; but do not understand how the proposed model would incorporate referral from "gateway" CAB-type advice organisations to (in-house or out-of house, "first" or "second" tier) specialist providers.

2.2.2 We consider that the division between "information, advice and assistance" often will not correspond to the way in which "public-law" type questions arise.

2.2.3 For example, at present, a person may go to a councillor, a CAB or to an appropriately qualified franchised solicitor with a concern about provision of community care services. They may not necessarily realise that they have a legal problem, but rather perceive it as one of failing

to obtain a necessary social/economic service. They will need information about entitlement to community care assessments (and perhaps welfare benefits), but also advice and assistance. It is likely that these will need to be given at the same time: in cases of this kind, internal complaints procedures and correspondence are often engaged in an attempt to avert court proceedings, but the tight time-limits or urgency of need may require that a barrister is instructed, and that court action is considered (and even instituted on paper) at the same time as, or shortly after the "avoidance strategies". In such situations, the referral (first tier) adviser or lawyer must be expert in his or her field to understand the complex statutory and policy materials in play, and to understand the various available mechanisms for dispute resolution. A barrister is often involved, at least by telephone, very early on. The advice and assistance functions cannot usefully be divided; and such a division could prove artificial and unhelpful in considering this (typical) public law problem.

2.2.4 ALBA would applaud the introduction of a universal (and free) gateway to legal services: the equivalent of a general practitioner or triage nurse, who could deal with minor problems immediately, but make a speedy and appropriate diagnosis of the type of legal problem, its urgency, and the type of legal expertise needed. These "gateway" practitioners would not necessarily need to be solicitors or barristers: appropriately qualified "para-lawyers" (see Part 3 below) could free up the time of the lawyers to deal with the more specialist questions. But they would need to be sufficiently qualified to know what it was appropriate to deal with themselves, when time limits may start to run, and when a person with professional qualifications was needed.

2.2.5 We find it difficult to see how, in the proposed CLS model, early access to a solicitor (where needed) could be guaranteed. We applaud the principle in paragraph 3.14 of the consultation paper, but do not understand how cross-referral between "community" legal services and franchised, but private, law firms, is intended to operate in practice.

2.2.6 We also fear that the model proposed would not enable the expertise of the public law bar to be consulted at the properly early and appropriate stage. This is where public law barristers are often used at present to meet the simultaneous "second" and "third" tier needs of advice and assistance: to give early pointers and avert unnecessary conflict, whilst making timeous preparation for urgent litigation should it prove necessary.

2.2.7 ALBA fears that the models presently proposed could lead to the unintentional loss of a number of beneficial features which exist, albeit insufficiently universally, in the present system. In our view, any model for a CLS which is adopted needs to ensure that the following features are maintained and extended:

(a) where time is of the essence (as in judicial review, with its requirement to act "promptly" and in any event within three months) the ability for specialists (qualified lawyers) and non-specialists to act together so as to offer appropriate expert and non-expert advice and assistance sequentially or simultaneously, as is most necessary and appropriate;

(b) the ability to seek expertise from national organisations such as Liberty or the Public Law Project, to enable individuals and "public interest" organisations to work together on test-case litigation so as to avoid the waste of legal resources in a flood of individual cases. For example, in *R v Sefton MBC ex parte Help the Aged, Pinch & Blanchard* [1997] 4 All ER 532, Help the Aged was able to join with two legally aided Applicants to raise issues of general public importance as to charging for residential care homes. This enabled a large number of cases (some initiated in inappropriate fora such as County Courts) to be stayed, thus saving significant sums by way of legal aid. But even relatively large voluntary organisations are rarely able to take the financial risks involved in such litigation. There needs to be a funding mechanism to enable this form of beneficial litigation (which clarifies rights, and ultimately saves costs) to occur. Bodies such as the Public Interest Advocacy Centre in Sydney, Australia, provide a good model.

2.3 FUNDING/MAKE-UP OF CLSPs

2.3.1 The consultation paper suggests that local authorities are often best placed to understand the needs for legal services in their areas. But this overlooks the role which local authorities continue to play as the commissioner or providers of local services, and the fact that a large number of problems which a CLS will be called upon to deal with will involve groups or individuals in conflict with the local authority.

2.3.2 This particularly affects fields of law in which members of ALBA practice. A very substantial proportion of the cases which reach the Crown Office List are judicial reviews against local authorities, and this is a feature which needs to be taken into account in considering the make-up of CLSPs and the funding formula adopted for them.

2.3.3 The CLS will succeed in diminishing work for members of ALBA if:

a) there can be no suggestion that there is a conflict between the membership and control of the CLSP and the cases and issues it is required to deal with.

b) there is a clear and transparent formula for funding a CLSP which does not depend on the discretion or competing priorities of the local authority for the area concerned.

2.3.4 In the past, there have been occasions on which there has been a perception that where a particular legal advice centre has a great deal of success in challenging (for example) the local authority's housing department, there has then been political pressure on that authority to reduce the funding of that legal advice centre.

2.3.5 Indeed, ALBA's members have derived work on a number of occasions from acting for applicants and respondents in cases where such organisations have (successfully) argued that proper procedures and consultation have not been followed in taking such funding decisions, or that irrelevant considerations have been taken into account in deciding to cut their budgets.

2.3.6 Nonetheless, we are concerned to ensure:

a) that there is some proper method to make it accountable to the community which it serves other than through the local authority for the area in which it is located;

b) that the CLS has a statutory entitlement to funding which does not depend on the discretion of the local authority.

Pioneering

2.3.7 ALBA is keen to ensure that the models presently being pioneered include consideration of when, and how, specialist barristers be consulted.

3 QUALITY ASSURANCE (Chapter 4)

3.1 ALBA is not opposed in principle to lawyers working with non-lawyers so that the purely legal skills are effectively used and targeted. Nor is it opposed to some services traditionally provided by lawyers (such as welfare rights advice) being provided by appropriately trained non-lawyers provided they have:

(i) sufficient training to be able to identify when legal input is needed;

(ii) appropriate and timely access to qualified legal advice, whether in-house or from a local or national "expert" referral service (such as Child Poverty Action Group's Welfare Rights Advisers'

Advice Line, or an appropriately qualified barrister with sufficient material before him or her to be able to offer meaningful advice).

3.2 However, it is essential that the CLS does not become second-rate "advice on the cheap" for the poor, who (in many cases) will lose the access they presently have to lawyers acting on legal aid.

3.3 We applaud the idea of a universal gateway of access to the CLS (akin to the GP system in the NHS: whether the gateway is a franchised private sector firm of solicitors, mixed solicitor/non-solicitor partnerships, or through other not-for-profit CLS body).

3.4 We accept that the first person to hear a legal problem need not always be qualified as a solicitor or barrister. But the "first adviser" must know enough to be able to identify when a matter is urgent, and when professional skills are needed. ALBA's members have seen many cases which fail because well intentioned, but inexpert and erroneous advice is given at an early stage. We regard it as essential that rigorous and universal standards are applied to specialist advisers in different fields (eg welfare rights, employment, housing).

3.5 We envisage an "accreditation scheme" which will need (at minimum) to ensure that advisers can demonstrate:

(i) sufficient knowledge of the subject area in which they hold themselves out as offering legal services;

(ii) sufficient knowledge of the legal system to understand the methods of dispute resolution available in the field in question, the procedures involved, and the applicable time-limits;

(iii) ability to identify when referral on (or advice from a "second-tier" agency or practitioner) is necessary and appropriate.

3.6 We do not believe that a real and effective CLS can operate without the appropriate input, at every level, of qualified lawyers, albeit working with other accredited legal service practitioners.

3.7 ALBA is enthusiastic about the idea of appropriate and developing use of computer resources in the CLS (part 4 below). However, this will be of limited use if staff are insufficiently trained to make the best use of those resources. We recommend that one of the standards used to test the ability of staff in the "Quality Assured" service is ability to access and use up-to-date legal information on the Internet.

4 APPROPRIATE USES OF INFORMATION TECHNOLOGY (Chapter 5)

4.1 At the "information" stage of solving a legal problem, it ought to be possible for many people to find out what they need without needing face-to-face contact with a CLS worker.

4.2 In his speech to the Holborn Law Society on 2 November 1998, the Lord Chancellor said that:

"legal ... rights in theory are of no use, unless people can benefit from them in practice. ... [For example, we need] employment rights respected so that office cleaners as well as the managing directors know where they stand with their employer and are not victims of unfair work practices ..."

ALBA agrees that knowledge of legal rights should be easily accessible to all, and that the Internet is a useful way forward in enabling people to obtain information as to their own rights.

4.3 Appropriate and easily accessible sources of "self-help" information will help the Community Legal Service to operate effectively in two ways:

(i) Enabling some people to solve their enquiries for information themselves without recourse to the CLS;

(ii) Enabling others to find the CLS and to enter the system at the appropriate point.

4.4 However, (as the consultation paper observes), it is likely to be several years before it is realistically available to the majority of people as a source of information and advice; and the Internet is likely to be least available as a research tool for the most socially excluded (the old, the poorly educated, the disabled). Also, there is a danger that if advice is offered without expertise, people could actually harm their cases by misunderstanding that which is presented to them.

4.5 Thus, the Internet cannot be the sole means of ensuring that no-one is excluded from accessing the basics of the law for themselves.

4.6 People need easy access to basic legal information, and clear and timely guidance to the right source of access to the CLS.

4.7 At a meeting with Melissa Morse on 12 March 1999, a representative of ALBA suggested as a model the Legal Resources and Information Centres (LRICs) which operate in New South Wales. Every public library in New South Wales has a "basic" legal resource kit. "Plain-English" manuals as to how the legal system works, and legal basics in a range of areas of law, copies of court forms, lists of first tier and specialist information, advice and legal assistance centres. At a number of designated libraries, which are evenly geographically spread, more detailed legal materials (e.g. employment law encyclopaedias) are held. Staff are available who can direct members of the public to the appropriate source of legal information, whether it is a paper or computer source, though not undertake legal research.

4.8 Thus, ALBA would propose:

(i) that the Community Legal Service website be available on terminals in every public library; but that

(ii) as part of the CLS, basic materials e.g. the leaflets produced by County Courts about how to bring claims, the leaflets produced by the Department of Employment as to Employment Rights, CRE and EOC codes of practice; the CPAG annual welfare rights guides; an annual compendium are also available in every public library.

4.9 In terms of saving time and improving services offered by CLS advisers, we would suggest that a basic information leaflet and form be available (both in computer form, which could be accessed by e-mail, and on paper) for people who want to attend CLS centres, in which they could provide basic details about themselves (name, address, occupation, age) and what they identify as the source of the problem. This could enable the making of appropriate appointments for the giving of advice, and would act as the equivalent of a "triage nurse" in a casualty department, saving time in providing appropriate advice or information.

4.10 The Internet could also play an important role in acting as a "second tier" of advice to CLS advisers. Many lawyers (for example Discrimination Law Association) make effective use of the Internet to share information about recent cases, or news of policy proposals or useful new websites. We would thus suggest (see part 3, quality, above) that it should be part of the quality Kitemark for a CLS service that at least one member of an office is qualified and competent successfully to access relevant legal information from the Internet.

4.11 ALBA's practitioners specialise in areas of law in which published statutory and other guidance, published policy advice from government departments, rules and codes of practice often have important legal consequences (for example, community care, health immigration, and taxation).

4.12 An important source of difficulty and delay is in obtaining these documents quickly and in an up-to-date form. Any website developed by the CLS ought to have hot-links to all such policy guidance etc published by government departments (and, eventually, by local authorities in the CLSP area). In that way, lawyers and other advisers would be able to find relevant statements of policy and practice quickly and cost-effectively to assist their clients.

4.13 We consider that, to sit with the government's declared ethos of "Open Government" and freedom of information, these documents should be available on the web free of charge.

5 OTHER ISSUES

5.1 Much of the most important public law is undertaken by groups of individuals , or on a public interest basis , or through third-party amicus interventions by interested and expert groups in existing litigation . But these challenges cannot always proceed, for want of funding .

5.2 The Lord Chancellor has spoken a number of times, inside and outside parliament, of his intention to create a "public interest fund" to enable proper challenges in the public interest to be brought on the basis of equality of arms. But the consultation paper makes no mention of such a fund.

5.3 Without it, there is a real danger that the culture of rights which the government seeks to bring about, through the CLS and the Human Rights Act 1998, will fail to thrive.

5.4 ALBA would urge the Lord Chancellor to introduce his proposals for a public interest fund in tandem with his proposals for the CLS.

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