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Proposals for the Reform of Legal Aid in England and Wales

Response from the Employment Lawyers Association

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather than to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the Chairmanship of Paul Statham of Pattinson & Brewer to consider and comment on the proposals for the reform of Legal Aid in England and Wales consultation paper CP12/10 of November 2010. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

The Government has invited views on a wide range of proposed legislative changes. Our comments are divided according to the Chapter arrangement in the consultation paper. We are commenting only on those aspects of the consultation that affect employment practitioners.

Chapter 4 – Scope

Cross-cutting issues - Discrimination proceedings (paras 4.133 – 4.137)

*Question 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 legal aid scheme? Please give reasons.*

ELA agrees that discrimination claims in the Employment Tribunal should be kept in scope for Legal Help. We agree that this is vital to protect groups of employees and workers perhaps more vulnerable than others or who may be more likely to be the subject of prejudice and lacking in equality of opportunity. Much discrimination occurs in SMEs, which are unlikely to be unionised, and therefore these individuals will not have easy access to the specialist advice required for discrimination work. The removal of assistance in these cases may lead to an increase in unmeritorious claims and to greater pressure on Tribunal and judicial time. Employers defending claims from unrepresented claimants may incur higher legal costs.

ELA does have some concerns over how this will be managed in practice. It is our experience that many discrimination claims are brought together with other claims, for example unfair or wrongful dismissal, unpaid holiday pay, other breaches of the

Working Time Regulations 1998, breach of contract, breach of the Flexible Working Regulations and so on. The Tribunals Service **Employment Tribunal and EAT Statistics (GB) 1 April 2009 to 31 March 2010** confirm that the average number of jurisdictions per claim form received is 1.7, i.e. more than one claim per form is the norm.

Advisers could be accused of being negligent if they fail to advise clients about those potential employment law claims they may well have in addition to claims of discrimination. In any case, the other claims are likely to be so inextricably linked with the discrimination claims that it would be impossible not to advise. In addition, it would be very confusing for both clients and Tribunals if clients were required to lodge their own additional claims on a separate claim form to the discrimination claims being advised on by CLS/CLA. In the normal course of events, the Tribunal would naturally seek to save time and resources by consolidating claims arising out of the same employment relationship and between the same parties.

It will clearly be important that sufficient matter starts are made available by the LSC in discrimination law cases for it to be viable for suppliers to advise on this area, if the rest of employment is removed from scope. Otherwise there is a risk of there being a right to advice and assistance but insufficient suppliers to provide this.

Areas of civil and family law proposed for exclusion from the legal aid scheme – Employment (paras 4.188-4.192)

*Question 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.*

ELA does not support these proposals, which would exclude all employment law claims other than those of discrimination from scope.

We would firstly point out that the description of employment tribunal jurisdiction in paragraph 4.188 is inaccurate. For example employment tribunals do deal with breach of contract claims where there is a dismissal.

We accept that there are some straightforward money claims that may not require or merit assistance paid for by public funds, (depending on whether the client is not incapable of bringing such claims because of language or learning difficulties). We would note that even apparently low value money claims can be of significant value to low paid claimants and that the resolution of employment issues by obtaining payments from Respondent employers could also impact on the payment of benefits, arrears of rent/mortgages and other areas. Therefore, there is a potential public policy argument for funding good employment claims so that the state is not left subsidising employers with poor employment practices.

The Governments recent announcement that it is considering introducing a power for employment tribunals to impose financial penalties on those employers who have breached an individual claimant's rights (**Resolving Workplace Disputes: A Consultation page 52)** would be severely undermined if claimants were unable to bring claims because they could not access legal advice because of the withdrawal of Legal Help in employment cases.

Further, some jurisdictions – for example whistleblowing claims – are just as complex as discrimination. To have a viable whistleblowing claim the Claimant must have made a qualifying disclosure that satisfies various legislative and case law requirements and must then show a causal link between the disclosure and the detriment they have suffered or their dismissal.. Transfer of Undertakings claims are another area where complex ECJ case law can be difficult even for experienced Judges to untangle. Some claims such as those involving part time workers can be quasi discrimination claims (because the majority of part time workers are women).

Many lay clients and unqualified "Employment Advisers" ~~will~~ are unlikely to have ~~never~~ have heard of many of the claims that can be brought in the tribunal for example claims for automatic unfair dismissal for asserting a statutory right or raising a Health & Safety issue. Many CABs do not have specialist advisers and while they can provide general advice cannot deal with the complexity of much of employment law.

We are also concerned that some of the premises on which the proposal to remove all employment claims other than discrimination from scope are flawed.

For example, the "easily accessible and user-friendly procedure of the tribunal" is referred to in paragraphs 4.190 and 4.192. The Employment Tribunal, unlike some other Tribunals, is an adversarial forum. The Tribunal Service's annual report for 2009/2010 shows that the vast majority of litigants in Employment Tribunals are represented by lawyers (161,900 as opposed to 12,500 by Trade Unions, 44,900 by themselves or where no representative is identified on the claim form, and 16,700 by "other".) "Legal Action" in March 2009 stated that while 72 % of Respondents are represented only 42 % of Claimants are.

We do not accept the premise that there are significant differences between the employment tribunal and other civil courts. For many Claimants they are no more accessible or user-friendly than any other court. In addition, tribunals do have the power to award costs against Claimants if it appears they were unreasonable or vexatious in pursuing their claims. Any such risk should be avoided by the provision of competent professional legal advice.

Paragraph 4.189 suggests that cases are generally concerned with monetary damages or earning potential, and are not sufficiently important to merit support from legal aid. It is our experience that although the motivation for some Claimants is financial, for more it is the need to challenge the perception that they have been treated unjustly. Regrettably it may be just these Claimants, often earning the National Minimum Wage or little more, who are working for employer Respondents with the least understanding of or available resource to dedicate to complying with their legal obligations to their employees/workers.

The primary remedy in some employment cases is not monetary. For example, the primary remedy in flexible working cases will generally be a decision giving effect to flexible working arrangements. A finding of unfair dismissal could have a significant effect on a claimant's ability to find work.

Many non discrimination claims also involve important issues of public policy e.g. whistleblowing, detriment for trade union membership or activities and health and safety cases, where the primary reason for pursuing the claim are non monetary.

Paragraph 4.190 proposes that those bringing employment claims are not "generally likely to be particularly vulnerable" or unable to present their case themselves. That may apply to the generality of Claimants, but ELA is concerned that it may not apply to those currently eligible for Legal Help with their claims. The financial eligibility conditions currently in place have the effect of selecting a group of employees/workers eligible for Legal Help who, in many cases, are not best placed in terms of education, life skills and domestic circumstances to devote the necessary time to effective preparation of their claims. Many clients, particularly in cities do not speak English and many clients have mental health or other problems that would make it impossible for them to bring claims. There are duties on public bodies and the Tribunals to make reasonable adjustments for disabled clients. If such Claimants were to receive no professional legal advice on their potential claims, ELA is concerned that there could be a variety of negative outcomes as follows:

- Good claims may not be brought at all, as the prospect would be too daunting for some Claimants with genuinely good claims.
- Poor claims may be brought because Claimants have not received advice that the claims are weak. This will require the use of resources from Tribunals and Respondents to resolve.
- Good claims may be brought but the merits of the claims may be unclear without significant input from an Employment Judge at a Case Management Discussion because they have not been pleaded clearly with the input of legal advice. This may add to the employer's costs.
- Effective Case Management may prove difficult for both Tribunals and Respondents if unrepresented Claimants do not understand the steps that are required to prepare cases for hearing. For example, a Claimant may find it difficult to understand what is required when ordered to provide "Further and Better Particulars" of their claim.

Employers often have more resources and almost always have more information than employees. It can be very difficult for unrepresented Claimants to obtain relevant documents and information in support of their case, as they may not know what to ask for or even that an application for specific disclosure can be made

Proceedings in the employment tribunal can be extremely complex as a result of underlying statutory provisions including EU case law and procedural rules. Without access to legal advice, tribunal hearings are likely to be extended increasing costs for employers and the tribunal system. Judicial time will be consumed in sorting paper work, clarifying the issues and marshalling facts thus adding to delays.

ELA is concerned that the proposal does not appear to take into account the other work carried out under the Legal Help scheme in addition to advising clients on and assisting them with claims in the Employment Tribunal. Work done advising clients that they do not have viable claims is arguably just as important and may have a significant impact on the workload of the Employment Tribunals and on employers' legal costs. .

Further, work done whilst clients are still in employment or before claims have crystallised can help clients to understand and manage their legal rights and resolve issues in the workplace themselves avoiding conflict which might result in dismissal or resignation and therefore create a ~~the~~ need for issuing proceedings.

Paragraph 4.191 which refers to other sources of advice and methods of funding contains some inaccuracies and these are addressed below.

The Availability of Damages-Based Agreements

The Government refers to the availability of damages based agreements being available in employment cases. It is ELA's view that the availability of such agreements is unlikely to fill the gap left by the exclusion of employment cases from Legal Aid. As noted in paragraph 4.188, the vast majority of Legal Aid allocated to ~~for~~ employment cases is Legal Help rather than Legal Representation and generally legal representation is not available to assist Claimants in Employment Tribunal cases. As such, currently any Claimant whose claim cannot be settled must either represent themselves or seek representation from somebody willing to take the case on a damages based agreement basis. Currently, it is likely that the vast majority of Claimants would seek advice and representation through a damages-based agreement if one were available as this guarantees them representation in the tribunal unlike Legal Aid.

It is the experience of members of the sub-committee that it is very hard to find advisers willing to take on referrals of good claims for representation under damages-based agreements. Most current CLS/CLA suppliers are unable to offer such representation themselves because of lack of resources or because it is not practical to represent claimants who get advice over the phone who may live at the other end of the country.

It is likely that the vast majority of Claimants currently using Legal Help do so because a damages-based agreement is not available because of the level of compensation likely to be received or because the prospects of success or in recovering any award from the respondent are uncertain. The cases handled currently are not sufficiently attractive to representatives offering damages based agreements.

There is also the issue that many Claimants will only be able to access advice through contingency fee agreements with unqualified advisers, albeit regulated in some areas pursuant to the Compensation Act 2006. Any compensation received would have to be shared with the advisor. The fee has now been capped at 35%(Damages-Based Agreements Regulations 2010) but that is still a substantial sum for many claimants in small value claims.

Although such advisers are regulated and in particular since the Damages- Based Agreements Regulations 2010, the terms of any retainer with the adviser are governed, there is no guarantee as to the experience and quality of the adviser or the advice given. The Regulations merely ensure that there is in existence a complaint handling procedure in accordance with certain minimum standards and that this is applied.

In support of this, one of our contributors advised a client who was facing an application for costs from their former employer against whom they had brought an unsuccessful Tribunal claim. The client had paid up front for advice and assistance from an Employment Advisor advertising online. The client had understood the adviser to have agreed to take various steps, that were not taken on behalf of the client, and their claim failed. An application for costs was made based on his alleged unreasonable conduct of the proceedings. Our contributor was able to put together submissions for the Judge to consider at the costs hearing, the effect of which was that no costs order was made against the client. The Employment Advisor did not respond to any correspondence about the costs issue.

According to the **Ministry of Justice Consultation (Regulating Damages Based Agreements) Consultation paper CP10/09, paragraph 21**, there are over 300 claims handling businesses currently authorised to offer these services in employment cases. Almost all of the business are sole traders and only provide advice in employment cases. In 2008 30% of the business websites advertised employment related services according to the Claims Management Regulator.

In the latest **Annual Report the Claims Management Regulator 2009/2010 chapter 3, paragraph 9**, the employment sector was approximately 16% of the total number of authorised businesses with a turnover of 13.2 million which is 4% of the annual turnover of the industry in the claims sector. In chapter 4, paragraph 19, the Regulator lists the type of complaints received in this sector.

On the one hand, many of the employment cases currently dealt with through Legal Help are unlikely to be attractive to most qualified advisers using a damages-based agreement because of the small sums involved, the prospects of recovering any compensation from the respondent or the complexity of the case. On the other hand, the inexperienced and/or competitiveness of the market could lead to a rise in speculative or weak claims being pursued. In the **Gibbons Report (better Dispute resolution: A Review of Employment dispute Resolution in Great Britain March 2009 paragraph 1.28)**, there is reference to no win no fee advisors increasing the number of claims brought before tribunals.

Trade Unions and Legal Expense Insurers

In paragraph 4.191, it is also suggested that trade unions may be able to provide an alternative source of help. We consider this suggestion misconceived. Currently, if a Claimant seeks advice through Legal Help, they cannot be advised if they are currently a union member. They should be referred to their union for advice. It follows that the Claimants who are provided advice through Legal Help currently are unlikely to be trade union members. Legal Help can only be provided to trade union members if their trade union provides them with written confirmation that the union is not able to assist them.

Further, trade union legal assistance is not generally extended to those who were not members of the trade union at the relevant time any dispute arose and legal assistance varies from union to union in both the scope of what is covered and what advice or representation can be provided.

Similar arguments would apply with regards to the availability of Legal Expense Insurance. Again, Claimants are not able to access Legal Help if they have Legal Expense Insurance and so it must follow that those who currently seek Legal Help do not have and probably cannot afford Legal Expense Insurance.

Civil Mediation

It is also suggested in paragraph 4.191 that some employers may be willing to engage in civil mediation as an alternative to Tribunal proceedings. It is also suggested that the employer may pay this for. It is the experience of the members of this sub-committee that the costs of engaging a civil mediator privately can be very high (£750+ per day). It is very rare that the employer pays for such services unilaterally except in circumstances where the value of the claim is very high and the Claimant remains in employment. These would normally be discrimination cases and of course the Government does not propose to remove Legal Help in respect of such cases.

ACAS

It is also suggested in paragraph 4.191 that the Advisory Conciliation and Arbitration Service (ACAS) provides a free arbitration service in respect of disputes concerning unfair dismissal or flexible working. Again, we consider the reference to this service as misconceived as it is not an advice service, but is an alternative method of dispute resolution.

It is clear from the ACAS guidance that they require as much information about the dispute as possible including copies of any Originating Application form. Any Claimant who does not have advice through Legal Help will be at a severe disadvantage compared to any employer in preparing for the hearing, which although it is more informal than an Employment Tribunal case operates on the same legal principles.

Further, the scheme has had a notoriously low take up since its commencement in May 2001. The take up continues to be so low that the figures do not even appear in the last two ACAS annual reports. According to the latest IDS Brief, **(917 January 2011)** there have been a total of 61 cases since 2001. It seems highly unlikely that the availability of this free arbitration service can fill the gap left by the withdrawal of Legal Help from employment claims.

ELA agrees that ACAS provides an extremely valuable service. However, ACAS advisors cannot help Claimants prepare ET cases, they only give general advice. Neither can they advise on the appropriateness of offers to settle.

Litigants in person (paras 4.266-4.269)

Question 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.

ELA has been unable to obtain more than anecdotal evidence on the impact of Legal Help assistance on the conduct of ET proceedings. However, such evidence suggests that both Respondent's Representatives and Employment Judges appreciate the benefits of Claimants who are properly advised with properly pleaded cases. Further proper advice can have the effect of filtering out claims, which are not worthwhile bringing or resolving claims earlier. There is a risk of hearings being lengthened through litigants in person lack of familiarity with proceedings.

These benefits are perceived to be:-

- that it can be easier to negotiate with a representative rather than the Claimant direct;
- that the quality of the pleaded claim in terms of setting out the jurisdictions under which claims are brought and giving sufficient detail to enable Respondents to enter a full response is often clearer;
- that case management is easier as the steps required are understood.

Legal Representation in the High Courts

Although the vast majority of Legal Aid for employment cases is Legal Help, legal representation is available in the Employment Appeal Tribunal and higher Courts for employment cases that originated in the Employment Tribunal. It is also available for breach of contract matters where the Claimant remains in employment. These claims have to be pursued in the County Court. The withdrawal of legal representation will inevitably lead to the higher Courts having to deal with more appeals where parties are unrepresented which will inevitably increase the use of judicial time in dealing with poorly pleaded cases or weak claims which should not be appealed.

It is noted that the Government are consulting on proposals for the payment of fees to lodge Employment Tribunal claims and changes to the costs regime rights (**Resolving Workplace Disputes: A Consultation pages 49 and 32)**.

ELA notes that when Legal Aid was withdrawn from personal injury claims, an alternative funding system through conditional fee agreements was introduced. It is significant that at the present time there are no such similar proposals to fill the gap left by the withdrawal of Legal help for employment cases.

Unless a civil costs regime was to be introduced into Tribunals which would give the opportunity to lawyers to offer Conditional Fee Agreements instead of contingency fee agreements, then Claimants who have Legal Help withdrawn are likely to be at an even greater disadvantage in being able to present claims and their ability to access justice would be severely restricted.

The Community Legal Advice Telephone Helpline

Question 7-Do you agree that the Community Legal Helpline should be established as the single gateway to access civil legal aid ?

ELA has a number of concerns about this proposal, relating to the accessibility of the service to vulnerable clients, the quality of advice provision in situations where face to face advice will be needed before telephone advice, in relation to cost and the best use of resources and the client's right to chose their advisor.

Accessibility of the service

The experience of providers of employment advice under the Legal Help and Legal Aid schemes, particularly in the larger cities, is that telephone advice alone is not a suitable sole gateway for vulnerable clients.

In London and many of the larger cities, large numbers of clients in low paid jobs, either speak very little English at all, or in some cases speak no English whatsoever. Many clients from abroad have little understanding of UK Tribunal and Court systems.

Currently the Legal Help scheme provides disbursements for interpreters. Initial face to face advice sessions are usually needed for such clients, who would have serious problems accessing a telephone advice gateway as the sole route to legal aid.

Some clients do not have telephone access e.g. because they are homeless or unable to pay their telephone bills.

Many clients on low income often cannot afford to pay telephone bills, or to pay for the cost of taking time to contact a call centre and to hang on a telephone line waiting for advice. It will necessarily take a considerable period of time for many clients to explain their problems. This is not feasible over a telephone.

Clients who have mental health problems may not be able to explain their problems over a telephone and/or may not be able to explain over the telephone that they have a mental health issue. A telephone adviser may be unlikely to know whether or not the caller they are talking to has a mental health issue.

Many clients are not articulate and will need to a have a face to face discussion with an adviser first, before it can be established whether or not they have a problem that is suitable for help through legal aid.

Clients with sensitive issues e.g. HIV or abuse or harassment problems may be reluctant to raise issues initially over a telephone and may wish first to see an adviser face to face to establish first whether they can have trust and confidence in the adviser to explain their problem.

In large numbers of cases, clients are not aware of the nature of their legal problem and it is necessary to consider documentation with them on a face to face basis, before it is clear whether or not they have a legal issue.

In many cases it is necessary to see from the client's reactions whether they understand the questions they are being asked and the advice they are being given. This is not possible purely over the telephone.

Many clients are not able to explain or formulate their problem without face to face interviews.

Some clients may be illiterate and may be reluctant to explain this over the telephone. The adviser may assume that they can simply deal with the matter on their own with some brief telephone advice, but this may not in fact be the case.

When clients attend offices for advice, it is usually possible if they cannot be seen immediately, to book them in for future assessment. However clients who simply cannot get through to a call centre to speak to someone, because of the overload of calls, will not be picked up. Clients are likely to be missed and serious cases could end up being overlooked.

There may be serious problems as to how clients would become aware of the existence of this telephone service. Many clients will simply unaware of it, which is not the case with established current funded outlets for advice.

Quality control

The ability to give diagnostic advice over a telephone usually requires considerable training and experience. If inexperienced or unqualified advisers are used to assess client problems, then significant issues may well be missed. Clients with valid problems and entitlement to legal aid may not be identified through a call centre.

In such circumstances, there is a risk of negligence claims against the state, if clients with valid problems are not picked up through the service.

Although the experience of CLA currently providing advice over the telephone is that, in fact, many clients do find the service easy to use and that it is possible to provide full and good quality advice over the telephone, we are concerned that if the option for face to face advice was removed this would affect the vulnerable groups identified above and reduce client choice.

Use of resources

There is an issue as to whether it is sensible to spend considerable extra resources on establishing a new service, when resources are likely to be taken from established quality suppliers as a result. It would be better to preserve existing sources of advice. Telephone advice cannot be a substitute for a proper detailed assessment of a client's case on a face to face basis with documentation.

There must be a question whether the proposed new approach will make it viable for quality suppliers to undertake the work.

Choice

A gateway telephone service, which is only sign-posting clients to a particular supplier, may create problems given a client's right to chose their own legal adviser.

Question 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?

This is not advisable for the reasons set out above, if it is proposed that this will replace existing sources of advice. It would better to preserve existing sources of advice. In addition the complexity of many of the areas of law covered mean that it is simply not sensible or cost effective for advice to be given over the telephone.

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

The following factors are likely to be relevant;

a. Whether the client has a mental health problem.
b. Whether the client has language issues.
c. Whether the client is illiterate.
d. Whether the client simply cannot explain their problem over the telephone.
e. Where the client has a disability requiring reasonable adjustments.

Question 10 What organisations should work strategically with Community Legal Advice and what form should this take.

It is ELA's view that it would be wrong to favour particular organisations over others. Community Legal Advice should work with solicitors, Law Centres and Legal Advice Centres, CAB's and any other bodies currently providing specialist advice.

Question 11 Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?

The proposal may well be anti competitive, as the LSC proposes contracting with exclusive private suppliers to refer non legal aid work. This would effectively shut out other providers of advice and assistance in the private sector from this source of work.

There may also be an issue if the fees to be charged by providers are capped of clients clearly not entitled to Legal Help because of their income being offered the chance to receive legal advice at less than the prevailing open market rate for that advice.

In addition it is not a sensible use of LSC resources to be expending time and money on non- eligible clients, when eligible clients should be the priority.

ELA has a number of concerns about this proposal, relating to the accessibility of the service to vulnerable clients, the quality of advice provision in situations where face to face advice will be needed before telephone advice, in relation to cost and the best use of resources and the client's right to chose their advisor.

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