



# **Legal Aid: the need for reform**

**A policy statement from SHLA**

**September 2007**

## **Legal aid: the need for reform**

Legal aid<sup>1</sup> should be an important way of facilitating access to justice. But in SHLA's opinion the current system allows too many weak cases to receive legal aid. This is to the detriment of many people of modest means who are denied legal aid on income grounds even though their cases have reasonable prospects of success. SHLA is particularly concerned that the use of public money to bring and defend weak cases causes social landlords to spend more on legal proceedings than they should have to. SHLA would like to see:

- costs protection reformed
- the merits test tightened
- the means test relaxed

These reforms would help to shift resources from weak cases to stronger ones and would facilitate access to justice.

### **Costs protection**

The grant of legal aid to a tenant gives the recipient a considerable economic advantage over the privately paying party (a social landlord for SHLA's purposes). Win or lose the tenant rarely has to pay the landlord's costs because of what is known as costs protection. On the other hand the landlord that loses will invariably have to pay the tenant's costs. This is fundamentally unfair to landlords as costs protection creates an inequality of arms between the legally aided and privately paying parties.

The inequality created by costs protection encourages the bringing of weak cases. With a weak case the social landlord is put in the invidious position of either finding the legal costs to fight it or settling it to save costs. Costs protection sometimes enables legally aided tenants to exert a nuisance factor that can cause social landlords to make commercially based concessions to their tenants that are not justified on the merits.

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<sup>1</sup> This term is still commonly used in preference to 'public funding'.

This problem was highlighted over ten years ago by Lord Woolf in his interim report on Access to Justice<sup>2</sup> when he noted that:

‘While a successful assisted party may recover costs from his unassisted opponent, the converse, practically speaking, does not apply. Nor can a successful unassisted party recover costs from the legal aid fund itself, except under very limited conditions.’ (para 25.12)

In a consultation document about Legal Aid<sup>3</sup> Lord Woolf felt compelled to comment on costs protection because it was linked to the ‘aim of securing procedural equality’.

He noted:

‘the virtual inability of a successful unassisted party to recover costs where his opponent was legally aided. There is a limited power under section 17 of the Legal Aid Act 1988 to make an order against the legally aided litigant personally. There is also an exceptional power under section 18 of that Act in proceedings at first instance for the court to make an order against the legal aid fund in favour of such a litigant.’<sup>4</sup>

‘I welcome the initiation of debate about the position of the unassisted litigant *vis-à-vis* an assisted opponent. ... Greater liability to costs orders could result in the Legal Aid Board being more discriminating as to how its funds are used when there is, for example, an offer of settlement.’ (paras 25.26-27)

Despite Lord Woolf’s call for a debate costs protection and its inherent unfairness remains. The problem could be overcome by requiring the Legal Services Commission (‘LSC’) to pay the winning party’s costs in cases where the funded party lost. This reform would not directly affect the legally aided party who would still have costs protection but it would overcome the current problem whereby the social landlord who wins a case cannot usually recover any costs. This reform would also give the LSC an incentive to monitor more carefully to ensure that only cases with a reasonable prospect of success receive legal aid.

### **Merit tests and monitoring**

It is currently too easy for lawyers to claim that their clients’ cases have reasonable prospects of success (ie at least a 50% chance of success). Indeed, on possession claims an even lower threshold is applied because the lawyers merely have to certify

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<sup>2</sup> June 1995, <http://www.dca.gov.uk/civil/interim/woolf.htm>

<sup>3</sup> *Striking the Balance: the future of legal aid in England and Wales* 1996 Cm3305.

<sup>4</sup> Similar limited and exceptional powers are now to be found in *The Access to Justice Act 1999*.

that the prospects of success are not poor.<sup>5</sup> A threshold of having reasonable prospects of success should be applied across the board and the LSC should monitor the outcome of cases to ensure that this test is applied.

The LSC is not currently able to say what percentage of its funded cases are won or lost (ie which side has to pay the other's costs) as it uses the lower and subjective test of whether the funded party received a substantive benefit<sup>6</sup>. Some cases are settled on the basis of the funded tenant being able to extract a compromise, such as getting more time before being evicted, on the basis of the nuisance factor that a legal aid certificate creates. These cases enable a solicitor to claim that the tenant has received a substantive benefit. Yet these compromises rarely indicate that the tenant's case had merit: they usually indicate that the landlord has taken a commercial view of the situation in a case where even if it won it would not have been able to recover its costs from the funded party. At present the LSC spends £24 million on housing advice<sup>7</sup> yet has little idea what proportion of these cases are actually won<sup>8</sup>.

One way of gauging the extent of the problem is to consider the number of reported cases that are brought by tenants with legal aid. Although reported cases do not record whether the tenant of a social landlord had the benefit of legal aid s/he will invariably have had legal aid unless appearing in person. Of cases reported in the 2005 Housing Law Reports, 44 of them involved social landlords. Tenants initiated 80% of them yet won only 23%. This figure suggests that the merits threshold of reasonable prospects is not being adequately enforced. Moreover social landlords initiated only 20% of them yet won 77% and this figure suggests that social landlords impose a much higher merits threshold on themselves.

SHLA realises that at an early stage of proceedings legal aid lawyers may not appreciate if their clients' cases lack merit. But it is SHLA's experience that legal aid lawyers should do more to consider the merits of a case as it develops and to report

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<sup>5</sup> *The Funding Code: Criteria*, LSC, para 10.3.2

[http://www.legalservices.gov.uk/docs/civil\\_contracting/funding-code-criteria-new-dec05.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/funding-code-criteria-new-dec05.pdf)

<sup>6</sup> Guidance for reporting work under general civil contracts: controlled work the span system, LSC, April 2006, [http://www.legalservices.gov.uk/docs/forms/span\\_guidance\\_0406.pdf](http://www.legalservices.gov.uk/docs/forms/span_guidance_0406.pdf)

<sup>7</sup> This is an increase of 37% from £17.4million in 1999/2000, letter in the Law Society Gazette, Crispin Passmore, director of the LSC, 8<sup>th</sup> March 2007.

<sup>8</sup> Letters from LSC to SHLA of 22<sup>nd</sup> December 2006 and 30<sup>th</sup> January 2007.

to the LSC if their clients' cases are subsequently shown to have less than reasonable prospects of success.

### **Who would benefit from these reforms?**

Tenants are not helped by a system that allows too many weak cases to receive legal aid. For example, SHLA's members are familiar with defences to nuisance possession cases where the evidence of numerous witnesses for the landlord is denied by the legally aided tenant. Such cases almost invariably result in outright possession orders due to the absence of any honesty, contrition or regret from the tenant. If lawyers formed a view as to the merits and advised their clients that improbable defences could not receive legal aid then the process of getting an anti-social tenant to turn a corner could begin. For some tenants this could make the difference between losing a home and keeping it. At present legal aid is given to too many tenants who wish to run fanciful defences right down to the making of an outright possession order.

If the issues raised in this policy document were taken on board by the government, the LSC and legal aid lawyers then money could be reallocated to helping people with modest means many of whom currently fall foul of the legal aid means test even though they have legal problems that they cannot afford to tackle.

The Social Housing Law Association  
27<sup>th</sup> September 2007