

# evidence



## Landscape shift for consumers

Teresa Perchard looks at changes to support and advocacy for consumers

**On 14 October Vince Cable MP, the Secretary of State for Business, Innovation and Skills announced a significant shift in the government's approach to the 'landscape' of bodies supporting consumers. His rationale for doing so was that the current landscape is confusing and duplicatory which does not deliver best value for money.**

For example, enforcement of general consumer law is shared between the Office of Fair Trading (OFT) and Trading Standards. Consumer complaints are handled by a constellation of sector-specific bodies, by the Citizens Advice service and by Consumer Direct, a helpline currently operated by the OFT. Research and advocacy work is done by OFT, Consumer Focus and Citizens Advice and in some regulated sectors there are a number of specific consumer bodies. Information and education provision is split between all of these bodies.

In a move designed to simplify, strengthen and localise support for consumers, and deliver efficiencies, Vince Cable said he was minded to shift almost all relevant central government funding for consumer bodies towards local Trading Standards and the Citizens Advice service, both of which have high public awareness and trust levels.

This announcement appears to have come as a surprise to those who had not noticed that the Citizens Advice service has become a significant advocate on policy as well as advice. Not only did we help 2.1 million people last year to resolve seven million problems, but our evidence based policy work also resulted in real change to public and private sector services and the law, benefiting nine million people, many of whom have not personally needed to get advice from us.

Citizens Advice is proud of its achievements as an advocate for consumers. We have the track record, know how and a strong evidence based authenticity and credibility with the public and stakeholders. Big businesses and complex legal issues have never intimidated us – indeed our volunteer advisers take on big businesses and cut through complex law and bureaucracy every day of the week. The extensive involvement of volunteers and network of locally based organisations within the Citizens Advice service could help to create a more grounded, active, dynamic and responsive system of consumer protection and consumer advocacy, with consumers themselves and communities empowered and helped to play a stronger role. We are therefore excited by the opportunities ahead and determined to get the best for consumers from it, subject to

resources. But no organisation affected by this announcement has a monopoly on making a difference for consumers. It will be vital that we all work together to ensure that this landscape shift genuinely delivers more for consumers and that we keep our focus firmly on the consumer at all times.

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# Bank charges – plus ça change, plus c'est la même chose

Tony Herbert argues that as banks' changes to unauthorised overdraft charges are merely cosmetic, fundamental reform is urgently needed to protect people on low incomes.

**In November 2009 the Supreme Court delivered a crushing blow to a challenge to the legality of unauthorised overdraft charges when it found against the Office of Fair Trading (OFT) in its test case with the banking industry. Yet the attention surrounding the test case focused a spotlight upon banks' charging structures, prompting interest among politicians and inducing banks to alter the presentation of their charges.**

So, have these changes ushered in a new era of fair charging? In a word, no. Admittedly, work led by the OFT has produced some tangible improvements. For example, the average amount charged for unpaid item charges<sup>1</sup> has fallen by 50 per cent from £34 in April 2007 to about £17 in March 2010. Banks now provide illustrative scenarios showing how unarranged overdraft charges would be applied and better information is provided about charges on statements.

However, the main change has been in the way that customers are charged for the facility of having an overdraft. In general, there has been a move to a daily charging structure whereby customers are charged a set amount per day. This new system is, ostensibly, simpler. But the changes are largely presentational. The fundamental problem remains that they are contingent charges which people are unable to plan for, and therefore to compare offerings, since they are unable to predict if and

when they may apply.

The OFT's market study into personal current accounts in July 2008 found that unauthorised overdraft charges disproportionately affected people with low incomes or savings. In effect, the charges paid by poorer people were subsidising the 'free' banking enjoyed by many more affluent customers. The new charging structure perpetuates this unfair system. Under one bank's new charging structure, for example, someone who exceeds their authorised overdraft limit, is overdrawn for 21 days and makes 12 payments while overdrawn will actually be £16 worse off than under the previous regime.<sup>2</sup>

Large numbers of cases reported by Citizens Advice Bureaux continue to highlight how those on the lowest incomes are being made to suffer by the imposition of bank charges. While the charges may now be clearer, such improved transparency provides small consolation to those on low incomes who continue to see large chunks of their income swallowed up by bank charges.

A Gloucestershire CAB reported that their client requested a new debit card which would not allow him to go overdrawn, like his previous card. The client subsequently withdrew money from an ATM, a transaction which made him overdrawn by approximately £1. Once daily charges and other penalties had been added, this figure had reached £459.

Similarly, little seems to have changed

at an industry level. The OFT found that banks earned around £2.6 billion in 2006 from unauthorised overdraft charges. By 2009 this had fallen only very slightly to £2.52 billion. Meanwhile, in 2006, unauthorised overdraft revenue represented around 30 per cent of all revenue made from personal current accounts. In 2009, this had fallen to around 28 per cent. As the OFT notes, '[unauthorised overdraft charges] continue to represent a significant source of revenue for PCA providers'.<sup>3</sup>

## Impact of charges

The multiple charges applied to bank accounts belonging to people on low income are particularly invidious for two specific and related reasons.

Firstly, bank accounts are essential to function within modern society. They are required for almost all jobs, for the receipt of many benefit payments and to obtain the best deals on utilities. People have no choice but to possess an account and yet there are remarkably few safeguards to protect them from potentially toxic charges, or even to limit the amount charged. In this context, it is entirely unsurprising that four in ten of the recently banked had actually suffered financial detriment from opening a bank account.<sup>4</sup>

Secondly, once people encounter financial difficulties – caused or exacerbated by bank charges – it can be difficult or even impossible for them to open another bank account. This is because, increasingly, banks

1. The unpaid item charge is an unarranged overdraft charge that is levied when a bank refuses to make a payment, which if it had been paid, would have created or extended an unarranged overdraft

2. Scenario 6 under the OFT's illustrative scenarios

3. *Personal current accounts in the UK - Progress update*, The Office of Fair Trading, September 2010

credit check people applying for an account, refusing to open an account for those with poorer credit scores or if the person already has a bank account elsewhere.

A CAB in Tyne and Wear was helping a woman with her multiple debt problems. As she had a debt to her bank, she needed to open an account with another bank so that she could take control of her financial situation. The client took proof of her identity and address to another bank to ask for a basic account. However, the bank staff questioned her motives as to why she would need another account when she already had one.

Consequently, people in this position are trapped and can be subject to the repeated imposition of bank charges without escape. Improvements to transparency and the switching process are therefore of little relevance.

A Yorkshire CAB reported that a single unemployed woman had an authorised overdraft of £250 with her bank. Since she was on a very low income, she regularly exceeded this limit, incurring charges of £5 per day. When she received her benefit income, her balance returned to within the authorised overdraft. However, when her bank applied the charges accrued during the previous month (usually approximately £120), this took the client over her authorised limit once again, thus incurring incur further fees. The client was trapped in a spiral of debt.

It is important to recognise that there are protections available to people in financial difficulties which have been caused or made worse by

unauthorised overdraft charges. Most pertinently, the Lending Code requires subscribers to treat people in financial difficulty 'sympathetically and positively'. Unfortunately, bureaux report many cases where banks are unwilling to stop levying bank charges on a customer's account.

A 40 year old unemployed man suffering from cancer sought advice from a CAB in Northumberland because he could not withdraw money from his bank account. When the client inadvertently exceeded his £1,000 overdraft limit he was charged £15 per day, up to approximately £150 per month. These charges were absorbing almost all his benefit income. When the client went to the bank to ask for an end to the charges, he was told that he would have to get himself sorted out first. The client therefore had no money for food or to keep warm.

A CAB in the West Midlands was helping an unemployed man deal with his non-priority debts. The client had been charged £166 in overdraft charges in September and was due to pay a further £119.08 in October. The charges had been taken from the client's housing benefit payment, and so he could not pay his rent. Although both the client and the CAB adviser told the bank about his financial difficulties, the bank would not stop the charges.

## What is being done?

At the moment, a working party led by the Lending Standards Board is developing best practice guidance on how banks should deal with customers in (or at risk of) financial difficulty who incur unarranged

overdraft charges. The guidance will be incorporated into the Lending Code, and subject to the Lending Standard Board's monitoring and enforcement regime, in 2011. This is welcome since there is a pressing need to improve the protections available to those in financial difficulty.

However, because compliance with the existing provisions contained in the Lending Code can be patchy, Citizens Advice believes that more fundamental reform of bank charges is urgently required, including limits on the level and frequency of such charges. We also argued strongly that the UK government should seek to amend the Consumer Rights Directive to enable unauthorised overdraft charges, to be assessed for unfairness. Unfortunately, Government decided it required more time to consider this issue and to reflect on the outcome of the Credit and Personal Insolvency Review.<sup>5</sup> We are heartened that the Review states that 'voluntary, market-driven solutions alone may not deliver sufficient improvements. We want to see charges that are fair, clear and proportionate for consumers and banks.'<sup>6</sup>

More broadly, we will note that the Coalition Agreement stated unequivocally, 'we will introduce stronger consumer protections, including measures to end unfair bank and financial transaction charges'.<sup>7</sup> Let's hope that the coalition Government's commitment on bank charges is one that is kept.

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4. *Realising Banking Inclusion: the achievements and challenges*, HM Treasury, Financial Inclusion Taskforce & Policis, May 2010

5. *Government Response to the Call for Evidence on the Consumer Rights Directive: allowing contingent or ancillary charges to be assessed for unfairness*, Department For Business, Innovation And Skills, October 2010

6. *Call for evidence in support of the Consumer Credit and Personal Insolvency Review*, HM Treasury and the Department for Business, Innovation and Skills, 15 Oct 2010

7. *The Coalition: our programme for government*, May 2010, Cabinet Office, p. 13

# Realising the vision

Lizzie Iron examines the Government’s proposals for welfare reform

**Since the budget in June, the coalition Government has made it clear that they will re-shape welfare in this country. Not only are they determined to cut the £87 billion bill for working age benefits, but they will also reform society through simplifying the system and making work pay, thus eliminating fraud and error, and ensuring that there is a clear incentive for everyone to get back to work.**

At the highest level, the Government is thinking in a joined up way and envisages a future where its policies for business – for example, tax relief for small businesses, and encouraging apprenticeships and self-employment – will grow the economy and generate new jobs. The active approach to welfare – support for people to find suitable work, combined with punishments if they don’t try hard enough – will then move thousands of people into these jobs, and generations of workless households will re-discover the benefits of work, thus resolving many of our social problems, and enabling the Government to target welfare spending on those who really need support.

We understand the Government’s intentions, and to a large extent, we support the principles of these reforms – but the problems come in the translation of this macro vision into reality. Perhaps most fundamentally, how do we get from here to there, and what safety nets are in place for those who fall by the wayside on the journey? Those who do fall into rent arrears and homelessness, or into severe debt,

as we work towards the new system, are likely to find it very difficult – if not impossible – to recover in time to benefit from the new universal credit. It is vital that the Government assesses the impact, and ensures mitigating measures for the worst affected.

## Universal credit

The future of welfare lies in the universal credit, a single benefit for households in and out of work, which is scheduled to start for new claims in 2013. It will be compiled according to household need – that is with elements for children, disability and housing costs. Most people on the benefit will be allowed to earn up to a threshold of income before the benefit begins to be withdrawn at a steady rate as they earn more – currently set at 65 per cent (this will be calculated after tax and national insurance contributions and therefore amounts to a 76 per cent withdrawal rate for those paying tax). Delivery depends on an IT system that will monitor income on a monthly basis, and pay the credit due each month, while client information will be managed through personal online accounts. It should, indeed, be beautifully simple.

The fundamental difficulty, however, is that this reform is expensive and the Government is trying to introduce it in the context of the biggest deficit reduction programme in recent memory. We therefore see the architecture for the universal credit being prepared now, and its foundations depend on reducing the costs of welfare to make the new system affordable.

These foundations include reducing the number of people on incapacity benefits (mainly the new employment and support allowance (ESA)); cutting the housing benefit bill; and reducing levels of tax credits. There will also be an integrated Work Programme, where claimants will start with Jobcentre Plus, and may then move on to support from third party providers to help them find work. This supportive approach will be backed up with a strict regime of conditionality, which will require certain behaviours in return for the benefit, including the option of forced work experience.

While this makes some sense as a theoretical model, we are – as always – deeply concerned for the numerous clients we see who will not fit neatly into the model.

Some people develop debilitating physical problems in their fifties or sixties, which result in reduced life expectancy, and make it difficult for them to adapt to new types of work. Yet the new assessment for ESA is likely to find them fit for work (or place them in the work related activity group) because – in theory – they could re-train. Furthermore, if they have moderate savings, or a partner earning anything over £150 per week, they will only receive ESA (contribution-based) for 12 months, and will then have only the partner’s income to live on, as they will be above the threshold for means-tested ESA. We would like to see provision for people in these circumstances to access their pensions early.

A Hertfordshire CAB saw a 63 year old man with prostate cancer and knee problems, but still two years away from state pension age. He had given up driving, was physically unable to do the kind of manual work he had done all his life, and felt he did not have the skills for less arduous work. He received no points at his ESA assessment and was appealing the decision, but was exhausted and demoralised just by the problems of using public transport to travel to the assessment. His wife had a part-time job that just put him out of pension credit limits.

## Housing benefit cuts

We are particularly concerned about two of the proposals to cut housing benefit (HB): the plan to cut HB by 10 per cent for people who have been claiming jobseekers allowance (JSA) for over 12 months, and the plan to extend the shared room rate from people under the age of 25 to those under 35 (which means that single people eligible for HB will only receive enough money to cover the cost of a room in a shared house). Both these proposals will affect people with mental health difficulties and other disabilities which mean they are already disadvantaged in the labour market, and are least likely to be accepted for shared accommodation.

A Hertfordshire CAB saw a young woman who was in receipt of JSA and disability living allowance. She had problems communicating clearly, so it was particularly difficult for the adviser to resolve a fairly straightforward debt issue. Her chances of finding a job must be very low indeed, but under current plans, she would lose 10 per cent of her housing benefit after 12 months of trying, most likely resulting in rent arrears to her housing association. If she were then evicted, she would be

in priority need for re-housing by the local authority.

Each of these measures will also impact on separated families, as lone parents with care may legitimately spend over 12 months on JSA if they are looking for work around their caring responsibilities, while non-resident parents will lose the opportunity to provide suitable accommodation for when they see their children. If we cannot persuade the Government to withdraw these measures, we would – at least – expect to see a comprehensive list of people exempted from them.

## Tax credit cuts

There are a number of cuts to the amounts of tax credits to be paid, from freezing rates, to raising the withdrawal rate as income rises. Perhaps the most worrying is the proposed rule which will disregard £2,500 of any reduction in income. So from 2012-13, anyone who loses their job from redundancy or through illness will also lose £1,025 in tax credits, at a time when they are struggling to cope with the drop in income and the change in circumstances, and are at their most vulnerable. We would like to see this measure withdrawn.

## Designing the new system

If these are the foundations for the new system, the plans for the actual buildings are still very much on the architect's table, and the Treasury has allowed the DWP £2 billion to implement the changes. Citizens Advice is very pleased to be included in the Government's advisory panel on the design and delivery of the system, and we are – at least – worrying about the same things.

These include critical details, such as how childcare will be paid for. For single parents and low income households with children, the ability to cover the cost of childcare – or to find reliable, state-funded childcare – is often crucial in whether someone can successfully sustain a job. For employers, too, it is essential that their employees have reliable childcare to enable them to focus on work.

Council tax benefit is to be managed by local authorities, but also incorporated into the universal credit – the practicalities of this are not at all clear. The Government is also encouraging older people to leave the workplace gradually, and the new system must therefore be integrated into pension provision. It must also work for people who are self-employed, and for carers, and for those with limited capacity to work.

These and other details are all still on the drawing board. Let's hope that the Government's architects can not only realise the vision, but also have a robust risk assessment for the building process. If not, the vision will be sadly tarnished by the plight of those left behind on the way.

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# Will the new SMI standard interest rate push poor homeowners over the edge?

Peter Tutton highlights recent CAB evidence suggesting that a technical change to the calculation of the help with housing costs under the means-tested Support for Mortgage Interest (SMI) scheme could have serious consequences for some of the most vulnerable low income homeowners

**The 2010 Budget and more recent Comprehensive Spending Review (CSR) brought both good and bad news for low-income homeowners receiving help with mortgage interest payments with their means tested benefits. The CSR announced that the temporary changes to the SMI scheme introduced in 2009 (a shorter 13 week waiting period for help with housing costs and increased £200,000 capital limit) will remain in place for another for another year. This is good news. Although the Council of Mortgage Lenders recently revised down its repossessions forecast for 2010 to 39,000, unemployment remains high and predicted public sector job losses may mean a new group of households seeking help from the SMI safety net next year.**

On the other hand, the 2010 June Budget announced changes to the SMI standard interest rate that will reduce the support available for a large number of homeowners. SMI payments are not based on the mortgage interest rates that borrowers actually pay, but on a single standard rate determined by benefit regulations. The main policy point was to keep the SMI scheme administratively simple, avoiding thousands of adjustments to individual mortgage accounts.

From 2004 the standard interest rate was set at Bank of England

base rate plus 1.58 per cent. But risk based pricing, particularly in the sub-prime mortgage market meant more borrowers were paying rates over and above the standard rate. When base rates fell to a historic low of 0.5 per cent, the rates that many borrowers were actually paying did not follow. The recession broke the 1.58 per cent formula as an effective safety net. In response the previous government temporarily fixed the standard rate at 6.08 per cent.

This worked in delivering the help but created a new problem. Some SMI entitled borrowers, such as those with base rate linked tracker mortgages, were being paid significantly more than their actual liability. Welfare minister Lord Freud recently stated that over 90 per cent of SMI recipients got more than their actual interest liability<sup>1</sup>.

This was not a bad thing in some cases. Courts will suspend a possession order where a borrower shows that they can pay the current mortgage plus something off the arrears. The SMI overpayment allowed some borrowers to do this, as the following case shows.

A CAB in Hertfordshire saw a 38 year old lone parent. Her lender took possession action for mortgage arrears. Because the standard rate of 6.08% was higher than the actual rate on her mortgage, SMI paid £89 per month more than the contractual mortgage payment.

So the judge made a suspended possession order on terms that she paid the contractual payment plus £89 towards the arrears each month.

One could also argue that as the excess SMI was being paid directly to lenders, it helped to fund forbearance across the market more generally. However, in the current context of deficit reduction, it is hardly surprising that the Department for Work and Pensions (DWP) decided that such overpayments could 'no longer be justified'.

Instead SMI entitlement will be based on an average of the various rates in the mortgage market published regularly by the Bank of England, currently 3.63 per cent. But using a market average means that currently around 110,000 households (according to the DWP's own equality impact assessment) will see their SMI help reduce below their actual mortgage liability.

Borrowers started to receive this new lower level of support from around the beginning of October and CAB advisers are already seeing people facing the prospect of making up the difference from their subsistence level benefits. As the following cases show, some of the borrowers are very vulnerable and the shortfalls in support are very large compared to their incomes.

A CAB in London saw a 59 year old man who was in receipt of

1. Comments reported on BBC website, 13 November 2010

employment and support allowance (ESA) and disability living allowance (DLA). He had previously had two jobs to provide for his family, but became ill with stomach cancer and was unlikely to ever be able to work again. They had a mortgage and were previously receiving £146 per week SMI. But the fall in the standard SMI rate reduced this to £87. They were already under a great deal of stress and had no means to meet this shortfall.

A CAB in London saw a 53 year old woman who was undergoing chemotherapy for cancer. She received DLA and needed full time care. Her SMI reduced from £84 a week to £50. She could previously meet the shortfall between the SMI payment and the contractual mortgage payment with help from her family and by using her disability living allowance. But she had no way of meeting this greater shortfall. The stress of the situation was very difficult as she was suffering severe fatigue and finding it hard to cope as a result of the chemotherapy.

A CAB in Staffordshire saw a woman who had suffered serious injuries in a car accident that resulted in ongoing physical disabilities. She was unable to work and in receipt of ESA and DLA. Until recently most of the monthly mortgage repayment was covered by SMI and she had to pay a £20 shortfall from her benefit income. But her SMI payments fell by about half, leaving her to find a shortfall of £208 per month. She said this left her with about £40 per month to live on, and so she had already started looking for rented accommodation.

Other cases involve borrowers already under a suspended possession order for existing arrears. The reduction in SMI support is a

further squeeze on what is already a hair trigger to repossession.

A CAB in Nottinghamshire saw a 52 year old man who lived with his daughter. He received employment and support allowance and an SMI payment of £67 per week leaving him £0.46 to pay towards his mortgage. On this basis a possession order was suspended on terms that he paid the current mortgage and £25 per month towards the arrears. But SMI reduced to £40 per week leaving him an additional payment of £118 per month. This was completely unaffordable.

The DWP is aware of the potential for hardship and has responded by challenging lenders to absorb the excess or reduce the rates they charge to borrowers receiving SMI. Lord Freud even hinted that the Government may legislate to force lenders to do so if voluntary persuasion does not work<sup>2</sup>. Alas, early evidence from CAB clients shows that some lenders are not helping borrowers in the way the DWP imagines.

A CAB in Essex saw a 50 year old disabled man who was unemployed and in receipt of income based jobseekers allowance and DLA. The fall in the SMI interest rate left him with a monthly shortfall of £44. His mortgage lender responded by telling him that arrears of three months would trigger repossession action.

A CAB in Dorset saw a man whose SMI payments reduced from £111 per week to £66 per week. He contacted his mortgage lender who said that they could not change his existing rate of 6.45 per cent until 2013 as he had a fixed rate mortgage. He was unable to find the extra £195 per month to make up the shortfall.

A CAB in Yorkshire saw a 53 year old disabled woman. After finding out that her SMI payments were reducing she contacted her mortgage company for help. The mortgage lender offered to change her to a different mortgage package as she was on fixed rate for five years at 5.59 per cent. But this would cost her £2,000 and a £190 admin fee.

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## So where does this leave us?

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We would urge the government not to let this emerging problem drift into a crisis of hardship among the most vulnerable homeowners. Instead we believe that the government should consider one or more of the following policy measures to ensure that the mortgage safety net remains effective at keeping people in their homes:

- Ensure that the courts have the power to keep people in receipt of SMI in their homes, even where they cannot meet the whole contractual mortgage payment or arrears payments.
- Follow through to ensure that lenders benefitting from SMI payments take responsibility for protecting borrowers.
- Or better still, why not pay SMI at the rate that borrowers are actually required to pay?

The government established a claims and payments architecture for the Homeowner Support Scheme quickly and efficiently. Could similar thinking be used to simplify administration of the SMI scheme and remove the need for a problematic standard rate altogether?

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<sup>2</sup> Financial Times online edition, published 30 September 2010

# The end of the world as we know it?

James Sandbach asks whether the Government spending cuts effectively mean the end of civil legal aid

**Just over 60 years since the birth of legal aid, the Government set out its proposals for the future of legal aid, including a £350 million budget cut. In his announcement to Parliament, the Secretary of State for Justice, Kenneth Clarke MP, said he wanted to take legal aid back to its original intentions. Indeed in many respects the proposals could be described as a reboot rather than a reform. Under the proposed changes, large numbers of civil issues will no longer be eligible for publicly funded legal advice – including relationship breakdown, child contact, immigration problems, asylum support, consumer issues, welfare benefit problems, educational exclusion and special needs. In other words it is social welfare law - the whole project of using law to tackle social issues - that will no longer be funded by the justice system. Civil legal aid funding will be reserved explicitly for issues involving liberty, human rights and abuses of power by the state.**

At the heart of this proposed change is a debate about what constitutes a legal need, and what support the state should fund to help citizens deal with their legal and related problems. The Green Paper's explicit view is that the state is a funder of last resort, and that citizens should resolve their issues out of court without recourse to public funds. This debate about legal aid versus alternative redress is not a new one. Professor Hazel Genn wrote in 1999 that 'The central dilemma

in the access to justice argument is whether the objective of legal policy should be to enhance access to legal forums for the resolution of disputes, or whether it should be aimed at preventing disputes from arising, equipping as many members of the public as possible to solve problems when they do arise without recourse to legal action and diverting cases away from the courts into private dispute resolution forums. It is not an answer to say that they should be twin objective of policy, because logically they conflict.'<sup>1</sup>

However, there is something ominous in the Government's proposals. Firstly, there appears to be a complete rejection of 'cluster theory' as the basis for organising categories of civil legal aid provision. Decades of empirical research on people's legal problems has shown that typically people seeking legal aid experience inter-related and multiple problems; that when one type of problem type occurs, other problems follow. For example, family law problems bring economic ones, and homelessness problems typically involve debt and welfare benefits issues. In the LSRC's civil justice survey, 24 per cent of those who reported having employment problems also had consumer problems, 22 per cent had problems with neighbours, and 18 per cent had money or debt problems.<sup>2</sup>

## Funding for advice

Indeed it was the last Conservative Government that recognised the value of holistic services, and set

up a franchising pilot for Citizens Advice Bureaux and other not-for-profit agencies to provide civil legal aid services as an alternative to the more legalistic approach of private solicitors.<sup>3</sup> As a result, legal aid is now an integral part of the CAB service. During 2009/10 over 300 CAB specialist advisers dealt with 43,234 welfare benefit problems, 56,990 debt problems, 9,129 housing and 2,954 employment problems paid for by contracts with the Legal Services Commission (LSC) and accounting for over 20 per cent of all publicly funded cases in these topic areas. Around 80 per cent of social welfare legal aid cases record positive outcomes for clients, with additional savings for other public services.

So bureaux will be understandably anxious about the future of their specialist services. The LSC is now the most significant funder of specialist advice services within bureaux. In 2009/10, it provided £27 million for specialist advice delivered by the Citizens Advice service. This amounts to over 15 percent of funding for the service.

## Scope and entitlement

But it is the clients who will really suffer. Based on current case volumes this will mean over half a million less people getting help from the legal aid system according to the Ministry of Justice's own impact assessment. If the Green Paper's proposals on scope are implemented without amendment, then all clients with cases in benefits, employment, and housing or debt short of

1. Genn, *Paths to Justice – What people do and think about going to law*, 1999

2. *Causes of Action: Civil Law and Social Exclusion*, LSRC 2008

3. *Striking the Balance: the Future of Legal Aid in England and Wales* Cm 3305 MSO 1996

homelessness can only be directed to navigate the system themselves and argue their own case (as 'unassisted claimants'). It is suggested that other forms of legal advice and redress might exist; for example, support from trade unions, legal expenses insurance, self-representation before tribunals, and self-navigation of complex complaints and review mechanisms. However people who seek advice from bureaux overwhelmingly have no such options. Therefore the reality is that withdrawal of legal aid will simply mean no service and no advice.

Also ominous are the Green Paper's proposals on entitlement. Eligibility for the full costs of civil legal aid will be restricted to people with total assets worth less than £1,000 – thereafter a sliding scale of contributions will apply. People in receipt of benefits will also have their capital assessed in the same way, so there will be no automatic 'passporting' as there is at present. Capital disregards will also be abolished in cases not involving contested property, (whilst retaining a 'waiver scheme' for those who cannot access their equity), although people with disposable income of less than £315 per month will not have to pay contributions. Overall this means a major reduction in eligibility. Contributions are set to rise from 20 per cent of weekly income to 30 per cent. Consequently, there are likely to be situations where clients who are offered legal aid will not be able to accept it as they will not be able to afford the contributions.

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## Triage

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The one ray of light in the Green Paper in keeping with the 'alternatives' approach is a bold proposal for a new triage service via the Community Legal Advice (CLA) telephone advice service. This

is envisaged as a single gateway to access civil legal aid and advice. The vision is for the 'CLA providing not just a gateway to legal aid advice services, but also enabling access to the wider advice services market, including the voluntary sector' and 'as a reliable one-stop shop for clients looking for legal advice.' So the CLA also to have an enhanced role in information and referrals into 'alternative' redress.

It is expected that call volumes could increase by around 1.2 million calls per year (from around 600,000 to around 1.8 million), with an overall increase in Operator Service costs of around £10 million per year and procurement costs of £1 million. A target of around 580,000 cases could appropriately be offered specialist advice over the phone, rather than face to face, and in some categories it is intended that the majority of civil legal help clients and cases can be dealt with through this channel.

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## Alternatives

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Yet the alternative resolution routes on offer in the Green Paper are little more than existing Ombudsman and Tribunal services. Our evidence is that people need expert help and support in preparing a good case if they are to be successful in gaining redress via ADR schemes. A switch to mediation is envisaged for family law (except where domestic violence is involved), but there is no indication of any funding to enhance the capacity of mediation services. So reforming legal aid by slicing civil funding down to human rights and public law issues, without offering much by way of alternatives, is a breathtaking risk in terms of access to justice strategy and the public's ability to get redress.

Our final concern about the proposed legal aid reforms is that the Green Paper says nothing about the need to simplify complicated laws and government systems which drive up need for legal aid. For example, as many as 40 per cent of appeals against decisions to find employment and support allowance claimants fit for work succeed, suggesting there are problems in the initial decision making. Yet this is an area of law the Government proposes removing from legal aid altogether, which could leave people with no way to get the vital support they deserve.

To influence the future of legal aid, Citizens Advice is working with other legal and advice providers on a campaign, Justice for all. The campaign is calling for:

- advisers to be free to advise on any problem, where and when they are needed
- adequate levels of government spending on legal aid, but spent on services not on wasteful systems.

Please join the campaign for a sustainable legal aid system by visiting [www.justice-for-all.org.uk](http://www.justice-for-all.org.uk).

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# What price justice?

The controversial idea of charging fees for tribunals is back on the agenda, in at least two government departments. [Richard Dunstan](#) reports.

**After an absence of almost a decade, the controversial idea of charging application fees for tribunals is back on the agenda. In October, the Ministry of Justice announced a formal consultation on its plans to introduce fees for appeals in the immigration and asylum chambers of the First-Tier and Upper Tribunals.<sup>1</sup> And in November, after *The Daily Telegraph's* website reported<sup>2</sup> that leading human resources (HR) directors have called on ministers to introduce application fees for employment tribunals, officials in the Department for Business, Innovation and Skills (BIS) confirmed that they are giving serious consideration to the idea as part of an internal review of employment law launched shortly after the formation of the Coalition Government.**

Fees for employment tribunals were last proposed by the then Labour government in July 2001, but the proposal (for fees of up to £100) was quickly dropped in what *The Guardian* described at the time as Prime Minister Tony Blair's 'first political retreat since the [May 2001] election'<sup>3</sup>. And in 2000 and 2001, Citizens Advice led a successful, multi-agency campaign against the fees for family visit visa appeals introduced alongside the new appeal right in October 2000. The fees – which Citizens Advice and others argued were racially discriminatory as well as wrong in

principle – were first much reduced, in January 2001, and then finally abolished in April 2002.

In both cases, Citizens Advice strongly opposed the fees on the basis that such fees would constitute a substantial barrier to justice that cannot be justified on any financial, administrative or other grounds. This time around, *The Daily Telegraph* reported one HR director as favouring what he called a 'small' fee for employment tribunals of 'say, £200'. But whilst £200 may not be a significant sum to the average HR Director, it is a great deal of money to a worker earning £5.93 per hour on the National Minimum Wage who has, for example, been denied some or all of their statutory entitlement to paid holiday. And CAB evidence on the lack of fee remission for the bankruptcy deposit fee (currently £450) shows that it is a real barrier to obtaining debt relief for people on low incomes.

The only way for a worker to assert his or her legal right to their paid holiday is to bring an employment tribunal. Should they be deterred from doing so, by an application fee equal to one week's wages, not only would an injustice be done to them, but the rogue employer would have been able to profit from breaking the law. And that is an injustice to the great majority of law-abiding employers, who quite rightly want – and are entitled to expect – a level playing field on which they can compete *fairly*, within the law.

As in 2001, the principal argument put forward by the HR directors is that the fees would 'weed out' the 'far too many spurious claims from former disgruntled employees'. But, as in 2001, the HR directors present no actual figures or, indeed, evidence of any kind to back up their claim that such 'vexatious and spurious' claims currently 'clog up' the employment tribunal system. They fail to mention that tribunal judges already have extensive case management powers to require a deposit of up to £500 in seemingly 'weak' cases, to strike out a claim they deem to be 'vexatious' or otherwise have no reasonable chance of success, and to award costs of up to £10,000 against a claimant deemed to have brought a 'misconceived' claim (which includes one having no reasonable prospect of success). And they overlook the fact that those claims 'weeded out' by the fees would – as demonstrated above – include valid and meritorious claims by low paid workers. In the words of Brendan Barber, general secretary of the TUC:

"Low-income and vulnerable workers are more likely to face discrimination and already find it hard to challenge unfair treatment in the courts. Introducing fees would make it even harder to seek justice and would be a victory for bad employers that seek to exploit workers who they know cannot afford to fight back"<sup>4</sup>.

Much the same can be said of

1. *Introducing fee charges for appeals in the Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal*, Consultation Paper CP10/10, Ministry of Justice, October 2010. The consultation will run for 12 weeks (that is, until 21 January 2011) and the consultation paper is available at: [www.justice.gov.uk/consultations/consultations](http://www.justice.gov.uk/consultations/consultations)

2. 'Workers should pay up to £250 to sue their employer, HR chiefs say', *The Telegraph*, 8 November 2010

3. 'Blair relents on tribunal fees', *The Guardian*, 5 September 2001

4. Quoted in 'Will Government proposals for Employment Tribunal charges reduce the number of claims?', *Personnel Today*, 9 November 2010

the Justice Secretary's decision, announced in November, to abolish all 'legal aid' for employment cases (as well as for most housing, benefits, debt, immigration and other legal problems). As Steve Hynes, director of the Legal Action Group, notes, these cuts will 'fall heavily on Citizens Advice Bureaux and other community-based legal advice services such as law centres, at a time when they are already facing cuts from other arms of government.'<sup>5</sup> In other words, the cuts will damage the very advice services on which vulnerable (non-unionised) workers most rely in challenging the exploitative practices of rogue employers through the employment tribunal system.

In relation to the planned fees for immigration and asylum appeals, the Ministry of Justice uses a somewhat more subtle argument: that it is reasonable to ask users of the tribunal system to contribute to the financial costs of that system. In the consultation paper, it proposes that fees be set at a level to 'achieve total fee income of around 25 per cent of full cost', which would mean fees of around £125 for an oral hearing and £65 for a paper-only appeal in the First-Tier Tribunal, and £250 in the Upper Tribunal. (The consultation paper proposes exemptions for those cases where action is initiated by the State upon an appellant, such as deportation or deprivation of citizenship, and for asylum appellants in receipt of UK Border Agency asylum support or in the 'detained fast track' process.)

But this argument assumes that those making an immigration or asylum appeal are using the tribunal system *out of choice*. In reality, many if not all are seeking justice in relation to a decision by the State that they consider to be wrong in substance

and/or in law. As the Immigration Law Practitioners' Association (ILPA) notes, 'it shows a reckless disregard for the principle of equality of arms to put barriers in the way of calling to account a department [the UK Border Agency] whose powers are so great and whose track record in using them is so very unhappy'. Furthermore, many appellants will already have paid a substantial fee to submit the original application now under appeal. As Steve Hynes notes:

"The essential civil legal bedrock of a civilised society is laws that protect people from injustice. For such laws to be effective, people must have the means to enforce them. Cutting off people from the legal means of redress when things go wrong in their lives only helps create more human misery".

Interestingly, whilst one of the HR directors seeks to 'sweeten the pill' by suggesting that employment tribunal fees should be 'refundable if the case succeeds', the Ministry of Justice explicitly rules out such refunds of immigration and asylum appeal fees on the grounds that 'a cost will be incurred to administer an appeal irrespective of the outcome and we consider it appropriate that the user of the system should make a contribution towards that cost'. It is hard to see how employment tribunals could be treated any differently by the Government.

More fundamentally, the proposed introduction of such fees marks a move away from a fundamental principle of the social welfare tribunal system since its formation: that, in the interests of justice, the system is free at the point of access. Although the Ministry of Justice consultation paper on fees for immigration and asylum appeals states that it is 'Government policy that users of

a service should contribute to the cost of providing that service', the application of such a 'policy' to the tribunal system has never been fully debated, let alone approved, by Parliament. Immigration and asylum applicants are hardly the most popular of groups, and in the current political climate it is hard to imagine the kind of 'political backlash' that led to the then Government's 'climb down' on Employment Tribunal fees in 2001.

But perhaps any move by Vince Cable at BIS to introduce fees for employment tribunals – combined with the 'double whammy' of the abolition of legal aid for employment cases – will yet rouse shadow ministers, Liberal Democrat backbenchers, and trade union-sponsored Labour MPs. The issue could yet prove to be one of the first major political tests of Ed Miliband's leadership since his election.

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5. In "Legal aid cuts lack public support", *The Guardian*, 16 November 2010

## Evidence reports published in the last six months

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- **Called to account** (*July 2010*)  
Why banks must provide basic bank accounts to undischarged bankrupts.
- **Fair welfare** (*September 2010*)  
Client experiences of support into work.
- **(Un)civil recovery** (*December 2010*)  
Major retailers' use of threatened civil recovery against those accused of shoplifting or employee theft.

## Recent briefings and responses to consultation papers. October-December 2010

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- The Office of Fair Trading's national strategy for online consumer protection (October).
- Ministry of Justice's Family Law review (October).
- HM Treasury's consultation on a new approach to financial regulation: judgement, focus and stability (October).
- Ofgem's consultation on Smart Metering Implementation Programme: Consumer Protection (October).
- The Government Equalities Office consultation on the Equality Act 2010's public sector Equality Duty: Promoting equality through transparency. (November).
- Submission to European Commission on right to a basic bank account (November).
- Ofcom's Strategic Review of consumer switching (November).
- Ofcom's call for evidence on ADR schemes (November).
- The Ministry of Justice's call for evidence on the European Commission's Green Paper about European Contract Law (November).
- The Department for Business, Innovation and Skills' consultation on implementing the revised EU Electronic Communications Framework – Overall approach and consultation on specific issues (December).

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