

Final Combined Regulatory and Race Impact Assessment (RRIA) on the proposals contained in the "New Focus" consultation on civil legal aid

(i) The objective

Reform of the scope and eligibility levels of the civil legal aid scheme: to encourage early and effective dispute resolution and to discourage unnecessary litigation; and to ensure that the limited resources of the Community Legal Service (CLS) (Civil Legal Aid) are better targeted on the areas of greatest need.

The "New Focus" consultation paper was issued on 22 July 2004 by the Legal Services Commission (LSC) (formerly the Legal Aid Board), an executive Non Departmental Public Body of the Department for Constitutional Affairs (DCA). The LSC was established and given responsibility for the administration of legal aid funding under the Access to Justice Act 1999 (AJA).

The primary objective of the proposals was to indicate possible changes that would allow the LSC to re-focus CLS funding so that early and effective dispute resolution is encouraged and litigation is seen as a last resort. The paper also proposed changes designed to ensure that the limited resources of the CLS are better targeted on the areas of greatest need. The merits criteria for CLS funding and other issues concerning the eligibility of individual clients, such as the current financial eligibility tests for funding and scope exclusions, as well as matters of cost protection, were also considered.

(ii) Historical context

The DCA and the LSC's overriding concern is that legal aid provides the benefits to society that it was designed to achieve while providing value for money for the taxpayer. Legal aid funds must continue to be targeted on those who need them most and the overall cost of legal aid cannot be allowed to outstrip inflation. During the 1990's there was a rapid increase in legal aid spending, which more than doubled between 1988/89 and 1992/93. More recent increases are largely as a result of increasing expenditure on criminal and asylum/immigration legal aid, on which we have now taken measures to bring under control.

A reform programme to tackle increasing costs was established under the AJA. This programme was targeted on better spending of civil legal aid and improving the efficiency of criminal legal aid.

Civil legal aid was prioritised on social exclusion, putting some legal activity into the private sector (e.g. 'no win, no fee' for personal injury cases). A tougher merits test was instituted, Community Legal Service Partnerships were set up to measure local needs, and a greater proportion of resources was allocated to "legal help" work to resolve cases without court intervention. As a result, the civil legal aid budget has remained broadly static with more money going to those with a genuine need. Although fewer cases in total now receive public funding, more money is going to those with a genuine need but the average cost per case is rising substantially - hence the need to move away from litigation where at all possible.

(iii) Devolution

These proposals would apply to England and Wales.

3. The background

The LSC helps people obtain publicly-funded legal and advice services. This financial year, the LSC will spend almost £2 billion on legal and advice services, mainly through its two schemes:

- The Community Legal Service, that provides legal advice and representation for people needing help on civil law matters.
- The Criminal Defence Service, that provides legal advice and representation for people facing criminal charges.

There are currently around 8,000 quality-marked solicitor and advisory offices providing publicly-funded legal and advice services in England and Wales through the LSC. The LSC provides funding that assists around 2 million people each year. Around 800,000 of these people are assisted by the CLS.

The aim of the CLS is to ensure that people can get information and advice about their legal rights and help with enforcing them. The qualifying criteria for access to CLS funding are set out in the AJA, regulations and the Funding Code. In order to receive funding through the CLS, a client must establish that their income and capital levels are within the qualifying limits set by regulation. In addition, they must establish that their proposed case has sufficient merit to warrant funding in that it has the appropriate level of prospects of success and cost benefit.

The Funding Code, which is established under section 8 of the AJA, sets out the criteria under which individual cases may be funded as part of the CLS. The Funding Code is in two parts, Criteria and Procedures. Whilst the Procedures have been amended several times since their introduction, the Criteria have remained unchanged since April 2000. Changes to the Code Criteria generally require parliamentary approval under the affirmative procedure under section 9 of the AJA.

There is a range of specific Funding Code issues where amendments may be necessary to ensure that the Code remains fully relevant to the current legal climate. In some cases, the proposals for reform are needed due to external reforms, for example in the field of Clinical Negligence. However other proposals stem from the need to respond to some of the concerns that have arisen about the current operation of the Code.

The current incentives of the Legal Aid Scheme, many of which have remained unchanged since the statutory scheme was introduced half a century ago, do not encourage litigation to be seen as a last resort. In particular, remuneration rates are higher for Legal Representation, which covers litigation, than for Legal Help which provides support for early resolution of disputes. Also, funded clients enjoy protection against costs orders from the other side. In practice cost protection makes litigation almost risk free for the funded client, so that the normal private client instinct to treat litigation as a last resort does not apply in legal aid cases.

In combination these factors lead to strong pressures to litigate. Those pressures cannot be eliminated entirely, indeed it will always remain a key role of legal aid to fund litigation in appropriate cases. However where appropriate we do want to shift the balance of the incentives away from contested litigation. To do that we propose a combination of:

- (i) strengthening the Funding Code Criteria to make it harder to fund litigation especially where reasonable alternatives exist, such as complaints systems or other forms of ADR;
- (ii) addressing the above incentives directly, for example by removing or reforming the existing differential remuneration rates or by reforming cost protection.

These changes are necessary to ensure that the limited resources of the CLS are better targeted on the areas of greatest need, and that those people who are able to afford to use alternative means of funding legal action do so. The changes are designed to align the eligibility tests for Legal Help and Legal Representation. They will also end the anomaly whereby an individual may qualify for Legal Representation, but not Legal Help. The financial eligibility tests are set out in the Community Legal Service (Financial) Regulations 2000 (as amended).

In addition, the budget for legal aid services is currently under serious pressure. Separate consultations have been undertaken in relation to crime and immigration/asylum expenditure. In that context it is important to look critically at all areas currently within the scope of civil funding to see whether expenditure can be more effectively targeted and controlled. The consultation therefore raised a range of options for tightening up the existing funding of civil cases.

4. Risk assessment

There are a number of risks which need to be addressed. First, there is serious pressure on the CLS fund which may mean that the CLS does not remain within budget. If this happens then there is a real risk that the CLS will have to be reduced in the future. Second, and consequently, if CLS funding is not controlled it may be that the most deserving cases and priority areas may not receive the assistance they need.

The following risks have also been identified in the various category areas within which public funding is available under the CLS. In addition, there is a general risk that the current criteria governing the availability of public funding are not preventing unmeritorious cases being taken. For example, last year, in certain non-family categories only 1 in every 3 cases resulted in a successful outcome for the funded client. If these risks are not addressed they will remain as obstacles to the DCA Public Service Agreement 3, to “reduce the proportion of disputes that are resolved by resort to the courts”. DCA sets the overall policy framework for public funding, within which the CLS operates. DCA is responsible for securing the CLS budget, which is administered by the LSC.

Family

- The lower remuneration rates for Legal Help encourage important early work to be done by less experienced staff, possibly to the detriment of the funded client. In addition, the lower rates for Legal Help in comparison to Legal Representation also create an incentive to proceed to a full certificate, in some cases sooner than necessary;
- General Family Help, a category of work directly focused on funding assistance in resolving disputes through negotiation or otherwise, has not been widely used. General Family Help was intended to be the usual method of funding initial instructions in family cases. At present, however, only 1 % of private law children

cases use General Family Help. This appears to indicate that the current funding arrangements are not encouraging low-level dispute resolution as strongly as possible;

- The present structure arguably does not make the best use of Family Mediation. The requirements in the Funding Code Procedures to refer cases to consideration of Family Mediation apply both to General Family Help and to Legal Representation. This will sometimes cause cases to be referred to Family Mediation too early in the process, causing wasteful mediation assessments;
- The range of different levels of service available in the family area is causing unnecessary bureaucracy for practitioners and the LSC, especially when firms need to complete detailed application forms for services which are devolved and where firms choose to open separate files for each separate level of service.

Clinical Negligence

There is currently a risk that clients are not being directed to appropriate dispute resolution. The Chief Medical Officer has produced a report, the central recommendation of which is the establishment of a Redress Scheme. These proposals raise a number of issues for legal aid but until the detail of any Redress Scheme becomes clear, it is impossible to say whether independent legal support or some form of legal aid is needed to support cases proceeding through Redress. Until this process is settled, there is a risk that CLS funding is not being directed appropriately. In particular, there is a real risk that cases are proceeding to litigation, without first attempting some form of ADR, when such a process would be more appropriate. For example, in the last financial year, only 4 % of funded clinical negligence cases were concluded with either side proposing ADR.

Actions Against the Police

There is currently a risk that current funding rules are allowing too many weak claims to proceed at considerable public expense to both sides. There is also a risk that the current approach to funding unnecessarily encourages litigation before exploring all other options. In funded claims against the police where proceedings were issued, 40 % of cases proceeded to final hearing; a much higher proportion than most other non-family categories. Almost no use was made of ADR.

Personal Injury

Currently, most Personal Injury proceedings other than Clinical Negligence are excluded from public funding. However, some risk has been identified that the scope of this exclusion does not extend to exclude all the cases intended. In particular, the exclusion applies only to negligence cases, not to cases involving allegations of deliberate harm. While the overall number of cases funded in this category has remained low, the limitation of this exclusion to negligence only has meant that certain cases have remained in scope when they cannot be considered a high priority for CLS funding. This was highlighted by the burglar Brendon Fearon's claim for damages against Tony Martin. Although Brendon Fearon was funded under the Legal Aid Act 1988 his claim would have been within scope under Schedule 2 to the AJA, because his injuries were deliberately, not negligently, caused.

5. Options

Option 1 – Do Nothing

This option would mean that the Funding Code remained unchanged and no action would be taken to address the continued pressure on the CLS budget. In addition, proposed amendments to some case categories, as the result of reviews by other government departments, would not be taken into account. The consequences of this for other government departments and public bodies would be that they continued to incur litigation costs that might otherwise be avoided. If this situation continued then it would be likely that a severely limited CLS budget could hamper the ability of the LSC to target its resources on the most deserving cases. Further, this option would mean that the financial eligibility test for CLS funding would remain unchanged and no action would be taken to address the anomalies in the means test and the pressures on the CLS budget. In addition, should that situation continue, funding would not be targeted on the most vulnerable.

Option 2 – The proposals contained in the "New Focus" consultation paper, to make changes to Financial Eligibility, the Funding Code and merits Criteria

The consultation paper set out proposals that were aimed at addressing the risks outlined in this impact assessment. Overall, the proposals shown below aim to re-focus CLS funding so that early and effective dispute resolution is encouraged and that the limited resources of the CLS are better targeted on the areas of greatest need, whilst aiming to address the current budgetary issues facing the fund.

Following the detailed and considered responses received to the consultation, a number of changes and concessions have been made to the original Option 2 proposals. The approved way forward on each is detailed beneath each option *in italics*. The consultation responses themselves are examined and represented in more detail in the Consultation Response document, which will be published in conjunction with this document on the DCA & LSC websites at www.dca.gov.uk and www.legalservices.gov.uk.

The main proposals are:

Financial Eligibility

1. to target further controls on financial eligibility at the upper end of the range of eligible clients. It is proposed to increase the income eligibility limits for Legal Help in line with inflation but reduce the upper limit for contributory Legal Representation down to the same level. This will achieve uniform income limits across all levels of service.
- *Proceeding with aligning Legal Help and Legal Representation disposable income eligibility limits, but with added improvements and safeguards such as: introducing a discretion to waive the disposable income limit in domestic violence proceedings (subject to the Gross Income Cap, and paying contributions where required); increasing the capital limit for Legal Help from £3000 to the £8000 limit for Legal Representation to allow us to passport all income support recipients for Legal Help; the pensioner disregard to apply to Legal Help; and childcare costs for self-employed people will be discounted from disposable income. Those*

excluded will be paying contributions at the top end of the income bracket of up to £168.

2. to abolish the existing rule under which the first £100,000 of equity in an applicant's home is disregarded. This reflects the modern trend towards the flexible use of housing equity. However, exemptions will be provided for those on the lowest incomes and on passported benefits, so that an allowance of up to £100,000 can be made dependent on income level and benefit receipt.
- *Not proceeding with the abolition of the equity disregard because there was a genuine concern from a wide range of stakeholders, including the legal professions and their representative bodies, NGOs, and other interested parties, that people should not be forced to risk their homes in order to assert their rights. In response to the strong representations received we have listened and will not be taking this proposal forward.*

Family

3. to develop Family legal aid to encourage the early and amicable resolution of Private Law Family cases, to support wider government initiatives on the family justice system and to ensure that available resources are directed towards the services which are most important to clients.
4. to re-structure Funding Code levels of service to replace Legal Help, General Family Help and Help with Mediation with a single devolved level of service called Family Help, which will cover all non-adversarial Family dispute resolution. In time this new level could be funded under a system of standard fees for particular items of work. At the same time the grant of Legal Representation for contested proceedings would be more strictly controlled. Such a system could be piloted and rolled out through FAlnS (Family Advice and Information Service) suppliers prior to national implementation in April 2006.
- *Proceeding with the restructuring of the three Funding code levels of service – to replace Legal Help, General Family Help and Help with Mediation with a single devolved level of service called Family Help. A pilot will be established to test its operation. There was much support for going ahead with this as it will benefit solicitors and clients alike.*
5. to increase the grounds for refusing funding for ancillary relief cases to include grounds that private funding mechanisms may be available. There is also a case for restricting the operation of the rule under which assets in dispute in a matrimonial case are disregarded when calculating financial eligibility. The current £3,000 statutory charge exemption on property or money recovered in Family proceedings is arguably anomalous. Especially given the current budget situation, it should be considered whether there is any real justification for retaining the exemption.
- *The proposal to introduce a discretion for the LSC to allow refusal of funding in ancillary relief cases where private funding is available has been agreed in principle but implementation has been deferred until officials and stakeholders have undertaken further research into the possible effects of this and on the availability of loans for this purpose.*

- *Proceeding with a modified proposal (following helpful comments from consultees) on the subject matter of dispute (SMOD) rule, so that only the first £100,000 in the name of each applicant should be disregarded, and assets in joint names should be treated as equally shared.*
 - *Proceeding with abolishing the current £3,000 statutory charge exemption on property or money recovered in Matrimonial (Family) proceedings.*
6. to introduce stricter controls over multiple and repeat applications in Private Law Family cases and to limit our funding to one certificate per client at any time.
- *Proceeding with the introduction of stricter controls over multiple and repeat applications in Private Law Family cases, and with the improvement of LSC processing systems to provide a more reliable means of identifying all previous legal aid applicants*
7. to remove cost protection in Family cases to make sure that the court has powers to deter unreasonable conduct by publicly funded clients.
- *Proceeding with the removal of cost protection in family cases to deter unreasonable behaviour by publicly funded clients.*
8. to remove low priority categories from scope, such as Legal Help for drafting divorce and judicial separation petitions or for changes of name.
- **Not proceeding with the removal of the drafting of divorce petitions or name changes from scope as it was felt that clients drafting their own petitions would make errors, wasting court time and legal resources, and reducing the possibility of an early settlement. Although many respondents were in favour of removing name changes from scope it was felt on balance that, as there would have to be exceptions for vulnerable clients or victims of domestic violence, the status quo would be better overall.**

Discouraging Unnecessary Publicly Funded Litigation

9. to require clients to pursue a complaint or Ombudsman scheme prior to seeking funding for Legal Representation, where appropriate. Whether or not the complaint scheme can offer compensation, obtaining an explanation from a public body before legal aid is considered may enable a better informed decision to be made on the merits of the proposed claim.
- *Proceeding - instead of making ADR mandatory, the LSC will have the discretion to require appropriate cases to proceed through the appropriate complaints schemes before legal aid is available, i.e. the new Independent Police Complaints Commission or the NHS Complaints procedures.*
 - **Not proceeding with the proposal to use the new NHS Redress Scheme as it has not been finalised.**
10. to require Mediation and other forms of ADR to be considered routinely in publicly funded litigation. In appropriate cases the Commission should have the power to limit a certificate to cover only pursuit of ADR options.

- *Proceeding to encourage the use of Complaints, Ombudsman, ADR and Mediation in Non-Family Cases.*
11. to limit the availability of funding in non priority litigation if the case can instead be pursued privately under a conditional fee agreement (CFA). The availability of public funding should not necessarily be linked to the availability of private insurance.
 - ***Not proceeding** to refuse funding in non-family cases which could proceed under a CFA. It was not thought that this was practical in housing disrepair cases, police, clinical negligence or judicial review cases, and some cases could lead to the solicitor not being paid if costs are not awarded.*
 12. to build in flexibility to the funding process in Clinical Negligence cases to ensure that the appropriate balance between public and private funding in Clinical Negligence cases is achieved. It should be possible for cases to shift from legal aid to conditional fee agreements after all investigative work has been concluded.
 - ***Not proceeding** with funding Clinical Negligence cases by CFA after the investigation stage, as After-the-Event insurance is either not available, or the premiums prohibitively expensive. In addition, any legal aid savings would simply have to be met elsewhere from public funds through success fees to the NHSLA.*
 13. to take into account the availability of conditional fee agreements in group actions, even in priority areas, so that the appropriate balance between public and private funding can be achieved. It is proposed to expand the definition of CFAs in the Code so that it clearly covers other insurance-based private funding arrangements.
 - *Proceeding with the refusal of funding if a case can proceed under an insured CFA. If insurance is unavailable, legal aid will be granted.*
 14. to improve the applications procedure to make sure that clients with before the event insurance are identified.
 - *Proceeding*
 15. to retain protection against orders to pay another party's costs in Non Family cases. However, the extent of that protection should be reduced, for example by making clients liable for the first £200 of any adverse costs order, in order to discourage weaker claims.
 - ***Not proceeding** with this proposal as it was felt that this would not discourage those who were determined to pursue weak cases, and might even discourage many of those with meritorious cases. It was also unlikely to be enforced and would cost more to administer than was recovered.*
 16. to strengthen the Cost Benefit Criteria for priority Non Family cases to ensure that the benefits to be obtained from a case are proportionate to the costs involved.
 - *Proceeding*

17. to raise the minimum cost benefit ratios for Clinical Negligence damages claims to match those in the General Funding Code.
 - Proceeding.
18. to exclude weak claims against public authorities from public funding to improve the outcomes secured by those cases which are publicly funded. This may require extra training of LSC staff and restricting such cases to expert suppliers with a good track record.
 - Proceeding.
19. to simplify the application of the Affordability Criterion for high cost cases so that only the most expensive cases are in practice subject to the test.
 - Proceeding with restricting the civil VHCC budget by Lord Chancellor's direction and with simplified guidance.

Other Changes

20. to replace the current exclusion from funding of cases concerning "negligently caused" injury with a general exclusion of personal injury claims, other than Clinical Negligence cases and cases brought back into scope by the Lord Chancellor's Directions.
 - Proceeding and also to ensure a new scope direction to authorise Legal Help funding in relation to applications to the Criminal Injuries Compensation Authority.
21. to abolish the existing system of support funding for high cost Personal Injury cases.
 - Proceeding.
22. to introduce a separate section of the Code for cases which are arguably criminal in ECHR terms. Such cases would then be subject to an "Interests of Justice" test instead of the normal Code Criteria on Prospects of Success and Cost Benefit.
 - Proceeding. It is right that these cases should be subject to the interests of justice test instead of the normal Code criteria.
23. to restrict devolved powers to grant Judicial Review in some or all cases. The presumption of funding in Judicial Review cases should be modified so that appropriate cases can still be refused where alternative funding for the litigation is available.
 - Proceeding with a modified proposal to take action against individual firms where there are concerns. Further decisions on whether to grant on grounds of "wider public interest" will be referred to the LSC.
24. to extend devolved powers to allow suppliers to extend funding to defend substantive appeals to the Court of Appeal.

- *Proceeding with extending devolved powers to allow suppliers to extend funding to defend substantive appeals to the Court of Appeal.*
25. to make Help at Court (a form of informal funded advocacy) available for all cases where advocacy is within the scope of public funding.
- *Proceeding.*

6. Benefits of the revised package

Even in its much reduced form the remaining package of proposals is expected to produce savings of £50m over the SR04 period - in conjunction with those set to be made through the implementation of the Fundamental Legal Aid Review (FLAR). If we can remain within budget this will help us to ensure that we can continue to provide funding for essential services to the most vulnerable in society in coming years without having to make further, or more drastic, changes.

Moreover, the suggested financial eligibility changes will strike a balance between public and private funding for litigation, by excluding the less poor who may be able to obtain private funding. They also include a number of measures that will widen financial eligibility for public funding:

- alignment of the capital limits to the higher Legal Representation level will allow us to passport income support recipients for Legal Help;
- introduction of a discretion to allow the LSC to waive the Legal Representation disposable income limit in domestic violence proceedings;
- extension of the pensioner equity disregard to Legal Help as well as Legal Representation; and
- discounting childcare costs for self-employed people from their disposable income when assessing eligibility.

The table below sets out each of the reforms we propose to go ahead with and the corresponding estimated SR04 RAB savings from each.

Change as part of the review of the Funding Code	Estimated saving in RAB (full years) £m	Numbers affected	
New Family Levels			
New level of family help	Cost neutral	340,000 (all affected will benefit)	
Income and Capital Limits			
Align income limits for Legal Help and Legal Representation; align capital limits for Legal Help and Representation; introduce discretion to waive disposable income limit in dv cases; apply pensioner disregard to Legal Help; self-employed childcare costs discounted from income	05 to 06 - £2m 06 to 07 - £2m 07 to 08 - £2m	3500	
Assets in Dispute			
Place £100,000 per person ceiling on SMOD rule	05 to 06 - £0m 06 to 07 - £1m 07 to 08 - £1m	600	
Family Proceedings			
Abolish £3000 Statutory Charge exemption; abolish cost protection in family cases.	05 to 06 - £1m 06 to 07 - £2m 07 to 08 - £3m	4000	
Private Law Children			
Control Multiple and Repeat Applications; improve systems to reliably identify previous legal aid recipients	05 to 06 - £2.25 06 to 07 - £4m 07 to 08 - £6.25m	7500	
Actions against the Police			
Reform police cases: discretion to refuse funding in appropriate cases where complaints procedure not pursued first; refer to common sense proportionality in cost-benefit test; improve handling of police cases	05 to 06 - £0m 06 to 07 - £0.5m 07 to 08 - £0.5m	200	
Clinical Negligence			
Reform Clinical Negligence: discretion to refuse funding in appropriate cases where complaints procedure not pursued first; bring cost-benefit ratio into line with General Funding Code.	05 to 06 - £0.75m 06 to 07 - £1m 07 to 08 - £2m	900	
Judicial Review			
Remove presumption of funding for post-permission judicial reviews; restrict devolved powers for emergency judicial reviews by removing devolved powers from firms with poor results at JR & refer funding based solely on wider public interest grounds to LSC	05 to 06 - £0m 06 to 07 - £0.5m 07 to 08 - £0.5m	500	
Miscellaneous Non-Family Changes			
Encourage greater use of ADR/mediation; identify existence of BTE insurance early on; introduce discretion to refuse funding in low-priority areas e.g. education damages, contract disputes where they can proceed by insured CFA – if insurance is unavailable, funding will be granted. Broaden personal injury exemption to remove deliberate harm from scope; abolish support funding	05 to 06 - £0.75m 06 to 07 - £1m 07 to 08 - £1m	1200	
Statutory Charge			
Improve Statutory Charge enforcement: Automatic postponement on home becomes discretion to postpone; Increase interest rates to 8%; Direct resources into chasing outstanding Statutory Charge debts	05 to 06 - £0m 06 to 07 - £1m 07 to 08 - £1m	5000	
Very High Cost Cases			
Restrict the civil VHCC budget by direction. Proceed with simplified guidance on affordability criterion.	05 to 06 - £2m 06 to 07 - £4m 07 to 08 - £6m	2000	
	05/06	06/07	07/08
Total Savings RAB	9.75	17	23.25
Total SR04 Savings RAB			50

7. Individuals affected

The above table also sets out how many cases we expect to be affected each year. The proposals are limited in scope and carefully targeted to pursue the necessary savings with the minimum of impact on those affected. Up to one million people are helped through the CLS each year.

We recognise that people will still require support from the Legal Services Commission where informal dispute resolution is not available. Whilst we intend to encourage mediation and a variety of alternatives to litigation, legal aid will continue to be available to fund the cost of litigation where there is no more appropriate alternative. Indeed, such a system is necessary to maintain our compliance with Article 6 of ECHR.

We recognise also that processes such as mediation require the co-operation of both parties. If a party with significant resources refuses to mediate, legal aid will remain available to the other party to take or defend the matter in Court subject to the normal means and merits criteria. Further, the Court of Appeal has recently affirmed the importance of mediation and other forms of alternative dispute resolution being considered by all parties. Litigation must be the last resort. In a number of leading authorities the Courts have been prepared to exercise the sanction of costs orders against a party with significant resources who unreasonably refuses to take mediation seriously. This approach by the Court should work hand in hand with a reformed legal aid scheme which places the emphasis on resolving disputes as early as possible.

The Code changes will have benefits for individuals seeking early and effective dispute resolution. The changes seek to encourage mediation and settlement, thereby avoiding unnecessary and potentially costly litigation. For example, reforms to the Code would take into account reforms in the NHS and police complaints procedures, and avoid litigation costs both for individuals and public authorities. Furthermore, the suggested Code changes help strike a balance between public and private funding for litigation, by encouraging the use of CFAs which are able to provide access to justice not just for the poor, but also for those on middle incomes who cannot afford the costs of traditional litigation. The market has now improved so that a wide range of banking products are more readily available to cover the cost of premiums and disbursements for good cases proceeding under a CFA, without the need for the client to provide funding. We recognise that there are still many cases where it may not be available, and so funding will still be available where necessary and appropriate.

It is important that the legal aid scheme reflects external developments in dispute resolution, of which the substantial improvements in the systems of police and clinical negligence complaints are a good example. Such complaint schemes are, of course, available free of charge to the complainant. For cases which need to proceed to litigation after the complaints procedure, CFAs are available.

8. Business sectors affected

The Code and financial eligibility changes will lessen the publicly funded legal representation work of solicitors' firms and Not for Profit (NfP) organisations, as

individuals are encouraged to seek mediation and settlement over litigation. However, solicitors' firms and NfP organisations will continue to provide Legal Help (advice and assistance) for most matters. Additionally, solicitors' firms may make up any short-fall in publicly funded work through accepting clients on a private fee basis, through greater use of conditional fee agreements.

As at February 2005, the number of solicitors and NfP organisations with civil contracts with the LSC was 4,464. Of these 77 deal with Actions Against the Police, 61 deal with Education, 3,128 deal with Family, 1,059 deal with Personal Injury and 290 deal with Clinical Negligence.

9. Costs

(i) Compliance costs

The Code and eligibility changes reflect the need for change in the way that services are provided. In addition, savings need to be made because of budgetary constraints. However, the need to make savings is not the only reason for making these changes. The majority of the proposals in the consultation paper are measures to target CLS funding more precisely, in line with our commitment to use dispute resolution procedures which do not depend on litigation wherever that is possible, and target funding on the least well-off in society.

The following table shows the rise in CLS net expenditure in recent years:

Community Legal Service	2001/02	2002/03	2003/04
Family Representation	£319m	£325m	£422m
Civil Non-Family Representation	£157m	£137m	£92m
Family Legal Help	£64m	£90m	£76m
Immigration Legal Help	£120m	£174m	£196m
Civil Non-Family Legal Help	£74m	£86m	£111m
Total CLS	£734m	£812m	£898m

A detailed breakdown of the total estimated savings to the CLS fund from the revised proposals is set out in the table under the benefits section.

(ii) Other costs

In re-structuring Family levels of service it is intended that the changes will be cost-neutral. For Non Family services, major restructuring of Funding Code levels of service is not proposed. The existing principal levels, namely Legal Help, Investigative Help and Full Representation may well be appropriate even in the longer term. The LSC/DCA are particularly interested in considering which services should be devolved to quality assured suppliers and which decisions ought to remain directly controlled by the LSC. The funding of individual high cost cases, however that threshold is defined, should remain with the LSC. However, other Non Family funding could be devolved especially services within the scope of Investigative Help.

10. Issues of equity and fairness

Race Equality Impact Assessment

The proposed changes to the Code are designed to ensure that the limited resources of the CLS are better targeted on the areas of greatest need. The financial eligibility changes propose that CLS funding is more focused on the socially excluded, while the scope changes are designed to ensure that public money is targeted on the cases with the greatest merit.

The LSC monitors the ethnicity of CLS clients in receipt of Legal Help and Legal Representation and reports the outcome of this monitoring in its equalities annual reports. These reports, including the latest for 2003/04, are available on the LSC website at www.legalservices.gov.uk, or from the Secretariat, Legal Services Commission, 85 Gray's Inn Road, London WC1 8TX (020 7759 0000). The submission of information on ethnicity is voluntary. In 2003/04 ethnicity information was volunteered by 44.7% of applicants for civil representation. Using this information, the LSC has assessed the likely impact of the Code changes and do not believe that the changes will be likely to unlawfully discriminate against black and minority ethnic (BME) clients.

Proportion of BME clients seeking Legal Help

In the latest report, a table of Legal Help matters completed by ethnicity of client for 2003/04 includes comparative data from 2002/03. Although it appears that the percentage of BME clients receiving Legal Help has reduced significantly, this is largely as a result of there being a substantial drop in asylum applicants. Discounting the asylum category, BME clients represented 14.6% of total recorded clients in 2003/04, compared with 16.3% in 2002/03. There has been a fall in BME clients in every contract category except clinical negligence and family, where there have been slight rises. However, as last year, a particularly high number of BME clients continue to be helped in community care, education, immigration and social welfare law.

Proportion of BME clients seeking Legal Representation

In 2002/03 applicants for civil representation in all categories of law¹ were 79.7% white and 20.3% of BME origin. In 2003/04, 80.9% were white and 19.1% were BME. Although the overall proportion of white and BME applicants applying for civil representation remained at a similar levels to 2002/03, the LSC's report shows that there were higher numbers of applications for immigration and nationality, welfare benefits, community care, employment and housing. The majority of the proposals in the consultation paper apply to particular categories of law. It therefore follows that any tightening of funding in these categories of law is likely to impact differentially on BME groups as compared to white applicants.

The table below shows applicants for civil representation by category of law and ethnicity, in those categories of law most affected by the reform package.

¹ Categories of law: actions against the police etc; clinical negligence, community care, consumer, debt, education, employment, family, housing, immigration & nationality, mental health; personal injury; public law, welfare benefits; and miscellaneous.

Applicants for Legal Representation by category of law and ethnicity²

Category of Law		BME %	White %
Actions against the police etc	2002/03	31.9	68.1
	2003/04	33.3	66.7
Clinical negligence	2002/03	10.3	89.7
	2003/04	11.1	88.9
Family	2002/03	14.2	85.8
	2003/04	12.9	87.1

Family is the dominant area of certificated work and therefore the area in which there will be the most significant changes. However, the proportion of BME applicants for family work in 2003/04 was 12.9 per cent, which is relatively low compared with the proportion of BME applicants in other categories of law. The same is true for clinical negligence, and so the LSC do not anticipate that the Code changes in these categories of law will have a significantly disproportionate effect on the BME population.

In contrast, the percentage of BME applicants for actions against the police is high in comparison with the general population. However, this does not mean that the Code changes will have a disproportionate impact on BME communities. The objective of the code changes is to reduce the number of weak claims being pursued overall, by encouraging applicants to make use of alternative dispute resolution procedures, where appropriate. Of certificated cases completed in 2003/04, only 36% achieved any benefit for the client. Only 41% of cases which proceeded to a final hearing were successful. Since pursuing weak cases to an unsuccessful conclusion is of no benefit to the applicant, we consider that these reforms will in fact benefit the applicant group, and that the Code changes do not unlawfully discriminate against any racial groups.

Gender Equality Impact Assessment

A number of respondents stated that the proposals to reduce the upper eligibility limit for legal representation, to abolish the equity disregard, to control multiple or repeat applications, and to refuse funding for ancillary relief where private funding alternatives are available, would have a disproportionate effect on women, particularly those fleeing domestic violence, with English as a Second Language (ESL), or with childcare responsibilities.

Data

Helpful data is provided in the Legal Services Commission's second equalities annual report, which presents the results of their equal opportunities monitoring for the period 1 April 2003 to 31 March 2004. During 2003/04 the LSC extended monitoring of public service functions to include disability and gender.

The LSC report shows that there was a high proportion of female applicants for civil representation in housing, family and clinical negligence. The area with the highest proportion was family with the percentage of female applicants at 63.1%. An analysis of the gender of applicants by region did not show any significant variances from the total national figures.

Gender had a significant influence in predicting three of the 18 problem types studied: domestic violence, clinical negligence and unfair treatment by the police. Female respondents were much more likely than male respondents to report domestic violence and clinical negligence problems.

Assessment

Equity Disregard and Low-Priority Cases

Following our consultation, we do not intend to proceed with the proposal to abolish the equity disregard, or to take low-priority cases, such as divorce proceedings or name changes, out of scope.

Alignment of Disposable Income Eligibility

As for the proposed eligibility alignment, this will exclude from eligibility those people best placed to fund their own legal costs. At present, someone at the highest level of eligibility has to pay a monthly contribution of £167.50 per month and this level of contribution is similar to private funding. We intend to cap eligibility at the level where someone has to pay a contribution of £130 per month.

However, we propose to increase the capital limit for Legal Help from £3000 to £8000 in line with Legal Representation. This would further align eligibility levels, and would increase eligibility.

In the light of the views expressed by respondents, we propose, as an essential safeguard, that the Legal Services Commission has a discretion to waive the upper disposable income eligibility limit for domestic violence proceedings. This would help to ensure that no victim of domestic violence is left without legal redress.

Also, we intend to discount childcare expenses from the disposable income of self-employed people, which will increase eligibility and reduce costs for self-employed women with childcare responsibilities.

Control Multiple And Repeat Private Law Family Applications

The proposal to introduce stricter controls over multiple and repeat applications in Private Law Family cases will prohibit the grant of more than one certificate per client at any time (unless there are already proceedings in two or more different courts). However, there is no additional risk that further private law proceedings will not be funded, as further proceedings will be covered by amendment to the original certificate. This measure will, however, assist the LSC in ensuring that applications are only funded where reasonable and justified under the private client test.

Ancillary Relief

The refusal of ancillary relief funding, where private funding is available, would not take ancillary relief cases out of scope, but would provide the LSC with a discretion to

refuse further funding where there are available assets which can be used to fund legal costs, or where the client in the individual case is in a position to borrow sums to cover the costs.

We will not withdraw assistance from any client at the beginning of the process (i.e. Legal Help and General Family Help). Clients subject to the proposed new criterion will still be able to receive advice, investigate the financial position of the other party, negotiate, mediate and be represented if necessary up to the Financial Dispute Resolution hearing (FDR). For cases which did not settle in this period, solicitor and client will have the time to put in place any necessary private funding arrangements where these are possible. Where no such alternative exists, this will be explained to the LSC on a revised application form and funding will be available under the usual rules. Further work into the availability and conditions of personal finance will be done to ensure that those refused legal aid will be able to access affordable private alternatives.

Conclusion

Under the Sex Discrimination Act 1975, a person directly discriminates against a woman if, on the grounds of her sex, he treats her less favourably than he treats or would treat a man. A person also discriminates if he applies to a woman a requirement or condition which he applies, or would apply, equally to a man, but which is such that the proportion of women who can comply is considerably smaller than the proportion of men who can comply, and which he cannot show to be justified in respect of either sex.

Although in some of the affected areas, e.g. ancillary relief, the majority of applicants are women, these proposals will only affect those best placed to fund their own action, and it will not target women generally, irrespective of their financial circumstances. The proportion of women affected by this proposal is confined to those in the best position to fund their own cases, and likewise the proportion of men affected by this proposal are exactly those who are in the best position to fund their own cases.

Given the nature of the proposals, and the safeguards we will put in place, we believe that there is no evidence that women will be discriminated against, or disproportionately affected in an unfair way.

Disability Equality Assessment

Several respondents stated that the proposals to reduce the upper eligibility limit for legal representation, to abolish the equity disregard and to remove low-priority cases, such as the drafting of divorce petitions and name changes from scope, would have a disproportionate effect on persons with a disability.

Data

Once again, useful data is provided in the Legal Services Commission's second equalities annual report. The LSC recorded the disability of Legal Help clients for the first time in 2003/04. In consequence there was a relatively high number of matters where disability status was not provided (45.5% of the sample). However, the report shows that, as expected, a high proportion of disabled clients received legal help for

welfare benefits (55.7% of applicants disabled), community care (52.9%), and mental health (38.3%) problems.

In addition the LSC's research centre published a national periodic survey of justiciable problems in February 2004³. It showed that disabled respondents were more likely to experience a justiciable problem than non-disabled respondents: 43% of the 1,395 disabled respondents had experienced one or more problems in the survey period. Disabled respondents' increased likelihood of experiencing a problem was observed in the majority of categories and particularly those relating to issues of social exclusion such as housing and welfare benefits.

Disabled respondents were more likely to go on to experience other problems, but showed no overall difference to other respondents in terms of advice-seeking behaviour, including both propensity to seek advice and types of advisers contacted.

Assessment

Equity Disregard and Low-Priority Cases

Following our consultation, we do not intend to proceed with the proposal to abolish the equity disregard, or to take low-priority cases, such as divorce proceedings or name changes, out of scope.

Alignment of Disposable Income Eligibility

In regards to the proposed eligibility alignment, this will exclude from eligibility those people best placed to fund their own legal costs. At present, someone at the highest level of eligibility has to pay a monthly contribution of £167.50 per month and this level of contribution is similar to private funding. We intend to cap eligibility at the level where someone has to pay a contribution of £130 per month.

However, we propose to increase the capital limit for Legal Help from £3000 to £8000 in line with Legal Representation. This would further align eligibility levels, and would increase eligibility.

Conclusion

It is unlawful under the Disability Discrimination Act 1995 for a person to treat a disabled person less favourably for a reason related to their disability than he or she treats (or would treat) others to whom that reason does not (or would not) apply. Although a disabled person is more likely to experience a justiciable problem than a non-disabled person, the proposed eligibility reductions will only exclude from eligibility those people best placed to fund their own legal costs, and they will not target disabled persons generally, irrespective of their financial circumstances.

Given the nature of the proposals, we believe that there is no evidence that disabled persons will be discriminated against, or disproportionately affected in an unfair way.

³ Pascoe Pleasence, Alexy Buck, Nigel Balmer, Aoife O'Grady, Hazel Genn and Marisol Smith (2004) *Causes of Action: Civil law and Social Justice* (TSO: London). LSRC publications are available from the LSRC at <http://www.lsrc.gov.uk>.

11. Monitoring and reviewing

We will review the impact of the Code changes in practice, using the equal opportunities client monitoring carried out by the LSC and reported in its equalities annual reports.

12. Consultation with small business: the Small Firms' Impact Test

Initial consultation took place with the Small Business Service (SBS) who did not anticipate that these proposals would have a significant impact on business. In relation to this revised package of reforms, the SBS have confirmed the same view; that there would not be any significant impact on business.

The consultation document was distributed to a wide range of people and organisations with an interest in the justice system and made widely available among the LSC current providers, including small firms' who have an existing contract with the LSC. In addition, the consultation was published on the LSC website and it was included in "*Focus*", the LSC's publication for civil legal aid suppliers.

13 . Competition assessment

The civil Legal Aid market is not dominated by any particular firm or NfP organisation. The proposals set out in the consultation paper are not likely to impact greatly on the costs associated with obtaining or managing a legal aid franchise. There is no rapid technological change in the market.

Additionally the competition filter indicates that the overall effect will be neutral.

14 . Enforcement and sanctions

The LSC will monitor compliance and enforce the Code changes, through reduction /non-payment of bills, e.g. where submitted inappropriately for excluded work etc. Further, the LSC will monitor suppliers through its contract audit process, and procedures for awarding new contracts.

15. Monitoring and Review

The LSC will examine the effects of any changes implemented to the Funding Code and merits criteria, as part of the continuous monitoring and review process of the civil scheme.

16. Consultation

(i) Within government

Officials have liaised with colleagues in other Departments, and in particular the Office of the Deputy Prime Minister, the Department for Education and Skills, the Home Office, HM Treasury, and the Department of Health.

The proposals have received clearance from the Domestic Affairs Committee. The Domestic Affairs Committee reviews policy on issues relating to the Government's broader domestic policies, ensuring the work of its sub-committees contributes to achieving the Government's overall agenda.

(ii) Public consultation

The consultation paper was widely circulated among suppliers and the voluntary community sector. It was also available publicly, including on the LSC and DCA websites. Meetings were held between Ministers and officials with key stakeholders.

Response to the consultation was impressive, both in the quality and quantity of responses. 136 responses were received, many examining the issues raised in considerable detail. Whilst a number of individual proposals were received favourably, the weight of responses was hostile to the majority of the proposals, particularly those that would result in significant savings, eg, there was real concern about the proposed reductions in eligibility, particularly the abolition of the £100k disregard. In response to these serious concerns, this proposal was dropped from the final package. In addition, we decided not to proceed with a number of other proposals, eg, removal of drafting divorce petitions and name changes from scope, and a requirement for Clinical Negligence cases to be funded by CFAs in some circumstances. Following objection to the removal of non-family costs protection, this proposal was modified to impose a liability to pay the first £200 of any adverse costs order. However, in the light of the responses, it was decided not to proceed with this modified proposal.

DCA and LSC officials held discussions with key stakeholders, including: the Legal Aid Practitioners Group; the Solicitors Family Law Association; The Law Society; The Official Solicitor; Action Against Medical Accidents; the NHS Litigation Authority; the Metropolitan Police; the Independent Police Complaints Commission; and the Bar Council.

David Lammy MP, the Parliamentary Under Secretary of State at the Department for Constitutional Affairs with responsibility for legal aid, held discussions with the Child Poverty Action Group; Public Law Project, the Legal Aid Practitioners Group; Advice Services Alliance; and the Bar and Law Society.

17. Summary and recommendation

The revised proposals are aimed at re-focusing CLS funding so that early and effective dispute resolution is encouraged and litigation is seen as a last resort; they are also designed to ensure that the limited resources of the CLS are better targeted on the areas of greatest need. The CLS budget is currently under serious pressure. Separate consultations have been undertaken in relation to crime and Immigration/asylum expenditure.

Option 1, Do nothing. This impact assessment sets out the risks associated with the current regime and management of CLS funding. These will not be resolved by allowing the situation to continue and may mean that the most vulnerable members of society are unable to gain access to CLS funding and assistance. Additionally the situation may be worsened by failing to control and manage the CLS budget.

The revised Option 2 proposals represent the best way of meeting both the DCA/LSC objectives and the concerns expressed by respondents during the consultation:

- to re-prioritise CLS funding so that early and effective dispute resolution is encouraged and litigation is seen as a last resort;

- to ensure that CLS funding is better targeted on deserving cases and priority areas, e.g. Domestic Violence;
- to ensure that the CLS fund remains within its limited budget;
- to remove anomalies in financial eligibility.

18. Declaration

I have read the Regulatory and Race Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....

David Lammy

Date: 20 March 2005

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