Ministry of
JUSTICE

Reform of Legal Aid in England and Wales:

the Government Response

June 2011

Legal Aid Reform in England and Wales: the Government Response

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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Ministerial Foreword

When I published the consultation paper, *Proposals for the Reform of Legal Aid in England and Wales* last November, I said that the legal aid scheme was a vital part of the system of justice in this country but one that needed fundamental reform to ensure access to public funding in those cases that most require it, to encourage early resolution of disputes instead of unnecessary conflict, and to improve its affordability.

This document sets out the Government's plans to deliver these goals. It reflects over 5,000 responses to our original proposals, each of which we have considered carefully. Some of the details have been modified to take on board comments by legal professionals, charities and members of the public and ensure that the measures we are taking forward are sensible and workable. What hasn't changed is the basic case for reform or the substance of our overall vision for a more modern and effective system.

The aims of justice are relatively easy to state: sound results, delivered fairly, with proportionate costs and procedures, and cases dealt with at reasonable speed. Yet anyone with even passing familiarity with our system knows that we are yet to achieve this ideal. The civil justice system in England and Wales is characterised by spiralling legal costs, slow court procedures and unnecessary litigation, all of which add to the fear of a compensation culture. The criminal justice system is weighed down with bureaucracy, and can fail victims and communities, and the professionals who work to protect them.

As I argued last November, legal aid contributes to some of these weaknesses.

Law should generally be a place of last resort, not first. However, legal aid too often encourages people to bring their problems before courts, even when they are not the right place to provide good solutions, and sometimes for litigation that people paying from their own pocket would not have pursued.

The current legal aid system is also unaffordable. It bears little resemblance to the one introduced in 1949, having expanded far beyond its original scope. For example, taxpayer funding provides for foreign students to appeal UK visa refusals, for squatters to fight eviction proceedings and for multiple judicial reviews of immigration and asylum decisions. It's small wonder that the system is now among the most expensive in the world, costing over £2 billion a year. England and Wales spends an average of £39 per head of population on Legal Aid compared with £8 per head in New Zealand, a country with a comparable legal system and as low as £5 per head in continental jurisdictions like Spain, France and Germany. In the current fiscal climate this is not sustainable.

All this formed the backdrop to my proposals for root and branch reform of legal aid. The aims are: to discourage unnecessary and adversarial litigation at public expense; to target legal aid to those who need it most; to make substantial savings to the cost of the scheme; and to deliver better value for money for the taxpayer.

Under the proposals set out in November, legal aid would continue to be routinely available in cases where people's life or liberty is at stake, where they are at risk of serious physical harm, or immediate loss of their home, or where their children may be taken into care. They included retaining legal aid for criminal cases, for asylum cases, for domestic violence, for debt and housing matters where someone's home is at immediate risk, for judicial reviews of public authorities and for mental health cases. Following consultation, I am seeking to implement these changes. But I am strengthening some aspects of the original proposals to ensure that victims of domestic violence do receive legal aid for private family cases and to ensure that legal aid is available for children at risk of abuse or abduction. Following consultation too, legal aid funding for Special Educational Needs matters will also remain available.

Prioritising critical areas for legal aid funding means making clear choices about availability of legal aid elsewhere. Areas where taxpayer funding will no longer be routinely provided include most private family law cases, clinical negligence, employment, immigration, some debt and housing issues, some education cases, and welfare benefits. People will instead use alternative, less adversarial means of resolving their problems (notably, in divorce cases, where the taxpayer will still fund mediation).

Separately, the Government is also supporting a simplification of the legal system to make it easier for individuals to navigate. This includes proposals, on which we are currently consulting, to modernise civil justice, and forthcoming reforms to family justice. But these legal aid reforms are not dependent on the implementation of those wider reforms.

Many respondents raised concerns about access to justice – especially for vulnerable groups. I believe that the plans I am bringing forward protect fundamental rights to access to justice, whilst at the same time achieving a more affordable system. This is reflected in the retention of certain areas of law within scope, but also in the new exceptional funding scheme for excluded cases. Under its terms, funding will be made available, where the observance of core protections, such as those guaranteed by the Human Rights Act, require it.

Other proposals in the consultation which we intend to implement include a series of rationalising changes to make the system more efficient, and ensure value for money for the taxpayer. For example, we are taking forward reform to fee structures to promote swift resolution of criminal cases, tackling expenditure in Very High Cost Criminal Cases and introducing a Telephone Advice Gateway. Following consultation, the mandatory telephone advice service will initially be introduced in four areas of law, with exceptions where, for example, the case is an emergency, or the client is a child or in detention.

We will not be proceeding with plans for all clients with £1,000 of disposable capital to make a minimum £100 contribution to their legal costs. We have also decided not to proceed with using interest on solicitors' accounts to fund legal aid at this stage.

Legal aid reform is just one element of a broader agenda for change. My ultimate aim is a fundamental shift in the way justice works as a system, one based on continued access to justice where it counts, earlier resolution of disputes, less complexity and greater affordability. Not the least of my aims is for a reformed profession: one where there is enough provision to ensure people have access to justice; but more broadly, that we have competitive, consumer-focused law firms that can compete internationally.

In summary, these legal aid changes constitute a substantial set of very bold reforms, the overall effect of which should be to achieve significant savings whilst protecting fundamental rights of access to justice.

Kenneth Clarke

1. Introduction

1. This is the Government response to the consultation paper, *Proposals for Reform of Legal Aid in England and Wales*.

The consultation

2. The consultation was published on 15 November 2010 and closed on 14 February 2011. We received over 5,000 responses. A list of those who responded to the consultation is available at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm

3. The majority of responses did not support the Government's proposals for reform, although there was some support for particular measures. The key issues raised in the consultation, and the Government's response, are summarised in this document, and full details are set out in the annexes to this response.

4. An impact assessment and equalities impact assessment have been published alongside this response, setting out the estimated impacts of the programme of reform on legal aid clients and providers. These can be also accessed at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm

2. The case for reform

1. In May 2010, the Coalition published its programme for Government. This included a commitment to carry out a review of legal aid. In November, the Government published its proposals for reform in the consultation paper: Proposals for the Reform of Legal Aid in England and Wales.[1] The consultation set out proposals for a radical, wide ranging and ambitious programme of reform, which aimed to ensure that legal aid was targeted to those who needed it most, for the most serious cases in which legal advice or representation was justified.

2. Reducing expenditure on legal aid was one of the key drivers for reform, but irrespective of the current economic situation, the Government believes that legal aid is, in any event, in need of fundamental reform. Legal aid has expanded far beyond its original intentions, available for a wide range of issues, many of which need not be resolved through the courts. This has encouraged people to bring their problems to court when the courts are not well placed to provide the best solutions. There is a compelling case for going back to first principles.

3. The proposals in the consultation paper were estimated to deliver a saving of £350 million[2] to the public purse in 2014/15 annually over the longer term, against a scheme which now costs over £2 billion each year, an increase of around 6% in real terms since 1997/98. It is by far one of the most comprehensive, and expensive, legal aid provisions in the world, second only to Northern Ireland. We spent around £39 a head on legal aid in 2009/10, compared to around £5 a head in Spain (2008), France (2008) and Germany (2006). Countries with similar legal systems to ours also spend a lot less on legal aid: in New Zealand, the average cost per head was £8 (2004).

4. There have been many attempts to reform legal aid, with over thirty separate consultations over the last five years. This piecemeal approach has not helped to encourage sensible resolution of disputes and conflict. Neither has it provided a solid foundation to allow lawyers to manage their practices stably, and the Government to manage public spending.

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1 See: http://www.justice.gov.uk/consultations/633.htm

2 It should be noted that the figures in the accompanying Impact Assessment are long run, steady state savings which take account of the continued impact of policy reform beyond the period to 2014/15.

The way ahead

5. The Government received over 5,000 responses to the consultation. There were over 1,000 responses from solicitors, a further 800 from barristers, and 500 from not-for-profit organisations. There were over 100 submissions from representative bodies. We also received responses from members of the judiciary, experts and academics. A summary of the responses to the consultation questions is at Annex M.

6. The majority of responses to the consultation did not support the proposed reforms.

7. Some respondents, in particular the Law Society and the Bar Council, argued that we did not need to make such significant changes to the legal aid scheme, in particular we did not need to remove large areas of law from the scope of legal aid. They put forward a set of alternative proposals which they argued would deliver the same, or a higher, level of savings.

8. Our analysis of these alternative proposals is at Annex L. In some cases, we are already developing our wider plans for improving efficiency in the system of justice. However, for the reasons set out in Annex L, we do not believe that these alternative proposals represent a realistic alternative to the reforms set out in the consultation.

9. Some respondents to the consultation raised valid concerns about our original proposals and in some cases therefore, we have decided to amend our original proposals where we believe this better meets our aims for legal aid.

10. However, overall it remains our view that the legal aid scheme needs fundamental reform to:

    - discourage unnecessary and adversarial litigation at public expense;
    - target legal aid to those who need it most;
    - make significant savings in the cost of the scheme; and
    - deliver better overall value for money for the taxpayer.

11. We therefore intend, subject to Parliamentary approval, to take forward the programme of reform set out in this Government response.

Impacts

12. Although we have modified our programme of reform, our estimate remains that these measures will deliver a saving of £350 million by

2014/15. Full details are set out in the Impact Assessment, published alongside the Government response.[3] The estimated potential equalities impacts are set out in the Equalities Impact Assessment.[4]

Wider Justice Reforms

13. There is therefore a strong case for reform of legal aid. But this cannot solve all of the problems in the justice system. Alongside the plans for legal aid, the Government is also today announcing its plans for the reform of central funds. In the higher criminal courts,[5] where legal aid is available to all individuals, defendants who decline legal aid and choose to pay privately for their defence will no longer be able to recover their costs from the taxpayer if they are acquitted. In the magistrates' courts, the amounts they can recover will be limited to the rates payable under legal aid. Companies and other organisations which can insure against criminal prosecutions will no longer be able to recover their costs from the taxpayer if they are acquitted.

14. Legal aid reform is one part of the picture of justice reform. Another is the Government's efforts to promote an alternative, less adversarial, approach to resolving many social problems that currently fall into the hands of lawyers; and to simplify the legal system.

15. Our programme of reform includes reforms to sentencing and rehabilitation, which have also been announced today. These are designed to deliver a rehabilitation revolution, delivering more effective punishments and greater payback to victims while rehabilitating offenders to reduce crime and make the public safer.

16. Other proposals are for a series of reforms to make the procedures and processes of the courts simpler, more transparent and more efficient, so that we secure best value for the money we spend on them. This work covers, for example:

    - reforms to family justice, including the proposals in the interim report of the independent Family Justice Review.[6] The review is consulting on the proposals in its interim report;
    - the proposals to balance out costs for court users and encourage the use of quicker and cheaper alternatives to court, set out in the consultation paper, *Solving disputes in the county courts.*[7] The

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3 See: http://www.justice.gov.uk/consultations/legal-aid-reform.htm

4 Ibid.

5 The Crown Court and Court of Appeal, but not the Supreme Court.

6 See: http://www.justice.gov.uk/publications/policy/moj/family-justice-review.htm

7 See: http://www.justice.gov.uk/consultations/consultation-cp6-2011.htm

consultation period ends on 30 June. The Government will consider the responses and respond in due course;

- the development of an efficiency programme for the criminal justice system, in collaboration with all of the criminal justice agencies. It is focussed on system-wide inefficiency, to deliver a more efficient and cost-effective system. Proposals and implementation plans to improve the efficiency of the Criminal Justice System will be published by December;
- implementation of Lord Justice Jackson's reforms to the costs of civil litigation,[8] which aims to tackle the so-called 'compensation culture' and create a more proportionate civil justice system.

17. We are also taking forward a programme for the modernisation of the regulation and delivery of legal services by implementing the reforms in the Legal Services Act 2007. This includes the introduction of Alternative Business Structures. These new structures, which can be partly or wholly owned or controlled by non-lawyers, will allow lawyers and other professionals to work together in a single entity to provide legal services (or a mixture of legal and non-legal services) to their clients.

18. These freestanding reforms will help us to move towards a simpler justice system, where fewer individuals, businesses and public bodies are forced to resort to formal court processes, and more people take up mediation and other forms of alternative dispute resolution to help solve their problems. We also expect that new ways of obtaining legal advice will become more prevalent as the legal profession modernises and takes greater advantage of technological advances – for example by offering advice over the internet or via a telephone helpline.

19. Legal aid reform is independent of these wider reforms, but this outline of the wider justice context helps to demonstrate how legal aid reform contributes to a significant package of modernisation of the system of justice as a whole.

[8] See: http://www.justice.gov.uk/consultations/566.htm

3. The programme of reform

1. This section summarises the key issues raised on specific proposals in the consultation and the Government's response, and highlights those areas where the Government has decided to adapt, modify or refine its proposals. Full details are set out in the annexes to this response.

2. An Impact Assessment and an Equalities Impact Assessment are published alongside this Government response.[9]

I Scope (questions 1 and 3)

3. The consultation asked whether consultees agreed with the proposal to retain those categories of case and proceedings set out in the consultation paper within the scope of legal aid (question 1); and separately whether they agreed with the proposal to remove other cases and proceedings from the scope of legal aid (question 3).

4. Full details of the issues raised in the consultation and the Government's response, are set out at Annexes A (categories retained within scope) and B (categories removed from scope), and summarised below.

Rationale for proposed changes to scope

5. The proposals for reforms to scope were designed to refocus legal aid on those who needed it most, for the most serious cases in which legal advice or representation were justified. We considered from first principles which issues should attract public funding in the light of the financial constraints. This took into account our domestic, European and international legal obligations, including the European Convention on Human Rights (ECHR).

6. This examination took into account four factors:

   i) the importance of the issue: cases involving the individual's life, liberty, physical safety and homelessness were considered to be a high priority, as were cases where the individual faces intervention from the state, or seeks to hold the state to account;

   ii) the litigant's ability to present their own case: considerations included the type of forum in which the proceedings are held, whether they are inquisitorial or adversarial, whether litigants bringing proceedings were likely to be from a predominantly physically or emotionally

[9] See footnotes 3 and 4 above.

vulnerable group (for example, as a result of their age, disability or the traumatising circumstances in which the proceedings are being brought);

iii) the availability of alternative sources of funding: where litigants are able to fund their case in other ways, for example through a Conditional Fee Agreement (CFA), legal insurance, or as a member of a trade union;

iv) the availability of other routes to resolution: in determining the priority for certain types of case, we considered whether people might be able to access other sources of advice to help resolve their problems, avoiding the need for court proceedings. Examples include, advice on welfare benefits, (housing and other benefits), or the availability of an ombudsman scheme, or complaints procedure.

7. No one factor was determinative: in developing our proposals for reform we balanced these major considerations.

Key issues raised: rationale

8. The Law Society and the Bar Council argued that it was not necessary to make the proposed changes to scope, and the put forward a series of alternative proposals designed to achieve similar levels of saving. These are considered at Annex L.

9. The majority of respondents agreed that we had taken the right factors into account in determining the priority of cases and proceedings, but some respondents argued that we had not applied them correctly in certain classes of case. We have considered these arguments and as a result, in some cases, we have decided to modify our original proposals to ensure that our objectives for legal aid reform are met. The details are set out below.

Proposals to retain cases and proceedings within the scope of legal aid

10. A significant majority of respondents (nearly 80%) agreed with the Government's proposals to retain the categories of cases and proceedings set out in the consultation. Generally, the Government intends, subject to Parliamentary approval, to retain those categories of case and proceedings within the scope of legal aid. These, together with a list of the cases and proceedings we intend to remove from scope, are set out at Table 1 below.

11. We have decided, in the light of responses to the consultation, to make some amendments to the original proposals for cases remaining in scope to ensure that our objectives for legal aid reform are met. These amendments are in relation to certain judicial review proceedings, claims against public authorities (other than judicial review and other similar remedies), some debt proceedings where the client is at risk of homelessness, housing cases concerning those who are "squatting", the

criteria for the domestic violence exception, and in proceedings to prevent child abduction in the United Kingdom.

12. A summary of each of these changes is given below. Further detail on these proposals and the changes is set out in the annexes below.

Key issues raised: judicial review

13. Most respondents agreed with the consultation proposal that judicial review proceedings should remain in scope, but the sub-committee of the Judges' Council which responded to the consultation made a number of detailed suggestions about how to further limit funding for unmeritorious judicial reviews. Some of their suggestions do, we believe, have the potential to reduce the number of unmeritorious judicial reviews brought with the benefit of legal aid. The Judges' Council's response argued that many judicial reviews in immigration and asylum cases which came before the courts had already had at least one oral hearing on the same issue, and that public funding should therefore be removed from these cases or severely curtailed. The response suggested that funding should also be removed if the case were a challenge to removal directions or detention pending removal, on the basis that such challenges are often designed to frustrate the removals process rather than to raise a point of genuine merit.

The Government response

14. Although only a minority of the immigration and asylum judicial review cases referred to by the Judges Council are funded by legal aid, we believe that the principle of refusing funding for a case which has already had at least one full oral hearing on the same, or substantially the same, issue is the right one.

15. Given our aim to reduce unnecessary litigation, and to target resources to those who need them most, the Government does not believe that public funding is merited in these cases. We have therefore decided that legal aid will no longer be available in this narrow group of cases. However, we consider that there should be some important exceptions to these exclusions principally to take into account potential changes in an individual's circumstances over time, and to ensure that cases where an appeal has not already taken place are not inadvertently captured. We also consider that challenges to detention pending removal should remain in scope (as they relate to the applicant's liberty).

16. The Government therefore generally intends to retain legal aid for judicial review in immigration and asylum cases, except for:

    i) immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year, except so far as necessary to comply with article 15 of the EU Procedures Directive;

ii) judicial reviews challenging removal directions except where there has been a delay of more than one year between the determination of the decision to remove a person and the giving of removal directions.

17. However, cases falling within these categories would be subject to certain exceptions:

- where funding is necessary to comply with article 15 of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (this will apply to 'fresh claim' judicial reviews and cases against a certificate issued under section 94 of the Nationality, Immigration and Asylum Act 2002[10]); and
- where the challenge is to a certificate issued under section 96 of the Nationality, Immigration and Asylum Act 2002.[11]

Key issues raised: claims against public authorities other than judicial review and other similar remedies

18. The consultation proposed that the claims concerned primarily with recovering damages would not normally justify funding but that there would be some exceptions to that general principle. One of these exceptions was for the most serious claims against public authorities. This typically covers tort claims of various kinds, but could also cover, for example, a claim for damages under the Human Rights Act 1998.

19. In the consultation paper, we proposed no longer including within scope cases against public authorities concerning allegations of serious wrong-doing because a court judgment had meant that the serious wrong-doing criterion no longer captured the very serious cases against public authorities that was intended. We also proposed introducing a new criterion of "negligent acts or omissions falling very far below the required standard of care". Several respondents pointed out that the courts did not recognise degrees of negligence, and that the proposed new test of "negligent acts or omissions falling very far below the required standard of care" was unlikely to have any impact on the cases it had been designed to remove from scope.

The Government response

20. The Government intends to proceed to abolish the serious wrong-doing criterion for the reasons given in the consultation paper. The Government also accepts that the proposed new test for negligent acts or omissions

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[10] Section 94 allows the Secretary of State to issue a certificate preventing an appeal within the United Kingdom in the case of an unfounded human rights or asylum claim.

[11] Sections 96 sets out the "one-stop" arrangements which prevent a person from seeking to appeal when they have already had an opportunity to put their case to an adjudicator.

falling very far below the required standard of care is unlikely to have the intended effect on limiting legal aid to the most serious cases, and in practice would cover many of the same cases covered by the test of serious wrong-doing. The Government considers that there is considerable overlap between the existing criteria and that the most serious cases will be caught by the abuse of position or power or significant breach of human rights criteria. Therefore funding for these (typically damages) claims against public authorities will no longer be within the scope of the scheme unless they concern a significant breach of human rights or an abuse of position or power.

Key issues raised: domestic violence in private law family cases

21. The consultation proposed retaining legal aid for private family proceedings involving domestic violence.

22. Most respondents to the consultation welcomed the proposal to retain legal aid for cases involving domestic violence. But many argued that the criteria were drawn too narrowly. Concerns were also raised that the proposal would lead to false allegations of domestic violence.

The Government response

23. The Government accepts that, to ensure that victims of domestic violence are protected, the criteria for the domestic violence exception originally proposed in the consultation need to be widened, whilst maintaining the requirement for objective evidence of domestic violence. We have therefore decided to accept some additional circumstances as evidence of domestic violence, so that the criteria should target legal aid to genuine cases without providing an incentive for unfounded allegations of domestic violence. As with the original proposals, only one of these criteria would need to be met:

    - there are ongoing criminal proceedings for a domestic violence offence by the other party towards the applicant for funding;
    - the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them from violence by the other party; or
    - there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim, but the victim has not already been granted legal aid.

24. However, the Government is concerned that one of the original criteria proposed for the domestic violence exception, where there are ongoing proceedings for a domestic violence order (such as a non-molestation order or an occupation order) or forced marriage protection order, but an order has not yet been made, could lead to false claims of domestic violence for the purpose of securing legal aid. For this reason, the Government has decided not to include this criterion in the domestic violence exception.

25. These criteria will be subject to the 12 month time limit set out in the consultation paper. This means that legal aid will be available, for example, where there has been a referral to a Multi-Agency Risk Assessment Conference in the past 12 months, as well as where a protective injunction or other order has been put in place in the past 12 months.

Key issues raised: child abuse

26. Respondents to the consultation also pointed out that under our proposals, legal aid would not routinely be available in private family law cases where a child was at risk of abuse, but the local authority was not seeking to take the child into care (which would continue to attract public funding under our proposals to retain legal aid in public law children cases).

The Government response

27. The Government accepts that legal aid should be routinely available in these circumstances, provided that there is objective evidence of the risk of abuse. We have therefore decided to extend the approach to the criteria for the domestic violence exception in private law family cases to provide legal aid for the party seeking to protect the child in cases where:

    - there are ongoing criminal proceedings for a child abuse offence against the person from whom the protective party is seeking to protect the child; or
    - a local authority has put a Child Protection Plan in place to protect the child who is the subject of the proceedings from abuse by or including abuse by the person from whom the protective party is seeking to protect the child; or
    - there is a relevant finding of fact by the courts that child abuse on the part of the person from whom the protective party is seeking to protect the child has occurred.

28. As with the domestic violence proposals, only one of these criteria would need to be met. They will apply where a party to the case, or another individual in respect of whom protection for the child is being sought, has abused either the child who is the subject of proceedings, or any other child (including a child of another family).

29. These criteria will be subject to the same twelve month time limit set out in the consultation paper in relation to the domestic violence criteria so that legal aid will be available, for example, where the child has been the subject of a Child Protection Plan in the past twelve months, as well as where a protective injunction had been put in place in the past twelve months.

30. The Government therefore intends that the following circumstances will be accepted as evidence of domestic violence or child abuse. Where there is evidence of domestic violence, legal aid will be available for the victim for ancillary relief or private law family and children cases. Where

there is evidence of child abuse, legal aid will be available for disputes about children for the party seeking to protect the child. Only one of these criteria would need to be met:

i) a non-molestation order, occupation order, forced marriage protection order or other protective injunction is either in place or has been made in the last twelve months;

ii) there is a criminal conviction for a domestic violence offence by the other party towards the applicant for funding or for a child abuse offence against the person from whom the protective party is seeking to protect the child (unless the conviction is spent);

iii) there are ongoing criminal proceedings for a domestic violence offence by the other party towards the applicant for funding or for a child abuse offence against the person from whom the protective party is seeking to protect the child;

iv) the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them from violence by the other party;

v) a local authority has put a Child Protection Plan in place to protect the child who is the subject of the proceedings from abuse by or including abuse by the person from whom the protective party is seeking to protect the child;

vi) there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim;

vii) there has been a finding of fact by the family courts that child abuse on the part of the person from whom the protective party is seeking to protect the child has occurred.

Key issues raised: child abduction cases

31. The consultation proposed keeping legal aid in scope for international child abduction cases. However, many consultation responses (including from the Family Justice Council and the main representative bodies) pointed out that this would not cover steps to prevent abduction from the United Kingdom. This is particularly important for abduction to non-Hague Convention countries where it is much harder to recover a child once he or she has been abducted.

The Government response

32. The Government recognises that, to ensure consistency in the application of our policy on child abduction, we need to modify our proposals. We have therefore decided that legal aid should be available for an application to obtain (but not to oppose) an emergency order specifically to prevent the abduction of a child from the United Kingdom. However, it will not routinely be available to make an application to remove a child from the jurisdiction.

Housing: risk of homelessness, repossession, eviction, Anti Social Behaviour Orders and housing disrepair that risks serious harm to individual and his/her family

33. The consultation proposed retaining legal aid for cases where the client is homeless (or threatened with homelessness) and seeking homelessness assistance from the local authority, where they were threatened with homelessness through possession or eviction, or where they were facing housing disrepairs which posed a serious risk to the life or health of the client or their family, or for Anti-Social Behaviour Order (ASBO) proceedings brought an individual in the county court.

34. While the Government's priority is to assist those who are homeless or who are facing homelessness, and we therefore intend to proceed with retaining legal aid for the matters referred to above, we do not consider it appropriate to provide legal aid in relation to eviction where the individual has clearly entered and remained on the property or site as a trespasser (i.e. "squatting"). In these cases, the individual has typically taken up residence in unoccupied residential property or non-residential property, and the Government does not consider it appropriate for the taxpayer to provide funding for individuals to try to resist removal where they are clearly trespassers on private property.

35. Where individuals are homeless and in need of assistance, rather than assisting them in defending their occupation of private property, the Government wants legal aid to be targeted on assisting them instead to obtain homelessness assistance from the local authority, for which funding is being retained. The details of how such cases will be identified are set out at Annex A.

Family Mediation

36. The consultation proposed retaining legal aid for family mediation. We also proposed that a fixed amount of legal help would be available where the client enters mediation, which would attract a fee of £150.

Key issues raised

37. Many respondents argued that the proposed mediation fee of £150 would be insufficient for legal advice to support the mediation, especially in ancillary relief cases where the issues are more complex and agreements would need to be turned into draft court orders or contracts.

The Government response

38. It remains the Government's view that the proposed fee is sufficient in the majority of cases. However, we accept practitioners' concerns that it would not be sufficient in cases where a greater level of work is required, such as drafting a court order in addition to advising on the mediation agreement.

39. The Government believes that mediation is more likely to be successful in reaching agreement and diverting cases away from court if it is supported

by adequate legal advice. For this reason, we have decided that a fixed fee of £200 will be paid where legal advice is necessary to give effect to a mediated settlement to draft a court order setting out the terms of settlement in finance cases.

40. This fee could be claimed in addition to the mediation fee of £150.

Proposals to remove cases from the scope of legal aid

41. Over 90% of respondents to the consultation disagreed with the proposals to remove from the scope of legal aid those cases and proceedings set out in the consultation. In general, the objections did not raise issues which have persuaded us that the original proposals needed to be changed, and we intend to pursue the reforms to scope substantially as set out in the consultation paper.

42. However, in some cases, responses to the consultation raised issues which have persuaded us that the original proposals should be adapted to meet our objectives for the reform of legal aid. These changes include retaining legal aid for: a wider range of cases where the home is at immediate risk (involuntary bankruptcy and Orders for Sale); retaining legal aid for Special Educational Needs cases; retaining legal aid for cases concerning unlawful eviction; and retaining legal aid for asylum support cases which concern accommodation.

43. The reasons are summarised below and set out in detail at Annex B.

Key issues raised: ancillary relief, and private law children and family proceedings (where domestic violence not present)

44. While most respondents agreed that resolving these cases out of court was preferable to court proceedings, the responses overwhelmingly opposed the proposal to remove these proceedings from the scope of legal aid. They argued that:

- not all cases could be successfully diverted to mediation;
- without early legal advice, fewer cases would settle, increasing the burdens on the family courts and on other agencies, such as Cafcass;[12]
- it could lead to an increase in public family law cases;
- decisions in this area should be delayed until the outcome of the Family Justice Review;

[12] Cafcass is the Children and Family Court Advisory and Support Service, whose key functions include safeguarding and promoting the welfare of the child in family court proceedings, advising courts about what it considers to be in the best interest of the child in family cases, and provide reports on welfare issues, and helping parents who cannot agree on contact and residence agreements.

- proceedings often related to financial provision and contact arrangements for children, and children would therefore also be affected by these proposals;
- the proposal could be in breach of the European Convention on Human Rights (ECHR).

The Government response

45. There are a number of factors that will help to mitigate the impact of removing legal aid from private family proceedings, including:
    - the availability of legal aid for mediation and legal advice in support of mediation, including the increased fee (see paragraphs 36 to 40 above);
    - the decision to enhance the court's powers to order one party to divorce and related proceedings to pay an amount to the other to enable the other to secure legal services for the proceedings (see from paragraph 115 below and Annex D);
    - other avenues of support and advice to the extent they remain available.

46. In the longer term, the Family Justice review is considering options for a quicker, simpler, more cost-effective and fairer system, whilst continuing to protect children and vulnerable adults from risk of harm.

47. While the Government accepts that some private family law cases may raise particularly complex issues, we do not believe that these cases are routinely complex. Funding for excluded cases will be provided where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law.

48. The Government has sought to mitigate the impact of these reforms on children by targeting legal aid to the most serious cases:
    - we have decided to extend the approach of the criteria for the domestic violence exception so that legal aid will continue to be available for cases involving children at risk of abuse (see paragraphs 26 – 29 above);
    - legal aid will continue to be available for international child abduction cases, including for steps to prevent international abduction paragraphs 31 and 32);

49. The Government will take steps, will continue to monitor the position, and will take steps to limit the impact on the workload of Cafcass, including issuing guidance, if necessary.

50. Many respondents argued that legal aid should be available to children where they were separately parties to proceedings, and not just in the circumstances set out in the consultation (where they are separately

represented under (then) Rule 9.5 and 9.2A of the Family Proceedings Rules 1991, (now Rule 16.2 and 16.6 of the Family Procedure Rules 2010)). Such cases are in fact likely to be rare. However, the Government agrees that children are not able to represent themselves in family proceedings, and that should such cases arise, legal aid should be provided to them on the same basis as if they had been made a party under Rules 16.2 or 16.6.

51. For these reasons, the Government has decided that ancillary relief and private family law cases should be taken out of scope, with the following significant exceptions:

    i) legal aid will continue to be available for victims of domestic violence and for the protective party in children cases where the child is at risk of abuse;

    ii) legal aid will be retained for emergency orders that seek to prevent a child from being removed from the United Kingdom (including for forced marriage), but not for subsequent contactor residence issues in these cases;

    iii) legal aid will also continue to be available for children who are separately represented under Rules 16.2 or 16.6 of the Family Procedure Rules 2010, or for a child party in any other private family law case (legal aid will only be available for child parties in these cases, and not for the other parties);

    iv) legal aid will also continue to be available for applications under the Conventions dealing with international child abduction.

Key issues raised: clinical negligence

52. Many respondents argued that the most complex clinical negligence cases were unlikely to be undertaken under a Conditional Fee Agreement (CFA), particularly if the Lord Justice Jackson's recommendations on CFAs were introduced following his review of the costs of civil litigation.[13] They argued that removing the more complex cases from scope would deny people access to justice, as these cases which include, for example, cerebral palsy and severe obstetrics cases, often required significant upfront work, including incurring costs on expert reports, to establish the strength and merits of a case. In such circumstances, providers were unlikely to be willing to undertake them on a CFA, and clients were unlikely to be able to afford to fund the investigative stage privately.

The Government response

53. Many of these concerns were also expressed in response to the consultation on Lord Justice Jackson's proposals on the costs of civil

[13] See: http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf

litigation. In the Government response to the Jackson proposals,[14] made it clear that we are aware of specific concerns in relation to the funding of experts reports in clinical negligence cases, which can be expensive. We announced that we were therefore making one change to Lord Justice Jackson's recommendations for CFA reform, to allow the recoverability of "after the event" (ATE) insurance premiums to cover the costs of expert reports only in clinical negligence cases. This will enable meritorious claims, where claimants cannot otherwise afford to pay for expert reports upfront, to continue to be brought.

54. In addition, as the Government indicated in its response, a regime of qualified one way costs shifting will be introduced in personal injury cases, including clinical negligence. This means that an individual claimant is not at risk of paying the defendant's costs should the claim fail (except in limited prescribed circumstances), but that the defendant would have to pay the individual claimant's costs should the claim succeed.

55. Removing legal aid for this area will increase the number of cases which rely on CFAs. However, under the changes being implemented to the CFA arrangements, the ATE insurance premiums for expert reports will be recoverable from defendants who lose in certain circumstances.

56. In our view, the removal of legal aid in this area will deliver significant legal aid savings, whilst the changes to the CFA arrangements will reduce the costs of civil litigation for defendants from the current disproportionate level. For these reasons, we intend to remove clinical negligence cases from the scope of legal aid, as proposed in the consultation.

Key issues raised: consumer and general contract

57. Almost all of the respondents to the consultation were opposed to the removal of legal aid for these matters. They argued that some cases, for example, professional negligence, are particularly difficult and complex, and can require significant upfront funding to secure expert opinions. They said that without legal aid, clients would be denied access to justice.

The Government response

58. The Government view remains that these cases are essentially claims for money or damages, which are a lower priority for funding than cases which involve more fundamental issues such as safety and liberty. The stronger claims are likely to be suitable for alternative sources of funding, such as Conditional Fee Agreements. There are also other sources of advice available (for example, Trading Standards and Consumer Direct). We do not consider that litigants in these cases are likely generally, as a class, to be vulnerable (as opposed, for example, to litigants in

[14] See footnote 8 above.

community care cases). The factors we took into account in considering a person's vulnerability are set out at paragraph 6.ii) above.

59. For these reasons, we intend to remove these cases from the scope of legal aid, as proposed in the consultation. Cases brought under the Equality Act 2010 which arise from a consumer matter, and which are currently within the scope of the legal aid scheme, will remain in scope.

Key issues raised: Criminal Injuries Compensation

60. Many respondents argued that while the application to the Criminal Injuries Compensation Authority (CICA) was relatively straightforward, legal aid also funded advice on appeals which were more complicated. Clients for this work were victims of crime, many of whom were vulnerable, and some disabled.

The Government response

61. We recognise that the people making these applications might be vulnerable,[15] having often been through a traumatic event, and that these matters can involve more complex issues around appeals and assessing whether the award is fair one. We also accept that these cases might involve money for medical equipment. We consider that article 15 of the Trafficking Convention might require exceptional funding for CICA applications and appeals where, in the particular circumstances of the case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under article 6 of the European Convention on Human Rights.

62. We consider that generally the application forms are straightforward to complete, and that CICA provides help and guidance for applicants to help them put forward their claim. While appeals may be more complex, we have to prioritise funding and we consider that these cases are primarily money claims, which are of lower priority for public funding.

63. For these reasons, we intend to remove legal aid for Criminal Injuries Compensation claims, as proposed in the consultation.

Key issues raised: debt (where the client's home is not at immediate risk)

64. The consultation proposed removing legal aid for all advice on debt matters other than in cases of rent or mortgage arrears in which the client's home was at immediate risk. The majority of respondents were opposed to the removal of any debt cases from the scope of legal aid.

[15] See paragraph 6.ii) above.

65. The consultation responses also identified some additional areas of debt disputes in housing matters, which under our original proposals would be removed from the scope of legal aid, but which would be inconsistent with the policy to protect those whose homes were at risk.

The Government response

66. It is still the Government's view, in view of the need to make substantial savings in legal aid expenditure, that legal aid for debt matters where the home is not at immediate risk is not a priority for funding. In our view, clients in these cases need practical help rather legal advice.

67. However, to ensure a consistent approach to our policy in this area, the Government has decided that legal aid should remain available in relation to the following debt-related matters where the home is at risk:

- orders for sale of the home, (but not to set aside a charging order because the home is not at risk at that stage);
- bankruptcy proceedings (including dealing with a statutory demand) initiated by creditors where the bankrupt's estate includes a home.

68. Other than in these cases, for the reasons set out above, we intend to remove all other debt proceedings from the scope of legal aid.

Key issues raised: education

69. The consultation proposed removing all education cases from the scope of legal aid. Most respondents opposed the proposal, and in particular, many respondents objected strongly to the proposed removal of legal aid in cases where clients were appealing about Special Educational Needs (SEN) provision. They argued that:

- most SEN cases could be easily be brought instead as disability discrimination claims under the Equality Act 2010, which would remain in scope under these proposals;
- the Department for Education's proposed reforms to SEN procedures[16] to mandate mediation would, if implemented, settle most disputes, which would leave only the more difficult and intractable matters to be resolved;
- it was inconsistent with the approach to community care (which would remain in scope) because these raised similar issues (for example, resolving disputes about state assistance);

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[16] *Support and Aspiration: A New Approach to Special Educational Needs and Disability*. Cm 8027, Department for Education, March 2011 http://www.education.gov.uk/consultations/index.cfm?action=consultationDetails&consultationId=1748&external=no&menu=1

- research shows that children with a disability are over twice as likely as non-disabled children to live with a parent with one or more disabilities (as defined under the legislation then in force: the Disability Discrimination Act 1995).

The Government's response

70. The Government is persuaded by the strength of the arguments that legal aid should be retained for SEN cases. We have therefore decided to modify the original proposal, so that legal aid should continue to be available for SEN cases where it is currently available.

71. It remains our view that funding is not generally required for representation before the First-tier (SEND) Tribunal. Legal aid will therefore only be available, as now, for advice and assistance in relation to Special Educational Needs matters arising under Part 4 of the Education Act 1996, and the Special Educational Needs Tribunal for Wales (and for representation before the Upper Tribunal). We continue to take the view that all other education cases are a lower priority for funding, compared with cases which involve, for example, liberty, safety, and homelessness. For these reasons, we intend to remove them from the scope of legal aid.

Key issues raised: employment

72. Most respondents, particularly those from the not-for-profit sector, opposed the proposal to remove legal aid for employment matters.

73. Many argued that employment cases were not solely money claims, but also involved important employment rights (for example, rights to holidays, or to flexible working). They argued that claims often raised complex and difficult issues for litigants; the employer was often represented, and there was an inequality of arms; and where offers to settle were made, without legal advice, clients would not be in a position to assess whether it was a fair offer.

The Government response

74. Most employment cases are pursued through the Employment Tribunal which is designed to be used by unrepresented litigants.

75. We accept that most people will find legal advice helpful in preparing a case for the tribunal, and that these cases are often not only about money. We do not consider that applicants in these cases are likely to be particularly vulnerable (see paragraph 6.ii) above). We consider that, given the need to prioritise resources, employment matters are of a lower importance than cases involving life, liberty or homelessness. It is also

the case that a Damages Based Agreement[17] may be made in appropriate cases.

76. For these reasons, we remain of the view that employment cases do not represent as high a priority for funding, and we intend to remove legal aid for these cases as proposed in the consultation.

Housing cases (not involving homelessness)

77. The consultation proposed removing legal aid from housing cases in which there was not an immediate threat of homelessness.

Key issues raised: unlawful eviction

78. Many respondents queried the exclusion of unlawful eviction (where a landlord 'changes the locks') from scope when it was proposed that lawful eviction would remain in scope. Respondents argued that it was irrational to fund lawful eviction cases, but not unlawful eviction cases where the client would have been rendered immediately homeless.

The Government response

79. The Government agrees that legal aid should be available for cases of unlawful eviction. We have therefore decided to amend our original proposals so that these cases remain within the scope of legal aid. As indicated in the section relating to debt (see paragraphs 64 to 69) we also intend to retain legal aid in relation to orders for sale of a person's home as this poses an immediate risk to the home.

80. As originally proposed, we intend to exclude housing matters where the home is not at risk, from the scope of legal aid. See Annex B for further details.

Key issues raised: immigration where the individual is not detained

81. Most respondents were opposed to the proposal to remove legal aid for these cases. The main points they raised were:

- immigration was a particularly complex area of law;
- there would be an inequality of arms between the state and the individual;
- many applicants may have difficulty communicating in English;
- contrary to the assertion in the consultation document, these cases were not just about personal choices, especially where they concerned family life;

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[17] A Damages Based Agreement is a type of "No Win, No Fee" arrangement under which the legal representative is paid a proportion of the claimant's damages only if the case is successful.

- it could lead to an increase in the workload of the UK Border Agency (UKBA), as applications were unlikely to be as well prepared, and in the workload of the tribunals, as it could lead to an increase in appeals.

82. Some also argued that the proposals would make legal aid providers specialising in immigration and asylum matters financially unviable, with knock-on consequences for people's ability to access asylum legal aid.

The Government response

83. The Government's view remains that, in general, individuals in immigration cases should be capable of dealing with their immigration application, and it is not essential for a lawyer to assist. Tribunals are already designed to accommodate litigants-in-person, and interpreters are provided free of charge.

84. The Government believes that tackling inefficiency in administrative decision making is important. Separately UKBA is undertaking a wide-ranging review of its administrative processes to improve its decision-making, which is designed to reduce the number of challenges to its decisions. This does not alter the need to reduce the cost of legal aid.

85. The question of whether the market is able to sustain the changes to scope generally, and specifically in immigration and asylum matters, is considered below (see paragraphs 298 to 308). Generally, we believe that the market should be able to sustain the reforms to legal aid, but any disruption to supply can, we believe, be adequately addressed through short term measures, such as the reallocation of new matter starts to firms outside the immediate area, or a focussed retender exercise.

Key issues raised: immigrants who are victims of domestic violence

86. Under immigration rules, someone on a spousal visa, who subsequently finds themselves in an abusive relationship, can apply for indefinite leave to remain under the 'domestic violence immigration rule'. Some respondents called for legal aid to be retained for individuals who find themselves in this situation.

The Government response

87. The Government's view is that these applications are generally straightforward. They should not require specialist legal advice, even if applicants may well benefit from practical help and assistance. While we accept that the Government's policy is generally to provide legal aid to protect victims of domestic violence, these immigration cases are paper based applications to the Home Office, and do not require the applicant to, for example, face the alleged abuser in court.

88. Legal aid will continue to be available to all victims of domestic violence seeking protective remedies (for example a non-molestation order) regardless of their nationality or immigration status.

Key issues raised: refugee family reunion cases

89. Many respondents argued that these cases were not about making personal choices, but sought to reunite families fleeing oppression. They should, it was argued, be treated in the same way as asylum cases. Some also argued that they raised complex legal arguments.

The Government response

90. Applications to join family members are treated as immigration cases, and are generally straightforward because they follow a grant of asylum. Respondents argued that these cases are akin to claims for asylum but if a person wishes to claim asylum it is open to that person to do so either as a dependant of a primary asylum claimant or to do so in his or her own right. Legal aid for any such asylum claim will be in scope.

Key issues raised: statelessness

91. Some responses to the consultation argued that immigration legal aid should remain available for stateless people who wish to apply, for example, for citizenship or for a stateless person's travel document. They argued that this group of people were vulnerable and that legal aid was required to meet the UK's obligations under the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

The Government response

92. The Government considers that applications such as that for a stateless person's travel document are straightforward and do not generally require legal advice. The Conventions mentioned by respondents require no more than parity of treatment between stateless persons and nationals and legal aid in the UK is available to anyone who meets the criteria irrespective of their immigration status.

Key issues raised: The Council of Europe Convention on Action against Trafficking in Human Beings

93. Some respondents raised concerns that the proposals to remove legal aid for immigration matters would breach the UK's obligation under the Council of Europe Convention on Action against Trafficking in Human Beings which requires parties to provide legal aid to victims of trafficking.

The Government response

94. The requirement to provide legal aid under the Convention is not automatic (it is with reference to the requirements of article 6 of the European Convention on Human Rights) and is to help victims of trafficking seek compensation rather than to make immigration claims.

95. There will be instances in which the Convention requires legal aid to be provided to victims of trafficking to fund their claims. However, we estimate that the volume of these cases is likely to be small and any obligation to provide legal aid will be met by the proposed new

exceptional funding scheme that will provide legal aid where failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998.

96. For the reasons set out above, the Government intends to proceed with the proposal to remove all immigration legal aid from scope other than cases concerning immigration detention, appeals to the Special Immigration Appeals Commission and claims for asylum.

Key issues raised: welfare benefits

97. Many respondents, particularly those from the not-for-profit advice sector, opposed the proposal to remove welfare benefits cases from the scope of legal aid. They argued that these cases were not simply financial claims, but claims for minimum subsistence benefits. They also argued that these cases were complex; that there were strict time limits for appeals against benefits decisions; and that forthcoming reforms to benefits would increase the need for advice. They also suggested that welfare problems, if not addressed at an early stage, could lead to more serious problems later, such as homelessness.

98. Some also argued that early advice in these cases, and in related matters such as debt and housing, provided good value for money. They cited research which suggested that the cost of providing early advice would be recovered several times over through savings elsewhere in public expenditure. This is considered under cross cutting issues (see paragraphs 326 to 330 below)

The Government response

99. We do not consider that most cases before the tribunal will be sufficiently complex, and, compared with cases involving the safety, liberty or homelessness, we consider these cases to be a lower priority for funding.

100. The Government has considered the concerns raised about the risk that the loss of benefits could later lead to homelessness. We intend to retain legal aid for debt cases where the home is at immediate risk due to rent or mortgage arrears. Where the arrears are as a result of a dispute about welfare benefits, we do not believe that legal aid should be provided for the welfare benefits appeal, because the tribunal is accessible without legal assistance and because the risk of homelessness is not as immediate. We need to prioritise need, and those facing eviction or possession proceedings (or who are already homeless) are in greater need. The arguments are considered from paragraph 33.

101. For the reasons set out above, it remains the Government's view that legal aid should be removed for welfare benefits cases, as proposed in the consultation. However, it will be retained for judicial review of welfare benefit decisions, and for claims about welfare benefits relating to a contravention of the Equality Act 2010 that are currently funded, as proposed in the consultation.

Key issues raised: asylum support

102. The consultation proposed removing legal aid for asylum support cases on the grounds that they were similar to welfare benefits cases. Respondents to the consultation pointed out that most cases concern the provision of housing for otherwise homeless asylum seekers (UK Border Agency data indicate that 90% of these cases are accommodation matters). They argued that these cases are more closely related to cases where there is a risk of homelessness (which will remain in scope).

The Government response

103. To ensure consistency with our policy of providing legal aid where the applicant is at risk of homelessness, we have decided to amend our original proposals so that asylum support cases where the individual is seeking help with accommodation should remain in scope. However, legal aid will not be available for cases solely about financial assistance because these are analogous to welfare benefits cases.

Miscellaneous (cases to be removed from scope)

104. The consultation proposed removing a wide range of other miscellaneous areas of civil law. There were very few responses on these particular categories of case and proceedings. We remain of the view that these types of case and proceedings are generally of a lower priority, and given the need to make substantial financial savings, legal aid is no longer be justified.

105. The Government therefore intends to remove the following cases and proceedings from the scope of legal aid as proposed in the consultation:

i) appeals to the Upper Tribunal from the General Regulatory Chamber of the First-tier Tribunal;

ii) actions relating to contentious probate or land law, for example, actions to challenge the validity of a will (including Inheritance (Provision for Family and Dependents) Act 1975) other than in the context of an in-scope family case;

iii) legal advice in relation to a change of name;

iv) actions concerning personal data, such as actions relating to inaccurate or lost data or rectification of personal data;

v) legal advice on will-making for (i) the over 70s; (ii) disabled people; (iii) the parent of a disabled person; and (iv) the parent of a minor who is living with the client (a parent) but not with the other parent, and the client wishes to appoint a guardian for the minor in a will;

vi) Cash forfeiture actions under the Proceeds of Crime Act 2002.

Key issues raised: public interest cases

106. Legal aid is currently available for any case (except a business case) which is normally out of scope but which raises matters of significant wider public interest. If an excluded case is judged to be of significant wider public interest, then it is brought back into scope for funding. The consultation proposed abolishing the rule that brings otherwise excluded cases back into the scope of the scheme where they are of significant wider public interest.

107. Few respondents commented on this element of the consultation. It was argued that this test resulted in savings when compared with granting legal aid for multiple applications raising the same issue. One respondent also argued that the proposals to remove large areas of law from the scope of legal aid strengthened the arguments for funding in cases which raised issues which had a wider public interest.

The Government response

108. Cases or categories of law have been excluded because we do not consider them to be of sufficient importance to merit public funds, either because there are alternative sources of funding available, or because the procedure is simple enough that litigants can present their case without assistance, or because the types of case are a lower priority for funding. We do not consider that the presence of the "wider significant public interest" factor generally justifies the provision of public funding in cases which would otherwise be excluded. We therefore intend to abolish the Public Interest rule, as proposed in the consultation.

109. However where a case is in scope, and the type of proceeding is therefore a priority for funding, it is our intention that wider public interest will continue to be a relevant feature in the merits criteria, thus allowing the benefit to other individuals to be taken into account in the funding decision.

Key issue raised: tort and other general claims

110. These cases are typically concerned with recovering damages, for example tort claims for damages (or an injunction), and include, for example, a claim for damages under the Human Rights Act 1998. The consultation proposed that claims concerned primarily with recovering damages would not normally justify funding and proposed to remove these types of claim from scope in all categories of law, including those categories that we were proposing to retain generally in scope, except for cases that met the proposed new criteria for claims against public authorities; and claims arising from allegations of abuse or sexual assault.

111. Few respondents commented on this specific proposal. Those respondents who commented argued that claims brought against public authorities were an essential means of holding the state to account.

The Government response

112. The Government intends to retain legal aid for the more serious cases and proceedings which seek to hold public bodies to account for their decisions, such as judicial review, and the most serious claims against public authorities where these concern a significant breach of human rights, or an abuse of position or power. We also intend to retain legal aid for claims against private and public parties where these concern allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault. Other claims which are concerned primarily with recovering damages we consider to be of lesser importance and they will be excluded from scope. The stronger excluded claims may be suitable for alternative funding such as a Conditional Fee Agreement. For these reasons we intend to proceed to remove tort and other general claims from the scope of legal aid, as proposed in the consultation.

Conclusion

113. Subject to Parliamentary approval, the Government intends to implement its reforms to the scope of legal aid in civil and family matters as set out above. A list of the cases and proceedings remaining in scope, and to be removed from scope, once these reforms have been implemented, are set out in Table 1 below.

Table 1: Summary of cases and proceedings remaining in scope, and to be removed from scope.

1. Cases and proceedings retained within the scope of legal aid.

i) asylum;

ii) asylum support where accommodation is claimed;

iii) claims against public authorities (other than judicial review and other similar remedies), concerning a significant breach of human rights, or an abuse of position or power;

iv) claims arising from allegations of abuse and sexual assault;

v) community care;

vi) debt (where the client's home is at immediate risk), including involuntary bankruptcy and orders for sale of the home;

vii) domestic violence and forced marriage proceedings;

viii) family mediation;

ix) housing matters where the home is at immediate risk (excluding those who are "squatting"), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;

x) immigration detention;

xi) appeals to the Special Immigration Appeals Commission

xii) international child abduction (including orders both to recover a child and those to prevent international abduction);

xiii) international family maintenance;

xiv) mental health, including mental capacity issues currently in scope;

xv) Special Educational Needs cases (currently within scope)

xvi) private family law cases involving domestic violence and private law children cases involving child abuse;

xvii) public law cases (judicial review and other similar remedies) other than representative actions and certain immigration and asylum judicial reviews);

xviii) public law children cases;

xix) registration and enforcement of judgments under European Union legislation;

xx) representation of children in rule 16.2 (and 16.6) private law children cases;

xxi) miscellaneous proceedings: confiscation proceedings, injunctions concerning gang related violence, Independent Safeguarding Authority Appeals (care standards), Legal Help at Inquests, proceedings under the Protection from Harassment Act 1997, and quasi criminal proceedings;

xxii) discrimination cases that are currently within scope (claims relating to a contravention of the Equality Act 2010);

xxiii) environmental cases;

xxiv) European Union cross border cases; and

xxv) appeals to the Court of Appeal and Supreme Court, and references to the European Court of Justice, where the area of law to which the appeal relates remains in scope).

2. Cases and proceedings removed from the scope of legal aid.

i) asylum support (except where accommodation is claimed);

ii) clinical negligence;

iii) consumer and general contract;

iv) criminal Injuries Compensation Authority cases;

v) debt, except in cases where there is an immediate risk to the home;

vi) employment cases;

vii) education cases, except for cases of Special Educational Needs;

viii) housing matters, except those where the home is at immediate risk (excluding those who are “squatting”), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;

ix) immigration cases (non-detention);

x) miscellaneous (specified matters): appeals to the Upper Tribunal from the General Regulatory Chamber of the First- tier Tribunal, cash forfeiture actions under the Proceeds of Crime Act 2002, legal advice in relation to a change of name, actions relating to contentious probate or land law, court actions concerning personal data, action under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, and legal advice on will-making for (i) those over 70 (ii) disabled people (ii) the parent of a disabled person and (iv) the parent of a minor who is living with the client, but not with the other parent, and the client wishes to appoint a guardian for the minor in a will;

xi) private family law (other than cases where domestic violence or child abuse is present);

xii) tort and other general claims, and

xiii) welfare benefits.

114. In addition, the rule bringing back into scope any case of wider public interest will be abolished.

II. Interim lump sum costs orders to fund legal services in ancillary relief proceedings (Question 2)

115. The consultation sought views on the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party.

116. Full details of the issues raised and the Government's response are at Annex C, and are summarised below.

Key issues raised in consultation

117. Responses to this question were mainly from legal practitioners, and while the majority supported the proposal, many argued that it would only have a practical application in a very small number of cases. It was also argued that any potential applicant would need funding for advice on whether such an application could be made. More detailed points made by respondents about how the proposal would operate included:

- interim lump sums would only be viable in a small proportion of cases where sufficient realisable assets were available for two sets of legal fees, and this would not be an option in middle income cases where the matrimonial home or pension entitlement are the only assets at stake, or where the wealthier party has hidden their assets or tied them up in a company or trust;
- unrepresented parties would not be aware that they could get an interim lump sum and would not know how to apply for one, including how to establish and prove their partners' assets;
- interim lump sums may not be paid as ordered;
- the proposal could generate satellite litigation to deal with interim lump sum orders and could increase conflict, which would have an impact on the courts, particularly where a party is litigating in person;
- these points led to calls for legal aid for applications for interim lump sum orders and for enforcement;
- interim lump sums would deplete the assets available to both parties for re-housing on separation;
- there is a risk that the receiving party would litigate unreasonably after receiving an interim lump sum;
- the statutory charge for legal aid is a better mechanism for funding, and better enforcement of the statutory charge could ensure that the Legal Services Commission recoups its expenditure; and
- there is potentially unfairness in making orders for costs before the issues at stake have been determined, and the contributing party could be left without an effective remedy if the final outcome of the case is that the lump sum should be refunded.

118. Some consultation responses called for interim lump sum orders to apply in Schedule 1 Children Act applications for financial provision for children. Respondents, including the Family Justice Council, called for interim lump sum orders to be available for purposes other than for legal costs, such as for accommodation or to repay pressing debt (for example, where there is a threat that the home could be repossessed).

The Government response

119. The Government accepts that this reform will not apply in all cases, but considers that it has the potential to provide a route to private funding of legal costs in some cases currently funded by legal aid. We are not persuaded that legal aid should be available for advice and/or representation to apply for an interim lump sum costs order or for enforcement proceedings because many of the issues that would arise in respect of interim lump sum orders would be akin to those that arise in ancillary relief cases themselves.

120. The Government therefore intends to introduce the reform largely on the basis set out in the consultation.

III Exceptional funding (question 4)

121. The consultation sought views on the proposal for a new scheme for funding cases excluded from scope (the exceptional funding scheme). Under the proposals in the consultation, funding would only generally be provided where some provision of legal aid was considered necessary to meet domestic and international legal obligations, or where there was a wider significant public interest in funding representation at inquests.

122. Full details of the issues raised and the Government's response is at Annex C and are summarised below.

Key issues raised

123. **Rationale**: Most respondents were opposed to the proposals to remove large areas of the law from the scope of legal aid. Many of the views expressed on the proposed exceptional funding scheme were therefore similar to those raised in relation to the scope changes, including concerns about obligations under the European Convention on Human Rights (ECHR), and the ability of the market to sustain supply of legally aided services. These are considered under the cross cutting issues (from paragraph 320 below).

124. **Criteria**: many respondents were concerned that under the scope restrictions, legal aid would not be available for meritorious cases. They argued that the existing criteria for exceptional funding should be retained (or even relaxed). Some argued that the criteria for funding should take into account the client's capacity to represent himself or herself, and that in complex cases, exceptional funding should be available where clients cannot afford to pay for the necessary expert reports.

125. **Specific categories**: respondents argued that certain types of case should routinely attract exceptional funding, including the most serious clinical negligence cases; welfare benefits, in view of the introduction of the new universal credit and the need to clarify the new rules; and many private family proceedings and immigration matters, which often raised issues under articles 6 and/or 8 of the ECHR.

126. **Scheme operation and costs**: many respondents argued that decisions on exceptional funding should be made independently, particularly in cases which sought to challenge the Government. Some respondents were concerned that only very few cases would attract exceptional funding, although others argued that so many cases would attract funding that exceptional funding would become routine. There was also a concern that the scheme would generate satellite litigation to challenge decisions, and generally that the process for handling applications would be lengthy and bureaucratic.

127. Some respondents also argued that the details of the new exceptional funding scheme should be subject to a further consultation.

The Government response

128. The Government has decided to introduce a new exceptional funding scheme which will provide funding for excluded cases where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law. We have also decided to retain the existing significant wider public interest criterion for advocacy in inquest cases, for the reasons set out in the consultation.

129. The Government recognises the concerns about the restrictions on scope and the implications for exceptional funding. We believe that cases we intend to retain within the scope of legal aid are those which are more likely routinely to require funding in order to meet our legal obligations. This is reflected by our focusing on factors such as the ability of the individual to present their own case, the complexity of the case, and importance of the issue at stake.

130. The proposals for exceptional funding were designed to ensure that we meet our legal obligations to provide legal aid. In particular, the need to consider the particular circumstances of each case, including the client's capacity to represent himself or herself, are well established in case law on article 6 of the ECHR and will form a part of the criteria upon which exceptional funding decisions are made.

131. To ensure the appropriate degree of independence and transparency, the Government has decided that funding decisions for individuals' cases, including exceptional funding, will be made by the Director of the new legal aid agency, subject to general criteria and guidance issued by Ministers. Ministers will be prevented by statute from giving the Director directions about funding in an individual case. We will publish details on the operation of the exceptional funding scheme, including the application process, in due course.

IV The legal aid merits test (question 5)

132. The consultation sought views on a proposed amendment to the merits criteria, to enable legal aid to be refused in any individual case which is suitable for alternative funding. Full details of the issues raised and the Government's response are set out at Annex C, and summarised below.

Key issues raised

133. Respondents in general recognised that where alternative sources of funding are available, they should be used, and that there was no objection in principle. Most respondents, however, did not agree with the proposal, and the key issues they raised were:

- it was not clear how 'suitable' would be defined and on what criteria the Legal Services Commission (LSC) would base their decision. They questioned whether funding would be available, for example, if the case was suitable in theory for funding on a Conditional Fee Agreement (CFA) but not in practice, or if a case was refused by one solicitor for funding on a CFA because after their risk assessment success prospects were less than 75 per cent;
- there was concern that in certain areas CFAs will not be available or suitable, such as re-housing applications and welfare benefits and debt advice;
- some respondents (including the Law Society) acknowledged that it was acceptable for public funding to be a last resort to secure access to justice and that where a case could be pursued on the basis of a CFA, this was a legitimate basis on which to refuse public funding. However, they argued that a CFA must be available in the individual case, and on reasonable terms, and not just generally for cases of that type;
- funding cases on a CFA under the new arrangements (following implementation of Lord Justice Jackson's proposals[18]) would be less likely and in future solicitors would be less inclined than they are now to take on meritorious but riskier cases.

The Government response

134. Most of the points raised mainly related to the criteria that the LSC, or the successor agency, would apply to establish whether an individual case was suitable for an alternative form of funding, rather than to the principle.

135. The Government intends to amend the merits criteria so that funding in any individual case will be refused if it is suitable for an alternative source of funding (as proposed in the consultation).

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[18] See footnote 8 above.

V Litigants-in-Person (question 6)

136. The consultation sought views on the impact of the proposed changes to the scope of legal aid on litigants-in-person and the conduct of proceedings.

Key issues raised

137. Many respondents, including members of the judiciary, argued that the programme of reform would lead to an increase in the numbers of litigants representing themselves in court, and that this would have a negative impact on the conduct and outcome of proceedings.

The Government response

138. In the consultation paper we undertook to review the research available on litigants-in-person, and their impact on the conduct and outcome of proceedings. The Government has completed its review, which it has published separately today.[19] Overall the review found that the evidence available on litigants-in-person tends to suggest a mixed impact in length of proceedings. This was affected by case type and how active the litigants were. It was suggested that cases took longer when the unrepresented litigant was active but could take less time when the litigant was inactive.

139. Litigants-in-person are already a feature of the current justice system and the current assistance will be maintained. We will also look at ways to better promote awareness of alternative ways of settling disputes. For example we are working with providers of mediation services on plans to increase awareness and use of mediation and to help people to better understand the options available to them. Information about mediation is currently available on the MoJ website and other online sources.

140. We do accept, even if there is no conclusive evidence of this, the likelihood of an increase in volume of litigants-in-person as a result of these reforms and thus some worse outcomes materialising. But it is not the case that everyone is entitled to legal representation, funded by the taxpayer, for any dispute or to a particular outcome in litigation. In individual cases where the failure to provide legal aid would result in a breach of an individual's rights under the Human Rights 1998 or European Union law then exceptional funding will be available.

[19] See: http://www.justice.gov.uk/publications/research-and-analysis/moj/index.htm

VI The Community Legal Advice Telephone Helpline

141. The consultation asked five questions on the Government's proposals to expand the Community Legal Advice (CLA) telephone helpline currently provided by the Legal Services Commission. In addition to what appears in the consultation document, on 7 January 2011 the Government published a document entitled: *Provision of advice and information services by telephone: clarification and background.*[20] The document clarified that clients would not be required to first ring the helpline in emergency cases and asked for views on what would constitute an emergency case. Annex D sets out in detail the issues raised by respondents to the consultation, and the Government's considered response.

Mandatory single gateway to apply for legal aid (questions 7, 9 and 10)

Key issues raised

142. The majority of respondents to the consultation were opposed to the proposal that the telephone helpline should be the mandatory single gateway for applying for all civil legal aid.[21] The mandatory single gateway means that if a person wants legally aided advice in a particular area of law, the person will be required to telephone the helpline in order to apply for legal aid. Access to actual legal advice over the telephone, either legally aided or privately funded, is discussed separately below.

143. The key concerns raised were:

- the operation of the mandatory single gateway would restrict access to justice for those clients who would have difficulty using a telephone based service and would reduce their ability to choose their preferred advice provider;
- the adverse impact the mandatory single gateway would have on the existing legal aid advice services market, including the impact on local referral networks;
- the mandatory single gateway would generally limit access to justice, and possibly contravene European Convention on Human Rights (ECHR) legislation;

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[20] See: http://www.justice.gov.uk/downloads/consultations/provision-advice-telephone.pdf

[21] It should be noted that calling the mandatory single gateway will only be the first stage in the legal aid application process. The operator service will make an initial assessment of whether the caller is financially eligible for legal aid and whether their problem falls within the scope of legal aid. Specialist advice providers, whether telephone or face-to-face, will still be required to complete the legal aid application process on behalf of the client, for example by assessing the merits of the client's case or seeking evidence to confirm financial eligibility with the client.

- the mandatory single gateway may lead to increased bureaucracy and delays to an individual receiving assistance, especially in emergency cases;
- the adequacy of the training and accreditation that call operators would be required to receive in order to ensure the service could effectively diagnose the problem and adequately screen callers, and how ongoing quality would be monitored.

144. Many respondents also argued that the consultation proposals on the expansion of the telephone helpline were insufficiently detailed to allow respondents to understand and comment effectively on how the proposals would work in practice and the effects they might have on a wide range of clients, as well as on legal aid advice providers and paid-for advice providers. The Government sought to address this concern by publishing the document referred to in paragraph 141 above, which clarified that the helpline would not be the mandatory single gateway for emergency cases and set out further information on the operation of the current CLA helpline.

The Government response

145. The Government has considered these responses. The Government has decided that the telephone helpline should be the mandatory single gateway for applying for legal aid and has decided that to begin with, this will extend to only four areas of law. The Government will review the implementation of the mandatory single gateway for applying for legal aid in these four areas of law and use the outcome of this review to determine whether the mandatory single gateway should be expanded to other areas of law in due course.

146. The four initial areas of law are:

- debt (insofar as it remains in scope);
- Special Educational Needs (SEN) cases;
- discrimination cases (claims relating to a contravention of the Equality Act 2010);
- community care.

147. In selecting the areas of law most appropriate for this initial stage of the mandatory single gateway we have considered:

- whether there was any increased risk within each area of law of clients' needs not being met by a telephone service;

- the likely frequency of the need for Legal Representation or Controlled Legal Representation;[22]
- the likely frequency of emergency cases in the area of law;
- whether the existing Community Legal Advice (CLA) helpline service had any previous experience of delivering advice in the area of law.

148. The Government has already clarified in the document of 7 January 2011 that there will be an exception to the mandatory single gateway in cases of emergency. In addition, the Government intends make the following further exceptions to the mandatory single gateway in these four areas of law:

- cases where the client has previously been assessed by the mandatory single gateway as requiring advice face-to-face, has accessed face-to-face within the last twelve months and is seeking further help to resolve linked problems from the same face-to-face provider;
- clients who are in detention (including prison, a detention centre or secure hospital);
- children (defined as being under 18).

149. In the event that a client visits a face-to-face provider who recognises that the case will not be within scope for legal aid but may be eligible for exceptional funding, the application can be made straightaway without the client first telephoning the helpline.

Receiving legally aided advice by telephone (question 8)

150. The consultation also sought views on providing civil legal aid advice services at the specialist level[23] (referred to in the consultation document as legally aided advice) through the helpline in all areas of law.

Key issues raised

151. Many of the concerns and issues raised about the proposal on the provision of legally aided advice service by telephone were similar to those raised in relation to the proposal for a mandatory single gateway for all civil legal aid. Additional concerns included that:

- a telephone based service would not be able to offer an advice service where ongoing casework or Legal Representation or Controlled Legal Representation was required;

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[22] Legal Representation is a type of legal aid that pays for a solicitor or barrister to represent a client in court, if they are taking or defending court proceedings. Controlled Legal Representation offers representation for clients appearing before a Mental Health Review Tribunal or an Asylum and Immigration Tribunal.

[23] By 'specialist' we are referring to the second tier of the CLA helpline, which delivers tailored legal advice to the individual funded by legal aid.

- specialist telephone advice would be inappropriate for many clients and for particular areas of law, including asylum cases;
- it was more difficult to provide a high quality service for legal aid clients over the telephone;
- the fund saving figures in the impact assessment were overstated.

The Government response

152. The Government has considered the consultation responses. The CLA helpline will continue to offer specialist legal advice by telephone in the six areas of law that it does at present (debt, welfare benefits, housing, family, education and employment) until the proposed changes to the scope of legal aid are implemented.

153. At that point the CLA helpline will offer specialist legal advice in the following areas of law:

- debt (insofar as it remains in scope);
- Special Educational Needs;
- discrimination (claims relating to a contravention of the Equality Act 2010);
- community care;
- family;
- housing.

154. Where clients access the CLA helpline thorough the mandatory single gateway in debt, Special Educational Needs, Discrimination (claims relating to a contravention of the Equality Act 2010) and Community Care cases, clients who are eligible for legal aid will be transferred to CLA specialist telephone advisors. Annex D details the circumstances in which callers would instead be referred to face-to-face legal aid services. For example, where Legal Representation or Controlled Legal Representation is required or the client requires face-to-face support. But subject to these exceptions, legal aid specialist advice will only be available on the telephone. In family and housing cases, callers will be able to express a preference for face-to-face or telephone services. Over time, specialist telephone advice services will be available in other areas of law remaining within the scope of legal aid. However we will not provide specialist telephone advice in asylum matters. The Government accepts that it is likely that very few asylum cases would be suitable for telephone advice, as many of the cases concern people who are detained.

155. As stated at paragraph 145, the mandatory single gateway may be extended to other areas of law. In this event, subject to the exceptions described in Annex D legal aid specialist advice in those areas of law would only be available on the telephone.

Paid for advice (question 11)

156. The consultation also sought views on whether the CLA helpline should be able to refer clients who are not eligible for legal aid or whose cases were outside the scope of legal aid to a paid-for advice service.

Key issues raised

157. Some respondents to this question did not object in principle to the proposal, however most considered that the helpline should concentrate solely on eligible clients. In addition, some were concerned that the proposal might breach competition and state aid rules.

The Government response

158. The Government has considered the consultation responses. The Government has decided not to implement this proposal at this stage but instead to run a pilot scheme. This will further examine the feasibility of offering the option to clients to pay for advice over the telephone.

Conclusion

159. Having given due consideration to the responses to the consultation, the Government has decided to:

- implement a mandatory single telephone gateway limited to the following areas of law: debt (insofar as it remains in scope), community care, discrimination (claims brought under the Equality Act 2010) and Special Educational Needs subject to the exceptions set out at paragraph 148;
- introduce a phased expansion of the provision of specialist telephone advice into the areas of law remaining in scope; and
- run a pilot scheme which will further examine the feasibility of offering the option to clients to pay for advice over the telephone.

VII Financial eligibility

160. The Government asked a series of questions on proposals to reform the financial eligibility rules for applicants for legal aid in civil and family proceedings. The proposals were designed to ensure that those who can afford it should pay for, or contribute towards the costs of their case, as well as making substantial savings in the cost of legal aid. Details of the questions, the issues raised by respondents, and the Government's response are set out at Annex E.

Capital passporting (Question 12)

161. The consultation proposed removing the automatic passporting for legal aid for those on qualifying benefits. While the legal aid eligibility rules provide that people who have more than £8,000 disposable capital are not eligible for legal aid, by automatically passporting people receiving certain income-based benefits has led to a position where some individuals may be awarded legal aid even where they have up to £16,000 in disposable capital. This is twice the level of the upper limit to qualify for legal aid for persons not in receipt of these benefits.

Key issues raised

162. The majority of respondents to this question opposed the proposal. They argued that the threshold for benefits represented subsistence levels, and that it was therefore justified to award legal aid where benefit recipients' disposable capital exceeded the £8,000 disposable capital limit for legal aid. Others argued that this would penalise those who rely on savings, for example pensioners, or those who have been awarded a lump sum for damages in a personal injury case.

The Government response

163. The Government notes the strong objections to this proposal to apply the capital means test to all applicants, but we continue to believe that those who can afford to pay for, or contribute towards, the costs of their cases should do so. In our view, it is inequitable that some applicants with disposable capital assets exceeding £8,000 are deemed eligible for legal aid, whereas other persons with similar income and capital levels are ineligible. We believe that those on benefits should be subject to the same tests of disposable capital as those who are not on benefits.

164. The Government has therefore decided to implement the reform as set out in the consultation.

£100 contribution for those with £1,000 of disposable capital (question 13)

Key issues raised

165. Many respondents argued that a £100 contribution from £1,000 disposable capital would be likely to deter vulnerable people from seeking advice and legal aid. Some viewed the £100 contribution as a barrier to justice. Others argued that vulnerable people with low levels of savings

need these savings as a safety net to cover emergency costs. Many respondents, including Shelter and the Legal Aid Practitioners' Group, argued that there could be substantial administrative costs and practical impediments to providers collecting the money, particularly where emergency work was needed.

The Government response

166. The Government is firmly of the view that people who can afford to pay for, or contribute to the costs of, their cases should do so. However, we recognise that at the level of £1,000 of disposable capital, individuals' assets may be highly variable, and that for many sums below £1,000 may represent a contingency fund. We also recognise the importance of individuals being able to save to pay for necessities. In addition, the collection of the fee would deliver only modest savings which would be off-set, to an extent, by the administration costs of collecting them.

167. Having considered respondents' concerns, we have decided not to proceed with this proposal. We consider that the measures to abolish capital passporting and to increase monthly contributions will ensure that individuals with sufficient means have a financial interest in how their case is conducted.

Abolition of capital disregards, and waiver (questions 14 – 21)

168. The consultation paper asked a series of questions proposing the abolition of the existing capital disregards, so that greater account is taken of the equity in a client's home in the means assessment. We also proposed that, in certain circumstances, where clients could not access their equity to fund the case, a waiver would operate which would allow the case to be funded on the basis that this was repaid at the end of the case, or the client accepted an interest-bearing charge on their property.

Key issues raised

169. Respondents generally disagreed with the proposals to abolish the capital disregards. They argued that there was a difference between equity in the main home, and accessible capital which could be used to fund proceedings. The majority of respondents were, however, in favour of the proposed waiver, although they pointed out that in practice applications for a waiver were likely to become routine rather than the exception, and that these proposals were therefore unlikely to make significant savings in the short term.

The Government response

170. We recognise that respondents are correct in their assertion that there may be practical difficulties with using capital in equity to fund proceedings, and for this reason a waiver was proposed. We accept, as respondents have argued, that it is likely that the vast majority of clients subject to this proposal would need to take advantage of the waiver, and therefore immediate savings would be minimal. In addition it is likely to

take a number of years before charges placed on property would be redeemed. Having conducted further work during the consultation period, the Government considers that the proportion of homeowners who are eligible for legal aid is significantly smaller than originally estimated. Therefore, because only a small proportion of legally-aided individuals are homeowners, most of them would qualify for the waiver, and savings would only be delivered in the long-term, we consider that this change does not justify the additional complex and potentially expensive administrative burden it would place on individuals, providers or the successor to the LSC.

171. The Government has therefore concluded that the benefits of this reform are outweighed by the costs. For this reason, we have decided not to abolish capital disregards or to uncap the existing mortgage disregard, which will remain capped at £100,000.

172. The Government does, however, intend to proceed with the proposal to retain the subject matter of the dispute disregard for contested property cases, and to cap it £100,000 for all levels of service. This proposal was included in the consultation and was not contingent on the implementation of other proposals relating to capital disregards. Currently, in assessing eligibility for controlled work, such as Legal Help, the value of any assets that are disputed in the proceedings is completely disregarded. This means that extremely wealthy people can currently obtain legal aid for advice in relation to disputes about contested property. The Government intends to implement the proposal to cap the capital disregard in such cases at £100,000, so that it is consistent with the eligibility criteria for other forms of legal aid (such as legal representation). Applying a consistent limit to different types of cases will ensure that limited legal aid resources are focussed on those most in need.

Income contributions (Questions 22 and 23)

173. The consultation sought views on two options for increasing income based contributions to up to 30% of disposable income.

Key issues raised

174. Many respondents to the consultation were opposed to this proposal. They argued that current contribution levels were not readily affordable for clients and were already onerous. Many respondents did recognise, however, that the monthly contribution gave applicants a financial interest in the case which served to encourage speedier resolution of cases.

175. Few respondents expressed a preference between the two proposed models, supporting neither option. Of those who did express a preference, the majority favoured option 1. They felt that this option, which required a greater contribution to be paid by those who are assessed as having a higher disposable income, would be fairer than the alternative.

The Government response

176. Given the need to make substantial savings in the cost of legal aid, the Government's view remains that it is appropriate for those who have disposable income to contribute towards the cost of their case, and to have a financial interest in how it is conducted. The Government agrees with the views of respondents who favoured Option 1, and we therefore intend to increase income contributions as set out in Option 1 in the consultation paper.

Conclusion

177. Having taken into account the responses to the consultation, the Government intends to introduce the following reforms to financial eligibility for legal aid in civil and family proceedings:

    i) to apply the same capital eligibility rules to applicants in receipt of "passporting" benefits as other applicants for legal aid, as set out in the consultation;

    ii) to retain the 'subject matter of the dispute disregard' capped at £100,000 for all levels of service, as set out in the consultation;

    iii) to increase the levels of income based contributions to a maximum of 30% of monthly disposable income, as set out under option 1 of the consultation.

VII. Remuneration: criminal fees

178. The consultation sought views on a series of questions about proposed reforms to the remuneration of providers of legal aid in criminal matters. The proposals were designed to make substantial savings in the cost of legal aid.

179. Full details of the questions, the issues highlighted in the consultation and the Government's response are set out at Annex G.

Key issues raised

180. Many respondents argued that the proposed fee reductions, which are in addition to reductions in fees already in train, would have a significant impact on the ability of providers to operate profitably, and that this might lead to a significant withdrawal of legal providers from the market. Similar issues were raised in relation to the proposals on civil and family fees.

181. The question of market sustainability is considered in the section on cross-cutting issues (paragraphs 298 to 308 below) and in more detail at Annex F.

182. The Government's proposals on criminal fees were designed to be introduced quickly in advance of competition. As highlighted in the consultation, the Government intends to introduce price competition into the procurement of legally aided services as soon as possible. The Government believes that this is the best way to ensure long term sustainability and value for money in the legal aid market. We intend to consult on detailed proposals for introducing competition in criminal proceedings later in the year.

Fees for guilty pleas in either way cases in the Crown Court determined suitable for summary trial; increase in certain magistrates' court fees and the abolition of the committal hearing fee (question 24)

183. The consultation proposed:

- to pay a single fixed fee of £565 in cases which magistrates had determined were suitable for summary trial, but where the defendant had elected for trial by jury, where these subsequently resulted in a guilty plea;
- to enhance the lower standard fee in the magistrates' court paid for cracked trials and guilty pleas; and
- to abolish the separate committal fee under the Litigators' Graduated Fee Scheme.

Key issues raised

184. Most respondents opposed this proposal on the grounds that they unfairly penalised lawyers for the decisions of the client. While solicitors generally welcomed the introduction of a single fee, barristers, the Bar Council and the Criminal Bar Association argued that it would give solicitors an unfair advantage and that they would be able to negotiate lower advocacy fees which would have a significant impact on the junior bar in particular. Should the proposal be implemented, they argued that the Government should prescribe the fees to be paid for litigation, and separately for advocacy.

185. Many respondents also questioned the rationale for enhancing only the lower standard fee. They argued that the proposal was likely to lead to an increase in more complex either way cases being heard in the magistrates' courts, and that the higher standard fee should also be enhanced to reflect this.

The Government response

186. It remains the Government's view that it is inappropriate in this narrow group of cases (which the magistrates' court has determined to be of a level of seriousness and complexity suitable for them to be dealt with summarily) for the taxpayer to continue to pay significantly more for a guilty plea by reason of the venue in which the plea takes place.

187. Nevertheless, in light of the responses received, the Government has decided to modify the proposal. The Government agrees that this reform is likely to result in an increase in the numbers of cases being heard in the magistrates' courts. Having considered the consultation responses, we have decided to modify the original proposal so that both the lower standard fee and the higher standard fee are enhanced (by 23% and 8% respectively[24]) within the same overall funding envelope.

188. The 8% increase in higher standard fees takes fee levels to the current upper fee limit. Any greater increase would risk the new higher standard fee exceeding the limit at which the fee 'escapes' to hourly rates, so paying more for the higher standard fee cases than some 'escape' cases. The increase of 23% in lower standard fees is set at a level which ensures that the overall total increase in fees remains the same as the original proposal.

189. The Government notes the concerns about the introduction of a single fixed fee covering both litigation and advocacy. The Government has concluded that the question of whether or not to introduce a single fee scheme should be considered as part of the consultation on introducing competition, which we plan to publish later in the year. It has therefore

[24] Rounded to the nearest percentage point.

been decided that the fee of £565 should be split into separate elements for litigation and advocacy.

190. In 2009 /10, 64% of the relevant expenditure in these cases (payments under the two Crown Court graduated fees schemes, and payments for committal hearings in the magistrates' courts), was paid to litigators and 36% to advocates. The Government believes that this is a fair basis for apportioning the fee of £565 (excluding VAT) between litigation and advocacy. The fee for litigation will therefore be £362 (excluding VAT) and the advocacy fee £203 (excluding VAT).

191. We believe that in practice, committal proceedings are rarely substantive hearings, usually just confirming the decisions made earlier at the mode of trial hearing, with such papers as there are served either very late or on the day itself. Moreover, any preparation which solicitors are required to make will cover much the same ground as for the Plea and Case Management Hearing in the Crown Court just a few weeks later. There are provisions (which have not yet been commenced) in the Criminal Justice Act 2003 that would put an end to committal proceedings altogether. The Government is considering whether they should now be brought into force. But the Government intends in any event to proceed with the abolition of the committal fee.

192. We also wish to acknowledge that Annex G to the consultation paper was not as clear as it could have been. It showed that the Government proposed to enhance both Category 1 fees (guilty pleas and cracked trials) and Category 2 fees (trials and cases fully prepared for trial that crack on the day of trial). We believe that it was clear from the context of the proposal that the reforms related to Category 1 fees only, and not to fees for full trials. However, for the avoidance of doubt, we wish to make it clear that it was never our intention to enhance Category 2 fees under this proposed reform.

Fees for Guilty Pleas and Cracked Trials in the Crown Court (question 25)

193. The consultation paper proposed the same fee for an early guilty plea and a cracked trial. It proposed that the fee should be set at a level 25% above the fee for a guilty plea to achieve an appropriate balance, and that the existing facility for an additional fee for special preparation would be used to reflect the extra work required for the most complex cases.

Key issues raised

194. Respondents raised similar objections to those on the single fee proposal above, in particular that the proposals would unfairly penalise lawyers for the decisions of their clients. They also argued that the availability of special or wasted preparation was illusory as it would only be available in a very small number of cases, and that cases which required significant trial preparation would not be adequately rewarded.

The Government response

195. The Government accepts the force of the argument that the original proposal would not reward the most complex cases which require significant and sustained trial preparation. To address these concerns, we have decided to modify the proposal. We have concluded that the best way to achieve our aims, taking into account the responses to consultation, is to leave guilty plea fees at current levels while reducing the fees for cracked trials by 25% overall, rather than by 33% implied by the original proposal to harmonise fees at early guilty plea level. This will continue to provide additional funding for those complex cases which require additional work in preparation for trial, while reducing the significant differential between fees for early guilty pleas and trial which crack late in proceedings.

Fees in cases of murder and manslaughter (question 26)

196. Fees paid in cases of murder and manslaughter are significantly higher than those offered for other serious cases. We do not believe that the differences are justified, and the consultation therefore proposed removing the distinction in fees for these cases, so that they were paid at the same rates as for rape and other serious sexual offences.

Key issues raised

197. Most respondents disagreed with the proposal, arguing that it was a unique offence which upon conviction carried an automatic life sentence. It was argued this placed a heavy burden of responsibility on the defence legal team. It was also argued that, compared with rape and other serious sexual offences, these cases often:

- involved much more evidence, including unused evidence; and
- raised more complex legal arguments, for example diminished responsibility, joint enterprise and provocation.

The Government response

198. The Government accepts that cases of murder and manslaughter can raise significant amounts of evidence and complex legal arguments, but issues of volume and complexity are not unique to these cases, and often occur in rapes and other serious sexual offences. Certain factors, such as pages of prosecution evidence, are already taken into account under the graduated fee schemes so that those cases which are more paper heavy will be paid more.

199. For these reasons, the Government has concluded that the premium for cases or murder and manslaughter is not justified, and that in future these cases will be paid at the same rates (i.e. those set out under Category J of the Advocates' and Litigators' Graduated Fee Schemes) as cases of rape and other serious sexual offences (as set out in the consultation).

Fees in cases of dishonesty (question 27)

200. The consultation sought views on proposals to remove the distinction in fees between cases of dishonesty based on the value of the dishonest act(s) below £100,000.

Key issues raised

201. The responses to this question were split. Many respondents accepted that the differentiation in fees according to the value of the dishonesty was somewhat arbitrary and that the current cut-off at values over £30,000 was probably 'out of date'. Most agreed with maintaining a distinction for cases where the value exceeded £100,000.

202. However, others took the view that the value of the dishonest act was a good indication of the amount of work involved and the current fee structure should be preserved. Some respondents suggested that all cases should be aligned irrespective of value but at a rate above the current Category F rate.

203. Respondents also argued that the number of prosecution pages was not an adequate marker of complexity and that both complexity and seriousness should be considered. It was argued that crimes concerning a higher value would attract higher penalties on conviction and continue to require more senior lawyers.

The Government response

204. Having considered the responses to the consultation, the Government continues to take the view that:

- the value of the dishonest act is not a reliable proxy measure for the seriousness of a case, and that the distinction below £100,000 should be removed; and
- pages of prosecution evidence provides a reasonable basis for additional fees in the more complex cases.

205. We have therefore decided to implement the reform, as proposed in the consultation.

Fees in magistrates' court cases in London (question 28 a)

206. The consultation proposed removing the premium paid for magistrates' courts cases in London.

Key issues raised

207. Most respondents disagreed with the proposal arguing that the costs of working in London were higher. It was argued that London was a unique area. Unlike other urban areas, there were no planned criminal justice centres, and the different agencies were often widely dispersed.

208. However, some respondents (including solicitors) working outside London agreed that the additional fees could not be justified.

The Government response

209. The Government accepts that the costs of operating in London can be higher than elsewhere in England and Wales. However, we note that, some other fee schemes do not provide a premium in London, such as the Crown Court fees scheme. The Government also believes that there may be some evidence of potential over-supply of legal aid providers in London. In 2009/10, 21% of legal aid firms holding a criminal contract were based in London, but London only accounted for 17% of the representation orders for magistrates' courts and Crown Court cases.

210. For these reasons, the Government has decided to remove the premium paid for cases in the magistrates' courts in London, as proposed in the consultation.

Ancillary Payments ("bolt-ons") (question 28 b)

211. The consultation proposed that ancillary fees should be reduced by 50% to bring them into line with Lord Carter's recommendation, during his review of legal aid in 2006,[25] that they should be capped at £10 million per annum.

Key issues raised

212. Most respondents opposed the proposal. They argued that the 50% cut was too crude an approach. The Bar Council argued that it would have a significant impact on the junior bar in particular.

The Government response

213. The Government accepts that the original proposal did not take sufficient account of the differing natures of the various hearings which currently attract an ancillary fee. The Government has therefore decided to amend the original proposal in a way designed to achieve the same level of saving. We have decided to maintain the current fees for ancillary payments for those matters which normally raise genuinely complex or legal arguments. This will cover ancillary payments for all bolt-on payments other than for sentencing hearings, including special and wasted preparation; hearings about disclosure; hearings on the admissibility of evidence; and proceeds of crime hearings.

214. The Government intends to remove separate ancillary payments for sentencing hearings, which will be subsumed within the standard graduated basic fee as one of the five standard appearances included within the base fee.

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[25] *Legal aid: a market based approach to reform*, July 2006. http://www.legalaidprocurementreview.gov.uk/publications.htm

Very High Cost Cases (VHCCs) (question 29)

215. The consultation sought views on removing the current distinction in criteria for VHCCs between litigators and advocates. In the Crown Court, trials estimated to last more than 40 days are funded under a VHCC contract. However, for advocates, the relevant criterion is based on trials estimated to last more than 60 days. Trials estimated to last between 41 and 60 days are paid under the Advocates' Graduated Fees Scheme.

Key issues raised

216. Views on this proposal were mixed. Barristers tended to support the proposal, whereas many solicitors did not.

The Government response

217. The Government remains of the view that, consistent with the approach currently in place for advocates, only cases due to last above 60 days at trial or more should continue to be paid at VHCCs rates and that payment for all work on cases due to last under 60 days should therefore be at levels set out in the Litigators' Graduated Fees Scheme. The Government has decided to achieve this by continuing to provide for individual case contracts for cases due to last 41 to 60 days, but to be paid at the rates set out in the Litigators' Graduated Fees Scheme, rather than VHCC rates.

Independent Assessor for Very High Cost Cases (VHCCs) (question 30)

218. The consultation proposed appointing an independent assessor to review and challenge the opinions of the client's legal representatives on VHCCs.

Key issues raised

219. The very large majority of responses were opposed to the proposal on the grounds that it added a further layer of bureaucracy, the benefits of which would be limited.

The Government response

220. The Government accepts that the limited benefits of the proposal are likely to be outweighed by the additional costs. For this reason, we have decided not to proceed with the appointment of an independent assessor.

Restricting use of two counsel

221. The consultation sought views on amending one of the criteria for the appointment of two counsel in criminal cases, by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages.

Key issues raised

222. There were few strong views expressed on this question, but most who did respond said that the criterion on pages of prosecution evidence was unnecessary and irrelevant, and other factors were more important in determining whether a case merited two counsel.

The Government response

223. Having reviewed the consultation responses, the Government accepts that there is little value in pursuing the proposal further. Instead, the Ministry of Justice will work with the Crown Prosecution Service and the Judiciary to review the criteria for allowing representation by two counsel, with a view to producing a more transparent set of rules for their appointment at the start, and during the lifetime, of the case.

Conclusion

224. Having taken into account the responses to the proposals in the consultation paper, the Government has decided to take forward the following programme of reform:

    i) to implement an overall fee of £565 for either way cases deemed suitable for summary trial, but with the fee split between litigation and advocacy as set out in paragraphs 189 and 190 above; and to enhance the lower and higher standard fee in the magistrates' court as set out at paragraphs 187 and 188, and to abolish the committal hearing fee, as set out in the consultation paper;

    ii) to reduce Crown Court fees for cracked cases by 25%, leaving the fees for guilty pleas unaltered, as set out at paragraph 195;

    iii) to align the fees paid in cases of murder and manslaughter with those paid in cases of rape and other serious sexual offences, as proposed in the consultation paper;

    iv) to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000, as proposed in the consultation paper);

    v) to remove the premium paid for magistrates' courts cases in London, as proposed in the consultation paper;

    vi) to remove separate ancillary payments (or "bolt-on" fees) for sentencing hearings and to subsume sentencing hearings within the standard graduated basic fee as one of the five standard appearances included within the base fee, as set out in paragraphs 213 and 214 above; and

    vii) to pay litigators in all cases with an estimated trial length of between 41 and 60 days under individual contracts at rates specified under the Litigators' Graduated Fee scheme, rather than at Very High Cost Case rates, as set out at paragraph 217 above.

225. Details of the new fees we intend to introduce for criminal proceedings have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm. We intend to bring forward a Funding Order shortly, giving effect to these reforms from October 2011.

VI Remuneration: civil and family fees

226. In chapter 7 of the consultation paper, the Government sought views on a series of proposals principally designed to reduce the fees paid in civil and family proceedings. Many respondents called into question the sustainability of the market in legally aided services if these proposals, and the proposals on crime fees, were implemented. Market sustainability is considered in the section on cross-cutting issues (see paragraph 298 below) and in more detail at Annex F.

227. The detailed issues raised in consultation and the Government's considered response, are set out at Annex H, and summarised below.

Payments to Solicitors and Barristers (questions 32 and 34)

228. The consultation proposed reducing all fees paid to solicitors and barristers in civil and family matters by 10% compared with the rates currently paid in these cases. The consultation further proposed codifying barrister rates in civil proceedings and reducing these by 10%.

Key issues raised

229. There was strong opposition to these two proposals. Solicitors in particular argued that the proposed cuts in their fees would make legal aid work unviable, and would deter experienced practitioners from undertaking this work.

230. Solicitors generally supported the proposals on barristers' fees as a first step towards paying the same rate to solicitors and barristers for the same work. While barristers opposed the proposal, it was generally on the grounds that the proposed benchmarks did not make any allowance for more complex cases.

231. The Bar Council argued that the proposed new rates for civil proceedings, set out at Table 5 in the consultation, were incorrect. Having reviewed the proposed rates against the rates the LSC currently pays in these proceedings, we have identified one fee which was incorrect in the consultation. This relates to the fees paid to junior counsel in the county court. The consultation indicated that they are currently paid £120 hour, but the LSC has confirmed that the starting point for junior counsel is £125 per hour for proceedings outside London, and £150 hour for proceedings in London, with staff having discretion to award higher levels if they consider it justified.

232. These provide the basis for the reforms to all civil and family fees.

The Government response

233. The Government acknowledges that there is a risk that the fee reductions could lead to a reduction in the availability of solicitors and barristers prepared to undertake legally aided work. However, for the reasons summarised below, and set out in more detail at Annex F, we have

concluded that the fee reductions are likely to be sustainable and that any disruption to supply in particular areas of the country can be addressed.

234. For these reasons, we intend to implement the reduction of 10% to all fees paid under the civil and family legal aid scheme as set out in the consultation.

Enhancements in civil and family cases (questions 33 and 37)

235. The consultation asked two questions on proposals to set caps on the fee enhancements paid to solicitors and barristers in civil proceedings, and separately in family proceedings.

Key issues raised

236. The Bar Council, and barristers generally, were opposed to the proposals on the grounds that enhancement allowed for highly skilled, complex and urgent work to be remunerated at a reasonable rate. Solicitors generally argued that the proposal would affect only a limited number of very complex cases, and they did not object provided it did not lead to a pro-rata reduction to all payments made for enhancements.

237. Most respondents argued that the existing criteria for enhancements were already well understood, and sufficiently flexible to take account of a wide range of factors. They did not believe that it was necessary for the LSC to develop and issue new criteria.

The Government response

238. During the consultation the Government identified that paragraph 7.12 of the consultation paper incorrectly suggested that the maximum rate of enhancement that would be payable in civil (non-family) cases in the Upper Tribunal would be 50%. These cases currently attract the same level of enhancement as the High Court, Court of Appeal and Supreme Court and it is not the Government's intention to alter this link. Therefore, the maximum rate of enhancement that would be payable in these cases should also be 100%.

239. The proposed revised caps on enhancements were not designed to deliver financial savings, but to exert greater control over legal aid spending. It is not the Government's intention to reduce enhancements, generally, but to prevent a general increase over time.

240. The Government has therefore decided to implement the caps on enhancements generally as set out in the consultation, but to apply the 100% cap to civil (non-family) cases in the Upper Tribunal. However, in view of the responses, we do not intend to review and refresh the criteria for the payment of enhancements.

"Risk rates" (question 35)

241. The consultation proposed extending the use of "risk rates" in cases where costs are likely to be recoverable from the opponent if the case is successful. Fees paid at risk rates, which are currently only used in high cost cases, are much lower than those paid under standard legal aid rates and are paid only when costs are not recovered in full from the opponent. They are designed to encourage litigators to consider the likelihood of success, and the recoverability of costs, in deciding whether to pursue the case.

Key issues raised

242. There was strong opposition to extending the use of risk rates. Many respondents argued that legal aid rates were so far below private client rates that they already represented risk rates. They also argued that it could have unintended consequences by discouraging parties from settling in cases, for example in judicial review, because of disagreements about which side should bear the costs.

The Government response

243. In view of the force of the arguments, the Government is persuaded that it should not extend the use of risk rates.

Use of Queen's Counsel in family cases (question 38)

244. The consultation proposed restricting the use of Queen's Counsel (QCs) in family cases, using criteria for the appointment of QCs similar to those applied in criminal proceedings.

Key issues raised

245. Solicitors generally supported this proposal, arguing that QCs were only required in very few cases, and in some cases only at certain stages of proceedings. The Bar Council, and barristers, on the other hand, argued that there were already strict criteria in place and that the use of QCs by a local authority was not a condition that should be relevant to parents facing serious allegations. Their general position was that given the different implications for the two sides, any link or comparison to a local authority's position was a false one.

The Government's response

246. A QC is a specialised resource. The Government takes the view that they should only be used in novel, complex or exceptional cases which require that level of skill.

247. For this reason, the Government has decided to proceed with the reform to the criteria for the appointment of QCs, as set out in the consultation.

Remuneration for excluded cases

248. The consultation proposed that individual cases excluded from the scope of the new civil and family legal aid scheme, but funded through the new exceptional funding scheme for excluded cases, should be paid at the current fixed hourly rate in the relevant Category, subject to the proposed reduction of 10%.

Key issues raised

249. The Government has not identified any specific concerns raised by respondents in respect of the proposal on remuneration for excluded cases.

The Government's response

250. It is desirable to retain the current fixed fee or hourly rate in the relevant Category, subject to the proposed 10% reduction, for excluded cases, as differential rates could have the undesired effect of incentivising the taking of exceptional funding cases as opposed to those remaining in scope.

251. For this reason, the Government has decided that cases funded in future through the new scheme for excluded cases should be paid at the current fixed fee or hourly rate in the relevant Category, subject to the reduction of 10%.

Conclusion

252. Having reviewed the responses to the consultation, the Government has decided to implement the following programme of reform of fees in civil and family proceedings:

i) to reduce all fees and hourly rates in civil and family matters by 10%, as proposed in the consultation;

ii) to cap, and set criteria for, enhancements to hourly rates paid to solicitors in civil cases generally as set out in the consultation, but to apply the 100% cap on enhancements to civil (non-family) cases in the Upper Tribunal;

iii) to codify the rates paid to barristers in civil proceedings, and to reduce them by 10%, as set out in the consultation;

iv) to cap enhancements to the hourly rates paid to solicitors in family cases, as set out in the consultation;

v) to restrict the use of Queen's Counsel in family cases using criteria similar to those applied in criminal cases, as set out in the consultation;

vi) to pay cases funded, in future, through the new scheme for excluded cases, at the current fixed fee or hourly rate in the relevant Category, subject to the proposed reduction of 10%.

253. The 10% reduction will apply to all fees and hourly rates paid under the civil and family legal aid scheme, except those where the service has been procured following competition on price, regardless of whether the service provided is subject to fixed rates, general assessment or an individually negotiated contract. This includes Very High Costs Cases which are paid under hourly rates or "events rates" models, but not those paid under risk rates.

254. Details of the new fees we intend to introduce for civil and family proceedings, taking into account the correction to the fees paid to junior counsel in the county court, have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm

255. We will bring forward the necessary secondary legislation, giving effect to these reforms, for civil fees generally, with effect from October 2011. In the case of housing work covered by the Unified Contract we intend that they will be given effect from February 2012, together with the reforms in respect of family fees. We wish to give effect to the reforms for housing work not covered by the Unified Contract from October 2011 at the same time as the other civil fee changes, but are still considering whether this is feasible.

VII Remuneration of expert witnesses (question 39)

256. Chapter 8 of the consultation sought views on proposals to exert greater control over the fees paid to experts under the legal aid scheme. Full details of the issues raised, and the Government's response, are at Annex I.

Key issues raised

257. Most of the respondents to the consultation accepted that action needed to be taken to address the rising costs of experts. However, expert witnesses argued that the rates were too low to ensure continued access to experienced, quality advisers in the future, particularly in child protection, other family cases and in London generally.

258. The majority of respondents supported the Government's proposals to develop its plans to reform expert fees, based on a mix of fixed and graduated fees, with limited access to fees paid at hourly rates, and with provisions for exceptional cases. However, some respondents argued that expert fees should be competitively tendered.

The Government response

259. The Government notes concerns about the level of fees paid to expert witnesses. However, given the need to make substantial savings to legal aid, it remains the Government's view that fees paid to experts should be subject to the same constraints as those paid to lawyers. The Government therefore intends to:

    i) codify the Legal Services Commission's benchmark hourly rates (reduced by 10%) as set out in the consultation paper; and

    ii) continue to develop our longer term plans to reform expert fees, as set out in the consultation paper.

260. Details of the new fees we intend to pay to experts have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm. We will bring forward the necessary legislation, giving effect to these reforms, with effect from October 2011.

VIII Alternative Sources of Funding

261. Chapter 9 of the consultation paper asked a series of questions about proposals for securing alternative sources of funding to offset the costs of legal aid. There were two main proposals: the establishment of an Interest on Lawyers' Trust Accounts scheme, and the introduction of a Supplementary Legal Aid Scheme.

262. The key issues raised and the Government's response are summarised below and full details are at Annex J.

Interest on Lawyers' Trust Accounts (questions 40 to 42)

263. The consultation sought views on establishing a scheme under which the interest accruing on sums help by lawyers on behalf of clients would be used to offset the costs of legal aid. Views were sought on two alternative models.

Key issues raised

264. Although there was some support for the proposal, many responses, including from the Law Society, raised concerns about both the principle and the practical arrangements for operating such a scheme. These included concerns that the scheme would not provide a certain income; would be relatively easily avoided; might reduce the level of pro-bono work; might reduce the competitiveness of the sector; and might cause significant harm to a number of small businesses.

The Government response

265. The Government has considered the arguments put forward by the Law Society. We recognise that the estimated financial benefits of the proposal are uncertain, and the impact on the providers is unclear. For these reasons, the Government has decided not to pursue this proposal at this stage.

Supplementary Legal Aid Scheme (questions 43 and 44)

266. The legal aid consultation paper proposed implementing a Supplementary Legal Aid Scheme (SLAS) for all areas of civil legal aid in cases where general damages were successfully claimed, and sought views how funds should be recouped if a SLAS were implemented. The proposal aimed not only to create an alternative funding stream but also to provide the opportunity to address the relationship between legal aid and proposals on the reform of Conditional Fee Arrangements (CFAs) recommended by Lord Justice Jackson as part of his review of the Costs of Civil Litigation.[26] Lord Justice Jackson proposed that CFA success fees in

[26] See footnote 13 above.

personal injury cases should be limited to 25% of damages (excluding damages awarded for future care and loss).

267. The Government announced on 29 March[27] our intention to abolish recoverability of CFA success fees in all cases, with a cap of 25% of damages (other than those for future care and loss) that could be taken as a success fee in personal injury cases (including clinical negligence cases) in line with Sir Rupert Jackson's proposals. For these cases, the success fee would be payable out of all damages other than those for future care and loss. We also announced a 10% increase in non-pecuniary general damages such as pain, suffering and loss of amenity in tort cases.

268. The consultation proposed two alternative models for a SLAS: a self funding model (requiring start-up funding, and a variable percentage of damages depending on individual case risk), or a partially funded model which could have the proportion of damages set to be more consistent with limits on CFA success fee recovery. Possible methods of recovering money to the legal aid fund included a percentage of damages paid to the legally aided person or a percentage of the interparty costs awarded to the claimant lawyer at the conclusion of the case.

269. Under the proposed partially self-funding SLAS, which was our preferred option, our preferred method of recovery was that a proportion of those damages successfully claimed in legally aided cases would be repaid to the legal aid fund. In addition, we proposed that the partially self-funding SLAS would also apply to any out-of-scope case which was funded through the exceptional funding scheme.

Key issues raised

270. The majority of respondents to the consultation did not agree with the proposal to introduce a SLAS, although some respondents saw the merit of a SLAS if the Government introduced the wider reforms to civil litigation costs proposed by Lord Justice Jackson. Some respondents also argued that the SLAS should be set at 10% (in line with the increase in non-pecuniary general damages in tort cases).

The Government response

271. It is the Government's intention that clients should take forward their damages claims under a CFA where this is available to them. The SLAS provides the opportunity to address the relationship between legal aid and the wider reforms to costs in civil litigation recommended by Lord Justice Jackson, which the Government has subsequently accepted.[28] We wish

[27] See footnote 8 above.

[28] Ibid.

to ensure that, in cases involving damages, CFA or other forms of funding are generally no less attractive than legal aid, as far as possible.

272. For this reason, we intend to introduce a SLAS which takes for the legal aid fund a fixed percentage of 25% of all damages successfully claimed other than damages for future care and loss, thereby ensuring that the SLAS is consistent with the Government's reforms in personal injury cases.

IX Governance and Administration (questions 45 to 48)

273. As set out in the consultation paper, the Government has announced its intention to abolish the Legal Services Commission as a non-departmental public body, and to replace it with an executive agency of the Ministry of Justice. The Government is today introducing legislation to give effect to this reform.

274. Chapter 10 of the consultation paper asked for views on how the LSC's administration of the legal aid scheme could be simplified and improved. Responses to this section of the consultation are being considered by the LSC and will be taken forward separately in collaboration with the relevant representative bodies.

275. Some respondents were concerned about the amount of time consumed in completing lengthy paper forms and submitting them to the LSC by post. To address this concern the LSC is planning implementation of a new IT system to introduce electronic working for civil certificated work. The system will enable providers in civil cases to make applications and submit bills online creating a more efficient process and reducing the burden on their time. The LSC is also already responding to concerns raised about the way providers are audited by reviewing, with representative bodies, the way it carries out audits. The aim is to improve co-ordination of activity and introduce a more transparent approach to audit.

X Impact Assessments (questions 49 to 51)

276. Chapter 11 of the consultation asked a series of questions about the Impact Assessments which accompanied the consultation paper, as part of the Government's duty to have due regard to our obligations under Equalities legislation. Full details are at Annex K.

277. The comments from respondents to these questions were largely negative:

- some respondents used the analysis to highlight the particular impacts the proposals would have on women, Black, Asian and Minority Ethnic (BAME) groups and disabled and ill people;
- respondents were critical that the Impact Assessments and the Equalities Impact Assessments did not identify the full range or extent of the potential impacts; and
- respondents also criticised the lack of mitigation for the potential impacts identified.

278. Concerns about the impacts of specific proposals are considered in the Equalities Impact Assessment which accompanies this Government response.[29]

279. We have published a final Impact Assessment and Equalities Impact Assessment to accompany this Government response. These set out the potential impacts of the final programme of reform set out in this response, but they also reflect updated data and respond to some of the feedback from the consultation. For example:

i) we have considered the information provided in the Otterburn report on the impact of the proposals on firms of legal aid solicitors;

ii) we have considered additional information from the Civil and Social Justice Survey conducted by the Legal Services Research Centre (LSRC); and

iii) we have given further consideration to the potential costs to Her Majesty's Courts and Tribunals Service.

[29] See footnote 4 above.

280. The Government accepts that gaps in the evidence inevitably remain, as information that would be useful in assessing the impact of the proposals is not routinely collected by the LSC, the MoJ, or other organisations involved in the justice system (for example, data on protected characteristics such as religion and belief). In some areas, this has meant that we are not able to undertake detailed assessments of the impact of the proposals on particular groups. In these cases, we have taken a cautious approach when drawing conclusions about the impacts the proposals are likely to have. Where there are significant gaps, we have not discounted the potential for the proposals to affect particular groups of people.

XI Alternative proposals

281. Although the consultation did not specifically seek views on other means of achieving savings, some respondents, including the Law Society and the Bar Council, put forward alternative proposals designed to achieve the similar levels of savings in legal aid. We have carefully considered these proposals. The issues raised and the Government's response are summarised below, and set out in more detail at Annex L.

1. Proposals to reduce the volume of cases

282. The covered a range of proposals, including:

Strengthening the legal aid merits test

283. A number of respondents argued that a tougher merits test would avoid the need to remove certain categories of case from scope, for example private children matters.

284. We have considered the proposals put forward. In some cases, the factors suggested already form part of the current test and others were similar to the criteria we intend to adopt in determining whether legal aid should be provided for cases involving domestic violence. The merits test has been strengthened a number of times in recent years, and we intend to make one further change to strengthen the merits test (see paragraphs 132 to 135above. Enforcement of the test has costs for both the LSC and providers. For these reasons, we believe that there is limited scope to deliver savings through a stronger merits test.

Applying the "polluter pays" principle

285. Some respondents argued that those departments which caused legal aid costs should fund them in some way. This was a principle endorsed by the Justice Select Committee in its recent report.[30] While they accepted that in some cases this shifted costs to other public bodies, it would, they argued, provide a financial incentive to improve decision-making and minimise litigation.

286. Although this seems an attractive proposal, and we agree with the aims of improved decision making and minimising unnecessary litigation, the Government does not believe that there is scope to extend this principle further in terms of legal aid:

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[30] *Government's proposed reform of legal aid*, HC 861-I, March 2011, http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/681/68102.htm

- the courts can make orders for the opponent to pay the assisted person's costs in civil cases where the assisted person is successful. Last year the fund recovered £170 million in costs;[31]
- it would be difficult to apply the principle in cases involving legal advice about a decision of a public body, for example on benefits. It would not necessarily be the case that the initial decision was wrong (it may have been correct, or based on insufficient evidence). Determining who should pay in these cases would be problematic and carry an administrative cost;
- we believe that applying the principle to criminal cases and in public law children matters could be counter-productive. We would not want to discourage these matters being brought before the courts because of concerns over costs.

287. While we do not think there is scope to extend the principle further, we agree that there is scope to improve initial decision making, and the management of cases. Further details are at Annex L.

Better enforcement by departments

288. It was argued that consultation papers and legislation proposing or establishing new offences should include an estimate of the costs of enforcing them.

289. All consultations are required to carry out an Impact Assessment, including a specific Justice Impact Test (JIT) identifying the costs to the Ministry of Justice, including legal aid. In clearing the policy, departments are required to agree costs, and who should fund them, and where agreed resources are transferred.

2. Proposals for alternative sources of funding

290. Some respondents put forward suggestions for securing additional funding, or for offsetting the costs of legal aid. Suggestions included new, or higher, taxes, the use of legal insurance, or providing loans (similar to student loans).

291. For the reasons set out in Annex L we do not think these are realistic alternatives to the legal aid reform programme. We are not minded to consider new taxes to fund legal aid, and there is little appetite in the market to extend the use of legal insurance (which is any event is unlikely to be affordable for those eligible for legal aid).

[31] Data from the Legal Services Commission.

3. Improved efficiency in the system of justice

292. Respondents, including the Bar Council and the Law Society, highlighted the costs to legal aid of inefficient procedures in taking cases through courts. The Government agrees that there is considerable scope for simplifying and streamlining the process of justice, and we are already undertaking a significant programme of work to identify opportunities for greater efficiency across the whole of the justice system, including:

- the independent Family Justice Review: the review is currently consulting on a series of interim proposals;[32]
- in March, the Government published a consultation: *Resolving disputes in the county courts* [33] which contained proposals which sought to balance costs for court users and encourage the use of quicker and cheaper alternatives to court;
- the Ministry of Justice is also working with criminal justice partners, including the Home Office and the Crown Prosecution Service, to develop a programme of efficiency reforms for the Criminal Justice System.

293. Although the Government is considering proposals for the improving the efficiency of the justice system, the MoJ's spending plans already assume savings from these programmes, and they would not therefore provide an alternative to the savings required from legal aid.

294. The Law Society also proposed that 20% of either way cases heard in the Crown Court could be dealt with in the magistrates' courts, saving an estimated £41 million, although they did not specify how this change would be achieved. The Government agrees that there is scope for the magistrates' courts to deal with more of these cases, and our plans address the concern that existing fee schemes may discourage early resolution of cases (see Annex G).

295. It is however a longstanding and important principle in certain criminal cases that the defendant has a right to a trial before a jury, and we have no plans to restrict this.

Conclusion

296. The Government has carefully considered respondents' alternative proposals. However, for the reasons set out above, and set out in greater detail in Annex L, we do not consider that the alternative proposals would meet the Government's aims for legal aid reform, and in particular, substantially reduce the cost of legal aid. We do not therefore believe that they represent a realistic alternative to the Government's reform programme.

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[32] See footnote 6 above.

[33] See: footnote 7 above.

Cross-cutting issues

297. Many respondents expressed general concerns about the impact that the overall programme of reform might have. Particular concerns were:

- **Market sustainability**: that it would make legally aided services unprofitable for providers, who would choose to withdraw from legal aid, and that clients would not be able to access publicly funded services;
- **Litigants-in-person**: that it would significantly increase the numbers of litigants representing themselves (litigants–in-person) with a consequent impact on the conduct and outcome of proceedings;
- **International obligations**: that it would not be compliant with legal obligations to provide legal aid, in particular under article 6 of the European Convention on Human Rights (the right to a fair trial);
- **Equalities**: that it would have a disproportionate impact on groups protected under the Equalities Act 2010, in particular women, ethnic minority groups and disabled people; and
- **Cost effectiveness**: that the proposal to remove early advice would cause people's problems to escalate, creating greater downstream costs for other public services.

Market sustainability

298. This section summarises the concerns raised about market sustainability, and the Government's response. Annex F provides further details.

Key issues raised

299. Many respondents were concerned that the Government's overall reform programme, and in particular the proposals on scope and lawyers' fees, would threaten lawyers' ability to deliver legally aided services profitably, and that as a result many would choose to withdraw from the market. They argued that this could lead to disruption of supply with clients unable to find lawyers prepared to take on their cases under legal aid, at least in some parts of the country.

300. In support of its concerns, the Law Society submitted a report from Andrew Otterburn (a management consultant specialising in law firms) about the impact of the proposed reform programme, and the proposed cuts to fees and changes to scope in particular, on the sustainability of the solicitor market in publicly funded legal services. He considered that fee cuts would have an effect but that the main impact on sustainability was in relation to scope changes.

301. The responses from the Bar Council and barristers raised similar concerns about the likely impact of the reform programme on advocacy. More specifically there was a concern that the more experienced barristers in particular could be expected to leave the market. However,

there is no analysis, as far as we have been able to establish, similar to the Otterburn work, to help assess the anticipated impact of the reform programme on advocates.

The Government response

302. The Government acknowledges that there is a risk that barristers might withdraw from the legal aid market as a result of the fee reductions but these reductions need to be considered against significant increase in income that many barristers have received from legal aid in recent years. Between 2006/07 and 2009/10, there was a 5% increase in the number of legal aid certificates granted. At the same time, legal aid remuneration rates fell in real terms and there was an overall 4% fall in the numbers of barristers undertaking legal aid work. However, over the same period, the total amount paid to self-employed barristers for civil and family legal aid work increased by 12% with the average payment increasing by 16% and the number of barristers receiving over £50,000 per annum from the legal aid scheme increasing by over 13%.

303. This suggests that there is a strong demand for self-employed barristers in the legal aid market and, while there have been some departures over the past four years, this has provided an opportunity for others to increase their share of the market. Although this is a market reaction to a particular set of market conditions, it does indicate that self-employed barristers are able to adapt and take advantage of the opportunity to generate potentially significant income. This does not support the argument that further reductions in the general level of remuneration rates would necessarily lead to significant disruption in the supply of advocacy in legally aided cases.

304. We acknowledge that a significant number of providers may withdraw from providing legally aided services as a result of the overall programme of reform. The impact on providers is considered in the Impact Assessment, and the Equalities Impact Assessment, published alongside this Government response.[34] However, the Government's principal concern is whether clients with cases remaining within the scope of the legal aid scheme will receive an appropriate service. It is important to note that the significantly reduced scope of legal aid will mean that there will be a need for fewer providers.

305. To mitigate the risk that clients might not be able to access legally aided services, the Government will work with Legal Services Commission on a client and provider strategy, which will include consideration of the best way that services remaining in scope can be bundled in future procurement rounds to ensure that clients are able to access the services they need. In the longer term, the move to competition is designed to

[34] See footnotes 3 and 4 above.

ensure that legal aid services are procured at a rate which delivers value for money and that the market is able to sustain. We will publish our detailed proposals for introducing competition into criminal legal aid later in the year.

306. In the shorter term, the Government accepts that there is a risk that the fee reductions may lead to at least some providers withdrawing from the legal aid market. On balance, taking into account all of the available evidence, we have concluded that the proposed fee reductions are likely to be sustainable. However, if there is any short term disruption in supply in some areas, this can be mitigated through:

    - temporary arrangements, for example reallocating matters starts within an area, or allowing suppliers from surrounding areas to provide legal aid;
    - running a short, focussed retender exercise, for example as undertaken immigration matters in Dover following the 2010 bid round.

307. Over a longer period, these can be addressed through the structure of future bid rounds and/or the expansion of other services such as the telephone helpline if suitable.

308. The Government will be working closely with the LSC to ensure that they have robust mechanisms in place to identify any developing market shortfall and that they are able to respond promptly, effectively and appropriately should this materialise.

Impact on the not-for-profit providers

309. Under the current legal aid scheme, some legal aid services are provided by not-for-profit providers, such as Citizens Advice Bureaux, Law Centres, and other voluntary organisations. They generally provide advice under the Legal Help scheme in the areas of social welfare benefits, debt and housing. In 2009/10, payments of £68 million were paid to not-for-profit providers under the legal aid scheme.

310. As the Impact Assessment[35] demonstrates, we believe that these providers are likely to be particularly affected by the reforms to the scope of legal aid. We estimate that they might lose up to £51 million (75%) of that part of their income that is derived from legal aid.

[35] See footnote 3 above.

Key issues raised

311. Many respondents to the consultation pointed out that the reforms to legal aid scope were likely to lead to increased demands on their services at a time when their overall funding was also under pressure.

The Government response

312. The Government is keen to promote the role of this sector in the delivery of public services. However, legal aid represents a small proportion of the funding of many not-for-profit providers. For example, around 15% of the overall funding of Citizens Advice Bureaux comes from legal aid, and around half of all bureaux do not hold a legal aid contract.

313. Several departments have a role in providing general advice on these matters. For example funding of £27 million has been allocated by the Department for Business, Innovation and Skills for face-to-face debt advice to be delivered by Citizens Advice Bureaux and other advice agencies to help ensure that individuals facing financial difficulty can get impartial assistance at an early stage. In addition the Government has set up the Money Advice Service, a free, national financial advice service funded by a levy on the financial services industry and raised through the Financial Services Authority, which is available face-to-face, over the telephone, and online.

314. The Government recognises that not-for-profit advice centres play an integral role in many communities. Many are becoming increasingly innovative and developing new ways in which significant local demand can be met. We recognise the important contribution they make and we will therefore be reviewing the impact of recent Government proposals on the sector. This will include identifying the scale of the issue both in terms of funding and effectiveness of advice; developing a plan for future central government funding arrangements for advice services to simplify, streamline and consolidate the current complex funding mechanisms and to recommend sustainable alternative funding models.

Litigants-in-person

Key issues raised

315. Many respondents, including members of the judiciary, argued that the programme of reform would lead to an increase in the numbers of litigants representing themselves in court, and that this would have a negative impact on the conduct and outcome of proceedings.

The Government response

316. In the consultation paper we undertook to review the research available on litigants-in-person, and their impact on the conduct and outcome of proceedings. The Government has completed its review, which it has published separately today.[36] Overall the review found that the evidence available on litigants-in-person tends to suggest a mixed impact on length of proceedings. The review also found some evidence that there are worse outcomes for litigants-in-person than those who are represented.

317. We do accept, even if there is no conclusive evidence of this, the likelihood of an increase in volume of litigants-in-person as a result of these reforms and thus some worse outcomes materialising. As necessary access to justice is protected by exceptional funding, taxpayer funded representation has to be targeted on priority areas. More detail is given in Annex C.

318. It is already the case that some people decide to represent themselves in court and we are not planning to reduce the assistance provided to them.

319. We will also look at better ways to promote awareness of alternative means of settling disputes. For example, we are also working with providers of mediation services on plans to increase awareness and use of mediation and to help people to better understand the options available to them. Information about mediation is currently available on the MoJ website and other online sources.

International obligations

Key issues raised

320. A range of observations and arguments, based on the UK's obligations under the European Convention on Human Rights (ECHR) and wider international law obligations, were received in response to the consultation. International agreements were primarily cited in connection with individual areas proposed for scope withdrawal (EHCR obligations are also frequently cited for specific scope areas), and these are considered in Annex B.

321. Generally, the main observation raised in response to the consultation was that the proposals were likely to breach article 6 of the ECHR (the right to a fair hearing). A number of representative bodies argued that many private family law cases removed from scope would require funding for this reason. Other respondents citing article 6 ECHR argued that our analysis of the complexity of particular types of proceedings, or of the capacity of the individual to present their case effectively, was flawed.

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[36] See footnote 19 above.

322. A related argument put forward by some respondents was that the proposals would be contrary to the European Union law rights that are reaffirmed by Article 47 of the EU Charter of Fundamental Rights ('right to an effective remedy and fair trial').

The Government's response

323. In formulating the consultation proposals on scope, we took into account our international obligations, including the factors identified by the courts as weighing in favour of the provision of legal aid under article 6 ECHR. The consultation paper therefore generally proposed retaining funding for those areas of law in which article 6 considerations could reasonably be considered to indicate public funding might be required usually or very often. This is reflected by our focusing, for example, on the ability of the individual to present their own case, the complexity of the case, and importance of the issue at stake.

324. We accepted at the time of consultation that this analysis could not capture the specific circumstances of every litigant within an excluded category of law. The Government has therefore decided to introduce an exceptional funding scheme which will provide funding for excluded cases where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law. (see Annex C for further details of the exceptional funding scheme).

Equalities Impacts

325. The key issues raised by respondents on the equalities impacts of the proposed reforms, and the Government's responses, are set out in the Equalities Impact Assessment.[37]

Cost effectiveness of early advice

Key issues raised

326. Respondents to the consultation, particularly those from the not-for-profit sector, argued that removing legal advice, particularly from areas such as welfare benefits, debt, and housing would lead to problems escalating, creating greater downstream costs to other public services.

327. Respondents pointed to two principal pieces of research to support this view: the Socio-Economic Benefits of Law Centres study conducted by the Law Centres Federation; and Towards a Business Case for Legal Aid conducted by Citizens Advice. Both studies suggested that the cost of providing early advice would be recovered several times over through savings elsewhere in public expenditure.

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[37] See footnote 4 above.

The Government response

328. The Ministry of Justice have discussed the potential impact of these reforms with other government departments throughout the consultation period to ensure that the Impact Assessments published with the consultation paper recognised any increase in government spending that may result. However it is not possible to predict accurately clients' behavioural responses to a reduction in legal aid and so it is not possible to quantify accurately these wider costs.

329. We have considered both pieces of research carefully, but we have reservations about the methodology employed and the significance attached to some of the source figures used to underpin the assumptions on which the findings of the studies are based. In both cases our view is that the evidence was not sufficiently robust to allow conclusions to be drawn about the impact of advice. Therefore, there is insufficient evidence to substantiate the conclusion that early advice saves more in wasted expenditure across Government than we currently spend on legal advice.

330. We recognise that early advice can be helpful in a range of contexts. However what people often need is practical help, rather than legal advice. The approach adopted by Government in making decisions regarding the future provision of legal aid has been to focus resources on those who most need help, for the most serious cases in which legal advice or representation is justified.

4. Summary of the legal aid reform programme

1. The Government intends, subject to Parliamentary approval, to implement the following programme of reform

Scope

1. Cases and proceedings retained within the scope of legal aid.

i) asylum;

ii) asylum support where accommodation is claimed;

iii) claims against public authorities (other than judicial review and other similar remedies), concerning a significant breach of human rights, or an abuse of position or power;

iv) claims arising from allegations of abuse and sexual assault;

v) community care;

vi) debt (where the client's home is at immediate risk), including involuntary bankruptcy and orders for sale of the home;

vii) domestic violence and forced marriage proceedings;

viii) family mediation;

ix) housing matters where the home is at immediate risk (excluding those who are "squatting"), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;

x) immigration detention;

xi) appeals to the Special Immigration Appeals Commission

xii) international child abduction (including orders both to recover a child and those to prevent international abduction);

xiii) international family maintenance;

xiv) mental health, including mental capacity issues currently in scope;

xv) Special Educational Needs cases (currently in scope);

xvi) private family law cases involving domestic violence and private law children cases involving child abuse;

xvii) public law cases (judicial review and other similar remedies) other than representative actions and certain immigration and asylum judicial reviews);

xviii) public law children cases;

xix) registration and enforcement of judgments under European Union legislation;

xx) representation of children in rule 16.2 (and 16.6) private law children cases;

xxi) miscellaneous proceedings: confiscation proceedings, injunctions concerning gang related violence, Independent Safeguarding Authority Appeals (care standards), Legal Help at Inquests, proceedings under the Protection from Harassment Act 1997, and quasi criminal proceedings;

xxii) discrimination cases that are currently within scope (claims relating to a contravention of the Equality Act 2010);

xxiii) environmental cases;

xxiv) European Union cross border cases; and

xxv) appeals to the Court of Appeal and Supreme Court, and references to the European Court of Justice, where the area of law to which the appeal relates remains in scope).

2. Cases and proceedings removed from the scope of legal aid.

i) asylum support (except where accommodation is claimed);

ii) clinical negligence;

iii) consumer and general contract;

iv) Criminal Injuries Compensation Authority cases;

v) debt, except in cases where there is an immediate risk to the home;

vi) employment cases;

vii) education cases, except for cases of Special Educational Needs;

viii) housing matters, except those where the home is at immediate risk (excluding those who are “squatting”), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;

ix) immigration cases (non-detention);

x) miscellaneous (specified matters): appeals to the Upper Tribunal from the General Regulatory Chamber of the First- tier Tribunal, cash forfeiture actions under the Proceeds of Crime Act 2002, legal advice in relation to a change of name, actions relating to contentious probate or land law, court actions concerning personal data, action under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, and legal advice on will-making for (i) those over 70 (ii) disabled people (ii) the parent of a disabled person and (iv) the parent of a minor who is living with the client, but not with the other parent, and the client wishes to appoint a guardian for the minor in a will;

xi) private family law (other than cases where domestic violence or child abuse is present);

xii) tort and other general claims, and

xiii) welfare benefits.

In addition, the rule bringing back into scope any case of wider public interest will be abolished.

Exceptional Funding

2. The existing exceptional funding scheme will be replaced with a more narrowly drawn scheme which will provide funding for excluded cases where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law. We have also decided to retain the existing significant wider public interest criterion for advocacy in inquest cases.

The Merits Test

3. The merits criteria for civil legal aid will be amended so that civil legal aid may be refused in any individual case suitable for alternative funding, such as a Conditional Fee Agreement.

The Community Legal Advice Telephone Helpline

4. We will:

   i) implement a mandatory single telephone gateway limited to the following areas of law: debt (insofar as it remains in scope), community care, discrimination (claims brought under the Equality Act 2010) and Special Educational Needs subject to the exceptions set out at paragraph 148;

   ii) introduce a phased expansion of the provision of specialist telephone advice into the areas of law remaining in scope; and

   iii) run a pilot scheme which will further examine the feasibility of offering the option to clients to pay for advice over the telephone.

Financial Eligibility

5. We will introduce the following reforms to financial eligibility in civil and family proceedings:

   i) to apply the same capital eligibility rules to applicants in receipt of "passporting" benefits as other applicants for legal aid, as set out in the consultation;

ii) to retain the 'subject matter of the dispute disregard' and to cap it at £100,000 for all levels of service, as set out in the consultation;

iii) to increase the levels of income based contributions to a maximum of approximately 30% of monthly disposable income, as set out under option 1 of the consultation;

Criminal Remuneration

6. We will:

i) implement an overall fee of £565 for either way cases deemed suitable for summary trial, but with the fee split between litigation and advocacy as set out in paragraph 189 and 190 above; and to enhance the lower and higher standard fee in the magistrates' court as set out at paragraphs 187 and 188, and to abolish the committal hearing fee, as set out in the consultation paper;

ii) reduce Crown Court fees for cracked cases by 25%, leaving the fees for guilty pleas unaltered, as set out at paragraph 195;

iii) align the fees paid in cases of murder and manslaughter with those paid in cases of rape and other serious sexual offences, as proposed in the consultation paper;

iv) remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000, as proposed in the consultation paper;

v) remove the premium paid for magistrates' courts cases in London, as proposed in the consultation paper;

vi) remove separate ancillary payments (or "bolt-on" fees) for sentencing hearings and to subsume sentencing hearings within the standard graduated basic fee as one of the five standard appearances included within the base fee, as set out in paragraphs 213 and 214 above; and

vii) pay litigators in all cases with an estimated trial length of between 41 and 60 days under individual contracts at rates specified under the Litigators' Graduated Fee scheme, rather than at Very High Cost (Criminal) Case rates, as set out at paragraph 217 above.

7. Details of the new fees we intend to introduce for criminal proceedings have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm. We intend to bring forward a Funding Order shortly, giving effect to these reforms from October 2011.

Civil and Family Remuneration

8. We will:

   i) reduce all fees and hourly rates in civil and family matters by 10%, as set out in the consultation;

   ii) cap, and set criteria for, enhancements to hourly rates paid to solicitors in civil cases generally as set out in the consultation but apply the 100% cap on enhancements to civil (non-family) cases in the Upper Tribunal ;

   iii) codify the rates paid to barristers in civil proceedings, and to reduce them by 10%, as set out in the consultation;

   iv) cap enhancements to the hourly rates paid to solicitors in family cases, as set out in the consultation;

   v) restrict the use of Queen's Counsel in family cases using criteria similar to those applied in criminal cases, as set out in the consultation;

   vi) pay cases funded, in future, through the new scheme for excluded cases, at the current fixed fee or hourly rate in the relevant Category, subject to the proposed reduction of 10%.

9. The 10% reduction will apply to all fees and hourly rates paid under the civil and family legal aid scheme, except those where the service has been procured following competition on price, regardless of whether the service provided is subject to fixed rates, general assessment or an individually negotiated contract. This includes Very High Costs Cases which are paid under hourly rates or "events rates" models, but not those paid under risk rates.

10. Details of the new fees we intend to introduce for civil and family proceedings, taking into account the correction to the fees paid to junior counsel in the county court, have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm.

11. We will bring forward the necessary secondary legislation, giving effect to these reforms to civil fees, generally, with effect from October 2011. In the case of housing work covered by the Unified Contract we intend that they will be given effect from February 2012, together with the reforms in respect of family fees. We wish to give effect to the reforms for housing work not covered by the Unified Contract from October 2011 at the same time as the other civil fee changes, but are still considering whether this is feasible.

Expert Fees

12. We will:

    i) codify the Legal Services Commission's benchmark hourly rates (reduced by 10%) as set out in the consultation paper; and

    ii) continue to develop our longer term plans to reform expert fees, as set out in the consultation paper.

13. Details of the new fees we intend to pay to experts have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm. We will bring forward the necessary secondary legislation, giving effect to these reforms, with effect from October 2011.

Alternative Sources of Funding

14. We will introduce a Supplementary Legal Aid Scheme, under which a fixed percentage of 25% the client's damages (but excluding damages for future care and loss) awarded in the legally aided proceedings (including proceedings funded under the exceptional funding mechanism) is repaid to the legal aid fund.

Annexes

Annex A: Cases and proceedings retained within the scope of legal aid

Introduction

1. The consultation asked:

   Question 1: Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 and 4.144 of the consultation document within the scope of civil and family legal aid.

2. There were 2,028 responses to this question. 1,584 (78%) agreed with the proposal, 217 (11%) disagreed and 227 (11%) neither agreed nor disagreed.

3. While the majority of respondents supported the proposal in the consultation, most indicated that this should not be interpreted as meaning that legal aid should only be available for these cases and proceedings.

4. In light of the consultation responses, the Government intends broadly to proceed as set out in the consultation. However, in certain cases, having considered the issues raised in the consultation, we intend to modify the proposals set out in the consultation to ensure that our aims for legal aid reform are met, and that legal aid is targeted to those who need it most, for the most serious cases in which legal advice or representation is justified.

Asylum

5. Legal aid is currently available for most issues relating to asylum. This includes legal advice for nearly all asylum applicants at the application stage, representation for most asylum appeals before the First-tier and Upper Tribunal (Immigration and Asylum Chamber), and advice on appealing to the higher courts. It is not generally available for asylum interviews, except in certain circumstances.

6. The consultation proposed retaining the current legal aid provision for clients seeking asylum (except for asylum support cases which are considered in the section on welfare benefits: see paragraphs 107 to 111 of Annex B).

Key Issues raised

7. Almost all respondents supported the proposal, although a very small number suggested that asylum legal aid should not be available on the basis that the UK's asylum system had been abused. Some representative bodies asked whether asylum claims based on article 3 of

the European Convention on Human Rights would remain in scope. (Claims under the 1951 Geneva Convention, article 3 ECHR, or both, would all remain in scope, as is presently the case.)

8. The Judges' Council suggested that, subject to the need to ensure fairness in the proceedings, funding for judicial reviews should ordinarily be restricted where a full oral hearing has taken place and referred specifically to asylum and immigration judicial reviews. (This is considered separately under the section on public law section: see paragraphs 88 and 95).

Government response

9. The Government considers that it is appropriate to retain legal aid for asylum cases, given the potential risks to the individuals involved and their particular vulnerability.

Claims against public authorities (other than judicial review and other similar remedies)

10. Legal aid is available for legal advice and representation for claims (typically claims for damages) against public authorities concerning: (i) serious wrong-doing; (ii) abuse of position or power; (iii) significant breach of human rights.

11. The consultation paper made two proposals:

    - removing the 'serious wrongdoing' limb of the current test because a recent court judgment[38] has meant that it has become difficult to restrict these to the very serious cases intended;
    - introducing a new limb to the current test to cover: 'negligent acts or omissions falling very far below the required standard of care' (which was essentially intended to capture cases that involve a high degree of negligence).

Key issues raised

12. Some respondents said that the "serious wrong-doing" limb should be retained because some claims would only fall under this heading and not under the other two limbs of the test.

13. Some respondents (in particular the Association of Personal Injury Lawyers and the Young Lawyers Association) argued that the proposed 'negligent acts or omissions' limb was unworkable because the civil cause of action of negligence did not admit degrees of negligence (an act is either negligent or it is not).

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[38] *R (G) v Legal Services Commission* [2004] EWHC 27646).

14. Some argued that the proposals were too tightly drawn and would exclude important cases such as negligence cases of significant wider public interest. Respondents argued that funding should be available for serious wrongdoing as these allow the individual to hold the state to account.

The Government response

15. We recognise that there may be a small number of serious cases captured by 'serious wrong-doing' and not by the other limbs, but we consider that retaining this limb would potentially bring into scope many more less serious claims (as a result of the decision in *R (G) v Legal Services Commission*), and this will undermine our objective to prioritise funds for the most serious cases of this type.

16. We had proposed an extra limb to capture cases which involved a high degree of negligence even where these did not involve an abuse of position or power or a significant breach of human rights. We note the view of respondents that the civil courts do not recognise degrees of negligence in the way suggested, and we are concerned that this limb would potentially bring into scope the same less serious claims as "serious wrong-doing".

17. Having taken into account the issues raised by respondents, the Government intends:

    - to proceed to abolish the "serious wrong-doing" limb; but
    - not to introduce the proposed 'negligent acts or omissions falling very far below the required standard of care' limb.

18. This will mean that only claims (typically damages claims) specifically against public authorities (other than judicial review or other similar remedies) involving (a) abuse of position or power or (b) a significant breach of human rights will be within the scope of legal aid. We consider that this will help to focus resources on priority cases, and that in practice the most serious cases against public authorities will involve one or both of these two limbs. This will include funding for certain tort claims that will be otherwise out of scope, such as personal injury.

19. For less serious cases, alternative forms of funding may be available, such as Conditional Fee Agreements.

Claims arising from allegations of abuse of a child or vulnerable adult or allegations of sexual assault

20. Legal aid is available for legal advice and representation for claims (typically for damages) against public authorities and private individuals arising from allegations of abuse of a child or vulnerable adult, or arising from allegations of sexual assault.

21. These claims include claims by individuals who allege they were abused in local authority care, and claims against a local authority for failure to take them into care. These claims also cover a claim for sexual assault against, for example, an ex-partner or an employee of a public authority.

Key issues raised in consultation

22. Respondents agreed with the proposal to retain these cases in scope.

The Government response

23. The Government considers that it is appropriate to retain these cases in scope given the seriousness of the alleged harm suffered by the litigant, and the litigant's likely vulnerability. We therefore intend to retain legal aid for claims arising from abuse of a child or vulnerable adult, or sexual assault. This will include funding for certain tort claims that will be otherwise out of scope, such as personal injury.

Community Care

24. Legal aid is available for legal advice in relation to community care issues (for example, services such as personal carers or accommodation in a care home, provided by local or health authorities to those with care needs), and for representation in a small number of community care matters. Legal aid is also available for judicial review of local authority services, or independent care providers who are providing services on behalf of local authorities (judicial review of public authorities is covered under "Public Law" below). In the consultation, we proposed retaining legal aid for these Community Care cases, except for tort and other damages claims, or other general claims.

Key issues raised

25. The majority of the respondents argued that it was right to retain legal aid for these cases, given the vulnerability of the clients and the clients in these cases are often disabled adults and children and not just elderly persons.

26. The not-for-profit sector mainly argued that it was inconsistent to retain community care within scope, which principally dealt with the care needs of disabled persons, but to exclude Special Education Needs cases which concerned the needs of disabled children in an educational context.

27. Special Educational Needs cases are considered in Annex B.

The Government response

28. In line with respondents' views, and given the typical vulnerability of clients involved in these cases, and the risk of homelessness in some of them, our view remains that legal aid should continue to be available in community care cases. This will include legal advice on community care, and representation for a small number of other areas concerned with

community care which are currently funded (judicial review of public authorities is covered under "Public Law" below).

29. However, we consider that (in line with our stance on "Tort and Other General Claims" (see paragraphs 128 to 132 of Annex B below) that funding should not be retained for damages claims arising out of community care disputes.[39]

Debt: matters where the client's home is at immediate risk (social welfare law)

30. In the consultation, we proposed retaining legal aid for cases where the client's home was at immediate risk of repossession as a result of rent or mortgage arrears.

Key issues raised

31. The vast majority of respondents were in favour of retaining legal aid for these cases, but thought that funding should be retained for all debt matters. Some respondents were concerned that "immediate risk" had not been defined, and that waiting until possession proceedings had been issued would be too late.

The Government response

32. The Government considers that these debt cases are a high priority for funding and legal aid will be retained, as proposed, for debt cases where the client's home is at immediate risk from rent or mortgage arrears. In such cases proceedings would not need to have been issued before legal aid would be available. It could be granted, for example, on receipt of a letter which threatens such action against a person's home.

33. The Government accepts that, in light of the consultation responses, there are some closely linked areas of debt proceedings which should also be retained in scope because these also concern an immediate risk to the home. This is considered further at paragraphs 48 to 59 in Annex B. We will therefore also retain legal aid:

    - in cases where an individual is facing an order for sale of their home, including under a charging order (but not for matters relating to the making or setting aside of a charging order whereby a creditor secures a debt against the individual's property, because the home is not at immediate risk in these proceedings – see also housing below);

[39] Legal aid will remain available for damages or other general claims where these meet the criteria for "claims against public authorities" or "claims arising out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault" (see separate sections).

- in relation to a statutory demand or proceedings concerning the making or annulment of a bankruptcy order against an individual whose estate includes their home. However, legal aid would only be available where an individual was the respondent to a creditor's petition, and funding would not be available for voluntary bankruptcy. In voluntary bankruptcy the homeowner is essentially making a decision to place his home in the hands of the trustee, which is analogous to choosing to sell the home to satisfy creditors.

Domestic Violence

34. Legal aid is currently available for both legal advice and representation for domestic violence and forced marriage cases, such as proceedings for non-molestation orders, occupation orders and forced marriage protection orders. In the consultation paper we proposed retaining full legal aid for these cases, including the power to waive the financial eligibility limits for these cases.

Key issues raised

35. All those who commented agreed with the proposal to retain within scope injunctions to prevent domestic violence and forced marriage. Some respondents raised questions about the definition of domestic violence. This is covered separately in the section on retaining those private family law cases in scope which involve domestic violence (see paragraph 37 below).

The Government response

36. Having considered the responses to the consultation, the Government has decided to retain legal aid for proceedings for injunctions and other orders to prevent domestic violence and forced marriage.

Private law family cases where domestic violence / child abuse is present

Introduction

37. Legal aid is currently available for legal advice and representation in ancillary relief and other private law children and family proceedings. While in the consultation paper we proposed that legal aid should be excluded from scope for ancillary relief and private law children and family proceedings, an exception was made for victims of domestic violence. The consultation paper proposed that legal aid would be available for the client at risk in the following cases:

    - ancillary relief, or private law children and family proceedings, where the LSC is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last twelve months and an order was made, arising from the same relationship;
    - ancillary relief, or private law children and family proceedings, where there are ongoing domestic violence (or forced marriage)

proceedings brought by the applicant for legal aid, where the applicant has funded proceedings privately or has acted as a litigant in person, or where there have been such proceedings in the last twelve months and an order was made, arising from the same relationship;

- ancillary relief, or private law children and family proceedings, where there is a non-molestation order, occupation order, forced marriage protection order or other protective order or injunction in place against the applicant's ex-partner (or in the case of forced marriage, against any other person); and
- ancillary relief, or private law children and family proceedings, where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).

Key issues raised in consultation

38. Respondents raised concerns that the proposal in the consultation paper would not achieve the aim of providing legal aid for victims of domestic violence in private law family cases. These concerns focused on the following points:

    - the proposed definition of domestic violence was too narrow, and that the definition used by the Association of Chief Police Officers, which includes emotional and financial abuse, should be used;
    - the proposal could lead to an increase in allegations of domestic violence that were exaggerated, or without merit;
    - other types of evidence of domestic violence should be accepted, as many victims do not report domestic violence to the police or seek injunctions;
    - the proposal would lead to an increase in applications and contested hearings for orders, and undertakings should be accepted as evidence as an alternative to court orders;
    - where victims of domestic violence receive legal aid, but the other party does not, there would be an inequality of arms and victims would be directly cross-examined by their abuser which would be inconsistent with the criminal courts where screens and other protective measures are used;
    - the twelve month time limit should be extended; and
    - unmarried victims of domestic violence should be given as much assistance as those who were married, and so should be given legal aid to establish their interest in shared property.

39. Respondents also raised concerns about legal aid not being available in private law children cases where there are allegations of abuse of a child ('abuse' ranging from sexual and physical abuse to neglect). Respondents cited the importance of the issues at stake in these cases

and their evidential complexity, which would make it even more difficult for litigants to represent themselves. Some also argued that it would be inconsistent to fund money claims involving allegations of abuse and sexual assault against adults but not applications intended to protect children from abuse. Consultation responses also questioned who would pay for expert reports in private law family cases where the parties could not afford to pay for them, and who would instruct the experts.

The Government Response

40. We did not seek to create a new definition of domestic violence in the consultation paper. Although the paper referred to protection from physical harm, the circumstances we proposed that would be accepted as evidence of the need for protection would not be limited to cases of physical violence.

41. We note concerns raised in consultation responses about the risk of creating an incentive for false allegations of domestic violence. That is why clear, objective evidence is needed. We consider that the circumstances proposed in the consultation would be sufficiently objective, with one exception. We proposed that legal aid would be available where there are ongoing proceedings for a protective injunction. In the absence of a requirement that an order has been made rather than applied for, applications could be made for protective injunctions where they are not needed, for the purpose of having access to legal aid for a private family law case. We have therefore decided to remove ongoing domestic violence proceedings from the criteria, except where an application for an emergency domestic violence order and an emergency application to protect a child are made at the same time. Domestic violence proceedings are dealt with quickly, so except in emergency situations we do not consider that having to wait for their resolution would create for a problem for victims, and it would help safeguard against false allegations.

42. We have considered the suggestions that additional circumstances should be accepted as evidence of domestic violence. We consider that one or more of the following circumstances, which were proposed in consultation responses, would provide appropriately clear, objective evidence of domestic violence for the purposes of qualifying for legal aid:

    - there are ongoing criminal proceedings for domestic violence offence by the other party towards the applicant for funding;
    - the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them from violence by the other party; and
    - there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm.

43. Undertakings given in domestic violence proceedings were particularly singled out in consultation responses as a potential form of evidence. A person can give an undertaking, for instance not to be violent towards family members, without admitting to domestic violence. This means that undertakings may be given in cases where domestic violence has not taken place. We therefore do not consider that undertakings would provide clear, objective evidence that domestic violence has occurred.

44. As indicated above, responses to the consultation also raised concerns about private law children cases where a party is seeking to protect a child from abuse, for example by seeking an order barring unsupervised contact with the abuser. The Government agrees that child protection is an issue of paramount importance, and that it would be difficult for the protective party to act in person, in cases of potential complexity and heightened risk, and potentially facing the abuser. We accept that legal aid should be available in private law children cases involving child abuse, for the party seeking to protect the child. As with cases involving domestic violence, to avoid incentivising false allegations we will require clear, objective evidence. Some of the types of evidence of domestic violence will be relevant for this purpose. We consider that one or more of the following circumstances will also provide evidence of child abuse for the purposes of qualifying for legal aid:

    - there are ongoing criminal proceedings for a child abuse offence against the person from whom the protective party is seeking to protect the child;
    - a local authority has put a Child Protection Plan in place to protect the child who is the subject of the proceedings from abuse by, or including abuse by, the person from whom the protective party is seeking to protect the child;
    - there is a relevant finding of fact by the courts that child abuse on the part of the person from whom the protective party is seeking to protect the child has occurred

45. In considering whether alleged perpetrators should receive legal aid in these cases, it is important to remember that we are seeking to protect the most vulnerable in society.[40] Alleged perpetrators do not necessarily fall into this category in the way a victim of abuse would. Furthermore the tests that we wish to use to determine the availability of legal aid in these cases are designed to be as objective as possible, and to minimise the risk of false allegations. If, however, the particular facts of an individual case meant that the failure to provide legal aid for both parties would be likely to result in a breach of the individual's rights under the Human Rights Act 1998 or European Union law, exceptional funding would be available.

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[40] See paragraph 6.ii) in section 3: the programme of reform.

46. Cross-examination of victims by an unrepresented perpetrator of abuse is an issue that can arise at present. Judges have powers and training to manage situations such as this. For example, they can intervene to prevent inappropriate questioning, or have questions relayed to the witness, rather than asked directly. Additionally, where there is evidence of domestic violence the victim would have a legal representative who could assist in addressing any inappropriate conduct on the abuser's part.

47. We consider that the twelve month time period, where relevant, will be an appropriate time limit to protect victims and to enable them to deal with their private family law issues. If the criteria arise again – for instance, if a second protective injunction is made – the time period would start again.

48. The Government agrees that unmarried victims of domestic violence who cohabit with their partner will need the same access to legal aid for disputes about property following separation as married victims.

Conclusion

49. The Government has decided to amend the criteria for allowing legal aid for private family law cases involving domestic violence so that, in addition to the criteria set out in the consultation, it is also available where one of the following applies:

    - there are ongoing criminal proceedings for a domestic violence offence by the other party towards the applicant for funding;
    - the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them against violence by the other party; or
    - there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim.

50. We have also decided to remove one of the criteria originally proposed: that legal aid should be available in private law cases where there are ongoing proceedings to obtain a domestic violence injunction, but no order has yet been made.

51. We have also decided to keep in scope for the protective party private law children cases involving child abuse, where one of the following applies:

    - there are ongoing criminal proceedings for a child abuse offence against the person from whom the protective party is seeking to protect the child;
    - a local authority has put a Child Protection Plan in place to protect the child who is the subject of the proceedings from abuse by or including by the person from whom the protective party is seeking to protect the child;

- there has been a finding of fact by the courts that child abuse on the part of the person from whom the protective party is seeking to protect the child has occurred.

52. Legal aid would be available for the protective party where the evidence of abuse relates either to the child who is the subject of the proceedings or to any other child, including a child of another family. We consider that these changes to our proposals will ensure that legal aid is focused on those parents and children most at risk of harm.

53. The Government has also decided that, for the reasons set out above:

- legal aid would only be available for the victim of domestic violence or the protective party, and not to the other party;
- the twelve month time limit proposed in the consultation will apply, where relevant; or
- unmarried domestic violence victims who cohabit with their partner should be subject to similar gateway rules for legal aid to establish their interest in shared property (that is, for cases under the Trusts of Land and Appointment of Trustees Act 1996).

Family Mediation

54. Legal aid is currently available for mediation to resolve private family law disputes. In the consultation we proposed that family mediation services currently funded by legal aid should remain in scope. We also proposed that, where the client enters mediation, a fixed amount of Legal Help would be available to assist clients by providing advice during the mediation and immediately following the mediation to formalise and give legal effect to any agreement reached. We proposed to set the payment fee at £150.

Key issues raised

55. The majority of respondents were generally supportive of the principle of mediation in the consultation and that mediation should remain within the scope of legal aid. However respondents expressed reservations that not all cases should be dealt with in this way, including those where there were child welfare concerns, where one or more party was uncooperative or there was a clear imbalance of power (in addition to those which would continue to receive legal aid either because there is objective evidence of domestic violence or through exceptional funding). The other main issues raised were:

- the £150 fee proposed for accompanying legal advice would be insufficient, especially for ancillary relief where the issues are more complex and agreements would need to be turned into draft court orders or contracts;
- legal advice should be available at an early stage to avoid the risk of an agreement being unpicked at a late stage; and also in the interim

between breakdown and mediation to encourage parents to reach agreement without recourse to the courts;

- mediation is not a substitute for legal advice and a mediator's role does not encompass reaching a view as to what is fair for each party;
- mediation does not provide for supervised contact;
- mediation needs to be backed up by the ability to apply to the courts if one party does not cooperate or takes an unreasonable stance;
- the potential for a decline in mediation take-up due to the loss of the (legal aid funded) referral system through solicitors;
- conversely, concerns about supply and potential for delay if take-up significantly increases; and the negative impact on children if there is delay in waiting for mediation appointments;
- the need to fund collaborative law as well as mediation;
- the potential to extend the statutory charge to mediation cases (it is currently exempt to encourage take-up of mediation, though under the proposal to remove private family law, this incentive would no longer be necessary).

The Government response

56. The £150 fee for legal advice in support of mediation was based on the average length of time spent by solicitors assisting with mediation across all cases. We believe that this should be sufficient in routine cases where legal advice is needed.

57. However, the Government accepts that a fixed fee of £150 may be insufficient for ancillary relief cases where a greater level of work is required to draft a court order giving effect to a mediated agreement. We will pay a fixed fee of £200 for this work which could be claimed in respect of one party in each case in addition to the £150 mediation fee. Legal advice will only be available once a client has entered mediation, to ensure that it is focused on supporting the mediation process.

58. Further details will be set out in due course, but we expect that there would be flexibility regarding the stage at which legal advice could be provided, once the client has entered mediation.

59. The Government considers that if mediation is not suitable then court action is available, regardless of whether legal aid is available (and, as set out above**,** legal aid will be available for cases involving domestic violence or child abuse).

60. We have decided not to apply the statutory charge to mediation as we believe that the administrative costs would outweigh the potential benefit. The MoJ and the LSC will work together with the Family Mediation Council and mediation providers to look at potential supply issues, but we do not expect there to be a shortage of mediation providers. Currently

84% of the population live within 5 miles of their nearest mediation service and over 99% live within 15 miles and the existing provider base has capacity to increase the number of mediations they currently undertake. There will be opportunities for providers to tender for contracts to deliver family mediation services in the future if there is a need to increase capacity. A significant number of firms have already expressed an interest in being able to offer publicly funded mediation as they diversify the services they provide to clients.

61. We do not plan to fund collaborative law at this stage, bearing in mind the financial context and its current uncertain value for money, but we are interested in considering the benefits of collaborative law and other forms of alternative dispute resolution in the longer term.

62. For the reasons set out above the Government has decided that:

    - legal aid should be retained for family mediation and legal advice where the client enters mediation; and
    - further legal advice will be available in family cases involving a financial or property dispute where an agreement is reached through mediation for the agreement to be turned into a court order. An independent fee for this level of service will be set at £200.

Housing: risk of homelessness, repossession, eviction, Anti Social Behaviour Orders and housing disrepair that risks serious harm to individual and his/her family

63. We proposed retaining legal aid for cases where the client is homeless (or threatened with homelessness) and seeking homelessness assistance from the local authority, or where they were threatened with homelessness through possession or eviction, or where they were facing housing disrepairs which posed a serious risk to the life or health of the client, or their family, or for Anti-Social Behaviour Order (ASBO) proceedings brought against an individual in the county court.

Key issues raised

64. The vast majority of respondents were in favour of retaining these cases in scope, but argued that all or most other housing matters should also remain in scope. Respondents argued that it was inconsistent to fund proceedings where landlords were legally evicting individuals, but not proceedings where landlords had unlawfully evicted people (for example, by changing the locks). While respondents generally welcomed the retention of serious disrepair cases in scope, they were concerned that "serious" disrepair had not been defined, and that it would be difficult to assess the level of the disrepair before an expert survey. Respondents also argued that minor repairs could be addressed early on to prevent them worsening. Respondents also queried whether legal aid would remain available for eviction cases concerning unauthorised encampments or other matters where the individual had no legal right to occupy the property.

The Government response

65. We intend to retain the proposed subset of housing cases within scope, but in light of the responses received we consider that there are certain analogous matters which should also be included in scope. The first of these is unlawful eviction. We accept that these cases are of an equal or even greater priority than eviction cases, and we will retain advice and representation for these matters.

66. Second, we recognise that proceedings where an order for sale against an individual's home is sought, this poses an immediate risk to the home, and we will retain legal aid for advice and representation in relation to such orders (but not for the making or setting aside of a charging order whereby a creditor secures a debt against the individual's property, because the home is not at immediate risk in these proceedings (see also Debt above).

67. We propose to proceed to retain legal aid for housing disrepair cases where there is a serious risk to the life or health of the individual or their family. Funding will be available to obtain repairs from their landlord, but not for claims that are primarily for damages. In these cases we intend that legal aid will be granted where there is a credible allegation that the disrepair poses a serious risk to the life or health of the client or heir family. This will mean that legal aid will be available for the early stages of such cases to enable the merits of the claim to be investigated. Where a disrepair is found not to pose a serious risk to the individual or the family's safety or health, further funding will not be available.

68. However, we do not consider it a priority to provide legal aid in relation to eviction from premises where the individual has clearly entered and remained as a trespasser (i.e. squatting). In these cases the individual has typically taken up residence in or on unoccupied residential property or non-residential property, and the Government does not consider it appropriate for the taxpayer to provide funding for individuals to try to resist removal where they are clearly trespassers on private property. Where individuals are homeless and in need of assistance, rather than assisting them in defending their occupation of private property, the Government wants the legal aid fund to assist them instead in obtaining homelessness assistance from the local authority, and funding is being retained for these matters.

69. The Government therefore intends to retain legal aid for housing cases:

    - where the client is homeless (or threatened with homelessness) and seeking homelessness assistance from the local authority. This will include obligations of local authorities to those who are homeless or threatened with homelessness under Part VII of the Housing Act 1996, (including the provision of accommodation and assistance under Part VI of the 1996 where the person meets the Part VII test for homelessness). This will include legal aid to assist a party to make an application for homelessness assistance or for a review of that decision under section 202 of the Act, or for further appeals to

the county court on a point of law under section 204 and 204A of the Act;

- where the client is threatened with homelessness (other than where the individual has clearly entered and remained in the premises as a trespasser), through eviction from their home, possession of their home, an order for sale of their home and following unlawful eviction;
- where the client is seeking to compel repairs from their landlord where the disrepairs pose, or are alleged to pose, a serious risk to the safety or health of the individual or their family;
- for Anti-Social Behaviour Order (ASBO) proceedings brought against an individual in the county court.

Immigration Detention and appeals to the Special Immigration Appeals Commission cases

70. Legal aid is currently available for cases concerning detention under immigration powers including bail. Legal aid is also available for advice and representation for proceedings before the Special Immigration Appeals Commission (SIAC).

Key issues raised in consultation

71. Most respondents agreed with the proposal. Almost all of those who disagreed felt that it would be practically impossible to distinguish between the underlying immigration matter and the detention matter and that legal aid should remain available to those in detention for all immigration matters. One respondent disagreed altogether with keeping these cases in scope on the basis that the immigration system had been abused.

The Government's response

72. The Government considers that contracted legal aid providers should not generally find it difficult to distinguish between advice related to aspects of immigration detention or bail and the underlying immigration issue. Providers are frequently expected to make such distinctions currently as part of their legal aid contract obligations. We therefore do not accept the argument that it would be impossible to distinguish between underlying immigration matters and detention issues.

73. Given that the individual's liberty is at stake in immigration detention and bail cases, and the nature of the issues involved in SIAC cases, the Government's view is that these cases should remain in scope.

International Child Abduction and Family Maintenance

74. Legal aid for legal representation is currently available under reciprocal arrangements on international child abduction set out in the 1980 Hague Convention,[41] the Luxembourg Convention[42] and the Child Abduction and Custody Act 1985 which gives effect to them in domestic law, and the Council Regulation (EC) No 2201/2003 (Brussels IIa).[43] In addition, legal aid is available for legal help for applications to the Child Abduction Unit for transmission to another jurisdiction.

75. Legal aid is also currently available under a number of reciprocal agreements for international applications, appeals and enforcement proceedings concerning family maintenance and child support, and for international child maintenance applications.

76. In the consultation, we proposed to retain legal aid for all international child abduction cases, and to continue to provide legal aid under reciprocal agreements for international applications, appeals and enforcement proceedings concerning family maintenance and child support, and for international child maintenance applications.

Key issues raised

77. This proposal was welcomed by those respondents who commented on it. Respondents argued that legal aid is needed in these cases due to their importance, urgency and difficulty. There was one suggestion that Hague Convention cases should be means tested once the case had finished.

78. Some respondents questioned whether legal aid would be available for the respondents in international child abduction cases. Some respondents to the consultation also raised concerns about not providing legal aid for advice on the jurisdiction in which to issue divorce proceedings where there is an international element, given the potential for different outcomes in different jurisdictions and the potentially serious consequences of failing to get advice on financial relief.

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[41] The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[42] European Convention [Council of Europe] on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children signed in Luxembourg on 20 May 1980. The 1980 Hague and Luxembourg Conventions apply to persons from Contracting States.

[43] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Brussels IIa applies to persons domiciled or habitually resident in the EU Member State concerned.

79. Respondents also argued that legal aid should be available for unlawful removal of children from the United Kingdom. See Annex B for consideration of this issue.

The Government's Response

80. Under the consultation proposal, legal aid would continue to be available for respondents in child abduction cases as it is at present. In regards to whether legal aid should be available to answer questions on which jurisdiction to issue divorce proceedings, the Government considers that such cases are akin to other private family law cases, and therefore will not generally be of sufficiently high priority to receive legal aid. Means testing is generally governed by the requirements of the Convention or regulation, and the Government's position is to go no further than what is required to meet our obligations.

81. For the reasons set out above the Government has decided that legal aid should be retained for international child abduction and international family cases.

Mental Health

82. Legal aid is currently available for legal advice on any mental health matter, and representation for mental health matters heard in the county court, such as changing a detained person's "nearest relative" for mental health legislation purposes, for damages claims, and for representation before the First-tier mental health tribunal, and onward appeals.

83. Advice is currently available for any mental capacity matter and representation is available for the Court of Protection in limited circumstances where there is to be an oral hearing and the case will determine the vital interests of the individual i.e. life, liberty, physical safety, medical treatment (including psychological treatment), capacity to marry or enter into a civil partnership, capacity to enter into sexual relations, or the right to family life.

84. We proposed retaining these cases within the scope of legal aid, except that tort and other damages involving mental health issues will not be within scope unless those claims meet the criteria for "claims against public authorities" or "claims arising out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault" (see separate sections).

Key issues raised

85. Respondents agreed that funding should be retained for these cases, but a minority also argued that funding should be retained for damages claims arising in a mental health context, because very vulnerable detained patients will not be able to bring such cases themselves.

The Government response

86. Bearing in mind our ECHR obligations to detained persons, and the strong support of respondents, our view remains that funding should be retained in this area. Advice and representation in mental health and mental capacity proceedings under the Mental Health Act 1983 and the Mental Capacity Act 2005 will be retained in line with the scope of the current scheme.

87. However claims involving tort or other general damages claims will be excluded from scope except where these meet the criteria for "claims against public authorities" or "claims arising out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault". We accept that often these clients might have greater difficulties than others in bringing proceedings, but nevertheless, given that these are money claims which we consider to have a lower priority than other more fundamental matters, and for which alternative funding, such as under a Conditional Fee Agreement, may be available, we do not consider it appropriate for legal aid to be provided for those cases.

Public Law (Judicial Review and other similar remedies)

88. Legal aid is available for judicial review (and other similar proceedings where a court applies the principles applicable on judicial review) and applications for the writ of habeas corpus.

89. The consultation proposed retaining legal aid for judicial review proceedings. However, this was subject to the proposals at paragraphs 4.148 and 4.149 of the consultation to exclude from scope categories of case currently listed in Schedule 2 of the Access to Justice Act 1999 – including business cases.

Key issues raised

90. The majority of the respondents agreed with retaining legal aid for this area. However, the sub-committee of the Judges' Council that responded to the consultation made suggestions about how to limit further funding for unmeritorious judicial reviews. These included a suggestion to remove or severely curtail funding for judicial reviews in immigration and asylum cases where there has been a full oral hearing on the merits within a specified period or the case is a challenge to removal directions or detention pending removal.

91. The response pointed out that of some 12,500 judicial review claim forms issued in the Administrative Court in 2010, approximately 7,500 concerned asylum or immigration matters. In the great majority of cases, the sub-committee stated, there had already been an adverse decision by the Secretary of State giving rise to an unsuccessful appeal on the merits to the Asylum and Immigration Tribunal or the First-tier Tribunal. Judicial review in these cases it was argued, was often the second – or sometimes the third or fourth – bite at the cherry, and that many of the cases failed and were without merit. Whilst such cases would normally be

refused at the permission stage, a significant amount of public funds and judicial time was used up in the process.

The Government response

92. Most of the cases highlighted by the Judges' Council are not, we believe, brought with the benefit of legal aid. The current criteria governing the granting of legal aid in individual cases would generally preclude such funding. Even if the numbers of cases involved are relatively small, we accept the principle that these cases should not receive funding, subject to certain safeguards. However, we consider that there should be some important exceptions to these exclusions principally to take into account potential changes in an individual's circumstances over time, and to ensure that cases where an appeal has not already taken place are not inadvertently captured. We also consider that challenges to detention pending removal should remain in scope (as they relate to the applicant's liberty).

93. The Government therefore generally intends to retain legal aid for judicial review in immigration and asylum cases, except for:

    i) immigration and asylum judicial reviews where there has been an appeal or judicial review to a tribunal or court on the same issue or a substantially similar issue within a period of one year;

    ii) judicial reviews challenging removal directions except where there has been a delay of more than one year between the determination of the decision to remove a person and the giving of removal directions.

94. However, cases falling within (i) and (ii) above would be subject to certain exceptions:

    - where funding is necessary to comply with article 15 of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (this will apply to judicial reviews of a decision of the Secretary of State not to treat further submissions as a fresh asylum claim and cases against a certificate issued under section 94 of the Nationality, Immigration and Asylum Act 2002[44]); and

    - where the challenge is to a certificate issued under section 96 of the Nationality, Immigration and Asylum Act 2002.[45]

95. We also intend to maintain the restriction, currently in the Legal Services Commission's Funding Code, which allows legal aid for judicial review cases only where the proceedings have the potential to produce real

[44] See footnote 10 above.

[45] See footnote 11 above.

benefits for the applicant, the applicant's family, or the environment. These changes to the Funding Code which were introduced by the previous administration were recently quashed by the High Court. While the Court found that the process followed in making these changes was flawed, the Court did not find that the restriction itself was unlawful. Legal aid should be focused on the highest priority cases, and because we consider that bringing a judicial review over a matter with which you have no personal involvement or connection will not generally be of a high priority for funding, we intend to remove these cases from the scope of the legal aid scheme.

Public Law children

96. Legal aid is currently available for legal help and representation in public law children cases. This is an area of law which covers proceedings under the Children Act 1989 where a local authority is considering commencing, or has commenced, care and supervision proceedings in respect of a child, proceedings for a child assessment order, or proceedings for an emergency protection order. Other public law proceedings include adoption proceedings under the Adoption and Children Act 2002, and cases which are heard under the inherent jurisdiction of the High Court (for example, wardship). The consultation proposed keeping such cases in scope as now.

Key issues raised

97. Respondents agreed with the proposal to retain these cases in scope. There was reference however to the need to control costs in this area, which is within the remit of the Family Justice Review. Respondents raised concerns about the availability of legal aid for private family proceedings that are connected with public law proceedings, especially where a private law remedy might provide an alternative to a care order.

The Government's Response

98. The Government has decided to keep public law children cases within the scope of legal aid. By keeping public law children cases in scope, legal aid will also be available for related proceedings, such as those heard alongside public law proceedings. We have also decided to retain legal aid for the protective party in private law proceedings where there is evidence of child abuse (see paragraphs 44 to 48 above).

Registration and enforcement of judgments under European Union legislation

99. Currently the Courts of England and Wales recognise a range of family and civil judgements which are made in other Member States of the European Union, and legal aid is available for the registration and enforcement of these judgements.

100. In the consultation, we proposed retaining legal aid funding for the registration and enforcement of family and civil judgements made in other Member States of the European Union.

Key issues raised

101. Very few consultation responses commented specifically on this proposal, but those who did agreed with it.

The Government response

102. In view of the consultation responses and the nature of these cases, the Government will keep these cases in scope.

Representation of children in Rule 9.5 and 9.2A (now 16.2 and 16.6) private law children cases

103. Legal aid is currently available for advice and representation for separately represented children in private law children cases. In the consultation, we proposed retaining Legal Help and Representation for children who are separately represented under Rules 9.2A or 9.5 of the Family Proceedings Rules 1991, which have since been replaced by Rules 16.2 and 16.6 of the Family Procedure Rules 2010.

Key issues raised

104. All the consultation responses that commented specifically on this proposal agreed with it. Some respondents argued that all parties in these cases should be able to get legal aid.

105. The availability of legal aid for children in other private family law cases is considered at paragraphs 25 to 30 of Annex B.

The Government response

106. The Government has decided to retain legal aid for these proceedings as set out in the consultation.

Miscellaneous (areas to retain)

107. Legal aid is available for legal advice and representation for a range of other matters which do not fall within the scope of other categories - these are classified by the LSC in the “Miscellaneous” category for funding purposes.

108. We proposed retaining some of these cases within the scope of legal aid, namely: confiscation proceedings, injunctions concerning gang related violence, Independent Safeguarding Authority Appeals (Care Standards), Legal Help at inquests, Protection from Harassment Act 1997 and quasi-criminal proceedings.

Key issues raised

109. A limited number of respondents commented on this section. There were very few comments on the Miscellaneous areas we have proposed retaining. Respondents agreed with retaining Legal Help for inquests, but argued that funding should be extended to cover representation.

The Government response

110. **Confiscation proceedings under the Proceeds of Crime Act 2002**: Currently, legal aid is available for a range of proceedings in the Crown Court and magistrates' courts relating to offences under the Proceeds of Crime Act 2002. These are in the main proceedings connected with the confiscation of criminal assets. Civil legal aid is available principally where the confiscation proceedings (such as an application for a restraint order to prevent a person dealing with property) are taking place independently from a criminal prosecution, or where the recipient is a third party who may have a claim over the restrained assets.

111. We consider that the current funding provision for these cases should be retained because the litigant's assets will have been restrained by the state, preventing them from paying privately for legal representation.

112. **Injunctions concerning gang-related violence**: section 34 of the Policing and Crime Act 2009 will allow the Court to impose an injunction on an individual if it is satisfied that the individual has engaged in, or has encouraged or assisted, gang-related violence, and that an injunction is necessary to prevent gang-related violence, or to protect an individual from gang-related violence.

113. We consider that legal aid should be retained for these civil proceedings, given the potential restrictions placed upon a person's liberty as a result of such an injunction. Breach of an injunction can lead to contempt of court proceedings which, for 14 to 17 year olds, can result in a supervision order or a detention order being made under the Crime and Security Act 2010, and for those aged 18 years or over can result in up to two years in prison and/or an unlimited fine.

114. **Independent Safeguarding Authority Appeals**: Civil legal aid is currently available for an appeal in relation to inclusion on a list of individuals who are considered unsuitable to work with children and vulnerable adults or in relation to prohibiting an individual from teaching and related activities.

115. We consider that legal aid should be retained in this area because inclusion on this list will have a significant and lasting impact on the life and the livelihood of an appellant who may have been included on the list in error.

116. **Legal Help at Inquests**: Legal Help is currently available at inquests, and can be used to assist bereaved families in making written submissions to

the coroner (for example, a list of questions they wish him or her to ask other witnesses).

117. We consider it appropriate to retain Legal Help for Inquests to assist the bereaved given the importance of the issue in these cases (investigating the cause of death of a loved one). However, we do not consider that legal aid for advocacy is generally required given that inquests involve an inquisitorial process rather than adversarial court proceedings. Participants do not have to present legal arguments, and can ask coroners to question witnesses on their behalf. However, we consider that legal aid advocacy services should be capable of being available in relation to inquests in some circumstances under the exceptional funding mechanism. See Annex C for further details.

118. **Protection from Harassment Act 1997**: The Courts have the power, under sections 5 and 5A of the Protection from Harassment Act 1997, to make a restraining order, either on conviction for a violent offence or on acquittal, where they consider that the victim needs additional protection.

119. We consider that funding should be retained for the victim in relation to applications to vary or discharge such a restraining order on the basis that the issues at stake are important, as the litigant's physical safety is potentially at risk (for example, where an ex-defendant seeks to vary or discharge such an order). This is consistent with our general approach to funding proceedings where an individual's physical safety is at risk.

120. Legal aid is also available for bringing or defending injunctions against anti-social behaviour under sections 3 and 3A of the Protection from Harassment Act 1997.

121. The Government intends to retain legal aid in these cases for both parties, primarily because of the potential restrictions placed on the defendant's liberty. In line with our approach on tort cases, damages claims will not be funded.

122. **Quasi-criminal proceedings**: Civil legal aid is currently available for any civil proceedings in which the individual may be subject to orders or penalties which are (or which the individual is reasonably contending are) criminal penalties within the meaning of article 6 of the European Convention on Human Rights. Where a civil case has a penalty which has been determined by a court to be criminal in ECHR terms, we consider that similar considerations apply as in criminal cases, and that these cases are a priority for funding because of the nature and severity of the penalties which may result. We therefore intend to retain legal aid for quasi-criminal proceedings which meet the existing strict test (including the interests of justice test). However, we consider that it is more appropriate that this should be provided through the criminal legal aid scheme, rather than the civil, and we will extend the list of proceedings covered by criminal legal aid to include these cases. Where an out of scope case has a 'penalty' which has not been determined by a court to be criminal, legal aid may be made available where, in the particular

circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law.

Cross Cutting Issues

Discrimination

123. Legal aid is available for legal advice and representation for cases alleging unlawful discrimination, harassment or victimisation and this can arise in a variety of contexts from consumer to education to employment matters.

124. We proposed that legal aid should remain available for those discrimination claims, subject to current restrictions on scope (which, for example, exclude funding for representation before the employment or social security tribunals.

Key issues raised

125. The majority of the respondents agreed that these cases should remain within scope. However, they also argued that where an excluded case had a discrimination element (for example, employment) funding should be allowed for the excluded matter because it will not be practical to separate the issues.

The Government response

126. We consider, in line with the proposals in the consultation paper, that unlawful discrimination cases should be retained within scope. We have therefore decided that funding should continue to be provided for claims relating to a contravention of the Equality Act 2010 (at the existing levels of service). These claims have an importance beyond a simple money claim due to the nature of the issues at stake – addressing societal prejudice and ensuring equality of opportunity – that on balance justifies the continuance of funding.

127. We acknowledge that cases will arise where it will be difficult to separate discrimination from other issues in terms of funding. Under the current legal aid scheme, there are provisions set out under the Funding Code to cover mixed cases, in which the case is partly in and partly out of scope. These provisions allow funding of the whole case in certain circumstances, and in others they allow funding for aspects of the case. We will ensure that similar appropriate provisions are included in the new scheme.

128. The Government therefore intends to retain legal aid for claims concerning contravention of the Equality Act 2010 at the levels of service where it is currently available, and to make appropriate provision for mixed cases.

Environmental Cases

129. Legal aid is available for legal advice and representation for environmental cases. We proposed to retain environmental nuisance claims in which an injunction is sought as relief, subject to the proposal in paragraph 4.242 of the consultation paper to remove damages claims from all categories of law.

Key issues raised

130. Those who replied on this area agreed that legal aid should be retained, and that doing so was an important way for the United Kingdom to show it was meeting its Aarhus Convention obligations.

The Government response

131. Having considered the responses to the consultation, the Government intends to retain advice and representation for environmental injunctions in respect of nuisance. We also intend (in line with our obligations under EU law (the Public Participation Directive 2003/35/EC PPD)) to retain legal aid for judicial review (see Public Law).

European Union cross-border cases

132. The 'European Cross-Border Dispute' directive (Council Directive 2002/8/EC) is a reciprocal agreement between EU member states which sets out minimum common rules relating to legal aid in civil and commercial disputes where the party applying for funding is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or the decision is to be enforced.

Key issues raised

133. There were very few responses on this point, but those who did respond agreed with the proposal.

The Government response

134. We intend to keep these cases in scope in order to comply with our international obligations under European Union law.

The forum in which cases are heard

135. Legal aid is currently available for appeals to the Court of Appeal and the Supreme Court, and for references to the European Court of Justice, provided that the matter or issue is not excluded.

136. We proposed to reduce the availability of legal aid for these appeals and referrals in line with the proposed of scope of subject matter i.e. that if the case was not within the scope of legal aid in the lower courts, then it would not be in scope in these higher courts.

Key issues raised

137. Most responses did not directly address this point, which they instead raised in the context of the proposals to remove particular areas from scope or in general points about the ability of litigants-in-person to conduct proceedings, especially on points of law. Responses generally opposed legal aid not being available for onward appeals, particularly for respondents, and particularly where their opponent might be the state, and particularly where the appeal was on a point of law. Immigration appeals were offered as an example where all three of these characteristics might feature.

The Government response

138. We consider that the fact that these cases are before a higher court does not automatically outweigh other considerations. Where these cases involve matters which generally will be out of the scope of legal aid, they will be a lower priority for funding.

139. Therefore funding for appeals to the Court of Appeal and Supreme Court and references to the European Court of Justice will only be within the scope of legal aid when the appeal or reference arises in an area of law which is itself in scope.

Conclusion

140. A summary of the cases and proceedings the Government intends to retain in scope, and to remove from scope, is set out at the conclusion of Annex B to the Government response.

Annex B: Cases and proceedings removed from the scope of legal aid

Introduction

1. The consultation asked:

   Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 of the consultation document from the scope of the civil and family legal aid scheme. Please give reasons.

2. There were 3,749 responses to this question. 103 (3%) agreed with the proposal, 3,380 (90%) disagreed, and 266 (7%) neither agreed nor disagreed.

3. Although a significant majority of responses disagreed with the proposals, the Government remains convinced that reform is necessary to avoid unnecessary litigation, reduce the cost of legal aid and deliver better overall value for money. We therefore intend substantially to implement the reforms to scope proposed in the consultation. The key issues raised by respondents, and the Government's response, are detailed below.

4. In some cases, responses to the consultation raised issues which have persuaded the Government to amend or refine our original proposals in order to ensure that our objectives for legal aid reform are met. Full details are also set out below.

5. We also proposed (paragraph 4.148) continuing to exclude areas of law which are currently excluded from the scope of the scheme, including personal injury, damage to property, defamation or malicious falsehood, boundary disputes, conveyancing, the making of wills, trust law, company or partnership law and business cases. The Government intends to continue to exclude these areas because the issues are of low importance, when compared with other cases concerning, for example, fundamental rights such as life or liberty, and in many cases (for example, personal injury) alternative sources of funding are available, such as Conditional Fee Agreements.

6. We also proposed continuing to exclude from scope advocacy before the coroners' court and most tribunals. We intend to continue to exclude these areas because of the ease of access and the more user-friendly nature of most tribunals (as opposed to courts), and because of the inquisitorial non-adversarial nature of inquests. We also intend, as proposed, and for the same reasons, to repeal section 51 of the Coroners and Justice Act 2009 which would have extended advocacy to certain inquests. Advocacy for inquests may be available under the exceptional funding scheme. Further details are set out at paragraph 133 and in Annex C.

Ancillary relief and private law children and family Cases (where domestic violence not present)

7. Legal aid is currently available for legal advice and representation in disputes concerning the division of financial assets on the dissolution of a relationship. This includes financial provision on divorce, claims by cohabitants for interests in property, and claims under the Inheritance (Provision for Family and Dependents) Act 1975. These can include disputes about the marital home or other assets, and involve, for example, applications for property adjustment, periodical payments, lump sums, or pension sharing orders.

8. Legal aid is also currently available for advice, representation and mediation in a range of disputes arising from relationship breakdown. This area of law covers a range of proceedings relating to children and families. These include:

    - orders for child contact and/or residence (including rule 16.2/16.6 cases);
    - parental responsibility orders;
    - prohibited steps or specific issue orders;
    - parenting orders;
    - family maintenance;
    - divorce, judicial separation, nullity and dissolution of civil partnership; and
    - international child abduction.

9. In the consultation, we proposed that all legal aid other than for family mediation services should be excluded from the scope of the scheme for all ancillary relief cases other than those where domestic violence is present. We also proposed to exclude private law children and family matters where domestic violence was not present from the scope of legal aid for all levels of service other than mediation (except for international child abduction, which we proposed would remain in scope, and the representation of children in Rule 9.5 and 9.2A cases (now rules 16.2 and 16.6);

Key issues raised in consultation

10. Responses to this proposal from individuals, legal practitioners, representative bodies, the judiciary and most other stakeholders were almost entirely negative, other than for a general agreement that resolving cases out of court is preferable to court for all concerned. Respondents argued that:

    - only a limited number of family cases would be diverted into mediation, due to the nature of the issues involved;
    - many legal aid clients are vulnerable, and will need assistance to put their case;

- there would be a reduction in access to justice – some people will be put off taking a meritorious case to court. Others will still bring their case to court but have worse outcomes. Both would have knock-on consequences beyond the individual – particularly on children, but also on the welfare state;
- there will be an increased burden on the family courts. Poor cases will not be filtered out due to lack of early legal advice, and fewer cases will settle without lawyers' involvement. As a result there will potentially be more cases going to court, with a greater percentage involving litigants-in-person, which in turn will take longer and be less likely to settle;
- there will also be increased burdens on Cafcass due to the increased reliance by judges on them in the absence of legal aid;
- the timing should be reconsidered: legal aid reforms should wait for the Family Justice Review proposals and be implemented in tandem in order to avoid disjointed policy;
- there would potentially be an increase in public law cases, and therefore in the number of children taken into care, because private law proceedings are often used as an alternative to public law cases;
- a smaller number of representative bodies and individual responses suggested that the proposals risked breaching both article 6 and article 8 of the European Convention on Human Rights.

11. Respondents also raised specific issues in relation to private law children cases, including the importance of ensuring safe and equitable contact arrangements, the potential for interim care orders to arise during private law proceedings where the parents are unrepresented, and the difficulty that unrepresented litigants would have in making applications, putting forward their case and dealing with issues such as enforcement of orders and jurisdiction questions.

12. In relation to ancillary relief cases, respondents raised the importance of protecting the financial interests of the vulnerable, including children, and the difficulty that unrepresented litigants would have dealing with financial arrangements of greater complexity such as pension sharing and constructive trusts, and dealing with issues such as disclosure (especially where one party is uncooperative) and preventing the dissipation of matrimonial assets.

13. Some respondents also argued that the private family law proposals would have a disproportionate effect on children and suggested that the impacts of the proposals on children should be specifically considered. Some respondents also argued that the private family law proposals would have a disproportionate impact on women.

14. Other concerns included:

    - the availability of legal aid in private family law cases involving allegations of child abuse;
    - how experts would be instructed and their reports paid for in private law family cases, and how litigants without representation would test their evidence;
    - the availability of legal aid for the prevention of international child abduction, as well as after it has occurred, and for the removal of children within the UK;
    - legal aid for children who are parties to proceedings other than under Rule 9.5 or 9.2 of the Family Proceedings Rules 1991, such as looked after children who are searching for, or applying to have contact with, siblings who are not looked after.

The Government response

15. The Government accepts that certain features of private family law, and particularly ancillary relief cases, may be complex in some instances. However, we do not consider that these cases are routinely as complex as other areas, and legal aid will remain available for exceptional cases where it is required as a result of our domestic or international legal obligations, including article 6 of the European Convention of Human Rights. The Government also needs to prioritise its resources, and does not consider most private family law cases as high priority for legal aid compared with cases, for example, involving homelessness, domestic violence or liberty.

16. Many people currently choose to represent themselves in court, and the courts therefore already have to deal with litigants-in-person. The Government considers that certain factors will mitigate the impact of the proposals on access to justice for litigants-in-person. There is a fuller discussion of this cross-cutting issue in Annex C**.** These factors include:

    - the evidence on the impact of litigants-in-person on case duration is mixed,
    - there is current assistance available to litigants-in-person,
    - the availability of legal aid for family mediation will continue and we will work with providers to increase awareness,
    - the Government will examine the system to support litigants-in-person as part of the post-implementation review and will report the findings to Parliament.

17. The Government accepts some of the concerns raised about private family law cases which are brought as an alternative to public family law cases. As a result, we have decided to retain in scope legal aid for the protective party in private law children cases involving child abuse (see paragraphs 44 to 48 of Annex A).

18. The making of an interim care order at a private family law hearing is a relatively unusual step taken only where the judge considers it necessary to protect a child. The parents would be able to apply for legal aid to challenge the interim care order, as public family law cases will remain within the scope of legal aid.

19. The Government considers that the impact of the proposals on children will be mitigated by targeting legal aid on the highest risk cases – those involving domestic violence and child abuse (see paragraphs 37 to 48 of Annex A), as well as continuing to fund international child abduction cases (paragraphs 74 to 81 of Annex A) and child parties in private family law cases (paragraphs 25 to 30 below).

20. Concerns about cases involving child abuse are addressed in Annex A, the impact of litigants-in-person on the courts is covered in Annex C and the equality impacts of the reform programme are set out in the Equalities Impact Assessment.[46] We intend to take steps, including through guidance, to limit the impact of the reforms on Cafcass, and to monitor the scale of any impact. The Government considers that legal aid should be available for expert reports in cases remaining in scope. This means that a proportion of the costs of expert reports may remain available in cases involving domestic violence or child abuse, and in cases where there is a child party.

21. The Family Justice Review is a separate and independent programme of work from legal aid, and it is looking at the whole system of family justice. The legal aid proposals are not dependent on the outcome of the review but complement the aims of the Review, for example, by encouraging mediation.

Prevention of child abduction cases

Key issues

22. The consultation document proposed keeping legal aid in scope for international child abduction cases. Consultation responses argued that this would not cover steps to prevent abduction and that legal aid should be available to prevent 'abduction' within the UK, as well as to locate a child within the UK.

The Government response

23. The Government notes that preventing abduction is a particularly important concern in cases of abduction to non-Hague Convention countries where it is much harder to recover a child once they have been abducted. We have therefore decided to retain legal aid to obtain an emergency order to prevent unlawful removal of a child from the United

[46] See footnote 4 above.

Kingdom. Legal aid will not however be available to oppose orders to prevent unlawful removal taking place or to apply to take a child out of the jurisdiction.

24. The Government does not consider that internal cases not involving a risk of removal from the United Kingdom raise the same issues. Disagreements over where parents should live are commonplace in family proceedings. Furthermore, purely domestic cases do not involve the same imperative to prevent removal of the child to avoid the difficulties of securing return once the child is abroad and in a different system. We do not propose to change our general approach to private family law for these cases.

Representation for child parties in private law family cases

25. In the consultation, we proposed retaining Legal Help and Representation for children who are separately represented under Rules 9.2A or 9.5 of the Family Proceedings Rules 1991, which have since been replaced by Rules 16.2 and 16.6 of the Family Procedure Rules 2010.

26. Under Rule 16.2 the judge can, in certain circumstances, make a child a party to the proceedings if it is in their best interests. Cafcass would normally appoint a guardian, who in turn would instruct a solicitor on the child's behalf. Under Rule 16.6, a child party may also need to be represented where they are old enough and able to instruct a solicitor directly.

Key issues raised

27. While consultation responses were supportive about continuing to provide legal aid for children who are separately represented under rule 16.2, some respondents argued that due to the seriousness and frequent complexity of rule 16.2 cases all parties to them, not just children, should have access to legal aid.

The Government response

28. While the Government accepts that some of these cases may be more complex than routine cases, the fact that it is in the best interests of the child to be separately represented does not necessarily mean that the case would be so complex as to require representation for all of the other parties.

29. The Government accepts that where a child needs to be a party to a private family law case they should have access to legal aid. We will seek to ensure that children are not used by adult family members who would be better placed to be a party, as a way to get access to legal aid.

30. In conclusion, for the reasons set out above, the Government has decided that ancillary relief and private family law cases should be taken out of scope, with the following significant exceptions:

    - legal aid will continue to available for victims of domestic violence and for the protective party in cases involving child abuse;
    - legal aid will be retained for emergency orders that seek to prevent a child from being removed from the United Kingdom (including for forced marriage), but not for the contact issues in these cases;
    - legal aid will also continue to be available for children who are separately represented under Rules 16.2 or 16.6 of the Family Procedure Rules 2010 (legal aid will only be available for child parties in these cases, and not for the other parties);
    - private law family cases will remain in scope for all child parties, including children who are parties other than under rules 16.2 or 16.6; and
    - legal aid will also be available for applications to prevent international child abduction.

Clinical Negligence

31. Legal aid is currently available for legal advice and representation for clinical negligence cases. The consultation paper proposed that such cases would be removed from scope in their entirety.

Key issues raised

32. The majority view of the respondents was that clinical negligence should not be removed from scope. Their concerns were largely as follows:

    - Conditional Fee Agreements (CFAs) are unlikely to be available for any cases which require extensive expert advice to establish liability and causation over a period of possibly several years, for example, cerebral palsy and serious obstetrics cases, for example, cases involving brain-damaged babies);
    - the cost of disbursements in cerebral palsy and serious obstetrics cases tend to be very high and individuals would not be able to afford to pay for these privately;
    - some respondents urged us to retain in scope children cases including cerebral palsy and serious obstetrics cases, because CFAs are not available and people cannot afford to pay for expert reports (although there are some adult cases (for example, paralysis) with a similar profile);
    - removal of legal aid for clinical negligence coupled with the Jackson proposals to reform CFAs (which it was argued were likely to reduce significantly the number of cases in which CFAs can be offered) would deny access to justice for the poorest in society and the state would fail in its duties under article 6;

- at a minimum legal aid should be available for investigative work, if not for all the claim, or it should be retained for the most vulnerable people (for example, children);
- these proposals were contrary to the original intention of Jackson LJ who has argued that legal aid should be maintained for clinical negligence cases;
- removing clinical negligence from legal aid whilst reducing the availability of no-win no-fee agreements will result in the National Health Service becoming even less accountable to those injured through its negligence;
- in these cases there is a fundamental inequality of arms – the doctor will be funded and represented whereas the potential claimant will not;
- there should be greater take-up of "before the event" insurance, although some recognised that those most vulnerable will not have this currently in their insurance packages due to extra costs.

The Government response

33. We recognise that respondents have voiced serious concerns about the removal of clinical negligence from the scope of legal aid, and in particular on the impact on cases which require substantial expert investigation at the outset.

34. These concerns were also raised by respondents to the consultation on civil litigation costs (Jackson). In our response to that consultation,[47] we announced our decision to implement a range of Lord Justice Jackson's recommendations, including abolishing the recoverability of success fees and "after the event" (ATE) insurance premiums associated with 'no win no fee' conditional fee agreements (CFAs), increasing general damages by 10%, and extending the availability of damages based agreements (DBAs).

35. However, in light of the concerns that had been raised about disbursements and clinical negligence cases in particular, we announced that a power will be put in place (subject to Parliamentary approval) to allow recoverability of the ATE insurance premiums to cover the cost of the expert reports in clinical negligence cases only. The MoJ will continue to work with the Department of Health and claimant and defendant representatives and insurers, to ensure that joint expert reports can be commissioned wherever possible so that ATE insurance is not necessary.

36. In our view, these changes will deter unnecessary or avoidable claims, but will continue to allow good clinical negligence claims to be brought

[47] See footnote 8 above.

under CFAs (and now DBAs). Therefore, we consider that, despite the importance of the issues in some of these cases, the exclusion of clinical negligence from scope is justified because there will remain a viable alternative source of funding, enabling the targeting of limited resources to other priority areas.

37. We accept that there may be particularly complex cases, where despite the arrangements for funding disbursements described above, it may be difficult to find a CFA, but the exceptional funding scheme for out of scope cases will ensure that individual cases of this type continue to receive legal aid where, in the particular circumstances of the case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law. Cases granted funding under the exceptional funding scheme in the clinical negligence category will, as with other damages cases, be subject to the Supplementary Legal Aid Scheme (see Annex J**)**.

Consumer & General Contract

38. Legal aid is available for legal advice and representation for a range of consumer matters which are principally heard in the county court. These cases concern, for example, contracts, consumer credit and professional negligence proceedings.

39. In the consultation, we proposed removing these cases from the scope of legal aid (other than claims relating to a contravention of the Equality Act 2010).

Key issues raised

40. Of those respondents who commented on this aspect of the proposals, almost all were opposed to removing these cases from scope. The key points raised were.

- some respondents argued that consumer cases should be retained, in particular professional negligence cases where negligence may have resulted in serious consequences for the client;
- some respondents argued that in some professional negligence cases clients would need expert reports to prove negligence and without legal aid individuals would not be able to afford these;
- some respondents argued that legal aid should continue to be available for consumer contract claims which would stop possession claims or eviction proceedings for secured loans and for claims relating to a contravention of the Equality Act 2010 that are brought.

The Government response

41. Having considered the responses to the consultation, we confirm our intention to remove consumer and general contract cases from the scope of legal aid. Whilst there are some difficult cases, in particular professional negligence cases, these are still essentially claims

concerned primarily with recovering damages, and that means that we consider that their relative importance is generally low, compared, for example, with issues of safety and liberty. There are other sources of advice available in relation to consumer matters, for example, from Trading Standards and Consumer Direct. There may be alternative non court based solutions in some cases, for example, through regulators and ombudsmen.

42. Although there may be exceptions, in our view the individuals bringing these cases are not likely to be particularly vulnerable compared with, for example, those in the mental health category (see paragraph 6.ii) above for the factors we took into account in considering an individual's vulnerability). In addition, where these cases lead to an immediate risk of losing the home, then the possession or eviction proceedings will remain in scope for legal aid (see Housing above). We will also retain consumer matters within scope where these concern an alleged contravention of the Equality Act 2010 (see Discrimination above).

Criminal Injuries Compensation Authority (CICA)

43. Legal aid is available for legal advice to assist victims of crime in making an application to the CICA. In the consultation, we proposed removing all of these cases from scope.

Key issues raised

44. The main issues raised by respondents to the consultation were:

- respondents from the legal profession and some members of the judiciary pointed out that while the initial application might be simple, legal aid also assisted clients in any appeal against the award offered, which was not straightforward;
- victims of crime were likely to be vulnerable, disabled and traumatised and continuing to provide legal aid would help support victims;
- CICA awards were not simply about money, but could also be used to fund special equipment or adaptation of homes for people disabled or ill as a result of being a victim of crime;
- failure to provide legal aid would breach the Council of Europe Convention on Action against Trafficking in Human Beings (Trafficking Convention);
- the forms are complex and require articulate responses to ensure that the client received the right compensation.

The Government response

45. We have considered the points made by the respondents that the people making these applications may be vulnerable, having often been through a traumatic event, and that these matters can involve more complex issues around appeals and assessing the merit of an award (see

paragraph 6.ii) in the section on the programme of reform for the factors we took into account in considering an individual's vulnerability). We also accept that these cases may involve money for medical equipment. We consider that article 15 of the Trafficking Convention may require exceptional funding for CICA applications and appeals where, in the particular circumstances of the case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under article 6 of the European Convention on Human Rights.

46. However in general, we consider these cases, which are financial claims, are a lower priority than other cases, for example where the immediate consequences of the proceedings can affect the liberty or the personal safety of the applicant. We consider that the process for making an application is relatively straightforward: applications can be made on-line and by telephone: there is assistance available from the CICA; and legal expertise will not in our view generally be required. While appeals may be more complex, we have to prioritise funding and we consider that these cases are primarily financial claims, which are of lower priority for public funding.

47. We therefore confirm our intention to remove these cases from scope.

Debt: other than cases of immediate risk to the home

48. We proposed excluding debt work from legal aid, other than where the client's home was at immediate risk of repossession from rent or mortgage arrears (see Annex A). Legal aid is currently available for legal advice and representation for a range of debt matters, from negotiating with creditors to assisting individuals to deal with their debts through a Debt Management Plan, an Individual Voluntary Agreement, or Debt Relief Order. While most funding in this area is for legal advice, representation is available for individuals seeking to set aside a statutory demand, and to obtain, resist or annul a bankruptcy order.

Key issues raised

49. The vast majority of respondents were opposed to the removal of legal aid for any debt work. In the main, these were from organisations from the not-for-profit sector but comment was made by others such as the judiciary and representative organisations of the legal profession.

50. The key points made by respondents were:

- the advice agencies and also some legal representative organisations argued that the proposal to retain legal aid for "immediate risk to the home" cases was unclear, and that it did not go far enough. These respondents argued that where someone was unable to pay their rent or mortgage because they had been denied welfare benefits, legal advisers should be able to help them by addressing the benefits problem;

- some respondents argued that any kind of debt could lead to the home being at risk – for example where a debt was secured against the client's home via a charging order, that debt could lead to an order for sale of the home (see Housing below). Some respondents argued that early advice was necessary to challenge the charging order as little could be done after it had been made;
- many respondents pointed to the withdrawal of other funding streams for debt work and that legal aid was needed to ensure this vital assistance continued to be provided;
- the requirement for the home to be at risk before legal help was available will prevent early intervention and this is normally important to prevent the problem becoming more serious at a later stage, resulting in the need for state intervention;
- the removal of the Financial Inclusion Fund shows that alternative forms of advice will not necessarily be available. This will open the doors to unscrupulous Debt Management companies to prey on vulnerable people and charge for services that are unaffordable to the client;
- a bankruptcy order could lead to homelessness (where, for example, the home was sold to settle debts) and to prevent this funding should be available for: setting aside a statutory demand; the hearing of a bankruptcy petition; and an application to annul the bankruptcy order;
- some respondents (for example, the Law Society) accepted that some debt work was not really of a legal nature.

The Government response

51. We recognise that the majority of the respondents are opposed to the removal of this category due to the impact on clients and on the not-for-profit sector. We have carefully considered the points made.

52. One concern raised by respondents was that legal aid should be retained to contest charging orders whereby debts are secured against property. In these cases, the home is not at immediate risk at the stage where the charging order is made, but is at risk later when a creditor seeks to enforce the charging order through an order for sale. We therefore consider that funding should be retained in relation to an order for sale because these cases present an immediate risk of homelessness, which we consider to be the highest priority. However, we consider that legal aid should not be available to contest a charging order. At the charging order stage, the home is not at immediate risk, and the charging order merely secures the otherwise unsecured debt against the property.

53. Some respondents have drawn to our attention that clients may also face immediate loss of their home in bankruptcy proceedings where, for example, the home may be sold to pay creditors. We recognise that there are strong analogies to be drawn with our policy on providing legal aid

where the house is at immediate risk, and on that basis there is a strong argument for retaining these proceedings in scope.

54. As confirmed in Annex A above, we intend to retain legal aid for advice and representation in relation to a statutory demand, or for proceedings relating to the making or annulment of a bankruptcy order where the individual's estate includes their home. However, legal aid would only be available where an individual was the respondent to a creditor's petition, and funding would not be available for voluntary bankruptcy. In voluntary bankruptcy the homeowner is essentially making a decision to place his home in the hands of the trustee, which is analogous to choosing to sell the home to satisfy creditors.

55. We have also considered further the situation where the client's home is at immediate risk due to rent or mortgage arrears, and these arrears are caused by a dispute about welfare benefits. In such cases, respondents have urged us to allow legal aid to provide advice on the welfare benefits dispute. We consider that because there is a user-accessible tribunal to resolve welfare benefits problems, we do not believe that legal aid is justified for such matters (welfare benefits are considered at paragraphs 101 to 106 below). Where the client loses their benefits appeal, and subsequently faces action for rent or mortgage arrears that places the home at risk, legal aid will become available to deal with the housing dispute (for example, to negotiate with mortgage lenders), but it will not be available for the welfare benefits matter.

56. More generally, we note the points made about the importance of early advice. However, given the need to make substantial financial savings within the spending review period, and to target resources on those who need them most, we consider that debt cases where there is an immediate risk of homelessness is the appropriate priority. Overall, we consider that financial issues, however important to the individual, are less important in terms of legal aid funding than fundamental issues such as safety or liberty.

57. We also consider that many of these cases are about practical rather than legal problems. Therefore, whilst we recognise that advice on money management is often of clear benefit to the client, it is not necessarily an issue which requires specialist legal advice funded by legal aid. We recognise that many respondents told us that alternative sources of advice will no longer be available in the future. However, on 12 February 2011, the Government announced continued funding of £27 million in 2011/12 to maintain the face-to-face debt advice programme (previously the 'Financial Inclusion Fund') in Citizens Advice Bureaux and other independent advice agencies across England and Wales.

58. The Government is working to move the future provision of debt advice through this programme to a more sustainable footing, to ensure that individuals can access the support they need easily and that the service delivers the best possible value for money.

59. For these reasons, the Government intends to remove debt cases from the scope of legal aid, with the exception of cases where the home is at immediate risk.

Education

60. Legal aid is available for legal advice on a range of educational matters including bullying, school admissions or exclusions, assistance in preparing for a meeting with the School Governors, or attending the Independent Appeal Panel that deals with permanent exclusions. This area also covers court claims concerning, for example, educational negligence for which legal help and representation are available. Legal aid is also available in Special Educational Needs (SEN) cases for legal advice in preparation for the First-tier (Special Educational Needs and Disability) Tribunal and the Special Educational Needs Tribunal for Wales, and for legal advice and representation at the Upper Tribunal (and higher courts). We proposed removing all legal aid in this area (other than for claims relating to a contravention of the Equality Act 2010).

Key issues raised

61. The main issues raised by respondents to the proposal to remove education matters from the scope of legal aid were:

- it was inappropriate to view exclusion matters as a "personal choice" about conduct because children were below the age of responsibility, and their behaviour might be due to special educational needs (SEN);
- these cases tended to deal with more difficult admissions cases where clients had moved because they were victims of domestic violence or were travellers;
- the exclusion of education and admission matters could prevent discrimination claims from being brought because it would take legal advice to identify that the clients had the grounds for a discrimination claim;
- lack of early advice would lead to additional judicial review legal aid costs because legal aid would remain for that area;
- children involved in bullying could suffer serious physical or psychological harm, and that children with SEN were particularly vulnerable to bullying;
- some respondents were supportive of excluding educational negligence cases from scope.

62. It was argued, specifically on SEN in particular that:

- SEN cases were very complex, that Legal Help did not just cover advice but also paid for vital independent expert reports from educational psychologists. Without legal aid, clients would be unable to afford their own expert report to challenge the report of the local authority;

- parents of children with special educational needs were vulnerable because they frequently had substantial caring responsibilities and were much more likely to have SEN themselves;
- SEN claims could very easily be recast as disability discrimination claims under the Equality Act 2010, which were remaining in scope;
- the capacity and resources of alternative sources of advice cited are already stretched and it is unlikely they will be able to deal with a larger workload without funding;
- children's futures would suffer if they could not get the educational provision they needed;
- respondents also argued that SEN cases were very similar to Community Care cases in that these both involved obtaining from local authorities provision for vulnerable disabled persons.

The Government response

63. We consider that there are a number of arguments put forward by respondents which, when taken together, have persuaded us that current legal aid funding for SEN matters should be retained. The main arguments were:

    - **Overlap with discrimination**: respondents argued cogently that SEN disputes could almost always be recast, on the very same facts, and going to the very same tribunal, as a claim of disability discrimination. This is different from more general employment cases where new facts would generally be needed to support a new discrimination ground. Many SEN claims could be brought as a claim under the Equality Act 2010 that the local authority had (i) treated a disabled child like other children, thereby putting that child at a particular disadvantage, or (ii) failed to make reasonable adjustments in the way that it provided education for that child. Lawyer respondents stated that they tried to steer clients away from bringing disability discrimination cases because local authorities were much more active in defending such claims, given the reputational risks of conceding such claims. A rise in such claims was likely to be an obstacle to resolving disputes constructively.
    - **Similarity to community care**: respondents have argued that our proposals were inconsistent because while we proposed retaining legal aid for community care, SEN cases raise similar issues of resolving disputes about state assistance that will enable disabled individuals to live independent and fulfilling lives.
    - **Equalities**: research shows that children with a disability are over twice as likely as non-disabled children to live with a parent with one or more disabilities (as defined under the then Disability Discrimination Act 1995). Nearly 46% of disabled children had a parent with a disability, compared to 20% of non-disabled children.
    - Parents whose children have SEN are also more likely to have substantial caring responsibilities compared to other individuals. This

means that clients in these cases are more likely to have particular difficulty in proceeding without assistance from a lawyer.

64. We have also noted that current proposals by the Department for Education and Skills to reform SEN procedures,[48] and in particular their plans to mandate mediation, would mean that in future the cases which reach the tribunal would be the more complex and intractable cases where parents may be less able to present their case effectively.

65. For these reasons, we are persuaded that legal aid should continue to be available, as it is currently, for legal advice in preparation for the First-tier (Special Educational Needs and Disability) Tribunal and for the Special Educational Needs Tribunal for Wales, and for legal advice and representation at the Upper Tribunal (and higher courts). However, we do not consider that legal aid should be extended to cover representation at the First-tier (Special Educational Needs and Disability) Tribunal or the Special Educational Needs Tribunal for Wales. We consider that the user-friendly and accessible nature of the tribunal, with legal aid available for legal advice, will mean that legal aid for representation will not generally be necessary.

66. With the important exception of SEN cases, and claims relating to a contravention of the Equality Act 2010, which we consider to be the highest priorities within this category, the Government intends to proceed with the exclusion of the remainder of educational cases. However, as with other areas of law, we recognise the importance of being able to challenge public authorities' decisions on such matters via judicial review, and this will remain in scope. Whilst we accept that legal advice is of some assistance to individuals, including some vulnerable individuals, the remaining educational cases are of lower priority than other matters remaining in scope, such as safety or homelessness. Nor given the retention of legal aid for SEN and claims brought under the Equality Act 2010, do we consider that the clients in this group of cases (usually the parents on the child's behalf) are likely to be particularly vulnerable,[49] or that those parents involved will necessarily be unable to present their own case. There may be alternative sources of help for education cases, and CFAs may be available in damages cases.

Employment

67. Legal aid is available for legal advice on any issue of employment law, including for assistance at Employment Tribunals, and for representation for court employment claims (for example, breach of contract), and for appeals to the Employment Appeals Tribunal and onward appeals. We

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[48] See footnote 16 above.

[49] See paragraph 6.ii) of section 3: the programme of reform, for the factors we took into account in considering an individual's vulnerability).

proposed removing legal aid from scope in all employment cases (other than for claims brought under the Equality Act 2010).

Key issues raised

68. Respondents were generally opposed to this proposal. In the main, these were offered by organisations from the not-for-profit sector but their views were shared by others such as the judiciary and representative organisations of the legal profession. Key points made by respondents were:

- employment representative bodies and the legal profession representative bodies argued that employment cases were not just about money or earning potential, but also about rights such as entitlement to holiday time, or the right to request flexible working. These respondents argued that loss of one's livelihood was extremely important, and removal of employment advice could lead to greater reliance on the welfare state;
- there was a great deal of overlap between employment and discrimination claims, and that funding needed to be provided for both elements of a dispute;
- employment was very complex and individuals would not easily be able to bring cases without assistance, and they would not understand issues such as the time limits for claims. These types of claim are complex and steps taken by the employee to seek redress are technical for example, grievance procedures;
- because employers were usually represented, the withdrawal of funding to prepare cases before the tribunal would lead to even greater inequality of arms;
- without legal aid for advice, where offers were made, individuals would not know if they were being offered a fair sum;
- respondents were sceptical that Damages Based Agreements (DBAs) would be available for most tribunal claims, and argued that few legal aid clients were trade union members. While the Advisory Conciliation and Arbitration Service (ACAS) was useful, respondents argued that individuals needed to enter into mediation having been advised about the merits of their claim and how to argue it;
- appeals to the higher courts will involve points of law which in employment are complex and will not be suitable for self representation;
- many clients seeking employment advice tend to have mental health problems and are unable to bring their own case. If employees do not receive advice on the merits of the case, it is likely that there will be an increase in the number of misconceived claims made to the tribunals.

The Government response

69. Whilst we accept that legal aid is of assistance in employment matters; that some employees find facing their employer, who may be legally represented, daunting; and that these cases can involve wider issues than simple monetary advantage (for example, resolving issues about access to flexible working), on balance our view remains that legal aid should be withdrawn in this area.

70. The majority of these claims are pursued in the tribunal which is designed to be used by unrepresented litigants. While we recognise that clients find advice in the preparation of their case useful, we do not consider that this group of clients are generally likely to be particularly vulnerable,[50] and we do not accept that the tribunal cannot be accessed or that justice cannot be obtained, without access to legal aid for advice. We consider that given the need to prioritise resources, employment matters are of a lower objective importance than cases involving life, liberty or homelessness. It is also the case that DBAs will remain available in appropriate cases.

71. We also note the consultation paper 'Resolving Workplace Disputes'[51] which proposes that in future all cases should go to the ACAS before the employment tribunal to try to resolve problems before lawyers are needed.

72. For these reasons, the Government intends to remove legal aid funding for employment cases (other than cases brought under the Equality Act 2010.

Housing – other than risk of homelessness, repossession, eviction, Anti Social Behaviour Orders and housing disrepair that risks serious harm to individual and his/her family

73. Legal aid is available for legal advice and representation for any housing matter, other than business cases. We proposed the removal of all legal aid in this category except for cases where the client was homeless (or threatened with homelessness) and seeking homelessness assistance from the local authority, or where they were threatened with homelessness through possession or eviction, or where they were facing housing disrepairs which posed a serious risk to the life or health of the client or their family, or for Anti-Social Behaviour Order (ASBO) proceedings in the county court.

Key issues raised in consultation

74. Respondents were generally opposed to this proposal. The not-for-profit sector was particularly concerned, but their views were shared by others

[50] Ibid.

[51] See: http://www.bis.gov.uk/Consultations/resolving-workplace-disputes

such as the judiciary and representative organisations of the legal profession. Key points made by respondents were:

- it was irrational to fund eviction proceedings but not unlawful eviction proceedings;
- it was wrong to fund the eviction stage, but not to provide legal advice and assistance to people suffering the earlier stages of harassment, trespass and wrongful breach of quiet enjoyment by landlords;
- funding should be retained for all disrepair cases, that non-life threatening disrepairs should be addressed early before they become life-threatening, and that even non-threatening disrepair could lead to children's health being at risk, and misery for some of the most vulnerable people;
- torts of nuisance, negligence and breach of statutory duty should be retained for housing because these are used in situations analogous to serious disrepair where, for example, the problem was coming from a neighbouring property to public space (for example, leaks), and where it was not the landlord's responsibility;
- given the court Housing Disrepair Protocol which advised the instructing of joint experts, legal aid was needed to pay experts to determine the degree of seriousness of the disrepairs. They also queried what was intended by "serious risk to life or health". Some respondents also argued that it was not practical to separate a disrepair case and run separate disrepair and damages actions, and that in practice these could not be separated;
- funding should be retained to set aside a legal charge to prevent, for example, a charging order being placed on a property that might later lead to an order for sale of the home;
- funding should be retained for cases about re-housing (allocation of council homes) because the people involved in these cases were particularly vulnerable and children might be living in unsuitable housing;
- funding should be provided for planning appeals and eviction cases involving gypsies and travellers because this group was one of the most vulnerable in society;
- wrongful breach of enjoyment should be in scope as this almost always includes a claim for an injunction pursuant to the Protection of Harassment Act 1997;
- funding for the Housing Grants, Construction & Renovation Act 1996 should also be retained, because the Act had been repealed except for provisions relating to disabled facilities grants, and that these were important cases allowing people to live supported within their homes;

- landlords were unlikely to listen to tenants, Jobcentre Plus, or DWP, and without legal advice these clients will be unable to enforce their legal rights;
- respondents queried whether early advice would be possible or whether eviction or possession proceedings must have been issued before legal aid would be available;
- the alternative sources of advice cited in the consultation will not be able to cope with the pressure of an increased workload as a result of the legal aid proposals.

The Government response

75. **Housing disrepair**: We intend, as proposed in the consultation, to exclude less serious disrepair claims from scope where the disrepair does not pose a serious risk to the safety or health of the individual or their family. We consider that cases of less serious disrepair are a lower priority for funding, and given the need to prioritise, we do not intend to retain legal aid for the less serious cases. However, we agree with respondents that the severity of the disrepairs will not always be clear at the outset until an expert assessment has been carried out (in line with the Housing Disrepair Pre-Action Protocol). In these cases legal aid will be granted where there is a credible allegation that there is a serious risk to the safety or health of the individual or their family. This will mean that legal aid will be available for the early stages of such cases to enable the merits of the claim to be investigated. Where a disrepair is found not to pose a serious risk, further funding will not be available.

76. **Orders for sale**: in line with our decisions in debt cases (see Annex A and paragraphs 48 to 59 above), we intend to retain legal aid funding in respect of an order for sale of the home, as it represents an immediate risk to the individual's home. However, it will not be retained to contest an application for a legal charge, such as a charging order, to be placed on the home. The placing of a charging order is essentially to secure an outstanding debt and we do not consider debt as sufficiently important to merit funding (see paragraph 52 above). However, an order for sale presents an immediate risk to the individual's home.

77. **Other housing matters**: The Government intends to exclude from scope all other cases in the housing category (except claims relating to a contravention of the Equality Act 2010 and judicial reviews), including, without limitation: action to enforce a right to buy; action to enforce a right to buy a freehold or extend the lease; actions to set aside a legal charge or the transfer of a property; actions for damages and/or an injunction for unauthorised change of use of premises; an action under the Housing Grants, Construction and Regeneration Act 1996; applications for a new tenancy under the Landlord and Tenant Act 1954; actions concerning council house allocation; an action under the Access to Neighbouring Land Act 1992; an action for wrongful breach of quiet enjoyment; housing disrepair proceedings where the primary remedy sought is damages,

including damages for personal injury; an action under the Mobile Homes Act 1983 which does not concern eviction.

78. Many of these cases are about money or property, improvements to property, or use of property, and we consider that these cases are not of high importance when compared with cases concerning fundamental issues such as homelessness, eviction or the immediate safety of clients.

79. While people find assistance in dealing with, for example, trespass and wrongful breach of quiet enjoyment helpful, we have had to prioritise funding on the most serious cases and these cases are not as serious as eviction or unlawful eviction cases.

80. We also intend to exclude from scope nuisance, negligence and breach of statutory duty torts for housing. While respondents have said that these cases are analogous to disrepair cases, we do not consider that the matters addressed through these claims are as serious as the housing disrepair claims which pose a serious risk to life or health that we wish to prioritise.

81. We also intend excluding from scope legal advice for planning matters as these will generally be of lower importance than eviction or possession cases and are heard before a relatively informal planning appeal panel.

82. We also intend to exclude from scope the Housing, Grants, Construction and Regeneration Act 1996 concerning grants from a local authority to make a disabled person more able to live independently in their home. This is essentially an application for discretionary funding for a grant, rather than in relation to the local authority carrying out a statutory function, and we do not consider that clients will require legal assistance to make this application.

Immigration where the individual is not detained

83. Legal aid is currently available for a variety of immigration issues, including those relating to citizenship, leave to enter or remain in the United Kingdom for visits, study or employment, and deportation.

84. The consultation paper proposed that legal aid for immigration proceedings should be removed from the scope of legal aid, except where individuals are challenging detention under immigration powers, claims for asylum and appeals to the Special Immigration Appeals Commission.

Key issues raised

85. Most respondents were against the proposal to remove legal aid for immigration proceedings. The main points raised were:

    - the complexity of immigration legislation, and the difficulty individuals would have in representing themselves, especially in cases that raised article 3 and article 8 ECHR issues;

- the inequality of arms between the State and individual applicants without legal aid;
- the fact that many applicants will have no or limited understanding of UK law, and that English may not be the applicant's first language;
- that many of the problems (and costs) in the system stemmed from the decisions and processes of the UK Border Agency (UKBA);
- these cases were not about personal choice, as suggested in the Government's consultation document, especially where they involved family life;
- removing legal aid would make it harder for the UKBA to consider applications efficiently, as more applications would be poorly presented, potentially leading to more hearings;
- there was likely to be an increase in appeals to the higher courts or judicial reviews if legal aid was removed;
- removing immigration legal aid from scope would threaten the viability of legal aid providers currently dealing with both immigration and asylum. The consequence of this would be a diminution in the quality of asylum legal aid providers;
- due to the vulnerability of the individuals involved and the issues involved, legal aid should remain available for domestic violence immigration rule cases;
- legal aid should also remain available for refugee family reunion cases due to the importance of family life and the complexity of article 8 ECHR case law;
- legal aid should remain for stateless persons, due to their marginalisation and consequent vulnerability;
- the proposal risked breaching the Council of Europe Convention on Trafficking in Human Beings.

The Government response

86. The Government's view is that, in general, individuals in immigration cases should be capable of dealing with their immigration application and should not require a lawyer. Tribunals are designed to be accessible to users. Interpreters are provided free of charge. Claims for asylum, including claims under article 3 of ECHR, will remain in scope. Otherwise, whilst it is true that immigration law can be complex, it is not generally the case that an appellant will need to argue points of law or have any knowledge of the law. Immigration cases are generally about whether the facts of a particular case meet the immigration rules, and a significant amount of guidance is produced by UKBA and others to explain what these rules are, and how they apply.

87. The Government accepts that tackling inefficiencies in its administrative decision making process is extremely important. UKBA has a wide-ranging quality improvement programme in place to continue to improve

the quality of its decision-making in asylum, entry clearance and decisions made under the Points Based System. However, this does not alter the need for savings to the legal aid budget if the Government is to meet its targets to reduce the deficit. The Government does not consider that there is any evidence to show there will be a significant negative impact on UKBA or the higher courts as suggested in consultation responses, from the removal of legal aid in immigration cases.

88. The Government has considered the impact on suppliers, and the risks that the market will not be able to sustain an adequate supply of providers of legally aided services. While the Government accepts that there is a risk of disruption, we believe that the proposed reforms are sustainable, and that any short term disruption to services can be mitigated. Further details are set out at Annex F.

Domestic Violence Immigration Rule cases

89. Under the Immigration Rules, someone on a spousal visa, which is valid for a limited period of time, and who finds themselves in an abusive relationship, can apply for indefinite leave to remain under the 'domestic violence immigration rule'. Under the consultation proposals, such cases would be removed from scope.

Key issues raised

90. A number of respondents called for legal aid to be retained for these cases, citing both the complexity of the issues and that the victim of abuse will have been traumatised. They also refer to the Home Office project in this area ('Sojourner') which they suggest will be undermined by the removal of legal aid. The Sojourner project provides four weeks (20 working days) of money to cover essential housing and living costs for victims of domestic violence. During this time, victims are encouraged to complete an application for indefinite leave to remain under the domestic violence immigration rule. Once this application is submitted to UKBA, money for essential living costs will be provided for a maximum of 4 additional weeks (20 working days) while UKBA considers the application. Respondents also pointed to a discrepancy between the proposed lack of legal aid for these cases and its availability in private family law cases where domestic violence is shown to be present.

The Government response

91. The Government's view is that these applications are comparable to other immigration applications, albeit that individuals need to obtain documentary evidence of their domestic violence. Whilst individuals may well find it difficult to fill in the forms, it is not specialist legal advice that is required. This is something that can be addressed through guidance or non-specialist help rather than legal aid.

92. In terms of the comparison with private family law, the Government is seeking to prevent a victim of domestic violence from facing their abuser in court without legal representation. In immigration cases, the victim is

making a paper-based application to the Home Office, and the Government therefore considers the situations to be different. Legal aid will continue to be available for those seeking a civil injunction to prevent domestic violence irrespective of their nationality or immigration status.

Refugee family reunion cases

93. Responses to the consultation pointed out that refugee family reunion cases are not about making personal choices. The lead applicant has been granted asylum and is seeking to reunite with his family, and these cases also raise issues of complexity. They argued that refugee family reunion cases should be treated in the same way as asylum claims for the purposes of legal aid.

The Government response

94. The Government considers that applications to join family members are immigration cases, and that they will generally be straightforward. If a person wishes to claim asylum, it is open to them to do so either as a dependant of a primary asylum claimant or in his or her own right. Legal aid will be available for any such asylum claim.

Statelessness

95. This issue relates to someone who is stateless and who wishes to apply, for example, for citizenship or for a stateless person's travel document. Consultation responses suggested that legal aid should remain available due to the vulnerability of these individuals and because of the UK's obligations under the Convention on the Status of Stateless Persons 1954 and the Convention on the Reduction of Statelessness 1961.

The Government response

96. The Government considers that applications, such as that for a Stateless person's travel document, are straightforward. By making legal aid available to stateless persons on the same basis as other applicants for legal aid, the Government is fulfilling its international obligations. Civil legal aid in the UK is available to anyone who meets the criteria, irrespective of their immigration status.

The Council of Europe Convention on Action against Trafficking in Human Beings

Key issues raised

97. Some respondents (including the Immigration Law Practitioners' Association and Rights of Women) raised concerns that the immigration proposals would breach the UK's obligation under the Council of Europe Convention on Action against Trafficking in Human Beings which requires parties to provide legal aid to victims of trafficking.

The Government response

98. The requirement to provide legal aid under the Convention rules is not automatic (it is with reference to the requirements of article 6 ECHR) and is to help victims of trafficking seek compensation rather than to make immigration claims.

99. There will be instances in which the Convention requires legal aid to be provided to victims of trafficking to fund their claims. However, we estimate that the volume of these cases is likely to be small and any obligation to provide legal aid will be met by the proposed new exceptional funding scheme that will provide legal aid where failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998.

100. For the reasons set out above, the Government intends to proceed with the proposal to remove all immigration cases from the scope of legal aid where the individual is not detained, making a claim for asylum or appealing to the Special Immigration Appeals Commission.

Welfare Benefits

101. Legal aid is available for legal advice on welfare benefits matters including appeals to the First-tier (Social Security and Child Support) Tribunal, and Upper Tribunal. Representation is only available for onward appeals to the High Court, Court of Appeal or Supreme Court.

102. We proposed excluding all welfare benefits matters from the scope of legal aid (other than claims relating to a contravention of the Equality Act 2010).

Key issues raised

103. Respondents were generally opposed to this proposal. The not-for-profit sector was particularly concerned, but their views were shared by others such as the judiciary and representative organisations of the legal profession. Key points made by respondents were:

- respondents (particularly advice agencies) argued that these cases were not about financial entitlement but about access to minimum subsistence payments on which to live;
- welfare benefits legislation was extremely complex, and individuals could not deal with these cases without assistance, and would not realise there were tight time limits to appeal;
- appellants seeking incapacity or disability related benefits would need access to expert medical reports to win their case and that Legal Help paid for these reports as well as legal advice;
- respondents (including the judiciary) said that without early advice many cases would be brought which should not be brought, and other cases would not benefit from preparation leading to additional tribunal costs;

- lack of advice on welfare matters would mean people getting into eviction or repossession proceedings, which would have an adverse impact on individuals and would also cost more through housing legal aid;
- cases of "significant wider public interest" should be retained;
- the forthcoming changes to the benefits system would mean that the need for advice would greatly increase;
- tribunals will spend more time taking oral evidence if advice agencies and lawyers are unable to help clients structure their submissions with relevant evidence.

The Government response

104. The Government accepts that there are some difficult cases brought before the tribunal concerning the complex interaction between, for example, entitlement to benefits and nationality issues. These cases are typically ones where legal aid currently provides representation through the exceptional funding scheme**.** We do not consider that most cases before the tribunal are this complex. Cases range in importance from entitlement to subsistence benefits, to overpayment cases, but even so we generally consider that the importance of these cases is low when compared to safety, liberty or homelessness cases.

105. We recognise that benefits issues can have a knock-on impact on homelessness, but we consider that our approach to prioritise cases where there is a direct and immediate risk of homelessness is rational and appropriate. Funding will be retained for homelessness matters but, for benefits cases, the accessible and relatively user-friendly nature of the tribunal means that applicants can generally present their case without legal assistance. Whilst we acknowledge that respondents have told us that other sources of advice, particularly the voluntary sector, may not be able to meet the demand for welfare benefit services because of factors such as local authority cuts, it remains the case that Job Centre Plus and the Benefits Advice line will continue to be available to assist applicants. For several years, reports by the President of the Appeal Tribunals have shown that most welfare benefits decisions are overturned on the basis of new factual evidence obtained orally from the appellant, rather than legal submissions.

106. For these reasons, our intention is that these cases should be excluded from scope, except for judicial review and claims relating to a contravention of the Equality Act 2010.

Asylum Support

107. Legal aid is available for legal advice for applications for asylum support under sections 4 and 95 of the Immigration and Asylum Act 1999. These applications can be for accommodation, financial assistance, or both, for otherwise destitute asylum seekers and their dependents, or failed asylum seekers and their dependents.

108. In the consultation, we proposed excluding these cases from scope, on the basis that they were analogous to other welfare benefits cases.

Key issues raised

109. Respondents argued that asylum seekers were vulnerable, would need assistance in making applications (particularly where English was not their first language), and that if advice were unavailable, very vulnerable individuals could be left homeless and destitute without recourse to any form of support. They also argued that these cases were more analogous to homelessness cases.

The Government response

110. The Government recognises that what is at stake in these applications is often not entitlement to money, but provision of housing for otherwise destitute asylum seekers. While applications can be for subsistence payments, data from the UKBA shows that 90% of these applications cover applications for accommodation. Therefore, the large majority of these cases are closely analogous to the local authority housing cases we intend to retain within scope (i.e. cases under Part VII of the Housing Act 1996 covering the statutory duties of local authorities to house homeless individuals).

111. For these reasons, we intend to retain legal aid for advice for asylum support cases which concern applications for accommodation for destitute asylum seekers. Asylum support applications which only concern financial support will be excluded from scope, in line with other welfare benefits matters.

Miscellaneous (areas to remove)

112. Legal aid is available for legal advice and representation for a range of other matters which do not fall within the scope of other categories and the consultation document proposed removing some of these from scope. These cases relate to appeals to the Upper Tribunal from the General Regulatory Chamber of the First-tier Tribunal, contentious probate matters, legal advice in relation to a change of name, actions concerning personal data, legal advice on will-making and cash forfeiture actions under the Proceeds of Crime Act 2002.

113. In the consultation we proposed removing all of these areas from the scope of legal aid.

Key issues raised

114. A limited number of respondents commented on this section. Of those who did, the following concerns were raised:

- the withdrawal of legal help, which it was thought would be likely to place an additional burden on the tribunal system, and cause extra costs;

- the vulnerable would be affected by removing advice for wills;
- it would be difficult for people to be able to identify issues, or argue grounds for appeals before the Upper Tribunal;
- the Bar Council and Chancery Bar Association were concerned about the proposal to exclude contentious probate under the Inheritance (Provision for Family and Dependents) Act 1975. They noted that the nature of the claims (i.e. claims made by dependants who would often be elderly or children) meant that there would be a risk of vulnerable claimants being denied access to justice;
- the Bar Council was content that funding for the General Regulatory Tribunal should be removed.

The Government's response

a) Appeals to the Upper Tribunal from the General Regulatory Chamber of the First-tier Tribunal – This covers appeals from a number of small tribunals:

- Charity – certain organisations and individuals can appeal under the Charities Act 1993 against a decision of the Charity Commission.
- Claims Management Services – businesses and individuals who provide claims management services can appeal against decisions of the claims regulator.
- Consumer Credit – hears appeals against decisions of the Office of Fair Trading relating to licensing and money laundering.
- Environment – hears appeals against civil sanctions made by environmental regulators.
- Estate Agents – hears appeals under the Estate Agents Act 1979 against decisions made by the Office of Fair Trading.
- Gambling Appeals – hear appeals by individuals or companies against the decisions of the Gambling Commission.
- Immigration Services – hears appeals against decisions made by the Office of the Immigration Services Commissioner and considers disciplinary charges brought against immigration advisors by the Commissioner.
- Information Rights – hears appeals from notices issued by the Information Commissioner relating to freedom of information, data protection and other issues.
- Local Government Standards in England – determines references and appeals about the conduct of members of local authorities.
- Transport – hears appeals against decisions of the Registrar of Approved Driving Instructors (the 'Registrar'). These appeals concern approved driving instructors, trainee driving instructors, and training provider appeals.

115. We intend to exclude these matters from the scope of civil legal aid. The issues involved are, in many cases, quasi-business and financial issues. We consider that these cases are of relatively low importance compared to fundamental issues such as liberty or homelessness, and we do not consider that the class of individuals involved in these cases is generally likely to be particularly vulnerable.[52]

b) Actions relating to contentious probate or land law, for example, actions to challenge the validity of a will (**including Inheritance (Provision for Family and Dependents) Act 1975).**

116. In our view these cases are primarily about financial entitlement, which we consider to be of a low objective importance compared to other areas of fundamental importance, such as personal safety or liberty. Nor do we consider that the class of individuals involved in these cases is generally likely to be particularly vulnerable.[53] It is therefore the Government's intention that these cases should be excluded from scope.

117. This section of the paper also referred to applications under section 14 of the Trusts for Land and Appointment of Trustees Act 1996. This was interpreted by some respondents as relating to "ancillary relief" cases involving cohabitees. However, such matters were included and dealt with in our proposals for ancillary relief, and this section was concerned solely with other non-family matters of trust law under that section of the 1996 Act.

c) Legal advice in relation to a change of name.

118. These cases are typically funded in the context of family proceedings. For example, in cases where a mother seeks to change her child's surname to that of her new partner, and her ex-partner objects (for example, seeking a prohibited steps order). Where the funded client was successful in resisting the order, legal aid (Legal Help) could also cover the steps necessary to enact the change of name.

119. We intend that these cases should be excluded from legal aid given the lower objective importance of these matters compared to other more fundamental matters.

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[52] See paragraph 6.ii) of the section on the programme of reform for the factors we took into account in considering an individual's vulnerability.

[53] Ibid.

d) Actions concerning personal data, such as actions relating to inaccurate or lost data or rectification of personal data

120. Given the relatively low objective importance of these matters and the need to prioritise resources our intention remains that these cases should be excluded from scope.

e) Legal advice on will-making for (i) the over 70s; (ii) disabled people; (iii) the parent of a disabled person; and (iv) the parent of a minor who is living with the client but not with the other parent, and the client wishes to appoint a guardian for the minor in a will.

121. While the making of wills is generally excluded from the legal aid scheme, it is currently made available in the above circumstances. While such services may be useful, and some of the class of client covered by this case may be particularly vulnerable,[54] we consider that the making of wills is of lower objective importance compared to more fundamental issues. Given the need to prioritise funds, our intention remains that these cases should be excluded from scope.

f) Cash forfeiture actions under the Proceeds of Crime Act 2002:

122. Money may be seized by a customs officer or police officer because they have reasonable grounds for suspecting that it is intended for use in unlawful conduct. Such seized cash may be forfeited by order of a magistrates' court. The decision of the magistrates' court may be appealed to the Crown Court. Civil legal aid funding is available for both the magistrates' court proceedings and Crown Court appeal. Given that these proceedings are essentially about preserving a sum of cash, we continue to consider that these cases are not of as high importance and we therefore accord them a lower priority than cases involving more fundamental issues such as liberty or homelessness. Our intention remains that these cases should be excluded from scope.

Public Interest Cases

123. Legal aid is available for any type of case (except business cases) which is out of scope but which has a 'significant wider public interest'. This allows cases to be funded even where the benefits to the individual litigant alone might not justify the likely costs, because they have the potential to benefit other people.

124. We proposed in the consultation that the 'significant wider public interest' test should no longer be a gateway for bringing out of scope cases back into the scope of legal aid.

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[54] Ibid.

Key issues raised

125. Very few respondents have commented on this area. However, the concern was raised that granting legal aid for a case with significant wider public interest will result in cost savings, as opposed to granting legal aid to multiple individuals on the same issue. Another respondent said that it is necessary if such cases are generally out of scope that the exceptional funding scheme allows for funding of such cases.

The Government response

126. We do not consider that the presence of this factor should constitute an automatic entitlement to publicly funded legal services, particularly where an area of law has been excluded because it is considered insufficiently important to merit public funds, because there are alternative sources of funding or because the procedure is simple enough that litigants can present their case without assistance. We therefore intend to abolish the Public Interest rule as a means of bringing back cases into scope proposed in the consultation.

127. However where a case is in scope, and therefore the type of proceeding is a priority for funding, it is our intention that public interest will remain as a relevant feature in the merits criteria, thus allowing the benefit to other individuals to be taken into account in the funding decision.

Tort & Other General Claims

128. Legal aid is available for legal advice and representation for a variety of tort claims arising from a civil wrong, including assault; negligence; nuisance; breach of a statutory duty; false imprisonment; and malicious prosecution. These claims may involve a civil action between private individuals or brought against a public authority; for example, relating to an education or housing matter. These claims can arise in any of the other categories of law; for example educational negligence, police assault, false imprisonment in a mental health context. These cases are typically concerned with recovering damages; for example tort claims for damages (or an injunction) and would include, for example, a claim for damages under the Human Rights Act 1998.

129. The consultation proposed that claims concerned primarily with recovering damages would not normally justify funding and that these types of claim should be excluded from scope in all categories of law, including those categories that we were proposing to retain generally in scope. The exceptions were claims relating to a contravention of the Equality Act 2010, cases that met the proposed new criteria for claims against public authorities and claims arising from allegations of abuse or sexual assault where we proposed that related damages claims would remain in scope.

Key issues raised

130. Those respondents that commented on this proposal argued that claims brought against public authorities were an essential means of holding the state to account – for example assault or false imprisonment claims brought against police or prisoner officers, malicious prosecution cases brought against the Crown Prosecution Service or other prosecuting agency (for example, Environment Agency).

The Government's response

131. While legal aid may be of assistance in holding the state to account in certain cases, we need to prioritise funding, and we have proposed focusing it on other claims with special features which give them an importance beyond money (for example, discrimination and abuse claims), or on more serious claims against public authorities (other than judicial review or other similar remedies) where these concern a significant breach of human rights, or an abuse of position or powers. We also intend to retain claims against private and public parties where these concern allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault. We intend to retain the most serious claims against public authorities in scope, and in stronger excluded cases, alternative sources of funding will be available, such as CFAs. We do not consider that litigants bringing the remaining cases are likely, in general, to be especially vulnerable,[55] or that they will be unable to present their own case.

132. The Government therefore intends that these cases should be excluded from scope, as originally proposed in the consultation paper.

Inquests

133. As set out at paragraph 4.152 of the consultation paper, we intend to repeal section 51 of the Coroners and Justice Act 2009. This would have amended the Access to Justice Act 1999 to bring advocacy at certain inquests into scope of the legal aid scheme. We have though decided to retain a significant wider public interest criterion for advocacy in inquest cases, as part of the exceptional funding test.

[55] Ibid.

Conclusion

134. For the reasons set out in Annex A, and above, the Government intends to retain within and remove from the cope of legal aid the following cases and proceedings:

1. Cases and proceedings retained within the scope of legal aid.

i) asylum;

ii) asylum support where accommodation is claimed;

iii) claims against public authorities (other than judicial review and other similar remedies), concerning a significant breach of human rights, or an abuse of position or power;

iv) claims arising from allegations of abuse and sexual assault;

v) community care;

vi) debt (where the client's home is at immediate risk), including involuntary bankruptcy and orders for sale of the home;

vii) domestic violence and forced marriage proceedings;

viii) family mediation;

ix) housing matters where the home is at immediate risk (excluding those who are "squatting"), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;

x) immigration detention;

xi) appeals to the Special Immigration Appeals Commission

xii) international child abduction (including orders both to recover a child and those to prevent international abduction);

xiii) international family maintenance;

xiv) mental health, including mental capacity issues currently in scope;

xv) Special Education Needs cases (currently within scope)

xvi) private family law cases involving domestic violence and private law children cases involving child abuse;

xvii) public law cases (judicial review and other similar remedies) other than representative actions and certain immigration and asylum judicial reviews);

xviii) public law children cases;

xix) registration and enforcement of judgments under European Union legislation;

xx) representation of children in rule 16.2 (and 16.6) private law children cases;

xxi) miscellaneous proceedings: confiscation proceedings, injunctions concerning gang related violence, Independent Safeguarding Authority Appeals (care standards), Legal Help at Inquests, proceedings under the Protection from Harassment Act 1997, and quasi criminal proceedings;

xxii) discrimination cases that are currently within scope (claims relating to a contravention of the Equality Act 2010);

xxiii) environmental cases;

xxiv) European Union cross border cases; and

xxv) appeals to the Court of Appeal and Supreme Court, and references to the European Court of Justice, where the area of law to which the appeal relates remains in scope).

2. Cases and proceedings removed from the scope of legal aid.

i) asylum support (except where accommodation is claimed);

ii) clinical negligence;

iii) consumer and general contract;

iv) Criminal Injuries Compensation Authority cases;

v) debt, except in cases where there is an immediate risk to the home;

vi) employment cases;

vii) education cases, except for cases of Special Educational Needs;

viii) housing matters, except those where the home is at immediate risk (excluding those who are "squatting"), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court;

ix) immigration cases (non-detention);

x) miscellaneous (specified matters): appeals to the Upper Tribunal from the General Regulatory Chamber of the First- tier Tribunal, cash forfeiture actions under the Proceeds of Crime Act 2002, legal advice in relation to a change of name, actions relating to contentious probate or land law, court actions concerning personal data, action under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, and legal advice on will-making for (i) those over 70 (ii) disabled people (ii) the parent of a disabled person and (iv) the parent of a minor who is living with the client, but not with the other parent, and the client wishes to appoint a guardian for the minor in a will;

xi) private family law (other than cases where domestic violence or child abuse is present);

xii) tort and other general claims, and

xiii) welfare benefits.

135. In addition, the rule bringing back into scope any case of wider public interest will be abolished.

Annex C: Other reforms to the scope of legal aid

Introduction

1. This section considers responses to the consultation proposals on interim lump sum orders, exceptional funding, the merits test, and litigants-in-person.

Interim lump sum costs orders to fund legal services in ancillary relief proceedings

2. The consultation asked:

   Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party?

3. There were 1,417 responses to this question. 1,090 (77%) supported the proposal, 265 (19%) disagreed, and 62 (4%) neither agreed nor disagreed.

Key issues raised in consultation

4. Responses on this question were mainly from legal practitioners, and while the majority supported the proposal, many pointed out that it would only have a practical application in a very small number of cases. It was also argued that any potential applicant would need funding for advice on whether such an application could be made. More detailed points made by respondents about how the proposal would operate included:

   - interim lump sums would only be viable in a small proportion of cases where sufficient realisable assets are available for two sets of legal fees, and this would not be an option in middle income cases where the matrimonial home or pension entitlement were the only assets at stake, or where the wealthier party has hidden their assets or tied them up in a company or trust;
   - unrepresented parties would not be aware that they could get an interim lump sum and would not know how to apply for one, including how to establish and prove their partners' assets;
   - interim lump sums may not be paid as ordered;
   - the proposal could generate satellite litigation to deal with interim lump sum orders and could increase conflict, which would have an impact on the courts, particularly where a party is litigating in person;
   - these points led to calls for legal aid for applications for interim lump sum orders and for enforcement;

- interim lump sums would deplete the assets available to both parties for re-housing on separation;
- there is a risk that the receiving party would litigate unreasonably after receiving an interim lump sum;
- the statutory charge for legal aid was a better mechanism for funding, and better enforcement of the statutory charge could ensure that the LSC recouped its expenditure;
- there was potentially unfairness in making orders for costs before the issues at stake were determined, and the contributing party could be left without an effective remedy if the final outcome of the case is that the lump sum should be refunded;
- some consultation responses called for interim lump sum orders to apply in Schedule 1 Children Act 1989 applications for financial provision for children. Respondents, including the Family Justice Council, called for interim lump sum orders to be available for purposes other than legal costs, such as for accommodation or to repay pressing debt (for example, where there is a threat that the home could be repossessed).

The Government Response

5. The Government accepts that this reform will not apply in all cases, but considers that it has the potential to provide a route to private funding of legal costs in some cases currently funded by legal aid.

6. The Government considers that many of the issues that would arise in applications for and enforcement of interim lump sum orders would be akin to those that arise in ancillary relief cases themselves. For this reason, we have decided that applications for interim lump sum orders will not be in scope for legal aid.

7. We consider that giving the Court this power will encourage parties to settle disputes between themselves and help to address the potential unfairness that might arise if a party of greater means seeks to draw out a dispute in the knowledge that the other side cannot afford the same level of legal representation. It will be for the Court to consider whether it is appropriate to make an interim lump sum order, taking into account the circumstances of the case.

8. Amending court powers to enable the Court to make interim lump sum orders for other purposes such as accommodation would not meet the objective behind the proposal in the consultation: namely to address the financial imbalance of the parties which may disadvantage one party in the proceedings. It would also extend beyond the remit of the consultation.

9. This new power would codify the operation of powers already used by the courts in ancillary relief proceedings to make provision for legal costs as part of maintenance pending suit. It would also extend it so as to allow for

lump sums, but not so as to allow for such orders to be made outside the context of ancillary relief. The courts have not in the past made provision for costs as part of interim maintenance in disputes about financial provision for children, and the Government is not persuaded that these new powers should be available outside the ancillary relief context.

10. For the reasons set out above, the Government has decided that:

    - the proposed changes to courts' powers to make interim costs orders in ancillary relief cases should be implemented;
    - these powers should not be available for purposes other than for legal costs, or in disputes about financial provision for children outside an ancillary relief context; and
    - applications for interim lump sum orders and their enforcement should not be in scope for legal aid.

Exceptional funding

Introduction

11. The consultation asked:

    Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention in Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases.

12. There were 1,506 responses to this question. 641 (43%) agreed with the proposal, 720 (48%) disagreed and 145 (10%) neither agreed nor disagreed.

13. There was general agreement among respondents that the UK must fulfil its legal obligations, and that an exceptional funding scheme is better than no legal aid provision at all. However, more respondents did not support the proposal to change the existing exceptional funding scheme, and objected to the narrowing of the funding criteria. A minority expressed support or qualified support for the proposals.

Issues raised – underlying rationale for proposals

14. Most respondents opposed the proposed scope restrictions, and this set the background for a significant number of responses about exceptional funding.

15. Shelter Cymru argued that the scope proposals would result in a loss of provider expertise, making it more difficult for clients to find experienced practitioners who can identify and progress important exceptional cases.

16. Some respondents (including the Public and Commercial Services Union and the Public Law Project) disagreed with the idea that exceptional funding should be provided only on a minimal basis to comply with the Government's legal obligations. The North Eastern Circuit argued that legal obligations will change over time, and that there will be backlogs of cases in the European Court of Human Rights as a result.

17. A range of respondents, including the Law Society, argued that proposals for a narrow exceptional funding scheme would preclude the funding of other deserving cases. The Bar Council and others argued that, in many cases, clients will be unable to obtain Conditional Fee Agreements (CFAs) because of their fundamentally commercial nature, and because of costs recovery issues.

18. A range of respondents (including the Discrimination Law Association, the Immigration Advisory Service and Young Legal Aid Lawyers) argued that cases which the Government is legally obliged to fund should not be treated as exceptional.

The Government response

19. The Government recognises that many consultees have concerns about the proposed scope restrictions and their implications for exceptional funding. We are aware of consultees' concerns that the new exceptional funding scheme should extend to the funding of excluded cases which are meritorious but do not engage our legal obligations to provide legal aid: for example, those cases having an overwhelming importance to the client or which have a significant wider public interest. However, as the consultation document stated, the scope proposals were designed to take into account some of the considerations included in the current exceptional funding criteria. The areas of law which will be retained in scope reflect those that are more likely to include cases featuring these characteristics. For example, we have retained funding for cases involving the client's life, liberty, physical safety or homelessness as well as for categories of law in which cases genuinely have the potential to yield significant wider benefits to the public.

20. The Government recognises that some consultees are concerned that individuals will not be able to take advantage of CFA for excluded cases. We consider that, where a CFA is available for an excluded case, exceptional funding should not be provided. All legal aid applications, for both in-scope and excluded cases, will be subject to the civil legal aid merits test, which will consider the availability of alternatives to legal aid. Where the merits test is met, the exceptional funding criteria are met, and a CFA is not available, exceptional funding will be provided.

21. The Government recognises that some consultees have raised concerns about maintaining a sufficient pool of legal aid practitioners with suitable experience and expertise. Market sustainability is considered in more detail in Annex F, but part of the Government's approach to ensuring a sustainable market in legally aided services includes the development by

the Ministry of Justice (MoJ) and the Legal Services Commission (LSC) of a client and provider strategy.

22. In the longer term, the Government intends to introduce competition for legal aid services, as was proposed in Lord Carter's review during 2006. Initially, we intend to introduce competition in the procurement of criminal legal aid services. We intend to consult on the detailed proposals later in the year. Subsequently, we intend to introduce competition into the procurement of civil and family services.

Key issues raised in consultation: exceptional funding criteria

23. A small number of respondents, including the Judges' Council of England and Wales, suggested that the exceptional funding criteria should be relaxed rather than tightened, because of the scope proposals.

24. A more widely held view (reflected in the responses of the Bar Council, the Child Poverty Action Group, the Council of HM Circuit Judges and Shelter, inter alia) was that the existing criteria should be retained, as they provide valuable flexibility for funding deserving cases.

25. A number of respondents (including the Association of Child Abuse Lawyers, the Bar Council and Citizens Advice) argued that public interest cases are a proper and necessary use of public funding which develop the rule of law and prevent similar claims from being contested.

26. The North Eastern Circuit held that it would be inconsistent to fund hospital death inquests on Significant Wider Public Interest (SWPI) grounds, but not clinical negligence cases where a child has been seriously damaged by hospital failings.

27. A small number of respondents (including Action Against Medical Accidents, the Education Law Association and the Social Security Practitioners Association) stated that the current scheme rarely grants exceptional funding for certain case types, and that tightening the funding criteria would increase difficulties in obtaining effective access to the courts.

28. A range of respondents (including the Disability Law Service, the Law Centres Federation and the Law Society) argued that the new scheme must take account of the client's capacity to represent themselves, particularly in complex cases. The Law Society also stated that exceptional funding should be provided where clients cannot fund the necessary experts' reports. They also suggested that clients who would be financially ineligible for legal aid under the means proposals would claim that they are denied effective access to the courts if they cannot obtain exceptional funding.

Key issues raised: specific category issues

29. **Clinical Negligence**: some respondents said that the new scheme must grant exceptional funding for the most serious clinical negligence claims (Forum of Complex Injury Solicitors). Respondents also said that exceptional funding will not provide a safety net for these cases, and it would be futile if the funding test requires the solicitor "to produce a complement of reports to show the case had merit" (Action Against Medical Accidents).

30. **Welfare Benefits**: respondents argued that the introduction of the universal credit will lead to a number of Upper Tribunal cases to clarify the new rules. These will require legal representation (Child Poverty Action Group). If clients cannot get funding, only the Department for Work and Pensions (DWP) will be able to advance legal arguments in welfare benefits cases (Social Security Law Practitioners Association).

31. **Family**: respondents said that article 6 issues will arise in many family matters, including finance cases, and urgent family issues cannot wait for exceptional funding decisions to be resolved (Resolution). Many family cases will require exceptional funding on article 8 ECHR grounds (many solicitors and barristers).

32. **Immigration**: respondents suggested that overwhelming importance to the client be retained and taken to include the right to remain in the UK where a disproportionate breach of article 8 or other European Union law may otherwise occur (Immigration Advisory Service).

33. **Housing**: respondents said that exceptional funding should cover re-housing cases that are likely to progress to judicial reviews (Association of Women's Solicitors).

34. **Business Cases**: significant wider public interest cases should be retained, but refined to exclude business cases specifically (Social Security Law Practitioners Association).

The Government response

35. The Government recognises that some consultees are concerned that funding should be available for excluded cases which require legal aid in order to meet our legal obligations. The new exceptional funding scheme has been designed to provide funding for excluded cases where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law.

36. The Government acknowledges that many consultees are keen to retain the existing exceptional funding criteria. However, as the consultation document explained, the Government has factored significant wider public interest considerations into the scope proposals. The Government considers that individual cases that genuinely have the potential to yield significant wider benefits to the public are most likely to arise in

categories of law which will be retained in scope (for example, claims against public authorities). In addition, the Government has prioritised cases which concern life, liberty, physical safety or homelessness. The Government therefore considers that the new exceptional funding scheme will not require the 'overwhelming importance to the client' criterion or the 'significant wider public interest' criterion for non-inquest cases.

37. The Government recognises that some consultees are concerned that the new scheme should take account of the individual client's capacity, as well as the complexity of the case. The requirement to consider these factors is well established in case law on article 6 ECHR, and is reflected in the '*Jarrett* complexity' criterion which is part of the existing exceptional funding scheme. Exceptional funding decisions will continue to take account of these factors, among others.

38. The Government acknowledges that some consultees believe that it would be inconsistent to retain 'significant wider public interest' as a funding criterion for inquest cases but not for clinical negligence cases. However, the Government considers that inquests, by their very nature, are concerned with different issues than clinical negligence claims or any other civil litigation and that the nature of the proceedings in inquest cases is unique. In the Government's view, providing exceptional funding in certain inquests where the 'significant wider public interest' criterion is met may help to prevent future deaths. The 'significant wider public interest' criterion will be retained for inquest cases only.

Key issues raised: scheme operation and cost implications

39. A number of respondents (including the Council of HM Circuit Judges, the Law Society, the Legal Action Group and Liberty) argued that exceptional funding decisions must be made independently, particularly for cases brought against the Government. It was also suggested that the judiciary could have a role to play in recommending funding in particular cases.

40. Action Against Medical Accidents and Citizens Advice asked how the Government's human rights obligations would be determined in practice.

41. A small minority of representative groups (including the Bar Council Civil Legal Aid Sub-Committee) expressed concern that the number of cases qualifying for exceptional funding would be very low, especially compared with the volume of cases that would be removed from scope.

42. The converse view – that so many cases would require exceptional funding that it would become routine – was much more widespread among respondents, who also raised issues about the practicalities of the process. A wide range of groups (including EAGA plc, the Equality and Human Rights Commission and the Law Society) stated that the new exceptional funding scheme would be inundated with applications (including those from litigants-in-person) and expressed concerns about

bureaucracy, costs, delays, staffing and the handling of urgent applications.

43. A number of respondents (including the Immigration Law Practitioners' Association, the Judges' Council of England and Wales and Shelter) were concerned about satellite litigation stemming from exceptional funding decisions, and the potential costs for legal aid and the wider justice system.

44. A range of respondents (including the Bar Council Civil Legal Aid Sub-Committee, the Law Centres Federation and the Legal Aid Practitioners Group) expressed concerns about Legal Help. It was argued that clients would require Legal Help to apply for exceptional funding, and that the funding of Legal Help itself under the new scheme would mean that the fixed fee sought would be exceeded by the cost to the provider in many cases.

45. A wide range of groups (including the Bar Council, the Law Society and the Legal Action Group) argued that the details of the new exceptional funding scheme should be subject to a further consultation. In addition, some respondents argued that the types of case which would automatically qualify for funding should be clearly set out.

The Government response

46. Many consultees raised issues about the volume of exceptional funding applications that might be received under the new arrangements, and the time that would be required to process these applications. The new legal aid agency will be processing all legal aid applications (for both in-scope and excluded cases). The Government envisages that the process will therefore be simpler and more streamlined than under the existing two-stage exceptional funding scheme. Currently, all exceptional funding applications are dealt with by the LSC in the first instance. While the LSC has delegated powers to authorise funding for certain inquest cases, all other individual cases where the LSC considers that exceptional funding is justified are passed to MoJ for a final decision.

47. The Government understands that some consultees are concerned about the independence of the decision-making process under the new exceptional scheme. The Government intends that decisions on the funding of individual cases, including cases funded through the exceptional funding mechanism, will be taken by the Director of the new legal aid agency, subject to criteria and guidance issued by Ministers. Ministers will be prevented by statute from giving the Director directions about funding in an individual case. In the Government's view, this achieves the appropriate level of independence in decision making on individual cases.

48. The Government recognises that consultees are keen to know about the details of the new exceptional funding scheme. Full details of the operation of the scheme will be published in due course.

49. The Government acknowledges the points raised by consultees about satellite litigation. The Government anticipates that the volume of exceptional funding applications received will increase significantly under the new scheme, at least in the short term. In addition, it is likely that clients who are refused exceptional funding under the new scheme will seek to test the boundaries of the scheme through judicial reviews, which will be retained within the scope of legal aid.

Conclusion

50. The Government has carefully considered all the arguments raised by respondents, including the individual respondents and the representative bodies referred to above. The Government has decided that the existing exceptional funding scheme should be replaced with a more narrowly drawn scheme which will provide funding for excluded cases where, in the particular circumstances of a case, the failure to do so would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or European Union law, and that consequently:

    - the current "significant wider public interest" exceptional funding criterion will be retained for inquest cases but abolished for non-inquest cases; and
    - the current "overwhelming importance to the client" exceptional funding criterion will be abolished for non-inquest cases.

Merits test: availability of alternative sources of funding

Introduction

51. The consultation paper asked:

    Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement?

52. There were 1,285 responses to this question. 387 (30%) agreed with the proposal, 764 (59%) disagreed and 134 (10%) neither agreed nor disagreed.

Key issues raised in consultation

53. The respondents in general recognised that where alternative sources of funding are available this should be the first port of call. Key issues raised by the respondents were as follows:

    - it was not clear how 'suitable' would be defined and on what criteria the LSC would base their decision. They queried whether funding would be available if, for example, the case was suitable in theory for funding on a CFA but not in practice, or if a case was refused by one

- there was concern that in certain areas CFAs will not be available or suitable such as re-housing applications and welfare benefits and debt advice;
- some respondents (Law Society) acknowledged that it is acceptable for public funding to be a last resort to secure access to justice and that where a case could be pursued on the basis of a CFA, this was a legitimate basis on which to refuse public funding. However, they argued that a CFA must be available in the individual case, and on reasonable terms, and not just generally for cases of that type;
- funding cases under a CFA, following implementation of Sir Rupert Jackson's recommendations, is going to be less likely and solicitors will be less inclined to take on meritorious but riskier cases than they are now.

The Government response

54. In general, there was no objection to alternative forms of funding being explored. In disagreeing with the consultation proposal, the points that the respondents raised were mainly about the criteria that the LSC will apply to establish whether the individual case is suitable for an alternative form of funding. The LSC already has a power to refuse legal aid on this basis, and we do not therefore consider that the practical objections are significant.

55. For these reasons, the Government has decided that the merits criteria should be amended as set out in the consultation paper so that funding in any individual case can be refused if it the case is suitable for an alternative source of funding.

Litigants-in-person

Introduction

56. In the consultation document we asked:

    Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants-in-person and the conduct of proceedings.

57. 1,665 respondents offered suggestions on the likely impact litigants-in-person would have.

Key issues raised

58. Many respondents, including members of the judiciary, argued that the programme of reform, and in particular the scope changes, would lead to an increase in the numbers of litigants without representation "litigants-in-person" representing themselves in court, and that this would have a negative impact on the conduct and outcome of proceedings.

The Government response

59. In the consultation paper we undertook to review the research available on litigants-in-person, and their impact on the conduct of and outcome of proceedings. The Government has completed its review, which we have published separately today.[56]

60. The review found some good quality evidence, however it was limited. In addition, much of the evidence was also from outside the UK and so is not based on our justice system. The findings therefore provide useful indicators of the types of motivations, problems encountered and outcomes for litigants-in-person rather than conclusive evidence of these.

Who are litigants-in-person and what are their motives?

61. The research highlights that the term "litigants-in-person" covers a wide range of situations. Individuals without representation may have received varying degrees of legal advice; may have chosen to litigate or had claims brought against them. In addition they may or may not have participated in proceedings. The main research looking at England and Wales remains the 2005 study conducted on behalf of the then Department for Constitutional Affairs, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*. This found that litigants-in-person were common in civil and family cases. However many unrepresented litigants, particularly in civil cases were inactive. While the review aimed to focus on active participants, it was not always possible to differentiate between these groups in the evidence.

62. While inability to afford a lawyer or lack of legal funding were identified as reasons why parties were unrepresented, there were other reasons. These included believing the matter was simple enough to handle on their own, that it was unnecessary in some types of proceedings to require legal representation and dissatisfaction with lawyers.

63. Respondents to question 6 (or to the questions on scope) suggested that the proposals would increase the number of litigants-in-person, that cases would take longer and that those involved would have worse outcomes. However, the evidence provided by respondents was either anecdotal or based on the 2005 study.

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[56] See footnote 19 above.

Impact of litigants-in-person on case outcomes

64. The evidence from the evidence review on the impact of litigants-in-person on case duration was mixed. This was affected by the case type and how active the litigants were. It suggested that cases took longer when the unrepresented litigant was active but could take less time when the litigant was inactive.

65. A number of studies investigated assistance for litigants-in-person, presenting positive findings on litigant and court staff satisfaction where such assistance was received. We know little about the impact of such assistance on case outcomes however.

66. Our review found that litigants-in-person could face problems in court, such as understanding evidential requirements. It also suggested participants could find the oral and procedural demands overwhelming. Research with court staff, the judiciary and other parties' representatives suggested they felt compensating for these difficulties created extra work for them.

67. The weight of the evidence indicates that lack of representation negatively affected case outcomes. There were indications that in some cases specialist lay representatives were as effective as legally qualified representatives. The report highlighted that we do not know how the quality and longevity of outcomes compare for litigants-in-person to those who are represented.

68. The review does suggest there may be adverse impacts on outcomes for litigants-in-person but it is not always certain whether this was due to lack of representation or case complexity. The evidence from the review does not conclusively prove whether outcomes for people who subsequently represent themselves as a result of these reforms will be worse than they would have been if they were represented. However the Government does accept, even if there is no conclusive evidence of this, the likelihood of an increase in volume of litigants-in-person, and potentially some worse outcomes for them materialising. But it is not the case that everyone is entitled to taxpayer funded legal representation for any dispute or to a particular outcome in litigation. Our new exceptional funding scheme will mean that no one will be deprived of their fundamental rights of access to justice. Taxpayer funded representation has had to be targeted on priority areas.

69. Litigants-in-person are a feature of the current justice system. Some people choose not to be legally represented because they consider it unnecessary or that they can do a better job themselves, and others, who may fail to qualify for legal aid on either means or merits grounds, may feel that they are unable or unwilling to pay for representation.

Current assistance available to litigants-in-person includes:

70. As has been mentioned previously litigants-in-person are a current aspect of the justice system and there is assistance available which will continue. Examples of the assistance (and other options available) available includes:

    - the simplification of court documents where this is possible, for example, the simplification of divorce forms completed in April. Court forms are available on DirectGov and from the courts;
    - making guides available through DirectGov and the courts. For example, MoJ will shortly produce a written guide in relation to disputes between parents about the arrangements for children following divorce or separation. This will be available through DirectGov and the courts;
    - assistance given by court staff and judges on procedures;
    - additional help for those who have particular needs, for example the availability of sign language in court;
    - the principles set out in Court of Appeal decisions[57] that a litigant who is not legally represented has the right to have reasonable assistance from a layperson, sometimes called a 'McKenzie Friend';
    - online forums offering support;
    - low cost legal services such as on-line help to complete court forms for a specified cost;
    - increased availability of legal expenses insurance.

71. As noted above the existing system provides some assistance to litigants-in-person and we are committed to improving the system further.

72. The Government is not complacent about the risks to outcomes for litigants in person. We do accept, even if there is no conclusive evidence of this, the likelihood of an increase in volume of litigants-in-person as a result of these reforms and thus some worse outcomes materialising. But it is not the case that everyone is entitled to legal representation, provide by the taxpayer, for any dispute or to a particular outcome in litigation. In individual cases where the failure to provide legal aid would result in a breach of an individual's rights under the Human Rights 1998 or European Union law, exceptional funding will be available. As necessary access to justice is protected by exceptional funding, taxpayer funded representation has to be targeted on priority areas.

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[57] McKenzie v McKenzie [1970] 3 All ER 1034, R v Leicester City Justices ex parte Barrow & ors, [1991] 3 All ER 935, R v Bow County Court, ex parte Pelling [1999] 4 All ER 751. See also Collier v Hicks (1831) 2 B & Ad 669.

73. We will continue to provide assistance to litigants-in-person, such as that mentioned above. However, the Government will encourage the use of alternatives to court to avoid the need for people to represent themselves. Maintaining legal aid for family mediation will provide an incentive for parties to pursue that route. We are working with providers of mediation services on plans to increase awareness and use of mediation and to help people to better understand the options available to them. Information about mediation is currently available on the MoJ website and other online sources.

74. However, the Government recognises that further examination of the system to support litigants-in-person is required and we intend to review this issue.

Annex D: Community Legal Advice Telephone Helpline

Introduction

1. In the consultation paper, we asked five questions about three proposed changes to the future provision of advice and information services by telephone. The three proposed changes were:

    - Proposal 1: Establish the Community Legal Advice (CLA) helpline as the mandatory single gateway to civil legal aid services for all areas of law remaining in scope.
    - Proposal 2: Expand the range of areas of law for which specialist advice is offered through the CLA helpline to cover all areas remaining in scope.
    - Proposal 3: Offer callers who are ineligible or who are out of scope access to a paid-for advice service through the Community Legal Advice (CLA) helpline.

2. On 7 January 2011 the Government published a document entitled: *Provision of advice and information services by telephone: clarification and background.*[58] The document clarified that clients would not be required to first ring the helpline in emergency cases and asked for views on what would constitute an emergency case.

3. The Community Legal Advice helpline currently provides legally aided advice and information in a number of areas of law. It is not currently mandatory to use this helpline in order to access civil legal aid advice services.

Establish the Community Legal Advice (CLA) helpline as the mandatory single gateway to civil legal aid services

4. The consultation asked:

    Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.

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

    Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

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[58] See footnote 20 above.

5. There were 1,956 responses to question 7. 69 (4%) agreed with the proposal, 1,690 (86%) disagreed, and 197 (10%) neither agreed nor disagreed. 1,365 respondents provided views sought in question 9, and 931 respondents made suggestions in response to question 10.

6. Responses on these questions came from a wide range of organisations, including representative organisations, legal practitioners, and not-for-profit advice organisations. There was strong opposition to this proposal for a mandatory single gateway across most of the responses. The mandatory single gateway means that if a person wants legally aided advice in a particular area of law the person will be required to telephone the helpline in order to apply for legal aid.[59]

Key issues raised in consultation

7. **Access to Justice and the importance of face-to-face contact**: a widely held view was that a mandatory single telephone gateway would restrict access to justice for those clients who would have difficulty using a telephone based service. This could lead to some clients failing to take action to resolve their problems. These included the following examples:

   i) people who did not have easy access to a telephone (particularly a landline);

   ii) people who did not have the necessary privacy to make the call including situations where the client was detained or lived in residential care;

   iii) people with communication difficulties, including callers who did not speak English, had low levels of literacy, or people who lacked the ability to express themselves or understand information given by telephone;

   iv) people who could not afford the cost of the call or would have problems accessing call back services. Many respondents also pointed out that call costs for mobile 'phones can be considerably higher than for landlines;

   v) people with multiple or particularly complex problems which could be more difficult for advisors to handle over the telephone;

   vi) people with problems where the subject matter is particularly sensitive or where they need additional emotional support;

[59] It should be noted that calling the mandatory single gateway will only be the first stage in the legal aid application process. The operator service will make an initial assessment of whether the caller is financially eligible for legal aid and whether their problem falls within the scope of legal aid. Specialist advice providers, whether telephone or face-to-face, will still be required to complete the legal aid application process on behalf of the client, for example by assessing the merits of the client's case or seeking evidence to confirm financial eligibility with the client.

vii) problems where the advisor would need to see documentation in order to give effective advice.

8. **The quality of diagnosis and screening**: many respondents had concerns about the level of training and accreditation that call operators would be required to meet and how ongoing quality would be monitored. A few respondents felt that these factors would lead to an increased risk of professional negligence and claims against the state. Many respondents were also concerned that the nature of a telephone service would make it more difficult or impossible to screen callers effectively, to identify all relevant issues and to diagnose problems. Specific examples given included checking caller identity, completion of conflict of interest checks, identification of multiple problems and risks to the caller's welfare including domestic abuse or instances where a client may be acting under duress. In addition, many respondents felt that it would be difficult to ensure effective screening of callers to confirm financial eligibility.

9. **Using a preferred advice provider**: many respondents suggested that individuals seeking civil legal aid advice should not be denied the choice to go to their preferred provider using their preferred means of access, particularly in instances where they had previously received help and built up a relationship. A number of representative bodies and many other respondents felt that this lack of client choice may possibly contravene article 6 of the European Convention on Human Rights (ECHR). Some respondents were also concerned that many clients may fail to seek advice via the gateway in the future if they cannot access advice face-to-face or go to their preferred advice provider.

10. **Increased bureaucracy and potential delays to an individual receiving assistance, especially in emergency cases**: there was some concern that a mandatory single gateway would lead to increased bureaucracy and unnecessary delays to individuals receiving assistance. This would be particularly problematic in emergency cases. There was also concern that it would be inefficient for clients who attempted to access help from a face-to-face provider to be told that they would instead be required to contact the gateway. Some respondents were concerned about whether the infrastructure of the gateway would be adequate for the likely future demand for the service. For example, there were concerns about whether there would be sufficient capacity within the service to handle the necessary call volumes and what the service opening hours would be. Respondents identified the type of cases that should be considered as emergencies and which should not be required to go through the gateway. These included cases where there was a risk of harm to the individual or to their children, such as domestic violence cases and various types of public law children cases, and cases where legal representation would be required.

11. **Equalities legislation**: a number of respondents suggested that the proposed mandatory single gateway would contravene the Equality Act 2010 and other anti-discrimination law and equalities duties.

12. **Appropriateness for different groups of people**: a number of representative bodies and many other respondents considered that the difficulties that certain groups of people would face by using a mandatory gateway would make it difficult or impossible for those groups to access advice. This could lead to some clients failing to take action to resolve their problems. Specific examples given included:

    - younger people, including children;
    - older people;
    - homeless people;
    - people in residential care;
    - victims of abuse;
    - refugees and asylum seekers;
    - deaf and deafened people;
    - people with learning difficulties;
    - people with mental health problems, including substance abuse;
    - people in detention, including prisoners and detained patients;
    - Black and minority ethnic groups, including immigrants;
    - people for whom English is not their first language.

13. **Appropriateness for different types of cases**: a number of representative bodies and many other respondents were of the view that the difficulties that a mandatory single gateway delivered solely by telephone would present to some groups of people would make it inappropriate for the gateway to deal with certain types of cases. Specific examples included: domestic abuse cases, asylum cases, housing cases and mental health.

14. **A need for further consultation**: a number of representative bodies and individual respondents stated in their responses that they considered that the consultation contained insufficient detail regarding the helpline proposals for them to be able to comment fully. These respondents suggested that a further consultation was therefore required setting out the proposals in more detail.

15. **Savings estimates and costs**: many respondents were concerned that the estimated savings from the proposals, set out in the Impact Assessment, were overstated as the proposal for a mandatory single gateway would lead to unnecessary additional expenditure on providing the Operator Service, for example through duplication of costs where a client was initially advised by the helpline and then required a referral to a face-to-face advice provider.

16. **Impact on legal aid advice services market**: there was a concern that the proposals would restrict free trade and could create an unfair monopoly. Many face-to-face advice providers were of the view that the proposals would have a significant effect on their practices, leading to a considerable reduction in their income and impact on their future sustainability (this was a particular concern for the not-for-profit sector). This would in turn reduce the availability of face-to-face advice services for those clients that needed them.

17. **Impact on existing local referral networks and loss of local knowledge**: many legal practitioners and advice providers were of the view that the gateway would interfere with existing effective referral networks and that the gateway would not have the benefit of the local knowledge and contacts of face-to-face advice providers. Many felt that a national telephone service would not be able to meet the needs of specific local communities as effectively as existing local face-to-face advice providers.

18. **Opposition to the telephone gateway being the only entry point to the civil legal aid system**: some respondents saw benefits to a telephone gateway, even if they did not agree that it should be mandatory. For example, some representative bodies felt that a telephone gateway system might offer benefits to individuals, as it would make it easier for them to find an advice provider able and willing to take their case. However, some respondents felt that people should also be able to access the gateway online or by e-mail. Many respondents also wanted face-to-face channels to be maintained.

19. **Process for referring callers to face-to-face advice services, including the need for a clear complaints procedure**: many respondents wanted more detail on how any signposting or referral to face-to-face advice would operate in practice. Some respondents asked how the operator would deal with a caller who wanted a level or type of service, or referral to a named provider, that the operator did not consider to be suitable and the process for dealing with any ensuing complaints. Some respondents considered that an appeal process would be required.

20. **Organisations working strategically with Community Legal Advice and what form this should take**: respondents put forward a wide range of suggestions for organisations with which the Government should work strategically to develop telephone advice services and some options for the form that this should take. Examples of the form that such strategic working should take included: formal input into policy implementation and service development, facilitating referrals between gateway and other services, and sharing of knowledge, experience and best practice. Organisations mentioned included professional bodies such as the Law Society and the Bar Council, not-for-profit representative groups such as Citizens Advice and the Law Centres Federation, and local and regional advice organisations, as well as specialist organisations such as mental health charities, women's organisations and other existing helplines and not-for-profit providers.

The Government response

21. In the Consultation Paper, *Proposals for the Reform of Legal Aid in England and Wales* the Government proposed that the CLA helpline should be the mandatory single gateway to civil legal aid services. The mandatory single gateway means that if a person wants legally aided advice in a particular area of law, he or she will be required to telephone the helpline in order to apply for legal aid.

22. The Government agrees that a telephone gateway could in principle present a barrier for some people applying for legal aid advice services. However, we believe that the design of the existing CLA service and our proposed future gateway service will ensure that these barriers can be removed sufficiently for the effective delivery of the required service. Some specific examples of existing adaptations to the CLA service that will continue and will mitigate against many of the potential barriers highlighted by respondents include:

    - three-way translation services for clients with limited or no spoken English or Welsh;
    - a British Sign Language (BSL) Service available via webcam, Minicom, and Typetalk for deaf and deafened callers;
    - where clients give approval, friends, family members or other professionals can call the service on their behalf;
    - extended opening hours, including evenings and weekends, to give callers greater choice over when to access the service, to help ensure they can do so in comfort and in private. Both call operators and specialist advisors will be expected to check with clients that they can gain sufficient privacy for their call. However, callers who are in detention will be exempted from any requirement to contact the gateway in order to apply for legal aid;
    - delivery of suitable induction and ongoing training for all call operators to help ensure that they can effectively show empathy and build rapport with all callers and provide additional support where this is needed. This includes specific training on domestic abuse and child protection issues. For details of proposed requirements for specialist advice providers, see paragraph 74;
    - various call back facilities are available to help to minimise the cost of contacting the service. These include call operators and specialist advisors offering to call people back, a ‘text for a call back’ service and an online call back request service that enables callers to request a call at a time and in a language of their choice. Where ongoing contact is required, specialist advisors will agree the best approach with clients. Where needed, clients are also given a direct telephone number for their specialist advice service, so they will not be required to go through the gateway if they need to speak to their advisor again in the future;
    - data from Ofcom suggests that very few people have no access to either a landline or mobile phone. But in such circumstances a caller

could ask someone else to call on their behalf. All callers in these circumstances will be routinely offered an immediate call back. As noted above there is also a facility to book a call back online through DirectGov or text for a call back;

- finally both gateway call operators and specialist advisors will assess the specific needs of all callers on a case by case basis and will as appropriate refer them to a face-to-face advice service if this is considered necessary.

23. The Government has already clarified in the document of 7 January 2011 that there will be an exception to the mandatory single gateway in cases of emergency. In addition, the Government intends to make the following further exceptions to the mandatory single gateway:

    - cases where the client has previously been assessed by the mandatory single gateway as requiring advice face-to-face, has accessed face-to-face within the last twelve months and is seeking further help to resolve linked problems from the same face-to-face provider;
    - clients who are in detention (including prison, a detention centre or secure hospital);
    - children (defined as being under 18).

24. In the event that a client visits a face-to-face provider who recognises that the case will not be within scope for legal aid but may be eligible for exceptional funding, the application can be made straightaway without the client first phoning the helpline.

25. The Government has decided that the telephone helpline should be the mandatory single gateway for applying for legal aid and has decided that to begin with this will extend to only four areas of law. The Government will review the implementation of the mandatory single gateway for applying for legal aid in these four areas of law and use the outcome of this review to determine whether the mandatory single gateway should be expanded to other areas of law in due course.

26. The four initial areas of law are:

    - debt (insofar as it remains in scope);
    - Special Educational Needs cases;
    - discrimination cases (claims relating to a contravention of the Equality Act 2010);
    - community care.

27. The Government is confident that implementing the telephone gateway in the limited areas of law will enable better monitoring of the impact on clients and providers in order to inform future decisions regarding any potential further expansion of the gateway.

28. In selecting the areas of law most appropriate for this initial stage of the mandatory single gateway we have considered:

    - whether there was any increased risk within each area of law of clients' needs not being met by a telephone service;
    - the likely frequency of the need for Legal Representation[60] or Controlled Legal Representation[61] in an area of law;
    - the likely frequency of emergency cases in the area of law;
    - whether the existing Community Legal Advice (CLA) helpline service had any previous experience of delivering advice in the area of law.

29. For all these areas of law, we believe that it would generally be unusual for clients to require Legal Representation, Controlled Legal Representation or emergency advice. In addition, whilst we recognise that all problems can be sensitive to the individual client, we believe that the issues covered by the areas of law we have chosen are less likely to present particular concerns when compared with other case types such as domestic abuse or asylum cases, which were specifically raised as a concern by many respondents.

30. The existing CLA service already provides advice in debt and education cases, including Special Educational Needs and advice in claims under the Equality Act 2010 across all the areas of law currently available, in particular employment and education. The service does not presently offer advice in community care but we believe that there are few reasons arising from the nature of the cases currently funded by legal aid as to why advice could not be delivered via the telephone.

31. The Government recognises that when compared with the other areas of law chosen for the gateway there may be an increased proportion of clients with community care problems who could fall within the groups of clients with particular needs, and for whom telephone advice may be inappropriate. However, we believe that the potential opportunities that the gateway presents for streamlining the process for accessing help, the consistency of services available to support people with specific needs, and the safeguard that all clients will be assessed to determine whether face-to-face advice would be more appropriate and referred on as necessary will mitigate this.

32. As soon as it becomes clear that a caller requires Legal Representation or Controlled Legal Representation they will be given the option of seeking advice from a face-to-face advice provider.

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[60] See footnote 22 above.

[61] Ibid.

33. The provider of the gateway Operator Service will continue to be required to meet appropriate quality standards. Currently they are expected to meet the Community Legal Service (CLS) General Help Quality Mark and the overall CLA service has achieved the Customer Service Excellence standard.

34. The provider of the gateway Operator Service will also continue to be required to ensure that all call operators have completed an adequate induction programme before answering any live calls. The current Operator Service contract specifies the initial training required and the standard of individual performance required. This includes specific training for dealing with callers with particular needs, and conducting the means assessment. The operators do not simply follow a script but must be able to demonstrate that they can identify key words or issues from a client's description of a problem to ensure an accurate diagnosis of their legal problem. They are also expected to understand the different areas of law, including those areas within each category where a Specialist Telephone Advisor is able to advise. Additional specific training will be required to ensure that Operators are able to determine which matters are within the scope of legal aid.

35. Where an operator is in any doubt about whether a caller's problem is in scope, whether telephone advice is appropriate, or whether the caller is financially eligible for legal aid, he or she will be referred to a specialist advisor. The gateway operators will not offer the callers any advice specifically tailored to their circumstances so legal qualifications will not be a contractual requirement.

36. The current Operator Service provider is required to carry out routine call monitoring, assessment and performance management. This includes the regular review of calls by CLA specialists and these requirements will continue to be included within the contract for the future gateway operator service. The LSC will continue to monitor the performance of all contract holders appropriately.

37. With regard to the screening of callers, the gateway operator will continue to be expected to explore the caller's problem to a level sufficient to effectively refer the caller onto a suitable specialist legal advisor. Where they have any concerns about a caller's welfare they will be expected to highlight this to the specialist telephone advisor and to follow relevant protection policies (for example, the child protection policy). The gateway provider will also continue to be expected to provide adequate training to equip call operators to identify risks and support clients with specific needs, including victims of abuse.

38. The gateway will continue to complete an initial financial assessment of eligibility. Where they are assessed as eligible, callers will still need to provide evidence of their identity (or for the person on whose behalf they are calling) and means to both face-to-face and specialist telephone advice providers. Some respondents were concerned that providing such evidence to a phone service would be difficult. At present clients must

submit evidence of means, usually by post, to the specialist telephone advice provider. However, clients can receive up to two hours of advice before this evidence is submitted. A sample of specialist provider files are regularly audited to ensure that the rules are being applied appropriately and action taken if they are not. The Government recognises that this is a different approach to the one used for face-to-face advice providers who must ensure that clients provide evidence of means before giving advice. However, it ensures that telephone clients can access advice without delay. It will not be the responsibility of the gateway operator service to conduct the conflict of interest test (which will be undertaken by the specialist telephone or face-to-face advice provider).

39. The Government firmly believes that a good quality service is offered through the existing CLA helpline and that face-to-face contact is not critical to providing a good quality service. Where the telephone service operators or specialists believe that they cannot provide a quality service without face-to-face contact they will refer callers to a suitable face-to-face advice provider.

40. The Government agrees with respondents that there is some benefit to a client receiving advice from an organisation with which they have past experience and with whom they have already developed a relationship. Where a caller has previously been advised by a specific CLA provider within the last twelve months and makes a request to speak to them again for a new issue, this will be accommodated, where possible. Similarly the gateway will seek to accommodate reasonable requests by callers to speak to specific types of CLA advisors, for example where a female caller would prefer to speak to a female advisor.

41. Some representative bodies suggested that there will be lack of client choice, which will breach article 6 of the ECHR. article 6(3)(c) of the ECHR provides that everyone charged with a criminal offence has rights including the right “to defend himself in person or through legal assistance of his own choosing”.

42. The mandatory single gateway and access to specialist legal aid advice services over the telephone will apply to civil cases rather than criminal cases. Where it is determined that face-to-face advice would be more appropriate for the caller they will be given a choice (where possible) of face-to-face advice provider either from a list of suitable advice providers or a specific suitable provider known to the client. Where a client has previously been assessed by the gateway as requiring face-to-face advice, having seen a specific advice provider within the last twelve months and they would like further assistance from the same provider for a linked problem the client will be exempted from the need to access this advice initially via the gateway.

43. The Government does not believe that there will be any significant delay to an individual receiving the help they need, or any increased bureaucracy caused by the introduction of the gateway. In some cases (for example, where a client does not know which provider will be able to

help) we believe that telephone advice is likely to be quicker, even where a referral to a face-to-face provider is required. The Government believes that the diagnostic and routing service offered by the gateway will be of value to many.

44. During any initial implementation there may be some circumstances where clients may first attempt to access advice through a face-to-face advice provider rather than directly through the gateway. We will work closely with existing providers to communicate the actions to be taken in these circumstances. The Law Society included a case study regarding an instance where a child with an urgent case was referred to a telephone specialist initially. Ultimately the client was referred to a face-to-face provider but there was a concern that there was a delay in their receiving the help that they needed. Given the facts of the case the client should have been referred to a face-to-face provider at the earliest opportunity. We are satisfied that occurrences of this nature are rare within the current service and (as set out above) children will be exempt from the requirement to first contact the CLA helpline in order to apply for civil legal aid.

45. The clarification issued on 7 January after the consultation was published[62] made it clear that people with emergency cases will not be required to access services through the gateway. We have considered the views expressed in the consultation responses regarding a definition of 'emergency cases'. Many of the consultation responses suggested that the definition of emergency cases should include many matters which we have decided to exclude for now from mandatory single telephone gateway, such as private family law cases involving domestic violence. Taking into account the range of responses, as well as the current definition of emergency cases in the LSC's Funding Code, we have decided that the 'emergency cases' exception should include the following circumstances:

    'A client needs Legal Representation or Controlled Legal Representation and

    i) there is a need for an urgent injunction or other emergency judicial procedure and the advisor will be required to represent the client in person, either at a court, tribunal or other location for procedural reasons; and

    ii) there is an imminent risk to the life, liberty, or physical safety of the client or his/her family or the roof over their heads; or

    iii) any delay will cause a significant risk of miscarriage of justice, or unreasonable hardship to the client or irretrievable problems in handling the case and there are no other appropriate options to deal with the risk.'

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[62] See footnote 20 above.

46. The risk or likelihood that a client may need Legal Representation or Controlled Legal Representation in the future will not alone be an exemption to the requirement to use the gateway. However, where it becomes clear that Legal Representation will be necessary, clients will be given the option to see a face-to-face advice provider.

47. In addition to emergency cases, the Government intends to apply the exceptions to the requirement to use the mandatory gateway set out at paragraph 23 above.

48. The Government believes that in the majority of circumstances the gateway and systems in place will offer sufficient support for callers to access the most suitable advice service. However, the needs of all callers will be assessed on a case-by-case basis and where appropriate, callers will be referred to a face-to-face advice service. The key consideration will be whether the individual client is able to give instructions and act on the advice given.

49. The Government considers that issues about equalities legislation and anti-discrimination law are largely addressed by the many measures that the helpline already has in place to assist all callers, including disabled people, to access the service (see paragraph 22 for full details). Prior to implementation, we will engage with a range of groups (including those which represent disabled people) to identify any additional ways to provide reasonable adjustments for callers with specific needs. There is always a risk that some clients may not access help and advice whether by telephone or face-to-face. We will monitor levels of people accessing the gateway in comparison with current and future services.

50. The Government agrees that children (defined as being those under 18) should be afforded special protection and be exempted from the need to access advice via the gateway. Similarly, people in detention should be exempted as at present due to the particular difficulties they may face in freely accessing a private and secure phone line.

51. As noted above, several respondents suggested that there was insufficient detail in the consultation document to allow for meaningful comment. The Government addressed this concern by publishing the document referred to in paragraph 45 above, which clarified that the helpline would not be the mandatory single gateway for emergency cases and set out further information on the operation of the current CLA helpline.

52. The Government has revised the Impact Assessment to take account of the revised reform programme, using more recent (2009/10) data. In the analysis, we have allowed for the possibility that the average call length at the Operator Service may increase when compared with the existing service.

53. The Government agrees that taken together with the proposed changes to scope, the telephone proposals will have a significant impact on current

legal aid advice providers. However, the Government believes that any concerns relating to the restriction of free trade and the potential to create a monopoly will be addressed by the fact that contracts for both telephone (Operator Service and Specialist) and face-to-face services will be subject to tender processes compliant with EU regulations. The decision to limit the initial scope of the helpline gateway to a restricted number of areas of law will significantly reduce the impact when compared to the original proposal set out in the consultation paper. These changes will, we believe, also help to retain sufficient face-to-face legal aid advice services for those clients that need them.

54. The Government recognises that there may be some benefits to local knowledge in helping people to resolve their problems. However the Government believes that the telephone gateway (and the CLA helpline generally) will provide a consistent level of service to all callers irrespective of where they are located and will be of added benefit to those who cannot easily access face-to-face advice. In addition, even where the gateway is the initial entry point, appropriate cases will still be referred on to face-to-face providers where this is necessary in the interests of the client.

55. The Government agrees that there is benefit in providing access to services through a variety of channels (for example, telephone, on-line, email) and we continue to examine the way in which this can best be achieved.

56. Whether a caller is referred to a specialist telephone advisor or a face-to-face advisor, a clear and consistent referral process will be used to ensure fairness and transparency. The Government has addressed the issues regarding the processes for signposting and referral at paragraph 32 to 35 above and intends to engage with legal aid providers further on this issue.

57. Both the gateway provider and all specialist advice providers will be required to have a clear complaints process that will be made available to all callers who wish to see it. The process will make it clear how complaints will be addressed by the individual provider and the circumstances when a complaint should be escalated to the LSC or other regulatory body. We will give further consideration to how requests for a review of a decision not to refer to a face-to-face provider will be accommodated.

58. The Government already works with many of the organisations listed by respondents to question 10 as strategic partners and will consider how best to engage with those organisations with which the CLA does not currently have a relationship.

59. We believe that the existing service is operating well. Results for the latest automated survey of the CLA operator service showed that 96% of callers found the Operator Service helpful and 97% of callers would recommend the service to a friend. The 2010 survey of clients advised by

the specialist service showed that 90% of clients found the advice given by the CLA helpline helpful.

Expand the range of areas of law for which specialist advice is offered through the CLA helpline to cover all areas remaining in scope

60. The consultation asked:

    Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.

61. There were 1,698 responses to question 8. 109 (6%) agreed with the proposal, 1,366 (80%) disagreed, and 223 (13%) neither agreed nor disagreed.

62. The responses on this question were again mainly from representative organisations, legal practitioners, and not-for-profit advice organisations. Some respondents to the consultation indicated that they did not, in principle, have objections to specialist advice being delivered via the telephone service or the proposal to provide a specialist telephone advice service in other areas of law. There was however strong opposition to the proposal that in some areas of law the majority of civil legal help clients and cases could be dealt with through this channel.

Key issues raised

63. Many of the concerns and issues raised about the proposals to expand the provision of specialist telephone advice were similar to those raised for the questions relating to the gateway proposals. Many were in the context of the proposal that the telephone gateway would be mandatory in all areas of law. These included concerns that the proposals would:

    - limit access to justice and contravene human rights and equalities legislation due to the increased difficulties that many people would face in accessing specialist advice via the telephone. The Government's response to these issues is set out at paragraphs 40 to 41;
    - have a significant adverse impact on existing face-to-face advice providers, particularly the not-for-profit sector, leading to many providers withdrawing from legal aid and so reducing access to face-to-face advice provision when it was needed. The Government's response to this point is at paragraph 53;
    - restrict client choice of advice provider and means of advice and that a client may not be able to return to a specific advisor with whom they had already had a relationship. The Government's response to this point is set out at paragraph 39;

- would not be suitable for some clients such as those with hearing problems, older clients, younger clients, children, those with learning difficulties and clients at risk of abuse. The Government's response is at paragraph 22;

64. Finally many respondents expressed concern about whether the service would be suitable for emergency cases giving examples of situations that they considered would be an emergency. The Government response is at paragraph 23.

65. **Ongoing casework and representation**: many respondents were concerned that the CLA helpline would not be able to offer a specialist advice service where ongoing casework or representation was required. Many respondents were specifically concerned about the ability of specialist telephone advisors to handle more complex matters or cases involving large quantities of documentation over the telephone.

66. **Quality of specialist telephone advice provision**: many respondents were concerned that the nature of a telephone service would make it difficult to make a proper diagnosis and assessment of callers' problems and this could lead to an increased risk of incomplete or incorrect advice being given.

67. **Overstating savings figures in the Impact Assessment**: many respondents were concerned that the savings figures in the Impact Assessment were based on flawed assumptions. In particular, they argued that clients currently accessing the service have self-selected to use a telephone service (and are therefore unrepresentative of all clients) and that existing cases dealt with by telephone tend to be less complex than those dealt with by face-to-face providers.

68. **Loss of local knowledge**: some respondents were concerned that the specialist telephone advice providers would lack the benefit of local knowledge and contacts and it would be harder to tailor services to meet the needs of specific local communities in the way that local face-to-face services were able to do. Some respondents also suggested that the expansion of telephone advice could interfere with local referral networks and may provide a disincentive for providers to form links with other local organisations.

69. **Lack of Research**: many respondents were of the view that there was a lack of robust research demonstrating the benefit and outcomes of telephone advice when compared to face-to-face advice and suggested that further research be completed.

70. **Areas of law**: many respondents identified specific areas of law where they were of the view that telephone advice would be inappropriate. In most cases this was due to concerns that the needs of the majority of clients experiencing the problem would not be met through a telephone service, that many cases would be emergencies and the likelihood that a full representation service would be required.

71. There was particularly strong opposition to any proposals to offer asylum advice over the telephone in any circumstances.

The Government response

72. The Government will ensure that clients who require representation will always be given the choice to see a face-to-face advice provider where available. However, the Government is of the view that an ongoing casework service can be offered through the specialist telephone advice service and that specialist telephone advice providers can handle both complex matters and cases where there is a lot of documentation. The CLA helpline already offers this service.

73. The Government recognises that case complexity and level of documentation could present issues for some callers. For example, some clients may have greater difficulty understanding complex issues over the phone or they may lack easy means of sharing documents with their advisor. We will explore various options to mitigate the issues around handling documentation to reduce the burden and cost on the client. This will include the option for specialist advisors to refer the client to face-to-face advice services where considered necessary.

74. The Government believes that a specialist telephone advice service can offer the same level of quality service to clients as face-to-face advice providers. The existing CLA specialist telephone advice providers are required to meet the same quality standards, including supervision standards, as face-to-face advice providers and contractually a higher minimum level of achievement via peer review. It is the Government's intention that quality will continue to form part of the selection criteria for any new specialist telephone advice tender process. We will also continue to consider other appropriate standards that should be required of the providers of the CLA helpline service.

75. In the unlikely event that a client who lacks mental capacity, as defined under the Mental Capacity Act 2005, contacts the specialist telephone advice service (or the advisor believes that they may lack such mental capacity) the advice provider will need to follow relevant professional standards. However, the specialist advice service will be able to provide advice to an authorised third party (such as an attorney or court appointed deputy) who should in the majority of cases be able to access telephone advice on behalf of the client.

76. We would not expect to see any increase in claims for negligence against individual providers or the state. Specialist advice providers will continue to be required to hold suitable professional indemnity insurance and indemnify the LSC against any claims of negligence.

77. During the course of the consultation period, and after, the assumptions informing the Impact Assessment were fully re-examined and have been revised, taking into account the modifications to the proposals and the most recent available data ensuring that the risks to the assumptions

raised by respondents have been reflected in the savings range. These figures incorporate upper and lower estimates which are both estimated to achieve a net saving. The lower estimates take into account the risks associated with the savings, including the assumptions made around average case costs of telephone advice when compared with face-to-face advice and the proportion of current face-to-face clients likely to be suitable to received telephone advice. The additional cost of the gateway service has been taken into account when revising the figures.

78. There may be some situations where the specific local knowledge of advisors may be of benefit to callers. However, we do not believe that it will be a significant issue for the effective operation of the specialist telephone advice service as a whole. One of the benefits of the service will be the ability to provide a consistent level of service to all callers irrespective of where they are located. The Government recognises the importance of local referral networks. However, these do not exist in every locality. In addition, it is likely that for many advice agencies it will be easier to refer to the CLA helpline than to maintain a full list of local legal aid links for referral purposes.

79. The Government has decided that the CLA helpline will continue to offer specialist legal advice by telephone in the six areas of law that it does at present (debt, welfare benefits, housing, family, education and employment) until the proposed changes to the scope of legal aid are implemented. At that point the CLA helpline will offer specialist legal advice in the following areas of law:

    - debt (insofar as it remains in scope);
    - Special Educational Needs;
    - discrimination (claims relating to a contravention of the Equality Act 2010);
    - community care;
    - family;
    - housing.

80. Where clients access the CLA helpline through the mandatory single gateway in debt, Special Educational Needs, Discrimination (claims relating to a contravention of the Equality Act 2010) and Community Care cases, clients who are eligible for legal aid will be transferred to CLA specialist telephone advisors. We have explained above the circumstances in which callers would instead be referred to face-to-face legal aid services. For example, where Legal Representation or Controlled Legal Representation is required or where the client requires face-to-face support. But subject to these exceptions, legal aid specialist advice will only be available on the telephone. In family and housing cases callers will be able to express a preference for face-to-face or telephone services. Over time, specialist telephone advice services will be available in other areas of law remaining within the scope of legal aid.

However, we will not provide specialist telephone advice in asylum matters. The Government accepts that it is likely that very few asylum cases would be suitable for telephone advice as many of the cases concern people who are detained.

81. As explained in paragraph 25, the mandatory single gateway may be extended to other areas of law. In this event, subject to the exceptions, as explained above, legal aid specialist advice in those areas of law would only be available on the telephone.

Offer callers who are ineligible or who are out of scope access to a paid-for advice service through the Community Legal Advice helpline.

82. The consultation asked:

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

83. There were 1,445 responses to question 11. 473 (33%) agreed with the proposal, 848 (59%) disagreed, and 124 (9%) neither agreed nor disagreed.

84. Some representative bodies indicated that they did not in principle have objections to this proposal. There were supportive comments which recognised the role of the CLA helpline in simplifying the process by which clients are able to identify suitable services to help them with their case. However, other respondents considered that the helpline should solely concentrate on eligible clients. More widely, there was concern that there was insufficient detail of the proposal to allow for meaningful consultation. There was also strong objection among some respondents to the idea of referral fees.

Key issues raised

85. **Appropriateness of Government involvement in paid-for services**: some respondents felt strongly that providing access to paid-for services was not the role of the LSC and were concerned that the proposal might pose a risk regarding the financial viability of other providers on whom the LSC rely for delivery of civil legal aid services. Others considered that there was already a sufficient supply of paid-for advice at reasonable rates. Some respondents, including the Advice Services Alliance, also raised the issue of possible distortion of the legal services market.

86. **Impact on the legal services market**: some not-for-profit advice organisations, including Citizens Advice and the Advice Services Alliance, were concerned that the proposal might act as a deterrent to not-for-profit organisations from applying for CLA contracts because provision of paid-for services may conflict with the ethos and principles of their organisations. Some respondents were concerned that the proposal

would give disproportionate benefit to the organisations holding contracts to provide telephone advice. In addition, some respondents were concerned that any referral fee could disadvantage smaller suppliers and it could risk their financial viability to continue offering legal advice.

87. **Criteria for providers**: some respondents, including Citizens Advice, considered that providers should not be chosen on the level of potential income that could be generated alone but that quality of service should be the main factor. Advice Services Alliance considered that it was important that the existing quality requirements placed on CLA specialist providers should apply equally to providers offering paid-for services.

88. **Demand for the service**: other respondents, including the Law Centres Federation, considered that most individuals seeking legal aid would not be able to afford paid-for services and for this reason they were unclear how the proposal would be of benefit. Some respondents were concerned that the proposal may put off eligible clients from seeking advice from the gateway (if they believed that they would have to pay for the advice they sought).

89. **Transparency of the referral system**: in a similar vein, some respondents were concerned that there might be an actual or implied inducement on the Operator Service to refer callers for paid-for advice (which they may be unable to afford) or to a particular provider leading to a conflict of interest. Several respondents sought reassurance that the system would be transparent for clients and that, if appropriate, should be informed about the existence and amount of any referral fee.

The Government response

90. The Government has carefully considered the issues raised. The proposals represented a new approach for the LSC but the purpose behind them was to help people to access affordable paid-for advice services, alongside existing free advice services, in a seamless manner. This is likely to be of particular benefit to clients who, after contacting the helpline, find out that they are not eligible for legal aid.

91. The proposal was that clients who are eligible for legal aid and whose case is within scope will continue to receive legal aid services. As at present, those who are ineligible or have problems that are outside of the scope of legal aid will be given a range of options by the CLA Operator Service, including both paid-for and free services. The facility to be referred directly to paid-for advice would be an additional service for those that would find it helpful.

92. The Government believes that the risk of eligible clients being deterred from calling the CLA helpline could be mitigated by providing clear messages about the role of the service, emphasising that no charge will be made for callers for initial help or for specialist advice where callers are eligible for legal aid. We envisage that the range of rates payable would be transparent with indicative ranges detailed in the relevant tender

documents. We envisage that the tender process would enable advice providers to bid to provide legal aid services only or both legal aid and paid-for service. However, we do not envisage that the Government would direct particular providers to offer services at a set rate.

93. The Government has given careful consideration to the issues raised regarding competition issues. The service would only be available for clients that call CLA directly and are willing to pay for advice. The Government anticipates that the impact on the overall private client market would therefore be limited. Any provider who is able to meet the published criteria (including not-for-profit providers) would be free to bid for the relevant contracts when tendered and the tender process would need to meet EU procurement regulations and be in accordance with competition law requirements. Paid-for advice providers would be chosen following a tender process based not only on cost to clients but also the same quality requirements as those expected of legal aid providers.

94. The Government intends, if it decides to go ahead, that the relevant tenders would be designed to ensure that the organisation contracted to provide the Operator Service would not benefit financially from referring a caller to the paid-for services. In addition, the intention would be to prevent the Operator referring clients to themselves or to related organisations.

95. Having taken into account the points made by respondents to the consultation, the Government has decided not to implement this proposal at this stage but instead to run a pilot scheme. This will further examine the feasibility of offering the option to clients to pay for advice over the telephone.

Conclusion

96. Having given due consideration to the responses to the consultation, the Government has decided to:

- implement a mandatory single telephone gateway limited to the following areas of law:: debt (insofar as it remains in scope), community care, discrimination (claims relating to a contravention of the Equality Act 2010) and Special Educational Needs subject to the exceptions set out at paragraph 23;
- introduce a phased expansion of the provision of specialist telephone advice into the areas of law remaining in scope (except asylum matters); and
- run a pilot scheme which will further examine the feasibility of offering the option to clients to pay for advice over the telephone.

Annex E: Financial eligibility

Introduction

1. The consultation asked a series of questions about proposed reforms to the financial eligibility rules in civil and family proceedings which aimed to ensure that those who could afford to pay, or to contribute towards, the costs of their cases should do so.

Capital passporting

2. The consultation asked:

   Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants?

3. There were 1,331 responses to this question. 327 (25%) agreed with the proposal, 940 (71%) disagreed and 64 (5%) neither agreed nor disagreed.

Key issues raised

4. The majority of respondents opposed this proposal. They argued that it targeted those in society who had already been judged the most economically vulnerable and that it would deter vulnerable people from seeking advice and therefore impacted on access to justice.

5. A consistent response was that passporting benefits are set at a minimum level which a person needs to subsist. Many respondents argued that a more generous capital limit for those on passporting benefits is justifiable. They argued that, unlike non-passported persons, people receiving these benefits are most likely to need to draw on their savings and least likely to be able to replenish them. They are therefore more reliant on their disposable capital as a safety net and unlikely to be able to secure credit from scrupulous lenders. Citizens Advice argued that this proposal was likely to have most impact on groups reliant on savings, such as retired people or those who have received capital as a result of damages awards for personal injury. For example, the Law Society was opposed to applying the same capital eligibility rules to those receiving subsistence benefits, except where the applicant owned their home and had significant equity in the property. The Law Society was similarly opposed to applying the same capital eligibility rules to those receiving subsistence benefits, except where the applicant owned their home and had significant equity in the property.

6. Many respondents also argued that the additional administrative burden (to both providers and the LSC) of assessing the means of all applicants had not been properly quantified. It was argued that a relatively small proportion of those in receipt of passporting benefits had disposable

7. Some respondents, such as the Bar Council, took a different approach. The Bar Council argued that the distinction between capital and income was illogical and that it should not matter whether the financial resources related to capital or income. The Bar Council instead proposed a system of legal loans akin to Student Loans, arguing that this would increase the 'contribution basis' for legal aid, create an asset (a loan book) and free up more capital to fund legal action.

The Government response

8. Currently a person who receives certain income-based benefits (subsistence benefits) is automatically deemed eligible for legal aid on both income and capital grounds. However, while the legal aid eligibility rules provide that people who have more than £8,000 disposable capital are not eligible for legal aid, automatically passporting certain benefits recipients has meant that over time people who have more than £8,000 disposable capital have been awarded legal aid (as their disposable capital has not been subject to the legal aid eligibility test). This has led to a position where passported benefit recipients may be awarded legal aid even where they have up to £16,000 disposable capital. However, a person of similar income but who is not in receipt of these passporting benefits and who has more than £8,000 disposable capital is ineligible for legal aid. The capital limits for those receiving passporting benefits are de facto more generous. The consultation paper therefore proposed that applicants receiving these benefits should be subject to the same capital test as other applicants.

9. The Government recognises that many consultees have concerns about the capital eligibility test being applied to all applicants including persons receiving subsistence benefits.

10. However, the current position allows some passported clients to receive legal aid who would be found to be ineligible on capital grounds if their capital assets were assessed in the same way as other applicants. The Government believes that this is inequitable as it means that applicants with similar levels of disposable income and capital may be eligible for legal aid or be excluded from it depending on the source of income. Ensuring that the capital assets of all individuals are subject to the same eligibility test helps to ensure that limited public legal aid funds are properly focused on the most financially vulnerable clients, and that those who can afford to pay, or contribute towards, the costs of their case do so.

11. Instances of individuals having a higher level of disposable capital due to an award of damages in personal injury cases arise under the present system. In most of these cases, individuals have a sum exceeding £8,000 in a trust fund and presently there is no disregard for the damages. This proposal does not change the rules on the treatment of capital in personal injury trust funds being treated differently from the current position.

12. The Government recognises that implementing this recommendation will generate additional administrative work. We estimate that these costs are minimal and do not outweigh savings arising from this proposal.

13. Overall, it is the Government's view that applicants who are in receipt of subsistence benefits should be subject to the same capital eligibility test as other legal aid applicants, thereby focusing limited public legal aid funds on the most financially vulnerable clients. We therefore intend to implement this reform as proposed in the consultation.

Capital contributions

14. The consultation asked:

    Question 13: Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution?

15. There were 1,362 responses to this question. 318 (23%) agreed with the proposal, 941 (69%) disagreed and 103 (8%) neither agreed nor disagreed.

Key issues raised in consultation

16. Many respondents accepted in principle that:

    - it is important that litigants have some financial interest in the conduct of their case to ensure that costs are sensibly managed;
    - those who can afford to pay towards their costs should do so.

17. However, many respondents argued that many clients already have a financial stake in their case through paying a monthly contribution from income. While recognising the importance of a financial contribution, the Bar Council argued that in family law cases, among others, financial contributions by the client make no or little difference to the management of the case.

18. Many respondents argued that a £100 contribution from £1,000 of disposable capital would be likely to deter vulnerable people from seeking advice and legal aid. Some viewed this deterrent effect as a barrier to justice. Furthermore, it was argued that the proposed £100 contribution was inconsistent with the Department for Work and Pension's (DWP) approach to financial contributions from benefit payments. Some respondents highlighted that DWP approve only small weekly payments from benefits to social landlords for rent arrears. They argued that an upfront £100 payment to legal advice providers would run counter to DWP's treatment to date of benefit recipients with low income. The Law Centres Federation viewed this proposal as a punitive measure towards the very poorest in society.

19. Some respondents who are also advice providers were concerned about how the £100 would be recouped where emergency work is needed and the cash was not immediately available, as well as where the financial

risk would fall should emergency work be undertaken but the financial contribution subsequently remained unpaid by the client. Some respondents, whose role in the advice sector and community is premised on offering free advice, were concerned about how their organisations would recoup a £100 contribution (the fee would not apply at the level of initial advice, and this concern was therefore misplaced).

20. There were also concerns about the practicality and administrative costs of recouping payments, particularly where this is not presently part of the organisation's role. Several respondents questioned the costs of implementing this proposal and the number of potential applicants who may be affected. Some respondents queried whether this cost would be a one-off payment or by instalments. Many respondents also expressed concern over how the level of disposable income would be ascertained, and whether funds should be counted or disregarded which are needed for fees, payments and bills that are pending.

21. Some respondents, such as the Institute of Legal Executives (ILEX), did not object to the proposal although they questioned the impact of DWP's proposed introduction of the universal credit/ benefit. Other respondents agreed to the proposal subject to certain provisos, for example, that the applicant was not receiving income-based benefits or that the capital was 'genuinely disposable' such as cash.

The Government response

22. An important driver of this proposal was to give clients a direct financial interest in their case, making clients more likely to approach litigation in a similar way to privately paying litigants and possibly deterring unnecessary litigation. The proposed £100 contribution aimed to help underline that litigation is not cost- and risk-free, and needs to be approached proportionately.

23. The Government accepts the argument that in some cases (for example, those involving particularly emotive issues) there are likely to be drivers more powerful than financial considerations in motivating the client's interest in the conduct of their case. However, the Government's view is that this does not justify the absence of a financial interest where the client has sufficient income or disposable capital. We accept the Bar Council's arguments that in some cases, (for example, family law cases) the financial contribution may not be a significant consideration when deciding how to proceed, but we believe that clients should have a financial stake in their case wherever possible. The Government notes that the Bar Council, along with other respondents, agreed in principle that it is important for litigants to have some financial interest in the conduct of litigation in order to ensure that costs are sensibly managed. This includes litigants with limited financial resources.

24. The argument presented by some respondents comparing the £100 capital contribution to deductions that DWP takes from benefit payments for rent arrears payments to social landlords conflates the issue of income

deductions with issues of capital. As such, the Government does not find this argument against the capital contribution to be compelling. Under this proposal, free legal aid would remain targeted on the most vulnerable (individuals whose disposable capital is less than £1,000) who do not have the ability to pay towards their case.

25. The Government notes concerns from respondents such as advice organisations, whose role in the advice sector and community is premised on offering free advice, about recouping the £100 contribution. However, the £100 capital contribution would not apply at the level of initial advice, so this concern appears to be misplaced. Should, for example, law centres offer legal representation in cases, then clients of those organisations are already subject to the legal aid rules relating to contributory payments.

26. The Government is firmly of the view that people who can afford to pay, or contribute to, the cost of their case, should do so. However, we recognise that at the level of £1,000 of disposable capital individuals' assets may be highly variable in nature, and sums below £1000 may represent for many a contingency fund. We also recognise the importance of individuals saving for necessities. In addition, the collection of the fee would deliver only modest savings which would be off-set, to an extent, by the administration costs of collection. Having considered respondents' concerns we have decided not to proceed with this proposal to introduce a £100 capital contribution.

27. The Government considers that proceeding with the proposals to ensure that all applicants' disposable capital is assessed and that monthly contributions are increased will ensure that individuals with sufficient means have a financial interest in how their case is conducted.

Capital disregards

28. The consultation asked the following questions about equity and pensioner capital disregards:

    Question 14: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases?

    Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases?

29. There were 995 responses to question 14. 140 (14%) agreed with the proposal, 803 (81%) disagreed and 52 (5%) neither agreed nor disagreed. There were 784 responses to question 20. 179 (23%) agreed with the proposal, 582 disagreed (74%) and 23 (4%) neither agreed nor disagreed.

30. Under the current means assessment, significant sums associated with capital (including interests in land) are disregarded.

Key issues raised in consultation

31. The majority of respondents disagreed with the proposal to abolish the equity and pensioner capital disregards. Respondents argued that there was a fundamental difference between accessible liquid capital and equity in the main dwelling house, the latter of which is often inaccessible.

32. Respondents including the Housing Law Practitioners Association argued that those with equity in their property who receive state benefits will only be able to release the equity by selling their home, which may ultimately result in state dependence for accommodation. It was also argued that this proposal would have limited effect in increasing contributions or reducing funded cases.

33. Respondents also argued that homeowner pensioners and those living in London and the South East would be disproportionately affected. Indeed, some respondents including Shelter argued that this proposal discriminated against pensioners. A further argument offered against this proposal was that the cost of an unsecured personal loan would have a significant impact on monthly income versus expenditure and that for many this would be unmanageable. Many respondents also argued that if the Government were to abolish the capital and pensioner disregards as proposed, applications for the proposed waiver scheme were likely to become routine rather than the exception.

34. Respondents queried what mechanism would be in place to ensure that the property and its equity would be accurately valued. Questions were also raised about the administrative costs of this process. Some respondents also suggested that if these proposals were to be implemented, a formula relating to average property prices in differing zones or areas should be used.

35. Furthermore, respondents indicated that applicants involved in contested property disputes would be extremely unlikely to be able to secure any credit against the property or otherwise unlock the value of their property due to the dispute over ownership.

36. It was also argued that for contested property disputes, unless it could in some way be realised, the equity in a property should be disregarded given the likelihood that the statutory charge would apply once the dispute was resolved, against which the legal aid fund would recover the costs of the case.

37. Other respondents supported these and related proposals on capital disregards recognising that they would save costs. For example, the Institute of Legal Executives (ILEX) was of the view that generous capital limits have contributed to a media backlash against legal aid and that these proposals therefore ought to be welcomed.

The Government response

38. The Government recognises that the system of capital disregards and the waiver system are closely connected. The Government accepts that the waiver is likely to be routinely applied if these and related proposals on capital disregards were implemented.

39. The Government recognises that there may be practical difficulties with using capital in equity to fund proceedings, and for this reason a waiver was proposed. We accept, as respondents have argued, that it is likely that the vast majority of clients subject to this proposal would need to take advantage of the waiver, and therefore immediate savings would be minimal (see paragraphs 51 to 68 below on the waiver). In addition it is likely to take a number of years before charges placed on property would be redeemed. Having conducted further work during the consultation period, the Government considers that the proportion of homeowners who are eligible for legal aid is significantly smaller than originally estimated. Therefore, only a small proportion of legally-aided individuals are homeowners, and the vast majority of them would qualify for the waiver, and savings would only be delivered in the long-term. We therefore consider that this reform does not justify the additional complex and potentially expensive administrative burden it would place on individuals or the Legal Services Commission's successor.

40. The Government recognises that this may mean that people with substantial assets may still be eligible for legal aid. We acknowledge that some respondents have commented that the current system of capital disregards is generous. However, we consider that retaining the current system is capital disregards can be justified as:

    i) a relatively small proportion of home owners will be eligible for legal aid; and

    ii) they may have difficulty in releasing the equity from their property.

41. The Government has therefore concluded that the costs of these proposed reforms outweigh the benefits and has decided not to proceed with these proposals to abolish the equity and pensioner disregards.

Mortgage disregards and gross capital limits

42. The consultation asked the following questions about mortgage disregards and gross capital limits:

    Question 15: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)?

    Question 21: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped and that there should be a gross capital limit of £500,000 for all clients?

43. There were 964 responses to question 15. 346 (36%) agreed with the proposal, 550 (57%) disagreed and 68 (7%) neither agreed nor disagreed. There were 771 responses to question 21. 475 (62%) agreed with the proposal, 236 (31%) disagreed and 60 (8%) neither agreed nor disagreed.

Key issues raised in consultation

44. Respondents generally agreed that the mortgage disregard should be retained with the £100,000 limit removed. There was agreement that the gross capital limit should be higher for pensioners with low incomes. However, some respondents disagreed with the gross capital limits arguing that these are arbitrary and disproportionately discriminate against pensioners and those in London and the South East. Others were opposed in principle to the gross capital limits in property cases, considering it unnecessary due to the operation of the statutory charge.

45. Many respondents also argued that these proposals assumed that people would be able to access equity in their property and that this was not necessarily the case.

46. As with the abolition of equity and pensioner capital disregards (set out at paragraphs 28 to 41 above), some respondents queried what mechanism would be in place to ensure that the property and its equity could be accurately valued, and they questioned the relative costs and benefits of this process.

47. It was suggested by some respondents that if there were to be capital and/or property related disregards then they should reflect, as a percentage of value, the average property prices in given zones or areas, subject to minimum thresholds.

The Government response

48. Retaining the mortgage disregard limit with the £100,000 cap removed found favour with many respondents. However, introducing a gross capital limit received a much less favourable response. The Government also recognises that implementing these proposals in isolation from the other changes to capital disregards may also lead to more individuals (with relatively expensive properties but high mortgages) eligible for legal aid. This in turn may result in additional financial demands on limited public legal aid funds.

49. The proposals on the mortgage disregard and gross capital limits were developed as part of a package of proposed changes to capital disregards and the discretionary waiver scheme. However, the Government recognises that abolishing the current capital disregards and introducing the revised system set out in the consultation paper, would mean that a complex and expensive administrative system would have to be put in place.

50. The Government has concluded that, as an overall package, the limited financial benefits are outweighed by the additional administrative costs. We therefore do not intend to implement these proposed reforms on mortgage disregards and gross capital limits.

Discretionary waiver scheme

51. The consultation asked:

    Question 16: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver.

52. There were 905 responses to this question. 485 (54%) agreed with the proposal, 336 (37%) disagreed and 84 (9%) neither agreed nor disagreed.

Key issues raised in consultation

53. The majority of respondents agreed with this proposal. Of those who disagreed, the main opposition was to the creation of a gross capital limit and/or the removal of the equity and pensioner capital disregards rather than to the discretionary waiver scheme.

54. In the event of implementation of the gross capital limit and / or removal of the equity and pensioner capital disregards, many respondents stated that a discretionary waiver scheme would be essential.

55. Responses also indicated that the proposed criteria for applying the waiver set out in the consultation paper seemed sensible. Some respondents suggested additional criteria for the proposed waiver, for example, ‘physical safety, mental health, risk of neglect of harm, or possible liberty of the client’.

56. Again applications for a waiver were viewed by many respondents as likely to become routine rather than the exception. The Advice Services Alliance argued that it would be simpler if applicants could opt for repayment (or a charge) under the waiver scheme rather than requiring a discretionary decision to be made in each case.

57. It was argued the LSC would need to become the lender to eligible clients where:

    - eligible applicants were likely to find it very difficult to obtain credit to release the equity in their property; or
    - repayments would cause financial hardship even if credit were available.

58. Some respondents argued that the proposals would burden lenders as evidence of applications and refusals would need to be obtained to support the waiver application.

59. Respondents questioned the administrative costs to the legal aid body processing the waiver applications. There were also concerns that numerous futile applications for credit would adversely impact clients' credit ratings.

60. The Government proposed this waiver scheme as part of a package of proposals with those for capital disregards, recognising that there may be situations where the client may find it difficult to access their equity readily.

The Government response

61. For the reasons set out earlier, the Government has decided not to proceed with the related package of proposals to abolish capital disregards or to the discretionary waiver scheme.

Waiver conditions

62. The consultation also asked the following question on the waiver scheme:

    Question 17: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

63. There were 883 responses to this question. 363 (41%) agreed with the proposal, 395 (45%) disagreed and 125 (14%) neither agreed nor disagreed.

Key issues raised in consultation

64. Most respondents accepted that, where a waiver operated, the costs of the case should be repayable but underlined that:

    - the client should not be forced to sell their home to discharge the charge;
    - enforcement of the charge should always be postponed where the client does not have the means to pay at the end of the case;
    - discretion would be needed on enforcement where pensioners are selling their homes to purchase a smaller property as they age and using the proceeds to prevent reliance on state support for their living needs.

65. Many respondents questioned the administrative costs to the legal aid body processing and registering the charges arising from the discretionary waiver, arguing that these may negate any gains to legal aid.

66. Some respondents stated that the proposed interest rate was excessive whereas others argued that the interest rate should be capped at 8%. Others were of the view that interest should be simple interest and that the rate should be reviewed at regular intervals.

67. The Law Society argued that Legal Help cases should be exempt from the charge where there was a property worth £200,000 or less (this was a separate proposal in the consultation). It also argued that the implementation of the charge should be subject to a "de minimis" principle whereby the amount recoverable must be significantly in excess of the overall costs of administering the charge.

The Government response

68. The Government proposed this waiver scheme as part of a package of proposals with those for capital disregards. For the reasons set out earlier, the Government has decided not to proceed with the related package of reforms to capital disregards, and it is not therefore necessary to introduce consequential reforms to the waiver scheme.

Legal Help and the capital waiver

69. The consultation asked:

    Question 18: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)?

70. There were 863 responses to this question. 312 (36%) agreed with the proposal, 433 (50%) disagreed and 118 (14%) neither agreed nor disagreed.

Key issues raised in consultation

71. While most respondents disagreed with the proposal, they accepted that, in the event that the proposal to introduce a gross capital limit of £200,000 (£300,000 for low income pensioners) were implemented, the proposed waiver for Legal Help clients was reasonable.

The Government response

72. The Government proposed the waiver as part of a package of related reforms to capital disregards. For the reasons set out earlier, the Government has decided against proceeding with this package of capital disregard proposals, or to the discretionary waiver scheme.

The 'subject matter of the dispute' disregard

73. The consultation asked:

    Question 19: Do you agree that we should retain the 'subject matter of dispute' disregard for contested property cases, capped at £100,000 for all levels of service?

74. There were 831 responses to this question. 480 (58%) agreed with the proposal, 265 (32%) disagreed and 86 (10%) neither agreed nor disagreed.

Key issues raised in consultation

75. Respondents generally agreed that the 'subject matter of the dispute' disregard should be retained. Some respondents did not agree with setting the cap at £100,000. For example, Citizens Advice argued that there should be no cap for legal help cases. The rationale being that the absence of a cap for legal help cases will encourage early resolution of legal disputes. There was also concern about the impact that the proposals would have on the service to families who are not entitled to non-means tested funding.

76. Many respondents argued that the equity may be inaccessible as the party may not be able to secure a loan against it in circumstances where the assets were the subject of a dispute. A further argument was that disputed property should continue to be disregarded in its entirety for early advice. To do otherwise may mean that an applicant was ineligible (on capital grounds), which, it was argued, may reduce the prospects of an early settlement.

The Government response

77. This proposal was developed to address a deficiency in the current system that means that parties who are contesting ownership of a very expensive property may be eligible for legal aid for advice (though not representation). For this reason, although it is related to the wider proposals on capital disregards, it can be considered separately, and is not contingent on the implementation of the others. The Government believes that its implementation would serve to streamline and ensure a consistent limit is applied to different types of cases. This would ensure that limited legal aid resources are not expended on those who own high value properties but instead are focussed on those most in need. Currently, in assessing eligibility for controlled work, such as Legal Help, the value of any assets that are disputed in the proceedings is completely disregarded, meaning that extremely wealthy people can currently obtain legal aid for advice in relation to disputes about contested property.

78. While we note respondents' arguments that the £100,000 cap should not apply for legal help, we are of the view that early resolution should be an objective in all cases in so far as possible and is not contingent on the availability of free legal aid help where clients have the resources to pay for or contribute to the costs of legal advice. While we note respondents' concerns that the disputed nature of the assets may make it more difficult to secure a loan against these assets we also note that:

    i) persons seeking legal aid for representation are already subject to this £100,000 subject matter of dispute cap and as such are required to draw upon their own resources where they have sufficient assets; and

    ii) the sums required to pay for legal advice would be significantly lower than the current expectation that clients above the limits fund their own legal representation

79. Having considered the responses to the consultation, it remains the Government's view that a consistent £100,000 cap for the subject matter of the dispute should be applied to different types of cases and at all levels of service. For this reason, we have decided to retain the subject matter of the dispute disregard but to cap it at £100,000 for all levels of service, as proposed in the consultation.

Income contributions

80. The consultation asked:

    Question 22: Do you agree with the proposal to raise the level of income-based contributions up to a maximum of 30% of monthly disposable income?

    Question 23: Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase of income-based contributions? Are there alternative models we should consider?

81. There were 1,065 responses to question 22. 96 (9%) agreed with the proposal, 881 (83%) disagreed and 88 (8%) neither agreed nor disagreed. There were 668 responses to question 23. 117 (18%) favoured option 1, 21 (3%) preferred option 2, and 530 (79%) preferred neither option 1 nor option 2.

Key issues raised in consultation

82. Many respondents opposed this proposal indicating that current contribution levels were not readily affordable for clients and were already onerous. Many respondents recognised that the monthly contribution served to encourage speedier resolution to cases. However, many respondents argued that a contribution of up to 30% of disposable income was too high unless there were adjustments to the definition of disposable income, which they considered needed to be revisited.

83. Many respondents therefore argued that the Government should additionally address the disposable income criteria, although this was not covered in the consultation proposals. With regard to the disposable income criteria, several respondents commented that the definition of disposable income in the regulations:

    - allows deductions for tax and national insurance, housing costs, and small fixed amounts for employment expenses and each dependent; but
    - items of household expenditure for essential items, such as food, utilities, transport, school costs, were not covered.

84. The Legal Aid Practitioners Group argued that the discretionary power to disregard income should be reintroduced to remove a risk of non-compliance with legal obligations around ECHR and equalities, particularly in respect of disabled clients.

85. Some respondents stated that the proposal would remove up to 10% of the monthly disposable income of those who are already in the lowest income quintile.

Options

86. Of those respondents who expressed a preference, option 1 was viewed as being fairer as it better reflected the means of the clients. Under this option, the proportion of the disposable income required ranges from 0.6% to 27.8% (as opposed to 0.8% to 28.8% that clients would incur under option 2). However, even among those who expressed a preference many underlined that they viewed both options as being inequitable. The significant majority of respondents expressed no preference as they supported neither proposal.

The Government response

87. The Government expressly addressed the issue of expenditure on food, utilities and other items in the consultation paper. The Government explained that it had taken the decision not to lower the £316 threshold for financial contributions, as this threshold broadly reflects the level of subsistence benefits payments which are intended to cover the basic elements such as food, utilities and other items. As such, the consultation paper did not propose to change the criteria used to assess disposable income, and there are no plans to amend these.

88. This proposal aimed to achieve the Government's objective of increasing financial ownership of litigation and was developed to ensure that the increased contributions for low income clients were limited. However, the potential savings from this proposal are significant. By increasing the contribution of those who have the means to contribute, limited public legal aid funds are preserved to assist those who are the most financially vulnerable and do not have the means to contribute.

89. The Government does not accept the suggestion that the means test fails to take account of the position of disabled clients. Under the relevant regulations certain disability benefits, such as disability living allowance, are disregarded in calculating disposable income to reflect the extra costs incurred by disabled people.

90. Of those respondents who expressed a preference, the majority favoured option 1 as being the more equitable of the two options for increasing monthly contributions.

91. For these reasons, the Government intends to proceed with this proposal to increase the monthly income based contributions as set out under option 1 in the consultation paper.

Conclusion

92. Having given due consideration to the responses to the consultation, the Government has decided:

    i) to apply the same capital eligibility rules to applicants in receipt of "passporting" benefits as other applicants for legal aid;

    ii) to retain the 'subject matter of the dispute disregard' and to cap it at £100,000 for all levels of service;

    iii) to increase the levels of income based contributions to a maximum of approximately 30% of monthly disposable income, as set out under option 1 of the consultation.

Annex F: Legal aid remuneration: market sustainability

Introduction

1. The consultation paper made a series of proposals for reforms to criminal, civil and family remuneration, in order to reduce legal aid expenditure. Given the need to make substantial savings from the legal aid fund, changes to fees will be introduced in advance of legislation to amend the framework and the scope of the legal aid scheme. These changes to fees will therefore be subject to the requirements of section 25(3) of the Access to Justice Act 1999. This places the Lord Chancellor under an explicit duty to have regard to the need to ensure that there is sufficient supply of competent providers when setting remuneration rates. In exercising this duty, the Lord Chancellor is required to have regard to the cost to public funds and the need to secure value for money when setting remuneration rates.

2. The main issue that was identified in the consultation responses in respect of the proposed reforms to fees across all sectors is the ability of the market to sustain the 10% reduction in fees. The reduction will apply to all fees and hourly rates paid under the civil and family legal aid scheme, except those where the service has been procured following competition on price, regardless of whether the service provided is subject to fixed rates, general assessment or and individually negotiated contract. This includes Very High Costs Cases which are paid under hourly rates or "events rates" models, but not those paid under risk rates.

3. As clarified during the consultation period, the proposed reduction will not apply to family mediation fees. Nor will the proposed reduction apply to the fees payable to telephone providers under the Community Legal Advice Telephone Service. This is because the contracts for telephone advice were subject to competitive tenders on price and as a result the rates payable under these contracts are already significantly below the rates payable to face-to-face providers. As indicated in paragraph 1.13 of the consultation paper, it is the Government's long term intention to introduce price competition for civil and family proceedings delivered face-to-face. Once completed this will remove the need for further changes to fee levels.

Key issues raised: impact on solicitors

4. The most significant reform in the package of proposals affecting civil and family practitioners is the proposed 10% reduction in the level of fees.

5. As was made clear in paragraph 7.27 of the consultation paper, the proposed 10% reduction will apply to all payment rates and fees for family in force at the point of implementation. This means that the proposed 10% reduction would also apply to the new Phase 2 family fees fee schemes (Phase 2 fees) which were implemented on 9 May 2011 and

which introduced new standard schemes for representation in private family law and advocacy in all family cases.

6. The Phase 2 fee schemes redistributed the way payments were made on the basis of the historical spend in 2007/08. The effect of this redistribution is that some providers will experience a reduction in the amount of income they receive from the legal aid fund while others will experience an increase. Overall the Impact Assessment on the family fee schemes indicated that the majority of providers and advocates would experience an increase as a result of the redistribution. However, the changes were also intended to cap payments at 2007/08 spend (assuming no changes to the number and type of cases started); stripping out any inflationary increases and therefore also delivering savings. This means that the cumulative effect on some firms of the introduction of the Phase 2 fees together with the proposed legal aid fee reforms may be a reduction in income of more than 10%. However, given the different data sets used for the two sets of proposals, the changes that will have taken place in practice between 2007-8 and 2009-10, and the differing responses of individual practitioners and firms to the Phase 2 fee (for example, by undertaking more advocacy) modelling the impact of the changes together is not seen as likely to provide any indication of any changes in the behaviour of providers and the impact on them.

7. The Family Law Bar Association, amongst others, raised specific concerns about the cumulative impact of the Phase 2 fees and the proposed 10% reduction in its response to this consultation. However, in their recent responses to the statutory consultation on the draft Funding Order introducing the Phase 2 fees, the representative bodies, generally, have either not opposed or welcomed the introduction of the Phase 2 fees in their final form. The Government, therefore, does not consider that the phase 2 fees are likely to decrease the sustainability of supply.

8. The vast majority of consultation responses argued that many providers would be forced to withdraw from the legal aid market as the reduced fee levels that would result from the proposed remuneration reforms, generally, would mean that the work will no longer be commercially viable.

9. There has been a downward trend in the overall number of providers dealing with civil and family legal aid over the past few years, a decrease of around 23% between 2006/07 and 2009/10. Over the same period there has been an increase of 11% in the number of civil (including family) matter starts opened for clients and a 5% increase in the number of certificates granted. This is because there has been a continuing process of providers that do only small amounts of legal aid work leaving the market or merging with other firms, so that the work is done in larger volumes at fewer offices. At the same time the LSC has over time sought to terminate dormant accounts where no work was being done. The Government believes that these trends have not affected the ability of the public to obtain legal aid when they require it. In addition, the CLA helpline was established in 2004 to provide advice on debt, housing,

welfare benefits, employment and education and was extended to offer advice in family matters in 2009. The helpline provides legal advice to clients and has improved access to advice for clients.

10. The same arguments about sustainability were made by the profession when Phase I of the fixed fee schemes were implemented in October 2007 and January 2008. The LSC analysis of the consultation responses to *Legal Aid: a sustainable future*, published in November 2006, said: "Many respondents anticipated that they and many of their colleagues would see a drop in income, and that this would cause them to re-evaluate whether to continue with publicly funded work. It was noted that this would have the likely effect of reducing access to justice. The principal concern had to do with the fixed fees proposed in the consultation, which many respondents thought were set at a level that would make legal aid work uneconomic".

Civil and family providers

11. The Impact Assessment undertaken by the LSC at that time indicated that a high proportion of providers in the civil and family sectors would be adversely affected. Subsequent analysis of the provider base undertaken by the LSC has shown that over 80% of those civil and family providers who had been identified as being adversely affected by the Phase 1 reform were still actively providing legal aid services.

12. While this does not indicate what particular mitigating action these providers may have taken and is not determinative of future behaviour, it does indicate that they have been able to adjust to the new fees. Of those firms who had been identified as being adversely affected, and subsequently left the market, almost half of them were among the smallest 25% of providers of legal aid work.

13. It is important to note that over the same period, LSC data also indicates that, overall, the proportion of cases reporting positive benefits to the client has remained broadly constant. Therefore, while this was a specific market response to a particular set of remuneration changes it does suggest that providers in this area are able to make changes to their business practices and structures without adversely impacting on quality.

Criminal providers

14. In the case of criminal fees, there are a number of proposed reforms that would impact on providers. These would be introduced in addition to the planned staged reduction of 13.5% to the Advocates Graduated Fee Scheme (AGFS) currently being implemented. The impact on advocates (both barristers and Higher Court Advocates) is discussed further below.

15. While MoJ analysis into active supply (i.e. the numbers actually undertaking work, rather than just holding contracts) shows a decline in the number of active providers by around 14% between 2006/7 and 2009/10, we are unable to attribute this decline to a single cause such as profitability. Other factors may have had an impact, such as mergers or

the recording of contracts by firm rather than office. The Government does not believe however, that the current net rate of exit indicates a threat to delivery or the sustainability of suppliers.

16. In line with the above, most CJS areas have experienced a reduction in provider base in this period, and those areas with the largest decrease are generally rural areas with a small population group, and lower volumes of work. There are a small number of police station duty schemes with low membership (3 or 4 suppliers), indicating that supply is more fragile, but also reflecting the low volumes of work on these schemes.

17. However, unlike the proposed changes to civil and family fees, the criminal fee reductions would not fall equally across the range of work – the biggest impact would be felt by those who specialise in, or solely practice in, Crown Court work. Our analysis shows that this is rare. It indicates there is no specialisation in contracts over time, and typically firms tend to provide both areas of work in various degrees depending on demand in that year. For example, in 2009/10 the vast majority of criminal legal aid providers, some 85%, received 60% or less of their total revenues from Crime Higher. Only 10% of crime providers received more than 80% of their fees from Crime Higher contracts, and for most of these firms this was not the case in previous years.

18. The proposal to align magistrates' court fees in London with those paid in other major urban CJS areas brings the treatment of these cases in to line with those at the Crown Court, where there is currently no London uplift paid. The Government does not see a specific threat to sustainability arising from this proposal. Approximately 21% of criminal legal aid firms are based in London, however in 2009/10, the proportion of magistrates' courts and Crown Court representation orders in London were 17%. This could indicate there is some oversupply of criminal legal aid in London compared to the rest of England and Wales, where there are on average proportionately more cases per provider, but it could be an indicator of other market features. Additionally, in the most recent tender round, the number of offices in London increased by 31%, compared with 18% outside London. Therefore bringing the London magistrates' courts rates more in line with the rest of the country should be sustainable without risking supply.

Otterburn report

19. As part of its consultation response, the Law Society submitted an independent analysis of the profitability of solicitor legal aid firms undertaking civil, family and/or criminal work by Andrew Otterburn, a law firm management consultant. While the Government welcomes the report as an important recognition of the need for respondents, generally, to provide robust data to support their arguments, there are a number of issues about the data used in this particular report. For example, it is not clear whether the solicitor firms that participated are representative of the entire supplier base. In particular, there is a significant risk that self

selection bias may exist because, given the short time to respond to the questionnaire used to gather data for the report and the urgency in the response to the consultation, it is possible that solicitor firms most adversely affected by the cuts were more likely to reply. In addition, the sample size is very small with only 171 solicitor firms responding. Of these only 163 completed the questionnaire with financial information. This is the equivalent of about 8% of the total number of civil solicitor firms operating in the legal aid market. Therefore, these findings should be treated with caution due to the small number of solicitor firms involved.

20. Although this analysis must therefore be viewed with caution, overall it does indicate that while the proposed fee reductions would have a negative impact on solicitor firms by reducing their income, on the whole, they would still make a profit even before making any efficiencies to their working practises. Subsequent to his report, Otterburn specifically confirmed to the Ministry of Justice that, in his view, an overall phased reduction in fees of around 10%, with the reduced fees only applying to new cases commenced after the implementation date, would allow solicitor firms time to adjust to the new fee levels and would not, therefore, necessarily make supply unsustainable.

21. In addition to assessing the impact of the proposed fee reductions, Otterburn also examined the likely impact of the proposed changes to the scope of civil and family legal aid. In broad terms his analysis suggests that the loss of income as a result of these changes would make the market in those areas unsustainable in its current form.

22. None of the other consultation responses contained any form of detailed numerical analysis on likely sustainability.

Key issues raised: impact on advocacy

23. The Bar Council expected that the proposed changes, generally would adversely impact on the availability of publicly funded legal advice with fewer advocates willing to work at legal aid rates and fewer good quality candidates willing to pursue publicly funded work. In the context of the proposed changes to civil and family fees they were also particularly concerned that the proposed benchmark rates were incorrect and that the proposals, generally, did not make any allowance for more complex cases where they argued that a greater level of experience, complexity or expertise merited a higher rate. As a result, they expressed the concern that more experienced barristers in particular could be expected to leave the market.

24. While the Government accepts that this issue needs to be monitored, it takes the view that this is not a new phenomenon. Whilst legal aid provides a source of guaranteed work for advocates and there will be a small proportion of cases that require very experienced advocates, a lot of the work is more straightforward and able to be handled effectively and competently by relatively junior advocates. We would therefore expect that more straightforward legal aid work is undertaken by junior

advocates, who gradually increase the proportion of non-legally aided work that they undertake, moving into more 'lucrative' areas as they increase their experience. As long as that legal aid work continues to be performed to an acceptable standard, this is not necessarily a practice that is of concern.

25. As noted in the 2009 Ernst and Young report *Market Analysis of Family Advocacy*, solicitors can choose between different barristers and one barrister may substitute for another one if needed, meaning that they are not tied to a single provider or group of providers. Instead providers have a wide potential pool of advocates to choose from and provided that overall there are sufficient numbers of advocates of the requisite quality, it does not matter whether these are the most experienced or not. What matters is that they are able to perform effectively in the cases in which they are involved.

26. Between 2006/07 and 2009/10 there was a 5% increase in the number of legal aid certificates granted.[63] At the same time, legal aid remuneration rates fell in real terms and there was an overall 4% fall in the number of self-employed barristers undertaking legal aid work. Over the same period, the total amount paid to self-employed barristers for civil and family legal aid work increased by 12% with the average payment increasing by 16% and the number of self-employed barristers receiving over £50,000 from the legal aid fund increasing by 13%.

27. This suggests that there is a strong demand for advocacy services in the legal aid market and while there have been some departures amongst self-employed barristers over the past four years, this has provided an opportunity for those remaining to increase their market share without impacting on quality. Although this is a market reaction to a particular set of market conditions and is not determinative of future reactions, it does indicate that self-employed barristers are able to adapt to a changing legal environment and take advantage of opportunities to generate potentially significant income.

28. In the context of criminal cases, the data the Government holds on advocates is limited, and not robust enough for us to comment on the rate of market entry and exit, because advocates do not usually enter directly into contracts with the LSC. While the final part of the staged reduction of 13.5% to the Advocates' Graduated Fee Scheme (AGFS), to be implemented in April 2012, is likely to impact on advocates alongside the proposals discussed above, the Government does not believe that the combined effect will have a significant impact on the sustainability of advocacy. This is partly because of our understanding of the profitability of advocacy work, and partly because, in these firms, advocacy is

[63] Data from the Legal Services Commission.

provided as a largely separate service.[64] Therefore, if these firms then perceive this work to no longer be profitable, they should be able stop providing it without jeopardising their supply of other criminal legal aid services.

29. There is sufficient supply of suitably qualified barristers willing to work at the legal aid rates currently paid and the Government believes that this supply, of both barristers and Higher Court Advocates, is sufficient to make up any shortfall should some advocates move away from criminal work. The Crown Prosecution Service (CPS) also reports no current problems securing the services of appropriately qualified members of the Bar, even though the CPS graduated fees for advocacy are lower than the defence fees.

Key issues raised: impact on the not-for-profit sector

30. The not-for-profit sector is particularly important as suppliers in the welfare benefits/debt and immigration/asylum sectors have also argued that they would be significantly impacted by the proposed changes. For example, in their response to the consultation, Citizens Advice reported that 30% of the Bureaux that had responded to a survey on the proposed reforms had confirmed that they would not be able to cope with the proposed 10% reduction and would be unable to continue to operate under the legal aid scheme.

31. The Government accepts that the proposed reforms may be particularly challenging to the not-for-profit sector. It also recognises that this sector is also likely to be at risk from threats to other sources of funding (for example from local authority cuts) which may make supply in the areas they cover vulnerable in any event. This is clearly a matter for concern for the Government as a whole, and the issue of the future of the voluntary advice sector is being considered in a cross-Government review. However, in the context of legal aid services, the issue is whether services will be available for clients, rather than whether the legal aid work is done by any particular type of provider

The Government response

32. The Government accepts that the proposed changes to scope will have an impact on the current legal aid market. A number of respondents felt that the proposed changes in scope would significantly alter the mix of cases on which the legal aid fee schemes are based, meaning that the remaining fees may no longer be viable and would need to be reassessed. While the proposals would mean that many types of cases would no longer be eligible for legal aid, the Government does not agree that this necessarily requires the current fee schemes to be revised. Any

[64] As highlighted in a Frontier study on the potential impact of a single fee for litigation and advocacy.

new contracts will be tendered on the basis of these fees for which providers may choose to tender. Given the current fiscal deficit it considers that it is critical that it ensures that the amount that it pays for any service represents maximum value for money. In this context the Government considers that it needs to ensure that it only pays those fees that are necessary to secure the level of services that are required.

33. The proposed scope changes will require primary legislation and are therefore some time away, which will provide time for the Government working in conjunction with the LSC to develop and put in place a new robust client and provider strategy that both reflects the demands and requirements of the new legal aid market and also extracts the maximum value from the ongoing structural developments in the legal market (set out below). It is confident that that there will be a sufficient number of providers willing to undertake legal aid work under the new strategy once the proposals have been implemented.

34. In contrast, the proposed fee reforms would take effect much earlier and the Government takes the view that the impact of these particular reforms on individual providers will depend on any mitigating steps that they choose to take, for example, changing working practices.

35. The legal aid market does not operate in a vacuum. Providers in this area will also be affected by and be able to take advantage of wider structural changes, in particular, the implementation of the Legal Services Act 2007 which provides an opportunity for firms to radically change the way that they operate, combining and streamlining services to maximise efficiency and returns. Significantly, the Act addresses the current anomaly that means that solicitors can employ barristers but not form partnerships with them and will also permit barristers to form their own partnerships and employ solicitors.

36. The Solicitors Regulation Authority has already changed its regulatory rules to allow Legal Disciplinary Partnerships which enable solicitors to enter into partnerships with barristers and it is expected under the Act that the Bar Standards Board will follow suit very soon and allow barristers to take advantage of different business structures in meeting consumers' needs. Alongside these changes, alternative business structures will be introduced shortly, allowing non-lawyer organisations to provide legal services and giving lawyers, generally, much greater flexibility in the way they practise.

37. It is not for the Government to decide what structures lawyers should use to deliver legal aid services, nor to restrict the use of those structures that are lawful. Rather provided that there are enough providers of sufficient quality willing to work at legal aid rates, the Government must simply specify the services it wants to buy for clients and the required level of quality and access. However, we do believe that we should not obstruct, and where possible should facilitate, changes taking place within the market that will support the efficient and effective delivery of legal aid services ensuring that the Government is able to maximise value for

money. How far providers take advantage of such opportunities is a matter for them but we would expect at least a proportion of the market to do so.

38. We will, in any event, have the opportunity to see the actual reaction to market of remuneration changes. It is intended that the proposed reforms to family fees and housing work carried out under the Unified Contract would be introduced by way of the planned retender of the family contracts, which would enable the Government to see the reaction of a key part of the market to the proposed changes in advance of their implementation.

39. The proposed changes to civil and criminal fees generally will be introduced by the LSC by way of amendments to the current civil and criminal contracts following secondary legislation. It is intended that the proposed changes to fees for housing work not covered by the Unified Contract will be introduced in the same way in October 2011, at the same time as the other civil fee changes, but are still considering whether this is feasible. Under these contracts providers are required to give 3 months notice before exercising their right to withdraw. The Government is therefore satisfied that the LSC would have advance notice of any developing market shortfall and is working closely with them to ensure that they are able to respond promptly, effectively and appropriately, should this materialise in any form.

40. There are a number of actions that the LSC could take to mitigate any shortfall that might develop. For example, they could run a limited focussed bid round. This recently happened for immigration cases in Dover where, following the end of the 2010 civil bid round, there were no providers. The LSC completed a focussed retender exercise within a few months on a new contract that took effect in June 2011. In the interim, the LSC put in place temporary measures to ensure supply using providers from the surrounding area to allow them to provide the necessary services on a short term basis. This typically involved office sharing or an outreach programme. In cases where there are already providers available in an area, an alternative approach would be to reallocate additional New Matter Starts to these other providers. In the case of criminal fees, if, for example, there were difficulties in relation to coverage of specific police station duty rotas, scheme membership rules could be relaxed. In the past, the Public Defender Service has also stepped in to provide coverage where there have been localised problems.

41. Overall, therefore, the Government is satisfied that the proposed reforms to civil, family and criminal fees would be likely to be sustainable, and that, although individual providers may leave the scheme, there will be sufficient supply of providers of sufficient quality to provide an appropriate level of service.

Annex G: Remuneration in criminal proceedings

Introduction

1. The consultation document sought views on a series of proposals for the reform of remuneration in criminal proceedings.

2. Many respondents raised concerns that the proposed fee reforms to both criminal and civil and family proceedings threatened the ability of providers to deliver legally aided services. These concerns are considered at Annex F above, and responses to specific questions on criminal fees are considered below.

Single fixed fee for guilty pleas in either way cases in the Crown Court deemed suitable for summary trial

3. The consultation asked:

   Question 24: Do you agree with the proposals to:

   i) pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;

   ii) enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way case; and

   iii) remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?

(i) Single fee

4. 817 respondents answered question (i) on a single fixed fee of £565, 681 (83%) of whom disagreed with the proposal, 136 (17%) agreed.

Key issues raised in consultation

5. The overwhelming majority of respondents, including the Law Society, the Bar Council, and individual solicitors and barristers, opposed the introduction of a single fixed fee on the grounds that it would unfairly penalise defence representatives for a decision made by the defendant. They said that the proposal, if implemented, would see a significant reduction in income for elected late guilty pleas. They argued that the decision on election for jury trial and the timing of a guilty plea lay ultimately with the defendant and there was no widespread evidence to suggest that such decisions were influenced by lawyers out of self-interest. Even if the clear advice to a defendant were to enter a plea of guilty, there were some defendants, they argued, who would choose to maintain a plea of not guilty and elect Crown Court trial in exercise of their statutory right to do so. The respondents cited numerous reasons why defendants might elect a Crown Court trial irrespective of any advice they

might have received to the contrary. These included: a belief that they would receive a fairer trial or had a greater chance of acquittal before a jury or they might elect Crown Court trial in an attempt to delay proceedings in the hope that the passage of time would lead to witnesses changing their minds.

6. A wide range of respondents (including the Bar Council, the Law Society, the Judges' Council and individual firms) also argued that it would be unfair and inappropriate to reduce fees where: the prosecution accepted at the doors of the court a plea they had previously refused; where there was a late provision of evidence by the prosecution; or where a case had been dropped at the last minute or dismissed due to lack of evidence or for any other reasons beyond the defence's control. They pointed out that full disclosure was unlikely to have taken place during the early stages of a case and therefore a lawyer was often not in a position to give the sort of robust advice that might be given at a later stage in the proceedings.

7. This view was echoed by the London Criminal Courts Solicitors Association (LCCSA) who expressed concerns about court and prosecution processes, the legal aid application process and a lack of time between charge and first appearance, all of which meant that as a matter of process there was insufficient time to prepare for a truly effective first hearing. It was also suggested that in practice there was often no possibility of having a meaningful dialogue with the prosecution before charge and first appearance in Court and that frequently, the only way to obtain sight of the prosecution evidence or be in a position to discuss alternative charges was to elect trial at the Crown Court.

8. LCCSA added that the charging process had introduced a degree of inflexibility and unwillingness to revisit a charging decision and that defence lawyers are not given the opportunity to have some input into or participate in the charging process, before the charge was laid. This inflexibility coupled with the lack of ownership of prosecution cases at the magistrates' courts stage usually meant that there was no one with whom to negotiate.

9. The Judge's Council agreed in principle that fees for an early guilty plea in either way cases deemed suitable for summary trial should be substantially the same irrespective of whether the case was heard in the magistrates' court or in the Crown Court. However, they disagreed with the idea of fixing a single fee for such cases in the Crown Court on the grounds that failure to remunerate lawyers for additional work undertaken before a late plea of guilty (cracked trial) would not only be unfair but would perversely incentivise lawyers to pressurise defendants (with vulnerable defendants particularly at risk) to plead guilty at an early stage irrespective of the appropriateness of such a plea and before there has been full disclosure of information. Other respondents also pointed that it was often very difficult to establish at an earlier stage in proceedings whether the defendant would get credit for a guilty plea. It was also argued that the proposal could potentially lead to fewer guilty pleas by perversely incentivising lawyers to allow a case to proceed to trial (and

thereby earn the higher trial fee) rather than advising a change of plea, where appropriate, before trial. This would lead to an increase in contested trials, and higher prosecution costs, in addition to increased defence costs. It was suggested that the Government should instead try to encourage defendants to enter an early guilty plea (where appropriate) through sentencing discounts rather than implementing this proposal. A number of solicitors suggested a discount of 33% as assisting early decision.

10. Both the Bar Council and the Criminal Bar Association expressed their concern that the introduction of a single fee would be particularly unfair to junior barristers as solicitors (litigators) would control what proportion of that fee went to the advocate. They argued that this was likely to result in payments to the junior bar being substantially less than those currently paid under the Advocates Graduated Fees Scheme. They said this was a particular concern in London where, commonly, relatively junior barristers gain experience acting as counsel on an unassigned basis in the magistrates' courts. Barristers also argued that solicitors negotiated very low rates with unassigned counsel and that more senior members of the Bar would decline to take such poorly paid work. They suggested that the overall quality of representation would be affected, particularly for vulnerable clients. They suggested that the proposal could, in effect, deny the right to jury trial. They also suggested that if this proposal was implemented then a separate fee should be paid for the advocacy element of a case in the Crown Court to ensure that standards were maintained.

11. A number of other issues were raised by consultees including the following:

    i) the proposals were said to be based on 2008/09 financial data which was already three years out of date and did not take into account cuts to police station, Crown Court and file review fees which had been imposed since that time, and that cast doubt on the accuracy of the projected cost savings. Also it was argued that the assumptions did not take account of the significant fall in the number of defendants in the magistrates' court arising from the introduction of conditional cautions and reduced charging by the prosecution;

    ii) given that the LSC had acknowledged at the Committee of Public Accounts hearing on the Ministry of Justice Financial Management Report in November 2010 that the introduction of fixed fees had created a more complex system for both the LSC and the legal firms to administer, it was argued that the proposals would further increase the complexity of the current payment system.

(ii) Enhancement to lower standard fee

12. There were 753 responses to question (ii) on enhancing the lower standard fee paid for cracked trials and guilty pleas under the magistrates' court scheme. 530 (70%) of those were against the proposal with 223 (30%) answering 'yes' to enhancing the fee.

Key issues raised in consultation

13. A majority of respondents, including the Law Society, said that the proposal to enhance only the Lower Standard fees would not remunerate adequately those cases where more work was required before a defendant entered a guilty plea, meaning those cases were more likely to be paid (an unchanged) Higher Standard fee. They also argued that the proposal was likely to lead to an increase in more complex either way cases being heard in the magistrates' courts. They therefore suggested that the Higher Standard fee should also be enhanced (by 25%).

14. It was also suggested that the enhanced payment to cover guilty pleas for cracked trials and guilty pleas was somewhat illusory given the other cuts, particularly, the proposed reduction in fees for magistrates' courts cases in London.

15. LCCSA agreed in principle with the proposal, but highlighted the danger of placing too much pressure on defendants to enter a guilty plea through both the discount on sentence and the fee arrangements. To guard against this, it was suggested that full disclosure of evidence should take place at the earliest opportunity and that efforts should be made to change magistrates' court and prosecution processes and culture.

(iii) Removal of committal fees

16. 768 respondents answered question (iii) on removal of committal fees, with 707 (92%) of those arguing that committal fees should be retained, and 61 (8%) agreeing with the proposal to abolish the fee.

Key issues in consultation

17. A number of respondents, including the main solicitors' representative bodies, argued that the removal of the committal for trial fee (payable for the committal proceedings in the magistrates' court even if the defendant was financially ineligible for legal aid there) would lead to defendants being unrepresented at committal. This in turn, they argued, would lead to delays in proceedings as an unrepresented defendant could not simply be committed to the Crown Court 'on the nod'. It was also pointed out that the removal of the committal fee would discourage the early preparation of cases.

18. Some respondents took the view that committal fees should not be removed without consideration of the removal of committal proceedings themselves and their replacement with a similar transfer process or

alternatively a proper paper process without the need to attend court unless there was a need to make an application.

19. Concerns were raised about the sustainability of legal aid providers if the overall package of proposals on criminal remuneration were implemented.

20. Some respondents (including the Crown Prosecution Service, Magistrates' Association, Justices' Clerks Society, the National Bench Chairmen's Forum and Bedfordshire Criminal Justice Board) were in favour of the proposals. The CPS argued that the proposals would reduce the number of defendant's elections which were 'fee focused' rather than 'merit focused', allowing the CPS, police and Court to concentrate on truly contested cases. The Magistrates' Association noted that too many minor cases were being heard at the Crown Court, resulting in lengthy trials and pressures on both victims and witnesses. They believed that this proposal, coupled with incentives directed at defendants, would significantly increase the number of either way cases being heard in the magistrates' courts, although they suggested that the proposed fixed fee needed to be sufficiently close to the amount payable in the magistrates' courts to be effective. Bedfordshire Criminal Justice Board stated that cases that can be heard under the jurisdiction of the magistrates' courts should be heard there and enhancing the lower standard fee for cracked trials would encourage trials to remain in the magistrates' courts and thereby achieve efficiencies in the Crown Court.

The Government response

21. Many respondents argued that lawyers do not have any influence over plea. The Government accepts that the final decision on plea rests with the defendant. However, there is a body of research, cited recently in a Legal Services Research Centre report,[65] suggesting that many defendants enter the plea their lawyer advises. The Government does not suggest that lawyers necessarily advise on plea based on the likely legal aid fee. However, there remain concerns that the current system of fees does not sufficiently support the aim of speedy and efficient justice and may discourage the defence team from giving early consideration of plea. For the specific group of cases to which these proposals would apply, there are significant differences between fees paid in the magistrates' courts and those paid in the Crown Court, depending upon the timing of the plea.

22. Despite the points raised in consultation responses, the Government takes the view that, in this narrow group of cases that were considered by the magistrates' court to be of a level of complexity and seriousness suitable for trial by the magistrates, it is not appropriate for the taxpayer to

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[65] *Transforming Legal Aid: Access to Criminal Defence Services*, Kemp, V. (2010), London.

pay significantly more for a guilty plea by reason of the venue in which the proceedings take place. The Government does not believe that the proposal affects the right to jury trial, as that remains an option for the defendant, and the fees paid to the defence lawyers that do go to trial are unaffected by this proposal.

23. The proposed fee per case of £565 itself has been calculated to be in line with the average cost of an either way guilty plea in the magistrates' court, including those paid at the higher standard fee and non-standard fee. We therefore continue to believe that for this narrow group of cases the fee represents adequate remuneration, including in circumstances where the defendant changes plea or the prosecution decide to offer no evidence at a late stage in the proceedings.

24. The Government has carefully considered all the arguments and concerns raised by various respondents, including the concern that enhancing the lower standard fee was inadequate. We agree that this reform is likely to result in an increase in the number of either way cases being heard in the magistrates' court (which, we consider, justifies increasing certain magistrates' court fees as part of this set of proposals) We accept that the original proposal did not take adequate account of those cases where more work was required before a defendant entered their guilty plea. For these reasons, we have decided that the higher standard fees for either way guilty pleas should also be increased so that these cases are remunerated at an appropriate level.

25. We therefore intend to increase the Higher Standard Fee for a guilty plea by 8% and to scale back the enhancement to the lower standard fee to 23%. The 8% increase in higher standard fees takes fee levels to the current upper fee limit. Any greater increase would risk the new higher standard fee exceeding the limit at which the fee 'escapes' to hourly rates, so paying more for the higher standard fee cases than some 'escape' cases. The 23% increase in lower standard fees means that the overall total increase in remuneration remains the same as the original proposal.

26. The Government notes the suggestion by the Criminal Law Solicitors Association that some Category 2 fees should also be enhanced. However, Category 2 fees cover contested trials as well as cases fully prepared for trial that crack on the day of trial, and it was never our intention to increase them. As explained in the consultation paper (paragraph 6.18), this proposal only related to fees for guilty pleas and cracked trials. Whilst Category 2 fees include some cracked trial fees, it clearly would not have made sense in the context of our proposals to increase the fees for those cases as they are already paid at full trial rates. We would therefore like to use this opportunity to correct an error in the original consultation paper (Annex G page 202) which suggested that there would be a similar 25% enhancement to Category 2 fees.

27. As for committal proceedings, we believe that, in practice, they are rarely substantive hearings, usually just confirming the decisions made earlier at the mode of trial hearing, with such papers as there are served either very late or on the day itself. Moreover, any preparation which solicitors are required to make will cover much the same ground as for the Plea and Case Management Hearing in the Crown Court just a few weeks later. There are provisions (which have not yet been commenced) in the Criminal Justice Act 2003 that would put an end to committal proceedings altogether. The Government is considering whether they should now be brought into force. But the Government intends in any event proceed with the proposal to abolish the committal fee.

28. We have noted the concerns raised by advocates about a single fee payable only to the litigator. We have concluded that questions of whether or not to introduce a single graduated fee will best be dealt with in the context of competition, which will be the subject of a separate consultation exercise later in the year. We have therefore decided to adjust the original proposal and divide the fee into two separate fixed fees payable for litigation and advocacy.

29. We believe that the appropriate way to establish separate fees for litigation and advocacy is to split the single fee in line with the ratio of payments currently made to litigators and advocates in cases that crack following election by the defendant. This means looking at payments under the two Crown Court graduated fees schemes and taking into account the committal fee currently paid to litigators for the work done in the magistrates' court. Current expenditure[66] on this group of cases sees 64% going to litigators and 36% going to advocates. Applying those same percentages to the proposed fixed fee of £565 + VAT provides a fixed fee for litigation of £362 + VAT and a fixed fee for advocacy of £203 + VAT.

Fees for guilty pleas and cracked trials in the Crown Court

30. The consultation asked:

    Question 25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that: (i) the proposal to enhance the fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates' Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and (ii) access to special preparation provides reasonable enhancement for the most complex cases?

[66] Data from 2009/10 was used to model the impact of this proposal, and all the other criminal proposals.

(i) Enhanced fees for guilty pleas

31. There were 623 responses on proposal (i) to enhance the fees for a guilty plea in LGFS and AGFS by 25%. Of these, 558 (90%) disagreed, and 65 (10%) agreed.

Key issues raised in consultation

32. A clear majority of respondents including the Criminal Bar Association (CBA) were not in favour of the proposed harmonisation. As with the previous proposal, they argued that the proposal would penalise lawyers for the defendant's decision on whether and when to plead guilty. Respondents pointed out that a substantial amount of work would have been done by both the litigator and advocate to prepare the case fully for trial, particularly in dealing with late disclosure, and reverting to the early guilty plea fee would be an extreme penalty. They said that where a defendant was charged with a serious offence where the matter was prepared for trial, but the prosecution might eventually accept a plea to a lesser offence at the door of the court, it is quite wrong to effectively disallow all the preparation that has been taken place by the lawyers.

33. Respondents reiterated that lawyers cannot 'control' plea and suggested that if, in fact, lawyers could control plea, this proposal would lead to an increase in lawyers advising the defendant to go to trial rather than try to resolve matters pre-trial. It was also suggested that cases would not be prepared properly and that it would be inappropriate to reduce fees in cases which the prosecution drop at the last minute.

34. A number of respondents commented that cracked trials were "different animals" to guilty pleas. They argued that many trials crack only as a result of detailed analysis and work after the full cases had been served. They argued that cracked trials prevented more jury trials and saved money, and that treating them as enhanced guilty pleas across the full range would not provide reasonable remuneration.

35. It was also argued that the proposal to increase the guilty plea fee by 25% did not provide reasonable remuneration for cracked trials, as the work involved in a guilty plea entered a few weeks after Plea and Case Management Hearing (PCMH) was substantially less than a guilty plea entered at the door of the Court on the day of trial. Respondents suggested that a more sensible proposal might be to align the process with the Advocates Graduated Fee Scheme (AGFS) system whereby a cracked trial fee where the trial cracks in the first 'third'[67] is paid at a lower rate than if it cracks in the second or final third . Others argued that a

[67] AGFS payments for cracked trials vary according to the point in the life of a case when the crack occurred. The period between the date after a case is either fixed or placed into a warned list and the fixed date or the beginning of the warned list is divided into three equal periods ('thirds'), and any additional days are added to the final third.

more sensible proposal might be to consider different rates of remuneration where the defendant pleaded guilty to the original charges, as opposed to pleading guilty to new or alternative charges laid by the Crown.

36. Some respondents took the view that early guilty plea fees with a non-standard fee for exceptional cases could represent a viable structure. It was also submitted that the proposed 25% uplift would benefit those undertaking routine work but not those undertaking more difficult and demanding work and would therefore not provide a reasonable level of remuneration.

(ii) Special preparation

37. 635 responses were received on question (ii) on whether access to special preparation provides reasonable enhancement for the most complex cases with 517 (81%) answering 'no', and 118 (19%) answering 'yes'.

38. The majority of respondents including solicitors' and barristers' representative bodies did not believe that access to special preparation provided reasonable enhancement for the most complex cases. They argued that the 'escape' for exceptional cases with more than 10,000 pages to 'special preparation' hourly rates was, in reality, illusory as so few cases would qualify, and that even if the special preparation threshold were lowered, a move to hourly rates, as opposed to a graduated fee, was a backward step to a payment method that would not reward the most efficient providers.

39. A number of respondents, including the Junior Lawyers' Division of the Law Society, suggested that the Government should consider what cost savings could be gained from a review of prosecution conduct before making changes to defence fees.

40. Again, some respondents (including the CPS, Justices' Clerks Society and Bedfordshire Criminal Justice Board) favoured the proposed harmonisation saying that would lead to increased efficiency, freeing up courtrooms to hear truly contested trials. Some of these respondents also highlighted the benefits of the proposal to victims in terms of certainty when a plea is entered, not being warned to attend for ineffective court hearings and less time spent waiting for trials. The CPS however noted the risk of the economic incentive for the defence to maintain the not guilty plea to trial, in order to earn the more attractive trial fee, particularly if the difference between the plea fee and trial fee was significant.

The Government response

41. As with the previous proposal, the Government accepts that the final decision on plea rests with the client and we do not suggest that lawyers necessarily advise on plea based on the likely legal aid fee. However, as before, we remain concerned that the current system of fees does not

sufficiently support the aim of speedy and efficient justice and may discourage the defence team from giving early consideration of plea given the great disparity in fees depending upon the timing of the plea.

42. We recognise that there is some force in the argument that, even after taking account of the 25% enhancement for early guilty pleas, the proposals would not always adequately remunerate the most complex cases which required significant and sustained work to prepare for trial, and where the defendant changed his or her plea or the prosecution changed its view at a late stage in the run-up to trial. It was for this reason that we consulted on whether the existing rules on special preparation for cases involving over 10,000 pages of prosecution evidence provide reasonable enhancement for the most complex cases. Most respondents disagreed that special preparation would provide appropriate enhancement in the most complex cases.

43. We have concluded that the best way to achieve our aims, taking into account the responses to consultation, is to leave fees for guilty pleas at current levels while reducing the fees for cracked trials by 25% overall, rather than the 33% implied by harmonisation at early guilty plea level. This would reduce the current significant differential in fees between guilty pleas and cracked trials, and thus remain consistent with the rationale behind the original proposal. But it also addresses the key concern expressed in consultation, namely the impact on the more complex cases, as there would continue to be additional remuneration for work in the run-up to trial. We therefore propose to reduce payments for cracked trials under the Litigators' Graduated Fees Scheme (LGFS) by 25%.

44. However, a simple reduction would not work for the Advocates' Graduated Fees Scheme (AGFS) as some cracked trial fees would pay less than the fees for an early guilty plea. We therefore propose to reduce the value of pages of evidence under the AGFS for trials that crack in the final 'third'[68] to the same level as trials that crack in the second third and then reduce all cracked trial base fees by 11%. This achieves an overall reduction of 25% in AGFS payments. For payments under both AGFS and LGFS the amended approach produces a higher payment than under our original proposal for the most complex and paper heavy cases that crack late. Fees for guilty pleas and trials that crack in the first third are unaffected.

[68] Ibid.

Fees in cases of murder and manslaughter

45. The consultation asked:

    Question 26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences?

46. This question was answered by 753 respondents, 592 (79%) of those disagreed with the proposal to align the fees, and 123 (16%) were in favour of the proposal. A further 38 respondents (5%) neither agreed nor disagreed with the proposal.

Key issues raised in consultation

47. Most barristers and their representative bodies were opposed to this proposal. Those against the proposal took the view that a reduction in fees payable for murder cases would merely remove the requirement for any heightened level of expertise and experience and would result in less experienced advocates being instructed to conduct murder cases. They argued that murder was unique, as on conviction it carried a mandatory life sentence, adding that the pressure to ensure that everything was done in representing a client charged with murder was much more acute than in a rape trial where the average sentence was 6 – 8 years and that, unless an Indeterminate Public Protection sentence was imposed, the defendant would only serve half of that sentence.

48. Respondents also argued that a murder trial placed a significant burden of responsibility on litigators and advocates and had a much higher public profile. They covered a very large range of types of cases, including mercy killings, and murder by stranger. In manslaughter there were often complex health and safety issues. Respondents also argued that murder trials were subject to intense public scrutiny and public interest and were factually often much more complex and often involve for example, gangs carrying firearms, CCTV, cell-site analysis, several victims, numerous witnesses and complex legal issues such as diminished responsibility, joint enterprise and provocation which were likely to be more technical and wide ranging than in cases of rape and/or other serious sexual offences. It was also argued that murder trials involved more complex evidence, including the examination of forensic evidence, and it was suggested that the volume of unused material was often very high in murder cases, particularly in killings where there are other suspects and lines of enquiry to pursue.

49. It was further argued that significantly more resources were allocated to murder trials by the police and the prosecution and therefore any reduction in funding to the defence would lead to "inequality of arms" under the Human Rights Act. The Judges' Council commented that there was a difference: murder cases were class 1 (the most serious categorisation) while rape cases class 2, and a very much more limited cadre of judges was authorised to try class 1 cases.

50. A specialist consultant in legal practice management suggested that there were murder and manslaughter cases which raised particularly complex issues and it would be appropriate to retain a fee structure that recognised this, adding that it might be appropriate to consider complexity on a case-by-case basis and for it to be certified by the Judge rather than by offence type. This, it was argued, could result in savings in respect of any complex cases across categories.

51. The CPS and Bedfordshire Criminal Justice Board (BCJB) agreed with the proposal to align the fees. The CPS thought that the complexities could be differentiated by page count on a case-by-case basis. The BCJB argued that the cost of preparation of murder and manslaughter cases was not necessarily greater than the costs of preparing for rape and sexual offences.

The Government response

52. The Government accepts that murder is a unique crime, but notes that many respondents also acknowledged that a complex rape case could be more demanding than a 'routine' murder. It might be the case that murder cases do tend to be more paper heavy than serious sexual offences and that the same may be true of unused material. However, paper-heavy cases do get paid more under the existing graduated fees schemes, as both take pages of prosecution evidence into account in the fees payable.

53. The Government also accepts that a more limited cadre of judges is authorised to try murder cases, although this does not necessarily mean that there is more work to do to defend in a murder case. Many of the factors highlighted in cases of murder (gangs carrying firearms, CCTV, cell-site analysis, several victims, numerous witnesses and legal issues such as joint enterprise) often also arise in cases other than murder.

54. In addition, we believe that the argument made about "equality of arms" with the prosecution is misplaced. The AGFS payments proposed for murder will still exceed the payments under the CPS graduated fees scheme for prosecutors. On top of this, there will continue to be a fee payable to the defence litigator, plus arrangements to ensure that where necessary in the circumstances of a specific case the defence can gain access to appropriate expert advice. When taken together, we believe that these continue to provide reasonable assurance as to equality of arms.

55. For these reasons, the Government intends to implement the proposal to align fees for murder with fees for rape and other serious sexual offences, as proposed in the consultation.

Fees in cases of dishonesty

56. The consultation asked:

    Question 27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000?

    This question was answered by 714 respondents with 375 (53%) disagreeing with the proposal, and 290 (41%) in support of the proposal to remove the distinction. 49 respondents (7%) neither agreed nor disagreed.

Key issues raised in consultation

57. Many respondents accepted that the differentiation in fees according to the value of the dishonesty was somewhat arbitrary and that the current cut-off at values over £30,000 was probably 'out of date'. Most, however, agreed with maintaining a distinction for cases where the value exceeded £100,000. Some suggested maintaining an increment, such as at £50,000 (so differentials would be between values of up to £50,000, between £50,000 and £100,000, and over £100,000).

58. Some respondents took the view that the value of the dishonest act was a good indication of the amount of work involved and the current fee structure should be preserved. Some respondents also suggested that all cases be aligned irrespective of value but at a rate above the current Category F rate. It was argued that as the number and complexity of transactions involved in an allegation of dishonesty increased so the value involved increased, becoming more complex and requiring the review of numerous pages of documentation which could be time-consuming. Respondents also argued that the number of prosecution pages was not an adequate marker of complexity and that both complexity and seriousness should be considered. It was argued that crimes concerning a higher value would attract higher penalties on conviction and continue to require more senior advocates.

59. Some respondents, including the CPS, agreed with the proposal and felt that the £30,000 threshold was far less significant than it used to be and that the complexities could be differentiated by page count on a case-by-case basis. The BCJB also took the view that the complexity of a case, rather the value obtained by dishonesty, was a better determinant of the degree of legal aid to be afforded to defending it. It suggested that all cases could be banded into Category F with an escalator applied for aggravating factors such as volume of case papers or complexity of issues.

The Government response

60. The Government notes the alternative proposals put forward by respondents, but we believe that there would be benefits from the simplification that the proposal would bring**.** Moreover, we continue to believe that the value of an offence does not provide a particularly reliable

proxy indicator for the complexity of the case, and that the enhancement available for pages of prosecution evidence provides a reasonable and adequate remuneration for case complexity, as more complex cases will generally have a greater number of pages of evidence.

61. For the reasons set out above, the Government intends to proceed with the implementation of this proposal as set out in the consultation.

Fees for magistrates' courts cases in London and ancillary payments ("bolt-ons")

62. The consultation asked:

    Question 28: Do you agree with the Government's proposal to: (i) remove the premium paid for magistrates' court cases in London; and (ii) reduce most 'bolt on' fees by 50%?

(i) Fees in the magistrates' courts in London

63. There were 629 responses to question (i), and of those 473 (75%) answered 'no', arguing that the premium paid for magistrates' court in London should be retained, and 156 (25%) agreed that the premium should no longer be paid.

Key issues raised in consultation

64. The majority of respondents, including the London Criminal Courts Solicitors Association, the Bar Council, the Law Society and individual solicitors and barristers practising in London, did not support the removal of the premium paid for magistrates' courts work in London.

65. The LCCSA argued that London was a unique criminal justice area. It was approximately 650 square miles and, as a result of a lack of planning, there were no planned complexes of police station, magistrates' courts, Crown Court centre and/or prison of the type often found in other urban areas or cities. Hence costs in London were higher than elsewhere. Respondents pointed out that clients were frequently held in custody miles from their solicitor's office and court centres where they were due to appear, citing those located in HMP Belmarsh as an example. One respondent commented that the proposal took no account of the fact that duty solicitors were required to be able to attend a police station within 45 minutes.

66. A small number of respondents commented that London weighting was introduced in 1992 following evidence being submitted to the then Lord Chancellor's Department as part of the fixed fee negotiations. They argued that a separate impact assessment should be undertaken before proceeding with the proposal to remove it. The London Criminal Courts Solicitors Association (LCCSA) estimated that the removal would involve a cut between 20% and 22% of solicitors' income.

67. The LCCSA suggested that the number of duty schemes should be reduced thereby bringing about a consolidation of work for firms in more local areas and perhaps some economy of scale. Some argued that the larger number of London schemes and larger number of solicitors on these schemes was simply a reflection of the higher population density of London rather than an indication of a "more than adequate supply of solicitors willing to undertake criminal work in London".

68. It was also highlighted by respondents that London had been subject in recent times to the arbitrary reallocation of work (for example, long delays in Snaresbrook Crown Court led to the reallocation of its work to the Isleworth Crown Court) with all of the inconvenience that involved for practitioners, defendants, witnesses and victims. Similarly work was arbitrarily moved from one magistrates' court to another, or trials listed away from the home court.

69. A number of respondents argued that London had a greater proportion of Black, Asian and Minority Ethic owned and controlled firms and employees and had been the most successful in the profession in encouraging diversity and therefore any restrictions in economic viability would disproportionately impact on diversity, as well as inhibit young lawyers from entering legal aid work, particularly as the LSC Training Grant scheme has been abolished. The Bar noted that the removal was likely to have a marked effect upon the earnings of young barristers in particular, given the degree of competition among advocates in London.

70. Some respondents, including some solicitors, working outside London agreed with the proposal arguing that there was no justification any longer for London weighting given the level of oversupply in the number of firms providing legal aid services across London, in common with other urban areas. A few respondents suggested that the premium should be redistributed to rural areas with recruitment problems, whilst other respondents queried the justification for paying a premium for magistrates' court work when there was no similar premium for Crown Court work in London.

The Government response

71. The Government accepts that overheads tend to be higher in London. However, fees for Crown Court work and for Very High Cost Cases are uniform across England and Wales, although police station work in London incurs higher fees than elsewhere in the country. Approximately 21% of criminal legal aid firms are based in London. In 2009-10, however, London represented only 17% of the total of representation orders in England and Wales. This may indicate that there is some oversupply of criminal legal aid providers in London compared to the rest of the country, or simply that there are on average more cases per provider outside London for other reasons. While some firms may wish to leave the market if fees are reduced, our assessment is that it is likely that sufficient suppliers will remain to meet demand (see Annex F for further consideration of market sustainability).

72. For these reasons, the Government intends to proceed with the proposal in the consultation and reduce all magistrates' courts fees in London in line with other urban areas, including the underlying hourly rates used to determine whether or not a standard fee or non-standard fee is payable.

(ii) Ancillary Payments (bolt-ons)

73. Of the 691 respondents who answered this question, 543 (79%) answered 'no' believing that 'bolt on' fees should be retained at current level, 148 (21%) agreed with the proposed reduction.

Key issues raised in consultation

74. The majority of respondents directly answering the questions on 'bolt-on' fees disagreed with the proposed 50% reduction. They argued that these reductions were significant, especially on top of the other consultation proposals and reductions to the Advocates' Graduated Fees Scheme (AGFS) in train that would cut advocacy fees by 13.5% by April 2012. Some respondents argued that this was no justification for any further reduction, particularly as the 'bolt ons' were fully examined and approved by Lord Carter of Coles as part of his review of legal aid procurement in 2006.

75. Barristers and their representative bodies argued that the 50% reduction was crude, and would directly affect all advocates, but would have a particularly adverse impact upon the junior bar as litigators would simply pass the loss to the independent bar. In addition to having a detrimental effect upon fees payable to junior advocates, it was argued that the proposal would also discourage the young and talented advocates from joining the criminal bar and this would consequently lead to fewer suitable candidates coming through to the senior bar and the judiciary.

76. Some respondents argued that the proposal was another undermining of Lord Carter's recommendation. They stated that MoJ relied upon Carter saying that 'bolt-ons' should be capped at £10 million, but they pointed out that Carter made that recommendation at the same time as he recommended that they be incorporated in the base fee for all cases. For this reason they argued that the two proposals should go hand in hand.

77. Advocates argued that "bolt-on" payments were an important part of the AGFS and reflect unusual but important hearings such as abuse of process or disclosure. These hearings were often complicated and time consuming to prepare. They argued that a half day hearing (of up to 2 ½ hours) would require many hours of preparation and that a great deal of preparatory work was required, for example, in sentencing hearings where sentencing reports had to be considered and issues such as dangerousness properly addressed. It was also argued that the legislation introduced by the last Government in respect of dangerousness, indeterminate sentences, extended sentences, Anti- Social Behaviour Orders, Sexual Offences Prevention Orders and Serious Crime

Prevention Orders had meant that sentence hearings were invariably more complex.

78. Other respondents argued that the comparison with prosecution fees was irrational as defence lawyers had to act for a real person with associated demands such as: language difficulties; learning difficulties; mental health issues; alcohol or other substance abuse issues and juveniles. Furthermore, it was argued that the prosecution lawyer might deal with a number of cases on the same day thus giving economies of scale. It was suggested that the job of presenting a case on a guilty plea was less onerous than the job of mitigating for a client and that the CPS pay advocates for written advice and for conferences not paid separately under the defence advocates' scheme.

79. A small number of respondents including the CPS however agreed with the proposal to bring the defence fees broadly in line with current CPS fees in respect of the standard and sentence appearance "bolt-ons". Bedfordshire Criminal Justice Board supported this view as well as a few other respondents who took the view that the proposal would achieve efficiency in the sense that removing the "bolt-on" sentence fee might mean more cases listed for plea and sentence rather than plea then sentence, especially if there was modest increase in the AGFS fee payable on a guilty plea to reward representatives who concluded matters at first hearing.

The Government response

80. The Carter review recommended in July 2006 that ancillary payments should be subject to a fixed budget of just over £10 million, and that if that budget were exceeded, ancillary payments should cease and be absorbed into the base fee. The previous Government accepted this recommendation, reserving the right to return to the issue if there was an overspend. As the cost of "bolt-ons" is currently well in excess of that limit, even after taking account of the reductions to the AGFS implemented by the previous administration in April last year, there are good grounds for reviewing them.

81. The Government accepts, however, that there is some force to the argument that the proposed 50% across-the-board cut was too crude an approach, given the great variety in nature of the hearings involved. An amended approach, which we believe is the appropriate way forward, is to retain 'bolt-on' fees for those cases which normally raise genuinely complex or lengthy legal arguments, but to remove them for those which do not. This would see 'bolt-ons' retained at current levels for all hearings other than sentencing hearings. We propose to treat sentencing hearings as one of the five appearances covered within the standard graduated fee. These hearings take place in around 85% of Crown Court cases, and do not routinely raise novel, complex or lengthy arguments. This is analogous to the position with Plea and Case Management Hearings (PCMH), which take place in almost every case, and are included as one of the standard appearances within the base fee. However, an additional

82. As with the original proposal in the consultation paper, payments for committals for sentence and appeals from the magistrates' courts would remain, as these are fixed fees for stand-alone pieces of work rather than "bolt-ons" to the overall graduated fee. We are also not proposing to make changes to fees for committals for sentence or deferred sentence hearings.

Very High Cost Cases

83. The consultation asked:

    Question 29: Do you agree with the proposal to align the criteria for Very High Cost (Criminal) Cases (VHCCs) for litigators so that they are consistent with those now currently in place for advocates?

84. There were 616 responses to this question. Of this 250 (41%) answered 'no' to the proposal, and 285 (46%) answered 'yes'. 81 (13%) respondents neither agreed nor disagreed with the proposal.

Key issues raised in consultation

85. Mixed responses were received on this proposal. Solicitors and their representative bodies opposed the proposal on the basis that the LGFS was modelled on the present system of cases lasting up to 40 days, not up to 60 days as proposed. They said that the LGFS was not designed to deal with VHCC cases and especially the particular problem of high volumes of unused material. It was pointed out the LGFS had no adequate mechanism for the consideration of electronic and other non-paper evidence, whereas the current structure of the VHCC cases allowed for that work to be remunerated. Respondents also highlighted the difficulty for litigators in the degree of risk involved in taking on a very large case, allocating substantial resources and time, and simultaneously being at risk in respect of the fee outcome. Concerns were also expressed that a shift in payments to the end of a case (which would occur as more cases were caught by the LGFS) rather than three-monthly staged payments during the life of a case would cause significant cash flow issues.

86. A few other respondents agreed that VHCCs absorb a large part of the legal aid budget and need closer scrutiny, but they suggested that a more detailed examination followed by proper consultation was required before changing the working criteria.

87. The Bar Council and the CPS on the other hand were supportive of the proposal. The Bar thought that this proposal had the effect of putting litigators on the same footing as advocates. The CPS noted that defence litigators and advocates would have a different threshold to prosecutors (the prosecution threshold for a VHCC is 40 days), but they did not see that as an issue as it simply reflected differences in the operation of the

CPS and defence Graduated Fee Schemes (GFS) and VHCC fee schemes. The CPS welcomed the suggestion of exploring the definition of page count as they intend to make more use of electronic file transfer and electronic evidence and new rules for this would need to be agreed.

The Government response

88. There are already a significant number of cases paid through the LGFS where the original trial estimate was fewer than 41 days but the trials have in practice taken longer. In spite of this, firms do not make very heavy use of the existing provisions within the LGFS to make interim payments in the case of financial hardship. Given this, and the fact that there is a safety net in cases of genuine financial hardship, the potential risks to provider cash flows do not appear to outweigh the substantial operational benefits for Legal Services Commission (LSC) in aligning the LGFS and AGFS so that VHCCs are standardised as cases with an estimated trial length of over 60 days. There is, in our view, an adequate mechanism for remunerating viewing of electronic documents by way of special preparation.

89. The Government remains of the view that, consistent with the approach currently in place for advocates, only cases due to last above 60 days at trial or more should continue to be paid at VHCCs rates and that payment for all work on cases due to last under 60 days should therefore be at the levels set out in the Litigators' Graduated Fees Scheme. We have decided that the most straightforward way to achieve this is by continuing to provide for individual case contracts for cases due to last 41 to 60 days, but to be paid at the rates set out in the Litigators' Graduated Fees Scheme, rather than VHCC rates.

90. Cases classified as VHCCs with estimated trial lengths of over 60 days will continue to be remunerated under the current VHCC fee scheme (hourly rate, stage negotiations).

Appointment of independent assessor for VHCCs

91. The consultation paper asked:

    Question 30: Do you agree with the proposal to appoint an independent assessor for VHCCs? It would be helpful to have your views on the proposed role of the assessor (i) the skills and experience that would be required for the post, and (ii) whether it would offer value for money?

92. There were 597 responses to this question. 322 (54%) disagreed with the proposal to appoint an independent assessor, and 232 (39%) agreed. 43 (7%) respondents neither agreed nor disagreed with the proposal.

Key issues raised in consultation

93. The majority of respondents were against the appointment of an independent assessor and thought that this would add an additional layer of bureaucracy. The Judges Council were not in favour and noted the potential for conflict with trial judges. Other respondents felt that there

were insufficient details in the consultation paper on how much money would be required to implement the new scheme and how an assessor would maintain independence.

94. A few respondents were however supportive of the proposal. They argued that VHCCs consume a disproportionate amount of the legal aid budget and that a suitably skilled assessor would guarantee independence and provide rigorous assessment which would offer the public reassurance that taxpayers' money was not being wasted in the process.

95. Those who responded affirmatively to this proposal expressed a range of views as to the suitability for the post. It was suggested that anyone on the Serious Fraud Office (SFO) list would have the necessary skills and would be able to oversee the work being done. Other respondents suggested that a senior member of the Criminal Bar with knowledge of how the system works, a cost judge, or a solicitor with good experience of working on VHCCs would be a suitable candidate. Other suggestions included: a retired High Court Judge with experience of dealing with difficult and complex cases would provide the appropriate level of skills; someone independent of the legal profession and the judiciary with a sound knowledge of the work involved; and someone with a wide experience in similar cases and their handling, both prior to going to court and during case in court to be suitable for the position.

96. The majority of respondents took the view that an independent assessor would not offer value for money given the few cases that are involved and the necessity of an appeal system, suggesting that consideration should be given to hiring experienced account managers instead.

The Government response

97. The Government accepts the argument that the appointment of an independent assessor, especially if a serving or recently retired judge, could potentially give rise to a conflict with the trial judge in a system where judicial case management is being given greater weight.

98. The Government also acknowledges that the LSC has recruited lawyers within the Complex Crime Unit as recommended by Lord Carter, and the LSC is well supported by the LSC Appeal Committee, which upholds the majority of LSC decisions. The Appeal Committee is chaired by a senior practitioner and is made up of a panel of senior and experienced practitioners, so in effect provides the kind of independent oversight envisaged.

99. Overall the Government is persuaded that the limited benefits of the reform are likely to be outweighed by the additional administrative costs, and we have therefore decided not to proceed with this proposal.

Amendment of criteria for the appointment of two counsel

100. The consultation asked:

> Question 31: Do you agree with the proposal to amend one of the criteria for appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages?

101. There were 696 responses to this question. Of this, 437 (63%) answered 'no' with 229 (33%) answering 'yes' whilst 30 (4%) commented on the question without answering yes or no.

Key issues raised in consultation

102. Many respondents, including some judges, believed that page count was largely irrelevant to the question of allowing representation by two advocates. Many respondents argued that some serious cases require two counsel due to the seriousness and factual complexity, notwithstanding a relatively low page count. The judiciary suggested that the courts should be given unfettered discretion to allow for representation by two advocates where the judges felt that it was appropriate. They argued that the judiciary are already acting to ensure that two counsel are allowed only in "exceptional cases involving substantial, novel or complex issues of law or fact which could not be adequately presented by a single advocate". They argued that this was the most important criterion and it is being applied competently by the senior judiciary. It was suggested that increasing the page limit makes no difference to whether a case contains substantial, complex or novel points of law. The judiciary further argued that evidence from digitally stored media such as disc or audio/visual recordings was increasingly being served in electronic format, which did not count towards the page count – which meant that a case could run to 1,500 pages if it were printed out but because of the format in which it is was served, it would not qualify for the revised criteria.

103. Some respondents did agree with the proposal. The Bar Council agreed with the proposal, provided that the material disclosed electronically was included and that the primary consideration remained the novelty or complexity of facts or law in a case.

104. The CPS welcomed the suggestion of joint working with the LSC and the judiciary to review the criteria for instructing two counsel. They believed that the decisions to instruct one counsel on serious cases can cause some concern among practitioners and that a more overt set of rules would be helpful.

105. It was suggested that, rather than increasing the page count requirement as a consideration for the appointment of two counsel, it would be more effective for orders granted to be kept under constant review. It was often the case that two counsel could be appointed at the commencement of the proceedings, but that as the case progressed the matter may become more straightforward, therefore potentially allowing for the order for two or

more counsel to be revoked. This could be applicable, for example, in cases which start with numerous defendants on the indictment but as the case progresses they enter pleas leaving only one or two defendants standing trial. It was suggested that this was something which the court could keep under review throughout the proceedings.

The Government response

106. The Government has considered the arguments made by consultees. We accept that the benefits of the proposed reform are likely to be very limited, as the appointment of two counsel is very rarely determined in practice with reference to the number of pages. We have therefore decided not to proceed with this proposal. Instead, we will work with the judiciary and prosecutors to review the criteria more broadly before we consider proposing any changes to the criteria for appointment of two counsel at the outset and through the lifetime of the case.

Conclusion

107. Having considered carefully the responses received on the consultation, the Government has decided that it intends to implement the following reforms to criminal remuneration:

i) to implement an overall fee of £565 for either way cases deemed suitable for summary trial, but with the fee split between litigation and advocacy as set out in paragraphs 28 and 29 above; and to enhance the lower and higher standard fee in the magistrates' court as set out at paragraphs 24 and 25, and to abolish the committal hearing fee, as set out in the consultation paper;

ii) to reduce Crown Court fees for cracked cases by 25%, leaving the fees for guilty pleas unaltered, as set out at paragraphs 43 and 44;

iii) to align the fees paid in cases of murder and manslaughter with those paid in cases of rape and other serious sexual offences, as set out in the consultation paper;

iv) to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000,as set out in the consultation paper;

v) to remove the premium paid for magistrates' courts cases in London, as set in the consultation paper;

vi) to remove separate ancillary payments (or "bolt-on" fees) for sentencing hearings and to subsume sentencing hearings within the standard graduated basic fee as one of the five standard appearances included within the base fee, as set out in paragraphs 81 and 82above; and

vii) to pay litigators in all cases with an estimated trial length of between 41 and 60 days under individual contracts at rates specified under the Litigators' Graduated Fee scheme, rather than at Very High Cost Case rates, as set out at paragraph 89 above.

108. Details of the new fees we intend to introduce for criminal proceedings have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm. We intend to bring forward the necessary secondary legislation giving effect to these reforms from October 2011.

Annex H: Remuneration in civil and family proceedings

Introduction

1. The consultation sought views on a series of proposed reforms to remuneration in civil and family proceedings.

2. Many respondents raised concerns that the proposed fee reforms to criminal civil and family proceedings threatened the ability of providers to deliver legally aided services. These concerns are considered at Annex F above, and responses to specific questions on civil and family fees are considered below.

Payments to solicitors and barristers

3. The consultation document asked:

   Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees?

   Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction?

4. There were 1,735 responses to question 32. 115 (7%) supported the proposal, 1,525 (88%) disagreed, and 95 (5%) neither agreed nor disagreed. There were 1,061 responses to question 34. 369 (35%) agreed with the proposal, 638 (60%) disagreed, and 54 (5%) neither agreed nor disagreed.

Key issues raised in consultation – reducing civil and family fees

5. There was strong opposition to the proposed general reduction in fees across all respondents, most particularly amongst solicitors. As noted in Annex F above, the general view was that this would render legal aid work unviable, deter experienced practitioners from carrying out this type of work, and result in only those cases with the greatest prospect of success being taken. While the Bar Council questioned the amount of the savings that would be made, they did concede that if a saving had to be made it would be better to achieve this through an overall reduction in the level of fees paid rather than a more general restructuring of fees. This was subject to there being a period of stability once the reductions were introduced.

Key issues raised in consultation – codifying and reducing barristers' rates

6. The Law Society, and solicitor respondents generally, strongly supported the proposed reform as a first step towards harmonising the rates paid to barristers and solicitors. While the Bar Council opposed the proposal, this was on the basis that the proposed benchmark rates did not make any allowance for more complex cases where they argued that a greater level

of experience, complexity or expertise merited a higher rate. However, they did agree that any general reduction to rates would have to be applied equally to barristers' fees.

The Government response

7. Under section 25(3) of the Access to Justice Act 1999, the Lord Chancellor is explicitly required to have regard to the cost to public funds and the need to secure value for money when setting remuneration rates. Given the urgent need to address the fiscal deficit the Government's view is that it is crucial to review every area of expenditure to ensure that this duty is being met and that the amount that it pays for any service represents maximum value for money. In this context the Government considers that it needs to ensure that it only pays those fees that are absolutely necessary to secure the level of services that are required.

8. As noted above, the Bar Council specifically argued that the benchmark rates set out in Table 5 of the consultation paper were incorrect. While they did not provide any specific examples of cases where higher fees were being paid, the Government made it clear in paragraph 7.14 of the consultation paper that it intended to set the rates for Queen's Counsel in the Supreme Court at a different level to those in the High Court and Court of Appeal to reflect the novelty and complexity of the case issues being advocated at that level. Therefore the rates set out in Table 5 of the consultation paper for Queen's Counsel High Court and Court of Appeal do intentionally represent a reduction to the rates currently paid at that level. However, the Government has revisited the other proposed rates and has identified that the rate of £120 per hour for junior counsel in the county court contained in Table 5 in the consultation paper was incorrect. Further discussions with the LSC have confirmed that split rates of £125.00 outside London and £150.00 inside London are currently used as the starting point for payments to counsel in the county courts, with staff having discretion to award higher levels if they consider it justified. Otherwise the Government is satisfied that the rates set out in Table 5 do accurately reflect the rates currently paid.

9. Clearly no provider is likely to support changes that directly impact on their own income, therefore the opposition to the proposed general reduction in fee levels was to be expected. However, in this context it is interesting to note the substantial support from the solicitor sector for codifying and reducing barrister's fees. This reflects concern amongst solicitors, generally, about the different rates currently payable to barristers and solicitor advocates for comparable work.

10. The proposals to codify barrister's rates and reduce all fees paid in civil and family matters by 10% will deliver an estimated £50 million in annual steady-state savings. This will make an important contribution to making substantial savings in overall legal aid spend. While the Government accepts that there is a risk that the proposed fee reductions could lead to at least some providers leaving the legal aid market, given the current fiscal deficit it considers that it has to look critically at what the market can

sustain as opposed to what providers would like to receive in terms of remuneration for legal aid work.

11. As set out Annex F, taking into account all of the available data, on balance, the Government considers that the proposed reductions are likely to be sustainable. It considers that they draw an appropriate balance between the need to reduce spending and encouraging providers to be efficient and innovative, while ensuring that clients can continue to access legally aided services. Although there is a risk of short term disruption in supply in some areas, particularly immigration and asylum and some other areas of work mainly provided by the not-for-profit sector, it is confident that these could be dealt with by appropriate mitigating action by the LSC, such as running additional bid rounds and/or expansion of other services such as telephone, if suitable.

12. For the reasons set out above the Government has decided to:

    - implement the proposed 10% reduction in all fees paid under the civil and family legal aid scheme; and,
    - codify barristers rates, subject to a 10% reduction, as proposed in Table 5 of the consultation paper, subject to amending the county court rate to reflect that currently being applied by the LSC

13. The 10% reduction will apply to all fees and hourly rates paid under the civil and family legal aid scheme, except those where the service has been procured following competition on price, regardless of whether the service provided is subject to fixed rates, general assessment or an individually negotiated contract. This includes Very High Costs Cases which are paid under hourly rates or "events rates" models, but not those paid under risk rates.

Enhancements in civil and family cases

14. The consultation asked:

    Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate.

    Question 37: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases. If so, we would welcome views on the criteria which may be appropriate.

15. There were 1,148 responses to question 33. 317 (28%) agreed with the proposal, 751 (65%) disagreed and 80 (7%) neither agreed nor disagreed. There were 1,089 responses to question 37. 382 (35%) agreed with the proposal, 662 (61%) disagreed and 45 (4%) neither agreed nor disagreed.

Key issues raised in consultation: new caps

16. Although there was general opposition to these proposals, a sizeable minority of respondents support the proposed reductions in both areas. The Bar Council, and barrister respondents generally, were firmly opposed to the proposed caps, arguing that given the low level of standard rates, the current maximum rates for enhancements were necessary to allow for highly skilled, complex and urgent work to be remunerated at a reasonable rate. They also noted that, given that these higher rates were used very rarely, the savings from capping these at the proposed new lower limits would result in negligible savings. The Association of Her Majesty's District Judges partly echoed this view and expressed concern that such a cap might deter more experienced litigators.

17. The Law Society and many solicitor respondents took a different view. While they accepted that the proposal would impact on solicitors doing very complex cases, they took the view that as such cases were fairly rare the proposed change was unlikely to affect many cases or save substantial sums for the legal aid fund. On this basis they saw no particular problem with introducing the new caps provided that they did not result in a pro-rata reduction in the level of enhancements currently awarded below these rates.

Key issues raised in consultation: new guidance

18. The consensus amongst respondents generally was that it was unnecessary for the LSC to issue any new criteria for the setting of enhancements, as the current bases for enhancements are well understood and are sufficiently flexible to take account of a wide range of factors. These factors are already set out in guidance published by the LSC. Only very limited suggestions for new criteria were received and these did not differ significantly from those already used by the LSC.

The Government response

19. Although the current limits have been in place since 2007, indicative data from the LSC and the general consensus amongst respondents is that very few cases currently exceed the proposed new lower limits. The Government therefore accepts that any savings that would arise at this time would be negligible. It also recognises that, while it is not possible to assess what the precise impact on individual providers might be, where a particular provider has received enhancements at the higher rates in the past, the proposed new caps would mean that they would receive less income for similar cases in the future. While the Government accepts that this may mean that some practitioners would leave the legal aid market, as noted in Annex F above, the Government is satisfied that the proposed changes are likely to be sustainable.

20. As noted above, the Government accepts that any savings that would arise from the introduction of the proposed new limits on enhancements at this time would be negligible. However, this is solely due to the fact that very few cases currently appear to exceed the proposed new limits. It is far from clear that this would be the case in the future. Given the pressing need to address the fiscal deficit the Government considers that it is important to take steps now to ensure that there are appropriate controls in place to avoid future cost pressures. It considers that the proposed changes to the maximum level of enhancements that can be paid in civil and family cases are critical to this in providing greater certainty and control over those areas not covered by standard fees and hourly rates. Given the general consensus about the very limited numbers of cases to which higher rates currently apply, it is satisfied that lower maximum limits can be applied without adversely affecting sustainability.

21. During the consultation the Government identified that paragraph 7.12 of the consultation paper incorrectly suggested that the maximum rate of enhancement that would payable in civil (non-family) cases in the Upper Tribunal would be 50%. These cases currently attract the same level of enhancement as the High Court, Court of Appeal and Supreme Court and it is not the Government's intention to alter this link. Therefore, the maximum rate of enhancement that would be payable in these cases should also be 100%.

22. The LSC already publish guidance on the application of enhancements which contains detailed and comprehensive criteria. Given that only a small minority of cases appear to currently exceed the proposed new thresholds and the limited suggestions for additional/revised criteria, the Government is satisfied that new criteria are not necessary at this time.

23. The Government has therefore decided to cap the maximum level of enhancements that can be paid to solicitors in civil and family cases generally, as proposed in the consultation paper, but to apply the 100% cap on enhancements to civil (non-family) cases in the Upper Tribunal. However, the Government does not intend for this to lead to a pro-rata reduction in the level of enhancements currently awarded below the new, lower caps and will consider with the LSC how this can be clarified in guidance.

24. Given that the existing LSC guidance is sufficiently detailed and comprehensive the Government has decided not to introduce new criteria at this time.

Risk Rates

25. The consultation document asked:

    Question 35: Do you agree with the proposals:

    i) to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and

    ii) to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?

    Question 36: The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23 of the consultation document) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

26. There were 666 responses to question 35 (i). 81 (12%) agreed with the proposal and 585 (88%) disagreed. There were 667 responses to question 25 (ii), of which 84 (13%) agree with the proposal and 583 (87%) disagreed. 346 respondents provided views on the types of case in which risk rates would be justified.

Key issues raised in consultation

27. There was strong opposition to the proposed extension of risk rates from the vast majority of respondents, including both the Law Society and the Bar Council. The Bar Council, in particular, identified risk rates as being the single biggest threat to the sustainability of the civil legal aid Bar. There was general concern that 'risk rates' would apply to a very large number of cases where costs are often not recoverable even though a successful outcome is achieved for the client. Many respondents argued that any extension of their use would deter experienced practitioners from carrying out this type of work, and result in only those cases with the greatest prospect of success being taken.

28. In broad terms, respondents agreed that any extension of risk rates would need to meet three separate tests:

    i) **There must be adequate time to carry out an assessment of risk**. In many cases, particularly those where the legally aided party is defending a case, for example a possession case, the litigation timetable is driven by the other party and there will be no opportunity to carry out a full investigation before beginning to defend the claim. In others, the merits cannot be evaluated until after disclosure and witness statements have been obtained. Standard limitations on public funding certificates currently recognise these features by providing for claims to be re-assessed at various stages.

    ii) **They should not apply to cases involving fundamental rights**. Currently, the Funding Code permits cases to be supported because the consequences for the defendant are so grave or it is a matter of overwhelming importance to them for some other reason, even if the

prospects of success are poor. Logically, a high proportion of these types of cases, which include possession proceedings, will fail. Applying risk rates to such cases would mean that they would not be accepted by providers.

iii) **Cost recovery must be likely**. Many publicly funded cases do not involve the litigant seeking to recover money. For example, where they are defending a possession case or appealing against a homelessness decision. In such cases, the defendant will often settle the matter out of court on the basis that the defendant/appellant does not seek an order for costs. Even where the case is resolved in court it will often result in no order for costs.

The Government response

29. The consultation paper set out the Government's view that the system of risk rates discourages lawyers from proceeding with cases which have little chance of success. The purpose of the consultation was to explore whether they could be applied at a much earlier stage in the process before costs had reached such a high level. In light of the consultation responses and further modelling, the Government has concluded that the majority of cases that could realistically be affected by any extension of risk rates would be public law cases, most of which would be Judicial Reviews. In these cases, risk rates would only apply after the initial application for permission has been considered and therefore after weaker cases have been filtered out. As a result, the Government has concluded that any extension would be unlikely to have a particular impact on the number of cases being issued.

30. The consultation paper also set out the Government's view that the current system of risk rates resulted in a higher success rate at a lower cost to the legal aid fund, resulting in improved results for clients and greater value for money for the fund. However, the system of risk rates is dependent upon successful parties being able to recover their costs at full inter-partes rates. Many respondents argued that public law cases, in particular, were often settled on the basis that the defendant/appellant does not seek an order for costs, and even where the case is resolved in court it will often result in no order for costs. While it is essentially a matter for the judiciary, it would be reasonable to expect that any extension of risk rates would therefore result in the courts coming under increasing pressure to make more costs orders. If granted, these would result in potentially significantly higher costs for public authorities defending these cases.

31. The extent of any additional costs that could be faced by public authorities would, to a large degree, depend upon the reaction of the judiciary. Currently, when deciding on the question of costs, the courts follow the general guidance set down in the case of *Boxall v Mayor and Burgess of the London Borough of Waltham Forest*. This sets out that the overriding objective of the court is to do justice without incurring unnecessary court time and consequently additional cost to either side. As a result, the courts generally will not award costs against a public

authority where the case has been settled after the permission stage without the need for a hearing.

32. The Government believes that a large proportion of public law cases are settled at a relatively early stage in proceedings and wants to avoid changes that could unnecessarily prolong litigation as defendants sought to avoid costs being awarded against them.

33. Although it is difficult to assess precisely how the judiciary are likely to respond to the proposed extension of risk rates, the Government takes the view that there is a high risk that significant additional costs could be imposed on defendants. Given that any costs orders would be payable at private client rates, which are nearly double the rates paid under legal aid, it is likely that any savings to the legal aid fund from the introduction of risk rates would be exceeded by the additional costs imposed on defendants.

34. For the reasons set out above the Government has decided not to proceed with the risk rates proposals

Use of Queens's Counsel in family cases

35. The consultation asked:

    Question 38: Do you agree with the proposal to restrict the use of Queen's Counsel (QC) in family cases to cases where provisions similar to those in criminal cases apply?

36. There were 1,116 responses to this question. 459 (41%) agreed with the proposal, 592 (53%) disagreed and 65 (6%) neither agreed nor disagreed.

Key issues raised in consultation

37. A sizeable minority of respondents including the Law Society, and solicitor respondents generally, fully supported the proposal, taking the view that there were only a minority of cases where very experienced counsel is needed. By contrast, the Bar Council was firmly against any proposals to restrict the use of QCs by aligning the criteria more closely with criminal cases, in particular that the use of a QC by the public authority should be a relevant consideration. They argued that there are already strict criteria in place and that the use of a QC by a local authority was not a condition that should be relevant to parents facing serious allegations. Their general position was that given the different implications for the two sides, any link or comparison to a local authority's position would be a false one.

The Government response

38. Given the urgent need to address the fiscal deficit the Government view is that it is crucial to review every area of expenditure to ensure that this duty is being met and that the amount that it pays for any service represents maximum value for money. In this context the Government

considers that it needs to ensure that it only pays the level of fees that are absolutely necessary to secure the correct level of services that are required.

39. QCs are a very specialised resource. The Government believes that this should only be provided at public expense where it is truly necessary. However, LSC analysis and the general consensus amongst respondents suggest that they are used by parents in public law family cases regardless of the level of counsel employed by the public authority. While the Bar Council have argued that use of a QC by a local authority should not be relevant to parents facing serious allegations, it is not clear that a QC is necessarily needed in all the cases where they are currently employed.

40. In their response the Law Society and many solicitor respondents took the view that there were only a minority of cases where the use of an extremely experienced counsel was necessary and that, in any event, this input was often only needed at a particular stage, not through the whole duration of a case. For example, there could be instances where there was a very complex interim hearing requiring the use of a QC, but afterwards the issues simplify. Therefore, while their input may be needed initially, there is no absolute need for any ongoing involvement. The proposed revised criteria contain the flexibility to permit the use of a QC regardless of the approach taken by a local authority where there are exceptional features to a case and the Government is satisfied that this should provide an appropriate safeguard to ensure that QCs can be used where and when their expertise is necessary.

41. The Government is satisfied that the proposed criteria will provide sufficient flexibility to permit the use of a QC where the expert input provided by a QC is necessary. It therefore intends to tighten the guidance covering the engagement of a QC in a family case (whether the case is above or below the VHCC threshold) to make clear that they should only be approved by the LSC if they meet provisions equivalent to those applying in criminal cases, as proposed in the consultation.

42. As set out in paragraph 13 of this Annex, payments made to QCs in these cases will also be reduced by 10% in line with the general reduction to all fees paid under the civil and family legal aid scheme.

Remuneration for excluded cases

43. Although no specific question was asked, paragraphs 7.32 – 7.34 of the consultation paper proposed that individual cases that were excluded from the scope of the new civil legal aid scheme, but are funded through the new exceptional funding scheme for excluded cases, should be paid at the current fixed fee or hourly rate in the relevant Category, subject to the proposed reduction of 10%.

Key issues raised in consultation

44. The Government has not identified any specific concerns raised by respondents in respect of the proposal on remuneration for excluded cases.

The Government response

45. Given the urgent need to address the fiscal deficit the Government view is that it is crucial to review every area of expenditure to ensure that this duty is being met and that the amount that it pays for any service represents maximum value for money. It considers that it needs to ensure that it only pays the level of fees that are absolutely necessary to secure the correct level of services that are required.

46. In this context, it is essential that the Government takes steps to ensure that there are appropriate controls and safeguards in place to manage future spend. The Government therefore believes it is desirable to retain existing current fixed fee or hourly rates in the relevant Category, subject to the proposed reduction of 10%, for excluded cases, as differential rates could have the undesired effect of incentivising the taking of exceptional funding cases as opposed to those remaining in scope.

47. The Government has decided that cases funded in future through the new scheme for excluded cases, should be paid at the current fixed fee or hourly rates in the relevant Category, subject to the proposed reduction of 10%.

Conclusion

48. Having considered, and given due weight to the responses to the consultation, the Government has decided to introduce the following reforms to remuneration in civil and family proceedings:

    i) to reduce all fees paid in civil and family matters by 10%, as proposed in the consultation;

    ii) to cap enhancements to hourly rates payable to solicitors in civil cases generally as proposed in the consultation but to apply the 100% cap on enhancements to civil (non-family) cases in the Upper Tribunal;

    iii) to codify the rates paid to barristers, and reduce them by 10%, modified as set out in the consultation;

    iv) to cap enhancements to hourly rates paid to solicitors in family cases, as set out in the consultation;

    v) to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply, as set out in the consultation;

    vi) to pay cases funded, in future, through the new scheme for excluded cases, at the current fixed fee or hourly rate in the relevant Category, subject to the proposed reduction of 10%.

49. The 10% reduction will apply to all fees and hourly rates paid under the civil and family legal aid scheme, except those where the service has been procured following competition on price, regardless of whether the service provided is subject to fixed rates, general assessment or an individually negotiated contract. This includes Very High Costs Cases which are paid under hourly rates or “events rates” models, but not those paid under risk rates.

50. Details of the new fees we intend to introduce for civil and family matters, taking into account the correction to the fees paid to junior counsel in the county court, have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm.

51. We will bring forward the necessary secondary legislation, giving effect to these reforms, for civil fees, generally, with effect from October 2011. In the case of housing work covered by the Unified Contract we intend that they will be given effect in February 2012, together with the reforms in respect of family fees. We wish to give effect to these reforms for housing work not covered by the Unified Contract in October 2011 at the same time as the other civil fee changes, but are still considering whether this is feasible.

Annex I: Expert fees

Introduction

1. The consultation sought views on proposed reforms to expert fees. The consultation asked:

   Question 39: Do you agree that:

   i) there should be a clear structure for the fees to be paid to experts from legal aid;

   ii) in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;

   iii) in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;

   iv) the categorisations of fixed and graduated fees (shown in Annex J of the consultation paper) are appropriate; and

   v) the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable.

2. There were:

   - 965 responses to question (i), of which 875 (91%) agreed and 90 (9%) disagreed;
   - 863 responses to question (ii), of which 494 (57%) agreed and 369 (43%) disagreed;
   - 859 responses to question (iii), of which 639 (74%) agreed and 220 (26%) disagreed;
   - 762 responses to question (iv), of which 430 (56%) agreed and 332 (44%) disagreed;
   - 766 responses to question (v) of which 478 (62%) agreed and 288 (38%) disagreed.

(i) Clear structure for the fees to be paid to experts from legal aid.

Key issues raised by respondents

3. There was strong support for the need to control and provide a clear structure for fees paid to expert witnesses. Many respondents also commented that other changes should be made to improve the system, such as reducing the number of experts used in a case; increasing the use of single joint experts; better case management/court timetabling; and reducing excessively long expert witness reports.

The Government response

4. Separate work, along the lines suggested by many respondents, is already being undertaken by the Government to examine and challenge the use of experts in the justice system. The Family Justice Review (FJR) recently recommended in its interim report (published on 31 March 2011)[69] that the family justice system should reduce reliance on expert reports overall and make the criteria for their appointment more explicit and strict. The FJR also recommended the use of multi-disciplinary teams to provide expert services to the courts. The use of multi-disciplinary expert teams to provide jointly instructed health expert witness services to family courts in public law child care proceedings was explored in the recent Alternative Commissioning of Experts (ACE) pilot. A draft evaluation of the pilot is expected to be delivered to the LSC in late summer this year.

5. As most respondents strongly agreed with the need for a recognised fee structure, it is the Government's view that, in the short term, the introduction of codified rates is a reasonable first step towards providing a clear structure for the fees to be paid to experts from legal aid. The separate workstreams to examine and challenge the use of experts in the justice system – along the lines suggested by respondents – will continue and are likely inform the development of the more detailed experts payment scheme in future

(ii) In the short term the current benchmark hourly rates, reduced by 10%, should be codified.

Key issues raised by respondents

6. While a small majority of respondents agreed with the proposal, most expert witnesses who responded to the consultation commented that the proposed codified hourly rates were too low to ensure continued access to experienced, quality advisers in the future, particularly in child protection cases, other family cases and in London overall. A number of respondents, including expert witnesses, the judiciary and legal providers, also commented on the current difficulty of appointing expert witnesses elsewhere in England & Wales. The Welsh Assembly Government commented that it was particularly difficult to appoint child psychologists in some parts of Wales, with experts having to be instructed from a distance. This comment was echoed by the Wales Committee for the Community Legal Service (CLS).

7. Conversely, many legal aid providers, including solicitors and barristers considered that experts were currently paid too much, particularly in comparison to their own fees for legal aid work, and felt that experts' fees should more closely mirror other publicly funded professional fees.

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[69] See footnote 6 above.

A number of individual solicitors, barristers and legal representative bodies (including the Law Society) raised 'equality of arms' issues, with concerns that claimants may not be able to get the same level or quality of expert as the defendant, and suggested that the proposed rates should apply to all experts in a case. Some respondents commented that equivalent rates should apply to other experts instructed by public bodies, such as local authorities, the Police and the Crown Prosecution Service.

8. The Law Society strongly agreed with a move to control expert witness fees, but the Bar Council was less supportive and commented that there was no evidence of diversity and equality consideration.

9. Concerns about a lack of data underpinning the proposals were expressed by the Bar Council, the British Psychological Society (BPS), The Academy of Experts (TAE) and the Consortium of Expert Witnesses. There were also concerns about the adequacy and accuracy of data gathered from both previous file reviews on experts' legal aid costs carried out by the LSC.

The Government response

10. The Government acknowledges that the data captured by the LSC's earlier file reviews are not exhaustive and has limitations. The LSC does not hold or separately collect information on the number of experts paid from legal aid, the value of payments to them and the work that these payments bought. Neither is there sufficient equalities information available to enable a detailed assessment of the potential for this proposal to have a disproportionate impact on people based on the groups having the characteristics protected by the Equality Act 2010. Further details are set out in the Equalities Impact Assessment published alongside this Government response.[70]

11. This position has not significantly changed following consultation as no additional data was provided via the consultation exercise. However, the benchmark rates (in their current form) have been applied by the LSC for some time and there are only limited anecdotal reports of problems with access to experts. In London, in particular, the LSC has been able to apply lower rates than in the regions due to the level of competition for the work.

12. Given the clear need to make savings, the Government has therefore decided to proceed with codifying and reducing the current LSC guidance rates by 10%. There will however be a 'safety valve' in the system, in that the LSC will be able to authorise increased rates in exceptional cases where required – see paragraph 23 below.

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[70] See footnote 4 above.

13. During the course of implementation, the MoJ will work with the LSC to ensure that a proportionate but effective monitoring mechanism is put in place to enable a better understanding of the effect of the introduction of the reduced, codified rates on all affected groups.

14. Further work and consultation with affected groups will be undertaken on the back of this as part of the ongoing development of a more detailed scheme based on fixed fees, graduated fees (where specific totals are set for particular activities), and a limited number of hourly rates.

(iii) In the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates.

Key issues raised by respondents

15. The majority of respondents agreed with the longer term proposal to conduct further work to implement a fixed and graduated fee scheme and a limited number of hourly rates for experts, but stressed that it would be important to ensure the categories and banding in any future scheme should be appropriate and transparent, although no further detail was supplied.

16. Alternatively, a small number of respondents suggested that a fixed and graduated fee scheme with a limited number of hourly rates would be too complicated and costly to administer, and so a competitive tendering process should be considered instead. A number of solicitors and barristers commented on payment delays for expert witnesses and considered that the LSC should contract with, or pay, experts directly.

The Government response

17. It would be difficult to devise or initiate a competitive tendering process at this stage. It has already been acknowledged that insufficient data exists on expenditure to inform a very detailed scheme, and therefore defining the activities for which bids would be made, and comparing bids with current prices for those activities, would be difficult. By introducing the proposed schemes and improving the monitoring of expenditure, the Government hopes to be in a position in the future to work towards a more tailored payment scheme where a move towards a competitive scheme could then also be considered. The Government thinks that the LSC contracting with or paying experts directly for legal aid work would lead to a reduction in savings given the increased costs to the LSC that administering such contracting would entail.

18. The Government therefore intends to proceed with longer term plans to work towards putting in place a more detailed and prescriptive scheme of fixed and graduated fees (where specific totals are set for particular activities) and a limited number of hourly rates. This will, however, be in the context of any changes that, for example, come out of the Family Justice Review.

(iv) The categorisations of fixed and graduated fees (shown in Annex J of the consultation paper) are appropriate.

Key issues raised

19. Many respondents commented that the proposed fees either did not equate to existing specialist representative body (or other professionally recognised) fee levels; or were not flexible enough and needed further clarification or refining. In contrast, others felt that experts should be paid the same fee, whatever their field of expertise.

The Government response

20. Given the lack of consensus and contrasting views expressed by respondents, the Government is satisfied that the categorisations and graduated fees are a reasonable starting point, but acknowledges that further data collection and work with the profession will need to be undertaken to evidence any future fixed and graduated fee scheme.

(v) The proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable.

Key Issues raised

21. The outline definition of an 'exceptional' case was generally accepted by the majority of respondents, as a starting point. Some respondents commented in particular that further clarification was needed on how the proposed provisions for 'exceptional' cases would operate; who would make the decision on what constituted an 'exceptional' case; and how exactly this would be defined.

22. Whilst some respondents commented that the Judiciary should have discretion to authorise 'exceptional' cases, others felt that this should fall to the LSC.

The Government response

23. As 'exceptional' cases are likely to be more expensive, it is important that the LSC are able to retain the ability to assess that value for money is being achieved – even where exceptional expense can be justified.

24. 'Exceptional' circumstances are currently defined as those where: the experts' evidence is key to the client's case; and either the complexity of the material is such that an expert with a high level of seniority is required or the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.

25. It is the Government's view that the provisions for 'exceptional' cases remain as set out in the consultation paper, for the present. This will be considered further during the development of a more complex fixed and graduated fee scheme in the longer term.

Conclusion

26. Having considered the responses to the consultation, the Government has decided to:

    - codify the benchmark rates for experts, reduced by 10%, with provision for exceptional cases; and
    - continue to develop the longer term framework for expert fees as set out in the consultation.

27. Details of the new fees we intend to pay to experts have been published separately and can be found at: http://www.justice.gov.uk/consultations/legal-aid-reform.htm. We will bring forward a Funding Order, giving effect to these reforms, later in the year.

Annex J: Alternative sources of funding

Introduction

1. The consultation paper set out a series of questions seeking views on two proposals for offsetting the costs of legal aid: the establishment of a scheme to secure the Interest on Lawyers' Trust Accounts, and the introduction of a Supplementary Legal Aid Scheme.

Interest on Lawyers Trust Accounts (IOLTA)

2. The consultation paper proposed options for securing the Interest on Lawyers' Trust Accounts (IOLTAs), based on similar models used in other international jurisdictions. The consultation asked:

   Question 40: Do you think there are any barriers to the introduction of a scheme to secure interest on client accounts?

   Question 41: Which model do you believe would be more effective:

   > Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or
   >
   > Model B: under which general client accounts would be pooled into a Government bank account?

   Question 42: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on:

   a) a mandatory model;

   b) a voluntary opt-in model; or

   c) a voluntary opt-out model.

3. There were 897 responses to question 40. 578 (64%) thought that there were barriers to the introduction of an IOLTA scheme, 189 (21%) did not think there were barriers and a further 130 (14%) commented. There were 717 responses to question 41. Of these, 317 (44%) preferred Model A, 94 (13%) favoured Model B and 306 (43%) preferred neither Model A nor Model B. There were 657 responses to question 42. 216 (33%) preferred option (a), 102(16%) option (b), 47 (7%) option (c) and 292 (44%) favoured none of the options.

Key issues raised in consultation

4. Although there was positive support for the policy principle from a number of quarters, including some sections of the Bar and the Advice Services Alliance, in general respondents had concerns around both the general concept of an IOLTA scheme and the specific approaches proposed, with no consensus generated around either model.

5. Generally, the concerns about the proposed scheme were largely reflected in the Law Society's response. They pointed out that many firms

of solicitors already used the interest generated on client accounts in a variety of different ways:

- some solicitors account for the interest to the client and forego their entitlement to it;
- others use the money towards the costs of administering the accounts and the handling of clients' money generally – research suggests that those costs might have amounted to over £80 million which suggests that most firms are currently having to finance their handling of client money from their general fees;
- some use the money to fund related services – we understand that many "free conveyancing" offers for remortgages are, in fact, financed by the interest that solicitors are entitled to retain on the funds in their client account;
- some explicitly put the money towards pro bono or other charitable work.

6. They further argued that IOLTA schemes:
    - are unlikely to yield amounts of money that are sufficient to justify the damage that they will cause;
    - would not provide a certain income;
    - would be relatively easily avoided;
    - may reduce the level of pro bono work; and
    - may reduce the level of interest, service and competitiveness of the sector and may cause significant harm to a number of small businesses

The Government response

7. IOLTA schemes are not a new idea, and other countries, including the United States of America, Australia and France have similar schemes. It is evident, however, that the amounts generated by an IOLTA scheme vary with interest rates and the state of the economy generally. This is borne out by the experience of other countries, such as the USA, where income from their IOLTA scheme was as much as $370 million in 2007, before falling to around $92 million in 2009.[71]

8. Following the global economic crisis and the impact this has had on the financial sector, we were particularly sympathetic to the argument that having a choice of bank in which to place client monies helped firms to secure better rates and services for both their clients and themselves.

[71] See: http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/

9. We have listened carefully to the arguments made by those who responded to the consultation on the wider benefits and disadvantages of developing an IOLTA scheme. In particular, we have given considerable weight to the views of the Law Society. The Government commends in particular those providers that already use the monies generated from their client accounts to help fund pro bono and charitable work. We would encourage other providers of legal services to follow the example set by these firms. We also suggest that the Law Society could look carefully at this area and consider whether they can play a more active role in helping firms establish similar practices, perhaps providing strategic input into how such funding could be best targeted to maximise the benefit it offers.

10. Having considered carefully the arguments put forward on the consultation, the Government has concluded, on balance, not to pursue an IOLTA scheme for England and Wales at this time.

Supplementary Legal Aid Scheme

Introduction

11. The legal aid consultation paper proposed implementing a Supplementary Legal Aid Scheme (SLAS) for all areas of civil legal aid cases where general damages are successfully claimed. In addition, we proposed that the SLAS would also apply to any out-of-scope case which was funded through the exceptional funding scheme. The proposals were consulted on at the same time as Lord Justice Jackson's proposals for reform of civil litigation funding and costs.

12. The legal aid consultation invited views on introducing a Supplementary Legal Aid Scheme and on how funds should be recouped if a SLAS were implemented. Two different models of SLAS (self-funding and partially self-funding) as well as different methods of recovery were put forward for consideration. For example, possible methods of recovery under a partially self-funding SLAS included a percentage of damages paid by the legally aided person or a percentage of the interparty costs awarded to the claimant lawyer at the conclusion of the case.

13. The consultation asked:

    Question 43: Do you agree with the proposal to introduce a Supplementary legal Aid Scheme?

    Question 44: Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?

14. There were 622 responses to question 43. 176 (28%) agreed with the proposal, 273 (44%) disagreed, and 173 (28%) neither agreed nor disagreed. There were 565 responses to question 44. 259 (46%) agreed with the proposal, 182 (32%) disagreed, and 124 (22%) neither agreed nor disagreed.

Key issues raised in consultation

15. Some respondents saw merit in introducing a Supplementary Legal Aid Scheme, if Lord Justice Jackson's proposals on conditional fee arrangements and a percentage uplift in damages were implemented. However, the view that a SLAS may be a positive development was subject to broader uncertainty as to how such a scheme would work and its viability particularly in light of the proposed scope changes. Several respondents highlighted that they found it difficult to understand what was actually being proposed in light of the consultation paper's proposals to remove clinical negligence, education damages and housing damages cases from scope.

16. Many respondents, particularly representative bodies, questioned whether the SLAS would be likely to generate much money. The source of initial set up costs of the self-funding scheme was also questioned. Some respondents highlighted that any scheme of this type relies on a sufficient number of strong cases to ensure its viability. It was also argued in some responses that, if implemented, the SLAS proposals would be less favourable compared to current CFAs. Consequently, some respondents suggested that the SLAS would only attract the riskiest and most difficult cases should it be implemented in isolation (with the current CFA system remaining unchanged).

The Government response

17. The SLAS proposals were intended not only to create an alternative funding stream to supplement the legal aid fund but also to provide the opportunity to address the relationship between legal aid and Lord Justice Jackson's proposals for reform to the costs of civil litigation, thereby ensuring that alternative sources of funding, such as conditional fee agreements (CFAs), remained no less attractive a funding mechanism than legal aid in cases involving damages.

18. Lord Justice Jackson proposed that the recoverability of CFA success fees from the losing side should be abolished in all cases, including personal injury. He also proposed that in personal injury cases the success fee which lawyers can take should be limited to 25% of damages, excluding damages awarded for future care and loss. On 29 March 2011, the Government announced[72] that it would implement the following:

    - abolish the recoverability of CFA success fees in all cases;
    - limit CFA success fees in personal injury cases to 25% of damages (excluding damages awarded for future care and loss); and

[72] See footnote 8 above.

- increase by 10% non-pecuniary general damages such as pain, suffering and loss of amenity in tort cases.

19. The legal aid consultation paper proposed implementing a Supplementary Legal Aid Scheme (SLAS) for all areas of civil legal aid cases where general damages are successfully claimed. In addition, the Government proposed that the SLAS would also apply to any out-of-scope case which was funded through the exceptional funding scheme.

20. The Legal Aid consultation paper suggested a number of methods under which a partially self-funding Supplementary Legal Aid Scheme could calculate and collect funds. The options which suggested recouping a percentage of:

    - the inter-party costs awarded to the claimant lawyer at the conclusion of the case paid by the successful claimant lawyer; or
    - costs paid to the unsuccessful defendant

    received limited support.

21. The third option suggested recouping a percentage of damages paid by the successful legally aided client. However, this proposal was (unintentionally) narrower than the proposal set out in the Jackson consultation to cap success fees in personal injury cases at 25% of all damages other than damages for future care and loss, as the SLAS proposal referred only to general damages. Several respondents highlighted this anomaly. For example, the Bar Council Civil Legal Aid Committee commented that the SLAS restricted to general damages was a better option for claimants than a CFA because of the narrower types of damages to which the SLAS related.

22. The Government recognises that those respondents who argued that a SLAS restricted to general damages would make legal aid more attractive than CFAs are correct. The Government did not intend this outcome. The Government's view is that legal aid should generally be no more attractive than CFAs or other forms of funding and that the approach to the SLAS should be consistent as far as possible with the wider reforms to the costs and funding of civil litigation.

23. Some respondents argued that the SLAS should be set at 10% (in line with the increase in general damages for non-pecuniary loss in tort cases).

The Government's response

24. The Government acknowledges that the number of respondents supporting the SLAS was lower than those who opposed the proposal. Some respondents (both supporters and opponents of the proposal) indicated that they were not sure how the SLAS would operate, particularly, in light of the proposed scope changes. It was also notable that a higher number and proportion of respondents supported the

concept of the SLAS recouping a percentage of damages than those who expressed support for the SLAS itself.

25. The Government recognises that the SLAS proposal represents a new and unfamiliar way of funding some civil cases in England and Wales, but is of the view that no compelling argument against the SLAS was presented. At a time when the public purse is constrained, the partially self-funding SLAS represents an important innovative measure to enable legal aid funding for civil cases. The funds raised by the partially self-funding SLAS will supplement the legal aid fund, thereby supporting members of the public to pursue civil cases. Failure to innovate when public funding is limited is likely to result in greater pressure on the legal aid fund. This measure, along with others adopted by the Government, is intended to put legal aid on a sustainable footing and to ensure that those most in need receive legal aid funding.

26. Several respondents questioned the viability of the SLAS proposal should clinical negligence, education damages and housing damages cases be removed from scope. The Government has decided to proceed to remove clinical negligence, education damages and housing damages cases from legal aid scope. While the SLAS would apply to out-of-scope cases funded through exceptional funding, we recognise that respondents' concerns are well-founded in the context of a SLAS that is fully self-funding. In addition to the risk that SLAS funds would be easily depleted and difficult to replenish, a self-funding SLAS has the additional burden of requiring different percentages of damages to be recouped from different cases depending on risk and therefore would entail significant administration.

27. The Government's view is that this proposal should be consistent with the wider reforms to the costs and funding of civil litigation and that legal aid should generally be no more attractive than CFAs or other forms of funding.

28. Under the Jackson CFA reforms announced on 29 March, the success fee which a solicitor may claim from a successful client in personal injury cases (including clinical negligence cases) will be capped at 25% of all damages, other than those for future care and loss. Solicitors will be able to charge a success fee which is less than 25%, and the Government anticipates that market forces will encourage this.

29. The Government has therefore decided to implement a partially self-funding SLAS. The funds recouped will supplement the legal aid fund and therefore the funding of civil cases. This partially self-funding model is not only viable in light of the Government's changes to legal aid scope, it also ensures that the level of damages recouped to the legal aid fund can be set at a fixed percentage rather than the variable rates that the self-funding SLAS would entail. The partially self-funding model also facilitates a consistent approach with the wider reforms to the costs and funding of civil litigation.

30. Consequently, the Government has decided to introduce a SLAS which is partially self-funding and takes for the legal aid fund a percentage of all damages other than damages for future care and loss, in a way that is consistent, so far as possible, with the reforms to civil litigation costs in personal injury cases.

The percentage of damages

31. Some respondents argued that the SLAS should be set at 10% (in line with the proposed increase in general damages for non pecuniary loss in tort cases). However, the Government considers that this would mean that legal aid would generally be more attractive than CFAs in personal injury cases (to the limited extent that legal aid is relevant in these cases).

32. The Government recognises that in damages cases other than personal injury cases, the SLAS may, in some cases, be more attractive than a CFA because: there will be no cap on the CFA success fee; a legally aided claimant is protected from having costs awarded against him if he loses the case; and will not need to take out After the Event (ATE) insurance (although he may be required to make a contribution to the costs of his case). However, having considered the points raised by respondents, the Government has concluded that the recovery level for the SLAS should be consistent with the Jackson reforms to ensure, in so far as it is possible to do so, that CFAs are no less attractive than legal aid. The Government has decided to set the level of recovery at 25% of all damages successfully claimed, other than any damages for future care and loss.

Conclusion

33. Having considered the responses to the consultation questions on alternative sources of funding, the Government has decided to introduce a Supplementary Legal Aid Scheme, under which 25% of all damages successfully claimed, other than damages for future care and loss, in cases funded by legal aid will be recovered by the legal aid fund. This will include cases funded through the exceptional funding mechanism.

Annex K: Impact Assessments (IA) and Equality Impact Assessments (EIA)

Introduction

1. The consultation asked:

   Question 49: Do you agree that we have correctly identified the range of impacts under the proposal set out in this consultation paper? Please give reasons.

   Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

   Question 51: Are there forms of mitigation in relation to client impacts that we have not considered?

2. There were 1,361 responses to question 49. 88 (6%) agreed that we had correctly identified the range of impacts of the proposals for reform, 1,104 (81%) disagreed, and 169 (12%) neither agreed nor disagreed. There were 1,161 responses to question 50, of whom 50 (4%) agreed , 1,036 (89%) disagreed, and 75 (6%) neither agreed nor disagreed. 636 respondents offered views on forms of mitigation that had not been considered in the consultation.

3. A number of respondents also submitted new data or research, or referred to other existing information which could be used to support the impact assessment of the proposals and build on the analysis set out in the initial IAs and EIAs. We have included consideration of this evidence in the relevant sections of the final IA and EIA that accompany this response document.[73]

Key issues raised in consultation

4. Comments on the IAs and EIAs from individuals, legal practitioners, representative bodies and most other stakeholders were largely negative, although some welcomed the level of analysis and detail that had been provided to assess the impact of the proposals.

5. Many respondents highlighted the impacts and evidence gaps identified in the IAs and EIAs in their arguments against the reforms with many, in particular, raising the potential for the proposals to affect women, BAME people and disabled people.

6. Others criticised the IAs and EIAs for not identifying the full range or extent of the impacts of the proposals and / or identified additional potential impacts that the reforms might have. While many respondents

[73] See footnotes 3 and 4.

considered that the impact assessments did identify the extent of the impacts on clients sufficiently, others argued that the impacts would be more severe, stressing the vulnerability of many legal aid clients.

7. Respondents also criticised the lack of mitigations proposed in response to the impacts identified, although some agreed that the possible forms of mitigation were limited by the nature of the proposals. Where mitigations were proposed, mainly in relation to the proposals to expand the role of the telephone helpline, these have been considered in the relevant section of this response and the final IA and EIA.

8. Other key issues raised included that:

   - the impact assessments had failed to fully take account of the impacts on other Government departments and public bodies, including local authorities;
   - litigants-in-person would cause increased costs in other parts of the civil justice system;
   - clients are often vulnerable and some important potential impacts on clients, including the potential for increased ill health as a result of legal problems going unsolved, had not been taken into account;
   - the effect of reforms on children, including in divorce and contact cases, had not been taken into account;
   - because of these additional impacts on clients and other public bodies the wider costs of the proposals could outweigh any legal aid savings, and current legal aid expenditure saves money for other parts of the public sector;
   - reducing legal aid fees would deter young people from becoming solicitors and barristers undertaking legal aid work, and that as only those with significant resources would be able to do so in future, the diversity of the professions would suffer.

9. Respondents also raised specific equalities issues and these are set out in more detail in the relevant sections of the EIA that accompanies this response to consultation.

The Government response

10. The initial IAs and EIAs, which were published alongside the consultation *Proposals for the Reform of Legal Aid in England and Wales,* set out our assessment of the potential impact of the reforms. Following consultation we have made changes to the proposals for implementation and have now published a final IA and EIA, reflecting these changes and incorporating feedback on the proposals and impact assessments from respondents to the consultation.

11. This feedback includes additional information on the potential effect of the changes submitted by respondents including, for example, the report commissioned by the Law Society on the potential impact of the reforms

on legal aid firms. We have also undertaken a review of the research identified and referred to by respondents on a range of issues related to the legal problems that people face, including a review of the data collected by the Civil and Social Justice Survey conducted by the Legal Services Research Centre (LSRC), to identify relevant additional information.

12. The results of this exercise are set out in greater detail in the final EIA that accompanies this response. However, overall, we remain of the view that our analysis based on Legal Services Commission (LSC) and LSRC data is the most appropriate and robust way to assess the impact of the proposals on clients and providers.

13. A comprehensive review of the available evidence on litigants-in-person,[74] which as noted above was a particular issue identified by many respondents, has now been undertaken and published alongside this response to consultation. Again, while valuable additional information has been considered, we believe that our initial assessment of the likely impact on the wider civil justice system of an increase in the number of litigants-in-person is robust and consistent with the evidence.

14. While respondents to the consultation suggested a range of possible impacts on clients based on their personal circumstances, in the initial EIA we focussed our analysis on the protected characteristics set out in relevant equalities legislation. Changes to the equalities duties since the consultation was published mean that the impact on people based on their age, as well as other protected characteristics including religion and belief must now be considered by public authorities. We have therefore now considered these impacts and the relevant sections of the EIA set out our assessment of the impact that the proposals might have on children, as argued for by respondents to the consultation.

15. While we remain of the view that the initial IAs and EIAs appropriately identified the range and extent of the potential impacts of the consultation proposals, we have therefore addressed the key criticisms of the IAs and EIAs made by respondents to the consultation. The final impact assessment documents published alongside this Government response to consultation set out a comprehensive assessment of the range and extent of the impacts that the proposals will have, based on the full range of evidence available

[74] See footnote 19 above.

16. However, gaps in the evidence inevitably remain, as information which would be useful in assessing the impact of the proposals is not collected. For example, data on protected characteristics such as religion and belief is not routinely collected by organisations working in the justice system. In some areas this has meant that we are not able to undertake detailed assessments of the impact of the proposals on particular groups. Our approach throughout the initial and final IA and EIA has always been to exercise caution, and take account of how robust the evidence is when drawing conclusions about the impacts the proposals are likely to have. Therefore, we have not discounted the potential for the proposals to affect people because of gaps in the data.

17. Consideration of how the reforms have been amended in light of feedback, and how the impacts of the reforms for implementation are justified by the need to achieve the Government's objectives, is set out elsewhere in the relevant sections of this response documents. In order to assess the actual effects that the reforms have had there will be a full post-implementation review of the changes.

Annex L: Alternative Proposals

Introduction

1. The consultation did not seek alternative proposals for making savings. However, many of the responses, and in particular those from the Law Society and Bar Council, suggested alternative ways of making savings in legal aid expenditure, which it was said would reduce or remove any financial imperative to make the changes proposed in the consultation. Table 1 below contains a summary of ideas put forward by the Law Society, together with comments from the Government on the costings attributed to the Law Society savings.

2. Many of the proposals put forward by the Law Society and Bar Council were supported by other representative bodies, such as, in the family sphere, Resolution and the Family Law Bar Association. Other respondents have put forward additional ideas of their own.

3. There are a number of common themes that can be indentified from the alternative proposals put forward by respondents.

A. Proposals which reduce the initial volume of cases

4. A number of proposals seek to reduce spending on legal aid by reducing the volume of cases. These include:

i) Simplification of legislation and of legal provisions

5. Included were proposals to simplify the law on housing tenure in accordance with a Law Commission report[75] in order to reduce the incidence of disputes, and to repeal criminal legal provisions in respect of hearsay and bad character which generate additional arguments. Other proposals included removing duplicate sentences and simplifying statutory language. The Immigration Law Practitioners Association pointed out that the frequency and complexity of immigration legislation drives costs, including legal aid.

The Government response

6. The Government considers all legal simplification proposals on their merits, bearing in mind the relation between legal simplification and clarity, and legal flexibility and adaptability. Wider costs may be associated with inflexible legislation or with provisions which offer fewer safeguards, which need to be balanced against any savings from

[75] *Renting Homes: the Final Report*, Cm 6781,May 2006. http://www.justice.gov.uk/lawcommission/renting-homes.htm

applying the law more quickly and easily. The Government's response to the Law Commission's report was included in its response to the Rugg review.[76]

(ii) Reducing cases generated by government bodies

7. These proposals relate to procedural reforms which aim to reduce volumes of case. One proposal was that the volume of interim court hearings could be reduced if prisoners on remand were no longer produced to the court every 28 days. Savings would arise if the period was extended.

8. A second proposal from the Judges Council and other senior judiciary related to reducing the number and cost of judicial reviews, in immigration in particular. Another suggestion was that the Crown Prosecution Service (CPS) should be more selective about pursuing individuals and about laying charges as current practices lead to too many dropped prosecutions or judge-directed acquittals, which constitute a waste of resources.

9. In addition Citizens Advice suggested that merging the four different workforce employment agencies would reduce the need for employment advice, and that improved decision making and administration in the Department for Work and Pensions (DWP) and Her Majesty's Revenue and Customs (HMRC) could reduce the need for advice on benefit issues.

The Government response

10. The Government is already considering the prisoner production proposal as part of the MoJ's efficiency programme for the Criminal Justice System.

11. The Government agrees with the proposals on judicial reviews and our plans are set out at Annex A.

12. On criminal prosecutions, there is no strong body of evidence to indicate that there are disproportionate numbers of prosecutions which are dropped or result in a judge directed acquittal, particularly where the circumstances which lead to that outcome are foreseeable. For example, prosecutions are often withdrawn against defendants in multi-defendant cases when other defendants plead guilty and take responsibility for the offending. All prosecutions commenced by the Crown Prosecution Services (CPS) are undertaken in accordance with the Code for Crown Prosecutors, meeting the evidential and public interest tests. The latest CPS data shows a conviction rate of 86% across both the magistrates'

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[76] *The private rented sector: professionalism and quality – the Government response to the Rugg review consultation*, May 2009. http://www.communities.gov.uk/documents/housing/pdf/1229922.pdf

courts and Crown Court. There may be unintended consequences for victims, witnesses and local communities if prosecutors take a more risk-averse approach towards prosecution.

13. The Government announced on 3 December[77] a review of the Government's workplace rights, compliance and enforcement arrangements to establish what scope there is to streamline them and make them more effective. Findings will be published later this year.

(iii) Restricting eligibility further via the merits test

14. There were suggestions that the LSC should enforce more strictly its merits test for granting legal aid in civil and family proceedings. In family law, respondents put forward the idea of enforcing more strictly the merits test in private law children cases as an alternative to removing such cases from scope. The Law Society suggested that such a measure could reduce the volume of contact cases by 20-30%. Resolution suggested a list of questions that might be used by the LSC to enforce a stricter merits test.

The Government response

15. Many of these questions are already taken into account in the current merits test. Others are similar to the issues that would be raised in considering child protection issues for the purposes of the domestic violence exception (see Annex A, paragraph 44). Following the consultation, we have decided to make one change to the merits test (see Annex C). The Funding Code has been amended a number of times over recent years to tighten up the criteria for awarding legal aid. There are administrative costs in enforcing merits tests, and inherent difficulties in relying on them for savings. For example, it is very difficult to challenge the solicitor's assessment of the prospects of success for a case.

(iv) Application of 'polluter pays' for public bodies losing cases

16. One suggestion was that where public bodies (which are party to a case) cause unnecessary costs then they should bear the cost. In criminal cases, it was argued that greater use should be made of wasted costs orders, and that the threshold for making wasted costs orders should be lowered to enable this. Another suggestion was that where the administrative decisions of public bodies are overturned these bodies should pay the legal aid costs involved and also pay a surcharge. In both instances there would be a financial incentive on the public bodies to engage in actions which improved their decision making and reduced the costs to legal aid.

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[77] See: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101203/debtext/101203-0003.htm

The Government response

17. There would be no additional savings to the Government overall if the legal aid fund was financed by a different part of the Government, but we recognise that, in theory, the application of a 'polluter pays' approach might ensure that greater account is taken of the costs to legal aid. On the other hand, it might generate a much more risk-averse approach, especially in relation to borderline cases, and have unintended consequences which could drive additional costs. For example, local authorities might be reluctant to intervene in cases of suspected abuse, and prosecutors might be reluctant to pursue criminal prosecutions. Strict application of the "polluter pays" principle would also call into question the effective cost protection that the legal aid fund currently receives when funding litigation. A significant proportion of cases funded by the LSC are unsuccessful, and any requirement for the LSC to meet the costs of other parties in unsuccessful cases would be a significant drain on the fund.

18. It is already the case that the courts can award costs in civil cases, and last year, the legal aid fund recovered £170 million from opponents of legally aided parties.[78]

19. The Government considers that inefficiencies in criminal justice procedures are best addressed through better decision making, and by introducing more efficient and streamlined processes. The CJS efficiency programme aims to do this (see paragraph 16 section 2: the case for reform). The MoJ is also already working with other government bodies to help support improved decision making in civil matters, for example along the lines of the joint work currently being carried out between Her Majesty's Courts and Tribunals Service and the DWP.

20. For these reasons, the Government has no plans to extend the polluter pays principle further.

(v) Enforcement considered more thoroughly by Departments

21. The related proposal was that government consultation papers introducing new rights or offences should set out the costs of enforcement, as should explanatory notes to legislation. In addition the NAO should scrutinise these predictions and require compensation to be paid to the legal aid fund if appropriate.

The Government response

22. It is already a standard requirement that consultation proposals and legislation are accompanied by published Impact Assessments (IAs). These include the Justice Impact Test (JIT). JITs assess the costs on the justice system, including on legal aid, of new government proposals.

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[78] LSC data.

Where these proposals result in a net cost to MoJ, then appropriate funds are transferred to meet that cost.

23. The NAO already samples IAs and makes recommendations relating to their quality.

(vi) Diversion of cases away from court and legal aid

24. It has been suggested that some types of case could be diverted away from the court and to an Ombudsman service, where resolution of a dispute might be possible without the involvement of legal services. This might apply to debt, housing and social welfare cases.

25. It was also suggested that the use of mediation should be considered carefully, and that mediation should not be applied in such a way as to increase costs.

The Government response

26. One of the factors that was considered in deciding whether cases should be removed from scope was the availability of alternative remedies, for example a complaints procedure or an Ombudsman's scheme.

27. The Government is already considering other court diversion proposals as part of the public consultation on civil justice reform, where proposals are currently subject to public consultation. The Government has also considered (private law) family court diversion proposals although these have now been subsumed within the current Family Justice Review chaired by David Norgrove. This included reviewing the processes which apply to mediation. The Family Justice Review interim report[79] outlined the benefits of mediation in supporting parties to resolve their disputes. The need to make savings in the legal aid budget takes these initiatives into account.

B. Proposals for alternative sources of funding

28. A number of proposals seek to reduce spending on legal aid by securing alternative sources of funding. These include:

(i) Proposals for extra taxes and levies

29. Proposals included to place an increased tax on alcohol on the grounds that much crime is alcohol-related, to place a levy on the financial services industry to cover the legal aid costs of fraud cases as much fraud takes place within that sector, and to place a levy on consumer credit lenders to pay for debt advice.

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[79] See footnote 6 above.

The Government response

30. These proposals would mean creating new forms of tax and the Government's policy is to consider these on their own merits. Such consideration should not give extra weight simply on the grounds that new taxes could be hypothecated against specific areas of expenditure. The Treasury's Consolidated Budgeting Guidance sets out the criteria used to aid decisions whether to hypothecate taxation against expenditure. These are based on the general presumption that tax revenue should not used to offset specific expenditure. They have been devised in order to support decisions that hypothecated tax revenues are agreed only on grounds of efficiency. Therefore hypothecation is not normally agreed if it would: increase spending power; erode the ability of the Government to raise tax efficiently and in the sectors of its choosing, and erode its ability to allocate spending according to priorities.

31. In addition the relevant macroeconomic objective is to cut overall public spending rather than to increase overall levels of taxation and the two are not simply interchangeable. Tax policy is based on a variety of factors, including whether the tax base is broad or narrow, how regressive or progressive the tax might be, taxpayers' ability to pay, and the behavioural and other consequences of applying tax. In this instance the proposals seem to be based on some notion of causality, although there is no causal connection between alcohol and crime, between fraud and financial services providers (where regulation already applies), or between consumer credit providers and debt.

32. The Government is not therefore minded to consider recommendations to introduce new taxes to offset the costs of legal aid. Instead legal aid expenditure will continue to be funded primarily through general taxation.

(ii) Increased use of legal expenses insurance

33. It has been suggested that wider use of insurance in civil disputes would help reduce legal aid costs. One suggestion was that there should be legislation making legal expenses insurance a compulsory element of consumer insurance policies (such as car, household or contents). Compulsory legal insurance for company directors has also been suggested.

The Government response

34. In developing proposals for the consultation paper, we explored with the Association of British Insurers the scope for increasing the use of legal insurance.

35. A number of insurers already provide cover for company directors and company officials for the risk of prosecution. However, cover is only provided until guilt has been established and, where that is the case, all costs incurred have to be repaid. Moreover, the cover is only available once alternatives, such as the availability of legal aid, have been explored.

36. We not consider that compulsory legal insurance should be explored further at this stage. Dealing with those who do not take out the insurance would be costly, and there would also be increased regulatory burdens. If insurers were required to offer cover to everyone there may be issues of cross-subsidisation and affordability, and the Government would need to decide what should happen in relation to those who could not afford to pay. Under ECHR the Government is obliged to provide legal aid in certain circumstances and for this reason insurance could not be entirely universal.

37. If legal services were funded by insurance premiums rather than by general taxation the total level of spending and volume of activity might differ. Some policy holders may seek to access legal aid more than now, given that they have paid an explicit premium for this cover. If premiums were set according to risk then they might be more regressive than general taxation, and they might be more discriminatory from an equality perspective in relation to key groups and also geographical areas. It is unclear how well premium rates could be set to price risk accurately.

38. The nature and level of service might differ compared to now. It is unclear whether access would be tighter or less consistent across different groups. Legislation may be required here to address this. The efficiency of resource allocation might also differ. The funds would be administered by insurance companies rather than by the LSC, and administrative efficiency and costs might differ.

39. More generally, insurers were not in favour of expanding the market in before the event legal insurance. In their view, the premiums would not be affordable for those currently eligible for legal aid.

40. For these reasons, the Government does not believe that the there is scope in the short term to promote greater use of legal insurance.

(iii) Use restrained assets to fund cases

41. The Bar Council and Law Society have both proposed the use of restrained assets to fund criminal defence. Currently, there is a prohibition under the Proceeds of Crime Act 2002 that restrained assets should not be used in a criminal defence, to ensure that assets that are alleged to be the proceeds of crime are not dissipated.

The Government response

42. Assets recovered from the proceeds of crime are already applied to offset the overall costs of criminal justice to the public purse. Using restrained assets to pay for the costs of the legal defence would reduce the value of assets available for confiscation under any subsequent recovery proceedings. We therefore believe that they are unlikely to achieve any significant overall savings to Government.

43. We are however considering a related proposition, under which the value of restrained assets would be taken into consideration in the Crown Court

means test. This would ensure that those assets are used to contribute to the costs of the legal defence, although for the same reasons as set out above, it is not expected to achieve significant savings in public spending. For this reason, we do not consider it to be a realistic alternative to the Governments plans for legal aid reform.

(iv) Widen and improve application of charges and loans

44. Proposals included applying the statutory charge to mediation (subject to a 50% discount), better collection of the statutory charge by the LSC, selling off statutory charge debt to the private sector, and applying the statutory charge to a wider range of cases and to Legal Help. It was suggested that defendants who elect trial on indictment should take out a loan to pay the cost of representation.

The Government response

45. The private sector has displayed little appetite for buying statutory charge debt at a price which would save the Government money, and there is no strong body of evidence that the charge could be collected significantly more successfully or efficiently. In essence, legal aid clients need to satisfy financial eligibility criteria and as a result they do not tend to have assets or income which are able to yield funds for the legal aid budget. The Government's reform of financial eligibility, to ensure that those who can afford to pay for, or contribute towards the costs of legal aid are set out at Annex E.

46. The administrative costs of operating a "student loan" arrangement would be significant and savings are unlikely to be realised in the short term. Unlike many students, who expect that their incomes might rise in the near future upon graduation, the income of many legal aid clients might remain flatter over time.

47. Similarly, those who elect for trial in the Crown Court are subject to the Crown Court means test, and may have to pay contributions depending on their assessed disposable income and capital.

(v) Interest on client accounts

48. The suggestion was that the legal aid fund should secure the interest earned on solicitors' client accounts.

The Government response

49. In the consultation paper, the Government sought views on establishing an Interest on Client Trust Accounts (IOLTA) scheme. However, following consultation, we have decided not to pursue this. See Annex J for full details.

C. Efficiency improvement proposals

(i) Judicial system efficiency

50. A number of respondents argued that a more efficient court system would bring savings for legal aid. These relate to improving efficiency in the management and progression of cases, rather than reducing the volume of cases. Proposals included:

- a full review of civil procedure, especially in low value cases;
- training and encouraging judges to use modern case management procedures, improving listing systems, and in general having stronger case management in family cases and improving case management in clinical negligence cases;
- implementing Lord Justice Jackson's recommendations for clinical negligence claims as set out at Chapter 23 of his report;
- ticketing judges so that judges with the appropriate expertise hear cases;
- the proposals about simplifying legislation could also generate efficiencies in cases which arise (in addition to reducing the volume of cases, as mentioned above);
- hearing more cases in magistrates' courts rather than the Crown Court;
- considering the comparative costs and efficiency of lay and professional judges;
- investing in IT within the court system including to reduce physical attendance and to use more e-communication;
- means testing systems as applied to Crown Court cases should themselves not be excessively costly to operate;
- introduce twin track private law cases;
- use one joint expert for forensic accounts not multiple experts;
- review the use of associate prosecutors to ensure that any CPS budget savings are not at the expense of wider court service and legal aid costs;
- altering committal hearings so that defendants confirm their initial plea, legislating for Goodyear intentions and otherwise encouraging early guilty pleas.

The Government response

51. The Government agrees that delays in the court system can contribute to increased legal aid costs, and we are already working on efficiency programmes to simplify, streamline and modernise procedures. The Criminal Justice System (CJS) efficiency programme is being developed collaboratively with all of the criminal justice agencies and is focused on

system-wide inefficiency, to deliver a more efficient and cost-effective system. The MoJ is also in the process of consulting on a range of civil justice transformation proposals which are also designed to improve efficiency in civil courts.

52. The MoJ's existing spending plans already assume savings in the costs of the justice system, including through a reduction in capacity and also in improved efficiency. For example, the Government announced on 14 December 2010 its plans for courts modernisation.[80] The efficiency proposals outlined above could therefore only represent an alternative to the legal aid savings if they delivered savings beyond our existing plans. Our efficiency programme is designed to complement legal aid reform, rather than as an alternative to it, minimising waste and ensuring users and the taxpayer secure best value for money.

53. Several of Lord Justice Jackson's proposals for improvements in the handling of clinical negligence claims, mentioned in particular by the Bar Council in their response, have already been implemented. These include: increase in time for defendants to respond to the protocol letter of claim; NHLSA now routinely obtains independent expert reports to assess liability for claims; defendant bodies have nominated a senior officer to receive complaints about defendant lawyers failing to address the issues. The judiciary are taking forward a project to harmonise case management directions in clinical negligence and other types of claim. The Ministry of Justice is discussing with the judiciary the development of a costs budgeting pilot for clinical negligence claims. There are already statutory time limits for health bodies to provide medical records on request. Where a health body fails to comply with the statutory time limits for providing medical records on request a complaint should be made to the health body. If a complaint is not resolved satisfactorily, a complaint can be made to the Information Commissioner who can investigate and serve a decision notice, which can include a financial penalty.

54. In addition the Government is currently consulting on whether the principles of the Road Traffic Accident scheme could be extended to cover low value clinical negligence claims including claims against non-NHS bodies. This is wider than the scheme proposed by the NHS Redress Act. The Government will consider responses and publish proposals in due course.

55. The Law Society, in its proposal for dealing with either way cases in the magistrates' courts, did not specify how the change would be achieved. The Government agrees that there is scope for the magistrates' courts to handle more of these cases, and our plans to reform criminal fees reflect concerns that the current system of fees does not sufficiently support the aim of speedy and efficient justice and may discourage early resolution of

[80] See: http://www.justice.gov.uk/news/newsrelease141210a.htm

cases (see Annex G). It is, however, a longstanding and important principle of criminal justice that the defendant has a right to a trial before a jury, and we have no plans to restrict this.

(ii) Rationalising legal aid services

56. It has been suggested that the Public Defender Service (PDS) could be scrapped, that the Criminal Defence Service (CDS) Direct telephone service could be abolished with the work passed to local solicitors and that the Defence Solicitor Call Centre (DSCC) which allocates solicitors could be replaced with alternative local arrangements.

The Government response

57. The Government believes that the PDS provides an important safety net in areas where the supply of providers is low, and insures against future disruption to supply in the event that providers decide to leave the market.

58. CDS Direct offers a proven high quality, cost effective service, notably one that requires a higher level of performance in relation to peer review than is required of standard crime contract holders. The DSCC performs a number of key functions for the LSC. As well as providing national coverage through a single contractor, data provided by the DSCC assists the LSC in exercising proper financial control over police station expenditure, and is also best placed to provide the administrative flexibility required as we move towards competition.

59. For these reasons, we do not agree that PDS, CDS Direct or the DSCC should be abolished as an alternative saving for the legal aid.

(iii) Reducing fees

60. A number of proposals were made in relation to fees and costs. These included introducing a single fee for both litigation and advocacy, and also for family cases, aligning Queen's Counsel fees at the level of leading junior fees, other changes affecting Very High Cost Cases (VHCCs) and Quinn's Counsel rates, capping fees paid to individual fee earners to £250,000 per year, and reducing solicitor fees further and introducing more fee alignment.

The Government response

61. The Government sought views on a series of similar proposals on fees, including introducing a single fee, the appointment of QCs and for VHCC cases. The Governments plans are set out in Annexes G (criminal) and H (civil and family). The question of whether to introduce a single fee in criminal matters will be considered as part of the consultation on introducing competition in criminal fees, which will be published later this year.

62. We have separately considered the proposal to cap fees paid to individuals to £250,000. We believe that there are some practical

difficulties in implementing this proposal. For example, it would be difficult to stop payments and/or work, if this threshold were met part way through a case. However, even if the practical difficulties could be overcome, we do not believe the proposal would save money. It would simply distribute existing work, and therefore payments, across a wider group of providers without achieving any greater efficiency or effectiveness.

(iv) Reducing administrative costs

63. Narrower proposals included rationalising hourly rates to make it easier to identify the relevant fee, streamlining contractual requirements and streamlining accreditation schemes so that they are pitched at the correct level to ensure quality and avoid duplication, and being more tolerant towards unintentional non-compliance. Wider proposals included moving towards a much more decentralised model of legal fund administration, with local bodies more involved in fund allocation and with more flexibility and choice offered to providers in relation to taking on an running cases.

The Government response

64. The consultation sought views on the administration scheme, and the LSC's plans to take these forward are set out at paragraphs 273 to 275 of section 3: the programme of reform.

Table 2: Schedule of alternative proposals submitted by the Law Society

Quantified Law Society savings proposals

Law Society proposed saving	MoJ comments on figures
1. More efficient prosecutions/ reimbursement of legal aid fund In 2010, 9.5% of Magistrates' Court cases (almost 81,000 cases) and 12.6% of Crown Court cases (14,745 cases) resulted in a dropped prosecution or a judge-directed acquittal. The legal aid fund should not have to pay for these cases. They should be much fewer in number, and the CPS should bear the costs of the defence when they do arise. Assuming the cost of these cases is proportionate to the whole legal aid spend excluding AGFS, and assuming the numbers could be halved, there could be a significant saving to the legal aid fund. Further assumptions are that all cases in the Crown Court would have representation and half of the cases in the Magistrates' Court. The cost to the CPS of having to meet the defence costs in the remaining cases would be offset from the saved resources in the non-continuation or earlier discontinuance of these bad cases. Mags Court savings: 40,000 cases @ £475 per case (average case cost from LSC Stats Pack 2009-10): £19 million Crown Court savings: 14,745 cases @ £4,069 per case (average LGFS claim per case from LSC Stats Pack 2009-10): £60 million Total: £79m	This proposal would transfer costs to another part of the Government rather than cutting total spending. Total costs would only be cut if dropped prosecutions and judge-directed acquittals were the responsibility of the CPS and if the proposal provided the CPS with an increased incentive to avoid these. It is unclear to what extent this is so. The costing assumes that this would be the case in 50% of Magistrates' Court and to 100% of Crown Court dropped prosecutions and judge-directed acquittals. These are very high assumptions and no evidence is provided to support them. The costing also assumes that all such cases would simply not be brought in future by the CPS. Instead the CPS might adopt a different approach and these cases might divert into cases which proceed to a full hearing. In which cases total legal aid costs might rise as might costs to the CPS.

Law Society proposed saving	MoJ comments on figures
2. Consideration of more cases being dealt with in the Magistrates' Courts rather than the Crown Court provided that there are safeguards to preserve right to trial by jury. A pending amendment to Section 20(3) of the Magistrates Courts Act 1980, by Paragraph 6 of Part 1 of Schedule 3 to the Criminal Justice Act 2003, would allow for an indication of whether a custodial or non-custodial sentence would be imposed on a plea of guilty. This could encourage early guilty pleas in the Magistrates' Courts. The number of either way cases heard in the Crown Court in 2009 was 68,500, a rise of 20% on 2008. For the purposes of this calculation, we assume that this figure could be reduced back down to the 2008 figure of approximately 57,000, and that these cases would be average costs in each court. 2009/10 average crime lower bill where representation order granted: £475 2009/10 average crown court bill: £4,069 11500 cases at £3594 less per case, rounded Total: £41m	The costing assumes that 20% of cases could be moved from the Crown Court to the Magistrates' Court. There is no evidential backing for this assumption, which seems very high. The MoJ's legal aid reform package already includes reforms which respond to concerns that the current fee system does not sufficiently support the aim of speedy and efficient justice and may discourage early resolution of cases. Non-election either-way cases involve Magistrates rather than defendants passing the case to the Crown Court due to the nature of the case.
3. Single fee for Crown Court Over a relatively short time we believe that the administrative savings for both practitioners and the LSC from having a single fee would reduce the cost of delivering services in a way that would enable significant financial savings to be made. Total: £30m	No derivation for this saving has been provided.

Law Society proposed saving	MoJ comments on figures
4. More robust enforcement of merits test for private law family contact disputes Based on anecdotal evidence, we believe that a more effective application of the current means test could reduce the volume of contact cases by between 20 and 30%. For the purposes of this estimate, we have assumed a 25% reduction in volumes. The new fee scheme is designed to be cost neutral as against 2008-9 fees, so we have applied the average cost per case from 2008-9 for Children Act only cases. Published LSC figures do not distinguish between contact disputes and residence disputes. We have assumed that contact disputes account for 85% of the 46,000 private law children certificates (2008-9 figures) Reduction of 9,775 cases @ £3,002 per case, rounded. Total: £29m	It is unclear how deliverable and enforceable these savings would be in practice, and what the enforcement costs might be. The saving assumes that 85% of 'private law children cases' are contact cases and that 25% of those could be averted by applying means test more strictly. No evidence has been provided for these assumptions, which seem high.
5. Capping fees so no individual can earn a personal income of more than £250,000 in a year from legal aid Based on statistics for payment to advocates published by MoJ in March 2010 Mechanisms for achieving this could include: Aligning QCs' and Leading Juniors' fees at the latter rate Reducing the "event rate" for QCs in family cases from £2310 per event, and ensuring that a substantially reduced event fee is paid for events lasting less than half a day. Total: £16m	The derivation of this saving is unclear. A simple cap might just allocate current spending more evenly amongst recipients. There might also be risks concerning the quality of advice and service. The other proposals seem to relate to fee reductions. There is potentially some double counting with the savings highlighted elsewhere. The MoJ's reform package already includes savings from fee reductions.

Law Society proposed saving	MoJ comments on figures
6. Review of approach to prosecutions in VHCCs CPS could be more selective about the number of charges brought, the number of individual defendants prosecuted and the volume of evidence produced. Such an approach could generate a saving in the cost of VHCCs of 10-20%. For this calculation, we have assumed savings of 15%. 15% of £95m Total: £14m	The saving assumes a 15% reduction in VHCC costs as a result of the CPS operating in a more selective manner. This seems to double count the savings from item 1. There is no source or detailed explanation for the 15% figure or evidence of CPS inefficiency to indicate this is plausible.
7. Limit all but essential advocates' travel to court and hotel expenses and no longer pay for first class travel. In 2011 there is likely ample local coverage by Advocates of almost all Crown Court centres, thereby reducing the need for travel & hotel expenses. These expenses (under code THE), according to MoJ data, amounted to over £11m in 2009-10. Allowing for some exceptional travel, £10m could be saved. Total: £10m	The saving assumes a 90% reduction in advocate travel and subsistence costs based on cases being allocated on the basis of geographical proximity and reductions in the quality of travel and hotels. This assumption appears quite speculative and there might be costs associated with the implied different system for advocate allocation.

Law Society proposed saving	MoJ comments on figures
8. Reduce waste Mechanisms will include Increase efficiency of Court Service by improving listings systems, case management and implementing Jackson proposal for 'ticketing' of judges to ensure that cases are heard by judges with the appropriate expertise. Increase use of wasted costs orders. In the short term, this would cause an increased cost to other public bodies, but only to the extent that they were the cause of inefficiency in the Court system. In the longer term, the penalty of such orders should reduce the amount of waste in the system, generating savings for the public purse across a number of budgets, including Courts, prison delivery and CPS as well as legal aid. Review use of Associate Prosecutors. APs are in practice often reluctant to make decisions on cases leading to costs of unnecessary delays and adjournments. For the purposes of this calculation we have assumed that there is one unnecessary delay or adjournment caused by failures in the system other than on the defence side for every two representation orders, and that each hearing adds £40 to the costs of the case on average. 450,000 Representation orders x one half @ £40 each. Total: £9m	The saving assumes a 50% reduction in representation orders and assumes that each hearing costs £40 in legal aid. No evidence for these assumptions has been provided. The savings also does not seem to relate to other aspects of the proposal.

Law Society proposed saving	MoJ comments on figures
9. Funding from seized assets of defendants The SOCA Annual Report 2009-10 states that assets denied to criminals totalled £238 million. SOCA spent over £8.5 million on professional services and fees; and it is likely that a proportion of staff costs were also dedicated to asset recovery. For the purposes of this calculation, and in the absence of data from the LSC, we have assumed that a similar sum was spent on behalf of those whose assets were being pursued. This may be a significant underestimate. Total: £9m	The saving relates to SOCA's spending on their own legal services. There is no particular basis for assuming that this would equate to the legal aid savings of the proposal. The savings to the legal aid fund might not be savings for the Government overall as if the defendant is found guilty the funds would be seized by the Government. In which case the gain to the legal aid fund would relate to a loss to other parts of the Government.
10. Remove hearsay and bad character provisions There are no reliable figures for what this proposal might save. We do not know in how many cases such applications are made; in how many they directly cause a need for an additional hearing; or what impact that has overall on the fees paid under the Standard or Graduated Fee Schemes For the purposes of this estimate, we have assumed that an extra hearing is required in 25-40% of prosecutions where a Representation Order is granted, and that on average, it increases the costs claimed on the case by £40. 450,000 Representation orders x 25% x £40 = £4.5 million 450,000 Representation orders x 40% x £40 = £7.2 million Best estimate – mid point, rounded. Total: £6m	The saving assumes a 32% reduction in representation orders. There is no basis or evidence behind this assumption.

Law Society proposed saving	**MoJ comments on figures**
11. Single fee for family This could save an estimated 2.5% on the total spent on advocacy fees for family. Counsel's fees total £124 million. We do not have at this stage an accurate figure for solicitor advocacy in family cases, so we have based the calculation just on Counsel's fees. Total: £3m	The saving assumes a 2.5% reduction in advocacy costs. This assumption is unexplained. It is unclear how this relates to the other single fee saving.
12. Family mediated settlements should become subject to the legal aid statutory charge subject to a 50% discount. In a mediation briefing for the judiciary, the LSC stated that in 2008-9 they spent £13.8 million on publicly funded mediation. 68% of cases resulted in an agreement of which an estimated one half produced a financial settlement. 50% of half of 68% of £13.8 million, rounded. Total: £2m	The saving assumes 50% of legal aid costs can be recovered from mediations which produce a financial settlement. This seems a very high percentage with no assessment of time profile, admin costs, or bad debt rates. People might also move away from mediation if a statutory charge applies, reducing any savings and possibly generating increased costs of this resulted in more cases going to court instead of mediation.
13. Reduce need to produce prisoners on Governor's warrant This would reduce the number of interim hearing and thus produce savings for legal aid, the Court Service and the Prison Service. The Crown Court remands approximately 35,000 prisoners per year, who spend on average 13 weeks in custody. Figures do not appear to be available for the number of hearings that serve no purpose other than producing the prisoner. For the purposes of this calculation, we have assumed that there is on average two such hearings for every three remand prisoners, and that each such hearing increases the legal aid costs by £40 on average, rounded. Total: £1m	The saving assumes each Crown Court prisoner on remand has an interim hearing and 67% of these serve no purpose at all. No evidential basis for these assumptions is provided.
Total Law Society proposed savings:	**£249 million**

Law Society proposals for wider savings

Law Society proposed saving	MoJ comments on figures
14. Make the financial sector pay for its own fraud cases Total fraud costs, per LSC estimate: £148m Assume 50% relates to the financial services sector – LSC has no accurate figures: £74m Note: some potential overlap with £250,000 cap and with review of approach to VHCCs Additional saving: £63m	The saving assumes 50% of fraud cases relate to the financial services sector. There is no bass for this assumption. The derivation of the saving reduction relating to double counting is undefined.
15. A levy on the alcohol industry: Alcohol is a significant factor in offences and disputes requiring legal aid. Total alcohol sales are in the region of £40bn generating some £8.5bn in duty exclusive of VAT. A 1% increase in duty would generate additional revenue of £85 million per annum towards for legal aid. Total: £85m	The saving assumes a 1% increase in duty on all alcoholic products would yield income of 1% of current total duty. This assumes no behavioural effects or substitution effects.
16. Simplification of housing law along the lines proposed by the Law Commission report 'Renting Homes' (2006) Current legal aid expenditure on housing is around £50m. Implementing the simplification proposals would reduce spending by around 20%. Total: £10m	The saving assumes a 20% reduction in legal aid spending on housing. No evidential basis for this assumption has been provided.
17. Increase use of legal expenses insurance No significant savings under current limited scope of LEI. Possible savings if insurers could be persuaded to increase scope and if take of LEI could be increased	Not quantifiable

Law Society proposed saving	**MoJ comments on figures**
18. Compulsory legal insurance for company directors for offences arising from their office as director. This would largely duplicate savings arising from our proposed levy on the financial services industry	Not quantifiable
Total Law Society proposed wider savings: £158m	

Annex M: Summary of responses to the consultation questions

Question		Yes	No	Neither	Total
	Scope				
1	Do you agree with the proposals to **retain** the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme? Please give reasons.	1,584	217	227	2,028
2	Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party? Please give reasons.	1,090	265	62	1,417
3	Do you agree with the proposals to **exclude** the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.	103	3,380	266	3,749
4	Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.	641	720	145	1,506
5	Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.	387	764	134	1,285
6	We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants-in-person and the conduct of proceedings.				1,665

	Question	Yes	No	Neither	Total
	The Community Legal Advice Telephone Helpline				
7	Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.	69	1,690	197	1,956
8	Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.	109	1,366	223	1,698
9	What factors should be taken into account when devising the criteria for determining when face-to-face advice will be required?				1,365
10	Which organisations should work strategically with Community Legal Advice and what form should this joint working take?				931
11	Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline? Please give reasons.	473	848	124	1,445
	Financial Eligibility				
12	Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons.	327	940	64	1,331
13	Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons.	318	941	103	1,362
14	Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons.	140	803	52	995
15	Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)? Please give reasons.	346	550	68	964

Question		Yes	No	Neither	Total
16	Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.	485	336	84	905
17	Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.	363	395	125	883
18	Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)? Please give reasons.	312	433	118	863
19	Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases, capped at £100,000 for all levels of service? Please give reasons.	480	265	86	831
20	Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.	179	582	23	784
21	Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients? Please give reasons.	475	236	60	771
22	Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.	96	881	88	1,065

		Model 1	Model 2	Neither	Total
23	Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.	117	21	530	668

Question	Yes	No	Neither	Total
Criminal Remuneration				
24 Do you agree with the proposals to:				
i) pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;	136	681		817
ii) enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and	223	530		753
iii) remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?	61	707		768
Please give reasons.				699
25 Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:				
i) the proposal to enhance fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates' Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and	65	558		623
ii) access to special preparation provides reasonable enhancement for the most complex cases?	118	517		635
Please give reasons.				483
26 Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences? Please give reasons.	123	592	38	753
27 Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000? Please give reasons.	290	375	49	714
28 Do you agree with the Government's proposal to:				
a) remove the premium paid for magistrates' courts cases in London; and	156	473		629
b) reduce most 'bolt on' fees by 50%?	148	543		691
Please give reasons.				516

Question		Yes	No	Neither	Total
29	Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates? Please give reasons.	285	250	81	616
30	Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases? It would be helpful to have your views on: i) the proposed role of the assessor; ii) the skills and experience that would be required for the post; and iii) whether it would offer value for money. Please give reasons.	232	322	43	597
31	Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages? Please give reasons.	229	437	30	696
	Civil Remuneration				
32	Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.	115	1,525	95	1,735
33	Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.	317	751	80	1,148
34	Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction? Please give reasons.	369	638	54	1,061
35	Do you agree with the proposals:				
	i) to apply ‘risk rates’ to every civil non-family case where costs may be ordered against the opponent; and	81	585		666
	ii) to apply ‘risk rates’ from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?	84	583		667
	Please give reasons.				

Question		Yes	No	Neither	Total
36	The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.				346
37	Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.	382	662	45	1,089
38	Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply? Please give reasons.	459	592	65	1,116
	Expert Remuneration				
39	Do you agree that:				
	i) there should be a clear structure for the fees to be paid to experts from legal aid;	875	90		965
	ii) in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;	494	369		863
	iii) in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;	639	220		859
	iv) the categorisations of fixed and graduated fees shown in Annex J are appropriate; and	430	332		762
	v) the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable? Please give reasons.	478	288		766

Question	Yes	No	Neither	Total
Alternative Sources of Funding				
40 Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.	578	189	130	897
	Model A	**Model B**	**Neither**	
41 Which model do you believe would be most effective. Please give reasons.	317	94	306	
	Model A	**Model B**	**Model C**	**None**
42 Do you think that a scheme to secure interest on client accounts would be most effective if it were based on: Please give reasons.	216	102	47	292
43 Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.	176	273	173	622
44 Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?	259	182	124	565
Governance and Administration				
45 The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.				641

Question		Yes	No	Neither	Total
46	The Government would welcome views on the administration of legal aid, and in particular: i) the application process for civil and criminal legal aid; ii) applying for amendments, payments on account etc.; iii) bill submission and final settlement of legal aid claims; and iv) whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?				757
47	In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.				840
48	Are there any other factors you think the Government should consider to improve the administration of legal aid?				683
	Impact Assessments				
49	Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.	88	1,104	169	1,361
50	Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.	50	1,036	75	1,161
51	Are there forms of mitigation in relation to client impacts that we have not considered?				636
	General comments				939

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