Ministry of JUSTICE

Legal Aid: Refocusing on Priority Cases

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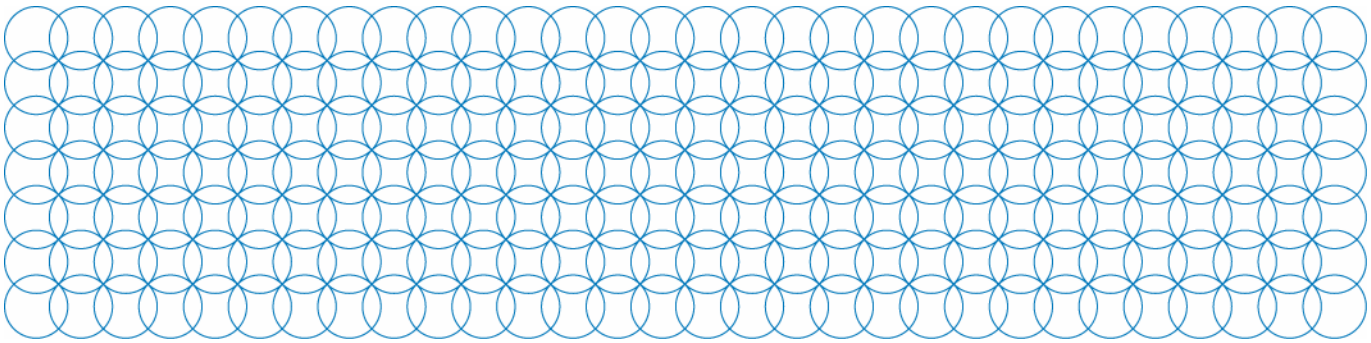

Ministry of JUSTICE

Legal Aid: Refocusing on Priority Cases

A consultation produced by the Ministry of Justice and the Legal Services Commission.

This information is also available on the Ministry of Justice website: www.justice.gov.uk

About this consultation

To:	Legal aid lawyers and their representative bodies, public sector bodies, equality groups, the judiciary, and members of the public.
Duration:	From 16 July 2009 to 8 October 2009
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Response paper:	A response to this consultation exercise is due to be published by 19 November 2009 at: http://www.justice.gov.uk

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Executive summary

This paper sets out proposals to change the existing civil and criminal legal aid funding rules to refocus resources on to priority cases.

For civil legal aid we propose a variety of changes to the Funding Code criteria, procedures and guidance to give better focus to the civil legal aid scheme, and to ensure resources are properly targeted. Our proposals include reforming the existing system for assessing whether a case is of 'wider public interest', removing from scope certain low value damages claims, where these can be dealt with through complaints systems or ombudsman schemes, and giving improved control over grants of funding for judicial review cases in the context of a significant fall in the number of judicial review permission applications which are granted by the High Court.

For criminal legal aid we propose the removal of quasi-civil advice on minor treatment issues from scope, where these can be dealt with through complaints systems or ombudsman schemes. Criminal legal aid will remain available for parole and sentencing matters. Civil legal aid will remain available for public law challenges or damage claims where there is a serious issue to be addressed.

Introduction

This paper sets out for consultation proposals to refocus limited civil and criminal legal aid resources on priority cases. It does this by suggesting the removal from scope of certain areas due to their being a low priority for funding, the tightening of existing rules for granting legal aid in civil cases, and the removal of powers for solicitors to self-grant funding in judicial review cases.

The proposals in Part One of this paper are the product of joint working between the Legal Services Commission (LSC) and the Ministry of Justice (MoJ). These include proposals to reform the civil Funding Code developed by the Joint Working Group on High Profile Cases. This group was tasked with improving the LSC's processes for handling high profile cases, such as public interest cases, and developing changes to the funding rules, where these were appropriate.

Part Two of this paper includes proposals which have been developed by the Ministry of Justice. These proposals relate to the scope of Criminal Defence Service funding, and also control of the delegated powers for solicitors to self-grant legal aid in judicial review cases which are included in the existing civil and criminal Unified Contracts.

The consultation is aimed at legal aid lawyers, their representative bodies, groups interested in civil rights, the judiciary, prisoners, members of the public and other public bodies in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 39 have been followed.

An Impact Assessment has been completed and indicates that these proposals will lead to some reduction in legal aid expenditure, and are likely to lead to savings for the courts. The Impact Assessment is provided separately as Annex A. Comments on the Impact Assessment are particularly welcome.

Copies of the consultation paper are being sent to:

The Law Society of England and Wales

Criminal Law Solicitors Association

The Legal Aid Practitioners Group

The Public Law Project

The Association of Prison Lawyers

Immigration Law Practitioners' Association

Association of Personal Injury Lawyers

Housing Law Practitioners' Association
Community Law Partnership
Resolution
Association of Lawyers for Children
Advice Services Alliance
The Law Centres Federation
Association of Child Abuse Lawyers
Action Against Medical Accidents
The Bar Council
Constitutional and Administrative Law Bar Association
The Family Law Bar Association
Young Legal Aid Lawyers
The Prisoners' Advice Service
The Howard League for Penal Reform
Prison Reform Trust
Liberty
UNLOCK
Shelter
Equality and Human Rights Commission
Rights of Women
Association of Women Solicitors
Society of Black Lawyers
Black Solicitors Network
Disability Law Service
The Attorney General and Solicitor General
Treasury Solicitors Department
National Offender Management Service
Prisons and Probation Service Ombudsman
Independent Monitoring Boards
Office for Criminal Justice Reform
The Crown Prosecution Service
The Ministry of Defence
Foreign & Commonwealth Office
Department for Children, Schools and Families

UK Border Agency
Government Equalities Office
The Association of Chief Police Officers
Legal Services Board
Legal Services Commission (Part Two)
Local Government Association
Welsh Assembly Government
Commissioner for Children for Wales
Commissioner for Older People for Wales
Her Majesty's Courts Service
Northern Ireland Court Service
Northern Ireland Legal Services Commission
Scottish Legal Aid Board
Association of Her Majesty's District Judges
Council of Her Majesty's Circuit Judges
District Bench (magistrates' courts)
Judicial Consultation Records
Judges' Council of England and Wales
High Court Masters' Group
National Bench Chairmen's Forum
Magistrates' Association
Sir Anthony Clarke, Master of the Rolls and Head of Civil Justice
Sir Andrew Morritt, Chancellor of the High Court
Lord Justice Moore-Bick, Deputy Head of Civil Justice
Lord Justice Leveson, Senior Presiding Judge
Lord Justice Goldring, Deputy Senior Presiding Judge
Sir Anthony May, President of the Queen's Bench Division
Lord Justice Thomas, Vice President of the Queen's Bench Division
Civil Justice Council
Judicial Communications Office
Judges' Council

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

Our legal aid system is one of the best funded in the world. We spend around £38 per head on it annually in England and Wales, compared to £4 in Germany and £3 in France. Even countries with a legal system more like ours spend less; for example, both New Zealand and the Republic of Ireland spend around £8 per head.

While we devote considerable resources to legal aid – £2bn annually – our resources are limited, and we need to review regularly how legal aid funds are being spent, and whether we are securing value for money for the taxpayer and providing the services that the public need.

Our legal aid reform programme has already achieved significant changes in the way we pay for legal aid services, by moving away from hourly rates that can encourage inefficiency, and towards fixed fees.

We also need to ensure that legal aid is being targeted appropriately, and that the rules for granting funding are as robust as they need to be to ensure this happens.

Part One: Legal Services Commission and Ministry of Justice Proposals

The proposals in Part One of this paper are the product of joint working between the Legal Services Commission (LSC) and the Ministry of Justice (MoJ). These include proposals to reform the civil Funding Code developed by the Joint Working Group on High Profile Cases. This group was tasked with improving the LSC's processes for handling high profile cases, such as public interest cases, and developing changes to the funding rules, where these were appropriate.

1. Public Interest and other Borderline Cases

One of the most significant innovations of the Access to Justice Act 1999 ('the Act') was the introduction of public interest considerations into legal aid decision-making. Public interest considerations allow important cases to be funded even where the benefits to the individual litigant alone would not justify the likely costs. Public interest is one of the statutory factors which the LSC is required to consider in formulating the Funding Code.

The civil Funding Code is a document prepared by the Legal Services Commission (LSC), and approved by the Lord Chancellor, under section 8 of the Access to Justice Act 1999. The Code sets out the rules for the granting of civil legal aid, and also procedures and guidance around those rules. The Code includes general rules applicable to all areas of law, and specific rules for particular categories of law, such as family or housing proceedings.

Public interest will remain an important feature of the Funding Code, but it is appropriate at this stage, after nearly ten years of operation, to consider whether the definition of public interest, the benefits deriving from this status, and the way in which decisions on public interest cases are reached, can be improved and strengthened.

A number of cases with limited benefits or public interest have been funded under the present criteria and procedures that we would not consider appropriate. An example is a recent case in relation to the destruction of a prisoner's mobile telephone. This case had limited benefit to the individual, and a limited wider interest to other prisoners.

There have also been cases where the case may provide a benefit to some members of the community while having a disadvantage to others. An example would be the funding of an environmental challenge to an industrial development. There are individuals in the community who do not wish the industrial development in their town, whilst others stand to benefit from the additional jobs created. Currently the rules do not allow the LSC to take into account these differing public interests.

It is estimated that there are some 200 cases per year that fall within the category of 'wider public interest' or have 'borderline' prospects of success and require this additional justification to be funded (see below). Taking into account individual and occasional group actions, these cases cost up to £5m per year.

1.1 Wider Public Interest

Wider public interest is defined in the Funding Code as:

> "The potential of proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question)"

Currently the decision-making process for cases with alleged public interest is the same as for other legal aid cases, save that an independent panel (the Public Interest Advisory Panel or PIAP) can consider and make recommendations to the decision-maker about the public interest content of cases referred to it by the LSC.

Whilst this broad definition helps to identify cases with potential public interest, it has led, in the experience of the LSC, to some relatively weak cases being funded on public interest grounds and to cases being funded even if, on their own facts, they are not a good vehicle to establish the point of principle raised by the case. Often the best chance of producing public benefit through establishing new law requires careful selection of an appropriate case which is suitable and sympathetic on its facts to establish the point contended for.

Our proposal is therefore that the definition of wider public interest in the Funding Code be refined so that, in addition to the test given above, a case will only be regarded as having wider public interest if the LSC is satisfied that the individual case, on its particular facts, is a suitable vehicle to establish the point and realise those benefits for the public.

Another feature of the LSC's current approach to public interest is that, in deciding whether a case has significant wider public interest, it is sufficient for a section of the public to derive benefits from the case. A further proposal is that future guidance for public interest would take into account whether or not a different section of the public would have a disadvantage or would not support the outcome being sought.

This would allow a more balanced view to be developed, but would not prevent cases being brought on behalf of minority interests. Potential disadvantages would also be taken into account, alongside potential benefits, in assessing whether a case has a significant wider public interest.

Q1: Do you agree that the definition of Wider Public Interest should be strengthened to ensure that a case will only qualify if it is a good vehicle on its facts to deliver those benefits? Do you agree that disadvantages to the public from the proceedings should also be taken into account in assessing public interest? What safeguards are appropriate for claims brought by minority interests?

1.2 Handling of Public Interest and Other Borderline Cases

Cases with only 'borderline' prospects of success are not usually considered to be of sufficient merit for funding to be granted. 'Borderline' means that the prospects of success are not 'poor' (i.e. clearly less than 50% so that the claim is likely to fail), but because there are difficult disputes of fact, law or expert evidence, it is not possible to say that the prospects of success are better than 50%.

However, for damages claims under section 8 of the Code, or under section 7.4.5 of the Code for judicial review proceedings where permission has not been granted, cases with only borderline prospects of success can be funded, if the case is considered to be of "significant wider public interest", or to be of "overwhelming importance to the client", or to raise significant human rights issues.

Whilst these cases have an important place in the scheme, relatively low prospects of success may require additional scrutiny and controls to ensure that public funding is directed towards the most important cases.

This is particularly true of public interest cases which are very often high cost and, by their nature, will often involve difficult legal arguments with only 'borderline' prospects of success. Cases which seek to establish new points of law, either at first instance or on appeal, typically come into this category. They often require appeals to the Court of Appeal and House of Lords. They are considered by the LSC at each stage, and at each stage the level of importance would need to be considered. Their level of importance would typically be higher at the appeal stage than at the first instance, with the highest level of importance generally applying to House of Lords appeals.

We therefore propose the following special controls:

(a) There should be a separate budget, as part of the overall budget for high cost cases, for high cost cases which depend on public interest considerations for their funding or are otherwise assessed as having 'borderline' merits. This would include all group actions, and other cases with 'borderline' prospects of success, such as those with 'overwhelming importance to the client' or which raise significant human rights issues.

(b) The Lord Chancellor, using his powers under section 5(6) of the Act, will set a budget for these cases annually and affordability will be considered in the light of that budget (at present a separate budget is set only for group actions but not for public interest / 'borderline' cases).

(c) The Lord Chancellor, using his powers under section 6(1) of the Act, will also set priorities for the budget for these cases to which the LSC will have regard in deciding which cases merit funding (and see below).

(d) A new LSC committee will be established with responsibility for final funding decisions in these cases. This new committee will absorb the functions of the existing Multi-Party Action Committee and the Public Interest Advisory Panel. It will also take on the role of the Independent Adjudicator under the Procedures.

(e) The Committee will be chaired by either a Commissioner or the Director of High Cost Cases, who will have responsibility for final decisions. The rest of the Committee, which would have an advisory role, could have a similar composition to PIAP, but could also be extended to include representatives of the public. It is proposed that the professional representatives and justice interest groups would advise on the potential benefits of developing the law and the merits of the individual cases as a vehicle for achieving that development. It is proposed that representatives of the public consider the public interest aspect. We consider that the public's representatives could be nominated by the Local Government Association, regional health associations, or Health Authorities. The Equalities and Human Rights Commission have expressed interest in involvement PIAP in the past and may also be interested in participating in a new committee.

(f) The Committee will receive recommendations from the Special Cases Unit on the Funding of cases, who will be entitled to address the Committee as necessary. The Committee will also seek the attendance of the applicant's solicitors where appropriate.

(g) The Committee will consider all relevant merits criteria, including alternative funding and the level of community contributions for public interest cases.

(h) All cases would as now be funded only stage by stage, allowing fresh review by the Committee at key stages, in particular before trial and before any substantive appeal.

(i) The Director of High Cost Cases may approve funding of cases that he considers the Committee would approve without referral. This is intended to help manage the case load of the Committee.

With regard to the budget for these cases, there are guidelines on assessing affordability at section 15.4A in the Funding Code Decision Making Guidance, which set out the key considerations for the LSC. These factors are:

i. Prospects of success of the action, including the prospects of full or partial cost recovery in the event of success;

ii. The likely costs of the case and consequent risk to the legal aid fund. This will be considered both in its own terms in light of the budget and as against the benefits the action might bring;

iii. The importance of the case to clients in the action, in particular whether the litigation may secure life-changing levels of damages for the clients; and

iv. The public interest, both the nature of any wider public interest in the action and the rating of public interest as advised by the Public Interest Advisory Panel.

We consider that the 4 key considerations above are relevant to all public interest or 'borderline' prospects cases. We would propose that the LSC apply these criteria, along with any priorities that the Lord Chancellor may direct, in decisions about the grant of funding for 'borderline' or public interest cases under these special controls.

Q2: Do you agree with the proposed special controls and budgeting for public interest and borderline cases as described above? Do you agree that the existing committees should be replaced by a new committee? Do you agree that the new committee should include non-lawyers? Are there other groups who should be represented on the new committee?

2. Legal Aid for Damages Claims

2.1 Low Value Damages Claims

Section 8 of the Funding Code sets out the criteria for the grant of civil legal aid funding for damages claims against public authorities. In practice this would include, for example, damages claims against local authorities, the police, prison service, or Crown Prosecution Service. It also covers claims for misfeasance in public office, and also claims for damages against a local authority by persons alleging abuse while in local authority care.

Section 8.3.3 sets out the cost / benefit test for these cases. This says that "Legal Representation may be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances".

This cost / benefit test mirrors the test for public interest cases under the General Funding Code (section 5 of the Code), and is significantly more generous than the usual test under the General Funding Code (section 5.7), which requires a ratio of damages to costs.

For example, under section 5.7 of the General Funding Code, if the prospects of success are 'moderate' (50–60%), then likely damages must exceed the costs by 4 to 1. Therefore, in these cases, if the anticipated costs are £2500, the likely damages would need to be £10,000 or more for the merits test to be satisfied. By contrast, a significant proportion of section 8 damages claims will only secure modest damages of less than £5000, while the costs of these cases is £2500–£5000 each.

While successful claimants may be awarded their costs, these are not automatically deducted from their liability to the LSC unless they are actually paid. The statutory charge means that successful claimants who have been funded through legal aid will need to repay their legal aid costs from their damages. Therefore they will only receive the net difference between the costs and damages, which could be a relatively modest sum. Where costs are awarded and these are paid, the claimant's costs will not be deducted from their damages, but legal aid funding for enforcement proceedings is not provided automatically. In each case the LSC will need to consider whether it is in the LSC's financial interests, in all the circumstances, to fund further enforcement proceedings.

In practice, the cost / benefit test under section 8 allows cases seeking relatively modest damages to be funded. In some cases the damages secured may not greatly exceed the costs, and in such cases it is questionable whether this is the best use of limited legal aid resources.

Other low value claims are not funded through legal aid. For example, section 5.4.6 of the General Funding Code states that funding for legal representation will be refused if the case is more appropriately dealt with by the Small Claims Track. The Small Claims Track generally deals with claims of below £5000 in value.

In addition, the criteria under section 5.6.3 of the General Funding Code for Investigative Help set out that funding will only be granted for a claim if it is primarily about damages where there is significant wider public interest, or where the damages sought are £5000 or more.

Given the significant pressures on limited civil legal aid resources, and the fact that these are likely to increase in the current economic climate, we are concerned that limited funds should be targeted on meritorious cases. We are concerned that the current 'proportionality' cost / benefit test for section 8 claims is insufficiently robust, and we can spend significant funds securing relatively small awards.

Our proposal is that the cost / benefit test for section 8 damages claims is amended so that, if the client's claim is primarily a claim for damages, investigative help and legal representation will be refused unless the damages are likely to exceed £5,000. This would apply to all cases under section 8 of the Funding Code, whether or not the case attracted significant wider public interest. This restriction would also apply to Multi-Party Action (MPA) claims brought under section 8 of the Code where the damages sought by each individual in the claim are likely to be less than £5000.

Many people who have been poorly treated simply want an investigation, and, where appropriate, an explanation and apology, rather than compensation. Research suggests that claimants in clinical negligence, children, discrimination, unfair police treatment and immigration cases are least likely to be primarily seeking financial compensation.

Public authorities are expected to have in place robust complaints systems through which the public can raise concerns, and seek explanations and apologies. Where the matters complained of are relatively minor, it may be more appropriate for complainants to use the public authority's complaints and ombudsman schemes. However, in some cases it may be more appropriate for those seeking damages to seek instead judicial review and declaratory judgements as alternative and more cost effective methods of resolving disputes. The underlying principle would be for funding to be used to obtain correction of the original decision of the public body, rather than minor financial redress. This could take the form of a court judgement, apology from the public body, or change to the policy of that public body. This could be particularly relevant to discrimination claims where a declaration that a policy is discriminatory and must be changed is of more value than a small monetary award.

We estimate that this would affect 375 cases per year. There is also one multi-party actions every 1–2 years involving a number of such claims. These would typically be for people inappropriately detained by the police for a matter of hours, minor treatment in prison, or very minor levels of physical abuse in care.

Q3: Do you agree that we should refocus our resources on higher value damages claims and refuse funding for investigative help and representation where the damages are unlikely to exceed £5000? Should we retain an exemption for low value cases which do attract significant wider public interest? Should we apply this to individual claims, MPAs or both types of claim?

2.2 Low Value Out of Scope Damages Claims

Section 10 of the Lord Chancellor's Direction on the Scope of the Community Legal Service sets out that "The Lord Chancellor authorises the Commission to fund excluded services in Legal Representation in proceedings which have a significant wider public interest, other than proceedings arising out of the carrying on of the client's business".

In practice this allows any of the matters (except business cases) which are outside the scope of the civil legal aid scheme to receive civil legal aid funding, if the case is of significant wider public interest. These cases can either be brought by individuals or as Multi-Party Actions.

For example, such MPAs could include actions against financial institutions (e.g. mis-selling of endowment mortgages) or industrial companies (e.g. industrial deafness or pollution). In such cases the LSC will determine the

merits of the case using the criteria in the General Funding Code (section 5 of the Code). This includes the 'proportionality' test for cost / benefit, referred to above.

Given the significant pressures on limited civil legal aid resources, we want to ensure that limited funds are carefully targeted. While there must be scope for cases which raise significant wider public interest issues to receive legal aid funding, even when these matters are ordinarily not covered by the legal aid scheme, this provision must be proportionate. We are concerned that devoting considerable resources to low value cases which are otherwise not considered to be of sufficient priority for funding is inappropriate.

Our proposal is to amend the Lord Chancellor's Direction on the Scope of the Community Legal Service to make clear that cases which are otherwise out of scope can be funded if there is both significant wider public interest and, if the case is primarily about damages, the damages sought by each individual are at least £5000. This restriction would also apply to Multi-Party Action (MPA) claims brought into scope by the Lord Chancellor's Direction where the damages sought be each individual in the claim are likely to be less than £5000. We estimate that a small number of individual claims, and one MPA every 1 to 2 years, would be excluded from funding by this change.

Q4: Do you agree that where an out of scope matter is brought back into scope because there is significant wider public interest this should only be for damages cases where the damages are at least £5000? Should we apply this to individual claims, MPAs or both types of claim?

2.3 Using Complaints Procedures before Litigation

An underlying principle of the Act is that alternative methods of resolution should be pursued before litigation. Currently the criteria under section 8 of the Funding Code for investigative help and legal representation set out explicitly that funding can be refused if it is more appropriate for the client to pursue the police complaints procedure than litigation.

Section 5.4.3 of the General Funding Code sets out the standard criteria for legal representation funding. This section states that funding may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued. While this applies to funding for all damages claims, section 8 currently includes specific reference to the police complaints procedure, but not to other complaints procedures.

We are concerned that the absence of other complaints procedures being mentioned in section 8 may be misleading. Our proposal is that we amend section 8 so that the criteria for investigative help and legal representation refer explicitly to the police complaints procedure, the prison complaints procedure, probation complaints procedures, the Prisons and Probation Ombudsman (PPO). For prisoners, it may also be appropriate to raise the matter with the prison's Independent Monitoring Board.

For legal representation, this is not a substantive change (as section 4.3 of the Code applies regardless), but is intended to clarify existing procedures and to act as a prompt.

Investigative help under section 8 only refers to the police complaints procedure, and we wish to extend the requirement to first use alternatives to litigation to prison and probation complaints systems, and the PPO.
A reasonable private paying client would be well advised to explore all available complaints systems and ombudsman schemes before commencing litigation, and this change would support that aim.

Q5: Do you agree that we should add a specific reference to the prison and probation complaints procedures and the Prisons and Probation Ombudsman in section 8 of the Funding Code? Are there other complaints systems or ombudsman schemes which should be explicitly mentioned?

2.4 Considering *Inter Partes* Costs against the LSC in Assessing Cost Benefit

When civil legal aid funds an appeal in a claim under section 8 of the Funding Code against a public authority and the funded client loses that appeal, the Legal Services Commission will usually have to pay the legal costs of the opponent. These *inter partes* costs will not be at controlled legal aid rates, but at higher commercial rates.

In assessing or reviewing the merits of a funding application for such an appeal, the Legal Services Commission will compare the costs of the proceedings against the damages sought. For section 8 damages claims the cost / benefit test is "Legal Representation may be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances".

Section 2.3 of the Funding Code defines 'likely costs' as follows:

> "Likely Costs" means an estimate of the likely total gross costs to be incurred on behalf of the client to disposal of the proceedings. This includes counsel's fees, disbursements and any enhancement or uplift on costs. Where appropriate, costs should be calculated by reference to standard or prescribed remuneration rates set by the Lord Chancellor or the Commission. Likely Costs and all cost thresholds specified in the Code are exclusive of VAT."

Our proposal is that section 8 of the Funding Code is amended so that, in considering the likely costs of the appeal proceedings, there is an explicit reference to the Legal Services Commission considering the potential *inter partes* costs of the appeal if the funded client were to lose, bearing in mind the prospects of success.

We estimate that between 10 and 20 cases per year may no longer be funded on the basis that the real likelihood of a costs order would not justify the

benefit to the claimant. These would primarily be in damages cases on appeal, where the claimant and defendant costs would exceed the value of the claim.

Q6: Do you agree that we should include a specific reference to potential *inter partes* costs in assessing the cost / benefit of appeals in section 8 public damages claims?

3. Legal Aid for Judicial Review

3.1 The Presumption of Funding for Judicial Review Cases Where Permission is Granted

Since the decision of the Court of Appeal in *R v Legal Aid Board ex p Hughes* (1992), where the Court found that the tests for permission and for the grant of legal aid ought to be the same, the Legal Services Commission's approach has been that if permission to bring proceedings has already been granted, there is a presumption that funding should also be granted.

This is reflected in the Funding Code at section 7 which sets out two different tests for the granting of funding for legal representation for judicial review proceedings: one for cases where permission has not been granted, and a different test for cases where permission has been granted.

Our view is that the existing tests may not provide sufficient control over limited legal aid funds and that there should be a single test in the Funding Code for judicial review proceedings, as there is for other areas of law. There have been significant developments in case law since 1992, not least the introduction of the Human Rights Act 1998.

There are various judicial decisions about whether cases may be brought, and it is unclear why only permission to bring a judicial review triggers the grant of funding in this way. For example, permission to appeal to the Court of Appeal or the House of Lords does not automatically entitle an applicant to civil legal aid funding.

Our proposal is that the existing tests for legal representation in judicial review proceedings at sections 7.3–7.5 are removed, and replaced with a single test. The single test will effectively replicate the pre-permission merits tests under the existing section 7.4.

Under this proposal a judicial decision that judicial review permission should be granted will be no longer be determinative in deciding whether legal aid should be granted. However, the permission decision, as with all judicial decisions, will be given considerable weight by the LSC in coming to a decision about the merits of a particular application for funding.

Q7: Do you agree that we should remove the presumption of funding and have a single test for granting funding in judicial review cases?

3.2 Personal Benefit from the Proceedings

An underlying principle of the Act is that the claimant has a direct interest in and will personally benefit from the action. The Act is not intended to provide funding for purely representative litigation.

Section 4.5 of the Funding Code's Standard Criteria sets out that "an application will be refused unless it is for the benefit of a client who is an individual…". This should make clear that proceedings cannot be brought about matters to which the applicant has no connection or direct interest. However, there have been cases where applicants have sought funding about matters of principle, on behalf of other people whom they do not know, or with regard to decisions to which they have no direct connection or involvement. It is our view that it is not appropriate for purely representative actions to receive limited legal aid funds.

Our proposal is to amend section 7 of the Funding Code to tighten the tests for both investigative help and legal representation in judicial review so that funding can only be granted to an individual who will gain a personal benefit from the outcome of the proceedings, either for themselves or for their family.

Q8: Do you agree that we should clarify the requirements around personal interest, so it is clearer that applicants for funding must have a personal benefit in the proceedings?

3.3 Reconsidering Merits when Acknowledgment of Service Received

On 21 March 2000, Sir Jeffery Bowman, as Chairman of the Review of the Crown Office List, reported to the Lord Chancellor. The recommendations of his report led to changes to the Civil Procedure Rules. One of the most important changes to the Rules was the requirement that a respondent to a claim for judicial review set out their grounds for defence in their acknowledgment of service. Having access to the detailed acknowledgment of service has assisted the judiciary in making determinations about judicial review, including decisions about whether permission should be granted.

Our proposal is that in future the LSC would only extend funding for a judicial review case after the acknowledgement of service and response is received and considered.

This would principally apply to the grant of full representation, and would require section 7.4.4 of the Funding Code to be strengthened. Currently this only requires that the respondent has been notified and given a reasonable opportunity to respond.

This proposal would allow the LSC to come to a more informed view about the continuing merits of a matter, with more of the facts at their disposal. The LSC could require the claimant's representatives to submit the response to the LSC before a hearing in all, or in selected, cases. This may be appropriate, for example, in cases raising disputes of fact, interpretation, or precedent. The reconsideration could alternatively be carried out by the claimant's solicitor.

Where the respondent fails to file their acknowledgment of service within the required timescales, and the court proceeds to grant permission, then the LSC, or the claimant's solicitor, will make a decision about the continuing merits without access to the respondent's response, as is presently the case.

Q9: Do you agree that further funding should not be granted until the receipt of acknowledgement and response, unless the court has granted permission? Do you think that the legal representatives or the LSC should carry this out?

4. Changes to Legal Services Commission Processes

4.1 Special Cases Unit Case Management

Section C23 of the Funding Code procedures sets out the criteria for when a case is referred to the Legal Services Commission's Special Cases Unit (SCU). These are:

(i) the actual or likely costs of the case exceed £25,000;

(ii) if the case were to proceed to a contested trial or final hearing (or, in the case of appeal proceedings before the Court of Appeal or House of Lords, to the conclusion of that appeal stage) the likely costs of the case might exceed £75,000;

(iii) the application or certificate relates to a multi-party action or potential multi-party action; or

(iv) the application is for an Exceptional Case Contract.

The Special Cases Unit is that part of the Legal Services Commission which manages high-cost cases and multi-party actions. The SCU has two main functions:

(a) to monitor the most expensive cases funded as part of the Community Legal Service and to ensure that such cases are subject to appropriate financial controls;

(b) to administer the central budget set by the Lord Chancellor for the funding of very expensive cases.

Cases referred to the Unit are subject to two additional criteria for the granting of funding:

(a) a case plan – a case plan will be required for all cases referred to the Unit, and the Unit is empowered to refuse funding if proposals for progressing litigation do not appear satisfactory; and

(b) affordability – the power to refuse or defer funding for very high cost cases if it is unreasonable for funding to be granted in the light of the resources available in the central budget and likely future demands on those resources.

The SCU will ensure that cases are monitored and controlled, and the following procedures will be adopted by the Unit:

(a) funding the case under a contract rather than a certificate where appropriate;

(b) requiring a detailed and costed case plan for the progress of the litigation. This applies in all referred cases;

(c) where appropriate, obtaining an independent opinion on legal merits or issues of expert evidence and/or inviting representations on the merits from an opponent or third party.

As set out above, at the moment there are narrow criteria for the referral of cases to the SCU. In practice this limits the ability of the LSC to deploy the SCU's expertise in other cases which, while they do not e.g. reach the £25,000 limit, are still difficult cases which would benefit from the close case management that SCU supervision provides.

Our proposal is that the referral criteria are broadened so that the LSC can refer to the SCU the management of any case which is, or is potentially, either particularly complex, or raises particularly important legal issues, or which is high profile. These new cases would be subject to supervision by SCU and the requirement to provide a case plan, but they would not be subject to the 'affordability' criterion. The 'affordability' criterion would continue to apply to the cases which fall within the existing C23 referral criteria, set out above.

Q10: Do you agree with extending the referral criteria for SCU case management? If yes, which cases would benefit from SCU case management? If no, please give reasons.

4.2 Inviting Representations before Funding is Granted

Applicants for a civil legal aid funding certificate are required to give honest and accurate information about their means and about the case for which they are seeking funding. When someone has been granted a funding certificate for their case it is open to the other side, or a third party, to make representations to the Legal Services Commission that the funding certificate should not have been granted.

Representations can concern either the financial circumstances of the funded client (e.g. that they are actually financially ineligible), or the merits of the case (e.g. that the damages sought are lower than is believed). When someone makes representations about the merits of the funded case, the LSC usually sends a copy of it to the solicitors acting for the person asking them to comment on the issues raised. The consent of the person making the representation is obtained before the LSC forwards details to the solicitor. Failure to give that consent could mean that the representation is not investigated by the LSC. The LSC then makes a decision in the light of any reply and all other information they have.

If the LSC receives a representation about the financial circumstances of a client, the LSC refers it to their means assessment team. They look at the representation in the light of the information given in the person's original application and investigate any points which are unclear. If necessary, they write to the client or make enquiries elsewhere.

While the representation system is an effective tool, we are concerned that representations are received and investigated after funding has been granted, and sometimes they are confirmed after considerable sums have been expended.

The Legal Services Commission has the power to revoke certificates if the client has made an untrue statement, failed to disclose a material fact about their means, or refused to co-operate with the LSC in investigating their means. If the LSC decides to revoke funding, the client will be told of its decision, and given reasons. The client will then have a chance to provide reasons why their funding certificate should remain in force, or be discharged, instead of being revoked. After considering all the circumstances of the case, the LSC may revoke the certificate, discharge it, or keep it in force. If the LSC decides to continue with the revocation, it will be as if the certificate was never issued, and the client will have to repay whatever has been spent on their case up to that point.

While revocation allows the Legal Services Commission to recoup legal aid funds where they should not have been made available, this is time consuming and representations may not be received until after considerable sums had been expended on the client's case.

Our proposal is that in future applications for civil legal aid, if the LSC decides that the client meets the means and merits tests for funding, before it grants funding, it will first notify the other side and any relevant third parties and invite them to make any representations as to why funding should not be granted. A similar arrangement is already operated by the Scottish Legal Aid Board for the legal aid scheme in Scotland. Those notified of the funding application will have 14 days in which to respond. If no representations are received by that point, the LSC will proceed to grant the funding certificate in the normal way. Providers would still be able to grant emergency representation if the proceedings became urgent.

We would not propose to apply this requirement to applications for proceedings relating to: detention under the Mental Health Act 1983; those from parents or guardians involved in childcare or supervision proceedings under the Children Act 1989; child abduction; domestic violence; asylum; or housing proceedings where the client is at risk of losing their home.

An alternative proposal is for the LSC to have the discretion to invite pre-grant representations where they consider it appropriate, rather than to seek them for all civil legal aid applications. This could be by categories of law, or the individual circumstances of a case, or the applicant and their financial circumstances.

It would still be open to the other party or third parties to make representations after funding has been granted, as is the case now. That is because it is important that if the client's financial circumstances change, or if the merits of the case change, the LSC needs to consider whether funding should continue.

Q11: Do you agree that LSC should seek representations before funding is granted? Do you think the 14 day period is too long or too short? Should this be a discretion for LSC to seek representations in particular categories of law or specific financial circumstances of applicants? In which categories of law or circumstances would pre-grant representations be more or less useful?

4.3 Independent Funding Adjudicator Decisions and SCU

In addition to qualifying financially, an applicant for civil legal aid must also show that the merits of the case justify the grant of legal aid. The application is considered against criteria specific to the type of case set out in the Funding Code. Broadly speaking, the test is designed to measure, taking all the circumstances into account, whether a privately paying client of moderate means would be prepared to spend his or her own money on taking the case.

The LSC must consider, for example, the prospects of success and any alternative sources of funding, and any other circumstances. It will also consider the possible benefits of litigation and, where possible, compare them to the likely costs.

The Legal Services Commission usually determines whether a particular case is of sufficient merit as to be awarded a funding certificate. If the LSC refuses an application on the grounds of merits, the applicant can ask for the matter to be referred to an Independent Funding Adjudicator (IFA).

The IFA is an independent lawyer who considers the application and the merits of the client's case in full. The IFA has the power, under rule C63 of the Funding Code procedures, to give a final determination on certain issues, i.e. the prospects of the client winning the case, whether a case is of 'overwhelming importance' to the client, the cost benefit of a case to a client, and whether a certificate should be discharged or revoked on the grounds of a client's conduct.

All decisions to actually grant or refuse funding, or amend the terms of funding, are taken by the relevant director of the LSC, accepting, where relevant, any determination by the IFA. If the appeal is unsuccessful, the client can make a fresh application if they can provide further evidence to support their case.

The Legal Services Commission values the expertise of IFAs, and their role in providing an objective insight into the merits of a particular case. However, while IFAs are experienced practitioners in a particular area of law, they are not necessarily experts on all aspects of that area. While the final decision on whether funding should be granted lies with the LSC, the LSC would like the SCU to have the flexibility to reach its own view on the merits of cases, on the basis of the IFA's advice.

The Special Cases Unit has particular expertise in its categories of law. Its lead Case Managers specialise in categories of law. This requires the selection of potential test cases for funding. These may well need sequencing through the courts. This may mean that those cases with higher likelihood of succeeding in setting a precedent are heard first, thus avoiding additional cost to the fund. It may also mean that other cases are stayed pending the court's judgement on a lead case. In these circumstances the Case Manager will have a greater level of knowledge of the category of law and its development than the IFA. At present the IFA is only confirming the decision of the SCU on a particular case's merits and cost/benefit.

Our proposal is that in future, for cases managed by the SCU, the decision of the Case Manager should be final. The Case Manager would therefore make the final decision about matters that are currently decided by the IFA i.e. on the prospects of the client winning the case, whether a case is of 'overwhelming importance' to the client, the cost benefit of a case to a client, and whether a certificate should be discharged or revoked on the grounds of a client's conduct. For cases which are not managed by the SCU, IFAs will continue to make final determinations on the merits of cases referred to them as they do at present.

However, if we were to proceed with the proposal at section 1 above, a large number of the most contentious cases would be determined by the new Committee system rather than Case Managers.

It is estimated that this would affect around 20 cases per year, where the Unit, having considered the decision of the IFA, would disagree with the IFA's view. The SCU Director would consider such decisions personally.

Q12: Do you agree that final determinations should be with Special Cases Unit for the cases they manage? Should this change be limited to the Special Cases Unit?

4.4 Community Contributions towards Legal Action

One of the factors to be considered under section 8 of the Act in setting funding criteria is the availability of other services. All other sources of funding should be exhausted before legal aid is provided. In effect, the LSC is lender of last resort. This extends to individual cases, community actions and group actions.

Where the Legal Services Commission is considering granting legal representation for a community case, it considers whether alternative sources of funding are available. The LSC's preferred approach is, where possible, to work in partnership with other bodies with an interest in funding the litigation. In the absence of any existing organisation which could be expected to fund the case, the LSC will need to consider whether some funding should be provided by those members of the public who stand to benefit from the outcome of the case, for example by all those affected getting together a fighting fund to finance the litigation.

In community actions the LSC would expect the affected community to demonstrate its commitment to the action by making a contribution to the costs. It would not be appropriate for an interest group to bring a community action without the support of the local community. In return, the LSC would provide cost protection for the action as a whole, removing the need to obtain insurance against adverse costs order or a protective costs order.

If a potential funding group does exist, the LSC's broad starting point, as set out in Guidance, has been a presumption that the group should fund half of the likely costs of the case at first instance, leaving the LSC to fund the remainder. That proportion will be varied from case to case taking into account all the circumstances of the matter, including the general financial resources of the group and the nature of the benefits they would gain from the litigation. The LSC will consider any available information on the general level of resources of the group but it will not usually be necessary or practicable to assess the means of each member of the group in detail.

The LSC's experience is that in some cases there is an active interest group that seeks out an individual eligible for legal aid to bring the action. Sometimes this person shows limited involvement in the action. An example would be an environmental case in which the claimant withdrew near trial, and the main activists were then substituted as the claimants.

The interest group usually obtains a limited contribution from the community, typically £3,000 to £5,000. Some environmental actions have affected whole towns with populations of over 100,000, while very little is contributed by the community. This brings into question the level of community commitment to the action.

While 50% seems to be an equitable starting point, it may not accurately reflect the proportion of the local community who are actually eligible for legal aid. In future we want to align the proportion of the costs which are paid for by legal aid with the proportion of the local population who are eligible for legal aid, using information about the size of the population, its financial circumstances, and information from the Office for National Statistics. This would be a starting point, and all the circumstances of the matter would also be taken into account as now, so that the proportion of costs can be adjusted up or down as is necessary. The existing consideration of the tangibility of benefits would remain. Typically those actions with wider, more intangible benefits are likely to affect a greater community.

It is estimated that there are up to 20 community actions each year. For example, in a school closure case only affecting a small local community, and where parental households are more likely to be eligible, the LSC may fund all the costs. In local environmental case affecting a whole town, the LSC may offer to fund only 30% of the costs, but the LSC would still provide 100% cost protection. It is considered that a minority of actions will not proceed because the local community choose not to contribute, but this may represent the community's assessment of the merits of the action.

Q13: Do you agree that, in community actions, in considering the proportion of costs that the community should contribute, the proportion of the population eligible for civil legal aid should be the starting point? If not, what alternative would you suggest?

Part Two: Ministry of Justice Proposals

Part Two of this paper includes proposals which have been developed by the Ministry of Justice. These proposals relate to the scope of Criminal Defence Service funding, and also control of the delegated powers for solicitors to self-grant legal aid in judicial review cases which are included in the existing civil and criminal Unified Contracts. They also cover restrictions on the availability of legal aid for non-residents.

These proposals have been developed by the MoJ to respond to the rising costs of legal advice in prison law cases, and the significant increase in the number of failed judicial review applications, many of which are funded by legal aid. Improving legal aid funding rules will not only help to focus limited legal aid resources onto priority cases, but will also assist the courts and National Offender Management Service by discouraging unnecessary litigation, and promoting alternative dispute resolution.

If we decide, following consultation, to proceed with these changes, they will be implemented by statutory instruments made by the Justice Secretary. Once those statutory instruments are made, the Legal Services Commission will be required to amend the existing Unified Contract (Civil) and Unified Contract (Crime) to reflect that legislative change. Both the Justice Secretary and the legal aid Minister, Lord Bach, will be discussing this potential change to existing contracts with the Unified Contract consultative bodies, the Law Society and the Advice Services Alliance.

5. Prison Law: Advice and Assistance on Treatment Matters

Legal aid is available for prisoners seeking advice about their treatment within the prison system, subject to a means test and a merits test (the sufficient benefit test). It is funded as part of the Criminal Defence Service (CDS) and therefore any firm holding a criminal contract with the LSC can take on these prison law cases, as well as a small number of firms with a civil contract who hold a separate prison law contract.

The proposal that is outlined below concerns the *scope* of the CDS. It is therefore distinct from measures being taken forward separately by the LSC to address the rapid increase in the cost of CDS prison law work (which also includes advice and advocacy assistance on discipline and sentencing matters) in recent years. However, a brief description of the LSC's proposals is provided below to provide further context.

Legal Services Commission Review of Prison Law

As detailed in the LSC consultation response published on 15 July 2009 (available within the consultation section of its website at www.legalservices.gov.uk) the LSC intends to implement the following changes to prison law work in July 2010:

(i) New fixed and standard fees for solicitors to replace the current system of hourly rates, bringing prison law remuneration into line with most other areas of legal aid;

(ii) A strengthened sufficient benefit test which solicitors must apply in determining whether publicly funded work is justified, together with further clarification of how the test applies to different types of cases;

(iii) A supervisor standard to ensure solicitors' firms undertaking this work have sufficient knowledge and expertise; and

(iv) A provision within the next criminal contract to introduce New Matter Start controls at a future date should this be considered necessary.

Removing Treatment Cases from the Scope of the Criminal Defence Service

The Government fully supports the steps being taken forward by the LSC to address the rising cost and volume of prison law cases. However, in view of the current financial pressures and the need to prioritise rigorously legal aid resources, it believes it is necessary to go a stage further. Prisoners have a number of routes to seek redress for any complaints they have regarding their treatment within the prison system, including the prison complaints system[1] and the independent Prisons and Probation Ombudsman (PPO). There are also other avenues such as the Independent Monitoring Board (IMB) and the Parliamentary Commissioner for Administration. The Government has therefore concluded that it is not necessary or justifiable to continue to provide advice funded by legal aid for the majority of prisoners' cases concerning treatment.

Prison complaints data, collected by the National Offender Management Service (NOMS) from a sample of prisons, showed that many of the complaints received about treatment concerned issues such as mail, visits, food, property, healthcare and telephones. We know that some prisoners are seeking advice and assistance from a solicitor to pursue relatively trivial complaints against the prison service which ought to be capable of resolution through the internal complaints process and without recourse to a solicitor. For example, solicitors were involved in cases involving the provision of items in cells, such as extra mattresses, and a special chair.

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[1] A detailed description of the three stage internal complaints process and the prescribed timescales for responding to complaints is set out in Prison Service Order 2510, Prisoners' Requests and Complaints Procedure (www.hmprisonservice.gov.uk/resourcecentre/psispsos/listpsos).

While the evidence we have would suggest that many complaints made by prisoners are relatively low level, we acknowledge that, even with the best of intentions, there will be occasions when the treatment received by a prisoner falls below the standard to which we aspire and the prisoner has a legitimate and serious grievance. In such cases, it is appropriate that a prisoner can seek redress in order to put the matter right and to try to prevent such a failing recurring in the future.

These are the kinds of matters for which civil legal aid is available for advice and representation to bring a judicial review challenge, or a civil damages claim. This funding is available to assist prisoners who may have a serious case to bring against the prison service. As set out in Part 1, Section 2.3 of this paper, we would expect that solicitors and their clients would, where appropriate, pursue the prison complaints procedure as a first step before turning to litigation.

In our view, the availability of civil funding for genuine and serious grievances concerning treatment will ensure a proper balance between protecting the interests of prisoners, and the need to rigorously focus limited resources on priority areas.

The Government therefore proposes the removal of advice and assistance for prisoners on treatment matters from the scope of the CDS. This step would rationalise the scope of the CDS and that of the CLS by removing the current duplication whereby criminal solicitors can advise prisoners on quasi-civil matters relating to their treatment.

Q14: Do you agree with the proposal to remove advice on treatment from the scope of the CDS? Please provide supporting reasons for your answer. Are there any circumstances in which you believe prisoners should be able to seek advice on treatment issues and which would not be captured within the scope for civil legal aid funding? Please provide supporting information.

Cases Concerning Discipline and Sentence

The change proposed above would not affect the availability of legal aid for advice to prisoners on discipline and sentencing matters, or for advocacy assistance in relation to parole hearings and disciplinary hearings (adjudications). Our obligations under human rights legislation, and the need to ensure prisoners are properly represented where there are important decisions to be made concerning their liberty or continued incarceration, are such that it is appropriate to fund these cases from public funds, subject to the applicable means and merits tests.

6. Delegated Powers to Self-Grant Judicial Review Funding

Currently legal aid solicitors are granted the power, under both civil and criminal legal aid contracts, to self-grant legal aid funding to clients without reference to the Legal Services Commission for emergency legal representation. This is important where, for example, a victim of domestic violence is seeking an urgent protective injunction. All other grants of funding must be approved by the LSC.

Delegated powers are also frequently used to self-grant funding in judicial review cases. Figures from Her Majesty's Courts Service show that over the last 15 years the number of applications for permission to bring judicial review has more than doubled, from approximately 3000 to 7000 per year. Over the same period, the proportion of applications where permission was granted has decreased from over 40% to just over 20%. A significant number of these failed permission applications will be funded through legal aid, and in some of those cases funding will have been granted using delegated powers.

Given the significant increases in failed judicial review applications, many of which are funded through legal aid, our proposal is to remove delegated powers granted to civil and criminal legal aid providers to grant emergency representation in judicial review. There is already an exclusion which prevents solicitors from granting emergency representation in immigration judicial reviews. This would extend that to cover all judicial reviews, except for housing judicial reviews. We consider that it would be inappropriate to restrict judicial for housing cases where the client may become homeless. For other judicial reviews, where a decision on an emergency application was required, this would be referred to the LSC on an urgent basis.

The LSC has recently consulted with stakeholders on some of the terms of the 2010 civil legal aid contract. One of the proposals put forward by the LSC was that delegated powers to self-grant judicial review funding would be restricted in the new 2010 civil legal aid contracts. The LSC will consult on similar controls for the July 2010 criminal legal aid contract in due course.

The proposal set out in this paper is similar to that proposal, but we seek to remove these delegated powers from current civil and criminal contracts. It is open to the Lord Chancellor to make a statutory instrument which would have the effect of requiring the LSC to change their contracts, under clause 13.2 of the Standard Terms of the Unified Contract, and to remove these delegated powers from providers. The Justice Secretary will be discussing the use of this power with consultative bodies before any change is implemented.

An alternative proposal is that, following withdrawal, delegated power to self-grant judicial review funding will be allowed for providers specifically approved by the LSC on the basis of performance. This approval would be category by category. Even for providers who are given delegated powers in future, they would not be authorised to use them on judicial review cases with 'borderline' prospects of success or cases attracting 'wider public interest'. Another alternative is that we only remove delegated powers for certain types of proceedings.

Q15: do you agree that we should remove the delegated powers of civil and crime providers to self-grant funding for judicial review cases, and that these funding decisions should be made by the LSC instead? Do you agree with the alternative proposal to grant delegated powers to individual approved providers? Are there particular types of judicial review for which delegated powers should be retained?

7. Restricting Civil Legal Aid for Non-Residents

Civil legal aid is limited to matters of English Law or to proceedings taking place in England and Wales. However, where proceedings are in this jurisdiction there are currently no restrictions on who can take advantage of civil legal aid, both when proceedings are in court and also at the investigative stage before they are issued. A person can therefore benefit from the scheme if they have no connection with the UK other than the fact that our courts would (at least arguably) have jurisdiction to hear their case, often because the proposed defendant is within England and Wales.

For such cases there is a range of proximity to the United Kingdom. First, there are cases brought against the British Government under UK legislation, such as the Human Rights Act 1998. Second, there are cases where non-residents have actions brought against them, or are party to proceedings initiated by others in the UK courts. Within this group will be family and children cases. Finally, there are cases brought by non-residents against UK individuals or companies.

At a time when our scheme faces considerable budget pressures we need to reconsider this general right of access to the scheme which is of course funded by the UK taxpayer. Restrictions on entitlement to legal aid for non-residents' claims could be introduced by amendment to Schedule 2 to the Act, subject to ensuring there was compliance with our common law and our obligations under the European Convention on Human Rights relating to access to the courts and discrimination.

Our proposal is that legal aid would not normally be available for those who did not reside in the UK. Funding would continue to be available for British citizens (whether they were resident in the UK or not), and for citizens of some Commonwealth countries who have a right to settle here.

If such an exclusion is introduced, there would need to be a range of cases for which funding for non-residents remained available. First, the European Legal Aid Directive (2002/8/ESC) of 27 January 2003 requires that each member state's legal aid scheme be available in cross-border disputes where a party domiciled or habitually resident in one member state applies for legal aid in a different member state. This is a reciprocal obligation which ensures access for UK citizens to foreign legal aid schemes in cross-border disputes.

Second, it would not be appropriate to impose restrictions in relation to cases where the issue was whether the client should be entitled to enter this country.

Therefore funding will continue to remain available for those who would qualify for legal aid as currently set out in the LSC Immigration category of law (which includes asylum). This would cover proceedings for non residents relating to applications for leave to enter the UK as well as non residents who have arrived in the UK and wish to make an application to remain.

Third, there are civil proceedings which concern the life or liberty of the client or where the penalties are so severe that funding should remain available. Therefore funding for proceedings concerning the detention of the client under the Mental Heath Act 1983, childcare or supervision proceedings under the Children Act 1989, child abduction proceedings covered by the Hague Convention, domestic violence proceedings, and housing proceedings where the client is at risk of homelessness.

Fourth, the exclusion would not apply where there was a pre-existing bilateral agreement between the UK and another country that provided access to the UK legal aid scheme for foreign nationals on the same basis as British citizens.

While, under this proposal, civil legal aid would not be generally available to non-residents, it would continue to be available in exceptional circumstances. Under section 6(8)(b) of the Access to Justice Act 1999 the Justice Secretary can grant legal aid in an individual cases which is otherwise excluded from the scheme, subject to strict criteria.

Q16: Do you agree that there should be restrictions on legal aid for non-residents? What exceptions or safeguards should apply? Do you agree that funding should continue to be available for the proceedings listed? Are there other areas of law for which funding should remain available?

Next Steps

This consultation will close on **8 October 2009**. Following consultation, we intend to publish our response in November.

If we proceed with changes to advice on treatment issues, delegated powers, or funding for non-residents, the MoJ will make regulations to implement these changes. Once these regulations are made, the LSC would need to consult the usual representative bodies about any changes to the legal aid contracts which might be necessary to implement the changes. The LSC would then need to give notice of the contract amendments before they took effect. We envision that the earliest that these changes could be fully implemented would be January 2010.

If, following consultation, we decide to proceed with the changes to the Funding Code, we would aim to complete the Parliamentary process and have the changes come into force by the end of the year.

Changes to the public interest arrangements and the establishment of a new committee would take longer, and we would not expect these to come into effect until April 2010.

Following consultation, should we decide to proceed with some or all of these proposals, the LSC will consider what consequential changes need to be made to the Decision Making Guidance in the LSC Manual. The LSC is also presently reviewing the reasons provided by the Administrative Court for refusal of permission in judicial review cases with a view to amending guidance to achieve a clearer selection of cases for funding for permission.

The LSC will also give further consideration to whether the existing guidance on Overwhelming Importance to the Client and Significant Human Rights issues needs to be strengthened. Any revisions to the guidance on judicial review to achieve higher levels of success at permission stage will also be included. These changes to the Guidance will be the subject of a subsequent further limited consultation with representative bodies, as is usually the case.

Q17: Do you agree with the initial impact assessment? Do you have any evidence of impacts we have not considered?

Q18: Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals with a have a disproportionate adverse impact on any group? How could any impact be mitigated?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Part One: Legal Services Commission and Ministry of Justice Proposals

Q1: Do you agree that the definition of Wider Public Interest should be strengthened to ensure that a case will only qualify if it is a good vehicle on its facts to deliver those benefits? Do you agree that disadvantages to the public from the proceedings should also be taken into account in assessing public interest? What safeguards are appropriate for claims brought by minority interests?

Q2: Do you agree with the proposed special controls and budgeting for public interest and borderline cases as described above? Do you agree that the existing committees should be replaced by a new committee? Do you agree that the new committee should include non-lawyers? Are there other groups who should be represented on the new committee?

Q3: Do you agree that we should refocus our resources on higher value damages claims and refuse funding for investigative help and representation where the damages are unlikely to exceed £5000? Should we retain an exemption for low value cases which do attract significant wider public interest? Should we apply this to individual claims, MPAs or both types of claim?

Q4: Do you agree that where an out of scope matter is brought back into scope because there is significant wider public interest this should only be for damages cases where the damages are at least £5000? Should we apply this to individual claims, MPAs or both types of claim?

Q5: Do you agree that we should add a specific reference to the prison and probation complaints procedures and the Prisons and Probation Ombudsman in section 8 of the Funding Code? Are there other complaints systems or ombudsman schemes which should be explicitly mentioned?

Q6: Do you agree that we should include a specific reference to potential *inter partes* costs in assessing the cost / benefit of appeals in section 8 public damages claims?

Q7: Do you agree that we should remove the presumption of funding and have a single test for granting funding in judicial review cases?

Q8: Do you agree that we should clarify the requirements around personal interest, so it is clearer that applicants for funding must have a personal benefit in the proceedings?

Q9: Do you agree that further funding should not be granted until the receipt of acknowledgement and response, unless the court has granted permission? Do you think that the legal representatives or the LSC should carry this out?

Q10: Do you agree with extending the referral criteria for SCU case management? If yes, which cases would benefit from SCU case management? If no, please give reasons.

Q11: Do you agree that LSC should seek representations before funding is granted? Do you think the 14 day period is too long or too short? Should this be a discretion for LSC to seek representations in particular categories of law or specific financial circumstances of applicants? In which categories of law or circumstances would pre-grant representations be more or less useful?

Q12: Do you agree that final determinations should be with Special Cases Unit for the cases they manage? Should this change be limited to the Special Cases Unit?

Q13: Do you agree that, in community actions, in considering the proportion of costs that the community should contribute, the proportion of the population eligible for civil legal aid should be the starting point? If not, what alternative would you suggest?

Part Two: Ministry of Justice Proposals

Q14: Do you agree with the proposal to remove advice on treatment from the scope of the CDS? Please provide supporting reasons for your answer. Are there any circumstances in which you believe prisoners should be able to seek advice on treatment issues and which would not be captured within the scope for civil legal aid funding? Please provide supporting information.

Q15: Do you agree that we should remove the delegated powers of civil and crime providers to self-grant funding for judicial review cases, and that these funding decisions should be made by the LSC instead? Do you agree with the alternative proposal to grant delegated powers to individual approved providers? Are there particular types of judicial review for which delegated powers should be retained?

Q16: Do you agree that there should be restrictions on legal aid for non-residents? What exceptions or safeguards should apply? Do you agree that funding should continue to be available for the proceedings listed? Are there other areas of law for which funding should remain available?

Impact Assessment

Q17: Do you agree with the initial impact assessment? Do you have any evidence of impacts we have not considered?

Q18: Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals with a have a disproportionate adverse impact on any group? How could any impact be mitigated?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by **8 October 2009** to:

Mandy Banks
Ministry of Justice
Legal Aid Strategy
4th floor
102 Petty France
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Tel: 020 3334 4205
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Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from the contact above.

Publication of response

A paper summarising the responses to this consultation will be published by 19 November 2009. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will

take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impac**t – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercise**s – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Julia Bradford, Ministry of Justice Consultation Co-ordinator, on 020 3334 4492, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Julia Bradford
Consultation Co-ordinator
Ministry of Justice
6.36, 6th Floor
102 Petty France
London
SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 37.

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