Association of **Lawyers for Children**

Promoting justice for children and young people

THE MINISTRY OF JUSTICE'S CONSULTATION PAPER ON PROPOSALS FOR REFORM OF LEGAL AID IN ENGLAND AND WALES

Response of the Association of Lawyers for Children

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ABOUT THE RESPONDENT

The Association of Lawyers for Children ["ALC"] is a national association of lawyers working in the field of children law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children's law, and several hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

(i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;

(ii) lobbying against the diminution of such mechanisms;

(iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the welfare, health and development of children;

(iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people;

(v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice. The ALC is automatically a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.

EXECUTIVE SUMMARY

In the view of our Association, these proposals:

- **Take little or no account of the complexities of society today**
- **Will have major regressive impacts**
- **Should not be considered further until after the Family Justice Review has published its final report**

We develop these points briefly below, and in detail in our responses to the individual questions we have been asked to respond to.

SOCIETY AS IT IS TODAY

On the first page of the Executive Summary of the Green Paper, it is stated that "The Government strongly believes that access to justice is a hallmark of a *civil* society"[1]. We certainly believe that access to justice is a hallmark of a *civilised* society. Since the passing of the Legal Aid and Advice Act 1949 our society has, however, changed enormously. Changes in family law, and its complexity, reflect that transformation. What is appropriate in terms of access to justice has to be gauged by reference to the ways in which society has developed. We do not believe that this government, or indeed any government, seriously proposes that the clock should be turned back more than sixty years. We think it is highly inappropriate, for that reason, to use either the 1949 Act or the original legal aid scheme as a basis for comparison.

SOME MAJOR REGRESSIVE IMPACTS OF THESE PROPOSALS

The effect of more litigants in person

One of the difficulties evident from the speed at which these proposals have been brought forward is the absence of proper research underpinning the proposals. Nowhere is this more starkly apparent than in relation to litigants in person. As we point out at a number of points in answering specific questions, below, many of the proposals will inevitably result in an increase in the percentage of cases which involve litigants in person, yet no proper assessment has been made either as to this, or the impact it will have on the courts and other agencies and government departments.

The impact on the quality of initial advice of the proposed move to a single telephone gateway

As with litigants in person, this has not been sufficiently researched. Such research as there has been suggests that telephone advice compares unfavourably with face to face advice where problems are complex or where a variety of factors are present.

The failure to acknowledge the value of skilled professional assistance

The proposals to remove most of private family law from scope seriously underestimate the impact on children's welfare of denying their family members the opportunity to obtain skilled advice. Almost half of all private law family cases involve allegations of serious abuse, relating not only to adult victims of domestic violence but to the children themselves. They are accordingly of crucial importance in child welfare terms, and for that reason ought not to be decided without professional assistance. Many non-custodial parents give up without legal support and many children will be denied a relationship with both parents. There is research evidence to suggest that input from a father reduces the likelihood of a child being involved in

[1] Paragraph 1.2

criminal activity and this measure will result in increased costs in other areas quite apart from the human cost to the children. An effective family justice system that meets the needs of all of society, not just the wealthy, surely requires access to proper informed legal advice, so individuals can understand their rights and be supported to act on them reasonably and in the best interests of their children.

The impact on women

The proposals will have a disproportionate effect on women and this will itself have a knock-on effect on the welfare of children, since over 80% of primary carers, post-separation, are women. This effect is acknowledged in the impact assessments, but there is no attempt within the proposals to address this issue.

The resulting increase, rather than decrease, in acrimony and litigation

The removal of public funding will greatly increase the adversarial and acrimonious nature of family proceedings. Skilled assistance helps to resolve these issues, as is clearly demonstrated by the very research on which the framers of the Green Paper seek to rely. Focused, authoritative advice is often the key to matters being resolved, and to the people involved committing themselves to agreements with confidence that they have been heard, advised and have obtained a fair outcome.

The impact on public law, and local authorities

Whilst the proposals on restricting legal aid in family cases do not ***directly*** relate to public law cases, they will have a significant effect on the numbers of cases where family situations deteriorate to the point, where local authorities ought to intervene. Many of the families currently entitled to public funding in private law cases are on the point of breakdown and their children are on the edge of care. However, the threshold of harm for intervention by public authorities was already very high before the current financial crisis, as is evidenced by the Commission for Social Care Inspection (CSCI) final report in 2007[2] . It is inconceivable that the situation will not worsen, if these proposals are implemented, to the great detriment of the vulnerable children concerned. Wider family members, who often step in to provide permanent homes, thereby avoiding children coming into Local Authority care, will be excluded from public funding under these proposals.

[2] *CSCI Report on Children's Services March 2007* "Increasing financial pressures are resulting in high eligibility criteria and thresholds for access to services … access to family support for many families in need is severely restricted. Families in considerable distress, on the threshold of family breakdown and serious harm, are not getting the sustained support they need. Some services operate inappropriately high thresholds in responding to child protection concerns and taking action to protect children…" (pages 2, 9-10)

THE FAMILY JUSTICE REVIEW

The previous administration announced on 20th January 2010 that a fundamental review of the family justice system would be undertaken and set out its terms of reference. The present administration decided to proceed with that review, and in June 2010 the chair of the Family Justice Review Panel, David Norgrove, launched a formal call for evidence[3]. Responses were to be submitted by 30th September 2010, and by that date there was a clear understanding that an interim report would be produced by the Review panel around March 2011 and a final report around August 2011.

This is a major and fundamental review. It is the most thoroughgoing examination of the family justice system since the work which led to the enactment of the Children Act 1989 more than twenty years ago. We have contributed fully to that review, by giving oral and written evidence, attending workshops, and assisting with a project to analyse the day to day work of lawyers within the family justice system.

In providing updating information to representative bodies in November 2010, the FJR panel made it clear that they expected to receive critical feedback in respect of their interim report and would not draw final conclusions until they prepared their final report in August 2011.

Accordingly we say that it is wholly inappropriate for the government to be setting out proposals at this stage which fundamentally affect entitlement to public funding in family law cases. The proper time to do that is once it has been possible to digest the final conclusions of the Family Justice Review, and not before. To do otherwise is contrary to the government's Code of Practice on Consultation[4].

This issue was raised with the Minister with responsibility for Legal Aid, Jonathan Djanogly at the All Party Parliamentary Group meeting on Legal Aid held on 24th November 2010. How, he was asked, was the feedback to representative bodies referred to above to be squared with the Government's stated intention to respond on the Green Paper during April 2011, so far as the family proposals were concerned? We were, and remain, wholly unconvinced by the Minister's answer to the effect that the team dealing with the Green Paper and the Family Justice Review Panel were not operating in silos, but were looking at what the other team was doing. That is, of course, to be expected. However, we have no reason whatsoever to doubt the Review Panel

[3] "Call for Evidence", Family Justice Review, June 2010

[4] See HM Government's *Code of Practice on Consultation,* July 2008 : Criterion 1 "When to consult", paragraph 1.2 : "It is important that consultation takes place when the Government is ready to put sufficient information into the public domain to enable an effective and informed dialogue on the issues being consulted on.", and see also paragraph 2 of *The Compact : The Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England* (2010).

members' integrity, and their stated position that they will keep an open mind until they have considered feedback on their interim report. This is clearly not compatible with the Minister making major decisions about family law public funding in April 2011.

RESPONSES TO THE SPECIFIC QUESTIONS ASKED

QUESTION 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.

1.1 Yes.

1.2 Because we consider that it is the hallmark of a civilised society, and a matter of compliance with the state's duties to its citizens (whether under domestic law or international convention) that legal aid should remain available as presently scoped, and we do not seek to suggest that any of these types of case and proceedings should be removed from scope.

1.3 We would, however, wish to comment on the stated rationale for retention of some of these areas, since we believe this demonstrates a lack of appreciation of the practical consequences of "labelling" types of case, and deciding that cases should be in or out of scope dependent on the label attached to them.

1.4 Take, for example, "Domestic Violence" (paragraphs 4.64 *et. seq.).* No definition of what is meant by this is provided anywhere in the Green Paper, although reference is made (in paragraph 4.64) to "those in abusive relationships" needing "assistance in tackling their situation". It is unclear what is to be encompassed within "abusive relationships". If it is only physical violence, then that would run counter to the research evidence as to the scope and definition of abuse and, indeed, to the impact of other types of abuse on the children of the family. It also runs counter to the definition of domestic violence which was adopted as recently as 2008 by the Association of Chief Police Officers (ACPO), the Crown Prosecution Service and government.[5]. It would also run counter to the Legal Services Commission's current policy on funding in this type of case[6].

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[5] *Guidance on investigating domestic abuse,* produced on behalf of the Association of Chief Police Officers by the National Policing Improvement Agency, 2008, Preface, at page 7: "The shared ACPO, Crown Prosecution Service (CPS) and government definition of
domestic violence is:
'any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality.'
(Family members are defined as mother, father, son, daughter, brother, sister and

1.5 Nor is it clear whether, in deciding to make domestic violence applications a portal to keeping other types of family application in scope, the framers of these proposals have kept in mind the distinction between "an order of the court" obtained by an applicant, and "a undertaking to the court" given by the respondent. Many injunction applications relating to domestic violence are resolved not by an order of the court, but by the respondent giving an undertaking as to his future conduct (which protects the applicant, but involves no finding of the court as to whether or not the respondent has been responsible for the behaviour complained of). Resolution by way of an undertaking accordingly has the well understood advantages of shortening proceedings, saving money, and reducing levels of tension and discord within the family. If it is intended that an order of the court is necessary, then this will have the following counter-productive and unintended consequences:

- Most cases will be contested by respondents in order to limit the adverse consequences to them of findings in relation (particularly) to arrangements for the division of parenting time;
- The Legal Aid fund will accordingly have to meet the much higher costs of contested domestic violence proceedings for the applicants, and there will be knock-on effects on other agencies[7];
- It is highly probable that many respondents will be able to demonstrate entitlement to public funding to meet the allegations against them[8].

1.6 There is a clear risk that, if alleging domestic violence is to be treated as an exclusive gateway to eligibility for public funding in related cases, then there will be an increase in allegations which are ultimately found to be false or exaggerated.

1.7 If the government's aim is to ensure that its responsibilities to victims of domestic violence are met, we consider that fair access to justice is better achieved by use of the LSC's current system of guidance and scope limitations. These allow access to advice but operate to limit, or control what steps can be taken. Both alleged victims and alleged perpetrators can accordingly receive advice, and be represented appropriately, on the basis of the merits of their cases.

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grandparents, whether directly related, in-laws or step-family.)"

[6] Volume 3 Part C (20.32 A paragraph 2) of the LSC Manual states that 'funding is not limited to persons who have suffered actual physical violence'.

[7] E.g. police authorities which will face a higher level of applications for disclosure.

[8] See the response to question 4, paragraph 4.2 below.

QUESTION 2

Do you agree with the proposals 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 cost of representation for the other party? Please give reasons.

2.1 Broadly, yes, but we think this will be of assistance only in a very limited number of cases.

2.2 This could be a useful power in appropriate cases, but the court already has the power to make interim maintenance orders for this specific purpose, and that has the advantage, of course, of not eating into the family's capital assets.

2.3 In any event, it is only likely to be helpful if the applicant (usually the wife) can be represented in making such an application. Applying as a litigant in person for such an order (because public funding is not now to be available under the Green Paper proposals) is likely to put off many potential beneficiaries of the proposed change. It will result in lengthy hearings for those who apply as litigants in person, and attempt to navigate their way through such issues as financial disclosure and hidden assets.

QUESTION 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.

We will answer this question category by category.

3.1 ANCILLARY RELIEF

3.1.1 We do not agree.

3.1.2 Whilst we note the observation, in paragraph 4.157 that in 2008 "73% of ancillary relief orders were not contested" it will be noted that Table 5.6 of the quoted statistics includes a footnote, as follows: "1. Uncontested applications do not have a court hearing." This nevertheless means that there has been an application, almost certainly following specialist legal advice and assistance, with lawyers on each side having drafted the highly technical documents required, including the draft consent order for scrutiny and approval by the Judge. Many of these lawyers will be working for their clients under public funding certificates. There is no acknowledgement of this in these proposals.

3.1.3 There is no analysis of the impact of legal advice and representation on the settlement statistics. This data exists, and was indeed commissioned by the DCA, but has not been

presented[9]. That research clearly indicates that being represented is beneficial both in terms of reaching agreement and saving money and court time.

3.1.4 In any case, it is a very large leap indeed to conclude that everyone will be able to reach agreement through mediation. Mediation is not always an option. There is not always a willingness to compromise, and in many cases one of the parties' behaviour has been so appalling, or their demands are so unrealistic, that mediation is impracticable.

3.1.5 This proposal is bluntly put forward "in order to reduce spending" (paragraph 4.158) but the actual amount which would be saved by removing ancillary relief from scope would be very small indeed, because of the impact of the statutory charge and costs orders, which serve to substantially protect the fund if costs recovered are netted off. In fact, it is not a matter of public knowledge as to whether there are net costs to the system, since the amounts recovered under the statutory charge do not appear in the available figures.[10]. It is unclear what the overall costs of such mediation would be[11]. We have seen no projections, and there is no reference to this in the impact assessments. The effectiveness of mediation is enhanced by proper legal advice and the process of mediation works in harmony with legal advice in order to be fully effective. In any event, mediated settlements still need to be drafted into formal court orders to have legal effect and protection for the parties involved. Without this, the whole process of mediation is fruitless.

3.1.6 Quite apart from the very small saving to be made to the Legal Aid budget from proceeding with this proposal, it would appear that little consideration has been given to the effect on HMCS, and judicial resources which would undoubtedly flow from these proposals, by reason of the increase in litigants in person.[12] This in turn would impact on other cases in the system, for example public law children's cases, by further restricting the time available for judicial case management, which is seen as a cornerstone of the current Public Law Outline, and likely, as we understand, to be a cardinal principle of the proposals put forward by the Family Justice Review.

3.2 CLINICAL NEGLIGENCE

We leave comment on this to the relevant practitioner and interest groups.

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[9] See the research carried out for the DCA by Professor Richard Moorhead and Mark Sefton on *Unrepresented Litigants in First Instance Proceedings* at page 223, where, when the applicant was unrepresented 60% of cases went to final hearing, as opposed to 35% where represented).

[10] For reasons which are unclear, they appear to be remitted direct to HM Treasury.

[11] All mediation costs are exempt from the statutory charge, and there is no financial contribution payable.

[12] See, below, the response to question 6.

3.3 CONSUMER AND GENERAL CONTRACT

We leave comment on this to the relevant practitioner and interest groups.

3.4 CRIMINAL INJURIES COMPENSATION

We leave comment on this to the relevant practitioner and interest groups.

3.5 DEBT MATTERS WHERE THE CLIENT'S HOME IS NOT IMMEDIATELY AT RISK

3.5.1 We do not agree.

3.5.2 The research which underpinned much of the Ministry of Justice's policy as set out in its consultation and response on the 2010 Civil Contract[13] demonstrated that persons requiring legal advice frequently had constellations of problems, e.g. family, debt, benefits and housing. Early availability of specialist advice was recognised as preventing more serious problems arising which would cost more to resolve. Legal providers were accordingly encouraged by government policies to develop, so as to provide a more holistic service. Removing virtually the whole of this area of law from scope accordingly appears to be counter-intuitive.

3.5.3 There is no indication that the not for profit sector or voluntary sector would be able to pick up the pieces. On the contrary, the proposals in the Green Paper and other budget cuts mean that they will themselves struggle to maintain their existing services, let alone deal with additional demand.

3.5.4 Research carried out by NACAB indicates that early advice in this field saves money - £3 for every £1 spent on debt advice.

3.5.5 Failing to provide early advice leads eventually to homelessness. Saving money by taking debt advice out of scope will have impacts both on the legal aid housing case budget, and on local authority budgets in relation to their responsibilities under the Children Act 2004, under homelessness legislation and under sections 20 and 31 of the Children Act 1989. Paying for foster care is very expensive, and foster carers are, in any event, a scarce resource. We are not aware of any impact assessment dealing with these consequences.

3.6 EDUCATION

3.6.1 We do not agree.

[13] *A trouble shared – legal problems clusters in solicitors' and advice agencies,* Richard Moorhead and Margaret Robinson, Cardiff Law School, Cardiff University and Matrix Research and Consultancy, November 2006, quoted at paragraph 3.6 of *Civil Bid Rounds for 2010 Contracts : A Consultation.*

3.6.2 Appeals to the First-tier and Upper-tier (SEND) Tribunal against decisions made by local authorities ('LA/s') in England about the additional support for the child (and in Wales to a separate Tribunal, SENTW) can be brought by parents or carers (including foster carers) of children with special educational needs ('SEN').

The relevant decisions against which an appeal may be brought are

i) refusal to assess a child for a statement of special educational needs;

ii) refusal to provide a statement;

iii) the contents of a statement (including significant decisions about which school the child should attend);

iv) ceasing to maintain a statement.

3.6.3 Currently, parents/carers can get funding for legal advice in preparing their appeals if they qualify for public funding. No funding is available for legal representation at hearings before the First-tier Tribunal but is available for legal representation at the Upper-tier Tribunal (the equivalent of the High Court).

3.6.4 The eligibility criteria for funding is both means tested and based on a merits test that considers the chances of a claim succeeding and the resources at stake. A total of £1.7 million was spent in the 2009/10 financial year on legal aid for education cases[14].

3.6.5 Funding enables parents/carers to commission independent reports to support their evidence to the Tribunal, and these reports can prove critical/determinative especially in cases where the LA has not obtained up to date information. That should be set in the context of an already limited range of specialist legal advice available.

3.6.6 Tribunal statistics[15] show 82% of appeals are won by parents/carers after a hearing and in 30% of appeals the LA concedes before the case reaches that stage. These statistics do not tell the whole story since many appeals are partially won but in most cases the important factor is that the outcome results in improved and clarified support for the child. Inquiries have already shown the variation in support for such children and the postcode lottery attached to successfully challenging decision-making in this area.[16]

[14] http://www.tes.co.uk/article.aspx?storycode=6064227

[15] www.sendist.gov.uk/documents/publications/annualreports/annualreport_08_2/009.pdf

[16] See e.g Audit Commission report, Lamb Inquiry December 2009 and Ofsted Review ' a statement is not enough' September 2010.

3.6.7 It should be noted that the child has no status in the appeal save for a duty in procedural rules on LAs to seek their views on the issues in the appeal, and a right to attend hearings and to give evidence (both rights subject to control by the tribunal). However, there is an increasing awareness of the application of rights accorded by international and European legislation.[17]

3.6.8 The tribunal is governed by the Education Act 1996 and subordinate legislation, whereas other jurisdictions will have different statutory considerations. Such cases require careful, specialist and knowledgeable advice to appellants. However, there is already a limited range and level of understanding and expertise available in education cases. It should also be noted that the range and level of needs may vary, but many appeals not only involve very complex issues at the interface of education, social care and health, but may also require decisions to be made about high levels of public expenditure, particularly regarding placement.

3.6.9 There are a small, but growing number of cases where the child in question is also subject to decisions by other jurisdictions, e.g. the family court in private law family disputes, care proceedings, immigration etc.). There is a particular interface with the family court because the respective jurisdictions are subject to different legislative frameworks and different tests with regard to protection of the child's interests. The competing legislative frameworks can result in different decisions being taken by different jurisdictions, with the tribunal as the recognised specialist forum for determining educational decisions, but not an integral part of the overall integrated children's services agenda.

3.6.10 The educational rights/interests of a looked after child are dependent upon the ability/role/commitment of their carer or alternatively their Independent Reviewing Officer. The carer has limited rights and will need specialist advice in bringing an appeal, but this is particularly true of a parent who shares parental responsibility with the LA – the interplay of legislative provisions is especially complex given the specific educational remit of the tribunal. The poor educational outcomes of looked after children in general and the limited availability of someone to champion their educational rights has been well documented, all the more true for those with special educational needs, and the duties of LAs as corporate parents must continue to be subject to proper scrutiny.[18]

[17] see e.g. Article 12 UNCRC; Article 2 First Protocol to European Convention of Human Rights, as incorporated into English law in Human Rights Act 1998

[18] See e.g. duties under section 22(3)(a) Children Act 1989, as amended by s.52 Children Act 2004; Care Planning, Placement and Case Review (England) Regulations 2010 and guidance e.g. Guidance on Education of Children and Young People in Care, May 2000; Statutory guidance on duty on LAs to promote educational achievement of looked after children under s.52 Children Act 2004, DCSF 2005

3.6.11 Many appellants do not have advice or help, but a growing number, especially those in the hardest to reach groups (i.e. those whose circumstances render the making and pursuit of appeals particularly difficult, viz the poorest, families with parental disabilities, black and ethnic minority families, those parents/carers whose first language is not English), have been assisted in bringing cases to tribunal through public funding when there are limited or no other resources available. That is particularly true in rural areas.

3.6.12 The Government's proposal to remove all legal aid for SEN cases as part of its plan to remove funding for all education matters would affect any SEN appeal to the Tribunal (excluding discrimination claims). The justification for this (viz. the same level of priority cannot be given to the education of children as other more important issues; the appellants are not particularly vulnerable; there are sufficient alternative sources of support) are not borne out by the facts.

3.6.13 The capacity and resources of the alternative sources of support cited, namely the Parent Partnership Services (PPS), the Advisory Centre for Education (ACE) and the charity IPSEA are already stretched beyond their ability to deliver. The statutory PPS service provides information and advice to parents but has already been identified as patchy, subject to pressure from sponsoring LAs who are also responsible for the relevant education decisions.

3.6.14 The experience of SEND and its Panels is that appellants frequently encounter difficulties in obtaining representation and the most vulnerable are substantially disadvantaged. It would be to the severe detriment of appellants and to outcomes for the most vulnerable children if the already limited funding available was to be withdrawn in favour of community resources that are already unable to meet demand, and do not always possess the necessary level of specialist legal expertise to deal with the most complex cases.

3.7 EMPLOYMENT

We leave comment on this to the relevant practitioner and interest groups.

3.8 OTHER HOUSING MATTERS

3.8.1 We do not agree.

3.8.2 The impact on children will be considerable if public funding is removed for illegal eviction, otherwise known as breach of quiet enjoyment. Children will lose their homes as their parents will not be aware that landlords cannot interfere with their home in a manner incompatible with their tenancy.

3.8.3 The removal of funding for any disrepair unless it causes harm risks children being left in squalid housing with the impact on child safety as well as on the well-being of the parent having to put up with such disrepair on a daily basis. It should also be borne in mind that most disrepair cases result on no claim on the fund as the landlord pays the costs. It is therefore taking away a safeguard for families which, in reality, is a very small burden on the public purse.

3.8.4 The proposal for homelessness appears to be to only give funding for the appeal stage. This will not only result in misery and anxiety for children and their parents but will involve costly emergency housing as well as potential accommodation of children by the local authority until housing can be sorted out.

3.9 IMMIGRATION WHERE THE INDIVIDUAL IS NOT DETAINED

3.9.1 We do not agree.

3.9.2 There are a large number of such cases which surface in the context of family cases (including those family cases unaffected by the present proposals)[19]. In these cases it is an essential component to the proper disposal of the case, in the interests of the child, that public funding be available also to deal with the immigration issues.

3.9.3 A large group of such cases involves a parent who is, subject to their immigration status being clarified, found capable of looking after a child, who might otherwise have to remain in, or come long term into, the local authority care system. Such people need advice and representation in relation to an application for leave to remain, whether under the rules or, by discretion, outside the rules. The family court cannot decide the immigration issues, or fetter the Home Office's discretion. The court is quite unable to exercise its duties under the Children Act 1989 and make lasting decisions about the child's future if it does not know whether a parent or relative is, in fact, going to be available to care for, or have contact with the child.

3.9.4 We are not aware of any impact assessment on local authority budgets for long term care/adoption in respect of these proposals.

3.10 PRIVATE LAW CHILDREN AND FAMILY CASES (WHERE A DOMESTIC VIOLENCE ORDER HAS NOT BEEN OBTAINED)

3.10.1 We strongly disagree with these proposals.

[19] *The Work of the Family Bar* Kings Institute for the study of Public Policy, February 2009

3.10.2 We have already commented, in answering question 1 above, on the difficulties that may be expected to arise, in the context of the proposals on domestic violence, both in relation to the lack of definition of "domestic violence", and the difficulties inherent in requiring the applicant to seek an order of the court (as opposed to accepting an undertaking)[20].

3.10.3 Paragraph 4.208 of the Green Paper quotes recent research[21] as "demonstrating" that "in the vast majority of cases parents agreed contact arrangements informally without resort to the courts". This is a ***wholly misleading*** picture of the research referred to, as has recently been described[22], and the research in fact shows that 74% of those who had been able to reach an agreement without a court order, explained that they had in fact done so with the advice and assistance of lawyers, judges, CAFCASS officers and other members of the existing family justice community.

3.10.4 Paragraph 4.209 of the Green Paper is even more misleading. The assertion that "the vast majority of children had the contact arrangement with their non-resident parent arranged informally without the assistance of the Courts, lawyers or mediators" is completely wrong. The research referred to leads to the entirely opposite conclusion (as referred to in paragraph 3.10.2 above), namely that the great majority of these arrangements were made as a result of engaging with the present family justice system.

3.10.5 Paragraph 4.209 of the Green Paper goes on to express concern "that the provision of legal aid in this area is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases which can have a significant impact on the long-term well-being of any children involved." As we have explained in paragraphs 3.10.3 and 3.10.4 above, this conclusion is founded on a completely erroneous presentation of the available research. The overwhelming majority of those involved in the Family Justice system deplore those cases (which do indeed exist) which are needlessly prolonged, acrimonious and damaging the children concerned. However, these tend to be ***either*** privately funded cases ***or*** cases involving litigants in person. The real issue is accordingly robust case management by the court. This can be applied more effectively when parties are represented and the likely outcome of unreasonable behaviour explained and such behaviour discouraged. To the extent that public funding is involved in such cases, then existing rules as to scope of funding, costs limit and

[20] At paragraphs 1.4 and 1.5 above.

[21] the *Omnibus Survey Report No. 38：Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey,* produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D)(2008)(Office for National Statistics)

[22] See the article by Ian Bugg in *Counsel,* January 2011, Law in Practice : Family Legal Aid, pages 22-24 at page 24.

reporting duties need to be more rigorously applied[23]. Additionally, there are professional conduct rules and codes of practice which exist to curb abuses in this area, and which likewise need to be more rigorously applied.[24]

3.10.6 As we state above, the research referred to in paragraphs 4.208 and 4.209 has been quite erroneously presented. But in any event, we do not understand the assumption, implicit in paragraph 4.209 of the Green Paper that, because some proportion of children involved in relationship breakdown do not have their contact arrangements made by a court, this means that the parents of the remaining cohort should have no recourse at all to a court, and that, as stated in paragraph 4.210: "people should take responsibility for resolving such issues themselves." Whilst there may be scope for simplifying procedures, improving judicial case management of such cases, and for "fast-tracking" the simpler kind of disputes, this approach appears to us to ignore a number of significant issues.

3.10.7 First, the fact that some people manage to resolve these issues without applying to the court ought not to be regarded as a sign that the court is redundant, but rather an encouragement to settle matters where at all possible in order to avoid having to litigate. Going to court ought indeed to be seen as a last resort in the simpler type of case.

3.10.8 There are, however, many private law children and family cases which are not at all simple, and where it would be quite unreasonable to expect people to sort things out for themselves. Some examples are:

- **Domestic abduction** (as opposed to international child abduction).Where a parent, who thinks they have agreed a pattern with contact with their former partner, hands over the child only to find that the child is not returned, but taken to a secret address, perhaps in another part of the country. Are they to be expected to apply for an order without legal assistance in these circumstances? How are they to trace the whereabouts of the child, and serve court process on the former partner? Are they to do this as a litigant in person?
- **Child alleges sexual or physical abuse**. Where contact stops following an allegation by the other parent to the effect that the child has complained she has been sexually or physically abused by, let us say, the father. The local authority conduct a brief enquiry,

[23] Solicitors are under a continuous duty, throughout the life of a publicly funded case, to review the merits of the case continuing with public funding. Costs Limitations are always placed on public funding certificates, and an application needs to be made to extend that limit. The application form includes a report on the case to date, what remains to be done, and a view as to the likelihood of the proceedings succeeding. Scope limitations limit the work which can be carried out to a certain stage of the proceedings, at which point a report on the merits of public funding continuing has to be submitted.

[24] E.g. *Solicitors Regulation Authority* Code of Conduct, *Resolution's* Code of Conduct, and numerous Best Practice guides published by *The Law Society*.

but as the mother is not letting the child see her father, conclude that the child is not at risk and decline themselves to intervene. In a case of a malicious allegation, what is the father to do? How is he to navigate his way through the many difficulties which such a set of circumstances throws up? In the case of a well-founded allegation, how is the mother and the child to be protected against privately funded litigation by the father (there is no domestic violence alleged, and so the mother will not be entitled, under the present proposals, to public funding[25]).

- **Removal from the jurisdiction.** Where a parent seeks to remove a child from the jurisdiction to settle perhaps on the other side of the world. What is the scope here for a mediated settlement?

- **Inaction by the local authority**. Where a parent who is exercising staying contact learns from police of the arrest of the parent with a residence order in connection with serious allegations, but the local authority do not step in, and leave it to that parent to apply to the court for an urgent variation hearing.

- **Constant undermining of contact and breaches of orders for no good reason.**

  Where the resident parent is not happy with the contact ordered she will often make sure it does not happen either by making allegations which need to be investigated by social services or by persuading the child to say they do not wish to go or by simply not taking them. These cases require robust case management and urgent application to the court. Even a lawyer in these circumstances can find it difficult to arrange an urgent hearing so, even assuming the parent can find their way through the system, there will be a long and discouraging delay each time before contact is resumed, and each time there will be the possibility that the parent will give up or the child will refuse to attend.

3.10.9 Even in types of case which, on the face of it, seem rather more straightforward, complications frequently and (which is significant) unpredictably arise. For example:

- **Deliberate and long term obstruction of a relationship with the other parent.** This might be by way of frequent moves of home and school (which in itself is potentially harmful to the child). This might be by development of illness behaviour within the child.

- [25] It seems particularly incongruous that a child who has been sexually abused can obtain public funding to pursue a claim for financial compensation against either an individual or a public authority, but that his or her parent is unable to obtain public funding in order to protect the child, or to maintain an appropriate relationship with the child, as the case may be. Moreover the result could well be that the local authority will need to take action in such cases to protect the child. That will involve considerable public expense.

This might be by emotional manipulation of the child, so as to avoid contact taking place or by other behaviours including so-called "parental alienation syndrome".

- **Changing a child's name.** This is frequently attempted with a view to obliterating a part of the child's identity, usually the paternal and/or cultural identity.[26]
- **Cases involving undiagnosed mental health conditions and personality disorder traits in one or both of the parents.**
- **Cases where one or more parents is from an ethnic or cultural minority group.**

3.10.10 The proposals seriously underestimate the impact on children's welfare of the removal of skilled advice. The most comprehensive research available clearly indicates that almost half of all private law family cases involve allegations of serious abuse[27].

3.10.11 If legal aid ceases to be available for these more complex cases, or if, worse still, private family law cases were to be removed altogether from the jurisdiction of courts, we anticipate that the law would fall into disrepute and that people would resort to all manner of unlawful and antisocial acts in order to obtain, as they saw it, redress, including violence and kidnapping. This is indeed flagged up as a possible consequence in the relevant Impact Assessment[28].

3.10.12 Since the great majority of primary carers of children are women, these proposals (as is acknowledged) will have a disproportionate effect on women. The fact that they are primary carers does not seem to have been taken into account in reaching the conclusion that this is an area in which the litigant has the ability, and can be left, to present their own case.

3.10.13 So far as advice and assistance with divorce alone is concerned, we observe that if no fault divorce is at long last brought into effect, this will enable both direct and indirect savings to be made. There would be direct savings, since advice and assistance with divorce itself could be restricted to cases involving procedural difficulties such as service, obtaining and translating foreign marriage certificates. There would also, we think, be substantial indirect savings, since no fault divorce could reasonably be expected to have a knock on effect, in terms

[26] See also the discussion at paragraph 3.12.3 below.
[27] *The Work of the Family Bar,* Kings Institute for the study of Public Policy, February 2009 at paragraph 20, page xix.
[28] IA number: MoJ028, paragraph 35(ii). It is hard to understand the basis on which that part of the impact assessment concludes that "the proposals aim to minimise any wider social and economic costs". Certainly the examples of types of case we are drawing attention do not sit easily with the factors which are relied on in asserting that, namely (i) the litigant's ability to present their own case; (ii) the availability of alternative sources of funding; and (iii) the availability of other routes to resolution.

of reducing tensions, emotional upset and unreasonableness in connection with issues relating to finances and children.

3.10.14 We make the point that the HMCS level of counter service has been reduced to such an extent that assistance from the court is not readily available at present. With such a rise in unrepresented parties the depleted court offices will be completely swamped and unable to operate unless they are better resourced.

3.10.15 Finally, we repeat the point that we have stressed in the Introduction to this response, namely that it is premature of the government to be considering the issues, in this part of the Green Paper at least, until the final report of the Family Justice Review is available in August 2011. That Review is giving active consideration to issues such as gateways into private law family proceedings, and forms of triage which might be suitable either before proceedings, or at a very early stage of proceedings. It is inevitable that the Review will make interim recommendations which representative bodies such as ourselves will wish to comment upon, and the government ought to consider those comments before reaching any conclusions as to the way forward.

3.11 WELFARE BENEFITS

3.11.1 We do not agree.

3.11.2 The research which underpinned much of the Ministry of Justice's policy as set out in its consultation and response on the 2010 Civil Contract[29] demonstrated that persons requiring legal advice frequently had constellations of problems, e.g. family, debt, benefits and housing. Removing virtually the whole of this area of law from scope accordingly appears to be counter-intuitive.

3.11.3 There is no indication that the not for profit sector or voluntary sector would be able to pick up the pieces. On the contrary, the proposals in the Green Paper and other budget cuts mean that they will themselves struggle to maintain their existing services, let alone deal with additional demand.

3.11.4 Research carried out by NACAB indicates that early advice on welfare benefits saves money - £8.80 for every £1 spent on welfare benefits advice.

[29] *A trouble shared – legal problems clusters in solicitors' and advice agencies,* Richard Moorhead and Margaret Robinson, Cardiff Law School, Cardiff University and Matrix Research and Consultancy, November 2006, quoted at paragraph 3.6 of *Civil Bid Rounds for 2010 Contracts : A Consultation.*

3.11.5 Failure to obtain the correct amount of benefit is likely to lead to debt, and debt will in turn lead to homelessness, with the consequences set out at paragraph 3.5.5 above. Inadequate income is also well known to be a contributory factor in family breakdown.

3.12 MISCELLANEOUS

3.12.1 We do not agree in respect of the following types of case.

3.12.2 Change of a child's name is not referred to under paragraph 4.205 of the Green Paper, and we accordingly assume that it is intended to be included under general name change in paragraph 4.227.

3.12.3 Change of a child's name is a serious step as to which there are specific rules under the Family Proceedings Rules, and a substantial body of caselaw[30]. In our view it ought to be considered as part of private law children and family cases, and we have dealt with it above in that section.[31]

3.12.4 Actions under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 are technical and complex. We do not consider that proper advice can be given other than by face to face contact with a lawyer, and, if these cases are removed from scope, then persons who would qualify on a means basis for assistance would have no effective means of enforcing their rights. If they commence court proceedings without advice as to the merits of their claim, and as litigants in person, they will further clog up the courts. The merits or otherwise of their cases would take a disproportionate amount of judicial time to unravel, with all the consequences which we comment on in dealing with question 6 below. As the proportion of unmarried families continues to rise, then the number of children affected by the lack of assistance in dealing with these claims will also rise. We do not see how the factors referred to in paragraph 4.14 can have been properly considered. In such cases the claimant and children are potentially homeless. The claimant is most unlikely to be able to present their own case. There are no alternative sources of funding of which we are aware.

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 on

[30] See e.g. section 8 of the Children Act 1989 and notes to *The Family Court Practice 2010* at pages 590-593, and the provisions of section 13 of the Children Act 1989 and notes to *The Family Court Practice 2010* at pages 616 to 617.

[31] See paragraph 3.10.9 above.

Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

4.1 We do not agree.

4.2 We do not think that these proposals are well-conceived in that there does not appear to have been a proper evaluation as to what is likely to be included in the exception category (in particular "where the provision of some level of legal aid is necessary to meet domestic and international legal obligations").

4.3 It seems to us that very large categories of family cases will fall into the exception category. The following examples will be familiar to any experience practitioner and member of the judiciary:

- Domestic violence cases which are contested, and where failure to grant legal aid will result in the alleged perpetrator cross-examining the complainant and, perhaps, other vulnerable witnesses (including children of the family) also[32];
- Allegations of domestic violence which are contested[33], where the "accuser" is represented (as provided for under the proposals) but the "accused" is not, so leading to an inequality of arms;
- Other family proceedings, brought into scope because there has been a domestic violence order, where the complainant is represented (as provided for under the proposals) but the respondent is ineligible for public funding, so leading to an inequality of arms;
- Private law family proceedings where allegations of sexual abuse of a child are raised by the parent with residence of a child as a reason for terminating contact, but where the local authority decline to commence care proceedings (quite possibly because the decision of the mother to terminate contact is seen as removing any "risk" factor which might trigger sufficient concern, irrespective as to whether the allegation can be substantiated). If public funding is not available, then this could lead to the person seeking to establish contact having to cross examine the child or other children of the family. A recent decision of the Supreme Court has removed the presumption against

[32] In criminal proceedings there are provisions to deal with this highly undesirable, and potentially traumatic situation. See sections 34 and 35 of the Youth Justice and Criminal Evidence Act 1999, (which provide an absolute bar in certain circumstances ,including cases where the charge is one of assault) and section 36 (which provides that on application by the prosecutor, or of the court's own motion the court may give a direction prohibiting the accused from cross-examining a particular witness in person) and Part 31 of the Criminal Procedure Rules 2010. Section 38 of that Act provides, where necessary, for the assignment of a qualified legal representative by the court to conduct such cross-examination in the interests of the accused. In family proceedings the court has no such powers.

[33] Which, for the reasons set out above at paragraph 1.5 above, are likely to increase significantly, in relation to cases where undertakings are given, under the new proposals.

child complainants and witnesses giving oral evidence, and specifically commented on the need to avoid harm to children arising in private law proceedings[34].

4.4 The above paragraph deals with specific categories of family law case, but the problems associated with inequality of arms (and consequent potential challenge on the basis of a failure to meet domestic and international obligations, in particular under article 6 of the ECHR) will arise in many other areas of law which it is proposed to take out of scope. No doubt these will be addressed by specialist practitioner and other groups working within those specialisms, but this issue seems to us to be likely to arise in respect of any court or tribunal case in which a government department or local authority has legal representation.

4.5 To proceed on the basis proposed (rather than first considering what categories of case are likely to fall within the exception category and putting these cases back into scope) will lead to a massive number of applications for exceptional funding which are likely to bring both the law, and public administration of justice into disrepute. These applications will need to be considered properly. The Legal Services Commission (or Executive Agency fulfilling its functions) will be overwhelmed by the sheer number of such applications, and the time required to process them.

4.6 It is reasonable to suppose that persons in these categories of case will pursue such avenues of complaint open to them, including complaints to their MPs.

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 civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.

5.1 We will confine our response to the issue of civil legal aid in **family** cases.

5.2 We doubt whether Conditional Fee arrangements could be a suitable vehicle in this area of law, since there is generally very little scope for the recovery of costs at all from the other party or parties[35].

[34] *Re W* [2010] UKSC 12, and in particular the comments of Baroness Hale at paragraph 29.

[35] The current application form CLSapp3 does not canvass the possibility of alternative sources of funding. However, older versions did. Presumably the change was an acknowledgement by the LSC of the realities of the position.

5.3 We would be concerned that any such refusal might be on the basis of a blanket policy, concluding that alternative funding was available for a particular class of case, without any exploration as to whether such alternative funding was indeed available for individual applicants.

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.

6.1 We note the reference, in paragraph 4.268, to the research carried out in 2005 by Professor Richard Moorhead and Mark Sefton for the DCA on *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, and we note the comment in that paragraph that this research "did not find a significant difference between cases conducted by a litigant-in-person and those in which clients were represented by lawyers, in terms of court time". We have looked carefully at this piece of research, and ***do not agree*** with the authors of the Green Paper's summary of the research findings on that point. The researchers ***did*** find a significant difference in all areas of family law proceedings they looked at, apart from divorce petitions. There was a slight difference in adoption applications[36], and a marked difference in ancillary relief applications[37], In "Children Act cases" (which appears to have included children and finance cases) the differences are described as "statistically significant"[38], whilst for injunctions the researchers state that "the differences were starker"[39]

6.2 As to an increase in the numbers of litigants in person, the researchers observed that "There is no quantitative data available to judge the situation in family courts"[40]. We think that the MoJ should have made it a priority to research this aspect, and the further impact of these proposed changes, before making changes which are likely to have such a detrimental impact of the administration of justice;

6.3 In paragraph 4.269 it is said that "We are undertaking further research into this area, and we will report our findings as part of the Government's response to this consultation", but there is no mention of who is undertaking this research, how the research project has been set up, or whether it is an external piece of research or a piece of work being carried out by a government department or HMCS. It is accordingly impossible to comment on whether such further

[36] *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, at page 222 (95% where both parties were unrepresented went to final hearing, as opposed to 85% where one or both parties were represented).
[37] *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, at page 223, where, when the applicant was unrepresented 60% of cases went to final hearing, as opposed to 35% where represented).
[38] *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, at page 224.
[39] *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, at page 224, where the researchers point out that "Three quarters of 'represented' injunction cases ended either at or before the first appointment, whereas only 21% of cases involving unrepresented respondents so ended."
[40] *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* at page 252

research is likely to be useful, or to provide any constructive feedback which might lead to it being a more effective piece of work.

6.4 Quite apart from the 2005 research, there is an abundance of evidence from the judiciary and lawyers who daily grapple with the effects of cases involving litigants in person. The effects are hinted at in the 2005 research[41] but any practitioner or judge will confirm the major impact on court hearing times and length of cases which are directly attributable to lack of representation by lawyers. Litigants in person consistently fail to comply with court directions. This results in cases being unable to proceed and court time wasted. Publicly funded parties' costs are thereby increased. and frequently they are required by the court to prepare documents and bundles when it should have been the responsibility of a litigant in person. This applies equally to privately paying clients, who can find themselves saddled with paying these costs when the work is, in fact, the responsibility of the litigant in person.

6.5 We note from paragraph 4.269 of the Green Paper that the Ministry of Justice is undertaking further research into this area. We are not aware of anyone or any academic body having been so commissioned. We are, however, aware that on 14th January 2011, the Ministry of Justice requested assistance in identifying the relevant literature[42]. This appears to be a belated attempt to identify what research has already been carried out, rather than the

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[41] *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* at page 182, where a judge is quoted as saying "it is far quicker to get the solicitor to summarise the facts than to ask the applicant to struggle". Unfortunately the researchers do not appear to have gone on to ask what the impact was where both parties were unrepresented.

[42] Email from Kim Williams, Senior Research Officer, Corporate and Access to Justice – Analytical Services (CAJAS), not sent to ourselves (which is unfortunate) but to "experts, stakeholders and research funders" :

'We are currently conducting a review of the research literature on litigants in person, with the aim of establishing what evidence exists on:

- who they are, how many there are, what are their motivations;
- what impact they may have on court processes;
- whether litigants in person have different outcomes compared to litigants with representation;
- what action works in assisting litigants in person.

As part of this work we are contacting experts, stakeholders and research funders such as yourself to ask for details of evidence that may be relevant. I would be most grateful if you could point me to any reports or articles you think may be useful for this review. The focus is on civil and family cases, and on empirical evidence. Although the focus is on the UK, international evidence will also be included.

Also, if you know of others who may be useful to contact, I'd be grateful if you could pass on their names, and contact details if possible.

There is a short deadline for this review, so I am aiming to have a list of evidence sources **by 28th January.** Responses by email are welcome, otherwise I will telephone in the next couple of weeks to discuss any leads you may have.'

undertaking of further research. We will evidently have no opportunity to comment on this prior to the closing date for this consultation. This literature review should surely have been carried out before the consultation was launched. It is, in our view, ***essential*** that comprehensive research is carried out into the likely impact of an increase in the number of litigants in person on courts and other agencies ***before*** any further steps are taken by the government which will impact significantly on the number of litigants in person.

6.6 We have no doubt that the effect of the Green Paper proposals, if implemented, will be a steep rise in the numbers of litigants in person, with consequential and severe detriment to court listing arrangements[43]. We do not see how, in the current economic climate, with court closures, and reduced judicial sitting days the system will cope with a significant rise in litigants in person. There must be a real risk that the quality of judicial decision making will be affected, both because of the pressure of time, and the poor quality of evidence presented.

6.7 There will also be a knock-on effect on other cases, and in particular an increase in the severe delays in finalising care proceedings and other family cases, as a result of reduced judicial availability.

6.8 Paragraph 4.105 of the Green Paper proposes that Legal Help and Representation for children who are separately represented under rule 9.2A or rule 9.5 of the Family Proceedings Rules 1991 will remain. We support that, but point out that an increase in the number of such children's parents who are litigants in person will exacerbate all the difficulties referred to above[44].

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.

7.1 We strongly disagree with this proposal, so far as it relates to family advice and cases which concern the welfare of children, for a number of reasons.

[43] In this context, it is important to note that, in the 2005 research *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* only a very small sample (some 7 per cent) of cases had no representation at all, ie all parties were litigants in person. The difficulties are, of course, compounded in such circumstances. There is no professional upon whom the task of preparing a set of ordered court papers and a case summary can be placed, as is the practice now, in order to assist the court.

[44] It is also likely to result in an increase in the number of cases satisfying the criteria for the child to be made a party in private law cases, often at a stage where parents' positions (particularly in the absence of legal advice and representation) had become so polarised and difficult as to require extensive expert assessment. This will place additional stress on the Legal Aid Fund and on CAFCASS, who would be under a duty to provide the child with a Guardian ad litem.

7.2 First, we do not believe there to be a robust evidence base for believing that the quality of advice services provided through a telephone helpline is adequate, let alone a proper substitute for face to face advice in family work[45]. In particular we are unaware of:

- any independent research verifying that the services provided through the Community Legal Advice telephone service are indeed an adequate substitute for face to face advice from providers;
- the results of any quality control testing in relation to advice given through this means (i.e. by some peer review mechanism which could compare the results with face to face provider's files);
- how many cases closed by the operator service were telephone calls from people who subsequently contacted a face to face provider (which might be an indication that the telephone helpline service had not resolved the particular problem, or that it did not meet their particular needs)[46].

7.3 In our experience, the vast majority of adults who seek family advice from our members are distressed or in emotional turmoil. Many have mental health problems, personality disorder traits, learning difficulties and for many of them English is not their first language. The issues they want to discuss are of a painful and sensitive nature. Frequently they have a lot of correspondence or court papers. We consider a face to face interview to be essential.

7.4 We note that the Legal Services Commission are currently researching whether case outcomes are dependent on the channel used. There is no indication as to when this research will be completed, how it is being undertaken, and whether it will be made public. We think it essential to evaluate the results of such research ***before*** designing a new scheme of the type envisaged.

7.5 In terms of relative cost we note that it is asserted that the average cost of cases dealt with through the helpline is more than 45% less than the cost of the equivalent face to face service[47] . However, certainly so far as family cases are concerned, this appears to relate only to one-off pieces of advice given over the telephone, where it is suggested that the net cost is

[45]We understand, from an article in *Legal Action* (February 2011, forthcoming) by Adam Griffith and Marie Burton, "From face-to-face to telephone advice?", that some research in the United States was published in 2002, and that in 2009 a small-scale, qualitative research study by one of that article's authors raised a number of significant issues about the effectiveness of telephone advice on matters which were not straightforward.

[46] *Family Community Legal Advice Helpline Pilot Evaluation,* Legal Services Commission, January 2009, paragraphs 11.5 to 11.8 purport to address this question. However, almost half the pilot length is not covered, and the time period for comparison with the face to face data coincides with telephone pilot period covered – it would have been helpful to compare the face to face data for the year ahead, since there might well have been a time lag between a client seeking preliminary telephone advice and then deciding on a face to face appointment.

[47] IA No: MoJ 032, page 7, paragraph 13

£51.95, as opposed to the net cost of fixed fee level 1 face to face advice of £86.66[48]. There are a number of issues which arise here. First, there is the question raised above of qualitative difference. Second, since advice under the pilot scheme was evidently paid for on an hourly rate[49], whereas the face to face advice under level 1 is delivered on a fixed fee basis, this is not a proper comparison. It is, in effect, an exercise in comparison between apples and pears. Third, face to face providers, both in terms of compliance with the Specialist Quality Mark and requirements of the Solicitors Regulation Authority are required, as part of their service, to send a client engagement letter dealing with various matters including a summary of the advice given to date and the steps now to be taken, and to keep detailed attendance notes. This does not appear to have been the case with the telephone pilot work[50].

7.6 In terms of client satisfaction, we note that the Legal Services Commission conducted a survey, in the summer of 2008, of approximately 50 clients who were dealt with by a specialist adviser under the telephone pilot, and approximately the same number who had been referred by the telephone service to a face to face provider[51]. Presumably, as 93% of the former cases were one-off pieces of advice only[52] almost all the former cases were regarded as straightforward. It is unclear whether the latter group were regarded as unsuitable for telephone advice because of evident complication. It is difficult, we would argue, to draw any conclusions on the basis of a small sample which appears to have involved comparison of groups who may have had very different case profiles, and some of the response data is, on any basis, quite puzzling[53].

7.7 We fully accept that one of the frustrations which potential clients have, and which makes the suggestion of a telephone gateway/referral system superficially attractive, is the difficulty often experienced in finding a solicitor who has, in fact, the capacity to take the client on. However, that is primarily a by-product of the LSC's system of allocating and rationing "New Matter Starts". Not only can a provider which has run out of matter starts not help the potential client – that provider cannot even suggest who might be in a position to help, since,

[48] *Family Community Legal Advice Helpline Pilot Evaluation,* Legal Services Commission, January 2009, at paragraph 1.11, and paragraph 7.8 where it states that "the overall average case length is 72 minutes."
[49] *Ibid,* paragraph 3.4
[50] *Ibid.* paragraphs 7.2 and 7.3 where reference is made to "different working practices" of the three specialist providers involved, which appear to have included "a varying level of detail in attendance notes".
[51] *Ibid.* Annex 1
[52] *Ibid*. paragraph 7.16
[53] E.g. the responses to questions 9 and 10 of the survey. Question 10 responses indicated that 52% of the group who had received telephone advice had resolved their problem, as opposed to 10% of the face to face group (understandable in the latter case, since that group's cases were likely to be ongoing; worrying in the former case, since it would appear that half the telephone group had failed to resolve the problem), Question 9 responses considered whether or not the client , on the basis of advice tendered, felt able to resolve their problem. 82% of the telephone group felt so able. A higher percentage of the face to face group (94%), however, felt so able.

despite repeated requests, the LSC has not been able to make available information about which providers have run out, and which still have capacity, in any given procurement area.

7.8 The Ministry of Justice published a one-page document on 7th January 2011 entitled "Provision of advice and information services by telephone: clarification and background". This requested views as to the type of case that should, or should not, be dealt with through the mandatory 'single gateway' of the CLA telephone service. We believe that we have made clear our views on this clear both in answering this question, and in our responses to questions 8 and 9 below.

7.9 Finally, if this service is indeed to be the single gateway, how are conflicts of interest to be dealt with? How, indeed, are they currently dealt with, if at all?

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.

8.1 We do not agree, but will confine our response to the family category of law and leave other areas of law to the relevant specialist practitioner and interest groups concerned.

8.2 We are unaware of any research which robustly analyses the relative effectiveness of giving family advice by telephone as opposed to face to face[54], but our members are well aware, on a daily basis, of the discrepancy between the problem as it *first appears when a potential client explains what their problem is* (in order to obtain a face to face appointment) and the *problem, or range of family problems that emerges* at the subsequent face to face interview. For example[55]:

- A potential client sought advice on a change of her son's name. No doubt she could have received telephone advice as to the procedure. On face to face interview, however, it transpired that she had a range of problems, in relation to the father, who in fact had parental responsibility for the child, and needed assistance with an injunction, and obtaining a residence order.
- A potential client sought advice on a non-molestation order. They were former partners and there had been separation difficulties. Presumably she could have been advised by

[54] We understand, from an article in *Legal Action* (February 2011, forthcoming) by Adam Griffith and Marie Burton, "From face-to-face to telephone advice?", that some research in the United States was published in 2002, and that in 2009 a small-scale, qualitative research study by one of that article's authors raised a number of significant issues about the effectiveness of telephone advice on matters which were not straightforward.

[55] These are not theoretical examples, but real life situations on which members have advised during the past year.

telephone as to the writing of a warning letter/notifying the police. On face to face interview, she had two children, one of them a young boy, but the former partner was not the biological father of either. She brought in a wad of paperwork, which include parental responsibility agreements for this person, who could not possibly have thought himself to be the biological father and who had evidently obtained Parental Responsibility improperly. It was necessary to obtain an order of the court terminating his parental responsibility. In the course of those proceedings it transpired that that he was a Schedule 1 offender, previously described in reports as a predatory paedophile, obsessed with young boys.

- A woman sought advice on what she described as a contact problem. On face to face interview, it was clear from the papers that she brought that agreeing to contact without putting protective arrangements in place would almost certainly result in removal from the jurisdiction and a lengthy custody battle.

Problems such as these need to be dealt with properly, and as soon as practicable. If they are not resolved promptly, then the issues fester, and come back into the family justice system later on. By then, the children concerned have been damaged (or further damaged), and the problem has become more complex and more costly to resolve.

QUESTION 9

What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

9.1 It will be apparent from our response to questions 7 and 8 above that we think that all persons seeking family advice ought to have the option to have a face to face interview. There is a public interest in ensuring that the difficult issues relating to child protection (which are frequently, as we demonstrate above, "buried" in complex histories) have the best chance of emerging and being tackled.

9.2 So long as the system passports certain persons through to free advice, it will be necessary for their entitlement to be checked, which requires relevant paperwork to be seen.

9.3 As indicated in answering question 8 above, we do not consider a single gateway to be appropriate or adequate, because of the difficulty in identifying the true scope of a client's problem over the telephone, and without sight of the papers they generally bring to a first appointment. However, factors which we would suggest make it imperative for a person ***seeking telephone advice now, under the existing system*** to be referred to a face to face provider include:

- Language difficulties;

- Learning difficulties (which are generally more apparent on face to face interview in any event);
- Mental health issues;
- Documents in existence which the person seeking advice thinks may be relevant to the problem in question;
- Any aspect which indicates that there may be a child protection issue;
- Immediacy of risk to caller and/or children involved;
- Caller ambivalent as to whether a victim of domestic violence;
- Caller is under legal disability (including a young person)
- Caller is unable to read and therefore cannot provide the advisor with the details of documents, in order to assess whether they might be relevant.

QUESTION 10

Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

10.1 We would certainly wish to have an opportunity to comment on any development of this scheme, if a decision is made to take it further, and we assume that all representative bodies who are currently members of the Civil Contracts Consultative Group would wish to do the same.

10.2 We think that many issues involved in a telephone gateway scheme have yet to be discussed and resolved. Some examples are:

- The undesirability of permitting referral for specialist advice to the screening agency itself;
- What a fair allocation scheme would look like, and how, in practice, abuses would be prevented;
- What right there would be for a client to seek referral to a solicitor of choice, and how that would in practice work;
- How the LSC, and indeed providers, would deal with referral of a client who is already seeing a provider with regard to an existing case[56].

[56] A provider might be giving Level 1 advice in a private law case, which, during the course of that advice, began to involve public law considerations. Under the existing regime the provider would properly start a new, public law file in such circumstances. What would the client and/or provider be expected to do under any new regime? Alternatively, the provider might have a contract to undertake mental health work, or another area of law, and the

10.3 We think that these issues, taken in conjunction with the matters we have raised in answering questions 7 to 9 above, are sufficiently important to merit a separate consultation in their own right, and that no changes ought to be introduced until full consultation and evaluation has taken place.

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.

11.1 We do not agree.

11.2 If a person is ineligible, then (as, indeed providers are expected to do with persons to whom they cannot offer a service) that person should be signposted to paying services which are available in their geographical area.

QUESTION 12

Do you agree with the proposals 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.

We do not seek to respond on this question.

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? Please give reasons.

13.1 We do not agree with this proposal.

13.2 We are not aware of any research suggesting that the requirement on a family law litigant to pay a part, or indeed all of their legal fees has any effect on the manner in which they give instructions. Sadly, in cases of such emotional intensity, the experience of our members is that this consideration plays little if any part in their approach to litigation. Indeed, the opposite is probably correct. The fact that a client has paid something frequently leads to a mindset where they expect the solicitor to comply with their wishes as to the conduct of litigation and contents of correspondence, however unreasonable!

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client might request advice which fell in these areas rather than the original family problem. How would this be dealt with?

13.3 What is essentially required is more robust case management, and greater clarity as to the circumstances under which a provider is under a duty to refer the question of continued funding to the Legal Services Commission.

13.4 As a matter of internal logic, if the aim of this proposal is indeed to encourage a "potentially more responsible approach to litigation" then it manifestly fails to achieve this in terms of those who have not managed to save even a small amount, and who might accordingly be thought of (according to the philosophy evidently underpinning this proposal) as altogether lacking a responsible approach. The proposal penalises those people who have managed to save a little.

13.5 We do not in any case agree that the sum of £100 should be collected by the legal aid provider. There are a number of factors to be taken into account which are not referred to in paragraphs 5.16 and 5.17:

- Nothing is said about the impact on providers of having to collect such sums;
- Is emergency action to recover a child to be delayed until payment is collected? Normally, a provider would immediately exercise devolved powers and take the client to court that same afternoon in order to obtain an *ex parte* order. Are they now to send the client away until they can produce the money?
- Will the relevant forms not become more complicated, and their processing by the Legal Services Commission more time-consuming and expensive?

QUESTION 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.

QUESTION 15

Do you agree with 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.

QUESTION 16

Do you agree with the proposals 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.

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 the 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.

QUESTION 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.

QUESTION 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.

QUESTION 20

Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.

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? Please give reasons.

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? Please give reasons.

14-22.1 We disagree with all these proposals.

14-22.2 We leave it to other representative bodies to respond in detail. However, these proposals will affect: two significant groups of family law clients:

- Those who wish to step forward in order to care for their grandchildren/related children, and, perhaps because of the need the local authority to share parental responsibility until final order are not eligible for non-means tested public funding[57];
- Persons other than parents who face serious allegations, e.g. because they are members of a possible pool of perpetrators of serious injuries to a child, and who are made "interveners" in court proceedings for the purposes of answering those allegations.

[57] They are eligible if the circumstances are such that an interim residence order in their favour can be made, but this is not always possible. This might be for a number of reasons, including a superficial and negative assessment of their capabilities for that role by the local authority, which means that they need to ask the court to approve an in-depth and independent assessment of themselves.

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 in income-based contributions? Are there alternative models we should consider? Please give reasons.

We do not seek to answer this question in the light of our answers above.

QUESTION 24

We do not seek to respond on this question, which is outside our remit.

QUESTION 25

We do not seek to respond on this question, which is outside our remit.

QUESTION 26

We do not seek to respond on this question, which is outside our remit.

QUESTION 27

We do not seek to respond on this question, which is outside our remit.

QUESTION 28

We do not seek to respond on this question, which is outside our remit.

QUESTION 29

We do not seek to respond on this question, which is outside our remit.

QUESTION 30

We do not seek to respond on this question, which is outside our remit.

QUESTION 31

We do not seek to respond on this question, which is outside our remit.

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? Please give reasons.

32.1 We strongly disagree with this proposal. We answer this question in relation to family legal aid fees only, and leave it to other specialist practitioner and interest groups to respond on non-family civil fees.

32.2 As an organisation we have been involved in virtually continuous negotiation with the Legal Services Commission/Ministry of Justice for over four years on the restructuring of family fees. Part 1 of the fixed fee programme came into effect in October 2007. Part 2, dealing with almost all the remainder of family fees, was agreed in October 2009, and would have come into effect in October 2010 had the family tendering process not been substantially flawed, and consequently overturned through proceedings for Judicial Review. It will be brought into force, we understand, very shortly. There are very few types of case which are not covered by these fees, and continue to be paid for at hourly rates.

32.3 Family fees have accordingly been "radically restructured" over the past four years. Given that a great deal of thought and effort has been put into devising these schemes and reshaping them in the light of consultations with representative bodies and others, we do not see how the undertaking of a further restructuring, so hard on the heels of the Part 1 and Part 2 restructuring, can be regarded as a reasonable option.

32.4 Nor can we agree to fees, including these recently negotiated fees, being cut by 10%. There has been no increase in the payment rates upon which those fees have been calculated for nearly fifteen years. They have, in effect, been progressively eaten away by inflation during that period of time. The result is that lawyers dealing with publicly funded family work are already poorly remunerated, and there simply are not the margins available to be cut further in the manner which these proposals contemplate. There are no "opportunities for further efficiency savings …to encourage providers to be efficient and innovative"[58] of which we are aware, and the Impact Assessment is silent as to what these might be. To make these cuts will seriously damage the development and sustainability of this market.

32.5 If these proposals are implemented, access to family justice will, in our view, be irreparably damaged. We see no basis for the "Key Assumption" that "the market can sustain these reductions without adverse implications for supply."[59] We note the identified risks that service quality may decline, that customer choice might be adversely affected, and that there might be shortages in the supply of legally aided services in the event of market exit[60] and that the relevant Impact Assessment contains the observation that "the probability of these risks materialising might be high in some cases."[61] We note that "The extent to which these effects should be viewed as likely impacts instead of possible risks is being assessed further over the

[58] Impact Assessment IA No: MoJ 029, paragraph 14 (option 1)
[59] *Ibid.* Page 2.
[60] *Ibid.* page 2
[61] *Ibid.* paragraph 25

consultation period"[62] but we have not been informed as to how this assessment is being conducted.

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. Please give reasons.

Insofar as the section on which this question is based (paragraphs 7.8 to 7.12) specifically applies to **"non-family** certificated work", we do not seek to respond on this question, which is outside our remit.

QUESTION 34

Do you agree with the proposal to codify the rates paid to barristers as set out in table 5 above, subject to a further 10% reduction? Please give reasons.
We understand this question to relate to **non-family** certificated work, and so do not seek to respond on this question, which is outside our remit.

QUESTION 35

Do you agree with the proposals:

- **To apply "risk rates" to every civil non-family case where costs be ordered against the opponent; and**
- **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?**

Please give reasons.

We do not seek to respond on this question, which is outside our remit.

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 above) 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.

We do not seek to respond on this question, which is outside our remit.

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. Please give reasons.

37.1 We strongly object to this proposal.

[62] *Ibid.* paragraph 25

37.2 The base hourly rates paid for family certificated work have not been increased for nearly 15 years. Very large numbers of complex cases, which would attract a number of "bolt-on" payments under the family advocacy scheme, are dealt with at County Court level. It is common practice, in a complex case in the County Court, for an enhancement (including the 15% specialist panel membership uplift) of 50-60% to be approved by the court for time spent on advocacy. A 60% uplift in care proceedings brings the hourly rate to £114.40 per hour. This is more than £25 an hour less than the "benchmark" hourly rate for a psychologist's report (£140), and less than the current hourly rate for junior counsel in a civil case (£120). It is manifestly not excessive for the skills involved. So far as we are aware, relatively few cases attract higher enhancements up to the 100% maximum. Such enhancements are, we believe, only given in the most complex of cases. The Legal Services Commission has these details and will be in a position to state:

(i) the number of such cases;

(ii) the cost to the Fund of the excess over 50%, or 60% enhancements, as the case may be.

We doubt whether this constitutes a large sum of money overall,[63] and to cap the enhancement in this way would, we argue, run completely counter to the philosophy accepted by the government in the negotiations over the Family Advocacy Scheme, that those undertaking complex cases needed to be properly remunerated.

QUESTION 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.

38.1 We do not agree.

38.2 The current provisions for the instruction of Queen's Counsel are already very restrictive. There would be no advantage to the Legal Aid scheme and no financial benefit by seeking to further limit the cases in which certificates for Queen's Counsel are granted.

38.3 Certificates for Queen's Counsel are currently granted only in "exceptional" cases, which include:

- A genuine and significant challenge to statute or precedent case law;
- Significant novel points of law;
- Numerous experts with conflicting expert opinion on an issue key to the case outcome;

[63] We note that the relevant Impact Assessment (IA no: MoJ 029, states on page 6 that "average current enhancements are estimated to be between 30-50% so it may be that there are no provider costs present" while of benefits to be obtained by introducing this cap it is said that "It is not possible to quantify benefits due to the unavailability of robust data on the current levels of enhancements paid".

- Allegations of extremely serious abuse or non accidental injury;
- Concurrent or threatened criminal proceedings of the most serious nature;
- Unusually complex evidential problems.

Usually the certificate is only granted where there is an accumulation of these factors.

38.4 These factors are much the same as in the Criminal Defence Service (General) (No 2) Regulations 2001 as amended in 2009.

38.5 Further, the application for instructing both Queen's Counsel and Junior Counsel must justify the work to be undertaken by each counsel and their role in the proceedings. The relevant factors include:

- Papers in case are so voluminous that it would be practically impossible for Queen's Counsel to review and absorb the material without a Junior;
- Large number of witnesses.

This criteria for the instruction of Queen's Counsel in family cases is already as demanding, if not more so, as that for the instruction of Queen's Counsel in criminal cases.

38.6 As part of the criteria for appointing a QC it is suggested that should occur, as in criminal cases, where the opposing party has engaged a QC or senior Treasury Counsel. However, in family cases there is no equivalent of Treasury Counsel so a strict comparison is difficult if not impossible. Rarely does the Local Authority applicant have a QC and hence the equality of arms argument for instructing a QC in criminal cases has no parallel in family cases. The application to instruct a QC in family cases is made, almost without exception, when the case has developed beyond the point of allegation, (equivalent to being charged in criminal proceedings), a significant amount of work has already been undertaken by a junior and the QC is applied for when the case has reached the acceptable professional limits of professional representation by a Junior.

38.7 As said before, the instruction of Queen's Counsel can often save money by, for example, shortening or vacating a hearing e.g. on a preliminary hearing resolving the substantive issue. Likewise there is a saving of funds where the expertise leads to the right result. We rely upon what has been said by Judges in numerous High Court cases as to the need for high quality representation in difficult cases.

38.8 The LSC spend on QC's does not take account of the money saved where the use of a QC has shortened the proceedings.

38.9 Further, it should be noted that the "Event Rate" encompasses all preparation associated with the case/hearing, which may amount to reading and analysing 20 or more lever arch files of information – thereby significantly reducing the daily rate for the case.

38.10 Finally, any diminution/ restriction of the current criteria would fundamentally affect the parents/child's HRA rights to a fair trial.

QUESTION 39

Do you agree that:

- **There should be a clear structure for the fees to be paid for experts from legal aid;**
- **In the short term, the current benchmark hourly rates, reduced by 10%, should be codified;**
- **In the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;**
- **The categorisation of fixed and graduated fees shown in Annex J are appropriate; and**
- **The proposed provisions for "exceptional" cases set out at paragraph 8.16 are reasonable and practicable?**

Please give reasons.

39.1 We deplore the fact that this structure does not include fees payable to Independent Social Workers, who have a crucial role to play in assisting the court, in the absence of proper assessments by the local authority, and proper "hands on" involvement of a Children's Guardian as is so often currently the case.

39.2 Whilst we support there being a clear structure for fees paid to experts from legal aid, we do not feel able to comment on the hourly rates described as "benchmark". Certainly the rates of payment requested and obtained by expert witnesses have risen dramatically during the last fifteen years. We are obviously concerned to ensure that expert witnesses are reasonably remunerated and continue to work in publicly funded cases, but remain concerned about the proportion of the family legal aid budget which is currently spent on experts. In considering the "market" for certain types of work, such as psychological reports in family proceedings, or specialist medical reports in care proceedings, what evidence is there that the percentage of reports funded by legal aid is so relatively small a percentage of overall reports prepared as to be genuinely susceptible to the argument "I won't work for that level of fee"?

39.3 We agree that, whatever rates are eventually decided upon for individual categories of expert, the LSC needs to retain discretion to authorise that these be exceeded in "exceptional" circumstances, as envisaged in paragraph 8.16.

39.4 We would support proposals, which have been made now for some time, for the centralising of payments to experts directly through the LSC (as with counsel) subject to experts providing information to solicitors as to fees claimed (as with counsel)[64]. This would enable the LSC to collate proper statistics and exercise fair and reasonable control over expenditure on experts' fees across the country.

QUESTION 40

Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.

QUESTION 41

Which model do you believe would be most 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?
Please give reasons.

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) **Voluntary opt-in model; or**
c) **Voluntary opt-out model?**

Please give reasons.

40/42.1 Yes, there are barriers.

40/42.2 A full response to these proposals is being provided by The Law Society, and we do not seek to respond to these particular questions, which fall outside our remit as a family representative body. However, we express disappointment that the Green Paper does not invite comment on other alternative sources of funding, and in particular, schemes designed to ensure that "the polluter pays".

40/42.3 Given that legal aid is currently funded entirely through tax revenue, some part of individual sources of revenue which are recognised as being directly related to expenditure

[64] This is essential to enable solicitors to keep track of the overall costs incurred in a case so that costs limits are observed, and applications made for extension to the limit when this becomes necessary.

could be so earmarked, for example, some part of alcohol taxation could go specifically to the family budget.

40/42.4 Legislative changes which have impacted on the Fund in the past have not been fully assessed, and there has accordingly been no compensating payment made by the relevant government department to offset that impact. Better assessment of the impact of future legislation on the Fund could result in the sponsoring department being held to account and contributing, in advance to the relevant budget.

40/42.5 Since a substantial proportion of civil expenditure (including virtually all judicial reviews) are brought against public authorities, consideration could be given to a system of recoupment by the LSC of costs in specific cases from sponsoring government departments.

QUESTION 43

Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.

43.1 We are supportive of measures which will result in additional money being made available for the Legal Aid Fund, provided that the administrative costs involved make such measures worthwhile.

43.2 We do not seek to respond in detail to this question, as it is outside our remit.

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?

We do not seek to respond on this question, which is outside our remit.

QUESTION 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 quality controls.
We do not seek to respond on this question, which is outside our remit.

QUESTION 46

The government would welcome views on the administration of legal aid, and in particular:

- **The application process for civil and criminal legal aid;**

46.1 We believe that this could be considerably streamlined, particularly through electronic application forms, submitted by email, on templates which avoided duplication and allowed standardised information to be carried forward to later documentation.

46.2 We do not understand the reason why non-means, non-merits tested applications are deemed to be the subject of exercise of devolved powers. We can see no merit in this, only additional work for both providers and the staff of the LSC.

- **Applying for amendments, payments on account etc;**

46.3 We have raised periodically through the Family Representative Body Meetings a number of ways in which administration could be improved, but these have not been agreed to. These include:

46.4 Extending devolved powers so as to allow providers to increase costs limits (short of the Very High Cost Case threshold). All bills are assessed at the conclusion of the case by either the court or the LSC. This extension would result in substantial savings for the LSC administrative staff, and also for the solicitors who are currently required to complete a lengthy form[65] each time they need to extend the costs limit. This time adds to the costs of the case, and could be better spent on progressing the case.

46.5 Extending devolved powers to as to allow providers to increase the scope of certificates in care proceedings to include a placement application. The purpose of retaining this level of micro management is unclear, since if a placement application is lodged by a local authority, whilst care proceedings are ongoing, the certificate necessarily has to include representation on that additional application. As with applications to increase the costs limit, referred to in the paragraph above, this simple extension would result in substantial savings for the LSC administrative staff, and also for the solicitors who are currently required to complete the same lengthy form[66]. This again adds to the costs of the case, which could be better spent on progressing it.

46.6 Following through the introduction of a unified claim form for payment of a disbursement which is shared between a number of parties, which can be lodged by the lead solicitor, by actually paying the lead solicitor so that s/he in turn can pay the expert. We, and the MoJ's *Experts Central Working Group*[67]*,* were informed that this could not be done, because the LSC's accounting systems could not cope with posting to a number of public funding certificates, but paying out on only one of them. The net result of this is to render the unified claim form obsolete, and to cause frustration to the experts, who need to collect contributions (and sometimes, unfortunately, to chase them) from a number of providers for individual pieces of

[65] CLSapp8
[66] CLSapp8
[67] At a meeting on 16th June 2010

work, rather than looking to the lead solicitor for payment. That, in turn, is used by expert representative bodies as a justification for higher fee levels[68].

- **Bill submission and final settlement of legal aid claims; and**

46.7 Again, we think this could be considerably streamlined, particularly by use of electronic submission.

46.8 Given that standard fees and High Cost case plans ought to have resulted in a considerable simplification of administration, it is disappointing that the failure to use available technology properly has not brought the hoped for advantages for either providers or the LSC. Papers are regularly mislaid. Making contact by telephone is difficult, as is identifying the person with whom one needs to speak to progress matters.

- **Whether the system of Standard monthly payments should be retained or should there be a movement to payment as billed?**

46.9 Standard monthly payments should be retained. Cash flow is a major problem for solicitors paid by the LSC particularly as the margins are so tight. Monthly payments even out the money coming to a firm and make income more predictable and regular. There is very serious delay in paying high cost cases and for those practitioners who deal with such cases a 6-9 month delay in receiving payment could be catastrophic and result in insolvency. The problems associated with "payment as billed" are well understood by the Legal Services Commission in relation to immigration practitioners, where this difficulty has existed, and continues to cause serious problems, for many years.

QUESTION 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.

47.1 We have pressed the Legal Services Commission for a long time to make more use of email, and to accept applications of all descriptions (whether for public funding, amendments to certificates, or otherwise) electronically. Occasionally, email communications have been accepted, but then, whatever reason, their use is embargoed or heavily restricted, and providers have had to telephone (often with great difficulty) to obtain permission to apply by fax.

47.2 Practitioners' "readiness to work in this way" is, we think, not in issue. The question is whether the LSC is ready and able to work in this way.

[68] As stated by representatives of numerous expert representative bodies at the meeting on 16th June 2010

QUESTION 48

Are there any other factors you think the Government should consider to improve the administration of legal aid?

48.1 We are concerned at levels of staff turnover and morale within the Legal Services Commission.

48.2 We would welcome better working relationship between providers and LSC staff, both locally and at Representative Body levels[69].

QUESTION 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.

49.1 Whilst we agree that many potential impacts have been identified in the accompanying impact assessments, we think that many have not.

49.2 What assessment, in the context of removal from scope of most private law proceedings, has been made (in the general context of IA MoJ028, paragraph 35(ii)) of the effect on the following budgets:

- Health (by reason of the effect on mental health and wellbeing of persons/families taking the law into their own hands, and, in some cases, causing injury in the course of so doing, increased depression arising from homelessness, homes in disrepair, and children being removed due to housing need);
- Police (being called to more breaches of the peace, and investigating/prosecuting these, dealing with parents alleging children have been unlawfully retained or not made available for contact as agreed or ordered, and dealing with unlawful evictions being carried out without public funding available to stop it);
- The MoJ's criminal budget (by reason of more prosecutions);
- The MoJ's family budget (by reason of an increase in public law cases where the local authority will now feel compelled to intervene);
- HMCS budget (***more court staff*** to deal with litigants in person, to prepare bundles for judges where neither party is represented, and there is no publicly funded party who can

[69] In the context of representative body meetings, we deplore the attitude shown by the Legal Services Commission as recently as 19th January 2011, at a meeting of the Civil Contracts Consultative Group (the overarching body which brings together representatives from all civil specialist representative bodies). Quarterly meetings of the Family Representative Bodies have hitherto been set for the whole year ahead. This is a very sensible arrangement, since many of those who attend are busy professionals with court and other diaries to manage. On 19th January, when we asked for the dates for 2011, we were informed that this arrangement was "too inflexible" and we would be told when the LSC had something that they wished to discuss with representative bodies.

be tasked with this, and to answer queries from litigants in person, ***more judges*** as cases will take longer and be more disorganised, and ***more court security personnel*** to prevent breaches of the peace within the court precincts.)

- DfE (CAFCASS, (likewise by reason on an increase in public law cases, litigants in person and an increase in requests for Guardians ad litem for children joined as parties in private law proceedings, and schools having to respond to the fallout in terms of family disputes being less effectively resolved,) and the schools budget (by reason of poorer performance of more children)?
- Local authority social services departments (by reason of increasing numbers of referrals, more crisis interventions where cases have not been dealt with adequately at an earlier stage, and more direct approaches by parents with nowhere else to go for help).

49.3 What impact assessment has been made of the effect of removing debt matters (at a stage when the client's home is not yet at immediate risk) from scope, particularly by reference to:

- the legal aid housing case budget?
- local authority budgets in relation to their responsibilities under the Children Act 2004, and under human rights and homelessness legislation?

49.4 What impact assessment has been made of the effect of removing immigration matters from scope, in the light of the matters referred to at paragraph 3.9 above?

49.5 What impact assessment has been made of the additionally cost of provision of mediation services generally under the proposals?

49.6 What impact assessment has been made, in respect of ancillary relief cases, as to the cost benefit of removing this group of cases from scope? What is the current ***net*** cost of public funding for ancillary relief cases, taking into account first, the capital recoupment as a result of the statutory charge, and second, the interest received?

49.7 In the context of housing law, what impact assessments have been made:

- in respect of housing disrepair cases, as to the cost benefit of removing this group of cases from scope? What is the ratio between the costs paid out to providers in such cases (i.e. because no costs order has been obtained against a third party) and the

overall costs of such cases (including the high proportion of such cases where costs orders are obtained and, accordingly, there is no ultimate cost to the Fund)?

- on the impact on local authority housing budgets of the removal from scope of cases involving breach of the covenant for quiet enjoyment (i.e. an increase in unlawful evictions)?

QUESTION 50

Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

50.1 We do not.

50.2 We think that the ***extent*** of the impact appears to be being minimised, for reasons which are not explained. Some examples are:

- wider social and economic costs are well summarised in IA MoJ028, paragraph 35(ii) as including persons seeking to resolve issues by themselves, a deterioration in case outcomes, reduced social cohesion, increased criminality, a domino effect of reliance on other public services, and increased levels of payment out by other government departments, but the paragraph ends with a bland statement that "the proposals aim to minimise any wider social and economic costs", without explaining how.
- IA MoJ028, paragraph 39, dealing with the potential increase in litigants in person ends with the (in our considered view, which we have explained in detail in answering question 6 above) breathtaking assumption "that on balance any such effect should not have a significant impact on ongoing court or tribunal operating costs." No impact assessment appears to have been carried out, for example, to establish either the increase in costs or the increase in length of court hearings which would follow, we say inevitably[70], from the proposals to require a court order in domestic violence proceedings (rather than undertakings) as a gateway to public funding for other private law issues.

QUESTION 51

Are there forms of mitigation in relation to client impacts that we have not considered?

We are not sure what mitigation is currently contained within the impact assessment dealing with client impact on ***scope changes***, and can see none. We do not think that sufficient research has been done in relation to ***telephone advice*** to enable any credible description of accruing benefits to be put forward. So far as ***legal aid remuneration*** is concerned, we see no

[70] See paragraph 1.5 above.

reference to benefit for legally aided clients, understandably, for there surely can be none. We note that the impact assessment on ***Cumulative Legal Aid Reform Proposals*** includes no reference under ***"Benefits"*** to clients and, sadly, we think that this correctly states the position.