

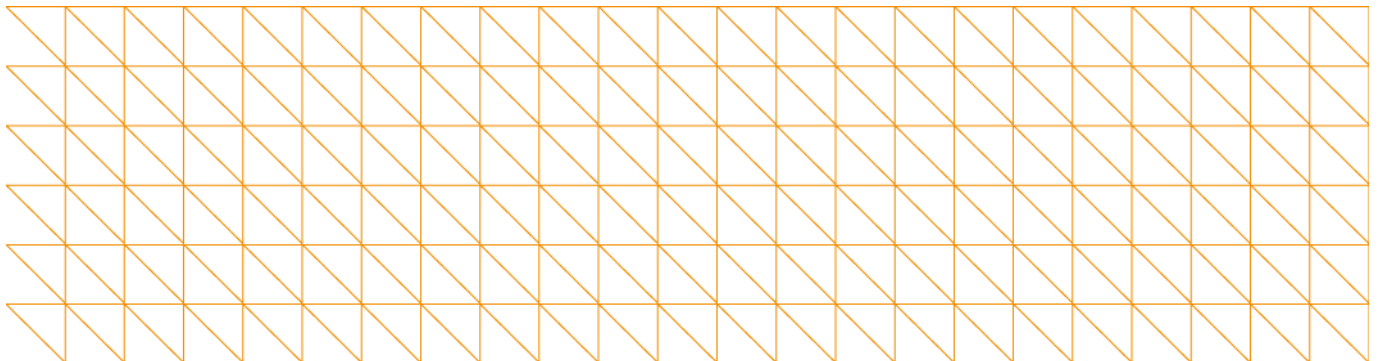


Legal Aid: Refocusing on Priority Cases

Response to Consultation

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Ministry of
JUSTICE

Legal Aid: Refocusing on Priority Cases

Consultation Response

Response to consultation carried out by the Ministry of Justice.

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

About this consultation

To: Legal aid lawyers and their representative bodies, public sector bodies, equality groups, the judiciary, and members of the public.

Duration: From 16 July 2009 to 8 October 2009

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Introduction and contact details

This document is the post-consultation report from the Ministry of Justice and Legal Services Commission for the consultation paper, *Legal Aid: Refocusing on Priority Cases*.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting Mandy Banks at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

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

Executive summary

Civil legal aid provides critical support for a range of important matters, from debt, housing, and employment advice to representation in important family and public law proceedings. We devote very significant resources to civil legal aid – over £1bn annually – so it is important that we review regularly how that money is being spent, and the cases and matters on which it is being targeted, to ensure we are achieving value for money.

We share the view¹ of Lord Justice Jackson that legal aid should remain in important areas like housing and judicial review. It is however essential that the rules for granting legal aid funding are focused on high priority and meritorious cases.

Legal Aid: Refocusing on Priority Cases set out a range of proposals to tighten the civil legal aid funding rules to target resources more effectively. Following consultation we intend to make a number of changes to civil legal aid to:

- Improve the way that cases involving human rights or public interest are handled by transferring cases that depend on these issues to receive funding to a new committee for advice on their merits. This will help to ensure that legal aid is awarded to meritorious cases.
- Ensure that cases granted legal aid on the basis that the proceedings will bring benefits to others have a realistic prospect of delivering such wider benefits.
- Detect fraudulent legal aid applications earlier, by checking with the unfunded opponent to ensure that the applicant is financially eligible for legal aid, with safeguards for domestic violence or urgent cases.
- Tighten the funding rules for granting legal aid for judicial review cases to ensure that funding is directed towards meritorious cases.
- Restrict funding for low-value damages claims brought as part of a multi-party action. This will help to ensure that limited resources are available for higher-value cases, or cases brought by individuals.
- Tighten access to civil legal aid in England and Wales for those who do not reside in the UK or associated territories, with safeguards for important human rights cases.
- Ensure that where legal aid funds a community action, the legal aid contribution mirrors the proportion of the affected population who are actually eligible for legal aid.

¹ *Review of Civil Litigation Costs: Final Report*, p.68

We intend to implement these changes in April, following Parliamentary consideration of the changes to the Funding Code and regulations.

Background

The consultation paper *Legal Aid: Refocusing on Priority Cases* was published on 16 July 2009. It invited comments on a range of proposals to change the legal aid funding rules for civil and criminal cases.

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

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

Part two of the paper included proposals developed by the Ministry of Justice. These proposals related to the prison treatment advice, solicitors' delegated powers and access to civil legal aid for non-residents.

The consultation period closed on 8 October 2009 and this report summarises the responses, including how the consultation process influenced the final shape of the proposals consulted upon.

A list of respondents is at Annex A.

Summary of responses

1. We received 94 consultation responses, mostly from lawyers' firms or representative bodies, but also many from charities, including refugee groups, and also several responses from the judiciary.
2. During the consultation, officials had meetings to discuss the proposals with the Law Society, Legal Aid Practitioners' Group, Public Law Project, Bar Council, Citizens Advice, Prisoners Advice Service, Association of Prison Lawyers, UNLOCK, the Howard League, and Stephen Shaw, the Prisons and Probation Ombudsman.
3. The vast majority of responses were opposed to most of our original proposals. In response we have dropped some proposals and modified almost all of our original proposals in the light of comments received from consultees.
4. We are now **not** proceeding with our proposals to: (a) balance disadvantages and benefits in assessing public interest; (b) invite members of the public and/or public sector body representatives on to the funding committee; (c) appoint the SCU director as the Chair of the new funding committee; (d) restrict legal aid for individual low value damages claims; (e) require additional reconsideration of merits in judicial review; and (f) withdraw solicitors' delegated powers to self-grant judicial review funding in urgent cases.
5. We have also made significant changes to our other proposals by, for example (a) retaining funding for low-value Multi-Party Action damages claims which are of wider public interest or which concern discrimination or child abuse claims; (b) narrowing the expanded referral criteria to the Special Cases Unit (SCU); (c) retaining Independent Funding Adjudicator oversight for most merits decisions in SCU cases; (d) inviting representations about financial eligibility, but not merits, before granting funding, and by first rolling this out in the area of private law family cases; and (e) excluding non-residents from routine access to civil legal aid in certain circumstances, but not basing this on 'lawful residence'. Further details of the response to the consultation and the changes to our proposals are set out below.

Responses to specific questions

Part One: Legal Services Commission and Ministry of Justice Proposals

Public Interest

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

Response

Many respondents were opposed to the proposal that a case would only qualify as being of 'wider public interest' if the case was a 'good vehicle' to actually realise wider benefits. Some respondents felt that it was already implicit in the existing test that a case must be a good vehicle to establish wider benefits.

Many respondents, including the Law Society, Public Law Project, and Immigration Law Practitioners' Association, were concerned that cases that were a 'good vehicle' would be strong cases, which would be settled. This would mean that the wider issue would not be resolved by a court and benefits to others would not be achieved. There were also concerns that this would mean that funding would be refused on the basis that 'a better case may come along'. Some respondents, including the Young Legal Aid Lawyers and Education Law Practitioners' Group, questioned how the LSC would be able to judge if a case was or wasn't a 'good vehicle'. The Bar Council agreed with strengthening the wording in principle, and offered suggestions as to how it should be changed. Justice felt that requiring that a case would be likely to deliver wider benefits should be made explicit in the test, but disagreed with the suggested wording.

The majority of respondents were opposed to the proposal that, in assessing whether a case is of wider public interest, the LSC should take into account both the benefits and the disadvantages to different aspects of the affected community that the case may bring about. Many respondents, including Liberty, the Immigration Law Practitioners' Association, and the Association of HM Circuit Judges, were concerned that this would require the LSC to take on what was essentially a judicial role of balancing public interest considerations. Some respondents, including the Public Law Project and Legal Aid Practitioners Group, were unclear how the LSC could balance competing public benefits e.g. health vs. economic benefits. Many respondents, including the Law Society, Association of Personal Injury Lawyers, and the Disability Law Service, were concerned that this proposal would have an adverse impact on cases concerning minority interests, and that there were no reliable ways to safeguard minority interests.

Decision

The Access to Justice Act 1999 introduced the consideration of public interest into legal aid decision making. Public interest considerations allow cases to be granted funding, even where the benefits to the individual litigant alone would not justify the likely costs, because other people will benefit from the outcome of the proceedings.

Because public interest allows cases to receive funding even where they would not otherwise pass the merits test, cases should not receive funding on this basis if the benefits to others are only 'theoretical'. Cases should only receive funding on this basis if there are realistic prospects of the outcome of the case providing benefits to others. We are therefore going to proceed to clarify the definition of public interest so that a case will only meet this test where:

- (i) the case has the potential to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question); and
- (ii) the case is considered on its particular facts to be an appropriate case to realise those benefits.

Some respondents thought this additional requirement was already implicit in the existing test, but we want to go further and to clarify this requirement explicitly. Some respondents thought that this would mean that cases funded on the basis of wider public interest would be strong cases which would inevitably settle. However, cases which are so strong in terms of their prospects of success that they will inevitably settle would not be relying on the case being of wider public interest to receive funding, as stronger cases would receive funding on their own merits.

We have considered amending the approach to wider public interest so that in assessing whether a case is of wider public interest, the LSC should take into account both the benefits and the disadvantages to different aspects of the affected community that the case may bring about. Having considered the strong representations received on this issue, we will not be proceeding with this change. We consider that there would be a risk that the LSC would be placed in the position of determining, to some extent, the issues between the parties and this is appropriately the responsibility of the court.

Public Interest and Borderline Cases

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

Response

The majority of respondents were opposed to special controls and budgeting for public interest and cases with borderline prospects of success.

Many respondents, including the Young Legal Aid Lawyers, Justice, and the Public Law Project, were concerned that important human rights case in this group should not be refused funding for monetary reasons. Some respondents said that the proposals would also impact on borderline housing disrepair, ancillary relief and immigration cases. Some respondents, including Irwin Mitchell Solicitors and the Housing Law Practitioners' Association, were concerned that if a budget with funding priorities was set by Ministers, this would give the government too much control over which cases receive funding, and would fetter the LSC's decision making. The Law Society argued that cases were often urgent and could not be deferred until the next financial year.

The majority of respondents were opposed to the proposal to merge the existing Public Interest Advisory Panel (PIAP) and the Multi-Party Action Committee. Many respondents, including Liberty, Young Legal Aid Lawyers, and the Law Society, were concerned that the new committee would be insufficiently independent. Many respondents felt that the new committee should not be chaired by the Director of the LSC's Special Cases Unit (SCU). Some respondents, including the Bar Council and Housing Law Practitioners' Association, argued that PIAP was working well and there was no need to change it. Some respondents, including Liberty and the Public Law Project, considered that it would be unfair if the SCU was allowed to address the committee but the applicant's solicitors were not.

The majority of respondents were opposed to the proposals to restructure the new committee to include new members, and to leave issues of public interest to non-lawyer members, and considerations of whether a public interest case was a 'good vehicle' to the lawyer members.

Many respondents, including the Legal Aid Practitioners' Group, Advice Services Alliance, and Mental Health Lawyers Association, felt that the non-lawyer members should not include representatives from public sector bodies, which are often the targets of litigation. Some respondents, including the Immigration Law Practitioners' Association, Fisher Meredith Solicitors, and Association of Personal Injury Lawyers, were concerned that a small group of non-experts would not effectively represent the public interest. Some respondents were concerned that the inclusion of non-lawyer members could lead to populist considerations factoring into funding decisions.

Decision

We intend to proceed to establish a 'special controls' regime for individual cases or types of cases which differ from the mainstream of civil legal aid cases. These cases are: (a) Multi-Party Actions; (b) appeals to the Supreme Court; (c) cases with only 'borderline' prospects of success which rely on significant wider public interest or significant human rights issues in order to receive funding; and (d) cases where the costs might exceed £250,000 if they proceeded to a contested trial or final hearing (or for Court of Appeal cases, to the conclusion of that appeal stage).

In order to pool expertise and to clarify funding decision making processes, the LSC will proceed to merge the existing Public Interest Advisory Panel and the Multi-Party Action (MPA) committee. The new 'Special Controls Review Panel' will carry out some of the existing functions of both the PIAP and the MPA committee, and in addition will also be able to consider funding issues for cases with the special features referred to above.

The membership of the new panel will be substantially the same as the present committees, but with the addition of one or more representatives from consumer groups. The new panel will be chaired, as at present, by an LSC Commissioner. The panel will not make the final decision about whether funding should or should not be granted. The panel will not have the power to make the final determination of any issues, other than the legal assessment of prospects of success. Other than the determination of the prospects of success, the Panel's role will be purely advisory, with final decisions being taken by the LSC Director of the Special Cases Unit (SCU).

The committee can be asked, by the SCU Director, to advise on any case which is subject to 'special controls'. In addition, where the SCU Director has refused funding for a case subject to special controls, the client can ask for that decision to be reviewed by the Special Controls Review Panel.

The Panel will then look at the SCU decision and either confirm the decision of the SCU Director, or advise the SCU Director on the Panel's view of the issues in the case. The Panel will be able to invite the client's representative to make oral representations, if the Panel considers it necessary, and the SCU Director, or a representative, can also attend. If the Panel does not confirm the SCU Director's decision, the SCU Director will make a final decision, giving reasons for disagreeing with the Panel if he does so.

In our consultation paper we proposed that the new committee would include representatives from the public, including representatives from public sector bodies. We also proposed that the public members of the panel would consider the public interest aspect of cases, while professional representatives and justice interest groups would advise on the potential benefits of developing the law and the merits of the individual cases as a vehicle for achieving that development. Having considered the representations put forward from respondents to the consultation, we will not be proceeding with these two changes. We consider that the proposed restructuring would have been overly mechanistic and there is a risk that the inclusion of public sector body representatives could lead to the perception of bias, as these bodies are often the subjects of funded litigation.

We consider it appropriate that for cases which would not be granted funding on their own merits, but which receive funding on the basis that they have a special feature, there should be a budget, established as part of the existing Very High Cost Cases budget which is set annually. This is because these cases, which are different to those in the mainstream civil legal aid scheme, have a lower hurdle to receive funding, and it is appropriate that they are therefore carefully monitored. This budget would apply to cases with 'borderline' prospects of success, which only receive funding on the basis that they are of wider public interest or raise significant human rights issues. We do not intend to establish a budget immediately, but will first monitor the costs of these cases throughout 2010, with a view to setting a budget at the start of the 2011-12 financial year.

We also consider it appropriate that the Lord Chancellor sets priorities for this budget, in a similar way to the priorities already set for civil legal aid through the existing *Lord Chancellor's Direction on Community Legal Service Fund Funding Priorities*. Our starting point would be that borderline cases concerning significant human rights issues would be of the highest priority for funding, followed by cases of significant wider public interest. These priorities will only be set once the new budget comes into effect at the start of 2011-12. Before we set the borderline case budget, or the funding priorities for this budget, we will consult further with key stakeholders.

Damages Claims

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

Response

The majority of respondents were opposed to the proposal to limit funding for claims brought under section 8 of the Funding Code, which were primarily about damages, to those where the likely damages exceeded £5000. Many respondents, including the Bar Council, Northern Administrative Law Association and Young Legal Aid Lawyers, argued that these cases can be about important matters of principle, not just money. Some respondents, including the Legal Aid Practitioners' Group, felt that funding for these cases helped to ensure that public authorities meet their statutory obligations. Some respondents argued that complaints and ombudsman schemes could not provide the same remedies as the court.

Some respondents, including the Legal Aid Practitioners' Group and Young Legal Aid Lawyers, argued that this proposal would have a disproportionate impact on discrimination cases as these rarely achieved damages of more than £5000, unless there were exemplary damages, and that this would have a disproportionate adverse impact on equalities groups. The Association of Child Abuse Lawyers argued that the proposal would have a disproportionate adverse impact on child abuse claims as these were often assessed to be of low financial value at the outset, before the full details of the abuse suffered were revealed.

Most respondents agreed that funding should remain for section 8 damages claims below £5000 if there was significant wider public interest in the case. Some respondents, including the Bar Council, felt that Multi-Party Actions by their nature were more cost-effective, and more likely to be of Wider Public Interest, so funding should remain for those claims.

Decision

In the consultation we proposed that individual damages cases brought under section 8 of the Funding Code would only pass the merits test if the likely damages were £5000 or more. We have considered carefully the responses received and other representations, and consider that it is not appropriate at this time to restrict these individual claims. We were persuaded that, notwithstanding that the costs of these cases are often high compared to the likely damages, they concern serious issues for which complaints procedures may not be the appropriate resolution. We will not therefore be proceeding with restrictions to individual damages claims.

For Multi-Party Actions, we consider that there are some different issues which justify our taking a firmer line. In assessing whether the costs of an MPA are proportionate to the likely damages, the LSC will aggregate the likely damages. In practice this means that for large MPAs, the case will usually pass the cost / benefit test. This is true even of cases which are of very low value (e.g. £1000) but which have large numbers of claimants. We do not consider that large sums of money from our limited legal aid resources should be focused on securing small awards. For claims which are primarily about damages, and which are part of an MPA, we will be imposing a tighter merits test, so that funding will only be granted for Investigative Help or Legal Representation if the likely damages for the client exceed £5000.

Funding will remain available for below £5000 MPA claims if they are of significant wider public interest. This will usually only apply to the lead claim within an MPA. Funding will also remain available for below £5000 MPA claims if they concern (a) a claim for race, sex or disability discrimination, or (b) a child abuse claim. We were persuaded that restrictions to discrimination claims would have a disproportionate impact in this area. We have also retained funding for low value child abuse claims within an MPA due to the high priority we place on child protection issues.

We are seeking to apply this restriction to all MPAs, not just those brought under section 8 of the Funding Code, although almost all in-scope MPAs are section 8 claims. We are consulting key stakeholders separately on this issue along with the consultation on draft regulations to implement these changes.

Out of Scope Damages Claims

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

Response

The majority of respondents were opposed to restricting funding for out-of-scope cases to those where the likely damages exceeded £5000. Many respondents, including Liberty, the Criminal Law Solicitors Association and Doughty Street Chambers, argued that the presence of wider public interest in these cases meant that cost / benefit considerations were less critical or irrelevant.

Some respondents, including Justice, the Howard League, and Devon and Carlisle Law Centres, felt that limits were inappropriate because low value claims could still establish important precedents, and discouraged abuses by public authorities. Some respondents rejected the idea of a damages limit, arguing that what mattered was whether the case would win and therefore secure costs.

Decision

Some areas of law or types of case are excluded from the civil legal aid scheme because there are alternatives to legal aid, or because they are of insufficient priority to justify funding. Section 10 of the *Lord Chancellor's Direction on the Scope of the Community Legal Service* allows any of the matters (except business cases) which are outside the scope of the civil legal aid scheme to nevertheless receive civil legal aid funding, if the case is of significant wider public interest. We proposed that we would not grant funding for Investigative Help or Legal Representation for an out of scope individual case or MPA which was primarily about damages if the likely damages were below £5000.

For the reasons given above for in-scope individual claims, we will not proceed with restrictions to out of scope individual claims.

For out-of-scope claims which are part of an MPA and which are primarily about damages, we will be imposing a tighter merits test, so that funding will only be granted for Investigative Help or Legal Representation if the likely damages for the client exceed £5000. In assessing whether the costs of an MPA are proportionate to the likely damages, the LSC will aggregate the likely damages. In practice this means that for large MPAs, the case will almost always pass the cost benefit test. This is true even of cases which are of very low value (e.g. £1000) but which have large numbers of claimants. We do not consider that large sums of money from our limited legal aid resources should be focused on securing small awards, particularly in areas which are generally excluded because there are alternative sources of funding or which are of insufficient priority to justify inclusion.

Complaints Systems and Damages Claims

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

Response

The majority of respondents were supportive of this proposal, so long as it was not used to force people to use complaints systems irrespective of the circumstances. Some respondents, including the Police Actions Lawyers' Group, noted that the limitation period for discrimination cases and human rights claims was much shorter than the standard 3-year limitation period, and use of complaints systems may be less appropriate for those claims, depending on the circumstances.

Decision

We will be proceeding to clarify section 8.3.4 of the Funding Code, which requires litigants to consider whether the issue should first be raised as a police complaint, to also refer to the prison and probation complaints schemes, and the Prisons and Probation Ombudsman.

There will be no substantive change in LSC's approach to this criterion. This criterion, and the existing standard criterion 5.4.3, require that complaints systems and ombudsman schemes are considered before litigation is pursued, and that funding can be refused if such systems should be pursued first.

Cost / Benefit in Damages Appeals

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

Response

The response to the proposal to take into account potential *inter partes* costs on appeal was mixed, with some respondents supporting this change. Many respondents, including the Bar Council, Public Law Project and Immigration Law Practitioners' Association, felt that the LSC should also take into account that funding an appeal may be the only way to secure any costs for LSC.

Decision

We will be proceeding to amend the definition of 'likely costs' in the Funding Code to clarify the LSC's ability to take into account the potential costs against the fund at *inter partes* rates.

The LSC already take into account that an appeal may be the only opportunity for the fund to recover its costs.

Judicial Review Presumption of Funding

- 7. Do you agree that we should remove the presumption of funding and have a single test for granting funding in judicial review cases?**

Response

The majority of respondents were opposed to the proposal to abolish the presumption of funding for judicial review cases, and to instead allow the LSC to consider whether funding should be granted in these cases. Most respondents, including Bindmans LLP, Pannone LLP, Child Poverty Action Group, and the Legal Aid Practitioners' Group, felt that if the court has granted permission, then the LSC should not try to second guess the court and funding should be automatic. Some respondents, including the Criminal Law Solicitors' Association, argued that because permission rates have fallen this is already tightly controlled. Some respondents argued that the LSC could not make better decisions than the court about the merits of a case.

Decision

It is not the LSC's role to determine whether a case can be brought or whether it should proceed. However, it is the role of the LSC to determine whether legal aid funding should be made available. Under the current presumption of funding, the LSC finds it difficult to carry out its funding role where the court has granted permission. Where a judge has granted permission for judicial review, and the case is of wider public interest, overwhelming importance to the client or raises significant human rights issues, the presumption is that funding will be granted, irrespective of the LSC's assessment of the merits of the case. This means that in

these cases the LSC is expected to grant funding without any consideration of either (a) the prospects of success in the case or (b) the cost / benefits of the case.

We therefore intend to proceed to abolish the separate Funding Code test for post-permission cases. In future the same Funding Code test will apply for legal representation in judicial review cases, irrespective of the permission status of the case.

While in future the Code will not have separate criteria for cases where judicial permission has been granted, the LSC will amend the Funding Code guidance to make clear that a judicial decision to grant permission will be given very serious weight by the LSC in deciding whether or not to grant funding for these cases. In practice, we anticipate that the LSC will only seek to refuse funding in a very small number of cases.

Judicial Review Personal Interest

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

Response

The majority of respondents were of the view that the existing rules were sufficiently clear to prevent funding for judicial review cases where the applicant had no personal benefit to be gained from the proceedings. Some respondents, including the Child Poverty Action Group, Bindmans LLP, and the Association of Prison Lawyers, were concerned that where a client obtained satisfaction for themselves in a case, but the general issue was unresolved, that LSC would withdraw funding. Some respondents, including Friends of the Earth, were concerned that this might restrict funding for environmental judicial reviews.

Decision

It is important that the rules for legal aid are sufficiently robust to ensure that it is correctly focused. Some respondents have argued that the existing criteria are clear enough, but we want to put beyond doubt the LSC's ability to refuse legal aid for cases where the client is not seeking a remedy for themselves or their family.

We will therefore proceed to clarify the Code so that funding for judicial review will only be granted where the client is seeking a material benefit for themselves or their family. We will also make clear that this restriction does not prevent the funding of judicial reviews on environmental matters in the light of our obligations under the Aarhus Convention².

² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

This measure is not intended as a method of withdrawing funding in a case where the client secures a satisfactory outcome, but the general issue remains unresolved. Funding will not automatically be withdrawn if the applicant ceases to have a direct personal interest in this way during the course of the proceedings.

Judicial Review Reconsideration of Merits

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

Response

The majority of respondents were opposed to further funding being withheld until the acknowledgment of service and response had been considered. Some respondents, including the Housing Law Practitioners' Association and Public Law Solicitors, argued the change would have very little effect as very little work was done between issue and receiving the Acknowledgment of Service. Some respondents, including the Education Law Practitioners' Group, were concerned that this could prevent solicitors doing work to settle a claim between issue and Acknowledgment of Service being received. Many respondents argued that this would add little, but would impose an additional administration burden and cause delays.

Decision

Having considered the responses and representations received, we will not be proceeding with this change. While it would provide some additional fund control, we were persuaded that this was outweighed by the significant additional administrative burden on providers.

Referral of Cases to the Special Cases Unit

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

Response

The majority of respondents were opposed to the referral of more cases to the SCU. Many respondents, including Davies Gore Lomax solicitors, the Housing Law Practitioners' Association, and Howells Solicitors, were concerned that SCU appeared to be inadequately resourced and it was difficult and time consuming to deal with SCU.

Many respondents, including the Bar Council and Family Law Bar Association, were concerned that the requirement to produce case plans more often would impose an additional administrative burden on solicitors and counsel, for which remuneration was not always allowed.

Some respondents, including the Bar Council, Child Poverty Action Group, and Shelter, were concerned that this would lead to the use of low 'risk rates' for this work, which they did not consider appropriate. Some respondents felt that the proposed SCU referral criteria were insufficiently clear.

A minority of respondents, including Pannone LLP and Ben Hoare Bell LLP, supported closer working with SCU, as long as there was flexibility. Mackintosh Duncan solicitors said they generally worked well with SCU, but an expansion of SCU's role would need to be properly resourced.

Decision

The LSC's Special Cases Unit provides experience and expertise in managing the LSC's most expensive and complex cases. We want to utilise that expertise in a wider range of cases and we will therefore proceed to expand the SCU referral criteria.

In future the SCU will deal with high cost cases, MPAs, exceptional funding, and also cases appealing to the Supreme Court, and borderline cases which depend on the case being of significant wider public interest or raising significant human rights issues in order to receive funding. We will not be expanding the referral criteria for the SCU more generally to cover 'high profile' cases as proposed.

The SCU have the discretion to request a costed case plan for any case they manage. They can also apply 'risk rates' to high cost cases they manage. These 'risk rates' will be used for Supreme Court appeals as now, but not for borderline cases newly managed by the SCU, unless these are also high cost cases.

The expansion of the SCU's role is likely to require additional resources from within the LSC, and the LSC will put in place the resources to ensure that cases referred to the SCU will be dealt with effectively.

Inviting Representations Before Granting Civil Legal Aid

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

Response

The majority of respondents were opposed to withholding funding for 14 days while the other side was given an opportunity to object to funding being granted on means or merits grounds. Many respondents, including the Legal Aid Practitioners' Group, Liberty, and the Association of District Judges, were concerned that in dealing with pre-trial representations on merits, the LSC would be taking on what is essentially a judicial role in determining the merits of a claim.

Many respondents, including the Young Legal Aid Lawyers, Fisher Meredith solicitors, and the Police Actions Lawyers Group, were concerned that the process would require a great deal of additional unfunded (pre-certificate) work from solicitors to respond to representations on the merits of cases. Many respondents felt that the proposal would encourage tactical vexatious representations from the other side.

Some respondents felt that the process would create delays in cases and courts, and impose a significant administrative burden on the LSC. Some respondents, including Public Interest Lawyers, Rikki Garg and Mitchell Woolf and Devon Law Centre, were concerned that this would give powerful defendants, including public authorities, a significant advantage pre-trial, because, for example, no disclosure will have been made.

Some respondents, including Mackintosh Duncan solicitors, the Bar Council and Lucy Scott-Moncrieff, felt that the process should not apply where there is already a pre-action protocol in place (e.g. public law, housing). Some respondents felt that the new process should not apply to immigration cases, or housing cases about dangerous properties in need of repair, or private law family due to the impact on children, or to trust of land or ancillary relief cases as assets would be hidden.

Decision

We received a number of strong representations on this proposal, and some of the strongest arguments against the proposal concerned the seeking of pre-grant representations on the merits of cases. We were persuaded that seeking pre-grant representations on merits in all cases was undesirable, and that there would be a risk that the LSC would be placed in the position of determining, to some extent, the issues between the parties and this is appropriately the responsibility of the court.

We are nevertheless concerned that civil legal aid is only expended on financially eligible clients, and therefore, in future, the unfunded party will be notified that an application has been made for legal aid, and will be invited to make representations to the LSC if they consider that the applicant is financially ineligible

for funding. The unfunded party will have 14 days to make representations to the LSC, after which funding will be considered and granted in the usual way. Emergency funding applications would not be subject to the new process.

If representations are received about welfare benefits, the LSC will use its secure data-link with the Department for Work and Pensions (DWP) to check that the client is in receipt of benefits. If the representations concern the applicant's eligibility for welfare benefits, LSC will pass these representations to DWP to investigate, in accordance with the fraud prevention protocol agreed between the LSC and DWP. If the representations concern other claims about financial eligibility, these will be passed to the LSC's Special Investigations Unit to consider in the usual way.

Under the current representations system, the majority of substantive representations that are received are representations about financial means in private law family cases. Therefore we will roll out the new application procedure in stages, starting first with private law family cases in 2010. Within the private law family area, we will not be applying the new procedure to domestic violence cases, or to cases covered by the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* or the *European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children*.

We are mindful that cases involving children must be resolved swiftly, and we do not wish to impose unnecessary delays in these cases. However, we need to balance that concern with the legitimate concern that limited legal aid funds are focused on financially eligible clients. We consider that the 14 day window for opponents to make representations about financial eligibility balances the need to protect the fund against the need to ensure cases are progressed as swiftly as is possible.

After the roll-out across private family law, it is our intention to roll-out the new process more widely to cover all areas of civil legal aid. There will be exclusions from the process for: cases involving detention under the Mental Health Act 1983 or Mental Capacity Act 2005; parents or guardians involved in childcare or supervision proceedings under the Children Act 1989; applications for asylum or asylum support; and housing or community care proceedings where the client is at risk of losing their home.

Independent Funding Adjudicators and SCU Cases

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

Response

The majority of respondents were opposed to limiting the powers of Independent Funding Adjudicators (IFAs) to determine merits for SCU cases. Many respondents, including Bindmans LLP, the Law Society, and Michael Purdon solicitors, felt that this removed a vital objective scrutiny of Special Cases Unit decisions, and it would increase the number of LSC decisions which were judicially reviewed. Some respondents, including Harrison Bunday solicitors and Howells solicitors, argued that the SCU's decision making was poor, and they lacked the necessary expertise. Some respondents argued that the alternative was to increase the knowledge or expertise of the IFAs.

Decision

Bearing in mind the responses received to the consultation, and the need to retain as much objectivity as possible, we will proceed with a narrower change to the powers of IFAs to determine merits issues in SCU cases.

Cases which are managed by the SCU may be managed under the special controls outlined above, in which case review is to the Special Controls Review Panel.

For all other types of case managed by the SCU, the IFA will continue to have the power to determine (a) the prospects of success; (b) whether a case has overwhelming importance to the client; (c) whether a certificate should be discharged or revoked on the grounds of the conduct of the client.

The IFA will no longer have the power to determine cost / benefit, including proportionality, for SCU cases. However, they will now have the power to determine (i) likely damages, or (ii) any other benefit or remedy the client is likely to achieve in the proceedings.

We consider that this better focuses the expertise of IFAs on to the areas where they are strongest, while recognising SCU's expertise in assessing potential costs to the fund.

Community Action Contributions

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

Response

Many respondents were supportive of this proposal. However, some respondents, including the Public Law Project and Legal Aid Practitioners' Association, expressed practical concerns about how the LSC would be able to accurately assess the civil legal aid eligibility of the affected population.

Decision

We will proceed in community actions to align the proportion of the costs which are paid for by legal aid with the proportion of the affected local population who are eligible for legal aid, using information about the size of the population, its financial circumstances, and information from the Office for National Statistics. This will replace the existing guidance which assumes 50% as the starting point for community contributions.

The proportion of the affected local population who are eligible for legal aid would be a starting point, and all the circumstances of the matter would also be taken into account, as they are present, so that the proportion of costs can be adjusted up or down as is necessary. The existing consideration of the tangibility of benefits would remain. Typically those actions with wider, more intangible benefits are likely to affect a greater community. The LSC will issue new guidance on the evaluation of contributions in these cases in line with the principles set out above.

Part Two: Ministry of Justice Proposals

Prison Treatment Advice

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

The response to this question, and the final decision on this matter, was published separately on 14 December (CP(R) 12/09).

Delegated Powers to Self Grant Funding in Judicial Review Cases

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

Response

The majority of respondents were opposed to restricting the delegated powers of solicitors to self-grant funding for judicial review cases (other than housing and immigration). Some respondents, including the Mental Health Lawyers Association, Liberty, Fiona Scolding and Denis Edwards of Hardwicke Chambers, and Southwark Law Centre, were concerned that the LSC would not have sufficient resources to deal with urgent applications quickly, including out of hours applications.

Some respondents, including Public Interest Lawyers, the Immigration Law Practitioners' Association and Mental Health Lawyers Association, argued that this was inappropriate for urgent judicial reviews as there would no time to appeal a refusal to grant funding. Some respondents argued that this should not apply to community care judicial reviews where clients are at risk of homelessness. Some respondents, including Liberty, Doughty Street Chambers, and Bindmans LLP, argued that if there were concerns, the LSC should tackle individual firms rather than taking powers away generally. Some respondents argued that the fall in permission rates should be looked at over the period after the Bowman reforms, which led to permission decisions being made with the benefit of the respondent's acknowledgment of service and grounds for defence, since which permission rates have been more stable.

Decision

We have carefully considered the arguments put forward by respondents and the representations received, and we will not be making this change. In the post-Bowman period, judicial review permission rates are more stable than in the longer 15 year period looked at in the original consultation paper. In addition, during the course of the consultation the LSC were able to produce an analysis of the usage of delegated powers in judicial review cases, and this showed that cases where delegated powers had been used were no less successful, in terms of client outcomes, than cases where they were not. We are also mindful that the LSC has, in the new civil legal aid contracts to take effect from October 2010, placed tighter controls on the use of delegated powers for judicial review cases.

Restricting Access to Civil Legal Aid for Non-Residents

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

Response

The majority of respondents were opposed to restricting access to civil legal aid for non-residents. Many respondents, including Liberty, the Immigration Law Practitioners' Association, the Law Society, the Law Centres Federation, Refugee Council and Refugee Action, were concerned that if this excluded those who were present in the country, but not 'lawfully resident', it would have an adverse impact on particularly vulnerable groups, including asylum seekers, trafficked persons, and non-economically active 'accession 8' citizens. Some respondents were concerned that it could prevent claims being brought concerning unlawful immigration detention, claims relating to asylum support, or access to healthcare services. Some respondents were concerned that providers would have to bear the burden of determining whether an applicant was 'lawfully resident', and that determining 'lawful residence' was far from straight-forward.

Many respondents, including Public Interest Lawyers, Liberty, the Law Society, Public Law Project, and Justice, were concerned that if this excluded persons who were permanently resident abroad, it would prevent funding for important human rights challenges against the British Government, and in particular that it would prevent funding for cases like the recent cases brought against the Ministry of Defence concerning Baha Mousa and the Danny Boy Incident. Some respondents were concerned that this would prevent people seeking child contact orders from overseas, and would exclude people bringing child abuse cases from overseas. Some respondents were concerned that it would prevent claims concerning treatment in immigration detention by those who had been removed from the country by the UK Borders Agency. Some respondents were concerned that it would prevent claims against British businesses from overseas. Some respondents, including Justice, argued that allowing funding to continue for British citizens who were non-residents was potentially discriminatory. Some respondents, including Matrix Chambers and Bindmans LLP, argued that restricting access to

legal aid for non-residents was incompatible with the Government's duties under race discrimination legislation.

Decision

Having carefully considered the representations received, we will take forward a revised proposal. We will amend schedule 2 to the Access to Justice Act 1999 to exclude from routine access to civil legal aid those who are non-residents (other than for immigration and asylum cases).

This change will not be based on 'lawful residence'. Instead, we would seek to exclude from the Community Legal Service in England and Wales those who reside outside the United Kingdom, the rest of the European Union, the British Overseas Territories, the Crown Dependencies, Macao or Hong Kong.

'Residence' would mean that the client states that they are resident within one of the territories above and is able to demonstrate this by providing an address for themselves within that territory which is not the address of their solicitors or legal representative.

In the consultation, we proposed that British citizens would continue to have access to the civil legal aid scheme regardless of their residence status. Under the revised proposal that we will now implement, British citizens who are non-resident will be excluded from the civil legal aid scheme in England and Wales on the same basis as other non-residents.

The European Legal Aid Directive (2002/8/ESC) of 27 January 2003 will mean that civil funding continues to remain available, subject to the usual tests, for those who reside within the EU. We would also continue to fund international child abduction cases, international child contact cases, international protection of vulnerable adults and international protection of children cases in line with our obligations under international treaties either current or due to come into force. We would also continue to fund cases concerning forced marriage, whether brought by the victim or by their representative on their behalf.

This change would not affect current or future bilateral agreements where citizens of one nation are given reciprocal access to the legal aid scheme of the other nation. For example, there are currently bilateral agreements in force between the UK and Algeria, the UK and United Arab Emirates and the UK and Libya.

In practice, this change would exclude those who reside outside the EU or other exempt territories above, but who are seeking to bring proceedings in the courts of England and Wales.

The residence test would also mean that people who were present, but not resident, in England or Wales, such as those who were here on holiday, or were visiting only in order to conduct litigation in this country, would be excluded.

However, for those who are present in England or Wales, but not resident, funding would continue to be available for the following types of cases: domestic violence proceedings; child care or supervision proceedings; emergency housing matters; and Mental Health Act or Mental Capacity Act detention. This will ensure that, even for non-residents who have just arrived here, or who are here temporarily (for example, on holiday), they will still have access to legal aid if they are at risk of

harm, if they become involved in a child protection case; if they are without shelter; or if they are detained under mental health or capacity legislation.

This change would mean that a range of civil cases would no longer have routine access to the civil legal aid scheme, including family cases, and also some public law claims. For any individual case excluded from the scope of the civil legal aid scheme, the 'exceptional funding' provisions under section 6(8)(b) of the Access to Justice Act 1999 allow funding to be granted, notwithstanding the case's exclusion from the scheme.

It will be open for any non-resident to apply for exceptional funding for their case. Usually, these applications are made to the LSC, who then refuse the application or recommend a grant, and then the application then goes to Ministers for a final decision.

Bearing in mind that some of the cases brought by non-residents will be public law challenges against the British Government, the Lord Chancellor will be issuing an authorisation, to coincide with the exclusion of non-residents in the Act, which will delegate to the LSC decisions in exceptional funding cases brought by non-residents. This means that decisions about granting funding will be made by the LSC, and not referred to ministers. This will ensure that exceptional funding decisions for important human rights cases against the Government will be made, independently from Government, by the LSC.

Conclusion and next steps

1. After the publication of this response, we will be conducting a further limited consultation with key stakeholders in the professions on the detailed regulation and Funding Code drafting changes which will implement these changes.
2. These changes will then be laid before Parliament to be debated (subject to Parliamentary time), and come into force in April 2010.
3. We will also monitor the costs of borderline cases over 2010, and hold a further limited consultation later this year on the details of a fixed budget for these cases, and priorities for that budget.

Summary: Intervention & Options

Department /Agency:
Ministry of Justice

Title:
Impact Assessment of Legal Aid: Refocusing on
Priority Cases

Stage: Decision

Version: 1.0

Date: January 2010

Related Publications: Legal Aid: Refocusing on Priority Cases Consultation Paper; Legal Aid: Refocusing on Priority Cases Partial Response Paper

Available to view or download at:

<http://www.justice.gov.uk/consultations/legal-aid-refocusing-priority-cases.htm>

Contact for enquiries: Stephen Jones

Telephone: 0203 334 4247

What is the problem under consideration? Why is government intervention necessary?

The Government wants to ensure that we rebalance the legal aid budget as far as possible in favour of civil help for those who need it most. But we also need to ensure that the resources we currently devote to civil legal aid are being targeted appropriately, and that the rules for granting funding are as robust as they need to be to ensure that resources are expended on meritorious cases.

What are the policy objectives and the intended effects?

By reforming the civil funding rules we want to ensure that finite civil legal aid resources are targeted on meritorious cases. The intended effects are to redirect resources onto higher priority areas, and to ensure that funding is only granted to eligible clients.

What policy options have been considered? Please justify any preferred option.

- Option 1 – Do Nothing
- Option 2 – Proceed with Consultation Proposals
- Option 3 – Proceed with Revised Proposals (preferred option).

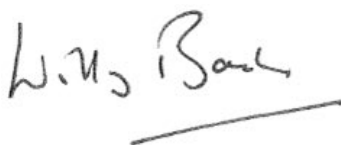
Having carefully considered the consultation responses and representations received, we will be proceeding to implement a revised package of reforms to the civil legal aid funding rules. This revised package will ensure funding is better targeted, while addressing many of the key concerns of stakeholders.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? We will seek to review the policy, together with the Legal Services Commission, after 12 months of operation.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (i) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy and, (ii) the benefits justify the costs.

Signed by the responsible Minister:



Date: 29 January 2010

Summary: Analysis & Evidence

Policy Option: 3	Description: Proceed with Revised Proposals (preferred option)
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' The LSC will incur admin costs of £150k (transitional) & £270k (steady-state) p.a. Civil legal aid providers may see a potential reduction in income of £5m - £5.8m per year (cash / gross), although £2.7m of this is from clients who are financially ineligible and should not receive funding in the first place.
	One-off (Transition)	Yrs	
	£150k	1	
	Average Annual Cost (excluding one-off)		
	£5.27-6.07 m	1	
Total Cost (PV)			£5.42-6.22m
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The LSC will achieve legal aid savings of £5m - £5.8m per year.
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£5m - £5.8m	1	
Total Benefit (PV)			£ £5m - £5.8m
Other key non-monetised benefits by 'main affected groups' Technically there will be improvements to the overall economic efficiency as a result of reduced subsidisation. There may also be gains in terms of equity (fairness) from no longer subsidising people who are not eligible for legal aid in the first place.			

Key Assumptions/Sensitivities/Risks Case volumes, or average case costs, could be higher or lower than expected.

Price Base Year 2008	Time Period Years 5	Net Benefit Range (NPV) £ -1.41m	NET BENEFIT (NPV Best estimate) £ -£1.41m
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What is the geographic coverage of the policy/option?	England & Wales			
On what date will the policy be implemented?	April 2010			
Which organisation(s) will enforce the policy?	LSC			
What is the total annual cost of enforcement for these organisations?	£0			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)					(Increase - Decrease)
Increase	£	Decrease	£	Net	£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

- 1.1 This impact assessment covers a range of changes to the rules for providing legal aid in civil cases.
- 1.2 A separate response and impact assessment concerning the changes to prison treatment advice was published on 14 December.

Scope of the proposals

- 1.3 The reforms cover changes to the Funding Code Criteria, Procedures or Guidance ('funding rules') in the following areas:
 - Wider public interest considerations in funding decisions
 - Funding rules for judicial review cases
 - Funding rules for damages cases
 - Funding rules for community actions
 - Reducing fraud by inviting representations before granting legal aid
 - Rules and procedures for cases with borderline prospects of success
 - Access to legal aid for non-residents

Stakeholder groups and Organisations in the scope of the proposal

- 1.4 The proposals are of interest to recipients of civil legal aid services, unfunded opponents of funded clients, lawyers, legal advisors, the courts and the judiciary.
- 1.5 According to the Legal Services Commission's Annual Report, in 2008-09 over 1.3 million acts of assistance were delivered through the Community Legal Service (civil legal aid scheme). Almost 150,000 of these were instances of 'licensed work', which includes providing legal representation at court. This represents an 8% increase in civil acts of assistance from the previous year.
- 1.6 The LSC Annual Report also indicates that in 2008-09 solicitors' firms held 4661 contracts in civil categories of law, and Not-for-Profit organisations held 949 contracts in civil categories of law.

2. Rationale for Government Intervention

- 2.1 The Government wants to ensure that we rebalance the legal aid budget as far as possible in favour of civil help for those who need it most. But we also need to ensure that the resources we currently devote to civil legal aid are being targeted appropriately, and that the rules for granting funding are as robust as they need to be to ensure that resources are expended on meritorious cases.
- 2.2 If we do not make these changes, then there is a risk that limited civil legal aid resources will be wasted on weak cases or expended on ineligible clients, at the expense of meritorious cases or eligible clients.

Economic Rationale

- 2.3 Legal aid is targeted at individuals at the lower end of the income distribution who may not be able to afford to buy legal services. The impact of the measures under option 3 will be to cease funding for cases that are ineligible for this service or for cases where funding is not targeted on meritorious cases. The overall impact is in the range of £5m to £5.8m, which is a benefit in terms of Government savings, but may reduce the income of legal aid solicitors who do this

work, or impose costs to current recipients of the service who will need to fund legal representation themselves in future. Some of the wider economic impacts of these changes are not directly measurable, but these are discussed below (paras 2.4 – 2.8).

Improved Efficiencies

- 2.4 Of the total £5m to £5.8m savings, £2.7m is from recipients who are not eligible for legal aid in the first place. Enforcing rules to ensure that people who can afford to pay for legal services do not obtain legal aid fraudulently provides gains to society as a whole by increasing fairness for taxpayers. Many of these ineligible clients may still decide to purchase their own legal support privately. Others may consider that it is not important enough for them to do so, and for this group the true value they place on the case is lower than the cost of pursuing it and therefore it is not economically efficient for them to continue.
- 2.5 The remaining £2.3m to £3.1m of savings is from cases which are no longer considered to be sufficiently meritorious to warrant public funds. Some of these cases may be funded privately, or the client may choose to represent themselves, or the client may obtain funding through a Conditional Fee Agreement (CFA). However, clients may not be able to find a solicitor willing to work on a CFA basis for a weak case. People who no longer receive legal aid might seek alternative and cheaper forms of dispute resolution, such as complaints procedures, or they might consider that the dispute is not significant enough to pursue e.g. that the likely damages do not sufficiently outweigh the costs of litigation.
- 2.6 If we consider that CFAs enable clients' capital constraints to be overcome, and that CFA lawyers are as productively efficient as lawyers funded by legal aid, then technically there will be gains relating to the reduced over-demand for legal support, i.e. fewer resources being directed into weak or low value legal cases where the benefits of tackling the issues at stake might not justify the resources involved in doing so.

Outcomes of Dispute Resolution

- 2.7 Costs and benefits may arise from the outcomes of dispute resolution. For those unmeritorious cases which are excluded from legal aid by these changes, where clients are unable to fund the case privately or obtain a CFA, and choose to represent themselves, the dispute resolution outcome may not be as successful as if they were represented. However we consider that this consideration is outweighed by the wider benefits to taxpayers, and clients with meritorious cases, by not funding these weak or low priority cases. In other words, the value of any improved outcomes would be outweighed by the cost of doing so in a resource-intensive way through legal aid.

Fairness and Equity

- 2.8 We consider that fairness and equity will be enhanced by ensuring that legal aid resources are diverted towards those who are eligible for help, and towards those who have meritorious cases, and away from those who are receiving legal aid fraudulently, or those who have unmeritorious cases.

3. Cost Benefit Analysis

OPTION 1 - Do Nothing

- 3.1 The Impact Assessment and HMT Treasury Green Book Guidance requires that all options are assessed relative to a common "base case." The base case for this IA is to "do nothing", i.e. none of the reform proposals are carried out. Hence the status quo is maintained and no new costs or benefits are incurred.
- 3.2 If we do not make any changes to the civil legal aid funding rules, then there is a risk that finite civil legal aid resources will be wasted on unmeritorious cases or ineligible clients. This is because e.g. cases may be funded on the basis of benefits flowing to others without any realistic prospect of those benefits flowing to others, or funding may be granted to multi-party actions where only minor damages are sought; or funding may be granted to ineligible clients because their opponents are unaware that they can make representations about their eligibility to the LSC.
- 3.3 The net present value of the base case is zero.

OPTION 2 - Proceed with Consultation Proposals

Description

- 3.4 This option is to proceed with all of the proposed civil changes set out in *Legal Aid: Refocusing on Priority Cases*. An estimate of the cost, benefits and net impact of this option is set out in the Draft Impact Assessment annexed to that consultation paper (available at the internet link above).

OPTION 3 - Proceed with Revised Proposals (preferred option).

Description

- 3.5 This option is to proceed with a revised package of reforms following consideration of the consultation responses and representations received from interested parties. The details of each change are set out below.

Benefits

- 3.6 The overall economic benefits of this option are legal aid savings of between £5m -£5.8m per year (cash / gross). This would affect approximately 1100 legal aid clients (although 900 of these are clients who are not financially eligible and should not be receiving legal aid). In 2008-09 civil legal aid delivered 1.3m acts of assistance, including granting funding certificates in 150,000 cases, so the affected represents a very small proportion of those helped by civil legal aid each year.

Costs

- 3.7 The overall economic costs of this option are approximately £150,000 one-off administration costs to implement, plus additional administration running costs of approximately £270,000 per year (cash / gross). In addition, other economic costs of this option are a potential reduction in income for civil legal aid providers of a combined total of £5m - £5.8m per year (cash / gross), although £2.7m of this is from clients who are financially ineligible and should not receive funding in the first place.

Net Impact

- 3.8 The overall net economic impact of this option is significant net savings of between £4.7m - £5.5m per year. This is a significant sum of public money, but is a relatively small proportion of the overall amount we spend on civil legal aid each year. In 2008-08 we spent £1.1bn (gross / cash)¹ on civil legal aid, so these changes represent a reduction in civil legal aid expenditure of just 0.5%.

DETAILS OF OPTION 3

General Costs

- 3.9 These changes would incur some one-off administration costs to the LSC due to training and updating their IT systems, which are estimated at £150,000. In addition running additional running costs of £270,000 are anticipated .
- 3.10 This proposal would incur some minor administration costs to providers to adjust to change and familiarise themselves with the new arrangements. Given the variation in providers' staffing, geographical locations, and business structures, it is not possible to accurately assess the likely administration costs to providers.

General Benefits

- 3.11 There are no additional economic benefits beyond those identified below.

¹ The fund also recovered £199m (cash), meaning that net expenditure (cash) on civil legal aid was £914m.

Wider Public Interest and Borderline Cases

Description

- Establish a 'special controls' regime for individual cases or types of cases which differ from the mainstream of civil legal aid cases.
- Clarify the definition of 'wider public interest' so that there must be a realistic prospect of benefits flowing to others if the case is to be granted legal aid on that basis.
- Merge the existing Public Interest advisory Panel (PIAP), and Multi-Party Action (MPA) committee into a new Special Controls Review Panel, and expanding its remit to cover borderline cases subject to special controls.
- Following monitoring throughout 2010, set a budget for borderline special controls cases, as part of the High Cost Cases Budget, with funding priorities set by Ministers.

Benefits

- 3.12 The annual economic benefits of this option are legal aid savings of £250,000 per year from ceasing to fund approximately 10 individual cases in this category, and a further £250,000 from ceasing to fund 1 Multi-Party Action.

Costs

- 3.13 The economic costs of this option are a potential reduction in income for civil legal aid providers of a combined total of £500,000 per year.

Section 8 Damages Cases

Description

- For claims brought under section 8 of the Funding Code, which are primarily about damages, and which are part of an MPA, impose a tighter merits test, so that funding will only be granted for Investigative Help or Legal Representation if the likely damages for the client exceed £5000.

Benefits

- 3.14 The economic benefits of this option are legal aid savings of £250,000 per year, based on ceasing to fund 1 MPA every 2 years, with a typical cost of £500,000. The LSC estimates that on average an MPA of this nature will cover 30 clients

Costs

- 3.15 The economic costs of this option are a potential reduction in income for civil legal aid providers of £250,000 per year.

Out of Scope Damages Cases

Description

- For out-of-scope claims which are part of an MPA and which are primarily about damages, we will be imposing a tighter merits test, so that funding will only be granted for Investigative Help or Legal Representation if the likely damages for the client exceed £5000.

Benefits

- 3.16 The economic benefits of this option are legal aid savings of £250,000 - £500,000, based on ceasing to fund 1 MPA every 1-2 years. The LSC estimates that on average an MPA of this nature will cover 30 clients.

Costs

- 3.17 The economic costs of this option are a potential reduction in income for civil legal aid providers of £250,000 - £500,000 per year.

Prison / Probation Complaints Procedures in Damages Claims

Description

- Proceed to clarify section 8.3.4 of the Funding Code, which requires litigants to consider whether the issue should first be raised as a police complaint, to also refer to the prison and probation complaints schemes, and the Prisons and Probation Ombudsman

Benefits

- 3.18 The economic benefits of this option are negligible because providers should already be using complaints and ombudsman schemes where appropriate. This change clarifies the criteria to ensure that prison and probation complaints procedures are considered alongside police complaints procedures. This proposal should be read alongside the proposal to restrict criminal legal aid for treatment advice, which was published separately on 14 December.

Costs

- 3.19 The economic costs of this option are nil.

Inter Partes Costs in Appeals

Description

- Proceed to amend the definition of 'likely costs' in the Funding Code to clarify the LSC's ability to take into account the potential costs against the fund at *inter partes* rates.

Benefits

- 3.20 The economic benefits of this option legal aid savings due to LSC ceasing to fund between 10 and 20 cases per year on the basis that the real likelihood of a costs order would not justify the benefit to the claimant. These would primarily be in damages cases on appeal, where the claimant and defendant costs would exceed the value of the claim. The LSC estimates that this would reduce legal aid expenditure by approximately £250,000–£500,000 per year (at £25,000 per claim).

Costs

- 3.21 The economic costs of this option are a potential reduction in income for civil legal aid providers of £250,000 - £500,000 per year.

Judicial Review Presumption of Funding

Description

- Abolish the separate Funding Code test for post-permission cases. In future the same Funding Code test will apply for legal representation in judicial review cases, irrespective of the permission status of the case.

Benefits

- 3.22 The economic benefits of this option are legal aid savings of £75,000 from ceasing to fund an estimated 5 cases each year. These are likely to be potentially expensive claims with costs of around £15,000 each.

Costs

3.23 The economic costs of this option are a potential reduction in income for civil legal aid providers of £75,000 per year.

Judicial Review Personal Benefit

Description

- Clarify the Code so that funding for judicial review will only be granted where the client is seeking a material benefit for themselves or their family (unless it is an environmental case).

Benefits

3.24 The economic benefits of this option are legal aid savings of £50,000 - £100,000 per year from ceasing to fund 1 or 2 high cost cases at a cost of £50,000 each.

Costs

3.25 The economic costs of this option are a potential reduction in income for civil legal aid providers of £50,000 - £100,000 per year.

Referral to SCU

Description

- Expand SCU referral criteria so they will also deal with cases appealing to the Supreme Court, and borderline cases which depend on the case being of significant wider public interest or raising significant human rights issues in order to receive funding

Benefits

3.26 The economic benefits of this option are due to legal aid savings from closer management of potentially high cost Supreme Court cases, and from cases which depend on complex issues around wider public interest or human rights issues, by the Special Cases Unit. Given the range of cases dealt with by SCU it is not possible to quantify these savings.

Costs

3.27 This proposal would impose an additional burden on providers as those whose cases come under SCU management would be required to produce a costed case plan. However, most providers would only handle such cases occasionally, so we consider this to be a small, manageable additional burden.

Inviting Representations Before Granting Civil Legal Aid

Description

- Give 14 days for the other side to make representations about the financial eligibility of the applicant before granting funding, except for emergency cases, and to first apply this to private law family cases, with exceptions.

3.28 The LSC has provided a breakdown of the types of cases where representations were received in 2007-08.

breakdown of sample of 1382 representations in 2007-08			
	financial means of applicant	merits of applicant's case	means & merits
Private Family	556	377	66
Housing	35	129	17
Debt	4	16	5

Clinical Negligence	1	24	0
Consumer	4	11	0
Employment	5	1	2
Other	59	61	9

- 3.29 This shows that 72% of all representations are received in family cases, 13% are in housing, 2% in debt, 2% in clinical negligence, 1% in consumer, 0.5% in employment and around 9% in other categories.
- 3.30 The private law family cases cover child contact/residence, prohibited steps orders, adoption, ancillary relief, domestic violence, etc. The representations will usually come from a family member. Legal aid in public law children cases is provided without reference to means, and with only a very limited merits test, and therefore representations in these cases are not represented in these figures.
- 3.31 The housing proceedings cover eviction proceedings, allocation of tenancies and possession cases. The representations generally come from the local authority, and these generally concern the merits of the case. In a smaller number of cases, landlords sometimes make representations about the means of tenants.
- 3.32 If we drill down further, we find that the majority of representations are received in these areas:

<i>type of representation</i>	<i>prevalence</i>
financial means in private family cases	40%
merits of case in private family cases	27%
merits of case in housing cases	9%
means & merits in family cases	4.7%
financial means in housing cases	2.5%
merits of case in clinical negligence	2%

- 3.33 The LSC has also provided figures for the outcome of representations based on the same sample. The table below shows the proportion of representations which were found to be of substance for the areas with the highest prevalence of representations.

outcome of representations in most prevalent areas	
type of representation	funding changed following representation
financial means in private family cases	61%
merits of case in private family cases	41%
merits of case in housing cases	34%
means & merits in private family cases	50%

- 3.34 These tables shows that, under the existing system, the most prevalent representations concern means in family cases, and that these are also the type of representations most likely to be of substance.

Inviting Representations on Financial Eligibility in Private Law Family Cases

- 3.35 In 2007-08 the LSC received 3263 representations. According to the sample of 1382 cases, 45% of the sample involved means representations in family cases (622 of 1382 cases). Assuming that proportion is constant across all of the representations received in 2007-08, there would have been 1468 means representations in private family cases in 2007-08 (45% of 3263).
- 3.36 The LSC granted approximately 75,000 funding certificates for private family law cases in 2007-08, so representations about means were received in 2% of private law family cases in 2007-08.

- 3.37 The number of representations appears to be falling. 3263 were received in 2007-08, but only 2459 in 2008-09.
- 3.38 Applying the same proportion of 45% for family means representations to the number of representations received in 2008-09 suggests that there were 1106 means representations in family cases in 2008-09. In 2008-09, the LSC granted received 150,056 applications for family funding certificates. It granted 120,468 of these certificates, 82,000 of which were for private family law cases, which suggests that the proportion of family certificates where means representations were received in 2008-08 was 1.4% (down from 2%).
- 3.39 The new requirement will be applied first to private law family cases, except for domestic violence cases, or cases covered by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. We estimate that in 2008-09 64,000 of the 82,000 family private certificates granted were for private law family cases to be covered by the new process.
- 3.40 The Scottish Legal Aid Board (SLAB) operates a scheme similar to that which we will implement. The SLAB received 2750 representations in its 17,000 applications for funding in 2008-09 (representations in 16% of applications). Of these representations, 37% involved the financial means of the applicant (so there were means representations in 6% of the applications received (37% of 16%)).
- 3.41 If the new process we will implement increases the number of representations about means that the LSC receives by the same proportion (6%), then we would expect approximately 3840 representations from the 64,000 family private certificates. This would increase the number of private law family means representations that the LSC must consider by 2700 (from 1106 to 3840).
- 3.42 Assuming that the LSC would have otherwise received the same number of representations in 2010-11 as it did in 2008-09 (2459), this new process will increase the overall number of representations received by LSC to 5100 – a rise of just over 100%.
- 3.43 Currently representations about means in family private cases are found to be of substance approximately 50-60% of the time (see table above). Where means representations are found to be of substance, this most frequently results in the certificate being revoked, which means any legal aid costs must be repaid.
- 3.44 Assuming that the new process increases the number of vexatious representations received, we estimate that under the new process approximately 30% of representations will be found to be of substance. This would suggest that of the additional 2700 representations about family private means received, 900 of these will be found to be of substance, resulting in the revocation of the certificate in most of these cases. According to the LSC 2008-09 Annual Report, the average cost of a private family case in 2008-09 was £3023. Therefore this new process could produce civil legal aid savings of £2.7m each year. This is dependent on a number of assumptions, so we would look carefully at the actual efficacy of the pre-grant representations system before expanding it beyond private law family cases.

Benefits

- 3.45 The economic benefits of this option are potential legal aid savings of £2.7m per year, based on revocation of funding in 900 private law family cases each year where the applicant was financially ineligible.

Costs

- 3.46 This change will require a consequent increase in staff resources within the LSC to process the new representations. The LSC have estimated that there would be a one-off IT cost of approximately £100,000, and then additional admin costs, including staff costs of approximately £270,000 per annum.

- 3.47 The economic costs of this option are a potential reduction in income for civil legal aid providers of £2.7m per year, but this would be for cases for ineligible clients who should not have received legal aid in the first place.

Independent Funding Adjudicators (IFA) and SCU Cases

Description

- Limit the power of IFAs so they will no longer be able to determine the cost / benefit of SCU cases, but will be able to assess (i) likely damages, or (ii) any other benefit or remedy the client is likely to achieve in the proceedings.

Benefits

- 3.48 The economic benefits of this option are legal aid savings of £350,000 per year, based on a legal aid being refused in around 20 cases each year, at an estimated average case cost of £17,500.

Costs

- 3.49 The economic costs of this option are a potential reduction in income for civil legal aid providers of £350,000 per year.

Community Action Contributions

Description

- Proceed in community actions to align the proportion of the costs which are paid for by legal aid with the proportion of the local population who are eligible for legal aid.

Benefits

- 3.50 The economic benefits of this option are legal aid savings estimated by the LSC to be £500,000 per year, either because a small number of cases (LSC estimate 5 per year) which would not proceed due to lack of community support, or by reducing LSC's contribution towards some community actions at first instance and at appeal.

Costs

- 3.51 The economic costs of this option are a potential reduction in income for civil legal aid providers of £500,000 per year.

Restricting Legal aid for Non-Residents

Description

- Exclude from routine access to civil legal aid those who are non-residents (other than for immigration and asylum cases).
- This will not be applied on the basis of 'lawful residence', but 'residence' would mean that the client states that they are resident within the United Kingdom, the British Overseas Territories, the Crown Dependencies, Macao or Hong Kong and is able to demonstrate this by providing an address for themselves within that territory which is not the address of their solicitors or legal representative.
- This change would not affect funding for international child abduction cases, international child contact cases, international protection of vulnerable adults and international protection of children cases, or for forced marriage cases brought by the victim or their representative.
- This change would exclude those who permanently reside outside the EU or other exempt territories, but who are seeking to bring proceedings in the courts of England and Wales.

- This change will also exclude those non-residents who are present in England or Wales. This would not be applied on the basis of 'lawful residence', but would exclude those here on holiday, or those who were only here to conduct litigation. Funding will continue for non-residents present in the country for domestic violence, emergency housing, mental health or mental capacity detention, or child protection proceedings.

- 3.52 In 2008-09 LSC estimates that 108 civil representation recipients were non-residents in the UK. Of this number 73 (67.6%) had applied from within the EU, and 35 (32.4%) had applied from outside the EU. Of the 73 applicants from within the EU, the vast majority are likely to be covered by European Legal Aid Directive (2002/8/ESC) of 27 January 2003, so this change will not affect them. There may be further clients who are listed for legal aid purposes under a UK address (e.g. c/o their solicitor), so the number of applications being made from outside the EU may be higher.
- 3.53 In addition, this proposal would apply to those from outside the EU who were on holiday here, or who had only come here to conduct litigation. Some of these clients may included within the estimate of 35 above who gave addresses outside the EU. We consider that this change will apply to a small number of clients – probably no more than 100 - who will no longer have routine access to legal aid in England and Wales. It will remain open to these applicants to apply for exceptional funding under section 6(8)(b) of the Access to Justice Act 1999, and a legal aid solicitor will be able to advise them about this process and make an application on their behalf.

Benefits

- 3.54 The economic benefits of this option are legal aid savings of £150,000 – £400,000, based on ceasing to fund approximately 50 – 100 cases each year, and an average certificate cost of between £3000-£4000 for non-family and family private cases in 2008-09.

Costs

- 3.55 The economic costs of this option are a potential reduction in income for civil legal aid providers of between £150,000 - £400,000 per year.

SUMMARY OF OPTIONS

- 3.56 Option 3 is preferred as we consider that it strikes the correct balance between ensuring that limited legal aid funds are directed to meritorious cases, and taking account of the concerns raised with us by consultees. This package will secure some relatively small savings through refocusing funding criteria, but will help to ensure that the resources we devote to civil legal aid are expended on appropriate cases. This package will secure further savings by improving the LSC's procedures to detect fraudulent applications early on, through closer working with the Department for Work and Pensions, and by conducting checks early on into applicants' financial eligibility.

4. Enforcement and Implementation

- 4.1 These changes will be implemented by changes to the Funding Code Criteria (which require the affirmative approval of Parliament), changes to the Funding Code Procedures (which are subject to the Parliamentary negative resolution procedure), and changes to the LSC's Funding Code guidance.
- 4.2 In addition, there will be changes made to schedule 2 to the Access to Justice Act 1999 (which require the affirmative approval of Parliament), and to the Lord Chancellor's Direction on the Scope of the Community Legal Service.
- 4.3 When these changes are brought into force they will be operated and enforced by the Legal Services Commission through its caseworkers and Special Cases Unit staff.

5. Specific Impact Tests

Rural proofing

- 5.1 We do not consider that these changes will have any impact on rural communities.

Environmental tests

- 5.2 We do not consider that these changes will have any impact on the environment.

Competition Assessment

- 5.3 We do not consider that these changes will have any significant impact on competition.

Small Firms Impact Test

- 5.4 A significant number of solicitors' firms would likely qualify as small businesses. According to figures from the Law Society², on 31 July 2009 there were 115,475 solicitors holding practicing certificates. 73.7% of solicitors (85,128) with practicing certificates work in private practice. In 2009 there were 10,362 solicitors' firms. The vast majority of firms are reported to be small, with 85.3% of them having four or fewer partners. Sole practitioners' account for 40.7% of firms, and employed 7.9% of private practitioners. By contrast, the 2% of firms with 26 or more partners employed 41.8% of all solicitors in private practice.
- 5.5 According to figures from the Bar Council³, at December 2008 there were 12,136 self-employed barristers in England and Wales. There were also 690 barristers' chambers, which could arguably qualify as micro (1-9) or small (10-49) businesses, and 351 sole practitioners. Excluding the sole practitioners, the average chamber has 17 barristers (11,785 divided by 690 chambers), which would mean that the average barristers' chamber may qualify as a small business (unless they should be seen as aggregates of sole traders).
- 5.6 As set out above, these changes are likely to reduce civil legal aid expenditure by approximately £5m - £5.8m per year. In 2008-08 we spent £1.1bn (gross / cash)⁴ on civil legal aid, so these changes represent a reduction in civil legal aid expenditure of just 0.5%. We do not therefore think that these changes will have any significant impact on small businesses.

Legal Aid and Justice Impact Test

- 5.7 These changes will have an impact on legal aid, as set out above. We do not consider that these changes will have a significant adverse impact on the justice system.

Human Rights

- 5.8 We do not consider that these proposals will have an adverse impact on human rights. In most cases, civil legal aid is not a right in the context of either the European Convention on Human Rights or the Human Rights Act 1998. Restrictions on the availability of legal aid including means testing, scope restrictions and the merits criteria are legitimate and necessary restrictions which ensure that legal aid funds are concentrated on the most deserving cases.

² *Trends in the solicitors' profession - annual statistical report 2009*, The Law Society

³ *The Bar Council Annual report & Accounts 2008*

⁴ The fund also recovered £199m (cash), meaning that net expenditure (cash) on civil legal aid was £914m.

6. Equality Impact Assessment

Name of the legislation, policy or service being assessed

- 6.1 This is the full Equality Impact Assessment for the package of changes to the civil legal aid funding rules set out in the *Legal Aid: Refocusing on Priority Cases* consultation paper.

Statutory Duties

- 6.2 Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to how they will eliminate unlawful racial discrimination, promote equal opportunities and promote good relations between people from different groups. The MoJ is also under a specific duty to conduct race equality impact assessments of its policies in relation to the public duty to promote race equality and within this, to identify whether there is a differential and adverse impact on particular racial groups.
- 6.3 The Disability Equality Duty came into force on 4 December 2006. The MoJ has published a Disability Equality Scheme, which is available at our website at: <http://www.justice.gov.uk/publications/equality-schemes-2008.htm>.
- 6.4 This sets out the actions that the MoJ will be taking to promote disability equality. When carrying out our functions, the MoJ must have due regard to the duties placed upon us by the Disability Discrimination Act 2005. From 4 December 2006, the MoJ is also under a specific duty to conduct disability equality impact assessments of its policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.
- 6.5 The Equality Act of 2006 places a statutory duty on all public authorities when carrying out their functions to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. The MoJ also has a specific duty to conduct gender equality impact assessments of its policies in relation to the public duty to promote gender equality and within this, to identify whether there is a differential and adverse impact on people of different genders.

What is the main aim or purpose of the proposed new or changed legislation, policy, strategy, project or service and what are the intended outcomes?

- 6.6 The policy objective is to ensure that the funds that we expend on civil legal aid are correctly targeted on meritorious cases. Successful outcomes will include a reduction in civil legal aid expenditure on weaker cases, or on cases where clients are receiving legal aid fraudulently. Resources will remain available for stronger cases or those with a higher priority for funding.

What existing sources of information will you use to help you identify the likely equality on different groups of people?

- 6.7 We have used data on client diversity collected by the Legal Services Commission. The LSC recently published a report on the impact of moving from hourly rate to fixed fee remuneration for civil legal aid work, *Phase 1 Civil Fee Schemes Review* (April 2009). The review included diversity profiles of clients who receive civil legal aid in England and Wales.

Civil legal aid clients: Gender

- 6.8 The report collated data on recent client gender using a fourteen-month period of data (October 2007 – November 2008). The report found that the gender profile of civil legal aid clients was as follows:

<i>Gender of civil legal aid clients over 14 months</i>		
Male	189,845	41.1%
Female	270,892	58.7%
Unknown	860	0.2%

- 6.9 This data shows that the majority of civil legal aid clients are female. Figures from the Office for National Statistics (ONS) show that in mid-2008 the UK population was 61.38m, of which 30.15m (49%) were male, and 31.23m (51%) were female. This suggests that a higher proportion of civil legal aid clients are female compared to the general population.

Civil legal aid clients: Race

- 6.10 The report collated data on recent client ethnicity using a fourteen-month period of data (October 2007 – November 2008). The report found that the ethnicity profile of civil legal aid clients was as follows:

<i>Ethnicity of civil legal aid clients over 14 months</i>		
White British	326,879	74.8%
BME	82,132	18.8%
Unknown	28,100	6.4%

- 6.11 The analysis on ethnicity does not include clients from the Immigration and Asylum category of law. This is because an overwhelming majority of Immigration clients will be from a Black Minority Ethnic (BME) background making any comparison with non-BME clients meaningless. Furthermore, a large proportion of clients from Immigration and Asylum providers were reported as 'unknown'.

- 6.12 This data shows that a significant proportion of (non-immigration/asylum) clients are from a BME background. According to 2001 census figures from the ONS, 92.4% of the UK population is white, and 7.6% is of a minority ethnic background. Although these figures date from 2001 (a new census is due in 2011) and the ethnic minority population may have changed, this does suggest that civil legal aid clients are much more likely to be from a BME background compared to other members of the population.

Civil legal aid clients: Disability

- 6.13 The report collated data on recent client disability using a twelve-month period of data (October 2007 to September 2008). The shorter period used for analysis relating to disability is due to data transference issues between the LSC's old and new management systems. The report found that the disability profile of civil legal aid clients was as follows:

<i>Disability of civil legal aid clients over 12 months</i>		
Not Disabled	215,669	59%
Disabled	102,218	28%
Unknown	47,145	13%

- 6.14 This data shows that a very significant proportion of civil legal aid clients declare themselves to be disabled. According to figures from the ONS, in February 2003 2.5m people were receiving Disability Living Allowance and 1.3m were receiving Attendance Allowance. In mid-2003 ONS estimates that the UK population in mid-2003 was 59.5m, which suggests that disabled persons make up roughly 6.5% of the population. Even allowing for a significant rise in the disabled population between 2003 and 2008, this suggests that civil legal aid clients are much more likely to be disabled compared to other members of the population.

Impact on civil legal aid clients: Age

- 6.15 The report collated data on recent client age using a fourteen-month period of data (October 2007 – November 2008). The report found that the age profile of civil legal aid clients was as follows:

<i>Age of civil legal aid clients over 14 months</i>						
	0-16	17-25	25-34	35-49	50-64	65+
	7640	67,183	122,918	173,959	72,122	17,775
	1.66%	14.55%	26.63%	37.69%	15.62%	3.85%

- 6.16 This data shows that the age groups most likely to access civil legal aid are 25-34 and 35-49.
- 6.17 We do not hold any information on the sexual orientation of clients. We do not hold any information on the religion and beliefs of clients. We sought input and data from consultees on this issue, but no information was made available. We therefore currently have no reason to believe that these changes will have an adverse impact on people of a particular sexual orientation or beliefs.

Who did we consult?

- 6.18 We conducted an open 12-week consultation during which we consulted equality and diversity representatives including the Equality & Human Rights Commission, Rights of Women, the Association of Women Solicitors, the Society of Black Lawyers, the Black Solicitors Network, and the Disability Law Service.
- 6.19 We received formal consultation responses from the Equality & Human Rights Commission, Disability Law Service, Refugee Action, The Refugee Council and Welsh Women's Aid. We also received responses from solicitors, barristers and their representative bodies, some of which raised equalities concerns about the impact of our changes.

Response to Consultation

- 6.20 Consultees were concerned that these changes would potentially impact on equality groups. In particular many consultees, including Matrix Chambers, Bindmans LLP and Justice, were concerned that the proposal to exclude non-residents from routine access to civil legal aid was discriminatory, and would not allow us to meet our statutory duty to promote equality of opportunity.
- 6.21 Refugee groups, including Refugee Action and the Refugee Council, and others were concerned that if this proposal was applied on the basis of a 'lawful residence' test it would exclude large numbers of vulnerable persons.
- 6.22 Respondents, including the Young Legal Aid Lawyers and Legal Aid Practitioners' Group, were also concerned that restrictions on damages claims brought under section 8 of the Funding Code would have a disproportionate impact on those seeking to bring sex, race or disability discrimination claims, which would have an adverse impact on equality groups.
- 6.23 We proposed that, in assessing public interest, we take into account the disadvantages to society as well as potential benefits to society of proceedings. Some respondents, including Liberty, the Immigration Law Practitioners' Association, and Justice, were concerned that this would mean that important minority interests would be sidelined by the concerns of the majority.

Mitigating Action

- 6.24 With regard to the proposal to exclude non-residents from civil legal aid, this will not be based on a test of 'lawful residence', and British citizens who are non-resident will be excluded under the same test. We have considered off-setting any negative impact by retaining legal aid provision for equality groups. However, we consider that this would constitute direct discrimination of male, white or non-disabled clients, and is therefore inappropriate.
- 6.25 For damages claims brought under section 8 of the Funding Code, we are not proceeding with changes to individual cases, and, where we are restricting funding for low-value in-scope Multi-Party Actions of this nature, we have said that we will retain funding for low-value discrimination and child abuse cases, so these will continue to be funded as at present.
- 6.26 We are no longer proceeding with the proposal to assess disadvantages as well as benefits in assessing public interest.

Assessment of Impact

Impact on Civil (non-family) Clients

- 6.27 Civil clients will primarily be affected by the following changes:
- Changes to public interest and human rights cases, special controls regime, restructuring of funding committees
 - Restrictions on section 8 damages cases which are part of an MPA
 - Restrictions on out of scope MPA damages cases
 - Inter partes costs in appeals
 - Abolish the judicial review presumption of funding
 - Requiring personal benefit for judicial review funding
 - Expanding SCU referral criteria
 - Limiting IFA powers to determine issues in SCU cases
 - Community Actions
- 6.28 The effect of these changes is to cease funding for approximately 150 clients. Any reductions to civil legal aid are likely to have an adverse impact on female, BME and disabled persons, as these groups are significantly represented within civil legal aid clients.
- 6.29 We have considered whether the policy can be implemented in a different way to mitigate any adverse impact. We will retain funding for low-value sex, race or disability discrimination claims. We have also decided not to proceed with changes to the public interest test to consider disadvantages to the public, because we were concerned that, among other things, this could have a disproportionate impact on equality groups. We have also considered whether we could go further to mitigate any potential impacts by, for example, retaining funding for certain equality groups, but we consider that this in itself would have an adverse impact on other equality groups, and would be directly discriminatory.
- 6.30 Civil legal aid is intended to assist people with a range of civil legal problems. It is available for a wide range of cases, and the rules for granting legal aid are set out in the Funding Code and other documents, including regulations.
- 6.31 We spend every large sums on civil legal aid. In 2008-08 we spent £1.1bn gross (£914m net) on providing 1.3m civil acts of assistance. Given the very large sums which are expended on legal aid, it is appropriate that the system through which this money is allocated to cases is subject to scrutiny from time to time.
- 6.32 We consulted on a range of proposals which had the legitimate aim of reforming the funding rules to ensure that funding is directed on meritorious cases. Our changes will potentially affect 150 civil clients, and will mean that they are not able to access legal aid for their cases.
- 6.33 We consider that these are proportionate changes, which affect a very small number of clients (150 of 1.3m), and which have been carefully targeted at weaker cases, or on cases which are not a priority for the scheme.
- 6.34 In a limited number of cases the LSC may decline to fund a weak case. This decision is subject to review and, ultimately, it could be judicially reviewed itself if it was considered to be wrong. Therefore we consider that the effect of these changes will be to exclude weak or low-priority cases, and we think any adverse impact on clients is justified because (a) we have a legitimate aim, (b) we are implementing targeted proportionate changes to achieve that aim, (c) we have included mitigation where possible, and (d) it is unlikely that clients will benefit from being helped to bring a weak case that will fail.

Impact on Family Clients

- 6.35 Family clients will primarily be affected by the following changes:
- Inviting representations before granting funding
- 6.36 The effect of this change is to seek views from opponents in private law family cases about whether the civil legal aid applicant is financially eligible for legal aid. This works successfully under the existing voluntary representations scheme, and a high proportion of representations lead to the applicant's funding being changed, restricted, withdrawn, or revoked.
- 6.37 This change is likely to introduce a small delay in the granting of legal aid in these cases, because the LSC will need to give the opponent an opportunity to respond. This change is also estimated to uncover a further 900 clients who are fraudulently in receipt of legal aid. Some of these applicants may also be fraudulently in receipt of welfare benefits, and this change will also help to uncover that fraud.
- 6.38 Any reductions to civil legal aid are likely to have an adverse impact on female, BME and disabled persons, as these groups are significantly represented within civil legal aid clients. However, in this case we consider that this change is justified. It is intending to achieve a legitimate aim – that of uncovering unlawful fraud and ensuring that funding is instead granted to eligible clients. We also think we are making a proportionate and targeted approach to achieving that aim by rolling out this process in the private law family area first. It is in this area that existing representations are most likely to be of substance, and where the opponents are most likely to have accurate knowledge of the applicant's finances.

Impact on Non-Residents

- 6.39 Non-residents will be primarily affected by the proposal to restrict routine access to civil legal aid for non-residents (other than for asylum & immigration matters).
- 6.40 The effect of this change will be exclude approximately 50-100 clients per year from accessing the civil legal aid scheme. Any excluded case can make an application for exceptional funding which will be determined by the LSC.
- 6.41 This change will apply equally to both British citizens who are non-residents, and citizens of other nations who are non-residents. Those excluded would include applicants who resided in European countries outside the European Union, India, Russia, the United States, etc.
- 6.42 The LSC's data for overseas applications in 2008 indicates that only a small number of civil legal aid applicants are from outside the EU (i.e. 35). The data is insufficiently detailed to draw firm conclusions about the make up of non-residents applying for legal aid, but, for illustrative purposes, the largest number of non-EU applications are from the USA (8), followed by Australia (5) and South Africa (5), then the Ukraine (3), Pakistan (3), and Canada (2). There are also a range of single applications from various countries.
- 6.43 There is a risk that denying funding to these applicants will have an adverse impact on women, BME or disabled persons. We have considered how we might change the proposal to mitigate any impacts. Funding for excluded non-residents will still be available in principle for 'exceptional funding' under section 6(8)(b) of the Access to Justice Act 1999. This would be granted where the case met the means and merits test and also the exceptional funding tests. Therefore in principle funding will continue to be available where it is needed for vulnerable out of scope clients.
- 6.44 Any reductions to civil legal aid are likely to have an adverse impact on female, BME and disabled persons, as these groups are significantly represented within civil legal aid clients. However, in this case we consider that this change is justified. It is intending to achieve a legitimate aim – that of ensuring that the civil legal aid scheme in England and Wales, paid for by UK taxpayers, is targeted appropriately.

6.45 The Government has a responsibility to ensure that public funds are used appropriately, and we consider that it is legitimate to place restrictions on who can access these funds. We consider that our change is a proportionate and targeted means to achieve our aim, and we have include a number of exemptions to ensure that funding is only limited where it is appropriate to do so.

Monitoring and Reviewing

6.46 We will seek to review the policy, together with the Legal Services Commission, after 12 months of operation. The LSC gathers information about the race, gender and disability status of legal aid recipients, and also details of which cases are funded or refused funding by the LSC.

Full EIA Approved by: John Sills, Head of Civil Justice and Legal Aid, MoJ

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Consultation Co-ordinator contact details

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

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

Julia Bradford
Consultation Co-ordinator
Ministry of Justice
102 Petty France
London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 7.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Advice Services Alliance
Alex and Shay Habel
Association of HM District Judges
Association of Prison Lawyers
Association of Personal Injury Lawyers
Association of Child Abuse Lawyers
Avon & Bristol Law Centre
Ben Hoare Bell LLP
Bhatia Best Solicitors
Bhatt Murphy Solicitors
Bindmans LLP
Birnberg Peirce and Partners Solicitors
Carlisle Community Law Centre
Christopher Barnett, Levenes Solicitors
Christian Khan Solicitors
Child Poverty Action Group
Citizens Advice
Community Law Partnership
Council of HM Circuit Judges
Criminal Law Solicitors Association
Devon Law Centre
Disability Law Service
Doughty Street Chambers
Education Law Practitioners' Group
Elizabeth Davey, Camden Community Law Centre
Equality and Human Rights Commission
Fiona Scolding & Denis Edwards, Hardwick Chambers
Fisher Meredith LLP
Forbes Solicitors
Friends of the Earth
Graeme Swain, Swain & Co Solicitors
Harrison Bunday Solicitors
Housing Law Practitioners' Association
Immigration Law Practitioners' Association
Irwin Mitchell Solicitors
John Scruton, Cartwright King Solicitors
Julian Coningham, Coningham's Solicitors
Justice
Keith Lomax, Davies Gore Lomax Solicitors
Law Centres Federation
Legal Aid Practitioners Group
Leigh Day & Co Solicitors
Liberty
Lisa Garnett, HMP/YOI Drake Hall
Lord Neuberger and Sir Anthony May
Lucy Scott Moncrieff, Scott-Moncrieff, Harbour and Sinclair Partners
Mackintosh Duncan Solicitors
Mandip Sandhu
Mark Leech, Institute of Prison Law

Maternity Action
Matrix Chambers
Medact
Médecins du Monde
Medsin
Mental Health Lawyers Association
Michael Purdon, Solicitor
National Association for Voluntary and Community Action
Northern Administrative Law Association
North Kensington Law Centre
Pannone LLP
Paul Bird, Wilson and Bird Solicitors
'Paul'
Peter Mahy, Howells LLP
Pierce Glynn Solicitors
Platt Halpern Solicitors
Police Actions Lawyers Group
Prisoners Advice Service
Prisoners' Consultative Committee, HMP Leyhill
Prison Reform Trust
Prisons and Probation Ombudsman
Public Interest Lawyers
Public Law Project
Public Law Solicitors
Refugee Action
Rikki Garg & Mitchell Woolf, Scott-Moncrieff, Harbour and Sinclair Partners
Serving Prisoner A
Serving Prisoner B
Serving Prisoner C
Serving Prisoner D
Serving Prisoner E
Sheila Carrick, Mowbray City Advocates
Shelter
Sharon Kelvie, Deputy Governor, HMP Wayland
Southwark Law Centre
Stephensons Solicitors LLP
The Bar Association for Local Government and the Public Service
The Bar Council
The Family Law Bar Association
The Howard League for Penal Reform
The Law Society
The Refugee Council
Welsh Women's Aid
Young Legal Aid Lawyers
Youth Justice Board for England and Wales

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