JUDICIARY OF ENGLAND AND WALES

THE ASSOCIATION OF HER MAJESTY'S DISTRICT JUDGES

Proposals for the Reform of Legal Aid in England and Wales;

Consultation Paper CP12/10:

A response from The Association of Her Majesty's District Judges.

INTRODUCTION

The Association represents all 434 District Judges in the County Courts and District Registries of the High Court in England and Wales.

District Judges are responsible for a substantial volume of the family and civil work that is dealt with in England and Wales significantly in relation to both public and private law proceedings under the Children Act and the case management and trial of civil claims embracing virtually the whole spectrum of civil and family. Those appearing before District Judges range from Queens's Counsel to litigants in person unable to read or write. All this means that the work of a District Judge has a significant, vital and lasting impact on the lives of large numbers of people, many of them disadvantaged and vulnerable

We accept that the Ministry of Justice ("MoJ") in common with all public bodies is faced with a difficult task in managing its resources in the face of substantial, increasing and competing demands including their own administrative costs whilst at the same time considering the impact of its proposals upon other services also funded from the public purse. We understand the responsibility that is entailed in discharging public funds but regard must be taken of the statutory duties as set out in the Access to Justice Act 1999 and in particular the obligations to ensure, within the available resources, that individuals have access to services that effectively meet their needs (s4(1) and promoting improvements in the range and quality of services provided(s4 (4)(a) .

Whilst the reforms of legal aid proposed in this paper will, on their own, almost certainly bring about a significant change to the legal landscape they are only part of the process of change underway. There is the Review of Family Justice; the drive towards mediation and of course the process of court closures .Whilst the MoJ may argue that the system of legal aid is ripe for substantive and substantial reform the pursuit of changes to the provision of funding before the FJR is concluded may lead to disjointed and incoherent policy.

We do not comment on the political decision making process that lies behind these proposals but focus on the effect of these proposals on the day to day county court business pointing out areas of concern and omission that may impact negatively and to suggest positive outcomes on and for that business.

We accept that submissions to this Consultation must be realistic. We note that the paper makes it clear that in replying to the paper "respondents are advised to have the overall fiscal context firmly in mind" and that "economic recovery is one of the main drivers". Equally, however, we note that "the Government believes that access to justice is a hallmark of a civilised society." (Paragraph 2.2).

The proposals relating to both scope and eligibility must mean fewer assisted litigants. If parties choose to litigate they will need to represent themselves. The paper makes much of other sources of advice being available. It may well be that such centres of advice will be just that; advice and not representation if, that is, they continue to exist. The financial imperatives that have led to this paper have consequences for funding of the voluntary sector with substantial cuts being proposed in the grant aided voluntary sector. Litigants will be representing themselves. The impact assessment recognises this – although anecdotal

evidence suggests that the assessment is flawed in its assertion that there will be no significant impact on operating costs.

We are concerned as to the reliability of the data used to validate the conclusions underpinning the funding proposals and would wish for research to be carried out before decisions are made .Judicial experience from courts across the country suggests that the number and degree of complex cases, particularly in disputes relating to children, is increasing .This trend will continue as we see an increase in mental health problems, drug and alcohol misuse and teenage parents. Such cases take longer to resolve; parties need access to qualified practitioners; families in crisis benefit greatest from the assistance of experienced advocates. It is only with the benefit of this representation that the parties' reasonable expectations of the court process can be met.

The Impact Assessment recognises that areas of litigation which might fall out of scope may be brought back into scope eg by raising allegations of domestic abuse in private law Children Act proceedings While the issue of domestic violence is extremely important In family cases this approach does risk encouraging parties to raise issues with a view to gaining funding rather than the proper determination of the case. It is an approach to funding that causes very real concern.

Furthermore the basis on which the funding triggers would be activated has not been addressed. It is perhaps an inappropriate way to approach such complex and important family and child welfare issues where the focus should be on the child.

We note the move towards a "simpler justice system; one which is more accessible to the public, which limits….the involvement of lawyers..." and that the litigant's ability to present their own case is taken as one of the factors in determining scope. It is, however, vital to guard against an environment where the quality of preparation, disclosure and evidence before the court is such that "judging" becomes a "lottery".

Whilst it is not the objective of these submissions to further the well being of lawyers it has to be recognised that unless those offering legal services to parties receive an appropriate and reasonable remuneration they will withdraw from the market place and that the dearth of experienced practitioners will damage the individuals' access to justice.

It is noted that judicial input in determining suitability for mediation is recognised in appropriate circumstances and is welcomed.

We are grateful for the opportunity to respond to this consultation but only respond to those issues raised in which we feel that we have a legitimate voice.

SUMMARY

We note that the aim of the proposal is said to be

"Our aim is to introduce a targeted scheme which directs resources to those areas of law we judge to be priority … based on an assessment of the nature of the rights involved, the client's ability to represent his or her own case and the availability of alternative assistance, remedies or funding."

The Association of District Judges does not consider that these proposals meet that aim in that they:-

fail to take sufficient account of the effect;

- of removal from scope of Private Law Children dispute,

- the effect on the legal process of a significant increase in Litigants in Person (LiP),

- the effect on the profession and therefore access to justice;

and places too great a reliance on

- domestic violence as a tool for determining merit entitlement

- the success (or willingness) of mediation

- the ability of (often voluntary) advice agencies to fill the void.

Family law –Children.

- Much is rightly made of the effect of domestic violence (para 4.64). However much of the difficulty within family litigation that presents as a result of domestic violence can just as readily be found in families that are blighted by drug or alcohol abuse or mental illness where there may be no violence and that is particularly true in private law children applications.
- Funding will remain within scope for urgent F.L..A applications but not for urgent private law children applications (para 4.69) when both applications are often made at the same time.
- No doubt for their own financial reasons, Local Authorities will often "piggy back" private law applications where social services have real concerns over welfare; it would seem perverse for such proceedings to be conducted by LiP.

- The Consultation document (CD) concerns itself with the position of the parties (para 4.207) ignoring that the paramount consideration is the welfare of the child. It is silent as to the entitlement of a respondent who otherwise falls within financial eligibility where the applicant receives public funding because of domestic violence. Will that respondent be entitled?

- The present Private Law Programme which involves experienced Cafcass Officers, Family Mediators and Family Lawyers to assist the parties is an effective and efficient method of assisting parties to reach safe agreements in respect of arrangements for children. Anecdotal evidence suggests that cases compromise at an earlier stage in proceedings where e both parties have access to good quality advice and representation.

The Association of Her Majesty's District Judges considers that private law Children Act applications should not automatically be removed from scope .We accept however that the criteria for entitlement would need to be developed and

- should be directed to the risk faced by the child as a consequence of or underpinning the application for the orders sought by the parents.

- would include the risks from relevant domestic abuse as the paper envisages but only where such abuse is relevant to the issues so avoiding the difficulties inherent in an unsophisticated system of domestic violence "passporting".

- allows parents to receive funding where the risks to the child are for reasons other than violence as identified above.

- switches the focus for determining scope away from the parties/parents to the needs of the child

- ensures that the court is better able to fulfil its' statutory obligation in ensuring the welfare of the child the paramount consideration.

So whilst private law applications would remain in scope

- many of those now receiving funding would no longer be entitled being directed to mediation following a successful judicial assessment or if necessary by robust determination by the court .at a preliminary hearing conducted on an inquisitorial basis.

- those applications in respect of children considered to be at risk as a consequence of their parent's behaviour/lifestyle would proceed with advice and representation. This would ensure a proportionate use of court time and the relevant information to allow a child focused decision to be made.

<u>Family Law - Ancillary relief</u>

The connection with Domestic Violence as the passport to funding is rather incongruous as

- Financial Proceedings often occur long after the parties have separated and often after any Domestic Violence has ceased.

- It would be unfortunate if there have to be hearings to make findings of fact in order to allow a party funding in a dispute for example as to whom should remain in the matrimonial home.

- It may engender a sense of unfairness if public funding is granted to a litigant to pursue an application for ancillary relief where there has been recent Domestic Violence but refused to another where there has been either historic violence – which may itself have been the cause for any delay or as suggested above no order sought again out of fear borne of the violence.

Many applications are resolved without a contested hearing following a successful Financial Dispute Resolution hearing (FDR).The system of First Appointment (FA) and FDR is dependent on Family Lawyers who not only ensure that the court is given the appropriate information to allow proper consideration of the s25 criteria but act as a proper source of independent and expert opinion on the indication given by the court.

We accept that the issues raised in ancillary relief proceedings are not always complex in every case, and that the extension of the ability to make interim lump sums is to be welcomed. However the blanket removal of ancillary relief from scope is inappropriate and should remain in scope where;

- representation will substantially shorten the court process,

- where the complexity of the asset holding position will require expert evidence over and above simple property valuations

- where the personal circumstances of the litigant are such that they would simply be unable to present their own case thus avoiding one of the principles of the CP on which removal from scope has been based being defeated.

In any event the statutory charge applies to recovered or preserved property and sums expended can be recovered. The legal aid fund is thus the provider of interest bearing loans rather than a funder of legal costs.

<u>General civil cases</u>

The Association of Her Majesty's District Judges accepts and acknowledges

- that civil legal aid in most cases should be a funder of last resort.

- that in many matters CFAs are available.

However

- CFAs are not presently available in obstetric cases such as brain asphyxia at birth. If legal aid funding is withdrawn bearing in mind that the consultation document acknowledges that it may be hard to secure CFAs in this area it will there will be no

access to the courts for people of limited means on behalf of children who are born disabled through errors at birth. Such cases are difficult if not impossible for a litigant in person to pursue and the absence of funding will thus give rise to significant miscarriages of justice and accordingly the Association considers that this type of case should continue to be funded as a funder of last resort.

Access to Legal aid funding and to Justice

The Association considers that those with the greatest financial and social difficulties should have access to resources to support meritorious litigation. It is acknowledged that a telephone **information** service may well be helpful particularly as a first point of reference. However detailed advice, particularly for the vulnerable members of society, is most effectively given in person. Face to face meetings not only allow a rapport and relationship of trust to be established but importantly, ensures that mental capacity can be considered as a preliminary issue. Furthermore it also enables full and proper consideration of relevant documents.

We accept that mediation is a powerful tool but is not suitable or appropriate in all cases eg violence, abduction or other emergencies or where there is a clear imbalance between the parties' abilities to undertake the mediation process. The approach therefore should be for widespread use of mediation assessments.

Importantly it must be kept in mind that unless the level of remuneration is sufficient for practitioners they will not be able to continue to offer legal advice to legally aided litigants and those that do may because of the remuneration levels only be able to offer a second best level of service. This raises serious access to justice issues – it is fundamentally wrong to tell a litigant that they are entitled to receive public funding to pursue/protect their legal rights only for them to find that there is no accessible practitioner to aid them. As a consequence such litigants will either be forced to abandon their legal remedy or pursue it in person. Each course brings about its own difficulties as we shall set out below.

Concerns also arise on the proposed treatment of expert fees.Whilst the ADJ acknowledges that experts' fees are a major component of legal aid expenditure and that steps must be taken to limit expert fees it is necessary to guard against"deserts" being created either geographically or by disciplne.

Litigants in person

If introduced it is certain that these proposals will lead to an increase in the number of litigants in Person ("LIPs") who appear in court. District judges because of the extent of their jurisdiction, not least in hearing small claims where most litigants are LIPs have substantial experience in considering the impact of the LIP on the allocation of court resources.

- Mediation or voluntary services will assist some LIPs but only if such services are properly funded and resourced. There has already been considerable impact through financial cuts on the voluntary sector.

- Some people who have legitimate claims will not seek any remedy or redress through the courts if no solicitor is available to them.

- Claims by LIPs are less likely to be pursued within the current regulatory system in consequence of ignorance or complexity of the rules .Furthermore it will be difficult for the court to determine the legal basis for claims or for a party to demonstrate a proper cause of action.

- Hitherto claims with little merit have been filtered out by advice from lawyers or by the LSC merits test. This will not happen in the future.

- Hearings, both case management hearing

as well as trials, will inevitably takes longer notwithstanding any increase in the judicial inquisitorial role. A LiP will not know how to prepare for such hearings.

- LIPs however carefully a judgement is phrased often have difficulty in implementing orders, particularly in Ancillary relief which will result in further, protracted satellite litigation. They also fail to understand any appeal process and pursue hopeless appeals.

CONSULTATION QUESTIONS

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

We agree with the proposals to retain legal aid in the proceedings listed.

We agree that Domestic Violence has very serious implications for the family and we agree that such cases should continue to be funded.

However, if Domestic Violence is to be a passport to Legal Funding this may have the following consequences:-

1 Allegations of Domestic Violence will be made, proceedings instituted and funding sought where previously no such allegations would be made. Such allegations could be made purely to obtain funding.

2 As the CD refers to an “order made” there may need to be more finding of fact hearings to achieve such an order.

3 Mediation may be considered unsuitable by mediation services where allegations of Domestic Violence made and specific orders sought.

4 Domestic Violence would become a paramount consideration with the consequence that parties would be concentrating on the past, rather than in, for example children cases, on parenting in the future.

5 Ancillary Relief claims are often pursued many months after the ending of the relationship and, often, many months after Domestic Violence has ceased. Such cases would not necessarily justify the availability of funding

We have some suggestions for other tests which we will identify in answer to later questions.

Question 2*: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party? Please give reasons.*

We agree.

We consider this to be a useful tool to fund the litigation.

However this may not provide funding save in the minority of cases.

The majority of Ancillary Relief cases in the County Court are concerned with only the equity in the Former matrimonial Home (FMH) and the value of a Pension. The capital is therefore inaccessible.

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

We do not agree in respect of the following categories.

<u>Private Law children</u>

We accept that, at present, there are a number of legally aided cases which if privately funded might not come before the courts.

However there are many cases where there are no allegations of Domestic Violence but there are serious issues which impact on the welfare of the children. These would include emotional abuse, sexual abuse, drug abuse and issues of mental illness.

If legal funding is not available and parents are in person the question arises as to how and on what evidential basis the Judge is to investigate matters in dispute and ensure the safety and welfare of the children.

The parties are unlikely to be able to instruct or indeed pay for the appropriate experts.

The Judge has no power to instruct experts him/herself or indeed funding to pay for them.

The inevitable consequence will be that Cafcass and Social Services will be required to provide more reports and there will be more S9(5) Guardians appointed.

This will be the only way to ensure the safety and welfare of the children.

Both Cafcass and Social Services are under financial pressure. Removing legal funding will merely save in one area of the public purse and increase costs in another.

The present Private Law Programme is an effective and efficient method of assisting parties to reach safe agreements in respect of arrangements for the children.

In most Courts there are experienced District Judges Cafcass Officers, Family Lawyers and Family Mediators at court to assist the parties.

In our experience most Family Lawyers promote agreement rather than encourage litigation.

We consider that legal funding should be directed at supporting this system. As District Judges we see this system working well.

Ancillary Relief

1 The present Ancillary Relief system with the use of FDAs and FDRs settles the majority of Ancillary Relief claims. This depends on experienced District Judges giving clear direction and Family Lawyers giving clear advice.

Our experience with this system shows that mediation is most useful when backed up by advice from lawyers. We note that mediation will continue to be funded in this area. We believe that to be effective legal advice should be available at the time the parties are before the court. In addition our experience is that most cases that do not settle involve a LIP.

It may be that public funding for advice should be available for the FDR and after Mediation. We believe this is most likely to assist the parties in reaching a settlement.

2 In disputes over a tenancy and who should remain in the home the losing party may become homeless.

Under para 4.75 it is recognised that some housing cases are sufficiently important to warrant funding. It seems to us illogical that if a person is at risk of losing a home by way of divorce he or she should not be funded but if at risk because of rent arrears he or she will be funded. The implications for the livelihood health safety and well being of the family will probably be the same.

3 Where there is a property owned by the parties the statutory charge applies and sums expended can be recovered. It is understood that the cost of legal aid for Ancillary relief for the last financial year was £19m. It is not clear whether this is the sum paid in legal costs to lawyers or the net cost after recovery of any statutory charges falling in. Clarification of this is essential.

If all funding for Ancillary Relief ceased immediately then there would be a net gain for the legal aid budget for many years in the future. Are figures available for the amount outstanding on statutory charges?

It may be that if a charge was placed on a property in a family dispute on receipt of a legal aid certificate then the funding would be an interest bearing loan. This would become payable at the conclusion of the case.

In those circumstances the legal aid fund would merely be a loan provider rather than a funder.

Clinical Negligence

Cases of clinical negligence are usually funded by CFAs save for obstetrics cases which are presently funded by legal aid. In para 4.167 the Government recognises that clients in these cases may find it hard to secure funding under CFAs. It takes the view however that there is insufficient justification to continue funding. The consequence of such a proposal if implemented means that a child born with serious disabilities as a result of negligence will have no access to the courts for compensation. Such cases are notoriously complex and can not realistically be pursued by a litigant in person and attempts to do so would require a disproportionate amount of court resources. There will be a huge knock on effect on other areas of the public purse namely welfare benefits social services and NHS.

We understand that cash expenditure on legal aid for clinical negligence in 2009 was £28m. We have no information on the recovery of costs and therefore do not know the net cost to the fund. This information should be provided.

It seems to us in this very specific area that funding should be provided.

The legal aid fund would be a funder of last resort. It is a question of calling to account a public body.

It would be helping the most vulnerable in society—children with profound disabilities.

Miscellaneous

1 There seems to be no mention of Schedule 1 applications under the Children Act and it is not clear what the proposals are for this type of litigation

2. It is proposed that s14 applications under TOLATA would be excluded. As these are likely to involve property the same comments apply as to Ancillary Relief in that funding could be provided as an interest bearing loan. Furthermore this area of law is difficult and evolving. LIPs are likely to increase the time each case takes from inception to delivery of judgement.

Question 4*: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide*

funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

We agree. It seems essential for the Government to comply with its treaty obligations.

***Question 5**: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.*

The test as proposed means that it is subjective. If the LSC take the view that it is suitable for alternate funding even if in reality it is not available funding will be refused. The test should be that funding would be refused only if it is suitable for alternate funding and that funding is in fact available.

***Question 6**: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.*

As District Judges we have more experience of LIPs than any other body. We see them in small claims, in possession proceeding, in insolvency and in family proceedings to name just a few. We agree that the removal of legal aid is likely to increase the number of LIPs who appear in court and make the following points;

1 Mediation services will assist some LIPs but only if such services are properly funded and resourced.

2 Some people who have legitimate claims will not seek redress or any remedy through the courts if no lawyer is available to them.

3 Many claims by LIPs will have an uncertain legal basis. Hitherto claims have been filtered by the LSC merits test and advice from lawyers.

4 The appearance of neutrality will be difficult to achieve in case management. At the CMC a District Judge will have to explain to the LIP whether the application, or indeed claim, has merit or incapable of succeeding without substantial amendment or evidence. This assistance may be perceived as bias by the parties. Simple steps such as the disclosure of documents or the preparation of witness statements have to be explained in great detail. LIPs do not generally summarize and do not succinctly explain the points in issue.

CMC's will takes much longer and time allowed for careful pre reading essential. Allowing 30 seconds per page an average medical negligence claim involving 500 pages at CMC will require 2 hour 30 minutes reading time.

LIPs rarely understand how to identify an expert or correctly instruct one. It may be suggested that a District Judge would have to draft the letter of instruction. These steps

would necessarily take up more time than the court system can currently accommodate and would be an inefficient and inappropriate use of court resources. Judges are required to judge not to conduct the litigation.

5 Final hearings. LIPs rarely prepare bundles or arrange for witnesses to attend.

However carefully orders are drafted by judges LIPs often fail to read them thoroughly or understand them. There will be abortive hearings to address the shortcomings of the presentation of their case. There are rarely skeleton arguments and if they are produced often change the basis of the claim. The judge will have to research the law and this will increase the time needed for delivering a judgement.

LIPs do not understand how to cross examine or give coherent evidence. In order to obtain the evidence the Judge will have to take on an inquisitorial role.

Finally LIPs do not understand how to negotiate and cases rarely settle.

6 Post Judgment.

LIPs, however carefully a judgement is phrased, often consider a judge biased or unfair if they lose. This can result in hopeless appeals and complaints.

Question 7*: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.*

No.

It is not clear how much such a system will cost and who will pay for each call.

The initial operator will have to have a lengthy phone call if he/she has to determine both financial eligibility and merits. If such a telephone call is limited in time then clients who cannot explain succinctly will be denied help whatever the merits. It is not clear whether the operator will have any legal training at all and in those circumstances how will the merits be determined? Will it be available outside office hours? How will the service deal with emergencies for injunctions etc? Will there be sufficient operators for clients to access without undue delay? How are issues of language, speech and language disabilities and cognition to be addressed?

Question 8*: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons*.

We do not agree.

It would appear under this scheme that the specialist would have to advise the client without seeing any papers at all. This will impact on the quality of the advice given as it will

inevitably be based on a summary by a litigant who may be elderly, confused, distressed illiterate or otherwise vulnerable. It is also unclear whether the specialist will be trained to the level of a qualified lawyer. How will the specialist help draft papers for an application for Protection of Harassment Injunction? Will the specialist be available at all times? Will the litigant be required to go through the same hurdles at each stage of the litigation? Will the advice be provided by the same advisor on each occasion or will it be a different person each time? These questions need to be answered before the second part of question 8 can be fully answered.

***Question 9**: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?*

We consider that the following factors should be taken into account:-

a) the need to draft papers such as applications to the court
b) the need to review documents served on the litigant by the court or the other party.
c) The vulnerability of the client.
d) The seriousness of the issues

***Question 10**: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?*

We consider that advice agencies such as Shelter, Welfare Rights Groups, CAB

Mediation Services and Women's Aid would among those who could work alongside.

We have no comment on the form of such working.

***Question 11**: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline? Please give reasons.*

We take the view that is likely that clients who are not eligible for legal aid will use the telephone help line.

We see no objection to referring such clients to a list of specialist lawyers who have expertise in the relevant area of law.

However we do not consider that the solicitor should be required to pay a referral fee. Judicial experience suggests that the most competent firms of solicitors would not be interested in paying referral fees. We think referrals should be on the quality and experience of the lawyers not the ability to pay fees.

***Question 12**: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons*.

We agree subject to the capital being genuinely accessible.

Question 13*: Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons*.

We agree but this could cause difficulty in certain areas. We highlight two:-

1. If a person wishes to apply for an injunction against a spouse and there is jointly owned property it may that the applicant will not be financially eligible but will have no access to the capital without the consent of the joint owner. It is unlikely that consent would be forthcoming in a timely manner or at all.

2 There may be problems with the definition of disposable capital. A person who has just received a salary of £1000 may have at that instant disposable capital. At the end of the month there will be nothing left. The definition should exclude bank balances attributable to income payments of wages etc

Question 14*: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons*

Agreed subject to the points made in answer to question 16

Question 15*: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)? Please give reasons.*

We agree again subject to the answers to Q16. The reality is that very few home owners in the South East would qualify for legal aid even though they would if they lived any where else in the country. It may be appropriate to have a higher gross capital disregard for applicants in London and the South East.

Question 16*: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.*

We agree the proposed waiver scheme but have concerns about it being discretionary.

We would suggest that it should be provided for all who qualify for legal aid on merits and income subject to the applicant agreeing to a charge on their property at the time of application for legal aid. This could be registered against the property at the time of granting of a certificate. If interest is set ,as now , at a higher rate than the prevailing mortgage rate this would be a huge incentive to pay off the charge either at the end of the case or as soon as possible. Elimination of discretion would reduce administration costs.

The net cost would be nil because as previously argued legal aid would be an interest bearing loan.

***Question 17**: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.*

The current rate is substantially above base rate. Perhaps it should be linked to base rates.

***Question 18**: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)? Please give reasons.*

Yes but a charge on the property should not apply. The administrative cost would be disproportionate in relation to the cost of the legal help provided.

***Question 19**: Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases, capped at £100,000 for all levels of service? Please give reasons.*

We believe that "subject matter of dispute" disregard should be retained.

If legal aid remained available for Ancillary Relief and TOLATA claims, the current £100,000 capital added to the waiver scheme discussed at Q16 would make legal aid available where a jointly owned property was worth up to £500,000 gross and £300,000 net.

***Question 20**: Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.*

Yes but subject to the non discretionary waiver scheme discussed at Q16.

***Question 21**: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients? Please give reasons.*

Yes although the £500,000 limit would apply to very different properties in different parts of the country. There is a case for a higher disregard in London and the South East.

***Question 22**: Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.*

If increased contributions mean the retention of legal aid for more people, we would support them in principle. However, there are other bodies with much greater knowledge of the finances of people on very low incomes who will be able to comment more usefully.

***Question 23**: Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.*

See answer to Q22. However we do consider that the system should be as simple as possible. The Public Funding should be spent on the advice and not on a complicated administration.

……..

Question 32*: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.*

We are concerned that such a reduction would mean that only less experienced lawyers would be prepared to undertake legal aid work.

Question 33*: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.*

It is unclear how such prospective criteria will work. Caps may discourage experienced solicitors from doing this type of work.

Question 34*: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction? Please give reasons.*

The proposal to have a lower rate in the County Court (where most civil work is done) may lead to only inexperienced junior counsel undertaking the work.

Our experience of this is an increase in the length of hearings. This impacts on judicial sitting days.

Question 35*: Do you agree with the proposals:*

to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and

to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?

Please give reasons.

We do not object to this proposal.

Question 36*: The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome*.

We do not think that risk rates should apply to all cases. In the example of Injunction proceedings we do not think they should apply. Cost orders may be obtained but are not

practically enforceable. The injunction may be conceded if no orders for costs sought. One would not want fought litigation purely for costs. There is also the possibility of a conflict of interest between client and lawyer.

Question 37*: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.*

We have no objection subject to the criteria being appropriate.

We suggest the criteria include

- number of parties
- vulnerability of client
- difficulty of obtaining instructions because of disability
- complex issues
- experts
- the number of documents.

We note that a member of a specialty gives an enhancement of 15%. There is a maximum enhancement of 50%. This may mean that there is little incentive for a solicitor to do the training etc A solicitor with the specialty can only obtain an enhancement of 35%. A solicitor with out the training can get 50%. There is no benefit for that person to become better trained etc

Question 38*: Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply? Please give reasons.*

We have no objection to this proposal.

Question 39*: Do you agree that:*

there should be a clear structure for the fees to be paid to experts from legal aid;

in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;

in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;

the categorisations of fixed and graduated fees shown in Annex J are appropriate; and

the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?

Please give reasons.

Experts.

The consultation document makes the point that experts fees have increased hugely in recent times. Of course the number of care proceedings have increased following the Baby P case and the local authorities reviewing their cases. In each of those cases experts are be

required. One cannot limit the number of cases where children are at risk because the public purse cannot afford the costs of protecting them.

We do however accept that expert fees could be more carefully controlled.

One way forward would be to control the number of experts in each case.

There is of course a tension that if the fees payable to experts were reduced then there may be fewer experts who would be prepared to undertake the work.

Care proceedings are the area where most experts are used. If fewer experts are prepared to do the work then there will be delays because of increased case loads. Delay for the most vulnerable children in our society is against the whole ethos of the Public Law Outline and not in their best interests.

The number of experts in this area will no doubt be considered by the Family Justice Review.

***Question 40**: Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.*

***Question 41**: Which model do you believe would be most effective:*

Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or

Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

***Question 42**: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:*

a) mandatory model;

b) voluntary opt-in model; or

c) voluntary opt-out model?

Please give reasons.

It is inappropriate for the Association to comment. However there some implications which we wonder have been considered in the consultation.

1 There is no Legal Aid Fund and so to secure the interest on a client account would be to presumably go into the general budget of the Ministry of Justice. It would be very difficult for the funding of this Ministry to be dependant on interest that would fluctuate according to interest rates.

2 This appears to be a tax on solicitors whether or not they undertake any publicly funded work. We consider that it should be subject to a separate consultation with solicitors.

3. The idea of Government Bank Account to hold client account monies seems to us fraught with problems. The number of transaction every day must enormous. If the Government Bank account was not as efficient as the clearing banks then business purchases house purchases take-overs of companies may not happen correctly. If that were to be the case then presumably the Government would be responsible in law for any losses to clients.

Question 43*: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons*.

We agree with the proposal to introduce a SLAS. In the Association's response to the Interim Report of Lord Justice Jackson, we commented that such a scheme would go a long way towards meeting the need for financial assistance in bringing claims where the current Legal Services Commission arrangements cannot help. We preferred the concept of a SLAS to a CLAF scheme. A SLAS would have the benefit of providing costs protection to a Claimant and would have the integrity that the LSC would bring to it (as opposed to reliance on the market place (whether regulated or not). For the reasons set out in paragraph 9.35 of the Consultation Paper, we prefer the proposals partially self funded model since this would give a wider access to the courts for potential claimants. We do however repeat the caveat we set out in our response to Sir Rupert Jackson's Interim Report, namely that we share the concerns of commercial solicitors that the bureaucracy of the Legal Services Commission may get in the way of settlement negotiations – parties should be free to agree terms of settlement without reference to the LSC for its approval.

Question 44*: Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?*

We agree that the amount to be recovered should be set as a percentage of general damages only so that past and future loss awards are ring-fenced. We cannot offer an informed view of what the percentage should be, save that, having regard to all possible deductions from the general damages award, there must remain an appropriate benefit available to a successful Claimant.

Question 45*: The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls*.

The Association want quality representation of legally clients in court.

We wish to see good advice and good preparation achieving good results for the legally aided client. This is not achieved by more tick boxes. Any regulation must be targeted at checking the quality of work by highly experienced lawyers.

***Question 46**: The Government would welcome views on the administration of legal aid, and in particular:*

the application process for civil and criminal legal aid;

applying for amendments, payments on account etc.;

bill submission and final settlement of legal aid claims; and

whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

We have little knowledge of these matters save that we understand that the monthly payments scheme is one of the reasons that experienced solicitors still continue to undertake legal aid work. If this ceased it is likely to have an impact on the number of lawyers doing this type of work.

Questions 49 – 51

We believe we have identified these matters in our answers to the individual questions

CONCLUSION;

Bearing in mind the volume of work, the nature of that work and the issues involved it is likely that the county court and the district bench will be seriously affected by the proposals in the CP. It is likely that there will need to be changes to bring about the "simpler justice system" proposed if those effects are not to cause even greater delay in the country court system.

Whilst complaint is made that since inception the legal aid scheme has expanded far beyond its original intentions it is equally correct that legislation has expanded significantly in the same period increasing the opportunity for litigation (para 1.7).

The CP sets out the criteria taken into account (summarised at para 4.12) in reaching views as to the types of proceedings that should continue to justify legal aid however, as there is the financial imperative a wider view than the expressed criteria is required, namely the effect on the overall cost of the litigation if it proceeds as LiP conducted proceedings on both HMC(T)S, third party agencies such as Cafcass or local authorities.

The CP is said to support wider plans to move towards a simpler justice system (para 2.5) and the Jackson Report (which is in part subject of a separate consultation) and the Family Justice Review are both mentioned. It is difficult therefore to be definitive on the proposals in this CP in the absence of other proposals in this move towards a simpler system. This is shown to be problematic for example in para 4.22 when there is discussion of a litigants

ability to present their own case by reference to the forum and procedure referring particularly to whether or not the proceedings are inquisitorial or adversarial by nature. There is a possibility of course future proposals may bring in procedural changes that may effect decisions reached in this consultation (see also para 4.210).

A similar point could be made with regard to the assertions in the CP as to the availability of alternative sources of funding (4.25). Assertions have been made without appropriate evidence. For example, it is said that use could be made of legal expense insurance provided with house insurance; firstly of those within financial eligibility for legal aid how many will avail themselves of this add-on let alone have insurance in the first place; secondly, if there were to be a substantial increase in the take up of such cover what effect may that have on the premium invisible or otherwise.

The proposals as to remuneration may well act as a powerful disincentive to professionals who may withdraw from such work so that even though eligible a litigant may simply be unable to find professional help. There may also be an effect upon the quality of the representation that will be available.

12th February 2011

For and on behalf of the Association of HM District Judges

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