



Please send your response by 12:00 noon on 14 February 2011 by email to legalaidreformmoj@justice.gsi.gov.uk, or by post to Legal Aid Reform Team, Ministry of Justice, 102 Petty France, London SW1H 9AJ.

Scope

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?

[X] Yes [ ] No

Please give reasons.

We agree that all the various types of case and proceedings listed in these paragraphs should be retained, and there is no further category of case or proceeding which we would wish to add the list.

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?

[X] Yes [ ] No

Please give reasons.

We regard this as, potentially a useful tool, but, save in few cases, rarely practicable unless combined with the power to order sale of an asset. The court does already make orders for interim periodical payments (maintenance pending suit) which include an element for expenditure on legal costs. Interim lump sums and periodical payments orders will only be an option where the paying party has the means and the liquidity to meet such an order. It will rarely be the case with an 'ordinary' family where the assets and income available are earned income from employment and a family home. It is unlikely in our view to bring about significant reduction in the number of applicants eligible for legal aid on the already stringent means tested basis. It must not be forgotten that in ancillary relief applications, if there are assets of value, for example a family home, the costs advanced by the LSC should be recouped by means of the Legal Aid Charge.

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?

[ ] Yes [X] No

Please give reasons.

We are deeply concerned about the proposal to exclude private law family and children cases from scope "where domestic violence is not present". There are a significant number of family disputes, whether concerning children or financial provision, where mediation is wholly inappropriate. This is not and should not be confined to cases where there is or has been within the the last twelve months a funded application for protection under Part IV of the Family Law Act 1996 or the Forced Marriage Act. In some cases the children concerned are the subject of child in need or child protection plans, and/or the applicant is seeking to protect the child or children by seeking orders regulating residence and contact to avert care proceedings. In a significant number of cases there are issues concerning physical, sexual or emotional abuse of the child or children, or a parent. It would not, in our view be compatible with Article 6 of the ECHR that legal aid be available to the accuser but not to the accused, if both are eligible financially.

Mediators will, properly, decline to undertake mediation where there is manifest imbalance of power, including where one party appears to be in fear of the other, but such fear may arise out of emotional abuse as much as physical abuse.

The restriction proposed, that a protective order has been made, or a conviction has been recorded, is likely to have unintended consequences. It may encourage exaggerated or even false claims of abuse. It will deter compromise of legitimate applications by way of undertakings. It will disadvantage those who make allegations of criminal conduct, or breaches of protective orders when the police or crown prosecution service take no action or caution the accused. It may well increase costs in cases where allegations have to be subject of a 'fact finding' hearing which might properly be avoided.

**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?

Yes     No

Please give reasons.

While we agree that those cases which concern life, liberty, physical safety or homelessness are those most likely to be of 'overwhelming importance to the client' we are concerned that it is proposed to remove this criterion altogether. We suggest that it is desirable to retain the criterion for the exceptional case, for experience indicates that situations can arise which were not foreseeable where a residual discretion can properly be employed to avoid injustice.

We suggest that serious consideration be given to giving Judges the discretion to make a recommendation that public funding be extended to a particular litigant in a complex case at the case management stage. The Judge may be required to give reasons for his/her recommendation.

**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?

Yes     No

Please give reasons.

This appears perfectly sensible, but we suggest that provision is made to enable civil legal aid to be granted in appropriate cases where, despite all proper endeavours, the prospective litigant has been unable to obtain a Conditional fee Arrangement.

**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.

The incidence of litigants in person in the county court has increased considerably over recent years. Finding the most appropriate way to deal with individual litigants in person is now a major feature of the life of the County Court judge. Judges have acquired considerable skill in approaching cases when one or both parties is in person, and the adversarial approach has in practice to be modified by the inquisitorial, without the judge being or appearing partisan. This is the case in civil and family proceedings alike, but we consider that in certain types of proceedings, involving, for example, children or housing issues, emotions can and do run very high, with the effect that some litigants are unable to moderate their presentation of cases, and unable to identify, let alone put, their case effectively.

**Impact on Outcome:** While we like to think that the presence of one or more litigants in person has no impact on the outcome of proceedings, we can never state that this is the position with any confidence, any more than we can say that the competence or otherwise of a party's lawyers has had no bearing on the final decision. Inevitably there will be some cases where the outcome will be different because one or both parties

has not been represented.

Impact upon court time: This is a serious matter. In a case where only one party is unrepresented it is sometimes but not always the position that the case will take longer to try than it would with both parties represented. This is because the represented party almost invariably takes upon itself the work necessary to prepare the case properly for trial, identifying the issues, and preparing the court bundles. A great deal of court time, and costs are saved by conducting case management hearings by telephone, but if one or more parties are unrepresented this is rarely practical. Advocates are taught that they have an overriding duty to the court which the overwhelming majority take very seriously. As a result advocates regularly alert the court to potential problems at the case management stage and assist the court to find ways to overcome such problems. At the trial, the advocate will normally provide a detailed skeleton argument and chronology that greatly assists the judge in his preparation for the hearing, and the advocate can usually be relied on to flag up issues for determination, for whosever benefit they may be, as well as bring all relevant authorities to the court's attention. The cases which do take longer to try are those where the litigant in person is voluble, argumentative with witnesses, and insists on pursuing lines of cross-examination which are not directly in point. This imposes an added burden on the trial judge. He/she has powers of trial management which can be employed to keep up momentum, but these powers have to be exercised with care because it is not always immediately plain that the litigant is off on a tangent, and judges are very concerned to ensure that all parties have a fair hearing in which the issues have been correctly identified and determined.

Where both parties are unrepresented the position is very different. Case management conferences will usually take much longer, because it is a rare litigant in person who can plead his case coherently, can understand the obligations on parties to make disclosure (and honour them), and can appreciate how to collect and collate the evidence needed to substantiate his case. Judges in multi-track cases regularly have to adopt a more inquisitorial procedure than that provided for in the CPR, but as they lack any administrative support to carry through such a procedure, time carefully spent at a CMC does not always (some say often) translate into a reasonably prepared case for hearing. In family cases effective case mangment is very difficult when one or more parties are unrepresented, and timetables often founder.

The chickens come home to roost at trial. It is the absence of proper preparation of the case for trial, more than the inability of litigants to conduct their case well, that is the cause of many litigant in person trials taking appreciably longer than they would had both parties or even one party been represented. Effective listing is difficult, it is much harder to estimate in advance how much court time will be needed if one or more parties are represented, and almost impossible if all are. when cases overrun those listed to follow are prejudiced. when cases go shorter than anticipated vluuable judge and court time is wasted. When the case involves a decision about the future of a child and overruns a judge may have to direct that the case continue notwithstanding the effect upon other litigants expecting their case to start. There are other real problems for the judge in two areas. First pre-trial preparation. The great advance of recent years in trial litigation is the preparation the judge puts into the case before it starts. An hour's preparation beforehand can save two or three hours in court. But judges can rarely undertake useful preparation if the parties do not provide skeleton arguments, lists of issues and coherent trial bundles. It is a rare case where there are litigants in person on both sides that a judge can really get to grips with the issues before the trial starts. The second area is the smooth-running of the hearing. However much time a judge may have spent on case management it is a regular experience of trial judges that as the hearing progresses important, sometimes essential, documents are not in court, and witnesses on whose evidence a fair trial may depend have not been brought to court or even alerted to the dates on which the trial has been fixed. Short adjournments are regularly required to enable parties to bring documents or witnesses to court.

It is difficult to assess the additional time taken to try cases where both parties are unrepresented. As circuit judges we are concerned with the multi-track civil trials and complex provate and public law children trials where the problems inherent in having unrepresented parties are the more acute. In many case management hearings and some trials litigants in person can double the length of the hearing. As a general average however we estimate an increase in case management hearing times of 50% and of trial hearing times of 30% is the result of having litigants in person on both sides.

Appeals. An unrepresented party is much more likely to appeal than one with representation. We are concerned that a withdrawal of civil legal aid will lead to an appreciable increase in the number of applications for permission to appeal, (both from District Judge to Circuit Judge and from Circuit Judge to High Court / Court of Appeal) with a corresponding increase in the demands on judicial time and court resources. The financial implications of this increased workload should not be ignored. It may be advisable to

restrict the automatic right of litigants to request an oral hearing following an unsuccessful paper application for permission to appeal. This will however necessitate a consideration of the implications of such a restriction on the rights provided by Article 6 (and possibly other Articles) of the European Convention on Human Rights implications.

The burden of dealing with unrepresented party appeals is particularly acute in those family cases where there is an automatic right of appeal from District Judge to Circuit Judge. It is anomalous that there is no filter of requirement for permission to appeal.

Settlement. This is perhaps the most important feature of all. It is well known that many (indeed the majority of) civil trials settle before the trial hearing. This settlement factor is allowed for by list officers, who "overlist" cases to ensure that their judges are kept busy. With litigants in person, particularly where there are litigants in person on both sides, cases are less likely to settle, and by a substantial margin. Settlement is rarely in the nature of the litigant in person (and indeed lawyers are often necessary to induce settlement in represented litigant cases), and for there to be litigants in person on both sides who are ready to come to sensible terms is very much the exception. There are times where the Judge can see a sensible route to a settlement, but it is extraordinarily difficult for a Judge to broker a settlement, for obvious reasons. The result is that settlement rates in cases where both sides are in person are extremely low. It is for this reason, even more than the increased length of contested trials, and the impact on judicial time and court resources of greater number of appeals, that the withdrawal of legal aid will lead to longer court lists and a consequent increase in cost of running the civil courts. How this increased cost will compare with the saving inherent in a sizeable withdrawal of civil legal aid will very difficult to assess, but should not be overlooked.

In family cases, both private and public law, the rate of settlement before trial is already significantly lower. Nonetheless we are of the view that responsible and constructive representation by experienced family lawyers does achieve clarification of the true issues and significant narrowing of them, with consequent saving both in terms of court time and legal costs.

Unrepresented litigants take up a disproportionate amount of the time of court staff. an increase in their number may bring back office staff, under pressure to cope with reductions in their numbers in successive years, to breaking point

## The Community Legal Advice Telephone Helpline

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

Yes     No

Please give reasons.

It really does depend on the quality of the service provided. At present advice comes from a variety of sources. It is the experience of some county court judges that litigants have received, or believe that they have received, advice as to the merits of the claims or the way to pursue them that is quite inappropriate. Judges are highly appreciative of the advice and support given by organisations such as the Citizen's Advice Bureaux, whose advisers have knowledge of and established lines of communications with social landlords and mortgagees. Those advisers have the advantage a telephone help line adviser, however competent, does not have, to ask for, and check documents. Provided there can be confidence that the CLA helpline is only staffed with skilled advisers the proposal appears sound. But it is difficult to have such confidence, both at the first and second tiers of the proposed service. Who will be manning the telephones? What experience and expertise will the "specialist" advisers have? If this proposal is to work well it will be very expensive. We view this proposal with concern, but cannot comment further without a clearer idea as to the calibre of person who will answer the telephone.

We should however flag up the question of insurance. It could not be right that a Community Legal Advice telephone helpline is run on a 'no legal liability' basis. It is inevitable that negligent advice will be given from time to time. Presumably the State will provide professional indemnity insurance for those who give advice.

**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?

Yes  No

Please give reasons.

As in 7 above, the helpline will only work if it is properly resourced. The whole thrust of these proposals for civil legal aid reform and policy generally (for reasons we understand) to the contrary. we doubt that advice 'on all categories of law' can be provided without the employment of advisers with a high degree of legal training.

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

1. Complexity of the legal issues;
2. The importance of documentation to an analysis of the legal issues. In any case where one or more of the legal issues involved will or may turn on one or more documents it is imperative that the documents are seen by the adviser if / when the documents are available:
3. When the person seeking advice is unable easily to articulate the problem or to comprehend the advice given, whether because of language difficulty, learning difficulty, mental health issues, or other reason.

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

There are a number of organisations in various parts of the country which are able to offer useful help and guidance. If the only access to civil legal aid is through the CLA helpline it may be that such organisations will act as an initial filter and it will be the helper from within the organisation rather than the litigant who makes the telephone call.

We cannot offer any useful comment on the question itself.

**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?

Yes  No

Please give reasons.

An individual who is seeking help and assistance should be given every help reasonably possible. Plainly the LSC have to be careful not to favour any particular provider of services, and a protocol will have to be prepared to ensure that all providers are treated fairly.

## Financial Eligibility

**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?

Yes  No

Please give reasons.

There appear to be no good reasons for a disparity in approach.

**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?

Yes  No

Please give reasons.

A modest, but welcome, step to encourage responsibility in legally aided litigants, however the capital cushion of £1,000 appears exceedingly small for a person with dependant children.

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

Yes  No

Please give reasons.

There is no compelling reason for these disregards. In some cases, which we accept will be fewer in number after these proposals are implemented, where the opposing litigant is a private individual of modest means, the pressure imposed on the opposing litigant by the fact of the legal aid certificate is immense. This is because the opposing litigant knows that even when victorious he will almost certainly have no recourse to the losing party for his costs. In such cases the equity and pensioner capital disregards really have no place if there is to be (relative) fairness to both sides of the litigation.

**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)?

Yes  No

Please give reasons.

We recognise the balancing exercise being undertaken here, means testing actual rather than notional capital but not rewarding individuals with very high levels of mortgage debt. The limit proposed may be seen as discriminating against those who live in London and the South East where property prices are substantially higher.

**Question 16:** Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances?

Yes     No

The Government would welcome views in particular on whether the conditions listed at paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

It is important that such a waiver be exercised in such a way as to preserve, where possible, homes for families where there are dependent children or other vulnerable occupants.

**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?

Yes     No

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 waiver scheme operates to give an advantage to the litigant and it is entirely appropriate that a charge be placed on the litigant's property.

The proposed interest rate of 8%pa may indeed act as an encouragement to the litigant to repay the charge, but that seems to us a poor reason for charging an interest rate that is well above market rates today. We would suggest that base + 3% is a rate which offers a reasonable compromise between a proper return to the fund and an encouragement to pay.

**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)?

Yes     No

Please give reasons.

Yes in that it is appropriate that the property eligibility waiver is exercised in such cases, but no to the extent that the text at para 5.33 suggests that the waiver will apply where the litigant has more than one property. There are unlikely to be many legal aid litigants with two or more properties where the waiver will affect more than one of them. Nevertheless it would seem more appropriate to restrict the waiver to the litigant's main dwelling.

**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?

Yes     No

Please give reasons.

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

Yes     No

Please give reasons.

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

Yes     No

Please give reasons.

**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?

Yes     No

Please give reasons.

Where there is pressure to reduce expenditure on civil legal aid it is preferable to increase income-based contributions than reduce the incidence of award of civil legal aid. 'Encouraging even greater financial ownership of the case for those who can afford it' means little.

**Question 23:** Which of the two proposed models 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.

Option 2 is preferred. The difference in the amounts involved between the 2 options are minor, and there is a considerable virtue in simplicity.



## Criminal Remuneration

**Question 24:** Do you agree with the proposals to:

- pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;  Yes  No
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and  Yes  No
- remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?  Yes  No

Please give reasons.

We do not agree with the proposals.

We agree that it is desirable that where possible a case should be dealt with in the Magistrates Courts rather than in the Crown Court. We acknowledge that there has been an increase in cases in which there have been elections for trial. Further, it is clear that a large number of these go onto plead guilty and be sentenced within the powers available to the Magistrates Courts. Superficially this would appear to be an unnecessary expenditure. We agree that, if possible, it should be avoided. We do not accept, however, that the proposals are based on sound propositions which will provide either a fair or an appropriate level of remuneration. The proposals proceed upon the basis that the magistrates and lawyers representing an accused have the dominant roles in the decision as to which court will deal with the case. They do not. It must be remembered that the role of the defendant is fundamental to the determination of the venue of the case. The law provides for the defendant to have the right to be tried by a jury. If the Magistrates accept jurisdiction, it is only if he consents that he may be tried by the Magistrates. The accused is also advised of their power of committal for sentence.

The role of the lawyer representing him is to advise. That advice may be given in strong terms but the decision must be that of the accused. (See the Code of Conduct issued by the General Council of the Bar of England and Wales.) It is well recognised that an accused person may wish to wait and see what happens. He may anticipate that a witness will not attend the Crown Court. That may result in the case being discontinued or the prosecution deciding to accept a plea of guilty to a lesser charge. Furthermore, the accused may consider that his prospects of a lower sentence are greater if he goes to the Crown Court especially if there is a likelihood that he will be committed for sentence.

Secondly, the lawyer has to base his advice on the information which is available to him at that time. In many cases this may be very limited. Recent procedures in the Magistrates' Court system have improved disclosure of the case to be presented by the prosecution but the defendant's instructions may indicate a clearly triable case. In those circumstances, it is proper to advise of the election for trial: that is the accused's constitutional right. If the government wish to alter that, it should be done openly and after proper consultation.

It must also be acknowledged that even if all necessary information is available so that the lawyer is able to point out in strong terms to an accused that his account is unrealistic, he may choose to elect trial at the Crown Court. Many defendants, particularly guilty ones, do "put off the evil day" in the hope that something will happen to their advantage, for example, that an important witness will not attend at the Crown Court for trial.

Changes in plea between the date of election and the appearance in the Crown Court may result from further information being available to the prosecution and the defence so that both may reassess the strength of their respective cases which leads to a resolution of the matter.

We consider that the proposals fail to recognize these factors and to provide adequate recompense for work which may well have been undertaken which leads to the cracking of the trial.

We further consider that it is unacceptable to link remuneration to an early resolution of the case. We express concern that this may lead to undue pressure being imposed upon an accused person, especially the more vulnerable defendants to plead guilty without proper consideration of the case.

We also consider that the argument that as the sentence imposed is one within the jurisdiction of the Magistrates Court, it should have been dealt with in that court is only superficial. There are many factors which could lead to the sentence being the same: the defendant may have been on remand so that a Community Order now becomes appropriate; there may have been a Newton hearing and the issue has been resolved in the defendant's favour: there may have been a reconsideration of the gravity of the offence by the Prosecution which has led to a compromise. It should also be noted that there are guidelines which straddle the jurisdictions and it may be very difficult at the time of election to decide whether the case is one which will remain in the Magistrates' Courts or will be committed for sentence.

We will also wish to record on very strong opposition to the introduction of a composite feed to be split between solicitor and counsel are set out in Paragraph 6.20. We consider that this may lead to conflicts of

interest which could work against the proper representation of the defendant. There would at least be a temptation to urge the resolution of a case and in its unwarranted expectation, a failure properly to prepare the case.

**Question 25:** Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- the proposal to enhance the Litigators Graduated Fee Scheme and Advocates Graduated Fee Scheme fees for a guilty plea by 25% provides reasonable remuneration when averaged across the full range of cases; and  Yes  No
- access to special preparation provides reasonable enhancement for the most complex cases?  Yes  No

Please give reasons.

We do not agree with these proposals. The argument advanced fails properly to take into account the work which will have been undertaken to produce the guilty plea whether it comes from a guilty plea or a "cracked trial". It is often that the reason for the cracked trial is because of the work carried out in the preparation of the case for trial. With that work, it often becomes clear even to the most unwilling defendant, that his defence is flawed. If the value of that work is not properly recognised in the fees payable, there will be a tendency for that preparation not to be carried out or carried out inadequately so that either the trial has to be vacated or worse, a trial is unnecessarily pursued.

Further many of the arguments set out under Question 24 apply. The guilty plea often comes as the result of a reassessment of the strengths of the case on both sides. Forensic evidence is often delayed. Transcripts of the recorded evidence of a complainant in a sex case are not prepared until after it becomes known that there is to be a trial. When they are, a proper assessment of the witness' evidence becomes more readily available. These are examples of the features which may lead to a guilty plea.

**Question 26:** Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences?

- Yes  No

Please give reasons.

We do not agree with this proposal.

Murder remains the most serious of offences in the calendar and, rightly in our opinion, is so regarded by the general public. A conviction results in lifelong consequences for the accused. The substantive law presents complexities. The principles of joint enterprise, diminished responsibility and provocation are difficult areas which require exceptional expertise. The special place of murder and manslaughter is recognised by its classification for trial. It requires either a High Court Judge or release by a Presiding Judge to a specifically authorised circuit judge. We do not ignore that the sensitivity required for a serious sex case may be commensurate with that required in a murder case. Nor do we fail to acknowledge that at the ends of the spectrum, cases can be identified in which serious sex cases can be more difficult than an uncomplicated murder case. We believe, however, that the overall picture requires the retention of the distinction presently drawn.

**Question 27:** Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000?

- Yes  No

Please give reasons.

We do not oppose the amalgamation of categories F and G. We do not think that this move is likely to have a significant impact as a cost saving exercise. We do not consider that the evaluation of the complexity of a case by value (or pages of witness statements or exhibits) provides an accurate assessment of the difficulties of a case but acknowledge that there has to be some yard stick which value produces.

We agree with the retention of category K. To amalgamate that would lead to too wide a category.

**Question 28:** Do you agree with the Government's proposal to:

- a) remove the premium paid for magistrates' courts cases in London; and  Yes  No
- b) reduce most 'bolt on' fees by 50%?  Yes  No

Please give reasons.

Question 28( a)

We do not oppose this though the argument presented relies more on the argument yet to be held about competition than it does upon providing fair remuneration for work done. There is a “London weighting” applied to some but not all publicly funded work. It is generally thought that the costs of a practice in London are higher than elsewhere. This may be a more appropriate comment when set against costs of a practice in rural areas than against one in other large conurbations

Question 28(b)

We have no comment to make about this issue.

**Question 29:** Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates?

Yes  No

Please give reasons.

We consider that this would be an appropriate step. The recent alteration of the criteria for designation of a case as a VHCCC makes the case for this change.

**Question 30:** Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases?

Yes  No

It would be helpful to have your views on:

- the proposed role of the assessor;
- the skills and experience that would be required for the post; and
- whether it would offer value for money.

Please give reasons.

Question 30

We do not consider this would be a wise move. We are unclear as to the role. The position is described as “an independent assessor” but then his role is described in terms which are one sided and not at all independent. It would be likely to cost a considerable amount to set up and run. If truly independent it may encourage reviews. It would inevitably lead to delays. Most of all, we fear that this could lead to a clash between the work of the trial judge who is managing the case and such “independent assessor”. It is often the case that counsel will sound out the views of the trial judge at a pre-trial hearing about a particular aspect of the case. We consider that the designated trial judge is often placed in a better position to make an assessment than is the case manager. We would welcome a requirement that the case manager should have regard to any views expressed by the designated trial judge. Given the emphasis which is now placed on case management, it is our view that this should be recognised in this area. We cannot judge whether it would offer value for money.

**Question 31:** Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages?

Yes  No

Please give reasons.

We do not consider that the complexity of a case can be measured by the number of pages of evidence and exhibits. It is an artificial yardstick. We acknowledge that there has been a tendency for more and more pages of evidence or exhibits to be served. This should be addressed by the prosecution; often they are superfluous. We do not strongly oppose the suggestion.

The section does, however, raise, without posing any specific questions, the problems which are arising in respect of representation. The present criteria for the appointment of two counsel involves the number of pages of evidence and exhibits.

We are firmly of the view, that whether it is appropriate for there to be two counsel is a decision which a

judge, and especially, the trial judge is well placed to decide. The general rule should be that if the case merits two counsel, that should be a Queen's Counsel and junior counsel rather than two junior counsel. It is the experience of the circuit Judiciary that the instruction of Queen's Counsel often has a positive impact in the smooth running of the case. This is largely due to the experience which they bring and the confidence which their appointment gives them in making decisions. We should also point out that we do consider it essential that the junior should be of sufficient experience to be able to continue the conduct of the case in the absence of leading counsel at least for a short period.

Where there is a very large quantity of paperwork and that is the reason for two counsel being required, then it may be appropriate for there to be two junior counsel. In other cases, they may not import the advantages which can be obtained from a Queen's Counsel and Junior.

We must also record our underlying concern that the present approach to the issuing of certificates for two counsel to include Queen's Counsel does mean that many junior counsel foresee no future in publically funded criminal work and hence a reluctance to apply to take "silk".

## Civil Remuneration

**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?

Yes     No

Please give reasons.

On the hypothesis that fees must be reduced it seems to us far more sensible to operate a 10% cut than attempt any form of restructuring of civil and family legal aid fees. The costs involved in preparing and implementing any form of restructuring are likely to be appreciable. We are deeply concerned about the effect of cuts in fees for family legal aid upon the availability of legal services for litigants throughout England and Wales, but particularly in areas where overheads for practitioners are high.

**Question 33:** Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases?

Yes     No

If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

There remains an unnecessary degree of complexity in the assessment of solicitors' fees. If payment is not to be determined solely by grade of solicitor and hourly rate, then there must be enhancements. With enhancements it is essential that clear criteria are set. Capping enhancements at half the present level is likely to have a considerable impact on the final fee, and whether such a cap is justified must in part be governed by the criteria to be applied to future fees. We can therefore neither agree or disagree with this double-headed proposal. Enhancement for membership of a specialist panel, for example the Children's Panel, reflects the training of members, who bring greater efficiency and focus to their work.

County Court Judges are now required to assess costs in many applications and some trials. One area of concern to many judges is the amount of time which is spent on items of work. It is important that due consideration is given to the time taken for items of work when determining the enhancement criteria. There should be proper encouragement given to completing work expeditiously, and a corresponding discouragement to solicitors who drag out their work. A cap of 50% may make this difficult to implement.

**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?

Yes  No

Please give reasons.

This is incapable of a 'yes' or 'no' answer. There is merit in codifying rates, but there is oversimplification in Table 5. Junior Counsel of less than 5 years' call should not be paid the same as Junior Counsel between 5 and 10 years' call, who should in turn be paid less than a junior of over 10 years' call. The proposed hourly rates are not attractive even before the reduction of 10%, and it should be borne in mind that court time and expense is often saved by having more experienced counsel.

We do occasionally have Leading Counsel in the county court. What fee applies in such a case?

The level of fees in Table 5 suggests that no QC of any calibre is expected to do civil legal aid work.

**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  Yes  No
- 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?  Yes  No

Please give reasons.

Any system of payment which concentrates the mind against proceeding with a case where, after disclosure and or service of witness statements looks far less strong than it did on initial instruction is to be welcomed.

**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.

None outside paragraphs 7.22 and 7.23

**Question 37:** Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases?

Yes  No

If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

There is no good reason why solicitors in family cases should be treated more (or less) favourably than solicitors in non-family civil cases.

**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?

Yes     No

Please give reasons.

This is a sensible proposal. There are many junior counsel with considerable skills and experience well able to take on difficult care cases, however a mechanistic, page count, approach will bring in a perverse incentive to over-complicate cases.

## Expert Remuneration

**Question 39:** Do you agree that:

- there should be a clear structure for the fees to be paid to experts from legal aid;  Yes     No
- in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;  Yes     No
- in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;  Yes     No
- the categorisations of fixed and graduated fees shown in Annex J are appropriate; and  Yes     No
- the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?  Yes     No

Please give reasons.

Any fee structure should be clear, and the short term proposal to reduced benchmark hourly rates by 10% is consistent with the reductions faced by the legal professions.

With the longer term proposal, and the categorisations in Annex J, the distinction between the contents of the Initial Report (fixed fee) and any Report resulting from 'Report writing' (hourly rate) is not clear to us. Is the distinction necessary? If the fixed fee for the Initial Report is set too low, such reports may become simple recitals of the background facts, with the analysis and opinion left to subsequent reports. Might it not be preferable for all reports to be paid on an hourly rate but subject to a cap in all but exceptional cases? The initial fee should be set at a level to encourage a full report from the start. The sooner a firm expert opinion is obtained the better for the proper management and, hopefully, disposal of the case. The cap should be set at a level that provides an incentive for conciseness; too many reports are overlong.

It may be advisable to give consideration to preparing a practice note setting out the structure to be applied to the report in a 'standard' case. In this way experts could be encouraged to prepare more concise reports which get to grip with the issues in the body of the report and contain the "cut and paste" material in annexes.

The judges who try criminal cases agree with all these proposals. We would point out that there are significant problems in respect of some types of report e.g. psychiatric and psychological reports. The implementation of Service level agreements may go some way to alleviate these problems.

As this is to be the subject of further consideration we do not comment upon this aspect in detail

## Alternative Sources of Funding

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

Yes     No

Please give reasons.

Whether it constitutes a barrier or not this proposal will be strongly opposed by solicitors. At present most solicitor client-care letters provide for the solicitor to keep any interest earned on client account (so far as this is permissible within the S A Rules), unless the client specifically requests to have it remitted to him. It seems likely that solicitors will increasingly move to ensure that the client receives the interest rather than the Government. The resulting inflow of funds from the introduction of the proposed scheme may be disappointing.

However, in the context of the present economic climate, the proposal seems worthy of consideration. What is noticeably absent from the proposals paper is any assessment of the sums likely to be collected under this proposal and the cost of collection.

**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.

The Proposals Paper attempts no analysis of the working of each model nor its cost of operation in practice. Model B seems to us likely to involve additional work and cost and the unintended consequences of placing solicitors funds into public hands.

**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.

The scheme will be unpopular. Only a mandatory model has any real prospect of raising worthwhile funds.



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

Yes     No

Please give reasons.

It is a sensible proposal which reasonably reflects the assistance the successful legal aid litigant has received in bringing his claim.

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

Yes     No

If so, what should the percentage be?

We suggest 5%. It is to be borne in mind that damages are only awarded where the claimant shows actual loss; damages in the county court are never 'a windfall'. This question could be properly posed as: What level of loss should the successful claimant bear himself? More than 5% would be excessive.

## **Governance and Administration**

**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.

As Judges we are in no position to comment.

**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?

As Judges we are in no position to comment

**Question 47:** In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

Our experience as Judges is that the overwhelming majority of solicitors make great use of electronic facilities, and are well ahead of the courts and HMCS in electronic working.

**Question 48:** Are there any other factors you think the Government should consider to improve the administration of legal aid?

### Impact Assessments

**Question 49:** Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Yes     No

Please give reasons.

We have no comments save to observe that the assessments do not appear to consider impact upon the justice system, upon other bodies related to the justice system nor upon those whose cases will be excluded from scope

**Question 50:** Do you agree that we have correctly identified the extent of impacts under these proposals?

Yes     No

Please give reasons.

We have no comments save our response to question 49 above.

**Question 51:** Are there forms of mitigation in relation to client impacts that we have not considered?

We have no comments

**About you**

Full name

The Council of Her Majesty's Circuit Judges

Job title (or capacity in which you are responding to this consultation exercise)

- ATE Insurer
- Claimant
- Claimant Lawyer
- Claims Management Company
- Consumer representative organisation
- Defendant
- Defendant Lawyer
- Government Department / Non-Departmental Public Body
- Insurer
- Judiciary
- Legal Academic
- Other – please specify

Date

14<sup>th</sup> February 2011

Company name/organisation (if applicable)

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