



JUDGES' COUNCIL
OF ENGLAND AND WALES

**RESPONSE OF A SUB-COMMITTEE OF THE JUDGES' COUNCIL
TO THE GOVERNMENT'S CONSULTATION PAPER CP12/10,
*PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES***

INTRODUCTION

1. Consultation Paper CP12/10, *Proposals for the Reform of Legal Aid in England and Wales*, presented to Parliament in November 2010, contains proposals for reform of the legal aid system which have wide-ranging implications for the administration of justice across the fields of civil, family and criminal justice in courts and tribunals at all levels. This response to the consultation paper has been prepared by a sub-committee of the Judges' Council. It is not an exhaustive judicial response. Separate representations from other judicial associations and bodies will deal with matters of particular relevance to their membership and will no doubt provide additional comments on particular aspects of the proposals.
2. The consultation paper invites responses to a number of specific questions. We think it more helpful to discuss the topics under a series of main headings and sub-headings before turning to the specific questions, which can then be answered in large measure by cross-reference to the previous discussion. Thus, although we provide a completed questionnaire as an annex to this response, our answers to the questions need to be read together with the text of the response for a proper understanding of our points.
3. We acknowledge the seriousness of the economic background against which the issues raised in the paper have to be assessed: the underlying economic problems, the general cut-backs in public expenditure that they necessitate, the particular target for a reduction in the Ministry of Justice's budget and the aim of providing a substantial contribution to that target by a reduction in legal aid expenditure (consultation paper, paras 1.3 and 2.3). There can be no doubt about the financial pressure on the legal aid fund or the need to achieve real savings in this area.
4. We also acknowledge the careful exercise undertaken by the Ministry of Justice in seeking to strike an appropriate balance in the achievement of such savings, notably in the analysis of factors relevant to the question whether specific areas of law should be retained within, or excluded from, the scope of legal aid.

5. Nevertheless we have numerous concerns about the proposals put forward in the consultation paper, both in relation to various matters of detail and as regards the overall impact of the cuts proposed.
6. One of the major concerns running through our comments is that the proposals would lead to a huge increase in the incidence of unrepresented litigants, with serious implications for the quality of justice and for the administration of the justice system in terms of additional costs and delays – at a time when courts are having to cope in any event with closures, budgetary cut-backs and reductions in staff numbers. The consultation paper shows an awareness of the issue but fails to recognise the depth of the problem. Even if one focuses on cost alone, there is a real question whether the cost savings arising from the proposed cut-backs in the scope of civil and family legal aid would be offset by the additional costs imposed on the system by dealing with the increase in litigants in person. Neither the consultation paper nor the accompanying impact assessments address that question adequately.
7. A related concern is the effect of the proposals on access to justice. The consultation paper places proper stress at the outset on the Government’s belief that “access to justice is a hallmark of a civil society” (para 1.2). Yet the proposals would damage access to justice in a number of ways.
8. First, the proposed cut-backs in the availability of Legal Help in civil and family law would undermine the work and even the viability of community advice agencies, to the particular prejudice of the disadvantaged for whom such agencies represent a trusted and invaluable doorway to possible legal solutions to their problems. The proposed advice service based on the current Community Legal Advice helpline would not be a satisfactory substitute.
9. Secondly, the proposals would deny litigants publicly funded representation, and would either prevent the pursuit of litigation at all or force litigants to pursue it in person, in areas of civil and family law where legal representation is important for the proper conduct of the case. The proposed scheme for funding excluded cases where it is shown to be necessary in order for the United Kingdom to meet its legal obligations is unduly narrow and would not be sufficient to counter those adverse effects.
10. Thirdly, the proposed cut-backs in fees for publicly funded work will provide a further disincentive for advocates to undertake this type of work. There is a real concern, especially in relation to family and criminal work, that the pool of skilled advocates willing to undertake the work will diminish, to the disadvantage of litigants and to the detriment of the efficient running of cases. Moreover, there are likely to be longer term adverse consequences for the recruitment of able advocates into these fields of work and, at the other end of the spectrum, for the existence of a sufficiently large and diverse pool of able advocates suitable for appointment as judges in such cases.
11. We develop those comments, and set out detailed comments on specific aspects of the proposals, under the main headings of “civil justice”, “family justice” and “criminal justice”, even though some of the issues straddle those areas. Within

each area we have endeavoured to follow the sequence of the consultation paper, with extensive use of sub-headings for ease of reference.

CIVIL JUSTICE

12. The proposals encompass a wide range of subject areas within the general field of civil justice (including administrative justice). Our comments relate principally to the *scope* of legal aid. In summary:
 - (1) We support the proposals for the retention of specified areas of civil justice within the scope of the legal aid scheme, subject to suggestions we make for limiting the availability of legal aid in relation to certain categories of judicial review claim.
 - (2) We have serious concerns about the exclusion of clinical negligence cases from legal aid and, for different reasons, about the proposal to remove Legal Help for a range of subject areas, which has particular implications for the work of the tribunals.
 - (3) We have serious reservations about the adequacy of the proposed scheme for exceptional funding of excluded cases if the proposals are implemented in their present form.
 - (4) We refer to the serious adverse implications, in terms of cost and delay within the justice system, of the increase in unrepresented parties to which the proposed exclusions will give rise.

Scope (Chapter 4)

(a) Areas of civil law proposed for retention in the legal aid scheme

13. Subject to what is said below about “public law” cases and a small point on cases under the Protection from Harassment Act 1997, we agree that the various types of civil case listed in paras 4.38-4.141 should be retained within scope.

Public law (paras 4.95-4.99)

14. The heading “public law” is used in the consultation paper to refer to a wide range of public law cases, including judicial review cases in the High Court or the Upper Tribunal and a variety of statutory appeals, though other headings such as “asylum”, “community care”, “education”, “immigration where the individual is not detained” and “welfare benefits” relate to additional categories of a public law character. The view expressed in the consultation paper is that legal aid for most “public law” challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance. The one exclusion referred to under the “public law” heading concerns business cases, though certain other categories of a public law character are the subject of separate proposed exclusions.

15. We support the retention of legal aid for the generality of public law cases, and we agree with the exclusion of business cases. Other categories of proposed exclusion are considered separately later in this response. We suggest, however, that the proposals could be subject to significant refinement in relation to judicial review claims, with a view to the achievement of three ends: (i) the funding of meritorious cases, just once, on the occasion on which they are first determined on their merits; (ii) the avoidance of continued, possibly increasing, expenditure on a large number of unmeritorious judicial review claims; and (iii) the funding of a small number of important judicial review cases which cannot fairly be determined without legal representation on both sides. This should lead to a significant reduction in the number of judicial review claims for which legal aid is available. What follows is indicative of the thinking behind that suggestion, though careful further consideration would need to be given to the details if the suggestion were to be taken up.
16. In principle, the stage at which public funding should be provided to permit individuals to be adequately represented when their vital interests are at stake is when their application or appeal is to be considered on its merits in a hearing at which they can and should deploy their full case. In an asylum or immigration case, this will be when they appeal to the First-tier Tribunal. In the great majority of cases, such a hearing should (subject to the right of appeal to the Upper Tribunal and beyond) suffice to protect the individual's vital interests and to discharge the state's obligation to afford the individual an adequate opportunity of doing so.
17. In such cases, money subsequently spent on judicial review claims is largely wasted. Out of some 12,500 judicial review claim forms issued in the Administrative Court in 2010, approximately 7,500 concerned asylum or immigration. In the great majority of cases, there had already been an adverse decision by the Secretary of State giving rise to an unsuccessful appeal on the merits to the Asylum and Immigration Tribunal or the First-tier Tribunal. Judicial review in these cases is the second – or sometimes the third or fourth – bite at the cherry. Most claims fail, most of the claims which fail are without merit, and many are wholly abusive of the court's process. Unless the claim is rejected by the refusal of permission before an acknowledgement of service is filed, public funds will necessarily be incurred in preparing and filing the acknowledgement of service and summary grounds of defence. When the claim itself is publicly funded, two sets of publicly funded costs will be incurred – all irrecoverable. No-one derives any legitimate benefit from this litigation. A significant weakness of the proposals in the consultation paper is that such cases will not be filtered out.
18. The intervention of publicly funded lawyers does not reduce the number of unmeritorious claims of this type to the extent that might be expected. Bad claims are advanced by publicly funded lawyers as well as by litigants in person, albeit litigants in person are responsible for a greater proportion of hopeless cases. Often, bad claims are advanced by lawyers which an individual would not have thought of for himself. Several times a year, decisions of the Court of Appeal or Supreme Court on cases which raise questions of principle produce waves of claims supposedly founded on the same principle, many of

which can be seen on examination to be hopeless. Scores or even hundreds of claims, generally unmeritorious, may be backed up behind a “lead” claim awaiting a permission hearing or, sometimes, a full hearing. In such instances the claims are generally devised by lawyers: it is unlikely that many individuals would have dreamt up the claims for themselves.

19. It is true that, along with a large majority of unmeritorious cases, there is a significant minority of claims which do have merit. Cases with merit may arise, for example, in the immigration context where there has been no action to remove a person for several years, substantive family life has been established in this country, and removal action is then taken without consideration of the interference with family life: such cases lead quite often to success on reconsideration or appeal. Regrettably, however, the existing “merits” criterion does not appear to work satisfactorily to filter out unmeritorious claims and to focus legal aid only on those which have merit. For public expenditure to be controlled satisfactorily in this area, consideration should be given to a different approach, whereby certain categories of claim are excluded from scope, subject only to a means of identifying those which deserve to be publicly funded.
20. Of the cases which occur most frequently, there are several categories where public funding must plainly be available: (i) first time asylum and humanitarian protection appeals to the First-tier Tribunal and beyond; (ii) second time asylum and humanitarian protection appeals to the First-tier Tribunal where the Secretary of State has accepted, or a court has determined, that further representations give rise to a fresh claim under paragraph 353 of the Immigration Rules; (iii) all SIAC appeals in which ECHR and EEA rights are in issue; (iv) control orders; (v) asset freezing at the instigation of the state (including UNSC orders and civil recovery proceedings); (vi) challenges to the legality of detention (criminal, mental health and immigration, except when secondary to a challenge to imminent removal); and (vii) committal for contempt. This is not an exhaustive list. There may also be a compelling case for the funding of judicial review challenges and appeals to the First-tier Tribunal and Upper Tribunal which involve EEA or human rights issues or the best interests of children. Environmental claims are another possible contender.
21. At the other end of the spectrum, there are cases in which public funding should plainly not be available: (i) oral renewals of applications for permission to apply for judicial review when the judge who has refused permission on the papers has certified the claim as totally without merit; (ii) judicial review challenges to state decisions when an alternative remedy is available, e.g. to the Independent Police Complaints Commission or the Prison and Probation Service Ombudsman; (iii) judicial review challenges to the decisions of such bodies; (iv) judicial review challenges to state decisions which do not affect an individual’s vital interests or involve an abuse of power, e.g. a decision by the Ministry of Justice (if it takes over responsibility for the administration of legal aid) to refuse public funding or a decision by the Crown Prosecution Service not to prosecute. (It falls outside the scope of the consultation paper, but in relation to (i) there is a strong case for a change to the rules to introduce a provision similar to CPR 52.3(4A) in respect of appeals, so that a judge an application for permission on the papers may, if he or she considers the application to be totally

without merit, order that the person seeking permission may not request that the decision be reconsidered at an oral hearing.)

22. In between is a category of cases where public funding should not be available in the absence of a positive decision that it should be, and, to adopt a nuanced distinction, a category of cases where public funding should be available subject to a positive decision to do so. Cases in the former category include: (i) judicial review challenges to asylum and immigration decisions when the claims of the individual (and family if appropriate) have already been determined on the merits by the Asylum and Immigration Tribunal or the First-tier Tribunal within, say, the preceding three years (there is room for argument about the period, but cases in which previous determinations are very old are likely to involve changes in circumstances which require the case to be looked at again); (ii) attempts to stay removal directions and to challenge detention pending removal in like circumstances; (iii) judicial review challenges to immigration only decisions, whether or not supported by human rights grounds. Cases in the latter category include: (i) local authority decisions about community care and accommodation; (ii) prisoners' challenges when there is no other remedy available, e.g. to Parole Board delays; and (iii) a miscellany of challenges to state decisions not specifically identified above which may raise questions of importance for an individual or class of individuals and are not covered by specialist tribunals or alternative remedies.
23. There is clearly room for debate about the test that should be applied to identify the cases in those intermediate categories which should be publicly funded. One possibility would be a composite test of importance to the individual plus legal complexity plus general public importance. The test could be applied by the Ministry of Justice (if it assumes responsibility for the administration of legal aid), or by a judge sitting in the Administrative Court or the Upper Tribunal, or both. If a judge is to play a part in the decision, it could be at the stage at which permission is considered on the papers, after the defendant has filed an acknowledgement of service and summary grounds of defence. If permission is granted (or, exceptionally, before a decision is made as to permission), the judge could decide that, subject to financial eligibility, the claim should be publicly funded or, alternatively, could refer the case to the Ministry with a recommendation that it should be.
24. It is acknowledged that adoption of this more restrictive approach to the availability of legal aid in public law cases would lead to an increase in the number of claims issued by litigants in person. It is likely, however, that the overall number of claims would fall and that there would be an overall saving in time and costs because, as explained above, publicly funded lawyers currently advance many unmeritorious claims which would not be advanced in the absence of such legal representation.
25. We stress the importance of continued funding for representation by competent lawyers in meritorious cases. There is no realistic alternative sources of funding, litigants typically lack resources of their own, many are unfamiliar with the English language, law and procedure, and cases frequently involve issues of ECHR or EU/EEA law where expertise is necessary. It is vital to

retain a pool of competent practitioners available for publicly funded work in this area, as in other areas referred to in this response. The recent withdrawal of a number of able representatives from legally aided asylum and immigration work illustrates the risk of excessive cut-backs and is viewed with alarm.

Protection from Harassment Act 1987 (paras 4.123-4.125)

26. We support the proposal to retain legal aid funding for victims wishing to oppose the variation or discharge of a restraining order under section 5 or 5A of the Protection from Harassment Act 1987, and for bringing or defending injunctions against anti-social behaviour under section 3A of the Act. The only point we would add is that in most, if not all, cases under section 5 the Crown, which will have made the original application, should be able to stand in the shoes of the victim and oppose the variation or discharge. Most, if not all, of the post-acquittal orders under section 5A will originally have been prosecuted by the CPS and there may be scope for putting the burden on the CPS to “represent” the views of the protected person before the court on an application to vary or discharge. There may be cases, however, where the CPS does not see eye to eye with the protected person, and the continued availability of legal aid is appropriate to enable the protected person’s position to be separately represented in such a case.

The forum in which cases are heard (paras 4.142-4.144)

27. The consultation paper proposes to cut back the availability of legal aid for appeals to the Court of Appeal and Supreme Court, and for references to the European Court of Justice, so that they remain in scope only where the appeal or reference arises in an area of law otherwise retained in scope (paras 4.142-4.144). The reasoning is that the importance of the case will vary from case to case, as will the vulnerability of the appellant; and that whilst some appellants may have difficulty presenting their case before the upper courts if it is a complex case, not all cases before these courts will necessarily be complex; and where such difficulties occur, appellants will be able to seek funding under the scheme for excluded cases.
28. We disagree with the proposal. Appeals before the Court of Appeal or the Supreme Court have to get through a demanding permission filter, frequently involve issues of difficulty and importance and may lead to the laying down of binding principles of broad application – *a fortiori* in the case of “second” appeals to the Court of Appeal, which are subject to even stricter criteria requiring the appeal to raise an important point of principle or practice or that there is some other compelling reason why the appeal should be heard. References to the European Court of Justice relate to a difficult area of law and are made only where the answer is unclear. In appeals and references of this nature, the court ought to be given all possible assistance through professional advocacy. There should be no further cut-back in the availability of legal aid for such cases. The possibility of applying under the funding scheme for excluded cases is not a satisfactory answer, both because the scheme will be very limited in scope and because the very process of applying under the scheme is bound to be complicated and dissuasive.

(b) Areas of civil law proposed for exclusion from the legal aid scheme

29. We comment below on a number of specific areas proposed in paras 4.145-4.245 of the consultation paper for exclusion from the scope of legal aid.
30. But we have a more general concern which runs across many of the specific areas identified in this section of the consultation paper and which has a particular importance for the work of the tribunals. It relates to the removal from scope of the Legal Help element of legal aid.
31. Legal aid is a means of securing access to justice for the disadvantaged. Many such people with a problem will be unable to identify or articulate a legal need or solution to the problem. A notable achievement of the legal aid system has been the embedding of Legal Help in community advice work and the development of advice agencies with a local reputation for being helpful and someone you can trust. They are generally run efficiently and comparatively cheaply. They realise that not every problem needs a lawyer, but they are the doorway through which the disadvantaged can learn of the possibility of a legal solution to their problems in an appropriate case. Other organisations which the consultation paper wishes to encourage, such as the Free Representation Unit, depend on them.
32. We fear that the effect of the withdrawal of Legal Help will be to make many of these agencies unsustainable. It is difficult to see what alternative sources of funding will be available to them, especially at a time of severe cut-backs in local authority expenditure. Their collapse would prejudice the disadvantaged, for whom the proposed service based on the Community Legal Advice helpline would be unlikely to constitute an adequate and trusted alternative.
33. The withdrawal of Legal Help is also likely to place additional burdens on the tribunal system and to cause extra costs and delays. This aspect of the proposals is of greater concern to the tribunals than the cut-backs in the Representation element of legal aid.
34. At present the advice given under the Legal Help scheme assists the tribunals in at least three ways:
 - (1) It acts as a filter in helping to identify those cases in which an appeal is or is not appropriate. This is of benefit to the individuals concerned, to the tribunal and to other tribunal users: inappropriate appeals are a cost to the public purse and can actually be more time-consuming and costly to deal with than appropriate appeals.
 - (2) For those cases that do proceed, advice ensures that relevant evidence is obtained. It is the provision of relevant evidence that leads to most appeals being allowed in social security and child support cases. The point is also critical to many other jurisdictions, such as special educational needs. This kind of help shortens hearings and avoids adjournments.

- (3) It is common for a Legal Help advisor to produce a written statement of case which focuses on the relevant issues, thereby saving judicial and administrative time.
35. The absence of Legal Help is likely to have the consequence that some claimants do not pursue appeals that have merit; the tribunals will receive more appeals that lack merit; they will receive more appeals that are less well prepared; and they will have to take more time and resource in identifying the merits which an appeal does have and ensuring that the issues are fairly dealt with.
36. For a system which already deals with hundreds of thousands of cases a year, the result is likely to be very significant. It is not possible to say, in the absence of proper costings, how significant they would be relative to the financial savings resulting from the withdrawal of Legal Help in those areas relevant to the work of tribunals. But Legal Help should not be withdrawn without full consideration of these adverse consequences.

Clinical negligence (paras 4.163-4.169)

37. The proposal to remove clinical negligence claims entirely from the scope of legal aid does not appear to us to be justified.
38. Although clinical negligence claims are essentially claims for damages for personal injury or death, there are fundamental differences deriving from the fact that almost invariably such claims involve criticism of members of the medical professions, ranging from nurses and health technicians to general medical practitioners and dentists and on to consultant surgeons and physicians. Unlike those who are injured in road accidents, accidents at work or play, and accidents arising from the defective state of premises or products, the victims of clinical negligence are almost always the vulnerable, from the unborn child to those who are physically or mentally ill or infirm, and whose vulnerability is usually the reason for the medical intervention (whether in the form of advice or treatment) which is criticised. The majority of claims involve allegations of a breach of a professional duty of care owed to patients in the provision of the state's National Health Service (rather than the private sector).
39. As a result of the many special features of clinical negligence litigation, a separate body of legal principles and practice has developed over the last 50 years or so, leading to what is now sophisticated and complex litigation, quite beyond the ability of anyone to pursue as a litigant in person. In common with other negligence claims, clinical negligence claims depend for their success upon establishing breach of duty, damage and causation; however, all three limbs of the cause of action depend, individually, upon expert evidence, whereas in ordinary personal injury litigation it is usually only the issue of damages (and very occasionally, causation) that requires such input.
40. The current scope of legal aid in the field of clinical negligence covers Legal Help and Representation. In practice, the majority of clinical negligence cases are legally aided. Fewer than 1% of all solicitors are able to represent claimants

in clinical negligence litigation under the system of legal aid franchising. Those that do are, consequently, responsible and highly specialist practitioners who are unlikely to waste public funds on hopeless claims.

41. The consultation paper accepts that clinical negligence claims are not only about monetary compensation but "may well be about very serious issues" (para 4.164). However, the "very serious issues" highlighted in the paper are limited to the personal issues of the severely injured victim's future needs, whereas they should also include the maintenance of high professional standards in the provision of health care by the testing of failure in legal proceedings, as well as the public accountability of state health services.
42. The consultation paper states that "[a]lternative sources of funding are available for many of these cases, most obviously in the form of CFAs" (para 4.165), and the justification for removing legal aid from all clinical negligence cases is said to be the existence of "a viable alternative source of funding" (para 4.166). In the judicial experience, almost all cases that come to trial are funded by legal aid rather than by CFAs, not least because of the difficulty in obtaining after-the-event insurance cover for an unsuccessful claimant's liability for costs in such high risk litigation. Again, unlike many "ordinary" personal injury claims, there is no basis for sustaining arguments of contributory negligence against victims: the claimant either wins or loses. In any event, the concurrent consultation on implementing recommendations on civil funding and costs arrangements in Sir Rupert Jackson's *Review of the Costs of Civil Litigation* (Consultation Paper CP13/10) casts doubt on alternative funding under CFAs, at least in so far as it is proposed to remove the "success fee" element of such arrangements and the recovery of ATE insurance premiums.
43. Given the heavy front-loading of financial outlay to assemble the necessary expert evidence to support clinical negligence claims, as well as the high cost of legal expertise (in terms of time and level of fee-earner) to pursue litigation, it must be highly questionable whether there is any other "viable" alternative to legal aid.
44. Para 4.167 singles out obstetrics cases as those likely to have "high disbursement costs for which clients may find it hard to secure funding under a CFA". Such cases include those regularly featured in the national press as "the cerebral palsy baby cases". If successful, they are likely to result in awards of many millions of pounds, arising from mismanagement of a mother during pregnancy, labour or delivery. The issues, particularly of causation, are always complex and often very controversial. The consultation paper suggests that such claims are not "a sufficiently high proportion of cases to justify retaining clinical negligence within scope". That reasoning is open to question if the value, rather than the number, of such claims is used as the yardstick. In 2008/09 the total sum paid out by the National Health Service Litigation Authority, representing all NHS defendants, was £769,225,000. That figure includes both damages and successful claimants' costs (£103 million), and almost 60% was by way of payments made in settlement of cases before trial (see Sir Rupert Jackson's *Review*, Chapter 23, para 2.2). Whilst there are no data for the breakdown of this figure between cases that were legally aided and

those that were not, it is likely that a substantial proportion will have been recovered in cases funded by legal aid.

45. Further, although the consultation paper states that the proposed funding scheme for excluded cases "will ensure that individual cases of this type continue to receive legal aid where necessary for the United Kingdom to meet its legal obligations" (para 4.167), it is evidently not contemplated that this would lead to the funding of many of these cases. In Annex 1A, *Derivation of Legal Aid Savings*, to the accompanying impact assessment concerning scope changes it is suggested that 3,600 clinical negligence cases will be removed from the category of Legal Help and 2,500 cases will be removed from the category of Legal Representation, resulting in a *net* saving of a mere £17 million (i.e. the costs incurred through the grant of legal aid are largely recovered from the defendants). As Table 3 of Annex 1A also shows, only 10% of the clinical negligence claims excluded from legal aid would be readmitted under the proposed new scheme for funding excluded cases. In simple terms, of the 2500 clinical negligence cases which secured legal aid funding in 2008/09, only 250 would possibly achieve some funding under the new scheme. The opportunity to bring claims for the remaining 90% of cases, if not illusory, is likely to be so severely constrained that there will be no real opportunity either for assessment of prospects of success or for the pursuit to trial of anything other than the most simple of cases - of which, by virtue of the nature of such claims - there are very few indeed.
46. The absence of viable funding arrangements for clinical negligence claims might be mitigated were there any proposals for dealing with all such claims in other ways, for example by establishing a scheme for compensation such as exists for criminal injuries. However, apart from the possibility of some degree of funding for a few excluded cases, there are no current proposals for any other means of redress. The NHS Redress Act 2006 has not yet been implemented through secondary legislation and, in any event, is not intended to cater for anything other than claims of relatively low value.
47. The above discussion highlights the potential injustice for a small group of highly vulnerable claimants if the present proposal is implemented. The benefits for the government are, of course, not limited to savings in legal aid funding. If fewer claims are made, some of which would have been successful, there will be savings for the Department of Health in not having to meet the compensation payments and claimants' lawyers' costs. Where the state is involved on both sides of the equation, namely as funder of the claims and as payer of compensation and costs if a claim is successful, that fact may be thought to be an additional reason why such claims should not be excluded from funding. But even where defendants are funded by insurance (e.g. through the Medical Defence Union or Medical Protection Society) there may be thought to be a public interest in the maintenance of the ability to make a claim, with the benefit of public funding, against those responsible for inadequate or incompetent medical care.

Education (paras 4.180-4.187)

48. We refer to the comments above about the effect of withdrawal of Legal Help in this area.

Employment (paras 4.188-4.192)

49. Here, too, we refer to the comments above about the effect of withdrawal of Legal Help.

Immigration where the individual is not detained (paras 4.198-4.204)

50. We refer again to the comments above about the effect of withdrawal of Legal Help. Our comments on the “public law” category also touch on the issue of immigration appeals and judicial review applications.

Welfare benefits (paras 4.216-4.224)

51. We refer again to the comments above about the effect of withdrawal of Legal Help. It should also be stressed that, although the tribunals seek to be accessible and user-friendly, cases in the field of social entitlement are not as easy for unrepresented parties as the consultation paper suggests. The law is of considerable complexity and the various bodies referred to at para 4.218 rarely assist the tribunal with any kind of submission (they simply do not have the resources). There is often no attendance on behalf of the relevant Government department, which adds to the work required of the tribunal itself. Where decisions are overturned “simply because the tribunal is able to elicit additional information” (para 4.217), the burden on the tribunal in performing that function is not to be underestimated. In short, lack of legal representation adds to the time and cost of the tribunal proceedings.

52. Over and above those general points, we have a particular concern about the proposed exclusion of asylum support cases from the scope of legal aid (paras 4.221-4.223). Applicants in such cases tend to be particularly vulnerable individuals, very frequently with language difficulties. They cannot be expected to be able to cope by themselves with applications and appeals. Voluntary sector organisations perform a valuable role in the provision of help and advice but are subject to very considerable financial pressures of their own and do not represent a complete alternative. All this gives additional strength to the argument for retention of Legal Help for this category of case.

Upper Tribunal appeals (paras 4.231-4.235)

53. It is proposed in this part of the consultation paper that appeals to the First-tier Tribunal and Upper Tribunal in relation to a variety of issues should be taken out of the scope of legal aid. We question whether it is appropriate to adopt that course in relation to appeals to the Upper Tribunal in particular. We do not accept the proposition that appeals before the Upper Tribunal are fact-based: appeals lie only a point of law and many cases involve complex legal issues. Whilst the lack of legal representation may force the tribunal in practice into more of an inquisitorial role, its function remains that of determining an appeal *inter partes* and it operates most effectively where it has the benefit of

adversarial argument. It is also very odd if the availability of legal aid before the Upper Tribunal should depend on whether the case comes by way of judicial review (where the consultation paper proposes the retention of legal aid) or by way of statutory appeal from the First-tier Tribunal. We consider that legal aid should continue to be available for representation in the Upper Tribunal in those appeals where it is currently available.

Tort and other general claims (paras 4.239-4.243)

54. We agree in general with the exclusion of these cases from scope, but an exception is called for in the case of those who suffer from mental illness or incapacity that makes it difficult or impossible for them to decide on or undertake litigation without legal advice or representation: the general approach taken in relation to cases concerning mental health (paras 4.92-4.94) should be applied to these cases too. One approach would be to enlarge the criteria for exceptional funding under the scheme for excluded cases so as to ensure that it would apply to such persons.

Funding for excluded cases (paras 4.246-4.262)

55. The consultation paper proposes the abandonment of the existing criteria for funding of exceptional cases (“significant wider public interest”, “overwhelming importance to the client” because the case concerns life, liberty, physical safety or homelessness, or cases of “Jarrett complexity”) and the substitution of a scheme to provide legal aid for excluded cases where it is shown to be necessary for discharging the United Kingdom’s domestic and international legal obligations, including those under the ECHR, or where there is a significant wider public interest in funding legal representation for inquest cases. The limitation of exceptional funding in non-inquest cases to those where it is shown to be necessary for the discharge of the United Kingdom’s legal obligations involves a very substantial cut-back on the existing position.
56. The acceptability of that proposal depends upon the extent to which the proposed exclusions are adopted in their present form: the greater the degree of exclusion from the normal scope of legal aid, the more important it becomes to broaden the power to grant legal aid on an exceptional basis. Conversely, a greater degree of flexibility for exceptional funding of excluded cases may operate to weaken objections to the exclusion of such cases from the normal scope of legal aid.
57. In particular, we are concerned about the removal of the criterion for exceptional funding of cases of “overwhelming importance to the client”: whilst priority has been given, in formulating the proposals, to the retention within scope of cases concerning life, liberty, physical safety or homelessness, there may be excluded cases where such issues also arise, and it is difficult to see the justification for the removal of a long-stop criterion enabling the exceptional funding of such cases. See also our comments above about advice and representation for persons suffering from mental illness or disability.

58. If the existing proposal is implemented, we see considerable potential for the growth of litigation as to whether public funding is required in order to meet the United Kingdom's obligations under the ECHR in particular. The existing scope of legal aid and the existing criteria for the funding of exceptional cases have made that a non-issue in many cases to date, but it is likely to become a very important issue under these proposals. The additional cost to the justice system of handling any increase in such cases needs to be taken into account.

Litigants in person (paras 4.266-4.269)

59. The proposals would give rise to a huge increase in the number of cases involving unrepresented parties. We refer to the observations made below, in the context of family justice, as to the implications of that increase in terms of burden on the courts, and cost and delay within the justice system. Similar observations apply in the context of civil justice.
60. The incidence of litigants in person has increased considerably over recent years in courts at all levels below the Supreme Court. The incidence is probably at its highest in the County Court, but there is substantial judicial experience at all levels of the problems to which lack of representation can give rise.
61. The experience in the County Court is, first, that case management takes much longer with unrepresented parties. In the interests of efficiency many case management conferences are conducted by District Judges by telephone, but that is not practical in relation to a unrepresented party save in the simplest cases. Moreover a case management conference generally takes much longer with an unrepresented party because of the time that has to be taken in identifying and considering the issues and explaining the relevant procedures, including disclosure and the service of witness statements.
62. However much time has been devoted to careful case management, litigants in person rarely prepare properly for trial, and 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. In order to do justice between the parties, judges often find that short adjournments are needed to enable documents or witnesses to be brought to court, thereby lengthening the hearing overall. Where only one party is unrepresented, the position is likely to be manageable, but real difficulties can arise where both parties are unrepresented.
63. However carefully a judgment or order is phrased, litigants in person often have difficulty in understanding and implementing them, and are also more inclined to try to appeal adverse rulings; so that an increase in the number of litigants in person is also likely to lead to an increase in the number of applications for permission to appeal from District Judge to Circuit Judge and above (and even where such applications are refused on paper for cogent reasons, unrepresented parties tend still to request an oral hearing)

64. Overall, experience in the County Court strongly suggests that the proposed cut-backs in legal aid will result in less efficient and effective use of court time and will impose a greater burden on judges and court staff alike.
65. The experience in the High Court is similar. Again, where parties are unrepresented, case management can be very difficult and trials tend to take longer.
66. The problems can be illustrated by reference to the Chancery Division, where legal aid funding has largely disappeared because of its withdrawal from business cases. Such cases, ranging for example from company shareholder disputes to partnership and contractual disputes over the use of confidential information, regularly involve interlocutory applications for freezing orders and search orders. They are usually urgent, with complicated legal and factual issues and documents. Litigants in person can find them bewildering.
67. Judges have to put in place a regime that protects both sides so far as possible until the trial. This will cover funding issues (the orders sought may severely curtail access to funds), timetables for the action, and disclosure, which can be very significant but where litigants in person regularly fail to understand the obligation to disclose material that might harm their case and will not necessarily have the expertise to seek out material from the other side that is, for example, stored on computer systems. The judge has to take time to assist these litigants, thereby lengthening the hearing and impacting on other cases in what is often a busy list. A judge performing this role faces the additional difficulties that he will not be alive to all potential issues, since he has no background material beyond what is put before him usually by the other side; this may cause him to miss something which is vital and causes injustice; and in pressing the case for the benefit of the litigant in person, he also needs to avoid giving an impression of unfairness to the other side.
68. These difficulties become all the greater at the trial. Litigants in person regularly have difficulty in presenting their cases. They rarely understand the need to put their case to witnesses, they are usually unable to cross-examine effectively and they struggle with the documents. This inevitably leads the judge into asking questions on their behalf, which has to be done with great care so as to avoid giving an appearance of bias against the other side. Similarly, where the litigant in person gives evidence and is cross-examined, the judge has to “re-examine” him so that the case is put fully on the record; and this, too, risks creating the wrong impression. Where there are detailed written or oral submissions from the represented party, the judge has to consider them without the benefit of proper submissions or analysis by the unrepresented party. In all these respects the judge will do his best, but it is a difficult and time-consuming exercise. And it is not his function, nor does he have the support, to generate his own lines of inquiry and investigate matters, so that it is quite possible that issues are overlooked that could have had a vital impact on the case.
69. A further aspect of the concern relates to cases which need the services of an interpreter, whether for the litigants or for witnesses. Litigants in person cannot be relied on to make the necessary arrangements to secure the presence of a

proficient, independent interpreter at court, and there is a potential here for significant additional problems and delays.

70. As to the inadequacy of the research referred to at para 4.268 of the consultation paper, see our comments at para 110 below in the context of family justice. The consultation paper states at para 4.269 that further research is being undertaken in relation to the impact of unrepresented parties on the conduct and outcome of proceedings. Properly conducted further research can be expected to reflect the judicial experience outlined above. In any event, however, it is difficult to see how any decision can properly be made without a proper assessment of the impact on the administration of justice, including questions of cost and delay, arising out of the increase in the number of cases involving unrepresented parties.

Provision of advice and information services by telephone (paras 4.270-4.273)

71. The proposal to establish a service based on the Community Legal Advice helpline as the single gateway to civil legal aid services is viewed with concern. The quality of the advice given to persons calling the helpline will be critical and will require even at the first tier a level of expertise that is unlikely to be available unless those giving the advice are themselves qualified solicitors, which has major resource implications and does not appear to be what is contemplated. It is also difficult to see how responsible advice can be given over the telephone, without looking at relevant documents. The existing system whereby those needing advice can consult a solicitor or community advice agency which will act where appropriate as the initial point of referral has much to commend it.

Legal Aid Remuneration: Civil Fees (Chapter 7)

72. We have only limited comments on the proposals in this chapter. We accept that, if fees paid under the civil legal aid scheme have to be reduced, it is better at this stage to apply a 10% cut across the board rather than to attempt a radical restructuring (paras 7.5-7.7). In relation to this and the other specific proposals, however, the concerns expressed below in relation to the effect on family justice also have a resonance in relation to civil justice.

Expert Fees: Civil Proceedings (Chapter 8)

73. Here, too, we accept the appropriateness in the short term of the proposed 10% reduction in benchmark hourly rates (para 8.14) and we share the concerns expressed about the need to bring expert fees under proper control, but we stress the importance of maintaining a sufficient pool of experts willing to undertake publicly funded work in those areas where legal aid remains in scope.

Alternative Sources of Funding (Chapter 9)

74. The consultation paper refers in Chapter 9 to various alternative sources of funding, including a Supplementary Legal Aid Scheme (SLAS) (paras 9.27 ff) and, in that context, a Contingent Legal Aid Fund (CLAF) (para 9.36). We take

the view that these potential schemes merit detailed further evaluation as possible ways of supplementing legal aid provision and helping to maintain the quality of justice and the efficient conduct of legal proceedings. Our reasons can be shortly stated. The proposed reduction in the scope of legal aid and the proposals for reform of the regime governing conditional fee agreements are likely between them to leave a gap which SLAS or CLAF schemes could fill, and financial conditions which may be more favourable to such schemes. In addition, a CLAF scheme could support cases where a lawyer would not wish to risk a conditional fee agreement. Any research done in the past, such as for the Civil Justice Council, was predicated on the then current landscape of legal aid and conditional fee agreements. If the present proposals are implemented the landscape will be much changed and the premises underlying past conclusions will have gone. A proper feasibility study is both justified and necessary.

FAMILY JUSTICE

75. In relation to family justice, our points may be summarised as follows:

- (1) We have numerous comments of detail as to the cases proposed to be kept in scope for legal aid and those proposed to be excluded from scope, as well as concerns about the implications of the proposed cut-backs in legal aid remuneration for the availability of experienced practitioners and suitably qualified experts.
- (2) The proposals would result in a huge increase in the number of litigants representing themselves in family proceedings, with serious implications for the quality of justice and increases in court hearing time and consequential costs and delays in the justice system.
- (3) There has been no proper evidence-based consideration of whether the proposals would result overall in a cost saving or, as the experience of the family judiciary would suggest, a cost increase. It is of concern that the total figures given in the tables in the impact assessment addressing scope changes (Tables 1 and 2, pages 16-17) are based on inputs that, in relation to family cases, are recorded as being “n/a”. This seriously undermines the statement that “[t]he overall impact on the Justice System is outlined in the evidence base of this Impact Assessment”.
- (4) The outcome and recommendations of the comprehensive review of the family justice system being undertaken by the independent Family Justice Review should be awaited, to enable any reforms to take place in a coherent and evidence-based way. If, for example, the Family Justice Review led to the imposition of limitations on access to the courts without prior mediation (to which the consultation paper makes oblique reference at paras 2.20 and 4.73), the availability of legal aid for court proceedings should be considered in the light of that development.
- (5) The proposals put at risk the effective case management systems that have been implemented by the family judiciary in ancillary relief and children cases (systems that are not even mentioned in the consultation paper).

76. We understand that the Family Division intends, as part of its detailed response to the consultation paper, to provide a fuller description of its existing case management procedures and to suggest a way forward based on those procedures pending the outcome of the Family Justice Review. We refer to that material without repeating it here, and we support the way forward suggested by the Family Division.

Scope (Chapter 4)

(a) Areas of family law proposed for retention in the legal aid scheme

Domestic violence (paras 4.64-4.68)

77. We agree with the proposed retention of legal aid for domestic violence and forced marriage cases (paras 4.64-4.68), subject to the following comments, which are also relevant to the proposed exclusion of ancillary relief cases and private law children and family cases where domestic violence is not present (paras 4.154-4.162 and 4.205-4.215).
78. First, it is assumed, though the consultation paper does not make this clear, that legal aid will be available not just to the applicant but also to the respondent to such applications (subject in each case to merits and means testing). The availability of legal aid to the respondent is important because of the issues at stake (orders can be enforced by criminal proceedings), the fact that contested cases can involve issues of third party disclosure requiring expertise which an unrepresented respondent is unlikely to have, the need for an applicant to give live evidence and be cross-examined in a contested case (the prospect of questioning by the alleged abuser may deter applicants, and an unrepresented respondent may not have the expertise needed for the proper presentation of his case), and the absence of any other routes to resolution.
79. Secondly, the proposal to retain legal aid in ancillary relief and private law children and family cases only in the cases listed in para 4.67, on the basis that in such cases there is “an ongoing risk of physical harm from domestic violence” and “the client may be unable to assert their rights and may face intimidation because of risk of harm”, gives rise to a number of problems:
- (1) It would provide a perverse incentive for allegations of domestic violence to be raised and pursued in circumstances where they might not otherwise be litigated, since only by doing so would the applicant be eligible for legal aid for related proceedings. This would mean an increase in the number of fact-finding hearings, which tend to be lengthy because of the need to obtain historic evidence and call witnesses, with the possibility of lengthy cross-examination. Such hearings are also very divisive, requiring the parties to take opposed positions at a time when the court is encouraging parents to work together to make the decisions which are best for their children, or to look forward rather than back in reaching compromises in relation to ancillary relief.

- (2) The need to pursue allegations of domestic violence in order to be eligible for legal aid would be likely to reverse the present trend whereby the number of stand-alone applications for domestic violence orders is falling.
 - (3) The inclusion, in the first bullet point in para 4.67, of a condition that an *order* has been made in domestic violence proceedings funded by the Legal Services Commission in the last twelve months fails to deal with the significant number of cases that are resolved by *undertakings*. Resolution of cases by undertakings represents a great saving in court time and cost. The proposed condition would create a real risk of an increase in contested hearings, with a consequent increase in costs to the Legal Services Commission and the court system, as well as other adverse consequences.
 - (4) The risk of harm referred to in para 4.67 is harm to the applicant (“the client at risk”). This would exclude an important category of private law children cases in which the respondent is alleged to have abused the child (sexually or otherwise). Such cases are frequent and raise factors that are important to the applicant, the child, the respondent and the wider public interest. The very nature of the allegations and the forensic issues that arise limit the litigants’ ability to present their own case. There is often a need for third party disclosure requiring an expertise that unrepresented parties lack. The child may need to give evidence, requiring consideration of protective measures and the conduct of examination and cross-examination. Such cases, for which there are no other sources of funding and no other routes to resolution, call for legal aid. It also appears illogical to exclude them from the scope of legal aid whilst including cases, in the fourth bullet point, where “the applicant’s partner has been convicted of a criminal offence concerning violence or abuse towards *their family*” (emphasis added). We note, too, that legal aid is proposed to be retained for compensation claims against both private individuals and public authorities where they arise out of allegations of abuse or sexual assault (paras 4.56-4.58).
 - (5) Consideration also needs to be given to those cases where the allegations/conviction relate to a child of another family. The risk of harm to the child of the family in question may be just as high.
 - (6) The reference to “an ongoing risk of physical harm” suggests that only cases where there is *physical* harm will be eligible. Standard definitions of domestic violence include psychological as well as physical harm, and it is illogical and unacceptable to draw a distinction between physical harm and psychological harm when determining the scope of legal aid in the context of domestic violence.
80. The consultation paper refers in para 4.68 to the need to ensure “that there is clear objective evidence of the need for protection in the main proceedings”. It will be apparent from the foregoing that para 4.67 is not an adequate statement of the situations where protection is needed.
81. But we also have a more general concern, that the blunt definitional tool proposed for defining whether cases are in scope or out of scope may mean that

cases are included when they do not need to be. The family courts have considerable expertise in this field and have devised case management procedures that have encouraged and facilitated parties to go to mediation and to reach agreement in both ancillary relief and private law cases, with very good results in terms of the settlement rate and reduction in court time required, whilst also ensuring the appropriate management of safeguarding issues. These procedures, which include a scheme for the management of ancillary relief cases and the Private Law Programme for private law children cases, are described further in the Family Division's separate response. They may provide a more effective tool to ensure that the correct cases are retained in scope for legal aid and are managed in a way that best meets the particular circumstances.

Family mediation in private law family cases (paras 4.69-4.73)

82. We support the use of mediation and the proposed retention of legal aid in relation to it. Mediation is actively encouraged by the court at each stage in appropriate cases and is a specific part of the Family Division's Private Law Programme.

International child abduction (paras 4.86-4.88)

83. Although para 4.88 refers to the retention of legal aid for "all international child abduction cases", it is not clear whether it is proposed to keep *outward* abduction cases in scope for legal aid. Such cases are equally important and should be kept in scope, given the issues at stake and the expertise required in relation to them. The impact on the child and its parent is just as grave, particularly if the abduction is to a country without reciprocal arrangements on child abduction. See, further, our comments at para 105 below.

International family maintenance (paras 4.89-4.91)

84. The proposal to keep these cases in scope for legal aid is supported.

Mental health (paras 4.92-4.94)

85. We cannot find any specific reference in the consultation paper to proceedings in the Court of Protection under the Mental Capacity Act 2005 in respect of personal welfare and healthcare decisions 2005 where an individual ('P') lacks capacity to make decisions. It is not clear whether these cases are intended to be covered by the proposal at para 4.59 in respect of community care.
86. The financial affairs of incapacitated persons are also dealt with under the 2005 Act. Financial proceedings are likely to be self funding, and P will probably not need to be a party.
87. Applications for declarations as to whether a course of action in respect of health and welfare is lawful, or to authorise a course of conduct, are usually brought by a public authority with statutory duties to P, such as a primary care trust or hospital trust or local authority. Some cases involve issues which are so serious that they need the court's decision in any event, even when there is

agreement. Sometimes P, although lacking capacity, has sufficient understanding to object to a course of action. Sometimes the relatives of P, P's spouse or partner, or other interested parties, object. Sometimes the proceedings will be instituted by such individuals and sometimes by the public authority. Cases are heavily expert dependent, because expert evidence is required as to capacity and best interests.

88. Cases which come to court involve extremely important and often finely balanced decisions such as: whether P should be removed from his or her home and accommodated elsewhere, in circumstances which may involve a deprivation of liberty; or whether contact with family members and others should be curtailed. Healthcare decisions include: whether it is lawful to impose or withhold surgical intervention; to carry out prophylactic surgery such as sterilisation; to impose or withhold treatment for serious illness including potentially terminal disease; to continue or withdraw life support; termination of pregnancy and contraception.
89. Increasing numbers of cases are coming to the courts where a marriage of a person asserted to lack capacity to marry or to consent to sexual relations has taken place abroad where such marriage is not unlawful. Such cases may start off as Forced Marriage Act 2007 cases and then be transferred to the Court of Protection for a full range of welfare decisions to be made. These cases invariably involve a clash of cultural viewpoints with a religious element and are very sensitive as well as raising issues of conflict of laws, status and immigration.
90. Where the case concerns a personal welfare decision it is highly likely that P will be joined, not least because there is a statutory duty to consider (i) whether P lacks capacity and if so in what respects, (ii) whether P is likely to regain capacity, and (iii) P's past and present wishes and feelings and the principles upon which P would have acted in decision-making if he had capacity. Furthermore the decision maker (including the court) must permit and encourage P to participate in the making of the relevant decision. Where P lacks litigation capacity and is a party P must be represented by a litigation friend. At present P is entitled to legal aid, subject to means. Although the Official Solicitor often represents incapacitated parties where there is no other litigation friend, he does not have a budget from which litigation can be funded. Other litigation friends cannot be expected to fund the litigation. We are strongly of the view that legal aid funding must continue to be available to incapacitated persons.
91. At the moment P's parents and other interested parties are sometimes granted legal aid either to institute or to respond to proceedings. Parents and others have no parental responsibility in respect of incapacitated adults, and there is no justification for automatic provision of funding as in public law Children Act 1989 proceedings. Nevertheless we suggest that there may be cases, particularly where very serious issues arise, in which public funding for representation may be justified. In any event this consultation needs to give consideration to whether and, if so, in what circumstances and on what criteria,

public funding may be made available to an individual in Court of Protection proceedings.

92. We suggest that since welfare and healthcare cases are similar to Children Act 1989 public law children cases, Court of Protection cases should be remunerated on the same basis and not, as at present, under the civil legal aid scheme.
93. More generally, persons who lack litigation or decision-making capacity who have a legitimate case in family proceedings, for instance to make an application for ancillary relief, require legal assistance. We suggest that public funding be made available to litigants who require a litigation friend.

Public law children (paras 4.100-4.101)

94. The proposal to keep these cases in scope is supported.

Registration and enforcement of judgments under European Union legislation (paras 4.102-4.104)

95. The proposal to keep these cases in scope is supported.

Representation of children in rule 9.5 (and 9.2A) private law children cases (paras 4.105-4.106)

96. The proposal to keep these cases in scope is supported.

Protection from Harassment Act 1997 (paras 4.123-4.125)

97. This topic cuts across the various fields of law. In its application to family law, as in other areas, the proposal to keep such cases in scope is supported. Legal aid should also be available to *respondents* to these applications, for the same reasons as outlined above in relation to respondents to domestic violence cases.

The forum in which cases are heard (paras 4.142-4.144)

98. We repeat the observations we have made above in the context of civil justice concerning the undesirability of cutting back the availability of legal aid for appeals to the Court of Appeal and the Supreme Court and for references to the European Court of Justice.

(b) Areas of family law proposed for exclusion from the legal aid scheme

Ancillary relief cases (where domestic violence is not present) (paras 4.154-4.162)

99. For reasons explained above, the proposal to keep cases of “domestic violence” in scope for legal aid is unduly narrow and is liable to produce adverse consequences. Those considerations tell strongly in favour of expanding the range of ancillary relief cases kept in scope.

100. We have also referred to the court-based case management procedures introduced by the judiciary, in consultation with stakeholders, for the effective and proportionate management of cases. In relation to ancillary relief cases referred to in para 4.157 it is of note that, of cases that started as contested, 78% settled (see Judicial and Court Statistics 2009, Table 2.6). It is the judiciary's experience that this is in large part due to the assistance of the court and the case management procedures. There can be no doubt that an increase in the number of unrepresented parties, lacking the benefit of independent legal advice, will undermine this high rate of settlement and put at risk the good practices flowing from the court-based case management procedures. It is stated at para 4.162 that the net cost of providing legal aid in ancillary relief cases in 2008-09 was £19 million. That sum is very likely to be exceeded by the additional costs in court time caused by a significant rise in the number of cases being contested through to trial.
101. Those additional costs do not appear to be addressed in the estimates of savings to be achieved by the proposed reforms. Legal aid should not be removed from ancillary relief cases unless and until there is evidence to demonstrate that it will result in significant overall savings.
102. In addition, account should be taken of the public interest consideration that (i) the greater time taken by cases involving unrepresented litigants will result in delay both for those cases and for other cases, and (ii) this is of particular concern in relation to cases involving children (which applies to half of the ancillary relief cases that start contested and are then resolved through the court process: see Judicial and Court Statistics 2009, Table 2.7): it cannot be in the children's interests for issues relating to the financial arrangements for them or their family to be delayed.
103. We do, however, welcome the proposal at para 4.161 to make changes to the court's powers to enable the court to make interim lump sum orders in these cases. Existing powers are unduly limited. It is also important that the powers should be extended to cover applications for financial support for children pursuant to Schedule 1 to the Children Act 1989.

Private law children and family cases (where domestic violence is not present) (paras 4.205-4.215).

104. Points made above in the context of ancillary relief cases apply equally here. Thus:
 - (1) The proposal to keep cases of "domestic violence" in scope for legal aid is unduly narrow and is liable to produce adverse consequences. Those considerations tell strongly in favour of expanding the range of private law children and family cases kept in scope. It is a matter of particular concern that cases where significant issues of child protection are raised (e.g. allegations of sexual abuse against the child) would not be in scope if the proposals were implemented in their present form.

- (2) The proposals put at risk the good practices flowing from the case management procedures introduced by the judiciary for the effective and proportionate management of cases. As to that, it is difficult to see the evidential foundation for the concern expressed at para 4.209 that the provision of legal aid in this area “is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases which can have a significant impact on the long-term well-being of any children involved”.
105. The focus of the discussion in paras 4.205-4.215 is on contact cases. Careful consideration needs to be given to those cases where a child is at risk of removal from the jurisdiction. Such cases are as important as the incoming child abduction cases and frequently require urgent orders to be sought, either by way of a prohibited steps order preventing the removal of the child or, more often, by way of wardship proceedings so that suitable ancillary orders can be made to find the child through a location order which can be enforced by the High Court Tipstaff. The impact on both the child and its parent of being taken to another country (particularly one which is not a signatory to the international agreements) is of high importance and expert legal advice is needed at short notice. The exclusion from scope of these cases needs to be reconsidered.
106. Some of the most difficult cases are the international abandonment cases, which are usually linked with separation of a parent, always the mother, from her child. Where the mother and father are based in this jurisdiction and the child is habitually resident here, the mother will be inveigled into visiting a non-Hague country where the parties have connections, or a neighbouring jurisdiction, where the child is removed from her and the mother is abandoned. Sometimes the child is placed with a relative abroad, sometimes in this country. If the mother manages to seek help from the authorities in this country, whether she is physically able to return or not, there are strong grounds for the public funding of advice and representation here. On the current proposals legal aid would not be available unless actual physical harm was alleged. The exclusion from scope of these cases needs to be reconsidered.
107. As already indicated, the proposal to make changes to the court’s powers to enable the court to make interim lump sum orders (paras 4.161 and 4.212) is welcomed, but such powers should be extended to cover applications for financial support for children pursuant to Schedule 1 to the Children Act 1989.

Funding for excluded cases (paras 4.246-4.262)

108. We repeat the observations we have made on this topic in the context of civil law, above.

Litigants in person (paras 4.266-4.269)

109. There can be no doubt that the proposals, if implemented in their present form, will result in a huge increase in the number of litigants representing themselves in family proceedings. The consultation paper acknowledges that there will be an increase but does not face up to the likely size or impact of that increase. The statement that the increase “*may potentially* lead to delays in proceedings,

poorer outcomes for litigants ..., implications for the judiciary, and costs for Her Majesty's Courts Service" (para 4.266, emphasis added) is unrealistically vague. Such adverse consequences are inevitable, as is supported by the limited research available and by the experience of family judges.

110. The research referred to at para 4.268 is old, was based on a very small sample and is of limited value. Moreover, the statement that the research "did not find a significant difference between cases conducted by a litigant-in-person and those in which clients were represented by lawyers, in terms of court time" does not deal properly with the findings of the research in relation to family cases, where it found that "the presence of unrepresented litigants in the family courts increase the instances of activity (hearings, orders and interventions)".
111. That finding accords with the common experience of family judges that the following are the effects of having litigants in person in the cases before them, with either both parties or one party being unrepresented:
 - (1) It leads to a far higher level of court intervention, as the judge tries to establish what the case is about from the court file, whether further disclosure or evidence is required, and what the issues are. All of this is hugely wasteful and leads to the lengthening of court lists.
 - (2) Where there is an unrepresented party, cases take twice as long. The prospect of an increase in the number of cases with unrepresented parties will make it very difficult to give accurate time estimates for hearings, with the result that court time will be wasted and there will be longer delays in hearing other cases.
 - (3) The judge has to step into the court arena more, which can compromise the judge's role as the impartial decision-maker. The judge has to tread a careful line in ensuring that that an unrepresented party has understood the proceedings properly, that the parties' human rights are being properly safeguarded and that all the relevant evidence is before the court, whilst also making sure that the other party does not gain any perception of bias in the way the case is being dealt with. Many family hearings have to be conducted as an essentially adversarial process: in particular, fact-finding hearings, where it is for the parties to put the evidence before the court and to challenge any relevant evidence they do not accept, and it is for the court to reach a decision. The role of the judge is in danger of being blurred if the judge is also expected to assist one or both of the parties in relation to their conduct of the litigation.
 - (4) An increasing number of cases involve litigants whose first language is not English and who require interpreters as well as being unfamiliar with the law and court procedures in this jurisdiction. Such cases give rise to particular difficulties and take up a disproportionate amount of court time if a party is unrepresented.

- (5) There is considerable scope in the context of family proceedings for the making of repeat applications, in relation to which litigants in person tend to display far less restraint than those who are legally represented.
- (6) Despite the best efforts of the judges in these cases, there is a real risk that the court is unable to do justice in cases involving unrepresented parties owing to their failure to identify relevant issues or evidence: the court does not have an inquisitorial function and there is only limited scope for investigation beyond that undertaken by the parties themselves.
112. We stress that these problems are not just the province of the higher courts. The experience of magistrates in Family Proceedings Courts is very much the same. There is already a substantial number of litigants in person in private law family disputes heard by those courts. In cases where one party is legally represented, the unrepresented party often expresses real concerns about their ability to present their case as well as the other side can. Attempts by the court to redress the balance consume significant additional court time. Where both parties are unrepresented, the courtroom often becomes a negotiating venue, with success heavily dependent on the mediation skills of legal advisor and magistrates; and again this takes up significant extra time. The views of CAF/CASS may need to be heard directly by the court (rather than through the parties' lawyers, as will happen where there is legal representation), and this results in further strain on a critically scarce resource.
113. As stated above in the context of civil justice, the judicial experience that we have described can be expected to be reflected in the further research referred to in the consultation paper in relation to the impact of unrepresented parties on proceedings. In any event we repeat that it is difficult to see how any decision can properly be made without a proper assessment of the impact on the administration of justice, including questions of cost and delay, arising out of the increase in the number of cases involving unrepresented parties.

Provision of advice and information services by telephone (paras 4.270-4.273)

114. It is not clear whether this proposal extends to family justice: para 4.270 refers to those seeking "civil legal aid", an expression which is not always used to include family case. If it is intended to cover family cases, we do not agree with it. In addition to the points already made in the context of civil justice, there is the further consideration that, owing to the sensitive nature of family cases, telephone contact is inappropriate and may deter those in need from seeking advice. Nor has the suitability of the Community Legal Advice helpline been properly assessed in relation to the provision of advice in family cases. It is of note that the Legal Services Commission's Annual Report 2009/10, published in November 2010, records (at page 11) that of the 126,866 acts of assistance provided by the CLA only 16,525 were categorised as "family".

Legal Aid Remuneration: Family Fees (Chapter 7)

115. Whilst it is recognised that the provision of public funding cannot be opened, it is equally important to bear in mind that restriction of public funding

below a level at which competent representation can be provided, and in particular restriction of funding at crucial early stages, leads to wastage of court time and an increase in costs.

116. There needs to be a pool of senior, experienced, committed practitioners to undertake the more difficult and complex work, in the interests of justice and of the efficient administration of justice. Such practitioners will not do the work unless they are properly remunerated. Yet they save court time and increase efficiency, whereas the inexperienced and less competent run cases less efficiently and are less likely to identify issues and prepare a case effectively at an early stage: mistakes at an early stage increase the burdens on the courts (particularly in respect of adjournments and appeals). Costs paring runs a serious risk of costs wastage and of further burdens on the courts.
117. The success of the Public Law Outline (the case management procedure used in public law children cases) depends on early provision of funding. It was devised on the specific basis that experienced and competent representation, with detailed preparation at the initial stages, was essential to its success.
118. A study of the family Bar was conducted by King's College in 2008 to provide quantitative (statistical) evidence of the work undertaken and of the role that legal aid plays in barristers' income. At the time of the surveys, cuts of about 13% to 14% to the legal aid graduated fee system for the Bar's family work had been proposed. This was the explicit basis on which barristers answered questions about their intentions. The survey revealed that (a) in the event that no changes were made to the legal aid system, about 25% of family barristers intended to change the way they practised, mostly to reduce their reliance on legal aid work; and (b) in the event that the proposed cuts were introduced, over 80% of barristers indicated their intention to change their practices, with a particular emphasis on senior practitioners (for example, 40% of barristers over 16 years' call intended to stop or greatly to reduce the amount of legally aided public law final hearings they undertook). Following this research, the Government consulted again and further cuts to the budget were proposed under the Family Advocacy Scheme, which is yet to be implemented.
119. The concern of the judiciary is that if the proposed further cuts in legal aid remuneration are implemented, many senior practitioners will cease doing legally aided work and the fund of experience and talent acquired over many years will dissipate, and junior practitioners will not be given the financial incentive to replace them.

Expert Fees: Family Proceedings (Chapter 8)

120. In family cases the court relies, in suitable cases, on expert evidence to assist it in determining either factual (usually medical) disputes or what orders will meet the welfare needs of the child in question. Such evidence can often be critical in helping the court to determine what is in the best interests of the child.
121. Whilst understanding the need to control and manage the costs of such experts, we are concerned that the cuts should not have the effect of reducing the pool of

available experts to the extent that suitable experts are not willing to undertake the work. Reaching decisions regarding a child's future without the benefit of such evidence would take longer, be more costly in terms of court time, and be less reliable in the outcome.

CRIMINAL JUSTICE

122. The consultation paper's proposals relevant to criminal justice are largely confined to those in Chapter 6 concerning legal aid remuneration in respect of criminal fees, and those in Chapter 8 concerning experts in criminal proceedings. Our response likewise concentrates on those chapters. In so far as the proposals in Chapter 4 concerning the scope of civil and family legal aid are relevant to criminal proceedings or the criminal law (e.g. issues of confiscation or cash forfeiture, quasi-criminal proceedings, injunctions concerning gang-related violence, and orders under the Protection from Harassment Act 1997), any comments we have on them have been made above.
123. In summary, the main points we make at this stage in relation to criminal justice are these:
- (1) We agree with the principle that the fees for an early guilty plea in either way cases determined to be suitable for summary trial should be substantially the same regardless of whether the case is heard in the magistrates' court or in the Crown Court, but we disagree with the proposal to fix a single fee for such cases in the Crown Court regardless of the time when the plea is entered or whether there is a cracked trial.
 - (2) We disagree with the proposed harmonisation of the fees paid for guilty pleas and cracked trials in the Crown Court in indictable only cases and either way cases where the magistrates' court has declined jurisdiction.
 - (3) We also disagree with the proposed downward alignment of fees paid for murder and manslaughter cases with those paid for cases of rape and other serious sexual offences.
 - (4) We do not consider that the consultation paper goes far enough in seeking to address the problem of funding for Very High Cost Criminal Cases.
 - (5) The narrow proposal relating to one of the criteria for the appointment of two junior counsel triggers wider comments on our part concerning the appointment of leading counsel in two-counsel cases and the importance of maintaining an incentive for leading counsel to undertake publicly funded criminal work
124. We also have specific concerns about the operation of the system in extradition cases, where the requirement for means-testing of applicants is causing unacceptable delays. The point does not relate, however, to matters specifically raised in the consultation paper. It will be addressed in submissions responding to the current review of extradition.

Legal Aid Remuneration: Criminal Fees (Chapter 6)

Fees in either way cases suitable for summary trial (paras 6.15-6.22)

125. The proposal set out in the consultation paper is (i) to pay a single fixed fee of £565 for a guilty plea or cracked trial in an either way case where the magistrates' court has determined that the case is suitable for summary trial but the defendant has elected trial at the Crown Court, (ii) to enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' court scheme by 25% for either way cases, and (iii) to remove the separate fee for a committal hearing for all cases committed to the Crown Court for trial.
126. We accept that it is desirable that a case be dealt with where possible in the magistrates' court rather than at the Crown Court and we share the concern expressed in the consultation paper (at paras 6.10-6.14) about the increasing number of either way cases in which the magistrates' court determines that the case is suitable for summary trial but the defendant elects trial in the Crown Court and then pleads guilty in the Crown Court. The consultation paper also expresses concern about the fact that in many of these cases the sentence imposed by the Crown Court is one that the magistrates' court would have had power to impose. That, however, is probably a point of secondary importance and should be treated with some caution, since the sentence in the Crown Court is frequently affected by factors that did not apply at the time when the case was before the magistrates' court. In particular, the passage of time or further investigations or evidence may lead to a more realistic assessment of the strengths and weaknesses of the parties' respective cases, with a potential effect not only on the defendant's willingness to plead but also on the prosecution's willingness to accept a plea to a lesser offence or to accept a particular basis of plea.
127. We also understand the concern (para 6.16) that the fee structure should not discourage a defendant's lawyers from giving proper consideration to, and proper advice about, the question of plea at an early stage of the proceedings. It would be wrong, however, to think that the problem can be addressed adequately in terms of incentives to lawyers or that the incentives produced by the proposal would be necessarily beneficial:
- (1) The decision whether to elect trial at the Crown Court is that of the defendant, not his lawyers. He is told in terms in open court that he has the right to be tried at the Crown Court but that he may, if he consents, be tried by the magistrates' court. There are numerous reasons why he may elect trial at the Crown Court irrespective of any advice he may have received to the contrary, and why he may nonetheless then decide to plead guilty at some stage in the Crown Court. For example, he may simply want to put off the evil day; he may hope that something will turn up, or that an important witness will not turn up; or he may take the view, whether rightly or wrongly, that the magistrates' court might commit him to the Crown Court for sentence and that the sentence on a plea at the Crown Court might be lower than the sentence on a committal.

- (2) Thus, whilst lawyers will have some influence over a defendant through the giving of appropriate advice, they do not take the decision and they do not generally have a decisive influence over the decision.
- (3) The lawyer's duty to his client is to advance the client's case to the best of his ability and to give advice accordingly. We do not dispute that incentives given through the fee structure may operate on the mind of the lawyer in relation to the advice to be given on issues such as early plea or election for trial at the Crown Court. But the impact of such incentives should not be overestimated; and whilst there may be cases under the current system where the higher fees for Crown Court cases encourage lawyers to give inappropriate advice out of self-interest, this is not thought to be a widespread practice. Further, to the extent that such incentives do operate on the minds of lawyers, the proposals cut both ways for reasons given below.
- (4) There are many cases where it is appropriate for a lawyer to advise the defendant to elect trial at the Crown Court and where the defendant follows that advice yet subsequently enters a guilty plea in the Crown Court. At the plea before venue stage the defendant's instructions may indicate a clearly triable case. The instructions may call for significant investigations to be carried out or requests for disclosure to be made. On the basis of existing disclosure the prosecution case may appear to be weak. Further investigations, disclosure or evidence, or a change in the defendant's instructions, may result in different advice being given at a later stage. Or the defendant may simply come to the view that the benefits to be derived from a guilty plea outweigh the risks of a trial.
- (5) In the ordinary course, where a defendant enters a late guilty plea in the Crown Court or there is a cracked trial, his lawyers will have done additional work in the meantime in accordance with their professional duty – whether in dealing with further investigations or disclosure or in preparing for trial – and in our view they ought to be remunerated for that work. Indeed, the work done may contribute to a plea being entered or the trial cracking. In any event the lawyers ought not to be penalised in their remuneration for the fact that the defendant elected trial at the Crown Court but then pleaded at a later stage.
- (6) Failure to remunerate for such additional work where there is a late plea or cracked trial might create an undesirable incentive for lawyers to apply pressure on a defendant to plead guilty at an early stage irrespective of whether such a plea is appropriate. Vulnerable defendants would be particularly at risk from pressure of that kind.
- (7) If a guilty plea has not been entered at an early stage, failure to remunerate for additional work will create an equally undesirable incentive for the lawyer to allow a case to proceed to trial (and thereby earn the higher trial fee) rather than advising a change of plea, where appropriate, before trial. The result may be that pleas are entered very shortly after the jury have been sworn or that cases will simply be fought when, if appropriate advice

had been given, there might have been a plea prior to trial. Although a cracked trial is less desirable than an early guilty plea, it does at least avoid the cost of a much more expensive hearing. Failure to remunerate for additional work is therefore liable to have the perverse consequence of leading to an increase, rather than a reduction, in overall costs.

128. In the light of those considerations, we can state our views on this proposal as follows.
129. We agree with the principle that the fees for an early guilty plea in either way cases determined to be suitable for summary trial should be substantially the same regardless of whether the case is heard in the magistrates' court or in the Crown Court.
130. We disagree, however, with the proposal to fix a single fee for such cases in the Crown Court regardless of the time when the plea is entered or whether the case counts as a cracked trial. That proposal is unfair, in failing to give any remuneration for additional work properly done in the Crown Court, and is liable to create the undesirable incentives and to produce the adverse consequences to which we have referred.
131. We would add that the proposals contained in the consultation paper should not be considered in isolation but should be viewed in conjunction with the Government's consultation paper on sentencing and, in particular, the proposed discounts for a guilty plea. Incentives are more appropriately directed at the defendant, whose decision it is whether to elect trial at the Crown Court and whether to plead guilty at any stage, than at his lawyers. On the other hand, if discounts for a plea are very heavily front-loaded, they are liable to produce the perverse consequence that a defendant who has not pleaded at a very early stage is more likely to risk a trial instead of entering a late plea.

Fees for guilty pleas and cracked trials in indictable only and either way cases where magistrates have declined jurisdiction (paras 6.23-6.28)

132. The proposal is to "harmonise" the fees paid for guilty pleas and cracked trials in the Crown Court in indictable only cases and either way cases where the magistrates' court has declined jurisdiction. Specifically, it is proposed to increase by 25% the fee for a guilty plea at an early stage of the proceedings and to pay that fee for all guilty pleas (whenever entered) and for cracked trials, subject to application of the existing facility for an additional fee for special preparation.
133. We do not agree with the proposal, for similar reasons to those given above when commenting on the proposal to have a single fixed fee for a guilty plea or cracked trial in an either way case determined to be suitable for summary trial. Again, the decision whether to plead or to go trial, and as to the timing of any plea, lies with the defendant, not his lawyers, and the lawyers do not generally have a decisive influence over the decision; they ought in principle to be remunerated for work properly done prior to a late plea or cracked trial, and ought not to be penalised for the defendant's decision to plead at a late stage;

and the adoption of a harmonised fee regardless of the time when the plea was entered or whether there was a cracked trial would create undesirable incentives and consequences.

134. The proposed increase in the fee for a guilty plea will not meet those objections. It will not serve to achieve an appropriate balance or to bring fairness overall. Nor will the payment of an additional fee for special preparation in the most complex cases deal adequately with the problems.
135. Here, too, we stress the need to view the proposals in conjunction with the Government's consultation paper on sentencing.

Fees for murder and manslaughter cases (paras 6.29-6.31)

136. It is proposed to make a downward alignment of fees paid for murder and manslaughter cases with those paid for cases of rape and other serious sexual offences.
137. We disagree with the proposal, which we consider to be wrong in principle. Whilst we accept that a small number of trials of rape and other serious sexual offences may be more complex for a variety of reasons than the trial of a straightforward homicide, the generality of serious sex cases tried in the Crown Court are not of comparable complexity to the generality of murder cases. Nor are they subject to the same pressures on the advocate. The dynamics of the two types of case differ considerably.
138. Murder cases frequently involve complex issues such as those arising out of joint enterprise and the partial defences of provocation and diminished responsibility. Murder is in any event the most serious offence in the criminal law and is perceived as such in the minds of the public. The defendant faces a mandatory sentence of life imprisonment and a very long minimum term if convicted. Trials often take place under the glare of national publicity, imposing additional pressures on trial counsel.
139. It is fundamental that a defendant in such a case should be entitled to a high quality criminal advocate. Such advocates also help to ensure that these complex cases are conducted efficiently. This is a point to which we return in our comments below on the proposal to limit the use of leading counsel and/or multiple advocates.
140. Thus, the downward alignment of fees for murder cases with those for serious sex cases, by discouraging the best advocates from taking these cases, will work to the detriment of defendants and of the criminal justice system: paying less for cases of murder will result in delays to the most difficult and high-profile trials and will be a false economy.
141. The trial of a manslaughter indictment standing alone is relatively rare and is restricted in practice mainly to cases brought on the basis of gross negligence, usually with some corporate element. These have proved to be very difficult cases, hence the new offence of corporate killing which was introduced in order

to address the fact that it was often difficult to fit the facts of a corporate killing into the existing law of manslaughter and therefore convictions were relatively rare even when some degree of culpability was clearly present. A trial where corporate killing is alleged will remain complex and difficult even under the new law and such cases often involve matters of great public importance and wide public interest.

142. Cases of murder and manslaughter are classified as class 1, whereas rape and other serious sexual offences are classified as class 2, for the purposes of trial in the Crown Court, and they are subject to different judicial “ticketing” arrangements: see paras III.21 and IV.33 of the Consolidated Criminal Practice Direction. Cases in class 1 may only be tried by a High Court Judge or by a judge or deputy judge who is specifically authorised by the Lord Chief Justice to try murder or (as the case may be) attempted murder cases. Such authorisations are given sparingly, whereas many Circuit Judges and experienced Recorders have authorisations to try serious sexual cases. Given that such a distinction is considered appropriate at the level of judge, it should also apply in relation to the fee structure for advocates.

Fees for offences of dishonesty (paras 6.32-6.33)

143. These proposals concern relatively detailed changes to the existing basis of remuneration in cases of dishonesty.
144. We do not disagree with the proposal to amalgamate categories F and G, remunerating most cases of dishonesty (including trials) at the category F level, with fee enhancements available as at present for cases of genuine complexity. How such complexity is best assessed, and whether the present basis of the number of pages of prosecution evidence is appropriate, is another issue.
145. We agree that category K should be retained for the most serious offences of dishonesty, and that those are best categorised as having values over £100,000.

Other fee changes (paras 6.35-6.39)

146. We have no specific comment on the proposal to remove the premium paid for magistrates’ courts cases in London (para 6.37).
147. As to the proposal to reduce most “bolt on” fees by 50% (para 6.39), our concern lies not so much with the particular proposal taken in isolation – we do not disagree with it, given the need to save money - as with the cumulative effect of cuts upon cuts and the overall impact of the proposals upon an already fragile system and the willingness of competent advocates to undertake publicly funded criminal work.

Payments in Very High Cost Criminal Cases (paras 6.40-6.44)

148. We share the concerns expressed in this section of the consultation paper that a very small number of Very High Cost Criminal Cases (VHCCCs) soak up an excessive proportion of public money. The change in the definition of

VHCCCs so that a smaller number of cases was covered (para 6.42) was a move in the right direction, and we agree with the proposal to align the criteria for VHCCCs for litigators so that they are consistent with those now currently in place for advocates (para 6.44). But the consultation paper does not grapple with the deeper problems concerning VHCCCs. In particular, although it expresses a wish “to reward efficient providers through the graduated fees schemes and to move away from hourly rates wherever possible” (para 6.44), it does not go far enough in this respect. We agree with the need to reward efficiency: fees should be assessed for the quality of work done, not for the length of time it has taken. The payment of hourly rates should at least be changed to daily rates, which would mitigate any abuse of the system.

Independent assessor for VHCCCs (paras 6.45-6.46)

149. As already indicated, we support steps to curb expenditure on VHCCCs. In that connection there may be some merit in trying out an independent assessor, who would have to be someone with real first-hand experience of the way VHCCCs progress in court (a retired judge or a seconded serving judge would be the most suitable person).
150. We should, however, sound a strong note of caution about the proposal. First, even a person with extensive experience in managing complex cases might find it difficult to put himself in a position to review and challenge effectively the defence representatives’ assessment of an individual case. Secondly, the process could lead to delay, given the time needed for the independent assessor to be briefed and to consider the case. Thirdly, as part of case management the trial judge is frequently told of particular lines of enquiry and is invited to express a view about them, and it would be necessary to ensure that the independent assessor had regard to the trial judge’s views and did not undermine or impinge upon the case management process. One cannot therefore be sure that such an appointment would work or would be good value for money.

Limiting the use of leading counsel and/or multiple advocates (paras 6.47-6.50)

151. The specific proposal in this section (at para 6.50) is a narrow one, that one of the criteria for the grant of a representation order for two junior counsel be amended by increasing from 1,000 to 1,500 the number of pages of prosecution evidence to be exceeded. However, reference is also made (at para 6.48) to a wider concern to ensure that an order for the appointment of leading counsel and/or multiple counsel is made only where it is in the interests of justice to do so and such representation is the most cost effective means of managing the case.
152. As to the specific proposal, the length of a case file is not a useful measure of complexity. The ease with which documents can be scanned and copied has meant that bundles have become longer irrespective of the complexity of a case. A case can be very complex without involving a large number of documents. That said, we do not oppose the proposal to increase the number of pages to

1,500 in the relevant criterion; but we do not think that the criterion has any real meaning or that the change will have any significant effect.

153. As to the wider concern, we take issue with the suggestion that judges allow more than one counsel in cases where this is not justified. The purpose of the provisions must be to ensure that cases of complexity and seriousness are dealt with by an advocate or team of advocates of sufficient skill and experience to help the court handle the case efficiently. This sometimes calls for the appointment of leading counsel, supported where appropriate by a competent junior, rather than the appointment of two junior counsel. As judges know better than anyone, appointment of leading counsel usually has a positive impact on the running of a trial. Such an advocate has the ability and experience to know good points from bad and the confidence to argue only the good. Senior advocates who are not leading counsel are likely to be less assured under the pressure of handling cases which stretch their ability levels, leading to an overly cautious approach in making submissions or concessions. The same consideration applies to cases of length and complexity where two junior counsel are appointed.
154. Yet some judges have sensed a reluctance among the profession to apply for the appointment of leading and junior counsel in cases that merit certification for two counsel, a marked preference being shown for the appointment of two junior counsel. As we have indicated, the appointment of two junior counsel may lead to trials proceeding less efficiently than if leading counsel had been appointed.
155. We suggest that judges should be given greater freedom in this area. Where a case genuinely merits two counsel on the grounds of seriousness or complexity of issues (which judges should be free to determine without the constraint of criteria such as the number of pages of prosecution evidence), certificates should be issued for leading counsel supported by a competent junior. Where certificates for two counsel are sought primarily because of the large volume of paperwork, which a single advocate cannot deal with at the same time as asking questions or listening to evidence and taking a note during the trial, it would be better if the former power of the court to issue a litigator's certificate were restored as an alternative to a certificate for two counsel. Certificates for two junior counsel should be issued only in the relatively small number of cases where the paperwork contains a large amount of unused material or similar pieces of evidence that require consideration by a trial lawyer during the trial when the advocate dealing with the evidence as it is put to the jury cannot find the time to do so. The trial judge is the best person to take these decisions.
156. What we have said about the value of leading counsel leads on to a further and deeper concern. There is a reluctance among junior advocates practising in criminal law to apply for silk. The reason given by them is that they see no future for Queen's Counsel in publicly funded criminal work. This is a serious problem. There needs to be sufficient incentive for Queen's Counsel to undertake such work, since otherwise there will be insufficient incentive for junior barristers and solicitor advocates with higher court rights in the field of criminal law to apply for appointment as Queen's Counsel. If the ranks of

Queen's Counsel experienced in criminal law diminish and ultimately disappear, it will have serious implications at both ends of the profession. Those with ambition and talent who are seeking to enter the profession are likely to avoid criminal work and to look to specialise in other areas. Over time, this will have adverse effects on the availability of skilled representation for prosecutors, defendants and on the efficiency of the trial process. Just as worryingly, it will reduce the pool of candidates suitable for appointment to the bench as criminal judges.

157. It seems to us that the question of how best to employ and reward Queen's Counsel under the system of criminal legal aid has not been properly addressed with the long term interests of a healthy criminal justice system in mind. Whilst the point has only a limited bearing on the specific questions raised by the consultation paper, we think it appropriate to mention it in this response because of its longer term importance.

Expert Fees: Criminal Proceedings (Chapter 8)

158. We agree that greater control is required over experts and we do not oppose the specific proposals relating to experts' fees, but we stress that in determining the structure and level of fees in the longer term it will be necessary to ensure a fair level of remuneration for work properly done.
159. Consideration also needs to be given to the possibility of applying stricter controls over the amount of expert evidence given; but that is a matter for separate discussion and is not something that we think it appropriate to comment upon here.

ANNEX

160. As indicated at para 2 above, a completed questionnaire is attached as an annex to this response. Our answers are largely confined to the matters covered in the response.

11 February 2011