

A New Focus for Civil Legal Aid

The Advice Services Alliance's response to the
Legal Services Commission's consultation paper

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1 Introduction

About ASA

1. ASA is the umbrella organisation for independent advice networks in the U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:

- adviceUK
- Age Concern England
- Citizens Advice
- Citizens Advice Scotland
- DIAL UK (the disability information and advice service)
- Law Centres Federation
- Scottish Association of Law Centres
- Shelter
- Shelter Cymru
- Youth Access

2. Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law').

3. This response has been drafted following discussion and consultation with our full members. However, it may not reflect our members' views in their entirety and we are aware that some members will submit their own response. On some issues, our members have differing views.

Introductory Comments

4. ASA is extremely saddened to read the proposals in this consultation paper. While the paper contains many proposals that appear reasonable, particularly in relation to family law, these are overshadowed by proposals to make cuts in the legal aid scheme, both in family and other categories of law.

5. The consultation is clearly and expressly driven by the need to reduce costs, but no reasons are given as to why this has to be done, or the extent to which it is due to pressures from other parts of the legal aid budget (especially crime and immigration).

6. The partial regulatory impact assessment gives figures for the number of people affected by various proposals, but does not explain how the figures are reached. It is difficult therefore to understand how it can be claimed that the effect of the proposals will be neutral and non-discriminatory.

7. We would seriously question the timing of this consultation paper. Firstly, there is already in place a Fundamental Review of Legal Aid, which is presumably considering many of the issues raised by the consultation paper in terms of the purpose and extent of legal aid.

8. Secondly, the DCA has just consulted on the recommendations of the Independent Review of the Community Legal Service, carried out by Matrix Research and Consultancy, which include a recommendation (number 3.1) to protect the CLS budget either directly or indirectly and for the CLS budget to be based more directly upon need. The proposals in the present paper point in the opposite direction, by proposing cuts in the CLS budget. The proposals provide strong evidence in favour of the Matrix recommendation, since the impetus for these proposals seems to arise from pressures on other parts of the legal aid budget.

9. We believe very strongly that further cuts in eligibility are not acceptable. Legal aid is already a residual welfare service, a shadow of the principles set out in the 1949 Act. The proposals in this paper run the risk of creating a vicious circle, causing further erosion in general public support for the scheme as fewer benefit from it.

10. In expressing our opposition to these cuts, we would wish to emphasise that

- We represent the voluntary advice sector which has always emphasised the importance of early advice to prevent disputes escalating
- In the same vein, we strongly support increased information on the law and have promoted this through Advicenow¹
- We support the appropriate use of ADR and have done pioneering work to raise awareness of this, eg through ADRnow.²

11. However, none of this is a substitute for ensuring that people have access to the courts where this is necessary to enforce their rights. As Lord Irvine pointed out, in the foreword to the 1998 white paper *Modernising Justice*:

“People need to have ways to uphold their rights and defend their interests in their dealings with others, including employers, retailers, service providers and the state. It is not enough for people to have rights; they must be confident they can enforce those rights if need be. This was the purpose behind the Human Rights Act 1998, which enables citizens to enforce their fundamental rights through the British courts. It is also the reason for the reforms of legal aid and civil justice described on this White Paper.”³

12. We believe that it is essential to democratic government that public funding be available (subject to merits and means testing) to challenge government agencies (including local authorities and quasi public authorities like housing associations) both in relation to human rights (eg actions against the police) and the provision of public services (eg clinical negligence, housing disrepair, education and judicial review). Judicial review cases in particular may raise public interest considerations. None of this should be left to the market in the form of conditional fee agreements (CFAs).

13. With respect, we would remind the government, and the Commission, of the Lord Chancellor’s direction on the priorities for legal aid.

This provides that top priority should be given to the following categories:

- Special Children Act proceedings (as defined in the Funding Code);

¹ www.advicenow.org.uk

² www.adrnow.org.uk

³ Lord Irvine of Lairg: Foreword to *Modernising Justice: The Government’s plans for reforming legal services and the courts*

- Civil proceedings where the client is at a real and immediate risk of loss of life or liberty.

After that, higher priority should generally be given to the following categories:

- *Help with social welfare to tackle social exclusion, including help with housing proceedings, debt, employment rights and social security benefits;*
- *Domestic violence proceedings;*
- *Proceedings concerning the welfare of children (including proceedings under part IV or V of the Children Act not included above, adoption proceedings and proceedings concerning residence);*
- *Proceedings against public authorities alleging serious wrong doing, abuse of position or power or significant breach of human rights.*

14. There are many respects in which the proposals in this paper fail, in our view, to take account of the direction.

15. As far as ADR is concerned, we consider that it is not acceptable for the operation of legal aid to run a coach and horses through *Halsey*,⁴ in effect making ADR compulsory for the poor but not those who can afford a solicitor. In general clients cannot get the same remedies through ADR as they can obtain through the courts. There is a serious risk in these proposals of creating a two-tier system of justice, with the poorer sections of our society being reduced to obtaining only those forms of redress that are available outside the court system. We cannot see how such a situation could lead to a reduction in social exclusion. There is clearly a risk that those directly affected by these proposals would feel that they are second-class citizens entitled only to a second-class form of justice.

16. It appears to us that these proposals change the whole focus of the legal aid scheme. We agree with a recent commentator that the paper's vision is that:

*"legal aid should be available only for the poorest, and only for litigation where it is a last resort – and only then when no other form of funding is available."*⁵

17. We would comment also that, if cases are taken out of legal aid, this can have a double effect. Where clients end up paying, for instance by taking out loans, their solicitors will be entitled to charge private rates and not legal aid rates. Such clients would therefore be facing a double blow as a result of these proposals.

18. Before commenting on the specific proposals made we would like to point out that we have had the advantage of seeing a number of other responses to this consultation, mostly in draft form. Where others have greater knowledge of a particular subject than we do, or where they have made a point particularly well, we have referred to their responses.

19. We have also seen the final version of the Joint Response prepared by the Public Law Project, with which we are in fundamental agreement and which we have also signed.

20. We have restricted our comments to those proposals about which we feel qualified to speak. There are some categories of law, such as clinical negligence, which are outside the experience of the advice sector. Similarly, we have made only a few comments in relation to the family proposals. Where we make no comment however, we would not wish this to be taken as suggesting our agreement with the

⁴ *Halsey v Milton Keynes General NHS Trust* EWCA Civ 576

⁵ Sarah Ricca 'Access to civil justice under threat?' *Legal Action* October 2004 p.6

proposal in question. We would only ask the government, and the Commission, to listen closely to the views of those who are qualified to speak on these subjects.

2 Questions for Consultation

Introduction

Q1. Does the Funding Code strike the right balance between funding early advice and contested litigation? How far should reforms go to re-focus CLS funding towards early resolution and away from litigation?

21. In our view the Funding Code does strike the right balance.

22. It is true that there are incentives to do work under Legal Representation. A further incentive is likely to be provided by the introduction of fixed fees. These incentives could be reduced by increasing the payment rates for Legal Help, or by having one payment rate, as is proposed for family work.

23. The questions refer to 'early advice' and 'early resolution', which are different things. We are strong believers in the advantages of both early advice, and early resolution, when this is possible. Sometimes early resolution can be obtained by means other than litigation. Often however litigation is necessary to resolve an issue, whether the litigation starts 'early' or 'late' in the course of a dispute.

24. The questions seem to assume however that many cases could be resolved satisfactorily either by early resolution or by (later) litigation. We do not think that this is correct. In our experience, early resolution is not often an appropriate alternative to litigation.

- Particularly in cases relating to social welfare law, the vast majority of litigation by claimants is conducted because the other side will not take the necessary action, and early resolution is not therefore available. This may be because an organisation or individual does not want to admit that it has done something wrong. It may also be that an organisation is unable to respond, because access cannot be obtained to a person who has authority to make a decision. This has been the case with many local authorities. Advisers find regularly that they cannot get a response from a local authority housing department, for example. They then contact the legal department, but find that the latter are also unable to get such a response. Litigation is often necessary just to get an organisation to respond at all. The same problem occurs in relation to the Home Office in immigration cases. Advisers often find that a case falls squarely within a Home Office concession or that there are clear errors of fact in a Home Office refusal letter. Generally, however, the Home Office will not consider the details of the case until shortly before the appeal hearing. Therefore, despite the adviser's efforts to resolve the case early, it continues until the occasion of the appeal hearing forces the Home Office to take action.
- The problem is often therefore one of intransigence and inflexibility on the part of government organisations.
- It is unfortunately the case that public and private bodies react very differently to litigation than they do to informal attempts at resolution. Alternative dispute resolution mechanisms such as mediation do not carry the same clout as litigation. Complaint systems carry very little clout at all.
- There are obviously some cases that could be settled for small amounts rather than litigated to achieve higher amounts, but these are, by definition, damages

claims, and are probably mostly outside scope anyway because they are personal injury claims.

- The tendency in some cases to commence litigation at an early stage of a case has been significantly reduced by the introduction of pre-action protocols, of which the housing disrepair protocol is the most recent example, and by the pre-action principles that apply in other cases.⁶
- Early resolution is often not possible, because clients fail to seek help from an appropriate adviser until late in the day, or even the last minute. This is often the case when clients are defendants to court proceedings. This may be for various reasons, including difficulties in navigating the advice maze. It may also reflect the inability of advice organisations to respond to requests for 'early' advice because they have to concentrate their resources on cases that are more urgent or 'emergencies'.
- The LSC statistics do not suggest that there has been an emphasis on premature litigation. Of certificates granted in 2003/04:

133,468 [83%] were in family cases

12,066 [7.5%] were in housing

6,064 [3.75%] were in clinical negligence

2,251 [1.25%] were in immigration

1,088 [0.6%] were in public law

1,003 [0.6%] were in actions against the police

We do not know about family work, but it seems unlikely that there is much litigation in the other areas which is premature.

Financial Eligibility

Q4. Is it appropriate to concentrate savings on the upper eligibility limit for Legal Representation? Should the upper limit for Legal Help and Legal Representation be aligned? What forms of safeguard should be introduced to protect the most vulnerable clients?

25. We are concerned that the paper itself provides no figures as to the current level of eligibility, or the effects of its proposals.

26. When the present eligibility rules were established, following consultation, this was preceded by detailed modeling, by the Legal Services Research Centre, of a number of different proposals. We are very concerned that no such modeling has been done on this occasion.

27. The paper suggests that 4,000 certificates will be affected by the proposal to align the income limits, whereas the impact assessment paper suggests that 3,500 clients will be affected each year. The impact assessment paper suggests that 10,000 clients a year will be affected by the proposal to remove the equity disregard, but no explanation is given as to how this figure is reached. One is left with the suspicion that these figures are guesstimates at best.

28. We are opposed to any further erosion in eligibility, with its concomitant effects on access to justice. We have serious doubts as to the extent to which people who

⁶ Rules 4.1 – 4.10 of the Civil Procedure Rules

are made ineligible by these proposals will be able to obtain advice. It is unlikely that they will be able to pay any significant amount in respect of lawyers' fees. They are likely to turn to the NfP sector, but the capacity of the sector to provide specialist advice to noneligible clients is already restricted.

29. We agree wholeheartedly with Legal Aid Practitioners Group that the time has come for this issue to be debated by Parliament.

30. It may be more appropriate, in fact, to provide some services without a means test, as already happens in relation to proceedings before a Mental Health Review Tribunal, and certain proceedings under the Children Act 1989 or the Hague Convention.⁷ We would suggest that this should apply in relation to

- Domestic violence
- Other cases where the client's safety or liberty are in issue
- Possession proceedings
- Homelessness cases

31. We note in this context that the LSC's Yorkshire & Humberside regional report recommends:

*"LSC to consider proposing the right of women suffering DV to non-means-tested public funding for emergency work, as exists for mental health tribunals etc"*⁸

32. It is likely that the vast majority of clients in these categories are eligible in any event. At the very least it is worth researching what the financial implications of this proposal would be.

33. We believe furthermore that initial advice (up to a maximum of two hours) should be provided without means testing in relation to the matters identified in the Lord Chancellor's direction as priorities for legal aid spending.⁹

Q5. What forms of safeguard or exemption should apply if the £100,000 equity disregard is abolished? Should the £100,000 mortgage cap be retained?

34. We must object to this proposal, both in principle and for practical reasons.

35. The Constitutional Affairs Select Committee's report on legal aid stated:

*"At present, the legal aid system is increasingly being restricted to those with no means at all. There is a substantial risk that many people of modest means but who are homeowners effectively will fall out of the ambit of legal aid. In many cases this may amount to a serious denial of access to justice."*¹⁰

36. In practical terms, we are talking about people who qualify on income grounds, who may or may not be on means tested benefits (although there is a suggestion that people on some benefits may be excepted from this provision), and have some equity in their homes. Such people are being told, in effect, to seek advice from any agency that is able to advise ineligible clients or to borrow money on the security of their homes and pay for legal advice.

37. The capacity of the advice sector is already extremely limited, and it is unlikely that the sector would be able to cope with a significant amount of increased demand.

⁷ The CLS (Financial) Regs 2000, para 3

⁸ Legal Services Commission Yorkshire and Humberside 2003 Regional Report p.28

⁹ See page 3 above

¹⁰ Civil Legal Aid: adequacy of provision Volume 1 paragraph 105

There are considerable practical objections to the idea that people in this position should borrow money on the security of their homes, and it is very unlikely that many of them will be able or willing to do so, without incurring additional liabilities that they are unable to meet. We are in fundamental agreement with the many points made by the Legal Aid Practitioners Group in opposition to this proposal.

38. The paper suggests that the £100,000 mortgage cap is largely irrelevant now because the gross income cap excludes most people who could afford a mortgage of £100,000 or more. However, there could be some people whose income has reduced dramatically (itself a classic cause of debt problems), and may even be on benefits, who have a mortgage of over £100,000. In the circumstances, we would agree that the £100,000 mortgage cap should be abolished.

Family

Questions 6 – 15

39. We do not feel able to provide detailed responses to these questions as family law falls outside our expertise and that of the Nfp sector. We will therefore limit our comments to some of the wider aspects of the proposals.

40. In relation to the funding of litigation

- We are opposed to contributions of the kind proposed in paragraph 3.23. While some clients will be able to afford them, others will either be unable to do so, or will only be able to do so by borrowing these sums either from friends or relatives or from moneylenders at a cost that is likely to be exorbitant. Neither course of action is likely to increase social inclusion.
- We do not believe that funding from the financial sector for ancillary relief cases is likely to be available to those who would otherwise be eligible for legal aid.
- We object very strongly to the suggestion that clients, who would otherwise be eligible for legal aid, should fund their cases by personal borrowing under a credit card or bank borrowing secured on joint matrimonial assets, as suggested in paragraph 3.28. Borrowing on a credit card is expensive and is likely only to lead to increased debt and social exclusion. Borrowing secured on joint matrimonial assets is likely to cause a number of practical difficulties, and in any event is unnecessary given the operation of the statutory charge.
- In general we consider that the statutory charge regime already provides a satisfactory solution to this issue, and we cannot see any reason to change it.

41. We are concerned also at the proposal to take the drafting of divorce petitions out of scope. Drafting a divorce petition requires a fairly high level of literacy and the ability to understand legal terminology, such as “maintenance pending suit”. Some clients may be able to do it themselves, but many will not. If clients do it themselves, there is a danger that in providing, for example, details of alleged unreasonable behaviour by their spouse, they are likely to escalate disputes, which will cause unnecessary distress and conflict, and involve other costs elsewhere in the system.

42. If clients ask advice agencies for help in drafting petitions, this will place a burden on agencies, which do not have the necessary expertise.

Discouraging unnecessary litigation

Q16. In what circumstances should Legal Representation be refused on the grounds that an existing complaint or Ombudsman scheme has not first been pursued? What forms of complaint and Ombudsman schemes are most appropriate for such an approach?

43. It is our view that this question is largely based on a false premise: litigation and the use of complaints and ombudsmen schemes are rarely alternatives. In general there is a clear division between those types of problems that are suitable for resolution by complaints or Ombudsmen schemes, and those that require litigation. There are also a number of practical issues which mean that the possible overlap between these schemes and litigation is likely to exist more in theory than in practice.

44. The consultation paper refers to the general power to refuse legal representation if there are schemes that should be tried before litigation is pursued. We are unclear what additional powers are being sought here. The paper suggests that this approach could be applied more generally whenever such a scheme “will give a proper explanation and response to the matters complained of.”¹¹ There must be a serious question as to the ability of many complaints schemes to do this. What we find particularly worrying however is the implied suggestion that “a proper explanation and response” may in some cases be an appropriate resolution to the matters complained of, and that this is more likely to be the case “the more open and comprehensive the response.”¹² In our view, such an approach contains a serious risk that denials of error by the body complained of will be taken into account and used as a reason for refusing legal representation. Such an approach also runs the risk of undermining the important priority placed in the Lord Chancellor’s direction on “proceedings against public authorities alleging serious wrongdoing, abuse of position or power or significant breach of human rights.”

45. To take housing as an example, the main housing issues dealt with by the Local Government Ombudsman are housing benefit and repairs. Housing benefit, in itself, is rarely the subject of publicly funded litigation. Housing disrepair is now covered by its own protocol.

46. There is at present only one local scheme of which we are aware, which deals with housing disrepair, which is the scheme in the London Borough of Southwark.¹³ While such a scheme may be appropriate for dealing with less serious cases, it is our understanding that the scheme offers far lower financial remedies than the courts. A recent attempt by the local authority to persuade the local county court that tenants should use the local scheme rather than the court was roundly rejected by the court on the basis that ADR is a consensual procedure which cannot be forced on reluctant parties. HHJ Cox stated also that “if the decision to pursue litigation was not a reasonable one, the penalty is in costs.”¹⁴

47. As far as complaints schemes are concerned, it is our view that

- They may provide an appropriate remedy in some cases, but disputes are rarely resolved to the satisfaction of the complainant.¹⁵
- They are generally not effective as ways of resolving complaints, as they do not appreciate the legal background, or ask the right questions.
- They are not relevant to most social welfare law disputes.
- They are themselves regularly found by Ombudsmen (such as the Health Service Ombudsman) to have been too slow and ineffective.
- They are not needed in order to clarify the facts since this is largely achieved in any event by the pre-action protocols.

¹¹ Paragraph 4.3

¹² Paragraph 4.5

¹³ We are also aware of an arbitration scheme being established in the London Borough of Hackney.

¹⁴ *Bibi v London Borough of Southwark* (LB3.02884)

¹⁵ We refer to the response of the Housing Law Practitioners’ Association on this point

- Research is needed as to their value and use.

48. As far as Ombudsmen schemes are concerned, it should be noted that Ombudsman investigations cannot be completed quickly and are therefore inappropriate where urgent action is required. As other respondents to this consultation have pointed out, Ombudsmen cannot make binding decisions, quash a decision, resolve points of law or grant interim relief.

49. As the paper recognises, most Ombudsman and complaint schemes do not offer compensation comparable to that which might be obtained through legal proceedings.¹⁶ As we have argued earlier, we do not think it can be right to propose that clients who are eligible for legal aid on financial grounds should be eligible only to a second class form of justice.

50. As we argue below, in relation to other forms of ADR, we consider that it would be completely wrong for the Funding Code to require parties to use ADR. The recent decision of the Court of Appeal in *Halsey* confirms this view.

Q17. Should Police claims generally proceed through the new police complaints system before litigation is considered? Are there particular categories of police claim or circumstances in which referral to the complaints system might be inappropriate? When would it be appropriate to introduce the new approach?

51. The paper recognises that there has not yet been time to assess the new system as it only started operating in April this year.

52. It is our view that it is too early to answer this question, and that no changes should even be considered until the new scheme has been tried and tested.

53. We would however reiterate our previous comment concerning the importance attached by the Lord Chancellor's direction to "proceedings against public authorities alleging serious wrongdoing, abuse of position or power or significant breach of human rights."

Q18. Should the criteria be amended to require more cases to proceed through the NHS complaints system before litigation is considered (compared to the current approach which applies only to cases under £10,000)? If so, from what date?

Q19. What are the categories of Clinical Negligence case or circumstances in which referral to the complaints system might be inappropriate? Should a different approach be applied in Wales?

54. Clinical negligence falls outside our area of expertise. However, given the recent 'Making Amends' proposals, it is our view that consideration of these issues should be deferred until the government has indicated its intentions.

Q20. How can the Commission encourage the wider use of Non Family mediation and other forms of ADR? In what circumstances should the Commission require mediation to be pursued? What further steps could be taken to promote more mediation of Clinical Negligence disputes?

55. The first question posed actually begs the question whether the Commission should encourage the wider use of non-family mediation. The research done by the Newcastle Centre for Family Research into family mediation following the abortive Family Law Act found that:

- 90% of those using mediation also got legal advice from a solicitor.

¹⁶ Paragraph 4.2

- 25% of couples managed to resolve all the issues in dispute through mediation, but 62% left mediation with issues still needing to be resolved.
- 46% of mediation users said they were satisfied with mediation, 19% were dissatisfied, and a further 19% very dissatisfied. The most common concerns were:
 - that outstanding issues were unresolved
 - that mediation agreements were unenforceable
 - users felt that they had been pressurised to make an agreement
 - users felt that they had not received sufficient advice.
- Most people attending mediation did not feel that it had helped to make divorce less distressing, or that it had helped them to improve communication, share decision-making about parenting, reduce conflict or avoid going to court.

56. The researchers conclude that mediation will continue to be used by only a minority of divorcing or separating couples, and that the majority, including most of those who do use mediation, will continue to be dependent on legal services.¹⁷

57. Although this research concerned family cases, we consider that it provides an important indication of the limits of mediation, and especially the extent to which mediation can reduce the need for legal advice and representation.

58. Mediation is not an alternative to advice. As others have pointed out, even where mediation is available and appropriate, access to legal advice is necessary throughout the process to ensure that the parties are adequately advised on settlements and in order to redress the power imbalance between the parties.

59. The present guidance to the Funding Code already requires consideration of mediation and other forms of ADR before legal representation can be granted.

60. It should be noted also that:

- There are major problems of delay, particularly in relation to mediation in the NHS.
- Mediation can be used by the party complained about to string matters out in the hope of deterring a complainant from proceeding with their complaint.
- If a case is complex, mediation without representation is not a practical option.
- Judicial review is a jurisdiction which already has an 'alternative remedies' principle. At the permission stage judges regularly decide whether a complaints procedure should be used first.
- It is not always easy, in relation to social welfare law matters, to find someone working for the authority who has authority to mediate.

61. There are also practical difficulties in improving access to ADR, as set out in detail in the responses by the Public Law Project¹⁸ and the Legal Action Group.¹⁹

62. Our view is that people should have enough information to make an informed decision about the best way to solve their problem/resolve their dispute, and that this decision will depend on a number of factors. Good independent advice will help them to make an informed decision.

¹⁷ See the summary on <http://www.dca.gov.uk/pubs/reports/prefexec.htm>

¹⁸ Paragraph 30

¹⁹ In response to question 1 of the consultation paper

63. The Commission should however encourage provision of *information* about mediation through:

- Leaflets at court
- Training/information for legal advisers, solicitors, court staff and judges
- General information in libraries and CABx information services
- Promotion of the ASA ADRnow website
- Information on consumer websites

64. Finally, we would comment that, even where mediation is available and appropriate, it still has to be paid for. It is possible that in some cases the use of mediation may reduce costs payable by the LSC, but the most likely result will merely be to shift costs to another category of public spending.

65. As far as the second question is concerned, the Commission should not *require* mediation to be pursued. The *Halsey* judgement, in May this year, set out clear guidance on how courts should approach ADR. Courts have a duty to encourage the parties to use mediation where it is considered appropriate. However mediation and ADR processes have disadvantages as well as advantages, and are not suitable for every case, so there should not be a presumption in favour of mediation. A distinction was made between the duty of the court to encourage parties to use mediation, and the power to force parties to use mediation against their will. Lord Justice Dyson said; *“It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.”* He added that to compel parties to attempt mediation risks adding to the total costs, delaying the date of the hearing, and bringing ADR into disrepute.

66. We do not have a view on the third question concerning mediation in clinical negligence, which is outside our area of expertise. We would however reiterate our general comment on the need for people to get advice in relation to any mediation process.

Q21. In what additional categories of case and in what circumstances should funding be refused on the grounds that a case appears suitable for a conditional fee agreement? To what extent should the availability of funding be linked to the availability of insurance in support of a CFA?

67. On the basis of experience to date with CFAs, we are clear that there are no additional categories of case or circumstances in which funding should be refused on CFA grounds. We are also extremely concerned at the suggestion that CFAs should be used without insurance, leaving a litigant with no protection against an adverse costs order if a case is unsuccessful.

68. We do not accept the premise that CFAs are proper alternatives to legal aid. We do not accept that CFAs have been a success to date. Available evidence suggests that the contrary is true. We refer in particular to the comments made in this respect by the Legal Aid Practitioners Group and the Legal Action Group, who are better placed than we are to comment on the experience of CFAs to date. This experience is however borne out by evidence that we have seen of problems presented to Citizens Advice Bureaux by clients who have used CFAs.

69. We note that the Master of the Rolls, Lord Phillips, has been recently quoted as telling Hong Kong lawyers “not to follow us down the road of conditional fees.”²⁰

²⁰ Legal Action August 2004, p.8

70. At the very least we would argue that proper research is needed as to the experience of CFAs to date, before consideration is given to extending their use.

71. We now turn to the specific examples suggested by the paper.

Housing disrepair

72. We consider that CFAs are inappropriate in housing disrepair cases because they increase the overall cost of such actions through profit margins for insurance companies and solicitors: CFAs simply transfer the cost away from the state, and, in effect, privatise justice. Many housing disrepair complainants will be very badly off, and CFA arrangements may well deter people from taking justifiable action against a local authority or social landlord. Cases with a higher degree of risk may be excluded altogether.

73. There is already evidence that the present use of CFAs in this area is causing severe problems.²¹ In our view, this demonstrates that cases of this nature cannot be left to the private market without placing clients at unacceptable levels of risk. There are already sufficient safeguards in place, both through the Housing Disrepair Protocol and the LSC's contracting requirements to ensure that such cases can and will be handled properly within the legal aid scheme, where they have sufficient merit to justify the grant of legal representation.

Actions against the police

74. We consider that CFAs for actions against the police would be wrong in principle. It is an important role of the legal aid system to act as a check on the abuse of power. The Lord Chancellor's direction on priorities for legal aid includes, as higher priorities "proceedings against public authorities alleging serious wrong doing, abuse of position or power or significant breach of human rights."

75. There is also a practical issue as to whether insurance will be available in such cases. The evidence suggests not.²² We cannot accept that the possible existence of CFAs without insurance should justify a refusal of funding.

Judicial review

76. In principle, we are fundamentally opposed to the suggestion that CFAs could be applied to judicial review proceedings. In our view:

- Judicial review proceedings, almost by definition, are cases with a wider public interest.
- Judicial review serves a public function in keeping government departments and other public bodies on their toes, and to restrain illegal behaviour on their part.
- This proposal conflicts with the Lord Chancellor's direction on priorities.

77. There are also numerous objections to this suggestion on practical grounds. These are well set out in the responses prepared by the Public Law Project²³ and the Housing Law Practitioners Association²⁴ with which we are in full agreement.

²¹ See the letter by Duncan Forbes in the Law Society Gazette 19 February 2004, p.17 and the guidance issued by the Law Society's Rules and Ethics Committee in June 2004, which is available at www.lawsociety.org.uk/professional/conduct/guideonline/view=page.law?POLICYID=181479

²² Independent Lawyer, Issue 21, p.24

²³ Paragraph 33

²⁴ See the HLPAs response to this question

Clinical negligence

78. This is outside our area of expertise.

Q23. Should all forms of group litigation take into account conditional fee agreement availability and strike a balance between public and private funding? How should conditional fee agreements be defined?

79. We cannot comment on group litigation, but would refer to our more general comments on CFAs set out above.

Q25. Should cost protection be reduced for Non Family cases? If so what should the extent of liability be and are there categories of case or circumstances which should receive special attention? What should the extent of cost liability be and how strong a disincentive would it create for weaker claims?

80. We disagree with this proposal, for reasons of principle and practicality. For legally aided clients, litigation is often not a matter of choice.

81. It is likely that the proposed potential costs liability would have some deterrent effect (and is likely to deter the most socially excluded), but we cannot see any likelihood that the proposed measure would deter weaker cases (rather than stronger cases), since

- Clients cannot generally tell whether their case is strong or weak; if they have a strong sense of grievance they are more likely to think that their case is strong
- The proposal assumes that a legal aid certificate has already been granted to the client, with the implication that both their solicitor and the LSC think that their case is worth pursuing.

Q26. Should the General Cost Benefit Test in the Code be strengthened to require proportionality between costs and damages in all categories where it currently applies?

82. We disagree with this proposal. The present version of the test reflects

- the importance of claims against public authorities and housing cases
- the wider public interest that is generally involved in such cases
- the fact that these are cases involving significant imbalance in power between the parties.

83. It should be noted also that many of these cases are brought in order to obtain remedies other than damages.

Other Changes

Q31. Should the existing exclusion of negligently caused injury be replaced with an exclusion for all personal injury proceedings? If so, are any additional directions needed to ensure that services are not inappropriately excluded (e.g. in relation to CICA claims)?

84. We do not see why cases of deliberately caused injury should not remain in scope. In particular we do not see why victims of child or other abuse should not be entitled to bring the perpetrators of such abuse to court. Victims in such situations are usually powerless, and often facing perpetrators who are abusing positions of power and authority. Many such cases will therefore fall within the priorities established by the Lord Chancellor's direction.

Q35. In what circumstances may it be appropriate to refuse funding for a judicial review after the court has granted permission?

85. We note the paper's contention that funding could be refused on the basis that alternative sources of funding should be pursued. We cannot think of many circumstances when this could be the case. We are opposed to the suggestion that such cases could be subject to refusal on CFA grounds. We therefore believe that the existing presumption of funding should remain in its present form.

36. Should devolved powers be available to defend appeals to the Court of Appeal?

86. This seems sensible

Q37. Could the Sufficient Benefit Test be strengthened to better reflect private client considerations and proportionality?

87. We do not agree that the test needs to be strengthened. If there are problems with the present application of the test in the Nfp sector, that is more likely to represent a misunderstanding of the present test rather than to indicate a need to strengthen the test. The test already requires that the cost of the work must be proportionate to the benefit to the client.

Q38. Should Help at Court be available for all tribunals for which advocacy is permitted?

88. This seems sensible.