

CLS Support Email Bulletin (Contracting No.29): consultation paper on the future of civil legal aid

1 Introduction

- 1.1 The Legal Services Commission (the Commission)'s thinking on the future of civil legal aid is set out in a new consultation paper that it has published, [A New Focus for Civil Legal Aid: encouraging early resolution; discouraging unnecessary litigation](#). The paper proposes changes to the Funding Code, the scope of the civil legal aid scheme, financial eligibility and costs.
- 1.2 Responses to the consultation will feed into the longer-term development of the civil legal aid scheme through the [Fundamental Review of Legal Aid](#) being carried out by the Prime Minister's Strategy Unit.
- 1.3 Advice agencies may wish to respond to the consultation paper directly, and they should also feed in any responses to their advice network. Advice Services Alliance (ASA) would also like to know what agencies think of the proposals and therefore would be happy to be copied in to any responses (cc bulletin@asauk.org.uk).
- 1.4 Responses are requested by Friday 15th October and should be sent to Colin Stutt, Head of Funding Policy, Policy and Legal Department, 85 Gray's Inn Road, London WC1X 8TX or by email to: michelle.jordan@legalservices.gov.uk.

2 A brief summary of the consultation paper

Chapter 2: Financial Eligibility (pages 13 to 16)

- 2.1 The Commission proposes to:
 - Reduce the upper limit for contributory Legal Representation to the same level as Legal Help
 - Abolish the disregard of £100,000 equity in an applicant's home, replacing it with an allowance of up to £100,000 depending on the nature of the case, level of income and benefit receipt.

Chapter 3: Family (pages 17 to 30)

- 2.2 The Commission:
 - Proposes a significant re-structuring of Funding Code levels of service;
 - Would more strictly control the grant of Legal Representation for contested proceedings;
 - Suggests that there should be wider powers to refuse funding for ancillary relief cases on the grounds that private funding mechanisms may be available;

- Suggests removing the £3,000 statutory charge exemption on property or money recovered in Family proceedings;
- Suggests removing cost protection to make sure that the court has powers to deter unreasonable conduct by publicly funded clients;
- Suggests removing low priority categories from the scope of Family legal aid, such as Legal Help for drafting divorce and judicial separation petitions or for changes of name.

Chapter 4: Discouraging Unnecessary Publicly Funded Litigation (pages 31 to 47)

2.3 The Commission proposes:

- That there should be more emphasis on pursuing a complaint or using an Ombudsmen scheme before funding for litigation is considered. This would include the Independent Police Complaints Commission, the NHS complaints procedure and the Redress Scheme (when it is established), for victims of medical accidents.
- That mediation and other forms of Alternative Dispute Resolution should be considered routinely in publicly funded litigation;
- That non-priority litigation should not be funded out of the Community Legal Service if a conditional fee arrangement (CFA) is appropriate;
- Specific provisions for conditional fee arrangements (CFAs) in Clinical Negligence cases and group actions;
- Some reduction in the extent of protection to pay another party's costs in Non Family cases, for example, making clients liable for the first £200 of any adverse costs order;
- To strengthen the Cost Benefit Criterion for priority Non Family cases to ensure that benefits to be obtained from a case are proportionate to the costs involved;
- Improving outcomes secured in claims against public authorities by excluding weaker claims from funding.

2.4 The section on CFAs [paragraphs 4.23 to 4.28] proposes that legal aid be refused where cases are suitable for a CFA whether or not insurance is in practice available. A case will not be suitable for a CFA if merits are unclear or borderline. Legal aid could be refused however if: "

- Merits are at least 50%, and;
- Reasonable costs would be recoverable if the case were successful" [paragraph 4.26].

2.5 Such an approach might be particularly important in relation to claims for damages arising out of the provision of educational services. "Education damages claims have a high cost, a low success rate and cannot be considered a priority for public funding" [paragraph 4.27].

2.6 Categories of case, which are not currently subject to refusal on CFA grounds, but could be in the future include: "

- Housing disrepair claims;
- Actions against the police;
- Judicial Review proceedings where permission had been granted;

- Clinical negligence proceedings” [paragraph 4.28].

Chapter 5: Other Changes (pages 48 to 54)

2.7 The Commission proposes:

- A redefinition of the current exclusion of personal injury claims;
- The abolition of Support Funding for high cost Personal Injury cases;
- Restricting devolved powers to grant judicial review in some or all cases;
- Strengthening the Sufficient Benefit Test (SBT) for Legal Help with the test more closely related to private client considerations.

2.8 The section on restricting devolved powers in judicial review cases [paragraphs 5.15 to 5.17] highlights “a particular problem in relation to judicial reviews arising out of educational cases eg school closure cases” [paragraph 5.17].

2.9 The section on the SBT [paragraphs 5.22 to 24] highlights the not-for-profit sector, saying that:

- The private client approach should generally be adopted;
- “...we do have concerns as to whether such an approach is being applied in practice, especially in the Not for Profit sector” [paragraph 5.23];
- They are therefore interested in strengthening the SBT either by replacing it with a version of the private client test (perhaps with a qualification) or by reframing it to provide that the costs of the work must be proportionate to the benefit to the client to justify work or further work being carried out.

3 Further support and guidance

3.1 If you would like further guidance on any of the issues covered this Email Bulletin, please contact the CLS Support consultancy service on **0870 7700 447** from **Monday to Friday 1pm to 4pm** or email cls.support@asauk.org.uk at any time.