resolution
first for family law

Proposals for the reform of legal aid in England and Wales

Resolution's response to the Ministry of Justice cp12/10

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Proposals for the reform of legal aid in England and Wales

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Resolution's 5,500 members are family lawyers committed to the non-adversarial resolution of family disputes. Resolution solicitors abide by a Code of Practice which emphasises a constructive approach to family problems and encourages solutions that take into account the needs of the whole family, and the best interests of any children in particular.

Around two thirds of Resolution's members undertake legal aid work. Resolution's members work in around 1,500 firms who form the bulk of family legal aid contract holders in England and Wales.

Resolution as an organisation is committed to developing and promoting best standards in the practice of family law amongst its members and amongst family lawyers in general. Resolution explores and promotes other means of resolving family disputes, such as mediation and Collaborative law, so that couples can negotiate solutions without using the courts. Many Resolution members also practice as mediators and collaborative lawyers and many are accredited by the organisation as specialists in particular aspects of family law, such as contact cases or financial aspects of separation. Resolution promotes and administers accreditation schemes demonstrating expertise in key aspects of family law, mediation and Collaborative law.

Resolution publishes various guides to improve standards of practice. Resolution provides training in law and in the skills and understanding that family lawyers need to help their clients face a difficult time. We also campaign for better laws and better support and facilities for families and children undergoing family change.

Please note that references to gender in this response are for illustrative purposes.

Introduction

Access to justice is a basic human right and a mark of a civilised society. Legal aid should be given a higher priority in the difficult funding choices that that the government has to make.

Taking cases out of scope is draconian especially as the history of legal aid shows the need for advice provision for such cases. This is not a Green Paper about legal aid reform, it is about legal aid cuts on a most dramatic scale. It is wrong for the government's approach to the scope of legal aid to be primarily costs driven. It will simply deprive and punish the poorest and most vulnerable in society to so drastically remove matters from scope at the same time as reducing financial eligibility for legal aid. It will also impact directly and indirectly on many children of separating couples. It will not solve problems within the justice system rather the cuts will create more problems. The reforms risk causing harm to children as their right to have a good safe relationship with both parents will no longer be protected.

The government stresses that since the modern legal aid scheme was established its scope has been widened far beyond what was originally intended. When legal aid was first introduced it was intended to help those with divorce and matrimonial problems. There is no reason to fundamentally change that principle.

There is an assumption in the Green Paper that as a country we are too litigious and that the availability of legal aid encourages this, yet there is no evidence produced in support of that driving assumption. There is a misconception that runs throughout the paper about the role of the skilled family lawyer. Resolution members are dedicated to a non-confrontational approach to resolving family disputes. We use not just our knowledge of family law and procedure but other skills to counsel, coax and encourage clients towards an early negotiated settlement. However when firm, positive action is required, including but not only in cases of domestic violence or abuse of children, then we are able to assist clients in taking it.

The proposals for the reform of family legal aid are wide ranging and fundamental. It is unwise to proceed with these reforms without there being a fully researched review and the opportunity of considering any recommendations by David Norgrove in the ongoing Family Justice Review.

The proposals are largely presented as if private family law cases do not raise legal issues. They do. Whilst mediation and other non-court resolution methods are to be applauded and should be encouraged, they are not a universal panacea. Legal issues require legal advice. Mediation works best in partnership with and supported by independent legal advice. There are just too many examples of cases where there are compelling reasons to justify a person receiving legal aid where the government seeks to remove it and where mediation cannot provide the solution. This in itself shows that the proposals are flawed.

It is vital that the circumstances justifying the need for protection in private family law cases reflect the definition of domestic violence adopted across other government departments.

The government is not consulting on alternative sources of funding. This is unacceptable in light of the draconian approach to scope. Rather than removing the vast majority of private family law matters from scope, in the absence of insurance and other alternative funding, the options might include a revised approach to merits and extension of the Statutory Charge.

We are not persuaded that the information provided in the impact assessments is adequately detailed, certain or robust to provide evidence on the benefits and costs of the policy changes proposed. There is a complete lack of research in respect of the impact of the proposed reforms on the access to justice for the most socially excluded people in society and also whether the supplier base is able to effectively downsize to meet the reduced demand.

The number of legal aid providers has dropped from 11,000 in the early 1990s to below 3,000 now.

Scope

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

Yes we agree

We agree that the following types of case and proceedings should remain within the scope of family legal aid: domestic violence, forced marriage cases, ancillary relief and other private law issues where there is a risk of domestic violence, family mediation, legal advice

to give effect to mediated settlements, international child abduction, international family maintenance, public law cases, registration and enforcement of judgments under EU legislation and representation of children in Rule 9.5 and 9.2A private law children cases.

The paper says 'We recognise that the state has a role to play in helping claimants to obtain protection and consider that those in abusive relationships need assistance in tackling their situation'. However, the circumstances identified in paragraph 4.67 which justify the need for protection in the main proceedings are inappropriate and too narrowly drawn as well as being inconsistent with other areas of policy. A person suffering domestic abuse, which may present in forms other than recent domestic violence, is particularly vulnerable. Mediators themselves may assess a domestic violence case, falling outside the circumstances identified by the Green Paper, as unsuitable for mediation. People would therefore be at risk of being refused both mediation and legal aid for representation.

We believe that the definition of domestic violence adopted by other government departments should be applied. The definition below replaced various definitions used by individual departments and agencies and has assisted to improve joint working practices and monitoring. The Association of Chief Police Officers, Crown Prosecution Service, NHS, HMCS and government share the definition:

'Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.'

On 26th January 2011 in Yemshaw v London Borough of Hounslow the Supreme Court ruled that domestic violence in the context of housing law extends beyond physical contact to include other forms of violent conduct.

The impact of domestic violence is significant resulting in a real need for assistance so that people do not have to represent themselves if mediation is unsuitable or unavailable. Such as:

- Physical impact-Physical injuries often result from domestic violence. They range from minor injuries to serious injuries resulting in disability. On average, 2 women a week are killed by a partner or former partner.

- Emotional and psychological impact-Mental health issues are more likely to result from domestic violence than to cause it. Women who have experienced domestic violence have higher rates of mental illness: 64% experience post-traumatic stress disorder, 48% have depression, and 18% attempt or commit suicide.

- Substance abuse as a coping mechanism. Women experiencing domestic violence are up to 15 times more likely to misuse alcohol and 9 times more likely to misuse drugs than women generally.

- Financial impact-Injuries can result in time off work and loss of income. If the sufferer's mental health is affected or the sufferer resorts to alcohol or drugs as a coping mechanism then this can result in loss of employment and hence income. Taking time off work or time away from study can have a long-term impact on financial security and career. Having to move home results in expense being incurred in setting up a new home. Moving away from the area will necessitate a change of job which can have a financial impact.

- Loss of home-Research by Shelter has found that domestic violence is the 'single most quoted reason for becoming homeless'. 40% of all homeless women stated domestic violence was a contributor to their homelessness.

Violence increases and the gap between incidents decreases as time progresses. If domestic abuse sufferers cannot receive advice until the case is so serious that it warrants an application for an injunction then for some it will be too late and others will have experienced the ongoing effects of domestic abuse for longer. These ongoing impacts have a cost implication in terms of increased input from the NHS, Housing Authorities, the Benefits Agency and the police.

The impact of domestic violence can occur regardless of whether there have been court proceedings for an injunction in the past 12 months or a conviction. It is recognized that a restraining order can be needed to prevent further domestic abuse even if the perpetrator has been acquitted (S5A Protection from Harassment Act 1997 as amended by S12 Domestic Violence Crime and Victims Act 2004) and that a domestic abuse sufferer needs protection before the perpetrator is charged ('Go-orders' are proposed).

It seems perverse that legal aid will not be available where undertakings have been given under the Family Law Act 1996. As a result, we believe that domestic violence related applications will be contested in far more (if not all) cases. This will increase expenditure from the legal aid and HMCS budgets. Undertakings have many advantages in terms of reducing both legal aid and court costs as well as reducing tension between the parties.

We are also concerned about alleged perpetrators not being eligible for legal aid which raises inequality of arms principles in cases involving domestic violence and Article 6 issues. There is also the prospect of a domestic abuse sufferer being cross-examined by the perpetrator in person. This is not appropriate. It is prevented in the criminal court where an advocate is paid for by the state to carry out cross-examination (S38 Youth Justice and Criminal Evidence Act 1999). The Vulnerable Parties Working Group of the Family-Criminal Interface Steering Committee has recommended that this be extended to all family proceedings. As a point of clarification, it needs to be clearer whether it is intended that respondents to an application where there is domestic violence will be unrepresented on any application, including on an injunction application, or whether they will only be unrepresented in the main proceedings – the commentary only refers to domestic violence victims but the summary table indicates that the scope of legal aid will remain unchanged for domestic violence which presumably means for both parties, where the Funding Code is met.

If the proposals are not revisited, there may be more domestic violence and tactical domestic violence related applications under the Family Law Act 1996 before the courts and these will involve contested hearings with an impact on legal aid and HMCS costs. We fear that if people do not have help in resolving their issues on divorce and separation, then there will be increased conflict between some couples with escalated violence in some cases. The Domestic Abuse, Stalking and Harassment and Honour Based Violence (DASH 2009) Risk Identification Checklist developed by ACPO with Co-ordinated Action Against Domestic Abuse assesses that the risk of domestic violence increases where there is conflict about child contact. Further domestic abuse can be prevented by a family solicitor negotiating safe contact arrangements.

We would welcome confirmation that immigration cases involving domestic violence will remain within scope. Rules exist to allow those whose relationships break down for this reason to remain, in an effort to ensure that people do not stay in abusive relationships because they fear removal.

If legal aid is only available in private family disputes where there is domestic violence as framed in the proposals, we fear that more allegations and cross-allegations will be found to be unproven or false when tested by the court.

Those clients with family law issues often present with a variety of problems which benefit from a holistic approach in order to avoid further costs. We are generally very concerned about other areas of law which it is proposed should be removed from scope.

We do not agree with the proposals to simply remove divorce and finance, private law children and family cases where domestic violence is not present from the scope of legal aid and deal with this in our response to question 3.

Example

Mr and Mrs T are separated but have yet to sort out their financial arrangements. There is history of domestic abuse in the relationship – Mr T would frequently shout, verbally threaten Mrs T and on one occasion he sent her 32 threatening text messages in the course of a day. Using legal aid Mrs T was able to get an undertaking from Mr T that he would not have direct contact with her. Under these proposals Mrs T will have to conduct her own negotiations with Mr T in order to sort out their finances, including potentially having to cross examine him in any court case as the domestic abuse definition in the Green Paper is drawn too narrowly and excludes cases like this where an undertaking was given instead of a formal court order.

Example

Mrs F has serious concerns about the behaviour of Mr F. He sleeps naked in the same bed as their young daughter. The daughter has told her mother that she is also naked when they go to bed and that she touches her father's penis. She is only five. Mr F has also been emailing naked pictures of their daughter to a woman he has met. Social Services have serious concerns and have told the Mrs F to stop contact immediately. As there is no history of domestic violence, Mrs F will not be eligible for public funding under the new scheme to deal with either that contact issue or the financial issues arising from the separation and divorce.

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

Yes we agree

Resolution has long argued that the court should have power to make an interim lump sum order in favour of a party or child. Parties to a divorce often need urgent financial assistance from an economically stronger party before the final settlement, for example, to provide interim accommodation, discharge debts, or fund their legal advice.

We therefore welcome this proposal. Consideration might also be given to:

- extending this to enable courts to make interim orders for sale of property, although perhaps not the former matrimonial home; and orders for the sale,

surrender or transfers of policies as a more direct method of producing funds than simply ordering a lump sum.

- allowing those eligible for legal aid to apply for maintenance and such orders above during ancillary relief proceedings for ongoing legal costs. The guidance in the ancillary relief authorities dealing with provision for legal fees (particularly A v A (Maintenance Pending Suit: Provision for Legal Fees)[2001] 1 WLR 605) means that currently those eligible for legal aid cannot pursue such an application.

But the proposal does not present a suitable alternative to family legal aid, especially in those cases where both of the couple are economically deprived or there is no liquid asset.

Funding for financial cases where the only or all assets are joint will not be easily available.

There is no proposed funding for obtaining advice on how to make or to support the making of an application for a lump sum in terms of legal support or raising the necessary court fee. We query how the financially vulnerable and unrepresented party will learn of this option. There is a lot of reliance in the proposals upon information online, but many people who would qualify for legal aid will be at the most vulnerable end of the spectrum and potentially less likely to access online services, quite apart from the lottery of finding the right online information.

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

No we disagree

Those eligible for legal aid are invariably the most significantly disadvantaged and often face multiple significant problems. There is no proper analysis or consideration of the consequences when there is no advice and assistance in so many family cases, and others such as employment, welfare benefits and housing to ensure that they are dealt with effectively at the earliest opportunity. Failure to resolve any one of those problems could give rise to any of the other problems or have consequences for all those areas as lives fall apart. Telephone advice cannot be a genuine substitute for representation for the families affected. The impact upon particularly children, their performance or behaviour at school, and reliance on Social Services and housing teams will certainly be greater than at present. Resolution is genuinely concerned about whether and how the proposed legal aid scheme addresses the needs of the vulnerable with mental capacity, learning difficulties or language issues who cannot represent themselves. The Ministry of Justice’s own research on court experiences of adults with mental health conditions or learning difficulties, July 2010, demonstrates the difference that good professional advice and access to legal representation can make for this client group.

There is little scope to consider alternative funding facilities as invariably those eligible for legal aid lack the resources to fund such alternatives. If there were such schemes practitioners would have sought to conduct cases in that way so as to be able to charge at more commercial rates and avoid the interminable bureaucracy of the legal aid system.

The government position is that the family legal aid reforms are not dependent on other reforms. We disagree. They should be properly linked to substantive family law reform, the Family Justice Review and the outcome of Green Paper on Strengthening Families

which is consulting on how to ensure that parents are able to access appropriate support and information at separation.

It is disappointing and worrying that the Ministry of Justice has made these proposals before the independent Family Justice Review Panel makes its interim recommendations to that department and the Department of Education in the spring and final recommendations in Autumn 2011. Its recommendations are expected to deal with the promotion of informed settlement and agreement in family cases, improved management of the family justice system and efficiency savings within the system. The Green Paper proposals are surely premature, particularly as the Family Justice Review should take account of value for money and resource considerations. Resolution and numerous others have given evidence to the Family Justice Review on, inter alia,

- those matters which it is appropriate to resolve through the family courts,
- redirection of non legal issues,
- the benefits of early information for parents (such as Resolution's Parenting after Parting programme) in order to avoid the court process,
- powers for the courts where users take an unreasonable approach to the use of non-court options before or during proceedings,
- the use of costs orders and improving the efficiency of the system.

A summary of our proposals to the Family Justice Review and others on the approach which should be taken in certain types of family cases is attached at Annex A.

Whilst the government has ring fenced public funds for relationship support to encorage couples to stay together, the reality is that many relationships end. We believe that these proposals mean that the courts will become the option of first rather than last resort for couples who do not know where else to turn without viable alternatives to legal aid having been developed. The proposals present a choice only between full on litigation on the one hand and mediation on the other. Targeted funding is also needed for parenting information post separation, early advice on all non-court options and early solicitor negotiation to avoid the court option or to settle cases during the court process but before a final contested hearing.

We note that the views expressed in the consultation paper on the types of issue and proceedings which should continue to justify legal aid are based on the importance of the issue, the litigant's ability to represent their own case, the availability of alternative sources of funding, the availability of other routes to resolution and legal obligations.

The importance of representation is not just relevant at the hearing of any case. Representation can avoid the need for court hearings. It provides the benefit of the investigation of a person's case; marshalling, testing and verification of evidence; preparation of statements and bundles which improve the ability of judges to make informed decisions where judicial decisions are still required. Representation also provides advice to clients that they do not have a case or that there are alternative ways of resolving the case and how to make them work.

The scope proposals, together with the narrowing of the eligibility criteria, simply underestimate or ignore the vulnerability of divorcing and separating couples and over estimate their ability to represent themselves. The Green Paper seems to assume that all

parties to a divorce or separation will have voluntarily chosen that course which is simply not the case.

The implementation of the proposals will deny access to legal advice and representation to people at one of the most stressful and difficult times of their lives. Emergency applications are sometimes needed to allow crisis situations to be resolved. The paper is silent on the need for legal aid in emergency situations. People cannot conduct such applications without advice and assistance and there is no alternative funding available other than legal aid. The proposals will result in inequality of arms and injustice for many people involved in family breakdown. The government's own impact assessments acknowledge that it is not known whether outcomes will be less fair than before with wider social and economic costs including adverse impacts on children.

Couples may have significant issues relating to the children and finances which are not easily resolved through mediation, or where one party simply refuses to cooperate with the mediation process. The person in a position of power, whether that be financial or being the main carer of the children, especially someone who abuses that position of power, may refuse mediation or not engage in it constructively. Each party clearly has the option of issuing proceedings themselves. It is not clear what expert legal advice on law and procedure is to be available to assist the litigant in cases falling short of domestic violence. We have commented more fully in respect of the domestic violence exemption in our answer to question 1.

Some people will be put off by the idea of representing themselves even if the courts are to improve their ability to deal with litigants in person. Research by the Rights of Women organisation showed that 73% of their survey respondents were reluctant to represent themselves in family law issues (see their response to this Green Paper). Many will simply not progress their rights if the reforms are implemented because they will feel unsupported and lack the confidence or skills to represent themselves. The reality is that there will be many people who simply will not pursue resolution of problems that otherwise would have been decided effectively by negotiation with legal advice or decisions made by the court. This is likely to impact markedly on children who are not potential litigants themselves, but suffer, for example, when non-resident parents do not pursue legitimate contact applications.

We do not consider that the removal of the majority of funding for private family law takes into account all the consequences on people's lives and the costs to families and children, society and the public purse of that. Nor do we consider that the factors above have been genuinely and appropriately applied to certain categories of family case.

Before such action is taken the government would be better to reform, simplify and codify the law and court procedure. Only then can a view be taken of the practicality of removing so many areas of law from legal aid scope.

Mediation and non-court dispute resolution in private family law

At the heart of the justification for the massive cuts in legal aid is that mediation will be available and indeed will be effective in resolving family disputes rather than the courts.

Resolution fully supports mediation and all other alternative to court methods of resolving family disputes. Alternative dispute resolution is a key pillar of the organisation's beliefs. As stated in our introduction we as an organisation offer training and expert accreditation in both mediation and Collaborative law.

The continued funding of family mediation is welcome. Resolution actively supports mediation as one of the potential effective methods of resolution between couples when relationships break down. Mediation can be a successful, suitable, quick and cost effective option in a number of but not all cases. Our members regularly inform family clients about mediation both at the outset of cases and at appropriate times later on too. Not only do we refer clients to mediation, we advise and support them during and after mediation. Some members have trained as and practise as mediators and we are training more members in mediation than ever before. Most of the current referrals to mediation come from solicitors.

However, the scope proposals are framed on the basis of "court versus mediation" and ignore the other options for finding solutions including solicitor negotiation and Collaborative law. We strongly urge the Ministry of Justice to consider the issue of funding for other options to reduce the number of applications coming before the family courts and offer incentives to family court users to use the full range of non-court options. We also support the requirement in the new Family Procedure Rules 2010 for the court to consider alternative dispute resolution (including mediation and Collaborative law) at every stage.

The current mediation success rate is good, but not overwhelming so, bearing in mind that currently those going into mediation are largely self-selecting and there is a likelihood that they will therefore have a positive attitude to the process. Where a mediator reports to the Legal Services Commission that a case is partly resolved, typically this will mean that in an all issue case the children issues have been resolved and the finance and property issues have not or vice versa. It may still be necessary to issue an application to settle the unresolved issues. What the government proposes is a referral of a significant number of additional cases which by their very nature are less suitable for mediation. If a greater number of cases are referred to mediation which are more challenging in character and nature then both the full and partial success rates will be significantly lower. Not only will this potentially leave many matters unresolved, but it risks in due course discrediting mediation as a way forward. Mediation needs to be presented as part of a package of methods of resolving relationship breakdown.

Mediation, like any option, has disadvantages. These include:

- Some people do not feel supported in mediation as they have no one with them in the room to assist them.

- Whilst mediators are able to give legal information (including information about the ability of the court to make certain orders), the mediator cannot offer legal advice. It is the application of information to the particular circumstances of their individual case that those experiencing family breakdown require. The good mediator will find a way of highlighting where proposals look plainly wrong, but the extent to which he or she does this varies from mediator to mediator and this "steer" is not a substitute for the clear and personalised advice that the lawyer gives.

- Mediation often cannot work where there is a significant power imbalance between the parties in terms of the dynamics and history of the relationship.

- Some parties are simply not equipped with the skills and abilities to engage with and use the mediation process effectively, especially those who are significantly socially excluded like many who are currently eligible for legal aid.

- Whilst many mediators are very good at resolving issues concerning children, not all mediators are trained in family finance law with the result that many mediated finance settlements do not always produce either the right result or a lasting result.

- A mediated settlement in a finance case still needs to drawn up into a consent order. Reliable legal advice and accurate drafting is essential in order to ensure the agreement is capable of being put into effect, to be binding and enforceable.

Mediation is intended to take place 'in the shadow of the law' i.e. based upon legal information of what a court might do in similar/equivalent circumstances. If legal aid is no longer available for the majority of family cases, mediators will lose the ability to make any assessment of legal outcomes to inform mediation. It should be recognised that particularly in financial cases mediators themselves encourage parties to have independent legal advice to support and inform the mediation process.

We note that even where domestic violence is present, the intention is to offer support through family mediation. We agree that the option should be available, but victims should not be forced down the mediation route and assumptions should not be made about take up. A domestic abuse sufferer may agree to unsuitable arrangements proposed for children or in respect of housing and financial arrangements out of fear of retaliation if they do not agree or because they lack the confidence to disagree.

The proposals suggest that Legal Help will not be available to assist those eligible for publicly funded mediation to refer to mediation services. The quality of referral to the mediation option and the choice of mediator are important in terms of diverting cases from the court and securing a lasting settlement. There will be possible mediation failures because expectations are unrealistic and untested.

We query where 'in court and court referred' mediation sits in relation to the proposals. Presently, where mediation fails there is no report by the mediator sent either to the court or the Legal Services Commission, therefore there is no assessment as to whether or not one party has cooperated and been reasonable in their attempt to engage in the mediation process.

We believe it is absolutely essential that parties have access to legal advice throughout the negotiation process. The fixed fee of £150 offered for legal assistance during the mediation process in the Green Paper is totally inadequate. The Legal Services Commission statistics for 2009-10 show that the average cost of Help with Mediation only was £590. The proposals fail to adequately provide for advice and valuations on pensions and any independent financial advice within mediation.

We note that the impact assessments identify uncertainty and risks around potential client behaviour, the costs of mediation which it is acknowledged could be more than anticipated and the wider costs of unfairness in dispute resolution. It should also be noted that the Statutory Charge does not apply to mediation costs. We believe that the Statutory Charge should apply to all finance work conducted under mediation. The exemption was previously introduced to encourage mediation but as only mediation will now be funded under legal aid there appears no justification for the costs not to be recovered.

It can also be misleading to compare the cost and time spent on mediation with a court matter. As well as the nature of the matters using each method, mediators report matter starts not when they see the client for mediation assessment but when the client actually attends for the first proper mediation session. Mediators record the end of successful mediation when the matter concludes with a memorandum of understanding having been prepared and signed by all the parties. At this point the parties will return to their respective solicitors who will prepare if appropriate a consent order. Reaching an agreed proposal is not the end of the matter. The mediator often spends much less time with clients than the lawyer as the mediator usually starts working with clients much later and finishes much earlier.

When mediation fails the contents of mediation consultations (save for financial information provided) is privileged and the principles and effectiveness of the process require the impartiality of the mediator and therefore no report is sent to the court or the Legal Services Commission as to whether a party has cooperated, been broadly reasonable and attempted to engage in the mediation process. However, it seems totally unfair if the other party, for example seeking contact where there is no domestic violence, cannot obtain funding for representation in such circumstances. We do not see why a party should be excluded from receiving legal aid when mediation has broken down through the unreasonableness of the other party. We believe that the mediator feedback form sent either to the Legal Services Commission or the court should incorporate tick box sections incorporating whether

(1) both parties attended and the mediation failed;

(2) one party did not attend and the mediation failed. A party who attended mediation (who will invariably be the parent without contact with the child) should then have the option to apply for legal aid for representation to be assessed on the revised merits as discussed below.

Collaborative family law

Collaborative law is as viable an out of court option as mediation. Collaborative law is the fastest growing area of family law. In Collaborative law users commit in a written agreement not to go to court. The process enables both parties to have their own lawyer and the lawyers use various methods including mediation techniques together with their expert training in children and finance law to collaboratively negotiate a settlement in a series of face to face meetings with the clients there. It can be tough and challenging but it is effective. Like mediation it has the advantage of being able to resolve finance and children matters at the same time. A key factor is that clients receive legal advice in the process.

The proposals do not confirm the previous government's proposed extension of legal aid to Collaborative law. Legal aid should be extended to cover payment for Collaborative law up to level 3 under the private law scheme. This would offer both legally aided parties another supportive option, direct legal advice and a workable alternative to the court process and also provide the opportunity to reduce further the number of cases taking up court time and resources.

We comment here on the specific categories referred to with particular relevance to family law.

Private law children and family cases (where domestic violence is not present)

We are seriously concerned about the impact of the current proposals.

ONS findings indicate that 90% of separating parents make their own contact and parenting arrangements. Others sometimes need information and advice to persuade them that litigation is not what is needed. Many of those who make more formal arrangements do so through negotiation by solicitors, avoiding the need for a court order. We do not agree that the recent research referred to in the Green Paper at page 34 provides any evidence that it is the availability of legal aid that creates litigation. In many Children Act 1989 cases mediation will have been tried and if unsuccessful proceedings will have been issued and a settlement is then often achieved early by negotiation and agreement. This is because clients are advised of the reality of the likely result and also

because of the skills of the lawyer focusing on the key issues, narrowing the issues and encouraging a settlement.

There is a fundamental principle that children should see both parents where safe to do so and there will be cases where representation for a father or a mother is necessary, even where there are no domestic violence issues if mediation or other alternative dispute resolution has failed.

As discussed earlier in our answer to question 1, the approach to domestic violence in the consultation ignores other harm including sexual abuse. This must be wrong in principle. If in a private family law matter, a judge considers that serious child protection issues arise and the threshold for a care or supervision order with respect to the child may be satisfied, the court may direct the appropriate authority to undertake an investigation of the child's circumstances under S37 Children Act 1989. Whilst this investigation takes place, an interim care order can be made. In effect, this means that parents could have their children removed where they are not legally represented as they would not be entitled to legal aid. Cases involving 'Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality' must justify funding and would include those where serious child protection issues arise. It would be inconceivable to allow a person to represent themselves when there was the possibility of an alleged abuser cross examining them within the proceedings.

Legal aid must be available for difficult cases where there are significant compliance and enforceability issues relating to Children Act 1989 orders or where there are long lasting obstructive and implacable hostility issues.

Where family members take over the care of children in quasi public law proceedings they and the child's parents will not have the benefit of representation. In many instances Local Authorities are seeking to avoid taking care proceedings either in part because the cases are border line in meeting the threshold criteria grounds, but also because resource issues can play a part in determining if proceedings are initiated or an alternative course of action preferred. Frequently they encourage either a parent or a relative such as a grandparent to take private law Children Act 1989 proceedings to resolve matters. In cases such as this it will be difficult for parties to conduct the case and for the proceedings to be effective without each of the parties being represented. If funding is not available this will not be an option for the local authority and the result is that there will be more care cases and costs to Social Services budgets and the public law legal aid budget.

Children may be left without carers with parental responsibility where family members cannot access advice or obtain orders where agreements made under S20 Children Act 1989 require orders to confer status. We doubt that Local Authorities will be in a position to fund such applications.

Emergency situations outside of S37 may arise concerning children, for example, where a child is retained after contact. People need advice and representation on prohibited steps and removal from jurisdiction issues. This can often avoid a matter escalating to the stage of abduction. Where a parent proposes to leave the jurisdiction, the issue can be of fundamental importance to both the parents involved and the children. Equally, a parent whose ex partner threatens to take their children abroad should get legal aid to apply for a court order to prevent this. Removal can have life changing and long lasting consequences for the child. This is too complex and emotionally traumatic an area for people to negotiate and conduct a case without legal advice and representation.

Enforcement of contact orders can raise very difficult issues for the applicant parent and stark choices for the court, particularly around committal of a parent with the care of the children to prison or a change of residency option. We fear that parents involved will not be able to conduct such matters on their own or with only telephone advice.

Whilst we welcome funding for children in Rule 9.5 and 9.2A private law children cases, it is hard to see why funding for representation of parents is not considered to be justified. There are almost invariably human rights issues if the case is identified as a Rule 9.5 case. An unrepresented parent could be facing a spurious sexual abuse allegation. Cafcass cannot be relied upon to speedily and effectively meet the needs of the court in all 9.5 cases. Nor is its role or that of the child's solicitor to fill the gap in representation for parents.

We disagree with the proposal to remove adoption from the scope of legal aid where the loss of a parent's parental responsibility is at stake (unless a placement order has been made).

Example

Mrs C had learnt through a mutual friend that her Algerian husband intended to take their two children to Algeria during a regular contact visit and planned not to return them to her. Under the present legal aid system lawyers were able to obtain a 'prohibited steps' order, preventing Mr C from taking the children out of the country.

Under the new proposals approval would have to be sought from the Legal Services Commission for this matter to be considered an exceptional case – but the Green Paper is silent on the process to grant that approval and the danger is that it will slow down and introduce delay to emergency cases.

If Mrs C is unable to prevent the children's removal she faces potentially permanent separation from her children as Algeria is not a party to the Hague Convention on child abduction.

Example

Mr G has struggled to see his children since he and Ms P broke up. Ms P refused to attend mediation and Mr G was able to use legal aid to obtain a court order allowing him to see his children.

However Ms P has continued to ignore the court order and he will need to take further action to enforce contact.

Under the new proposals Mr G would not be eligible for legal aid despite his ex-partner's refusal to attend mediation – but he would also be faced with having to represent himself in any further action to enforce the court order.

Example

Mr H has a loving and close relationship with his daughter and has regular contact with her. Contact has never been an issue but his former partner Ms J has recently become engaged and would like to move to America with her daughter and new partner.

Mr H is devastated – he will not be able to afford the air fare to America to visit his daughter but has been unable to persuade Ms J not to move away with their daughter. Mr H will no longer be entitled to legal aid to help him oppose the move despite his believing that this will not be in his daughter's best interests.

Ancillary relief cases (where domestic violence is not present)

We do not agree to the removal of such cases from scope. There is no analysis of the impact of the proposed removal of legal aid in such cases where mediation is unsuitable or unsuccessful.

We do not believe that telephone advice and online services offer much more than adequate information. They cannot be a substitute for family legal aid for finances on separation. There is a fundamental difference between legal information and legal advice.

Reference is made in paragraph 4.157 to the statistic that 73% of ancillary relief orders are not contested. This is completely misleading as most of these litigants will have had legal advice in relation to agreeing the issues and drawing up a consent order. In many cases ancillary relief proceedings will have been issued and a settlement is achieved early or during proceedings by negotiation and agreement. This is because clients are advised of the likely result and also the skilled lawyer focusing on the key issues and encouraging a settlement.

Resolution expects its members to take a proactive role in settlement at the earliest opportunity. The Legal Services Commission should monitor the number of cases that settle at or shortly before a final hearing so as to isolate firms that have a poor track record of settling cases proactively. Unfortunately in some cases non-lawyer mediators do not have the required experience and expertise in dealing with financial issues and settlements that are reached in mediation can often be both unfair and unworkable notwithstanding the fact that agreement has been reached. Finding out at a late stage after you thought you had a deal is financially and emotionally costly. The constructive input of experienced legal advisers gives the best chance of securing a fairer and longer lasting settlement.

Legal aid for limited legal support around mediation is proposed. However, funding to draft a consent order in a finance case is only available for those attending mediation, not for those who reach agreements themselves. This will potentially force people to mediate rather just to get a consent order drawn up and result in unnecessarily higher expenditure on mediation.

Women particularly are disadvantaged in finance cases and often take the lead role in protecting the interests of the children. The right to remain in the matrimonial home with dependent children has an importance which the proposals fail to address.

Example

A mother is left in the jointly owned former matrimonial home with the children and is struggling to pay the mortgage. Her husband, the children's father, is not paying maintenance as he should and is demanding that the home be sold so he can realise 'his 50%'. If the wife does not obtain advice and representation she may simply decide to agree with her husband's proposal and sell the home in circumstances that a court would not approve. The wife then seeks assistance in re-housing from the local authority and housing benefit support too. Whereas, if she had the benefit of legal advice and representation, it is almost certain that the husband would be required to pay maintenance, reducing the risk or extent of the wife's dependence on state support and the wife would remain in the former matrimonial home with the children until their majority. She risks being regarded as voluntarily homeless and therefore not eligible for public housing leading to homelessness for herself and the children.

Reference is made in paragraphs 4.89-4.912 to international family maintenance and in 4.102-4.104 to the registration and enforcement of judgements. The glaring omission is advice on jurisdiction to issue divorce proceedings where there is an international element, whether under Brussels II or otherwise. There can of course be a fundamental difference between outcomes in the different jurisdictions. The divorce itself is also the gateway to the financial relief and there will be no Legal Help for that.

Failure to get advice on dissipation of assets and injunctive relief could result in very serious consequences including the loss of the matrimonial home and dependence on public housing. Early and proper advice on protecting matrimonial home rights can also save costs in the long run. Legal Help for advice and Emergency legal aid for applications must be available for people in such circumstances.

Pension sharing is a complex area. Often with the lower paid, the pension will be the most significant asset, particularly where it is a public sector or other final salary scheme. In five-year or two-year separation cases, it can be critical to receive advice on an application under S10 Matrimonial Causes Act 1973 to delay the granting of the decree absolute until the finances have been dealt with to ensure that a pension sharing order can be made before widow's benefits rights are lost. Failure to secure a pension sharing order can have devastating consequences for the financially weaker spouse, resulting in inadequate provision for retirement and increased claims on the State.

Example

Mr and Mrs L are separated with two children aged 12 and 14. When Mr L visits the house to collect or see the children – he is physically rough, pushes her and is generally extremely overbearing. Whilst she finds his behaviour extremely intimidating, she doesn't want to report the abuse as she is worried that this will make things worse.

Mr L is self employed so the financial situation is complicated. Mrs L used to help keep the books for his business so is aware that the income he is now saying he makes is significantly less than previously. It will be extremely difficult for her to prove what his income is and she would need to demonstrate in court that his life style is inconsistent with his stated income.

Under these proposals – she will either have to cross-examine Mr L herself in court, or bring a separate domestic abuse action. This would then make her eligible for legal aid to

sort out the finances. These proposals could result in the State having to fund two cases rather than one.

Example

Mr and Mrs P have three children. She and her husband have separated due to Mr P's violent behaviour. Mrs P has not reported Mr P's violent and abusive behaviour as he is a policeman and she is worried that he will lose his job and no longer be able to support her and the children. She will not be eligible for legal aid and will have to pursue her financial claims herself despite her fear of him and the threats he continually makes to her.

TOLATA and Schedule 1 of the Children Act cases

Resolution understands that the proposals on scope as they relate to ancillary relief will also apply to claims by cohabitants for interests in property. There are more separating non- married couples now than ever before.

Cohabitants facing financial hardship, who have made career or financial sacrifices for the sake of their relationship and their children of that relationship will be expected to navigate through the complex law in relation to interests in property and to seek to reach a settlement. This will include where mediation with the economically stronger party is impossible or unsuccessful.

Cohabitants on separation face complex legislation and uncertain outcomes. Particularly without reform of the law affecting cohabiting couples, people need assistance in taking cases under the TOLATA and Schedule 1 Children Act 1989 because these are simply not easy to conduct as litigants in person.

Example

Ms M met Mr P at work. After they had been dating for a year he asked her to move in with him. After they'd been living together for two years Mr P, an extremely high earner with a pressured job, proposed marriage and asked Ms M to give up work to take care of the house and support the entertaining that was a large part of his work. He promised that if anything happened to their relationship he would make sure that she was financially okay.

She agreed and they lived together happily for a further five years and had a child together. When their daughter was aged two, Ms M returned from a short visit to her sister to find that Mr P had moved a new girlfriend into the house in her absence. Mr P told her that she could no longer share their home, that she was entitled to no financial assistance from him and that she should leave and leave their daughter with him. Mrs M had always thought she would have rights as a 'common-law wife'.

Ms M used legal aid to obtain an order under Schedule 1 Children Act 1989 that enabled her to re-house and provide for herself and her daughter. Under the cuts, she would not be eligible for legal aid and might not become aware of, or assert her less well-known legal rights. If she did she would have to represent herself whilst her wealthy ex-partner could afford to pay for legal representation.

Potential savings

The savings the government seeks to make in respect of finance cases are about £19m and no account is taken of the significant contribution that the Statutory Charge makes to offsetting family legal aid expenditure. We believe that there are a number of proposals which if implemented would produce significant savings in the area of ancillary relief which we detail below.

The Statutory Charge

It is surely wrong that the Statutory Charge is not taken into account in the legal aid budget with repayments not being credited against the legal aid fund. It is also totally unacceptable that accurate figures on what repayments are due or recovered are unavailable to reflect the true cost of legal aid in family finance cases. The Statutory Charge is a fundamentally fair way of funding finance based litigation.

The Statutory Charge is the current system where those in receipt of family legal aid who either retain or obtain a financial benefit (other than maintenance) from their representation are obliged to repay all of their legal costs to the legal aid fund. There are circumstances where the Statutory Charge can be postponed, particularly where it would cause hardship to an Assisted Party and result in the sale of their home and deprive the client or her children of a place to live. Where the Charge is postponed, it is only with interest being charged at 8% which is high compared with current lending rates.

The Statutory Charge could be extended to cover other family cases, whether or not they relate to assets including injunction and private law children matters, where the Assisted Party has assets such as a property with equity, whether these have been the subject matter of the dispute or otherwise. We also recommend that the Statutory Charge is extended to cover cases referred to mediation as a contribution to the cost of mediation. We note that other members of the Family Mediation Council suggest that a charge should not be implemented unless the sum to be recovered exceeds a certain level. Resolution is however of the view that the present rules in this regard should be applied.

The Statutory Charge should be repaid at the latest where the applicant no longer has children to accommodate save in exceptional hardship circumstances.

This would effectively give financially eligible individuals where there are family resources at least the option of a guaranteed loan to cover the costs of legal representation where an interim funding application is not viable or they cannot quickly access or raise funds elsewhere. The taxpayer secures and recovers all the costs incurred plus high interest by way of the Statutory Charge. We believe that those taking up the option are likely to take a positive view towards early settlement in order to minimise the Charge.

In addition, and in any event, there needs to be better and tighter monitoring and enforcement of the Statutory Charge than at present. The Legal Services Commission should have more flexible powers in avoidance cases and power to register Charges without the consent of the parties. Often a property (which may be the only asset) is jointly owned by the parties in dispute and one party refuses to allow the Statutory Charge to be entered.

Advice and representation for Divorce

Resolution has long advocated divorce reform. The present fault based system leads to more problems than it solves and maximises conflict. We consider that legislation should be introduced as soon as possible to provide "no fault divorce" and that the divorce process should be simplified and become an administrative rather than a judicial process. In those circumstances we consider that Legal Help for divorce could be removed, subject to limited help being available to assess for domestic abuse, advise on any international jurisdiction issue and explain all the alternative dispute resolution options. The consequential cost savings for both the legal aid fund and HMCS, will enable legal aid resources to be focused on more substantive issues. There would need to be a facility for translating foreign marriage certificates.

At present the procedure for obtaining a divorce through the courts is not without complications and advice and guidance is essential for most people at the stage of completing the divorce petition and at the special procedure stage. Court staff are not in a position to offer advice to litigants in person which means that there are a number of procedural hurdles the litigant in person has to surmount. Errors will usually not be spotted until the district judge considers the evidence at the special procedure stage, often resulting in the petitioner having to start again with amended documentation with consequent frustration and delay.

We do not understand why it appears to be considered that Legal Help for Divorce where there is domestic violence does not justify legal aid. This can be the gateway to dealing with children and finance issues and is inconsistent with the other proposals. Further abuse can be prevented by early intervention. The greatest risk of death from domestic violence is at separation.

We believe that as a consequence of these proposals more people will stay married but live apart raising issues of reliance on benefits where finances are left unresolved and of inheritance which can be costly to resolve.

Reintroduce costs orders in ancillary relief cases

We believe that the rules relating to costs orders in finance case should be reviewed and the present general rule that there should be no orders as to costs should go. The threat of costs orders made under the old 'Calderbank' principle acted as a significant incentive to settle ancillary relief cases.

Costs in Hague Convention cases

In Hague Convention cases, the applicant automatically receives legal aid regardless of means and the respondent does not. Consideration might be given to means testing for all Hague Convention representation, perhaps on an after the event basis to allow for emergency representation but with a later assessment for contribution to costs.

A new merits test

Rather than removing the vast majority of private family matters from scope in the absence of insurance and other alternative funding, an option might be to review the merits test on the grant of certificate applications. This might apply factors to the individual applicant and their case rather than to a category of case and reflect the type of factors identified by the government as justifying funding around complexity, the litigant’s ability to represent their own case, and the availability of alternative sources of funding or other routes to

resolution. For example, the types of questions asked in allocation questionnaires might be applied to and raise the merits for private law children cases along the lines of:

- Do you expect the application to be contested?
- What are the reasons given for opposition?
- Are you alleging that you have been subject to domestic abuse or harassment by the other party?
- Are you alleging that any child of the family has been subjected to sexual, physical, or emotional abuse or ill treatment?
- Has there been any involvement by Social Services in relation to child protection?
- Is there a real risk of abduction of the children?
- Are you alleging drug or alcohol abuse by the other party?
- Do you anticipate that the other party will be alleging any of the above against you?
- Do you expect that there is likely to be a problem with enforcement of an order?
- Do you or any other party suffer from a psychiatric illness?
- Are you able to read and write?
- Do you have any mental or physical disabilities that would prevent you from being a competent litigant in person?
- Are there any other complicating issues?

Other areas of law

Those clients with family law issues often present with a variety of problems which benefit from a holistic approach in order to avoid further costs. We are generally very concerned about other areas of law which it is proposed be removed from scope such as debt, education, employment, some housing matters and welfare benefits. Often early administered specialist advice is recognised as preventing major problems developing for families which can cause relationship breakdown and hardship for children. Contrary to the hope stressed in the Green Paper it is highly unlikely that either the voluntary sector or the not for profit agencies will be in any position to provide advice and assistance in these areas of law. Indeed all the evidence is that such organisations are already suffering major funding cuts now.

We oppose the removal of advice and representation in unlawful eviction and disrepair cases as the failure to benefit from remedies in these cases can have a significant effect upon the well being of families and particularly children.

Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

No we disagree

We believe that the proposals on what will be excluded from scope are flawed. The proposed excluded cases scheme is not the right way of approaching the funding of cases.

On the government's own assumptions it is suggested that 25 % of cases outside scope are likely to justify funding under the excluded scheme, but will have to jump this hurdle.

Any human rights issue is likely to lead to an excluded case application and require monitoring of whether a human rights issue remains relevant. Article 6 issues arise in relation to disputes that involve fundamental family issues such as contact and residence and also in respect of finance when it revolves around providing maintenance for the support of children and providing security for a long term home for children and vulnerable adults.

As stated above, in cases involving allegations of domestic abuse it would be unacceptable for an alleged wrongdoer to cross examine an alleged victim. Also it is unacceptable for an alleged victim of abuse to be granted legal aid but not the alleged perpetrator.

Any emergency case in an out of scope area may also give rise to an excluded case application as there will be no other way to solve urgent family issues, but such cases cannot await an exceptional decision. Exceptional type funding decisions currently go through committees and can take weeks. Where funding is granted, the court application may then simply be made too late.

It would be fairer and less bureaucratic to have automatic categories, including emergency applications, within scope and considered on merits, as opposed to the administration of excluded case applications.

If the scope proposals are not substantially revised, there will have to be a safety net in light of the nature of the scope proposals, but it is difficult to envisage and comment on how the proposed scheme would work, particularly without further information on how long such an application would take or the criteria for making a decision. We would anticipate an increase in applications for judicial review.

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

No

We disagree with the proposed removal of divorce and finance, private law children and family cases where domestic violence is not present from the scope of legal aid. Alternative options and solutions need to be considered.

Conditional fee type arrangements encourage an aggressive, all or nothing approach to litigation which is invariably contrary to the interests of separating couples and the approach advocated by Resolution's Code of Practice and incorporated into the Family Law Protocol which applies to all solicitors dealing with family law work. Resolution members encourage settlement and resolution of family matters, not least in the interests of children, and the maximum preservation of family assets possible.

As well as being inappropriate in principle to talk in terms of winners and losers in family, it is also impossible in most cases even to attempt to define who has won and who has lost. For example, a party might "succeed" in achieving the capital settlement sought, but fail to secure the hoped for level of maintenance.

There has been some discussion of insurance for legal fees on marital breakdown. There are no such schemes on the market for those eligible for public funding. Those eligible for Legal Help simply do not have insurance. We see no evidence that the market will step in to plug the gap left by the proposals. Any new insurance products would most likely be tailored to medium to high net worth people and we anticipate that the premiums for modest to low income members of the public would be prohibitive. Any such scheme needs to offer funding, for example, to the mother left in the matrimonial home with children and on a low wage who is seeking to postpone the sale of the home until the children are older. She will not be able to afford private fees or premiums for any policy. Such a person is well served under the Statutory Charge where although she is required to repay all her legal costs together with interest this is postponed until the home is no longer needed. It is well known just how difficult it is for individuals to obtain any sort of appropriate loan from commercial banks in the current economic climate.

We make proposals about the funding of family cases in our response to question 3. The Statutory Charge means the home can be occupied for the benefit of the children with the carrot of repayment as soon as possible because of the rate of interest.

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

We are deeply concerned about the impact of the proposed reforms on litigants in person in family proceedings and the conduct of those proceedings.

The Green Paper asserts that the research conducted in 2005 by Professor Richard Moorhead and Mark Sefton 'Litigants in Person: Unrepresented Litigants in First Instance Proceedings', 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. But in relation to family proceedings that research report states that

'where the applicant was unrepresented or where both parties were unrepresented, cases appeared to take significantly longer. In spite of evidence suggesting that generally cases involving unrepresented family litigants ended at a later stage and involved slightly more activity, divorce cases took significantly less long where both parties were unrepresented. This is consistent with other evidence suggesting that simpler, uncontested divorces were more often handled without representation......

In family, cases where both parties were represented involved more ineffective hearings (suggesting more settlement behaviour). Cases involving unrepresented parties tended to proceed further through the procedural steps and more often involved hearings.'

For the purposes of our response to this paper, we interviewed Professor Richard Moorhead of the Cardiff Law School. Professor Moorhead has long standing research interest in legal aid and access to justice. He is a former member of the Civil Justice Council and also acted as specialist adviser to Select Committees on legal aid. He has conducted research into litigants in person.

- Professor Moorhead comments that the rationale of the Green Paper is in part an assumption that we are too litigious as a society, and indeed that such litigiousness is caused by legal aid. However, he comments that the Green Paper provides no evidence to support that assertion and that most of the proposed cuts centre on areas of work which are not in general related to the litigation, such as social welfare law.

- Professor Moorhead observes that the Quarterly Court Statistics show disposal of ancillary relief applications, domestic violence applications and private law children applications. In each case the data does not point to a significant or consistent rise in litigiousness sponsored by legal aid. Indeed, the greatest rise is in fact in cases brought by the State, not by legally aided individuals.

- Professor Moorhead also referred to trends in personal injury claims using Compensation Recovery Unit data. This data compares the number of personal injury claims over a number of years and back to a time when legal aid was available for personal injury actions. Indeed, this evidence does not suggest a general rise in litigiousness associated with legal aid and indeed rather supports the contention that with the availability of conditional fee arrangements litigation actually increases. Perhaps a cautionary tale for the proposal that more conditional fee arrangements are introduced at the expense of legal aid availability.

Mediation

- Professor Moorhead comments that it will be essential to link the outcome of the Norgrove Review with the proposed legal aid reforms. Australia has already gone down the route proposed by the Green Paper in respect of mediation. However, Professor Moorhead comments that Australian authorities apparently invested some £250million to make the change to mediation in a country where the population is significantly smaller.

Litigants in person

- Professor Moorhead's view is that research evidence points towards substantial issues impacting on how the courts can conduct their business both judicially and administratively when the potential impact of litigants in person are taken into account. Professor Moorhead refers to the research he conducted with Mark

Sefton for the then Department of Constitutional Affairs in 2005. Professor Moorhead's view is that cuts in legal aid will have two significant effects. He fears that it will discourage participation in court proceedings where the participation would "usually" be in the client's interest and as a consequence in the interests of justice. Moorhead and Sefton's research focused on the profile of litigants in four County Courts. Their research found that unrepresented claimants were relatively rare. This suggests that it is usual but not always the case that claimants will bring cases if they can secure representation. Professor Moorhead's view is that it is unknown how the withdrawal of legal aid in family cases will reduce the number of applications in children and finance cases or whether the numbers of unrepresented litigants bringing family cases will simply increase. He believes that one possibility is that it will do both. Moorhead and Sefton's research was unable to track historical patterns in family cases of litigants in person because the Court Service did not collect the relevant data. Professor Moorhead believes that the Ministry of Justice's capacity to comment meaningfully on the significance of litigants in person must be in doubt in the absence of reliable data and detailed research in this field. The research that they were able to undertake in the four courts studied is set out in the table below. This emphasises the extent to which it was already the case that large proportions of cases have unrepresented parties and also of interest is the extent to which it was rare for them to participate fully in the case.

- It is Professor Moorhead's view that applicants who wish to bring proceedings unrepresented need strong motivations to overcome the fear of acting unrepresented as well as the technical barriers associated with lacking the relevant expertise. In interview Professor Moorhead said further that such motivations are most likely to arise where disputes are felt by the litigants themselves to be high stakes. Children disputes are bound to be one such area, or where the litigant is desperate or has a very strong sense of injustice that needs to be corrected. Professor Moorhead says that if his analysis is right this may lead to two particular classes of unrepresented applicants appearing before the court: litigants operating in a dispute where the emotional dimensions are very strong (which may be expected to impact on litigant behaviour and make those cases harder and more resource intensive to manage) and litigants who are obsessed or otherwise difficult.

- The research study found that obsessive and difficult litigants were a very small minority of unrepresented litigants generally but pose considerable problems for judges and court staff. It is well known that obsessive and difficult litigants already appear in the family courts. There are, we believe, many other such litigants who are presently represented by our members who are controlled and guided to successful early resolution of cases. The removal of legal aid may well unleash additional obsessive and difficult litigants who will further hamper the operation and administration of justice. Professor Moorhead believes that the other group, desperate litigants fighting over high stakes issues such as the future of their children, may also increase costs within the courts and for other relevant organisations such as Cafcass.

- It was noted by Professor Moorhead in interview that many potential litigants do not participate in the court process even though they have critical interests at stake which may go unprotected. At the time of their research 40% of unrepresented litigants in ancillary relief, Children Act or injunction cases did not participate in their cases. The impact of mediation on this group is uncertain. It is unclear to Professor Moorhead whether or not such a group are likely to engage with the increased availability of mediation. Professor Moorhead believes that this is

particularly important where one party knows that their unrepresented opponent is unlikely to issue or defend proceedings as their incentive to cooperate in mediation is significantly lessened.

- The Moorhead and Sefton research showed that where a party was represented their opponent tended to be unrepresented. Professor Moorhead, in interview, stated that this was important for three reasons. One is that the inequality of arms exacerbates the litigant in person's disadvantage. This makes the ethical position of the representative of the other party more difficult because they struggle to balance their duty to the client and their duty to the public interest together with their duty not to take advantage of their unrepresented opponent. The third difficulty for Professor Moorhead is the judges themselves. Judges typically adopt the role of passive arbiter, consistent with an adversarial judicial system. The judges have to balance the need to appear neutral with the need to assist litigants in person in the interests of justice. Professor Moorhead believes that represented opponents feel aggrieved if they can see the judge, as a neutral umpire, assisting their opponent. A judge cannot effectively decide a case without providing some assistance to litigants who are plainly out of their depth. Professor Moorhead believes that this is a Catch 22 situation which can only be overcome by potentially radically restructuring the court process with new approaches to judicial management.

- Professor Moorhead goes further in saying that judges are not trained to deal with circumstances which effectively require an inquisitorial approach within an adversarial system. Their research showed that judges have a range of approaches to dealing with litigants which were developed ad hoc, with apparently varied effectiveness and without the necessary support to make such a system function. It is Professor Moorhead's view that a system which is expected to successfully engage with unrepresented litigants needs to rethink its structures, policies and approaches. Professor Moorhead proposes a system with simpler procedural rules and a judiciary explicitly trained and supported in delivering justice in such ways is only part of the solution. Before this can occur Professor Moorhead believes that there are important matters of policy and principle which need addressing both in the court room and beyond it before this approach can be adopted.

- Professor Moorhead also said that their research found that litigants in person need a significant amount of support outside of the court room with there being a significant impact already on the time court staff spend dealing with such litigants. Inevitably litigants in person are going to make mistakes in their approach to the cases they conduct both in respect of pleading their case, interlocutory applications, preparing and effecting disclosure, and essential preparation for the final hearing.

- Whereas the research showed that there was only modest evidence suggesting unrepresented litigants cases took longer there was an observation that this may well be due to the relative passivity of some litigants in persons which in Resolution's view in itself points to potential injustice. Professor Moorhead shares Resolution's view that it is important to emphasise that unrepresented parties are less likely to settle their cases. Professor Moorhead's view is that this is for two reasons. One is that some litigants in person seek vindication through a court judgement, and the other reason is that there are barriers deterring litigants in person from effecting settlements.

Resolution is concerned that there is no indication in the Green Paper that the Ministry of Justice have grasped the extent of the change necessary to make the system work with the likely increase in litigants in person.

With no legal support for special procedure divorces and the volume of family legal aid cases being nearly halved under the proposals, we are very concerned at the lack of a recent and thorough assessment of the impact on the Court Service of the increase in litigants in person to date, or the impact of the reforms on the work of the judiciary and courts. Research needs to be undertaken on the impact of the inevitable increase in litigants in person before the family courts as a result of the proposed reforms. Despite there being no statistical analysis of either the current or the likely future volume of litigants in person there is compelling anecdotal evidence from most District and Circuit judges of the already marked increase in litigants in person to date and the effect that they have on the administration of justice.

We understand that the court computer system does not even currently log whether the litigants in each case are publicly or privately funded, or one of each, or indeed whether they are litigants in person.

The Government's own impact assessments raise a number of uncertainties including around how users of the family courts will behave if the changes are implemented. For example, it is simply not known whether more couples will leave issues totally unresolved, make agreements between themselves or exactly how many more will represent themselves in court. There is reference to 500,000 fewer cases in the courts as a result of the proposed reforms, but there is no evidence that the combination of mediation, advice lines and help from volunteer groups is going to reduce the number of conducted cases by that amount. The impact assessments estimate that the result of the reforms may be only 3,300 more publicly funded mediations each year.

Of equal concern is that many people who are eligible for legal aid are socially excluded and may not have the social skills, or mental capacity to collate information and present cases. There is a complete lack of analysis of the real impact, both emotional and financial, on parents and children themselves where one or both parents have to represent themselves.

Court proceedings without the parties having the benefit of legally aided advice and representation will effectively be the only forum available for those cases which are highly unlikely to be resolved through mediation, for example, intractable contact disputes, removal from jurisdiction cases, or cases involving abuse not classified as domestic violence.

The impact of domestic abuse can make it more difficult for a domestic abuse sufferer to act in person at court. It reduces their feeling of self-worth and saps confidence. This makes a visit to a court and giving evidence more daunting. Cross-examining the perpetrator or being cross examined by them would be particularly difficult.

Giving evidence is difficult without the assistance of an experienced family lawyer. One of the coping methods of a domestic abuse sufferer can be to blank out the incidents of abuse. Those who suffer post-traumatic stress can experience flashbacks in which they relive the incident of abuse. This occurs particularly if they have feared that their life was at risk. They will avoid talking about the incidents to prevent this.

In our members' experience, family cases do take longer where one party represents themselves and it will take more court days to complete a case. It is accepted that delay is detrimental to managing conflict and to children. Care cases already wait months for

hearings and the impact of litigants in person in private cases will have an impact on the availability of courts and judges to deal with public law cases.

The judiciary rely on receiving proper information about safeguarding issues and vulnerability. We fear that vulnerable parents without representation may fail to or feel unable to convey their difficulties to the judge. There are no allowances made for those under a disability or with learning and language issues.

There are also private law cases where the court orders a test result, assessment or report, for example, a DNA test to establish paternity, for drug or alcohol testing or a necessary psychiatric report. These will simply not be funded. Will the court do without these in children cases or will the case stop without them? What of the interests of the child?

As well as cases taking longer where both parties are unrepresented, points raised by our members include the following:

- Legal aid often tends to be granted to people who present as challenging and with difficult cases. If legal aid is not going to be available for these people then this will have a direct and significant impact on the ability of the judiciary to handle such cases.

- Although there are many litigants in person at present they often tend to be against a party who is represented and whose lawyer therefore can assist significantly in the case management and preparation of bundles which make dealing with a litigant in person so much less time consuming.

- Family court users will lack clear expectations of the process from a trusted adviser.

- People with an historic domestic abuse or violence history will have to confront their ex-partner and possibly cross examine them and vice versa.

- Security and safety issues at court will need to be identified by someone other than representing solicitors.

- In financial cases the absence of proper disclosure because of ignorance of the process is likely to result in extra appeals or manipulation of the process by some better resourced parties.

- There will be a lack of analysis, sifting or advising by anyone trained to assist the court leading for example to unstructured statements and ‘unfilled gaps’ currently filled by solicitors working in the family courts.

- In a number of areas of law the court has discretion in its decision making but there will be no tailored explanation to prepare the litigants and guide them in their representations about the exercise of that discretion.

- There will be further pressure on administrative and judicial staff. There will be no one to draft orders except judges or court staff leading to delays.

The consultation should also be asking about the impact on those who will not litigate at all as a result of the reforms. One can think of examples of fathers who seek to see their children who are put off by the process of challenging a forceful mother who is opposed to contact and similarly a mother who occupies the matrimonial home with the children bows

to pressure from the father to sell the family home. Invariably such sales would not be approved by a judge in a divorce ancillary relief or a TOLATA with children case, yet without the support and guidance of a legal representative these persons will not contest issues that otherwise they should do. We anticipate couples making a wrong assumption in their case of a 50/50 split applying; spousal maintenance rights not being exercised; and what would be fair and just transfers of tenancies or policies not happening. There are significant consequences arising from this, not least for children. It is well documented that children benefit from having a good relationship with both parents, and children are likely to perform indifferently at school if they do not have a beneficial relationship with both parents. Similarly if the family home is sold then the mother and the children need to live somewhere which in turn places stress and strain on local authority housing provision.

The Community Legal Advice Telephone Helpline

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

No we disagree

This is a potentially radical proposal and would have a further significant impact on access to justice. However, the consultation is vague and lacking in detail.

Those whose cases are outside the scope proposals will have no recourse to assistance and the single gateway raises issues even for those whose cases will remain within scope.

We would strongly urge the government to publish a full consultation on this specific issue. It should be joined up with the Family Justice Review and the Green Paper on Strengthening Families which is consulting on how to give more choice and ensure that parents are able to access appropriate support and information at separation.

We are not clear about the thinking behind the proposal on the basis that it is intended that only important, urgent and complex matters should remain in scope. We believe that the option of accessible, face to face services, including at first interview, in both rural and urban areas is key to advice and representation provision for them. There is a place for telephone advice in relation to family law but limited to giving basic guidance on the law, advising as to options and assessing eligibility.

We currently have a number of concerns:

- Research has shown that social groups D and E are the least likely to access telephone advice. This will disproportionately impact upon ethnic minorities, young people and women.

- Many people are who are eligible for legal aid are by nature both socially excluded and on very low income levels and therefore they would simply not be in a position to afford to pay the current phone charges applicable for 0845 advice lines. Again, this disproportionately affects young people, ethnic minorities and women.

- Many current legal advice service providers have a long history of commitment and integration with their local community. They have developed links with local advice, community groups and ethnic groups which have resulted in complimentary referral systems. They often also have close links with local voluntary sector organisations, charities and refuges. The introduction of the advice line as a single gateway would remove the incentive from such advice organisations to make a

local commitment. These connections form the bedrock of local advice provision and successful referrals.

- There is evidence to cast doubt on the suggestion that telephone advice offers cheaper advice, and therefore value for money. See Adam Griffith's article in the LAG Bulletin February 2011.

- There are clear limitations to telephone advice, not least that in cases involving domestic violence and indeed serious children disputes, interpreting and understanding a person's facial expressions and body language is critical in understanding the importance and seriousness of the issues that people are raising. Indeed, it can be common for people, particularly women, to underplay issues that are of genuine concern and it is only by experienced understanding of body language and facial expressions that practitioners know to push and probe to establish a client's real concerns and anxieties. The ability to perform such a function by telephone advice is extremely limited.

- In many cases, particularly financial cases, it is absolutely essential that the adviser is able to view documentation including in relation to identifying any interim funding option. Further, although an adviser on the telephone can give general advice about, for example, the operation of the S25 Matrimonial Causes Act 1973 criteria in an ancillary relief case it would only be after taking the most detailed instructions and examining both parties arguments, position and documents that an adviser would begin to be in a position to offer relevant, tailored and effective advice to a client.

- Other practical concerns include the inappropriate giving of advice at telephone operator level including conflicts arising where for example, both husband and wife telephone seeking advice.

Having said that, we recognise above there are instances where basic information in relation to relationship breakdown including the options for dealing with their situation and on legal principles in relation to domestic violence, Children Act 1989 and finance matters might be given by telephone. However, it is imperative that such clients are afforded the opportunity of obtaining more realistic and detailed advice from a local provider of their choice that meets relevant expertise and quality standards.

A telephone service may be more successful for users if it is self selecting. Clients being able to instruct someone recommended to them or who they choose and trust, who knows them and their problem rather than having to go back to square one with the telephone service, will be an important issue for some. There was a time only very recently indeed where the government and Legal Services Commission were convinced that the best way to provide advice was on an holistic approach because of the research by Hazel Genn and others which showed that a person tended to have a cluster of problems. It is difficult to see what has changed since that time.

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

No we disagree

Please see our response to question 7. In many cases the nature of the issues, current proceedings, the volume of documentation and other factors will make specialist advice by telephone inappropriate.

We would have concerns about ascertaining and verifying eligibility for legal aid where mediation willingness and assessments are carried out on the phone or by email or by whatever other means may be envisaged to replace face to face meetings. Such methods of carrying out these meetings may prove extremely challenging when screening for domestic abuse, child protection and carrying out money laundering checks.

Resolution is seriously concerned that this type of service will prevent providers providing specialist advice gaining work by demonstrated quality and user and local recommendation leading to a reduction in quality. In particular there appears to no longer be any recognition of the importance of solicitor providers committing to their local communities. The proposals appear to remove the importance of firms committing themselves to forming relationships with local advice agencies and community groups.

There needs to be thorough consideration of whether such a model for delivery of specialist advice on areas remaining in scope would be sustainable on top of the other changes proposed in the consultation.

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

We believe the following are relevant factors:

- Where there are current court proceedings.
- Where it is necessary to pick up non verbal clues; where there is a need to be very sensitive to verbal texture or to follow verbal and contextual clues which is crucial in family cases.
- Where there are issues concerning domestic abuse of adults or indeed children, where it is critical that the client receives face to face advice so that the fullest picture and understanding of the client's position can be judged so that appropriate action can be taken.
- The level and complexity of documentation or investigation required.
- Where there is any suggestion that the clients have mental health or language difficulties or themselves do not feel confident about taking forward issues concerning separation, divorce, children, finance and domestic abuse without more tailored legal advice.
- Where it is necessary to have local knowledge.

- We believe that the experience of NHS Direct shows that an options tree is not the way forward.

- The client's preference for either telephone or face to face advice.

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

We would strongly urge the government to issue a further consultation to consider this issue fully. The relevant organisations are any organisation presently providing triage or specialist advice and representation services. The data obtained from the pilot scheme for referring to face to face advice should be analysed.

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

Yes

We believe in principle that the Legal Services Commission should offer referral to paid advice services for ineligible clients through the Legal Advice Service helpline as this would be a valuable public service. However, the scale of the cuts to funding in all areas of legal aid provision mean that the burden upon the advice line would be intolerable and therefore the service should be reserved for those with the most significant need. Many organisations now offer the same areas of services to legal aid and privately paying clients.

If the government were to present a different environment where they maintained proper provision for legal advice and representation then it would be appropriate to offer such assistance through a properly set up, quality-checked and regulated scheme. For example, criteria for deciding who to refer to needs to be considered.

Financial Eligibility

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

No

It is wrong in principle that by abolishing passporting on capital, legal aid will have a significantly lower capital threshold than other means tested benefits which are set at minimum safety net levels. It would create discrepancies with other parts of the benefit system.

It will also make the means test more bureaucratic and difficult to administer because this means no client will effectively be passported and capital will have to be assessed in all cases.

Question 13: Do you agree with the proposal that clients with £1000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons.

No

£1000 in capital is very little indeed to cover the sorts of regular things that crop up in everyday life, such as children needing new shoes, replacement cooker, and additional expenditure at Christmas and birthdays. Asking for a contribution of £100 is the same as asking someone with £1million to fork out £100 000 at the start of their case which would be seen as unacceptable. It is likely to push clients into debt.

There will also be the added administration and bureaucracy of collecting contributions and further delays in the issuing of certificates.

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

No in relation to the equity capital disregard

Yes in relation to the pensioner capital disregard

Abolition of the equity capital disregard essentially favours people with big mortgages over people who have worked hard and paid them off or have small mortgages. It seems to us to fly in the face of fairness. How will people necessarily release the cash in their house?

Regarding the pensioner capital disregard, we believe that there should be a level playing field between all applicants regarding capital.

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

Yes in relation to retention of the mortgage disregard

No in relation to the other proposals (other than that there should be a level playing field between pensioner and non-pensioner applicants regarding capital)

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

Yes

The proposals in relation to the property eligibility waiver scheme will effectively mean that legal aid will be repayable in future regardless of whether money or property is recovered or preserved. We do not object in principle to such a scheme.

However, we are concerned that a discretionary scheme will be problematic in practice. Given that it is argued that the only cases that will remain in scope are serious and urgent, it will add to uncertainty and pressure. We consider that all applicants liable to make a capital contribution should have the option for it to be repaid under the scheme.

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

Yes

Please see our response to question 16.

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

No

We are not sure what family cases would remain in scope under the government's proposals to apply the proposed automatic property eligibility waiver to. However, in theory it would mean that a charge would be placed on property to recover small sums for Family Help Lower and Legal Help. This seems to us to be as unduly bureaucratic as operating a discretionary scheme in such cases.

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

Yes to the "subject matter of the dispute" disregard and **No** to the cap

We agree that the 'subject matter of the dispute' disregard should be retained, but do not agree the cap. Neither party will secure a loan if the subject matter is in dispute or that is contemplated. The equity is inaccessible and thus to deny access to justice for either party creates unfairness and inequality. In any event, if funded these cases may well secure Statutory Charge monies at conclusion and prove cost neutral. The disregard should be set when a dispute is contemplated rather than actual. To deny pre-emptive advice simply because the dispute has not yet begun is short sighted and lessens the chance of early action to prevent protracted litigation. In reality there is little prospect of the disputed assets being available for funding unless released by an interim lump sum application for which we maintain there should be funding.

As this has been the case for family matters then this should be applied to all types of cases.

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

No

For the reasons mentioned above unless the equity can be realised it must be disregarded (possibly with the potential of a later repayment/charge in order that parties can be empowered to access justice and ultimately manage their own financial affairs).

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

Yes

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

No

People struggle to pay contributions as it is. Putting them up will just mean people who are eligible will be denied access to justice as they will not be able to afford the contributions. Given that the only cases that it is proposed remain in scope are considered by the Government to be the most urgent and serious ones, in our view, this is simply wrong.

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

We do not agree with an increase in income-based contributions due to the denial of access to justice and hardship this would cause.

Legal Aid Remuneration

We do not propose to comment on the questions relating to criminal legal aid.

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

No we disagree

Legal aid lawyers have suffered a cut in fee levels on an annual basis for some 21 years, not least due to inflationary pressures and also the fact that expenses relating to running a legal practice have increased markedly above general inflation figures. There have been only four limited rate increases in legal aid in the last 17 years which makes legal aid lawyers one of the most poorly recognised and remunerated public servants.

Solicitors' practices are very different from, for example, the Bar. Although payment regimes can be similar the two branches of the profession operate in very different ways. Solicitors' practices have significantly greater overheads as a result of their commitment to accessible offices in areas of need and a public outface.

10% seems to be an arbitrary figure and the proposals simply assume that the market can sustain a 10% cut in hourly rates and fees across the board. In fact the cut will represent more than 10% reduction in current remuneration for family providers with the introduction of new fixed fees (those savings have not been factored into the government's figures) and other changes proposed in the consultation, for example, on enhancements. Coming together with scope changes it is difficult to predict impact, but the proposed reduction will inevitably cut margins tighter in an already difficult environment and require providers to assess their future business plans. Whilst our members would prefer the government to reconsider the scope proposals, they report to us that most family legal aid practice profit

margins are too tight to tolerate the fee cut and may simply tip some legal aid firms into unprofitability.

It is clear that the combination of the proposals on family scope and financial eligibility will result in a large and sudden reduction in our members' legal aid workloads. This will have a knock on effect for the remaining family legal aid scheme. It is likely that surviving by undertaking domestic violence and public law children cases alone and at the fees proposed is not a sustainable model. The impact assessments recognise that rural providers may leave the market or move their business out of rural areas negatively affecting clients remaining eligible for in scope matters.

Fewer providers will have consequences for access to justice in areas that remain in scope, raising particular problems in cases with multiple parties and a necessarily different approach to conflicts which might not sit with the solicitor's professional obligations. There may also be issues around quality of representation for the areas that remain in scope if legal aid solicitors have to become less specialised for firms to be able to sustain a legal aid practice.

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

Yes

It is more for civil non-family specialists to respond to this question. In our view, given the savings being sought, we consider that uplift should be capped rather than cease.

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

Yes

It is for the Bar to respond to the detail of these proposals. However, we are firmly of the view that there should be equal pay for comparable work done by barristers and solicitors, the latter having additional overheads and service requirements. The principle of parity of pay for equal work has already been accepted in relation to the advocacy fees due to be introduced.

Resolution welcomes the Government's commitment, in paragraph 7.26, to introduce the Private family Law Representation Scheme and the Family Advocacy Scheme which should be brought in as soon as possible.

Question 35: Do you agree with the proposals:

- To apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent, and
- To apply 'risk rates from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?

Please give reasons.

No

We do not agree with proposals to apply “at risk” rates to every case where inter parties rates are a possibility, because that is almost every civil and housing case. This may mean cases are cherry picked by barristers who are most likely to be impacted by risk rates and will take the case on if the case is likely to be successful, but if the prospects are borderline or otherwise uncertain may not be willing to do so at significantly lower “at risk” rates. If the rates are to be applied at the end of the investigative stage, information can be obtained and prospects of success gauged. Solicitors and barristers therefore bear the risk themselves of proceeding if prospects of success are poor. However, this may mean the more unusual or complex cases (such as human rights) are not pursued because prospects are uncertain.

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

Any claim involving a breach of a human right should not be covered because cases are extremely difficult to succeed in but the challenging of public bodies which have breached an individual’s basic human rights should not be deterred. Invariably, specialist Counsel’s opinion is required in Human Rights Act 1998 claims because of the complex legislation, and the rate may deter Counsel.

In addition, housing possession cases should not be subject to “at risk” rates because the outcome is normally so uncertain. In straight forward rent possession cases Counsel may not be involved, but a barrister is more likely to be instructed in nuisance possession cases. Again, the low rates of remuneration may deter Counsel in cases which are of such overwhelming significance to the client because it involves the potential loss of family home.

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

Yes

Resolution’s position is that uplift should be preserved to ensure that there is some incentive for more experienced practitioners to remain involved in legal aid work to support the most difficult cases. However, given the savings being sought, we agree that uplift should be capped rather than cease. We welcome the retention of the 15% uplift for Panel membership. It is agreed there should be a set criteria. The criteria should include expedition with which work carried out; exceptional difficulty, complexity; volume of

paperwork; complex international element; novel points of law. For advocacy there should be an additional element for the length of final hearing.

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

Yes

We agree that the use of Queen’s Counsel should be restricted although it is important that in those very difficult and complex cases that there remains the ability to be able to use Queen’s Counsel when absolutely necessary. Leading Counsel needs to be available where a novel point of law arises in a case. It is also important to retain the idea of an equality of arms.

It is right that those cases where the use of Queen’s Counsel is justified are rare and the criteria proposed is not dissimilar to that currently used. In certain cases it may not be necessary to have Leading Counsel throughout the proceedings and that is something that needs to be considered both at the time authority is given by the Legal Services Commission and is reconsidered again after the next stage has been completed. It will be essential that those at the Legal Services Commission making decisions around such matters are sufficiently skilled and continuity is maintained.

Expert remuneration

Question 39: Do you agree that:

- There should be a clear structure for the fees to be paid to experts from legal aid;
- In the short term, the current benchmark hourly rates, reduced by 10%,should be codified;
- In the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;
- The categorisations of fixed and graduated fees shown in Annex J are appropriate; and
- The proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?

Please give reasons.

Yes

It is well established that one of the principal cost drivers in family cases has been the increase in payments to experts in all fields. We believe this is unfair and that such fees should be limited and controlled.

We consider that experts should be paid at capped hourly rates and subject to a standard contract to include requiring agreement on number of hours and non charging of fees for last minute cancellations.

For many experts the government should be responsible whether through the Legal Services Commission or otherwise of contracting with the experts directly so they can set standard terms and conditions and service standards.

Alternative Sources of Funding

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

Yes

We do not consider that such a scheme would be a viable alternative source of funding.

The proposal would provide little reliability and certainty around incoming legal aid funding, particularly when interest rates are low, and require disproportionate administration.

There are of course currently professional rules around accounting for these funds to the clients in question.

It should be noted that many firms, especially conveyancers, rely on client account interest to generate income to keep professional fees down. It would be inequitable for the house selling and buying public to face higher bills to fund legal aid, especially when institutional 'polluters' contributing to the legal aid spend are not effectively taxed for this purpose.

We note that there has been no assessment of the amount of money in client accounts or of how much money might be earned.

The consultation is very and disappointingly limited in its discussion of and proposals around Alternative Sources of Funding. The government at paragraph 4.26 seeks to rely on not for profit and voluntary organisations to advise on many matters but these will also be seriously impacted by cuts across different departments and other funding streams.

We comment on funding for family cases in our response to question 3.

Consideration should be given to requiring the lending institutions to pay a levy which funds advice and representation in relation to housing and disrepair. In very many cases lenders have simply allowed debtors to borrow funds that they were in no position to manage in the event of a financial downturn and their industries should have some responsibility for the funding of advice.

A levy on the financial services industry to cover the cost of fraud cases should be considered. We endorse the Law Society's proposal about contributions by the financial services industry.

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

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

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

Please give reasons.

As we object in principle to the proposal there is no reason to answer this question.

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

a) Mandatory model;

b) Voluntary opt-in model; or

c) Voluntary opt-out model?

Please give reasons.

As we object in principle to the proposal there is no reason to answer this question

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

In principle yes but more details should be provided before we are able to comment further.

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

Between 10 and 25%.

Governance and Administration

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

We welcome the fact that the Law Society's Lexcel standard has become an acceptable standard for legal aid providers as it is more comprehensive and reflects the SRA Code of Conduct to a greater extent than the SQM.

Resolution's own specialist accreditation scheme provides an independent and challenging test of experience and knowledge in 15 specialist areas of family law which should be relied on by the Legal Services Commission for the purposes of quality assurance. Every Resolution accredited specialist has to comply with the Resolution Code of Practice, maintain their specialist CPD and re-accredit every 5 years. Two thirds of those members of the public who use the 'Find a Member' function on the Resolution website go on to search for an accredited specialist showing that there is an appetite for specialist advice. Specialists are able to carry out their work more efficiently than non specialists and this should be encouraged by the Legal Services Commission to ensure the best use of the funds available and value for money. Specialist practitioner organisations are best placed to provide quality assurance.

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

- The application process for civil and criminal legal aid;
- Applying for amendments, payments on account etc;
- Bill submission and final settlement of legal aid claims; and
- Whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

LSC administration could be reduced to save on the LSC's own costs.

Greater use of devolved powers by practitioners would assist the LSC in reducing its own costs and improve the efficiency of the system, as long as the LSC provided clear guidance and did not seek to redefine schemes retrospectively, as seems to have happened to some extent with the requirements for Family Help Lower under the existing Controlled Work scheme.

Standard Monthly Payments for controlled work were introduced to provide consistency and improve cash flow. The problem with the previous scheme was that solicitors would submit bills and never be certain when payment would be received. Legal aid providers rarely have the levels of reserves that would enable them to survive fluctuating payments on an 'as billed' basis. In particular, those doing volume work are likely to want to retain Standard Monthly Payments.

Resolution members have experienced severe problems in payment delays for certificated work, particularly towards the end of the financial year. Legal aid payments must be made on a predictable basis.

The proposed changes to eligibility in the Green Paper will make the concept of passporting benefits obsolete. It will no longer be possible to rely on the DWP's assessment of capital, which will need to be verified in all cases. This will cause additional work and waste time.

The LSC auditors are inconsistent as to what evidence they will accept in relation to evidence of means. It should be possible to get validated evidence of means from the DWP electronically. However, see comments regarding electronic working below.

There is often very little information provided to practitioners or representative bodies in advance of new audits, for example the introduction of Financial Stewardship visits, which were started before information was provided and then the Manual provided to LSC staff contained a high level of errors. This creates a great deal of uncertainty, providers do not know what sort of audit to expect or when.

The LSC's recent approach through Financial Stewardship visits, expecting providers to audit large numbers of their own files and write reports at short notice is unreasonable.

The LSC is not consistent in defining what is or is not acceptable under contracts. It sometimes seeks to backdate new interpretations through audit over a considerable period. Resolution has received many reports from members that the LSC's training on the October 2007 Unified Contract failed to mention that a second meeting with the client was required. This is borne out by the Provider Training Pack which the LSC used to introduce the new fees in October 2007 and is still on its website:

http://www.legalservices.gov.uk/docs/civil_contracting/ProviderTrainingPack270907v1.3.pdf.

It does not mention the need for a second meeting at all, and simply states that the case must be a 'significant family dispute' and require 'negotiation'. The fact that level 2 issue required a second meeting was not clarified until August 2008, when the LSC posted a Q&A on its website:

http://www.legalservices.gov.uk/docs/civil_contracting/QandAPrivateFeeScheme200808.pdf.

However, it was not well-publicised. As a result, many Resolution members are having to pay the LSC significant sums of money, which they could not budget for in advance, and which are causing financial hardship, as well as straining the relationship between the firms and the LSC. Clarity and consistency will be essential in the future if firms are to continue to provide legal aid services to increasingly vulnerable clients.

If the scope proposals are implemented, the requirement for prior authority should be removed and it be assumed that prior authority is already given for the minority of complex cases remaining in scope.

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

Resolution has previously stated that it supports greater use of electronic working. We can see the time and cost savings that could be generated if firms could apply for legal aid over the internet.

Many Resolution members have been asking for access to their own contract data so that they can monitor and manage their own contract key performance indicators. However, this has not been possible to date. The success of the LSC in rolling out its service delivery transformation programme has been patchy so far and less successful than was hoped.

Resolution members also expressed considerable concerns about the operation of the Bravo e-tendering system. The system was inflexible, difficult to use and not at all user-friendly.

Our members' experiences strongly suggest that the LSC (or its successor) will need greater in-depth expertise in IT delivery. In the light of proposed cuts to legal aid administration, it is difficult to see how this area can be improved and the risk is that without adequate funding, the system could become worse rather than better.

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

Please see our comments on devolving of powers to firms in response to question 46.

Legal aid providers have become increasingly micro-managed since the 1990s. Practitioners now have to deal with a system so complex that even LSC staff struggle to understand it. There is a lack of proportionality in the system, with the lowest paid Controlled Work schemes having arguably the most complex funding requirements and greatest degree of uncertainty, due to lack of regular audit and feedback.

Resolution would welcome the opportunity to work with the Ministry of Justice to identify ways in which legal aid funding could be simplified to save costs for practitioners and the public purse.

Impact Assessments

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

We reiterate that taking cases out of scope is draconian, but the government is relying on this mechanism for a substantial part of the savings sought.

The impact of the proposals to remove the vast majority of private family law from scope on budgets in other areas of the public sector appear not to have been assessed in any real or meaningful way, for example around health, housing, welfare benefits, and Social and Children's Services.

There is no assessment of the likely increase in public law cases where the Local Authority will now feel compelled to intervene and the consequences of that for the court.

The impact assessments do not consider the impact on those eligible for legal aid with multiple significant problems. There is no proper analysis or consideration of the consequences when there is no advice and assistance in so many family cases, and others such as employment, welfare benefits and housing to ensure that they are dealt with effectively at the earliest opportunity. Failure to resolve any one of those problems could give rise to any of the other problems or have consequences for all those areas as lives fall apart. The impact upon particularly children, their performance or behaviour at school, and reliance on Social Services and housing teams will certainly be greater than at present.

The government claims to support the family but the potential impact of the consequences of the reforms on the welfare of children at the centre of relationship breakdown has not been analysed. Both in terms of the impact on children of their parents lacking support and of non-court endorsed and/or child focused solutions. There is no assessment of being a litigant in person in a family case or of how that impacts on the litigant's children.

Taking the Green Paper proposals in the round together with other government programmes of cuts, we are very concerned about the apparent lack of joined up analysis of the risks identified in the impact assessments accompanying the Green Paper.

The likely impact on the number of family legal aid providers, especially in rural areas or where conflicts of interest arise, will have an access to justice consequence for those family members whose matters remain within the scope of legal aid and are financially eligible. This will include victims of domestic violence and parents and children involved in

public law children proceedings who may be unable to access legal services or lack customer choice.

Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

We do not believe that the information provided in the impact assessments is adequately, detailed, certain or robust to provide evidence on the benefits and costs of the policy changes proposed.

We reiterate that taking cases out of scope is draconian, but the government is relying on this mechanism for a substantial part of the savings sought.

Sweeping assumptions are made about the behavioural response of clients to the removal of areas of from scope. The government does not know whether people will resolve their problems themselves, represent themselves in court, pay for alternative dispute resolution or other services (unlikely for this client group), do nothing or experience worse health.

Whilst it is acknowledged that adverse impacts are possible in the scope and other impact assessments, including around reduced social cohesion, increased criminality, reduced business and economic efficiency and increased resource costs for other departments including health and education, those impacts are apparently dismissed rather than analysed.

The impact of savings from the family fixed fee schemes has not been included in the impacts. We do not agree that it is safe to assume that the market will sustain a further 10% cut in fees.

We are very concerned that such radical proposals have been made without final impact assessments on some aspects including on small legal aid firms, rural proofing and competition.

We are concerned that the Ministry of Justice is only now reviewing existing data, research and evidence on the impact of litigants in person on the courts.

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

It is difficult to respond to this question. We consider that the proposals to remove certain areas of family law from the scope of legal aid are flawed. We are not persuaded that the information provided in the impact assessments is adequately detailed, certain or robust to support them or provide confidence that those clients with matters remaining in scope will have access to sufficient legal aid providers. Benefits to clients are not identified and we are not clear what mitigation in relation to client impacts is currently being considered. The uncertainties and negative impacts identified appear to simply be dismissed.

Resolution

We are an association of 5,500 family lawyers committed to the non-adversarial resolution of family disputes and achieving constructive and lasting outcomes when relationships break down. Around two thirds of Resolution members work in around 1,500 firms who form the bulk of family legal aid contact holders.

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Annex A

Summary of Resolution's proposals to the Family Justice Review

- It would be very helpful for a one page letter to be provided by the court to all those who come to them about issuing providing basic information, including about what is expected of people in court, and making it clear that it is possible to consult a solicitor for just one off advice - making that contact doesn't mean that you cannot handle your own case or that the solicitor has to deal with your case for you.

- People sometimes need information to be persuaded that legal processes are not what are needed. We believe that pre court diversion through parenting information and compulsory information on non-court options for dispute resolution must increase capacity within the court system. The giving out of parenting after parting type information at the outset (and without the need for a court application) to divorcing and separating couples about the impact of separation on children and co-operative parenting is key to reducing parental conflict and assisting more couples to help themselves without the need to access legal processes or to choose the right process for them.

- Compliance with rules and a more uniform and robust judicial approach to the application of rules and diversion away from court are required across the board. This can take the fight out of some cases which do go through the court door, thereby increasing capacity.

- There needs to be some facilitation to achieve parental responsibility decisions which parents are not making appropriately between themselves. We see a role in private children matters for the use of short position statements from day one setting out the issues for the court and the order being sought, with the judge then setting out the options and deciding whether the matter should go forward away from the court or in line with rules and practice directions (effectively a CMC with position statements filed). Where the only issue is quantum of contact or relates to certain other issues, there should be early (i) judicial suggestion that the user seeks legal advice where they are a litigant in person, (ii) judicial consideration of the suitability of dispute resolution methods (including parenting sessions or a combination of such), and (iii) direction to an ADR option unless the judge is satisfied that there is a compelling reason for the matter not to be referred out of court. There should be a positive obligation on parties to attempt the option directed with a warning of a positive obligation to consider an order for costs where the option is not attempted. Guidance on or an indication of what the court is minded to do on the issue if it cannot be resolved otherwise and in light of the position statements should also be provided to facilitate decision making. The court should retain some oversight of cases referred out with a direction to return on what timetable and under what conditions.

- In other private matters, parties might be required to demonstrate to the court that they have considered other options and have good reason not to have attempted any at the outset or at other stages of the process. Use of costs penalties or payment into court based on value of assets, linked to whether a party has been unreasonable in not attempting an ADR option, might also be considered.

- In contact cases where there are issues about mental health, physical disability, drug or alcohol abuse or domestic abuse, the early involvement of an expert on

that issue or, for example, use of an independent social worker in trialling a solution, will resolve that particular issue –either the issue does pose a risk to the child during contact so safeguards have to be put in place or it is not a risk so the other party can no longer use it as a reason to prevent contact.

- When parents are not making sensible decisions together and there is no contact at all, early access to the court and more speedy hearings are needed. Fast tracking of cases where the child is having no contact with the non-resident parent should be considered to reduce the chances of the matter becoming intractable due to delay. We would be particularly concerned about a compulsory mediation assessment hoop adding to delay in such cases. Robust judging is necessary in cases where a party seeks to repeatedly raise new allegations without supporting evidence.

- In relation to finance cases, we have considered the suggestion of a dual track according to value of cases. A system based purely on value is too narrow. Cases with less money to cover the new households can in fact be more complex. If one was to set out criteria for a fast track finance case it should include, in addition to the value of the asset base, a list of criteria that would enable one to work out the difficult cases.

- However, in all courts there should be a more robust use of First Appointments as FDRs. In the PRFD the court will only use the First Appointment as a FDR Appointment if both parties agree. In many other courts District Judges will always make part of the First Appointment privileged so that, in simple cases, they can deal with the FDR then. This can save a lot of court time and therefore resources and ensure that appropriate cases are dealt with more quickly.

- We also suggest that agreed statements of issues be required for First Appointments in order to narrow the issues for that and save time.

- We believe that there should be fast tracking of consent orders reached without issuing court proceedings. Consideration should also be given to payment of a lesser court fee for such matters.

- The result of current costs provisions is that there is no real incentive to settle finance cases. Resolution seeks the reintroduction of Calderbank offers which we believe would be more effective than even a more robust approach to the use of costs penalties in finance cases. The fear of having to pay the other party's costs when they had made a reasonable offer previously made people settle.

- We suggest a positive obligation to consider an order for costs where an ADR option is not attempted in some private children cases and/or a general wider use of costs penalties linked to whether or not a party in a private matter has been unreasonable in not attempting an ADR option.