

**Full Impact Assessment on the
Northern Ireland Funding Code:
Evidence Base**

**Submitted to
Northern Ireland Legal Services Commission**

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1 Background

1.1 Introduction

The Northern Ireland Legal Services Commission ('the Commission') was established in October 2003 to assume responsibility for the administration of all aspects of publicly funded legal services in Northern Ireland. The creation of the Commission, under the Access to Justice (Northern Ireland) Order 2003 ('the Order'), is a central plank in the Government's ongoing reform of arrangements for the delivery of legal aid.

The current statutory basis for the provision of legal aid by the Commission is principally set out in the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Legal Aid (General) Regulations (Northern Ireland) 1965. The Access to Justice (NI) Order (2003) provides the legislative basis for the modernisation of the provision and administration of public legal services in Northern Ireland.

Article 15(1) of the Order requires the Commission to prepare a code setting out the criteria according to which any decision on the funding of civil legal services is to be taken. Article 15(2) sets out a range of factors that the Commission is to consider in specifying the criteria for inclusion in the code. These factors include, *inter alia*, the likely cost of funding the services, the benefit that may be obtained from providing funds, the availability of funding, the importance of the matters in relation to which legal services are sought and, where funds are sought in relation to a dispute, the prospects of success in that dispute.

Accordingly, the Commission has prepared a Funding Code which will comprise two parts:

- **Criteria** by which decisions on whether to fund (or continue to fund) civil legal services are taken.
- **Procedures** for obtaining funding as well as those covering the withdrawal of funding.

The Code will replace the existing merits test in civil legal aid in determining which individual cases should receive funding. The intention is to provide a more comprehensive, flexible set of criteria for deciding whether to fund, or continue to fund, civil cases as part of civil legal services, based on the following key features:

- The replacement of the existing legal aid schemes¹ with new 'levels of service' i.e. Family Help (comprising Family Help Higher and Family Help Lower), Investigative Help (where prospects of success are

¹ Legal Advice and Assistance ('Green Form' scheme), Assistance by Way of Representation (ABWOR) and Civil Legal Aid.

unclear in specified case types, such as money damages), and Full Representation.

- The promotion of alternative dispute resolution methods.
- The introduction of cost-benefit ratios and prospects of success categories. This element applies particularly to cases with quantifiable claims, notably money damages.
- The prioritisation of cases. The highest priority will be accorded to Special Children Order proceedings and proceedings to do with risk of loss of life or liberty. Other identified priority areas include: welfare, debt and housing; domestic violence; the welfare of children (excluding Special Children Order); and proceedings against public authorities.
- The application of different criteria to different case types and to different stages of a case. This is a key element in the projected flexibility of the Code in seeking to ensure that public money for civil legal services can be directed to areas of greatest need.

The Commission is now at the final consultation stage, prior to full implementation. The consultation and other preparatory work undertaken by the Commission previously include the following:

- The issue of an Exposure Document in May 2006 (NILSC, 2006a).
- A consultation document issued in November 2006 (NILSC, 2006b).
- Draft equality impact assessments (NILSC, 2006c).
- Guidance documents in relation to Public Law Children's Cases (NILSC, 2006d), Judicial Reviews (NILSC, 2006e) and Merits, Costs and Damages (NILSC, 2006f).

As shown in Table 1.1 below, the various documents listed above have attracted a number of consultation responses from a variety of sectors. The consultations raised a number of issues, including:

- The potential impact of cost-benefit ratios and prospects of success categories on the availability of legal aid for money damages cases, particularly in personal injury claims.
- Concerns that the Funding Code will lead to substantially increased bureaucracy and administration costs.

In July 2008, the Commission undertook a screening exercise to consider the need for a full Impact Assessment of the Funding Code.

Table 1.1 N.I. Funding Code: Responses to documents issued for consultation

	Legal profession	Voluntary sector	Public bodies	All
Exposure Document (May 2006)	2	5	4	11
Consultation Document (Nov 2006)	4	8	1	13
Draft Equality Impact Assessment (2006)	-	4	1	5
Guidance Documents	-	2	1	3

The screening document noted that, while the Funding Code is intended to be neutral in overall budget terms, the prioritisation of some areas is likely to lead to a redistribution of fees between legal providers. In addition, there will be initial set-up costs, both for providers and the Commission itself. To the extent that the new procedures under the Funding Code are more detailed and wide-ranging, there is also a risk of an increase in ongoing administrative costs for both providers and the Commission.

For those reasons, the July 2008 Impact Assessment Screening document recommended that a full Impact Assessment on the proposed Funding Code should be conducted, highlighting in particular the need for economic modelling to achieve a monetary estimate of the likely costs and benefits of the proposal to the Legal Aid Fund².

1.2 Approach

The approach to this impact assessment was based on the following:

- Review of consultation material.
- Statistical modelling to estimate quantifiable impacts.
- Interviews with a sample of solicitors firms.
- Engagement with the voluntary sector.

² As stated in the BERR Guidance on impact assessments, “any proposal that imposes or reduces costs on businesses or the third sector requires an Impact Assessment”. The Guidance also states that an Impact Assessment is required when “proposals would not yield an overall net change in costs and benefits but some kind of redistribution or when there is a change in administrative costs”.

1.2.1 Review of Consultation Material

The full responses to the exposure and consultation documents as well as the guidance documents and the draft equality impact assessment were published in July 2007 (NILSC, 2007a). The full responses document is detailed and lengthy (177 pages) and has served as an important source of information for the full impact assessment.

1.2.2 Statistical Modelling

The indicators on which the statistical modelling of quantifiable effects was focused are as follows:

- Applications made.
- Decisions and certificates issued.
- Reports paid.
- Assessed gross total costs of assisted cases.
- Value of full reports paid from the Legal Aid Fund.
- Value of reports dealt with by Direct Authority³.
- Composition of costs (profits, fees, disbursements, VAT).
- Damages awarded to the legally-aided client, if any.

The first stage in the modelling approach was to construct a historical dataset for the foregoing indicators, for each of the existing legal aid schemes i.e. Civil Legal Aid and Assistance by Way of Representation (ABWOR), as well as the Legal Advice and Assistance or 'Green Form' scheme. Information on the indicators listed above was obtained from the NILSC's administrative systems for each of the years from 2003/04 to 2007/08 inclusive. Given the requirements of the modelling exercise, it was necessary to construct a very large dataset, as indicated by the number of applications by scheme and acts of assistance over that time period:

- Civil Legal Aid – 50,276 applications were made from 2003/04 through 2007/08.
- ABWOR (including Children Order ABWOR) – 46,001 applications.
- Green Form (civil only) – 61,825 acts of assistance.

³ That is, cases where the Commission authorises the legally-aided person's solicitor to deal with the costs directly, when the costs are being met by the other side and not from the Legal Aid Fund.

Each of the foregoing indicators was modelled for 21 different case types, reflecting the range of problems that are addressed by civil legal aid⁴. Separate base models were constructed for each of the existing schemes. In addition, a suite of models was constructed around the new Funding Code levels of service, which will replace the existing schemes, in order to simulate the effect of the Funding Code on the indicators shown above. That is, compared to retaining the current set of schemes (the status quo position), what impact would the implementation of the Funding Code be expected to have on the key indicators listed above?

For the purpose of the impact assessment, the impact indicators were projected forward over a 20-year timescale. The timescale for assessing impacts was chosen to reflect the lag between submission of an application for legal aid and conclusion of a case, which varies considerably by case type.

The modelling approach is further described in presenting the quantifiable benefits and costs in Section 4 of this impact assessment.

1.2.3 Sample of Solicitors' Firms

A sample of solicitors was interviewed to help gauge the impact of the Funding Code on the legal profession. Selection of the sample was facilitated by the Law Society Northern Ireland. In total, 12 solicitor firms were interviewed⁵. The firms were chosen to encompass a spread of those dealing primarily with family-related cases, firms more specialised in money damages claims, and firms with a mixed caseload. Interviews were conducted face-to-face, lasting approximately 1.5 hours each. As the interviews with solicitor firms were on a strictly confidential basis, only aggregated and anonymised views are reported in this impact assessment.

The topics for discussion with the sample of solicitors were as follows:

- Impact on the firm, including the effect on demand for the firm's services and, compared to current procedures, the expected effects on administration costs/effort as a result of the introduction of the Funding Code.
- Impact on the firm's clients, especially whether any particular group of clients may encounter greater or lesser difficulty in accessing the justice system.
- Dispute resolution i.e. compared to the current position, whether the Funding Code proposals are likely to encourage earlier resolution of disputes.

⁴ See Table A.1 in Appendix A below for a list of the 21 problem types.

⁵ In line with the *Standard Cost Model Guidance* (BRE, 2005), the objective was to obtain indicative estimates of time inputs for a standard set of forms, rather than seeking a larger scale statistically representative sample of providers.

- Impact on firms in the legal profession, including competition, small firms and whether the effects may vary between rural and urban areas.
- Any potential actions to mitigate possible impacts on clients or firms.

1.2.4 Voluntary Sector

The engagement with the voluntary sector comprised the following elements:

- A presentation to the NILSC Voluntary Sector Forum.
- The 12 Voluntary Sector Forum member organisations were circulated with a questionnaire requesting their views on the potential impacts of the Funding Code on their organisation and their clients in relation to each of the key features of the Code.

1.3 Structure of the Impact Assessment

The remainder of this impact assessment is set out as follows:

Section 2 considers the purpose and intended effects of the Funding Code, including the policy context, rationale and objectives of the Code. This Section also sets out the options for reform.

Section 3 shows the current position in relation to civil legal services, an essential starting point in assessing the impacts of the Code.

Section 4 presents the findings in relation to the costs and benefits of the Funding Code, compared to the status quo option. Particular attention is paid to documenting the effects on the sectors and groups most affected by the changes.

Section 5 comprises the specific impact tests to accompany the impact assessment i.e. competition, small firms, rural, and equality.

Section 6 presents the summary and recommendation from the impact assessment.

2 Purpose, Intended Effects and Options

2.1 Introduction

This Section sets out the purpose and intended effects of the Northern Ireland Funding Code. The Section commences with an overview on the wider strategic and policy context for the proposed changes. It then discusses the Funding Code proposals under the following headings:

- Rationale i.e. the need for change.
- Objectives.
- Intended effects, including an overview on the proposed changes.
- The options to be assessed.

2.2 Policy Context

As set out in its Corporate Plan 2004-07, the Commission aims:

To provide high quality, customer-focused services that target those in greatest need and demonstrate value for money.

In pursuing that aim, the Commission has identified two main objectives:

- To improve the delivery of existing legal aid services.
- To reform publicly funded legal services.

The Funding Code is a critical element in the agenda for reform of publicly funded legal services in Northern Ireland. The reform agenda dates back to the 1999 consultation document, *Public Benefit and the Public Purse* (NICtS, 1999) which was followed by *The Way Ahead* in 2000 (NICtS, 2000).

The main driver of reform addressed in *Public Benefit and the Public Purse* was the escalating expenditure on legal aid. Over the course of the 1990s, legal aid expenditure in Northern Ireland rose in nominal or cash terms at 10 per cent per annum, a rate of increase described as “unsustainable”. The context for reform was therefore set in the following terms:

Legal aid is and will continue to be an important part of the fabric of our society. It exists so that citizens, who cannot themselves afford to litigate, can obtain redress in areas of most need. It is important however, that public funds for legal services are spent on the most meritorious actions and on those which can be of most help to the individual citizen and to the community. Resources are limited and it is no longer feasible for legal aid to continue to demand more and more

funds from the public purse. At the same time we must acquire the means to direct the available resources to where they can be of most benefit. (Public Benefit and the Public Purse, p 3).

Reflecting concern with the rate of increase in legal aid expenditure, much of the focus of the reforms announced in the subsequent 2000 decisions paper, *The Way Ahead*, was on cost control measures. In particular, it was decided to establish separate controlled budgets for criminal and civil legal aid. Civil legal aid was to comprise two budgets, civil family and non-family. The two civil controlled budgets were to be fixed by reference to the volume of cases within each budget area and the level of standard fees. Within that planning context, the White Paper went on to state that:

The government will have responsibility to establish priorities of legal work within the controlled budgets, which will receive priority funding. To inform the process of identifying priority classes of cases, the Legal Services Commission will be tasked with conducting research into areas of greatest need.

Similar to the reforms in England and Wales, the measures proposed in *The Way Ahead* also included a funding code to replace the merits test and a broadening of the provider base through contracting with non-lawyers for the provision of legal services.

While many of the reforms mooted for Northern Ireland in *The Way Ahead* reflected developments in England and Wales, there were some important contrasts. By comparison with England and Wales, *The Way Ahead* placed much less emphasis on the use of contracting. The 1999 Green Paper had proposed the introduction of exclusive contracting for the provision of publicly funded legal services. In the White Paper, the emphasis was more on the introduction of standard fees as a cost control measure. Similarly, conditional fee arrangements (CFAs) had been proposed in *Public Benefit and the Public Purse*, but were presented as an option for further consideration in *The Way Ahead*.

These contrasts partly reflect the particular circumstances of Northern Ireland. On the provider side, there is a geographical spread of small legal practices and a large proportion of solicitors firms which have 1-2 practitioners. On the demand side, Northern Ireland has a relatively small population – 1.6m, comparable to a medium-sized English county – with a substantial proportion living in dispersed small towns and rural areas. These factors tend to militate against the introduction of, for example, contracting for specialist legal services. Also, as the White Paper noted, the Northern Ireland situation is not currently conducive to the introduction of CFAs.

The first stage in implementing the reform agenda was the establishment of the Commission, in November 2003, as a non-departmental public body under the Access to Justice (Northern Ireland) Order 2003, with responsibility for the administration of both criminal and civil legal aid and for the reform of civil legal aid in Northern Ireland.

Since its establishment, the Commission has been pursuing a reform agenda that seeks “to enable civil legal services to operate within a controlled budget and to ensure that limited available resources can be directed to cases where need is greatest” (NILSC, 2006b). This is reflected in the key strategy for achieving its corporate objectives, which are as follows (Harbison *et al*, 2007):

- Target social need and promote social inclusion by enabling access to publicly-funded legal services.
- Bring control and predictability to expenditure on Civil Legal Services.
- Ensure that Civil Legal Services which are made available through the Commission’s funding represent value for money.

The preparation of a Funding Code is a critical element in the suite of reforms aimed at meeting the Commission’s corporate objectives for reform with the aim of modernising the provision of legal aid in Northern Ireland. The other main planks in the reform agenda are as follows (see NILSC, 2007b; Crossan *et al*, 2007; Holland, 2007):

- **Fees and quality.** The civil fees project will set a range of standard fees in civil business areas. The Commission will seek to manage the quality of service provision by means of a Registration Scheme.
- **Community Legal Services.** The Commission is committed to the development of a mixed model of legal services provision, funding providers in the voluntary sector as well as those in the private sector. The intention is to create a seamless network of services so that an individual seeking information, advice or help about legal issues will be directed to the most effective source. In December 2007, the Commission issued its Community Legal Services consultation paper for the development of a network of civil legal service providers to include advice services as well as private sector solicitors and barristers.
- **Financial eligibility and the statutory charge.** The existing means test will be simplified (NILSC, 2007c) while the statutory charge⁶ will be reformed so that it better contributes to the Commission’s corporate objectives.
- **The future of legal aid in money damages cases.** This issue is closely related to the Funding Code and attracted considerable comment in the

⁶ Where civil legal services have been funded by the Commission, the legal aid fund can seek to recoup its expenditure from costs paid by the other side and contributions made by the assisted person, if any. If costs and/or contributions are insufficient to cover expenditure incurred by the legal aid fund, the Commission has a first charge on any money or property recovered or preserved by the legally-aided client as a result of the legal services for which funding was provided. This is known as the statutory charge.

responses to the 2006 Consultation document. The Commission has been considering alternatives, if any, to support the funding of such cases and commissioned an economic and financial appraisal of the available options to assist in that regard⁷.

The foregoing reforms will each play a role in meeting the Commission's strategic objectives. Considered in isolation, no single reform will meet all of the Commission's objectives. The Funding Code must be seen in that context. The particular role that will be played by the Code is best elucidated by examining the rationale for its introduction.

2.3 Rationale

2.3.1 Current Arrangements

Civil legal aid in Northern Ireland is currently provided through three schemes (see Table 2.1):

- Advice and assistance (the 'Green Form' scheme).
- Assistance by Way of Representation (ABWOR).
- Civil Legal Aid (CLA).

Persons applying for any of the three schemes must satisfy a financial eligibility test⁸. Persons applying for either ABWOR or CLA must also meet the requirements of a merits test.

The merits test currently applied by adjudicators for Civil Legal Aid considers the following⁹:

- That the applicant has reasonable grounds for taking steps to assert or dispute a claim.
- That it is reasonable in the circumstances that he should receive legal aid.

Adjudicators also apply the *private client test* in that legal aid should only be granted in circumstances where the case is sufficiently strong that a private-paying client would invest his/her own money.

⁷ See also Peysner, 2007.

⁸ The financial eligibility tests differ between the schemes. Thus, the percentage of the population covered also varies between the schemes. See Dignan *et al*, 2006.

⁹ Legal aid must be granted in certain types of proceedings, which are stipulated in the 1981 Order, as amended, notably in specified proceedings brought under the Children (NI) Order 1995 e.g. Article 50 (care or supervision order).

Table 2.1 Legal aid, advice and assistance schemes in Northern Ireland

Scheme	Description	Scope	Eligibility
Legal Advice and Assistance ("Green Form Scheme")	Oral or written advice and assistance from a solicitor	Any legal matter, with some exclusions (e.g. libel and slander) Does not include representation in court	Purely financial No merits test
Assistance by way of Representation (ABWOR)	Solicitor can personally represent a person in court or before a tribunal	Limited range of situations: <ul style="list-style-type: none"> ▪ Certain civil proceedings in magistrates' courts, incl. Children (NI) Order family cases ▪ Duty Solicitors (non-statutory) ▪ Mental Health Review Tribunal 	Means test Merits test applies in civil proceedings Magistrates' Court level, including Family Proceedings Court
Civil legal aid	All advice and representation for court proceedings in civil cases	Every type of hearing, with the exceptions of tribunals (other than the Lands Tribunal) and coroners' courts Exclusions e.g. libel and slander, admitted debts, claims relating to elections	Means test Merits test applies County Court (Family Care Centre for family cases) and higher courts

The range of problems addressed by each of the three schemes is illustrated in Table 2.2, which shows the composition of applications and acts of assistance made over the period 2003/04 to 2007/08. Problems to do with children and family-related matters account for almost all ABWOR applications (98 per cent). Such problems also account for substantial proportions of CLA applications (40 per cent) and Green Form acts of assistance (28 per cent). However, both the CLA and Green Form schemes deal with a relatively broad range of issues, albeit the profile of problems varies between the two schemes.

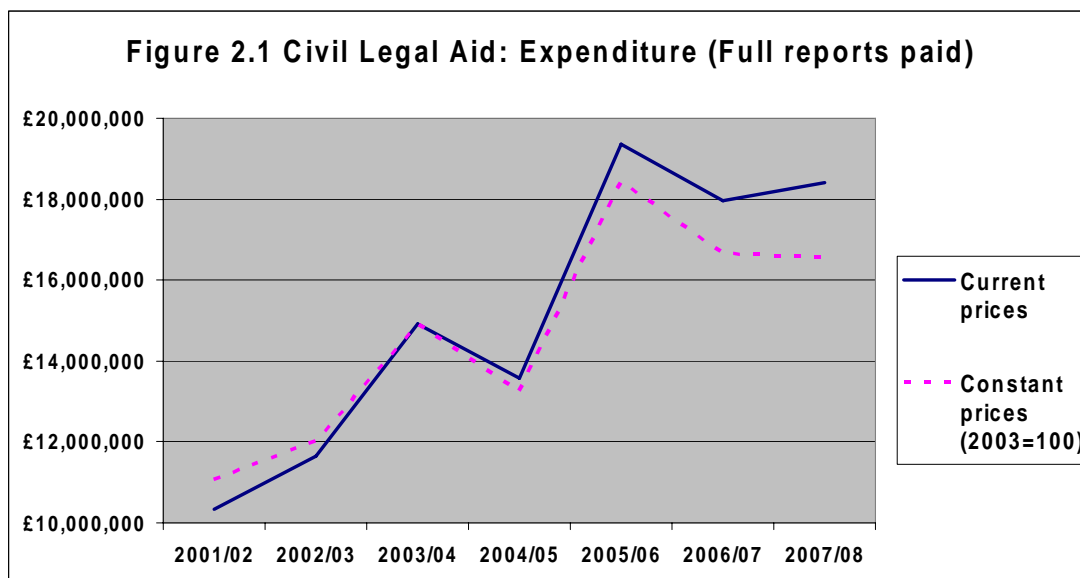
Table 2.2 Civil Legal Aid and ABWOR applications and Green Form acts of assistance, 2003/04 to 2007/08 (per cent of all)

Problem type	CLA	ABWOR	Green Form
	%	%	%
Priority Children Order	4.9	9.2	0.0
Adoption / Affiliation / Wardship	2.3	0.0	0.2
Other children	5.9	42.7	9.3
Domestic violence	1.7	39.1	3.0
Divorce/Nullity	20.3	0.0	1.7
Maintenance / Other Matrimonial / Partition	4.7	7.0	8.9
Bail	8.3	0.0	0.7
Immigration	1.5	0.0	1.8
Welfare/Debt/Housing	0.9	0.0	28.9
Assault/Battery/Trespass	2.0	0.0	0.4
Judicial/Statutory Reviews	3.4	0.0	0.6
Criminal Injury	4.0	0.0	10.3
Employers Liability	4.6	0.0	1.5
Negligence - General	9.8	0.0	5.6
Negligence - Medical	2.9	0.0	1.1
Negligence - Tripping	5.0	0.0	2.9
Road Traffic Accidents	5.4	0.0	4.2
Appeals	1.7	1.9	0.4
Injunction	5.9	0.0	1.6
Contract/Bankruptcy	1.1	0.0	2.6
Other	3.6	0.0	14.2
All	100.0	100.0	100.0
<i>Base</i>	<i>50,276</i>	<i>46,001</i>	<i>61,825</i>

Money damages problems account for about one in three CLA applications and one in four Green Form acts of assistance. Problems to do with welfare benefits, debt and housing form a large share of Green Form acts of assistance (29 per cent). Such problems comprise only a fraction (less than one per cent) of CLA applications. Mainly, this is because:

- The scope of CLA does not extend to tribunals dealing with social security and employment disputes.
- Admitted debt is out-with the scope of legal aid in Northern Ireland.

In the period from 2001/02 to 2007/08, expenditure on the Civil Legal Aid scheme¹⁰ increased by 78 per cent in cash terms and 50 per cent when adjusted for price inflation (Figure 2.1). Against a backdrop of tightening public sector spending, the rate of increase in the demands placed on the legal aid fund is clearly not sustainable. In that context, the reforms to be put in place by the Commission are intended to enable civil legal services to operate within a controlled budget, to ensure that limited available resources can be directed to cases where need is greatest and to extract maximum value for money from the available resources.



2.3.2 Value for Money

In general, the Commission has a statutory responsibility to Parliament to ensure value for money in all expenditure decisions. The Access to Justice Order also places specific responsibilities on the Commission. Article 7(6) requires the Commission to have regard to “the need to secure value for money” in considering the remuneration of persons or bodies providing legal services. Similarly, with reference to establishing and maintaining a fund for civil legal services, Article 11(5) states that “In funding civil legal services the Commission shall aim to obtain the best possible value for money”.

In September 2006, the Commission published *Delivering Value for Money in Access to Justice*, which explains how the Commission proposes to comply with its statutory obligation to demonstrate value for money in all its expenditure on publicly-funded legal services. The document first outlines

¹⁰ As measured by the assessed gross total costs of full reports paid.

the risks facing each of the stakeholders in the civil justice system. The risks to be managed by the Commission are as follows (NILSC, 2006g, para 1.2.13):

- Conformity to the general regularity, propriety and value-for-money requirements of Parliament, and specifically, providing remuneration for publicly-funded legal services which provides control, predictability and value for money.
- The risk to the legal aid budget of volume changes in publicly-funded proceedings.
- Risks to the legal aid budgets, both civil and criminal, that are driven, in part, at least, by changes in the Northern Ireland, United Kingdom and European civil and criminal justice systems.
- The risk to the legal aid budget of price changes to the services that are provided.
- The risk that persons with sufficient means to pay for legal services themselves receive public funding.
- The risk that persons with insufficiently meritorious cases receive funding, or continue to receive funding.
- The risk that persons with available rights or facilities which make it unnecessary to apply for legal aid, do so and receive public funding.
- The risk that the party who is not availing of publicly-funded legal services and is successful in the litigation, successfully applies to the Court for costs against the Commission.
- The principal/agent problem and the related issue of moral hazard.

The document then outlines the economic model that the Commission is applying to the provision of publicly funded legal services in Northern Ireland. The model draws on the Bevan *et al* (1994) paper that strongly shaped the reforms undertaken in England and Wales. Under present arrangements, the Commission faces a number of systemic risks, including supplier-induced demand due to an imbalance between the information available to the provider side and the Commission as purchaser, combined with a difference in incentives. As pointed out by the Commission, “legal aid in Northern Ireland remains led by the demand for legal advice and remedies through the Court sought by the public through lawyers” (NILSC, 2006g).

Four challenges are identified in meeting the systemic risks to value for money, i.e. resource allocation, targeting social need, funding and the transactional challenge.

The **resource challenge** is focused on setting, monitoring and controlling budgets for publicly-funded legal services. A key element in meeting this challenge will be the imposition of a financial limit in advance of expenditure being incurred. In very general terms, expenditure is the product of the number of certificates on which reports are paid (the 'volume' side) and average case costs.

The fees and quality component of the reform agenda directly addresses the average case cost side of the expenditure equation. Other controls are needed to address the volume side of the expenditure equation, both in terms of the number and composition of cases supported.

Considered purely from a value for money perspective, the **targeting social need challenge** is mainly about ensuring that assistance is granted only to those who cannot afford to pay for their own legal services and by requiring that people pay towards their cases as far as they are able. This challenge directly engages the statutory charge and financial eligibility streams in the reform agenda.

The Funding Code is a key plank in the reform agenda in relation to the remaining value for money challenges i.e. the funding and transactional challenges.

In the achievement of value for money, and specifically in the context of exercising control over the quantum of expenditure on publicly funded legal services, the **funding challenge** requires an effective means of determining the scope of the services that will be provided i.e. whether civil legal services should be provided in a particular case and, if so, what services are appropriate. The current arrangements do not provide the Commission with sufficient control in that regard:

- In a demand-led environment, the existing means and merits tests alone do not enable the Commission to set priorities for the provision of publicly funded legal services.
- The Commission is constrained in the extent to which it can encourage remedies other than resort to the law or a court-based solution, where such alternatives may be more effective in addressing a client's justiciable problems.

Particularly in the absence of a contracting environment, securing value for money places an onus on the Commission to effectively perform a challenge function in relation to *all* decisions that affect expenditure on publicly funded legal services. This is the **transactional challenge** i.e. the consideration of, and decisions made, in relation to transactions such as applications for civil legal aid certificates, requests for extensions to legal advice and assistance, request for counsel, and authority to proceed in very high cost cases.

The risks that have been identified by the Commission in meeting the transactional challenge include the following (NILSC, 2006g, para 1.7.2):

- Those cases which are hopeless or are without merit are funded.
- Cases where there are no, or limited, prospects of success are funded.
- Work is authorised which is not necessary to the successful resolution of a criminal or civil case.
- Public resources are not wasted.
- Work is authorised that would not be authorised if the recipient was not legally aided but funding this work from his own resources.
- A Court does not consider that a plaintiff has made a prima facie case that the defendants, its servants or agents were negligent in any way, and yet the plaintiff has received public funding.
- An Appeal Court does not consider that an appeal was well founded or that there was a major issue of law requiring further consideration.

These risks are heightened in the absence of a Funding Code that sets out in more precise detail the tests to be applied in determining whether a case merits public support or otherwise, thereby enhancing the rigour and strength of the challenge that the Commission can exert in relation to transactions that have implications for public expenditure on legal services.

2.3.3 Summary

The rationale for the Funding Code therefore comprises the following core elements:

- Enhance the Commission's capacity to secure value for money in decisions relating to expenditure on publicly funded legal services.
- Enable the Commission to set priorities for public funding of legal services.
- Assist the Commission in exercising greater control over expenditure on legal services.

2.4 Objectives

The Funding Code will be one of the primary mechanisms to be established by the Commission to enable civil legal services to operate within a controlled budget and to ensure that limited resources can be directed to cases where need is greatest.

Within that overarching context, the primary objectives of the Funding Code are as follows:

- Ensure that the Commission's limited available resources can be directed to cases where need is greatest based on priorities set by the NILSC and agreed with the Lord Chancellor.
- Enable civil legal services to operate within a controlled budget.

2.5 Intended Effects

The proposed decision-making processes under the Funding Code will significantly alter the existing arrangements. The intended effects are as follows:

- Introduce a more flexible scheme by replacing the existing legal aid schemes with new 'levels of service'.
- Promote alternative dispute resolution methods, in particular the use of mediation in private family law cases.
- Introduce cost benefit ratios and prospects of success categories.
- Enable the prioritisation of cases.
- Introduce public interest considerations into funding decisions.
- Enable the application of different criteria to different case types and to different stages of a case; this will allow greater control over legal aid expenditure and also enable expenditure to focus on priority areas.
- Increase transparency of decision-making for legally assisted parties and key stakeholders.

2.5.1 Levels of Service

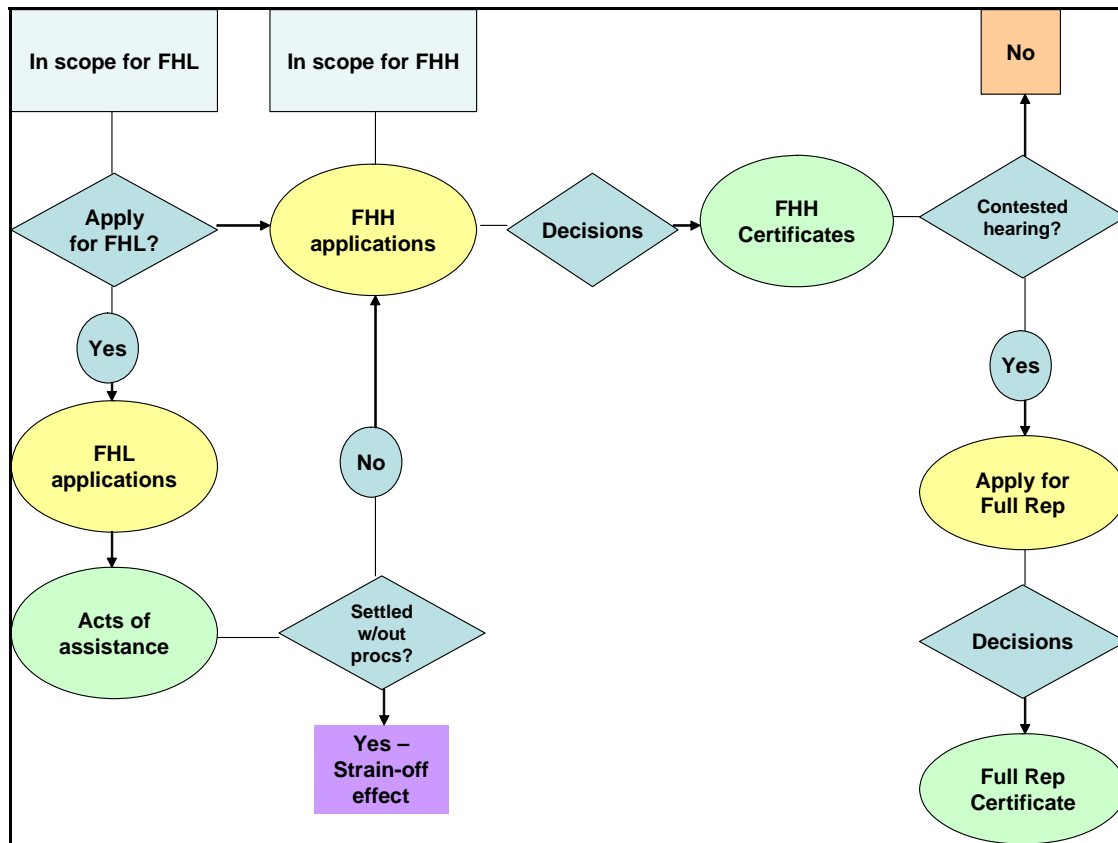
The proposed new levels of service in the Funding Code are listed in Table 2.3 below. The levels of service shown in Table 2.3 differ in two main respects from those set out in the 2006 Consultation document. First, Family Help had been proposed as a single level of service which would apply to Family Proceedings Court. It is now proposed to offer two levels of service, Family Help Lower (FHL) and Family Help Higher (FHH). Second, the Consultation Document had proposed additional levels of service in relation to legal aid for family disputes i.e. Family Mediation and Help with Mediation. The present position is that these levels of service will not be created, given the undeveloped nature of family mediation in Northern Ireland at this time. Instead, mediation in private law cases can be claimed as a disbursement.

Table 2.3 NI Funding Code: Proposed new Levels of Service

Level of Service	Form of assistance	Scope
Legal Help	Advice and assistance	Replaces current Green Form
Family Help		
Family Help Lower (FHL)	More substantial advice, assistance and negotiation Pre-proceedings	Private law children – contact, residence, etc Matrimonial – maintenance Matters that can be settled between the parties without proceedings
Family Help Higher (FHH)	Allows issue of proceedings, but not a contested final hearing	Private family law proceedings
Legal Representation		
Investigative Help	Strength of a claim. Limited to certain categories of case.	Money damages / quantifiable cases
Full Representation	Representation in legal proceedings	All problem types, so long as relevant alternatives have been availed of e.g. FHL and/or FHH in family law private
Other Services	Such other services as are authorised by specific orders or the Lord Chancellor	Exceptional funding applications Potentially also pilot schemes e.g. Help at Court

The structure of the Family Help level of service is depicted in Figure 2.2. Family Help Lower (FHL) is designed to provide more substantial advice, assistance and negotiation to help in resolving family disputes that can be settled between the parties without proceedings. The aim is to secure, as far as possible, the early resolution of a family dispute or to obtain a Consent Order following settlement.

Figure 2.2 Family Help in the NI Funding Code



FHL therefore provides an opportunity to resolve a dispute without resort to proceedings. To the extent that FHL is successful in that regard, it can be expected to have what can be called a ‘strain-off effect’ i.e. earlier settlement of disputes that would otherwise have resulted in an application to ABWOR (for proceedings in the Family Proceedings Court) or Civil Legal Aid (for proceedings in the Family Care Centre or the High Court). Insofar as a strain-off effect is realised in practice, there would then be a reduction in the demand for legal aid to fund court-based solutions to family disputes.

Family Help Higher (FHH) would allow the issue of proceedings but would not allow the conduct of a contested final hearing. As shown in Table 2.2, this level of service will apply to private family law matters (e.g. Children Order contact and residence orders, divorce, maintenance proceedings, etc). Where appropriate, FHH may be refused unless attempts have been made to resolve the dispute without recourse to contested hearings e.g. via negotiation between the parties to the dispute.

Where the dispute has not been resolved through FHH, a person wishing to proceed to a contested final hearing would have to apply for Full Representation. This provides another point in the dispute resolution process at which the Commission can exercise its transactional challenge function, since a fresh application would have to be submitted for Full Representation. The purpose is to encourage the approach that contested litigation in family cases should be seen as a last resort.

The Family Help level of service will therefore assist the Commission in seeking to secure value for money in two main respects:

- Promoting earlier settlement of disputes, via the strain-off effect.
- Increased capacity to challenge the necessity for progression to a final contested and, hence perhaps also, higher cost case.

In general, consultees welcomed the more tiered approach embodied in Family Help, albeit with some reservations regarding the potential for increased bureaucracy. The latter risk is evident from Figure 2.2; while the more tiered approach enhances the Commission's capacity to exercise a transactional challenge, the increased number of decision points compared to current arrangements will make for a more complex route through the various schemes for assistance.

In the Funding Code levels of service, certificates will not be tied to specific court levels and this may reduce the potential for complexity in the new arrangements. Presently, ABWOR applies to proceedings at Magistrates' Court level, including Family Proceedings Court (FPC) while CLA applies to proceedings at County Court level (including Family Care Centre (FCC) proceedings) and above. Where an ABWOR certificate is issued and proceedings are transferred from, say, FPC to FCC, it is necessary to apply for a new CLA certificate.

However, the financial eligibility tests will remain tied to court levels. Thus, for proceedings at Magistrates' Court level, the current ABWOR means test will continue to apply whereas at County Court level and above, the reformed CLA test will be applied. This is a potential source of complexity for two reasons. First, where proceedings are transferred to a higher court, the assisted person will be subject to a new and different means test. Second, the proportion of the population that is eligible under the CLA test is in excess of the proportions eligible under both ABWOR and the Green Form test (Dignan *et al*, 2006, Table 3.3).

Finally, it can be noted that the March 2006 Exposure Document outlining the Commission's early thoughts on the Code had proposed establishing a level of service known as Help at Court. Currently available in England and Wales, Help at Court provides informal advocacy and authorised representation of a client at Court, for example, in a housing case where the client has no defence in law but requires help to negotiate the terms of the order against him or her. The proposal to introduce Help at Court was welcomed by most consultees (notably in the voluntary sector), though not by all (notably the Bar Council).

As admitted debt type proceedings are precluded under Schedule 2 of the 2003 Order, Help at Court is not one of the levels of service within the Funding Code. The Commission has, however, indicated that the fourth level of service shown in Table 2.3 above can be used to fund pilot schemes such

as the proposed Help at Court pilot aimed at providing informal advocacy in mortgage possession proceedings.

2.5.2 Alternative Dispute Resolution

As stated in the Funding Code Consultation document, the 2003 Access to Justice (NI) Order is intended to enhance the ability of the Commission to fund alternative dispute resolution (ADR) methods as part of civil legal services. To the extent that the Code is effective in promoting ADR methods that lead to earlier and hence less costly resolution of cases, this would be expected to benefit the Fund by driving down average case costs.

The Consultation document sets out three issues in terms of how the Code can promote ADR, that is:

- Setting out criteria for when ADR should be funded.
- How that might happen, albeit with the dropping of the Mediation Levels of Service in family legal aid, ADR services will be funded as disbursements rather than as direct payments to providers.
- The circumstances in which the availability of a form of ADR should limit entitlement to representation in litigation e.g. whether the applicant could make use of an Ombudsman scheme.

2.5.3 Prospects of Success and Cost Benefit Ratios

As set out by the Commission, the General Funding Code stipulates two criteria for deciding whether an application should be assessed for legal aid i.e. prospects of success and the cost benefit test.

Under the General Funding Code, an application for Full Representation can be refused if prospects of success (if the case went to hearing) are unclear, borderline (unless the case has overwhelming importance to the client or a significant wider public interest) or poor. Quantifiable claims, typically money damages cases, with fair or better prospects of success must then satisfy the cost benefit criteria set out in Table 2.4 below.

Table 2.4 NI Funding Code: Criteria for quantifiable cases

Prospects of success	Definition	Minimum Damages to Cost ratio
Very good	80%+	1:1 (damages at least as great as costs)
Good	60%-80%	2:1
Fair	50%-60%	4:1

Cases which are not quantifiable claims (e.g. divorce), and which have fair or better prospects, must in addition demonstrate that the potential benefits to be gained from the proceedings justify the likely costs, “such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances”.

The fundamental rationale for the General Funding Code criteria is to more firmly embed the concept of ‘private client reality’ in the Commission’s decision-making, thereby enabling the Commission to better secure value for money in a fixed budget funding environment. As noted by the Commission in its 2006 paper on value for money in the provision of public legal services:

Legal aid does not exist to place assisted persons in any better position than privately paying clients. The Commission must have regard to whether a privately-paying client would reasonably be advised to litigate in the same circumstances and have regard to what a private client would do when being advised on steps likely to involve large expenditure.

The quantifiable criteria in the General Funding Code are considerably tougher than current arrangements. They will have the effect of reducing the availability of legal aid for money damages cases. In the responses to the Funding Code consultation documents, the legal profession expressed strong objections to the proposed quantifiable criteria. In the sample of solicitors undertaken for this impact assessment, those interviewed did not agree with the new criteria on the ground that this would reduce access to justice for those wishing to litigate in respect of a money damages claim. A number remarked that insurance companies would, in effect, be the main beneficiaries from a reduction in legal aid for money damages cases.

Given the importance of the issue, and the attention that it has attracted, the impacts of the quantifiable criteria in the General Funding Code are explored in greater detail in Section 4 below.

2.5.4 Prioritisation

Article 12(1) of the 2003 Order states that “The Commission shall set priorities in its funding of civil legal services, and the priorities shall be set (a) in accordance with any directions given by the Lord Chancellor, and (b) after taking into account the need for such services”.

In the Funding Code consultation document, the Commission proposed setting priorities in line with the Lord Chancellor’s directions for England and Wales. This provides that top priority should be given to the following categories (see also Table 2.5):

- Special Children Order proceedings.

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

Beyond the top priorities, higher priority should generally be given to the following categories:

- Help with social welfare to tackle social exclusion, including help with housing proceedings, debt, employment rights and social security benefits.
- Domestic violence proceedings.
- Other proceedings concerning the welfare of children (not outlined above) including adoption, residence.
- Proceedings against public authorities alleging serious wrongdoing, abuse of position or power, or significant breach of human rights.

The prioritisation of cases is important in focusing the available resources on areas of greatest need. It also provides a framework for applying different criteria to different case types, thereby facilitating the exercise of greater control over legal aid expenditure. Specific criteria will be applied to the priority problem types with the more stringent General Funding Code applying to non-priority problem types.

The top priority cases will remain 'demand-driven', as the standard criteria set out in the General Funding Code do not apply. The higher priority problem types listed in Table 2.5 will occupy a middle ground between top priority and General Funding Code cases, as the criteria for the higher priority problems will generally not be as stringent as for non-priority cases. For example, the cost benefit test that will be applied to claims against public authorities requires that "the likely costs are proportionate to the likely benefits of the proceedings".

In the Commission's November 2006 consultation document, it had been proposed to treat cases involving claims of assault, battery, trespass, wrongful arrest and false imprisonment by public authorities¹¹ as money damages cases, which would be subject to the quantifiable criteria in the General Funding Code. On further consideration, the Commission is now proposing to treat such cases as claims against public authorities.

¹¹ Specifically, the Police Service of Northern Ireland (PSNI), the Ministry of Defence (MoD) and the Northern Ireland Prison Service.

Table 2.5 NI Funding Code: Priorities

Priority case type	Examples
Top priority	
Special Children Order proceedings	Care or supervision orders, child assessment orders, EPOs, etc
Risk of loss of life or liberty	Proceedings directly related to averting threat to client's life or being sent to prison e.g. habeas corpus, asylum
Higher priority	
Help with social welfare, housing, debt, employment rights, entitlement to social security benefits	Housing (NI) Orders, Social Security (NI) Orders
Domestic violence	Proceedings under e.g. Family Homes and Domestic Violence (NI) Order 1998
Proceedings concerning the welfare of children, other than Special Children Order	Adoption, residence, etc
Proceedings against public authorities	Allegations of serious wrong-doing, abuse of position of power or significant breach of human rights

Though, outside of Legal Help, there will be limited support in the form of legal representation for problems falling under the social welfare, debt and housing priority. This is because the nature of proceedings associated with such problems are typically out of scope for civil legal aid e.g. admitted debt in housing and tribunal cases in relation to social welfare and employment. While Help at Court will not be proceeding as a bespoke level of service, the Housing Rights Service, a voluntary sector organisation, is currently piloting a Help at Court scheme (in co-operation with the NI Courts Service). The results of the pilot will help to inform the Commission's thinking on the way ahead for the housing priority in the Funding Code.

2.5.5 Application of Different Criteria by Case Type and Stage

The application of different criteria to different *case types* has been discussed above in the context of prioritisation. There are two main areas where the Code proposes the application of different criteria to different *stages of a case*, that is:

- In money damages cases, the distinction between Investigative Help (IH) and Full Representation. A claim with unclear prospects of success may initially receive support through Investigative Help but would be required to satisfy the cost benefit ratio test if a subsequent application for Full Representation was to ensue.
- In family legal aid, a case could conceivably ‘progress’ from FHL to FHH and then on to Full Representation in the event that a contested final hearing was required to resolve the dispute.

Considered in terms of the impacts of the Code, the application of different criteria to different stages of a case could potentially yield benefits in the form of earlier dispute resolution, especially in family law e.g. clients and their advisers must weigh the costs and benefits of proceeding further in a dispute. In money damages cases, the use of IH enables weaker claims to be weeded out. The opportunity to effect such transactional challenges will assist the Commission in securing value for money, especially in a controlled budget environment.

Furthermore, within each category of case assisted, the Commission can better ensure that the available resources will go to those in greatest need.

2.5.6 Very Expensive Cases

Special criteria have been set for very expensive cases, notably *the affordability criterion* “whereby funding will be refused or deferred unless it appears reasonable for funding to be granted in light of the resources available in the Fund and likely future demands on those resources”. The rationale is the risk posed by very expensive cases, as these can consume a disproportionate share of the Fund. Certain case types, notably the top priorities, are not subject to the affordability criterion.

2.6 Options

A number of factors need to be considered in specifying policy options for assessing the impact of the Funding Code proposals.

First, the range of options that can be considered is necessarily constrained by the legislative requirements that the Commission must satisfy. In particular, Article 15(1) of the Order requires the Commission to prepare a code setting out the criteria according to which any decision on the funding of

civil legal services is to be taken. Article 15(2) sets out a range of factors that the Commission is to consider in specifying the criteria for inclusion in the code. These factors include, *inter alia*, the likely cost of funding the services, the benefit that may be obtained from providing funds, the availability of funding, the importance of the matters in relation to which legal services are sought and, where funds are sought in relation to a dispute, the prospects of success in that dispute.

It is also necessary to consider the following:

- Article 11(5), which states that “In funding civil legal services the Commission shall aim to obtain the best possible value for money”.
- Article 12(1) of the 2003 Order states that “The Commission shall set priorities in its funding of civil legal services, and the priorities shall be set (a) in accordance with any directions given by the Lord Chancellor, and (b) after taking into account the need for such services”.

Second, the Funding Code is at an advanced stage in the policy development process. Commencing with the issue of the Exposure Document in May 2006, the Code has been widely consulted upon and modified at various stages, both in response to the views of consultees and further consideration by the Commission.

Third, the Funding Code is an integral part of the Commission’s reform agenda, which in turn dates back to the Government White Paper, *The Way Ahead*.

For all of the above reasons, retention of the current arrangements (the ‘do nothing’ option) is not a feasible alternative. By the same token, at this juncture it is difficult to conceive of a ‘do minimum’ option that would meet the objectives of the Funding Code and produce the intended effects as outlined above. The intended effects are interlocking and inter-dependent. For example, the proposed new Levels of Service will facilitate the application of different criteria to different stages in a case. Similarly, the prioritisation of problem types is inevitably linked to the specification of Funding Code criteria for assessing which cases to support via the application of the prospects of success and cost benefit ratio tests. To that extent, it is therefore difficult to ‘un-bundle’ the Funding Code into a feasible set of alternative policy options.

Nonetheless, the ‘do nothing’ or status quo option does need to be included amongst the range of options considered in the Impact Assessment. This will help to test the strength of the rationale and the risks to the achievement of intended outcomes in the absence of a Funding Code. Furthermore, the BERR guidance requires the identification of potential costs and benefits *over and above* the status quo or some ‘do minimum’ option.

Notwithstanding the constraints outlined above, it is also useful to consider a ‘do minimum’ option i.e. an option that can satisfy the requirement to

introduce a Funding Code but which involves the minimum disruption to existing arrangements.

The most useful option to consider in that regard is to limit the Funding Code reforms to the introduction of the prospects of success and cost benefit ratio tests for quantifiable cases only. Such an option could be considered to at least partially meet the legislative requirements. The legislation is clear that the Commission must prepare a Code setting out the criteria according to which *any* decision is to be taken as to whether to fund civil legal services. In that regard, it could be considered feasible to simply retain the existing merits test for non-quantifiable cases while setting out more stringent criteria for quantifiable cases. The option would not, however, make a significant contribution in other respects e.g. promoting earlier resolution of justiciable problems. Not would it provide a meaningful way of prioritising case types.

Mainly, however, and in light of the attention received by the proposed criteria for quantifiable cases, it is useful to specify an option that focuses solely on the proposals for the treatment of money damages cases in the Funding Code. An important context for such an option is that the Commission has explored alternative means by which money damages cases might be funded. It is keeping the situation under review and will monitor the impact of the Funding Code on money damages cases post-implementation. Specifying a do minimum option that focuses on money damages cases will therefore provide a base case for the post-implementation review, against which out-turns can be compared.

For the purposes of this impact assessment, the policy options to be assessed are therefore as follows:

- Do nothing i.e. retain the status quo, for comparison with proposed changes.
- Do minimum i.e. limit the Funding Code reforms to the introduction of the prospects of success and cost benefit ratio tests for quantifiable cases only.
- Implement the Funding Code, as set out in the NILSC's November 2006 consultation document, with subsequent amendments as outlined in the NILSC's July 2009 document.

2.7 Summary

As pointed out by the Commission, "legal aid in Northern Ireland remains led by the demand for legal advice and remedies through the Court sought by the public through lawyers" (NILSC, 2006g). This poses a number of problems for the Commission:

- Lack of control over expenditure. Against a backdrop of tightening controls on overall public spending, expenditure on the Civil Legal Aid

scheme increased by 78 per cent in cash terms and 50 per cent when adjusted for price inflation over the period from 2001/02 to 2007/08.

- Inability to set priorities for legal aid.
- Ensuring that, within each category of case assisted, the available resources go to those in greatest need
- Lack of leverage in promoting earlier dispute resolution e.g. encouraging remedies which may be more effective in addressing a client's justiciable problems.

The Funding Code alone will not address all of these issues. However, taken in conjunction with the other elements of the reform agenda, such as standard fees and the statutory charge, the Code will better enable the Commission to secure value for money from the available resources. In particular, through the reform of decision-making criteria and procedures, the Code can be expected to enhance the rigour and strength of the challenge that the Commission can exert in relation to transactions that have implications for public expenditure on legal services.

The potential benefits from the Code are as follows:

- More control over different stages in dispute resolution.
- Encouraging earlier resolution.
- Prioritising the allocation of resources.
- Managing risks to securing value for money from publicly funded legal services.
- Contribute to the Commission's capacity to operate within a fixed budget

Nonetheless, a number of potential risks to the realisation of the potential benefits will need to be managed by the Commission:

- The potential for increased complexity and bureaucracy, arising from the introduction of new Levels of Service compared to current schemes, particularly in respect of Family Help.
- While the new levels of service are not tied to particular court levels, the current means tests continue to vary by court level. This is a potential source of complexity because the current means tests vary also in their population coverage.
- The General Funding Code criteria for money damages cases are tougher than existing arrangements. The availability of legal aid for

money damages cases will reduce, and this raises the potential for unmet need among persons wishing to pursue such a claim.

- Gaining support from the legal profession. In particular, the profession is not convinced of the rationale for the introduction of prospects of success and cost benefit ratios in money damages cases.

3 Current Position

3.1 Introduction

The approach to the assessment of the impacts of the Funding Code is to compare the do minimum and full implementation options to the status quo or 'do nothing' option i.e. what are the additional costs and benefits of each option compared to doing nothing?

As one of the objectives of the Funding Code is to enable civil legal services to operate within a controlled budget, the impacts of the Code on expenditure, both overall and by problem type, are central to the assessment. The main mechanism by which the Code will assist the Commission in operating within a controlled budget is via the increased control that the Commission can exercise in deciding whether to fund an application for legal aid or assistance. Thus, in order to model the expenditure effects of the Funding Code, it is necessary to model the implications for the conversion of applications into certificates issued by the Commission i.e. the transactional challenge in securing value for money as discussed in Section 2 above.

The path from applications to expenditure is depicted in a highly simplified form in Table 3.1, which also serves to illustrate the modelling framework used for this assessment. The point of entry for the Funding Code is the rate at which *applications* are converted into *certificates issued*. For some case types, the Code will change the mean number of certificates issued per application i.e. the decision as to whether or not to fund an application.

Table 3.1 Modelling framework: From applications to expenditure

<ul style="list-style-type: none"> • The trend in applications by problem type <ul style="list-style-type: none"> • Number of certificates issued <i>equals</i> Number of applications <i>times</i> mean issue rate • All reports <i>equals</i> Certificates issued • Full reports paid <i>equals</i> All reports <i>minus</i> Direct authority reports • Expenditure <i>equals</i> Number of full reports paid <i>times</i> Average case cost
--

As the impact assessment model has been built from historical data provided by the Commission in respect of the key indicators outlined in Table 3.1, it is useful to present an overview on the current position in respect of key parameters affecting expenditure on publicly funded legal services, as a prelude to the assessment of impacts in Section 4 below. In serving that

purpose, this Section is organised along the lines of the modelling framework shown in Table 3.1, discussing the present position in relation to:

- The trend in applications by problem type.
- Decisions.
- Certificates.
- Expenditure.

Reflecting the affordability criterion in the Funding code, the Section also includes a discussion of the incidence of high cost cases. The Section concludes by mapping from the current schemes to the proposed new levels of service.

3.2 Applications

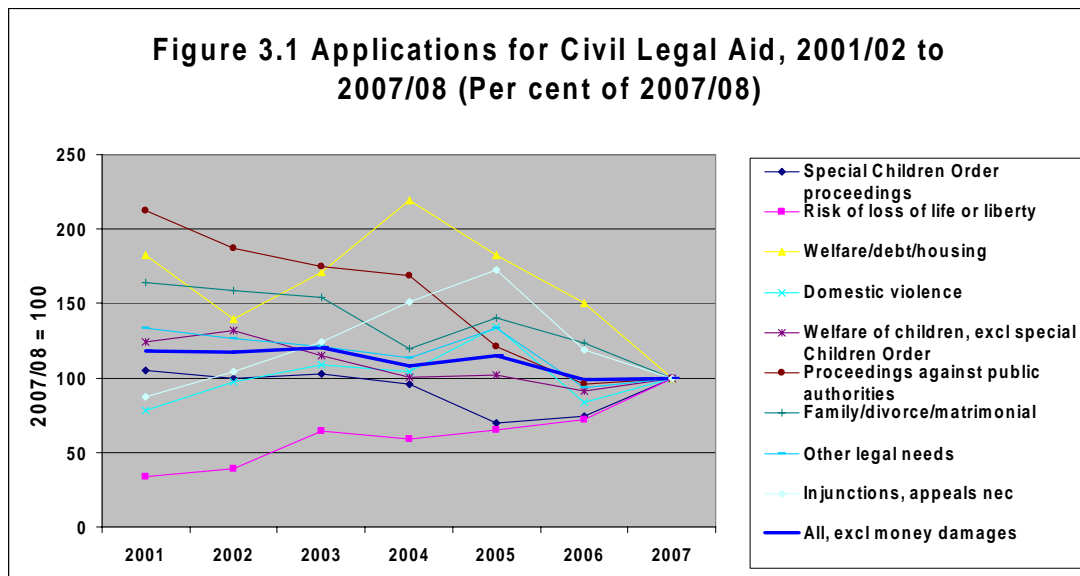
The volumes of applications and acts of assistance under the current schemes are shown, by Funding Code priority, in Table 3.1. The mapping from the problem types shown in Table 2.2 above to the Funding Code priorities in Table 3.1 can be found in Table A.1 in Appendix A.

Table 3.1 Civil Legal Aid and ABWOR applications and Legal Aid and Advice (Green Form) acts of assistance, 2007-08

	Civil Legal Aid	ABWOR ¹	Green Form
Special Children Order proceedings	554	920	0
Risk of loss of life or liberty	1,361	0	360
Welfare/debt/housing	58	8	1,534
Domestic violence	162	3,163	264
Welfare of children, excl special Children Order	805	3,569	1,015
Proceedings against public authorities	416	0	71
Family/divorce/matrimonial	1,974	369	842
Money damages	1,619	0	1,799
Other legal needs	425	0	1,326
Injunctions, appeals nec ²	574	195	175
All	7,948	8,224	7,386

1 Including Children Order ABWOR. 2 nec Not elsewhere specified.

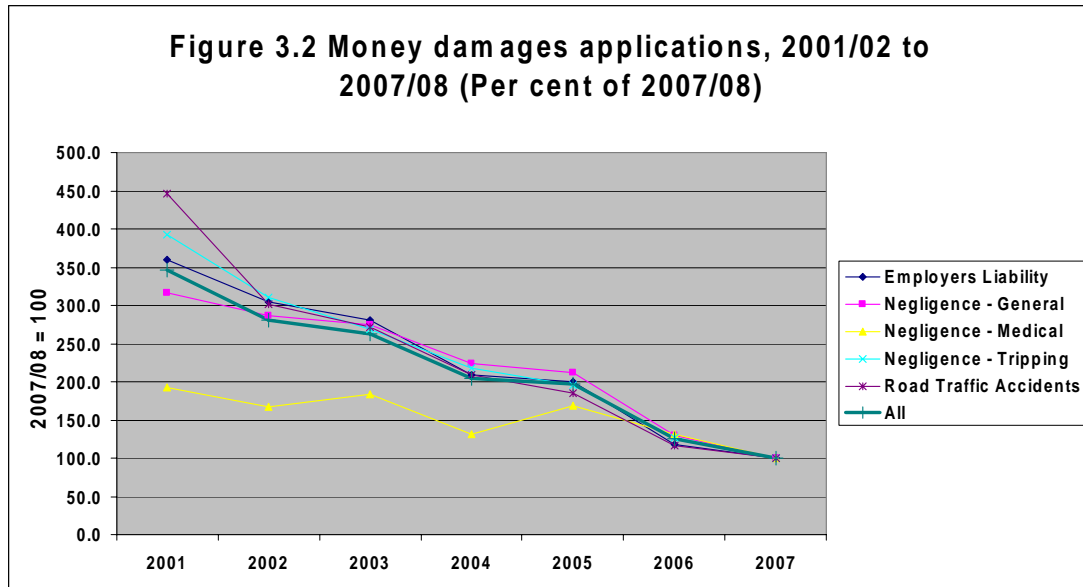
The different priority case types have exhibited varying trends in the volume of applications, notably in the Civil Legal Aid scheme. Excluding money damages cases, the volume of CLA applications has been declining somewhat since 2001/02, albeit more recent years have seen a stable number of applications (Figure 3.1)¹². Problems to do with the risk of loss of life or liberty (bail and immigration) have been rising. Mainly due to the inclusion of assault/battery/trespass cases, applications under the actions against public authorities have been declining, though less so in the most recent years. The decline in such cases has been levelling off. Judicial and statutory reviews comprise the other major element in actions against public authorities. Such cases have declined from about 350-400 per annum in the early years of the decade to a fairly stable level of around 300 per annum in recent years. The other major point to note from Figure 3.1 is that, while there have been fluctuations, family cases (both public and private), have shown a broadly stable trend in applications.



CLA applications in respect of money damages cases have been in sharp decline, falling by almost 250 per cent in the period from 2001/02 to 2007/08 (Figure 3.2). Medical negligence applications have fallen less sharply, but the number of applications in 2007/08 was only half the 2001/02 volume. Broadly similar trends can be seen in Green Form acts of assistance for money damages problems.

The reasons for the decline are not entirely clear. The sample of solicitors interviewed for the assessment felt that one reason for the falling trend is the influence of third party capture, where an insurance company goes straight to the injured party and offers them a settlement. Another possible factor mentioned was the tightening of the definition in law of ‘duty of care’, making it harder to claim.

¹² For the recent trends in applications by scheme, see also Tables A.2 (Civil Legal Aid), A.3 (ABWOR) and A.4 (Green Form) in Appendix A.



Whatever the mix of reasons, it is important to take the foregoing trends into account. For example, ignoring the downward trend in money damages cases would result in an over-estimate of the effects of Funding Code proposals, notably the prospects of success and cost benefit ratios for quantifiable claims¹³.

Finally, the number of ABWOR applications has also been on a downward trend, averaging -6 per cent per annum from 2003/04 to 2007/08. The trend has been most noticeable in family/divorce/matrimonial cases, which have more than halved over that period. By contrast, Special Children Order proceedings have remained broadly constant. Again, these trends need to be taken into account.

3.3 Decisions

An application for Civil Legal Aid can be granted, or refused either on its merits or some other ground (mainly means, but occasionally also scope). In addition, some applications are made for which no decision is taken.

For applications made in the period from 2005/06 to 2007/08, the decision outcomes by Funding Code priority are shown in Table 3.2. On average, the decision was to grant assistance in 72 per cent of applications. One in eight applications was refused, either on the merits (seven per cent) or for some other reason (five per cent), mainly the means assessment.

¹³ If the trends are ignored (e.g. by holding applications fixed at their 2007/08 level), the Funding Code impacts would be magnified as they would apply to a larger volume of applications than is likely to materialise. Thus, in the statistical model developed for this assessment, money damages cases are assumed to continue on a downward trend for the first five years of the assessment period, levelling off after that

Table 3.2 Decisions recorded for Civil Legal Aid applications, 2004/06 to 2007/08

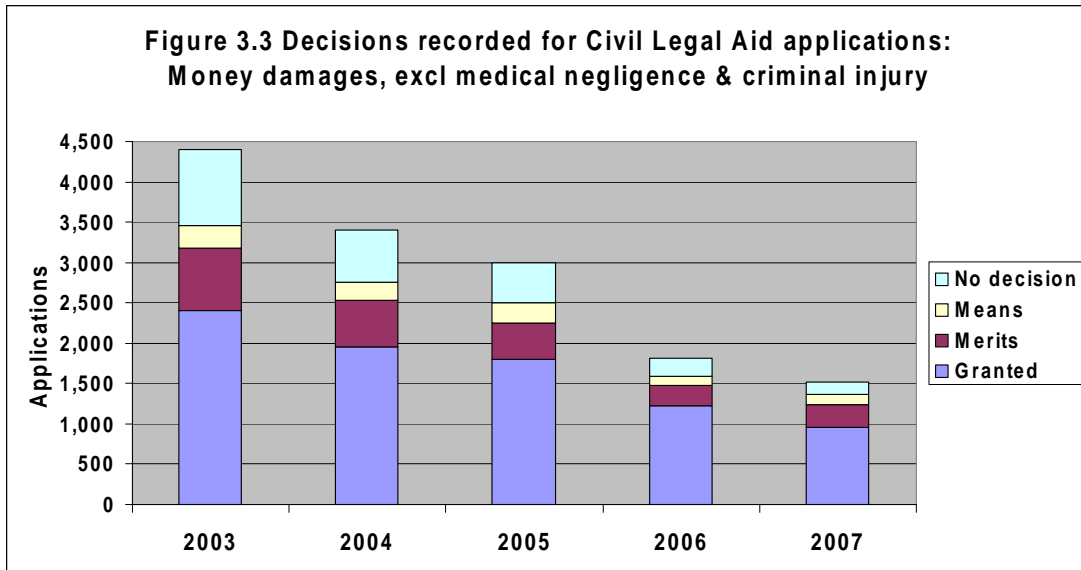
	No decision %	Refused Other %	Refused Merits %	Granted %	All %
Special Children Order proceedings	12.9	1.0	0.9	85.3	100.0
Risk of loss of life or liberty	22.6	0.1	0.2	77.2	100.0
Welfare/debt/housing	19.5	5.2	21.5	53.8	100.0
Domestic violence	17.5	0.4	3.3	78.8	100.0
Welfare of children, excl special Children Order	17.9	1.6	1.1	79.4	100.0
Proceedings against public authorities	15.3	2.1	12.6	70.0	100.0
Family/divorce/matrimonial	14.0	8.6	1.6	75.8	100.0
Money damages	13.3	6.9	14.6	65.1	100.0
Other legal needs	18.3	7.8	15.8	58.1	100.0
Injunctions, appeals nec	22.1	1.7	11.5	64.6	100.0
All	16.2	5.1	7.1	71.7	100.0

To an extent, the proportion of applications where the decision made is to grant legal aid broadly reflects the Funding Code priorities. For example, the very low refusal rates in respect of Children Order proceedings, both public and private. Similarly, domestic violence cases are rarely refused on the merits.

Conversely, family/divorce/matrimonial applications, which are not a Funding Code priority, currently show a very low refusal rate on the merits. The effect of the Funding Code on the grant rate for such applications is uncertain. But change will be effected through the tiered approach in the Family Help level of service. This is a factor to be explored further in the impact assessment in Section 4 below.

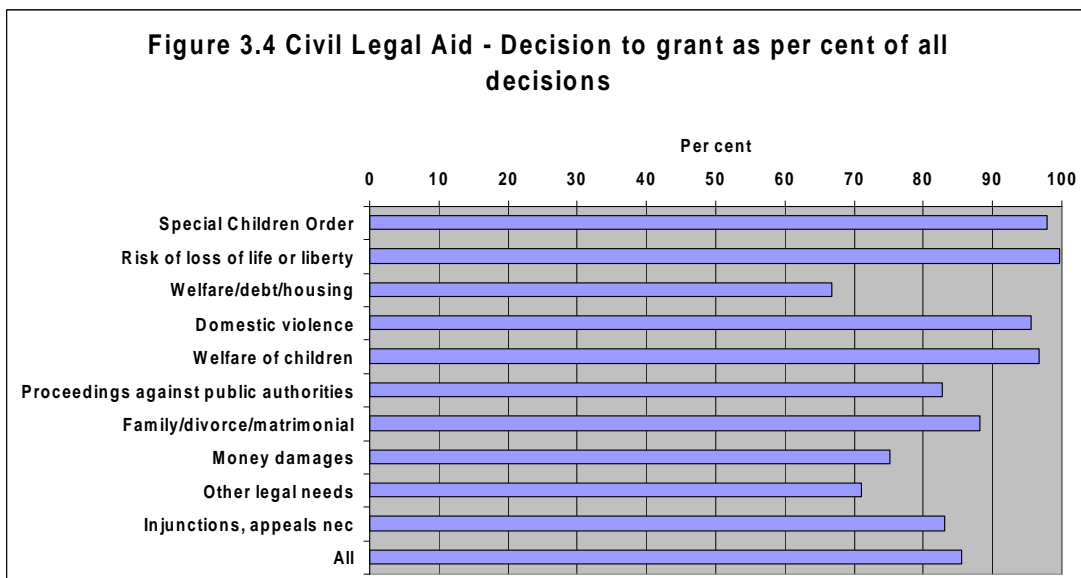
Money damages cases are about twice as likely to be refused on the merits (15 per cent) by comparison with the average for all applications (seven per cent). The main factor affecting the volume of money damages cases, however, has been the decline in applications, as the proportion refused on the merits has been relatively stable over time (see Figure 3.3).

As shown in Table 3.2, no decision was taken in 16 per cent of applications made over the period 2004/06 to 2007/08. The no decision share has been consistently in the region of 16-18 per cent since 2001/02, suggesting that these applications may reflect factors other than a backlog of assessments.



When the no decision applications are omitted, the decision to grant as a per cent of all decisions varies from one problem type to another (Figure 3.4). Public law children proceedings have very high grant rates (over 97 per cent). By contrast, the rates for money damages cases and other legal needs are closer to 70 per cent.

For the top priority and high priority problem types, the pattern shown in Figure 3.4 suggests little scope for an impact on the decision outcome from the Funding Code. For private law family cases, the effect will come through the tiered approach to Family Help.



3.4 Certificates

Under the current CLA scheme, an applicant may be issued an emergency certificate, a limited certificate, a full certificate, or some combination of those, or none at all (Table 3.3). For the purposes of this impact assessment, the main point of interest is the proportion of applications that are issued with at least one certificate, regardless of the type of certificate. The reason for this is that, when a certificate is issued, it will subsequently result in a report to the Commission with an assessment of the total costs of the legal services provided in respect of the certificate.

As can be seen from Table 3.3, about 28 per cent of CLA applications in 2007/08 were not issued with any certificate, of whatever form, mainly because no decision was made or the application was refused. As expected from the preceding discussion of decisions, the proportion of CLA applications for which a certificate was issued varied considerably from one problem type to another, ranging from 88 per cent for special Children Order applications to 66 per cent for money damages cases and 63 per cent for the other legal needs category.

Table 3.3 Certificates issued as per cent of applications, 2007-08

	Civil Legal Aid	ABWOR ¹
	%	%
Special Children Order proceedings	88	96
Risk of loss of life or liberty	80	-
Welfare/debt/housing	74	(2)
Domestic violence	79	95
Welfare of children, excl special Children Order	83	96
Proceedings against public authorities	74	-
Family/divorce/matrimonial	67	91
Money damages	66	-
Other legal needs	63	-
Injunctions, appeals nec ³	69	89
All	72	95

1 Including Children Order ABWOR

2 Too few applications.

3 nec Not elsewhere specified

3.5 Expenditure

Certificates granted under the Civil Legal Aid scheme take varying lengths of time to complete, ranging from around three months in respect of bail applications to four years or more for medical negligence cases. When a certificated case has concluded, a report is submitted to the Commission showing the assessed gross total (AGT) costs of the case. Such reports can be classified into two main types:

- Direct authority reports i.e. where the Commission authorises the legally-aided person's solicitor to deal with the costs directly. Generally, this is because costs are being met by the other side.
- Full reports paid (FRP) i.e. reports for which the costs of the legal services provided in respect of the case are met by the Commission from the Legal Aid Fund.

When Value Added Tax (VAT) is excluded, the total amount of assessed gross total costs represents the value of the services provided in respect of legal aid certificates. These services comprise solicitors' profits, counsel fees and disbursements. Full reports paid represent the gross expenditure that is actually incurred by the Commission. Thus, the AGT costs are of most relevance to the legal profession whereas full reports paid are of most relevance to the Legal Aid Fund.

In 2007-08, the assessed gross total costs of reports in respect of Civil Legal Aid certificates granted by the Commission amounted to £30.4m. Almost two-fifths (39 per cent) of the total costs, amounting to £12m, were met by way of direct authority. The remaining 61 per cent, amounting to £18.4m, comprised full reports paid by the Commission. In addition, the Commission paid £5.7m in bills presented in respect of ABWOR certificates and £0.6m for Green Form acts of assistance in relation to civil matters.

When considered by Funding Code priority, the composition of full reports paid and reports paid by way of direct authority varies considerably by problem type (Table 3.4). In 2007-08, children and family-related cases accounted for 72 per cent of full reports paid (i.e. the combined total of special Children Order proceedings, domestic violence, welfare of children and family/divorce/matrimonial). By contrast, money damages cases comprised 89 per cent of the value of direct authority cases and less than 10 per cent of the value of full reports paid.

The contrasting profile of full reports paid and direct authority cases reflects the fact that, in most children and family cases, each side bears their own costs. In money damages cases, the other side is liable in the event that the case is lost. The majority of legally-aided money damages cases are successful in that regard.

Table 3.4 Civil Legal Aid: Assessed gross total costs, by priority, 2007-08

	Full reports paid	Direct Authority reports	All reports
	%	%	%
Special Children Order proceedings	14.7	0.0	8.9
Risk of loss of life or liberty	2.0	0.0	1.2
Welfare/debt/housing	0.4	0.0	0.3
Domestic violence	1.0	0.0	0.6
Welfare of children, excl special Children Order	22.0	0.0	13.3
Proceedings against public authorities	8.0	6.7	7.5
Family/divorce/matrimonial	33.9	0.1	20.5
Money damages	9.5	88.6	40.7
Other legal needs	2.8	2.6	2.8
Injunctions, appeals nec ²	5.6	1.9	4.2
All	100.0	100.0	100.0
Base (£m)	18.396	11.991	30.387

1 Including Children Order ABWOR

2 nec Not elsewhere specified.

Of the £12.4m in assessed gross total costs reported for money damages cases in 2007/08, 86 per cent of the AGT costs were met by direct authority. This in turn reflects the success rate of legally-aided money damages cases.

Considering the set of money damages cases for which a certificate was issued in the years from 2002/03 to 2007/08 and for which a report was made in 2007/08, 63 per cent of money damages cases were awarded damages, with a mean award, as reported to the Commission, of £15,402. The total value of such damages (£17m) represented 178 per cent of assessed gross total costs in all money damages reports in that year.

Overall, while money damages cases currently account for over 40 per cent of assessed gross total costs of Civil Legal Aid cases, they comprise a much lower share of full reports paid, which is what matters from the perspective of the legal aid fund.

However, the divergent trends in applications by problem type discussed earlier in this Section have important implications for the future composition of the total value of publicly funded legal services.

In particular, the sharp decline in money damages applications presages a reduction in the proportion of publicly funded legal services that will be accounted for by such cases. When the recent trends in applications by problem type are projected forward, from the 2007-08 applications baseline position, and assumed to flatten out after five years, the money damages share of total AGT costs and bills paid falls from 36 per cent in 2007-08 to around 17 per cent by 2017, a shift in share of -19 percentage points¹⁴ (Table 3.5). The shift in the money damages share drives a decline in the quantum of publicly funded legal services, from almost £37m in 2007-08 to less than £28m by 2017, a drop of £9m¹⁵. In short, the composition of the 'market' in publicly funded legal services is changing, regardless of any impact that the Funding Code will have.

Table 3.5 Projected shift in composition of assessed gross total costs (full reports paid plus direct authority) and bills paid in respect of ABWOR and Green Form, 2007/08 to 2017

	Actual 2007-08	Projected, 2017	Shift in shares
	%	%	pps
Special Children Order proceedings	10.9	17.5	6.6
Risk of loss of life or liberty	1.2	1.7	0.6
Welfare/debt/housing	0.5	0.8	0.3
Domestic violence	4.9	6.1	1.3
Welfare of children	17.9	23.3	5.4
Proceedings against public authorities	4.3	6.4	2.1
Family/divorce/matrimonial	17.4	17.3	-0.1
Money damages	36.2	16.8	-19.4
Other legal needs	2.5	4.2	1.7
Injunctions, appeals nec ¹	4.3	6.0	1.7
All	100.0	100.0	
Base (£m)	36.689	27,662	-9.027

pps Percentage points change

1 nec Not elsewhere specified.

¹⁴ The illustrative 10-year ahead projection was chosen to allow for time lags between the submission of an application and the issue of a certificate combined with the fact that Civil Legal Aid certificates may take a number of years to report once a certificate is granted.

¹⁵ This figure *includes* direct authority cases. Excluding direct authority cases, the trend-based projection indicates a more modest decline in expenditure by the Commission, from £24m in 2007-08 to £23m by 2017. Note that this is a projection from the 2007/08 applications baseline combined with assumptions for future trends in applications by problem type, based on extrapolation of recent trends. It is not a forecast.

3.6 High Cost Cases

The management of high cost cases is one element in the Commission's approach to operating within a controlled budget. As noted in Section 2 above, the affordability criterion will be applied as part of the Funding Code criteria for deciding whether to fund very expensive cases.

In addition, the Commission envisages the establishment, at some future date, of a Special Cases Unit whose responsibilities will include the management of high cost cases.

In England and Wales, the Legal Services Commission has established such a unit for dealing with high cost cases, multi-party applications and applications for litigation support. There, applications are referred to the Special Cases Unit when it is considered that likely costs to disposal will exceed £25,000 (excluding VAT) or that potential costs to trial will exceed £75,000 (excluding VAT).

In the Northern Ireland situation, money damages cases remain within scope for civil legal aid. This is in contrast to the position in England and Wales, where such cases have been removed from the scope of legal aid, apart from medical negligence cases.

The contrast between the position in England and Wales and the scope of the Funding Code in Northern Ireland is relevant because money damages cases account for the vast majority of cases costing in excess of £25,000 and most such cases are dealt with by direct authority.

Over the period from 2005/06 to 2007/08, reports with an assessed gross total cost of £25,000 or more comprised less than two per cent of all reports. In money terms, these same cases represented 20 per cent of the assessed gross total costs of all reports. Money damages cases accounted for almost 63 per cent of the assessed gross total costs of reports submitted to the Commission (Table 3.6). However, the vast bulk of these high cost money damages cases were dealt with by way of direct authority. The high cost money damages cases dealt with by way of full reports paid (and hence representing a claim on the Legal Aid Fund) accounted for just two per cent of full reports paid in respect of money damages cases.

Certainly, high cost money damages cases represent a potential risk to the Legal Aid Fund. In practice, however, that risk is largely managed through the success rate that such cases achieve, as indicated by their relatively low share of full reports paid. At least in the civil sphere, the management of high cost cases will need to be shaped to the Northern Ireland situation, for so long as money damages cases remain in scope.

Table 3.6 Civil Legal Aid cases with assessed gross total (AGT) costs in excess of £25,000: Pooled data, 2005/06 to 2007/08

	Reports	AGT	Share of all £25k+	Full Reports Paid share
	%	%	%	%
Special Children Order proceedings	3.5	21.8	11.0	100.0
Risk of loss of life or liberty	0.0	0.0	0.0	n.a.
Welfare/debt/housing	1.6	30.2	0.6	100.0
Domestic violence	0.0	0.0	0.0	n.a.
Welfare of children, excl special Children Order	1.9	12.5	9.0	99.1
Proceedings against public authorities	3.2	22.6	7.6	62.2
Family/divorce/matrimonial	0.3	3.0	2.9	86.9
Money damages	2.4	31.2	62.5	2.1
Other legal needs	1.3	16.7	2.3	38.7
Injunctions, appeals nec	1.3	18.0	4.1	87.4
All	1.6	20.1	100.0	33.5

A second point of interest in the profile of high cost cases is that, when such cases are re-defined as those which cost the Fund £25,000 or more (i.e. they are paid as Full Reports), the picture changes very sharply. In that situation, high cost money damages cases make only a small contribution to the total amount of Full Reports Paid (Table 3.7). The main contributors are Special Children Order proceedings (33 per cent), welfare of children (26.5 per cent), proceedings against public authorities (14 per cent), and injunctions and appeals (11 per cent).

Thus, case types to which the affordability criterion does not apply (Special Children Order and judicial review proceedings) comprise almost half (47 per cent) of the value of high cost full reports paid.

Table 3.7 Civil Legal Aid cases with Full Reports Paid (FRP) costs in excess of £25,000: Pooled data, 2005/06 to 2007/08

	Reports	FRP	Share of all FRP £25k+
	%	%	%
Special Children Order proceedings	3.5	21.8	32.8
Risk of loss of life or liberty	0.0	0.0	0.0
Welfare/debt/housing	1.7	32.3	1.7
Domestic violence	0.0	0.0	0.0
Welfare of children, excl special Children Order	1.8	12.4	26.5
Proceedings against public authorities	3.1	22.4	14.2
Family/divorce/matrimonial	0.3	2.6	7.6
Money damages	0.3	4.7	3.9
Other legal needs	0.6	10.0	2.6
Injunctions, appeals nec	1.1	17.5	10.7
All	1.2	11.0	100.0

3.7 Mapping to the Funding Code

This Section has presented an overview on a number of the key trends and parameters that need to be taken account of in modelling the impacts of the Funding Code. Prior to presenting the assessment, it is useful to illustrate how the proposed new levels of service relate to the existing schemes. This is shown in Table 3.8, by Funding Code priority, for the applications made in 2007/08, which is the baseline year for rolling forward projected applications by problem type for each of the options to be assessed.

A particular point of interest is the number of applications that are within scope for the Family Help level of service, especially those that are eligible to apply for Family Help Lower (FHL). The applications within scope of FHL present the opportunity to realise benefits from the strain-off effect discussed in Section 2 above, albeit this will depend on the take-up of FHL and its effectiveness in promoting earlier resolution or settlement of disputes.

Table 3.8 The 2007-08 applications: Eligibility mapped to the new Levels of Service, by Funding Code priority and current legal aid scheme

Priority:	Eligibility:	Family Help		Investigative help + Full Rep (quantitative criteria)	Full representation only
		Lower + Higher + Full rep.	Higher + Full rep.		
		%	%	%	%
Special Children Order proceedings					
• Civil Legal Aid		0	0	0	554
• ABWOR		0	0	0	920
Risk of loss of life or liberty					
• Civil Legal Aid		0	0	0	1,376
• ABWOR		0	0	0	168
Welfare/debt/housing					
• Civil Legal Aid		0	0	0	58
• ABWOR		0	0	0	8
Domestic violence					
• Civil Legal Aid		0	0	0	162
• ABWOR		0	0	0	3,163
Welfare of children, excl special Children Order					
• Civil Legal Aid		454	181	0	170
• ABWOR		3,329	119	0	126
Proceedings against public authorities (all CLA)					
		0	0	0	416
Family/divorce/matrimonial					
• Civil Legal Aid		356	1,618	0	0
• ABWOR		0	364	0	0
Money damages (all CLA)					
		0	0	1,619	0
Other legal needs (all CLA)					
		0	0	0	408
Injunctions, appeals nec (all CLA)					
		0	0	0	559
All					
Civil Legal Aid		810	1,799	1,619	3,703
ABWOR		3,329	483	0	4,385

4 Benefits and Costs

4.1 Introduction

This Section presents the findings for the quantifiable impacts of the proposed Funding Code arrangements, under the following headings:

- Sectors and groups affected.
- Benefits and costs.
- Impacts from the do minimum option.
- Impacts from full implementation of the Funding Code.

4.2 Sectors and Groups Affected

The main sectors and groups that will be affected by the Funding Code are as follows:

- Legal Aid Fund.
- The NILSC – administration side.
- Clients/people with justiciable problems.
- The legal profession.
- The voluntary sector.
- The taxpayer.

4.2.1 The Legal Aid Fund

As outlined in Section 2 above, the intended effects of the Code are oriented towards reducing demands on the Fund, in three main respects:

- Encouraging earlier dispute resolution and applying different criteria to different stages of a case would be expected to help drive down the average costs of legally-aided cases. For example, Family Help Lower (FHL) is designed to promote settlement without recourse to issuing proceedings. Family Help Higher (FHH) would not allow the conduct of a contested final hearing; a new Full Representation certificate would have to be applied for.
- The more rigorous and stringent tests in the General Funding Code can be expected to reduce the number of certificates issued in the case of quantifiable claims i.e. money damages.

- The Code proposes an affordability criterion for high cost cases, which would not be funded in the event that the Legal Aid Fund budget would be at risk of being exceeded.

These effects on the Fund can be viewed as *benefits* from the implementation of the Funding Code, since they release resources that can potentially be used to better effect.

4.2.2 Cost Effects

For the Commission, there will inevitably be set-up costs associated with the introduction of the Funding Code, as new procedures need to be put in place and staff trained to implement those procedures. The recurring costs impact will be driven by the decision-making requirements associated with applications for new certificates combined with net changes in activities associated with the administration of publicly funded legal services i.e. volume changes in applications, certificates issued and reports submitted for payment, relative to the position under current arrangements.

4.2.3 Clients

Legal aid exists to enable those without adequate means to obtain access to justice. In considering the impacts of changes to the decision-making criteria, it is therefore necessary to consider the effects on persons with justiciable problems.

A key element in the Funding Code provisions is that, especially for those whose problems fall within the ambit of the general Funding Code, a legal aid certificate will be more difficult to obtain. This effect has the potential to heighten the risk of unmet legal need, insofar as the applicant is unable to obtain an alternative source of assistance.

The changes brought by the Funding Code may therefore have wider social costs that, at least partially, offset the benefits to the Legal Aid Fund e.g. the person with a money damages claim who is unable to vindicate that claim in law due to a lack of financial resources and alternative means of seeking redress.

The *potential* scale of the unmet need issue can be quantified by examining the effect of the Code on the number of certificates issued by problem type to the extent that these are affected by the quantifiable criteria in the Funding Code. Whether the Funding Code effect on the number of certificates issued results in unmet need depends on the availability of alternative avenues for obtaining redress.

For that reason, potential impacts on the client and the risk of unmet need were an important topic in consultations with solicitor firms. The solicitors interviewed expressed a range of views, from relatively sanguine (“if chances

are good, would still run with it") to pessimistic (fewer able to pursue a claim, strengthens hand of insurance companies).

Conversely, to the extent that the Funding Code is effective in promoting earlier dispute resolution, the changes can be expected to produce social benefits for those in receipt of legal aid. For example, the evidence from legal needs surveys is that the experience of a legal problem or dispute can have severe adverse impacts on an individual's health and wellbeing¹⁶. If problems are resolved earlier and perhaps more amicably, than would otherwise have been the case, this would be expected to generate positive outcomes for some subset of those receiving legal assistance.

Being essentially qualitative in nature, such impacts cannot readily be addressed within a statistical modelling framework. The potential for such impacts is, however, important to recognise. Similarly, leveraging such impacts will represent a challenge for the Commission in implementing the Code, as their realisation is essentially about changing behaviour by modifying incentives to settle a dispute more quickly than would otherwise occur.

4.2.4 The Legal Profession

To the extent that the implementation of the new decision-making criteria results in lower volumes of new certificates issued and/or reduced average case costs for particular problem types, there will be an effect on the revenues of those providing legal services.

This is an indirect effect because legal aid is for the benefit of those with justiciable problems, not those who provide legal services. In quantitative terms, the effect on providers will be determined in the first instance by the extent to which unmet legal need occurs as a consequence of the implementation of the Funding Code. Particularly in respect of money damages cases, the number of persons who cannot procure legal services, and who would otherwise have done so via civil legal aid will have an effect on revenue opportunities for providers. To that extent, the effect on providers is *indirect* since it is mirrored in the direct effects outlined above. Nonetheless, to the extent that it occurs, this indirect effect involves a redistribution of benefits due to the Funding Code and needs to be taken into account.

Especially in the family sphere, providers' revenues may also be affected by the extent to which the Funding Code proves effective in encouraging earlier and hence less costly, resolution of problems than would otherwise occur. Such effects will, at least partially, be offset by the introduction of Family Help Lower, a form of help which is not mirrored in the current arrangements.

¹⁶ See, for example, Dignan (2006) on the findings from the NI Legal Needs Survey, especially the discussion around impacts of justiciable problems (paras 2.26-2.35). Pleasence *et al* (2008) report similar findings for England and Wales.

In principle, there may also be costs on the provider side. In that regard, it is important to bear in mind that the NI Funding Code does not entail new arrangements for the procurement of legal services e.g. it is not proposed to introduce contracting in Northern Ireland. This serves to distinguish the Northern Ireland context very sharply from that in England and Wales.

When the new arrangements were discussed with solicitors, all of those consulted felt that the application forms used in England and Wales for comparable levels of service would take about the same time as the current NILSC forms to complete or even slightly less. The main concern expressed was the extent to which the new levels of service would require a greater volume of form-filling e.g. where a case is 'progressed' from one level to another.

4.2.5 The Voluntary Sector

As one of the objectives of the Commission's reform agenda is to promote a mixed economy approach to the provision of legal advice and assistance, it might have been expected that there would be some effect on *the voluntary sector* e.g. flowing from the enhanced priority given to social welfare issues, an area in which the sector is already active in advice-giving. However, the Funding Code reforms are entirely focused on changing the decision-making process within the current arrangements. For example, there is no new level of service proposed that could readily be provided from the voluntary sector. Taken in isolation, therefore, the Funding Code will have no impact on the voluntary sector. This conclusion is consistent also with the feedback provided by those voluntary sector organisations that responded to the request for views on the impacts of the Funding Code.

4.2.6 The Taxpayer

The primary benefit to the taxpayer will lie in the extent to which the Funding Code reforms are effective in enabling the Commission to better secure value for money in the provision of publicly funded legal services. On the benefit side, this can be measured by estimating the net effect on the Legal Aid Fund, adjusted for the fact that payments made to providers of legal services include an element of VAT.

A number of the solicitors interviewed for the impact assessment made the point that, if persons with a personal injury claim are unable to obtain damages by way of compensation, this could also result in a loss to the taxpayer. The reason for this is that those who are awarded compensation in respect of personal injury claims may have their award reduced if the Compensation Recovery Unit (part of the Social Security Agency) determines that they have received state benefit to meet the same need. This would affect, for example, a person who is compensated for loss of earnings following an injury and who consequently claimed a benefit such as Incapacity Benefit (replaced by the Employment Support Allowance in

October 2008). Compensation can also be recovered where benefits are paid for cost of care or loss of mobility.

However, compensation for reasons such as pain and suffering can never be recovered.

In addition, health services hospitals can recover the costs of treatment given to road traffic accident casualties in cases where the accident casualty claims personal injury compensation. Under the Recovery of Health Services Charges (Northern Ireland) Order 2006, the principle of cost recovery from the compensator is being extended to health care costs associated with all types of personal injury claims.

Currently, the Compensation Recovery Unit recovers in the region of £8m per annum. It is not, however, possible to estimate what proportion of that amount relates to legally-aided claims as opposed to those which are pursued without legal aid or where the compensation is paid without recourse to the courts. Indeed, it is not possible to estimate the amount of damages awarded in respect of claims for which compensation is recovered by the Unit, as the Unit does not collect such information.

The potential effect of the Funding Code on the Compensation Recovery Unit's receipts cannot therefore be estimated with any degree of precision. Ultimately, the effect will depend on the extent to which those with claims for damages are unable to pursue that claim due to their inability to access legal aid. However, it should also be noted that, from an economic perspective, funds recovered by the Compensation Recovery Unit represent a transfer from the compensator to the state, rather than an economic benefit per se.

4.3 Benefits and Costs

As outlined in Section 2 above, for the purposes of the impact assessment, the options to be appraised are as follows:

- Do nothing i.e. retain the status quo, for comparison with proposed changes.
- Do minimum i.e. introduce the cost benefit and prospects tests for quantifiable cases only. This is referred to as **Option A**.
- Implement the Funding Code, as set out in the NILSC's November 2006 consultation document, with subsequent amendments as outlined in the July 2009 document. This is **Option B**.

The approach to analysis of costs and benefits is to compare the effects of Options A and B with the status quo option. The starting point was therefore to build a statistical model for the status quo option. Key parameters in the status quo model could then be adjusted to reflect the changes proposed by the Funding Code.

The first step in constructing the status quo model was to project **applications** forward for a period of 20 years from their 2007/08 baseline (see also Figure A.1 in Appendix A, which illustrates the modelling framework). The projections were based on the extrapolation of recent trends across each of the 21 problem types listed in Table A.1 in Appendix A, for the first five years of the projection period, after which the volume of applications was held constant for each problem type. The 20 year projection period was used due to the timescales that are involved in many problem types, particularly for proceedings at High Court level.

The status quo model for the **Civil Legal Aid** scheme was then estimated using parameters drawn from the historical data reviewed in Section 3, including:

- **Decisions** and the proportion of applications resulting in 1+ **certificates**.
- The number of **reports** generated by the certificates issued, taking account of the expected duration of a case, by problem type and court level.
- For each problem type, the model predicts the **assessed gross total** (AGT) costs, based on historical mean AGTs per report, again taking account of the duration of a case and whether proceedings are high court or some other court.
- The model distinguishes between **full reports paid**, which represent a call on the Legal Aid Fund, and **direct authority** reports, where the costs are met by the other side.
- **Suppliers' costs** (alternatively, the revenues obtained by providers from publicly funded legal services) are equivalent to AGT costs, net of VAT. Based on historical data by problem type, these are allocated between solicitors' profits, counsel fees, and disbursements.
- **Damages awarded** were modelled from the historical data for the ratio of the value of awards to AGT costs, again by problem type.

The models developed for the **ABWOR** and **Green Form** schemes were broadly comparable in structure to the Civil Legal Aid model, albeit somewhat simpler e.g. less reliance is placed on the duration of a case and there is no requirement to distinguish full reports paid and direct authority reports.

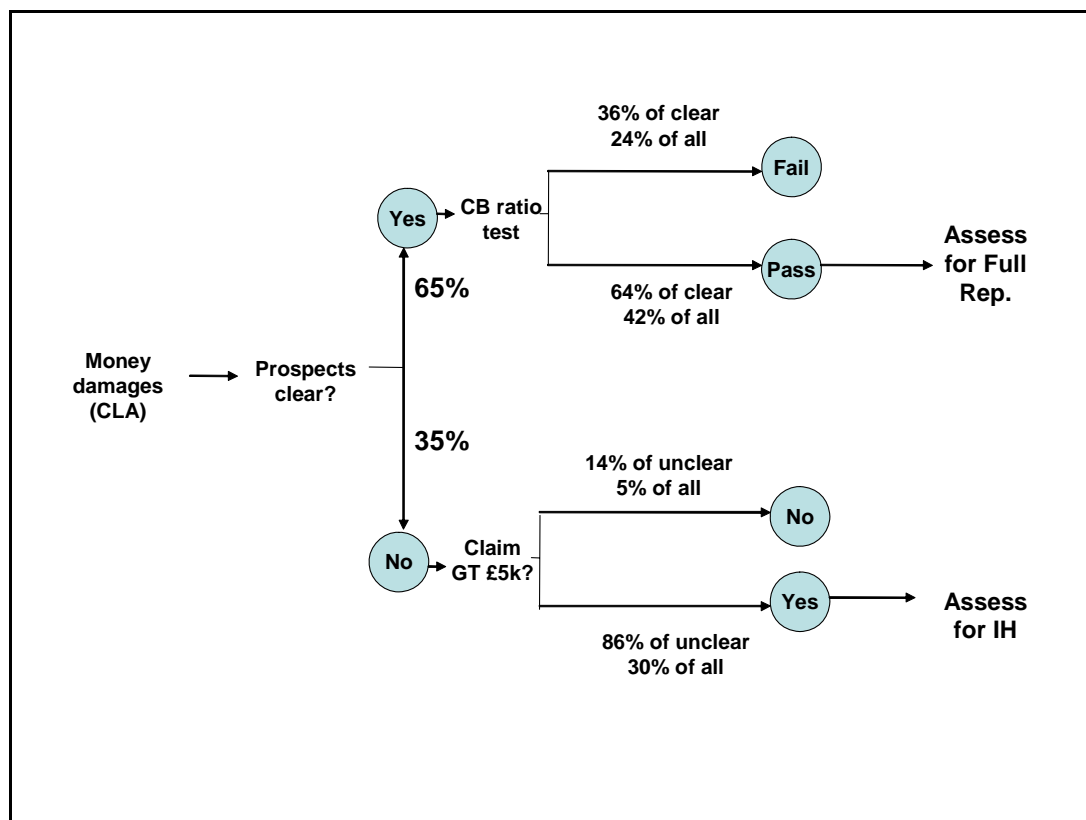
For **Options A and B**, the foregoing set of impact indicators were modelled by changing parameters in line with the Funding Code criteria, as described in more detail below. As the Legal Help level of services largely replaces the Green Form scheme, the focus in this section is on the remaining levels of service under each Option as compared to CLA and ABWOR.

4.4 Option A Quantitative Criteria Only

The key consideration in estimating the effects of reforming only the criteria for money damages cases is the potential effect of the prospects of success and cost-benefit ratio tests on the likelihood of obtaining a legal aid certificate, be that for Investigative Help or Full Representation.

The estimated effects of the quantifiable criteria were based on detailed file review, undertaken by the Commission, of a sample of 277 money damages applications dating from 2003/04 and which had been approved under the CLA merits test. The results are shown in Figure 4.1. As can be seen, when the Funding Code criteria are applied to the sample of cases, 65 per cent of money damages applications are assumed to have clear prospects of success. The 65 per cent of applications with clear prospects are then subjected to the benefit cost ratio test. Based on the file review sample results, 64 per cent of those with clear prospects would pass the ratio test.

Figure 4.1 Money damages cases and the Funding Code tests: Findings from a sample of reports



Applications with clear prospects that pass the ratio test are not assumed to qualify automatically for Full Representation. They may, for example, fail the means test. Or the Commission’s adjudicators may determine that it would not be appropriate to provide support, for example, due to the circumstances of the case. In short, marked prospects, damages and costs are subject to further examination and challenge by the Commission.

In the file review sample, 14 per cent of the applications that were estimated not to have clear prospects would be excluded in the Funding Code on the ground that expected damages were less than £5,000. The remaining applications for which prospects were not clear could then be assessed for Investigative Help.

A point to note at this juncture is that there appears to be some confusion within the legal profession regarding the £5,000 threshold, based on the perception that the threshold applies across the board to all applications. The threshold does not apply to cases with clear prospects, only to those where prospects are unclear and Investigative Help is the more appropriate form of assistance, at least initially.

The results for activity and volume indicators are shown in Table 4.1. As can be seen, in the base case model for Option A, the Funding Code would stimulate an increase in the total number of applications for legal aid in respect of money damages cases. This derives from the assumption that solicitors will continue to make applications for legal aid in money damages cases in line with recent trends and that those granted Investigative Help will subsequently apply for Full Representation. Of course, the legal profession may adjust to the new regime by making *fewer* applications, for example, where they perceive that a given case may not satisfy the quantifiable criteria. Rather than speculate about the effect on the propensity to submit an application, it was considered prudent to estimate the effects on the basis of the historical trends in applications submitted.

Table 4.1 Money damages cases – Modelled effects on applications, certificates and reports: Annual averages, 20-year time period

	Status quo	Funding Code	Difference from status quo	Investigative Help	Full Representation
Applications	1,133	1,343	+211	393	951
Certificates	680	577	-105	211	366
Issue rate	60%	43%	-17%	54%	39%
Reports	612	530	-105	200	330

While the volume of money damages applications that would be submitted under the Funding Code is uncertain, the new test is tougher and this will almost certainly mean a fall in the number of certificates issued. Based on the parameters shown in Figure 4.1 above, the mean issue rate for certificates in respect of money damages cases would fall from 60 per cent to 43 per cent in the Funding Code, a drop of 17 percentage points. This is a substantial effect. But the quantifiable criteria in the Funding Code do not herald the elimination of money damages cases from civil legal aid.

The monetary impacts on the main affected sectors and groups are shown in Table 4.2. Reflecting the decline in certificates issued, AGT costs under the Funding Code decline by over £1.5m per annum, averaged over the 20-year projection period. As noted in Section 3 above, most money damages claims are dealt with by direct authority. Hence, the effect on the Legal Aid Fund is modest, less than £150k per annum.

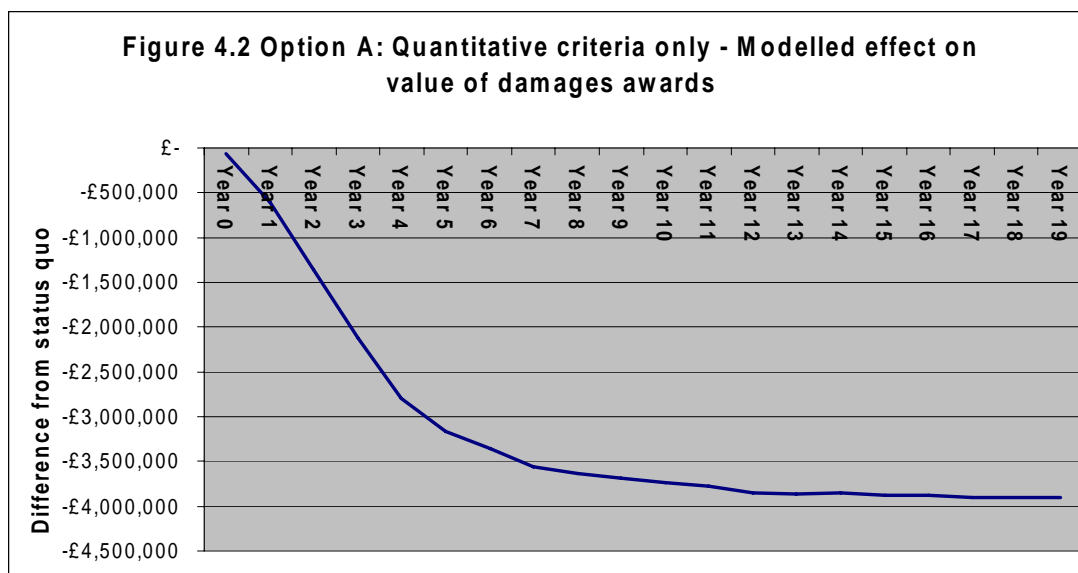
Table 4.2 Money damages cases – Modelled effects on costs and damages awarded: Annual averages, 20-year time period (£'000s)

	Status quo	Funding Code	Difference from status quo	Investigative Help	Full Representation
Reports					
AGT costs	£3,784	£2,217	-£1,566	£174	£2,043
Direct Authority	£3,265	£1,845	-£1,420	£83	£1,762
Full Reports Paid	£519	£372	-£147	£91	£281
Damages					
Awards	£7,120	£3,975	-£3,145	£146	£3,829
Suppliers' costs					
Profits	£1,817	£1,060	-£756	£80	£981
Fees	£778	£432	-£346	£12	£420
Disbursements	£747	£470	-£276	£66	£404
Total	£3,341	£1,963	-£1,378	£159	£1,804
VAT	£442	£254	-£188	£16	£239

The lower volume of certificates awarded for legal aid under the Funding Code criteria is estimated to lower the total amount of damages awards to legally-aided clients by £3m, compared to what would have transpired under current arrangements. As noted above, the proportion of such damages awards that might be recoverable through recourse to non-legal aid assistance cannot be estimated with any certainty. Some of those with money damages claims will be taken on by solicitors who feel that the case is winnable. But this may not happen in all cases.

Reflecting the timescales involved in money damages cases (an average of 2.3 years from the issue of a certificate to submission of a report) the effect on the value of awards is lower in the earlier years of the assessment period (Figure 4.2). This feature of the time profile of Funding Code effects does,

however, provide an opportunity for the Commission and other stakeholders to further consider the development of alternatives to legal aid for money damages cases, such as the NI Additional Legal Aid Scheme (NIALAS) described in Harbison *et al.*



By definition, AGT costs are equivalent to the value of suppliers' bills submitted in respect of civil legal aid work. That is, when VAT is netted out, the predicted effect on AGT costs shows the effect on the revenues of those supplying publicly funded legal services. As can be seen from Table 4.2, this is estimated to be in the order of -£1.4m per annum when Option A is compared to current arrangements.

The quantifiable benefits and costs of Option A, when compared to the status quo, are shown in Table 4.3. On the costs side, the Commission will incur one-off costs in training staff to administer the new procedures. As the Option involves a minimal departure from existing arrangements, one-off costs are modest. Average annual costs are based on volume changes in various transactions and other activities that the Commission must perform in administering Option A. These costs include:

- An increased number of transactions. The increased number of applications shown in Table 4.1 above generates a rise in the costs of registration and adjudication, offsetting the reduced numbers of certificates and reports.
- An increased number of means tests, due to the increase in the number of applications.
- Appeals are assumed to be proportional to the number of refusals, which rise under the Funding Code quantifiable criteria.

Table 4.3 Option A Quantitative Criteria Only: Benefits and costs compared to status quo option

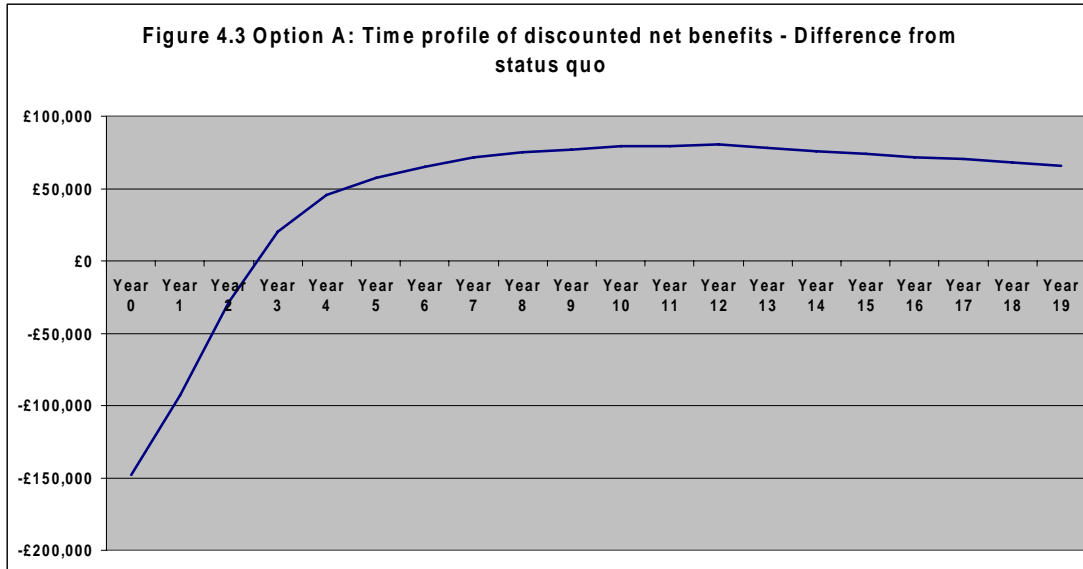
	£'000s
Costs	
One-off	£21
Average annual	£55
Total (PV)	£863
Benefits	
One-off	0
Average annual	£129
Total (PV)	£1,748
Net Benefit (NPV)	£885
PV = Present value. Public costs and benefits discounted at 3.5% per annum, over 20-year time period.	

The recurring cost effects listed above are not large. Indeed, they would be reduced, and even eliminated, if the volume of money damages applications was to fall markedly in response to the more rigorous Funding Code quantifiable criteria. It is certainly not implausible that this would happen. However, it was considered prudent to adopt the assumption that applications would follow the underlying historic trends *and* that those granted an Investigative Help certificate would subsequently apply for a Full Representation certificate.

There are no one-off costs on the benefit side. The annual average benefit shown in Table 4.3 is the full reports paid effect from Table 4.2, net of VAT payments to suppliers. This quantifies the additional funds released from the Legal Aid Fund that can be put to some other useful purpose for the benefit of society.

The benefit cost calculation does not include the effect of the quantifiable criteria on the value of money damages awards (a reduction of £3m). This reflects the uncertainty that exists regarding the extent to which those who would have been legally-aided under current arrangements are able to obtain assistance through some other means. As noted earlier, the solicitors interviewed for this impact assessment expressed a range of views in that regard. However, the modelling exercise does mean that the effect on money damages claims can be noted as a potential impact from the implementation of the quantifiable criteria for money damages cases.

Again reflecting the timescales involved in money damages cases, net benefits are negative in the early years, turning positive from year 3 onwards (Figure 4.3). Thus, even this ‘do minimum’ option would take time to realise benefits in the form of a reduced legal aid funding cost.



Over time, however, Option A would be expected to yield an excess of benefits over costs; a modest total net benefit of less than £1m spread over a 20 year period.

Nonetheless, the option would not be preferred on the ground that it is too narrowly focused to meet the Commission’s objectives for the Funding Code. To that extent, the option does not make the required contribution to the Commission’s objective of directing resources to cases where need is greatest e.g. family-related problems are not addressed within the do minimum option. This also limits the extent to which the option can contribute to the intended effects of the reform e.g. the desire to promote earlier resolution of disputes. Furthermore, as money damages cases account for only around 10 per cent of full reports paid from the Legal Aid Fund, the option does not contribute greatly to the objective of enabling civil legal services to operate within a controlled budget.

4.5 Option B Full Implementation of the Funding Code

The main issue to be addressed in estimating the effects of the full implementation of the Funding Code is the treatment of the Family Help level of service. Partly, this is because a substantial number of legally-aided cases come within the scope of Family Help: around 40 per cent of the combined CLA and ABWOR applications made in 2007/08 (see Table 3.8 above). It is also readily apparent from Figure 2.2 above that Family Help is the most complex level of service within the Funding Code. By the same token, it engages most directly with the desire to promote early resolution of cases to avoid court-based solutions to disputes. The Family Help level of service also provides the Commission with a number of decision points at which the transactional challenge can be exerted in seeking to secure value for money. Finally, consideration of Option A above has already highlighted the specific impacts of the quantifiable criteria in the Funding Code.

In light of the above, the presentation of the Option B impacts commences with the analysis of the effects emanating from the Family Help level of service. The overall impacts, combining the changes from Family Help and the quantifiable criteria, are then presented prior to discussing the potential benefits and costs from full implementation of the Funding Code.

4.5.1 Family Help Effects

For the reasons discussed in Section 2 above, the key issues in estimating the effects of the Family Help level of service are as follows:

- **FHL Take-up.** What proportion of those within scope will apply for Family Help Lower?
- **FHL Strain-off.** What proportion of those assisted by Family Help Lower will be enabled to resolve their dispute without recourse to the issue of court proceedings?
- **Contested final hearing.** What proportion of those who are assisted via Family Help Higher will seek to proceed to a contested final hearing, thereby triggering an application for Full Representation?
- **Full Representation certificate issue rate.** What proportion of those who apply for Full Representation would be approved for such a certificate?

These are difficult questions to answer, especially as Family Help entails the introduction of a new scheme (Family Help Lower) that has no direct counterpart among the existing legal aid, advice and assistance schemes. Given the uncertainty around the foregoing issues, the approach taken for this impact assessment has been to produce a number of scenarios, by varying assumptions for the foregoing key issues around a best estimate in

order to illustrate the potential range of risks and opportunities from the Family Help level of service.

The assumptions adopted for the Family Help scenarios are shown in Table 4.4, with the best estimate highlighted in yellow shading. Turning first to the take-up assumptions, the best estimate shown in Table 4.4 is derived from a National Audit Office study of legal aid and mediation for people involved in family breakdown in England and Wales (NAO, 2007). The NAO study found that 48 per cent of clients receiving legal advice and assistance (over and above the basic Legal Help level of service) used either general family help or mediation before or instead of going to court. As Family Help Lower is an entirely new scheme in Northern Ireland, it can safely be assumed that there will be some (non-zero) take-up rate. As the Funding Code emphasises the importance of seeking a negotiated settlement or non-court based solution, an assumed take-up rate of 48 per cent would not seem unreasonable.

Table 4.4 Option B Full Funding Code: Modelling assumption scenarios for Family Help

	A	B	C	D	E	F
Take-up of FHL (% of those within scope)	24%	24%	48%	48%	48%	100%
Strain-off (% of those granted FHL)	23%	23%	23%	23%	56%	0%
Apply for Full (Proceed to contested from FCC+)	15%	15%	15%	15%	15%	15%
Granted Full Rep certificate (% of contested)	100%	76% (per CLA)	76% (per CLA)	88%	76% (per CLA)	100%

The strain-off rate assumption in Table 4.4 is also derived from the NAO study, which found that, among those who used either general family help or mediation before or instead of going to court, 42 per cent used mediation and 56 per cent of those who used mediation were able to achieve full agreement on their disputes, giving a strain-off rate of 23 per cent (i.e. 0.42 times 56). Note that this only applies to those taking up FHL, so that strain-off as a proportion of *all* who are within scope of, or eligible to apply for, FHL equates to 11 per cent. It is a moot point as to whether the NAO study findings transfer directly to Northern Ireland, given the underdeveloped state of mediation in the province at this time. Such a rate may take time to achieve. The uncertainty also emphasises the importance of testing the sensitivity of the impact assessment findings to the assumed strain-off.

In the best estimate scenario, it is assumed that, among those in receipt of Family Help Higher (FHH) certificates issued for proceedings in the County Court/Family Care Centre or higher¹⁷, 15 per cent apply for a Full Representation certificate for a contested final hearing. This is equivalent to the proportion of CLA divorce cases for which party and party costs are awarded, roughly indicative of a contested hearing.

As the application for Full Representation enables the Commission to exercise a transactional challenge with a view to securing value for money, the best estimate does not assume that 100 per cent of such applicants will be awarded a certificate. Under the current arrangements, the average issue rate of CLA certificates for the range of problems within scope of FHH is 76 per cent. This might be considered too low for an application from an individual who would already have been awarded the equivalent of a CLA certificate under current arrangements. The assumption adopted for the best estimate – an 88 per cent approval rate – is at the mid-point between the two possibilities (100 per cent and 76 per cent). The assumption regarding the mean issue rate for FHH applicants wishing to obtain Full Representation is very important in relation to the potential impacts on the Legal Aid Fund. This is because the modelling of the effects is based on the premise that such applications will result in above average costs to the Fund, compared to FHH certificates that are resolved at the FHH level.

The remaining scenarios represent variations around the best estimate, which are designed to highlight risks to the achievement of the intended effects from FHL and opportunities for enhanced effectiveness, as follows:

- Scenarios A and B highlight the implications of a relatively low take-up rate (24 per cent) for FHL, since this necessarily limits the number of problems for which strain-off is possible. With the take-up rate halved, the proportion of problems strained-off falls to 5.5 per cent of *all* within scope of FHL i.e. half the best estimate. Within this set of scenarios, the proportion granted a Full Representation certificate is varied between 76 per cent and 100 per cent, to illustrate the effect of that particular parameter.
- Scenario C varies from the best estimate (D) only insofar as the proportion granted Full Representation is set at the historical average issue rate for those applying for a CLA certificate and whose problem type is within scope of FHH.
- Scenario E illustrates the effect of increasing effectiveness (strain-off equals 56 per cent with take-up of 48 per cent) combined with the most robust challenge to the issue of Full Representation certificates for those seeking to proceed to a contested final hearing. This is the best case scenario.

¹⁷ That is, individuals who would, under present arrangements, have been granted a CLA certificate.

- Scenario F shows the worst case scenario. All those within scope take up FHL, but with zero effectiveness (no strain-off). That is, the scheme is used simply because it exists. Also, all those applying for Full Representation from FHH are granted a certificate (no transactional challenge).

Table 4.5 shows the effects on the number of applications and certificates issued for the Family Help level of service, along with the estimates by scenario for applications from FHH to Full Representation. Both applications and certificates are higher in each of the scenarios when compared with the status quo option. This is mainly due to take-up of Family Help Lower.

Table 4.6 illustrates the effects on the Legal Aid Fund. Over the 20 year projection period, the best estimate scenario (D) shows an average reduction of £188k per annum in the value of full reports paid.

However, the funding cost effects vary considerably by scenario. Generally, the higher the strain-off rate and the greater the transactional challenge posed to those applying for Full Representation, the larger the reduction in the value of full reports paid. Thus, the best case scenario registers a reduction in full reports paid of -£0.8m. By contrast, the worst case scenario shows an increase of almost £1m per annum in full reports paid.

Comparison of scenarios A and B shows the effect of a transactional challenge to those applying for Full Representation. In the absence of such a challenge, scenario A shows a slight increase in full reports paid, as there are additional costs from FHL when compared with current arrangements. By contrast, scenario B shows a reduction of £0.537m. This is based on the assumption that the cost of contested final hearings can be approximated from the 15 per cent most expensive CLA cases that would be within scope of FHH under the Funding Code.

Comparing scenarios C and E illustrates the effect of increasing the strain-off rate. In scenario B, with a 23 per cent strain-off, full reports paid are reduced by £0.345m. With a 56 per cent strain-off rate, scenario E results in a reduction of £0.8m.

Table 4.5 Family Help: Modelled effects on numbers of applications and certificates

	Status quo	A	B	C	D	E	F
	<i>No.</i>	<i>No.</i>	<i>No.</i>	<i>No.</i>	<i>No.</i>	<i>No.</i>	<i>No.</i>
Applications							
Total	6,421	7,049	7,049	7,971	7,971	7,971	9,970
Family Help Lower	-	957	957	1,913	1,913	1,913	3,986
Family Help Higher	-	6,092	6,092	6,058	6,058	6,058	5,984
Full from FHH	-	273	273	267	267	249	280
Certificates							
Total	5,501	6,260	6,198	6,907	6,937	6,302	9,399
Family Help Lower	-	923	923	1,845	1,845	1,845	3,844
Family Help Higher	-	5,067	5,067	4,858	4,858	4,267	5,279
Full from FHH	-	270	209	204	234	190	277

Table 4.6 Family Help: Modelled effects on the Legal Aid Fund

	Status quo	A	B	C	D	E	F
	£'000s	£'000s	£'000s	£'000s	£'000s	£'000s	£'000s
Full reports paid							
Total	£9,088	£9,126	£8,551	£8,742	£8,900	£8,289	£10,059
<i>Difference from status quo</i>	£0	+£38	-£537	-£345	-£188	-£799	+£971
By scheme							
Family Help Lower	-	£351	£351	£703	£703	£1,016	£998
Family Help Higher	-	£6,483	£6,373	£6,258	£6,258	£5,617	£6,712
FPC (ABWOR)	£2,183	£2,066	£2,066	£1,950	£1,950	£1,624	£2,183
FCC+ (CLA)	£6,905	£4,417	£4,307	£4,307	£4,307	£3,993	£4,529
Full representation	-	£2,291	£1,827	£1,782	£1,939	£1,656	£2,349
All FCC+	£6,905	£6,709	£6,134	£6,089	£6,247	£5,649	£6,878

FPC - Court level is Family Proceedings Centre/Magistrates' Court.

FCC+ - Court level is Family Care Centre/County Court and higher

Table 4.6 Family Help: Mean case costs

	Status quo	A	B	C	D	E	F
	£'000s	£'000s	£'000s	£'000s	£'000s	£'000s	£'000s
Family Help Lower	-	£381	£381	£381	£381	£551	£260
Family Help Higher/Current Scheme							
• FPC/ABWOR	£780	£778	£778	£775	£775	£765	£780
• FCC+/CLA	£4,355	£2,821	£2,806	£2,806	£2,806	£2,756	£2,837
Full Representation (additional)	-	£10,143	£10,367	£10,367	£10,153	£10,370	£10,144
All FCC+	£4,355	£4,280	£3,992	£3,963	£4,065	£3,896	£4,304

FPC - Court level is Family Proceedings Centre/Magistrates' Court.
FCC+ - Court level is Family Care Centre/County Court and higher

Table 4.6 shows the effects on mean case costs. Clearly, there is no status quo comparator for Family Help Lower. However, it can be noted that the model incorporates an effect of increasing mean cost with increasing effectiveness as measured by the strain-off rate. In scenario F, with zero effectiveness, mean FHL costs are limited to the assumed standard fee for the service, similar to England and Wales. In scenario E, with 56 per cent strain-off, mean costs are assumed to increase to £551¹⁸. This is to illustrate that achievement of intended effects from FHL will have a resource implication.

4.5.2 Total Effects

Table 4.7 shows, for each scenario, the modelled effects across all levels of service from full implementation of the Funding Code i.e. Investigative Help and Full Representation in addition to Family Help and including also the prospects of success and cost benefit ratio tests for quantifiable cases. The percentage changes relative to the status quo are shown in Table 4.8.

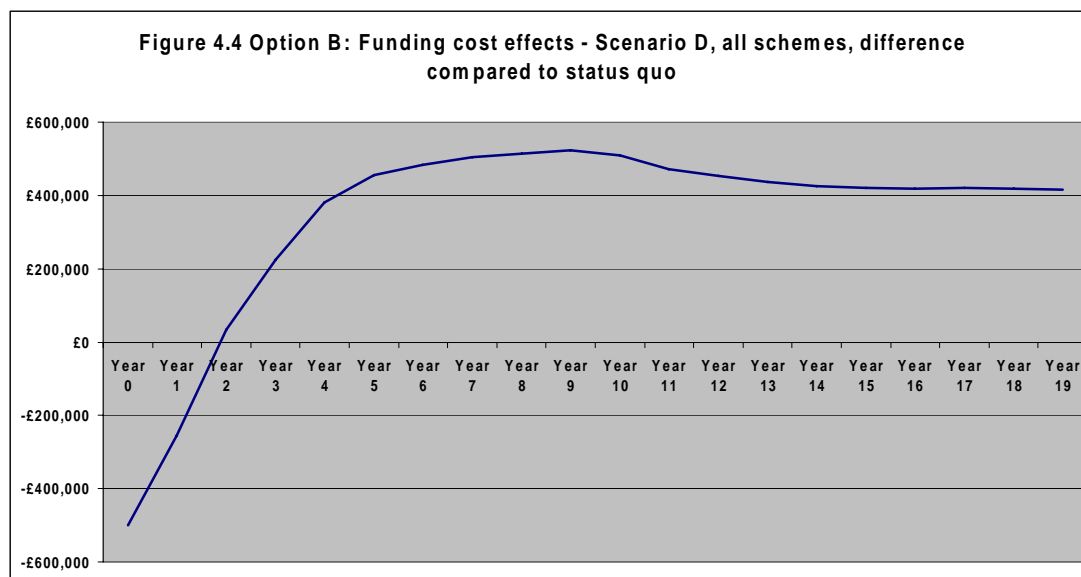
In the statistical model, proceedings started at FPC/Magistrates' Court level are mapped from ABWOR to the new arrangements while those at FCC/County Court or higher are mapped from CLA. The reduced number of such applications shown in Table 4.7 results from the strain-off effect discussed above. However, these effects are more than offset by the effect of FHL applications. Thus, the number of certificates that are issued (and hence have to be processed by the Commission) will increase under the Funding Code.

As the reduced number of money damages cases is included in the full implementation of the Code, full reports paid, which indicate the effect on the Legal Aid Fund, are reduced further by comparison with the Family Help effects shown in Table 4.6 above. In the best estimate scenario (D), full reports paid fall by £361k per annum, a reduction of -1.8 per cent compared to the status quo. In the best case scenario (E), full reports paid fall by almost five percent, with a worst case scenario (F) increase of +4 per cent.

However, it is very important to note the time profile of the full reports paid effect. As shown in Figure 4.4, the effect is negative for the first two years of the Funding Code. The reason is that Family Help Lower incurs costs from the outset, depending on the take-up rate, whereas the strain-off and mean case costs effects from the Family Help Level of Service take time to register an impact on the value of full reports paid.

In addition, as discussed in relation to the do minimum Option A, the funding cost effect from applying the quantifiable criteria to money damages cases also takes time to turn positive.

¹⁸ This effect is obtained by calculating a weighted average FHL fee in which the standard fee is tripled for the proportion of cases assumed to be strained off, on the basis that achieving a settlement will require extra input. This is why mean costs for scenario E are higher than the scenarios with 23 per cent strain-off.



The full implementation model includes also the quantifiable criteria. Hence, the damages awarded effect is of the same magnitude as was discussed above in relation to Option A i.e. a drop of about £3m per annum, regardless of the full implementation scenario. Again, it should be noted that, insofar as those with money damages claims are able to pursue an alternative route to legal aid, the effect will be mitigated.

The effect on revenues received by the legal profession from legally-aided cases is equivalent to the sum of full reports paid and direct authority cases. The distribution of the effect across the components of suppliers' costs is shown in Table 4.9. Under the best estimate scenario (D), solicitors' fees from legally-aided cases would fall by around £741k per annum, a six per cent drop compared to the status quo projection. Similarly, counsel fees would fall by around £489k, a decline of eight per cent relative to what would be expected under current arrangements. These effects are mainly due to the inclusion of the quantifiable criteria in the full implementation of the Funding Code. As can be seen from Table 4.7, the Funding Code effects on suppliers' revenues from legally-aided cases are larger for direct authority (money damages) cases than for Family Help cases.

As with the other effects discussed above, the impact on suppliers' revenues is subject to a degree of uncertainty, depending on the assumptions made in respect of the Family Help Level of Service. Nonetheless, the inclusion of the quantifiable criteria in the full implementation of the Funding Code means that, under any of the scenarios shown in Table 4.9, there is expected to be a reduction in suppliers' revenues from legally-aided work relative to current arrangements.

Table 4.7 Option B Full Funding Code – Difference from status quo, all Levels of Service, annual average

	A	B	C	D	E	F
Applications (Number)						
Family Help Lower	+957	+957	+1,913	+1,913	+1,913	+3,986
Mapped from ABWOR	-25	-25	-49	-49	-49	-103
Mapped from CLA	-135	-135	-151	-151	-169	-158
Total (excl. FHL)	-160	-160	-200	-200	-218	-261
Certificates (Number)						
1+ certificates (all Levels of Service)	+390	+328	+1,067	+1,067	+431	+3,529
1+ certificates (excl FHL)	-533	-594	-809	-779	-1,414	-315
Costs (£'000s)						
Full reports paid	-£135	-£710	-£519	-£361	-£972	+£798
Direct Authority	-£1,437	-£1,438	-£1,438	-£1,438	-£1,439	-£1,437
Damages (£'000s)						
Damages awarded	-£3,172	-£3,184	-£3,184	-£3,181	-£3,194	-£3,168

Table 4.8 Option B Full Funding Code – Percentage difference from status quo, all Levels of Service

	A	B	C	D	E	F
	%	%	%	%	%	%
Applications						
Family Help Lower	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Mapped from ABWOR	-0.3	-0.3	-0.6	-0.6	-0.6	-1.3
Mapped from CLA	-1.7	-1.7	-2.0	-2.0	-2.2	-2.1
Total (excl. FHL)	-1.0	-1.0	-1.3	-1.3	-1.4	-1.6
Certificates						
1+ certificates (all Levels of Service)	+2.9	+2.4	+7.9	+7.9	+3.2	+26.3
1+ certificates (excl FHL)	-4.0	-4.4	-6.0	-5.8	-10.5	-2.3
Costs						
Full reports paid	-0.7	-3.5	-2.6	-1.8	-4.8	+4.0
Direct Authority	-33.9	-33.9	-33.9	-33.9	-34.0	-33.9
Damages						
Damages awarded	-38.3	-38.4	-38.4	-38.4	-38.5	-38.2

Table 4.9 Option B Full Funding Code – Effect on suppliers: Difference from status quo, all Levels of Service

	A	B	C	D	E	F
£'000s						
Profits	-£699	-£964	-£816	-£741	-£1,018	-£91
Fees	-£389	-£531	-£519	-£489	-£664	-£242
Disbursements	-£297	-£400	-£394	-£360	-£449	-£235
VAT	-£186	-£252	-£227	-£210	-£280	-£70
Total	-£1,572	-£2,148	-£1,956	-£1,799	-£2,411	-£639
Percentage difference						
Profits	-5.8	-7.9	-6.7	-6.1	-8.4	-0.8
Fees	-6.3	-8.6	-8.4	-7.9	-10.8	-3.9
Disbursements	-9.5	-12.8	-12.6	-11.5	-14.4	-7.5
VAT	-6.4	-8.6	-7.8	-7.2	-9.6	-2.4
Total	-6.5	-8.8	-8.0	-7.4	-9.9	-2.6

4.5.3 Benefits and Costs

For each full implementation scenario, estimated costs and benefits are shown in Table 4.10, again by comparison with what would be expected to transpire under current arrangements.

One-off costs include two components:

- Administrative costs associated with training Commission staff to implement the new arrangements.
- The first two years of Family Help Lower, reflecting the funding cost effect described in Figure 4.3 above.

Similarly, ongoing costs comprise administrative costs and funding of FHL. The ongoing administrative costs arise primarily from the higher volumes of activity in relation to processing of applications and certificates (see Table 4.7 above). There is also a recurring cost from funding of FHL, which has been included as a cost since it is a new scheme without a direct counterpart within existing arrangements.

Similar to Option A above, the annual average benefit shown in Table 4.10 is the full reports paid effect from Table 4.7, net of VAT payments to suppliers. In the best estimate scenario, the net benefit (discounted at 3.5 per cent) over the 20 year projection period is almost £3.5m. This is in excess of the net benefit from Option A (see Table 4.3 above). Since Option B would also provide the Commission with greater scope to realise the objectives and intended effects from the Code, Option B is to be preferred. There are, however, two points to note in that regard.

First, while they are unlikely to materialise, the best and worst case scenarios (E and F respectively) serve to illustrate the uncertainty that exists in relation to the net benefits that can be expected from full implementation of the Code. The worst case scenario shows what would be expected to happen if the Family Help Level of Service proved ineffective in meeting its objectives.

Conversely, the remaining scenarios indicate that a positive benefit is achievable, under the following conditions:

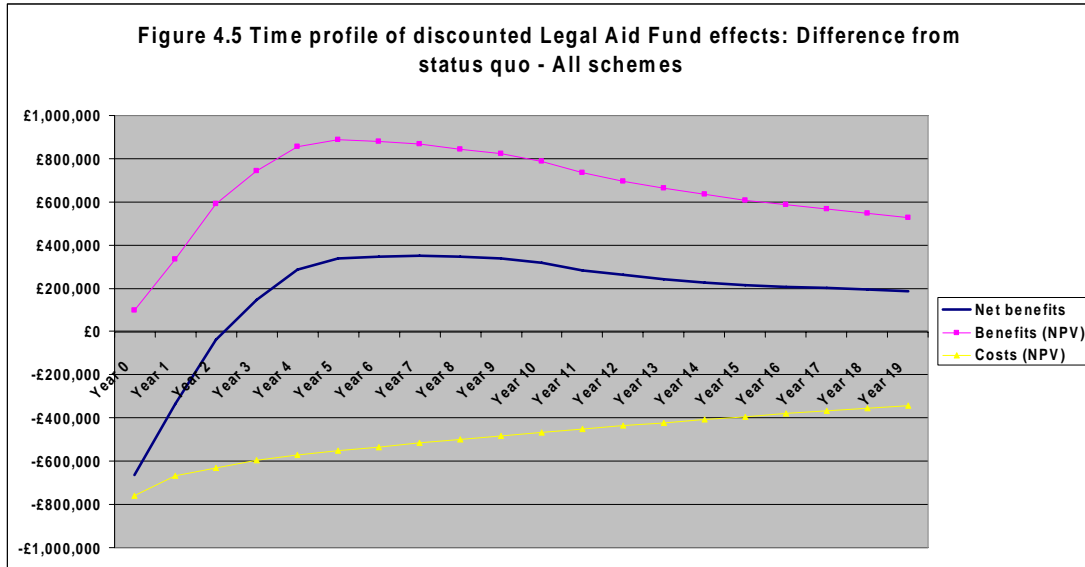
- Take-up of FHL is directed towards meeting the intended effect i.e. to help in resolving family disputes that can be settled between the parties without proceedings, and this is achieved with a degree of effectiveness.
- Availing of the opportunity for transactional challenge in respect of cases that seek to move from Family Help to Full Representation.

Table 4.10 Option B Full Funding Code: Benefits and costs compared to status quo

	A	B	C	D	E	F
	<i>£'000s</i>	<i>£'000s</i>	<i>£'000s</i>	<i>£'000s</i>	<i>£'000s</i>	<i>£'000s</i>
Costs						
One-off						
Admin	£83	£83	£84	£85	£84	£88
FHL (Years 1 and 2)	£598	£598	£1,197	£1,197	£1,730	£1,700
Average annual						
Admin	£32	£19	£58	£62	£33	£180
FHL	£300	£300	£599	£599	£866	£851
Total (PV)	£4,977	£4,793	£9,771	£9,825	£13,338	£15,268
Benefits						
One-off	0	0	0	0	0	0
Average annual	£431	£938	£1,074	£937	£1,742	£182
Total (PV)	£6,108	£13,045	£15,007	£13,276	£24,530	£2,563
Net Benefit (NPV)	£1,131	£8,253	£5,236	£3,451	£11,192	-£12,705

PV = Present value. Public costs and benefits discounted at 3.5% per annum, over 20-year time period.

Second, under any scenario, it is likely that there will be a time lag between the commencement of the Funding Code and the accrual of net benefits, as illustrated in Figure 4.5 for the best estimate scenario. The implementation costs will be front-loaded. The new FHL scheme will need to be funded from the outset, but benefits from the realisation of the intended effects will take longer to materialise.



4.6 Summary

This Section has considered the quantifiable effects of options for the implementation of the Funding Code on a range of affected groups and sectors. The main findings are summarised below.

Two options were assessed, by comparison with current arrangements, as follows:

- Option A – implementation of the quantifiable criteria only. This served to highlight the effects in respect of money damages cases.
- Option B – full implementation of the Funding Code.

The main results are shown in Table 4.11. Full implementation has the potential to generate a higher level of quantifiable benefits and would also provide the Commission with greater scope to realise the objectives and intended effects from the Code. For those reasons, Option B is preferred.

Table 4.11 Summary Table: Difference compared to status quo

	Option A	Option B (best estimate)
	<i>£'000s</i>	<i>£'000s</i>
Costs		
One-off	£21	£1,281
Average annual	£55	£661
Total (PV)	£863	£9,825
Benefits		
One-off	0	£0
Average annual	£129	£937
Total (PV)	£1,748	£13,276
Net Benefit (NPV)	£885	£3,451

PV = Present value. Public costs and benefits discounted at 3.5% per annum, over 20-year time period.

The benefits from the preferred option derive from the potential impacts on the Legal Aid Fund. The following points can be noted in that regard:

- There will be a relatively limited effect on the value of full reports paid from the introduction of the quantifiable criteria for money damages cases.
- Family Help Lower is a discrete new level of service, which will absorb funds.
- The Family Help Level of Service offers the potential to realise benefits, by encouraging earlier settlement of disputes (the strain-off effect) and greater scope to challenge cases seeking to proceed to a contested final hearing. Insofar as they are realised, these effects will generate a positive net benefit. But the putative benefits are not guaranteed to happen.
- In that regard, it can be noted that some concerns were expressed by solicitors regarding the alternative dispute resolution (ADR) and mediation 'infrastructure' in Northern Ireland.

On the administration side, the Commission will need to anticipate and address the following issues:

- The increased complexity associated with administering the new levels of service.
- Set-up and bridging costs from the current arrangements.

Regarding the client side and those with justiciable problems, the following can be noted:

- The application of the quantifiable criteria will reduce the number of persons assisted in money damages cases. Compared to current arrangements, damages awarded to legally-aided persons in such cases would fall by around £3m per annum.
- If such individuals cannot make other arrangements, there is a potential for unmet need in money damages cases.
- The unmet need effect is uncertain. Solicitors interviewed for this assessment expressed a range of views, from relatively sanguine ("if chances are good, would still run with it") to pessimistic (fewer able to pursue a claim, strengthens hand of insurance companies).
- While the effect cannot be quantified, insofar as those with money damages claims are unable to pursue a claim, there may also be a knock-on effect on recovery of benefits from compensation awards.
- To the extent that the Funding Code is effective in promoting earlier dispute resolution, the introduction of the Family Help Level of Service can be expected to produce social benefits for those in receipt of legal

aid. For example, the evidence from legal needs surveys is that the experience of a legal problem or dispute can have severe adverse impacts on an individual's health and wellbeing.

Regarding the voluntary sector, the main finding is that there will be no impact from the Funding Code, taken in isolation from other elements of reform agenda.

As the suppliers of publicly funded legal services, the legal profession will be affected by the implementation of the Funding Code. The following points can be noted from the analysis in this Section and the interviews with solicitor firms:

- Solicitor firms with a personal injury focus do not at this juncture see the rationale for the prospects of success and benefit cost ratio tests.
- It is likely that the profession will experience some loss of revenue from the reduction in money damages certificates.
- The changes will affect some more than others.
- Generally, solicitors with a focus on family cases were less concerned about the changes.
- It is apparent that there is some confusion regarding the £5,000 damages threshold for money damages cases, which applies to cases where prospects are unclear.
- Solicitors expressed a range of views regarding the promotion of ADR methods. Some favoured that thrust, others took the view that solicitors already act to negotiate settlements.
- Regarding the administration impact, solicitors had no issue with the forms currently in use in England and Wales for the new levels of service. Some concerns were expressed regarding additional stages and the potential for increased complexity.

5 Specific Impact Tests

5.1 Introduction

The BERR Guidance outlines a number of specific impact tests that aim to ensure policy development is joined up and that individual policy proposals take account of the Government's broad policy objectives. The main tests relevant to this Impact Assessment are as follows:

- Competition assessment.
- Small firms impact test.
- Rural proofing.
- Equality.

The Commission has published, in July 2009, an equality impact assessment (EQIA) of the Funding Code for consultation. Hence this Section focuses primarily on the competition, small firms and rural impacts.

5.2 Competition

The competition assessment focuses on whether the intervention limits the number or range of suppliers, whether directly or indirectly, and/or whether the intervention affects the competitive position of suppliers. The competition assessment addresses the following issues i.e. would the proposal:

- Directly limit the number or range of suppliers?
- Indirectly limit the number or range of suppliers?
- Limit the ability of suppliers to compete?
- Reduce suppliers' incentives to compete vigorously?

The market affected by the Funding Code is the supply of publicly funded legal services. Based on the assessment of costs and benefits, the main effect from the Funding Code will be to change the composition of demand for such services. In relative terms, the proportion of legally-aided services accounted for by money damages cases will decrease while the proportion going to children and family cases will rise (Table 5.1). An important point to note is that the changes effected by the Funding Code will accentuate trends already apparent in the composition of applications for legal aid. Indeed, the Funding Code effects are of a smaller magnitude by comparison with the changes already taking shape (Table 5.1).

Table 5.1 Option B Full Funding Code: Projected shift in composition of assessed gross total costs and bills - All legal aid, advice and assistance schemes, 2007/08 baseline to 2017, Scenario D compared to status quo and trends

	2007-08	Projected 2017		Shift due to:	
		Status quo	Funding Code	Trends	Funding Code
	%	%	%	pps	pps
Special Children Order proceedings	10.9	17.5	19.0	6.6	1.5
Risk of loss of life or liberty	1.2	1.7	1.9	0.6	0.2
Welfare/debt/housing	0.5	0.8	0.9	0.3	0.1
Domestic violence	4.9	6.1	6.7	1.3	0.5
Welfare of children, excl special Children Order	17.9	23.3	25.4	5.4	2.1
Proceedings against public authorities	4.3	6.4	7.0	2.1	0.6
Family/divorce/matrimonial	17.4	17.3	17.3	-0.1	0.1
Money damages	36.2	16.8	11.1	-19.4	-5.7
Other legal needs	2.5	4.2	4.3	1.7	0.2
Injunctions, appeals nec	4.3	6.0	6.5	1.7	0.5
All	100	100.0	100.0		
<i>Base (£'000s)</i>	<i>36,689</i>	<i>27,662</i>	<i>25,420</i>	<i>-9,027</i>	<i>-2,241</i>

5.2.1 The Market

Prior to considering the competition issues, it is useful to review briefly some salient aspects of the market for publicly funded legal services in Northern Ireland.

As of 2007, the Northern Ireland Legal Services sector was comprised of¹⁹:

- 1,850 practicing solicitors.
- 800 solicitor practices.
- 600 barristers.

Considering all Civil Legal Aid certificates issued between 2001/02 and 2007/08 as well as ABWOR certificates and Green Form acts of assistance between 2003/04 and 2007/08, the following can be noted:

- 560 solicitor firms provided some form of civil legal aid, advice or assistance.
- Measured by assessed gross total costs of CLA reports and ABWOR and Green Form bills, no firm had more than a 10 per cent market share.
- The three largest firms accounted for less than seven per cent of the total value of publicly funded civil legal services.
- The top 10 firms accounted for 17 per cent of the total value of publicly funded civil legal services.

The market is not, therefore, dominated by any one firm. Some firms tend to be more highly specialised in one area of law than in others. But even within each of the individual Funding Code priorities, no single firm is in a dominant position. As can be seen from Table 5.2, across the Funding code priorities, the share of the total value of services accounted for by the top 10 firms *within* each priority ranges from less than 14 per cent in family and money damages cases to 47 per cent in proceedings against public authorities.

The spread of solicitor firms within each priority area is also evident from the proportions that have assisted at least one client in that area within the period covered. Again, the spread is particularly evident in money damages (94 per cent of firms) and family/divorce/matrimonial (80 per cent).

The mean number of priorities in which firms have provided at least one service is seven, with a median of eight. Only a small proportion of firms (5.5 per cent) have provided services within one priority only.

¹⁹ NICtS, 2007, para 138.

**Table 5.2 Solicitor firms providing legal aid, advice and assistance:
All with CLA certificates granted 2001/02 to 2007/08, ABWOR and
Green Form bills, 2003-04 to 2007/08**

	Top 10 firms by amounts paid in each priority - % of total value	Per cent with: 1+ cases	Cases in 1 priority only
Special Children Order proceedings	15.7	56.4	0.2
Risk of loss of life or liberty	23.4	44.5	0.0
Welfare/Debt/Housing	24.3	68.4	0.2
Domestic violence	14.3	74.1	0.4
Welfare of children, excl special Children Order	17.3	81.1	0.2
Proceedings against public authorities	46.6	50.4	0.0
Family/divorce/matrimonial	13.6	86.3	0.5
Money damages	13.6	94.1	3.6
Other legal needs	14.9	80.2	0.4
Injunctions, appeals nec	25.5	66.3	0.2
All	17.4	100.0	5.5

The majority of solicitors in Northern Ireland are in small law firms (Peysner, 2007). It is not possible from the NILSC's administrative data to calculate the size distribution of firms supplying publicly funded legal services. It is, however, possible to classify firms according to the total value of reports and bills they have generated from Civil Legal Aid certificates issued between 2001/02 and 2007/08, as well as ABWOR certificates and Green Form acts of assistance between 2003/04 and 2007/08. The results, by priority, are shown in Table 5.3.

As can be seen, in the bands above £250k, almost all firms (accounting for one third of the total) have supplied services across all Funding Code priorities and case type categories. Even in the £100k-£249k band, the majority of firms have participated across the range of problem types addressed by the Funding Code.

Table 5.3 Solicitor firms providing legal aid, advice and assistance classified by total value of reports and bills: CLA certificates granted 2001/02 to 2007/08, ABWOR and Green Form bills, 2003-04 to 2007/08 – Per cent of firms supplying at least one service by Funding Code priority

	Assessed gross total / bills paid:					All firms
	LT £100k	£100k- £249k	£250k- £499k	£500k- £999k	£1m+	
	%	%	%	%	%	%
Special Children Order proceedings	26.5	80.0	89.5	98.3	100.0	57.7
Risk of loss of life or liberty	19.9	55.0	73.7	84.5	97.2	45.9
Welfare/debt/housing	49.3	84.0	96.1	94.8	100.0	70.5
Domestic violence	57.4	91.0	98.7	98.3	97.2	76.4
Welfare of children, excl Special Children Order	67.3	97.0	100.0	100.0	100.0	83.0
Proceedings against public authorities	25.4	62.0	80.3	94.8	97.2	52.0
Family/divorce/matrimonial	77.9	97.0	100.0	98.3	100.0	88.2
Money damages	90.1	98.0	100.0	100.0	100.0	94.6
Other legal needs	66.5	95.0	100.0	98.3	100.0	82.1
Injunctions, appeals nec	43.0	85.0	97.4	100.0	97.2	68.1
<i>Number</i>	<i>272</i>	<i>100</i>	<i>76</i>	<i>58</i>	<i>36</i>	<i>542</i>

Overall, the data show a diverse pattern of supply across a large number of firms, none of which occupies a dominant position in the Funding Code priority areas. The question is whether the Funding Code will substantially change that pattern. The short answer is that it is very unlikely to do so, as discussed below.

5.2.2 Number or range of suppliers

The Funding Code changes do not involve regulating access to the market, only the criteria for deciding whether to fund an application for legal aid, advice or assistance. Unlike England and Wales, legal aid work in Northern Ireland is not contracted. This situation will not change as a result of the Funding Code. The Funding Code contains no provisions that would, for example, entail the award of exclusive rights to supply or procurement from any restricted group of suppliers. Nor does the Code create any form of licensing scheme or impose any form of fixed limits or quotas on suppliers. There will therefore be no direct effect on the ability of suppliers to enter the market.

Insofar as it affects the composition of demand for publicly funded legal services, the Funding Code may indirectly affect the structure of the market. However, such effects are likely to be minor, for the following reasons:

- The two highest priority areas – Special Children Order and risk of loss of life or liberty – already have relatively high issue rates for legal aid applications (see Figure 3.4 above). This is unlikely to change.
- As measured by the proportion of firms having provided one or more publicly funded legal services, participation by solicitors firms in family related matters is already at high levels (Table 5.2 above), indicating an absence of barriers to entry.
- Almost all firms have supplied services in relation to money damages. These firms, however, are not confined to that area of work, where there is already a declining level of applications.

Two final points can be noted. First, on the cost side, the Funding Code will not act as a deterrent to entry by new firms. Application forms will change but, from discussions with solicitors, this will not have any noticeable impact.

Second, insofar as it seeks to encourage earlier resolution without recourse to the courts, the Funding Code will encourage the market for mediation skills. This is within the context of meeting policy objectives for the development of publicly funded legal services, including value-for-money.

5.2.3 Ability to compete

The Funding Code would not be expected to limit the ability of suppliers to compete. Nor would the Code have the effect of reducing incentives to compete. The Code is about decisions to fund legal services from the public purse. The Code *per se* does not include any provision that relates to the prices that suppliers may charge.

5.3 Small Firms

As stated in the BERR guidance, the Small Firms Impact Test becomes a mandatory part of the Impact Assessment process when the proposed intervention imposes or reduces costs on business. The key issue is whether the intervention has a disproportionate effect on small businesses e.g. if larger businesses have greater scope for streamlining administrative requirements to contain unit costs.

It is, however, important to bear in mind that the Funding Code is not seeking to regulate the behaviour of firms supplying legal services. Rather, the Code involves a change in decision-making criteria and will entail new procedures in applying for legal aid. To that extent, it is difficult, if not impossible, to envisage how the implementation of the Code could be modified to distinguish between different *sizes* of providers i.e. micro, small, medium and large.

Furthermore, from the discussions with solicitors, it is apparent that the main concern is the impact on access to legal aid for money damages cases. As noted earlier, the solicitors interviewed for this assessment did not regard the application forms used for comparable levels of service in England and Wales as any more onerous than the set of forms used for the current schemes. If anything, the forms used in England and Wales were viewed as more straightforward.

5.4 Rural

The rural proofing in the assessment process is designed to test whether the proposed intervention would have a different impact in rural as compared to urban areas and whether that impact would be significant (Countryside Agency, 2002; CRC, 2009). In the context of the Funding Code, there are two main issues to consider:

- Needs i.e. whether the Funding Code changes will have a differential effect on those with legal needs in rural as compared to urban areas.
- Access to services i.e. whether the Funding Code changes will alter the level of access to legal services of rural as compared to urban residents.

5.4.1 Needs

Among those availing of legal aid, advice and assistance in the period from 2003/04 to 2007/08, it is possible to classify 60 per cent according to whether they were resident in an urban or a rural location²⁰. The results are shown, by problem type, in Table 5.4. As can be seen, for those for whom an assignment was possible, the estimated urban:rural split is 78:22, ranging from 70:30 in welfare/debt/housing cases to 87:13 in special Children Order proceedings.

**Table 5.4 Legal aid, advice and assistance, 2003/04 to 2007/08:
Urban-rural split**

	Location known:			<i>Not known</i>
	Urban	Rural	All	
	%	%	%	%
Special Children Order proceedings	86.6	13.4	100.0	48.2
Risk of loss of life or liberty	83.9	16.1	100.0	58.1
Welfare/Debt/Housing	69.8	30.2	100.0	44.5
Domestic violence	80.5	19.5	100.0	40.6
Welfare of children, excl special Children Order	81.1	18.9	100.0	39.4
Proceedings against public authorities	77.7	22.3	100.0	46.3
Family/divorce/matrimonial	74.0	26.0	100.0	35.4
Money damages	81.4	18.6	100.0	36.1
Other legal needs	74.1	25.9	100.0	43.5
Injunctions, appeals nec	75.4	24.6	100.0	38.4
All	78.3	21.7	100.0	40.7

According to the 2001 Census of Population, the urban:rural split in the population was 67:33. However, this is not the most relevant comparator in the context of publicly funded legal services. In particular, the urban:rural split in relation to those living in the 30 per cent most deprived areas, based on 2005 figures, was 82:18. Amongst those living in the most deprived 30 per cent of areas based on the child poverty deprivation indicator, the urban:rural split in 2005 was 87:13. The deprivation-based comparators would suggest that rural residents are not under-represented in the baseline position for the urban:rural split among those using publicly funded legal services.

²⁰ The classification is based on classifying postcodes as urban or rural, using NISRA's Central Postcode Directory.

In addition, it can be noted that, according to the NI Legal Needs Survey, the incidence of justiciable problems tends to be somewhat higher in urban than in rural areas (Dignan, 2006). Thus, the Legal Needs Survey found that 42 per cent of those in the Belfast area had experienced a justiciable problem in the preceding three years compared with 36 per cent in other urban areas and 33 per cent in rural areas.

Overall, the baseline urban:rural split among those using publicly funded legal services would appear to be proportional to the distribution of legal needs. The Funding Code priorities are unlikely to alter that position.

5.4.2 Providers

A second possible impact from the Funding Code would be if it changed the pattern of provision to the detriment of rural areas. In assessing that issue, it is more useful to consider the distribution of legal services providers by type of settlement, since providers tend to be located across the urban settlement hierarchy rather than in rural areas *per se*. As can be seen from Table 5.5, rural dwellers access legal services mainly via large, medium and small towns. This reflects the relatively dispersed pattern of solicitors' practices in Northern Ireland.

**Table 5.5 Legal aid, advice and assistance, 2003/04 to 2007/08:
Location of solicitors' offices by urban:rural split in clients**

	Urban	Rural	Not known	All
	%	%	%	%
Belfast MUA	56.2	17.1	38.0	43.8
Derry MUA	6.9	5.4	12.5	9.0
Large town	20.0	28.2	25.4	23.3
Medium town	11.2	30.1	17.9	16.4
Small town	5.0	15.1	5.0	6.3
Intermediate settlement	0.2	2.3	0.5	0.6
Village	0.4	1.8	0.7	0.7
All	100.0	100.0	100.0	100.0

So long as solicitors' practices remain dispersed throughout the urban hierarchy, the Funding Code changes will not differentially affect access to services by rural dwellers. From Table 5.6, it can be seen that the settlement pattern in solicitors' practices does not vary greatly from one problem type to another. Indeed, the share of solicitors providing services from medium-sized towns tends to be higher in the Funding Code priority problem types as compared with the pattern for all problem types.

Table 5.6 Distribution by settlement type of solicitors' offices providing legal aid, advice and assistance: Based on CLA and ABWOR certificates and Green Form acts of assistance, 2003-04 to 2007/08

	Belfast MUA	Derry MUA	Large town	Medium town	Small town	Villages/ Other settle- ments	All	Base
	%	%	%	%	%	%	%	%
Special Children Order proceedings	37.0	6.6	26.4	17.5	8.0	4.6	100.0	349
Risk of loss of life or liberty	40.7	7.5	25.8	16.6	5.8	3.7	100.0	295
Welfare/debt/housing	42.6	6.3	23.4	16.6	7.0	4.1	100.0	441
Domestic violence	43.6	6.1	23.1	15.5	7.6	4.1	100.0	489
Welfare of children, excl special Children Order	42.9	6.0	23.1	15.6	7.3	5.1	100.0	532
Proceedings against public authorities	49.3	6.1	21.3	13.9	5.7	3.7	100.0	296
Family/divorce/matrimonial	44.6	5.4	22.4	15.2	7.5	4.8	100.0	558
Money damages	46.3	5.6	22.5	14.2	6.9	4.4	100.0	590
Other legal needs	43.8	5.6	23.1	15.5	7.4	4.7	100.0	516
Injunctions, appeals nec	43.6	6.4	24.8	15.3	6.4	3.5	100.0	404
All	45.6	5.6	21.7	14.0	7.3	5.8	100.0	658
<i>Number</i>	<i>300</i>	<i>37</i>	<i>143</i>	<i>92</i>	<i>48</i>	<i>38</i>		

5.5 Equality

Section 75 of the Northern Ireland Act 1998 requires public authorities to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally, persons with a disability and persons without, and persons with dependants and persons without. The Act also requires public authorities to “have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group”.

As noted earlier, the Funding Code has already been subjected to a full section 75 equality impact assessment. The assessment for each of the nine groups is reproduced in Table 5.7.

Table 5.7 Assessment of Equality Impacts (from Final Equality Impact Assessment)

Category	Assessment
Religion	None identified
Political Opinion	None identified
Racial Group	Positive differential impact
Age	Positive differential impact
Marital Status	Positive differential impact
Sexual Orientation	None identified
Gender	Positive differential impact
Dependants	Positive differential impact
Disability	Positive differential impact

The EQIA concluded that the differential impacts shown in Table 5.7 were based on need and “therefore necessary to promote equality of opportunity for these groups and to secure fair and equal access to justice”. The overall conclusion drawn by the EQIA was that “an adverse impact arising on any of the Section 75 groups from the implementation of the proposed Funding Code was found to be unlikely”.

5.6 Summary

This Section has considered the impact of the Funding Code in relation to competition, small firms, rural proofing and equality. The following are the main conclusions:

- **Competition.** Publicly funded legal services currently show a diverse pattern of supply across a large number of solicitors' firms, none of which occupies a dominant position in the Funding Code priority areas. It is considered unlikely that the Funding Code will change that pattern. Insofar as it affects the composition of demand for publicly funded legal services, the Code may indirectly affect the structure of the market. For example, there will be fewer opportunities for money damages cases. It is not anticipated that this will adversely affect competition in the market for publicly funded legal services. Indeed, there may be an offsetting increase, at least to a degree, in the demand for privately funded legal services in pursuit of money damages claims.
- **Small firms.** The Funding Code involves a change in decision-making criteria and will entail new procedures in applying for legal aid. It does not regulate the behaviour of firms. Application forms will change but, from discussions with solicitors, this will not have any noticeable impact.
- **Rural proofing.** There is no evidence to suggest that the Funding Code will have a differential impact on rural areas, either in respect of the needs addressed by the Code or access to providers. Reflecting the dispersed nature of the profession in Northern Ireland, solicitors' practices are well represented in the settlement types most often used by rural dwellers (medium and small towns and villages/other settlements). It can also be noted that none of the responses to the Funding Code consultation and other documents alluded to the possibility of a different impact on rural areas.
- **Equality.** The Commission has conducted a full equality impact assessment of the Funding Code, which concluded that the implementation of the Funding Code is unlikely to have an adverse impact on any of the section 75 groups.

6 Summary and Recommendation

6.1 Monitoring

The key indicators to be monitored in the implementation of the preferred option are as follows:

- Take-up of Family Help Lower. This should be straightforward to monitor from administrative arrangements.
- Family Help Lower strain-off rate i.e. the proportion of those assisted by Family Help Lower who resolve their dispute without recourse to the issue of court proceedings. The Commission will need to monitor outcomes from Family Help Lower.
- Contested final hearing. The proportion of those who are assisted via Family Help Higher and who seek to proceed to a contested final hearing, thereby triggering an application for Full Representation. It should be possible to monitor this indicator from administrative systems.
- Full Representation certificate issue rate i.e. the proportion of those who apply for Full Representation from Family Help Higher and are approved for a certificate. Again, it should be possible to monitor this indicator from administrative systems.

The impact assessment has identified a number of potential risks to the realisation of the potential benefits from the full implementation of the Funding code that will need to be managed by the Commission:

- The potential for increased complexity and bureaucracy, arising from the introduction of new Levels of Service compared to current schemes, particularly in respect of Family Help. This risk can be managed through ensuring clarity in the guidance regarding the application procedures and the criteria for 'progression' from one level of service to another.
- While the new levels of service are not tied to particular court levels, the current means tests continue to vary by court level. This is a potential source of complexity because the current means tests vary also in their population coverage. In the implementation of the Funding Code, managing this risk will also require clarity in the guidance as to the means testing requirements. The interaction between the existing means tests and the Funding Code levels of service should be assessed at the interim stage of the post-implementation review.
- The availability of legal aid for money damages cases will reduce, raising the potential for unmet need among persons wishing to pursue

such a claim. The Commission will need to keep the situation under review. As part of the interim post-implementation review, the Commission should consider a research exercise to determine whether money damages applications rejected on the basis of the new tests have been able to obtain an alternative source of assistance.

- Lack of effectiveness in the new levels of service e.g. high take-up but low strain-off from Family Help Lower. Managing this risk will require close monitoring of the indicators listed above. The Commission will also want to monitor the 'supply' of mediation services and to engage with the legal profession to ensure a common understanding of the objectives of the new Family Help level of service.

6.2 Post-implementation Review

Reflecting the timescales involved in many legally aided cases, the analysis of the profile of anticipated benefits from the full implementation of the Funding Code suggests that costs are likely to outweigh benefits at least in the first two years of implementation. Time will be needed to bed in the new levels of service.

In that context, the implementation of the Code should be subjected to an interim post-implementation review after three years with a full review after five years.

The focus of the interim review should be on the monitoring indicators listed above, with the following objectives:

- Establish how well the A2B initiative is on course in achieving the intended effects.
- Update and review of risks affecting the achievement of intended effects.
- Identify actions required to improve performance.

The full post-implementation review should be undertaken to examine in detail the costs and benefits from the Funding Code.

6.3 Summary and Recommendation

The rate of increase in the demands placed on the legal aid fund is not sustainable. In that context, the Funding Code is a critical element in the reform and modernisation of publicly funded legal services in Northern Ireland. It will operate alongside the civil fees project, the introduction of Community Legal Services and other initiatives. The reforms will enable civil legal services to operate within a controlled budget, to ensure that limited

available resources can be directed to cases where need is greatest and to extract maximum value for money from the available resources.

Having considered the costs and benefits, the preferred option is full implementation of the Funding Code. Compared to more limited or partial options, this has the following advantages:

- Meeting the requirements of the Access to Justice (NI) Order 2003, notably Article 15(1) which requires the Commission to prepare a code.
- Full implementation provides the Commission with greater scope to realise the objectives and intended effects from the Code.

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Appendix A

Table A.1 Problem types by Funding Code priority: Civil Legal Aid and ABWOR applications and Green Form acts of assistance, 2003/04 to 2007/08

Priority	Problem	CLA	ABWOR	Green Form
Special Children Order proceedings	Priority Children Order	2,452	4,237	0
Risk of loss of life or liberty	Bail	4,158	0	402
	Immigration	744	0	1,127
Welfare/debt/housing	Welfare/Debt/Housing	477	18	17,878
Domestic violence	Domestic violence	861	18,000	1,880
Welfare of children, excl special Children Order	Adoption/Affiliation/Wardship	1,155	0	129
	Other children	2,942	19,636	5,777
Proceedings against public authorities	Assault/Battery/Trespass	1,023	0	226
	Judicial/Statutory Reviews	1,728	0	353
Family/divorce/matrimonial	Divorce/Nullity	10,221	0	1,057
	Maintenance/Other Matrimonial/Partition	2,367	3,229	5,513
Money damages	Criminal Injury	2,014	0	6,395
	Employers Liability	2,305	0	929
	Negligence - General	4,928	0	3,447
	Negligence - Medical	1,463	0	699
	Negligence - Tripping	2,523	0	1,813

Table A.1 Problem types by Funding Code priority: Civil Legal Aid and ABWOR applications and Green Form acts of assistance, 2003/04 to 2007/08

Priority	Problem	CLA	ABWOR	Green Form
	Road Traffic Accidents	2,702	0	2,611
Other legal needs	Contract/Bankruptcy	564	0	1,607
	Other nec	1,820	0	8,773
Injunctions, appeals nec	Appeals	874	881	230
	Injunction	2,955	0	979
All		50,276	46,001	61,825

Table A.2 Civil Legal Aid Applications, by Funding Code priority: 2001-02 to 2007/08

Priority:	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
	<i>Number of applications</i>						
Special Children Order proceedings	581	552	570	529	387	412	554
Risk of loss of life or liberty	464	537	875	801	885	980	1,361
Welfare/debt/housing	106	81	99	127	106	87	58
Domestic violence	127	158	177	169	217	136	162
Welfare of children, excl special Children Order	998	1,064	924	808	824	736	805
Proceedings against public authorities	883	778	728	702	505	400	416
Family/divorce/matrimonial	3,235	3,141	3,038	2,355	2,777	2,444	1,974
Money damages	7,575	6,152	5,291	3,657	3,307	2,061	1,619
Other legal needs	568	539	514	481	567	397	425
Injunctions, appeals nec	500	597	715	868	991	681	574
All	15,037	13,599	12,931	10,497	10,566	8,334	7,948

Table A.3 ABWOR (including Children Order) Applications by Funding Code priority: 2003/04 to 2007/08

Priority:	2003/04	2004/05	2005/06	2006/07	2007/08
	<i>Number of applications</i>				
Special Children Order proceedings	955	853	772	737	920
Risk of loss of life or liberty	0	0	0	0	0
Welfare/debt/housing	3	1	1	5	8
Domestic violence	4,174	3,634	3,610	3,419	3,163
Welfare of children, excl special Children Order	4,502	3,777	4,068	3,720	3,569
Proceedings against public authorities	0	0	0	0	0
Family/divorce/matrimonial	965	777	576	542	369
Money damages	0	0	0	0	0
Other legal needs	0	0	0	0	0
Injunctions, appeals nec	135	166	168	217	195
All	10,734	9,208	9,195	8,640	8,224

Table A.4 Legal Advice and Assistance (Green Form) bills by Funding Code priority (civil matters only): 2005/06 to 2007/08

Priority:	2005/06	2006/07	2007/08
	<i>Number of bills</i>		
Special Children Order proceedings	0	0	0
Risk of loss of life or liberty	275	296	360
Welfare/debt/housing	3,582	2,635	1,534
Domestic violence	362	344	264
Welfare of children, excl special Children Order	1,244	1,178	1,015
Proceedings against public authorities	130	84	71
Family/divorce/matrimonial	1,325	1,087	842
Money damages	3,228	2,275	1,799
Other legal needs	1,720	1,410	1,326
Injunctions, appeals nec	302	211	175
All	12,168	9,520	7,386

Figure A.1 Modelling Framework

