



NORTHERN IRELAND
Legal Services
Commission

The Northern Ireland Funding Code
Consultation Paper on the Proposed Criteria



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Foreword by Chairman

The Northern Ireland Legal Services Commission is publishing two consultation documents on the proposed criteria and procedures for the Northern Ireland Funding Code, together with Regulatory and Equality Impact Assessments. We think it useful to begin by providing some background on these documents.

When the Northern Ireland Legal Services Commission (the Commission) was established under Article 3 of the Access to Justice (Northern Ireland) Order 2003 in October 2003, the Commission was required by the Lord Chancellor to prepare a Northern Ireland Funding Code (the Code) in accordance with Article 15 of the Order.

The purpose of the Code is to set out the Criteria according to which decisions will be taken to fund civil legal services for an individual and identify what services should be funded. In earlier Exposure and Consultation papers on the Code the Commission consulted on the Lord Chancellor's priorities set out in the Funding Code of the Legal Services Commission in England and Wales and sought comment from consultees on the applicability of these priority areas for legally aided services in Northern Ireland. In addition to this consultation the Commission informed itself about priority funding areas by conducting a survey on legal need to ensure the priorities matched identified need and conducted an investigation of financial eligibility that

cross checked the alignment between existing provision of legal aid with Targeting Social Need groups. A paper detailing the Commission's rationale for priority areas for funding can be found on our website at (www.nilsc.org.uk).

On the basis of the evidence presented to it and of research into legal need, the Commission believes that the Lord Chancellor's priorities for funding legally aided services in England and Wales (www.legalservices.gov.uk) are equally applicable to NI and therefore propose to adopt the following priorities;

- 1) special children order proceedings (defined on p36 of the Code Criteria);
- 2) civil proceedings where the client is at real and immediate risk of loss of life or liberty;

After that the Commission would intend to give the following categories higher priority than others:

- 3) help with social welfare issues that will enable people to avoid or climb out of social exclusion, including help with housing proceedings (as defined within the Funding Code) and advice relating to debt, employment rights, and entitlement to social security;

- 4) domestic violence proceedings;
- 5) proceedings concerning the welfare of children (including proceedings under Part IV and Part V of the Children Order (Northern Ireland) 1995 not included above, adoption proceedings, and proceedings concerning residence); and
- 6) proceedings against public authorities alleging serious wrong doing, abuse of position or power or significant breach of human rights.

As required for legislative change of this importance, an Equality Impact Assessment (EQIA) and a Regulatory Impact Assessment (RIA) have been completed. The Commission will monitor and assess the actual impact of the Funding Code after implementation to ensure that no unintended differential impacts arise between different Section 75 groups. An RIA has also been completed which sets out the impact assessment of the proposals for change as set out in the Funding Code. The most notable impact identified is in the funding of money damages cases. The Commission is aware of the importance of this area of work to members of the legal profession and while it is not among the Lord Chancellor's Priority funding areas, the Commission will keep this area of funding under review after implementation of the Code.

The Commission considers the development and introduction of the Code to be an important step in the process of reform of publicly funded legal services in Northern Ireland. It is a further step towards full implementation of the 2003 Order and can be seen in the context of the other reforms currently being undertaken by the Commission. Parallel strands of work are ongoing to develop new Financial Eligibility Regulations; new Regulations governing the application of the Statutory Charge; a Registration Scheme and an Order governing remuneration in legally aided cases.

I should like to thank all who contributed to the work that has brought us to this point, including existing and former Commissioners, staff of the Commission, and colleagues in the Northern Ireland Court Service and from the Legal Services Commission of England and Wales.

The public consultation on the proposals for the NI Funding Code is being formally launched on the 29th June 2009 and lasts for 16 weeks.

About the Consultation Exercise

The current statutory basis for 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 (Northern Ireland) Order 2003 provides the legislation basis for the modernisation of the provision and administration of public legal services in Northern Ireland. Article 15 of the 2003 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. This paper sets out for public consultation the proposed Criteria. Please read this document in conjunction with the other supporting documentation, which is also available at www.nilsc.org.uk

How to respond

When responding to this consultation document, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.

Please submit your response to this consultation by post, fax or email to:

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Closing Date

Responses must be received by Friday 16th October 2009. We have extended the normal 12 week period to 16 weeks to allow for the summer holiday period.

Miscellaneous

Additional copies of this consultation document may be made without seeking permission from the Northern Ireland Legal Services Commission. Printed copies may be obtained by post by contacting the Consultation Co-ordinator. An electronic version is available on the Northern Ireland

Legal Services Commission's website www.nilsc.org.uk This document will also be made available in a wide range of alternative formats. Requests for alternative formats should again be made to the Consultation Co-ordinator.

Please tell us if you know of others who would be interested in receiving this consultation document.

Confidentiality and Complaints

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the Information access legislation (that is, the Freedom of Information Act 2000 [FOI] and the Data Protection Act 1998 [DPA]). If you want information that you provide to be treated as confidential, it would be helpful if you would explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system, or included as a general statement in your fax cover sheet will not, of itself, be regarded as binding on the Northern Ireland Legal Services Commission and will be taken to apply, therefore, only to information in your response for which confidentiality has been requested.

The Northern Ireland Legal Services Commission will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

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A copy of the consultation criteria being used in this consultation is set out in Annex 2 of this document.

Executive Summary

This paper sets out, for public consultation, the proposals relating to the setting of the Criteria for the Northern Ireland Funding Code. The Code will be made up of two parts; Code Criteria ('the criteria') and Code Procedures ('the procedures'). In addition the Code will be underpinned by detailed decision-making guidance. A Regulatory Impact Assessment on the Code has been circulated with this paper also.

The following are the key features of the consultation document chapters.

- Chapter 1 is a general introduction to the Funding Code Criteria and sets this consultation in the context and development of earlier papers on the Code.
- Chapter 2 provides information about the General Funding Code and the levels of service proposed, highlighting any differences from earlier consultations.
- Chapter 3 sets out the criteria for dealing with Family cases.
- Chapter 4 provides information on how the criteria should be applied to very high cost cases.
- Chapter 5 sets out the specific criteria that will apply to Clinical Negligence cases and deals with some of the responses to the previous consultation document in this area.
- Chapter 6 deals with how Money Damages cases will be treated under the Funding Code.
- Chapter 7 sets out the types of cases that will fall under Section 8 Claims against Public Authorities.
- Chapter 8 deals with the Conclusion to this paper. A general question on the Criteria is also set out here.
- Annex 1 lists the respondents to the previous consultation document 'The Northern Ireland Funding Code: A Consultation Paper on the Proposals for a Northern Ireland Funding Code'.
- Annex 2 Levels of Service Grid
- Annex 3 NI Funding Code Criteria
- Annex 4 Consultation Criteria

Chapter 1: Code in Context

- 1.1 The Northern Ireland Legal Services Commission ('the Commission') was established in October 2003 under Article 3 of the Access to Justice (Northern Ireland) Order 2003 ('the Order').
- 1.2 In accordance with Article 15 of that Order, the Commission is required to prepare a Funding Code, setting out the criteria according to which any decision is to be taken as to:
 - a) whether to fund (or continue to fund) civil legal services for an individual for whom they be funded by the Commission; and
 - b) if so, what services are to be funded for him.
- 1.3 This paper sets out for public consultation the proposed Code Criteria. The document is also available on the consultations section of our web-site at www.nilsc.org.uk
- 1.4 In April 2006 the Commission conducted an initial consultation on the Code's development, the exposure document entitled 'The Development of the Northern Ireland Funding Code' provided the Commission's early thinking on various pivotal issues including the key objectives of the Code, setting priorities for funding and the proposed levels of service to replace the existing legal aid schemes.
- 1.5 The responses received helped inform the consultation document issued in November 2006 ('The Northern Ireland Funding Code, A Consultation Paper on Proposals for the Northern Ireland Funding Code'.) This paper set out an introduction to the Code, the Commission's proposed approach to setting the criteria, and a copy of the draft criteria.
- 1.6 A total of 11 responses were received and these have helped to inform the proposals set out in this paper. A list of all those who responded is set out at Annex 2 of this paper.
- 1.7 The purpose of this paper is to illustrate the criteria the Commission are intending to adopt and to highlight any differences from our previous consultations and the rationale for these differences.
- 1.8 The Code Criteria will be supplemented by detailed guidance which will underpin the decision making processes and by the related Procedures (which have also been issued for Consultation).
- 1.9 The objective of the Code is to define criteria to ensure, as far as possible, that cases which satisfy those criteria receive public funding from within the budget allocated by the Government. The criteria are a vital tool to ensure that public funds are spent more

effectively to target social need and promote social inclusion particularly in an environment where the costs of legal aided cases are increasing year on year.

- 1.10 It is within this framework that flexibility of the Code is seen as its greatest strength, as it is through the application of different funding criteria to different case-types that public money for civil legal services can be directed to areas of greatest need. Under the new economic circumstances it is likely that legal need will alter and the Commission needs to be flexible enough to deal with these changes.

Chapter 2: General Funding Code and Levels of Service

- 2.1 The criteria in the General Funding Code will apply to all applications except to the extent that different criteria are specified for particular types of case. Section 4 of the Code criteria, for example, sets out the standard criteria which will apply to all applications under the Code. They include criteria to ensure that services can only be funded where they are within the scope of the Order.
- 2.2 The levels of service or new public funding schemes are also identified in the General Funding Code. In the Commission’s previous consultation document seven levels of service were proposed. However taking account of the responses received to this consultation and in line with the position adopted in England and Wales the Commission now proposes to adopt four levels of service namely;
- i) Legal Help
 - ii) Family Help (sub-divided into Family Help Lower and Family Help Higher)
 - iii) Legal Representation (sub-divided into Investigative Help and Full Representation)
 - iv) Such other services as are authorised by specific orders or directions from the Lord Chancellor
- 2.3 A grid explaining the new levels of service and when they will apply is included at Annex 2.
- 2.4 The definition of Legal Help, which is set out at section 2.1 of the Code criteria, covers initial advice and assistance beyond general information giving but excludes issuing or conducting court litigation. Legal Help replaces legal advice and assistance (‘Green Form’ scheme). The criteria to be applied to this level of service are set out at 5.2 of the Code criteria. Legal Help may only be provided where there is sufficient benefit to the client, having regard to all the circumstances of the matter, including the circumstances of the client to justify work being done. In addition Legal Help should not be provided unless it is reasonable for the matter to be funded out of civil legal services, having regard to any other sources of funding.
- 2.5 The levels of service specific to family proceedings are Family Help Lower and Family Help Higher. These levels of service have changed since our previous consultation and will be explained in further detail in Chapter Three.
- 2.6 Legal Representation will contain two subsets, namely Investigative Help and Full Representation. The Code

contains a separate set of criteria for each. A clear distinction exists between Investigative Help and Full Representation.

- 2.7 Investigative Help is only available where the prospects of success are unclear and require further investigation and would only apply to certain categories of case. It is proposed that a certificate for Investigative Help would not cover the issue of proceedings save where this was required either for limitation purposes or to obtain essential pre-action discovery. Having a separate test for the investigative stage allows additional criteria to be set for the Full Representation stage. Investigative Help may be available in a number of subject areas most notably clinical negligence cases and other personal injury cases. It is not available in family cases or a number of other subject areas. Its purpose is to allow the conduct of such investigations as are needed to determine the likely prospects of success of the claim.
- 2.8 Investigative Help will be refused, under the General Funding Code if the client's claim is primarily a claim for damages and has no significant wider public interest, unless a minimum threshold of £5,000 has been reached in respect of the claim for damages. This issue is further explored at paragraph 5.4.
- 2.9 Full Representation is a grant of Legal Representation other than Investigative Help, and covers representation in legal proceedings. It is only available where the prospects of success are clear and can be estimated in one of the merit bands set out in the Code.
- 2.10 In our previous exposure document the Commission asked for views as to the appropriateness of creating Help at Court as a level of service in the Code. Help at Court is primarily used in England and Wales in circumstances where the client is a defendant to mortgage possession or other possession proceedings where rent or mortgage arrears are not in dispute. Many consultees were in favour of this level of service, and in particular in regard to its application to cases involving potential repossession of property. Admitted debt type proceedings are however precluded from being funded under Schedule 2 of the Order. The Consultation document issued in November 2006 confirmed that the Commission does not propose to apply Help at Court as a level of service; however as 'help with housing proceedings' fall within the Lord Chancellor's stated funding priorities, it was suggested that a Direction could be sought specifically authorising funding in mortgage repossession cases. The Commission would intend to apply to the Lord Chancellor to remove the

exclusion on admitted debt proceedings should that prove necessary to provide help at court as a level of service or a pilot. It will also provide additional scope when looking at how housing legal services can be delivered in line with the priority set for housing within the Funding Code.

2.11 The economic climate and housing market have undergone considerable change since our consultation in November 2006, however we remain of the view that Help at Court should be provided as a pilot, rather than a level of service. This will enable us to target specifically the area of mortgage repossession. The aim of the pilot would be to provide legal aid funding for informal advocacy, usually by way of mitigation, in mortgage repossession cases.

2.12 Emergency representation will continue to be available under the Funding Code provided that the following conditions are met:

- the case concerned is within scope;
- it appears to the solicitor that the applicant would be financially eligible for legal aid;
- it is in the interests of justice that the applicant should, as a matter of

urgency, be granted legal aid; on the basis of the information available, the Commission must be satisfied that it is likely that the case will satisfy the Code Criteria for Full Representation;

- there must be insufficient time for an application form to be submitted;
- unjustifiable delay must not be the reason for the need for emergency representation.

2.13 The fourth level of service the Commission intends to adopt deals with exceptional funding applications. The government relies upon exceptional funding to meet any European Convention of Human Rights obligations which may arise in a case which is otherwise outside the scope of usual funding. Exceptional funding (currently under the SEGP scheme) provides funding in certain circumstances for legal representation for the family of the deceased at an inquest. The Minister has a wide discretion to waive financial eligibility limits. The Commission is empowered to fund legal representation at the inquest in a prescribed set of circumstances, for example where the deceased died in prison or police custody, during the course of police arrest, search, pursuit or shooting. The Commission has no authority to waive

financial eligibility limits. In all other instances the funding is granted by the Minister upon recommendation by the Commission.

- 2.14 The fourth level of service can also be used to fund pilot schemes such as the proposed Help at Court pilot aimed at providing informal advocacy in mortgage possession proceedings (see paragraph 2.9 and 2.10 above).

Chapter 3: Criteria for Family Cases

3.1 The levels of service the Commission intends to adopt in regard to Family proceedings are;

Legal Help which covers the initial meeting with the client and any follow up advice. It also covers advice and assistance in divorce proceedings.

Family Help Lower which facilitates more substantial advice, assistance and negotiation to resolve disputes. It may be used to secure early resolution of a family dispute or to obtain a necessary consent order following settlement.

Family Help Higher will be appropriate when it becomes necessary to issue proceedings other than for the purpose of obtaining a consent order (or, in the case of a respondent the proceedings have already been issued) with a view to securing the early resolution of a family dispute. Family Help Higher does not cover preparation for, or representation at, any final hearing.

Legal Representation covers representation in all other contested Family Proceedings.

3.2 The Commission had previously signalled its commitment to Mediation and its intention to adopt **Family Mediation** and **Help with Mediation** as two separate levels of service. The responses received to the Consultation

document were broadly supportive of such a proposal although some consultees indicated certain reservations regarding the creation of two separate levels of service for an area that may not have the infrastructure to support this. The Commission understands that Northern Ireland has insufficient mediators to allow for mandatory pre-proceedings mediation at this time. However the Commission is keen to promote effective alternatives to the court process in family and children cases in conjunction with others and recognises that mediation must be an effective and real alternative in some cases. Therefore while not intending to introduce the above levels of service as separate and discrete levels; mediation will continue to be available as a disbursement.

3.3 The primary aim of funded family services is to help people resolve their disputes concerning children and family relationships at the earliest opportunity, in the most appropriate way and where possible without litigation. This is in line with statutory objectives to reduce the proportion of disputes resolved by recourse to the courts. However, the Commission recognises there are many family cases where contested proceedings are unavoidable and indeed essential to protect children or adults from harm or where all other

attempts at resolving the dispute have failed. These cases will be progressed having regard to the 'no delay' principle.

- 3.4 The Commission is also cognisant of the fact that family cases are not about winning and losing, but are about obtaining the most appropriate outcome for all the parties. Whereas many non-Family cases result in all or nothing results for one party or the other, the aim of Family Funding is to achieve results which are fair and acceptable to all parties where possible. The prospects of success criterion do not apply to Special Children Order proceedings. These cases will be progressed under the current system of 'non means, non merits' and include Articles 50, 62, 63 and 64 of the Children (Northern Ireland) Order 1995. For other public law cases the prospects of success criterion applies only if the client is making or supporting an application or appeal.
- 3.5 The criteria previously consulted on in the Family levels of service included General Family Help which reflected the position in England and Wales at the time. The intention behind the proposed introduction of General Family Help was to encourage the earlier resolution of cases and to include greater use of mediation prior to the issue of proceedings. Under recent reforms in England and Wales the Legal Services Commission has adopted the use of Family Help (Lower) and Family Help

(Higher) to replace General Family Help. The Commission also proposes to adopt this approach and the criteria set out in Section 11 reflect this.

- 3.6 Family Help Lower is a pre-proceedings level of service most suitable for private law cases in the Family Proceedings Court. Family Help (Lower) enables provision of more substantial advice, assistance and negotiation to help resolve disputes than would be available under Legal Help. It should be used to secure, where possible, the early resolution of a family dispute or to obtain a Consent Order following settlement. Family Help Lower will not be appropriate when the other side has issued proceedings or is refusing to reply to correspondence. In order for a private law case to progress to Family Help Lower the case must satisfy the cost benefit test; Family Help will be refused unless the benefits to be gained from the help provided justify the likely costs, such that a reasonable paying client would be prepared to proceed in all the circumstances. The case must also be a 'significant family dispute'. This is defined in the England and Wales guidance as a dispute which 'if not resolved may lead to family proceedings and for which legal advice and assistance is necessary to enable the client to resolve the issues.' The Commission also proposes to adopt this approach.

- 3.7 An important initiative is also being brought forward by judges in the Family Division in Northern Ireland. This initiative is modelled on the Public Law Outline (PLO) currently being introduced in England and Wales. The PLO scheme aspires to streamline core processes to increase the focus on the needs of the child, to target the effective use of expert evidence, to identify early in proceedings potential issues of dispute and to ensure there is strong judicial case management throughout the proceedings. It is hoped that the PLO should lead to a reduction in the number of days proceedings last through the tighter case management at all levels of Court and focusing at an earlier stage on the areas of dispute. Any pre-proceedings work carried out by the solicitor under the proposed PLO will be administered under the Family Help Lower level of service.
- 3.8 Family Help Higher would allow the issue of proceedings but would not allow the conduct of a final hearing. It is envisaged that this level of service would apply to private law proceedings as in the majority of public law proceedings a Full Representation certificate will be more appropriate once proceedings have been issued. Family Help Higher may be refused unless attempts have first been made to resolve the dispute without recourse to contested proceedings through negotiation or other appropriate avenues. Family Help Higher may also be refused if it is deemed more appropriate for the client to be assisted by way of Legal Help or Family Help Lower. As Family Help Lower can cover all pre-proceedings work, Family Help Higher may only be justified where it is necessary to issue proceedings (other than for a Consent Order) and all other reasonable avenues have been pursued, or where proceedings are already in existence. Where Legal Help or Family Help Lower are available they should be used (where possible) to identify the principal issues both by way of attendance on the client and if possible by contact and negotiations with the other party.
- 3.9 Family Help Higher can only be provided when the cost-benefit criterion is met and the reasonable client approach applies. In effect, funding will not be obtained unless, on the evidence available, the benefits to be gained from representation for the client justify the likely costs such that a reasonable paying client would be prepared to proceed in all the circumstances. The sufficient benefit test imports an objective of reasonableness to the proportionality of the costs and benefits involved.

3.10 It is intended that the Northern Ireland Funding Code will encourage the approach that contested litigation in family cases should be seen as a matter of last resort. However, as previously mentioned the Commission will have due regard to the 'no delay' principle in Children's Order cases. Therefore Family Help Higher or Legal Representation will not be refused on the grounds of failure to attempt settlement if the client is genuinely and urgently in need of representation; or that any delay will cause a significant risk of a miscarriage of justice, or unreasonable hardship to the client; or irretrievable problems in handling the case; or there will be a risk to the life, liberty or physical safety of the client or his or her family.

Chapter 4: High Cost Cases Criteria

- 4.1 Section 6 of the Criteria reflects the Commission’s proposals on how the Criteria should deal with very expensive cases. The respondents to the Consultation document welcomed the proposed establishment of a Special Cases Unit to deal with very expensive cases (although one respondent felt the establishment of such a unit was unnecessary and would just lead to increased administrative costs).
- 4.2 The Legal Services Commission in England and Wales have established a Special Cases Unit whose responsibilities include dealing with high cost cases, multi party actions and applications for Litigation Support. The Unit’s main functions are to monitor the most expensive cases funded as part of the Community Legal Service, to ensure that such cases are subject to appropriate financial controls and to administer the central budget set by the Lord Chancellor for the funding of very expensive cases.
- 4.3 Although the Commission may not have a separate Special Cases Unit in place when the Funding Code is first introduced it is intended to establish such a unit as soon as practicable. Our experience has shown that a small number of very expensive cases can consume a large proportion of the Legal Aid budget.
- 4.4 The Legal Services Commission in England and Wales refer cases to its Special Cases Unit when it is considered that likely costs to disposal will exceed £25,000 (note that this figure refers to likely costs to settlement or other disposal and includes counsel’s fees, disbursements and any likely uplift or enhancement on profit costs but excludes VAT) or that potential costs to trial will exceed £75,000 (again this figure includes counsel’s fees, disbursements and any likely uplift or enhancement on profit costs but excludes VAT). The Commission proposes to use the same thresholds in this jurisdiction and these met with broad agreement from respondents. As outlined in the previous consultation document this approach would require from providers early identification of cases with the potential to involve very high costs. In such cases it may be appropriate to require submission of a ‘costed case plan’. It is likely that these cases will be subject to a higher and more frequent level of scrutiny by the Commission.
- 4.5 A costed case plan is a tool for case management. It is created by the solicitor after thorough analysis, planning and the identification of the objectives to be achieved. It provides a timetable for the case that identifies the key events and specifies

the work to be done, the resources needed to do it and when the resources will be needed. It is costed, specifying the cumulative cost of the work at specified intervals, at the key events and overall. It will normally include more detail for the near future and progressively less detail for dates further away. Case plans will therefore identify stages in a case and funding will be authorised stage by stage. Firms are therefore not expected at the start of the case to provide precise costings of the whole case.

- 4.6 The purpose of the costed case plan is to aid decisions on whether proposals for progressing litigation are satisfactory and to monitor and control the case. It provides information to enable an effective assessment of the cost benefit and risk.
- 4.7 The requirement to submit costed case plans in cases which appear to fall into the thresholds for very high cost cases will also act as a useful forecasting tool to enable the Commission to plan its expenditure accordingly for operation under a controlled budget environment.

Chapter 5: Clinical Negligence Cases

5.1 In our previous Consultation document we proposed that the definition of “clinical negligence” proceedings should be as follows:

- a) a claim for damages in respect of an alleged breach of duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services); or
- b) a claim for damages in respect of alleged professional negligence in the conduct of such a claim.

The majority of respondents accepted this as a suitable and adequate definition and the Commission has therefore decided to adopt this definition.

5.2 The criteria previously consulted on in this area reflected the approach that the general funding code cost benefit ratios should be applied to clinical negligence cases. Several respondents submitted that a ‘special case’ exists for the application of a different cost benefit test other than that of the General Funding Code. Respondents submitted that a more relaxed cost benefit ratio should be applied as clinical negligence cases can be very complex and generally have higher costs than most other categories of cases. To help inform decision making

in this area, in house research was undertaken by the Commission to ascertain the impact of applying the General Funding Code ratios to clinical negligence cases compared to the impact of lower alternative ratios (this research paper is available on our website www.nilsc.org.uk). The General Funding Code cost benefit ratios and alternative ratios used for testing are outlined below:

Cost Benefit - Quantifiable Claims

If the claim is primarily a claim for damages by the client and does not have a significant wider public interest, Full Representation will be refused unless the following cost benefit criteria are satisfied:

- 1) If prospects of success are very good (80% or more), likely damages must exceed likely costs;
- 2) If prospects of success are good (60%-80%), likely damages must exceed likely costs by a ratio of 2:1;
- 3) If prospects of success are moderate (50%-60%), likely damages must exceed likely costs by a ratio of 4:1.

Alternative Cost Benefit ratios

If prospects of success are good (60%-80%) a 1.5:1 ratio is required. For cases falling into the 50-60% range, a 2.1 ratio is required.

The main finding of this research, however, was that the use of alternative lower ratios did not allow significantly more cases to pass the alternative cost benefit test.

- 5.3 The Commission is in favour of introducing cost benefit ratios for quantifiable cases. Non-quantifiable cases including those in priority areas have less strict tests. Therefore the Criteria reflect the intention to apply the General Funding Code criteria to clinical negligence cases. It should also be noted that the Legal Services Commission in England and Wales applies the General Funding Code cost benefit ratios to clinical negligence cases. Therefore as a result of this research and the other factors mentioned it remains the Commission's intention to apply the General Funding Code cost benefit criteria to clinical negligence cases.
- 5.4 For example if the prospects of success are only a little over 50%, funding should only be granted if the benefits to the client will be really substantial such that the likely costs are justified. By contrast, if prospects of success are very high and costs are almost certain to be recovered from the other side, a private paying client would be more prepared to litigate over benefits which were more modest in extent, but were

still sufficiently important that a reasonable client would litigate.

- 5.5 Investigative Help will be refused, under the General Funding Code, if the client's claim is primarily a claim for damages and has no significant wider public interest, unless a minimum threshold of £5,000 has been reached in respect of a claim's level of damages. Several respondents to the Commission's previous consultation referred to the proposed £5,000 minimum damage threshold as being too high. They further submitted that the level of damages may be extremely difficult to assess at the commencement of any given action and suggested a threshold of £1,000 may be more appropriate in clinical negligence cases. The Commission's rationale behind this threshold is to ensure public funds are not used to investigate cases where the likely damages are modest in size compared to the costs involved (criterion 5.5.2). Given the increased cost in clinical negligence cases the Commission submits that a threshold of £5,000 is appropriate. This is considered justified in order to control the costs of investigating the potential merits of an uncertain claim of limited value.

Chapter 6: Money Damages Criteria

- 6.1 In the previous Funding Code Consultation document the Commission confirmed the importance of continuing the support for money damages and personal injury cases to ensure access to justice for those members of society of limited means to enable them to enforce their rights in the same manner as those who can afford to litigate privately.
- 6.2 The Commission has therefore considered the various alternatives that exist to continue the support for funding of money damages cases in Northern Ireland following the full commencement of the Access to Justice (Northern Ireland) Order 2003.
- 6.3 In England and Wales money damages cases are not covered under the Code but dealt with by way of Conditional Fee Agreements (CFA), also known as ‘no win, no fee’. Under the CFA model individuals have to pay for their solicitors fees if the case is lost. However they can limit this risk by purchasing After the Event Insurance (ATEI), however, even if cases are won not all costs may be covered.
- 6.4 CFA models require ATEI. Currently there are no ATEI providers in Northern Ireland. The Commission understands that no ATEI provider in England and Wales will offer a commitment to enter into Northern Ireland at this stage. Furthermore it would appear there have been historic profitability issues with a number of insurers making significant losses on ATEI.
- 6.5 Therefore under a CFA model an individual in Northern Ireland may easily find a solicitor to represent them but could potentially be unable to acquire ATEI to insure them against the risk of adverse cost. This would have the likely effect of deterring most of those who are currently eligible for legal aid and would effectively remove money damages claims from the legal aid system. Premiums could be so high as to exclude a large proportion of the population, leaving a large number of people without access to justice.
- 6.6 Another alternative scheme for funding money damages cases could be the introduction of an Additional Legal Aid System model (Northern Ireland Additional Legal Aid Scheme). This would require the development of a ring fenced fund to support money damages claims.
- 6.7 The Commission has explored various alternatives to the funding of money damages cases. NIALAS has its attractions as an alternative option, however, current legislation may preclude such a scheme and an evidence based case would need

to be presented to the Lord Chancellor to enable consideration of a change to current legislation.

- 6.8 This approach would require claimants and their lawyers to apply to the fund for support and pay a registration fee. If the case is lost the fund pays the losing lawyers disbursements and a percentage (perhaps somewhere between 50% and 75%) of the profit costs of the losing lawyers and some or all of the winners cost. If the case is won the loser pays the claimant's lawyers costs in the normal way and a percentage of the damages recovered are paid into the fund to support future cases.
- 6.9 The advantage of such an approach is that by introducing such a scheme while initially retaining Legal Aid within the Funding Code, access to justice could be maintained and ultimately widened. In due course Legal Aid for money damages could be taken fully out of scope of the Funding Code and processed completely through NIALAS. However the NIALAS model would be particularly sensitive to the level of successful cases taken and if this is not closely monitored the fund could move into deficit. The model would also be sensitive to the level of damages paid back into the fund and if this is too low it could also have serious implications on the success of the fund. There is also a question of finding initial pump priming funding to introduce a NIALAS.
- 6.10 The implementation of the Northern Ireland legislation to develop Civil Legal Services through the introduction of a Funding Code and the requirement to demonstrate value for money within a capped budget is likely to impact significantly on Legal Aid funding of money damages cases.
- 6.11 Under the Code money damages cases are not a priority area, however they will still be catered for providing they meet the relevant Criteria under Section 5 of the Funding Code.
- 6.12 The requirement of the Access to Justice (Northern Ireland) Order 2003 to introduce a funding code means that 'no change' for legal aid in money damages cases is not an option.
- 6.13 The Commission's aim is to balance the cost of providing Civil Legal Services in respect of money damages cases with the need to ensure that only merited cases are proceeded with in the most cost effective manner, while meeting the priorities set for the Commission by government.
- 6.14 However the Commission will keep the issue of funding money damages cases under review and will monitor the impact of the Funding Code in this area after implementation.

Chapter 7: Claims against Public Authorities

- 7.1 Section 8 of the Criteria deals with claims against public authorities. We suggest that specific criteria should be set for actions against public authorities.
- 7.2 Cases falling under this section of the Code would include those which alleged a serious wrong doing, abuse of position of power, or a significant breach of human rights by a public authority. In order to show that a cases concerns serious wrongdoing or abuse of power it is necessary to show that the case involves something more than a straightforward claim against a public authority, such as a simple claim for clinical negligence or breach of contract.
- 7.3 ‘Serious wrongdoing’ must involve either allegations of deliberately causing harm to the client by behaviour by a public authority which goes well beyond simple liability for negligence and breach of contract and which could objectively be considered to be really serious.¹
- 7.4 In our previous consultation we had stated that it was not intended to include cases involving claims of assault, battery, trespass, wrongful arrest and false imprisonment by the Police Service of Northern Ireland (PSNI), Ministry of Defence (MOD) and Northern Ireland Prison Service. However after further consideration of the matter it is now proposed that policy be brought into line with England and Wales and that these types of tort claims would fall under Section 8. The Commission would be keen to hear consultees views on this matter.
- 7.5 While many actions taken under this section are taken in the context of claims for damages, a significant number of these cases are often not solely concerned with recovery of damages. To reflect this it would not be appropriate to apply the minimum damages level contained in the General Funding Code to claims against the public authorities at the Investigative Help stage.
- 7.6 Another example of a case that would come under Section 8 would be an action against a Health and Social Care Trust alleging child abuse whilst in care.

¹ Legal Services Commission in England & Wales Decision Making Guidance (www.legalservices.gov.uk)

Chapter 8: Conclusion

- 8.1 Article 15(2)² of the Order sets out the factors that the Commission must give consideration to when setting out the criteria, to include the likely cost and benefit involved in granting funding to a case and also the prospects of success for that case. It is not the case that every factor has to be reflected in the criteria for every case-type. As can be seen from the Code, specific criteria apply to particular areas, such as housing and judicial review. These are among the case-types that the Commission has put forward as priorities. In terms of funding of the priority areas, the Code will not guarantee help in all circumstances for priority case-types. Rather the Criteria, in these instances, will be different and generally easier to satisfy than for other cases.
- 8.2 The Code will operate to target resources to those most in need. It aims to do so by targeting funding on the strongest cases and in particular to strong cases in priority areas.
- 8.3 When finalising these Criteria the Commission has taken cognisance of responses to the previous consultations and also conducted further research on various issues to help inform our thinking in these areas.
- 8.4 Under the current operational arrangements expenditure on Legal Aid is demand led. One of the main aims of the reform proposals for legal aid is the need to control legal aid spending. The Code Criteria will be a key mechanism in achieving this, along with the use of forecasting tools and standard fees.
- 8.5 The Commission will closely monitor the success of the various mechanisms used to control the budget, particularly during the years of initial operation of the Code. However, allowance will have to be made for the large numbers of cases granted before the Code is implemented and which may take some considerable time to conclude.

² Article 15(2) In settling the criteria to be set out in the code the Commission shall consider the extent to which they ought to reflect the following factors:

- a) the likely cost of funding the services and the benefit which may be obtained by their being provided,
- b) the availability of sums in the fund established under Article 11(1) for funding civil legal services and (having regard to present and likely future demands on that fund) the appropriateness of applying them to fund the services,
- c) the importance of the matters in relation to which the services would be provided for the individual,
- d) the availability to the individual of services not funded by the Commission and the likelihood of his being able to avail himself of them,
- e) if the services are sought by the individual in relation to a dispute, the prospects of success in the dispute,
- f) the conduct of the individual, in connection with civil legal services funded by the Commission (or an application for funding) or in, connection with any proceedings,
- g) the public interest, and
- h) such other factors as the Lord Chancellor may by order require the Commission to consider.

- 8.6 It must also be borne in mind that securing value for money in publicly funded legal services is a shared responsibility between all the parties involved in the provision of these services - that is, the Commission, providers of legal services, people who apply for legal aid and the Courts.
- 8.7 It is within this framework that the flexibility of the Code is seen as its greatest strength, as it is through the application of different funding criteria to different case-types that public money for civil legal services can be directed to areas of greatest need.
- 8.8 The Code criteria are stringent and rigorous so that weaker claims can be excluded from the funding scheme more effectively than under the current system. The Code will facilitate robust and consistent decision making against publicly available transparent criteria.
- 8.9 The Commission is very aware of the impact of its present activities and the potential impact of reform of Legal Aid and it is committed to full and open consultation on these matters.

Key Question for Consultation

Do you have any comments on any of these criteria? In particular do you think any of the criteria may cause practical difficulties in meeting legal needs and administering legal aid?

Annex 1

Respondents to Previous Consultation

The details of all those who responded to 'The Northern Ireland Funding Code: A Consultation Paper on Proposals for the Northern Ireland Funding Code' are as follows:

- Action Against Medical Accidents
- Advice NI
- Association of Personal Injury Lawyers
- Belfast Solicitors Association
- Children's Law Centre
- Citizens Advice Bureau
- Housing Rights
- Law Centre
- MENCAP
- NI Housing Executive
- Patrick J Mullarkey (Campbell Fitzpatrick)

Annex 2

Levels of Service Grid

	Civil Business Area			Court Jurisdiction			
	Family (Private)	Family (Public)	Non-Family	FPC Magistrates	FCC, County, High Court	Means Test	Certificate
Legal Help	Y	Y	Y	N/A	N/A	Existing Green Form test	N
Family Help:							
Lower Does not cover issuing of proceedings	Y	Y	N/A	Y	Y	Existing ABWOR	Y
Higher Covers issuing of proceedings but not final contested hearing	Y	N	N/A	Y	Y	ABWOR if FPC/ Magistrates, New CLA test if FCC/ County or above	Y
Legal Representation:	Y	Y	Y	Y	Y		Y
Investigative Help ³	N/A	N/A	Y	N/A	Y	New CLA test	Y
Full Representation ⁴	Y	Y	Y	Y	Y	New CLA test if in County Court or above but ABWOR test if in FPC/ Mag Court	Y

³ Granted if prospects of success are unclear

⁴ A grant of legal representation other than Investigative Help

KEY Y - Yes N - No N/A - Not Applicable

Annex 3

Northern Ireland Funding Code Criteria

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The Northern Ireland Funding Code (Access to Justice (Northern Ireland) Order 2003)

This Code has been prepared in accordance with Article 15 of the Access to Justice (Northern Ireland) Order 2003 (“the Order”). Part I of the Code contains Criteria for deciding whether to fund or continue to fund services. A revised version of Part I will only come into force if approved by the Lord Chancellor and a resolution of each House of Parliament, or under the emergency procedure set out in Article 16(7) of the Order. Part II of the Code contains Procedures. A revised version of Part II will come into force when approved by the Lord Chancellor and laid before Parliament.

The Funding Code

Part 1 - Criteria

Section 1 Levels of Service

1.1 Levels of Service Available

In funding Civil Legal Services under the Order the Commission will fund only the following levels of service, subject to the provisions of the Order, orders, regulations and directions made under the Order, these criteria and the Funding Code Procedures:

1. Legal Help.
2. Family Help - this can either be Family help (Lower) or Family Help (Higher).
3. Legal Representation - this can be either Investigative Help or Full Representation.
4. Such other services as are authorised by specific orders or directions from the Lord Chancellor including Statutory Exceptional Grants.

1.2 Representation

Legal Representation will be funded only in relation to proceedings for which representation may be funded in accordance with Article 12(A)⁵ and paragraph 2 of Schedule 2 to the Order.

1.3 Disbursements

Guidance or contracts may specify what items may or may not be charged as disbursements under each level of service. Costs of or expenses in relation to treatment, therapy, training or other interventions of an educative or rehabilitative nature may not be charged as disbursements under any level of service, unless authorised by specific orders or directions from the Lord Chancellor.

Section 2 Definitions

2.1 Levels of Service

Note: Nothing in these definitions limits the power of the Commission to place conditions or limitations on any grant.

“**Legal Help**” is a level of service the grant of which authorises Civil Legal Services other than:

- i) The provision of general information about the law and legal system and the availability of legal services (except where such provision is incidental to the provision of help in a specific case).
- ii) Issuing or conducting court proceedings.

⁵ Article 12A was inserted into the 2003 Order by the Legal Aid (Northern Ireland) Order 2005, Article 12A of the 2003 Order is at present un-commenced.

iii) Representation or instructing a legal representative in proceedings.

iv) The provision of mediation or arbitration (but this does not prevent legal help being given in relation to mediation or arbitration or covering payment of a mediator's or arbitrator's fees as a disbursement).

"Family Help" is a level of service the grant of which authorises help in relation to a Family Dispute including assistance in resolving that dispute through negotiation or otherwise. Family Help covers all services within the scope of either Legal Help or Legal Representation other than preparation for or representation at a contested final hearing or appeal.

"Family Help (Lower)" means Family Help which is limited to exclude issue of proceedings or representation in proceedings other than help in obtaining a consent order following settlement of a Family Dispute.

"Family Help (Higher)" means a grant of Family Help other than Family Help (Lower).

"Legal Representation" is a level of service the grant of which authorises legal representation for a party to proceedings or for a person who

is contemplating taking proceedings. This includes the following:

- i) All such help as is usually given by a person providing representation in proceedings, including steps preliminary or incidental to proceedings.
- ii) All such help as is usually given by such a person in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.

Legal representation does not include the provision of mediation or arbitration (but this does not prevent help being given in relation to mediation or arbitration, or the payment of a mediator's or arbitrator's fees as a disbursement).

- **"Investigative Help"** means Legal Representation which is limited to investigation of the strength of a proposed claim. Investigative Help includes the issue and the conduct of proceedings only so far as necessary to obtain disclosure of relevant information or to protect the client's position in relation to any urgent hearing or time limit for the issue of proceedings.

- **“Full Representation”** means a grant of Legal Representation other than Investigative Help.

2.2 Case Categories

Clinical Negligence Proceedings

means proceedings which include:

- i) a claim for damages in respect of an alleged breach of duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services); or
- ii) a claim for damages in respect of alleged professional negligence in the conduct of such a claim.

“Family Dispute” means a legal dispute arising out of a family relationship, including disputes concerning the welfare of children or which may give rise to Family Proceedings.

“Family Proceedings” means proceedings which arise out of family relationships, including proceedings in which the welfare of children is determined (other than judicial review or quasi criminal proceedings). Family Proceedings also include all proceedings under any one or more of the following:

- a) the Matrimonial Causes (Northern Ireland) Order 1978
- b) the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979
- c) the Adoption (Northern Ireland) Order 1987
- d) the Magistrates Courts Rules (Domestic Proceedings) (Northern Ireland) 1996;
- e) the Family Proceedings Rules (Northern Ireland) 1996;
- f) Parts I, III and IV of the Children (Northern Ireland) Order 1995;
- g) Family Homes and Domestic Violence (Northern Ireland) Order 1998;
- h) the inherent jurisdiction of the High Court in relation to children and
- i) the Adoption and Children Act 2002
- j) the Civil Partnership Act 2004

“Special Children Order Proceedings” means proceedings under the Children (NI) Order 1995 (other than appeal proceedings) where Legal Representation is applied for on behalf of:

- i) a child in respect of whom an application is made for an order under:
 - a) Article 50 (a care or supervision order);
 - b) Article 62 (a child assessment order);
 - c) Article 63 (an emergency protection order); and
 - d) Article 64 (extension or discharge of an emergency protection order).
- ii) any parent of such a child or person with parental responsibility for the child within the meaning of the 1995 Order;
- iii) a child who is brought before a Court under Article 44 (use of accommodation for restricting liberty) who is not, but wishes to be, legally represented before the Court.

“Other Public Law Children Cases” means public law proceedings concerning the welfare of children other than Special Children Order Proceedings or related proceedings (see Section 11.8) but including:

- i) Appeals (whether interim or final) from orders made in Special Children Order Proceedings;
- ii) Other proceedings under Part V or VI of the 1995 Order;
 - a) Adoption proceedings, including freeing for adoption;
 - b) Proceedings under the inherent jurisdiction of the High Court in relation to children.

2.3 Merits, Costs and Damages

Prospects of Success means the likelihood of the client obtaining a successful outcome in the proceedings, assuming the case were determined at trial or other final hearing. Guidance may give examples of what may constitute a successful outcome for different types of proceeding.

Different categories of Prospects of Success have the following meanings:

- **“Very Good”** means 80% or more;
- **“Good”** means 60%-80%;

- **“Moderate”** means 50%-60%;
- **“Borderline”** means that Prospects of Success are not poor, but because there are difficult disputes of fact, law or expert evidence, it is not possible to say that Prospects of Success are better than 50%;
- **“Poor”** means clearly less than 50% so that the claim is likely to fail;
- **“Unclear”** means that the case cannot be put into any of the above categories because further investigation is needed.

“Likely Costs” means an estimate of the likely total gross costs to be incurred on behalf of the client to disposal of the proceedings. This includes counsel’s fees, disbursements and any enhancement or uplift on costs. Where appropriate, costs should be calculated by reference to standard or prescribed remuneration rates set by the Lord Chancellor or the Commission. Likely Costs and all cost thresholds specified in the Code are exclusive of VAT.

“Likely Damages” means a realistic estimate of the size of any money award the client would receive if substantially successful at trial or final hearing, after allowing for any likely reduction through contributory negligence or otherwise. Likely Damages should be discounted (by anything up

to 100%) if there is doubt as to whether the opponent will be able to pay the money award.

2.4 Other Definitions

Note: that terms defined in the Order have the same meaning in the Code, unless otherwise provided for in the Code.

“Asylum and Immigration Tribunal” means the tribunal established under section 81 of the Nationality, Immigration and Asylum Act 2002.

“the Commission” means the Northern Ireland Legal Services Commission.

“Contract” means a contract with the Commission under which legal services are provided which are funded as part of Civil Legal Services.

“Excluded Services” means services which are excluded under Schedule 2 of the Order and are not covered by any direction or authorisation under article 12(A) of the Order.

“Guidance” means guidance published by the Lord Chancellor or the Commission for the purpose of making decisions under the Code.

“Hague Convention” means the convention defined in section 1(1) of the Child Abduction and Custody Act 1985.

“European Convention” means the convention defined in section 12(1) of the Child Abduction and Custody Act 1985.

“Hague Convention Countries” has the same meaning as in the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979.

“Maintenance Orders (Reciprocal Enforcement) Act 1972” means the Act as applied with such exceptions, adaptations and modifications as are specified in the 1979 Order.

“Multi-Party Action or MPA” means any action or actions in which a number of clients have causes of action which involve common issues of fact or law arising out of the same cause or event.

“the 1995 Order” means the Children (Northern Ireland) Order 1995.

“the Order” means the Access to Justice (Northern Ireland) Order 2003.

“Overwhelming importance to the client” means a case which has exceptional importance to the client, beyond the monetary value (if any) of the claim, because the case concerns the life, liberty or physical safety of the client or his or her family, or a roof over their heads.

“prescribed” means either set out in Regulations or specified by the Commission.

“Proceedings” means legal proceedings before any court, tribunal, arbitrator or panel in Northern Ireland, but mediation and any form of dispute resolution which cannot make a determination which is binding on the client do not count as proceedings.

“Public Authority” has the meaning given in section 6 of the Human Rights Act 1998.

“Regulations” means orders or regulations under the Order.

“Significant Wider Public Interest” means the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question).

“Small Claims” in general a small claim is one where the value of the claim is not more than £2,000.

Section 3 Case Categories

3.1 The General Funding Code

Applications for funding will be considered under the General Funding

Code except to the extent that different criteria are specified for specific categories of case or proceeding. Definitions and criteria for specific categories are given in sections 6-13 of these Criteria.

3.2 Disputed Categories

Where any issue arises as to which category a case falls into, the Commission will apply the criteria which appear to it to be most relevant to the substance of the application.

3.3 Mixed Claims

Where it appears to the Commission that an application for Legal Representation relates to proceedings covering more than one category, the Commission may apply the criteria which appear to it most appropriate to the proceedings as a whole. If proceedings have not been started, the Commission may consider each aspect of the case under the criteria relevant to it and may apply appropriate restrictions on any grant.

3.4 Excluded Proceedings

The Commission will refuse an application for Legal Representation if, in the view of the Commission, effective representation cannot be provided in the proceedings without the provision of excluded services.

3.5 Guidance

Guidance may give examples of descriptions of proceedings in particular case categories.

3.6 Foreign Orders and Judgments

Cases within the scope of section 11.12 shall be subject only to the criteria in that section (whether or not the proceedings in question are Family Proceedings).

Section 4 Standard Criteria

4.1 Scope Of This Section

The criteria in this section apply to all applications under the Code.

4.2 Northern Ireland Law

An application will be refused if it relates to law other than that of Northern Ireland, save where this is permitted by or under Article 9 of the Order.

4.3 Excluded Services

An application for the provision of excluded services will be refused unless by specific order, direction or authorisation of the Lord Chancellor.

4.4 Directions on Scope

Where an application relies upon a direction or authorisation under Article 12(A) of the Order the application will be refused if any conditions specified in the direction or authorisation are not satisfied.

4.5 Identity of Client

An application will be refused unless it is for the benefit of a client who is an individual and who satisfies such other conditions as are specified in the Code Procedures.

4.6 Identity of Supplier

An application will be refused unless the proposed supplier of services is of a description specified in the Code Procedures.

4.7 Contract Scope

Where an application is for services which under the Code Procedures can be provided under contract, the application will be refused unless the supplier has a contract and is permitted to provide those services under the terms of the contract.

4.8 Procedures

An application may be refused or rejected if any Code Procedures have not been complied with.

4.9 Financial Eligibility

An application will be refused unless the client is assessed as financially eligible under regulations, except where:

- i) under Regulations services are available without reference to means; or

- ii) Regulations or Code Procedures authorise services to be provided before completion of the financial assessment.

4.10 Conduct

An application may be refused if it appears unreasonable to grant funding in the light of the conduct of the client in connection with this or any other application or in connection with any proceedings.

Section 5 The General Funding Code

5.1 Application of General Funding Code

This section applies, in addition to the criteria in section 4, to any application for funding, save to the extent that different criteria are applied for specific categories of case or proceedings in sections 6 to 14.

5.2 Criteria for Legal Help

5.2.1 Sufficient Benefit Test

Help may only be provided where there is sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out.

5.2.2 Funding as part of Civil Legal Services

Help may only be provided if it is reasonable for the matter to be funded out of the Civil Legal Services Fund, having regard to any other potential sources of funding.

alternative dispute resolution which should be tried before litigation is pursued.

5.3 Standard Criteria for Legal Representation

5.3.1 Scope Of This Section

The following criteria apply to all applications for Legal Representation, in addition to the criteria relevant to the specific level of service applied for.

5.3.4 Other Levels of Service

An application may be refused if it appears premature or if it appears more appropriate for the client to be assisted by some other level of service under the Code, such as Legal Help.

5.3.2 Alternative Funding

An application may be refused if alternative funding is available to the client (through insurance or otherwise) or if there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case. For the purpose of this criterion only, alternative funding does not include funding by means of a conditional fee agreement.

5.3.5 The Need for Representation

An application may be refused if it appears unreasonable to fund representation, for example in the light of the nature or complexity of the issues, the existence of other proceedings or the interests of other parties in the proceedings to which the application relates.

5.3.6 Small Claims

An application will be refused if the case is a small claims matter.

5.4 Emergency Representation

5.3.3 Alternatives to Litigation

An application may be refused if there are complaint systems, ombudsman schemes or forms of

5.4.1 Urgency

Legal Representation may only be granted as a matter of urgency where it appears in the interests of justice to do so.

5.4.2 Limited Information

Where only limited information is available to determine whether

the criteria for Legal Representation are satisfied, emergency representation may be granted only if it appears likely on the information available that those criteria would be satisfied.

5.5 Criteria for Investigative Help

5.5.1 The Need for Investigation

Investigative Help may only be granted where the prospects of success of the claim are uncertain and substantial investigative work is required before those prospects can be determined. Guidance may indicate what constitutes substantial investigative work for this purpose.

5.5.2 Damages

If the client's claim is primarily a claim for damages and has no significant wider public interest, Investigative Help will be refused unless the damages are likely to exceed £5,000.

5.5.3 Prospects after Investigation

Investigative Help may only be granted if there are reasonable grounds for believing that when the investigative work has been carried out the claim will be strong enough, in terms of prospects of success and cost benefit, to satisfy the relevant criteria for Full Representation.

5.6 Criteria for Full Representation

5.6.1 Prospects of Success

Full Representation will be refused if:

- i) Prospects of success are unclear;
- ii) Prospects of success are borderline and the case does not appear to have a significant wider public interest or to be of overwhelming importance to the client; or
- iii) Prospects of success are poor.

5.6.2 Cost Benefit - Quantifiable Claims

If the claim is primarily a claim for damages by the client and does not have a significant wider public interest, Full Representation will be refused unless the following cost benefit criteria are satisfied:

- i) If prospects of success are very good (80% or more), likely damages must exceed likely costs;
- ii) If prospects of success are good (60%-80%), likely damages must exceed likely costs by a ratio of 2:1;
- iii) If prospects of success are moderate (50%-60%), likely damages must exceed likely costs by a ratio of 4:1.

5.6.3 Cost Benefit -

Unquantifiable Claims

If the claim is not primarily a claim for damages (including any application by a defendant or a case which has overwhelming importance to the client), but does not have a significant wider public interest, Full Representation will be refused unless the likely 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.

5.6.4 Cost Benefit -

Public Interest Cases

If the claim has a significant wider public interest, Full Representation may be refused unless the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances.

5.7 Criteria for Other Services

5.7.1 Orders, Directions and Authorisations

Levels of service other than those provided for in the General Funding Code or elsewhere in these criteria may be funded only if a specific

order, direction or authorisation from the Lord Chancellor so provides, and then only in accordance with the terms of the order, direction or authorisation.

5.7.2 Reasonableness

An application for such services may be refused if it appears unreasonable in all the circumstances to grant it.

Section 6 Very Expensive Cases

6.1 Scope

This section applies to applications or certificates for Legal Representation which meet the thresholds specified in the Code Procedures.

6.2 Relevant Criteria

All Criteria relevant to the level of service and category of case in question shall apply, as modified in this section, in addition to the Criteria set out in this section.

6.3 The Costed Case Plan

Funding may be refused if the proposals put forward for progressing the litigation including proposals as to cost do not appear to the Commission to be satisfactory.

6.4 Affordability

Subject to 6.5 below, funding will be refused or deferred unless it appears reasonable for funding to be granted

in the light of the resources available in the Budget and likely future demands on those resources.

6.5 Top Priority Cases

The affordability criterion in 6.4 shall not apply to:

- i) Special Children Order Proceedings;
- ii) Judicial review proceedings under section 7 of the Criteria in which funding is to continue by virtue of criterion 7.5.2;
- iii) Other proceedings in which the life or liberty of the client is at risk.

Section 7 Judicial Review

7.1 Scope

This section applies to applications for Legal Representation in relation to court proceedings concerning public law challenges to the acts, omissions or decisions of public bodies, including in particular challenges by way of judicial review or habeas corpus.

7.2 Criteria for Investigative Help

7.2.1 General Funding Code Criteria

Criterion 5.5.2 (minimum damages level) does not apply to applications for Investigative Help under this section.

7.2.2 Is Judicial Review Available?

An application may be refused if the act or decision complained of in the proposed proceedings does not appear to be susceptible to challenge.

7.2.3 Administrative Procedures

Investigative Help may be refused if there are administrative appeals or other procedures which should be pursued before proceedings are considered.

7.3 Criteria for Full Representation

If, at the time the application for funding is made, the court has not granted leave to bring the proceedings or if according to rules of court such leave is not required, the criteria in section 7.4 apply. If at the time the application is made the court has granted leave, the criteria in 7.5 apply.

7.4 Pre-Leave Criteria

7.4.1 General Funding Code

The following criteria replace those in section 5.6 of the General Funding Code.

7.4.2 Is Judicial Review available?

An application may be refused if the act or decision complained of in the proposed proceedings does not appear to be susceptible to challenge.

7.4.3 Administrative Procedures

Full Representation may be refused if there are administrative appeals or other procedures which should be pursued before proceedings are considered.

7.4.4 Notification to Respondent

Full Representation will be refused unless the proposed respondent has been given a reasonable opportunity to respond to the challenge or deal with the applicant's complaint, save where this is impracticable in the circumstances.

7.4.5 Prospects of Success

Full Representation will be refused if the prospects of successfully obtaining the substantive order sought in the proceedings are:

- i) unclear;
- ii) borderline and the case does not appear to have significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues; or
- iii) poor.

7.4.6 Cost Benefit

Full Representation may be refused unless the likely costs are proportionate to the likely

benefits of the proceedings, having regard to the prospects of success and all other circumstances.

7.5 Post-Leave Criteria

7.5.1 General Funding Code

The following criteria replace those in section 5.6 of the General Funding Code.

7.5.2 The Presumption of Funding

If the case has a significant wider public interest, or is of overwhelming importance to the client or raises significant human rights issues, then, provided the standard criteria in Section 4 and Section 5.3 are satisfied, funding shall be granted save where, in light of information which was not before the court at the leave stage or has subsequently come to light, it appears unreasonable for Legal Representation to be granted.

7.5.3 Refusal on the Merits

Where the case does not appear to have a significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues, Legal Representation will be refused if:

- i) prospects of success are borderline or poor; or

- ii) the likely costs do not appear to be proportionate to the likely benefits of the proceedings having regard to the prospects of success and all the circumstances.

Section 8 Claims against Public Authorities

8.1 Scope

This section applies to applications for Legal Representation in relation to proceedings or proposed proceedings against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights, other than cases falling within the scope of section 6 (Judicial Review) or section 9 (Housing).

8.2 Criteria for Investigative Help

8.2.1 Public Authority Complaints

Investigative Help may be refused if it is more appropriate for the client to pursue the public authority's complaints procedure than litigation.

8.2.2 Damages

Criterion 5.5.2 (minimum damages level) does not apply to applications for Investigative Help under this section.

8.3 Criteria for Full Representation

8.3.1 General Funding Code

The following criteria replace the criteria in section 5.6 of the General Funding Code in applications to which this section applies.

8.3.2 Prospects of Success

Full Representation will be refused if:

- i) Prospects of success are unclear;
- ii) Prospects of success are borderline and the case does not appear to have a significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues;
- iii) Prospects of success are poor.

8.3.3 Cost Benefit

Legal Representation may be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances.

8.3.4 Public Authority Complaints

Full Representation may be refused if it is more appropriate for the client to pursue the public authority's complaints procedure than litigation.

Section 9 Clinical Negligence

9.1 Scope

This section applies to applications for Legal Representation in Clinical Negligence Proceedings.

9.2 The Complaints Scheme

Legal Representation may be refused if it is more appropriate for the client to pursue the NHS complaints procedure than litigation.

Section 10 Housing

10.1 Scope

This section applies to applications for legal representation for a client in proceedings which concern possession of the client's home, the client's legal status in the home or the obligations of a landlord or other person to keep the client's home in good repair and allow quiet enjoyment of the property. However, this section does not apply to cases within the scope of section 7 (Judicial Review).

10.2 Criteria for Investigative Help

In applications for Investigative Help under this section the figure for minimum damages in criterion 5.5.2 shall be £1,000.

10.3 Criteria for Full Representation - Possession Cases

10.3.1 General Funding Code

The following criteria replace those in section 5.6 of the General Funding Code for proceedings which concern possession of the client's home.

10.3.2 Prospects of Success

Full Representation will be refused if the client has no substantive legal defence to the proceedings or the prospects of successfully avoiding an order for possession (or, if the client is bringing proceedings, the prospects of obtaining such an order) are poor.

10.3.3 Cost Benefit

Full representation may be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances.

10.4 Criteria for Full Representation - Other Housing Cases

10.4.1 General Funding Code

The following criteria replace the criteria in section 5.6 of the General Funding Code in applications within the scope of this section other than possession cases.

10.4.2 Notification to Landlord

Where the client is applying for Full Representation to bring proceedings the application may be refused unless the landlord or other person responsible for dealing with the matters complained of has been notified of the client's complain and given a reasonable opportunity to respond and put matters right, save where this is impracticable in the circumstances.

10.4.3 Prospects of Success

Full Representation will be refused if:

- i) Prospects of success are unclear;
- ii) Prospects of success are border-line and the case does not appear to have a significant wider public interest or to be of overwhelming importance to the client;
- iii) Prospects of success are poor.

10.4.4 Cost Benefit

Full representation may be refused unless the likely costs are proportionate to the likely

benefits of the proceedings, having regard to the prospects of success and all other circumstances.

Section 11 Family

11.1 Scope

This section applies to applications for Family Help, or Legal Representation in Family Proceedings.

11.2 Criteria for Family Help

11.2.1 Significant Family Dispute

Family Help may only be provided where the client requires ongoing help in relation to a significant Family Dispute. Guidance may specify what constitutes a significant Family Dispute for this purpose.

11.2.2 Cost Benefit

Family Help will be refused unless the benefits to be gained from help provided justify the likely costs, such that a reasonable private paying client would be prepared to proceed in all the circumstances.

11.2.3 Other Levels of Service

Family Help will be refused if it is more appropriate for the client to be assisted by way of Legal Help or Legal Representation.

11.3 Criteria for Family Help (Higher)

11.3.1 Family Help Criteria

An application for Family Help (Higher) must satisfy the following criteria, in addition to the criteria for Family Help at 11.2 above.

11.3.2 Attempts at Settlement

Family Help (Higher) may be refused unless reasonable attempts have been made to resolve the dispute without recourse to contested proceedings, through negotiation or otherwise.

11.3.3 Public Law Cases

Family Help (Higher) is not available for Public Law Proceedings

11.4 Legal Representation in Family Proceedings

11.4.1 Investigative Help

Investigative Help is not available in Family Proceedings. Legal Representation in Family

Proceedings shall take the form of Family help or Legal Representation.

11.4.2 Standard Criteria

The criteria at Section 5.6 of the General Funding Code (criteria for Full Representation) and criterion 5.3.6 (small claims) do not apply to applications for Legal Representation in Family Proceedings.

11.4.3 Legal Representation Criteria

The criteria at 11.5 to 11.12 below apply only to applications for Legal Representation.

11.5 Criteria for Special Children Order Proceedings

Legal Representation shall be granted in Special Children Order Proceedings (as defined in Section 2) provided the relevant criteria, other than those relating to financial eligibility, in Section 4.9 are satisfied. The standard criteria in Section 5.3 of the General Funding Code shall not apply.

11.6 Related Proceedings

Where Legal Representation has been granted to a person in Special Children Order Proceedings, Legal Representation may also be granted for that person in related proceedings which are being heard together with the Special Children

Order Proceedings or in which an order is being sought as an alternative to an order in the Special Children Order Proceedings.

if it appears unreasonable for funding to be granted, having regard to the importance of the case to the client and all other circumstances.

11.7 Criteria for other Public Law Children Cases

11.7.1 Standard Criteria

The standard criteria for Legal Representation in Section 5.3 of the General Funding Code do not apply in other public law children cases, save for the following criteria:

- i) 5.3.2 (refusal on the ground of the availability of alternative sources of funding);
- ii) 5.3.5 (refusal on the ground that representation is not necessary).

11.7.2 Prospects of Success

Where Legal Representation is sought on behalf of a client who is making or supporting an application or appeal, Legal Representation will be refused if the prospects of the application or appeal being successful are poor.

11.7.3 Reasonableness

An application for Legal Representation may be refused

11.8 Domestic Violence Cases

11.8.1 Scope

These criteria apply to proceedings seeking an injunction, committal order or other orders for the protection of a person from harm (other than public law children proceedings).

11.8.2 Prospects of Success

Legal Representation will be refused if the prospects of obtaining the order sought in the proceedings are poor.

11.8.3 Cost Benefit

Legal Representation will be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of obtaining the order sought and all other circumstances.

11.9 Private Law Children Cases

11.9.1 Scope

These criteria apply to proceedings concerning

residence, contact and other private law issues concerning children (other than issues of financial provision).

provision, and to all other family proceedings which are not covered by criteria elsewhere in this section.

11.9.2 Attempts at Settlement

Legal Representation may be refused unless reasonable attempts have been made to resolve the dispute without recourse to contested proceedings, through negotiation or otherwise.

11.10.2 Attempts at Settlement

Legal Representation may be refused unless reasonable attempts have been made to resolve the dispute without recourse to contested proceedings, through negotiation or otherwise.

11.9.3 Prospects of Success

Legal Representation will be refused if prospects of success are poor.

11.10.3 Prospects of Success

Legal Representation will be refused if prospects of success are:

11.9.4 Cost Benefit

Legal Representation will be refused unless the likely benefits to be gained from the proceedings for the client justify the likely costs, such that a reasonable private paying client would be prepared to take or defend the proceedings in all the circumstances.

i) borderline or unclear, save where the case has overwhelming importance to the client or a significant wider public interest; or

ii) poor

11.10.4 Cost Benefit

Legal representation will be refused unless the likely benefits to be gained from the proceedings for the client justify the likely costs, such that a reasonable private paying client would be prepared to take or defend the proceedings in all the circumstances.

11.10 Financial Provision and Other Proceedings

11.10.1 Scope

These criteria apply to ancillary relief and other family proceedings concerning financial

11.10.5 Private Funding

Legal Representation may be refused if it appears unreasonable in all the circumstances for the proceedings to be funded privately, having regard to the financial circumstances of the client and the value of the assets in dispute.

a maintenance order made in a Hague Convention country pursuant to the Maintenance Orders (Reciprocal Enforcement) Act 1972; or

ii) applies for the registration of a judgment under Section 4 of the Civil Jurisdiction and Judgments Act 1982. and who satisfies the criterion set out below.

11.11 Child Abduction Cases

Subject only to Section 4, Legal Representation shall be granted to a person whose application under the Hague Convention or the European Convention has been submitted to the central authority in Northern Ireland pursuant to Section 3(2) or Section 14(2) of the Child Abduction and Custody Act 1985 and on whose behalf a legal representative has been instructed in Northern Ireland in connection with the application.

11.12.2 Legal Aid Abroad

Legal representation under this provision shall be granted if the standard criteria in Section 4 are satisfied and if the client benefited from complete or partial legal aid, other public funding or exemption from costs or expenses in the country in which the maintenance order was made or the judgment was given.

11.12 Registration of Foreign Orders and Judgments

11.12.1 Scope

This section applies to a person who;

i) appeals to a Magistrates' Court against the registration of or the refusal to register

Section 12 Mental Health

12.1 Scope

This section applies to applications for Legal Representation in proceedings before a Mental Health Review Tribunal under the Mental Health (Northern

Ireland) Order 1986 on behalf of a person whose case or whose application to the Tribunal is or is to be the subject of the proceedings.

ii) the High Court, in relation to applications under section 103A of the Nationality, Immigration and Asylum Act 2002.

12.2 Investigative Help

Investigative Help is not available in applications under this section. Applications for Legal Representation under this section shall take the form of Full Representation.

13.2 Investigative Help

Investigative Help is not available in applications under this section. Applications for Legal Representation under this section shall take the form of Full Representation.

12.3 General Funding Code

The criteria in Sections 5.3 and 5.6 of the General Funding Code shall not apply to applications under this section (but this should not be taken as restricting the scope of the reasonableness criterion below).

13.3 General Funding Code

The standard criteria for Legal Representation in Section 5.3 of the General Funding Code apply to applications under this section, save for criterion 5.3.6 (small claims). The criteria for Full Representation under Section 5.6 of the General Funding Code do not apply to applications under this section.

12.4 Reasonableness

An application may be refused if it is unreasonable in the particular circumstances of the case for Legal Representation to be granted.

13.4 Prospects of Success

Legal Representation will be refused if the prospects of achieving a successful outcome for the client are:

Section 13 Immigration

13.1 Scope

This section applies to applications for Legal Representation for a client whose case is before

i) the Asylum and Immigration Tribunal; or

i) unclear or borderline, save where the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues; or

ii) poor.

13.5 Cost Benefit

Save where the case has a significant wider public interest, Legal Representation will be refused unless the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to take the proceedings, having regard to the prospects of success and all other circumstances.

Section 14 Quasi-Criminal Proceedings

14.1 Scope

This section applies to applications for Legal Representation in proceedings in which the client may be subject to orders or penalties which are (or which the client is reasonably contending are) criminal penalties within the meaning of article 6 of the European Convention on Human Rights.

14.2 Investigative Help

Investigative Help is not available in applications under this section. Applications for Legal Representation under this section shall take the form of Full Representation.

14.3 General Funding Code

The criteria in Section 5.6 of the General Funding Code shall not apply to applications under this section (but

should not be taken as restricting the scope of the interests of justice criterion below).

14.4 Interests of Justice

An application may be refused unless it is in the interests of justice for Legal Representation to be granted.

Section 15 Withdrawal of Funding

15.1 Scope

This section applies where funding has already been granted under the Code Criteria. Funding may be withdrawn in accordance with the following criteria and the Code Procedures. Code Procedures may in particular specify the grounds for withdrawal of emergency representation.

15.2 Criteria No Longer Satisfied

Funding may be withdrawn where the criteria under which funding was originally granted are no longer satisfied.

15.3 Reasonableness

Funding may be withdrawn where it is unreasonable for funding to continue in all the circumstances of the case, taking into account the interests of the client, any wider public interest and the interest of the Civil Legal Services Fund.

15.4 Investigations

Investigative Help will cease where it appears that sufficient work has been carried out to enable prospects of success to be determined.

15.5 Other grounds

Without prejudice to any of the above criteria, funding may be withdrawn:

- i) where the client has died;
- ii) where the client has had a bankruptcy order made against him or her;
- iii) on financial grounds, in accordance with Code Procedures and Regulations;
- iv) with the consent of the client;
- v) where the case has been disposed of or all work authorised by the Commission has been completed;
- vi) where, in accordance with the Code Procedures, it is unreasonable for funding to continue in the light of the conduct of the client;
- vii) where in any other circumstances it would be reasonable for funding to be withdrawn.

Annex 4

Consultation Criteria

When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Clarity of scope and impact

Consultation document should be clear about the consultation process, what is being proposed, the scope of influence and the expected costs and benefits of the proposals.

Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.



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