

Consultation Document

The Legal Aid (General) Regulations (Northern Ireland) 1965

- **Substantive Changes to the operation of the Statutory Charge in Civil Legal Aid**
- **Other matters:-**
 - **Application of the Statutory Charge under the Statutory Exceptional Grant Power; and**
 - **Appropriate jurisdiction for divorce proceedings.**

March 2010

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¹ http://www.opsi.gov.uk/RevisedStatutes/Acts/nisi/1981/cnisi_19810228_en_2#pt3-ch2-11g13

About the Consultation Exercise

This consultation exercise is being conducted in keeping the HM Government's Code of Practice on Consultation, July 2008. The consultation criteria being adhered to are set out at **Annex 1**.

A list of the consultees to this exercise is provided at **Annex 2**.

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:

The Consultation Co-ordinator
Northern Ireland Legal Services Commission
2nd Floor, Waterfront Plaza
8 Laganbank Road, Mays Meadow
Belfast BT1 3BN

Email jillherron@nilsc.org.uk

Facsimile 028 9040 8995

Closing date

Responses must be received by **11 June 2010**.

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 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, Freedom of Information Act 2001 [FOI] and the Data Protection Act [DPA]). If you want information that you provide to be treated as confidential please be aware that, under FOI, there is a statutory Code of Practice with which public authorities must comply and which deals with, among other things, obligations of confidence.

In view of this, 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 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, or 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:

Dr Theresa Donaldson
Director of Policy , Service Development and Civil Service Delivery
Northern Ireland Legal Services Commission
2nd Floor, Waterfront Plaza
8 Laganbank Road, Mays Meadow
Belfast BT1 3BN

Introduction

The NI Legal Services Commission (The Commission)

1. The Commission was established under Article 3 of the Access to Justice (Northern Ireland) Order 2003 (AJO) as an Executive Non-Departmental Public Body sponsored by the Northern Ireland Court Service. The AJO provides the legislative basis for the modernisation of the provision and administration of public legal services in Northern Ireland. The Commission seeks to ensure that, consistent with the resources made available to it, people in Northern Ireland have access to quality legal services that target those in greatest need and demonstrate value for money.
2. To comply with the Lord Chancellor's policy intention in terms of fully implementing the AJO, the Commission is engaged in a strategic programme of reform aimed at delivering civil legal service;
3. This consultation exercise focuses on one aspect of the Commission's reform programme; the reform of the Statutory Charge through the Legal Aid (General)(Amendment No. 2) Regulations (Northern Ireland) 2010, an amendment to the Legal Aid (General) Regulations (Northern Ireland) 1965.
4. Reforming the operation of the Statutory Charge is an important priority within the Commission's overall reform agenda. The aim of this reform is to tighten controls on the current application of the Charge in Northern Ireland by enabling individuals to litigate at public expense, but also to ensure that those who secure money or property with the assistance of public funds reimburse the legal aid fund for the benefit of others who will need similar assistance in the future.
5. A Draft Equality Impact Assessment (EQIA) on the proposed amendments accompanies this document in accordance with the requirements of Section 75 of the Northern Ireland Act 1998 and is available on the Commission's web site.

6. Responses are sought to this consultation generally, and specifically on whether you think the proposed amendments are fair and practicable. Views on individual elements of the proposals are welcome. In light of responses to the consultation, Ministerial approval will be sought for the resulting proposed reforms.

Purpose of the Statutory Charge

7. The purpose of the Statutory Charge² is to ensure that legally-aided clients contribute towards the cost of funding their cases, so far as they are able. The application of the Statutory Charge can contribute to the Commission's objective to target social need in two ways:
 - It provides the Commission with a revenue stream which the Commission is allowed to keep and use for funding future cases;
 - It enforces the ability-to-pay principle thereby targeting limited resources on those in greatest need.

8. The Statutory Charge serves to induce "private client realism" throughout the conduct of a case. The purpose of this control is to ensure legal aid funding is viewed by the assisted person and their legal adviser in the same way a private paying client would view funding - as if they were paying their own costs.

² Article 12 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, which defines the Statutory Charge, is set out at **Annex 3**).

Why Reform the Statutory Charge?

9. The need for reform arises because the legislation underpinning the Statutory Charge in Northern Ireland, and the way in which it is currently administered, do not afford the opportunity to recover costs from legally aided clients to the extent that is the case in other comparable jurisdictions (see Annex 4). The reform of the Charge is being brought forward in three phases.

10 Three Phases of Reform

Phase 1 – a clarification of the provisions contained in Regulation 17(9)(a) and (f) of the Legal Aid (General) Regulations (Northern Ireland) 1965.

Phase 1 clarifies that the existing exemptions to the Statutory Charge include monies recovered or preserved under the following provisions:

- Articles 24, 25(1) and (2), 26A, 29(6) and 33(2)(a) to (dd), 33(2)(f) and 33(3) of the Matrimonial Causes (Northern Ireland) Order 1978 (**it should therefore be noted that the exemptions do not extend to property recovered or preserved under Article 26 of the 1978 Order**)
- Articles 4 and 8 of the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979
- Articles 4(1)(b) and (d), 8(1) and (5) and 22(2) of the Domestic Proceedings (Northern Ireland) Order 1980
- Article 15 of, together with paragraphs 2, 8 and 11 of Schedule 1 to, the Children (Northern Ireland) Order 1995
- income support and housing benefit paid under the Social Security Contributions and benefits (Northern Ireland) Act 1992
- working tax credit and child tax credit paid under the Tax Credits Act 2002

This change will come into effect on 1st April 2010. It is **not** the subject of this consultation but has been brought forward to facilitate appropriate application of the Statutory Charge under existing legislation;

Phase 2 – Phase 2 is the subject of this consultation, and involves substantive amendments to Regulation 17(9), which will mean the application of the Charge in many more legally aided cases particularly those brought under the Matrimonial Causes (Northern Ireland) Order 1978 ;

Phase 3 – Phase 3 will involve the introduction of new Financial Regulations and will be brought forward at the same time as the Northern Ireland Funding Code legislation facilitating full implementation of the Access to Justice (Northern Ireland) Order 2003. The proposed changes in Phase 3 will be consulted on later in 2010.

Phase 2 - Substantive Amendments to Regulation 17(9)

11. This consultation document is concerned with Phase 2 of the reform of the Statutory Charge. The Commission intends to introduce a number of substantive amendments to the 1965 Regulations. The most significant effect of these amendments will be to narrow the exemptions from the Charge in Ancillary Relief Proceedings (Ancillary Relief Proceedings deal with financial provision and property linked to matrimonial and divorce proceedings).
12. In so doing, the Commission will be reflecting the position in England and Wales and Scotland which following the recovery of property or monies produces a considerable revenue stream for the Legal Services Commission (England and Wales) and the Scottish Legal Aid Board, thereby assisting the funding of future cases. In the Republic of Ireland, notwithstanding the different constitutional and legislative approach to the breakdown of family relationships and other legal matters, there is also a provision for costs recovery for legally aided clients.
13. The Commission proposes to delete the existing exemptions listed in Regulation 17(9) of the Legal Aid (General) Regulations (Northern Ireland) 1965 (see Annex 5) and to replace them with a new set of exemptions which, overall, are narrower in scope.
14. The most significant change proposed in this consultation is the deletion of the current exemptions in respect of lump sum payments of money in Ancillary Relief Proceedings. These payments will become subject to the Statutory Charge. This is the most common circumstance where money is recovered or preserved in legally aided proceedings, with no order as to costs. **The effect of the proposed reform for legally assisted persons is that the Statutory Charge will apply in many more cases. It will remain the duty of the legal adviser to warn the client that legal aid might not be free in their case and, if the following exemptions do not apply, their legal**

costs will be recouped by the Commission from money or property recovered or preserved. The new exemptions are set out in detail in the following paragraphs.

Proposed new exemptions to the Statutory Charge

15. The Commission proposes to replace the existing exemptions with the following new exemptions (Legal Aid (General) (Amendment No.2) Regulations (Northern Ireland) 2010:

1. ‘Any “periodical payment of maintenance”’;

(“Maintenance” will be defined as “money or money’s worth paid towards the support of a spouse, former spouse, child or any other person for whose support the payer has previously been responsible or has made payments”)

One of the purposes of periodical payments of maintenance is to relieve the financial hardship of a spouse or child who has been financially dependent on the other party. In light of this fact, the Commission proposes to exclude any periodical payments of maintenance from the Statutory Charge.

2. ‘Any sum or sums ordered to be paid under Article 27B(4) or 27C of the Matrimonial Causes (Northern Ireland) Order 1978’;

By inserting this provision the Commission proposes to exempt both income and lump sums which derive from a “pensions ear-marking” arrangement in ancillary relief proceedings in line with the Commission’s policy of not applying the Statutory Charge to pension arrangements under the Matrimonial Causes (Northern Ireland) Order 1978’;

3. ‘Other than in circumstances which are exceptional having regard in particular to the quantity or value of the items concerned, the assisted person’s clothes or household furniture or the tools or implements of his trade’;

The items listed here are currently subject to the Charge in Civil Legal Aid (although exempt from the Charge in Legal Advice and

Assistance). It is the Commission's view that the introduction of a limited exemption for these items will allow for the enforcement of the Charge where it is reasonable to do so, i.e. where high value or high volume items have been recovered;

4. 'Any sum or sums ordered to be paid under Article 7 of the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 or the Family Homes and Domestic Violence (Northern Ireland) Order 1998';

The effect of this will be to exempt any "interim" payment made to an assisted person to relieve financial hardship (although the Statutory Charge would still apply to any lump sums or property recovered at the conclusion of proceedings).

Article 18 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 relates to rights to occupy the matrimonial home, and imposes obligations on either party with regard to repairs and maintenance, discharge of rent or mortgage, or other payments, as well as the use or care of possessions or furniture. The Commission proposes to introduce an exemption which would protect such payments for the benefit of the assisted person.

5. 'Any sum, payment or benefit which by virtue of any provision of or made under an enactment cannot be assigned or charged';

Regulation 17(9)(f) currently contains provision to exempt certain social security benefits from the operation of the Statutory Charge. The Commission proposes to introduce a new provision which is wider in scope and which will exempt from the Charge state benefits and pensions, and any other property subject to a statutory prohibition on

assignment³. A significant effect of this exemption is that it will exempt monies, (both income and lump sum), recovered under a pension sharing order under Article 26A of the Matrimonial Causes (Northern Ireland) Order 1978, where the court has made the order to split a pension for the benefit of the legally assisted party in divorce proceedings.

£3,000 “threshold”

16. The Commission is aware that the proposals detailed here represent a radical modification of the present system, as the Statutory Charge will apply much more often, particularly in family and matrimonial proceedings. The Commission also believes it is right to extend the principle that where a person receiving legal aid recovers or preserves monies or property in a successful action, and where they can afford to do so, they should contribute to the costs paid to their legal representatives out of the legal aid fund.
17. The Commission also appreciates that these proposals may lead to an increase in circumstances where the assisted person does not fully benefit from any monies or property they have recovered in a successful action, especially in those types of cases where there is usually no order for costs.
18. The Commission has considered how to mitigate, to a certain degree, against such circumstances occurring in family proceedings and, has considered introducing a £3,000 threshold below which the Statutory Charge will not apply in certain family proceedings. Such a partial exemption would serve to ensure that individuals exposed to a drop in income, particularly subsequent to divorce, will not find themselves

³ The “statutory prohibition on assignment or charging” means that, for example, a person in receipt of certain defined social security benefits cannot transfer those benefits to another person, or charge them. The applicant’s legal adviser will need to ascertain whether this prohibition applies to monies recovered in the assisted person’s case, and if it applies such monies will be exempt from the statutory charge.

having to pay back the full amount of money or property recovered or preserved.

19. In England and Wales the threshold was set at £3,000 prior to the “New Focus” reforms in 2005, when it was eliminated. The Commission is proposing to set a threshold figure of £3,000 but will keep the affordability of such a threshold under review.

Questions for consultees on the proposed amendment to the Statutory Charge exemptions

- a) Are there any other matters that the Commission should consider in relation to exemptions from the Statutory Charge?
- b) Do consultees have any comment to make on the proposed £3,000 partial exemption, below which the Statutory Charge will not apply?

Application of the Statutory Charge under the Statutory Exceptional Grant Power

20. Legal aid legislation in Northern Ireland authorises the availability of legal aid under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (NI) Order 2003. However, there are certain proceedings which are outside the scope of the legal aid scheme.

21. A Statutory Exceptional Grant Power (SEGP) enables funding to be made available in “exceptional cases” that are outside the scope of the legal aid scheme. The authorisation for legal aid under SEGP is given by a Direction from the Lord Chancellor. It is the case that where SEGP funding is provided the statutory charge may apply to money damages received in any other related proceedings.

Question for consultees

- c) Consultees are invited to make comment on the application of the statutory charge in related money damages proceedings where SEGP funding has been provided.

(Further information in relation to SEGP may be found on the Commission’s website).

County Court / High Court Matrimonial Certificates

22. In bringing forward the programme of reform including the introduction of a NI Funding Code and new Financial Regulations, the Commission has been reviewing the grant of legal aid in divorce proceedings. On reviewing information submitted the Commission would take the view that proceedings should be issued in the County Court rather than the High Court, unless the applicant can assert why the application is required to be heard in the High Court.

Question for consultees

- d) Consultees are invited to express their views on the appropriate jurisdiction for divorce proceedings.

Conclusion

This consultation paper is focused on the second phase of reform of the Statutory Charge that is intended to bring the application of the Charge into line with other comparable jurisdictions in Scotland and England and Wales. While the Charge will apply in many more cases following these reforms, the Commission has proposed the inclusion of a £3000 'cushion' to reduce the impact on family cases.

In Phase 3- **New Financial Regulations under the Access to Justice (NI) Order 2003** the Commission intends to further tighten the operation of the Statutory Charge in conjunction with the introduction of a new "Funding Code" for Northern Ireland under the Access to Justice (NI) Order 2003

The Commission will be issuing more information on statutory charge reform proposals under the AJO in the future.

A Draft Equality Impact Assessment accompanies this consultation.
A Regulatory Impact Assessment will follow.

Questions for Consultees

- A) Are there any other matters that the Commission should consider in relation to exemptions from the Statutory Charge?
- B) Do consultees have any comment to make on the proposed £3,000 partial exemption, below which the Statutory Charge will not apply?
- C) Consultees are invited to make comment on the application of the statutory charge in related money proceedings where SEGP funding has been provided.
- D) Consultees are invited to express their views on the appropriate jurisdiction for divorce proceedings.

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 Exercise

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 documents 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.

Consultee List

Action against Medical Accidents
Advice NI
Advice Services Alliance
Age Concern/Help the Aged
Agnew Address Higgins
Alliance Party
Amalgamated Workers and General Transport Union
An Munia Tober Traveller Support Group
Antrim and Ballymena Solicitors Association
Antrim Library
Armagh Library
Armagh Solicitors Association
Association of Personal Injury Lawyers
Bahai Office for Northern Ireland
Ballymena Library
Banbridge Library
Bangor Carnegie Library
Bangor Solicitors Association
Baptist Church
Bar Council of Northern Ireland
Barnardos Northern Ireland
Belfast Central Library
Belfast City Council Youth Forum
Belfast Education and Library Board
Belfast Health and Social Care Trust
Belfast Hebrew Congregation
Belfast Islamic Centre
Belfast Solicitors Association
Blind Centre for Northern Ireland/RNIB
British Deaf Association(NI)
British/Irish Rights Watch
Business Services Organisation Headquarters
Carafriend
Carers Northern Ireland
Chief Executives Forum
Children and Young People's Unit, OFMDFM
Children in Northern Ireland
Children's Law Centre
Children's Order Advisory Committee
Chinese Welfare Association
Church of Ireland
Citizens Advice Bureau Regional Office
Cloona Child Contact Services and Family Support
CO3
Coalisland & Dungannon Solicitors Association
Coalition on Sexual Orientation (CoSO)
Coleraine and Ballymoney Solicitors Association
Coleraine Library
Commission for Victims and Survivors Northern Ireland
Committee on the Administration of Justice
Communication Workers Union
Community Foundation for Northern Ireland

Community Relations Council
Cookstown Solicitors Association
Council for the Homeless (Northern Ireland)
Council of District Judges (Magistrates' Court) in Northern Ireland
Criminal Justice Inspectorate Northern Ireland
Crown Solicitor's Office
Deaf Association of Northern Ireland
Democratic Unionist Party
Department for Social Development
Department of Agriculture and Rural Development
Department of Culture, Arts and Leisure
Department of Education
Department of Employment and Learning
Department of Enterprise, Trade and Investment
Department of Environment
Department of Finance and Personnel
Department of Health, Social Services and Public Safety
Department of Justice, Equality and Law Reform
Departmental Solicitors Office
Deputy District Judges (Magistrates' Courts) Association
Derry Central Library
Directorate of Legal Services
Disability Action
District Judges Association
Down & District Solicitors Association
Downpatrick Library
Dungannon Library
East Belfast Community Development Agency
Enniskillen Library
Equality Commission for Northern Ireland
Family Mediation Northern Ireland
Federation of Small Businesses Regional Office
Fermanagh Solicitors Association
Forum of Insurance Lawyers
Foyle Solicitors Association
G4S Plc
Gay and Lesbian Youth Northern Ireland
General Consumer Council for Northern Ireland
Gingerbread Northern Ireland
Graduate School of Professional Legal Education
Green Party
Greer Hamilton & Gailey
Health and Social Care Board
HM Council of County Court Judges
Housing Rights Service
Independent Health Coalition
Indian Community Centre
Institute of Child Care Research
Institute of Directors (NI Division)
Institute of Professional Legal Studies
James H Rodgers & Co
John J Rice Solicitors
Labour Relations Agency
Land Registers of Northern Ireland
Law Centre (NI)

Law Society of Northern Ireland
Legal Aid Board, Ireland
Legal Services Commission, England & Wales
Libraries NI Headquarters
Limavady Solicitors Association
Lisburn City Library
Lisburn Solicitors Association
MaCaulay & Ritchie
MacElhatton & Co
Magherafelt Solicitors Association
Men to men
MENCAP Northern Ireland
Mens Project
Methodist Church in Ireland
Mid-Ulster Womens Network
Mr A Forbes
Mr A M Brown
Mr J McNulty
Ms A Kelly
Multi-Cultural Resource Centre
Newry & Banbridge Solicitors Association
Newry Library
Newtownabbey Solicitors Association
NIACRO
NICVA
North Eastern Education and Library Board
North West Community Network
North West Forum of People with Disabilities
Northern Health and Social Care Trust
Northern Ireland African Cultural Centre
Northern Ireland Anti-Poverty Network
Northern Ireland Assembly
Northern Ireland Association for Mental Health
Northern Ireland Childminding Association
Northern Ireland Commissioner for Children and Young People
Northern Ireland Committee, Irish Congress of Trade Unions
Northern Ireland Council for Ethnic Minorities
Northern Ireland Court Service
Northern Ireland Gay Rights Association
Northern Ireland Guardian Ad Litem Agency
Northern Ireland Housing Executive
Northern Ireland Human Rights Commission
Northern Ireland Law Commission
Northern Ireland Local Government Association
Northern Ireland Office
Northern Ireland Office of the Information Commissioner
Northern Ireland Ombudsman's Office
Northern Ireland Peers
Northern Ireland Policing Board
Northern Ireland Prison Service
Northern Ireland Public Service Alliance (NIPSA)
Northern Ireland Sikh Cultural and Community Centre
Northern Ireland Lay Magistrates Association
NSPCC
Office of the First Minister and Deputy First Minister (Northern Ireland)

Old Persons Advocate
Omagh Library
Omagh Solicitors Association
O'Reilly Stewart
P A Duffy & Co
Parents Advice Centre
Participation Network
POBAL
Police Service of Northern Ireland
Portadown Library
Portadown Solicitors Association
Presbyterian Church in Ireland
Probation Board Northern Ireland
Progressive Unionist Party
Public Health Agency Headquarters
Public Prosecution Service for Northern Ireland
Relate
Roman Catholic Church in Ireland
Rural Development Council
Save the Children
Scottish Legal Aid Board
Simon Community Northern Ireland
Sinn Fein
SLS Legal Publications
Social Democratic Labour Party
Social Security Agency
Social Services Inspectorate
Society of Masters
Solace
South Eastern Education and Library Board
South Eastern Health and Social Care Trust
Southern Education and Library Board
Southern Health and Social Care Trust
Stephen Scott & Company Solicitors
Strabane Library
Strabane Solicitors Association
The Cedar Foundation
The Patient Client Council
Thomas Taggart & Sons
Traditional Unionist Voice
TV Licensing
Ulster Peoples College
Ulster Scots Heritage Council
Ulster Unionist Party
UNISON
Victim Support NI
Voluntary and Community Unit - DSD
West Belfast Economic Forum
Western Education and Library Board
Western Health and Social Care Trust
Women's Aid Federation Northern Ireland
Women's Forum Northern Ireland
Woodlands Juvenile Justice Centre
Youth Council for Northern Ireland
Youth Justice Agency

The Statutory Charge is defined in Article 12(5) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981⁴

N O R T H E R N I R E L A N D O R D E R S I N
C O U N C I L

1981 No. 228 (NI 8)

Legal Aid, Advice and Assistance (Northern Ireland) Order 1981

Contributions from persons receiving legal aid and charge on property recovered

12.—(1) Where a person receives legal aid in connection with any proceedings, his contribution to the legal aid fund in respect of those proceedings may include—

(a) if his disposable income exceeds [£2,995] a year, a contribution in respect of income not greater than **F2** one third of the excess or such other proportion of the excess or such amount as may be prescribed; and

(b) if his disposable capital exceeds **F3** £3,000, a contribution in respect of capital not greater than the excess or such lesser amount as may be prescribed.

(2) Regulations may provide that there shall be substituted—

(a) for the yearly sum specified in paragraph (1), such other yearly sum as may be prescribed;

(b) for the capital sum so specified, such other capital sum as may be prescribed.

(3) A person may be required to make any contribution to the legal aid fund in one sum or by instalments.

(4) If the total contribution to the legal aid fund made by a person in respect of any proceedings is more than the net liability of that fund on his account, the excess shall be repaid to him.

(5) Except so far as regulations otherwise provide—

(a) any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings; and

(b) if the total contribution is less than the net liability of the legal aid fund on his account, a sum equal to the deficiency;

shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings.

⁴ http://www.opsi.gov.uk/RevisedStatutes/Acts/nisi/1981/cnisi_19810228_en_2#pt3-ch2-11g13

(6) The reference in paragraph (5) to property recovered or preserved for any person shall include—

(a) his rights under any compromise arrived at to avoid or bring an end to the proceedings; and

(b) any sums recovered by virtue of an order for costs made in his favour in the proceedings (not being sums payable into the legal aid fund under Article 11).

(7) The charge created by paragraph (5) on any damages or costs shall not prevent a court allowing them to be set off against any other damages or costs.

(8) In this Article references to the net liability of the legal aid fund on any person's account in relation to any proceedings are references to the aggregate amount of—

(a) the sums paid or payable out of that fund on his account in respect of those proceedings to any solicitor or counsel; and

(b) if he has received any advice or assistance in connection with those proceedings or any matter to which those proceedings relate, any sums paid or payable out of that fund in respect of that advice or assistance to any solicitor,

being sums not recouped to that fund by sums which are recovered by virtue of an order or agreement for costs made in his favour with respect to those proceedings, or by virtue of any right of his to be indemnified against expenses incurred by him in connection with those proceedings.

Annotations:

[F1](#) Words in art. 12(1)(a) substituted (10.4.2006) by Legal Aid (Financial Conditions) Regulations (Northern Ireland) 2006 (S.R. 2006/119), reg. 4

[F2](#) SR 1993/121

[F3](#) SR 1988/255

Extract from Financial, Economic and Policy Appraisal of Reforming the Application of the Statutory Charge in Northern Ireland - undertaken by Dr. Tony Dignan in August 2008.

Operation of the Charge

- 1.1 The statutory charge is a feature of all UK legal aid systems. The Legal Services Commission (LSC) has responsibility for civil legal aid in England and Wales. The Scottish Legal Aid Board (SLAB) administers legal aid in Scotland, where the charge is referred to as 'clawback'.
- 1.2 In each jurisdiction, the charge operates in the same basic fashion. Thus, where money or property is recovered or preserved at the conclusion of a case, the legal aid fund may seek to recoup its costs in the following order:
 - Costs paid by the other side.
 - Any contributions made by the assisted person.
 - Any damages awarded to the legally-aided person or from property recovered or preserved by the litigation.
- 1.3 Typically, if a property which is to be used as a home is recovered with the benefit of legal aid, enforcement of the charge can be deferred or postponed. Where this occurs, and the client agrees, a charge will be registered against the property.
- 1.4 In both Scotland and England and Wales, simple interest is charged on outstanding debts. There is no legislative provision for charging interest in Northern Ireland.
- 1.5 In each jurisdiction, a range of exemptions are specified in the relevant legislation in relation to civil legal aid⁵. When the three jurisdictions are compared, the key points of difference lie in the treatment of financial provision in family and matrimonial cases. The following are the salient points of note:
 - In England and Wales, exemptions apply to a limited range of payments, including periodical payments of maintenance and interim inheritance payments. Lump sum payments and settlements are not exempted.
 - The situation in Scotland is similar, except that in family and matrimonial cases, payments or transfers up to a specified

⁵ Exemptions also exist in relation to legal advice and assistance (the 'Green Form' scheme in Northern Ireland). These are not dealt with here as the charge is for the benefit of the solicitor.

amount (£4,821)⁶ are exempt from the charge. Beyond that threshold, the charge applies. The partial exemption is intended to ensure that not all of a person's resources are consumed by the charge, as an individual's financial circumstances can be considerably altered in the wake of e.g. a divorce.

- In England and Wales, where a certificate has been issued prior to 1 April 2005, the first £3,000 of any money or the value of any property recovered or preserved in a family case is exempt from the statutory charge. The £3,000 exemption was removed following the implementation of the New Focus for Civil Legal Aid reforms (DCA, 2004).
- In Northern Ireland, the total amounts granted under certain specified proceedings are exempt. (See Appendix 4).

1.6 In addition to the proceedings specified as exempt in the regulations⁷, it has been the practice in Northern Ireland to exempt property recovered or preserved in relation to Article 26 of the Matrimonial Causes (Northern Ireland) Order 1978, which provides for property adjustment orders or settlements in connection with divorce proceedings.

1.7 At least through March 2008, the exemption applied in respect of property adjustment orders.

Recouping costs

1.8 The differences between the three jurisdictions in the exemptions to the charge have a direct bearing on the amount of income that is generated from that source. In England and Wales, the statutory charge accounts for a little over one-third (35 per cent) of the Community Legal Service Fund's operating income (Table 2.1). In Scotland, the charge contributes a lower share of income, in the region of 13 per cent.

⁶ 2006 – 07 figure. 2009 – 10 figure = £5,009:-

http://www.slab.org.uk/getting_legal_help/pdf/what_you_may_pay_2008.pdf

⁷ In regulation 17(9) of the Legal Aid (General) Regulations (Northern Ireland) 1965.

Table 2.1 Sources of income: England and Wales and Scotland, 2006-07

	Per cent of income		Per cent of gross expenditure	
	England and Wales	Scotland	England and Wales	Scotland
	%	%	%	%
Contributions	9	12	3	4
Expenses/costs recoverable	57	75	18	28
Awards/Recoveries from damages and statutory charge	35	13	11	5
Total	100	100	32	37

Sources: SLAB, Annual Report 2006-07; LSC, Annual Report, 2006-07.

1.10 When measured against gross expenditure, income from the statutory charge in England and Wales stood at 11 per cent in 2006-07, compared to five per cent in Scotland. The differences between Scotland and England and Wales cannot all be ascribed to the variations between the two jurisdictions in the range and type of exemptions to the statutory charge. The *mix of cases* in receipt of legal aid also varies between the two jurisdictions and this has an effect on the profile of income.

1.11 In England and Wales, family and matrimonial cases account for about 70 per cent of gross expenditure with personal injury/negligence cases comprising a little under one-fifth of the total⁸. By contrast, in Scotland, family and matrimonial cases account for a lower proportion of gross expenditure (52 per cent) while personal injury/negligence cases⁹ amount to one-third of gross expenditure.

⁸ Based on 2005-06 data supplied to the Commission by the Legal Services Commission as part of the research for the statutory charge project.

⁹ Termed 'reparation' in the SLAB Annual Report.

The exemptions from the statutory charge in civil legal aid (Legal Aid (General) (Northern Ireland) Regulations 1965)

Regulation 17(9)

(9) The provisions of this regulation shall not apply to-

(a) payments of money under the provisions of-

(i) Articles 4 and 8 of the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979¹⁰; or

(ii) Articles 24, 25(1) and (2), 26A, 29(6) and 33(2)(a) to (dd), 33(2)(f) and 33(3) of the Matrimonial Causes (Northern Ireland) Order 1978¹¹; or

(iii) Articles 4(1)(b) and (d), 8(1) and (5) and 22(2) of the Domestic Proceedings (Northern Ireland) Order 1980¹²; or

(iv) Article 15 of, together with paragraphs 2,8 and 11 of Schedule 1 to, the Children (Northern Ireland) Order 1995¹³; or

(b) moneys paid in lieu of or with respect to arrears of any payments referred to in sub-paragraph (a); or

(c) moneys payable, whether by way of arrears or otherwise, under an agreement in writing made between parties to a marriage for the purposes of their living separately and containing financial arrangements (whether made during the continuance or after the dissolution or annulment of the marriage); or

(cc) moneys payable under an affiliation agreement in writing or proceedings to enforce such an agreement; or

(d) payments of money under the provisions of any Act which provides for the enforcement of or for giving effect to an order made under one of the sections set out in sub-paragraph (a); or

(e) moneys so paid as a result of proceedings taken in a court in Northern Ireland to enforce an order made by a court outside its jurisdiction in proceedings for relief comparable to that which may be given by a court in Northern Ireland under the provisions mentioned in this paragraph;

(f) income support and housing benefit paid under the Social Security Contributions and benefits (Northern Ireland) Act 1992¹⁴;

¹⁰ S.I. 1979/924 (N.I. 8)

¹¹ S.I. 1978/1045 (N.I. 15)

¹² S.I. 1980/563 (N.I. 5)

¹³ S.I. 1995/755 (N.I. 2)

¹⁴ 1992 c. 7

(g) working tax credit and child tax credit paid under the Tax Credits Act 2002¹⁵;

and moneys so payable or property passing in lieu shall not be the subject of a charge within the terms of [Article 12(5) of the Order].

¹⁵ 2002 c. 21

Should you require any further information about the Northern Ireland Legal Services Commission please visit our website at www.nilsc.org.uk or alternatively contact us at the below address.

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