

Access to Justice Committee Response

HISTORY AND STATUS OF THE CIVIL JUSTICE COUNCIL

1. In his report Access to Justice (1996), Lord Woolf recommended 'the establishment of a Civil Justice Council as a continuing body with responsibility for overseeing and co-ordinating the implementation of [his] proposals'. The Lord Chancellor accepted this recommendation and the Council was formed in March 1998 alongside the provisions that introduced the most extensive civil justice reforms for over a century.
2. Under Section 6 of the Civil Procedure Act, the Council is charged with: keeping the civil justice system under review; considering how to make the civil justice system more accessible, fair and efficient; advising the Lord Chancellor and the Judiciary on the development of the civil justice system; referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee; and making proposals for research. To ensure an appropriate spectrum of experience and skills, the Civil Procedure Act enshrines in legislation a requirement that membership of the Council must include: members of the judiciary; members of the legal professions; civil servants concerned with the administration of the courts; persons with experience in and knowledge of consumer affairs; persons with experience and knowledge of the lay advice sector; persons able to represent the interests of particular kinds of litigants (for example business or employees)
3. The majority of the day to day business is conducted by committees. There are currently six committees, each chaired by a Council member. These represent Council interests in the priority areas of civil procedural reform; Alternative Dispute Resolution (ADR), Housing and Land Clinical Negligence and Serious Personal Injury Access to Justice - this has 2 sub-groups: the Fees Panel and the Public Legal Education Working Group Experts Access to Rehab

Access to Justice and Public Funding

4. The Funding Code consultation paper contains proposals for wide ranging restrictions on scope of public funding available or individuals seeking legal advice and representation, and on financial eligibility for such services.
5. The Access to Justice Committee of the Civil Justice Council is concerned that the Funding Code consultation paper has been produced against the background of the ongoing Fundamental Review of Legal Aid, which is due to report in early 2005, and questions the appropriateness of two separate reviews of the legal aid system being undertaken at the present time, with different bases for recommending future action. We therefore consider that the present consultation is premature and should await the report of the Fundamental Review. We are particularly concerned by the proposals for reducing availability of public funding for challenges to public bodies contained in the paper, given the constitutional importance of judicial review.
6. Moreover, until there is proper research, evaluation and analysis of the effect of the proposals upon access to justice, such proposals should not be implemented. Indeed we note that in its response to the consultation paper, the Legal Aid Practitioners' Group has called for a Parliamentary debate on the current state of public funding in civil cases, prior to any further cuts.

7. We have doubts as to whether the proposals in the paper will result in the (relatively minimal) costs savings expected to be achieved. In several respects we can anticipate that the proposals will create additional costs to the system of public funding, and be counterproductive as well as being disproportionate and discriminatory as for as restricting access to justice is concerned.

8. In urging caution about any further restrictions upon access to publicly funded legal services at the present time, attention is drawn to the recent report of the House of Commons Constitutional Affairs Committee [HC391-1] which concluded:

'There are human rights obligations in relation to civil cases. There is significant evidence of unmet need for legal services by many in society – often among those who are most vulnerable. Too much has been squeezed out of the CLS budget as a result of the twin pressures of criminal and asylum work. Civil Legal Aid has become the Cinderella of the Government's services to address social inclusion and poverty. The highly desirable extension of provision and services has been possible only at the expense of cutting back on eligibility, scope and remuneration. This process has now gone too far.'

(Page 42, para 148)

9. Whilst the Committee generally supports the broad aim of seeking to avoid litigation where possible, this approach should not be used to implement a replacement for properly funded quality legal advice at an early stage in a dispute. Otherwise, a two tier system of justice is promoted where those without means are unable to access justice effectively. Many of the proposals in the consultation paper involve further cuts to eligibility and scope of publicly funded legal advice and representation beyond that which is acceptable and which will further impede access to justice, impacting disproportionately upon the most vulnerable in society.

10. The Committee is concerned that there needs to be a greater understanding of the nature of ADR before there are any restrictions imposed which will have the impact on access to justice as a result of the proposals. The Committee queries the assumption in the paper that mediation is always cheaper and more effective than litigation, or that complaints procedures are effective remedies in all cases – the real picture is undoubtedly more complex. Practitioners are well placed to advise when a case may be suitable for mediation or other forms of ADR, although we recognise that more needs to be done to foster a culture of ADR. Whilst the Committee actively supports the use of ADR where appropriate, caution should be exercised in promoting a different approach to access to justice for the impecunious as opposed to those able to afford to pay for legal advice.

11. The Committee is also concerned that the impact of these proposals upon vulnerable people, such as frail older people, those with disabilities, the mentally disordered, the homeless etc. has not been sufficiently assessed. We note that the Regulatory Impact Assessment states that the effect upon such groups has been provisionally assessed to be neutral. We are most concerned by this statement and ask for details as to how such a conclusion can have been reached when the most socially excluded persons tend to be without means, and thus form a significant group of those who will be eligible for public funding. In our view, the impact of these proposals raises

serious issues of compliance with Disability Discrimination legislation and Article 6 ECHR, as the proposals will impact disproportionately on vulnerable people.

12. Publicly funded legal advice is provided to enable those without means to access justice, including the Courts. The Executive cannot abrogate the constitutional right of access unless it is expressly permitted to do so by Parliament. Some of the proposals in the paper will have the effect of practically preventing the most socially excluded from accessing justice, and lead to an obvious unfairness in terms of inequality of arms. In our view, if implemented the proposals will amount to prevention of effective access to justice, including the Courts.

The Access to Justice Committee's response

13. This paper concentrates on particular issues raised in the consultation paper, which relate to access to justice. Any absence of a response in relation to a particular proposal should not be taken as acceptance or support of the same. Other Committees of the Civil Justice Council are responding to the consultation paper and these should be read in conjunction with this response.

14. The main issues to which the Access to Justice Committee responds are:

1. ADR, alternative remedies and avoiding litigation
2. Judicial review (Public law):
 - (a) Alternative remedies and JR as a remedy of last resort
 - (b) Removal of public funding post permission in judicial review cases (the use of CFAs)
 - (c) Removal of the presumption of funding post grant of permission
 - (d) Removal of devolved powers in judicial review cases
3. The removal of costs protection for litigants
4. The removal of the £100,000 equity disregard
5. Help at Court

15. In addition, the Committee wishes to respond to the question as to whether the existing system could be improved to produce savings other than those specific proposals set out in the consultation paper. In particular the Committee asks the Legal Services Commission to consider consulting with the profession as a whole as to whether and how the present system could be adapted to reduce costs whilst not compromising access to justice. In our view, practitioners are well placed to contribute to the debate as a result of their contact with the system on a daily basis.

The need to avoid litigation, use of alternative remedies and ADR Please see the response from the ADR committee

16. We comment below on the availability of other routes to dispute resolution, such as complaints processes and Ombudsman schemes in the context of judicial review. We are most concerned that there needs to be a real understanding about the effectiveness or otherwise of these schemes before any proposals are implemented which will restrict access to justice based on an approach to public funding.

17. In particular, we draw the attention of the Commission to the fact that for a variety of reasons, many complaints processes do not provide effective access to justice and are not 'true' alternative remedies. They involve lengthy delays over months or years (which

will affect limitation periods) and result in recommendations only (eg social services complaints procedures). Whilst some claims for compensation, simple investigation of factual disputes, and questions of explanations or apologies may be suited to complaints processes, each case should be considered on its individual merits. Ombudsman's schemes do not replicate the jurisdiction of the Courts, and may indeed be incapable of dealing with questions of law at all (eg the Central and Local Government Ombudsman). Ombudsmen are not obliged to investigate disputes and may discontinue the investigation at any time.

18. In the Secretary of State for Constitutional Affairs' recent consultation paper 'Transforming Public Services: Complaints, Redress and Tribunals' (July 2004), reference is made to the shortcomings of the existing systems of complaints: 'Despite significant improvements in a range of tribunals and departments, the Government does not believe that...the existing system for redress provided by central Government are as successful as they could or should be'.

19. In cases which involve the need for urgent injunctive relief, it would not be appropriate to force clients to use inappropriate and lengthy complaints processes before granting public funding, as this would represent an impediment to access.

20. Cases which involve clear disputes about points of law do not amount to maladministration (the remit of the Ombudsman) and require resolution by the Courts.

21. Practitioners already consider alternative remedies before the grant of public funding, and are obliged to certify the same on the Commission's application forms. Pre action protocols already flush out whether there is an appropriate alternative to litigation which should be used. The system as it operates already provides safeguards.

22. We would not support a presumption in the Funding Code that complaints or Ombudsman schemes are necessarily appropriate in all cases before public funding is available for litigation. We repeat that access to quality legal advice during any complaints or ADR process is important, and that if any ADR method is used, it should not be a replacement for quality legal advice. The two should run in parallel.

23. We are therefore of the view that these matters require further consideration and proper testing before there are any major revisions to the legal aid system, such as those proposals set out in the consultation paper. It would appear to be appropriate to await the outcome of the Fundamental Review before proposals are implemented which will impact adversely on access to justice for the most socially excluded.

Public law

24. There are several proposals in the consultation paper which are applicable to public law. In many respects, however the paper does not distinguish between private and public law and the CJC is concerned that the proposals for administrative law may not have been given sufficient consideration.

25. The thrust of the proposals in the field of public law is to reduce to a very significant level, the right of access by individuals to public funding for judicial review proceedings, namely challenging decisions or failures of public bodies, including local and Central Government. The constitutional right of citizens to challenge the excesses or abuses of

executive power is fundamental. The practical effect of the proposals is that access to justice will be effectively prevented for the most vulnerable in society. For these reasons, the proposals in relation to public law are opposed.

26. The Council wishes to address four main issues:

- the proposal that if there is a complaints or Ombudsman scheme available, no funding for judicial review proceedings should be provided until such other schemes are used
 - the suggestion that public funding should be removed post permission as judicial review cases may be otherwise funded by CFAs (whether in practice such funding is available)
 - the removal of the presumption of continuation of funding post permission
 - the removal of devolved powers for judicial review proceedings.

Judicial review as a remedy of last resort

27. Before there is any proposal to restrict or remove public funding on the ground that an internal complaints system has not been exhausted, there needs to be a greater understanding of the way in which existing complaints systems operate and the remedies available. A more accurate understanding of the nature of judicial review as a remedy of 'last resort' is also required.

28. It is a fundamental feature of judicial review that all genuine alternative remedies should be exhausted before proceedings are issued. The Courts are not slow to refuse permission or apply sanctions if there is a true alternative remedy which could and should have been used prior to the issue of proceedings. However, even before the permission stage is reached there are safeguards built into the system to ensure that the jurisdiction is appropriately used.

29. The pre action protocol for judicial review will result in a prompt response from a prospective Defendant that an alternative to judicial review exists and should be used instead of judicial review proceedings. Copies of the letter before claim and any response are required to be sent to the Commission and action can be taken where the Commission considers that alternatives might be pursued. Moreover, the criteria for the grant of public funding already provides that funding will not be available if there are genuine alternative remedies which should be first utilised. It is for the practitioner to explain to the Commission in the individual case why a particular remedy has not been pursued or is not suitable to the case. Counsel instructed in a case will also be acutely aware of the need to ensure that there is no alternative which could be used, and this provides an additional check prior to issue of any proceedings.

30. If there is any criticism of the quality of suppliers in this regard then sanctions can be applied by the Commission in the usual way via the contract, and the client's individual public funding certificate can be discharged. The Courts may also order costs in appropriate cases, and thus it will be seen that there are already ample safeguards within the system to protect against inappropriate use of public funds. In our view there is no need for any additional action.

31. As referred to above, the test applied by the Court in considering whether permission should be granted includes a judicial determination of whether there are any

administrative alternatives which should be pursued first. The Court will not be slow to refuse an application for permission on this basis, and we are not aware that there has been a widespread problem which has arisen in respect of this issue in recent years.

32. Thus, it will be seen that judicial review already includes rigorous safeguards to ensure that genuine alternative remedies are pursued. We therefore do not support a proposal which would have the effect of placing barriers to access to justice by forcing clients to go through inappropriate alternatives not suited to the individual dispute before being granted public funding.

33. We have already commented above on the shortcomings of complaints processes in relation to swift and just resolution of disputes. The processes are fraught with delays, are not independent, and result in recommendations for future action. Whilst some cases are undoubtedly suited for the complaints processes, we note that the Health Service Ombudsman's report of 2003/4 pointed out that poor internal complaint handling was a feature of complaints to the Ombudsman. Some public bodies prefer that the dispute is resolved by litigation, which is more focused than lengthy and costly complaints processes. It would be incorrect to take the view that complaints are less costly than litigation – the *Cowl (R (Cowl) v. Plymouth CC (2001) EWCA Civ 1935)* complaints process undoubtedly cost considerably more than proceeding to a final hearing.

34. Judicial review covers a wide range of subject areas and the actions of a disparate variety of public authorities. Whilst we support the use of genuine alternatives to litigation, we do not consider that it is appropriate to alter the existing guidance or the Code by making general statements as to which cases will be suitable for resolution through non litigation routes. As set out above, we consider that proper safeguards already exist.

35. The Ombudsman schemes are generally more efficient than internal complaints systems. They are invaluable in cases where detailed investigation into widespread administrative failures is required, or where there are fundamental disputes of fact which require investigation. However they are not directed to achieving prompt action, and will not be available where litigation is an alternative (eg Parliamentary Commissioner, Local Government Ombudsman etc). There is therefore a 'chicken and egg' situation.

36. Many Ombudsman schemes require the complainant to have exhausted any internal complaints system first, and thus by the time a particular issue reaches the office of the Ombudsman it may be several months, if not years, since the original dispute arose. Plainly, this remedy is not effective for cases which require interim relief, compliance with time limits, a speedy resolution or the determination of a point of law.

37. As with complaints procedures, the Ombudsman may only make non binding recommendations for future action.

38. As far as mediation in judicial review cases is concerned, following *Cowl*, it is our view that practitioners who specialise in public law are familiar with the need to consider mediation at appropriate stages in proceedings, or prior to the issue of proceedings. We would be concerned if there was a shift towards compulsory mediation, as this would change the unique voluntary nature of the process and provide a barrier to the parties seeking to resolve the dispute in the most constructive way possible. We also question

whether compulsion would breach Article 6, and would appear to be outwit current judicial thinking in relation to mediation. The suggestion that a certificate might be limited to mediation only appears to be based on the clinical negligence model, and we are concerned that there appears to be a lack of understanding about the different nature of a claim for damages from the vast majority of judicial review claims which do not involve any question of damages.

39. We are aware that the ADR Working Party, set up under the auspices of the Administrative Court following *Cowl (R (Cowl) v. Plymouth CC (2001) EWCA Civ 1935)*, decided that mediation might only be appropriate following the grant of permission (ie after the Court had already filtered out unmeritorious claims), and even then there was no agreement as to whether mediation was suitable for particular categories of cases. This supports our view that each case should be considered separately on its own merits.

Judicial review and the use of CFAs

40. Conditional Fee Agreements were extended in 1998 to include all civil cases with the exception of family proceedings. The rationale behind the extension of CFAs was that they would enable access to the Courts to be provided to those ineligible for public funding but who were not otherwise able to afford to fund litigation, with predictable costs consequences.

41. The Commission's proposal is to remove public funding for judicial review cases at the grant of permission, on the basis that insurance is theoretically available, regardless of whether in the circumstances of the particular case, such funding is available.

42. We consider that this proposal is wholly misplaced and consider that if implemented, the proposal will result in a widespread denial of access to justice which is in breach of the fundamental right of access to the Courts, and Article 6 ECHR.

43. For CFAs to be of any real assistance, there must be clarity prior to litigation as to what constitutes a successful claim and certainty of costs orders. Judicial review offers neither.

44. Judicial review is a discretionary remedy. In many cases, Claimants achieve that which they sought by issue of proceedings, yet no relief is granted by the Court. For example, it may be that following issue of proceedings, the Defendant agrees to reconsider the decision under challenge, or takes some other action which gives the Claimant the same relief as that originally sought. However, the Defendant will invariably argue that such action should not attract an adverse costs order as this would merely serve to discourage Defendants from conceding claims at an early stage. This is supported by a range of cases regarding the circumstances where it would be appropriate to order an inter partes costs order in judicial review. (eg *R (Boxall and another) v Mayor and Burgesses of the London Borough of Waltham Forest* (21 December 2000)). These cases confirm that the Court will be slow to entertain applications for costs and that in many situations, even where the Claimant has been successful, costs will not be ordered.

45. Thus, 'success' in a judicial review claim may well not lead to a costs order, or even part costs order in many cases. Success for the Claimant cannot be equated with recovery of costs.

46. A CFA is only viable where insurance is available as protection against an adverse costs order. The nature of judicial review means that After The Event (ATE) insurance is highly unlikely to be available. As can be seen above the complexity of defining 'success' in judicial review proceedings makes both CFAs and ATE wholly unsuitable.

47. ATE is also prohibitively expensive for cases where the prospects of success are so difficult to determine. Most insurers will not offer ATE for judicial review at all. Even if in practice ATE were to be available, we anticipate that it would at such high premiums that it would be well beyond the reach of most Claimants in judicial review, most of whom are without means.

48. If CFAs were to be compulsory post permission, then in practice cases would cease at that stage, resulting in a prohibition on access to justice. Given the vulnerable nature of Claimants in judicial review (the mentally disordered, the homeless, destitute, asylum seekers, people with disabilities, the socially excluded) we consider that the proposal runs counter to the Lord Chancellor's Directions for priorities for public funding, which is directed towards these client groups.

49. We are also concerned by the proposal that even if insurance is not in practice available, CFAs are in theory an alternative means of funding judicial review cases, and thus can be substituted for public funding. We reject this argument. For access to the Court to be practical and effective, and not theoretical or illusory, the practical impact on Claimants must be considered.

50. We also consider that if CFAs provided a viable alternative to public funding, the current approach to costs orders would alter. There would be complex satellite litigation regarding costs, and the proceedings would be more vigorously contested. This would run counter to the current shift towards settled outcomes and would be regrettable.

51. We also query the policy of reducing or removing public funding from cases involving fundamental rights and freedoms, and instead placing the onus on practitioners to take commercial risks in conducting such cases. The Civil High Cost Case scheme already provides for practitioners to take the commercial risk of conducting judicial review cases (including human rights cases) once cases reach £25,000 costs. We question whether this is appropriate in the judicial review field, where there is no necessary match between 'success' of a claim and predictability of obtaining an inter partes costs order. We do not consider that it is appropriate for representation of vulnerable clients regarding challenges to executive actions to be dependent upon the willingness of practitioners to take commercial risks in the same way as damages claims. We would welcome further analysis and research as to how this has affected representation of clients already.

52. Finally, the removal of public funding for judicial review would serve to emphasise the inequality of arms between Claimants and public bodies whose decisions are under challenge. In practice, Claimants would be unable to access funding, and therefore adequate representation and in such a vital area where constitutional rights are

involved, we are seriously concerned that this proposal would lead to a denial of access to the most socially excluded.

Removal of devolved powers for judicial review

53. We are concerned that the Commission proposes to remove devolved powers from practitioners in judicial review cases. We are opposed to the proposal for the following reasons.

54. Devolved powers have been developed by the Commission under the supplier contract to allow practitioners to grant Emergency certificates in limited circumstances to take urgent steps in a case to protect the client's interests. Previously, there had been significant difficulties in the Commission being able to deal with urgent applications within the time required, resulting in impediments to access to justice. Often, an application to the Court or preparatory work is required the same day as the client first consults an adviser. The existence of devolved powers enables the clients' interests to be better served and an improvement in access, specifically related to the urgency of the situation. It also reflects the Commission's recognition that suppliers with devolved powers have reached the quality standard set by the Commission. The proposal does not sit easily with the Commission's 'hands off' approach to quality suppliers. Implementation of this proposal would, we believe, lead to the Commission being unable to deal as promptly with applications for funding with the unavoidable consequence that barriers to access would be created.

55. In exercising devolved powers, practitioners must still apply all the same tests which would be applied by the Commission as set out in guidance and the Funding Code, including the sufficient benefit test, the availability of other effective remedies, other funding etc. Full application forms must still be completed and delivered to the LSC office within 5 working days providing a second formal obligation on practitioners to certify these matters. If any matters of concern are raised by those documents then the Commission has a number of courses of action available.

56. If the Commission is concerned that practitioners are acting ultra vires in exercising their devolved powers, then sanctions are available to root out such practices. These include more comprehensive auditing of the supplier to investigate whether there is an inherent problem with a particular supplier or solicitor, revocation of the individual certificate, and/or the removal or restriction of the powers from particular suppliers via contract sanctions. These sanctions are sufficient to meet the Commission's concerns.

57. With regard to the reference as to whether applications for public funding should be in the name of a parent or a child, we wish to register our concern about the need for children (particularly children with disabilities) being able to enforce their legal rights via the civil justice system separately from the interests of their parents as carers. Whilst sometimes the interests of both will coincide, the refusal or inability of a parent to fund legal advice in respect of the child's rights should not, in our view, lead to funding being unavailable.

58. Finally, we find it difficult to reconcile this proposal with the suggestion (in para 5.21) that for appeals to the Court of Appeal, devolved powers should be extended. The stated reason for extending devolved powers to defend an appeal is to avoid delays. We are in support of the extension in this regard, but would point out that devolved

powers are even more vital in delays terms at the inception of a case where an urgent application for interim relief may be required.

59. In our view, practitioners should retain the existing devolved powers, and any concerns about unlawful exercise of such powers should be dealt with via existing powers of the LSC.

Removal of the presumption of continuation of funding post permission

60. We are concerned about the basis for the suggestion that the presumption of funding after the grant of permission for judicial review should be removed.

61. We are particularly concerned about the link made in paragraph 5.19 of the consultation paper between prospects of success and costs benefit, due to the nature of judicial review as a discretionary remedy and the difficulty of assessing the cost of any beneficial outcome for a client in monetary terms. Moreover, the cases where permission has been granted have already gone through the most rigorous merits and sufficient benefit test, and the Court has confirmed that the legal issues are arguable (this does not equate to borderline) and should proceed to be heard at a substantive hearing.

62. We agree that the availability of alternative sources of funding for continuation of the proceedings will not be the subject of consideration by the Court in granting permission for judicial review. However, in our view this is not relevant as practitioners must keep the question of other sources of funding under regular review throughout the course of the proceedings. Certificates are already limited to the grant of permission and thereafter Counsel's opinion (or the opinion of an external solicitor with higher advocacy rights). This formalises the obligation already imposed on practitioners to consider again the sufficient benefit test.

63. We suggest that if the Commission is concerned that there are cases where alternative funding is available but not utilised then it should amend the CLSAPP8 to include a section on funding from other sources, similar to that in the CLSAPP1. When the practitioner completes the CLSAPP8 in seeking an amendment to the certificate to cover steps up to and including the final hearing, a formal consideration of funding from other sources can be evidenced. For the reasons above, we do not accept that CFAs for judicial reviews are available or appropriately considered to be 'alternatives' to public funding continuing.

64. The Committee is opposed to the removal of the presumption of funding for these reasons.

Help at Court

65. We support the recommendation in para 5.26 to increase the scope of Help at Court unless this proposal is directed towards replacing existing Legal Representation with a level of assistance where the rates of remuneration is less. We therefore suggest that clients who do not qualify for Full Representation are assisted via the extended Help at Court.

Removal of costs protection

66. The consultation paper asks how effective a deterrent removing complete costs protection for publicly funded Claimants would be. It suggests that a penalty of £200 might be imposed in the event that a client was unsuccessful to discourage unmeritorious claims from being brought. We are opposed to any removal of costs protection.

67. The proposal implies that Claimants are 'litigation happy', issue proceedings without merit and that there are several unmeritorious cases where proceedings would not be issued at all if the costs penalty were to apply. We are concerned about the basis for these assumptions and ask for the evidence in support which has led to the assertions being made.

68. Clients who are eligible for public funding are impecunious, as the financial eligibility thresholds are already very low. Any removal of the costs protection would act as an immediate disincentive to exercise the right of access to justice and the Courts for such a client group. The sum of £200 would discourage the most socially excluded from the Courts, and result in a denial of access, as this sum would be simply unaffordable for such persons. We are concerned that the proposal would act as an additional impediment to access, akin to imposing an additional Court fee for issuing proceedings which would not be recoverable in the event of an unsuccessful claim. When applied to the poorest members of society, this would appear to raise questions of legality and discrimination.

69. Clients are entitled to rely upon the advice and judgment of their legal advisers in respect of whether proceedings should be issued. Within the public funded system, practitioners must apply the sufficient benefit test and the provisions of the Funding Code in respect of conducting cases, whether pre or post issue of proceedings, and throughout the course of litigation. There are already sanctions which can be applied if practitioners or clients act unreasonably during the course of the proceedings. Indeed, if a client refuses unreasonably to accept advice, then the public funding certificate may be discharged or even revoked. These sanctions, if properly applied, are sufficient.

70. For these reasons we are opposed to any removal of the costs protection for public funded persons.

Removal of the £100,000 equity disregard and comment on the mortgage disregard

71. We are opposed to further cuts in eligibility and are concerned that the income and capital limits already exclude much of the population who do not have the means to seek legal advice on a private paying basis.

72. We do not support the removal of the £100,000 equity disregard. We note that the justification for removing the equity disregard is that 'a person with £100,000 equity in their main dwelling is not considered to be socially excluded, or amongst the least well-off in society'. We do not share this conclusion, and would reiterate the concerns of the Select Committee that the existing means test excludes those who are unable otherwise to access legal advice.

73. Moreover, the proposal assumes that prospective litigant may raise capital against any equity in their main dwelling and we ask whether any research has been undertaken to confirm that in practice, this is possible for the majority of potential litigants affected. We are concerned that there is a lack of reality about this proposal in that it is highly unlikely that a person living in a property worth £70,000 and a £60,000 mortgage, could ever hope to raise £10,000 capital to pay for legal fees.

74. A person's principal residence is different in nature from other capital, as it is first a residence and secondly a capital asset. In a rising property market, many properties will be worth more than several years ago, but this does not mean that any 'paper profit' can be realised. We would also be concerned about a public policy which supports pushing people of low means into debt.

75. The proposal will, in our view impact disproportionately on those people who have purchased a property and then ceased to be employed, or suffered injury or disability such that they would be unable to sustain any additional repayments in respect of the extra loan secured on the property.

76. There is also a suggestion that the existing mortgage disregard may not be retained. We support the retention of the £100,000 mortgage disregard, although consider that the level should be increased. There is a pool of people who are in receipt of Income Support and other means tested benefits, or who are unable, for a variety of financial reasons, to fund legal advice privately but who have a mortgage in excess of £100,000. This is particularly so in London where even basic accommodation has a high value. In the event that there is a slump in the housing market and values fall, it will not be uncommon to find situations where mortgage levels exceed property values, and the effect of any removal of the disregard would be to bar access to legal advice.

77. For an example of how the existing system is already too restrictive, one of our members was approached recently by a prospective client in the advanced stages of Multiple Sclerosis. She was a wheelchair user and doubly incontinent. She had adapted her property to meet her increasing needs. Her night time domiciliary care services were to be withdrawn by the local authority on one day's notice, leaving her without care and unable to move or call for help. She was unable to write and was not in receipt of Income Support as she had been unable to complete the application form. She was awaiting a home visit from the local CAB to assist with completion of the form but was on a waiting list for such a visit. Her mortgage was £150,000 (the Building Society had accepted interest only payments due to her condition) and she had £80,000 equity in the home. However, she was unable to raise any funds against the value of the property due to the fact that she could not sustain the repayments by virtue of her disability. In any event such funds were not available in time for her to be able to access urgent advice. The outcome was that she was left without advice or representation.

Improvement to the existing system to achieve costs savings

78. The Committee is particularly concerned that the LSC is proposing cuts to eligibility with profound consequences for access to justice at the same time as the possibility of making savings without such results has not been properly investigated. As referred to above, the Committee suggests that a comprehensive consultation with the profession and other relevant stakeholders (eg the Court Service) should be considered to seek to

identify ways in which the existing system may be improved, without the detrimental effect on access to justice which the current proposals involve.

79. We would ask what action is taken by the Commission to enforce the statutory charge, particularly in family cases, and that information is provided as to how much is owed to the CLS Fund. If, as we understand, there is little pressure to repay the charge, this should be addressed as soon as possible, with regular statements and application of interest. Save where exceptions apply or there is an argument as to hardship caused by enforcement of the charge, we do not consider that it is appropriate for the Commission to be suggesting cuts to eligibility and scope at the same time as monies are due to the Commission which are not being actively recouped.

80. We are also aware that there are cases where an inter partes costs order is obtained against a privately funded opponent on behalf of the Commission, but no action is taken to enforce the costs order. We would be interested to see the policy of the Debt Recovery Department of the Commission in this regard.

81. There are also disincentives which are built into the present system which serve to redirect monies away from the CLS Fund. For example, the Civil High Cost Case Contract provides that at the end of the case, practitioners are required to make a 'Final Payment Choice'. Either they accept payment for all work undertaken on the case at the very low 'risk rates' (which apply on work after a threshold of £25,000, and are well below civil prescribed rates), and pay the Commission any inter partes costs received, or they take any inter partes costs and make no claim on the Fund. We have received reports of cases where the Commission has refused to fund the practitioners to seek an inter partes costs order in high cost civil cases. In meritorious cases where there is a reasonable prospect of recovering all or some of the costs for the Fund, regular refusals to fund such costs applications are bizarre and would appear to run counter to the obligations to the Fund. In addition, the Final Payment Choice provides a disincentive for practitioners to seek costs in cases where a part inter partes costs order (eg 40%) is likely to be awarded. Given that the costs in such cases are considerable, we question the appropriateness of the approach to costs recovery and the Final Payment Choice as this would seem to provide a disincentive to seeking a part costs order in a case where a full inter partes order is unlikely to be granted. We suggest that it would be beneficial to remove the Payment Choice and allow the usual incentives for practitioners to seek costs in appropriate cases to apply as usual. This will bring additional funding for the Commission and also ensure that practitioners continue to undertake legal aid high cost case work.

82. The suggestions above are examples where the Committee considers that improvements could be made to the existing system, to achieve savings over a period of time. These are unlikely to result in significant savings within the current financial year, but over a longer period.

Conclusion

83. We reiterate that whilst we generally support many of the proposed changes to family law, other proposals in the paper are of serious concern. Many will be unworkable and will reduce or even remove access to justice for the most vulnerable and socially excluded in society.

84. We recommend that those proposals are not implemented and that before any reconsideration of the proposals takes place, the outcome of the Fundamental Review of Legal Aid is awaited and then proper research is undertaken as to the full access to justice implications of any revised proposals. At the same time we would wish to see a proper analysis of the ways in which other savings may be made as a result of improvements to the existing system before cuts to scope or eligibility are contemplated.