

**Summary of LSC's response to specific consultation proposals
The Funding Criteria for Child Care Proceedings**

Part A – The Merits Criteria for Special Children Act Proceedings

Proposal in consultation	Related consultation questions	General view expressed	LSC approach and justification
<p>To introduce a limited merits criteria for parents and those with parental responsibility in Special Children Act Cases</p>	<p>Questions 1, 2 and 4 - 12 below</p>	<p>Concern was expressed about the impact on the wider justice system in terms of costs, delay and litigants in person. Respondents were of the view this would increase the administrative burden on suppliers and highlighted existing duties on solicitors to discharge certificates. Requests were made for information about the number of cases affected.</p>	<p>We will not introduce merits criteria for Special Children Act proceedings at this time.</p> <p>However, we will introduce a test as to whether a child is in need of separate representation from other children who are subject of the proceedings. We will also introduce a merits test for parents and people with parental responsibility who, in the absence of any conflict of interest, can be protected by being jointly represented with another party. There was some support for the introduction of these tests in the consultation responses. Their introduction will mean that separate representation and a separate standard fee will not be automatic for children and parents within the family fee scheme. The new scheme could encourage case splitting to maximize fees,</p>

			<p>thereby presenting a risk to the cost neutrality of the public law fee scheme. Consideration as to the appropriateness of separate representation will assist in making the best use of limited resources.</p> <p>We remain of the view that introducing further merits criteria is right in principle but that it is appropriate to first let the new family fee scheme bed in. Respondents point to the existing requirement to report unreasonable conduct in Funding Code Procedures and we will review the existing Procedures and Guidance and consider amending the Funding Code to make it clear that the reporting obligation applies to public law proceedings. We will keep the introduction of merits criteria under review.</p> <p>The necessary Funding Code changes are being pursued by the Ministry of Justice to obtain the approval of parliament.</p>
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	<p>1. Do you agree that within Special Children Act Proceedings there are some clients for whom funding is a lower priority?</p>	<p>There was a mixed response, which highlighted difficulties in generalising and listing groups of clients.</p>	
	<p>2. Do you agree that there should be no change to the financial eligibility rules for Special Children Act Proceedings? Should the financial position of clients ever be relevant to any reasonableness test?</p>	<p>Most agreed that there should not be any change to the financial eligibility rules. Most also said that the financial position of clients should not be relevant to any reasonableness test.</p>	
	<p>4. Do you agree with the list of parties who might be excluded from funding by a merits test as given in paragraph 4.1?</p> <p>(a) Those with no separate or sufficient interest in the outcome of the proceedings, sufficient to justify their representation. This will often be related to past issues and likely future degree of involvement of the client with the child.</p> <p>(b) Parties who have no positive or distinct case to put to the court.</p>	<p>Several responses were concerned that paternal families may not have much day to day involvement with children but may be the best chance for the child to remain within their family. Some stated that if there is no interest then the client is unlikely to have consulted a lawyer and is unlikely to be a party to proceedings.</p> <p>Some respondents stated that these parties were entitled to have their views heard and were of the view that if a party has sought legal representation and</p>	

	<p>(c) Clients who require representation but where, in the absence of any conflict of interest, the interests of the client can be protected by being jointly represented with another party.</p> <p>(d) Clients who disengage from proceedings or cease to give instructions</p> <p>(e) Clients who require proceedings to be conducted</p>	<p>continues to give instructions, then that that party should continue to be represented.</p> <p>There was a mixed response. Some were of the view that where there is no conflict of interest, parties can be jointly represented. Many cautioned that conflicts can often develop and are not always apparent at the beginning of the case, which could lead to delay.</p> <p>Several respondents supported this example, where a client ceases to give instructions over a long period of time. A number of respondents were concerned that clients often disengage but then will re-engage some weeks later. Problems with litigants in person were highlighted.</p> <p>Some respondents agreed with this example, although there was</p>	<p>There was some support for this proposal. This test will mean that separate representation and a separate standard fee will not be automatic for parents within the family fee scheme. The new scheme could encourage case splitting to maximize fees, thereby presenting a risk to the cost neutrality of the public law fee scheme. Consideration as to the appropriateness of separate representation will assist in making the best use of limited resources.</p>
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	unreasonably or at unjustifiable expense.	some concern as to the definition of reasonable conduct. Others were of the view that it is cheaper to provide representation rather than these clients emerging as litigants in person.	
	5. In what way, if at all, should the likelihood of the client achieving the outcome they seek in the proceedings be taken into account in any merits test?	The majority of respondents were of the view that the likelihood of the client achieving the outcome they seek in the proceedings should not be taken into account at all. They pointed to the difficulties in defining outcomes, since these cases are frequently not about a fixed outcome.	
	6. Are the existing criteria for Other Public Law Children Proceedings also appropriate for parties other than the child in Special Children Act Proceedings? If not, what criteria would be appropriate?	The majority were of the view that the criteria for are not appropriate for parties other than the child. They tended to be of the view that the current arrangements of parents and those with parental responsibility receiving non-means, non-merits tested funding and that those who wish to be joined having applications considered, should continue.	
	7. How should the Commission approach any discretion as to Reasonableness in merits criteria for Special Children Act Proceedings?	Most considered that reasonableness should not be introduced into merits criteria for these proceedings. A few respondents felt that such a criteria should be introduced and	

		that it should be clearly set out. Some felt a wide discretion available to the court and to solicitors.	
	8. What do you think would be the impact of the funding criteria proposed in this consultation? What proportion of clients is likely to be excluded under such criteria initially or during the course of the case?	Views varied on both the impact and on the proportion of clients likely to be excluded. Impacts identified included a potential to cause delay, an increase in costs and an increase in litigants in person. An increase in administration little savings to the Fund were also suggested. Some thought a significant number of cases would be excluded but many considered that that a small proportion of cases are likely to be excluded at the outset.	
	9. At what point in the proceedings is application of the merits criteria likely to have an impact? Is it correct that relatively few cases could be excluded under the merits criteria at the outset of the case?	Respondents were of the view that each case is different and that there is therefore no one likely point of impact. Some suggestions were put forward about the potential point of impact. Respondents agreed that relatively few, if any, cases could be excluded at the outset.	
	10. Do you support the introduction of a new devolved power for suppliers to grant legal representation in Special Children	The response to this question was mixed, since many were of the view that the merits test should not be introduced and that	Several respondents supported the introduction of a new devolved power, if a merits test were to be introduced. We will

	<p>Act Proceedings? How should that power operate in practice?</p>	<p>the current scheme should continue. However, several respondents supported its introduction if the grant of legal aid is not automatic. There was some concern that the operation of the devolved power may lead to delay, there were various suggestions as to how the power should operate in practice.</p>	<p>introduce devolved powers to self-grant certificates in Special Children Act proceedings. Guidance will be issued and arrangements will be in place to ensure that delay and additional administration are avoided.</p>
	<p>11. At what stages and in what circumstances should suppliers report cases to the LSC? Is the list of reporting obligations... at paragraph 5.4 above appropriate?</p> <p>Namely:</p> <ul style="list-style-type: none"> • Where the issues in the case have been identified and it becomes clear that the client has no reasonable prospect of securing the outcome they seek in the case • Where the client no longer has a separate or sufficient interest in the proceedings to justify their representation • Where the client's interest in the proceedings is no longer sufficiently distinct from that of other parties to justify separate representation 	<p>Respondents tended not to agree with this list as a whole, although some agreed with some of the specific points. Most did not think the suggested reporting obligations appropriate and repeated comments made in response to questions 4 and 5. Several stated that the current test of conducting their case reasonably and current reporting requirements should remain and be sufficient.</p> <p>In terms of joint representation, some queried which parent would leave the solicitor who had detailed knowledge of the case.</p> <p>The suggested time period of 28 days for reporting when a client disengaged or ceased to give</p>	

	<ul style="list-style-type: none"> Where the client has disengaged/ceased to give instructions for, say, 28 days 	<p>instructions was considered by most respondents to be too short a timeframe for vulnerable clients. A suggestion of 3 months was made by a number of respondents as an alternative.</p>	
	<p>11. To what extent should the new standard fee regime influence the way in which any merits criteria are applied.</p>	<p>Some respondents stated that remuneration should not influence whether clients have representation. Some were concerned about proposals to pay half the standard fee for incomplete cases and felt that providers should not be penalised for reporting a case. Several respondents were concerned that the fee schemes are based upon caseloads and average costs remaining the same and that cases excluded by these proposals will by definition be cheaper, thereby removing the balance in the swings and roundabout principle.</p>	
<p>To introduce a test to establish whether a child is in need of separate representation from other children who are the subject of proceedings.</p>	<p>3. Do you agree that funding for children in Special Children Act Proceedings should remain an absolute entitlement, subject only to the test for separate representation under criterion 5.4.5.?</p>	<p>There was a mixed response to this question. Some considered that representation should be an absolute entitlement, subject to the separate test for representation. Others were of the view that funding should remain an absolute entitlement,</p>	<p>There was some support for this proposal. This test will mean that separate representation and a separate standard fee will not be automatic for every child within the family fee scheme. Consideration as to the appropriateness of separate</p>

		whether or not they are separately represented.	representation will assist in making the best use of limited resources.
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Part B – Residential Assessments

Proposal in consultation	Related consultation questions	Views expressed	LSC approach and justification
To remove Residential Assessments, including viability assessments, from the scope of legal aid funding	13. Do you agree these assessments are outside the ambit of the legal aid budget as they are primarily about possible rehabilitation and are likely to involve treatment, therapy or other rehabilitative work?	The response was mixed in terms of where the obligation for funding residential assessments should lie. Those who agreed did so on the basis that costs should be met by the local authority, with duties to a child in need, rather than because they are primarily concerned with treatment, therapy or other rehabilitative work. Many considered it difficult to make a clear distinction between assessment and treatment, therapy or rehabilitative work and some pointed to recent case law. Concern was expressed about residential assessments will be funded in the future.	To remove the cost of residential assessments, including viability assessments, from the scope of legal aid funding from October 2007. Costs in relation to residential assessments fell to local authorities, in relation to their duties to children in need, prior to the Lambeth Case in 2005. Since then, these costs have increasingly been transferred away from local authorities to the limited Fund. Treatment, therapy, training and other rehabilitative work was excluded from scope in 2005, however, this exclusion has not been effective in relation to residential assessments.
	14. Are there any costs of these assessments that rightly fall to the client and therefore should be	The response was mixed with some respondents of the view that the costs of the assessment,	There is a lack of research on the long term effects of residential assessments.

	<p>funded from the legal aid budget? Please give examples of these.</p> <p>15. Do you agree that these assessments generally add insufficient value to the outcome of proceedings to justify the delay and costs involved given the availability of community based assessment?</p>	<p>except treatment and therapy should be shared as the court directs. Those who considered residential assessments to be outside the remit of the legal aid budget suggested the costs of experts reports as a result of the residential assessment should fall to the legal aid budget, but that they should be clearly restricted and shared.</p> <p>Respondents considered that residential assessments are valuable in certain cases and provided examples of cases where they had added value to proceedings.</p>	<p>We are holding discussions with DfES and Welsh Assembly Government colleagues around issues arising from this change. The necessary Funding Code changes are being pursued by the Ministry of Justice to obtain the approval of parliament.</p>
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