

## 14. Special Cases Unit

### *The Special Cases Unit*

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#### 14.1 The Referral Criteria

1. The Commission has established a Special Cases Unit whose responsibilities include dealing with high cost cases ~~and~~ [and complex cases including](#) multi-party actions. The Unit has two main functions:
  - (a) to monitor the most expensive cases funded as part of the Community Legal Service and to ensure that such cases are subject to appropriate financial controls;
  - (b) to administer the central budgets set by the Lord Chancellor for funding of very expensive cases. The Lord Chancellor's direction on budgets is set out in Volume 1 of the LSC Manual.
2. The Unit is based at the Commission's Brighton office with a significant presence in the London [Regional](#) office. There is also a small unit in the Cardiff office covering Wales but functions may be carried out at other offices, in particular the majority of family cases are dealt with by a unit based at Reading and Newcastle. Applications for Legal Representation which seem likely to meet the criteria for referral to the Unit described below should still be made by solicitors [according to the document "Where Work is Processed" as published on our website to their local regional office the office ? by us in our guidance on the website "Where Applications should be Sent"](#). That office will then refer the application to the Unit if it is of the view that the referral criteria are satisfied. However, many cases cannot be identified as potentially high cost at the outset and will only emerge as high cost cases after they have been issued as certificates by a regional office. Where a certificate is identified as meeting the referral criteria during its life, for example when there is an application to increase the cost limitation beyond £25,000, the certificate will be referred to the Unit. Solicitors will be notified when referrals take place.
3. Applications which relate to multi-party actions or potential multi-party actions may be made directly to the MPA Unit at the London [Regional](#) office which is part of the Special Cases Unit. [Further guidance on MPAs is covered by Chapter 15](#). Applications in family cases which meet the referral criteria are dealt with by the units in Reading and Jarrow **except** for cases under the Child Abduction and Custody Act 1985, cases under the Trusts of Land and Appointment of Trustees Act 1996 and any family case where authority has been granted to use Queen's Counsel or two junior counsel, which are dealt with in the

London office of the Special Cases Unit. (Queries regarding Very High Cost Case management in family cases should be directed the VHCC enquiry line:- 01189 558 764)

4. The referral Criteria are set out in rule C23 of the Code Procedures. [These are subject to important changes with effect from April 2010.](#) Applications or certificates for Legal Representation ~~or Support Funding~~ will be referred where it appears to a Director that any of the following conditions apply:

~~(a.i)~~ the actual or likely costs of the case exceed £25,000 (note that this figure refers to likely costs to settlement or other disposal – it includes counsel’s fees, disbursements and any likely uplift or enhancement on profit costs, but excludes VAT). Note that case planning has been reintroduced for family cases.

~~(b.ii)~~ if the case were to proceed to a contested trial or final hearing (or, in the case of appeal proceedings before the Court of Appeal or House of Lords, to the conclusion of that appeal stage) the likely costs of the case might exceed £75,000 (again this figure includes counsel’s fees, disbursements and any likely uplift or enhancement on profit costs, but excludes VAT);

~~(e.iii)~~ the application or certificate relates to a multi-party action or potential multi-party action (see sections 15.5 onwards below); ~~or~~

~~(iv)~~ [the application relates to an appeal or proposed appeal to the Supreme Court;](#)

~~(v)~~ [it is necessary to determine whether the case has a significant wider public interest or raises significant human rights issues in order to decide whether funding should be granted or continued; or](#)

~~(vii)~~ the application is for an Exceptional Case Contract (see section ~~15.10~~ [14.7](#) below).

- ~~5.~~ [5.](#)—Note that for the purpose of deciding whether the cost thresholds of £25,000 and £75,000 are reached, the Unit has a discretion to treat more than one set of proceedings or certificates as a single “case”. This is likely to be particularly relevant in Public Law Children Act proceedings involving numerous parties. The Unit will treat as one case public law certificates where the same solicitor is acting for siblings or parents and the cases are proceeding through the court together.

- [6. The referral criteria at sub paragraphs \(iv\) and \(v\) of paragraph 4 above were introduced with effect from 1 April 2010. However referral under these criteria apply both to new applications and to existing certificates \(see Transitional Provisions at the very start of the Funding Code Criteria\). The referral of Supreme Court appeals to the Special Cases Unit is](#)

self-explanatory and such cases are in any event very likely also to meet the financial thresholds for referral.

7. It is a new requirement that cases which rely upon significant wider public interest or significant human rights issues for their funding must be referred to the Special Cases Unit. Note that it is not simply the existence of those attributes which require referral to the Unit but whether those attributes are material to the funding decision. For example if a case is strong on prospects of success and costs benefit, the fact that it also raises significant human rights issues does not require referral. In relation to public interest, referral is likely to be needed in cases which might previously have been referred to the Public Interest Advisory Panel. In practice, referral under this criterion will arise in two situations:

(i) where a case is assessed by the office as having Borderline prospects of success such that without significant wider public interest or significant human rights issues funding would have to be refused. Remember that significant human rights issues are only a basis for funding Borderline cases under sections 7 and 8 of the Code (Judicial Review and Claims against Public Authorities Alleging Serious Wrong Doing);

(ii) where a case would not satisfy the Funding Code cost benefit criteria on its own facts and a depends on wider public benefits or human rights issues to be regarded as cost effective.

#### **14.2 The Special Controls Regime**

1. With effect from 1 April 2010 a new system operates for handling some of the most complex cases within the Special Cases Unit. This is The Special Controls regime which comprises a sub set of cases referred to the Unit under Rule C23 as described above. All cases within The Special Controls regime are overseen by a new committee, The Special Controls Review Panel.

2. The criteria for referral to The Special Controls are set out at C23 A of the Code Procedures. Risk controls applies to:

(i) all Multi-Party Actions or potential Multi-Party Actions;

(ii) all appeals or proposed appeals to the Supreme Court;

(iii) all cases where it is necessary to determine whether a case has significant wider public interest or raises significant human rights issues to decide whether funding should be granted or continued (as described in more detail above);

(iv) any individual case where the Director is satisfied that, if a case were to proceed to a test to trial or final hearing (or in the case of appeal proceedings before the Court of Appeal to the conclusion of that appeal stage) the likely costs of the case might exceed £250K.

3. Cases subject to Special Controls are subject to the same Funding Code criteria as other cases within the Special Cases Unit, including the affordability criteria. It is expected that in due course the Lord Chancellor will set a separate budget for Special Controls cases distinct from the budget for SCU cases generally but for the time being there will be just one budget for all SCU cases within which to consider affordability. The main practical difference for Special Controls cases is that they are overseen by the new Special Controls Review Panel.

4. For cases subject to Special Controls there is no right of appeal or review to independent funding adjudicators (Rule C23 A.2). The Special Controls Review Panel combines the functions previously carried out by such adjudicators, by the Public Interest Advisory Panel and by the Multi-Party Actions Committee. The administration of this panel is governed by The Special Controls Review Panel Arrangements 2010. The Jurisdiction and Procedures Panel are set out at Rules D1 – D4 of the Funding Code Procedures. The key points to note are as follows:

(i) as well as carrying out appeal functions the Director of the Special Cases Unit has the power at any time to refer an application or case before him to the Panel (much like the previous procedure for referring potential public interest cases to the Public Interest Advisory Panel);

(ii) unlike PIAP, the new Panel has jurisdiction over all issues, including public interest, legal merits and all other Funding Code criteria;

(iii) the Panel does not make final determinations of issues before it (save when a review from the Director is refused). Instead the panel makes recommendations to the Director who then makes the final decision;

(iv) it will, however, be very unusual for the Director not to accept the recommendations of the Panel and he is under a specific obligation to provide clear reasons if he does so (Rule D 4.5).

5. Further guidance on the role of the new panel in relation to public interest issues is set out at section 5.7 of those guidance.

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~~15.2~~ 14.3 — Treatment of Referred Cases

1. Where a case or a certificate has been referred to the Unit the Unit will consider all Funding Code Criteria relevant to the case in question and may refuse or withdraw funding on any of the grounds under which funding could be refused or withdrawn by a regional office. In addition, cases referred to the Unit are subject to ~~three~~ two additional funding Criteria:
  - (a) a case plan – the power for the Commission to refuse funding if proposals for progressing litigation do not appear satisfactory (see section 15.3 below) A case plan will be required for all cases referred to the Unit;
  - (b) affordability – the power to refuse or defer funding if it is unreasonable for funding to be granted in the light of the resources available in the central budget and likely future demands on those resources – see sections 15.4 to 15.8 below, especially paragraph 1(a) of section 15.5;
  - (e) ~~clinical negligence cases – a clinical negligence case with moderate prospects of success (50%–60%) will be refused funding if it is referred to the Special Cases Unit and its likely damages do not exceed likely costs by a ratio of at least 4:1. High cost clinical negligence cases with moderate prospects of success are therefore subject to the same cost benefit Criterion as cases considered under the General Funding Code (clinical negligence cases with moderate prospects of success which are not referred to the Unit need a damages to costs ratio of only 2:1).~~
  
2. For cases which are before the Special Cases Unit but have not been referred to the Special Controls regime as described at 14.2 above, any right of review against decisions of the unit is to an Independent Funding Adjudicator. However, there is a significant difference in the jurisdiction of Adjudicators for SCU cases compared to non-SCU cases. For SCU cases the Adjudicator does not have full jurisdiction over cost benefit issues but does have power to make a final determination of likely damages or any other benefit or remedy the client is likely to achieve in the

proceedings (see Rule C 61.2) Once the Adjudicator has determined those issues of damages and remedies, the final decision on the likely costs of the case and hence whether the costs benefit criteria are satisfied falls to the Unit (subject to the usual supervisory jurisdiction of Adjudicators under Rule C 62).

23. In addition to the above Criteria, the Unit will ensure that cases are monitored and controlled. The following procedures will be adopted by the Unit:
- (a) funding the case under a contract rather than a certificate. (The SCU has discretion not to require a separate contract in referred cases that do not meet the high cost thresholds in paragraph 3(a) and (b) of section 15.1) Where such a contract is in place, the contract governs remuneration;
  - (b) requiring a detailed and costed case plan for the progress of the litigation. This applies in all referred cases;
  - (c) where appropriate, obtaining an independent opinion on legal merits or issues of expert evidence and/or inviting representations on the merits from an opponent or third party.
3. ~~The Unit will also consider such procedures in relation to certificates issued under the Legal Aid Act 1988 which have been referred to it, although such cases will be governed by the merits tests in the 1988 Act rather than the Code.~~
4. There is a guidance pack regarding the handling of very high cost cases on the Commission's website explaining in more detail the Unit's approach to case plans and contracting. This explains the approach to remuneration under contracts. For cases where inter partes costs are expected to be paid if the case is successful, for example clinical negligence cases, remuneration is provided on a risk sharing basis. This means that if the case is successful recovery from the other side will be at full inter partes rates, but if it is unsuccessful payment from the fund is made only at specified hourly rates without mark up. The normal rates are £70 per hour for solicitors, £50 for junior counsel and £90 for senior counsel. Higher rates can sometimes be paid in specified circumstances – see the website.
5. Consideration of the Case Plan will take time to deal with and will often necessitate the costs position being resolved with retrospective effect. Provided the scope of the certificate covers the proceedings and the work being done, the costs position will be resolved retrospectively back to the date of the request for amendment to the costs limitation or the date of the Case Plan whichever is the earlier. Considering and responding to a Case Plan is much more time consuming than handling a request for an increase in the costs limitation where the costs will at the end of the matter be subject to detailed assessment.

Agreeing a contract price may often necessitate an exchange of correspondence or telephone calls to reach agreement. Solicitors and barristers should satisfy themselves that they have the necessary scope on the certificate to act, and then continue to do so whilst the costs positions is resolved. Therefore, there will be no effect on the court timetable and judicial management of the case caused by the case planning process. In family cases the VHCC Unit at Reading will, where necessary, write to solicitors to confirm that they may continue to act so that they have an assurance that the costs under the Case Plan will be resolved retrospectively. Practitioners are encouraged to submit a case plan as soon as they are aware that the costs to conclusion will exceed £25,000 rather than waiting until the actual running costs reach £25,000. Cases with twelve or more hearing days (interim and final) where counsel has been instructed are very likely to meet the criteria as are cases involving split hearings, numerous experts and assessments.

6. Once there is a request to amend the costs limitation (which will lead to a request for a Case Plan if one is not already provided) then the existing costs limitation on the certificate in effect “stops” and applies to costs incurred up to that date only and the Case Plan will “take over” and apply to costs from that date onwards.

Requests to amend the scope of the funding or provide prior authority are handled much more quickly than negotiating a case plan and also give providers an assurance regarding ongoing cover.

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#### **15.314.4 The Costed Case Plan**

##### **What is a case plan?**

1. A case plan is a tool for case management. It is created after thorough analysis and planning and the identification of the objectives to be achieved. It is a timetable for  
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the case that identifies the key events and specifies the work to be done, the resources needed to do it and when the resources will be needed. Resources might include skills, time (of named individuals) equipment and cost of disbursements. It is costed, specifying the cumulative cost of the work at specified intervals, at the key events and overall. It will normally include more detail for the near future and progressively less detail for dates further away. Case plans will therefore identify stages in a case and funding will be authorised stage by stage. Firms are therefore not expected at the start of a case to provide precise costings of the whole case.

### **Why have a case plan?**

2. The Special Cases Unit needs a case plan to decide whether the proposals for progressing litigation are satisfactory and to monitor and control the case. A case plan provides justified, realistic costs estimates for the Special Cases Unit. The Unit needs these to help to determine whether Legal Representation or Support Funding should be granted, or continued. It needs them to forecast and manage the expected demands on the Community Legal Service central budget.
3. A case plan enables compliance with the costs information requirements of rule 2.03 of the Solicitors' Code of Conduct. It provides information to enable an effective assessment of the cost-benefit and risk.
4. Using a case plan improves case management. It enables case management to be efficient and effective, transparent and consistent and well organised. Using a case plan reduces risks and uncertainty. It improves the prospects of securing a successful outcome. It should ensure and demonstrate the best possible value for money.

### **What are case analysis, case theory and Funding Code assessment?**

5. The case analysis identifies and assesses the strengths and weaknesses of the client's case and of the positions of other parties. It identifies favourable and unfavourable issues of law and the key propositions to be established. It identifies the major obstacles to success and how they will be overcome. It identifies favourable and unfavourable facts and assesses the evidence supporting them. It identifies what expert evidence will be required, and why. It identifies and assesses the risks and how to deal with them. The process of analysis identifies, for inclusion in the case plan, the key events, the resources required and the likely costs (in total and as solicitors' charges, counsel's fees and experts' fees).
6. The case analysis identifies what is in issue (e.g. the amount of a damages claim) and what is likely to be secured. It specifies the prospects of success.
7. As well as a case plan, an outcome of a case analysis is a case theory. This is a short statement, referring to the key issues of fact and law, stating why the case will be won. In ~~non-merits~~non-merits tested Special Children Act cases this would inform a decision on whether the anticipated work and costs constituted a reasonable expenditure in the circumstances of the case.
8. As well as a case plan, an outcome of a case analysis is a Funding Code assessment. This is a statement identifying each of the Funding Code Criteria that are relevant and stating why each is satisfied.

## What will the Special Cases Unit require?

9. Satisfactory proposals for progressing litigation will include:
- (a) a concise statement of what the case is about;
  - (b) a concise statement of the objectives including what is in issue and what is likely to be secured;
  - (c) a concise but thorough case ~~analysis which~~analysis, which must include, in a list, the favourable and unfavourable legal issues and the favourable and unfavourable  
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- facts and which must end with a statement of the prospects of success within the terms of the Funding Code;
- (d) a Funding Code assessment;
  - (e) a case theory, derived from the case analysis, beginning with the words “my client will win the case because “(or similar words) which normally should be no longer than five sentences, may commonly be contained in two or three sentences or may be encapsulated in one sentence;
  - (f) a broadly costed overall case plan including, among the key events, the dates when counsel and experts will be instructed, when the case management conference will be held and when the trial will take place and showing the forecast cumulative costs at key events and appropriate intervals. In family cases stages should be costed to appropriate points in the proceedings i.e. up to fact finding/threshold and thereafter disposal in public law children cases. If the court has already timetabled to final hearing then fully costed stages up to final hearing must be provided. If the timetable to final hearing is not yet in place then detailed stages must be costed up to the current timetable. A broad estimate to final hearing should also be given;
  - (g) a fully detailed, costed part of the case plan covering all the work to be performed, and all the costs to be incurred, in the next stage of the case with an overall price for the stage (and a breakdown of the costs incurred to date);
  - (h) details of any costs-sharing agreements;

- (i) the names of the person or team who will be managing or, doing work in, the case (and what work) with evidence of their suitability plus evidence of the firm's ability to handle the case to its conclusion.
- (j) For family cases the Special Cases unit will require typed details of:
  - (vi) The hearings, advocates' meetings and main client conferences with counsel (lasting half a day or more) which have taken place, and are to take place, with dates;
  - (vii) The court in which the proceedings are being heard, including any transfers between courts;
  - (viii) The rates applied;
  - (ix) Any enhancement applied, and justification for the enhancement;
  - (x) Disbursements claimed, ie, type, amount, number of parties and any apportionment;
  - (xi) For cases subject to the Funding Code merits tests, how the case continues to merit public funding.

Providers should ensure that:

- (xii) Counsels' fees are calculated on the basis of Family Graduated Fees, unless the case would otherwise escape the scheme because the number of main hearing days exceeds ten. Where the Family Graduated Fee Scheme is applied detailed workings must be provided by counsel to show how their anticipated fees have been calculated preferably by submission of a draft CLAIM5.
- (xiii) Routine correspondence and telephone calls claimed at an hourly rate must not be amalgamated with timed client attendances or preparation.

### **How is a case plan used by practitioners?**

10. A case plan is not a one-off static document created at the start of a case and then ignored, or edited after events have occurred. It is used to take a case forwards in a planned manner and, therefore, will always be up-to-date. As a case progresses, the case analysis and case theory may have to be revised. This may lead to amendments to the case plan.
11. As a case progresses, more detail should be added to the case plan. As a case progresses, the expected dates of events may change and the case plan should be amended to reflect this. As a case progresses, the court may make directions, new evidence may come to light

and unforeseen events may occur; any of these may mean reviewing the case analysis and case theory and making amendments to the case plan.

12. The Special Cases Unit will authorise work in stages. To obtain authority for a stage, the case plan, fully detailed and costed for that stage, is sent to the Unit.

#### **How is a case plan used by the Special Cases Unit?**

13. Before authorising a proposed stage, the Special Cases Unit will consider the case plan and, in particular, the fully detailed, costed part of it covering the stage. If there have been any amendments to the case analysis, case theory or Funding Code assessment since any previous stage was authorised, it will want to see them. The Special Cases Unit may discuss the proposed stage with the firm and require modifications to it.
14. When it authorises a stage, the Unit will specify a price for it based on prescribed rates (with, in appropriate cases, a reasonable mark-up for specified work). Mark-ups will only be allowed in cases such as family where inter partes costs are not normally awarded. If extra work has to be done or extra costs have to be incurred to complete the stage, an extra payment will be made only if the Unit has approved it in advance and only in defined circumstances, for example if an event has occurred that could not reasonably have been foreseen.
15. The Unit will not authorise small additional payments worth 5% or less of the total stage price. Suppliers will be expected to absorb these costs. On the other hand, if the stage has been completed at a cost that is between 95% and 100% of the specified price, the full 100% of the specified price is payable by the Unit. Only if a stage has been completed at less than 95% of the specified price will the actual cost be payable.
16. In monitoring a case, the Special Cases Unit may ask to see the current version of the case plan to ensure that the litigation is being progressed satisfactorily. In controlling a case, the Unit may require the case plan to be modified to cover additional work, less work or different work.

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#### **What happens at the end of a case?**

17. At the end of a case, the case plan can be reviewed to see what, if anything, could have been done differently, perhaps to achieve a better or quicker result or better value for money. A case plan, therefore, can be used as part of a continuous improvement programme.

## 15.414.5 — Managing the Central Budget

1. The Lord Chancellor has issued a direction under section 5(6) of the Act specifying the maximum amounts which may be spent on cases meeting the referral Criteria set out above in paragraph 4(a) and (b) of section 15.1. The text of the Lord Chancellor’s direction is set out in Volume 1 of the LSC Manual. It explains that the principal reason for setting this central budget is to ensure that it is not possible under the scheme for a small proportion of individual cases to consume a disproportionate share of public funds. Restricting funding for the most expensive cases allows funding to go further to help large numbers of people, especially at the level of Legal Help. The central budget for very expensive cases also assists in the control of the overall budget for the Community Legal Service Fund.
2. All high cost cases referred to the Special Cases Unit will be funded out of this central budget. Most cases will be subject to the affordability Criterion under which funding may be refused in the light of the resources available in the central budget and likely future demands on those resources. However, there are certain top priority cases in which funding is guaranteed regardless of other demands on the budget. It is only in these areas that funding is an entitlement. The three categories are:
  - (a) Special Children Act Proceedings – see definition in section 2.2 of the Code. These are cases in which there are limited merits Criteria. Where such proceedings are funded, any Related Proceedings heard at the same time may be funded (see section 11.8 of the Code);
  - (b) Proceedings in which the life or liberty of the client is at risk – note that this is a sub-category of the “overwhelming importance to the client” Criterion (see section 4.9). The life or liberty of the client will only be at risk where the proceedings will themselves determine issues of life or liberty, examples being judicial review of decisions to return asylum seekers to countries where they may face persecution, and habeas corpus actions challenging the lawfulness of current detention;
  - (c) Judicial Review proceedings in which funding is to continue under Criterion 7.5.2 – these are judicial review proceedings in which the court has given permission for the case to continue and the Commission is satisfied that the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues. See further guidance at section 16.
3. For these three exceptional types of case, the affordability Criterion does not apply, but such cases will still be funded out of the central budget and must be reasonable both in principle and as to the amount. Their costs must therefore be monitored and decisions on the affordability of other cases will depend in part on the funds allocated to these top priority cases.

4. Managing the central budget and assessing the affordability of cases is a complex process. It is not a simple question of whether there is sufficient money left in the budget for the current year. In particular:
  - (a) any individual decision to grant funding taken in a particular financial year is unlikely to have a significant impact on expenditure in that year. Because complex legal proceedings tend to have a long life span, the main effects of a decision to fund will usually be in future years;
  - (b) a decision to fund gives rise to payments on account that may be recouped and therefore to a **potential** liability on the Fund in that and future years. Actual liability will depend on the outcome of the case, and in particular on whether the case is abandoned, settles or costs are recovered from the other side.
5. The Lord Chancellor's directions limit net expenditure in a financial year. This has a number of implications:
  - (a) where payments on account are made in an ongoing case out of the central budget, all such payments will be recouped and will be credited to the central budget if the case reaches a successful conclusion and costs are recovered in full from the other side. The likelihood of this occurring must therefore be taken into account in estimations of future net expenditure;
  - (b) if a case is funded out of the central budget, but is unsuccessful and costs are ordered to be paid out of the Community Legal Service Fund to the unassisted party, such costs will be paid out of the central budget (see the CLS (Costs) Regulations 2000);
6. Experience of high-cost case funding since April 2000 under the strict controls applied by the Special Cases Unit has meant that it has not been necessary to apply the affordability criteria in the way originally envisaged. Instead, high costs cases have operated under an entitlement system under which every case passing the normal merits criteria has received funding.
7. This will continue to be true for the great majority of cases considered by the Unit. Affordability will, however, be applied in relation to the very largest actions. As from 2005/06, it is expected that affordability will be considered only in relation to cases where:
  - (i) Likely costs to disposal exceed £100,000; or
  - (ii) Potential costs to trial exceed £250,000.

8. For this purpose the Unit will treat more than one set of proceedings or certificates as a single case if they appear to be closely connected or proceeding together before the Court. For practical purposes, affordability will impact primarily or exclusively on the funding of potentially substantial group litigation.
9. The Director, Special Cases Unit, will undertake an annual affordability review. Major actions will be compared and funding considered within the budget approved in the three-year round spending settlements. The Director will compare potential actions under the criteria at 15.5 below and invite submissions on the relative merits of the different actions.
10. Where the Director makes an initial decision to refuse funding under the affordability criterion, it is likely that the decision will proceed to the MPA Committee for review. The MPA Committee will have the same powers as an Independent Funding Adjudicator. The Committee may also invite claimants' representatives to answer questions or make presentations in support of their actions. The Committee may then report back with recommendations to the Director for a final decision to be made.
11. The Commission has power both to refuse and to defer funding under the affordability criterion. The Director will, as necessary, defer funding of an action so that it can await comparison with other actions under the annual affordability review.
12. Funding of on-going actions is usually split into four main stages: concept; investigation; issue and conduct of proceedings; and trial. The concept phase allows an initial analysis to enable more realistic estimations to be made of prospects of success, likely costs and benefits. The affordability criterion will not usually be used to refuse funding for the concept phase if other merits criteria justify it. The key point at which to consider affordability will often be after the concept phase but before substantive investigations.

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13. Where substantive proceedings are approved for funding under an annual affordability review, subsequent funding for that litigation will not be withdrawn on affordability grounds, provided the case remains within its predicted level of costs.

#### **A.14.6 Guidelines on Affordability**

1. When considering affordability or comparing actions in an affordability review, the key considerations for the Commission (not in any particular order) are:
  - i Prospects of success of the action, including the prospects of full or partial cost recovery in the event of success;

- ii ~~The~~ likely costs of the case and consequent risk to the Fund. This will be considered both in its own terms in light of the budget and as against the benefits the action might bring;
  - iii ~~The~~ importance of the case to clients in the action, in particular whether the litigation may secure life-changing levels of damages for the clients; and
  - iv ~~The~~ public interest, both the nature of any wider public interest in the action and the rating of public interest as advised by the Public Interest Advisory Panel.
2. Other secondary factors may also be considered on affordability (to the extent that they have already been taken into account under the guidelines above):
- i Scientific Research. Most litigation operates within the framework of established science but some cases seek to develop new science to establish issues of causation. Evidence gathering in such cases sometimes takes the form on new scientific research. This is unlikely to be an appropriate use of litigation or Legal Aid funds. Such cases would have a lower priority under the affordability criterion than those that work within existing science.
  - ii Drugs and Other Regulated Products. Substantial weight will be given to the decision of a regulator as to the safety of an existing licensed product. If a regulator fails to act on concerns raised about the safety of a product, funding to challenge the actions of the regulator may be a better use of funding than directly claiming damages from manufacturers. Litigation against manufacturers of products that are subject to a sophisticated regulatory regime will tend to have a lower priority when applying the affordability criterion than other forms of actions, although this must be weighed against the merits and public interest of the case.
  - iii Overseas Claims. An action where the beneficiaries are not residents of the EU will be a lower priority than a similar action for the benefit of EU residents, although establishing the accountability of an EU company may contribute to the public interest.

#### 14.7 Exceptional Case Contracts

1. ~~As from 2 April 2001 applications for~~ Legal Representation must generally be made by firms holding a ~~General~~ Civil ~~Contract which~~Contract, which can cover the work in question (or in the case of public law challenges arising out of criminal proceedings, a ~~General~~ Criminal Contract which does so). However the Funding Code procedures do allow for the possibility of providing funding to a firm without ~~a General Civil such a~~

Contract by means of a special one off “Exceptional Case Contract”. Any firm wishing to apply for an Exceptional Case Contract to provide Legal Representation must apply to the Special Cases Unit. The Unit may authorize an Exceptional Case Contract but only if it is satisfied that it is necessary for the effective administration of justice to do so (rule C26.6 of these Procedures).

2. Applications for Exceptional Case Contracts are made on the relevant application forms for CLS funding but should be accompanied by a letter explaining the circumstances justifying the award of the certificate outside the normal scheme. Exceptional Case Contracts are only likely to be appropriate in particularly

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substantial litigation. An example where it might be appropriate is if a solicitor who is not franchised has been representing a private client in complex proceedings for some time before the client runs out of money and becomes eligible for CLS funding. [The Unit may also consider issuing an Exceptional Case Contract where a firm who is not franchised, has previously been advising or representing a client in complex proceedings either on a pro bono basis or for example through their work as a campaigning organisation; and has substantial experience of dealing with similar types of proceedings or clients.](#) If it would be unduly onerous and would run counter to the effective administration of justice for the client to be forced to change to a contracted solicitor, even though the client retained full confidence in the solicitor instructed, an Exceptional Case Contract might be justified.

3. Another example is where a firm has been representing a client in criminal proceedings under its General Criminal Contract. If the client then needs funding for civil private law proceedings which arise out of the same background as the criminal case these cannot be funded under the Criminal Contract. Again, rather than insist on a change of solicitors and a duplication of work, an Exceptional Case Contract might be justified.
4. If the Special Cases Unit refuse to issue an Exceptional Case Contract the client will normally need to go to a new solicitor able to carry out the work under a **General** Civil Contract. However the client or the firm applying can appeal the decision of the Special Cases Unit to the Independent Funding Adjudicator (rule C26.7 of the Procedures). In such cases the Independent Funding Adjudicator would exercise their usual jurisdiction under section 16 of the Procedures and in appropriate cases may refer the issue back to the Special Cases Unit to reconsider its decision.

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