

PART D

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1. The Access to Justice Act 1999

1.1 Scope of the Act

1. The Access to Justice Act 1999 received Royal Assent on 27 July 1999.
2. The Act has seven parts. However, this guidance and the Legal Services Commission's Manual generally are concerned only with Part 1, which establishes the Commission, the Community Legal Service and the Criminal Defence Service.
3. The remaining parts of the Act deal with private methods of funding litigation; the provision of legal services; the handling of complaints about lawyers; appeals, courts, judges and court proceedings; magistrates and magistrates' courts; and immunity from legal action and costs and indemnities for certain officers exercising judicial functions. Guidance on these reforms is contained in the explanatory notes to the Act which were prepared by the Lord Chancellor's Department and are available separately from Her Majesty's Stationery Office. The guidance which follows is based upon those parts of the explanatory notes which relate to Part 1 of the Act.

1.2 Overview of Part 1

1. The Act replaced the legal aid system with two separate schemes for funding services in civil and criminal matters. These are known as the Community Legal Service and the Criminal Defence Service respectively. Both schemes are run by the Legal Services Commission, which replaced the Legal Aid Board. Both secure legal services for people who need them largely through contracts with quality assured providers. But the Commission is also able to make grants and loans, and employ staff to provide services directly.
2. The Legal Services Commission and the Community Legal Service came into operation on 1 April 2000. The Criminal Defence Service came into operation on 2 April 2001. The provisions of the Legal Aid Act 1988 remain in force for any cases already started when the new schemes came into effect. Guidance on the 1988 Act and the regulations made under it are contained in the Legal Aid Handbook 1998/99.
3. Both the Community Legal Service and the Criminal Defence Service apply to the law of England and Wales.

Community Legal Service

4. The Legal Services Commission has two main duties in respect of the Community Legal Service (CLS).

- (a) It manages a Community Legal Service fund, which replaced legal aid in civil and family cases. The CLS fund is used to secure the provision of appropriate legal services, within the resources made available to it and according to priorities. A Funding Code, drawn up by the Commission and approved by the Lord Chancellor, sets out the criteria for deciding whether to fund individual cases. The Code and guidance upon its operation are set out in Volume 3 of the LSC Manual. Regulations determine financial eligibility for funded services.
 - (b) The Commission also takes the lead in developing the wider Community Legal Service, i.e. services beyond those supported by the CLS fund. It co-operates with local funders and others to develop local, regional and national plans to match the delivery of legal services to identified needs and priorities.
5. The development of the CLS is through the formation of Community Legal Service Partnerships (CLSPs) in each local authority area. Each CLSP provides a forum for local funders, the local authority, the Legal Services Commission, and others, including legal services providers, jointly to plan and co-ordinate funding of local advice and other legal services, ensuring that delivery of these services better matches local needs.
6. Overall, the creation of the Community Legal Service is intended to:
- (a) make best use of all the resources available for funding legal services, by facilitating a co-ordinated approach to planning;
 - (b) improve value for money through contracting and the development of quality assurance systems;
 - (c) establish a flexible system for allocating central Government funding in a transparent way within a controlled budget, so as to provide legal services where they are judged to be most needed; and
 - (d) ensure that the scheme is capable of adapting to meet changing priorities and opportunities.

Criminal Defence Service

7. The purpose of the Criminal Defence Service (CDS) is to secure the provision of advice, assistance and representation, according to the interests of justice, to people suspected of a criminal offence or facing criminal proceedings.
8. The Legal Services Commission is empowered to secure these services through contracts with lawyers in private practice, or by providing them through salaried defenders (employed directly by the Commission or by non-profit-making organisations established for the purpose). This will necessarily mean that suspects' and defendants' choice of representative is limited to contracted or salaried defenders, although the intention is to offer a choice in all but exceptional cases (see further guidance on section 15 of the Act). From 2 April 2001, it has been necessary to hold a General Criminal Contract in order to be eligible to undertake new criminal legal aid work funded by the Commission. All contractors are expected to meet quality-assurance standards; and contracts, wherever possible, cover the full range of services from arrest until the case is completed.

9. The Commission will gradually take over the functions currently undertaken by the higher courts in respect of criminal legal aid. At first, Court Service staff will continue to determine costs in most Crown Court cases; but the number of cases dealt with like this will diminish as the Commission increases the proportion of cases covered by contracts. Court staff will also continue to determine costs in cases before the Court of Appeal (Criminal Division) and the House of Lords; the scope for the Commission to contract for these cases as well will be considered in due course.
10. The courts grant representation under the scheme to defendants according to the interests of justice. From 2 April 2001 the courts no longer have to conduct a means test before granting representation. Instead, at the end of a case before any court other than a magistrates' court, the judge has power to order a defendant to pay some or all of the cost of his or her defence. The Commission may investigate the defendant's means in order to assist the judge.

1D-003

1.3 Background

Legal Aid

1. The former scheme is contained in the Legal Aid Act 1988. Details of that scheme are described in the Legal Aid Handbook 1998/99.
2. A common feature of former civil and criminal legal aid schemes is that expenditure on them was demand-led. Any lawyer could do legal aid work for a client who passed the relevant means test (if any), and whose case passed the statutory merits test (in the case of civil legal aid), or the interests of justice test (in the case of criminal legal aid). Lawyers were paid on a case-by-case basis, usually at rates or fees set in regulations, but in some cases on the same basis as a privately-funded lawyer.
3. This meant that there were few mechanisms or incentives for promoting value for money or assuring the quality of the services provided; and that neither the Government nor the Legal Aid Board was able to exert adequate control over expenditure or determine the priorities for that expenditure.

Quality assurance and contract pilots

4. Since August 1994, the Legal Aid Board operated a voluntary quality assurance scheme, known as franchising. The Board continued to develop the franchising scheme, and introduce new categories, in order to underpin the move to a generally contracted scheme under the reforms in the Act.
5. In 1994, the Board set up a pilot scheme that showed that non-profit-making advice agencies could provide legally-aided advice and assistance to the same quality assurance standard as solicitors' firms. In October 1996, a second stage of the pilot was established, involving a larger number of agencies, to develop systems for contracting for advice and assistance work.

6. In August 1997, the Board began a research pilot with solicitors' firms providing advice and assistance in civil matters under contract. A pilot of contracts to provide mediation in family cases under the legal aid scheme commenced in May 1997. A pilot covering advice and assistance in criminal cases began in June 1998, and was extended in February 1999 to cover representation in youth courts.
7. From October 1997, the Board set up a Regional Legal Services Committee in each of its 13 Areas to advise it about priorities for contracting.
8. From January 2000 all civil advice and assistance, and all family work, was provided exclusively under contract. Only organisations able to meet specified quality assurance standards were eligible for these contracts. Also, a new clinical negligence franchise came into effect in February 1999; and from August 1999 only firms with that franchise were able to take such cases under the legal aid scheme.

1D-004

1.4 Commentary on the Sections of the Act

The Legal Services Commission

1. **Section 1: The Legal Services Commission.** This section establishes the Legal Services Commission, and makes provision for appointments to it. The Commission replaced the Legal Aid Board. It was considered necessary to establish a new body to reflect the fundamentally different nature of the Community Legal Service (CLS) compared to civil legal aid. Within the broad framework of priorities set by the Lord Chancellor, the Commission is responsible for taking detailed decisions about the allocation of resources. It is also required to liaise with other funders to develop the CLS more widely.
2. The Commission also has a wider role in respect of the Criminal Defence Service than the Legal Aid Board did in respect of criminal legal aid. The Board had very limited responsibilities for legal aid in the higher criminal courts.
3. Section 1 is similar to section 3 of the Legal Aid Act 1988 ("the 1988 Act"), which established the Legal Aid Board. However, the membership of the Commission differs from that of the Board, to reflect a shift in focus from the needs of providers to the needs of users of legal services. Also, the Commission is to be rather smaller than the Board: with between 7 and 12 members rather than 11 to 17. This is intended to facilitate focused decision-making.
4. Section 1(6) gives effect to **Schedule 1 (Legal Services Commission)** which makes further provisions about the Commission. Paragraphs 1–10, 12 and 17, concerning the members, staff and proceedings of the Commission, mirror provisions about the Board in Schedule 1 to the 1988 Act, except that Treasury consent to arrangements for the pay, pensions and compensation of members and the staff of the Commission will not be required. Paragraph 11 provides for the Commission's administrative budget, mirroring section 42(1)(b) and (2) of the 1988 Act. Paragraph 13 requires the Commission to provide any information requested by the Lord Chancellor; this mirrors a provision in section 5 of the 1988 Act. Paragraph

16 requires the Commission to prepare accounts and provides for them to be audited. This mirrors section 7 of the 1988 Act, except that the Comptroller and Auditor General, rather than an appointed auditor, audits the Commission's accounts.

5. Paragraph 14 requires the Commission to prepare an annual report on the discharge of its functions. This is laid before Parliament. It includes a report on the impact of the Commission's activities on the supply and development of legal services within the wider CLS. (Section 5 of the 1988 Act provides for the Legal Aid Board's annual report).
6. Paragraph 15 requires the Commission to prepare an annual plan, which is laid before Parliament. This includes the Commission's detailed plans for allocating the resources available to the CLS fund (see paragraph 68 below). This was a new requirement. The Legal Aid Board produced annual corporate and business plans, but these were not statutory documents nor laid before Parliament.
7. **Part II of Schedule 14** makes transitional provisions for the replacement of the Legal Aid Board by the Commission. Briefly, it provides that, on the appointed day (1 April 2000), the Commission took over all the property, rights and liabilities of the Board. Staff of the Board automatically became staff of the Commission, with their employment and pension rights preserved.
8. The provisions of the 1988 Act remain in force for any cases that have already started when the new schemes take effect. The Commission is responsible for the continued administration of these cases.
9. **Section 2: Power to replace Commission with two bodies.** This section allows the Lord Chancellor, by order subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)), to split the Legal Services Commission into two separate bodies, one responsible for the Community Legal Service and the other for the Criminal Defence Service.
10. This allows for the possibility that, because of the different nature and objectives of the two schemes, it may prove more effective in the longer term to administer them separately. It would not be practicable to set up two bodies from the outset. This is because of the need to retain, in substance, the existing infrastructure and expertise of the Legal Aid Board to manage the transition from legal aid to the two new schemes. This involves both administering existing cases under the old scheme and developing contracting as the principal means of procuring services under the new schemes.
11. There is no definite intention to split the administration of the two schemes in future. Rather, the intention is to review the situation once the new schemes are firmly established, probably after about 5 years.
12. **Section 3: Powers of Commission.** This section gives the Legal Services Commission similar general powers to those enjoyed by the Legal Aid Board (section 4 of the 1988 Act). These powers allow the Commission to do whatever it believes is necessary in the discharge of its functions. Later sections exemplify the ways in which the powers may be used in the provision of specific services (see sections 6(3), 13(2) and 14(2)).

13. Section 3(4) provides that the Commission may delegate its functions to others. For example, it might delegate to contracted providers certain decisions about the funding of particular cases (much as the Legal Aid Board delegated some decisions to franchised firms). Section 3(5) empowers the Lord Chancellor to make orders about whether and how the Commission should delegate certain functions. For example, he might make an order requiring the Commission to monitor the decisions made by providers under a delegation.

The Community Legal Service

14. **Section 4: The Community Legal Service.** This section requires the Legal Services Commission to establish, maintain and develop the Community Legal Service (CLS). It sets out the purpose of the CLS and defines the services which may be provided under the CLS. These range from the provision of general information about the law and legal services to providing help towards preventing or resolving disputes and enforcing decisions which have been reached (section 4(2)). The scheme encompasses advice, assistance and representation by lawyers (which have long been available under the legal aid scheme), and also the services of non-lawyers. It extends to other types of service, including for example mediation in appropriate family or other cases.
15. Section 4(3) provides that the CLS does not cover services funded as part of the Criminal Defence Service, in order to avoid any overlap between the two schemes.
16. The purpose of the CLS (section 4(1)) is in two parts, reflecting the Commission's two key roles. First, the Commission will facilitate the development of the wider CLS, by working with other funders of services, such as local authorities, to plan for the most appropriate use of available resources in order to match the provision of services to identified needs and priorities. Section 4(6) describes this function further. The intention is to build on the work already carried out by the Legal Aid Board's Regional Legal Services Committees in order to establish systems for determining (i) the need for legal services at regional level, and (ii) the ability of providers to supply those services, to the required standard, within the available resources. Secondly, the Commission will itself fund the provision of services through the CLS Fund (which is described further in section 5).
17. The Commission will help to ensure that the services provided are of a high quality by setting and monitoring standards and establishing quality accreditation systems (section 4(7) & (8)). The intention is that only accredited providers will be eligible for funding from the CLS fund and that other funders of legal services will be able to impose a similar requirement. Section 4(9) makes clear that the Commission (and any bodies it authorises) may charge fees to cover the cost of providing accreditation.
18. Section 4(10) empowers the Lord Chancellor to give the Commission orders about how it should exercise its functions under subsections (6)–(9). There are similar powers in relation to the Commission's other main functions in sections 6(4), 13(3) and 14(3)(b).

19. **Section 5: Funding of services.** This section establishes the CLS fund and the mechanisms by which the Lord Chancellor will provide resources for the fund. Each year, as part of the general public expenditure planning process, the Lord Chancellor will set an annual budget for the CLS fund. This will take account of the receipts from contributions and other payments expected under the regulations made under sections 10 and 11, with the balance of the budget provided by the Lord Chancellor from money voted by Parliament. The CLS fund will therefore not be open-ended in the way that the legal aid fund was.
20. Section 5(2)(a) provides for the Lord Chancellor to determine how much to pay into the CLS fund. (Section 5(3) requires him to take account of the assessment of need made by the Legal Services Commission under section 4(6).) Section 5(2)(b) provides for the practical arrangements for paying that money into the fund – this will be by regular instalments throughout the year to meet immediate out-goings. Section 5(4) requires the Lord Chancellor to lay a statement of the budget he determines before Parliament. This would also require him to publish any re-determination, should it ever be necessary to change the budget during the course of a financial year.
21. Section 5(6) empowers the Lord Chancellor to direct the Commission to use specified amounts within the fund to provide services of particular types. The intention is that the Lord Chancellor will divide the fund into two main budgets, for providing services in (i) family and (ii) other civil cases, while allowing the Commission limited flexibility to switch money between the two areas. The Lord Chancellor may set further requirements within these two budgets, by specifying the amount, or the maximum or minimum amount, that should be spent on, say, services from the voluntary sector, mediation, or cases involving a wider public interest. In this way, it will be possible to ensure that resources are allocated in accordance with the Government's priorities.
22. Section 5(7) places a duty on the Commission to aim to obtain the best value for money – a combination of price and quality – when using the resources of the fund to provide services. Section 4 describes how the Commission will seek to ensure that services are of high quality. Section 5, in providing for a controlled budget, and section 6 in setting out the ways, principally contracting, through which services will be procured, provide the means to control cost.
23. **Section 6: Services which may be funded.** This section builds on the general powers contained in section 3, by setting out the ways in which the Legal Services Commission may use the CLS fund to provide services. These include making contracts with, or grants to, service providers in the private and voluntary sectors; itself providing services directly to the public, whether by employing staff to provide them or by any other means; and making grants or loans to individuals so they can purchase services for themselves.
24. These flexible powers are intended to give effect to one of the principal objectives of the reform of publicly funded legal services: that is the ability to tailor the provision of services, and the means by which services are delivered, to the needs of local

populations and particular circumstances. They also allow the Commission to test new forms of service provision through pilot projects.

25. Section 6(6) gives effect to **Schedule 2 (Community Legal Service: excluded services)** which excludes from the scope of the CLS fund specified types of service which would otherwise fall within the broad definition provided by section 4(2). Section 6(7) empowers the Lord Chancellor to make regulations, subject to the affirmative resolution procedure (by virtue of section 25(9)), to amend the Schedule. Amendments have been made to paragraph 2 of the Schedule to allow for the funding of advocacy in proceedings before an Immigration Adjudicator and Immigration Appeal Tribunal. Section 6(8) empowers the Lord Chancellor to direct or authorise the Commission to fund services within the excluded categories in specified exceptional circumstances; or, following a request by the Commission, to authorise it to fund an individual case. The Lord Chancellor's directions and his guidance on them are set out in section 3 of the Funding Code guidance which is in Volume 3 of the LSC Manual. The directions authorise funding in a range of circumstances including priority areas, certain mixed claims, high cost personal injury claims and cases with a significant wider public interest.
26. In effect, Schedule 2 defines the scope of the CLS fund for the time being. People (but not corporate bodies) will be able to obtain general information about any matter of English law, the English legal system or the availability of legal services. Corporate bodies are excluded because section 4(1) defines the overall scope of the Community Legal service in terms of individuals. Note also that section 19 limits the scope of the scheme to the law of England and Wales. Subject to any exceptions authorised by the Lord Chancellor, services beyond the giving of information will not be available in the categories listed in paragraph 1. In the categories of case listed in paragraph 2, it will be possible (subject to priorities) to fund any of the services listed in section 4(2). For categories that are not listed in either paragraph, it will be possible to fund any service except advocacy in court or other proceedings.
27. Subject to the changes described below, the scope of the CLS fund generally mirrors the scope of civil legal aid; but it may be changed over time. In particular:
 - (a) as conditional fees, legal expenses insurance and other forms of funding develop more widely, it may be possible to exclude further categories which can generally be funded privately; but on the other hand
 - (b) as resources become available through the greater value for money and control of spending provided by the new scheme and the development of private alternatives, it may be possible to extend the scope of the fund to cover services that are excluded now because, although they would command some priority, they are unaffordable.
28. The Lord Chancellor has issued guidance under section 23 of the Act explaining the Government's intention underlying paragraph 1 of Schedule 2. This is set out in the Funding Code guidance in volume 3 of the Manual. The following briefly summarises the exclusions:

- (a) Allegations of damage to property or the person (i.e. personal injury) caused by negligence, apart from those about clinical negligence. These cases are generally considered suitable for conditional fees.
 - (b) Allegations of malicious falsehood. Legal aid was not available for representation in defamation cases, but it was sometimes possible to get legal aid by categorising the case as one of malicious falsehood. The Government's view is that these cases do not command sufficient priority to justify public funding; and, in any event, they may often be suitable for a conditional fee.
 - (c) The law about companies and partnerships and other matters arising in the course of business. Legal aid was not available for firms and companies, but a sole trader could often get legal aid to pursue a business dispute. Businessmen have the option of insuring against the possibility of having to take or defend legal action. The Government does not believe that the taxpayer should meet the legal costs of sole traders who fail to do so.
 - (d) Boundary disputes and the law relating to trusts. The Government does not consider that these command sufficient priority to justify public funding.
29. In addition, funding for advocacy before the Lands Tribunal or Commons Commissioners will no longer be available. Other services, including assistance with preparing a case, will continue to be available.
30. **Section 7: Individuals for whom services may be funded.** This section allows the Lord Chancellor to set financial eligibility limits for people to receive services funded by the CLS fund. It allows him to set different limits, or no limit at all, in different circumstances or for different types of service. In essence, the section re-enacts provisions in the 1988 Act about financial eligibility: sections 9 (advice and assistance), 13B (family mediation), and 15 (civil legal aid).
31. Eligibility limits are set out in the CLS (Financial) Regulations 2000. For the most part, these replicate eligibility under the 1988 Act, adapted to the new levels of service under the Funding Code. In due course, the Government hopes to extend eligibility for advice and assistance to those who can afford to pay contributions.
32. **Section 8: Code about provision of funded services.** This section provides for the Legal Services Commission to prepare the Funding Code setting out the criteria for determining whether services funded by the CLS fund should be provided in a particular case, and if so what services it is appropriate to provide. The Code also contains the procedures for making applications. The Code and guidance on its operation are contained in Volume 3 of the Manual.
33. The funding assessment under the Code replaced the merits test for civil legal aid (set out in sections 15(2) & (3) of the Legal Aid Act 1988, and supplemented by Notes for Guidance published annually by the Legal Aid Board). The funding assessment is intended to be more flexible than the pre-existing merits test. It applies different criteria in different categories according to their priority. It also takes account of new factors, such as the wider public interest.
34. Section 8(2) lists factors that the Commission must consider when preparing the code. The factors have therefore been taken into account in drawing up the Code but are not applied directly in individual funding decisions. The way in which the

factors were considered in preparing the Code was set out in the Board's report "A New Approach to Funding Civil Justice" published in October 1999.

35. Section 8(3) requires the code to reflect the principle that in many family disputes mediation is more appropriate than court proceedings. This is intended to reinforce the development, under the Family Law Act 1996, of mediation as a means of resolving private law family disputes in a way that promotes as good a continuing relationship between the parties concerned as is possible in the circumstances. See section 11 of the Code Criteria. Family Mediators are funded directly by the Commission. The Government believes that mediation is more constructive than adversarial court proceedings, and that litigation in these cases usually serves only to reinforce already entrenched positions and further damage the relationship between the parties. In addition, the cost of court proceedings is higher than that of mediation, and additional costs have to be borne by the property of the family, reducing the amount available to the parties and their children in future.
36. Section 8(9) empowers the Lord Chancellor to give orders to the Commission about the contents and operation of the code. Section 25(9) makes such orders subject to Parliamentary approval under the affirmative resolution procedure.
37. **Section 9: Procedure relating to funding code.** This section provides for the Lord Chancellor and Parliament to approve the funding code before it takes effect. The Code was duly approved by the Lord Chancellor in January and by Parliament in March 2000. The original code and any revisions to it must be approved by the Lord Chancellor and laid before Parliament. The original code and any revisions which affect the criteria for funding cases (as opposed to those parts of the code dealing with procedures) must also be approved by an affirmative resolution in both Houses of Parliament. The Code is divided into two separate parts, Criteria and Procedures, to facilitate this. Only changes to Part I of the Code require Parliamentary approval.
38. Section 9(7) & (8) provide for an exceptional procedure so that urgent changes to criteria can take effect without delay. The Lord Chancellor can certify a change as urgent. That change then would take effect immediately, but fall after 120 days if not confirmed by affirmative resolution.
39. **Section 10: Terms of provision of funded services.** This section enables the Lord Chancellor to set financial conditions to apply to people receiving services funded by the CLS fund. Subject to two additions, the effect of section 10 is generally to replicate the provisions of the 1988 Act.
40. The regulations are contained in the CLS (Financial) Regulations 2000. These provide for people to contribute towards the cost of the services they receive by way of contributions related to disposable income and capital, and from any property recovered or preserved as a result of the help given.
41. Section 10 extends the potential scope of financial conditions in three ways (although there are no immediate plans to implement the first two of these).
 - (a) Section 10(2)(b) is the power to set contributions. Unlike the previous Act, this power does not preclude contributions from income payable after the end of the case. This makes it possible to provide services in some categories of case in the form of a loan scheme, with contributions continuing until the full

cost has been repaid. Section 10(4)(b) allows for interest to be added to the outstanding cost that the former funded client remains liable to repay.

- (b) Under section 10(2)(c), it is possible to make the provision of services in some types of cases subject to the funded client agreeing to repay an amount in excess of the cost of the services provided in the event that his or her case is successful. This might make it possible to fund certain types of case on a self-financing basis, with the additional payments from successful litigants applied to meet the cost of unsuccessful cases.
42. Regulations under section 10(2)(c) also allow for public funding to supplement a private conditional fee agreement: see regulation 43(2) of the CLS (Financial) Regulations 2000. This is the form of funding Litigation Support in the Funding Code. Guidance on Litigation Support, including the rules on costs and apportionment, is set out in section 14 of the Funding Code guidance in Volume 3 of the Manual.
43. Section 10(6)(b) provides for regulations about determining the cost of services for the purpose of contributions and the charge on property recovered or preserved. This is necessary to allow for the possibility of block contracts which do not define the costs of individual cases, or which are based on an average price for a set number of cases. Some cases require less work, and some more; and such contracts would remunerate the service provider on a 'swings and roundabouts' basis. However, it would often be inequitable to make every assisted person liable to contribute or repay the same amount (i.e. the average price under a contract covering many cases).
44. **Section 11: Costs in funded cases.** This section contains provisions about determining the award of legal costs between the parties in cases involving persons supported by the Community Legal Service fund. In effect, the section brings together provisions which are presently contained in sections 12, 13, 17, 18 and 34(2)(b) of the Legal Aid Act 1988. The relevant regulations are the CLS (Costs) Regulations 2000. In most respects these replicate the position that applied under the legal aid scheme.
45. Section 11 limits the costs that can be awarded against a person receiving funded services to an amount that is reasonable given the financial resources of both parties and their conduct during the case.
46. This protection may be disapplied by regulations subject to the affirmative resolution procedure (by virtue of section 25(9)). The regulations generally disapply cost protection for Legal Help, Help at Court and Support Funding (see paragraph 45 above). It would not be appropriate to prevent opponents in such cases, who would be liable for a success fee if they lost, from recovering their full costs if they won.
47. Section 11 also provides that regulations may, among other things: specify the principles that are to be applied in determining the amount of any costs awarded for or against the party receiving funded services; limit the circumstances in which a costs order may be enforced against the person receiving funded services; and provide for circumstances in which the court can require the Commission to meet any costs incurred by the opponent of the party receiving funded services.

48. Regulations which limit the circumstances in which costs may be enforced against a person receiving funded services, or which define the liability of the Commission to meet the costs of the opponent of a person receiving funded services, are made subject to Parliamentary approval under the affirmative resolution procedure by section 25(9). Making these provisions subject to affirmative procedure regulations, rather than in primary legislation as under the 1988 Act, is intended to provide greater flexibility.

The Criminal Defence Service

49. **Section 12: The Criminal Defence Service.** This section requires the Legal Services Commission to establish, maintain and develop a Criminal Defence Service, for the purpose of ensuring that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require. The Criminal Defence Service consists of the advice, assistance and representation provided under sections 13 and 14 and came into operation on 2 April 2001.
50. Section 12(2) defines “criminal proceedings”. These include criminal trials (subsection (2)(a)), appeals and sentencing hearings ((b)), extradition hearings ((c)), binding over proceedings ((d)), appeals on behalf of a convicted person who has died ((e)), and proceedings for contempt in the face of any court ((f)). Subsection (2)(g) allows the Lord Chancellor to add further categories by regulation. For the list of such categories see the CDS (General) Regulations 2001, Regulation 3(2).
51. Section 12(3)-(5) empowers the Commission to accredit providers of criminal defence services, and to charge for that service. This mirrors the provisions of section 4(7)-(9) for the Community Legal Service.
52. **Section 13: Advice and assistance.** This section requires the Legal Services Commission to provide such advice and assistance as it considers appropriate in the interests of justice for individuals who are arrested and held in custody, and in other circumstances prescribed by the Lord Chancellor in regulations. 53. Regulations provide for advice and assistance in broadly the categories for which it was previously available under the Legal Aid Act 1988, to people subject to criminal investigations or proceedings: see Regulation 4 of the CDS (General) Regulations 2001. The full list of circumstances in which advice and assistance is available is set out in the specification of the General Criminal Contract. The contract also specifies when Advocacy Assistance is available – this is similar to the circumstances under which ABWOR was provided under the old scheme.
54. Section 13(2) enables the Commission to comply with its duty to secure advice and assistance by: making contracts with, or payments or grants to, providers (i.e. solicitors’ firms, barristers or law centres); employing people to provide advice and assistance; establishing and maintaining separate bodies to provide it; and making grants to individuals to allow them to purchase it directly. Subsection (4) enables the Commission to secure the provision of advice and assistance by different means in

different areas in England and Wales and in relation to different descriptions of cases.

55. The aim of Section 13 is to provide the Commission with a range of options for securing advice and assistance in criminal matters. Contracting with quality-assured suppliers should produce better value for money, and give greater control over expenditure and quality of service. The power to provide services through lawyers employed by Commission (or by separate bodies it establishes for the purpose) offers additional flexibility if, for example, there is limited coverage by private lawyers in rural areas. Using employed lawyers provides the Commission with better information about the real costs of providing these services.
56. **Section 14: Representation.** This section requires the Legal Services Commission to fund representation for individuals granted a right to representation in accordance with Schedule 3. It enables the Commission to comply with this duty in the same ways as Section 13 does for advice and assistance. The power to make direct case-by-case payments to representatives (subsection (2)(b)) allows the Commission to continue to pay non-contracted lawyers to provide representation during the transitional period while contracting develops; and where this proves to be the best means of securing the necessary services.
57. Section 14(3)(a) requires the Lord Chancellor to make remuneration orders to set rates for such direct payments – see the CDS (Funding) Order 2001. Section 14(5) provides for reviews of, or appeals against, determinations of fees required for the purposes of a remuneration order and further details are set out in the Funding Order.
58. Section 14(1) gives effect to **Schedule 3 (Criminal Defence Service: right to representation)** which deals with the grant of rights to representation. Paragraph 1 provides that a right may be granted to individuals involved in criminal proceedings as defined in Section 12(2) (see paragraph 50 above). Paragraph 1(2) provides that a right may also be granted to private prosecutors to resist appeals to the Crown Court by people they have prosecuted in a magistrates' court. (This mirrors section 21(1) of the Legal Aid Act 1988.)
59. Paragraph 2 provides that a right may be granted by the court hearing the proceedings and by other courts prescribed in regulations. In most cases, a right will be granted by a magistrates' court and will also cover the case if it goes on to the Crown Court. (This was the position under section 20(4) of the 1988 Act.) The Commission may grant representation in certain prescribed circumstances – see the CDS (General) Regulations 2001, Regulation 3(2).
60. Paragraph 2(5) provides for regulations which prescribe when a court must consider withdrawing a right to representation. The circumstances are set out in regulation 17 of the CDS (General) Regulations 2001.
61. Paragraph 5 provides that a right should be granted where the interests of justice require it, and sets out the factors to be considered in assessing the interests of justice. The factors mirror those in section 22(2) of the 1988 Act. Paragraph 5(3) allows the Lord Chancellor to make an order amending the criteria, and paragraph 4 provides for regulations about appeals. Section 25(9) makes both these powers

subject to Parliamentary approval under the affirmative resolution procedure; the equivalent powers in the 1988 Act, sections 22(3) & 21(10) respectively, are subject to the negative procedure. Paragraph 5(4) allows for cases in which a right must always be granted. This power mirrors Section 21(3) of the 1988 Act.

62. **Section 15: Selection of representative.** This section provides that defendants granted a right of representation can choose their representative, restricted only as provided in regulations under section 15(2). The CDS (General) Regulations 2001 provide in particular that a defendant's choice of representatives is limited to those holding contracts with the Legal Services Commission.
63. The rules are set out in regulations 11 and 13 of the CDS (General) Regulations 2001. Firms must have a General Criminal Contract to provide representation in a Magistrates' Court (except in cases of contempt in the face of the court) and either a General Criminal Contract or a crime franchise to provide representation in the higher criminal courts.
64. In certain types of complex case, such as serious fraud trials, defendants' choice may be limited to representatives from panels of firms and advocates specialising in such cases: see the Commission's Fraud Panel Arrangements 2000. Membership of a panel will depend on meeting pre-determined criteria. In this way, the Commission is able to ensure that defendants in these exceptional cases are represented by those with the necessary expertise, experience and resources to do so effectively.
65. Section 15(5) provides for regulations prescribing when the Commission may stop funding a defendant's chosen representative – in effect, requiring that defendant to make a fresh choice. This may apply in high cost cases: see the CDS (Choice in Very High Cost Cases) Regulations 2001.
66. Section 15(2)(a) enables the Lord Chancellor to make regulations defining circumstances where a defendant will not have a right to choose a representative, but will instead have a representative assigned to them. This power might be used, for example, to assign an advocate to an otherwise unrepresented defendant charged with a serious sexual offence against a child. (Defendants charged with certain violent or sexual offences may not cross-examine child witnesses directly.)
67. Regulations under subsections (5) and (2)(a) are subject to Parliamentary approval under the affirmative resolution procedure (by virtue of section 25(9)).
68. Section 15(3) secures that regulations under section 15(2) may not provide for defendants' choice of representative to be restricted to employees of the Commission or any bodies it establishes to employ public defenders. The intention is that in most cases there should be a choice between several contracted firms and possibly a public defender.
69. **Section 16: Code of conduct.** This section provides that salaried defenders employed by the Legal Services Commission, or by any bodies established by the Commission to provide criminal defence services, should be subject to a code of conduct. The code includes duties to: avoid discrimination; protect the interests of the individuals for whom services are provided; the court; avoid conflicts of interest; respect confidentiality; and act in accordance with professional rules. Before

preparing or revising the code, the Commission is required to consult. The code must be approved by a resolution of each House of Parliament, and published.

70. **Section 17: Terms of provision of funded services.** This section provides that suspects and defendants do not have to pay towards the cost of services provided as part of the Criminal Defence Service, except where the court orders them to pay some or all of the cost of their representation. Section 17(2) provides that magistrates' courts do not have the power to make such orders. This means that only defendants in the more expensive cases that go to the higher courts may be ordered to repay their defence costs, but such an order could include the cost of any representation before a magistrates' court.
71. Section 17(3) empowers the Lord Chancellor to make regulations about how this new power should be used – see the CDS (Recovery of Defence Costs Orders) Regulations 2001. It will generally only apply to convicted defendants able to make a substantial repayment. Defendants are required to provide information about their means to inform a decision, and it will be possible to freeze their assets while their means are being investigated (subsection (3)(d) and (e)).
72. **Section 18: Funding.** This section requires the Lord Chancellor to provide the necessary funding of criminal defence services secured by the Commission in accordance with sections 13 and 14. As a result, like legal aid but unlike the Community Legal Service fund (see paragraph 19 above), the Criminal Defence Service will be a demand-led scheme. The section also enables the Lord Chancellor to determine the timing and way in which this money should be paid to the Commission, and requires the Commission to seek to secure the best possible value for money in funding the Criminal Defence Service.

Supplementary

73. **Section 19: Foreign law.** This section limits the Community Legal Service and Criminal Defence Service to providing information, advice and other services only in relation to the law of England and Wales (except where foreign law is relevant to proceedings in England and Wales). The Lord Chancellor is given a power to order further exceptions where this is necessary to fulfil the United Kingdom's international obligations. This restriction is the same as under the Legal Aid Act 1988.
74. **Section 20: Restriction of disclosure of information.** This section provides for the protection of information given to the Commission, the court or any other person or body authorised to undertake functions conferred by the Act.
75. Section 20 largely repeats the provisions found in section 38 of the Legal Aid Act 1988. But it allows information to be disclosed, subject to any regulations to the contrary, for the purposes of the investigation or prosecution of any offence or suspected offence. Under the 1988 Act information can only be disclosed for the purpose of prosecuting offences under the 1988 Act itself. This prevents information which indicates that other offences may have been committed from being made available to the appropriate authority for investigation or prosecution. For example,

information provided to allow the Commission to assess the means of a claimant might show or suggest that a fraud was being perpetrated in relation to the receipt of social security benefits. This could not be disclosed under the 1988 Act, but it could be disclosed under section 20. Section 20(3)(b) makes clear that information may be disclosed about the value of payments made by the Commission to particular firms or lawyers. This reflects previous practice.

76. Disclosure of information in contravention of this section is an offence punishable by a fine not exceeding level 4 on the scale (currently £2,500). This mirrors the provisions of section 38(4) of the 1988 Act. No prosecution may be brought without the written approval of the Director of Public Prosecutions.
77. **Section 21: Misrepresentation etc.** This section provides criminal penalties for people who give false information about their finances, or otherwise make false statements, in applying for publicly-funded help under the Act. The section largely replicates the equivalent provisions in section 39 of the Legal Aid Act 1988, but extends beyond the person receiving help to anyone who furnishes information. It sets out the proceedings and penalties where those seeking help fail to furnish information required of them under the Act, or make false statements or representations in doing so. It also enables the Legal Services Commission to take proceedings in the county courts for recovering any losses caused by these acts.
78. **Section 22: Position of service providers and other parties etc.** Section 22(1) and (4) provides that, unless regulations say otherwise, the fact that services are funded as part of Community Legal Service or Criminal Defence Service shall not affect lawyer-client privilege or the rights of any third party. This mirrors section 31(1) of the 1988 Act.
79. **Section 22(2)** makes clear that service providers under either scheme may not seek additional remuneration to that funded by the Legal Services Commission from their clients. Section 22(3) makes clear that a person chosen to represent a defendant with a right to representation is entitled to be paid if the right is later withdrawn. These provisions mirror sections 31(3) and 31(4) of the 1988 Act respectively. Section 22(5) provides for regulations about court procedures in cases involving funding under the two schemes. This mirrors section 34(2)(b) of the 1988 Act.
80. **Section 23: Guidance.** This section enables the Lord Chancellor to give guidance to the Commission about the discharge its functions. He is required to publish any guidance. However, the Lord Chancellor may not give guidance about the handling of individual cases. The Commission is required to consider any guidance given by the Lord Chancellor. An example of guidance under section 23 is that relating to excluded work which is set out in section 3 of the Funding Code guidance in Volume 3 of the Manual.
81. **Sections 24 – 26 and Schedule 4** make consequential amendments and provisions about orders, regulations and directions under Part I and its interpretation.
82. **Section 25(2) – (4)** provides for remuneration orders, under sections 6(4), 13(3) and 14(3), about the payments which the Legal Services Commission may make to

providers. Before making a remuneration order affecting payments to lawyers, the Lord Chancellor is required to consult the General Council of the Bar and the Law Society. This mirrors provisions in the 1988 Act about regulations dealing with remuneration. Section 25(3) sets out factors which the Lord Chancellor is required to consider before making a remuneration order. These are the need to secure a sufficient number of competent providers; the costs to public funds; and the need to secure value for money. This differs in several respects from the current list of factors in section 34(9) of the 1988 Act. See the CLS (Funding) Order 2000.

83. Section 25(9) lists the orders and regulations under Part I of the Act which require Parliamentary approval under the affirmative resolution procedure. All other orders and regulations under this part are subject to the negative resolution procedure – that is they take effect without debate unless there is a successful motion to annul them.

2. The Statutory Charge

1D-005

2.1 Cases under the Legal Aid Act 1988

1. Where a client had advice and assistance under Part III Legal Aid Act 1988, the relevant law is in section 11 of that Act and Regulations 31–33 and Schedule 4, Legal Advice and Assistance Regulations 1989. Guidance appears as Note for Guidance 2-34 on pages 48-50 inclusive of the Legal Aid Handbook 1998-99.
2. Where a certificate was granted for representation under the Legal Aid Act 1988, the relevant law is section 16 of that Act and Part XI Civil Legal Aid (General) Regulations 1989. Guidance is to be found in the Legal Aid Handbook 1998/99, Notes for Guidance 15 and 16, pp 206–225 inclusive.

1D-006

2.2 Cases under the Access to Justice Act 1999

1. Where the Commission funds a service for a client as part of the Community Legal Service, unless regulations provide otherwise, the un-recovered cost of funding the service gives rise to a first charge on any property recovered or preserved by the client in any proceedings, or in any compromise or settlement of any dispute, in connection with which the services were funded: see section 10 (7) Access to Justice Act 1999.

Under what levels of service does the charge arise?

2. The charge does not arise in respect of the cost to the Commission of:
 - (a) Legal Help, except in relation to family, clinical negligence or personal injury disputes or proceedings;

- (b) Help at Court, except in relation to family, clinical negligence or personal injury disputes or proceedings;
 - (c) Family Mediation; or
 - (d) Help with Mediation:
see Regulation 43(3) and (4) Community Legal Service (Financial) Regulations 2000.
3. The **costs of detailed assessment proceedings** do **not** go towards the charge. However, the expression 'costs of detailed assessment proceedings' does **not** cover **drawing up the bill**, so these costs will form part of the charge. If the costs of drawing up the bill are included in Box C (headed 'Costs of Assessment') on the Legal Services Commission Certificate of Assessment, either the regional office will have to adjust the figures, or the office may return the form and ask for it to be amended and re-sealed before paying the solicitor's claim. See Regulation 119 (2) and (3) Civil Legal Aid (General) Regulations 1989 as amended and Regulation 40(4) Community Legal Service (Financial) Regulations 2000.

When is property recovered or preserved?

4. The courts have said that:
- (a) Property has been recovered or preserved if it has been in issue in the proceedings. It is recovered by a claimant or applicant if it is the subject of a successful claim. It is preserved by the defendant or respondent if a claim fails: see *Hanlon v. The Law Society* HoL [1980] 2 All ER 199 [1980] 2 WLR 756.
 - (b) What is in issue is a question of fact. The pleadings, affidavits and correspondence, judgment and/or order will show what property was at issue between the parties (*Hanlon*).
 - (c) The recovery or preservation of the possession of property can give rise to the charge. Even if the title to the property is not in issue, if the proceedings reduce it or restore it to the possession of its owner, he or she has recovered property: see *Curling v. The Law Society* [1985] 1 All ER 705 and *Parkes v. Legal Aid Board* [1994] 2 F.L.R. 850. If as a result of the proceedings, the owner is able to unlock the value of the property, the charge arises.
5. Where the dispute or proceedings result in a payment to someone other than the client, such as a dependent child or a creditor, but the payment is for the benefit of the client, the charge arises on that payment: section 10 (7) Access to Justice Act 1999. In this respect section 10(7) Access to Justice Act has wider effect than section 16(6) Legal Aid Act 1988, although a payment to a client's creditor was found to be charged property in *Manley v. The Law Society* [1981] 1 All E.R. 401.

Is any property exempt?

6. Regulation 44 Community Legal Service (Financial) Regulations 2000 lists exempt property. The exemptions are: periodical payments of maintenance; where the charge is in favour of the supplier, the funded client's home; their personal

possessions and tools of trade unless exceptional in number or quality; interim payments in Inheritance Act proceedings; in relation to applications made before 1 April 2005, the first £3,000 of any property recovered or preserved in most family proceedings; 50% of any redundancy award; any Employment Appeal Tribunal award; any property subject to a statutory prohibition against assignment (which generally covers state benefits and pensions).

The Former Matrimonial Home

7. The **former matrimonial home**, as long as it is the client's 'main or only dwelling,' is **exempt** where the funded service was **only** Legal Help or Help at Court. But if the client recovers or preserves the home in family proceedings after the Commission has granted a certificate in the same matter, the exemption does not apply, and the costs that give rise to the charge will include those incurred on Legal Help or Help at Court. See Regulations 44(1) (g) and 45(2) and (3) Community Legal Service (Financial) Regulations 2000.

Orders Affecting a Spouse's Pension

8. Where one of the parties to ancillary relief proceedings has applied for an order attaching or 'earmarking' their spouse's pension, or for a pension-sharing order, the statutory charge position has given rise to a number of queries. Leading Counsel advised the Commission that exemptions will generally cover any property affected by the court's decision to make, or decline to make, a pension attachment or sharing order. See Regulation 94(c) and (g) Civil Legal Aid (General) Regulations 1989, and Regulations 44 (1)(a) and (h) Community Legal Service (Financial) Regulations 2000.

CICA Awards

9. Although the costs of legal help for a claim for compensation to the **Criminal Injuries Compensation Authority** are in respect of personal injury, and are therefore capable of giving rise to a charge, any award the client gets will be **exempt**. This is because CICA awards are inalienable under statute. See Regulation 44 (1)(h) Community Legal Service (Financial) Regulations 2000 and Section 7 (1) Criminal Injuries Compensation Act 1995.

Some examples of how the exemptions on costs and property work in family cases (references to regulations are to the Community Legal Service (Financial) Regulations 2000).

10. Suppose your client is getting divorced, and recovers both a lump sum and her former husband's share of the equity in the matrimonial home. She **remains in the home**.

Legal Help cases

11. If your client only had Legal Help (and/or Help at Court), the costs give rise to a charge (because although Legal Help does not normally do so, it does in family and personal injury cases, including clinical negligence). Where the application for funding was made before 1 April 2005, the first £3,000 of the lump sum is **exempt** (Regulation 44 (1)(d)). The home is **exempt** (because the charge is in favour of the solicitor) (Regulations 44(1)(g) and 45). So as long as the application was made before 1 April 2005 the charge will only bite on the lump sum above £3,000. If it was made after 31 March 2005, it will bite on the entire lump sum. In neither case will it attach to the home.

Both Legal Help and Representation

12. If your client has Legal Help followed by Representation, and, in the proceedings in which you represent her, recovers a lump sum and her former husband's share of the home, the costs of **both** the Legal Help **and** the Representation will give rise to a charge on the lump sum (above £3,000 where the application was made before 1 April 2005), **and** the recovered share of the home. The home is **no longer exempt**, because the charge is no longer in favour of the solicitor (Regulation 45).

General Family Help

13. The costs of **General Family Help** give rise to a charge in the same way as the costs of Representation. So again, if the client goes on to get General Family Help after having Legal Help, the costs of both give rise to a charge, and the home is **no longer exempt**.

Family Mediation and Help with Mediation

14. If your client had Family Mediation or Help with Mediation, those costs do **not** give rise to a charge, regardless of whether the recovered property is exempt. If she goes on to have Representation, and, in the proceedings in which you are representing her, recovers a lump sum and her former husband's share of the matrimonial home, the costs of **Representation** will form a charge on the lump sum (if the application was made before 1 April 2005, only over £3,000) and the recovered share of the home in the ordinary way. But the Family Mediation and Help with Mediation costs do **not** do so.

What if the former matrimonial home is sold?

15. Suppose now that the same client recovers a lump sum and her former husband's share of the proceeds of sale of the former matrimonial home. Although the **home itself** is exempt where the charge is in favour of the solicitor (see below), the **proceeds of sale** are not.

16. So whether the only service your client has is Legal Help, or both Legal Help and Representation, a charge in respect of the costs of both the Legal Help and any Representation will bite on **both** the lump sum, **and** the proceeds of sale of the home (above £3,000 if the application was made before 1 April 2005).

What is the value of the charge?

17. The charge consists of:
- (a) the amount of money the Commission has spent on funding services at all levels in connection with the proceedings or dispute;
(Note - when a contract does not distinguish the costs of the client's individual case and other cases, the cost is what the Commission specifies in writing)
 - (b) less any costs recovered by the client in the proceedings or dispute;
 - (c) less any payment by the client by way of contribution or otherwise: see section 10 (7) Access to Justice Act 1999.
18. When a client had a certificate under the 1988 Act, the Commission treated the value of the charge as the value of the property recovered or preserved, or the net deficiency, whichever was less. Regulation 99(6) Civil Legal Aid (General) Regulations 1989 supported this approach. But section 10(7) of the 1999 Act and Regulation 43 Community Legal Service (Financial) Regulations 2000 do not permit the Commission to value the charge in this way. The charge is always the cost of the funded services, less costs and contributions actually received, even if the property to which it attaches is worth less on recovery or preservation.
19. If the client pays off the charge at the end of the case, the changed approach to valuation is unlikely to make any difference. The Commission cannot seek more than the value of the charged property in satisfaction of the deficiency to the Fund. But if we agree to defer enforcing the charge by securing it on the client's home, and the home increases in value before the client pays off the charge, we may enforce the charge up to its full amount, depending on how much the property is worth at the time.
20. In determining the value of the property at the time the charge is enforced, the £3,000 exemption in most family proceedings where the application was made before 1 April 2005 will take effect to the extent that it has not already been used up on any other asset or assets.
21. If the Commission and the client agree to defer enforcement of the charge by registration on the client's home, any £3,000 exemption, to the extent that it has not been used up on any other asset, will affect both the sum on which interest accrues, and the value of the property to which the charge attaches when the client pays it off: Regulation 44 (1)(d) and 55(3)(e) Community Legal Service (Financial) Regulations 2000 as amended by Regulation 22 Community Legal Service (Financial) Regulations (Amendment No. 3) Regulations 2001.
22. For details of the charge in relation to Support Funding see section 14 of the Funding Code Guidance in Volume 3 of the Manual.

Who does the charge belong to?

23. The charge belongs to the Commission, except where it arises in respect of the costs of Legal Help or Help at Court, in which case it belongs to the supplier. If, after getting Legal Help or Help at Court and another level of service, the client goes on to recover or preserve property, the charge will be in favour of the Commission: Regulation 45 Community Legal Service (Financial) Regulations 2000.

Reporting and payment

24. Any money recovered in the dispute or proceedings, including damages, costs and interest, must be paid to the client's solicitor unless it is:
- (a) maintenance, or
 - (b) paid into court, and invested for the client's benefit, and exempt under Regulation 50 Community Legal Service (Financial) Regulations 2000 because the Commission has notified the court that the money is more than is needed to safeguard its interests: Regulation 18(1) and (2) Community Legal Service (Costs) Regulations 2000.
25. Even if the client's certificate has been revoked or discharged, if they recover or preserve property in the proceedings the charge will arise: Regulation 49 Community Legal Service (Financial) Regulations 2000. Any damages, costs and interest must still be paid to the solicitor, or to the Commission if the client no longer has a solicitor: Regulation 17(2) Community Legal Service (Costs) Regulations 2000.
26. The solicitor must report any attempt to get round this rule: Regulation 18(3) Community Legal Service (Costs) Regulations 2000. The solicitor must also report to the regional office straight away when the client recovers or preserves property: Regulation 20(1)(a) Community Legal Service (Costs) Regulations 2000.
27. The solicitor must pass on any money recovered in the proceedings which is not exempt to the Commission. The solicitor may pass on money which has been recovered or preserved, but which is exempt, to the client. The Regional Director may either pay the client, or direct the solicitor to pay them, an interim payment under CPR 25.6, if the Regional Director considers it essential to protect the client's interests or welfare: Regulation 20(1)(b)-(3) Community Legal Service (Costs) Regulations 2000.
28. The Regional Director may authorise the solicitor to release to the client any money which is not needed to protect the Fund: Regulation 20(4) Community Legal Service (Costs) Regulations 2000.

Can the supplier waive the charge?

29. Where the charge arises from the costs of Legal Help or Help at Court in a family, personal injury or clinical negligence case, and is therefore in favour of the supplier, the supplier may waive it in part or in full if enforcement
- (a) would cause grave hardship or distress to the client, or

- (b) would be unreasonably difficult because of the nature of the property: Regulation 46 Community Legal Service (Financial) Regulations 2000 and Rule 2.12 of the General Civil Contract. Guidance on the circumstances in which the supplier may grant authority not to enforce the charge is set out in

Appendix B paragraph 10 of the general guidance on devolved powers in volume 2 of this manual.

Can the Commission waive the charge?

- 30. The Commission has no power to waive the charge unless:
 - (a) it has funded Legal Representation or Support Funding in proceedings which it considered had a significant wider public interest and
 - (b) it considered it cost-effective to fund that service or those services for a specified claimant or claimants, but not for others who might benefit: Regulation 47 Community Legal Service (Financial) Regulations 2000.

This power to waive the charge exists only in relation to cases that are identified and funded as test cases from the outset.

See Section 5 - Financial Conditions in Public Interest Cases in the Guidance to the Funding Code in Volume 3 of the Manual.

Can the Commission defer enforcing the charge?

- 31. The Department for Constitutional Affairs intends to limit the Commission's discretion to postpone enforcing the charge, so that it is returned to its original purpose, namely that the client and any dependants will not risk losing the roof over their heads. When the regulations are amended, it will no longer be possible for the Commission to postpone enforcement of the charge where the client could raise enough money to pay it off, but chooses not to do so because having the Commission's charge registered on their home is more advantageous than borrowing from a bank or building society. Until then, the Commission may defer enforcing the charge if
 - (a) the property subject to the charge is the home of the client or their dependants or, in a family case, money to be used to buy a home for the client or their dependants; and
 - (b) the Commission is satisfied that the home will provide security for the charge; and
 - (c) the charge is registered: Regulation 52 Community Legal Service (Financial) Regulations 2000.
- 32. Interest accrues from registration on the lesser of either: (i) the value of the charge, or (ii) if the value of property was lower at the time of recovery, the value of the property when it was recovered or preserved: Regulation 53(3) Community Legal Service (Financial) Regulations 2000 as amended by Regulation 22 Community Legal Service (Financial) (Amendment No.3) Regulations 2001.
- 33. On 1 April 2002 the rate of interest was set at 5%. From 1 October 2005 it is 8%.

34. In determining the value of the property subject to the charge for the purpose of deciding what sum interest should accrue on, the Commission will take account of the £3,000 exemption in most family cases where the application was made before 1 April 2005; Regulation 44(1)(d) and 53(3)(e)(ii) Community Legal Service (Financial) Regulations 2000 as amended by Regulation 22 Community Legal Service (Financial) (Amendment No.3) Regulations 2001.
35. Unlike under the 1989 Regulations, the client's liability to pay interest does not depend on them having signed a form agreeing to do so.

3. Costs of Funded Clients and their Legal Representatives

1D-007

3.1 Introduction

1. This section covers remuneration and payments of damages, costs and interest in and out of the Community Legal Services Fund. Section H of this volume covers the assessment of solicitors' costs and disbursements and counsel's fees.

1D-008

3.2 Remuneration

Omitted

Bill Assessment

1D-009

3.3 Under the Legal Aid Act 1988

Omitted

1D-010

3.4 Under the Access to Justice Act 1999

Omitted

The Commission's Assessment Limits

1D-011

3.5 Assessment Limits generally

Omitted

1D-012

3.6 Magistrates' Courts

Omitted

1D-013

3.7 County or Higher Courts

Omitted

1D-014

3.8 Costs recovery bills

Omitted

1D-015

3.9 Protective writs

Omitted

1D-016

3.10 Calculating the Limit

Omitted

1D-017

3.11 Judicial Review proceedings

Omitted

1D-018

3.12 Inter Partes Costs

Omitted

1D-019

3.13 Discharge/Revocation

Omitted

1D-020

3.14 Magistrates' Court cases transferred up

Omitted

1D-021

3.15 Matrimonial/Family proceedings

Omitted

The Costs of Assessment

1D-022

3.16 Generally

Omitted

The Client's Rights on Assessment

1D-023

3.17 General

Omitted

1D-024

3.18 Definition of a "Financial Interest"

Omitted

1D-025

3.19 The funded client's rights

Omitted

1D-026

3.20 The Solicitor's obligations

Omitted

1D-027

3.21 Procedure upon receipt of written representations

Omitted

The Commission's Appeals Procedure for the Costs of Non-Contracted Legal Representation

1D-028

3.22 Introduction

Omitted

1D-029

3.23 Stage 1 – Appeal to the Funding Review Committee

Omitted

1D-030

3.24 Stage 2 – Certifying a Point of Principle of General Importance

Omitted

1D-031

3.25 Stage 3 – The Costs Appeals Committee

Omitted

1D-032

3.26 Solicitor's responsibility to Counsel

Omitted

1D-033

3.27 Solicitor's responsibility to Funded Clients

Omitted

Other Costs Assessments made by the Commission

1D-034

3.28 Contracted work

Omitted

1D-035

3.29 Non Contracted work

Omitted

1D-036

3.30 Approved Family Help

Omitted

1D-037

3.31 Special Family Proceedings

Omitted

1D-038

3.32 Support Funding

Omitted

Detailed Assessment by the Court

1D-039

3.33 Generally

Omitted

1D-040

3.34 Time Limits

Omitted

Appealing from Assessment of Costs

1D-041

3.35 Procedure

Omitted

1D-042

3.36 Costs of appealing against a detailed assessment

Omitted

Delay in Submitting costs claims to the Commission

1D-043

3.37 Generally

Omitted

1D-044

3.38 How the Commission applies the time limits

Omitted

Costs Conditions and Limitations

1D-045

3.39 Costs conditions

Omitted

1D-046

3.40 Costs limitations

Omitted

Payments in and out of the fund

1D-047

3.41 Under the 1988 Act

1. Parts XI and XII of the Civil Legal Aid (General) Regulations 1989 contain the rules of payment into and out of the fund. The relevant Notes for Guidance are 14–03 to 14–15 (pages 185–195) of the 1998/9 Handbook.

1D-048

3.42 Under the 1999 Act

1. This section explains how the CLS regulations deal with the rules on payment of damages, costs and interest into and out of the CLS Fund. The rules are primarily contained in Part III of the CLS (Costs) Regulations 2000. References below are to those regulations.

1D-049

3.43 Indemnity Principle and Costs Orders (Regulations 15 to 16)

1. Under the 1988 scheme lawyers could not receive payments for their legal work other than payments received from the Legal Aid Fund or expressly authorised by regulations. The indemnity principle generally ensures that costs recoverable from an opponent cannot exceed the costs payable as between solicitor and client. The legal aid regulations however allowed costs to be recovered from opponents in excess of legal aid prescribed rates after the introduction of prescribed rates in February 1994. The Access to Justice Act 1999 established an even more flexible régime.
2. Section 22(2) of the Act gives a general power to the Commission to authorise lawyers to receive fees other than from the Community Legal Service Fund.
3. The most common example of this is in applications for non-family Legal Representation. The new application form (CLS APP1) expressly allows solicitors and barristers to receive payments from the other side in successful cases at rates which are greater than the sums payable out of the CLS fund.
4. Another example is Support Funding. The application form for Support Funding (CLS APP2) not only allows for full inter partes costs to be recovered from the other side, but also allows for fees to be claimed from the client where they fall due under a conditional fee agreement.
5. This approach is reinforced by Regulation 15 of the CLS (Costs) Regulations 2000 which provides that the amount payable under a costs order or agreement in favour of a funded client should be the same as is payable for a client who has not been funded under the CLS. Regulation 15(2) expressly confirms that the indemnity principle does not apply where the Commission has authorised other payments to be received, as in the examples above.
6. Regulation 16 provides that costs incurred in filing with the court or serving any other party to proceedings with notices or other documents in accordance with regulations or the Funding Code may, in principle, be claimed from the other side. For example, the reasonable costs of serving notice of issue, amendment, discharge and revocation of certificates under Rules C16, 39 and 56 of the Funding Code Procedures may be claimed from the other side. This is not a change from the position under the legal aid regulations as Regulation 111 stated such work was taxable under Regulation 107(A)(2) and so costs incurred under regulations 25, 50, 54, 82 or 124 were costs in the cause. Note also that the obligations to serve

notices under the Code Procedures are in some respects less onerous than those under legal aid regulations. In particular, Rule C39 provides that there is only an obligation to serve notice of an amendment to a certificate on an opponent where the amendment relates to the level of service covered, the description of proceedings or an appeal. It is not necessary and will not usually be reasonable to incur costs in serving notices of amendment which relate only to the work to be done i.e. amending only scope or cost limitations.

7. All other administrative procedures are generally seen as non-recoverable (save those allowed under existing points of principle) and not claimable from the Fund. It should be noted that the contracts treat such work as administrative and non-recoverable.

1D-050

3.44 Payments into the CLS Fund (Regulations 17 - 20)

1. These rules generally replicate the rules in Regulations 87 – 90 of the Civil Legal Aid (General) Regulations 1989. They apply to costs as well as damages, and replace the general obligation to pay all costs to the Board in a legal aid case under section 16(5) of the Legal Aid Act 1988.
2. Regulation 17 of the CLS (Costs) Regulations 2000 provides that the rules on payments into and out of the fund only apply to Certificated Work. They therefore do not apply to any form of Controlled Work or to Family Mediation. However, the rules do apply to certificated Legal Representation, both forms of Support Funding, both forms of Approved Family Help and to work under High Cost or Multi-Party Action Contracts. In support funding, High Cost or Multi-Party Action cases, funded services are still being provided under a certificate for the purposes of Regulation 17 even though a contract is also in place.
3. Regulation 18 sets out the general rule that all money payable or recovered by a client in a funded case must be paid to the client's solicitor rather than paid to the client directly. The purpose of this Regulation is primarily to protect the Commission's interests in recovery of costs and in relation to the statutory charge.
4. Regulation 18 is very widely drawn and is wider than the obligations under Regulation 87 of the Civil Legal Aid (General) Regulations in a number of respects:
 - (a) The obligation applies to all money payable to or "recovered by" the client. This covers the situation where, for example, the client secures a lump sum settlement to be paid to a child. In line with the new wider approach of the statutory charge itself, this lump sum would have to be paid to the client's solicitor, not to the client or to the child.
 - (b) The Regulation expressly covers all money due to a client, whether damages, costs or other sums, such as interest on costs.
 - (c) Money which is exempt from the statutory charge must still generally be paid to the solicitor rather than the client. The only exceptions are periodical payments of maintenance and certain money held in court and invested for the client's benefit (Regulation 18(2)).

5. Money must be paid to the Commission if the client is no longer represented by a solicitor (Regulation 17(2)). There is now a general rule for money payable by third parties, such as trustees in bankruptcy, trustees of a pension fund or liquidators of a company, who must also all pay money to the solicitor rather than the client (Regulation 19).
6. Regulation 20 governs payment by the solicitor into the Fund. It also covers the general obligation to inform the Regional Director forthwith of any property recovered or preserved in the case (Regulation 20(1)(a)). Like any other breach of the Regulations, failure to comply which causes loss to the Fund can lead to non-payment of costs. For Licensed Work the power to do this is under Rule 1.14 of the General Civil Contract Specification; for non-Licensed Work, the power to defer profit costs is contained in Regulation 102 of the Civil Legal Aid (General) Regulations 1989 which is preserved by virtue of Article 4 of the CLS Funding Order 2000.
7. The general obligation of the solicitor to pay all moneys received to the Commission is contained in Regulation 20(l)(b). The exceptions, where money need not be paid to the Commission, are as follows:
 - (a) Where the property is exempt from the statutory charge (Regulation 20(2)).
 - (b) Where the money recovered represents an interim payment which the Regional Director considers is essential to protect the client's interests or welfare (Regulation 20(3)). Therefore interim payments, while not exempt from the statutory charge, can be released directly to the client where required.
 - (c) Where the Regional Director allows the solicitor only to pay certain sums into the Fund to protect the Fund's interests (Regulation 20(4)). This preserves the previous approach under which the solicitor could give an undertaking not to claim more than a particular sum from the Fund, and release the balance to the client.
 - (d) Where the Regional Director agrees to postponement of the statutory charge (Regulation 21 of the CLS (Costs) Regulations and Regulation 52 of the CLS (Financial) Regulations) – see the statutory charge guidance in this section.
8. When paying money in, the solicitor must identify separately costs, damages, interest on costs and interest on damages (Regulation 20(5)). Where the cases fall under the prescribed rates scheme, solicitors should also break down the interest agreed and/or paid between interest on the prescribed hourly rate and interest on the market rate excess.

1D-051

3.45 Payments out of the Fund (Regulations 22 - 24)

1. Regulation 22 sets out how the Commission deals with the costs, damages and other money paid into the fund. The Regulation preserves the procedures that existed previously, but the drafting of the Regulation is more straightforward than the approach previously taken in the Civil Legal Aid (General) Regulations 1989. Regulation 22 must also be read with the general obligations of the Commission to

pay out all remuneration properly due in accordance with the CLS Funding Order 2000 or its contractual obligations.

2. In summary, Regulation 22 requires the Commission to take the money paid to it and deal with it as follows:
 - (a) The Commission may retain the money properly due to it. This consists of three elements (Regulation 22(2)), which are:
 - (i) sufficient money to repay all the costs paid out of the fund, i.e. sufficient to pay off the statutory charge;
 - (ii) interest on costs where that interest relates to costs payable out of the fund;
 - (iii) the additional costs of enforcement action taken by the Debt Recovery Unit under Regulation 23.
 - (b) The Commission must pay the following sums to the supplier of services (as now payments to counsel are made directly to counsel) (Regulation 22(3)):
 - (i) remuneration due from the CLS fund under the CLS (Funding) Order 2000 or under contract;
 - (ii) inter partes costs received which are in excess of the payments due from the CLS fund;
 - (iii) interest on inter partes costs which is referable to that excess (rather than to the costs payable from the fund which the Commission retains as specified above).
 - (c) Once the Commission and the supplier have received their money, the Commission pays out all other sums (in practice, damages received by the Commission which have not been taken up by the statutory charge) to the client (Regulation 22(8)).
3. Regulation 22(2) only refers to the Commission retaining sums equal to the costs "already paid to the supplier". This should be interpreted as covering all costs payable from the Fund whether or not they have previously been paid on account. The Commission's obligations under both the Funding Order and Contract to pay the supplier take precedence over any obligation to return excess sums to the client.
4. Regulation 22(4) - (7) deal with the situation where a solicitor acts for the client prior to the issue of a certificate. The Regulation provides that fees due to the solicitor from the client should be paid to the solicitor out of the moneys held, but if there is insufficient to satisfy both the solicitor and the Commission there should be an apportionment between the two. Again, this approach is the same as old legal aid regulations (Regulation 103).
5. Regulation 22(4) allows these rules on payment and apportionment to be varied by any express agreement between the Commission and the solicitor. An example of such an agreement is Support Funding. The terms contained in the Support Funding application form (CLS APP2) set out how costs and damages are to be dealt with as between the Commission, the solicitor and the client. These conditions provide that there is no general apportionment of money as between the solicitor and the Commission. Indeed, in a conditional fee case, the solicitor will have no right to claim costs from the client in respect of work done prior to the grant of

Support Funding, save where costs are properly due from the client under the terms of the conditional fee agreement.

6. Regulation 22 covers how the Commission handles money paid to it under Part III of the Costs Regulations. In the case of Support Funding, the terms and conditions of Support Funding contained in the application form provide for other matters, including the right of the Commission to retain a proportion of the success fee in a successful conditional fee case which has been helped by Litigation Support. That proportion of the success fee must be paid to and retained by the Commission (in practice, by the Special Cases Unit).
7. Regulation 23 of the CLS Costs Regulations gives the Commission power to take action to enforce an order for costs or damages even if it is nominally in favour of a funded client. This work is carried out by the Commission's Debt Recovery Unit (DRU) in an enforcement action, and is done under broadly the same power as that set out in Regulation 91 of the Civil Legal Aid (General) Regulations 1989. The powers of DRU are made wider in one respect, namely that the costs of taking any step to enforce an order may be recovered, not just steps "in proceedings". For example, this can cover the use of a debt collection agency.
8. Regulation 24 deals with interest on damages held by the Commission and is identical to the rule in Regulation 92A of the Civil Legal Aid (General) Regulations 1989.
9. Prescribed Rates cases: the effect of the regulations remain the same so reference should be made to Notes for Guidance 14 - 08 to 14 - 14 of the 1998/99 Handbook (Pages 191 to 195).
10. Payments on account: for certificates granted for Legal Representation, Article 4 of the CLS (Funding) Order 2000 preserves the provisions of Regulations 100 - 102 of the Civil Legal Aid (General) Regulations 1989. Consequently Notes for Guidance 14-15 remains effective and solicitors should have due regard to pages 195 - 200 of the 1998/99 Legal Aid Handbook.

1D-052

3.46 Interest on Costs

Legal Aid Act 1988 Cases – What is Interest on Costs?

1. The Judgments Act 1838 gave a statutory right to interest on High Court judgments and orders. Once judgment is obtained, interest runs automatically and is recoverable from the opponent. Section 18 of that Act provides that interest also runs on any orders for costs.
2. Statutory interest on costs only arises where there is a court order for the payment of costs. If, for example, an action is settled on payment of an agreed sum for damages and costs, but the court order disposing of the action makes no order for costs between the parties, interest on costs does not arise.
3. Although the Judgments Act applied directly only to the High Court, interest provisions have been reproduced in the County Court under section 74 of the

County Courts Act 1984. The County Courts (Interest on Judgment Debts) Order 1991 came into force on 1st July 1991 and applied to certain judgments and orders in the County Court made after that date. There are several exemptions, the most important of which is that interest only runs on judgments or orders for payment of a sum of not less than £5,000. It is not clear what this figure of £5,000 includes and how costs fit in. It should be assumed that in any County Court case where the total amount of the judgment, including both damages and costs, turns out to be £5,000 or more, statutory interest would accrue on both the damages and the costs.

Who does Interest on Costs Belong to in a Non-Legal Aid Case?

5. In the absence of legal aid, interest on costs prima facie belongs to the client. It is payable to the client just like any other order between the parties. Some of the implications of this were considered in *Hunt v Douglas Roofing* [1988] 2 All ER 823. The rule could work unfairly to solicitors as an earlier case of *K v K* illustrated. Nevertheless, the House of Lords upheld the Incipitur Rule so that the client can recover interest on costs whether or not the client has paid the solicitor. Such a conclusion is possible because interest on costs arises automatically under statute, so that normal contractual principles of restitution cannot be directly applied. The solution is for solicitor and client to enter into an agreement as to the treatment of interest on costs, ensuring that the interest is paid to whoever has been waiting for their money. Such an agreement was recommended by Lord Ackner, and is now commonly entered into in contentious business agreements between solicitors and clients.

Position under Legal Aid Act 1988 and Regulations

7. As explained below, interest on legal aid costs is always payable into the Legal Aid Fund. The *Hunt v Douglas Roofing* case was not concerned with legal aid, and therefore one must look to the Act and Regulations and relevant authorities to decide how the grant of legal aid affects entitlement to interest on costs.
8. Where a legal aid certificate was issued, the primary obligation to pay the solicitor fell on the Board rather than the client (section 15(6) Legal Aid Act 1988), and solicitors could receive payment from no other source (Regulation 64 of the General Regulations). Therefore regarding payment of costs, the Board stepped into the position of the client. Section 16(5) of the 1988 Act then goes on to provide as follows:

“Any sums recovered by virtue of an order or agreement for costs made in favour of a legally assisted person with respect to the proceedings shall be paid to the Board”.

Interest on costs is plainly recovered ‘by virtue of an order ... for costs’ and therefore was always payable to the Board. Further, there was nothing in the 1988 Act or Regulations under it allowing the Board to pay out interest on costs to the solicitor, except as described below.

10. Part XI of the General Regulations sets out what sums were paid into and out of the Fund. Dealing first with the position prior to the Regulation changes which brought into effect prescribed rates in civil cases (cases covered by certificates issued before 25 February 1994), Regulations 87(1)(a) and 90(1), read with section 16(5) of the 1988 Act, meant that interest on costs had to be paid to the Board via the solicitor. Nothing in the Regulations allowed interest to be paid out to the solicitor, and Regulation 92 allowed the Board to retain "any sum paid under an order or agreement for costs made in the assisted person's favour....". Again, the view taken is that this covered any interest on costs.
- 11 For cases under the prescribed rates regime, Regulation 92(1)(d) as amended provided that where costs were recovered in full, together with interest on costs, the Board had to pay the solicitor any interest in excess of interest on costs at the prescribed rate. In other words, the Board retained interest on costs determined at prescribed rates, but any excess costs (the market rate differential) or interest thereon which had been recovered had to go to the solicitor. See also Regulation 107B(4), inserted by the Civil Legal Aid (General) (Amendment) Regulations 1994.

Relevant Authorities

12. The only authority directly on the point of the Board's entitlement to interest on costs was the unreported County Court decision of *Clifford v The Law Society* (12 May 1975, Mayor's and City of London Court). The facts were that legal aid had been granted to a Mr Pullen for a personal injury claim. After an appeal to the Court of Appeal, Mr Pullen was ultimately successful, and his solicitors Messrs Clifford & Co. accepted an agreed sum in full satisfaction of their costs. In addition, the defendants paid £65 interest on costs which was paid into the Legal Aid Fund. No payment on account had been made to the solicitor during the proceedings, so that there was no deficiency on the assisted person's account with the Fund. In the proceedings against the Law Society, the solicitors claimed they, not the Law Society, were entitled to the £65. At the hearing before Judge Leonard, the Law Society was represented by Leading Counsel. Giving judgment Judge Leonard concluded that as between the Law Society and the solicitors, the Law Society was entitled to the interest. This decision confirmed Leading Counsel's advice as to the entitlement to interest on costs in legal aid cases. The view taken is that the advice held good under the Legal Aid Act 1988.
13. Another reported case not directly in point reinforces the argument. In *The Debtor v The Law Society* (Times, 21 February 1981) the court considered whether a bankrupt could rely on a costs order made in his favour in legal aid proceedings as an argument for staving off bankruptcy proceedings. He could not, because the costs order "belonged" to the Board, not to the assisted person or his solicitor. If the costs belonged to the Board so must the interest. Note that this case is sometimes cited as direct authority for propositions on interest on costs. It is not directly concerned with interest on costs, but is a helpful and persuasive case. The recent case of *Burkett* (Court of Appeal 15 October 2004), whilst not approving the

arguments asserted, did not dispute the correctness of the decision but held that it could not be applied in order to prevent a set-off of costs between an adverse costs order belonging to a successful unassisted party and a costs order in favour of the assisted person.

14. The arguments based on the Act, Regulations and the authorities in favour of the Board retaining interest on costs remain valid. Solicitors sometimes assert that it is unfair that the Board should retain interest on costs where it is the solicitor who has been kept waiting for payment. That argument would not arise where the Board had made payments on account, and one can only say that the system for statutory interest sometimes produces surprising results. An advantage of publicly funded work is that costs will always ultimately be paid, but the disadvantage is that a solicitor cannot take steps to arrange for interest on costs to be paid to him or her.

Effect of Interest on Costs on the Legally Aided Client

15. Although the Board retained interest on costs, the client had to be given credit for all interest on costs received when calculating the amount of the statutory charge or deciding whether contributions could be refunded.
16. Section 16(4) provided that where the total contribution paid by a person exceeded the "net liability of the Board on his account" the excess had to be repaid to him. Similarly, the statutory charge applied where the total contribution was less than the net liability of the Board on his account (section 16(6)). The concept was defined in section 16(9) as including all sums paid or payable on behalf of the assisted person "being sums not recouped by the Board by sums which are recoverable by virtue of an order or agreement for costs made in his favour with respect to those proceedings...". This was the section which ensured that credit was given for inter partes costs recovered, and the view taken is that clearly any interest on costs was also recoverable "by virtue of an order...for costs".
17. It follows that the assisted person had to be given credit for interest on costs recovered when determining the amount of the statutory charge and the amount of contribution to be refunded, if any.
18. The net effect was that interest on costs went to the benefit of the client so long as there was a deficit on his account with the Board. Insofar as there was a credit, that credit was retained to the general benefit of the Legal Aid Fund.

Prescribed rates cases

19. Special care was needed in prescribed rates cases, because costs between the parties that were recovered in excess of those allowed at prescribed rates were payable to the solicitor. The Board retained interest on prescribed rates costs, with any balance of interest on costs being paid to the solicitor. Only the interest on costs actually retained by the Board in prescribed rate cases was credited when determining the liability under the statutory charge or a refund of contributions.
20. In a case where there were inter partes pre-certificate costs, interest on those costs belonged to the client in the normal way, subject to any agreement between the

client and the solicitor. If there was any shortfall in interest on costs received, the sums recovered were apportioned between the assisted person and the Board in accordance with Regulation 103(4).

Recovery of Interest on Costs

21. The Board expected a solicitor acting under a legal aid certificate to recover interest on costs in the same circumstances and to the same extent as if he or she were acting for the client privately.
22. In any case where interest on costs is not recovered, the Board was able to take enforcement action in its own name through the Debt Recovery Unit under Regulation 91 of the General Regulations.
23. Note also that the principles as to interest on costs applied even where costs were agreed and there was to be no net claim on the Fund. In such cases, there might be a notional assessment under Regulation 106, but even if the solicitor had agreed the costs he or she required from the other side, interest on costs should still be recovered and paid separately into the Fund.

Access to Justice Act cases - Interest on Costs

24. Section 10(7) of the Access to Justice Act preserves the principle of a first charge on property recovered. Money recovered must be paid into the Fund (Regulation 20(1)(b)(3)) Community Legal Service (Costs) Regulations 2000; and Regulation 22 (see 3.46.2) provides for sums to be retained or distributed. These provisions ensure the position on the interest on costs remains the same as under the 1988 Act.

4. Costs Orders Against Funded Clients and the Commission

1D-053

4.1 Cases under the Legal Aid Act 1988

1. Where a case was granted funding under the Legal Aid Act 1988, Sections 17 and 18 of the Act continue to apply. Guidance appears as Note for Guidance 15 pp. 206 - 208 Legal Aid Handbook 1998/99. But from 5 June 2000, the procedure for determining the liability of a funded client and/or the Commission to pay costs has applied to cases under the Legal Aid Act: The Access to Justice Act 1999 (Commencement No. 3, Transitional Provisions and Savings) Order, 2000 Article 8. See below: Determining the Client's and the Commission's Liability; Appealing and Varying Orders against the Funded Client or the Commission; and Late Determinations.

1D-054

4.2 Cases under the Access to Justice Act 1999

Costs orders against a funded client

1. Like Section 17 Legal Aid Act 1988, S.11(1) of the Access to Justice Act 1999 confers a degree of protection against liability for costs on a funded client, subject to prescribed exceptions. This statutory protection is defined as '**cost protection**' in Regulation 2 Community Legal Service (Cost Protection) Regulations 2000.
2. Section 11(1) provides that except in prescribed circumstances, the amount of costs ordered against a funded client must not exceed what it is reasonable for them to pay having regard to all the circumstances including:
 - (a) the financial resources of all the parties to the proceedings; and
 - (b) their conduct in connection with the dispute to which the proceedings relate.

What are the prescribed exceptions?

3. The Department for Constitutional Affairs intends to remove cost protection in family proceedings, where it may conflict with the court's power to make costs orders against parties who conduct proceedings unreasonably. Until that change comes into effect, the funding that does **not** give rise to cost protection is set out in Regulation 3 Community Legal Service (Cost Protection) Regulations 2000, as follows:
 - (a) Legal Help (unless the funded client later gets Legal Representation or Approved Family Help for the same matter, see paragraph 4 below);
 - (b) Help at Court;
 - (c) Litigation Support; and
 - (d) Investigative Support, unless the client's certificate is discharged and they do not pursue the proceedings: Regulation 3(1) and (2) Community Legal Service (Cost Protection) Regulations 2000. So if the funded client pursues the proceedings after the certificate is discharged they do not have protection in respect of the costs incurred by their opponent while the certificate was in force.
4. But if the Commission funds Legal Help and then Legal Representation or Approved Family Help for the same dispute, the funded client **has** cost protection in respect of the period when they had Legal Help, as well as when they had Legal Representation/Approved Family Help: Regulation 3(2) Community Legal Service (Cost Protection) Regulations 2000.

When does cost protection begin and end?

5. Generally, the client has cost protection in the proceedings for which they get funded services or for that part of the proceedings for which they get funded services: Regulations 2 and 3(3) Community Legal Service (Cost Protection) Regulations 2000.
6. But cost protection **starts** when:

- (a) pre-action Legal Help is given and the funded client subsequently receives Legal Representation or Approved Family Help in the same dispute (see above); or
 - (b) where the solicitor does work:
 - (i) immediately before the grant of an emergency certificate;
 - (ii) when they could not make an emergency application as the Commission's offices were closed;
 - (iii) they apply for an emergency certificate at the first available opportunity; and
 - (iv) the Commission grants the certificate: Regulation 3(2) and (5) Community Legal Service (Cost Protection) Regulations 2000.
7. Cost protection **ends** when:
- (a) the solicitor ceases to provide funded services under a certificate which is later discharged: Regulation 3(3)(b) Community Legal Service (Cost Protection) Regulations 2000. The date of the solicitor ceasing to provide funded services is likely to be some time before the final date of discharge, because the procedure leading up to discharge takes time and the funded client may appeal;
 - (b) a certificate is revoked. Revocation removes cost protection retrospectively, both during and after the subsistence of the revoked certificate: Regulation 3(4) Community Legal Service (Cost Protection) Regulations 2000.

Costs against the Commission

Cost Protection Cases

8. In certain circumstances, the court may make an order against the Commission to meet the shortfall between the amount it has ordered the funded client to pay, and the amount the court would have awarded a non-funded party if their opponent was not funded. The conditions are set out in Regulation 5(1) - (4) Community Legal Service (Cost Protection) Regulations 2000. The court may order costs against the Commission where:
- (a) a funded client has the benefit of cost protection;
 - (b) the proceedings are **finally** (see paragraphs 9 - 10 below, Effect of an Appeal in Costs Protection Cases) decided in favour of a non-funded party;
 - (c) the court has ordered the funded client to pay costs, but
 - (d) the costs awarded against the funded client do not cover the full costs (see paragraph 14 below);
 - (e) the non-funded party makes a request within three months of the order against the funded client, unless, where the application for funding was received on or after 3 December 2001, there is good reason for the delay;
 - (f) the court is satisfied that it is just and equitable in the circumstances that the costs should be paid out of public funds, and
 - (g) if the costs concerned were incurred in a court of first instance:

- (i) the client instituted the proceedings; and
- (ii) the court is satisfied that the non-funded party will suffer severe financial hardship unless an order is made.

If the application for funded services was made on or after 3 December 2001, the non-funded party must be an individual, and the court must be satisfied that they will suffer financial hardship unless an order is made, but the hardship does not have to be 'severe': Regulation 4(2) Community Legal Service (Cost Protection) (Amendment No. 2) Regulations 2001.

Effect of an Appeal in Cost Protection Cases

- 9. The Regulations provide that if the funded client appeals, any earlier order against the Commission has no effect. If the appeal is unsuccessful, the court can make a fresh order.
- 10. Where a court of first instance decides in favour of a non-funded party, any order made against the Commission shall not take effect until:
 - (a) where the funded client needs permission to appeal, the relevant time limit has expired without the funded client getting permission; or
 - (b) where the funded client has permission, or does not need it, the relevant time limit has expired without the funded client bringing an appeal: Regulation 5 (5) Community Legal Service (Cost Protection) Regulations 2000.

Litigation Support Cases

- 11. A client who has Litigation Support does not have cost protection, and paragraphs 8 - 10 do not apply. The client must have either insurance, or an equivalent arrangement, to cover their opponent's costs, as a condition of getting Litigation Support (see Funding Code Procedures Section 14 C 49 - 50). There is special provision in Regulation 6 Community Legal Service (Cost Protection) Regulations 2000 for cases where the insurance or other arrangement does not meet the full extent of the funded client's liability. The court must make an order against the Commission for a non-funded party's reasonable costs during the period when a funded client had Litigation Support if:
 - (a) the Litigation Support certificate has not been revoked;
 - (b) the Commission has approved the extent of cover (not the premium referred to in the Funding Code Procedures Section 14 C50) provided by the insurance or other arrangements; and
 - (c) the court has made an order against the funded client which exceeds the cover provided by their insurance or other arrangements.

All Cases

- 12. The court cannot make an order for costs, including wasted costs, in favour of a non-funded party against the Commission except in accordance with the Community Legal Service (Cost Protection) Regulations 2000. They form a

complete code: Regulation 7 Community Legal Service (Cost Protection) Regulations 2000.

Determining the client's and Commission's liability

13. When considering whether to make an order against a funded client the court must consider whether it would have made an order against a non-funded party: Regulation 9(1)–(3) Community Legal Service (Costs) Regulations 2000. The procedures set out below explain how the court determines:
 - (a) the amount of the order against the funded client (which may be nil);
 - (b) any assessment of the 'full costs';
 - (c) any liability of the Commission to pay any shortfall between the full costs and the amount the funded client has been ordered to pay.
14. The 'full costs' are defined as the amount the funded client would have been ordered to pay if it were not for cost protection: Regulation 2 Community Legal Service (Costs) Regulations 2000.

Immediate determination of the client's liability: the Regulation 8 - 9 procedure

15. The court can determine the funded client's liability (but not the Commission's) there and then, usually at the end of the trial, if:
 - (a) it would have made a costs order if there was no cost protection; and
 - (b) it considers it has enough information to determine the funded client's liability under Section 11(1); and **either**:
 - (i) it **would** have assessed the liability of a party without cost protection summarily; **or**
 - (ii) it **would not** have assessed the liability of a party without protection summarily; but
 - (iii) it is satisfied that the full costs are more than the funded client's liability: Regulation 9(2)(a) and (b) Community Legal Service (Costs) Regulations 2000. (This power enables the court to make an order there and then if it is obvious that the funded client's liability falls well short of the full costs, for instance, where the funded client's liability is nil.)
16. For the court to assess the funded client's liability there and then, it must have enough information to determine what is reasonable for the funded client to pay: Section 11(1)(a) Access to Justice Act 1999 and Regulation 9(2)(a)(i) and (3)(a) Community Legal Service (Costs) Regulations 2000. If the court has statements of resources from both the funded client and the party seeking the costs order, this condition is likely to be satisfied.
17. A party considering applying, or intending to apply, for a Section 11(1) Order at trial should file and serve a statement of resources at least seven days before trial. The funded client then has to produce their own statement of resources at the hearing: Regulation 8 Community Legal Service (Costs) Regulations 2000.
18. If the court makes a Section 11(1) Order without determining the funded client's liability there and then under Regulation 9, it may:

- (a) make findings of fact, including findings as to the parties' conduct, that will bear on the subsequent determination of the funded client's liability: Regulation 9(6) Community Legal Service (Costs) Regulations 2000.
- (b) order the client to make a payment on account into court, as long as it has enough information to decide the minimum amount the client is likely to be ordered to pay at a hearing to determine their liability, and the payment on account is no more than that: Regulation 10A Community Legal Service (Costs) Regulations 2000 as amended by Community Legal Service (Costs) (Amendment) Regulations 2001.

Hearings to determine the client's and/or the Commission's liability:

Regulation 10

- 19. Regulation 10 enables the court to:
 - (a) assess the funded client's liability if it could not do so there and then under Regulation 9;
 - (b) if it has not already done so, assess the full costs; and/or
 - (c) if the funded client's liability, however determined, falls short of the full costs, consider an application for an order against the Commission:
Regulation 9 (2)(b), (3)(b) and (5) Community Legal Service (Costs) Regulations. The trial court may, and should, delegate these functions: Regulation 10 (10) Community Legal Service (Costs) Regulations and 5(3A) Community Legal Service (Cost Protection) Regulations as amended by Community Legal Service (Cost Protection) (Amendment) Regulations 2001: see *R v Secretary of State for the Home Department ex parte Gunn*, [2001] EWCA Civ. 891.
- 20. To invoke the court's powers under Regulation 10, the receiving party has three months from when the court made the Section 11(1) Order against the funded client in which to file, and serve on the funded client (if appropriate) and the Commission's Regional Director (if appropriate), a request for a hearing, accompanied by:
 - (a) if the court has not made a summary assessment of the full costs (see above, paragraphs 15 - 16), their bill of costs; and
 - (b) a statement of resources (see above, paragraphs 18 - 19); and
 - (c) if they are making an application for a costs order against the Commission, or may seek one if the funded client's liability falls short of the full costs, written notice of that application: Regulation 10(2) - (4) Community Legal Service (Costs) Regulations 2000.
- 21. The court can extend the three-month time limit for making a request for a hearing of the application if:
 - (a) the application for funding was received on or after 3 December 2001; and
 - (b) there is good reason for the delay: Community Legal Service (Cost Protection) (Amendment No. 2) Regulations 2001.
- 22. If the receiving party serves a request for a hearing under Regulation 10(2), the funded client must file a statement of resources and serve it on the receiving party, and if appropriate, the Regional Director, not more than 21 days after getting the

receiving party's statement of resources: Regulation 10(5) and (6) Community Legal Service (Costs) Regulations 2000. At the same time the funded client may file and serve written points of dispute on the receiving party's bill: Regulation 10(7) Community Legal Service (Costs) Regulations 2000.

23. There is a procedure in Regulation 10(8) Community Legal Service (Costs) Regulations 2000 for the court to make, without a hearing, an order in default of the funded client filing a statement of resources.
24. If both sides fulfil the procedural requirements under Regulation 10 (1)–(7), on the receiving party to request a hearing, and on both parties to file and serve statements of resources, the court:
 - (a) fixes a date for the hearing; and
 - (b) notifies the receiving party and the funded client (if appropriate) and/or the Regional Director (if appropriate).
25. In any order for costs, the court can include the costs of the Regulation 10 procedure itself: Regulation 10(11) Community Legal Service (Costs) Regulations 2000.

What counts as the parties' resources in determining liability?

26. The court has to consider the resources of all the parties when making an order under Section 11: Section 11(1)(a) Access to Justice Act 1999. The funded client's resources are relevant to their ability to pay, which is an aspect of what is reasonable for them to pay: see Section 11(1). The other party's or parties' resources are relevant both to what it is reasonable for the funded client to pay, and to two aspects of the court's decision whether to make an order against the Commission:
 - (a) whether it is just and equitable that costs should be paid out of public funds; and
 - (b) in the court of first instance, whether the non-funded party will suffer financial hardship or severe financial hardship unless an order is made.
27. In determining the funded client's liability, the court must disregard:
 - (a) the first £100,000 of the value of their interest in their main or only home;
 - (b) the value of their clothes, household furniture, tools and implements of trade. This exemption does not cover items which the court considers to be exceptional in quantity or value.
28. In determining any party's liability:
 - (a) the court must take into account any partner's resources, unless their partner has a contrary interest in the dispute;
 - (b) if they are acting in a representative, fiduciary or official capacity, the court:
 - (i) must disregard their personal resources;
 - (ii) must take into account any fund or property from which they can be indemnified;
 - (iii) may have regard to any beneficiary's resources: Regulation 7 Community Legal Service (Costs) Regulations 2000.

Appealing and Varying Orders against the funded client or the Commission

29. The Regulations define four circumstances in which an **appeal** lies against a Section 11 Order (Regulation 11 Community Legal Service (Costs) Regulations 2000):
- (a) **any party** may appeal against an assessment of the full costs where they:
 - (i) have a financial interest in the assessment; and
 - (ii) would have been able to appeal under the relevant rules of court;
 - (b) the **funded client** may appeal where the court has determined their liability there and then, under Regulation 9(2)(a), on the basis that it considered the full costs would exceed their liability. If the funded client's appeal results in a determination that the full costs are lower than the court previously determined, their liability will be limited to the lower figure;
 - (c) **a receiving party** may appeal on a point of law against:
 - (i) the court's refusal to make an order against the Commission; or
 - (ii) the amount of costs awarded against the Commission;
 - (d) **the Commission** may appeal on a point of law against:
 - (i) an order to pay costs, or
 - (ii) its amount.
30. There are two circumstances in a party may apply to the court for a **variation** of the amount (if any) which the funded client is required to pay: Regulation 12 (2) and (8) Community Legal Service (Costs) Regulations 2000. The circumstances in which a party may apply for a variation are as follows:
- (a) **the receiving party** , where the amount the funded client has been ordered to pay, together with any costs ordered against the Commission, is less than the full costs;
 - (b) the **Commission**, where the receiving party was a funded client, and the amount the paying funded client has been ordered to pay is less than the full costs.
31. If the receiving party or the Commission makes an application to vary a Section 11(1) Order, the court has power to vary it if there has been a **significant change** in the funded client's circumstances since the date of the order: Regulation 12(4) Community Legal Service (Costs) Regulations 2000.

Late Determinations

32. Similarly, there are two circumstances in which the Commission or a party may apply for a **late determination** under Regulation 10. As explained above (paragraph 20), the receiving party generally has three months from the date of the Section 11(1) Order to request a hearing when the court can determine the funded client's and/or Commission's liability in detail: Regulation 10(2) Community Legal Service (Costs) Regulations 2000. The court may make a late determination of the funded client's liability, **but not that of the Commission**, after the three-month time limit has expired, but within six years of the Section 11(1) Order, on the application of:

- (a) **a receiving party**, where the court has not made a determination under Regulation 9; or
 - (b) **the Commission**, if the receiving party was a funded client.
33. The **grounds** on which the court may make a late determination are:
- (a) there has been a significant change in the funded client's circumstances since the date of the order;
 - (b) material additional information is available which the receiving party could not have obtained in time to apply under Regulation 10; or
 - (c) there are other good reasons why the receiving party could not have made an application under Regulation 10: Regulation 12(3) and (4) Community Legal Service (Costs) Regulations 2000.

5. Authorities

1D-055

5.1 Introduction

1. Regulations 59 to 63 Civil Legal Aid (General) Regulations 1989 continue to apply to Licensed Work under Rule 6.5 of the General Civil Contract Specification and article 6 of the Community Legal Service (Funding) Order 2000.
2. The rule is that no question as to the propriety of any step or act in relation to which prior authority has been obtained shall be raised on any assessment of costs. Where a limit has been imposed, the amount can only be disallowed if the solicitor or client knew, or ought reasonably to have known, that the purpose for which such authority was given had failed or become irrelevant or unnecessary before the costs were incurred (Civil Legal Aid (General) Regulations 1989, reg. 63(1) and (2)).
3. Although an authority can be given in the certificate itself, an amendment or a separate letter, all authorities are in practice given by letter.
4. Authorities cannot be given retrospectively. In *Wallace v. Freeman Heating Co Ltd* [1955] 1 W.L.R. 172, Pearson J., upheld a decision to disallow a sum in the solicitor's bill for the cost of a shorthand transcript, because the relevant authority had not, when granting the legal aid certificate for the appeal, authorised the bespeaking of a transcript. Their retrospective approval, after the master had first disallowed the amount, was insufficient to bind the taxing master.
5. When obtaining authority to instruct Queen's counsel or to incur unusual or unusually large expenditure, the solicitor should also get the client's consent, after telling him or her what the additional costs are likely to be, together with their impact on the statutory charge (*Re Solicitors, Re Taxation of Costs* [1982] 2 All E.R. 683).
6. The main areas of work to which prior authorities apply are:
 - (a) the instruction of counsel;
 - (b) the employment of experts and the incurring of unusual expenditure.

1D-056

5.2 Authority for Counsel

1. Under regulation 59 of the Civil Legal Aid (General) Regulations 1989, the general rule is that a solicitor may instruct counsel without the need for prior authority where it appears necessary for the proper conduct of proceedings. When counsel entrusts a case to another counsel the permission of the regional office is not required.
2. However, unless authority has been given in the certificate or subsequently, counsel should not be instructed in a magistrates' court (including family proceedings court), nor should Queen's counsel or more than one counsel be instructed. Note that authority for Queen's counsel is only required where Queen's counsel is acting as such. There may be circumstances where Queen's counsel choose to act and be paid at junior counsel rates, in which case no prior authority need be applied for.
3. In the case of proceedings a magistrates' court (including family proceedings court), unauthorised costs involved in instructing a single junior counsel may be allowed on assessment, or may be assessed on the basis that the solicitor undertook all the work with the amount allowed being shared between the solicitor and counsel. This is known as the 'maximum fee principle'. This means that on assessment, there are three possibilities:
 - (a) prior authority granted for the instruction of counsel – counsel's reasonable fees are assessed as for County Court proceedings;
 - (b) no prior authority given but it is considered on assessment that the conduct of the case required the use of solicitor and counsel. For example, there may have been a difficult evidential problem or a query on a point of law. Again, assessment is as for County Court cases;
 - (c) no prior authority granted and on assessment it is not considered that the circumstances justified the use of both solicitor and counsel – the maximum fee principle should be applied.
4. Where there is no inter partes detailed assessment of costs there is no discretion to allow unauthorised costs incurred in instructing counsel (*Din v. Wandsworth London Borough Council* (No 3) [1983] 1 W.L.R. 1171; *Hunt v. East Dorset Health Authority* [1992] 2 All E.R. 539 and Civil Legal Aid (General) Regulations 1989, reg. 63(3)). On receiving instructions, counsel should satisfy him or herself that any necessary authority has been obtained and that a copy of the certificate together with any amendments and or authorities are included with the instructions (Civil Legal Aid (General) Regulations 1989, reg. 59(2), see also *Hunt v. East Dorset Health Authority*).
5. All requests for authority to instruct or brief Queen's Counsel and more than one counsel are handled by experienced Case Managers in the Special Cases Unit (SCU). In family cases, all such applications are dealt with by the SCU in London. Non family applications are considered by any SCU office.
6. When applying for authority for counsel the solicitor should make it entirely clear whether authority is sought to:
 - (a) brief Queen's counsel alone;
 - (b) brief Queen's and junior counsel;

- (c) instruct Queen's counsel alone; or
- (d) instruct Queen's and junior counsel (or continue to instruct junior counsel);
- (e) brief two junior counsel; or
- (f) instruct two junior counsel.

and should submit the application in good time with sufficient information for the decision to be made. Applications (including late applications) with insufficient information will not be granted and oral applications are likely to be granted only very exceptionally as it should be possible to submit the necessary information in writing at the earliest opportunity. Applications should be made on form APP8 with supporting solicitor's letter and/or note from counsel. There is no right of appeal against a refusal of authority but the regional director must give reasons for the refusal and the application may be renewed at any time.

7. An authority for "briefing counsel" in respect of a hearing only covers the brief to appear itself, any necessary conference/consultation on the brief after its delivery and preparation of any necessary skeleton argument. It does not cover any conference/consultations or other work done on instructions before the delivery of the brief (**Error! Bookmark not defined.**(see *Din v. Wandsworth London Borough Council* (No 3) above).
8. An authority for "instructing counsel" is wider than one for "briefing counsel". It covers the involvement of counsel generally in the further conduct of the proceedings including being briefed to appear, subject only to assessment.
9. An authority for "instructing leading counsel alone" permits him or her to settle pleadings or draft such other documents as are normally drafted by junior counsel.
10. The agreement of the client must be sought to the instruction of Queen's or additional counsel where the additional cost may affect the amount of the statutory charge. If the client has not been informed of the position the propriety of any authority may be queried on assessment (see *Re Solicitors, Re Taxation of Costs* [1982] 2 All E.R. 683).

1D-057

5.3 Factors taken into account in relation to authorities for counsel

Generally

1. Authority for Queen's Counsel or more than one counsel will generally only be granted in cases of exceptional complexity or importance. The question for the Commission is whether the issues in the case are such that the interests of the client cannot be fairly and properly determined without the assistance of Queen's Counsel or more than one counsel.
2. For example, in non family cases if there are very difficult issues of causation and/or very substantial quantum this will make it more likely that an authority will be granted. Factual or evidential complexity alone is unlikely to justify an authority for Queen's Counsel but might, exceptionally, justify an authority to brief two juniors. If the reason for the application is merely that the case is of great importance to the

funded client (e.g. a parent in opposed care or adoption proceedings) this will not of itself be sufficient to justify a grant.

3. The urgency of the case or the convenience of the solicitor or counsel are not factors to be taken into account (although see below regarding the possibility of an authority for two junior counsel). The fact that the application concerns an appeal (including to the Court of Appeal) is not of itself a sufficient justification for authority (and see below regarding the House of Lords).
4. It does not follow that if one party has Queen's Counsel or two counsel then all the parties should have Queen's Counsel or two counsel. The case for/against each party may be different. Each individual application will be considered on its own facts and merits and the role and the involvement of each party within the proceedings will also be considered. If the only reason for the request being made is that another party has Queen's Counsel it will be appropriate to consider the reason(s) why. Another party having Queen's Counsel is not a factor that alone merits authorisation. Conversely if one party seeks authority for Queen's or two counsel, when the other party or parties do not, any justification for this will depend on the client's own case and position in the proceedings.
5. Where cases are linked or a number of parties are publicly funded in the same set of proceedings and there is no conflict of interest sufficient to justify the use of separate advocates then every attempt must be made to instruct the same counsel, including the same Queen's counsel or second counsel.

Family Matters

6. Although family matters are by their very nature emotive, dealing with difficult and complex personal issues and the outcome of these cases are of the utmost importance to the parties involved, in the majority of family cases the principles and law are generally well settled and therefore the matters in which the instruction of Queen's Counsel is justified will be exceptional. This includes public law cases which are generally managed by junior counsel.
7. It is unusual (although not unheard of) for the decision to grant authority for Queen's Counsel to rest on a single issue. Normally, there is an accumulation of issues and the difficulty is deciding at what point the level of complexity tips the balance. The factors to take into account when considering a request for authority are numerous and varied and may appear in any combination and to differing degrees. They may include:
 - A genuine and significant challenge to statute or precedent case law;
 - Significant novel points of law;
 - Numerous experts with conflicting expert opinion on an issue key to the case outcome;
 - Allegations of extremely serious abuse or non-accidental injury;
 - Concurrent or threatened criminal proceedings of the most serious nature;
 - Unusually complex evidential problems.

8. This is of course a non-exhaustive list and each case can reflect elements of any of the above in varying degrees. This highlights why it is so important to consider each application on its own merits and for each issue to be described in detail in any application for authority. Most of the above issues singly and in some combinations will be within the capabilities of experienced junior counsel. In order for there to be merit in instructing Queen's Counsel there would have to be an accumulation of these factors and/or other individual factors of the most exceptionally complex nature.

If any of the factors above are present, how they affect the management of the individual client's case is also relevant. The relevance of each factor may well be different for each parent, child or other parties.

At first instance venue is an issue to which weight may be given although clearly the less complex cases will be heard in the County Court and Family Proceedings Court. It is recognised that some cases that would otherwise be heard in the High Court are retained in the County Court for reasons of timetabling, expedition and judicial availability.

Authorities for Leading and Junior Council

9. If authority is sought for Queen's and junior counsel (as opposed to Queen's counsel alone):
- (a) there will be a presumption that Queen's counsel will operate without the assistance of a junior, and it is not a relevant factor that Queen's counsel is not prepared to appear without a junior;
 - (b) an application for both Queen's and junior counsel must justify:
 - (i) the work to be undertaken by each counsel and their role in the proceedings;
 - (ii) why the client cannot be adequately represented by one counsel alone.
 - (c) generally Queen's counsel will only be authorised where the nature of the case raises very significant public interest issues, or is exceptionally complex, such that the interests of the client cannot be properly determined without the assistance of Queen's counsel.
10. Where authority is sought for both instruction of Queen's Counsel and retention of previously instructed junior counsel, it may be suggested that there is merit in keeping the experience, knowledge and trust that the funded client has in junior counsel. However, the solicitor with conduct should also have this experience, knowledge and working relationship with the funded client, but may not be present at every hearing. Each case will be considered individually to determine the objective need for the continued instruction of junior counsel.
11. If junior counsel is to be retained, the respective roles of Queen's and Junior Counsel must be identified and justified. Authority may be given for Queen's and Junior Counsel where the considerations for Queen's Counsel alone apply, but the following will be taken into account:

- The involvement of junior counsel already is such that it can be demonstrated that his/her assistance to Queen's Counsel will materially save time for Queen's Counsel sufficient to justify the junior's fees.
 - The papers in the case are so voluminous that it would be practically impossible for Leading Counsel to handle them without a junior, either in preparation for the trial or at the trial itself.
 - There are such a large number of witnesses that trial management requires Queen's Counsel to be assisted by junior counsel.
12. All of these factors will be affected by the timing of the instruction of Queen's Counsel. The sooner in the action authority is given the more likely it is that Queen's Counsel will be able to manage the case alone and vice versa.
13. Where authority has initially been granted for Queen's Counsel alone, but it subsequently emerges that junior counsel will be required for reasons not apparent when the initial authority was granted, an application for further and wider authority can be made and should be supported by a note from Queen's Counsel.

Junior Counsel Taking Silk

14. Authority to instruct Queen's Counsel is only needed where Queen's Counsel will be acting as such. When a junior who has been instructed takes silk, the Commission will, on an application for authority for him or her to continue as a leader, take the following into account:
- (a) Queen's Counsel is permitted, and should normally be willing at any time before the first anniversary of being appointed as Queen's Counsel, to do any ordinary work of a junior in any proceedings he or she was instructed to settle before appointment;
 - (b) he or she may, at his or her discretion, continue to act as a junior for an unlimited time, inter alia, in a civil suit in which he or she was instructed before being appointed as Queen's Counsel and appeared as a junior at the trial or on an appeal before the first anniversary of the appointment;
 - (c) except as above, he or she should refuse to act as a junior after the first anniversary of being appointed as Queen's Counsel unless, in his or her opinion, such a refusal would cause harm to the client. In that event he or she may, at his or her discretion, continue to act until the second anniversary of the appointment;
- in the event of Queen's Counsel not electing or being able to continue as a junior, it is open to a solicitor to instruct a fresh junior.

Authority for two Junior Counsel

15. Authority for two junior counsel is needed where two counsel propose to claim separate fees. It is not, however, needed where there is an informal sharing of work and fees within a set of chambers. In any case where the Regional Director would be prepared to grant authority to instruct Queen's and junior counsel authority may be granted for two junior counsel, recognising that many experienced junior counsel

prefer to continue with such cases with the assistance of a second junior. In a case which would not otherwise warrant the instruction of Queen's Counsel, authority for two junior counsel might be justified by the volume and complexity of the work and the timescale of the proceedings— for example where, unavoidably, a party is joined at a very late stage in a significant and complex case.

Magistrates' Court (Family Proceedings Court/Summary Proceedings)

16. In the case of summary proceedings, authority is likely to be granted where the case poses:
- (i) unusually complex evidential problems; or
 - (ii) novel or difficult points of law;
- but not if the reason for instructing counsel is:
- (i) that the case is contested, protracted or involves the cross examination of witnesses or arguments on points of law;
 - (ii) the personal circumstances or convenience of the solicitor in circumstances where it would be more appropriate to instruct a solicitor agent.

House of Lords Appeals

17. Queen's counsel appearing in the Court of Appeal can apply to the Court of Appeal for leave to appeal to the House of Lords, but may not settle an application for leave to appeal to the Lords. Authority may be granted for him or her to advise the Legal Services Commission on the merits of such an appeal, but only where he or she conducted the appeal hearing in the Court of Appeal (Practice Direction House of Lords Civil Appeals; 1.20 [2005]). The instruction of both Queen's and junior counsel may be appropriate once leave has been granted, although the instruction of Queen's counsel alone is increasingly common.
18. In House of Lords cases the following authority wordings will normally be used:
- (a) Authority is included to instruct leading and junior counsel, but only after leave to appeal has been obtained;
 - (b) Authority is included to instruct leading counsel alone, but only after leave to appeal has been obtained;
19. These authority wordings reflect the following considerations:
- (a) The House of Lords will not authorise payment of Queen's Counsel's fees for settling the petition for leave (Practice Direction H.L., 1.20 [2006]).
 - (b) Applications for leave are generally dealt with on the papers. If there is an oral hearing the House of Lords directions provide only for the payment of junior counsel's fee (Practice Direction H.L., 1.20 [2006]).
 - (c) A consultation with Queen's Counsel before leave is obtained would not be allowed on assessment, but a conference with junior counsel may be (Practice Direction H.L. 1.20 [2006]).
20. Petitioners and respondents to a petition for leave to appeal may instruct leading or junior counsel, but on taxation (assessment of costs) the House allows only junior counsel's fees for any stage of a petition for leave to appeal, even if a public funding

or legal aid certificate provides for leading counsel. The only exception to this practice is where leading counsel who conducted the case in the court below are instructed by the Legal Services Commission or legal aid authorities to advise on the merits of an appeal.

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5.4 Employment of Experts, incurring Unusual Expenditure and Obtaining Transcripts of Proceedings

1. Authority is not needed if the solicitor is prepared to risk the costs being disallowed on assessment, but is required if the solicitor wishes to be sure that the item will be allowed on assessment.
2. Authority will be granted if the regional office is satisfied that the steps are necessary for the proper conduct of the proceedings. Applications must be made in good time and with sufficient information to make the decision.
3. There is no right of appeal against a refusal of authority, but the regional office must give reasons for any refusal, and the application can be renewed. The regional office must either grant or refuse any application which is made.
4. If authority is granted, it will specify the maximum fee payable for any report, opinion, expert advice or transcript. This may be less than the amount applied for. If the ultimate fee is difficult to predict, an initial sum may be authorised to establish the benefit and costs involved in undertaking further work.
5. Solicitors are expected to identify and instruct appropriate experts directly (rather than through any agency or third party, whose involvement is considered to be an unjustifiable expense).
6. Where a partner or employee (including a solicitor employee) of a firm advising or acting for a client is involved in the provision of non-legal services, then authority will be refused unless the regional office is satisfied that:
 - (a) the business providing the service (e.g. photography) has been legitimately set up and does exist as a separate entity;
 - (b) those involved appear to have the necessary expertise to undertake the work involved;
 - (c) it appears unlikely that those involved would have to give evidence – other than formal evidence;
 - (d) the expenditure is justified in terms of the work to be undertaken and the amount involved, at least one other estimate being available, and
 - (e) the client has been informed of the position and agrees that the disbursement should be incurred using the business connected with the solicitor: see Principle 15–04 of the “Guide to Professional Conduct of Solicitors”.
7. This reflects the private client position, and is intended to ensure that the client's interests are protected, having particular regard to any contribution payable and the possible operation of the statutory charge.
8. The regional office will not grant an authority for an item which would not be recoverable applying the normal principles of assessment.

9. Factors which may influence the regional office include the following:
 - (a) the total financial commitment as far as an expert is concerned, including the cost of obtaining a report and tendering evidence;
 - (b) whether the funded client has agreed to costs which may increase the amount of any statutory charge.

1D-059

[OMITTED]

1D-060

5.5 Funded clients' Travel Costs and Other Expenses

1. The basic principle is that costs, whether paid by the client or the Fund, are in reimbursement of the solicitor's profit costs, counsel's fees and disbursements properly and reasonably incurred. Since the solicitor is instructed by the client, it is only in limited circumstances that the solicitor could properly incur a disbursement in relation to his client's own expenses, e.g. travel costs.
2. The case of *R. v. Legal Aid Board, ex p. Eccleston* (QBD April 3, 1998, Law Society's Gazette May 20, 1998, The Times, May 5 1998) clarified the law on this subject. Mr Justice Sedley concluded that an assisted person's travel expenses could amount to a proper solicitor's disbursement, for which the Legal Aid Board could grant prior authority, if the assisted person needed to see an expert whose report was essential for the proper conduct of the proceedings, and the assisted person could not otherwise afford the expenses involved in travelling to see that expert.
3. The implications of this judgment affect both costs assessments and applications for prior authority made under regulation 61 of the Civil Legal Aid (General) Regulations 1989. Such applications will normally be made under regulation 61(2)(d), for performing an act which is either unusual in its nature or involves unusually large expenditure.
4. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns a personal expense of the client may arguably make the expense unusual in its nature.
5. The solicitor is not, of course, obliged to seek a prior authority. Such expenses may be recoverable on assessment as a disbursement provided that they have been reasonably incurred and are reasonable in amount. If the expense is allowed as a disbursement and the client recovers or preserves money or property as a result of the proceedings, then it will serve to increase any statutory charge liability. This type of expense will generally not be recoverable inter partes (as an item of costs as opposed to part of a special damages claim), but may be recoverable on a publicly funded assessment by the court or the Commission.
6. Any person attending court, whether as a party, or as a witness called or reasonably intended to be called to give evidence, is entitled to recover their expenses as to:
 - (a) loss of income;
 - (b) travel;

- (c) hotel expenses;
 - (d) subsistence.
7. A solicitor may pay these expenses on behalf of his or her client, and then include the payments in the bill, as they would generally be recoverable as a disbursement. Receipts should be produced where relevant. The usual principles as to reasonableness apply. If it was unreasonable for the client to attend the hearing in furtherance of his or her case, for instance because there was no intention that the client would give evidence, or the hearing was an interim hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed.
8. The expenses must also be reasonable as to amount and could be expected to fall within the following categories:
- (a) loss of income: only actual losses are claimable, therefore if the client is still paid while attending court, no notional loss of income is claimable.
 - (b) travel costs:
 - (i) travel by car at the mileage rate;
 - (ii) reasonable public transport costs: this will cover travel by the most economical and direct method. It would not generally be reasonable to allow a first class fare. Travel by coach may often be more economical than travel by rail;
 - (iii) hotel expenses: accommodation charges vary considerably across the country and it is difficult to give guidelines on specific amounts. It would be reasonable for accommodation to be of an adequate, but not luxurious standard;
 - (iv) subsistence: this would include reasonable expenditure on meals and non-alcoholic beverages, but not items such as cigarettes, newspapers etc.
9. Following *Eccleston*, a funded client may be entitled to recover his or her travel expenses in connection with attending a medical or other expert. The client must be "impecunious" and that the expense must be necessary "in order to make or keep the case viable". When considering an application for prior authority in connection with such expenses the following criteria will be applied:
- (a) it must be demonstrated that the expenditure is necessary to keep the proceedings viable. In other words the test is that the litigation would not be able to continue or would fail unless this expense is met;
 - (b) the funded client must establish that he or she does not have the resources to meet the expense. The fact that a litigant is in receipt of social security benefits or does not automatically satisfy the test of "impecuniosity". The client should provide a full breakdown of weekly income and outgoings, together with capital resources, to demonstrate that he or she cannot afford to meet the particular expense. A relatively small expense is unlikely to justify the grant of a prior authority, and should not generally be allowed on assessment unless the client is so impecunious as to be unable to meet even that small expense. This test

will be more difficult to satisfy where the amount is small, although each case should be determined according to its individual circumstances;

- (c) if the expert is based locally, then it would not generally be reasonable for the client to seek financial assistance from the Fund to attend the appointment. This is akin to a visit to the client's own solicitor's office. An application for prior authority or payment should generally be refused in these circumstances, unless the client can demonstrate that he or she is impecunious and that the proceedings would otherwise fail;
- (d) if the expert is based some distance from the client's home and the court where the case would be dealt with, justification should be provided as to why a local expert should not or could not be instructed. The solicitor should set out the steps which have been taken to identify an appropriate local expert, for instance, by reference to the Law Society Directory of Experts. It would not generally be reasonable to instruct a distant expert simply to avoid delay if adequate expertise is available locally.

The test should be based on the nature of the expertise available. It may be appropriate to instruct an expert outside of the local area if he or she has specific expertise which is unavailable locally or a limitation period is approaching and the client could not be seen promptly locally (provided that the client and his or her solicitors were not responsible for the delay in instructing an expert). The nearest expert with appropriate expertise should be used. For example, it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;

- (e) the client must justify why he or she needs to attend the meeting with the expert. For instance, e.g. if a physical examination is necessary, then clearly it would be reasonable to do so;
 - (f) the application must provide a full breakdown of the proposed expense;
 - (g) any available alternative sources of funding should be considered.
10. Before granting an application for prior authority the regional office should take into account all the above criteria, and determine whether it is necessary for the proper conduct of the proceedings to incur the expense. If the authority is refused, written reasons must be provided for the decision (Regulation 62 of the Civil Legal Aid (General) Regulations 1989).
 11. When considering applications, regional offices should also consider whether a private client of moderate means would incur the expenditure in all the circumstances of the particular case.
 12. Where a funded client is required to submit to a medical examination at the request of the other side, it is normal for those expenses to be borne by the party requesting the examination. In those circumstances, the expense is generally settled in advance and would not usually form part of the client's costs. If the expense has not already been paid by the opposing party, it should be claimed as an inter partes item in the bill. Prior authority should be refused.

13. The same criteria as above should be applied to funded clients' travel costs to attend legal advisers, such as for a conference with counsel. It would generally not be reasonable for the client to seek prior authority to cover such expenses unless the criteria can be met, for instance where attendance in conference with a specialist counsel in London was essential before counsel could review the merits of the case.
14. So far as the costs of an expert attending on the funded client are concerned, the general principle is that litigants are expected to visit their professional advisers unless they are unable to do so. It is generally more economical for the funded client to visit the expert rather than vice versa, as the attendance of an expert on the client would involve a claim for both travel and incidental expenses, and the time spent in travelling as well as the attendance.
15. Prior authority for an expert's costs of visiting the client should only be granted in exceptional circumstances, for instance where the client is unable to visit the expert due to physical incapacity, or the visit itself is the purpose, such as assessing the client at home.
16. So far as funded clients' travel costs to hospital are concerned, hospitals will pay the fares of patients attending for NHS treatment if they are in receipt of certain benefits such as income-based Jobseeker's Allowance, income support, or if they are covered by a low income exemption certificate issued by the Benefits Agency's Benefits Unit.
17. The above covers the most common scenarios. However, other types of application of a similar nature may be made, such as the costs of travel pursuant to a court order for interim contact with a child, attendance at a social services case conference, an assessment centre or family mediation appointment. If the expense would have arisen even if the person was not publicly funded, because it arose due to the circumstances generally rather than directly and solely as a consequence of the proceedings or proposed proceedings, it does not constitute a disbursement and must be refused. If the expenses arise as part of the implementation of a court order or agreement, they do not form part of funded client's costs, but are rather the consequences of implementation. In these circumstances applications for prior authority and payment should be refused.
18. Each application should be considered on its own merits.

1D-061

5.6 Joint Instructions and Apportionment Generally (see also para 5.7 below)

1. Parties should use a single expert jointly instructed where this is appropriate to the circumstances of the case (including in particular in ancillary relief applications). If the funded client unreasonably refuses to do so, then this should be reported by the solicitor as incurring an unjustifiable expense to the Fund (Funding Code procedures C.44).
2. Disbursements should be appropriately apportioned between parties (whether publicly funded or not) where that is reasonable, e.g. where only one report is to be

obtained for the use of the court (possibly following joint instruction), with or without the leave of the court. This may be equally as between the number of parties (but see para 5.8 below regarding public law Children Act cases).

3. However, the existence of public funding cannot affect the exercise of the discretion of the court (section 22(4) of the Access to Justice Act 1999). It is therefore both inappropriate and unreasonable to transfer the responsibility for an expenditure to a publicly funded party having regard to their publicly funded status. This is particularly relevant in private law Children Act proceedings, including contact proceedings, where only one of the adult parties or only the child may be publicly funded. Suppliers should not agree liability or apportionments which place or transfer financial liability on the funded client(s) on the basis that they are in receipt of public funding and the court will need to have regard to section 22(4) as against the particular circumstances and expenditure.

1D-062

5.7 Treatment, therapy and training and related expenses

1. It is not the role of the Community Legal Service Fund to meet the costs of, or expenses in relation to treatment, therapy or training or other interventions of an educative or rehabilitative nature (see Funding Code paragraph 1.3).
2. Funding Code Criteria 1.3 is widely drafted. It provides that costs of, or expenses **in relation to** treatment, therapy or training or other interventions of an educative or rehabilitative nature may not be charged as disbursements. This is clearly not confined to the expenses of such interventions. Any accommodation or other expenses, including subsistence and travelling expenses in relation to these items cannot therefore be charged as disbursements and must also be excluded from any application made by the conducting solicitor for prior authority (or for any increase in the costs limitation applicable to the certificate of public funding). This applies to all cases including public and private law Children Act cases.
3. Where it is not clear whether such costs or expenses are excluded in a case where this appears to be relevant, an application for prior authority or an amendment to the costs limitation will be refused for further information or confirmation.
4. Suppliers should not reach any agreement which anticipates such costs or expenses being met by a funded client (and therefore indirectly from the Community Legal Service Fund), nor which would transfer liability for payment of an expense on the basis that a particular party is publicly funded.

1D-062.1

5.8 Public Law Children Act Cases

1. The position of the Commission with regard to Public Law Children Act cases was contained in the information pack published to support the Protocol (www.legalservices.gov.uk/docs/stat_and_guidance/info_pack_public_fund_issues.pdf). In that pack, it was stated that the Commission would follow the directions given by the court where, following appropriate consideration of the relevant issues,

it had given leave for an expert to undertake specified work. However, the Commission suggested that where it was appropriate for an assessment to be apportioned then the apportionment should be on a moiety basis (i.e. shared equally between the local authority on the one hand and all the funded parties on the other).

2. The position has been considered and overtaken by the decision in *Calderdale Metropolitan Borough Council v S* (2004) Times, 18 November 2004 and [2004] EWHC 2529 (Fam), (Bodey J). In the light of the judgment in the *Calderdale* case, the Commission accepts that where an apportionment is appropriate then it should generally be on a proportionate or pro rata basis – i.e. each party paying equally towards the costs (but see below regarding section 38(6) assessments). In *Calderdale*, Bodey J treated the children’s guardian as the funded party, although there were in fact two children who were funded parties. The Commission accepts that any proportionate apportionment should accurately reflect the numbers of parties (including children).
3. In *Calderdale*, Bodey J accepted that a specialist report can and, on some occasions, should be comprised within a local authority’s core assessment and/or should be part of the local authority’s own basic case (para 28).
4. In the absence of any statutory or regulatory guidance on the distinction between reports which ought to be at the expense of the local authority and reports which should be funded by all the parties (except those unaffected by it), the following non-exhaustive considerations set out by Bodey J apply (para 35):
 - (a) The court has to exercise its discretion to apportion the relevant costs fairly and reasonably, bearing in mind all the circumstances of the particular case.
 - (b) The court will have regard to the reasonableness of how the local authority has conducted the information gathering process and with what degree of competence and thoroughness.
 - (c) The court will use its experience and ‘feel’ to be alert for cases where a local authority has done quite little preparation or else has prepared rather poorly. If for example, a local authority proposes the instruction of an independent social worker consultant (which for good practical reasons is agreed to be done on a joint-instruction basis), where the work would normally have been expected to be undertaken by the local authority as part of its core preparation, then the local authority will certainly or almost certainly be ordered to pay 100% of the costs involved.
 - (d) The court will have regard to the extent to which the report in question goes merely to satisfying the so called ‘threshold’ for state intervention, as distinct from helping the court to decide more generally what overall ‘disposal’ would best serve the interests of the child’s welfare.
 - (e) A further consideration is the type of expert concerned and the nature of his or her involvement with the family and/or his or her role in the case. ‘Treating’ experts and others who have had a ‘hands on’ role with the family already are more likely to have to be paid for, if they charge a fee, by the local authority. Conversely, the fees of a purely forensic expert brought in specifically to make

a full overview report to the court within the context of his or her discipline, are much more likely to be ordered to be shared in principle between the parties.

- (f) One reason that the costs of a jointly commissioned report ordered by the court will, generally speaking, be ordered to be shared in some way is that each party has an interest in having confidence in the integrity of the forensic process. However, if a party genuinely opposes a report being jointly commissioned, or disputes the need for a report at all then, provided this opposition is mounted for substantive reasons and not merely cosmetically or tactically, the court may take this factor into account in deciding how to exercise its discretion.
- (g) The fact that a party is publicly funded is not a reason for taking a different decision about costs from that which would otherwise have been taken. It would be wrong to pin a costs responsibility on the LSC which would not otherwise have been ordered against the publicly funded individual concerned (section 22 of the Access to Justice Act 1999).
5. The decision in *Calderdale* suggests that wheresoever possible, issues regarding payment for jointly commissioned assessments and reports should be resolved by agreement in a collaborative way, having regard to the guidance which may appear in reported authorities and to the particular circumstances of the case in question.
6. The judgment makes it clear that there will be cases where a party has intervened on a discrete issue (for example, as to contact) and should plainly not be required to join in the costs of a jointly commissioned report on other issues (para 53). Likewise, it was accepted that there will be some cases where even though it is determined that the costs of a joint report should in principle be shared, some apportionment other than equally between the parties would clearly be appropriate. Ultimately apportionment is a matter for the discretion of the court (para 54).
7. The Commission accepts that suppliers should seek to agree apportionments, having regard to the guidance given in the *Calderdale* case and that where an apportionment is justified this may generally be on a proportionate or pro rata, rather than moiety basis. However, having regard to the exceptional expense involved, suppliers should not agree the apportionment of residential assessments but rather put them to the court for consideration and possible adjustment (see para 8 below). Excluded work cannot be remunerated in any event (see para 5.7 above).
8. Although it has always been the position of the Commission that assessments under section 38(6) of the Children Act 1989 should be borne by the local authority alone, the position has now been considered by Ryder J in *The London Borough of Lambeth v S and C and V and J and the Legal Services Commission*, 3.5.05, [2005] EWHC 776 (Fam). He decided that:–
- The *Calderdale* headcount criteria apply to section 38(6) residential assessments. The apportionment between the parties is at the discretion of the court but there could be a discount to reflect the fact that a local authority would otherwise have to incur placement costs for the child(ren).

- The Community Legal Service Fund can meet the costs of treatment, therapy or training – however, this was reversed by an amendment to the Funding Code, paragraph 1.3 (see para 5.7 above).
 - The Community Legal Service Fund can meet the consequent accommodation costs and subsistence costs of funded clients (but see sub paragraph 15 below).
 - Generally all those involved have an interest in the use and instruction of an expert and should contribute to the cost but those who are disinterested/ opposed may not need to contribute.
 - The court can bind the costs assessing authority as to the principle of involving the expert and as to the apportionment of the costs. The costs themselves remain to be considered by the costs assessing authority or indeed by the Commission on any application for prior authority, payment on account or increase to a costs limitation.
9. Suppliers should be aware of the decision in *Re G* [2005] UKHL 58 and of the impact it has on assessments under section 38(6) as well as on the conduct of care proceedings generally. This decision makes it clear that an assessment of the capacity of the parent to change falls outside the section as does assessment for the purpose of rehabilitation of the family. Furthermore, it is not a proper use of the court's powers under section 38(6) to seek to bring about change. A proposed assessment must be of the child if it is to fall within section 38(6). The main focus must be on the child but can also include an assessment of attachment between a parent and child. Article 8 rights do not extend to being made a better parent at public expense.
10. Solicitors are urged not to seek prior authority in cases subject to the Protocol for Judicial Case Management in Public Law Children Act cases unless the expense involved is exceptional in amount or nature (for example it relates to a residential assessment or is in excess of £5,000 per funded client). This is because the process is discretionary and generally no prior authority is justified to incur costs in relation to obtaining a report or to a court attendance by an expert whose instruction and work have been authorised specifically by the court. Applications for prior authority may serve only to delay the instruction of the expert and the Court timetable for the proceedings. However, an amendment to the costs limitation may still be necessary. Where prior authority or an amendment to the costs limitation is sought details of the work to be undertaken, the rates applied and the total cost apportioned to the funded client must be provided (including, in any case where it is relevant, confirmation that any charges for or expenses in relation to treatment, therapy, training or other interventions of an educative or rehabilitative nature have been identified, costed and excluded). A viability assessment, i.e. an initial assessment, may also be publicly funded subject to apportionment, reasonableness and provided that treatment, therapy, and training or related expenses are excluded.
11. However, elements of a section 38(6) assessment, including a residential assessment, i.e. the assessment itself as opposed to treatment, therapy and related

expenses – will not be excluded under criterion 1.3. For those costs and expenses the apportionment should, following the Lambeth decision, be considered by the court on the principles of *Calderdale Metropolitan Borough Council v S*. Note, however, that the court's powers are limited by the decision in *Re G* and that therapeutic work and any related expenses are outside the vires of public funding. Furthermore, the LSC will not voluntarily fund work outside section 38(6) even if agreed by the parties.

12. Residential units (and others) may not provide any or a sufficient breakdown of the work to be carried out, or costings in relation to the individual elements or may provide a single figure or weekly rate which covers not only assessment but also any accommodation, subsistence, training, parenting work, etc.
13. In some cases the information received is that no treatment or therapy is included in the work being carried out under section 38(6). If this is the case then the whole cost of the work to be carried out, including any reasonable accommodation and subsistence expenses, can be met by the Fund (as appropriately apportioned and, in the case of residential assessments in particular, following consideration by the court).
14. Before the *Re G* decision courts were, in some cases, adopting an approach whereby they deducted a percentage from the total amount of the assessment before this was apportioned between the parties to take into account elements of treatment, therapy and training – based, however, only on the court's understanding of the case and the type of work to be carried out. This will inevitably lead to inconsistencies. There have also been different approaches in the 'discounts' allowed by the courts in apportioning the costs of assessments where the child/children would have otherwise been accommodated at local authority expense.
15. Where it is apparent that there may be an element of treatment, therapy or training but the provider does not give any breakdown of work in an assessment to be carried out under section 38(6), LSC regional offices will be forced to conclude that all the work must be 'in relation to' treatment, therapy or training. As stated above, if **no** elements of treatment, therapy or training are included in the assessment then an appropriate apportionment of reasonable accommodation and subsistence costs can be met. However, if any elements of treatment and therapy are included in the assessment, then **all** the costs and expenses of accommodation and subsistence must be excluded so far as funded clients and the Fund are concerned – either by the court or subsequently by the regional office.
16. Where having regard to the decision in *Re G*, treatment, therapy or training are nonetheless included in the work to be undertaken by a residential unit or other assessor but they cannot be accurately identified by the provider, any application for prior authority (or for an increase in the costs limitation) must be refused. However, these costs may, and ideally should, have been identified and then considered at the hearing at which the court directed the assessment and any apportionment. This is to ensure that no ultra vires payments are made from the Fund following ultimate costs assessment by the court or the LSC's regional office on the conclusion of the case.

1D-062.2

5.9 Contact centre fees (see also para 5.6 regarding apportionment)

1. Contact centre fees are not an allowable disbursement for all levels of service (see section 2.13 of the Contract Specification and paragraph 2.5, sub paragraph 3, of the Funding Code decision making guidance). Contact centre fees are a client expense and not recoverable. Supervised contact involves professional supervision and/or observation of the contact having regard to safety issues and/or contact reintroduction. Supported contact is contact taking place at a specified, neutral venue without any professional supervision although there may be contact centre staff present.
2. In general therefore contact centre fees (including the referral fee for supported contact) cannot be charged as disbursements. However, in exceptional circumstances the costs of an assessment of supervised contact (but not supported contact) or other professional assessment of contact may exceptionally be met by the funded client (through the Fund), provided:
 - (a) CAFCASS cannot reasonably be expected to assist through a report or other support;
 - (b) Contact sessions are reasonable both in number and extent, and court has ordered an assessment report of the contact to be submitted to assist in the final determination of an application pending before the court; and
 - (c) Any charges for or expenses in relation to treatment, therapy or training are met elsewhere.

1D-062.3

6. Multi-Party Actions

1. Guidance on Multi Party Actions, and on the Multi Party Action Arrangements 2000 is set out in Section 15 of the Funding Code Guidance in Volume 3, Section C of this manual.

7. Representation in Contempt Proceedings

1D-063

7.1 Availability

1. Contempt proceedings concerning breach of an injunction or other failure to comply with an order of the court are generally civil proceedings. They may therefore be funded under the Funding Code as part of the Community Legal Service in the normal way (see the Code and decision-making guidance in Volume 3 of this Manual).
2. Contempt in the face of the court is a special case for which there are streamlined procedures for the grant of representation and payment. Up to 1 April 2001

representation in such proceedings was governed by Section 29 of the Legal Aid Act 1988.

3. As from 2 April 2001 proceedings for contempt committed, or alleged to have been committed, by an individual in the face of the court come within the definition of criminal proceedings under the Access to Justice Act 1999 and therefore fall to be funded as part of the Criminal Defence Service (see Section 12(2)(f) of the Act). As for other criminal proceedings, the court before whom the contempt takes place has power to grant a Representation Order. Neither the Commission nor the supplier of services has any power to do so. Any court can grant representation in these cases, whether it is otherwise exercising civil or criminal jurisdiction. The court will decide whether to grant a Representation Order applying the "Interests of Justice" test in Schedule 3 of the Act. Representation in these cases is available without reference to the client's means.
4. Contempt in the face of the court includes violent or abusive conduct in court including assault or abuse towards a judge, court official or legal representative. It includes, but is not limited to, representation for persons liable to be committed or fined under the following statutes (which were previously specified under Section 29 of the Legal Aid Act 1988):
 - (a) by a magistrates' court under section 12 of the Contempt of Court Act 1981 (wilfully insulting the justice(s), any witness or court officer, solicitor or barrister in court or going to/returning from court or wilfully interrupting or otherwise misbehaving in court);
 - (b) by a County Court under section 14, 92 or 118 of the County Courts Act 1984 (assaulting an officer of the court in the execution of his or her duty, rescuing or attempting to rescue goods seized by the bailiff, wilfully insulting the judge, any juror or witness or court officer in court, or going to/returning from court; or wilfully interrupting the proceedings or otherwise misbehaving in court).
5. Any solicitor or barrister can provide representation for contempt in the face of the court. Such representation is funded as part of the Criminal Defence Service but falls outside both the General Criminal Contract and the General Civil Contract.

1D-064

7.2 Payment

1. Payment under a Representation Order for contempt in the face of the court is governed by articles 10 to 12 of the CDS (Funding) Order 2001. The rules are the same as those previously contained in the Legal Aid in Contempt Proceedings (Remuneration) Regulations 1995. Payment is by way of a standard fee for each day of appearance, although the paying authority may, where it is of the opinion that there are exceptional circumstances, allow an assessed reasonable fee having regard to the amount of the standard fee. Where two legal representatives represent the assisted person, the standard fee is to be divided.
2. The Commission is the paying authority for all the courts except the Court of Appeal, Criminal Division. In those courts where the Commission is the paying

authority, grants of representation is confirmed by the court by the issue and completion of the appropriate form (CLAIM 11). The solicitor or barrister submits the form, including the claim for payment, directly to the Commission's London Regional Office. Only that office processes claims for payment.

3. If the representative seeks an assessed fee, the form allows him or her to:
 - (a) indicate that he or /she wishes to apply for a non-standard fee;
 - (b) give details of the exceptional circumstances of the case to justify the payment of a non-standard fee, such as work required to be undertaken by the court after the court hearing and before a further court hearing in the case;
 - (c) give full details of the work done and time spent.
4. Only the standard fee will be authorised where it is not considered that there are exceptional circumstances.
5. Claims must be made within three months of completion of the work and, although this period may be extended for good reason, oversight on the part of the solicitor or barrister would be unlikely to be considered to constitute good reason. The same rights of review and appeal are available as in relation to other regional office costs assessments. There is a right of appeal against a refusal to extend the time for claiming and against the payment of a standard fee where a non-standard fee is claimed.

8. Funding for Cases in Courts Outside England and Wales

1D-065

8.1 Powers of the Commission

1. The Commission's powers are exercisable in England and Wales (see sections 19 and 109 Access to Justice Act 1999). The Commission may not fund a service relating to law other than that of England and Wales unless:
 - (a) it is relevant for determining any issue relating to the law of England and Wales (for example where a point of foreign law arises as an issue in funded proceedings in this jurisdiction), or
 - (b) the Lord Chancellor has specified by order that the Commission may fund specified services relating to other law. The only provision so specified covers transmissions under the EU Directive or Strasbourg Agreement – see sections 8.4 and 8.5 below.
2. The general position therefore is that for Legal Representation to be granted, the proceedings in question must take place, or be likely to take place, in England or Wales. There is no requirement for the funded client to be present or resident in this jurisdiction. Legal Representation can cover enforcement proceedings in England and Wales in relation to orders obtained in other jurisdictions. However

where enforcement is sought outside England and Wales, legal aid must be sought in the jurisdiction where enforcement is to take place.

3. Legal Help can be provided for clients who are outside England and Wales, provided the advice relates to the law of England and Wales. Advice for clients outside the jurisdiction is governed by Rule 3.4 of the General Civil Contract Specification – see Volume 2 at 2D-040.

1D-066

8.2 The European Court of Human Rights

1. The European Court of Human Rights (ECtHR), based in Strasbourg, administers the European Convention on Human Rights (ECHR). It was established by the Council of Europe. CLS funding is not available for proceedings before the ECtHR but that court administers its own legal aid scheme (see below). Legal Help may be used to assist clients in making initial applications to ECtHR.
2. The Human Rights Act 1998, which came into effect in October 2000, requires UK courts to have regard to the ECHR when interpreting legislation, and public bodies to act in a way which is compatible with the ECHR. The Human Rights Act 1998 generally enables clients to apply to a court in England or Wales instead of, or before, applying to the ECtHR itself to complain that the UK government has breached their human rights. The Commission will give high priority to funding services that concern clients' human rights: see chapter 6 of the Funding Code Guidance in Volume 3 of this Manual. Applications from the UK to ECtHR are less common since the Human Rights Act came into force as the ECtHR generally expects applicants to have exhausted their domestic remedies before applying.
3. The ECtHR will consider an application for legal aid under its own scheme if the case is "communicated" (passes through the initial screening). The ECtHR asks the Commission for confirmation that the applicant would be eligible for funding in England and Wales. The client should complete the statement of means which would be relevant if the case was taking place in the domestic courts. They should send the form to the London Regional Office with a letter saying that they are applying for a "certificate of indigence" for the ECtHR. They do not need to fill in an application form on the merits.
4. The London Regional Office undertakes an assessment of means according to the usual principles and tells the client's solicitor the outcome. The client or the solicitor sends that notification to the ECtHR.

1D-067

8.3 The European Court of Justice

1. The Commission may fund the cost of proceedings before the Court of Justice of the European Communities in Luxembourg (European Court of Justice or ECJ) where a domestic court makes a reference to the ECJ under the Treaty of Rome. Although the European Court of Justice is not separately listed as a court for which advocacy can be funded under paragraph 2 of Schedule 2 of the Access to Justice

Act 1999, paragraph 2(4) of that Schedule allows legal representation to cover proceedings before a court which have been referred, in whole or in part, from a court that is within scope.

2. A certificate must be specifically amended, or authority given by the regional director, to cover references to the European Court of Justice or to cover the services of an EU lawyer– (Funding Code Procedures Rule C35.5).

8.4 The European Union Legal Aid Directive

1. The European Legal Aid Directive (2002/8/ESC) of 27 January 2003 came into operation across the European Union on 30 November 2004. The Directive sets certain minimum standards for legal aid schemes in the EU but applies only to cross-border disputes. Under Article 2 of the Directive, a cross-border dispute is one in which a party domiciled or habitually resident in one member state applies for legal aid in a different member state where a court is sitting or where a decision is to be enforced.
2. The Directive applies to civil and commercial disputes, including Family, but not criminal cases (Article 1). Further the Directive affects only the rights of natural persons, rather than companies (Article 3). The Directive adopts a wide interpretation of legal aid covering both pre-litigation advice, which in England and Wales would usually be funded under the Legal Help scheme, as well as representation in proceedings. Article 4 provides that Member States must grant legal aid without discrimination to Union citizens and third country nationals residing lawfully in any member state.
3. In general the existing provision of legal aid under the Community Legal Service satisfies or exceeds the minimum requirements of the Directive. The Directive specifically allows states to set financial eligibility levels (Article 5) and merits criteria (Article 6). Therefore in general the same rules apply to cross border applications for legal aid as to applications within the United Kingdom, but the following points should be noted:
 - (a) although all the usual eligibility thresholds are applied, Article 5(4) of the Directive allows the thresholds to be exceeded by a cross- border applicant who is out of scope as a result of differences in the cost of living between different Member States. Effectively an applicant who is financially eligible for legal aid in his or her Member State of residence will be treated as financially eligible within the United Kingdom. The CLS Financial Regulations have been amended to provide a discretion to waive eligibility limits in such cases;
 - (b) the Directive allows Member States to exclude business cases and defamation proceedings from scope (Article 6(3)), as well as any cases where CFAs may be an alternative (Article 5(5)). Cross-border applicants are, of course, eligible to apply for exceptional funding in any excluded case under section 6(8)(b) of the 1999 Act, and all the requirements of the Directive will be considered in such applications;

- (c) Member States must ensure that legal aid can in principle cover costs related to the cross-border nature of a dispute, such as interpretation, translation and, where appropriate, travel costs for the applicant (Article 7). The requirements of Article 7 will be taken into account in legal aid cost assessments. There is further guidance on this in section H of this Manual;
- (d) a standard application form is being established under Article 16 of the Directive and may be used to apply for legal aid in any Member State. Use of the standard form is not compulsory, as cross-border applicants are entitled instead to use relevant national application forms. The standard application form will be sufficient to consider the applicant's entitlement to Legal Help in England and Wales. Where necessary, such Legal Help may then be used to assist the applicant in any subsequent application for Legal Representation. The standard form will be placed on the Commission's website when it becomes available;
- (e) The Directive also contains provisions concerning the transmission of legal aid applications between Member States – see section 8.5 below.

8.5 Transmission of Applications between Jurisdictions

1. The aim of the EU Directive is to improve access to justice in cross-border cases by facilitating the transfer of legal aid applications where an applicant resident in one jurisdiction needs to apply for legal aid in a different jurisdiction. Such an applicant can choose either to apply to the foreign jurisdiction directly, or to apply to a designated authority within his or her own jurisdiction. The Directive therefore contains procedural rules relating to legal aid authorities in the Member State where the applicant is domiciled or habitually resident (the transmitting authority) and the Member State where legal aid will be considered (the receiving authority).
2. The provisions in Articles 13 – 16 of the Directive are similar to the requirement of the European Agreement on the Transmission of Applications for Legal Aid (the Strasbourg Agreement), which was ratified by the United Kingdom on January 17, 1978. As between Member States of the EU the provisions of the Directive take precedence (Article 20 of the Directive). However a number of countries outside the EU have ratified the Strasbourg Agreement. Apart from the United Kingdom, the countries which have ratified the Strasbourg Agreement are:
 - (a) Austria;
 - (b) Azerbaijan;
 - (c) Belgium;
 - (d) Bulgaria;
 - (e) Czech Republic;
 - (f) Denmark;
 - (g) Republic of Ireland (Eire);
 - (h) Estonia;
 - (i) Finland;
 - (j) France;

- (k) Greece;
 - (l) Italy;
 - (m) Lithuania;
 - (n) Luxembourg;
 - (o) Netherlands;
 - (p) Norway;
 - (q) Poland;
 - (r) Portugal;
 - (s) Spain;
 - (t) Sweden;
 - (u) Switzerland; and
 - (v) Turkey
3. The provisions of the Directive and the Agreement supplement rather than replace national procedures for applying for legal aid. An applicant resident outside England and Wales is fully entitled to apply for funding using normal CLS procedures.
 4. The address for both transmitting and receiving legal aid applications in England and Wales is:

Head Office Customer Service Team, Legal Services Commission,
First Floor, 29-37 Red Lion Street, London WC1R 4PP
DX 170 LONDON/CHANCERY LANE
Tel: 020 7759 1966

The Customer Services Team holds information about the legal aid systems of most ratifying countries and, where available, this is supplied to prospective applicants. This may help applicants to understand the tests which will be applied and any language requirements. Applicants should take care to submit only relevant documents. and to summarise their cases briefly and clearly.

5. Legal Help is available for the preparation of applications for transmission under the Directive or the Agreement, including obtaining any necessary translations. Applications and costs for Legal Help for these purposes are dealt with in the usual way. Legal Help may be used to prepare an application for transmission under the Agreement, even though the help indirectly relates to foreign law (Article 7 Community Legal Service (Funding) Order 2000). Legal Help can include obtaining an necessary translation of documents prior to transmission.
6. When considering outgoing transmissions, the Customer Services Team will check that an application is in the appropriate form and in a language which will be acceptable to the receiving authority. Most countries will accept applications in English, but it is helpful if applications and relevant supporting documents can be made available in the official language of the country involved. France requires medical reports and other documents (if submitted) to be accompanied by translations in French. Austria requires applications to be accompanied by translations in German. The Customer Services Team will transmit the application to the relevant receiving authority within 15 days of receipt of the properly completed papers (Article 13(4) of the Directive).

7. When receiving applications under the Directive or Strasbourg Agreement from persons resident outside England and Wales, the Customer Services Team checks that the application is in the proper form and language. The Legal Services Commission accepts applications in English, French or Welsh. Where necessary, the Customer Services Team will assist the applicant in finding and transmitting the application to a supplier able to provide Legal Help.

9. The Review Panel

1D-068

9.1 Introduction

1. The Review Panel Arrangements 2000 are set out in the Arrangements and Directions section of this volume of the Manual. These Arrangements create a national Review Panel, from which Regional Directors will appoint:
 - (a) Funding Review Committees to consider reviews of refusals or withdrawal of funding, and
 - (b) Costs Committees to hear reviews of the Commission's costs decisions.

1D-069

9.2 Jurisdiction and Procedures

1. In civil cases the Funding Review Committee procedures and jurisdiction are set out in Volume 3 of this Manual at Section 16 part C of the Funding Code Procedures. 2. Under the Code, an application may be made for a review of a Regional Director's decision in relation to the grant or withdrawal of funding. When such an application for a review is received, the Regional Director may reconsider the matter before it goes to the Funding Review Committee. If the review proceeds, the Funding Review Committee may confirm the Regional Director's decision, or refer the matter back on the basis that the Regional Director's decision was improper or unreasonable. As part of the referral back, the Funding Review Committee has the power to determine certain issues such as costs benefit and prospects of success. The Regional Director is bound to take account of any such determination.
3. Costs Committees have jurisdiction in relation to civil and criminal work. For civil work, costs at the Controlled Work level (i.e. Legal Help, Help at Court and Controlled Legal Representation) and for Licensed Work are determined under the terms of the General Civil Contract Specification. See also the Civil Legal Aid (General) (Amendment) Regulations 2000 and the Access to Justice Act 1999 (Commencement No. 3 and Transitional Provisions and Savings) Order 2000.
4. In criminal cases, appeals against a refusal by the Commission to grant a Representation Order, and appeals where Advocacy Assistance is refused or withdrawn, lie to the Funding Review Committee (CDS (Representation Order Appeals) Regulations 2001 and rule 5.18 of the General Criminal Contract Specification). In relation to the assessment of criminal costs by the Commission, an

appeal lies to the Costs Committee (CDS (General) Regulations 2001, CDS (Funding) Order 2001 and Part C of the General Criminal Contract Specification).

5. In relation to cases that began before the implementation of the Access to Justice Act (on 1 April 2000 for civil cases, and on 2 April 2001 for criminal cases), Funding Review and Costs Committees determine the applications before them on the basis of the Legal Aid Act 1988 and Regulations,, except where the terms of the General Civil Contract provide otherwise).

6. The table below shows which procedures are applicable for the various types of review or appeal requests after 1 April 2000 by reference to the date the matter was commenced. The definition of when a matter is “commenced” is contained in a Transitional Order.

Annex A

Review jurisdiction after 1 April 2000	Date matter commenced	Legislation / Procedures applying	Committee
CIVIL			
1. Appeal against refusal or withdrawal of civil funding	Up to 31 March 2000	Legal Aid Act and regulations	Funding Review Committee exercising area committee jurisdiction
2. Application for review of refusal or withdrawal of civil funding	From 1 April 2000	Access to Justice Act and Funding Code	Funding Review Committee
3. Review of assessment of costs of Advice and Assistance and MHRT ABWOR	Up to 31 December 1999	Legal Aid Act and regulations	Costs Committee exercising area committee jurisdiction
4. Review of assessment of costs of Controlled Work (Legal Help, Help at Court and Controlled Legal Representation)	From 1 January 2000	General Civil Contract	Costs Committee
5. Review of assessment of costs of certificated work and all ABWOR save MHRT	Up to 31 March 2000	Legal Aid Act and regulations	Costs Committee exercising area committee jurisdiction
6. Review of Assessment of costs of Authorised Representation in magistrates' court	From 1 April 2000	General Civil Contract	Costs Committee

7. Review of assessment of costs of Legal Representation (other than in 4. or 6. above)	From 1 April 2000	General Civil Contract/Funding Order under Access to Justice Act.	Costs Committee
CRIMINAL			
8. Criminal costs (advice and assistance, ABWOR and magistrates courts)	Up to 1 October 2000	Legal Aid Act and regulations	Costs Committee exercising area committee jurisdiction
9. Review of refusal of legal aid orders criminal	Up to 1 October 2000	Legal Aid Act and regulations	Funding Review Committee exercising area committee jurisdiction
10. Appeal against refusal by LSC to grant a Representation Order	From 2 April 2001	Regulations and General Criminal Contract	Funding Review Committee
11. Appeal against withdrawal or refusal of Advocacy Assistance	From 2 April 2001	General Criminal Contract	Funding Review Committee
12. Review of refusal to increase upper costs limit for Advice and Assistance or Advocacy Assistance	From 2 April 2001	General Criminal Contract	Funding Review Committee
13. Review of assessment costs of Advice and Assistance and Advocacy Assistance	From 2 April 2001	Regulations and General Criminal Contract	Costs Committee
14. Review of prior authority request	From 2 April 2001	Regulations and General Criminal Contract	Costs Committee

1D-070

9.3 Membership of the Review Panel

1. Members of the Review Panel are appointed Regional Directors. Any practitioner interested in becoming a member of the Review Panel should contact their Regional Office. Membership involves a commitment to attend a training event on the Funding Code within 12 months of appointment. However, attendance at committee

hearings is remunerated, entitles solicitor attendees to Continuing Professional Education points.

10. Family Graduated Fee Scheme

General

1D-071

10.1 What is the Family Graduated Fee Scheme?

1. The FGF scheme provides a separate payment regime for counsel during the life of family proceedings. It operates alongside the existing arrangements for paying solicitors' profit costs and disbursements. The full provisions of the scheme are set out in the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. No. 1077 of 2001) (hereafter referred to as "the Order") as amended. The scheme was amended in November 2003 to reflect changes in care proceedings and to make some adjustment to the scheme. The Lord Chancellor conducted a review, which was implemented on 28 February 2005.

1D-072

10.2 Purpose

1. The scheme provides counsel with payment as work is done. In the majority of cases, it frees counsel from having his or her fees assessed at the end of the case. The amount paid is final and predictable, subject only to review on the assessment of costs at the conclusion of the case. It provides certainty to both counsel and the funded client. It aids the Commission by increasing control of expenditure, and will inform the future development of contracting for publicly funded legal services.

1D-073

10.3 Scope

1. The scheme applies to barristers in independent practice who undertake family work under funding certificates **granted on or after 1 May 2001**. If the certificate was granted before 1 May 2001, and is amended subsequently to cover further work or other family proceedings, the work done will continue to be paid under the relevant remuneration regulations in force before the introduction of the scheme. Those regulations are either the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 or the Legal Aid in Civil Proceedings (Remuneration) Regulations 1991.
2. The scheme does not include the work of the solicitor conducting the case, or that of an employed barrister, solicitor or other agent who undertakes advocacy on behalf

of the conducting solicitor. Such advocacy does not exactly match the role played by counsel in family work.

3. The scheme was amended in November 2003 to exclude proceedings issued during or after November 2003 under the Inheritance (Provision for Family and Dependents) Act 1975 and the Trusts of Land and Appointment of Trustees Act 1996.
4. Whilst the scope of the scheme remains the same, the structural changes introduced as part of the review affect only new certificates granted, or amendments made to add new proceedings to existing certificates, on or after 28 February 2005. It will be particularly important for counsel to have sight of the funding certificate to be sure under which scheme he/she is due to be paid. In this guidance, the amendments are referred to as “the revised scheme”.

1D-074

10.4 What work is included?

1. The scheme includes all family proceedings as defined in the Commission's Funding Code (Article 2 of the Order and section 2.2 of the Funding Code). This is wider in scope than the Legal Aid in Family Proceedings (Remuneration) Regulations 1991. The scope of the Funding Order has been amended to exclude proceedings issued on or after 1 November 2003 under the Inheritance (Provision for Family and Dependents) Act 1975 or the Trusts for Land and Appointment of Trustees Act 1996.
2. The scheme also includes civil non-family work in the magistrates' court, which is remunerated as family work (Regulation 104 of the Civil Legal Aid (General) Regulations 1989 as amended).
3. All work in the following venues is included:
 - (a) magistrates' courts (Family Proceedings Court) (FPC);
 - (b) County Courts;
 - (c) High Court.
4. It does **not** however apply to:
 - (a) appeals carried out in either the Divisional Court on appeal from the FPC), Court of Appeal, or House of Lords;
 - (b) cases where the main hearing exceeds 10 days; or
 - (c) where the case is the subject of a high costs case contract from the Commission's Special Cases Unit.
5. Whilst appeals are generally excluded, certain appeals are included. Interim appeals (i.e. interlocutory or not final) that are not heard in the levels of court in 10.4.4 (a) above are treated as a function within proceedings. A substantive appeal from a District Judge to a Circuit Judge or a High Court Judge is treated as the commencement of a new set of proceedings. Advice on the merits of such an appeal will be paid as a Function F1. Those appeals that are heard in the levels of court set out in 10.4.4 (a) are excluded, and thus remunerated under the pre-existing arrangements for payment of counsel's fees.

1D-075

10.5 The nature of the Graduated Fee Payment

1. Payments to counsel under the scheme are essentially fixed or standard fee payments. The order provides a range of base fees for different pieces of work. These fees are set according to the nature of the proceedings, the work to be done, whether junior or leading counsel is employed, and venue. There are also a range of additional payments which may be added to the fee due, to reflect special features and complexity.
2. In terms of the number of possible payments the scheme is quite complex, but the payments themselves are, as far as possible, fixed, objective and ascertainable prior to the work being undertaken.

1D-076

10.6 What happens in escaped cases?

Appeals

1. Appeal work in other levels of court, as defined by 10.4.4 above, is remunerated under the pre-existing arrangements. First instance work and appeals therefore fall within the scheme where the certificate was granted on or after 1 May 2001. If a certificate covers both the main action and any appeal, counsel will be paid under this scheme for first instance work only.

Main hearing exceeding 10 days and not subject to a High Cost Case Contract

2. This escape is always retrospective because the case must actually have lasted for more than ten days, which means that the case must have run into the eleventh day. If a case is estimated to run for, or listed by the court for, that length of time, but in fact settles or concludes earlier, it will not escape the scheme. If the case does escape, any payments already made under the scheme will be deemed to be payments made on account and will later be recouped against counsel's final fees following detailed assessment. Requests for payment under this scheme after the main hearing will be rejected. Counsel will need to submit fee notes with the solicitors' bill for detailed assessment and solicitors will report to the Commission in the usual way.

A High Cost Case Contract is issued

3. A case may be identified as a high cost case either at the outset, or after the certificate is granted. The Commission's Funding Code introduces new procedures and funding criteria for very high cost cases. An application, or an existing certificate in family proceedings, must be referred to the Special Cases Unit (SCU) where it appears:

- (a) the actual or likely costs under the certificate exceed £25,000; or
 - (b) if the case were to proceed to a contested hearing, the likely costs under the certificate might exceed £75,000; or
 - (c) the application relates to a multi-party action (MPA) or potential MPA.
(Funding Code Procedure C23).
4. Individual contracts for high cost family cases are necessary only where authority is sought to instruct leading or two junior counsel. In all other cases, despite fulfilling the Funding Code criteria, high cost case contracts will not be issued for family proceedings. Where leading counsel or two junior counsel are to be used, SCU will follow the approach set out below when determining the remuneration under the contract. The SCU will decide, on referral, whether the case should be the subject of an individual contract. Such a contract would allow progression of the case on a stage-by-stage basis with an agreed price for each stage. Information packs for both solicitors and barristers on high cost cases can be found on the Commission's website at www.legalservices.gov.uk.
 5. If a contract is issued, it sets the remuneration to be paid. The case plan and the overall contract price are based on the hearing's anticipated venue and length. The majority of cases falling within SCU's remit have a main hearing that concludes in less than ten days.
 6. If initially the case is considered to have a time estimate of more than ten days, it will be remunerated without reference to the Graduated Fee Scheme. The contract price will be set in advance on the basis of the estimated trial length, applying rates applicable to counsel in an ex post facto assessment. If the time estimate is less than ten days, the contract price will refer to the graduated fee scheme.
 7. Where the initial estimate turns out to be incorrect, so that, for instance, a case that was due to take less than eleven days concludes on the twelfth day, or a case that was expected to last twelve days settles on day two of the main hearing, the contract price is adjusted. In the first example, the contract price is renegotiated and counsel paid as if the graduated fee scheme had never applied. In the second example, counsel is offered the choice between the graduated fee and the contract price for the actual activities within the case plan that have been undertaken.
 8. For cases not involving multiple or leading counsel, where no contract has been or will be issued, the Funding Order continues to apply. Counsel's costs in such high costs cases will be paid under the Family Graduated Fee Scheme unless the case escapes the scheme due to the length of the main hearing.

1D-077

10.7 Funding Certificates

Generally

1. The scheme includes all levels of service applicable to family certificated work: Approved Family Help (Help with Mediation (HWM) and General Family Help

(GFH)), and Full Representation. As both HWM and GFH aim to resolve family disputes at an early stage, counsel is unlikely to be used, except in exceptional cases (see Family Guidance).

Prior Authorities

2. The existing requirement to obtain authority for counsel in proceedings in the Family Proceedings Court or where either Leading Counsel or multiple counsel are to be instructed will continue.
3. The use of counsel must be authorised by the certificate in three defined circumstances where:
 - (a) the case is to be heard in the Family Proceedings Court; or
 - (b) where Leading Counsel (a QC) is to be instructed; or
 - (c) where more than one counsel is to be instructed.
4. In the case of summary proceedings, authority is likely to be granted where the case poses:
 - (i) unusually complex evidential problems; or
 - (ii) novel or difficult points of lawbut not if the reason for instructing counsel is:
 - (i) that the case is contested, has become protracted or involves the cross-examination of witnesses or arguments on points of law;
 - (ii) the personal circumstances or convenience of the solicitor where it would be more appropriate to instruct a solicitor agent.
5. If counsel is instructed without authority the solicitor's costs may be at risk (see 10.42). If authority has not been given in the certificate, the unauthorised costs involved in instructing counsel may be allowed on assessment or alternatively may be assessed on the basis that the solicitors undertook all the work with the amount allowed being shared between the solicitor and counsel (the maximum fee principle).

This means that on assessment there will be three possibilities:

 - (a) prior authority granted for the instruction of counsel-counsel's reasonable fees are assessed and the solicitors' fees are assessed separately;
 - (b) no prior authority given but it is considered on assessment that the conduct of the case required the use of solicitor and counsel. For example, there was a difficult evidential problem or a query on a point of law. Again, counsels' fees are assessed as in (a);
 - (c) no prior authority granted and on assessment it is not considered that the circumstances justified the use of both solicitor and counsel-the maximum fee principle should be applied. In the original scheme the "agreed fee" used in the maximum fee calculation will always be the family graduated fee paid to counsel. Under the revised scheme this changes so that counsel will be paid for the work done, subject to assessment, on the basis of the time spent at the solicitor's hourly rate.

6. Where there is no inter partes taxation there is no discretion to allow unauthorised costs incurred in instructing counsel (*Din v. Wandsworth London Borough Council* (No.3) [1983] 1 W.L.R. 1171; *Robyn Hayley Hunt v. East Dorset Health Authority* [1992] 1 All E.R. 539 and Civil Legal Aid (General) Regulations 1989, Regulation 63 (3)).
7. As the family graduated fee is a flat rate irrespective of venue, the fee paid to counsel can have an overly detrimental effect on the solicitor's costs in the Family Proceedings Court in cases where the maximum fee principle is applied.
8. It has been agreed between the Law Society and the Bar Council that a different payment structure should be available both to prevent hardship to solicitors and to maintain the availability of counsel in the Family Proceedings Court.
9. Consequently, in those cases under the revised scheme where no prior authority has been granted and it is not considered appropriate to have used both solicitor and counsel, the maximum fee principle will be applied but counsel will be paid on a timed basis at the solicitor's hourly rate plus any enhancement due for the work done by counsel. Counsel will be required to submit times spent within the CLS CLAIM5. No fee will be paid without this information.
10. If prior authority has been granted, or it is considered appropriate to use both solicitor and counsel, counsel will receive the full family graduated fee. If no prior authority has been granted, counsel may apply for the full family graduated fee providing full information on the complexity of the case in addition to the information on time spent. The assessor will then consider whether the fee paid will be the graduated fee or time spent.
11. The correct rates to be applied for counsel's costs are set out below. Travel expenses are paid in the usual way under the order
Care: Magistrates
Preparation rate –
£68.20 Solicitors office within LSC's London region
£64.90 elsewhere
Advocacy rate – £71.50
Travel/Waiting – £32.45
Non-care: Magistrates
Preparation rate –
£52.25 if the solicitors office is within the LSC's London region
£48.95 elsewhere
Advocacy rate – £61.90
Travel/Waiting – £27.50
12. If counsel seeks enhancement on the work done he/she should set out the grounds for enhancement with specific reference to the enhancement criteria within the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 as relevant to the facts of the particular case and the work done. Further guidance on enhancement can be found in section H of Volume 1 of the LSC Manual.

Categories

1D-078

10.8 Generally

1. All family work is divided into four categories for the purposes of determining the level of remuneration for particular proceedings. The four categories are:
 - (a) family injunctions;
 - (b) public law children;
 - (c) private law children;
 - (d) ancillary relief and all other family work.These categories are identical to the types of family case identified in the Funding Code.
2. Categories are important because different levels of fees are prescribed for each category. Each function must be claimed under one and only one category (see 10.14 below).

1D-079

10.9 What does each category include?

1. Schedule 2 of the Order defines the general type of proceedings within each category. The text of the Order and the Commission's guidance on what generally falls within each category is set out below.
2. The wordings in Volume 3 of the Legal Services Commission Manual identify the relevant category in this scheme for each CIS wording. Consequently, the wording for each proceeding on the face of the funding certificate identifies which category of fee applies to assist both counsel and their instructing solicitor.

1D-080

10.10 Family injunctions

1. Paragraph 1 of Schedule 2 defines these as:

“Family proceedings (other than those for ancillary relief) for an injunction, committal order, or other order for the protection of a person (other than proceedings for the protection of children within paragraph 2).”
2. This category includes all proceedings for the protection of the person arising from a family relationship (commonly known as domestic violence proceedings). It will include any application for a non-molestation or occupation order under Part IV of the Family Law Act 1996, injunctive relief under the Protection from Harassment Act 1997 or personal protection injunctions based in tort (assault and trespass).
3. It does not include applications for a section 37 injunction made under the Matrimonial Causes Act 1973 (an avoidance of disposition order) nor section 40 of the Family Law Act 1996 (orders for maintenance or financial issues following an

occupation order where the application is made after the making of the occupation order), as they are not free standing proceedings but rather applications made within or are incidental to ancillary relief proceedings.

1D-081

10.11 Public law children

1. Paragraph 2 of Schedule 2 defines this category as:
“Family proceedings under Parts III, IV or V of the Children Act 1989, adoption proceedings (including applications to free for adoption), proceedings under the Child Abduction and Custody Act 1985 and other family proceedings within the inherent jurisdiction of the High Court concerning the welfare of children (other than proceedings for ancillary relief)”.
2. This is a broad category which encompasses all “Special Children Act Proceedings”, namely applications under the Children Act 1989 (for care or supervision orders (s.31); a child assessment order (s.43); an emergency protection order (“EPO”)(s.44); its discharge or extension (s.45) either on behalf of the child, their parent or a child brought before the court for a secure accommodation order (s.25) who requires representation.
3. Other public law children cases include proceedings concerning the welfare of children including other proceedings under Parts IV & V of the Family Law Act 1996, adoption proceedings and proceedings under the inherent jurisdiction of the court.
4. This category also includes applications for residence, contact, etc. under the Children Act 1989 where these are either made within care proceedings or are “related proceedings”. It does not cover such applications between individuals which are dealt with under 10.12 below.
5. Amendments to the Funding Order taking effect from 1 November 2003 expressly include cases under The Child Abduction and Custody Act 1995 where proceedings were issued on or after that date, within this category. Prior to that date these cases fell within Category 4.

1D-082

10.12 Private law children

1. Paragraph 3 of Schedule 2 defines this category as:
“Family proceedings between individuals concerning the welfare of children (other than those for ancillary relief or within paragraph 2)”.
2. This category is for applications made between individuals in relation to the welfare of children (residence, contact, prohibited steps, parental responsibility etc.) other than those relating to applications for maintenance or other financial orders.

1D-083

10.13 Ancillary relief and all other family work

1. Paragraph 4 of Schedule 2 defines this category as:
“All other family proceedings not within paragraphs 1 to 3”.
2. This category covers ancillary relief proceedings and all other family work not falling within categories 1–3. It specifically includes all applications for financial relief work whether within divorce or for children and other miscellaneous applications, e.g. Human Embryology Act applications or declarations of parentage.

1D-084

10.14 Mixed categories

1. In family cases, the certificate will often either be issued to cover a number of proceedings or be subsequently amended to add or substitute proceedings during the life of the certificate.
2. When the continuing proceedings fall within more than one category, counsel must, for the purpose of payment under the scheme, choose under which single category they would wish to be paid for all the function work performed when making a claim for payment. Usually, counsel will claim at the category that pays the highest rate. For example, a residence/contract application (Cat 3) which subsequently involves allegations of abuse to a degree that the local authority issues care proceedings (Cat 2). At the point at which the certificate is amended to include the higher category 2 proceedings, counsel can claim all future function work (including work done under the Cat 3 proceedings) at the higher category 2 rate.
3. The mixed category provision does not apply on amendments where new proceedings are added to an existing certificate under the revised scheme as the revised scheme will only apply to the new proceeding added. Where the certificate is granted after the implementation of the review the usual mixed category provisions will apply.
4. Where a function includes work from two categories but it falls within a single set of proceedings (as defined in Article 6(4) of the Order) only one function fee will be paid – see 10.15 below.

Example:

It is common for public law and private law children proceedings to be heard together by the court e.g. care proceedings which, in the alternative, consider residence and contact applications. If there is a main hearing to determine all issues it will fall within two categories (public law children and private law children). Counsel may only claim one function fee for the main hearing (see below) but can choose which of the two categories to claim under. In practice, counsel will always choose the category with the highest rate, which in the example given, would be the public law children category.

1D-085

10.15 What is a single set of proceedings?

1. For particular functions only one fee can be claimed per case. In order to determine what is or is not a 'case' for the purposes of determining appropriate claiming, (see 10.15.3 below), the Order defines what is to be treated as "a single set of proceedings".
2. A single set of proceedings is defined by Article 6(4) as:

"For the purposes of this Order, applications to the court constitute a single set of proceedings irrespective of whether they are made separately or together where they are:

 - (a) *heard together or consecutively; and*
 - (b) *treated by the court as a single set of proceedings"*
3. The purpose of this definition is to be able to ensure that claims for payment are made appropriately and cases are not presented in such a way as to maximise recovery or to alter existing court or administrative practices.
4. The definition covers separate statutory applications made either within the same proceedings, or in the alternative, and those cases where proceedings are issued separately but heard together or consecutively.
5. The functions are defined in 10.16 to 10.17 below. For each single set of proceedings payment will only be made once for Functions F1, F4 and F5. Functions F2 and F3, in contrast, may be paid for as often as they happen. This recognises that they are interim applications and may happen more or less frequently within different types of proceedings or due to the circumstances of the case. (Article 6(1)).
6. Where function work is done within a single set of proceedings, which covers a number of categories, only one function fee is due, rather than one function fee per category. (Article 6(2)).
7. Where counsel represents more than one party in a single set of proceedings, s/he is paid as if s/he represented a single party but may be able to claim a Special Issue Payment for representing more than one child (see 10.26).
8. Generally work undertaken in each of the four categories constitutes a single set of proceedings. For example, family injunctions usually proceed with a separate timetable of applications and hearings from other family work. The process starts generally with an urgent application for an ex parte order, leading up to a hearing to make a final injunction order. This would generally constitute a single set of proceedings.
9. Similarly, it is usual for the court to deal with residence and contact issues separately from financial issues in a divorce. Both aspects may be treated as a separate set of proceedings unless or until the court orders them to be heard together.
10. Sometimes simultaneous separate proceedings within a single category might become a single set of proceedings. For example, if there are contact issues

relating to the children of the family the court is likely to deal with both children within the same timetable for the proceedings. Even if the arguments in favour or against contact orders are different for each child the whole procedure would result in the applications being treated as a single set of proceedings for the purposes of payment, rather than two.

11. A care case which hears, in the alternative, residence and contact will be one single set of proceedings if heard together or consecutively by the court. See 10.15.2.

Functions

1D-086

10.16 What are functions?

1. For the purposes of payment, all work undertaken within a single set of family proceedings is broken down into five functions. The definition of what work each includes and guidance on the same is set out below.

1D-087

10.17 The Functions

F1 Pre-litigation work and advisory or drafting work falling outside the other functions

1. Article 2 of the Order defines this function as:
“all work, other than conferences:

(a) which is carried out prior to the issue of proceedings; or

(b) which does not fall within Functions F2 to F5”.
2. This function covers all pre issue work and any free standing post issue work which does not fall within any other function. For example, providing advice or drafting pleadings/affidavits after issue where no instructions have been received to do other function work.
3. The function includes all advisory work (whether written or oral), and any drafting work undertaken before the issue of the proceedings in the case or if proceedings have been issued that does not fall within any other function.
4. In appeals covered by the scheme, advice on the merits of the appeal will be a Function F1.
5. Prior to the implementation of the revised scheme this function could be claimed once only. For cases falling within the revised scheme up to a maximum of two F1s may be claimed per set of proceedings.

F2 Applications for injunctive relief or enforcement procedures

6. Article 2 of the Order defines this function as:

“all work carried out in connection with a hearing relating to injunctive relief or enforcement procedures, other than work which falls within function F5, including but not limited to preparation, advocacy, advising and drafting”.

7. The function covers all work relevant to such hearings including incidental work and preparation, e.g. advice, drafting and other work as well as the advocacy within the hearing itself.

Example:

An application for the protection of an individual under Part IV of the Family Law Act 1996 falls within category 1 (family injunctions). The work done prior to issue, where counsel is instructed, is paid as a Function 1. The work for the without notice hearing is paid at the Function 2 rate within that category. The on notice hearing is paid at a Function 5 rate. Any subsequent committal work, as enforcement of the order, is paid as either a Function 2 or 3, depending on when the proceedings were covered under a certificate.

8. An application under s.37 of the Matrimonial Causes Act 1973 or an application pursuant to s 31 Supreme Court Act 1981 (avoidance of dispositions or freezing orders) falls within category 4 (all other work), as an application within ancillary relief proceedings. Work done is paid as a Function F2 application at the applicable rate for category 4 work.

9. Where preparation work for a hearing is carried out and the hearing does take place, the payment will cover all the preparatory work, as above, including the hearing units.

10. As part of the review of the scheme, a new F3 in category 1 was introduced specifically for committal work.

F3 Preliminary applications, interim applications and review hearings

11. Article 2 of the Order defines this function as:

“all work carried out in connection with a hearing, other than work which falls within Function F2 or F5, including but not limited to preparation, advocacy, advising and drafting”.

12. This function covers all other hearings other than those falling within F2 or the main hearing itself. Commonly, this will cover all directions hearings including: the first appointment and the Financial Dispute Resolution hearing in an ancillary relief case; other interim or review hearings; within care proceedings, the Case Management conference hearing and advocates' meetings held under the Protocol for Judicial Case Management (“the Protocol”); Pre-Hearing Review Hearings where paragraph 27 (below) does not apply; following the review of the scheme, committal proceedings. All ancillary or incidental work relating to the application, e.g.

schedules, chronologies, skeleton arguments, as well as the preparation involved, will be included in the fee.

13. There was no Function F3 in a family injunction case until the review. Prior to the review if committal proceedings took place they were paid as an F2 because they are enforcement proceedings. For new proceedings on or after 28 February 2005, committal hearings are paid as an F3.
14. To reflect the importance, complexity and additional preparation required for the FDR in ancillary relief proceedings an increased payment is paid in addition to the set F3 fee. This additional sum is also paid if counsel attends the first appointment and it turns into the FDR.
15. To reflect the same factors in relation to a Case Management Conference in care proceedings, an increased payment is made in addition to the F3 base fee.
16. In the revised scheme an increased payment is made in addition to the F3 base fee to reflect the additional work involved in contested injunctions or enforcement procedures within ancillary relief cases.

F4 The Conference Fee

17. Article 2 of the Order defines this function as:

“all work carried out in connection with a conference (including a telephone or video conference) other than any conference which takes place on the same day as a hearing for which payment is claimed under Function F5, including but not limited to preparation and advice”.

18. Conferences are not generally separately remunerated within the scheme but it is accepted that there should be a separate payment for a single ‘main’ conference within the case, whenever that may take place. Up to the review, only one conference function fee has been payable in each single set of proceedings (Article 17(4)). For proceedings issued after the review this has changed: see paragraph 24 below.
19. This ‘main’ conference cannot, however, be held on the same day as the main hearing (Function 5) in the proceedings.
20. Counsel will need to designate which conference he or she seeks payment for. Ideally, it should be selected towards the end of the case, when counsel will be able to choose the appropriate conference and any additional payments it may attract.
21. Where different counsel is subsequently instructed and the Function 4 payment has already been claimed, no further Function 4 payment can be made. This is so even in circumstances where the later conference was more substantial. Where one counsel has replaced another, counsel must make enquiries whether the Function 4 payment has been claimed from either the outgoing counsel or instructing solicitors.
22. Work in this function includes all preparatory work for the chosen conference, keeping a conference note on the issues discussed, and work done with the solicitors and experts immediately after the conclusion of the conference. It can, however, include conferences on the same day as other hearing functions (F2 or F3).

23. Where pre-issue work has been undertaken and counsel holds a conference, whether or not proceedings are subsequently issued, counsel may claim a Function F4 payment in addition to the Function F1 payment.
24. The reviewed scheme allows the number of claimable F4s to be a maximum of two.

F5 The Main Hearing

25. Article 2 of the Order defines this function as:

“all work carried out in connection with the main hearing, including but not limited to preparation, advocacy, advising and drafting”.

26. The main hearing is defined as the hearing at which the substantive issues are listed to be determined and are considered by the court. It is essentially the hearing at which it is the proceedings are expected to conclude within the first instance jurisdiction.
27. Since October 2003 the definition has been amended in care proceedings to include the Pre-Hearing Review (“PHR”), but payment is only made at this rate where the same counsel attends both the PHR and the main hearing. The PHR is then paid as if it is the first day of the main hearing. All the days of the main hearing will then be paid at the F5 secondary hearing rate.
28. For example, in care proceedings, the main hearing would be the hearing at which the court should determine whether or not a care order is made. In ancillary relief proceedings, it is likely to be the hearing at which the court determines the form of relief entitlement and in family injunctions, the on notice hearing which will determine the form and continuation of the without notice injunction order made. The function includes all preparation or incidental work relating to the hearing, and so includes advices, and drafting of schedules, chronologies, skeleton arguments and draft orders.
29. Point of Principle CLA 41 states:

“A “main hearing”, as Defined in Article 2 Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001, involves determination and consideration of the principal issues in dispute between the parties. In ancillary relief proceedings it is unlikely that the hearing of an application for an injunction will amount to a “main hearing”. In proceedings solely for an injunction, neither an application without notice, nor one for enforcement, can constitute the “main hearing”.”.

Payment – The Graduated Fee

1D-088

10.18 The calculation of the graduated fee

1. Article 5 of the Order defines how the graduated fee is calculated. The text of that Article is set out below:

(1) The amount of the graduated fee for counsel shall be the base fee or the hearing unit fee, as appropriate, in respect of the function for which the fee is claimed, which is specified in the Schedules to this Order as applicable to the category of proceedings and the counsel instructed, increased by any:

- (a) settlement supplement (“SS”) or additional payment;*
- (b) special issue payment (“SIP”);*
- (c) court bundle payment (“CBP”).*

so specified.

(2) The total graduated fee, as set out in paragraph (1), shall be increased by 33% in respect of all work carried out while the proceedings are in the High Court.

1D-089

10.19 The Starting Point

1. Each function has a base fee or hearing unit, which is the primary amount counsel will get paid. The total fee due may in hearing units be multiplied to reflect time spent in court. Payments may then be increased by other additional sums, where the work done is within the criteria and rules for additional payments. The fees for each function are set out by category in Schedule 1 to the Order. The specific rules for the calculation of the hearing unit are set out in Article 8 of the Order.

1D-090

10.20 The base fee in Functions F1 and F4

1. These are both non-hearing functions and, as such, have a set base fee according to the category of the proceedings. This is in contrast to the hearing units, which have a base fee calculated by time spent – (see below, paragraph 10.21.2).

Rules for F1 and F4

2. Until the conclusion of the review, one base fee has been paid for all the work carried out in each of Functions F1 or F4 (Article 6(1)). For cases in the revised scheme, up to two base fees may be claimed for each.
3. Special issue payments can be claimed. Settlement supplement payments are not paid, unless settlement occurs within Function 1 in an ancillary relief case.

1D-091

10.21 Functions F2 and F3

1. These are hearing units, and the graduated fee is calculated on the time spent at court. Travel time and expenses are paid separately (see IP's at 10.28).

Hearing Units for Functions F2 & F3

2. One hearing unit is paid for each period of time of two and a half hours (or less) during which the hearing continues (Article 8(2)(a)). The period starts at the time the hearing is listed to begin, unless the court specifically directs counsel to attend earlier. It ends when the hearing concludes, or at 5.00 p.m., whichever is earlier. The time spent at the luncheon adjournment is discounted (Article 8(2)(b)). No discount is made for periods when the hearing is adjourned if it is still continuing, for instance, during negotiations between the parties, or whilst an order is being drafted. The hearing will end when the judge makes an order, or approves any negotiated consent order.
3. Where a case goes past 5.00 p.m. but concludes that same day, the time spent from 5.00 p.m. is paid as an extra one half hearing unit. (Article 8(2)(c)).

Example 1:

A case is listed for 10.30 but, due to the hearing of other applications, the hearing does not start until 11.30. It runs on until 12.45 when the lunchtime adjournment starts. The case is due to recommence at 2.00 but does not start again until 2.15 because the judge hears a family injunction application first. The case finally concludes at 3.55.

The time spent before lunch (10.30 to 12.45) is 2 hours 15 minutes. The luncheon adjournment is 1 hour 15 minutes (because the court sits again at 2.00 p.m. even though the judge hears an urgent application first). The period following lunch is 1 hour 55 minutes. The total time at court is 5 hours 25 minutes. The luncheon period of 1 hour 15 minutes must be deducted, so only 4 hours 10 minutes is claimable time. This amounts to two hearing units.

Example 2:

If, amending the example above, the post-lunch period ran from 2.15 (because the case was not due to recommence until 2.15) to 5.15, when the Judge signed the draft order, the total time spent at court would be 6 hours 45 minutes. The lunchtime period now of 1 hour and 30 minutes is deducted so the claimable time is 5 hours 15 minutes. The total claim would be for 2½ hearing units.

This will be claimed as follows:

- (a) 10.30 to 12.45 & 2.15 to 5.00 is 5 hours. This is 2 hearing units.
 - (b) 5.00 to 5.15 p.m. is claimed separately as an extra half hearing unit. This extra half unit would not be payable if the case had not concluded at that point.
4. An Advocates' meeting held on any day before the date of the Case Management Conference or the Pre Hearing Review will be a separate function F3. Where the Advocates' meeting is held on the day of the hearing itself, the hearing unit

commences from the start of the Advocates' meeting and finishes when the hearing itself concludes.

5. If a Function F2 or F3 hearing lasts for more than one day, the relevant multiples of the hearing unit are paid for the time spent on each day during which the hearing continues, but not for the time spent after 5 pm unless the case concludes on that day.
6. Although there is no specific payment for waiting time, as the time for calculating the hearing period commences from the time when the case is listed, time spent waiting for the hearing to commence is included in the calculation provided it is incurred after the time listed for the start of a hearing. Moreover, while the court will generally indicate on the notice of listing that representatives should attend at least 10 minutes before the listed time, this is not the specific direction referred to in Article 8(2)(b)(i). Where however, after listing, the court provides a specific direction for earlier attendance, in respect of that particular hearing time will run from the earlier time if counsel is able to establish that such a specific direction was made.
7. In the original scheme, special issue payments (see 10.26 to 10.30) could attach to Functions F2 and F3 but were only claimable once in each Function. Whilst these could be applied for and certified any number of times, a special issue payment in respect of each particular special issue could only be paid once: see Point of Principle CLA31. Counsel selected the hearing in Functions F2 and F3 for which the special issues were to be claimed. Payment was made for the special issues certified in relation to the chosen hearing: Article 9(7).
8. For cases falling within the reviewed scheme, special issue payments are paid as certified in respect of each hearing unit, without restriction.
9. For cases falling within the reviewed scheme, special issue payments are paid as and when certified by the judge and are calculated on the multiples of the hearing unit without the previous restrictions (Article 9(4)(4)(b)).

1D-092

10.22 Function F5

1. As Function F5 is a hearing function, the main hearing payment is also based on hearing units. Because it is the hearing to determine and conclude the case, the hearing unit is based on the number of days taken rather than smaller periods of time. One hearing unit is paid from the time the main hearing actually begins to 5 p.m. on that day (Article 8(3)(a)).
2. The first full day is paid as a primary hearing unit whilst all the other days are paid as secondary hearing units. This mirrors the existing system of brief fees and refreshers and the levels of payments reflect this (Article 8(3)(c)).
3. Where the hearing continues after 5 p.m. on any day of the main hearing and concludes on that day, the time spent after 5 p.m. will be paid as one half of the hearing unit (Article 8(3)(b)).
4. Where the court lists the case for the main hearing and starts to consider the case the first date is the primary hearing unit. All other days will be paid as secondary

hearing units including later dates when the case is part-heard or adjourned to a later date. (Article 8(3)(c)(i) and (ii)). If the case is listed as a main hearing but for some reason is adjourned or postponed before the court has considered the substantive issues, the hearing will not be a function F5 but a function F3 e.g. on or before the due date it emerges a party has not been served correctly or the wrong hearing date was sent. For split hearings in care cases see 10.34.

5. Where, at the conclusion of the main hearing in care proceedings under the Protocol for Judicial Case Management, the judge directs written submissions on consequential orders or directions, payment of such additional work will be as a secondary hearing unit in function F5.
6. A directions hearing that concludes the case does not make the hearing a 'main hearing'.
7. Finding of Fact hearings in care proceedings are generally payable as a function F5. Split hearings are dependant on the outcome of the finding of fact hearing and are therefore a continuation of the main hearing in care proceedings and as such will be paid as a function F5 secondary. If however the finding of fact hearing is within other proceedings the position is not as clear as the hearing may be listed separately and the final hearing not so dependant on its outcome. Consequently, in other types of proceedings it is more likely to be paid as a function F3.
8. On the making of a care order the court may decide to review the position after an interval of some months. That subsequent review is not a continuation of the main hearing but a function F3. It might make further directions, continue or vary the care order. None of these circumstances turn that later hearing into either the continuation of the main hearing or a new main hearing. What function each hearing falls into is a question of fact.

1D-093

10.23 No Hearing in F2, F3 or F5

1. A "hearing" may take place by any method directed by the court e.g. by either video or telephone conference, without attendance at court. If the court directs an alternative method of hearing, then a hearing will be deemed to have taken place; in contrast to the situation where no hearing has taken place because the application is withdrawn.
2. Where preparatory work for **any** hearing (including an Advocates' meeting) is carried out but no hearing actually takes place then one half of the relevant hearing unit fee, without any additional special issue payment, will be paid (Article 8(1)). A "no hearing" may happen for example where an application is discontinued or withdrawn, the case settles, or the funding certificate is revoked or discharged, or the hearing is otherwise abortive.
3. The same payment (i.e. one half of the relevant hearing unit fee) is made as compensation where counsel is prevented from representing the client at the main hearing by either of the following circumstances (Article 8(1)(b)):

- (a) where the counsel has had to withdraw from the proceedings with the permission of the court because of his or her professional code of conduct or to avoid embarrassment in the exercise of their profession; or
- (b) where counsel has been dismissed by the client.

The half fee paid includes all preparation work, related advices and any drafting work undertaken.

- 4. The Commission expects the conducting solicitor to inform it of the reasons why any counsel instructed has been prevented from attending a hearing in the circumstances set out in Article 8(1)(b)(i) and (ii). The Commission may then have notice of any conduct issues that may be raised on later costs assessment, particularly as this may involve circumstances that would entitle the funded client to reopen the payments made to counsel (see Article 19 and 10.38 post).
- 5. Where a hearing actually takes place but is not conclusive and is adjourned part heard, the hearing fee applicable to the relative function is paid. When the hearing recommences a new hearing fee will be paid. In F2 and F3 this will be paid as a further F2 or F3 payment. This is in contrast to adjournments of the main hearing, see 10.22.4.

1D-094

10.24 Payment to replacement counsel

- 1. In the situation where one counsel replaces another in an ongoing function (and not in circumstances where Article 8(1)(b) applies), e.g. in relation to a hearing function where one counsel has undertaken advice or drafting but is unable through prior commitments to make the hearing itself, the papers may be passed to another counsel to complete the function by doing the advocacy.
- 2. As this work is all part of the same function, both counsel will expect some payment. The Commission will make the function payment to the counsel who completed the function i.e. the counsel who did the advocacy and who is in a position to make a claim for payment. (Article 14).
- 3. No separate payment is made to the first counsel for wasted preparation. The matter of how exactly the fees will be apportioned is left to "arms length" discussions between counsels' clerks.
- 4. A claim cannot be accepted from the first counsel as s/he will be unable to certify that all the function work has been completed. Any application for payment by the first counsel will be rejected. Where it is discovered after the event that payment has been made incorrectly the erroneous sum will be recouped from the next payment due to counsel under the power provided by Article 19(8).
- 5. Where however different counsel perform different function work on the same case, each counsel will be entitled to claim payment at the permitted payment points (see 10.37 post). Only one F1 & F4 will be paid per single set of proceedings however regardless of the number of counsel involved (Article 17). A Function F5 will be paid for each main hearing (where the certificate contains multiple sets of family proceedings).

10.25 Multiple Applicants

1. Where there are multiple parties, who are represented by one counsel and the court deals with the applications by hearing them together, only one fee is due. For example, if there are three children each making a Section 8 application under the Children Act 1989 and the court hears all the applications together and they are all represented by the same counsel, only one fee will be paid for the hearing rather than three. (Article 7). In this scenario, counsel will be entitled to a special issue payment for representing more than one child (Article 9(1)(c)).
2. Where three applications are made in such circumstances the Commission will process one claim for payment but reject the others and link the files accordingly to prevent duplicate payment. If the statutory or contractual charge arises the single fee will need to be apportioned equally between the certificates involved.

Payment - Additional Sums

10.26 Special Issue Payments (SIPs) under the original scheme

Generally

1. The circumstances of a case may require payment to compensate for the extra work undertaken by counsel or to reflect its complexity. Such circumstances are referred to as “special issues”. The criteria entitling counsel to an additional payment (a ‘SIP’) are that the proceedings involve one or more of the special issues set out below. Special issues (a) to (c) are simple questions of fact and do not depend on the exercise of judicial discretion. For example either the litigant was in person or s/he was not. In relation to (d) to (g) they must also be of substance and relevant to any of the issues before the court.

(a) Litigant in person:

This requires one party to be representing themselves.

(b) More than two parties:

This would commonly be seen in care cases. It would not include cases where the divorce involved a co-respondent as they play no part within subsequent proceedings i.e. ancillary relief or contact, or contact cases brought by grandparents who are acting in consort with the parents.

(c) Counsel representing more than one child:

Whilst such representation is paid as a single function fee, the special issue payment reflects the additional complexity involved.

(d) More than one expert:

This covers both experts appearing for cross-examination, or where reports have to be read.

(e) A relevant foreign element:

A forum conveniens issue, issues of foreign law or assets held abroad.

(f) Relevant assets not or may not be under exclusive control of any of the parties:

Company assets, trusts, pensions, partnership, and insolvency issues.

(g) Conduct issues:

(i) cases involving children - the conduct by virtue of which a child the subject of the litigation has, may have or might suffer very significant harm. This is aimed at significant incidences of really serious bodily or emotional harm, e.g. rape, buggery, bestiality, repeated sexual, emotional or physical abuse or factitious illness syndrome. This test is higher than that contained within the Children Act 1989.

(ii) ancillary relief cases - the intentional conduct of any party has or could or might significantly reduce the assets available for distribution by the court.

2. In the following examples, the SIP is paid as a percentage of the function base or single hearing unit fee. The examples are based on the figures in the original scheme.

Example 1:

Junior counsel does a Function 5 hearing in a family injunction case which lasts 3 hours and the respondent is acting in person. The primary hearing unit fee due is £320. The SIP is 5% (£16) and so the total claim will be for £336.

Example 2:

Junior Counsel has had a one-day main hearing in a care case involving two experts and there are three parties to the proceedings. The Function F5 primary hearing unit is £430 and the SIP for experts is 20% and for multiple parties 40%. Consequently, the base fee is multiplied by 60% (£258) to bring the total claim to £688. In an F2/F3 function it is the single hearing unit that is multiplied by the relevant SIP percentage.

3. SIPs may be paid once only for each function in any single set of proceedings so counsel must elect which F2, F3 or F4 s/he wishes the SIPs to attach to. With regard to functions F2 and F3, where more than one of these function hearings have taken place, whilst counsel may apply in each for the relevant SIPs to be verified, counsel must specify in respect of which single particular hearing in each function that SIP payments should be made.

Point of principle CLA 31

If a judge certifies the same special issue at more than one hearing in a single set of proceedings, Article 10(7) of the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 provides that only one Special Issue Payment (SIP) may be made. But a SIP may be made in respect of each different special issue certified, whether at the same hearing or at separate hearings. If different counsel represent the client at successive hearings and submit claims for the same SIP, the first claim to be received will be paid.

This confirms that where special issues have been verified by the court each may be payable once.

4. In relation to the main hearing SIPs are applied to both Primary and the Secondary hearing units, when appropriate.
5. When a hearing involves special issues it is the judge who will decide, following an application at the end of a hearing which SIPs are due for payment. If SIPs (a) to (c) arise they must be certified. SIPs (d) to (g) require the Judge to additionally determine whether the case involved those special issues and that they were of substance and relevant to any of the issues before the court.
6. The judge's decision is final except on a point of law although the decision is, of course, capable of judicial review.
7. Subject to the rules on when a SIP may be claimed, payment will only be made for those special issues certified by the Judge. Any claim requesting special issues payments must be supported by a copy of the certified SIPs.
8. In a non-hearing function, it is the Commission which will consider claims for SIP payments. Counsel will be required to set out the grounds for payment on the claim form submitted to the Commission, to include whether the issues were of sufficient relevance and substance to assist in the determination of an issue and whether the work was reasonably carried out (Article 10(5) and (6)).

Examples:

Multiple parties: 9(1)(b)

9. The fact a co-respondent or other party was cited in divorce proceedings would not trigger the more than two parties provision in an application for ancillary relief because they are not parties to that application.
10. In proceedings relating to children, e.g. if grandparents of a child or children together seek orders for either residence or contact, their opponents being the parents acting in consort, it cannot be said there are more than two parties so as to justify a SIP. If, however, the grandparents become involved in proceedings between the parents, creating a triangular contest, the more than two parties SIP will arise.

Experts: 9(1)(d)

11. This is most likely to arise in public law children cases but could also arise within an ancillary relief application. An example might be a party having been permitted to rely on the evidence of a valuer in respect of real or personal property where values are in contention, and another expert concerning a pension. However, the fact a valuer has been employed to value the former matrimonial home where the amount has never been in issue should not contribute towards achieving a “more than one expert” special issue payment.

Foreign Element: 9(1)(e)

12. The fact the parties were married for romantic reasons at Gretna Green or on a beach in the Seychelles will not, in the normal course of events, of itself found a special issue payment for a foreign element. If, however, the law of the foreign jurisdiction becomes relevant e.g. on the validity of the marriage, a special issue payment will be justified where the point requiring consideration is of substance and relevant to any of the issues before the court.

Assets outside of the parties exclusive control: 9(1)(f)

13. In circumstances in which certain assets of the parties are not under their exclusive control (pensions, trusts, company assets, etc) or where third parties claim entitlement to or interest in assets that would otherwise be available for distribution it may be possible to justify a special issue payment but not if the assets in question, by being kept out of the equation, have no effect on the outcome.

Conduct Issues: 9(1)(g)(i) and (ii)

14. The test in Article 9(1)(g)(i) is deliberately framed to indicate harm or potential harm to child or children beyond the threshold provisions for a care order under the Children Act i.e. “very significant harm”. Examples may be of really serious physical emotional harm e.g. rape, buggery, bestiality, and repeated sexual, emotional or physical abuse over a long period of time.
15. The conduct provision may cover the commonplace scenario in financial provision proceedings where allegations are made that the other party has been a spendthrift or otherwise cavalier in disregard to the household fund. In order to obtain a special issue payment the dissipation must be serious and occasioned by deliberate conduct to the extent that it could or might significantly reduce the assets available for distribution.

1D-097

10.27 Special Issue Payments in the Revised Scheme

1. On the implementation of the revised scheme 28 February 2005 three new special issue payments (SIPs) were created and the scheme was restructured so that the claimable SIPs were made category specific – see below:

Category 1 – Family Injunctions	Category 2 – Public Law Children
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Litigant in Person Expert	More than two parties Expert Foreign Conduct Client care (new) Parents/Perpetrators (new)
Category 3 – Private Law Children	Category 4 – Other including Ancillary Relief
Litigant in Person More than two parties Expert Foreign Conduct Client care(new)	Litigant in Person More than two parties Expert Foreign Assets Conduct Analysis of accounts (new)

2. As the table above shows the SIPs in the revised scheme are category specific. The schedule to the Funding Order sets out the relevant percentages for each within the revised scheme. The guidance below deals with the definitions and the application of the SIPs only.

Acting for Parents or Others against whom allegations are made

3. The Funding Order makes this special issue payment available only in Category 3 (public law children proceedings) proceedings and describes it as;
“representation of:
(i) a parent of a child who is the subject of proceedings, or
(ii) another person (including a child)
against whom allegations are made that he has caused or is likely to cause significant harm to a child;”
(Article 9(1)(cb))
4. In the original scheme a special issue payment was available where the proceedings involved allegations of substantial harm and this was available to any representative irrespective of the nature of their involvement. This “conduct” SIP remains available. The new special issue payment is payable in addition to any conduct SIP. It ensures that those who represent parents or others who are subject to allegations will receive payment to reflect the additional work involved in such representation. Grandparents or others involved in care or related proceedings who are not the subject of abuse or neglect allegations will be ineligible for this new special issue payment. They will be entitled to the existing conduct special issue payment only.
5. This SIP is payable to the representative acting for parents in all proceedings under Parts III, IV and V of the Children Act 1989. Where the proceedings are under s.25

of the Children Act, it is available to the person representing the child against whom the order is sought, whether or not there are allegations of harm. It is available in adoption proceedings but not Child Abduction cases.

6. SIP payments to parents (or representatives of the child in s.25 proceedings) are automatic and thus payable whether or not the conduct of the parent is in issue at the hearing. The SIP payment for representation of others against whom there are allegations of harm is subject to the test under Article 9(2).

Client Difficulty in giving instructions/understanding advice (client care SIP)

7. The Funding Order makes this new special issue payment available in proceedings within Categories 2 and 3 (all proceedings relating to children) and describes it as;
“(ca) representation of a person who has difficulty:
(i) giving instruction, or
(ii) understanding advice,
attributable to a mental disorder or to a significant impairment of intelligence or social functioning;
“mental disorder” has the same meaning as in section 1(2) of the Mental Health Act 1983”
8. In order to be eligible for the special issue payment the client represented by counsel will need to be suffering from a diagnosed mental illness or impairment of intelligence or social functioning. Whilst payment of this SIP is automatic, turning on representation of the client, it also requires a medical diagnosis. A report from either a psychologist or psychiatrist should be available for the Judge, prior to verification.

Analysis of Accounts

9. The Funding Order provides that this new special issue payment is available in Category 4 proceedings (primarily for ancillary relief cases) and it is described as;
“analysis of the business accounts of an individual, partnership or company” (Article 9(1)(cc)).
“business accounts” includes accounts relating to trusts and investments whether or not those accounts are maintained for the purposes of, or in connection with, a business”
This special issue reflects the additional care and preparation required in cases where the client’s accounts require analysis as part of their representation. Generally these will be business accounts but may also include trust and investment accounts if they are sufficiently complex to require analysis. It remains subject to the significance and relevance test.

Experts

10. Whilst not a new special issue the definition of expert has been changed specifically for Category 4 cases (primarily for ancillary relief cases) so that the test for the

expert sip is “ one or more”. This reflects the fact that it is rare to get 2 or more experts in ancillary relief proceedings.

1D-097.1

10.28 Court Bundle Payments

1. The Order includes provision for payment to be made according to the size of the court bundle in each function. If the bundle comprises 176 to 350 a “CBP1” payment will be made and if 351 to 700 a “CBP2”.
2. Where the court bundle is 701 pages or more an additional fee may be payable, but the amount (calculated by reference to additional hours of preparation time) is at the discretion of the court in a hearing function.
3. In a non-hearing function it is the Commission’s assessor who decides what number of hours should be paid for the time spent in preparation in excess of the norm – see 10.32.
4. The court bundle is not defined by the Funding Order. The Family Practice Direction: 10 March 2000 however prescribes the format of the bundle for the main hearing. It covers all family proceedings in the High Court or heard in the Royal Courts of Justice or cases of an estimate of more than ½ day in all care centres, family hearing centres and divorce county courts.
5. The Practice Direction only covers preparation for the main hearing. For other family hearings, if there is a court bundle it should contain such documents as are reasonably necessary for that type of hearing; e.g., application, statements/affidavits, expert reports and other documents.
6. In the event there is no court bundle e.g. a hearing for which there is no court bundle, a non-hearing function or where no hearing took place, payment is made on the basis of the number of pages within counsel’s brief.

1D-098

10.29 Incidental items (IPs)

Generally

1. The fee paid may also include incidental items that counsel may have incurred. These are:
 - (a) audio tapes, discs or videotapes;
 - (b) travel expenses;
 - (c) hotel expenses; or
 - (d) travel time.
- (a) Audio tapes, Discs or Videotapes:

Where the case necessitates counsel listening to or viewing video/audio or other recorded evidence an incidental payment may be made. This payment is

made only once per tape in each case and calculated at a fixed rate of £10.90 per 10 minutes for the running time of the tape (Article 13(a)).

(b) Travel expenses:

Where it is reasonable for counsel to incur travel or hotel expenses an incidental payment may be made (Article 13(b)(ii) & (iii)). Payment for travel expenses is paid at a mileage rate of 45 pence per mile if counsel drives or at the cheapest second class train fare where available.

Whether it was reasonable to travel by car rather than public transport should be considered in the context of reasonable convenience and the savings of the claim for travelling expenses that may have resulted. The question of mode of travel depends on comparative costs, taking into account the fares incurred and the time saved by use of the more expensive mode of transport.

In proceedings issued before 1 November 2003, no payment could be made where the court was within 40 kilometres of Charing Cross or where there was a local bar within 40 kilometres of the court town, unless the use of specialist counsel was required and no suitably qualified counsel were available from the local bar. The Commission accepted that if the local bar was small, so that the members might not reasonably be expected to cover all the cases that are listed daily in the local courts, it might be reasonable to instruct counsel from further afield. Similarly, if the local bar was insufficiently specialist to deal with the particular case or if the instructing solicitors were unable to find counsel who was either available and prepared to accept a family graduated fee case, it was reasonable to instruct counsel outside of the local bar. Counsel should be able to justify their instructions in the CLAIM 5 and should supply written reasons for instruction from their instructing solicitors.

Point of principle CLA 30

Where a solicitor shows that the conduct of proceedings required specialist counsel, and that no specialist barrister was available from chambers within 40 km of the town in which the proceedings took place, the Commission may pay counsel's travel expenses and costs if they were reasonably and necessarily incurred. Factors affecting the decision whether counsel's travel expenses may be allowed include: the complexity of the issues; the distance between counsel's chambers and the court where the proceedings took place; counsel's possession of particular expertise relevant to the case; the location of the solicitor and client; and the need for continuity, particularly if there has been an earlier meeting or conference between counsel and the lay client.

After the Funding Order amendments which took effect on 1 November 2003, the test in Article 13 was been relaxed, so that the travel expenses must be 'reasonably and necessarily incurred'. Determining this may include consideration of the factors set out in

point of principle CLA 30 (save that the need to establish that there is no specialist in chambers within 40km no longer applies).

Where counsel's chambers are reasonably near the court in question, it is unreasonable for counsel to recover travel expenses, as they properly form part of counsel's overheads, being the normal cost of travel to work. Consequently, counsel practising within the four Inns of Court will not be paid travel expenses to the High Court or any central London court.

If distant counsel are instructed to attend, and it would have been reasonable to instruct counsel more locally, the travel costs incurred may be reduced to those that would have been incurred by the more local counsel.

(c) Hotel expenses:

These will be paid at prescribed rates depending on the area where the hotel is situated. For a hotel within the area of the Commission's London regional office £85.25 is paid per night and where a hotel is outside of that area, £55.25 is paid per night.

(d) Travel time:

Travel time is paid at a fixed hourly rate of £13.60. The assessor has discretion to allow what is reasonable. In the absence of unusual circumstances where there is doubt as to the reasonableness of the amount of time claimed the assessor should allow an average amount of time which it would be reasonable to expect counsel to take to travel between the two places concerned. Whether it was reasonable to travel by public transport or car should be considered in the context of reasonable convenience and the saving on the claim for travelling time that may have resulted Article 13(b)(i).

The use of taxi travel may well be reasonable in that although the disbursement claim will be higher, the travelling time would be substantially less than incurred as a result of travelling by public transport (or) it is reasonable in the circumstances e.g. where heavy bundles have to be transported. However, if the travelling time is not less than the time it would have taken on public transport then the extra time should not be allowed. If it was not reasonable in comparison, the expenses should also be reduced to the equivalent of that which would have been incurred using public transport.

1D-099

10.30 Settlement Supplement (SS)

1. Where settlement takes place during a hearing function, counsel dealing with the settlement will be entitled to a settlement supplement payment. This is paid as a percentage of the basic hearing unit fee or hearing unit fee. (Article 12(1) and (2)).

Example 1:

Junior counsel agrees a settlement in an ancillary relief case on the first day of a main hearing which was listed for four days. The Category 4 early settlement fee in Function 5 is 10% of the primary hearing unit of £305.00. An additional £30.50 is allowable.

Example 2 (these figures reflect the original scheme):

Junior counsel agrees a settlement at the end of a Financial Dispute Resolution Hearing which took all day. The settlement was finally reached at 5.15 p.m. Two and a half hearing units are due under Function 3: category 4. The total hearing unit fee for that function would be £300 (2 1/2 times £120). The settlement fee at that function is 50% of the single hearing unit of £120 making a settlement supplement of £60 due. The additional payment for the Financial Dispute Resolution Hearing of £60 is added making the total payment £420.

2. The settlement payment is available in all hearing functions but not in functions F1 and F4 except in relation to proceedings for ancillary relief (if the case settles within the function F1).
3. In relation to a main hearing, the settlement supplement payment may only be paid where settlement occurs on the first day of a main hearing listed for two days or more. (Article 12(2)). A settlement supplement is not available in this function where the case is listed for less than two days and not in relation to any secondary hearing unit.
4. A settlement supplement can only be paid once in a single set of proceedings, and only when the settlement leads to the resolution of the case.
5. Counsel would usually be directly involved in reaching the settlement. If still instructed and the function is not yet complete when settlement occurs, counsel is entitled to a settlement fee. For example, where counsel's advice results in a negotiated settlement which finally concludes the proceedings, counsel would be paid half the hearing unit fee for the preparatory work and would be entitled to a settlement supplement payment.

10.31 Other Additional Payment (“bolt-ons”)

The original scheme provided for additional payments to reflect the additional work occasioned by the Financial Dispute Resolution Hearing in Ancillary Relief. After November 2003, additional payments are also available for the Case Management Conference under the Care Protocol.

In the revised scheme an additional payment is made for contested injunctions (where oral evidence is given) or for enforcement work in ancillary relief proceedings (not merely implementation of the final order). (Article 10(B)).

10.32 Post trial applications

1. Post trial applications will be paid at the appropriate function rate (e.g. F2 or F3).

Examples:

Enforcement proceedings are paid under function F2. Advice on appeal is a new function F1 preliminary to the appeal proceedings. The appeal is a separate set of proceedings to the first instance case. In a private law children case where the court has made a "final" order but sets a review for some months later, for a review of the Order, the review hearing will be paid as a F3.

Special Preparation Fee

1D-101

10.33 Generally

1. Whilst the graduated fee is generally expected to be total payment for counsel's work supplemental amounts can be paid for additional work as defined by Article 16(2).
2. Article 16 applies where:
 - “(a) the proceedings to which the relevant certificate relates involve exceptionally complex issues of law or fact or was otherwise an exceptional case of its nature; or*
 - (b) in public law children proceedings, in relation to work carried out within the secondary hearing unit of Function F5, where the main hearing is split so that a period of at least four months elapses between its commencement and the time at which it resumes;*
 - such that it has been necessary for counsel to carry out work by way of preparation substantially in excess of the amount normally carried out for proceedings of the same type; or*
 - (c) the court bundle comprises of more than 700 pages”.*
3. Payment for the extra hours spent by way of preparation will be at the scheme's prescribed hourly rate of £40.20 for Junior Counsel and £100.50 for Queens Counsel for the number of hours allowed as over and above the norm for a case of the same type (Article 16(3)).

1D-102

10.34 Claiming for Special Preparation

1. In relation to Article 16(2)(a) in hearing Functions (F2, F3 & F5) the judge will decide following an application for a special preparation fee firstly, whether the special preparation fee is justified with reference to the criteria, and secondly what number of extra hours counsel should be paid. There will be no appeal against the decision of the hearing judge, in relation to the fee or the number of extra hours due, save on a point of law. (Article 16(5)).
2. The special preparation fee allowed is for substantial additional preparation. Counsel must therefore state what the normal preparation time would have been in order to justify the additional necessary and to establish that it is substantial. The judge indicates the number of additional hours rather than the fee to be paid for all preparation time.
3. In F1 and F4 counsel claiming a special preparation fee will submit their claim for payment to the Commission, supplying sufficient proof of the complexity of the relevant issues of law or fact and of the number of extra hours of preparation. The claim should identify what number of hours of preparation counsel would have normally undertaken as well as the extra number of hours involved. The Commission will decide what, if any, special preparation fee shall be paid. There is an appeal from this decision to the Commission's Costs Committee. (Article 16(4)).
4. Counsel who seek a special preparation fee under Article 16(2)(a)–(c) in a hearing function, must apply at the conclusion of the hearing.

1D-103

10.35 Exceptional Complexity

1. For a payment under Article 16(a) the case must be exceptionally complex, not just “exceptional” and not just “complex” or so exceptional in some other ways that a payment is justified.
2. As new proceedings are introduced, or changes in the law occur, counsel should not assert that consideration of the issues is exceptionally complex requiring extensive research and preparation. Lawyers practising in a particular field are generally expected to have the appropriate expertise and cannot charge for the time spent in research. *Perry v. The Lord Chancellor* TLR 26 May 1994 QBD.

1D-104

10.36 Public Law Children Cases

1. In public law children cases a special preparation fee may be made for additional preparation in excess of the amount normally carried out, where the main hearing is split and more than four months elapses between the two hearings. Counsel must state what the normal preparation time would have been to justify the additional necessary and to establish that it was both necessary and substantial.

1D-105

10.37 Court Bundles

1. For proceedings issued on or after 1 November 2003 the payment for a bundle in excess of 700 pages is the fixed payment for court bundle 2 plus an additional payment may be paid at the discretion of the judge in a hearing function and the assessor in non-hearing functions. The calculation will be a multiple of hours at the set hourly rate (£100.50 for Queen's Counsel and £40.20 for Junior Counsel). For proceedings issued before 1 November 2003 the payment for these court bundles remain entirely at the discretion of the court.

Payment

1D-106

10.38 Payment Points

1. Counsel may lodge a claim for payment for all work done at defined points in the case (Article 17(2)). In that claim counsel may apply for the payment of all work done up to that point where it has not previously been claimed for.
2. The payment points are:
 - (a) when the proceedings to which the certificate relates are concluded;
 - (b) when the certificate is discharged or revoked and any review by the Commission or the Funding Review Committee has been completed;
 - (c) when counsel has completed all instructed work, up to and including Function 2 or Function 3 as appropriate. (Note: where both functions have been performed only one application for payment can be made);
 - (d) when counsel has completed all instructed work in Function 5;
 - (e) where three months have elapsed since counsel carried out work and s/he has not received any further instructions.
3. Requests for payment made outside of these payment points will be rejected.
4. Following implementation of the review, the final claim for payment must be made within two months of the final hearing or discharge/revocation of the certificate if earlier. If counsel fails to do so, his costs may be reduced (Article 17(6))– see 10.42 post.
5. All claims for additional payment must be made at the same time as the claim for the function payment. If not claimed any later claim will be rejected as the Commission has no power to pay them separately (Article 17(7)).

1D-107

10.39 How to claim payment

1. Counsel should be prepared to supply such documentation as the Commission may request to justify the work done. In all hearing functions work done and additional payments will continue to be verified by the judge, where a hearing takes place.

2. The General Civil Contract Category Specific Rule 7.2(b) obliges the solicitor to provide written confirmation of instructions, and such other information as is required for the purpose of making a claim for payment under the scheme, within seven working days. Where the solicitor delays in complying with that obligation, counsel should inform the Commission's contracting team at the relevant regional office.
3. The Commission has designed specific forms for counsel to claim a graduated fee and this form (CLS Claim 5) must be used whenever a claim is made by counsel under this order.

The Commission's Role on Assessment

1D-108

10.40 The approach to assessment

1. The General Civil Contract governs payment of solicitors' costs for family work. Remuneration is explained in Section E of Volume 1 of the Legal Services Commission Manual.
2. Whilst Rule 6.5 of the Contract applies the regulations for assessment of costs, the Community Legal Service (Funding) Order 2000 deals with remuneration for contracted work. It prohibits the Commission from contracting at rates higher than those prescribed by the relevant regulations. Article 6 of the Order provides that whilst the contract sets remuneration and stipulates assessment in accordance with the existing regulations, the power is statutory rather than contractual.
3. The Commission will assess all fees due to counsel under this scheme whilst the conducting solicitors' profit costs and disbursements will be assessed in the usual way, through assessment by either the Commission or the Court.
4. The assessor will consider the following matters:
 - (a) whether counsel was instructed appropriately or used excessively;
 - (b) whether the solicitor was over-reliant on counsel;
 - (c) whether counsel acted in accordance with his or her instructions or the certificate;
 - (d) whether the correct fee was applied for;
 - (e) whether the criteria have been met for any additional payments;
 - (f) the reasonableness of any incidental expenses claimed.
5. This is not an exhaustive list of all considerations of the issue of what sums are properly and reasonably due to counsel under the Order for work carried out within the scope of the certificate. (Article 17(8)).

1D-109

10.41 The solicitor's obligations on detailed assessment

1. Rule 7.2 of the General Civil Contract states:

“In proceedings where remuneration of counsel is determined under the CLS (Funding) (Counsel in Family Proceedings) Order 2001 (“the Graduated Fee Order”) the procedures for assessment of remuneration as set out in Rule 6.5 above take effect subject to the following:

(a) You must notify any counsel instructed in family proceedings, within fourteen days of:

(i) those proceedings being finally settled or otherwise concluded, and

(ii) receiving notice of final revocation or discharge of the relevant certificate (following any review by the Regional Director and Funding Review Committee), whichever is the sooner, that the proceedings have been settled or otherwise concluded, or as the case may be, that the certificate has been discharged or revoked.

(b) Where so requested, you must provide counsel with written confirmation that they were instructed to carry out the work in question, together with such other information as counsel may reasonably request for the purpose of applying for payment under the Graduated Fees Order. You must comply by sending the requested confirmation or information within seven working days of:

(i) receipt by you of the request together with any necessary accompanying documentation (such as counsel’s claim form) or

(ii) receipt by you of any other information or documentation reasonably necessary for you to provide the confirmation or information (e.g. documentation required to show that a payment point has been reached such as notices of discharge of a certificate),

whichever is the later.

(c) You must include details (and attach confirmation) of all sums paid to counsel in the proceedings on any claim for costs you make on assessment or detailed assessment. Where counsel has carried out work in the proceedings to date that has not yet been paid, you must await the receipt of confirmation of payment before submitting your claim.

(d) On any assessment of costs, if it appears to us or to the court on assessment that counsel has been instructed either:

(i) without any prior authority required under the Rules and where the use of counsel was not justified; or

(ii) *in any other circumstances where it was not necessary for counsel to be instructed,*

but counsel's fees are paid or payable under the graduated fees scheme, your costs will be assessed as if counsel had not been instructed in the proceedings. Any sums paid or payable under the Graduated Fees Order shall be deducted from the amount so assessed when calculating your fees.

(e) Where the total sums payable on assessment exceed any cost limitation imposed by the Commission under the relevant certificate or contract, the costs payable to you shall not exceed the amount payable in accordance with that costs limitation less such sums as are paid or payable to counsel under the Graduated Fees Order.

(f) Without prejudice to your obligations under Regulation 112 of the Civil Legal Aid (General) Regulations 1989 (duty to inform counsel) you must inform counsel whenever counsel's fees are reduced under Article 19 of the Graduated Fees Order and any reasons for that deduction, and provide counsel with such information as he or she requires in order to pursue any review or appeal against the assessment allowed under this contract or under the Order".

2. This Rule sets out how graduated fee payments affect the final assessment of costs at the end of the case. The solicitor is obliged to notify counsel within 14 days of discharge or revocation so counsel may be aware of the date from which the time limit starts to run (see 10.41 below).
3. The solicitor is also obliged to provide details of sums paid to counsel on any claim made for assessment. The Commission notifies the solicitors of sums paid during the case, for the purposes of calculating the running total of costs, but the solicitor may seek further information from counsel if required. Solicitors must await payment of counsel's final claim before proceeding to assessment, so it is important for counsel to claim promptly after the conclusion of the case in order to minimise delay to the solicitor's costs assessment.
4. In cases where the statutory charge applies, or the client otherwise has a financial interest, payments to counsel under the Graduated Fees Order will form part of the client's liability. Therefore the client must be informed of payment to counsel and be given an opportunity to raise any objections on the assessment of costs. The Commission will provide the solicitor with details of payments to counsel in each case.
5. The Rule also sets out what happens where counsel has been instructed unnecessarily in the proceedings, has been instructed without prior authority, or where the total of the solicitor's fees and counsel's fees exceed a cost limitation on the certificate or contract. Whilst payments to counsel will continue to be governed by the Graduated Fees Order, such payments may be deducted from the sums that would otherwise be payable.

1D-110

10.42 Time limits for submission

1. Sanctions for delay on solicitors' costs were implemented at the end of October 2000. Solicitors are subject to a three-month time limit for submitting costs claims under Regulation 105 of the Civil Legal Aid (General) Regulations 1989 (as amended).
2. In the original scheme Counsel had three months from the discharge or revocation of the certificate to submit a final claim, if any. In order for this provision to work, the solicitor was obliged to serve counsel with notice of discharge or revocation of the funding certificate, to ensure counsel was aware of the date from which the three months would run. Rule 7(2)(a) of the General Civil Contract obliges the solicitor to serve such notice within fourteen days.
3. In order to prevent unnecessary hardship to solicitors when complying with contract rule 7.2(c), counsel is requested to promptly submit all costs claims due under this scheme following the main hearing or conclusion of the case. Following the revised scheme, the time limit for counsel has changed – see 10.36.4.

1D-111

10.43 Sanctions for late submission

1. Where counsel fails to submit the claim in time, they will be subject to a reduction in the amount allowed. A percentage deduction may be applied. Where, however, the fault for the delay lies with the solicitor, the penalty should be deducted from the solicitors' costs rather than counsel. The fault could relate to either the solicitor's failure to provide notice of discharge or revocation or failure to supply the verification documentation in good time.
2. Counsel may appeal to the Costs Committee against a decision made by the Regional Director and such an appeal shall be commenced within 21 days of the decision by giving notice in writing to the Costs Committee specifying the grounds of appeal.
3. Although claims may be submitted out of time, a fair balance has to be achieved between the interests of the Legal Services Commission in securing prompt submission of bills, those of the client who needs to be aware of the extent of their statutory charge liability, and those of the profession in not being deprived, merely due to late submission, of costs for work properly carried out.
4. It will, however, generally be reasonable to expect counsel to be aware of and to comply with the time limits, particularly as time limits already apply to the submission of bills for detailed assessment and in relation to solicitors' costs claims. Counsel will wish to obtain payment as soon as possible and should have access to appropriate support systems to monitor their cashflow.
5. Where costs are submitted outside of the time limit, deductions will be immediately considered. The guideline deductions are:
 - (a) bills submitted up to nine months late - 5%

- (b) bills submitted between nine and 18 months late - 10%
- (c) bills submitted between 18 and 27 months late - 15%
- (d) bills submitted between 27 and 36 months late - 20%
- (e) bills submitted between 36 and 45 months late - 30%

Generally, it should be possible for late claims to be submitted within 48 months or four years of the conclusion of the matter, but if the claim is submitted later, higher deductions may be applied.

6. The percentage reductions are a guide, so if counsel provides an explanation that justifies the delay, the regional office will consider what is the appropriate reduction in the circumstances. There may, for example, be circumstances where a bill submitted up to three months out of time has been delayed through no fault of counsel, and thus no deduction should be applied. Where circumstances are outside of the counsel's control it is less likely that a penalty will be imposed. Regard will be had to what reasonable steps could have been taken to minimise delay. The factors below are indicators that it may be reasonable for some delay to have occurred. The regional office will evaluate what period of delay is reasonable and make a reduction in accordance with that decision. For example, if counsel has a serious illness and is away from practice for three months, but it is 15 months before the cost claim is submitted, the whole delay is unlikely to be treated as reasonable. If it was known that counsel would be away for a considerable period, steps should have been taken to ensure his or her claims for fees were assessed promptly. In the circumstances, it may have been reasonable for a delay of up to six months to be incurred. If so, a deduction of 5% would be made on the basis that the claim should have been submitted only six months out of time.

What is reasonable and proportionate in the circumstances?

7. This is a question of fact in every case. Regard will be had to the particular counsel's history of late claiming.

Reasonableness

8. Common examples of where it may be reasonable for some delay to have been incurred are:
- (a) linked or related actions awaiting final disposal;
 - (b) the court has delayed in sending the final order;
 - (c) where the solicitor has failed to provide information or documentation;

Proportionality

9. In considering the deduction to be applied the size of the claim may be a relevant factor. If the claim is above average, i.e. over £2,500, it may be appropriate for a smaller deduction to be applied than that in the guidelines. In claims under £2,500, the guideline deductions are considered to be proportionate and therefore it will be a

case of considering the reasonableness of the reason for late submission when applying them.

10. Deductions are calculated on the total of the fee due. The deductions will be made from counsel's claim unless the solicitor has been responsible for the delay.
11. Counsel may raise queries regarding apparent non-payment of claims where payment has in fact been made, but counsel has not posted the payment in his or her accounts. It is reasonable to expect counsel to monitor the receipt of payments on a regular basis and therefore to be in a position to raise such queries promptly after having posted payments and checked remittance advices. Except in a small minority of cases, claims will be paid by the Commission within a maximum of four to six weeks of receipt of the fully completed claim forms. Counsel should therefore only make an enquiry of the regional office if payment is not received within two months of submission of the claim.
12. Before raising a query with the relevant regional office, counsel's clerk should specifically check for payment. If an enquiry of the regional office is appropriate, he or she should confirm that all remittance advices since the submission of the original claim have been checked for the appropriate payment, and a copy of the claim previously submitted, together with any proof of receipt, should be forwarded to the regional office. The process of counsel checking for payment will reduce unnecessary queries and assist the regional office in dealing with such queries as are received. Where counsel cannot provide proof of receipt of the claim by the regional office, the matter may be treated as a lost claim.
13. An alternative method of checking non-payment and to prevent unnecessary duplicate claims being submitted would be for counsel to prepare an Excel schedule or table of outstanding claims, containing the following information:–
Certificate number/Client name/Counsel's account number/the amount of the claim and the date the claim was submitted. This is the easiest way for a regional office to check payments and will not be confused as a duplicate claim, as copies of earlier submitted claims can.

1D-112

10.44 Inappropriate Use of Counsel

1. Where counsel has been used inappropriately or excessively the solicitor will be sanctioned. This means that counsel will be paid but the solicitor put on notice that those sums, because they were inappropriate will be deducted at the point of payment of their final bill in the case. At that point (normally at the end of the detailed assessment proceedings) the Commission will have power to reduce the sums due to the solicitor by the inappropriate fee, subject to the solicitors' right of appeal.
2. Amendments have been proposed to the General Civil Contract, see specific Rule 7(2)(d), which authorises the approach above.

1D-113

10.45 Where Counsel has been used without Authority

1. If the solicitor instructs counsel without authority in the example given in 10.7.3(a), there are two possibilities:
 - (a) it is not complex and the use of counsel is unjustified; or
 - (b) it is a complex case which would justify counsel but no application for authority was made, either at the outset or later in the case.

In example (b), counsel's fees may be paid. In (a) the "maximum fee principle" is applied to calculate the costs due as if the solicitor undertook all the work. Counsel still obtains payment but the graduated fee due is deducted from the adjusted total due to the solicitor. This will apply to magistrates' court work, as now, and Approved Family Help certificates. In the revised scheme this has changed – see 10.7. In order to undertake the maximum fee calculation, counsel will be expected to provide a breakdown of the time spent for all cases heard in the Family Proceedings Court where counsel is used without authority by providing times for preparation, advocacy and travel within section 12 of the CLS Claim5. Failure to do so will mean that the claim may be rejected – see also 10.7.7.

2. Where Leading Counsel is instructed without authority, counsel's fees will be disallowed entirely.
3. If multiple counsel are instructed without authority, work done by the second counsel is outside the scope of the certificate, and the fees and any associated costs will be disallowed.

1D-114

10.46 Costs Limitations

1. Counsel has a duty to check the limitations placed on the certificate both as to scope and costs to be incurred.
2. The amended Regulation 107A of the 1989 (General) Regulations ensures that counsel is only penalised where counsel's fee itself exceeds the costs limitation imposed. In other circumstances, the excess is deducted from the conducting solicitor and ensures payment to both counsel and experts.
3. Where the total payable on assessment exceeds the costs limitation imposed on the relevant certificate or contract the costs paid to the solicitor will be the amount of the costs limitation less any sums due to counsel under this order: Rule 7(2)(e) of the General Civil Contract.

1D-115

10.47 POA'S and Recoupment

1. As there are a number of potential payment points during the scheme, which ensure that counsel need not wait more than three months to make a claim for payment, there are no payment on account provisions at all. Applications for either an annual payment on account or hardship payment will be rejected. (Article 17(10)).

2. Where the case escapes from the scheme because it is a high cost case or has lasted more than ten days at the final hearing, counsel's costs will be assessed either under the contract by the Special Cases Unit or by the court alongside the solicitors' costs in the usual way.
3. As escape is retrospective, the fees paid under this scheme will be deemed to have been payments made on account. (Article 19(1)). When assessment of all the costs due under the certificate is concluded and the final bill is received, payments so made will be recouped in the usual way.

1D-116

10.48 The Statutory Charge and Review of Payments

1. The fees due to counsel are directly calculable from the work counsel is instructed to perform within the proceedings. Once the Commission has assessed counsel's fees, a letter confirming the payment made will be sent to the solicitor. The solicitor is thus made aware of the fees actually paid to counsel. Nothing in the Order obliges counsel to inform the solicitor of any appeal from an assessment. The Commission will provide the solicitor with notification of the outcome of any costs appeal made by counsel under this scheme.
2. The Commission's notification to the solicitor of sums paid to counsel will enable the solicitor to inform the client of the sums incurred, and to calculate costs for the purpose of staying within the costs limitation imposed on the certificate.
3. Where the client has a financial interest, he or she has a right on assessment of costs to object to the costs incurred under the certificate. This includes the fees paid to counsel. Nothing within the scheme overrides the client's existing right to make representations as to the use of counsel within the proceedings.
4. Consequently, whilst counsel may have received payments under this scheme, those payments are subject to review on detailed assessment of the solicitor's bill of costs at the end of the case. The Costs Officer can re-open the payments already made if it is considered counsel has been used excessively or inappropriately or acted incompetently or improperly, or if the fees paid are excessive. The Commission will comply with any public funding assessment certificate received and recoup excess payments made under Article 19(5).
5. For the purposes of detailed assessment, the solicitors' bill of costs must identify all work done by counsel as well as the sums paid by the Commission. The Costs Officer can then identify whether any payments made to counsel need to be reopened, and adjust the public funding assessment certificate accordingly.
6. There are two possible reasons for reduction on detailed assessment. The first may be where the client's representations affect the assessment of the fee. The second is an assessment of principle only where the use of counsel is deemed inappropriate by the Court. Where the Court reduces the fee because the amount of the fixed fee is considered excessive, and there are no representations from the client, counsel could challenge the assessment.

1D-117

10.49 Balancing

1. The Commission balances the funded client's account on receipt of the solicitor's final bill. Where the Court assesses the solicitor's claim for costs the solicitor's claim will generally arrive later than counsel's final claim for payment because of the time required for detailed assessment.
2. Counsel will now need to submit the final claim under the scheme within two months of the conclusion of the case. (See 10.40 above). To avoid inappropriate balancing, solicitors will be asked in the claim form to identify the number of counsel and number of times they were used so the Commission can ensure all counsel's fees have been received before marking the solicitor's claim as the final bill.
3. Where the Commission balances the case and distributes money but thereafter receives a claim from counsel, it will be treated as a late claim.

1D-118

10.50 Appeals

1. Appeals can be made against the decision of the Legal Services Commission to the Costs Committee from decisions made regarding individual function fee payments or other assessment decisions, save where the decision is of the judge and is final (Article 18).
2. Counsel must submit any request for an appeal, on Form APP10 or by letter, giving reasons within 21 days of the decision made, or a later date the Regional Director considers justified (Article 18(1)).
3. In any appeal counsel has no right of attendance but may, if requested and at his/her own cost attend to make representations. Counsel should ensure any documentation or representation in support of the appeal is with the regional office seven days before the listing of the costs appeal.
4. As in any costs appeal the Costs Committee may review the Commission's assessment and may uphold the decision made or, as they are looking it afresh assess a greater or lesser sum.
5. If counsel remains dissatisfied the next level of appeal is to obtain a point of principle of general importance from the Committee. This request must be made within 21 days of the Costs Committee's decision. The consideration of a point of principle will be put back to a Costs Committee of the Commission for consideration. There is no right of attendance.
6. The Costs Committee on consideration of the case will need to assess whether the result of the review raises a point of general importance to the profession. The purpose of this is to ensure that points of principle to be heard on appeal by the Costs Appeals Committee do not turn on the particular facts of a case but raise issues of principle, which are likely to affect other assessments or determinations in the future. Most points of principle are likely to arise in the interpretation of the regulations effective in costs assessment, or governing their application on

assessment. The Costs Committee will consider the issue on the papers without attendance by counsel who will usually make written representations.

7. Counsel should, when making submissions for the certification of a point of principle of general importance, provide the exact wording of the point of principle he or she wishes to be certified.
8. The Costs Committee must, when certifying a point of principle of general importance, consider whether there are any existing points of principle in the Manual of Points of Principle relevant to the request for certification. The Costs Appeals Committee's decisions are binding on future costs assessment and are maintained in the Legal Services Commission Manual. Notification of all new decisions is given in Focus and updates of the Legal Services Commission Manual.
9. If the request is granted, a clear certified point of principle must be made at the date of the meeting. If no point is certified, reasons for refusal will be given which will state either or both limbs of the basis on which the point can be certified, firstly, whether a point of principle arises. If the question turns on the individual facts of the case, it is likely that no principle has arisen. Is the question of general importance? If it turns on the very particular facts and is unlikely to arise again, and if it did, would not be generally applicable, it is not of general importance.
10. Counsel will be notified of the result. If no certification is given, there is no further avenue of appeal except judicial review of the decision. If a point is certified, the letter notifying counsel will inform him or her that they must apply direct to the Legal Team within 21 days. Any appeal must be forwarded to: The Secretary of the Costs Appeals Committee, Legal Team, 85 Grays Inn Road, London WC1X 8TX, (DX 328 London/Chancery Lane).