

SHAPING THE FUTURE OF LEGAL AID

Committee members appointed as consultation meetings begin

LORD CHANCELLOR'S DEPARTMENT

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All 13 Regional Legal Services Committees (RLSCs) are now established and working in earnest having attracted a universally high-calibre of membership as they prepare to help shape the future of legal aid provision. Draft strategies which will ultimately inform the nature and scope of legal aid provision in the new millennium are to be published imminently by each RLSC.

Fifty members from the fields of legal aid practice, not-for-profit advice, the consumer perspective and local government have now been selected to sit on the committees.

The RLSCs will make recommendations on the future provision of civil advice and assistance on a region-by-region basis in light of the Lord Chancellor's plans to reform legal aid. Each committee will recommend to the Legal Aid Board a strategy which will form the basis of exclusive contracts under which practitioners will offer civil advice and assistance. By the year 2000, it is intended that only practitioners working under exclusive contracts will be able to offer such services through the legal aid scheme.

The importance of the success of the RLSCs in drawing up effective regional strategies is underlined by the intention in the longer term

to provide all forms of legal aid under exclusive contracts with franchised practitioners.

Sir Tim Chessells, chairman of the Legal Aid Board, said: "I am delighted that the RLSCs have attracted individuals highly regarded in their various fields to sit as members.

"Their mission, to help shape the future provision of Legal Aid, is clearly a crucial challenge, but one to which I am sure these appointees will rise."

Most committees comprise four external members and are chaired by a member of the Legal Aid Board.

All those appointed are of an extremely high calibre. Some of those with a higher media profile include Arnold Simanowitz, chief executive of Action for Victims of Medical Accidents, Jane Coker, a member of the Immigration Law Practitioners Association, both members of the London regional committee.

The South Western committee includes social security specialist John Eames, a member of the Lord Chancellor's Council on Tribunals, and the Northern committee boasts David Gray, a member of the Law Society Mental Health Panel and part-time chairman of the Social Security



Disability Appeals Tribunal. Clive Oliver, a community advice development worker for Shelter Cymru and a former chairman of the Federation of Independent Advice Centres, will sit on the South Wales committee.

The RLSCs have been established to help realise the aims of the Lord Chancellor's legal aid reforms, principally to improve access to legal aid for those most in need while controlling spending.

In practical terms, each RLSC has been tasked to assess both the need for legal services in terms of geography, category of law and client group, and also the existing supply of services. A series of focused consultations then take place to inform the development of the strategy before the RLSCs consider the priority needs for different types of legal services.

Committees then draft regional strategies which will be open for consultation between October and December 1998. In light of the views expressed, the strategies will be amended then submitted in early 1999 to the Legal Aid Board for approval for publication.

On the basis of the regional strategy, the relevant area office – each of which has its own RLSC - will award contracts for civil advice and assistance in late 1999. The timetable envisages contract work commencing in January 2000.

*The RLSCs will imminently be seeking the views of all interested parties on the draft strategic plans. The substantial consultation process undertaken in each region will comprise a programme of large conferences and written submissions will also be encouraged. The first meetings are due to be held during the next few months. Each area has established an RLSC Network of interested parties who receive information on the development of the regional strategy and will be encouraged to submit their comments during the consultation. If you wish to have an input through the RLSC Network, please contact the Regional Legal Services Adviser, who is based at your area office of the Legal Aid Board. Your adviser will also be able to inform you where and when consultative conferences are to take place in your area.

Crime and Disorder Act 1998 – Sex Offender Orders and Anti-Social Behaviour Orders

These new civil orders will be introduced nationally in December 1998 (Sex Offender orders) and April 1999 (Anti-Social Behaviour orders). The scope of the duty solicitor scheme will be extended to include representation on an application for either of these orders. Board granted ABWOR will be available for more complex cases and appeals to the Crown court. Breach of an order is a criminal offence for which criminal legal aid will be available. Further guidance will be published in Autumn / Winter 1998.

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Reforming the Civil Advice and Assistance Scheme

Exclusive Contracting – The Way Forward

We received more than 60 responses from various organisations to our consultation paper published on 16 April 1998. These included the Law Society (and a number of local Law Societies), practitioner groups (e.g. the Immigration Law Practitioners Association, and the Solicitors Family Law Association), the Advice Services Alliance and individual advice networks, as well as comments from a number of practitioners both in private practice and in the not-for-profit sector. In addition, we received comments from a wide variety of other organisations ranging from Age Concern to Welsh Women's Aid.

We invited comments on proposals in four key areas: the allocation of funds to regions, the constitution and methods of working of Regional Legal Services Committees (RLSCs), the contracting process, and the development of franchising. We are committed to consulting further on the detail of the proposals in contracting and the development of franchising. We will therefore be publishing more detailed contract documentation for comment later in the year. The draft franchise requirements have been published for consultation with an end date for comments of 31 October 1998 (see page 4); this draft of the requirements includes a summary of the comments we received relating specifically to franchising.

Timetable

Organisations interested in applying for a contract to start in the year 2000 will be invited to join a tender panel by the end of January 1999. Only those who are on the panel by this date will be able to apply for contracts in the first round, commencing from January 2000. In order to join and remain on the panel, organisations will need either to be franchised or to apply for a franchise, and pass a preliminary audit, by specified dates. Only those who remain on the panel will be invited in May 1999 to apply for contracts starting from January 2000.

As a result of consultation we have proposed that we establish a review process such that applicants may apply for contract decisions made by individual area offices to be reviewed centrally. We have also proposed that agreement to amend a contract decision following review should not impact on other contracts.

The anticipated timetable is set out below. Any changes to this timetable will be appropriately publicised in the legal press or otherwise.

Date	Event
Oct 98	Detailed contracting documentation published for consultation
Nov 98	Applications invited to join year 1 contract tender panel
31 Dec 98	Last date to apply for franchise in order to be considered for contract in year 1
31 Jan 99	Last date for receipt of applications to join year 1 contract tender panel
Feb 99	RLSC Strategic Plans approved for publication by Legal Aid Board
May 99	Invitation to apply for contracts in year 1 issued, applications to be received by 30 July 1999
1 Jul 99	Last date to pass franchise preliminary audit in order to be considered for a contract in year 1
30 Jul 99	Last date for receipt of applications for contracts in year 1
Aug 99	Board completes evaluation of tenders against published criteria
Sept 99	Board completes contracts with suppliers (subject to review process)
Jan 2000	Contract work commences

We will publish our paper to the Lord Chancellor (with his permission) which reports the conclusions the Board has reached after considering the responses to our consultation paper. The paper also includes a summary of the points made by respondents. We expect the Lord Chancellor to respond to us with specific directions for implementation. We anticipate that the Lord Chancellor's directions to the Board will also be made public by his Department.

Time and resources preclude our responding individually to all those who commented on our initial proposals. However, if any respondent particularly wishes an individual response to specific points once they have considered our published proposals, they should write to Allison McGarrity, Policy Adviser, Policy and Legal Department, 85 Gray's Inn Road, London WC1X 8AA.

New Legal Aid Franchise Quality Assurance Standard

The Legal Aid Board has published for consultation the new enhanced franchise standard. The document entitled "Franchise Quality Assurance Standard" sets out the requirements which need to be met to be awarded and retain a legal aid franchise.

Following the consultation process, the revised standard will come into force on 1 August 1999. It will replace the existing version (Franchising Specification Second Edition), which was published in March 1995.

All existing franchise contracts come to an end on 31 July 1999. In order to maintain franchised status all current franchisees will be required to meet the revised quality assurance standard by 31 July 1999. In order to ease the transition process, from 1 January 1999 existing franchisees will be audited against the current standard but they will also be advised of their level of compliance with the new revised standard. Those meeting the new requirements can then be granted a new franchise contract automatically from 1 August 1999 when the new standard becomes effective for existing franchisees.

All new franchise applicants undergoing a preliminary or pre-franchise audit after 1 January 1999 will be required to meet the revised standard to enter the monitoring process or be granted a franchise.

The main changes are enhancements to the supervisor standards and to the supervision, file review, and business planning requirements. In addition, there are new requirements relating to financial management and cost control, and to family mediation. Details of the main changes are as follows.

Supervisor Standards and Supervision

We have introduced a new framework of supervisor standards which prescribes the required professional

experience in terms of breadth and depth of specific legal case types, and requires training in and experience of employing appropriate supervisory methods. Some of the requirements, such as supervisory experience apply generally, other requirements are specifically related to individual categories of work. Where possible we have based the standards on the membership requirements of the Law Society panels.

File Review

The current requirements allow a high degree of latitude for organisations to manage the file review process. This has led to some misunderstandings of the underlying purpose of the file review and its application. The enhanced file review requirements are more closely linked to supervision and the role of the supervisor. They include a requirement that the file review should cover a minimum number of files, which will vary according to the experience of the individual being supervised.

Business Planning

The foundations of effective business planning are based upon the availability of sound financial and other data. Accordingly, there now is a requirement that organisations prepare a detailed 12 month business plan that is linked to the annual budget, as well as an outline plan and forecast budget for the following two years.

Financial Management and Cost Control

These new requirements are designed to ensure that organisations are able to control case costs through appropriate financial control systems, with effective procedures for allocating costs accurately to individual cases, and for assigning appropriate overhead costs to cases.

Family Mediation

This new section requires all franchisees to be aware of the effects of the implementation of Section 29 of the Family Law Act 1996.

The published document has been sent to all organisations with a legal aid account number, plus selected others. Copies can be obtained by contacting the Franchise Development Group at 85 Gray's Inn Road, London, WC1X 8AA, 0171 813 8603. Comments and responses should be sent to the Franchise Development Group by 31 October 1998.

Lord Chancellor announces next steps for legal aid reform

A statement by the Lord Chancellor in July confirmed for the profession the current status of the Government's legal aid reform plans. Announcing the next stages of the reform proposals, he said that three principal programmes would be completed or undertaken:

- By the end of 1999, the Legal Aid Board would be completing its work in ensuring that civil advice and assistance and family advice and representation are provided exclusively through contracts.
- The Legal Aid Board would establish a panel of lawyers of proven experience and expertise in multi-party actions (MPAs), to whom preference would be given in awarding contracts. Other changes in the funding and contracting of MPAs, as recommended in the Board's 1997 consultation paper *When the Price is High*, would also be implemented.
- A Legal Aid Board franchise in medical negligence would be introduced along side exclusive arrangements to ensure access to specialist lawyers.

The Government had decided on a 'measured approach' to developing conditional fees as an alternative to legal aid, particularly in personal injury cases. In July 1998, an Order was laid before Parliament for the extension of conditional fees to all civil proceedings other than family cases. The Lord Chancellor indicated that he thought it desirable that success fees and insurance premiums be made recoverable. Legislation will be sought as soon as possible, he said, to achieve that end.

The Lord Chancellor made it clear in response to a Parliamentary question in July that the Government intends to proceed with its plans to shift from legal aid to conditional fees:

'To achieve maximum benefit from the money available', he said, 'the Government is determined to ensure that legal aid is not spent in purchasing legal services where a suitable alternative exists. It believes that conditional fees provide a suitable alternative, particularly in a range of money claims.'

Exclusivity for Franchisees – Medical Negligence

In the Lord Chancellor's recent statement he confirmed that in future, legal aid in medical negligence cases will be provided exclusively by franchised solicitors who have shown themselves to be competent in this area of work. The Lord Chancellor has approved the Board's proposals for bringing this about, first published in our response to the Lord Chancellor's consultation paper, *"Access to Justice with Conditional Fees"*.

The proposals received overwhelming support and we would like to thank the many people who provided constructive and detailed responses during the consultation exercise.

Our proposals centre on the introduction of a new medical negligence franchise category, within which there will be a requirement for the firm's category supervisor to be a member of either the Law Society's medical negligence panel or the referral panel of Action for Victims of Medical Accidents (AVMA). This will allow us to identify those firms with a specialist practitioner, and to ensure that all work is carried out either by them or under their expert supervision.

Applications for a franchise in medical negligence will be accepted from early November. The process for existing personal injury franchisees will be paper based and without the need for an additional audit in most cases. Franchise contracts will be awarded from 31 January 1999, when regulations to introduce exclusivity are also due to be implemented. From then, only medical negligence franchisees will be able to conduct new medical negligence legal aid work.

For the first six months after the introduction of the new category, existing personal injury franchisees will be able to conduct work as if they were also franchised in medical negligence. After that, they will only be able to take on new legal aid work if they have actually obtained a medical negligence franchise. Non-medical negligence franchisees will be able to continue to act on an existing case but will not be able to accept new instructions.

Queries about applications for a personal injury and/or a medical negligence franchise should be made to your local area office. You should also note that revised decision making guidance will be in place from 31 January next year and will apply to all cases, whether new or ongoing. The guidance is being developed in light of responses to the proposal and in consultation with members of the specialist profession, and is due to be published in December.

Copies of the Legal Aid Board's response can be obtained by writing to the Policy & Legal Department, 85 Gray's Inn Road, London, WC1X 8AA, or by telephoning 0171 813 1000.

MULTI-PARTY ACTIONS

reform of the Board's contracting procedure

Over the next 6-10 months, the Board will be instituting several key changes to its funding of multi-party actions in line with the Lord Chancellor's announcement. The changes to be implemented were set out in our 1997 consultation paper, 'When the Price is High'. This coming Autumn, we will be seeking a Direction from the Lord Chancellor to bring those changes into force through revised Multi-Party Action (MPA) arrangements.

Solicitors can expect the following key changes:

- The establishment of a panel of specialist MPA solicitors, with demonstrated experience and expertise in the field. We will be inviting applications for membership in the Autumn. Firms which apply will have to be franchised, with appropriate resources to handle large actions and must be able to demonstrate financial stability and satisfactory outcomes in multi-

party litigation. Panel members will be given preference in the award of contracts in MPAs. They will be eligible to tender *whether or not* they have certificates in an action and will be allowed to submit short-form tenders. They will also be invited to assume responsibility for ongoing contracts where difficulties have arisen with an existing contractor. In addition, the MPA panel will act as a consultative forum, providing regular feedback to the Board on group actions.

- Under the revised arrangements, any firm with an interest in the contract action will be allowed to tender, so solicitors with private clients will be eligible.
- We will evaluate contract tenders according to price as well as quality. Solicitors will be required to quote for the work tendered through submission of costed case plans.
- The Board may impose an overall cost limit on individual contracts which can be varied only in exceptional circumstances.
- A fast track procedure will be introduced to allow the Board to dispense with the tendering process in cases where delay would be prejudicial.
- The Board will manage the great majority of new group actions under contract.

Improving police station legal advice

The Legal Aid Board and Law Society have jointly published a research report examining the effectiveness of the accreditation scheme for non-solicitor police station legal representatives. The researchers conclude that the accreditation scheme has led to significant improvements in the quality of police station legal advice.

The accreditation scheme was introduced in 1995 following concerns about the poor quality of police station advice by solicitors' representatives. The scheme allows a representative a probationary period of 12 months in which to gain accreditation. The main findings of the report are as follows:

- There have been measurable and significant improvements in the quality of police station legal advice. An objective evaluation showed that accredited representatives performed as well as duty solicitors and other solicitors.
- Some of the most significant improvements contribute towards protecting the interests of suspects. These include obtaining greater disclosure by the police and more interventions by advisers in police interviews with suspects.
- The scheme has produced a substantial body of non-solicitor representatives who are likely to form a permanent sub-profession within criminal legal aid

firms. Over 1,600 people have gained full accreditation so far. Approximately 75% of these are committed to carrying on police station advice work for some time.

- Accredited representatives strongly supported a requirement for continuing professional development to keep their knowledge and skills up to date.

The research team, led by Lee Bridges of Warwick University, also found that:

- There are still high rates of non-compliance with the Law Society's standards of performance for police station advice among both solicitors and representatives. These include failing to ask suspects about their treatment by the police, informing them of their right to break interviews for further advice, intervening to object to inappropriate police questioning or behaviour and making representations at the police station about outcome and charge.
- There has been a low rate of success in representatives achieving full accreditation under the scheme. During the first year about a quarter of those registered achieved full accreditation. This has only increased slightly since then.

Simon Hillyard, National Duty Solicitor Co-ordinator said:

'The accreditation scheme has provided a solid basis for improving the quality of police station legal advice. The Board and the Law Society are committed to building on the success of the scheme in order to address some of the remaining areas of concern identified in the research.'

Copies of the research are available from Marston Book Services, Tel: 01235 465656.

Criminal Contracting Pilot

The criminal contracting pilot began in June 1998 and 68 of the 74 franchised firms originally invited to participate have now entered into a contract to provide criminal legal aid advice and assistance (including court duty solicitor work). The pilot project is operating in the following six areas:

London **Manchester** **Blackburn**
Shrewsbury **Reading** **Portsmouth**

The pilot contracts were limited to franchised firms, or those having passed the preliminary audit, in all areas except London where participation of franchised firms was limited to the highest earning 28 franchised firms (a total of 24 have now entered into a pilot contract). The limitation on franchised firms in London was due to problems which would have arisen in managing the volume of research data if all franchised firms had accepted. The limitation should not, therefore, be taken as an indication of the Board wanting to limit criminal work to the largest firms.

The purpose of the pilot project is to gather detailed information which will assist in the development of contracting throughout England and Wales. Central to the pilot will be an independent research project led by Professor Lee Bridges. The pilot project will not impact on the existing duty solicitor arrangements in the six areas and both franchised and non-franchised firms will continue to operate under the existing Duty Solicitor Arrangements.

However, in parallel with the pilot project the Board will be considering a review of the Duty Solicitor Arrangements in order to increase market share for franchised firms, as quality assured providers, throughout England and Wales. The National Duty Solicitor Committee will be considering draft proposals for increasing the amount of work undertaken by franchised firms in the near future. The proposals under consideration will be set out in a consultation document which will be published for comment later this year.

The pilot project incorporates measures to improve the quality of service provided. Contracted firms will need to meet the additional requirements as well as those set out in the franchise contract. The additional quality requirements include having a named supervisor for each category of work with the supervisor needing to be a current duty solicitor. Due to the low visibility of a good deal of criminal advice and assistance work there is also a requirement for file review supervision to be conducted face-to-face with the staff members designated to work

under the contract. There must also be six file reviews conducted for police station and green form cases and one for a court duty solicitor session, during each 12 month period. The supervisors will also be required to have experience of supervision or have undertaken a training course. We will be monitoring performance of each contractor against the additional quality compliance requirements and, together with the researchers and the practitioners, analysing the impact of these additional measures on the quality of service provided.

Narey Pilot

In addition to the Board's criminal contracting pilot there will be a project led by the Home Office and the Lord Chancellor's Department which will pilot a number of proposals contained in the Crime and Disorder Act 1998. The aim of the pilot will be to reduce delays at court. The pilot will commence on the 1st October 1998 in six areas and set out below are details of both the areas and courts involved:

Croydon, Bromley and Sutton

**Newcastle upon Tyne, Gosforth (Youth),
Gateshead and Blaydon**

Blackburn and Burnley

Stoke-on-Trent, Newcastle-under-Lyme and Leek

**Northampton, Towcester
Daventry, Kettering,
Wellingborough and Corby**

**Prestatyn, Denbigh, Abergelle,
Dolgellau, Llandudno, Bangor,
Caernarfon, Pwllheli, Llangefni and Holyhead**

The pilot project will be testing a number of recommendations including the introduction of CPS lawyers within police administrative units, the provision of out of hours advice by CPS lawyers to the police and the introduction of CPS lay presenters to deal with straightforward cases listed at special hearings known as Early First Hearings (EFH) and Early Administrative Hearings (EAH). The EFH will deal with straightforward guilty pleas which have been listed the day following charge, or to the next available court date. The EAH will deal with more complicated cases and proposed not guilty pleas. The pilot will also test out arrangements to improve case management at magistrates' courts.

The introduction of the two new hearings will have a significant impact on the work of defence solicitors representing clients at pilot courts. The National Duty Solicitor Committee has agreed proposals to amend the current Duty Solicitor Arrangements for the purpose of the pilot to allow for the following changes:

At an EFH and EAH in the pilot court the client may be represented by the court duty solicitor or a solicitor of choice who is a current duty solicitor, or a solicitor who is a duty solicitor representative, on any court or police station scheme. There will be an assumption that the court duty solicitor will deal with cases listed before the EFH and EAH, but a client can request, as

an alternative, a duty solicitor of their choice provided he or she is a duty solicitor. Representation will be non-means tested and, for cases where defendants wish to be represented by their own duty solicitor, will not be confined to solicitors who are members of the local duty scheme.

The payment for attendances both by the court duty solicitor or the client's choice of duty solicitor will be at the current court duty solicitor rate.

The court duty solicitor, or the client's choice of duty solicitor, may be required to attend on a subsequent occasion to deal with an adjourned case. The Duty Solicitor Arrangements will be amended to allow this. This provision will not restrict a solicitor applying for legal aid at any time throughout the proceedings (e.g. in order to carry out preparation work between hearings, or if the case becomes sufficiently complex).

Once the necessary changes have been approved by the National Duty Solicitor Committee and the Legal Aid Board a note for guidance will be sent to all duty solicitors throughout England and Wales advising how the pilot will operate.

From the 30th September 1998 Early Administrative Hearings will be implemented on a nationwide basis. These hearings will not have the same powers as those which are being tested in the pilot courts. The nationwide hearings will not, as a rule, be in a position to determine legal aid. The primary purpose of the hearing is to ensure that a defendant takes steps to obtain legal aid. In the circumstances, it is intended that both the prosecution and defence will not be in attendance. The remuneration arrangements set out above, therefore, will not apply outside the Narey pilot courts.

A further change to be piloted from 4th January 1999 in the Narey pilot areas only for a twelve month period will be the sending of indictable only cases straight to the Crown Court. Such cases will be limited to a brief hearing in the magistrates' court to deal with bail and legal aid following which they will be "sent" to the Crown Court to deal with pre-trial issues. Where a case is to be "sent" for trial the magistrates' court or justices' clerk may grant a "through" criminal legal aid order to cover proceedings in both the magistrates' court and the Crown Court (including any charges remitted back to the magistrates' court) following a preliminary means assessment without supporting documentation on condition that the applicant supply this information within 14 days of legal aid being granted.

Practitioners should note that where an indictable only case is sent for trial the Crown Court will become the appropriate authority for payment of the costs relating to work in both the magistrates' court and the Crown Court. The Crown Court Determining Officer will assess both elements of the claim at the appropriate magistrates' court and Crown Court prescribed rates to determine whether the case falls within the Crown Court standard fee scheme or is to be paid on an "ex post facto" basis applying the relevant magistrates' court and Crown Court prescribed rates.

Area offices will be instructed to reject claims for payment submitted for indictable only offences "sent" for trial in pilot areas. Where a case which has been sent to the Crown Court is remitted back to the magistrates' court, the Board will continue to assess and pay only for work done subsequent to the case being remitted back in the usual way.

Family Mediation Pilot Project

Assessment of mediator competence

To ensure the delivery of a quality service to clients, we have been implementing a competence-based assessment process for mediators. All mediators in Phase I services have now been assessed.

We are planning to complete the same assessment process for services which have joined the pilot in Phase II.

Contracts

The Board is currently negotiating contracts with suppliers shortlisted for Phase II. 70 services were shortlisted originally, a roughly 50/50 split between lawyer mediators and not-for-profit services. However there were late applications and the final figure for Phase II will probably be closer to 90 services (70/30 split). We are also currently renewing contracts with Phase I services. This will bring the total number of services to around 120.

Family Mediation Linked Legal Services

The Board piloted these contracts in Bristol and Northamptonshire, inviting all franchised firms within a 10km radius of the mediation services to provide Family Mediation Linked Legal Services. The level of demand for these services is being monitored by the area offices.

These contracts have been extended to all Phase I areas and have been sent out by the area offices. The Board will also be inviting additional firms in Phase I areas and firms in Phase II areas to apply for these contracts.

The Board is continuing to conduct research into Family Mediation Linked Legal Services, and is monitoring the amount of legal advice and assistance required to support family mediation.

Franchise specification

The Board is currently revising the draft franchise specification in consultation with the key bodies and Phase I suppliers.

The initial re-write of the franchise specification will be completed and sent to services in the Autumn.

Section 29 Pilot Implementation, Stage II

Following a review of the initial section 29 implementation pilot, the Board has introduced Stage II of the pilot which will run for 3 months. It is then intended that section 29 will be introduced to all Phase I and II areas by April 1999.

The current pilot sites, Bristol and Northamptonshire, will be enlarged to cover a wider catchment area of up to 20km. Four additional pilot areas will be piloting section 29 implementation; two in areas where there are Divorce

Information Sessions, Cambridge and Peterborough, and Greater Manchester, and two where we will test an alternative model of section 29, Birmingham and Coventry. At the start, all catchment areas will be set at up to 20km.

Catchment areas have been developed in consultation with services and local area offices. Factors taken into consideration when choosing the areas were the number of matrimonial certificates and travel patterns.

The Family Mediation Pilot Project can be contacted on 0171 813 1000 ext. 4992.

Legal Aid Board Research Unit Completes Case Profiling Study

The Board's Research Unit (LABRU) has completed a Case Profiling Study, undertaken to inform the framework within which the contracting of civil certificated work could be developed. The basic aim of the study was to gain an understanding of case profiles (i.e. the pathway, cost, duration and distribution of legally aided certificated cases) in order to identify the description, number and cost of cases which might sensibly be contracted for.

The Case Profiling Study was restricted to family and personal injury cases as together they make up the great bulk of civil certificated work. Although the nature of civil work evolves as practice and regulation adapt to change, such as the proposed new funding structure of conditional fees, the general lessons from this study remain valid.

During the course of the study both Legal Aid Board records (over 260,000) and a large number of solicitors files (around 1,500) were examined. The data collection was carried out throughout the second half of 1996 and follow up interviews were conducted in 1997. LABRU would like to thank the many solicitors who took part in the study, especially those who gave up their time to be interviewed.

The case profiling study includes the following findings:

Firms' work

- Those family practitioners interviewed indicated that, on average, family work made up 25% of their firms' total fee income. On average, 65% of family work income was from the Legal Aid Fund. Personal injury practitioners indicated that a lesser proportion of fee income (50%) was derived from legally aided cases. The proportion actually taken from the Fund, however, was very much lower, as costs are recovered

from defendants in successful cases.

- Most of the work in both areas of law studied was found to be distributed over a large number of firms each undertaking a relatively small volume.

Costs

- Costs in both family and personal injury cases were found to vary enormously. The average costs in family cases, excluding green form costs, were around £4,000 (public law, children), £1,800 (matrimonial), £1,500 (private law, children) and £1,000 (domestic violence). The average costs in personal injury cases were £3,362. The averages were significantly distorted by a relatively small number of very high cost cases. So, for example, the median cost of personal injury cases was found to be just £2,500.
- Solicitors' own costs (profit costs) were found to be the most important cost component, making up three-quarters of family case costs and over two-thirds of personal injury case costs. Correspondence costs (including telephone calls), on their own, accounted for one-quarter and one-third of total costs in family and personal injury work respectively.
- Econometric analysis (aimed at determining cost drivers) of around 1,500 cases demonstrated that current methods of thinking about and administratively classifying cases may not always be best suited to the needs of block contracting. In family cases, no useful cost drivers could be determined, suggesting that a broad based classification system might be appropriate despite their evident diversity. In personal injury cases, for which significant cost drivers were found, a severity of injury index was found to be the most appropriate cost oriented classification system.

- Significant regional variations in case cost were found. Within the context of personal injury work these are to some extent explained by different injury severities within different regions. In the context of family work, however, these differences are not easily explained.

Damages

- In personal injury cases, great variance was found to exist in relation to damages. The average award (£11,000) was significantly distorted by a relatively small number of very high damages cases. The median level of damages obtained was again just £2,500. As expected, some correlation between damages and costs was observed, though no uniform damages to costs ratio was found. Low value cases incurred disproportionate costs. Indeed, costs exceeded damages in a number of cases.

Case Duration

- On average, ancillary relief cases were found to take 2 years to complete, Children Act cases around 1 year and domestic violence cases between 6 and 12 months. The median duration of personal injury cases which did not see proceedings issued was found to be around 16 months. In contrast, the median duration of those cases in which proceedings were issued was just over 2 years.

Court and Counsel

- 80% of sampled children cases, 68% of domestic violence cases and 45% of financial cases reached court, although this did not mean that they went all the way to a fully contested final hearing. Much lower percentages went to full trial.
- Just 5 of the 750 solicitors' personal injury files

examined in detail involved a trial. This is consistent with the finding that just 2 of 15 personal injury practitioners interviewed indicated that more than 1% of cases proceeded to trial.

- Counsel was employed, on average, in around one-third of family and one-half of personal injury cases.

Conditional Fees, Fixed Fees and Block Contracting

- Personal injury practitioners reported that clients entering into conditional fee agreements generally had to pay for any disbursements incurred. Practitioners pointed out that these costs could be substantial. There were circumstances in which the possibility of solicitors' firms covering disbursements arose. However, these were rare and generally involved only "very high" prospects of success cases. The practitioners identified certain types of case which they considered unsuitable for conditional fee arrangements. For example, many practitioners felt that medical cases and industrial disease cases were unsuitable. Other types of case mentioned were those valued at under £5,000 and those with high disbursements.
- Some family practitioners stated that they already had experience of fixed fees or bulk provision in some form, for example, green form equivalent services, trade union work and legal helplines.
- In general, family practitioners seemed wary of the introduction of block contracting. Concerns focused on the possibility of clients suffering as a result of lower quality work, the prospect of earning less money or even becoming bankrupt and worries about having to turn clients away. Despite these concerns, most practitioners indicated that their firm would apply for contracts.

Legal Aid Handbook

The Legal Aid Handbook 1998/99 will be published in October by Sweet & Maxwell. The price of the new edition will be £13.50 and advance orders can be placed on Sweet & Maxwell's telephone order line – 0171 449 1111 (Customer Services).

The new edition includes amendments to the Notes for Guidance and updated statutory materials (including the Regional Legal Services Committee Arrangements 1997 and Area Committee Arrangements 1998). The Regional Legal Services Committees Directions are also included, as well as updated eligibility and remuneration information and the contents of the Area Committee Members' Handbook.

Annual Report 1997-98

The Board published its Annual Report for 1997-98 on 16 July 1998. The report gives a comprehensive update on the organisation's performance. The focus of work during 1997-98 was determined by the Lord Chancellor's announcement of his reform programme for legal aid. There are chapters on all the Board's reform pilot projects and also on the establishment of Regional Legal Services Committees, which the Lord Chancellor has said will help shape the development of the Community Legal Service in the longer term. The report is available from The Stationery Office Limited, price £18.60, ISBN 0-10-551886-7.

Supplies of Legal Aid Forms

In Focus 23 we announced that we were considering new arrangements for supplying legal aid forms, and that we were discussing these plans with the Law Society.

We have now made available forms on computer disk by licensing four companies to provide a forms on disk service. These firms (Shaw and Sons Ltd, The Solicitors' Law Stationery Society Ltd, Peapod Solutions Ltd and Laserform Law) are providing services in a number of different packages, providing solicitors with the opportunity to choose a service which best meets their business needs.

During November we plan to make available Master Packs of legal aid forms. These will include a copy of each legal aid form suitable for photocopying, computer scanning or manually copying into a computer system. One Master Pack will be available to each legal aid account holder free of charge on request. Additional copies will be available for purchase.

We will accept information provided to us on forms generated by solicitors on their computer systems from the computer disks or scanned into their computer systems using the Master Pack forms. We will also accept forms directly entered into their systems using the Master Pack forms as a model (ensuring that format, style, font and other specifications match those of the Master Pack forms), or photocopied from the Master Packs.

In some instances, solicitors may need to send forms to us that contain a small amount of information but with a number of form pages that, in the particular circumstances of the case, contain no information. We have introduced arrangements to allow for part-forms to be submitted in such cases, so that only those pages of the form containing information need be submitted.

In the light of the introduction of these arrangements, we plan to cease the bulk supply of legal aid forms from 1 December 1998.

We will provide further information about how to obtain a Forms Master Pack closer to the planned introduction date.

Further information on forms on disk and on other aspects of these arrangements can be obtained from Kirsty Saddler, Quality Assurance Department, 12 Roger Street, London, WC1N 2JL.

New Legal Aid Board Leaflets

The Legal Aid Board's public information leaflets for 1998/9 were published earlier this year. They contain eligibility figures effective from April '98.

The three leaflets, '*A Practical Guide to Legal Aid*', '*How to Get Free or Low-Cost Legal Help*', and '*Criminal Legal Aid at the Police Station and in Court*' are available from: **Legal Aid Publicity Distribution, PO Box 447, Croydon CR9 1WU.**

'*How to Get Free and Low-Cost Legal Help*' and '*Criminal Legal Aid at the Police Station and in Court*' are aimed directly at clients and provide a brief introduction to the legal aid scheme in England and Wales. '*A Practical Guide to Legal Aid*' is more detailed and is aimed primarily at solicitors/advisers who are explaining the scheme to their clients.

In order to help us to monitor our stocks, the maximum order number for each leaflet is thirty. If you have exceptional needs and require more than 30, please contact Sophia Swithern on 0171 813 8676.

Solicitors required for consultation

Consultation plays a major part in ensuring we get our guidance materials right for our caseworkers and for solicitors who are advising legally-aided clients.

We are in the process of updating our lists of consultees and would like to hear from network groups or practitioner organisations who are interested in being consulted on the individual drafts of guidance as they are produced.

If you are interested in participating and your details are not already on our list of consultees, please write stating your areas of specific interest to Neil McLeavey, Documentation Development Manager, Quality Assurance Department, 12 Roger Street, London, WC1N 2JL (DX: 328).

Solicitors survey results

Four out of five practitioners believe that the Legal Aid Board is committed to improving the quality of its service but clear majorities also say it is not customer focused and does not understand solicitors' needs.

Some 84% of the private practitioners canvassed in a survey expressed their belief that the Board seeks to better the service it provides, and 80% agreed that the Board cares about the quality of its work.

Yet 57% of respondents said that the Board was not customer focused and 65% that it does not understand the needs of the profession.

The research revealed that over half of the solicitors questioned believed that the Board is responsive to criticism (55%); that it provides a speedy service (51%); and that it trains staff to a high standard (54%).

The extensive survey into the profession's opinions of the Board was based on responses from 500 solicitors spread across all 13 LAB areas and interviews with 20 practitioners.

The research, undertaken by the Board, is intended to provide valuable material to inform the constant drive towards improving services to solicitors. The survey highlights areas of concern amongst the profession, some of which are already being addressed with recent initiatives.

Detailed analyses of specific areas of the Board's work showed that:

- **Priorities** were a major area of differing perceptions between the practitioners and the Board. The profession say that urgent amendments and correspondence should take precedence over initial applications, an observation that will prompt a review of the Board's priorities.
- Respondents found that the speed of processing **applications and bills** was on the whole satisfactory, and that decisions on applications were consistent. However, the policy and guidelines employed to reach decisions were unpopular. Respondents described the

subsequent dispatch of documents as slow, a problem that is addressed by the introduction of the new CIS computer system, which will speed the printing and dispatch processes.

- Solicitors expressed concern at the urgency with which **appeals** against refusals or discharge of legal aid were held. Over the coming year, the Board is to look into issues surrounding the speed with which appeal hearings are convened, the explanation of decisions and the provision of information on the procedures.
- The operation of the **green form** scheme was generally criticised, particularly the speed of handling and the decisions being made on authorising extensions and bill assessing. The latter complaint highlights the profession's belief that the Board's guideline times for solicitors' green form work are too tight. As the future of the green form scheme is contingent on the results of current pilot projects and the Lord Chancellor's reform plans, the Board has no immediate proposals to alter the system.
- The **rejection of applications and bills** was another area of discontent among the profession, who described as unsatisfactory the policy of rejecting incomplete or incorrect forms. A new policy to address this concern, which will see the Board asking for further information from solicitors in preference to simply rejecting unacceptable applications, is being introduced this year. The Board will still require bills to be fully and accurately completed before public funds are released.
- Solicitors also expressed their dissatisfaction with what they thought are the Board's **slow processes**, particularly with regard to financial assessments and refunds to clients. However the transfer of means assessment to area offices will make their completion more rapid, and breakdowns with improved explanations will be provided automatically. CIS – the Board's new computer system – should speed refunds, calculations of which will be automatically provided.
- There was major concern that the Board was not good at putting right errors. Most mistakes are administrative **errors**, but forthcoming customer care training to encourage staff to understand customer needs and put right problems should alleviate some of the concerns.
- Satisfaction with the **telephone service** varied significantly between area offices, a concern that will be addressed by the Board in a review of services and by the setting of common standards applicable to all offices. Caseworkers were complimented for being helpful, courteous and able to answer enquiries.

- The majority of solicitors are aware of the Board's **complaints** procedure; around a third of the respondents have used it in the last year, the majority of them satisfied with the outcome.
- The **franchising** operation was well received by the profession, who recognised the helpfulness of LAB staff and commented positively on the quality of procedures and administration.
- The Board's **communications** – particularly FOCUS and the Franchise Newsletter – were well received. The profession would like to have more advance notice of changes to policy, procedures and forms, a concern to be addressed by an impending review of

the issue and control of forms and guidance. The vast majority of respondents also expressed the desire to have access to standard forms on computer disk.

David Keegan, chairman of the Board's Quality Operating Committee, said: "The survey provides us with a clear list of areas for improvement, and we will progress all the specified actions over the coming year.

"It is encouraging that solicitors believe we are committed to improving the quality of service, and I accept that we do not always succeed in practice.

"The profession should be assured we are not complacent about our weaknesses and will take steps to improve our performance for the benefit of our customers."

Guidance survey on Board's approach to documentation

At the end of 1997 we undertook a survey of our guidance materials, focusing on the Guidance on the Exercise of Devolved Powers (GEDP) manual and the Legal Aid Handbook. The results will help us to better understand the needs of solicitors as we move to more open consultation with the profession on our documents.

Although a relatively small number of firms was invited to participate in the survey, the information provided in the responses was especially valid, as firms were selected for their particular interest in, and/or views on, legal aid work. A total of 92 solicitors were contacted, and 42 responses (45.7%) were received. In general, the tone of the responses was positive and the following comments were of particular note:

GEDP manual

- 57.1% of respondents were averagely or above-averagely satisfied with the manual's user-friendliness.
- 73.8% were averagely or above-averagely satisfied with the formatting of the content of the manual.
- 85.7% were averagely or above-averagely satisfied with the clarity of the manual.
- 54.8% were less than averagely-satisfied with the current system of page numbering employed; 26.2% stated consecutive page numbering from start to finish would be better.

Issuing of updates/use of Focus

- Slightly more solicitors felt the effectiveness of the then system of issuing updates was of below-average rather than average effectiveness (40.5% vs. 38.1%).
- 90.5% of solicitors felt that Focus is a useful medium for advance notification of changes to the guidance.

The Legal Aid Handbook

- 50% used the Handbook "Sometimes", whilst 45.2% reported "Frequent" usage.

Use of alternative media to hard copy

- 40.5% indicated that they would prefer to receive the Board's guidance in an alternative medium to hard copy.
- Of these solicitors, the most popular medium identified was CD-ROM (47.1% of the 40.5% who expressed a preference).

Overall, the findings of the survey support the approach the Board has adopted. They suggest that we need to enhance our current policy rather than totally reappraise our strategy.

As a result of the survey, some improvements have already been made. Among these is the use of consecutive page numbering for certain manuals including the manual giving guidance on civil means assessment, which will be published shortly. We are also continuing to explore the use of technology to improve and enhance the distribution and accessibility of our documentation.

The Legal Aid Board is committed to improving and maintaining the quality of its documentation. Comments are always welcome and should be addressed to Neil McLeavey, Documentation Development Manager, Quality Assurance Department, 12 Roger Street, London, WC1N 2JL (DX: 328).

Instructing Counsel

Note to Solicitors and Barristers

Under the Civil Legal Aid (General) Regulations 1989, Regulation 59(1), firms are required whenever they instruct counsel to send with the brief or instructions a copy of the certificate (and any amendments to it) and any authority to incur costs. Firms are reminded that it is important that this happens so that counsel are aware of the scope of the certificate and any restrictions placed on it. It is both solicitor's and counsel's responsibility to make sure that the certificate covers all the work that needs to be done for the assisted person. If the wording is incorrect or not in accordance with the needs of the assisted person, then solicitor and counsel will not get paid for the work outside scope (note for guidance 9-04, Legal Aid Handbook 1997/98).

The new style CIS certificate also quotes both the legal aid reference number and the name of the legal aid area office which has issued the certificate. This information is vital to counsel so that claims for payment can be submitted directly to the Board (for payments on account). If counsel receives instructions without a copy of the certificate, they should immediately request a copy from the conducting firm.

Criminal Injuries Compensation Scheme

The current scheme applies to applications received by the Criminal Injuries Compensation Authority (CICA) on or after 1 April 1996 under the Criminal Injuries Compensation Act 1995. Practitioners should note that where legal advice and assistance has been provided in connection with an application to the CICA, the solicitors' charge under s.11(2)(b) of the Legal Aid Act 1988 does not apply to awards of compensation.

The solicitors' charge **does** continue to apply to any award of compensation granted pursuant to an application made before 1 April 1996 to the former Criminal Injuries Compensation Board (CICB) i.e. an application which is not governed by the Criminal Injuries Compensation Act 1995.

A reminder about Regulation 106 and Regulation 106A

Civil Legal Aid (General) Regulations 1989

Regulation 106 remains applicable to all certificates issued prior to 25 February 1994. It provides that an agreement of inter partes costs is not possible unless the agreement is accepted in full and final settlement of **all** the solicitor's costs under the legal aid certificate, i.e. that there is to be no claim against the legal aid fund.

The concession in Regulation 106A of the Civil Legal Aid (General) Regulations 1989 is effective from 25 February 1994 and relates **only** to certificates issued on or after that date. Solicitors are able to agree their inter partes costs (whether in whole or in part) and then obtain a taxation or assessment of the legal aid only costs in such cases.

Unfortunately, it would appear that many solicitors are increasingly agreeing inter partes costs and then proceeding to tax the legal aid element only despite the fact that the certificate may have been issued prior to 25 February 1994 and thus is a certificate to which the concession in Regulation 106A does **not** apply.

If parties submit a bill in relation to a certificate issued prior to 25 February 1994 having purported to agree the inter partes element, the court should inform them that there will have to be a taxation of the whole bill. A full taxing fee will be payable if a taxing certificate is to be issued.

However, if parties do succeed in getting a bill taxed inappropriately this will constitute a breach of Regulation 106. If the fund has suffered a loss as a result of the breach, the Board will consider deferment of the solicitors profit costs or a referral of the matter to the Solicitors Disciplinary Tribunal under Regulation 102.

Representations against the grant or continuance of Civil Legal Aid

Solicitors making representations against the receipt of legal aid by their client's opponent in the proceedings need to be aware that if the area office decides that the representations merit investigation, the assisted person and their solicitor will be given the opportunity to comment on the representations. This is because a legal aid certificate cannot be discharged or revoked without giving the assisted person the opportunity to show cause why the certificate should not remain in force. To do this the Board will normally have to disclose the representations themselves.

Solicitors making representations on their clients' behalf should therefore be aware that the area office will normally disclose such representations to the assisted person and their legal representatives without first seeking consent to do so. This represents a change from the Board's previous practice and is on the basis that solicitors making representations should be aware of the relevant regulations and the Board's duty to disclose matters to the assisted person before taking any decision.

Representations will not automatically be disclosed if they are made by the opponent in person unless consent to disclose is contained in the representations or is obviously unnecessary (e.g. because the letter has already been copied to the assisted person). Instead, the area office will write to the person making the representations to ask for their consent.

If the representations are made explicitly on the basis that they cannot be disclosed to the assisted person then the area office will, for the reasons already outlined, usually not be able to take any further action on them.

A new leaflet explaining representations is now available from all area offices and will be sent automatically to anyone making a representation to the Board.

CIS for franchising to be introduced

Following the introduction of CIS in our area offices, a system has now been developed and integrated into CIS for our Franchising departments. The new system was piloted in Nottingham in June. It will be introduced progressively into other areas from September onwards, to reach all area offices by the end of the year.

The new system will allow the Board to manage applications and franchises more efficiently. Franchised firms will see a number of differences, mainly in the reports they receive:

- The FRAN 3 audit report, produced at the end of the audit by the liaison manager, will also contain the liaison manager's recommendations concerning devolved powers, and an overall summary of their recommendations to the area manager. The FRAN 4 will remain similar to the current report. There will no longer be a FRAN 8 report which is currently sent to franchisees along with confirmation of the area manager's decision.
- The franchise certificate, displayed by franchisees at their offices, detailing the categories of work which are franchised, will now be produced in landscape rather than portrait. This is to allow for the development of additional franchise categories. The specific devolved powers are no longer detailed on the certificate.
- The monitoring reports that we send franchisees and those organisations in pre-contract monitoring will be changing significantly. In particular the reports will contain information for the previous 6 months, rather than the last month and also specific details of items which are rejected or refused.

The new monitoring system is still being tested, and the first reports will not be available until October 1998 at the very earliest. Those area offices which are already live with operational CIS do not currently receive any reports from the residual systems.

Once the new monitoring reports are being produced, we will take into account the fact that we have not been sending reports to any firms which are outside the current targets. However, firms should be aware of any individual items that are returned as rejects or refusals, and should still implement the appropriate corrective action, even though we are not sending any specific summary reports to draw these to their attention.

Appropriate arrangements will be made by liaison managers for those offices which are still in the pre-contract monitoring phase, which are due for a pre-contract audit in the period before the first reports are available.

Payments into court and reporting requirements

Regulation 70 of the Civil Legal Aid (General) Regulations 1989 requires a solicitor to report to the area office either when an assisted person has declined to accept a reasonable offer of settlement **or** when a payment into court has been made. The regulation makes a distinction between offers to settle and payments in. Solicitors are obliged to report **any** payment in as the costs consequences could have implications for the continuation of the assisted person's certificate.

In legally aided cases the protection provided by section 17 of the Legal Aid Act 1988 is not an absolute shield against the possible costs consequences of a payment into court. If an assisted person fails to meet a payment in, costs as from the date of the payment in, are likely to be awarded against him/her, and to be deducted from whatever sum of damages is recovered. The statutory charge may then bite on the balance of the damages. Potentially, the combined effect of section 17(1) and the statutory charge may have a devastating effect on recoverable damages. It is important that when the payment in is reported to the area office the solicitor expresses a view on its reasonableness.

REMUNERATION RATES

On 11 May 1998, the Lord Chancellor's Department announced that the prescribed rates of remuneration paid to lawyers undertaking civil legal aid work will remain unchanged for 1998/9. For criminal legal aid, the only minor changes are to the graduated fees scheme for defence advocates in the Crown Court.

The remuneration rates are set out in the Legal Aid Handbook which will be published for 1998/9 this October.

CIS update

CIS has now been successfully implemented in 12 of the Board's 13 area offices.

The final area office, London, is currently on track for CIS implementation from Tuesday 17 November.

New devolved powers

Amending civil certificates

On 19 October 1998 a new automatic devolved power will be introduced enabling franchisees to amend substantive civil legal aid certificates in any franchised category of work subject to the exceptions noted below. The devolved powers to amend emergency certificates and specific matrimonial/family certificates relating to specified finance/property issues will remain available. The new devolved power will apply automatically to all franchised categories of work unless the area manager has specifically notified a franchised firm that they are excluded from exercising the devolved power.

Franchisees with a substantive certificate requiring (a) Counsel's opinion or (b) Counsel's opinion or, alternatively, a solicitor's report will be able to amend the certificate as follows:

1. By extending a scope limitation to a stage or step in proceedings up to and including a final, contested hearing, and
2. By extending a costs limitation to a maximum of £10,000 including counsel's fees and disbursements but excluding VAT *in association with the extension of a scope limitation*. Amendments may not be made to extend costs limitations alone.

The devolved power does not apply to the following types of case:

- Cases where total costs already exceed or are likely to exceed £10,000
- Multi-party actions
- Judicial Review
- Medical Negligence
- All appeals (whether against final or interlocutory decisions)

- Enforcement proceedings consequent upon a judgement or order (including committal) whether final or interlocutory
- Amendments to enable an application for a Mareva injunction or Anton Pillar order to be made
- Public Law non-merits tested Children Act 1989

Certificates may not be amended using devolved powers to correct a mistake nor to effect a change of solicitor. Amendments may not be granted to add parties to proceedings nor to add proceedings, including related proceedings under Regulation 46(3)(a) Civil Legal Aid (General) Regulations 1989.

Amendment requests for these cases or purposes must still be made to the area office in the usual way.

Where the devolved power is exercised the area office must be notified within 5 working days using CIS form APP6 (non CIS CLA30) and attaching the relevant Counsel's opinion or solicitor's report and experts' report(s).

Form APP6 will be amended shortly to make it clear that franchised firms exercising devolved powers to amend certificates need not complete page 3 ('Current situation report') where they are attaching separately Counsel's opinion and/or solicitor's report where required by the new guidance. Page 2 'costs and merits' should be completed in all cases.

Standard wordings must be adopted for all amendments – see *Guidance on the Exercise of Devolved Powers* appendix 1. Non-standard wordings cannot be used.

Detailed guidance will be included in an October update to the *Guidance on the Exercise of Devolved Powers* which will be issued to franchisees and subscribers in advance of the implementation date.

Mental Health Training

In January 1998 a new Mental Health category was added to the Board's franchising scheme (see Focus 23, p.7). In view of this, MIND, the mental health charity, have informed us that they run several training courses which might be of interest to firms who have, or who are applying for, a Mental Health franchise. The charity has asked us to alert practitioners to four courses in particular:

Mental Health Law Update – 14 October 1998

Legal Rights and Mental Health: A Foundation Course – 17/18 March 1999

Housing and Community Care Law in Mental Health – 19 November 1998

Mental Health Awareness – 20 October 1998 and 20 January 1999

If you would like more information about these or other MIND courses, please contact their Conference and Training Unit on 0181 519 2122 ext 213/215.

Pilot Transaction Criteria will count

In January 1998, the Board began to replace existing sets of transaction criteria in all franchise categories, except Matrimonial/Family where they are currently being developed. The Board has also been piloting the following new sets of criteria:

Housing

Breach of Covenant for Quiet Enjoyment / Wrongful Eviction / Trespass

Consumer and General Contract

Poor Workmanship / Building Disputes

Employment

Unauthorised Deductions

Mental Health

Mental Health Review Tribunals

During the pilot, file scores have been fed back to organisations, but have not counted towards the category compliance rate or transaction criteria audit result.

The Board has now reviewed the status of these sets of criteria in the light of the file scores achieved during the pilot exercise and has decided that **the sets listed above will become operational as of 9 November 1998**. This means that after this date, they may be used on any audit of the relevant categories, and the results will then count towards the organisation's audit result.

The Mental Health franchise category was introduced earlier this year, with pilot criteria only, and so the conversion to operational criteria has greatest impact in this category. Mental Health franchisees need to be aware that **they will have to pass the transaction criteria audit at their next post-contract audit**. New applicant firms also need to be aware that there will be a requirement for them to pass transaction criteria audits conducted on or after 9 November. The category compliance rate for the Mental Health transaction criteria audit will be 65%.

Any questions or comments should be addressed to Franchise Development Group, Legal Aid Board, 85 Gray's Inn Road, London WC1X 8AA.

Copies of all sets of criteria are available on request from your local area office.

New Monthly Payments

The Lord Chancellor has given a Direction to enable the Legal Aid Board to pilot a new payment system for legal aid work with franchisees.

The proposal is to pilot a change to the payment of franchised firms by fixed monthly amounts. The pilot focuses on work done as advice and assistance, certificated civil work and magistrates' court criminal work. The amount would be an average sum paid each month, equal to the expected take from the fund over the chosen period.

During the pilot, firms will continue to submit claims as normal, including billing, payments on account and disbursements. A reconciliation will take place at identified times to ensure that over the period the firm receive payment equal to the amount of work done.

The terms of the payment contract allow for a staged recoupment to take place where the payment level appears to be consistently above the profile claimed and a one off payment to be made where the amount appears low. There remains the ability to change the agreed monthly amount where necessary.

The pilot is to be implemented in London with a number of identified firms during September and October. The aim of the pilot would then be to extend participation to a number of firms from the Bristol area by December 1998.

Costs Appeals Committee

Points of Principle of General Importance

1. GREEN FORM

LAA 17 – 22 September 1997 Advice and Assistance on Living Wills

It may be reasonable to provide Legal Advice and Assistance in connection with preparing an "advance directive" where the individual concerned can satisfy the requirement in s.2(2) and (3) of the Legal Aid Act 1988 that particular circumstances have arisen requiring such advice to be given.

This requirement might be satisfied if it can be shown that such a directive may be needed, i.e. that by virtue of the individual's current medical state there is a real probability of medical treatment being required in the future.

LAA 18 – 17 November 1997 Solicitor Agents and the Legal Advice and Assistance Scheme

Section 32(10) of the Legal Aid Act 1988 authorises the use of solicitor agents for representation only. A solicitor cannot therefore delegate the provision of advice and assistance to a solicitor agent.

2. DUTY SOLICITOR

DS 7 – 27 April 1998 Advising and Assisting over the Telephone

The expression "advising and assisting over the

telephone" in Regulation 5(1)(d) of the Legal Advice and Assistance at Police Stations (Remuneration) Regulations 1989 covers any telephone attendance actually and reasonably made which is not a routine call and which materially progresses the case.

The onus is on the solicitor to satisfy the assessing officer that the work did progress the case, was actually and reasonably done, and that the amount of time spent was reasonable. The solicitor should be able to supply an attendance note to justify a claim for advising and assisting over the telephone, if required to do so by the assessing officer.

3. CIVIL

CLA 22 – 27 April 1998 Review and Supervision on a Franchised File

Time properly spent by a franchised firm reviewing and supervising files to meet the franchising criteria is time properly chargeable provided that it coincides with the stage in the proceedings at which the file would normally be reviewed and the work done would be recoverable on taxation as work reasonably done having regard to the needs of the case.

This decision applies to all civil legal aid certificates granted on or after 1 December 1998.

4. CRIME

CRIMLA 13 (Amended) – 23 February 1998 Enhanced Rates in Criminal and Care Cases

Where the criteria for paying enhanced rates in criminal proceedings under the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 are met, such claims will be assessed on the basis of the broad average direct cost of the work (the A figure), to which is added a percentage uplift (the B figure) to take into account all the relevant circumstances of the case.

The A figure will represent the broad average direct cost of undertaking the work. Factors to be taken into account in identifying this figure may include the rate likely to be allowed in an enhanced rates case by the appropriate Crown Court for the relevant level of fee earner at the

time to which the costs claim relates, and evidence of the results of surveys of local solicitors' expense rates for the locality in which the solicitor's office is situated.

As to the B figure, 35% should be considered as a starting point in respect of preparation. Solicitor advocacy would normally be expected to carry an uplift of 40-60%, and attendances with counsel 20%.

In the majority of cases where enhancement is claimed and allowed it will, nonetheless, be usual to pay travel and waiting without enhancement at the prescribed legal aid rate. Each case must be considered on its own particular merits having regard to all the relevant circumstances of the case. A claim for travel and waiting at the A figure may be allowed in exceptional cases. Even then travel and waiting would not be expected to attract an uplift on the A figure.

When enhanced rates apply to routine letters written and to telephone calls made or received and they are not timed, the method of assessment is to allow them at one-tenth of the hourly rate plus, in appropriate cases, an uplift for preparation.

Save for the purpose of CRIMLA 59, this decision only applies to cases where the legal aid order was granted prior to 1 October 1994.

CRIMLA 54 (Amended) – 27 April 1998

Review and Supervision on a Franchised File

Time properly spent by a franchised firm reviewing and supervising files to meet the franchising criteria is time properly chargeable provided that it coincides with the stage in the proceedings at which the file would normally be reviewed and the work done would be recoverable on taxation as work reasonably done having regard to the needs of the case.

This decision in its amended form applies to all criminal legal aid orders granted on or after 1 December 1998.

CRIMLA 59 (Amended) – 23 February 1998

Enhancement Rates for Legal Aid Orders Granted on or after 1 October 1994

In determining the percentage due under paragraph 3 of

Part 1 of Schedule 1 to the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, regard should be had to the Lord Chancellor's Directions for Determining Officers. Area offices and area committees must undertake the calculation set out in the attached guidance which must include a full "Backhouse" calculation for comparative purposes.

CRIMLA 70 – 17 November 1997

Magistrates' Courts Standard Fees: Deferred Sentence

Where sentence is deferred, two separate standard fee claims may be submitted. The first claim should be made on deferment of sentence. A subsequent claim may be made in Category 1 once the final deferred sentence hearing has taken place.

If there are multiple cases where the sentence is deferred and the original claim(s) for costs were assessed as consisting of more than one case for standard fee purposes, the later claims for the work relating to the deferred sentence hearing should be assessed at the same number of cases.

CRIMLA 71 – 27 April 1998

Enhanced Rates: Separate Representation

If co-defendants are separately represented in the same proceedings and enhanced rates are allowed on assessment in relation to work undertaken on behalf of one or more co-defendants, that may be a relevant factor in considering whether the criteria set out in paragraph 3 of Part I, Schedule 1 of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 have been met.

It will be for the solicitor seeking the enhanced rates to identify for the determining officer the issues which are common to the work undertaken by them and by other solicitors on behalf of any co-defendant.

CRIMLA 72 – 27 April 1998

Magistrates' Court Standard Fees: Breach Of Bail Conditions

A breach of bail conditions leading to an arrest under

section 7 of the Bail Act 1976 does not constitute a separate case for standard fee purposes when no section 6 offence is charged. Section 7 does not create an offence. Work undertaken in relation to a breach of bail is therefore incidental to the main proceedings.

GUIDANCE ON DECISION LA 17

1. An advance directive enables a competent person to give instructions about what is to be done if he or she should subsequently lose the capacity to decide or to communicate. It may cover any matter on which the individual has decided views but most commonly arises in relation to decisions about medical treatment, particularly when a person has a serious life threatening condition.
2. An advance directive may also be referred to as a "living will", "treatment refusal" or "refusal/release". It should include an informed authorisation or refusal of specific treatments. It cannot, however, insist on a specific treatment or require medical professionals to act contrary to the law e.g. active euthanasia.
3. The Costs Appeals Committee considers that legal advice and assistance in relation to an advance directive can be provided as long as the requirements in s.2(2) and (3) of the Legal Aid Act 1988 are satisfied i.e. that particular circumstances have arisen in relation to the person seeking the advice.
4. Particular circumstances will only arise at the point when the individual realises that there is a real probability of suffering some form of future incapacity by virtue of a current condition, eg. extreme age or terminal illness or diagnosis of a degenerative disease, which will prevent that person from expressing his or her wishes.
5. Particular circumstances may also arise where an individual holds a strong religious or moral belief e.g. a Jehovah's witness who wishes to decline a blood transfusion.
6. The crucial point is that the need for legal advice and assistance must stem from the particular circumstances of the individual and these circumstances should already have arisen when legal

advice is sought. A person facing a hypothetical risk would not satisfy this test and would therefore not be eligible for advice under the scheme e.g. concern about the possible threat of sudden incapacity or death through a freak accident.

7. A minor illness or recurring minor medical condition would not generally satisfy this test as such circumstances would not normally justify the preparation of an advance directive. In other words, there must be some relationship between the particular circumstances which have arisen and the need for legal advice and assistance in relation to an advance directive.
8. It is considered that the preparation of an advance directive would be unlikely in all but exceptional cases to take more than one hour in total (including taking instructions/attending on the client).

GUIDANCE ON DECISION CRIMLA 59

1. When determining a claim for enhancement under paragraph 3 of Part 1 to Schedule 1 of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, the assessing officer must first consider whether or not the case is "exceptional" and justifies enhancement. The Regulations provide that it may be appropriate to allow an enhancement for any item or class of work where, taking into account all the circumstances of the case, it can be established that :-
 - (a) the work was done with exceptional competence, skill or expertise;
 - (b) the work was done with exceptional dispatch; or
 - (c) the case involved exceptional circumstances or complexity.
2. The proper test of "exceptional" within the phrase "exceptional circumstances" is the ordinary and actual meaning of the word "exceptional", i.e. "out of the ordinary" [R -v- Legal Aid Board ex.p R M Broudie & Co [1994] 138 SJ 94].
3. If an assessing officer decides that enhancement should be applied to a case he may apply the

percentage to particular items of work. If an enhancement is allowed for one item of work it does not have to be allowed for other items. It will depend on the circumstances of the case. Enhancement may be applied to any item of work including travel and waiting.

4. If an assessing officer receives a claim for enhancement but decides not to allow an enhancement, the solicitor should be notified of the reasons why the case was not considered to fall within the criteria set out in the Regulations.

5.1 If the assessing officer considers that an enhancement should be applied to any item of work he must apply what he considers to be the appropriate percentage uplift to the prescribed legal aid rate applicable to that item of work. In determining the percentage, regard should be had to:

- (a) the degree of responsibility accepted by the solicitor and his staff;
- (b) the care, speed and economy with which the case was prepared;

(c) the novelty, weight and complexity of the case.

5.2 However, the assessing office must in each case then go on to consider what hourly rate and percentage uplift would have been applied if the legal aid order had been granted before 1 October 1994 when the "Backhouse" principle applied. This principle is set out in CRIMLA 13. A "Backhouse" calculation must be carried out. Once that composite figure is known (the hourly broad average direct cost rate plus appropriate uplift) the assessing officer should then ensure that the relevant percentage applied in the assessment of that item of work provides a figure not lower than that composite rate, subject always to the maxima provided by the regulations.

6. The percentage by which the prescribed rate may be enhanced shall not exceed 100% except for where the proceedings relate to serious or complex fraud where the percentage may not exceed 200%. Such cases are, for example, those conducted by the Serious Fraud Office or those transferred under section 4 of the Criminal Justice Act 1987.

Legal advice and assistance

Point of principle LAA15

Practitioners are reminded that this point of principle applies to all claims for legal advice and assistance where the form was signed on or after 1 April 1997. It provides that:

"The combined effect of Regulations 9(4) and 9(6) of the Legal Advice and Assistance Regulations 1989 are to make it mandatory for a solicitor to obtain capital and income details from the person applying to be assisted and to furnish that information on the green form.

In order to comply with those mandatory requirements solicitors must ensure that both sections for income and capital details are completed on the green form using words and/or figures as appropriate. A tick or striking through of the income or capital detail boxes does not furnish information as required by the Regulations."

Practitioners should note that the Board's area offices will not assess claims which do not comply with these requirements.

Assisted persons' travel costs and other expenses

Basic principle and background

The basic principle is that costs, whether paid by the client or the legal aid 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.

R .v. Legal Aid Board ex p. Eccleston

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) is important as the law has now been clarified.

The area office refused to grant prior authority for the assisted person (who lived in Liverpool) to incur the assisted person's travelling costs to see a consultant psychiatrist in Harley Street, London, in connection with his proposed action for damages against the local authority.

One of the area office's grounds for refusal was that authority under Regulation 61 of the Civil Legal Aid (General) Regulations 1989 could not be given in respect of an assisted person's own expenses in attending his own legal or medical advisers as such expenses would not be allowed on taxation. The area office considered that the Board did not have power to authorise such expenditure.

The assisted person challenged the area office decision by way of judicial review proceedings. Mr. Justice Sedley concluded that the assisted person's travel expenses could amount to a proper solicitor's disbursement for which the 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.

Implications of the judgment

The implications of this judgment are potentially wide ranging and will 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) i.e. performing an act which is either unusual in its nature or involves unusually large expenditure. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns a personal expense of the assisted person may arguably make the expense unusual in its nature.

The solicitor is not, of course, obliged to seek a prior authority. In future, such expenses may be recoverable on taxation or assessment as a disbursement provided that they have been reasonably incurred and are reasonable in amount. If the expense is allowed as a disbursement on taxation or assessment and the client recovers or preserves money or property as a result of the proceedings, then it will serve to increase the assisted person's statutory charge liability. These type of expenses will generally not be recoverable *inter partes* (as an item of costs as opposed to part of a special damages claim), but may, in future, be recoverable on a legal aid taxation. Similar principles apply where the bill is assessed by the Board.

Guidance

1. Assisted persons' travel costs to attend Court

- 1.1 The position has not been affected by the judgment in *R .v. Legal Aid Board ex p. Eccleston*.
- 1.2 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.
- 1.3 A solicitor may pay these expenses on behalf of his or her client and then include the payments in the solicitor's bill of costs as they would generally be recoverable as a disbursement. Receipts should be produced where relevant.
- 1.4 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 e.g. because there was no intention that the client would give evidence, or the hearing was an interlocutory hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed.
- 1.5 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 (currently 36 pence per mile);
 - (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.
- 1.6 Note also the existing guidance in point of principle CLA14 (NFG14, para. 14-29 Legal Aid Handbook).

2. Assisted persons' travel costs to attend experts

- 2.1 Following the Eccleston judgment, an assisted person may be entitled to recover his or her travel expenses in connection with attending a medical or other expert. In his judgment, Mr. Justice Sedley determined that 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 should 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 assisted person 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 legal aid does not automatically satisfy the test of "impecuniosity". The assisted person 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 impecunious. 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 assisted person to seek financial assistance from the Board to attend the appointment. This is akin to a visit to the assisted person's own solicitor's office. An application for prior authority or payment should generally be refused in these circumstances unless the assisted person 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 had been taken to identify an appropriate local expert e.g. 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 assisted person could not be seen promptly locally (provided that the assisted person and his or her solicitors were not responsible for the delay in instructing an expert). The nearest expert with appropriate expertise should be used e.g. it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;

- (e) The assisted person must justify why he or she needs to attend the meeting with the expert e.g. if a physical examination is necessary then clearly it would be reasonable to do so;
- (f) The applicant must provide a full breakdown of the proposed expense;
- (g) Any available alternative sources of funding should be considered (see also paragraph 5 below).
- 2.2 Before granting an application for prior authority the area office should take into account all the above criteria when determining 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).
- 2.3 When considering applications area offices should also consider whether a private client of moderate means would

incur the expenditure in all the circumstances of the particular case.

- 2.4 Where an assisted person 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 assisted person's costs. If the expense had 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.
- 2.5 Note also the existing guidance in point of principle CLA 19 (NFG 14, para. 14-34 Legal Aid Handbook) to the effect that costs in excess of any prior authority may nonetheless be allowed on costs assessment/taxation.

3. Assisted persons' travel costs to attend legal advisers (e.g. conference with counsel)

- 3.1 The same criteria as above should be applied. It would generally not be reasonable for the assisted person to seek prior authority to cover such expenses unless the above criteria can be met e.g. where attendance in conference with a specialist counsel in London was essential before counsel could review the merits of the case.

4. The costs of an expert attending on the assisted person

- 4.1 The general principle is that litigants are expected to visit their professional advisers unless they are unable to do so.
- 4.2 It is generally more economical for the assisted person to visit the expert rather than vice versa as the attendance of an expert on the assisted person would involve a claim for both travel and incidental expenses *and* the time spent in both travelling and the attendance.
- 4.3 Prior authority for an expert's costs of visiting the litigant should only be granted in exceptional circumstances e.g. where the assisted person is unable to visit the expert due to physical incapacity or the visit itself is the purpose, e.g. assessing the litigant at home.

5. Assisted person's travel costs to hospital

- 5.1 Hospitals will pay the fares of patients attending for NHS treatment if they are in receipt of income-based job seekers' allowance, disability working allowance, income support or family credit, or they are covered by a low income exemption certificate issued by the Benefits Agency's Benefits Unit.

6. Other travel and related expenses

- 6.1 The above covers the most common scenarios, however, other types of application of a similar nature may be made e.g. the costs of travel pursuant to a court order for interim contact with a child, attendance at a social services case conference/assessment centre/family mediation appointment etc. If the expense would have arisen even if the person was not legally aided i.e. because it arose due to the circumstances generally rather than directly and solely as a consequence of the proceedings or proposed proceedings then 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, then they do not form part of the assisted person's costs (but are rather the consequences of implementation) and applications for prior authority/payment should be refused.
- 6.2 Each application should be considered on its own merits applying the criteria set out in paragraph 2.

Guidance: Exercise of Devolved Powers – Update

- Introduction
- General – Advice & Assistance
- General – ABWOR
- General – Emergencies
- Family/Matrimonial – Civil
- Housing – Advice & Assistance

Amendments to Guidance: Exercise of Devolved Powers

The Guidance: Exercise of Devolved Powers is to be updated from **19 October 1998** by **issue 7**, which will be sent to franchisees and subscribers prior to the implementation date.

The main change is to introduce the new devolved power to enable franchisees to amend substantive legal aid certificates requiring either Counsel's opinion or a solicitor's report or, in the alternative, Counsel's opinion (see page 16 of this issue of Focus).

Changes will also be made to update the Guidance so that it reflects the text of the new edition of the Legal Aid Handbook (see page 10 of this issue of Focus) as well as the continuing implementation of the Board's CIS computer system and amendments to standard wordings. In particular, the update will include guidance on legal advice and assistance/ABWOR means assessment and that guidance will itself be reproduced in full in the next issue of Focus.

The other new/amended guidance of relevance to non-franchisees appears on pages 25-27 (with amendments to existing text shown in bold type) but the following is a summary:

1. To seek to better explain the use of the phrases "legal aid is likely to be granted" or "legal aid is unlikely to be granted" in the guidance.
2. To give guidance on legal advice and assistance costs assessment in relation to letters and telephone calls.
3. To amend paragraph 5.4 Tribunal Hearing/Preparation in General – Advice & Assistance to refer to the case of R v Legal Aid Board ex parte Higgins as well as to make it clear that costs which arise directly and only as a result of representing the client at a hearing would rarely be allowed and that particular circumstances would be required to justify them.
4. To amend the list of irrecoverable disbursements in relation to legal advice and assistance to include contact centre fees (as well as to indicate that court fees for bailiff service are recoverable).
5. To amend the guidance in relation to emergency certificates in relation to the return of a child to a parent who normally has care of the child and to refer generally to entering into correspondence as a possible option for dealing with an emergency.
6. To amend the Family/Matrimonial – Civil guidance in relation to adoption/freeing for adoption to recognise the position of a birth parent so as to reflect the fact that even where there are no reasonable prospects of success in defending the proceedings it may, in the particular circumstances of the case, nonetheless be appropriate for a parent to be represented.
7. To amend the guidance on Housing – Advice & Assistance so that it reflects the position in relation to homelessness under the Housing Act 1996.

Introduction

1.15 Discretion

The guidance in this document is only rarely expressed in absolute terms. For example, guidance on civil legal aid is generally expressed as "legal aid is likely to be granted" or "legal aid is unlikely to be granted". This is because most of the decisions to be made in exercising the devolved powers are discretionary. **However, the use of these positive and negative phrases indicates the outcome which is likely to be reached and justifiable.** Nonetheless, the particular facts of certain cases may make it justifiable to grant or to refuse even where the guidance suggests that such a decision is unlikely to be justifiable. Each time a franchisee exercises a devolved power they must ensure that the reasons justifying the decision are set out in the subsequent application to the Area Office or on the appropriate form which accompanies the claim for Green Form costs and are clear from the file.

General - Advice & Assistance

- 4.5 The guidelines are given in terms of units and time so that they do not have to be updated with changes in the remuneration rates. They have been calculated by reference to 6 minute units as it is recognised that many solicitors' practices use this recording system. Note, however, that the test for the costs assessor determining a costs claim is whether the work appears to have been reasonably done and the time as claimed (excluding time spent on routine letters and calls) is reasonable. Whilst solicitors may adopt 6 minute units for time recording purposes the determining officer will allow such time as is considered reasonable rather than notional time with reference to units. The guidelines are intended to include any necessary letters and telephone calls but not disbursements. They do not allow for travelling/waiting or a home visit which would have to be justified in any particular case.

Generally, letters written and telephone calls are paid at the routine rate set out in Schedule 6 of the Legal Advice and Assistance Regulations 1989. Where a letter written is substantial in length (more than one page) and content, or where a telephone call is lengthy and of such

substance as to constitute an attendance, then it may be reasonable for the preparation rate to be used. If so the claim should be the actual time spent calculated at the preparation rate.

It is not permissible to claim both the preparation rate and the routine letter or routine telephone rate in respect of the same letter or telephone call.

It should be noted that there is no separate charge for routine letters received. The rate set for routine letters written includes the perusal and consideration of such letters received and therefore no separate charge can be made for such letters.

Where a letter is produced using modern technology, then the routine letter rate should be used (e.g. where details are inserted into a format by the use of a word processor), even where a number of letters using fundamentally the same text are produced on the same file. Time spent inputting information to a word processed document/computer package to generate a letter is not preparation by a fee earner but is akin to typing and is an overhead. To that extent the solicitor gains the benefit of modern technology and he is not expected to dictate or re-draft the text of the letter each time it is used.

Letters are subject to costs assessment in the usual way and where a number of separate letters are produced to deal with matters which could reasonably, conveniently and appropriately have been dealt with in a single letter, then the costs of the additional, subsequent, letters are liable to be disallowed on costs assessment. This also applies to client care letters.

- 5.4.1 The green form does not extend to representation (no matter what the circumstances of the client and/or the case) and where an extension to the costs limit is sought for representation then it must be refused. The definition of "advice" and "assistance" were considered in *R v Legal Aid Board ex parte Higgins* (unreported, QBD, October 15, 1993) when the Divisional Court considered that assistance, as defined, extends to all assistance short of actual representation (i.e. advocacy).

- 5.4.2 Assisting the client in the gathering of evidence may be justified in the particular case. It may also be reasonable for the solicitor to advise the client in relation to conducting the hearing him or herself, including preparing a written submission.
- 5.4.3 **Costs which arise directly and only as a result of representing the client at a hearing, without the help of the Green Form Scheme, would rarely be allowed and it would not be reasonable to meet them in the absence of particular circumstances which would justify them.**
- 5.4.4 **Although costs which arise directly out of representation would not normally be met, work such as preparing a chronology, rationalising documents or preparing a written submission suitable for the client's own use at a hearing can sometimes be justified according to individual circumstances of the particular case.**

- 5.5.2 A non-exhaustive list of recoverable and irrecoverable disbursements appears below (NFG 2-47).

Recoverable Disbursements

- Accident report fees.
- Birth and other certificates.
- Conciliation referral fees to approved services. (See also paragraph 5.5.8).
- Counsel's fees.
- Enquiry agents' and interpreters' fees.
- Experts' fees including for medical reports.
- Newspaper advertisements.
- Fees recoverable on oaths.
- Photographers' accounts.
- Search fees.
- Stamp duties of a nominal amount e.g. the fee paid on a power of attorney.
- Travelling expenses of a solicitor, including a solicitor in the capacity of McKenzie friend.

Irrecoverable Disbursements

- Ad Valorem stamp duties.
- Capital duty.
- Client's travelling and accommodation expenses.

Contact centre fees

- Discharge of debts owed by the client, e.g. rent or mortgage arrears.
- Mortgagees' or lessors' solicitors costs and disbursements.
- Passport fees.
- Fee payable on voluntary petitions in bankruptcy.
- Court fees (unless for a search/photocopies/**bailiff service**).
- Probate fees.

General – Emergencies

2.10.4 All the circumstances of the particular case must be considered but the following are among the factors which will usually fall to be considered in balancing the absence of a means assessment and the urgency of the case:

- a) Unless the nature of the case and the work envisaged is urgent as against the time which a substantive application would be likely to take to process, the test will not be satisfied. For example, an emergency certificate would not be granted for work to be carried out in a period of weeks rather than days, to cover commencing proceedings for a contact order or defending ancillary relief proceedings short of a final hearing. The time limit for applying for leave for judicial review would not of itself justify a grant – this will depend on the remaining time available, the urgency of the case and the time it is likely to take for the ordinary application to be processed.
- b) Unless the significance of the work envisaged and the consequences of not undertaking it are serious the test will not be satisfied. For example, the likely loss of an applicant's liberty, the nature of the particular case, including the real risk of significant harm to mental or physical health, the irretrievable loss of significant evidence (e.g. through destruction, deterioration or repair) or the inability to pursue a claim due to the limitation period would be likely to satisfy the test. A delay in undertaking work which would have lesser consequences would not (e.g. undertaking a particular item of preparation which could be delayed, interviewing

a particular witness who would continue to remain available or **taking proceedings to seek the return of a child to a parent who normally has care of the child where the child is not at significant risk of harm serious enough to justify immediate proceedings**).

- c) Unless no other appropriate options would be available to deal with the emergency the test will not be satisfied. Other options include:
- Seeking an adjournment of a hearing or an extension of time.
 - Dealing with an outstanding matter by way of agreement (e.g. directions by consent between the parties).
 - Dealing with the urgent work in person (with assistance under the green form if appropriate).
 - **Entering into correspondence to seek to resolve the matter.**

Family/Matrimonial – Civil

5.2 Adoption/Freeing for Adoption

5.2.2 Legal aid/ABWOR is unlikely to be granted:

- (a) for proceedings in the County or High Court, if the application is uncontested.
- (b) unless the applicant has reasonable prospects of success in taking/defending the proceedings. The outcome of freeing proceedings will be relevant. **However**, the nature of the proceedings and the desirability of a **birth** parent being represented **may** be sufficient to satisfy the merits test and justify the grant/continuation of representation to a parent. **e.g. in a serial number case or where, given the particular circumstances of the applicant/assisted person, it would not be reasonable for them to put their position in person.**

In the case of applicants for an adoption order, where the prospects of success are not entirely clear the certificate is likely, if granted, to be limited in the first instance to obtaining Counsel's opinion on the merits.

Examples: include applications involving unmarried couples, applications with an immigration aspect and those where contact is likely to be sought after any adoption.

Housing – Advice and Assistance

1.5 Homelessness

1.5.2 Further extensions may be justified if there is a long delay between the notification of homelessness to the local housing authority and their **decision in writing. Negotiations and investigations can continue during this period. The housing authority will make an inquiry into the applicant's homelessness, or threatened homelessness, in order to satisfy themselves whether he is eligible for advice and assistance. If so, a decision must then be taken whether any duty, and if so, what duty is owed under the Housing Act 1996. The decision of the local housing authority on both eligibility and the duty to provide accommodation must be communicated in a formal letter. It is a requirement of the Housing Act that a decision is made, reasons given and that the applicant is notified of his right of review** of that decision. A delay in the making of the decision would probably indicate difficulties and the solicitor may need to obtain copies of all the information available to the housing authority, and to consider this information with the client. The information would be contained in the housing authority file and would include correspondence and the handwritten interview notes. An extension of up to **20 units** (2 hours) may be justified in these circumstances.

1.5.3 **If the decision of the housing authority is that the applicant is not eligible, or that the housing authority has no duty to provide accommodation, the solicitor will have to consider the reasons given in the decision letter, and the information in the housing authority file in order to decide whether an application for internal review should be made.** If there is an internal appeal system, this must be followed before any proceedings are commenced. A further extension of up to **20 units** (2 hours) must be justified to advise and assist a client in relation to an internal appeal. If the internal appeal is unsuccessful or considered to be inappropriate, a further extension of **5 units** (30 minutes) may be justified to submit an application for **legal aid, either to judicially review the decision or to appeal from it in the County Court.**

Proposed Payment Dates

There are two payment dates for solicitors and counsel each month. The proposed payment dates for the second six months of the 1998/99 financial year are set out below. These dates may be subject to amendment, but we will inform you of changes in advance where possible.

If you are paid by BACS (Bank Automated Clearing System) the proposed payment date shown is the date on which you will receive a payment in your bank. For some smaller banks the BACS credit may appear a day later. The proposed payment date will also be the date by which the last of the cheque/remittance advices are despatched from the Financial Services Settlement section. Remittance advices are despatched using DX or first class post.

If you are still being paid by cheque, we recommend that you change to BACS, which is a more efficient payment method. With BACS, the payment is made directly into your bank account avoiding cheque-handling and you also receive a remittance advice. BACS provides immediately cleared funds, unlike cheques which can take four to six days to clear. If you have any queries about payment by BACS, please telephone the Master Index section on 0171 813 8625.

Details of the amount due to you may be obtained by contacting either the area office or the Solicitors/Counsel Settlement section on 0171 813 8625. However, if you have a query regarding an individual item shown on a remittance advice, you should contact the relevant area office, which authorises and processes all such bills.

Keeping us up to date

Names, addresses, DX, fax and telephone numbers and bank details for BACS payments are held on the Board's Master Index database. Please send any relevant changes relating to your firm or chambers to the Master Index section at 85 Gray's Inn Road, London, WC1X 8AA, or at DX 328 London.

Proposed Payment Dates for October 1998 - March 1999

First Payment of the Month	Second Payment of Month
Tuesday, 13 October 1998	Wednesday, 28 October 1998
Thursday, 12 November 1998	Monday, 30 November 1998
Monday, 14 December 1998	Thursday, 24 December 1998
Wednesday, 13 January 1999	Thursday, 28 January 1999
Monday, 15 February 1999	Friday, 26 February 1999
Monday, 15 March 1999	Monday, 29 March 1999

Additional copies of Focus can be obtained from Sophia Swithern. Please write to the Press and Publications Office, Legal Aid Head Office, 85 Gray's Inn Road, London WC1X 8AA or DX 450 London.

