FOCUS

TWENTY FIFTH ISSUE DECEMBER '98

Legal Aid Board

Legal Aid – The Future

On 7 December, the Lord Chancellor announced that the deadline would be extended for solicitors' legal aid franchise applications for advice and assistance work. The deadline has been moved from 31 December 1998 to 31 March 1999. Accordingly, the last date to pass a franchise preliminary audit in order to be considered for a private practice contract in year 1 has changed from 1 July 1999 to 1 August 1999. We do not anticipate any other changes to the timetable. The bid panel closing date of 31 January 1999 remains the same.

On 2 December the Government published its White Paper 'Modernising Justice' setting out its plans for reforming legal services and the courts. It has also published its 'Access to Justice' Bill which will start its progress through Parliament immediately. I would like to take this opportunity to tell you about the main changes affecting us all.

We at the Board welcome the Government's White Paper, and the Bill which are designed to enable us to take forward many of the initiatives that we have developed over the last few years. The Legal Aid Board was created by the 1988 Legal Aid Act and we are to be replaced by a Legal Services Commission. Under our new name, we will have a key role in delivering the Government's community legal service which was a key commitment in the Labour Party's pre-election manifesto.

The Government's proposals for the Community Legal Service (CLS) are based on a practical and pragmatic analysis of what currently happens. The Legal Aid Board is a major funder of services in the civil field. In terms of public funding it is, to all intents and purposes, the monopoly funder of the private practising legal profession. Increasingly over the past two years it has been paying for work in the advice sector as well. However, there are other major funders of the advice sector, mainly local authorities and various charities.

Steve Orchard, Chief Executive of the Legal Aid Board

The Government has recognised that all this funding should be sensibly co-ordinated and used to target the real need for legal services. Accordingly, the Regional Legal Services Committees, set up by the Board to enable the targeting of legal aid funds will have a wider remit. They will work with local authorities and other funders to identify and use common indicators of legal need and ensure that services funded by the new Legal Services Commission complement other funding arrangements.

The Legal Services Commission will "own" a CLS kitemark. Any organisation having a contract with the Commission will be able to describe itself as a member of the CLS. However, there will be many organisations not funded by the Commission that will wish to be part of the CLS and the Government has set up a task force to agree the quality criteria such organisations should meet.

In considering this, the task force will take account of all the existing accreditation systems. Probably the best known is franchising, the Legal Aid Board's quality assurance scheme. Until now, franchising has been subject specific in that it has related to particular categories of law. For the purposes of subject specific contracts to be let by the new Legal Services Commission this approach will continue. However, the Legal Aid Board has already recognised that not all legal work can be covered by category specific franchises. That is why it has launched its proposals for a "generic" franchise which can be adapted to any category of law or, indeed, any legal work carried out by any organisation.

Legal Aid

The Government's announcement emphasises the crucial role to be carried out by the Regional Legal Services Committees. Those Committees have been operating for some time now and have produced drafts of strategic plans that are currently open for consultation. The first round of consultation ends in the new year, as the Committees must report to the Board in February with their recommendations about priorities for the first round of exclusive contracts, which will start on 1 January 2000. I have been disappointed by the lack of awareness among practitioners of the Regional Legal Service Committees and their role. It is essential, in my view, that anyone with an interest in legal aid should, at least, be on the RLSC network. If you are not on the network then you can join by simply writing to the RLSC Advisor at your local area office.

Eventually, the CLS will encompass the whole of civil legal aid. As you are aware, matrimonial and family certificated legal aid will be delivered exclusively under contracts from 1 January 2000. In his evidence to the Home Affairs Select Committee last month, the Lord Chancellor said that the whole of the remainder of civil legal aid will be brought under exclusive contracts by 1 April 2001.

The Government announced in the White Paper that the current civil merits test will be replaced by a funding code. This will be much more flexible and be able to take the availability of resources into account when individual decisions on the grant or refusal of legal aid are made. The Board has been working closely with the Government to draft the funding code and we understand that the Government will publish a draft for consultation while the Bill is going through Parliament.

The Government also set out its intention to replace criminal legal aid with a Criminal Defence Service (CDS). Criminal defence services will be delivered overwhelmingly by solicitors in private practice. However, the Government will also take power to employ lawyers to deliver criminal defence services directly. You may be aware that in Scotland the Government has just started a pilot involving directly employed lawyers and, no doubt, it will be watching the results of that pilot closely.

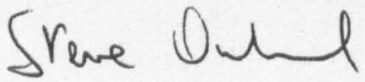
Another major element of the announcement about criminal legal aid was the proposed abolition of means assessment before the grant of criminal legal aid. Instead, Crown Court Judges will have power, where a defendant has been found guilty, to order an investigation into the guilty defendant's ability to contribute towards defence costs. The Board's Special Investigations Unit has been conducting investigations into the means of some applicants for criminal legal aid for some time now. That experience and expertise will be available for use by the Crown Court.

In the immediate future the Board will develop plans that will further the Government's overall objectives and assist the new Legal Services Commission. We are publishing a consultation paper that will bring about significantly greater market share in criminal work for firms with criminal franchises. We will also seek greater flexibility for franchised firms to enable them to deploy resources in a more efficient and effective manner. We expect those changes to be brought about in the Spring of 1999.

The Lord Chancellor has also asked us to prepare plans for the contracting of very high cost criminal cases. The Board is setting up a special team to concentrate on this. We hope to let some contracts before the Access to Justice Bill receives royal assent. We will use these early contracts to produce more refined contracts for the future and to develop our expertise in this new area of work.

The message that emerges from the White Paper is clear. The Government is determined to control the cost of legal aid. Within a controlled budget it wants to expand and develop the services that can be delivered. New methods of delivery are to be encouraged and financial eligibility for advice and assistance is to be increased. The needs of the client are to come first.

These are times of major change both for the Board and for the profession. I am sure that as we move towards implementation of the reforms and as the practical effects of them become understood, there will be growing support for the objectives and for the effects of the changes. We at the Board look forward to the challenges all this brings and to working with you to make them effective.



Steve Orchard
Chief Executive of the Legal Aid Board

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Advice and Assistance

Moving towards exclusive contracting

Another major step in the transition to delivering the entire legal aid scheme through contracts was taken in November when the Legal Aid Board published, for consultation, draft contract documents for the exclusive contracting of the civil advice and assistance scheme and certificated legal aid in family and matrimonial matters.

The draft documents include the rules for contract bidding, decision making and review, the contract work schedule and standard terms.

Exclusive contracting will ensure that all civil advice and assistance is available through organisations which have a contract with the Legal Aid Board. Family and matrimonial legal aid will also be delivered exclusively through contracted suppliers. The Board spent £163 million on civil advice and assistance and £411 million on family work in 1997/98.

The Lord Chancellor has asked the Board to introduce exclusive contracting by 1 January 2000.

The Board will contract with organisations provided that they meet the quality assurance standard required to obtain a franchise. At present some 2,500 solicitors' offices and advice agencies hold franchises, and applications from approximately 1,000 more are being processed.

Invitations to bid for contracts will only be sent to organisations which are on the Board's bid panel. Organisations must apply to be on the bid panel by 31 January 1999 if they want to be eligible to apply for a contract starting in January 2000. The Board invited applications to join the bid panel, from the end of November 1998.

To remain on the bid panel for a particular category of law, organisations will need either to be franchised in that category or to have made a franchise application by 31 March 1999 and passed a preliminary audit against the Board's quality assurance standard by 1 August 1999. For the avoidance of doubt, the date of receipt of a franchise application is the date when an application, properly completed on the Board's form and accompanied by all the necessary supporting documents, is received in the relevant area office.

The Legal Aid Board's 13 Regional Legal Services Committees (RLSCs), will produce regional strategies and advise the Board on levels of need for advice and assistance in particular categories of law and where they think contracts should be let.

Copies of the draft contract documents have been sent to all legal aid franchisees and franchise applicants. Copies may also be obtained from the Board's area offices or from the Exclusive Contracting Team, 6th Floor, 29-37 Red Lion Street, London, WC1R 4PP, (DX 170 London/Chancery Lane). Comments on the documents, published in November, should be sent to the Board by the end of January 1999. Copies of the existing not-for-profit contract are available from area offices.

Not-for-Profit (NFP) Organisations and Exclusive Contracting

The Board's timetable for the introduction of exclusive contracting for advice and assistance was published in the last edition of Focus (p.3, Issue 24, September 1998), (please see the table at the end of this piece which reflects the change referred to at the opening of this edition of Focus). Organisations from the not-for-profit (NFP) sector have asked us to clarify the position in relation to contract applications in an exclusively contracted scheme. The Lord Chancellor has now made his decision on the nature and amount of a reserve fund for contracting in the NFP sector and we can therefore set out the appropriate timetable for organisations in the not-for-profit sector seeking to apply for a NFP contract.

NFP organisations will operate under the contracts which have already been agreed with the Advice Services Alliance (ASA) and the advice networks for the block contracting pilot. The first contracts under these arrangements were let in July 1997. Therefore, the new contracts which will apply to private practice solicitors (on which the Board is currently consulting) will ***not*** apply to NFP organisations, ***except*** in specific circumstances (see below).

In our consultation paper *(Reforming the Civil Advice and Assistance Scheme,* April 1998) we suggested that a separate sum should be specified within the controlled budget and reserved for the purposes of letting NFP contracts alone. The Lord Chancellor has confirmed that NFP organisations should have a reserve fund of £20 million set aside specifically for contracting with organisations from the sector. This is a funding floor not a funding limit.

Contracts will be let for specified regions known as **bid zones**. These regions will be agreed through the Regional Legal Services Committees (RLSCs) to reflect sensible geographical areas for contracting purposes. There will be an opportunity to comment on the appropriateness of these zones through the RLSC consultation process. The zones will vary in size across the legal aid areas. Clients will be able to choose any suitable contracted organisation.

In order to be invited to apply for a contract, organisations will need to apply to join the bid panel by a specified date. Organisations which already have contracts will be placed automatically on the bid panel for the relevant bid zone. Where relevant, area offices will discuss the contract renewal position with these organisations individually. In due course, contract end-dates will be synchronised by extension.

Solicitor agencies, such as Law Centres, must have decided to opt to apply ***either*** for an NFP contract, ***or*** to join the bid panel with private practice solicitors and operate under the private practice contract.

If they opt to operate under the private practice contract then they will be treated as a private practice office and must meet all the same requirements and deadlines – this now means that non-franchised solicitor agencies would need to be on the bid panel and submit an application for a franchise by **31 March 1999** in order to be considered for a private practice type contract in the first year of exclusive contracting.

As the Lord Chancellor has confirmed the reserve fund for contracting with organisations from the not-for-profit sector, a separate initial timetable will apply to organisations applying for an NFP contract. The timetable which will apply in the first round of contracting is set out below. It sets out the key dates for both private practice and NFP contracting.

For solicitor and non-solicitor NFP organisations operating under the NFP contract, the application to join the bid panel will operate similarly to the NFP statement of intent round in previous years. This application will need to be received by 31 January 1999. Those meeting the initial requirements (i.e. normally having been established for at least 3 years, having stable core funding, and being able to establish their credibility probably by being a member of an appropriate network) and applying in relevant categories of work, will be invited to apply for contracts in accordance with the RLSC strategic plan which will be approved for publication in February 1999. Invitations will be issued in March 1999. Organisations interested in applying for contracts will be able to discuss contract priorities in their region at the RLSC consultative conferences prior to the RLSCs reaching formal agreement on their recommendations to the Legal Aid Board. Conferences started in October 1998 and will continue into the new year.

Non-franchised NFP solicitor organisations intending to operate under the current NFP contract will not be required to submit a franchise application by 31 March 1999 in order to remain on the bid panel. The NFP contract arrangements enable non-franchisees to enter a pre-franchise contract for twelve months during which they are expected to reach full compliance with the franchise requirements as well as comply with the contract output requirements in order to qualify for a longer term contract.

The March 1999 invitation to NFPs to apply for a contract will therefore constitute an invitation to apply for a franchise also. The closing date for contract applications will be **31 May 1999**.

Organisations opting to work under the private practice contract will have to demonstrate compliance at their pre-franchise audit during any initial one-year contract. If they are not compliant at that stage they will lose their contract.

After receipt of an application, and provided that the applicant satisfies the requirements at the initial franchise desk top audit, the area office will conduct a preliminary audit by the end of July 1999. All NFP contract applications for the same contract bid zone will be considered together.

In his letter to Sir Tim Chessells, the Chairman of the Legal Aid Board, accepting our report, the Lord Chancellor has said he agrees

> *"...that the £20m should be viewed as a floor and not as a ceiling for contracts allocated to the NFP sector. If agencies are in a position to win more than £20m of work, then they should have the opportunity to do so. If I am not satisfied that sufficient progress is being made by NFP organisations in future years, I may consider increasing the size of the reserve budget."*

All contracts with the advice sector will count towards meeting the £20m floor, including those with solicitor agencies that have opted for a private practice contract. Agencies with contracts that have met the full franchise requirements may apply to increase the size of their contracts if they believe they can contribute towards meeting needs identified in the RLSC final reports.

Queries on this timetable should be addressed to legal aid area offices in the first instance. The area office may then seek advice from legal aid head office as appropriate.

Key Dates

The key dates are set out below. You must meet all the relevant deadlines in order to be eligible for a contract in January 2000.

Private Practice Contract Timetable

31 Jan '99	Last date for receipt of applications to join year 1 contract bid panel (all potential contractors)
Feb '99	RLSC strategic plans approved for publication by Legal Aid Board
31 March '99	Last date to apply for franchise in order to be considered for private practice contract in year 1 of exclusive contracting
May '99	Invitation to apply for private practice contracts in year 1 issued, applications to be received by 30 July 1999
30 July '99	Last date to receive applications for private practice contracts in year 1
1 August '99	Last date to pass franchise preliminary audit in order to be considered for a private practice contract in year 1
Aug '99	Board completes evaluation of private practice and NFP contract applicants against published criteria
Sept '99	Board completes agreement of contracts with all suppliers
Jan 2000	Contract work commences

(and subsequently)

NFP Contract Timetable

31 Jan '99	Last date for receipt of applications to join year 1 contract bid panel (all potential contractors)
Feb '99	RLSC strategic plans approved for publication by Legal Aid Board
Mar '99	Invitation to apply for NFP contracts issued to appropriate NFP bid panel members. Applications to be received by 31 May 1999
31 May '99	Last date for receipt of NFP contract applications
July '99	Board completes franchise preliminary audits for potential NFP contractors
Aug '99	Board completes evaluation of private practice and NFP contract applicants against published criteria
Sept '99	Board completes agreement of contracts with all suppliers
Jan 2000	Contract work commences

(and subsequently)

Some common questions asked about contracting

Advice and assistance (Green Form) exclusive contracting

What does exclusive advice and assistance contracting mean?
From January 2000 you will need to have a contract with the Legal Aid Board in order to give civil advice and assistance (formerly known as the Green Form scheme) under the legal scheme.

Why is exclusive contracting for advice and assistance work being introduced?
It forms part of the Lord Chancellor's plans to control and reform the legal aid scheme and ensure that advice and assistance is delivered solely through quality assured suppliers.

Is exclusive contracting different from block contracting. If so how?
Exclusive contracting will restrict the delivery of legal aid services to organisations which have a franchise or are in the process of getting one, but payments will still be based on an hourly rate and the number of hours worked on the case. Block contracting involves a contract for a set amount of work at an agreed price. The Board is currently researching block contracting but has no specific proposals for its introduction at the moment.

Will exclusive contracting lead to a reduction in the number of suppliers providing a legal aid service?
There is no limit to the number of franchises available. However, a number of suppliers will choose not to apply for a franchise or will be unable to reach the required standard, and this will lead to a reduction in numbers.

If you have a franchise does that guarantee an advice and assistance contract?
We will guarantee contracts to franchisees in: Family/matrimonial, Immigration, Mental health, Crime (tolerance only contracts) see explanation below. We are unable to guarantee contracts in respect of other franchise categories because we do not yet know what Regional Legal Services Committees (RLSCs) will recommend about need for legal services in those categories.

What are Regional Legal Services Committees (RLSCs)?
There are 13 Regional Legal Services Committees based in each of the Legal Aid Board's area offices. RLSCs will advise the Board on the nature and extent of local need for legal services in their geographical areas and how need should be prioritised. RLSCs have been consulting widely over the past few months and have produced draft strategies setting out their recommendations. Once the strategies have been approved they will be used by the Legal Aid Board's area offices to inform their decisions in awarding contracts to ensure need is met in the most appropriate way and in accordance with the priorities set out in the strategies.

Should people get involved with RLSCs ?
It is important that anyone with an interest in legal services provision gets involved. The strategies will inform where and what contracts will be let in a given region. Everyone who provides advice and assistance will be affected by this process. The more information that is given to the RLSCs the better, as this will ensure accurate and informed strategies. Contact the Regional Legal Services Advisor at your local area office.

What is the bid panel and how can you join it?
The Bid Panel is the pool of organisations which the Board will invite to apply for contracts. You can join it by completing the Board's application form and returning it to the Board's Area Office for the area where your office is located.

What are Sections A and B of the Bid Panel? And how do they differ?
Organisations on Section A of the Bid Panel will be invited to apply for contracts starting in January 2000. Organisations must be franchised or in the process of applying for a franchise. In order to join Section A of the Bid Panel, organisations must apply for a franchise in the category(ies) in which they want a contract by 31 March 1999. If we are unable to meet the need for legal services in a Zone from Section A, we may also contract with organisations on Section B of the Bid Panel. These are organisations which have been unable to meet the timetable for Section A, but which have passed a preliminary audit against the franchise standard. Organisations that join section B of the Bid Panel can bid for contracts after 1 January 2000 if they progress towards meeting the new franchise standard. There are slightly different dates for NFP contracts (see page 4).

How will the Board ensure it makes independent decisions when awarding contracts?
The Board has published draft Rules for Bidding, Decision Making and Review which explain the basis on which contracts will be awarded. We believe our approach is transparent, realistic and fair. In the event of disagreement, however, we have proposed a review process which involves representatives from outside the Board.

How will Bid Zones work? Are there restrictions on where your clients live?
The geographical area covered by each of our Area Offices will be broken down into smaller geographical units called Bid Zones. Each Bid Zone will be based on one or more local authority wards and their definition will follow advice from RLSCs. The objective is to define geographical areas smaller than that covered by the area office which reflect how the eligible population accesses legal services. However, a firm will not be limited to serving clients who live in the Bid Zone where its office is located.

What is the "Generic Franchise" for practitioners in non-franchise categories?
The Board recognises that some practitioners specialise in work that is not covered by a franchise category (education and community care, for example). Some such practitioners may not have a franchise in any category of law. In order to address this and to ensure a level of quality, the Board is introducing a Generic Franchise. The generic quality standard will be based on the general principles in LAFQAS (the new franchise standard) but will relate to the specific specialist work undertaken.

What are the "tolerance only" contracts connected with Crime?
These are intended for organisations that have a franchise in criminal work only, or are able to obtain one within the timetable set for Section A of the Bid Panel. The contracts will enable those organisations to do some civil advice and assistance work.

Will you need to have applied for a franchise in crime by 31 March 1999 to continue providing criminal advice and assistance?
No, but the Government has made clear its intention that criminal work will be delivered through contracts by quality assured suppliers based on franchising. Therefore the Board would advise firms intending to provide criminal services under the legal aid scheme to apply for a franchise as soon as possible.

Certificated legal aid

When will contracting for certificated civil legal aid be introduced?
For Family/Matrimonial cases, from January 2000, along with civil advice and assistance. The Lord Chancellor has recently indicated, in his evidence to the House of Commons Home Affairs Committee, that he intends all certificated civil legal aid to be delivered through contracts by April 2001.

What are the main differences between the old and the new franchise standard? Has it changed as a result of consultation?
Please see article on pages 11-13.

New Board Members Appointed

Michael Barnes CBE joins the Board as Chair of the Regional Legal Services Committees based at our Birmingham and Nottingham area offices. He knows the legal services world very well, having served as Legal Services Ombudsman for England and Wales from 1991 to 1997. Michael has a wealth of experience relevant to his new role. Earlier appointments include work as Director of the UK Immigrants Advisory Service, Chairman, Electricity Consumers' Council and eight years as a Member of Parliament. Michael began his career in advertising and marketing. He has considerable experience in the not-for-profit sector including a period as Chair of North Kensington Housing Action Centre and Chair of the Advice Services Alliance. Michael's membership of other public bodies includes five years on the Data Protection Tribunal and six years on the Advertising Standards Authority.

Sheila Hewitt joins the Board as Chair of the Cambridge based Legal Services Committee. She will also become chair of the Brighton RLSC from 1 February 1998. Sheila's appointment is the first of a member from an ethnic background. A graduate of the London School of Economics, her earlier career was in international banking and she is an Associate of the Chartered Institute of Bankers. Following this, Sheila has been serving as a magistrate and is on the London Rent Tribunal and the Immigration Appeals Tribunal. She is a member of the Radio Authority, a statutory body which is responsible for the allocation of licences for independent radio services and the regulation of commercial radio. Until recently Sheila was Chair of the Surrey Heartlands National Health Trust.

Michael Barnes and Sheila Hewitt have taken over chairing roles including those of David Sinker who retired from the Board in November after 10 years service for which he was awarded an OBE in the 1998 New Year's Honours List. David was one of the founder members of the Board, appointed in 1988 during its shadow period before the Board took over statutory responsibility for legal aid. He has served continuously since then. Sir Tim Chessells, Board members, staff and all members of the many Board committees which David has chaired or on which he has served, join in wishing David and his wife Selina well for the future.

Mediation in non-family cases

In a landmark decision on 27 October 1998, the Board ruled that a civil legal aid certificate can cover mediation in non-family cases. Legally aided clients will now have the opportunity to resolve their disputes through mediation, instead of being restricted to litigation and negotiation between lawyers. The decision took effect immediately.

The change was made possible by the growth of mediation and Alternative Dispute Resolution (ADR) encouraged by Lord Woolf and others, which have developed to such an extent that they can now be regarded as part of the normal litigation process. Mediation can therefore be covered by the legal aid scheme.

The decision was made by the Board's Costs Appeals Committee and is detailed in the point of principle on page 19 of this issue of Focus.

Multi-Party Action Solicitors' Panel Launched

The Legal Aid Board is setting up a panel of specialist solicitors to whom preference will be given in the contracting of multi-party actions (MPAs). The Panel will be launched on 1 February 1999 and will help to ensure that tenders are received from those firms best able to conduct MPA work effectively and efficiently.

Panel membership will be restricted to firms of solicitors able to demonstrate experience and expertise in group actions. Panel members will be eligible to tender for any MPA contract offered by the Board, whether or not they have clients in the action.

Criteria for joining the panel include an LAB franchise in any category, recent experience of substantial involvement in coordinating or handling generic work in at least three MPAs and sufficient fee-earning staff and physical resources to handle a moderately sized MPA with 100 plaintiffs.

Interested firms were initially invited to apply for membership of the Panel in the 11 November issue of the Law Society's Gazette. The first group of panel members will be announced in the new year. However, firms will be able to continue to apply for membership of the Panel at any time.

For a list of the full membership criteria and an application form, please write to Freddie Hurlston, Policy Officer, Policy & Legal Department, Legal Aid Board, 85 Gray's Inn Road, London WC1X 8AA.

Do you deal with clinical or medical negligence cases?

...if you do, you need to be aware of the arrangements for exclusive provision of legal aid by franchisees

Since 2 November 1998, practitioners have been able to apply for a Clinical Negligence franchise. In order to be eligible to apply, practitioners must be a member of either the Law Society or AVMA (Action for Victims of Medical Accidents) panel. The Clinical Negligence franchises form the basis for exclusive provision of legal aid in this area of law from 1 February 1999.

Announcing the launch of the franchise category in November, the Lord Chancellor, Lord Irvine said:

> *"People on legal aid who feel they have suffered because of negligence by clinical practitioners must be confident they have genuinely expert legal help and advice on their side. Restricting these cases to a group of highly competent, specialist solicitors will give people the best possible chance of resolving their disputes successfully".*

Below is a guide to the move to exclusive provision for clinical negligence. The information that will be of interest to you depends on who you are and how you work now. For instance, if you are likely to qualify for a Clinical Negligence franchise, you need to be aware of different information from that which will be useful if you simply wish to continue with ongoing cases after 1 February 1999.

The information has been broken down into sections, with headings provided, so that you can more easily identify the information that is useful to you.

General Information

Why 'Clinical'?

The term 'clinical negligence' has been adopted to reflect most accurately the scope of legal aid case types, in that they extend to allegations of negligence by all clinicians, not just those practising in a medical sphere in hospitals. In practical terms the scope of legal aid, and of the franchise category, is no different from that which has been previously defined by the term 'medical negligence'. Where references to 'medical negligence' appear in Legal Aid Board material this should be taken to mean 'clinical negligence' in the same terms.

Timetable

A summary of key dates is provided below. Dates for events shown in shaded boxes are subject to the introduction of necessary regulations and will change if regulations are not in force from 1 February 1999, as scheduled. All other dates are confirmed.

Legal Aid – exclusive provision for clinical negligence (CN)

Date	Event
2 Nov '98	Franchise Application & Information packs available from area offices
31 Jan '99	Last date on which advice & assistance or civil legal aid applications for CN can be made (i.e. signed by the client), by suppliers who are not approved. Approved suppliers are CN franchisees, firms which have passed a CN preliminary audit (and been given a limited contract for the purposes of the regulations), or, until 31 July 1999, Personal Injury (PI) franchisees
1 Feb '99	Date from which CN franchise contracts can be granted
1 Feb '99	Published decision making guidance introduced and applies to all decisions on new and existing clinical negligence cases
1 Feb '99	Introduction of regulations to restrict legal aid for new cases to approved suppliers only in CN cases
19 Feb '99	All CN civil legal aid applications signed by the client prior to 1 February 1999, to be received by area offices
31 July '99	Last date on which PI franchisees have authority to make legal aid applications in new clinical negligence cases
1 Aug '99	Applications for legal aid in new clinical negligence cases restricted to suppliers awarded a CN franchise contract and CN franchise applicants who have passed a preliminary audit and have been provided with a limited contract for the purposes of the regulations.

About approved suppliers

When?

Regulations to bring about exclusivity for CN cases are due to come into force on 1 February 1999, and subject to that, legal aid in new cases will be provided exclusively by approved suppliers from that date.

Who?

For the purposes of the CN regulations, approved suppliers will be:

- Clinical Negligence franchisees.
- Firms (with a panel member) which pass a Clinical Negligence preliminary franchise audit.
- Personal Injury franchisees, but only until 31 July 1999.

The time taken to become an approved supplier may lead to periods in which a legal aid service cannot be provided in new cases. This is illustrated in the examples given below:

E.g. 1. A non-franchisee awarded a Personal Injury franchise on 20 March 1999 will be able to take on new cases up to 31 January 1999 and again between 20 March and 31 July 1999, but not in the period 1 February to 19 March 1999.

E.g. 2. A Personal Injury franchisee awarded a Clinical Negligence franchise contract on 15 August 1999 would be able to take on new clinical negligence cases from the date on which their Personal Injury franchise was awarded up to 31 July 1999 and again from 15 August 1999, but not in the interim period.

Ongoing cases (non-approved suppliers)

Ongoing CN cases will remain with the solicitor who has conduct of the case – whether an approved supplier or not – until the financial limitation is exhausted (for advice & assistance), or until the certificate is discharged/revoked (for civil legal aid).

An ongoing case (either advice & assistance or civil legal aid) is one which was *made* – i.e. an application for advice & assistance or an application for civil legal aid was signed by the client – before 1 February. You should note that the area office will not accept, without good reason, any application for civil legal aid which is *received* from a non-approved supplier after 19 February 1999.

Applications for CN cases made on or after 1 February 1999 will be rejected where the regulations no longer allow legal aid to be provided – i.e. where submitted by a firm which is not an approved supplier.

Decision making guidance for new and ongoing cases

New decision making guidance for CN cases will come into force on 1 February 1999. This will apply to all decisions (to determine new applications or to determine amendments to ongoing certificates) required on or after 1 February 1999. The relevant guidance is included in this issue of Focus, and will be sent to all franchisees as part of their Guidance: Exercise of Devolved Powers manual.

New application and amendment forms to replace the existing APP1 and APP6 forms, will be introduced specifically for use in clinical negligence cases. Copies of the new forms will be available from your supplier from mid-January and should be used for all applications and amendments in clinical negligence cases from 1 February 1999.

Getting a CN franchise

If you wish to continue to provide legal aid in clinical negligence cases after January 1999 (or for Personal Injury franchisees, after July 1999) you need to apply for a clinical negligence franchise. Your starting point should be to contact the Franchise Department in your legal aid area office to request a copy of the clinical negligence application & information pack. This contains background information as well as details about what you will need to demonstrate in order to apply for, and be awarded, a franchise. Practical information about the franchise audit process as well as relevant application forms are also provided.

Advice & Assistance Contracting and Tender Panels

Arrangements for exclusive contracting in civil advice and assistance (green form), from the year 2000, have recently been published. These apply to all areas of civil law *except* clinical negligence. In clinical negligence alone, exclusive provision will be achieved by the introduction of regulations pursuant to s32(7) of the Legal Aid Act 1988. This means that you do not need to apply to be on a tender panel, or bid for work, in order to continue to provide advice and assistance in clinical negligence after 1999.

How will the public know where to go?

Posters and leaflets are being produced to inform the public about the need to see an approved supplier, and to help them, or you on their behalf, to find one. The posters will be displayed in public places such as Citizens' Advice Bureaux and libraries, and will direct people to the Board's free franchise referral telephone line, on 0500 282 300. Information leaflets will also be distributed to all legal aid account holders, so that if you do not offer a clinical negligence service as an approved supplier, you will be able to provide information to enquirers about how to find someone who does.

Any queries please contact Franchising Development Group on 0171-813 1000.

Independent Merits Screening for Clinical Negligence cases

Action for Victims of Medical Accidents (AVMA) will provide independent merits screening reports on decisions made by the Board in clinical negligence cases where legal aid has been refused on merits.

Arnold Simanowitz, chief executive of AVMA, said that the new arrangements, whereby AVMA would have the opportunity to review the merits of cases refused legal aid, "...would strengthen his organisation's position as an independent champion of victims of medical accidents".

Under the new system, AVMA would use their experience of overseeing all types of clinical negligence matters and in some cases will highlight legal merits which they believe may make a claim worth pursuing. This advice will then be available for the Board or area committee to consider on appeal.

In other instances, AVMA's review of legal merits will support the Board's decision not to grant legal aid. Arnold Simanowitz pointed out that such advice, though disappointing to the client, is fairer than "raising unwarranted expectations and causing even greater distress" when legal aid may be discharged, sometimes years later, because the merits of the case are weak.

The Board, in partnership with Clinical Negligence franchisees and AVMA, are keen to ensure that the new arrangements deliver a legal aid system where public funds are appropriately allocated to meritorious claims and that the best possible outcome is achieved for the client at the earliest opportunity.

Guidance on the Supervision of Police Station Representatives

To comply with Regulation 20 of the Legal Aid and Assistance Regulations 1989, before entrusting work to a representative, the solicitor must be satisfied that the representative is competent and responsible and if the representative is not employed under a contract of service with the firm, then he or she must be under the solicitor's immediate supervision (see R-v-Legal Aid Board ex p. Rafina The Times 19 February 1998 and also see Focus 23).

Solicitor and non-solicitor representatives engaged on "own" solicitor cases who provide legal advice and assistance at police stations and who are not under a contract of service with the firm employing them must comply with the following guidelines, failing which the Board may refuse payment of such claims under Regulation 5(2)(a) of the Police Station (Remuneration) Regulations 1989.

i) The "own" solicitor must take the initial telephone call from the police station at which the advice is requested and should then consider whether it is appropriate to delegate conduct of the case to a representative;

ii) The representative must be a solicitor or currently registered on the register of accredited representatives maintained by the Board;

iii) The conducting solicitor must contact the representative directly before the representative attends at the police station;

iv) Before going to the police station, the representative must have the telephone number of the conducting solicitor (including an out of hours number if appropriate);

v) The representative must be able to contact the conducting solicitor (or another solicitor in the same firm with sufficient experience of police station work) in case the representative requires guidance as to how to proceed with the case when advising and assisting at the police station.

vi) A written report on the case must be submitted to the conducting solicitor by the representative once the attendance at the police station has concluded and at the latest by the next working day.

This guidance will come into operation in respect of any police station advice given on or after 1 January 1999. Where a representative to whom this guidance applies has been deployed the Board may ask for evidence that there has been compliance with the guidance.

Clinical Negligence Consultation

In September 1998, the Board issued for consultation draft proposals for dealing with legal aid applications in clinical negligence cases. We received many positive submissions from organisations with an interest in this area of law. They showed almost universal support for the proposal that only specialists should deal with clinical negligence cases. We would like to thank all those who gave us their comments.

As a result of the consultation, some key points of the decision making guidance have changed.

- The draft document proposed that claims with an estimated value of £10,000 would be unlikely to be granted legal aid because the potential costs of the case would be likely to outweigh the probable cost benefit to the client. This figure has now been changed to £5,000. However it is important to note that this is a guide, not an absolute limit and all cases will be considered on their individual merits.
- The proposal that claims should be valued at five times the initial investigation cost has been dropped. Following the consultation, we have come to the conclusion that the prospects of success in the case should be taken into account in deciding an appropriate relationship between likely cost and likely damages. There may be cases where legal aid will be granted where likely damages are the same or only slightly more than the initial investigative costs.

The final legal decision making guidance for clinical negligence cases is published in full on pages 25-31 of this issue of Focus.

CIS

London completes Implementation Plan

The Legal Aid Board successfully implemented the Corporate Information System (CIS) into the London area office, as planned on 18 November 1998. This is the 13th and final area office to go live on CIS.

The implementation programme started with our first pilot office, Nottingham, which went live on 3 November 1997.

We support 1250 CIS users in our offices, who in turn produce 30,000 items of correspondence daily which are collated and sent out via a central point. We now run a fortnightly payment schedule which handles in excess of 200,000 items to the value of around £60m per run. Before being able to move to this processing capacity, we have had to convert in excess of 6 billion items of data from a number of legacy systems onto our Oracle database. The monetary value of the data which has been converted is in excess of £10 billion.

We have maintained system availability for 99.8% of planned time since go live. A remarkable achievement, particularly when considering this was done with a simultaneous and incremental roll out programme. Our Oracle database now allows access to any legal aid case in the country, using discrete password and user identity controls. This access allows us a much greater ability to control and analyse the information we hold particularly in relation to the legal aid history of applicants, details of supplier's completed work and directly supports the work necessary to implement the legal aid reform programme, especially the move to exclusive contracting.

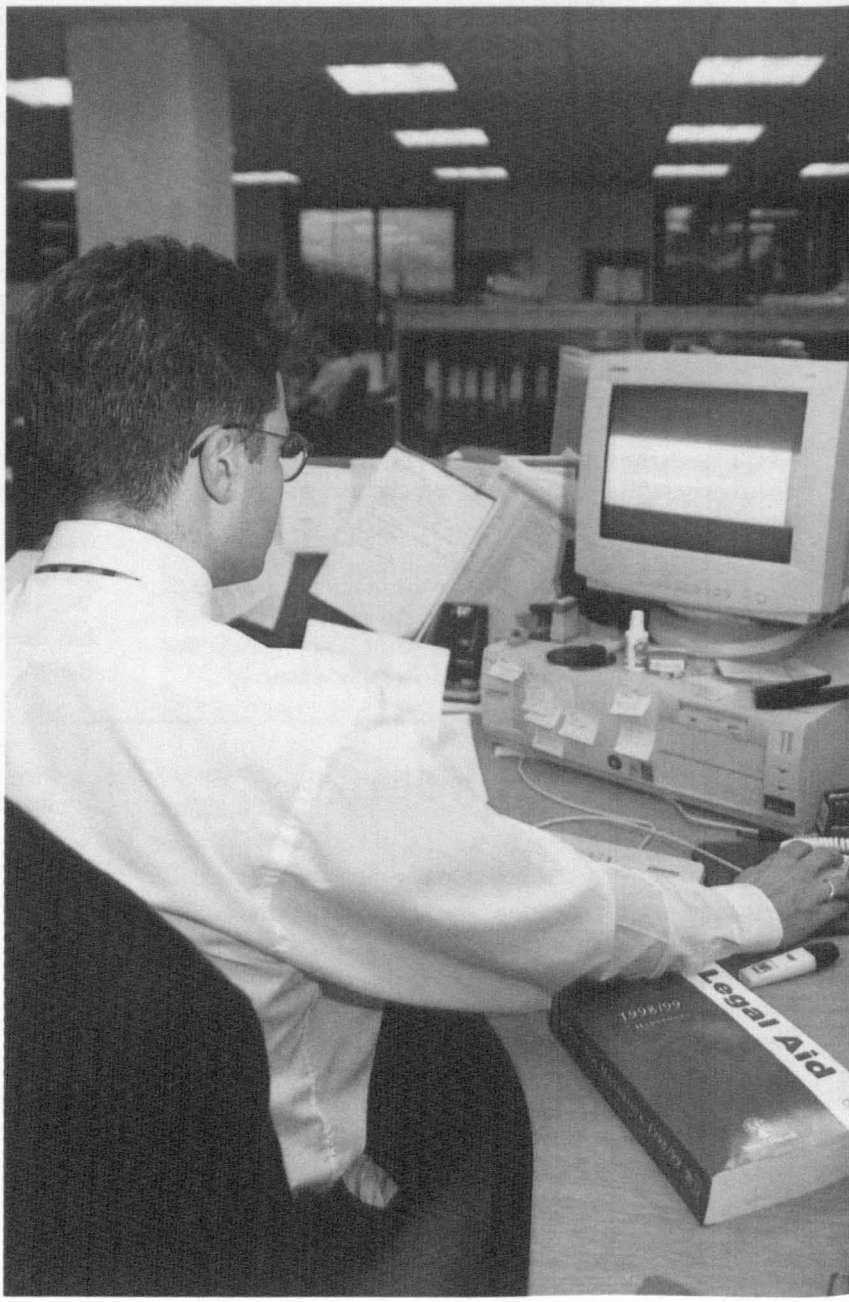
The roll out to each of the 11 offices following Nottingham, has seen us achieve implementation target dates in all cases with approximately eight week intervals. The Board's staff have had to cope with learning to work in a quite different way, whilst experiencing and overcoming the kind of difficulties to be expected with such a massive change in computer systems. It is to their enormous credit that the Board's staff have coped so well with such a major transformation in their working practices.

There have been some isolated and individual cases which have gone wrong and when this has happened, all but a very few cases have been resolved at the area office level. The Board would wish to express its gratitude to all solicitors who have shown great patience in working with us to overcome these problems and sort out those cases affected.

As this article goes to press, London area office is coping well with the work flow and is on track to meet the target of a twelve week recovery period. We would ask London solicitors to show the same level of patience and co-operation with us, in overcoming isolated case difficulties, as that demonstrated in other parts of the country.

London area office will continue to keep the profession informed about the position as we move through the recovery period. In the unlikely event of backlogs building up we will advise the profession as soon as possible.

The Corporate Information System is now in use in all legal aid offices.



New Generic Franchise

Legal aid advice and assistance in areas of law not covered by existing franchise categories will now be covered under a new generic franchise standard. The Legal Aid Board has introduced the new generic standard to ensure that all areas of work covered by legal aid exclusive contracts will be provided by quality assured suppliers (having a franchise is a pre-requisite for a contract).

At present over 85% of legal aid work is covered by existing franchise categories. The new 'generic' franchise covers all additional areas including education, community care, and certain areas of public law child care cases. Organisations will apply for the generic franchise, specifying the area of law to which the standard will apply.

Franchises will be awarded to specialists and niche practices able to demonstrate compliance with the Legal Aid Franchise Quality Assurance Standard, including the nomination of an appropriately qualified supervisor. A separate contracting timetable supports the introduction of the new generic arrangements in February 1999.

Contracts in areas outside the current franchise categories will be let where relevant priority need has been identified.

Applications for the new generic franchise category will be invited in February 1999. However, in order to be eligible for a contract, practitioners must notify their intention to join the bid panel by 31 January 1999. They must have submitted their application for a generic franchise by 31 July 1999. Providers will then need to pass a preliminary audit by December 1999. This timetable applies solely to the generic franchise arrangements.

Supervisors of work under the generic arrangements would need to be nominated individuals who:

- can demonstrate their knowledge, experience and understanding of the specified subject area, normally by reference to previous cases conducted or supervised by them
- have attended relevant learning opportunities, for example courses or conferences
- have attended a course in supervision and are appropriately available to provide support.

The Board is continuing to consult with members of the profession on what constitutes appropriate expertise of the specified niche subject areas.

A small amount of niche practice work could still be delivered by organisations with a contract in any other franchise category. Such work will be subject to the usual quality requirements, including file management, supervision and file review. The individual overseeing the work will also, as usual, have to demonstrate appropriate accessibility, have attended any necessary supervisory training, but will not be required to meet the relevant supervisor qualification for the specific categories covered under the generic franchise arrangements.

Revising the Franchise Standard

We received more than 180 responses from various organisations to our consultation draft of the Legal Aid Franchise Quality Assurance Standard (LAFQAS). These included the Law Society (and a number of local Law Societies), practitioner groups (e.g. The Legal Aid Practitioners Group), the Advice Services Alliance and individual advice networks. There were also comments from a large number of franchised organisations and from a number of practitioners both in private practice and in the not-for-profit sector as well as interested groups such as Essential Rights.

There was overwhelming support for the continued development of the franchising initiative. Where responses expressed concerns, these primarily related to revisions in supervision, financial information and the mandatory use of IT support systems, and the proposed minimum requirements in file review arrangements. Below is a summary of the main issues raised together with our response.

Supervision – There was widespread acknowledgement that a tightening of supervisory qualifications was necessary. However our proposal to enhance and extend the supervisor requirements in the way proposed raised concerns for some organisations. This has prompted us to reassess our approach to how the standards are applied and to ensure that the documentation supporting the requirements is simplified. The arrangements will be capable of supporting effective supervision of caseworkers working across a number of categories or in a multi-office environment, and the specialist departmental approach adopted in some larger firms.

- Supervisors will need to be named individuals to whom there is reasonable access. Conditions placed on any practising certificate will be taken into account in looking at the suitability of the individual to supervise.

- Suitability for supervision will be demonstrated by a combination of panel membership requirements, self-certification against revised specified criteria and the justification of relevant experience during interview. By exception, the Board will work with individuals who are developing portfolio evidence of competence.
- Supervisors must either maintain a caseload of their own or be able to demonstrate that they qualify on the basis of direct supervision or involvement in a number of cases relevant to the category. The scope of experience of case handling necessary to demonstrate competence to supervise will be simplified to reflect core mandatory areas of law. Some categories will have optional elements within specific areas.
- Where panel membership is the required supervisor standard, individuals will only be allowed to use the portfolio route of qualification by exception and progress towards meeting the panel criteria must be planned. Inclusion on the Children panel will qualify a fee earner as a supervisor within the Matrimonial and Family category.
- There will be some discretion in applying the length of experience criteria to supervisors. For instance, where a fee earner works full time in the category this may reduce the length of time required to achieve the necessary level of experience.
- Maintaining knowledge will be based on demonstrating appropriate attendance at events, CPD accredited courses etc. in the areas which the individual will supervise. The requirement for events to last a minimum of three hours will be withdrawn.
- Training in supervision will be an alternative measure for those who do not have experience in undertaking the supervision of caseworkers. LPC requirements to attend management courses within specified periods of time will be sufficient to illustrate attendance on a supervision course. We are working with the Law Society on the identification of key areas in which the individual will need to have received training or in which they need to be able to demonstrate that they exercise effective overall control.

Financial information – most respondents agreed with the need to move towards maintaining financial information that would enable organisations to gain better control of case costs. The majority of responses also acknowledged the importance of having appropriate IT systems to maintain and monitor the information. There were a considerable number of requests for guidance as to what an appropriate system would be. Concern was expressed at the speed with which compliance would be sought. Some smaller organisations felt that where manual systems could meet the standard this should be sufficient. A number of steps forward are to be taken as a result.

- With sufficient spreadsheet skills, it is possible to meet our requirements without purchasing a bespoke system. The Board will produce a user specification (by January 1999) to assist organisations in discussing their IT requirements with a software supplier where organisations wish to invest in the purchase of IT equipment. The Board is currently working with the Law Society to identify compliant products that will deliver the appropriate requirements.
- The timetable for implementation of IT systems requires compliance by 1st August 2000. Organisations must be able to demonstrate that they have an implementation plan that will ensure the necessary system is effective from that date.
- Some of the financial requirements may benefit from further clarification. Financial information must be capable of:
  - identifying overhead costs – these do not need to be apportioned on a case by case basis;
  - calculating work in progress including disbursements;
  - analysing average case costs by matter type (areas of law such as employment, housing etc.);
  - quarterly analysis of changes in average cost;
  - confirmation from an independent accountant that the organisation has audited accounts.

Within a contracted regime, organisations will need to be able to identify cases that exceed specific category limits for contracts (£1000 for Immigration and £500 for the other areas of law). This contract requirement may best be met with technological support.

File review arrangements were revised in line with earlier requests from practitioners to set prescribed volumes for review. Consultation responses suggested that these were unnecessarily restrictive. As a result, volume requirements will be revised and included in guidance together with reference to more commonly accepted file review systems.

- Organisations will need to justify the volume and frequency of file review to their account managers. Arrangements must ensure that files from each category are reviewed. Under contracting arrangements, all advice and assistance legal aid files will need to be included in the sample for review as all work under the contract will need to be done to the franchising standard.

As a result of the consultation exercise, we have made a number of other changes that will be reflected in the final standard. In brief, the main changes include:

- deleting the requirement to evidence consideration of the need for welfare benefits advice other than where a need arises;
- additional text to make it clear that the Board retains its current right not to grant franchises whilst an outstanding matter is still under investigation;
- changing our requirements so that appraisal of partners who supervise or undertake work in legal

aid will be mandatory. The requirement will not be mandatory for senior partners;

- removing the need to include a file with devolved powers within file review and deleting the requirement for a central record of devolved powers;
- changing the basis for cost estimates in advice and assistance cases to require an estimate at the outset of the advice and assistance case to be given where the solicitor's charge may or will apply. We have removed the requirement to give cost estimates on the extension of advice and assistance. Related changes to updating costs have been reflected. A separate section deals with the cost information to clients;
- removing the requirement to undertake a client questionnaire. We have made mandatory the recording of all complaints received rather than limiting this to formal complaints dealt with by someone other than the caseworker;
- adding in the requirement that organisations have recent copies of FOCUS within their relevant legal aid material.

Concerns were raised about the timetable for implementation of the new standard and there was evidence from some responses that there was confusion as to the transitional auditing arrangements. To clarify: existing franchisees will be required to demonstrate compliance with the standard from 1 August 1999 and will need to have a plan to implement appropriate IT. To assist in making any necessary changes, the Board will identify changes that will need to be made in order to be compliant with the revised standard at audits conducted with existing franchisees between January and July 1999. Existing franchisees will automatically have the relevant standard terms extended for a period of a further three years through to 31 July 2002. For organisations that are not yet franchised, the Board will audit against the revised standard from 1 January 1999. Where non-compliances are raised against the additional requirements, the organisation will be given time to take corrective action to meet the standard.

The initiative to produce separate versions of the standard was particularly welcomed by the advice sector. The versions reflect the different quality drivers within the two sectors and express the standard in language that is more appropriately tailored to each of them.

The final version of LAFQAS for law firms will be available from early December 1998. We have published an interim document explaining how key requirements will be applied within the NFP context. The final version for use by not-for-profit organisations will be available in January 1999.

Time and resources have precluded our responding individually to all those who commented on the consultation draft. The quality of responses that we received added considerable value to the consultation process. The Board wishes to thank all those who responded.

Devolved Powers Granted Automatically

Organisations will receive devolved powers immediately upon the grant of a franchise from 1 January 1999. The only exception to this is where previous performance trends were considered unsatisfactory. For existing franchisees, arrangements are in place to extend their current devolved powers from the same date.

The Legal Aid Quality Assurance Franchise Standard makes it mandatory for organisations to use their devolved powers except in particularly complex circumstances.

To complement the extension of the existing arrangements, the Board has produced an information pack which identifies the key points to assist practitioners in applying their devolved powers. Copies will be sent to holders of the Guidance: Exercise of Devolved Powers.

Additional copies of the information pack ('GEDP Trainers' Resource Pack'), priced at approximately £15, can be ordered by writing to
Denise Flindall,
Business Support Unit,
12 Roger Street, London WC1N 2JL.

Please include details of how many you are ordering, your name, firm name, address (DX where applicable) and telephone number.

Regional Legal Services Consultation Meetings

Consultation meetings which will guide the development of the legal aid system in the new millennium have been taking place across the country.

Over 50 meetings organised in the 13 Legal Aid Board areas will have given solicitors, representatives of the not-for-profit sector, local government and a wide range of consumers' groups the chance to have their say on the draft strategies that will inform exclusive contracting in their region.

In light of the views expressed during the consultation, the draft strategies will be amended then submitted in early 1999 to the Legal Aid Board for approval and for publication.

On the basis of each approved regional strategy, area managers will award contracts for civil advice and assistance in late 1999. Work under contract is scheduled to begin on 1 January, 2000.

Regional Legal Services Committees (RLSCs), who have organised the consultations in each area, reported that by the middle of November the process was generating constructive input from interested parties. Delegates at the consultation meetings were keen to play their part in ensuring that draft strategies accurately reflected local patterns of supply and demand for legal aid and to contribute both positive feedback and constructive criticism.

The Southern Legal Services Committee (SLSC), based in Reading, was the first to complete its round of consultation conferences with the last of five meetings at the end of October. More than 500 copies of the SLSC draft strategy have been issued on request to interested organisations and individuals.

Half-day conferences were held in Bournemouth, Portsmouth, Reading, Buckingham and Oxford, where delegates met face-to-face with the members of the SLSC responsible for the production of the strategy. Delegates took the opportunity to discuss the strategy, validate its contents and add further information.

Southern Legal Services Adviser, Rachael Naylor, said:

> *"Delegates and committee members alike were very positive about the outcome of the conferences. A significant amount of useful additional information has been provided for the SLSC to work with. However, delegates were generally happy that the majority of conclusions drawn in the strategy are correct."*

The Leeds-based North Eastern Legal Services Committee (NELSC) began its round of consultation conferences with a meeting for the East Yorkshire region in Hull at the beginning of November. Over 30 delegates from Hull and the East Riding of Yorkshire joined NELSC committee members and representatives from the Legal Aid Board area office.

Delegates discussed their own local areas in detail in syndicate groups chaired by NELSC members and the RLSA. Issues emerging from the groups included the limited provision of legal services in rural areas and the high number of child care cases in the Hull area.

Lorraine Jackson, North Eastern Legal Services Adviser, said:

> *"Everyone who attended agreed that they had gained useful information from the day and felt that they had contributed to better informing the Committee's knowledge of the area."*

The South Eastern Legal Services Committee (SELSC), based in Brighton, has held a number of events around the region to discuss the need for specific legal services, including provision in the categories of employment and immigration. In addition there were events which concentrated on issues of access to legal services and the specific difficulties experienced by rural residents.

While the number of delegates attending the eight events varied, and on some occasions a larger turnout would have been beneficial, the quality of the discussions was high and all the meetings provided helpful input to the Committee's understanding of local need. Key to the success of the meetings was the wide range of backgrounds of delegates, which included legal aid users, local authority officers, consumer groups and providers from both private practice and the not-for-profit sector.

Marisol Smith, South Eastern Legal Services Adviser, said:

> *"There was tremendous interest in the work of the committee and the meetings proved invaluable to the preparation of the draft regional strategy. By talking with users and providers, the Committee gained insight into local needs which would have been difficult to identify using other means."*

She also pointed out that the benefits of the meetings were not restricted to the Committee. Delegates commented that a useful by-product of the events was the contact established between users and providers of services.

The West Midlands Legal Services Committee held three conferences in the first week of December, in Leamington, Malvern and Birmingham. Bernadette Jackson, the West Midlands Legal Services Advisor, was very pleased with the high level of interest in the draft strategy that has been shown in this region.

The Committees, each chaired by a member of the Legal Aid Board, are keen that all interested parties should join their local network and get involved. This is your chance to contribute to the future provision of legal aid in your area. Don't miss out – contact your RLSA at your local area office.

Researching Reform

Notes from a conference organised by the Legal Aid Board Research Unit and the Institute of Advanced Legal Studies

The Legal Aid Board Research Unit (LABRU) held its second annual research conference on 29th October at the Institute of Advanced Legal Studies. Papers were given by representatives from all the research teams currently funded by the Legal Aid Board.

The primary goal was for the researchers to meet, and hear about other projects which make up the Board's programme of strategic research. Pascoe Pleasence (head of the Unit) introduced the day and chaired the first session: "Family Justice: Extending the Boundaries". Papers were given by Professor Gwynn Davis (University of Bristol) and Patten Smith (Social and Community Planning Research) on researching Publicly Funded Family Mediation and by Sarah Maclean (LABRU) on the Family Case Profiling Study.

A second session included papers by Alexy Buck (LABRU): "Assessing Means Assessment" and Jane Steele (Public Management Foundation) and John Seargeant (Independent Researcher) on "Access to Legal Services: The Contribution of Alternative Approaches".

The final session looked at evaluating advice and assistance contracting, including Lee Bridges (University of Warwick) and Ed Cape (University of the West of England) talking about criminal contracting, and Lisa Webley and Richard Moorhead (both from the Institute of Advanced Legal Studies) presenting work from the civil non-family project.

The conference provided a forum within which a wealth of information was presented and discussed. The most important aspect of the day was the opportunity it provided for the researchers to learn about each others' work. The programme of research projects clearly illustrated the focused nature of the Board's practical approach to evaluating, monitoring and researching reform.

The Legal Aid Board Research Unit.

Developing the Duty Solicitor arrangements

The Board is publishing a consultation paper which seeks views on proposed developments to the duty solicitor arrangements. The consultation paper

- puts the proposals into the context of the Lord Chancellor's plans for the reform of legal aid, in particular the Legal Aid Board's current pilots and the development of the existing quality assurance and accreditation mechanisms
- proposes the introduction of new incentives for franchisees within the duty solicitor schemes and for some consequential changes to management arrangements. The main purpose of the proposals is to provide significant new benefits to firms which hold a criminal franchise. Our intention in doing so is to provide a further major impetus to the development of franchising in the criminal category of work
- seeks views on the development of a single standard of accreditation for all those providing custodial legal advice, whether as duty or own solicitors or as representatives.

The consultation paper is being sent to all duty solicitors and firms holding a criminal franchise.

Additional copies of the consultation paper can be obtained by telephoning Robert Heard on **0171 813 1000** extension 8524.

We would welcome any views and comments on the proposals.

Responses to the paper should be sent to Richard Collins, Head of Criminal Services, Legal Aid Board, 85 Gray's Inn Road, London WC1X 8AA by 8 February 1999.

Youth Court Pilot

The White Paper, 'No More Excuses – A New Approach to Tackling Youth Crime in England and Wales', proposed that legal aid in the youth court should be available only through selected solicitors able to demonstrate appropriate skills and attributes. It further suggested that these services be delivered through contracts.

In order to provide the information necessary to develop and implement such arrangements, the Board is to commence a new pilot project, to start in January 1999. The objective of the pilot will be to gather information from firms of solicitors on their organisation of youth defence services and examine possible standards for quality assurance in relation to such work. The pilot will be the subject of research to be led by Professor Lee Bridges of the University of Warwick.

The youth court pilot will be introduced as an extension to the current criminal advice and assistance pilot for those firms which choose to participate and which conduct a significant volume of business in the youth court. So far, 56 of the 68 firms participating in the advice and assistance pilot have expressed interest in joining the youth court pilot. This represents close to 100% of those eligible to participate.

Crime and Disorder Act 1998

Abolition of Committal Proceedings for Indictable Only Offences (Narey Pilot Areas)

Section 51 of the Crime and Disorder Act 1998 abolishes committal proceedings for indictable only offences which in future will be "sent" to the Crown Court for trial. This change will be piloted in the Narey Pilot Court areas only for 12 months from 4 January 1999.

In Pilot Court areas, legal aid area offices will no longer be responsible for assessing and paying solicitors' claims for costs when an indictable only offence (and any related offences and/or defendants) are "sent" to the Crown Court. Changes to the criminal legal aid regulations will be made so that the Crown Court will become the determining authority responsible for assessing and paying the entire claim for work undertaken in both the magistrates' court and the Crown Court. The magistrates' court element of the claim will be assessed applying the appropriate magistrates' court prescribed rates. Work undertaken in the Crown Court will be assessed in accordance with the usual Crown Court hourly rates. The determining officer will assess whether the total amount falls within the Crown Court standard fee scheme in which case either a lower or principal Crown Court standard fee will be allowed. If the claim does not fall within the scope of the Crown Court standard fee then the entire bill will be assessed on the basis of the appropriate magistrates' court and Crown Court hourly prescribed rates.

Practitioners will be required to submit a single claim on the appropriate Crown Court form to the relevant Crown Court centre for payment at the conclusion of the case. Area offices will reject all claims for cases which involve an indictable only case (and any related offences and/or defendants) "sent" for trial to the Crown Court by a Narey Pilot Court.

Where the Crown Court determining officer reduces or disallows a claim for work undertaken in the magistrates' court a right of appeal arises to the taxing master in accordance with Regulation 15 of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989.

There is a further right of appeal on a point of principle to the High Court under Regulation 16. The legal aid area committee will not determine appeals in these cases.

If a case is "sent" to the Crown Court for trial but is subsequently remitted back to the magistrates' court, for instance, where the charge is reduced, then the Board will continue to assess and pay the claim for work undertaken after the case was remitted back to the magistrates' court. A separate claim should be submitted to the Board for this work on form CLAIM 7 or CLAIM 8. This will be assessed according to the usual principles i.e. the magistrates' court standard fee scheme or ex post facto where appropriate. The Crown Court will determine the remainder of the bill.

Regulation 4E of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 will be amended so that franchisees will not be entitled to claim an interim payment from the Board where a criminal legal aid order is granted for an indictable only offence (and any related offences) "sent" for trial. This is because the Board will not be able to recoup payments on account as we will no longer be responsible for determining the final bill.

Sex Offender Orders

These new orders under Section 2 of the Crime and Disorder Act 1998 were introduced nationally from 1 December 1998. They will be made in civil proceedings in the magistrates' court which will be initiated by way of complaint by the police.

Legal advice and assistance is available if the financial eligibility criteria are satisfied. The scope of the duty solicitor scheme has been extended to enable a duty solicitor to provide advice, assistance and representation where appropriate in these cases. A presumption will operate that the duty solicitor will generally be able to provide the degree of representation necessary. ABWOR may be granted by the Board if no duty solicitor is available or if the matter is unsuitable for the duty solicitor, e.g. due to its complexity or estimated hearing time. ABWOR may also be granted to cover representation on an application to vary or discharge an order. An application for ABWOR should be made on Form APP4. The usual ABWOR financial eligibility criteria will apply.

The ABWOR merits test consists of two limbs under Regulation 22(6A) of the Legal Advice and Assistance

Regulations 1989 (as amended). ABWOR may be refused where:-

a) it appears unreasonable that approval should be granted in the particular circumstances of the case, e.g. if a duty solicitor is available; or

b) it is not in the interests of justice to grant approval, e.g. the law is not unduly complex.

Home Office guidance requires the courts to prioritise listing of these applications. The Board will aim to make a decision on an ABWOR application relating to this type of order within five working days of receipt. Written postal applications should be submitted unless urgent work must be undertaken within one working day in which case an application may be submitted by fax. Area offices will determine whether the urgency of the case justifies the method of application used.

These orders will be included in the crime franchise category so that franchisees will be able to exercise devolved powers. However, the power to grant ABWOR for appeals to the Crown Court will be excluded.

Parenting Orders and Child Safety Orders

These new orders have been piloted in the Crime and Disorder Act Youth Pilot areas since 30 September 1998. A notice has been circulated by the Home Office directly to all pilot courts advising of the current legal aid arrangements.

Legal advice and assistance is available subject to the financial eligibility criteria. From 1 December 1998 the Board may grant ABWOR for representation on an application for a Child Safety Order under Section 11 of the Crime and Disorder Act 1998, or an application to vary or discharge a Child Safety Order. Civil legal aid will not be available for representation on these orders unless the Court of its own motion or on application makes other orders under the Children Act 1989, such as Section 8 orders, in which case an application for civil legal aid may be made in the usual way.

Civil legal aid is available for appeals to the High Court against the making of a Child Safety Order.

Child Safety Orders apply to children under 10 and the parties to the proceedings will be the local authority and the parent or guardian of the child. The usual ABWOR means test applies and the merits test is the same as for Sex Offender Orders. The duty solicitor will not be available to provide advice or representation in the Family Proceedings Court.

Section 8 of the Crime and Disorder Act 1998 sets out the different circumstances in which a Court may make a Parenting Order. A Parenting Order is incidental to the main proceedings against a child and the type of legal aid cover available depends on the nature of the proceedings in which an order is made.

Where a Child Safety Order has been made (Section 8(1)(a))

A Parenting Order made in these circumstances will be a civil order made by the Family Proceedings Court. Board granted ABWOR is available to respondents for representation on an application for a Parenting Order or to vary or discharge an order. The ABWOR means test will apply and the merits test is the same as the test applied for Sex Offender Orders.

There is a right of appeal against a Parenting Order made under Section 8(1)(a) to the High Court for which civil legal aid is available subject to the usual means and merits test.

Where an Anti-Social Behaviour Order or Sex Offender Order has been made in respect of a child (Section 8(1)(b))

These are civil orders made by the magistrates' court. The duty solicitor will be available in the magistrates' court to provide advice, assistance and representation where appropriate. An application for Board granted ABWOR may be made in complex cases or where the duty solicitor is unavailable. The same ABWOR merits test as for Sex Offender Orders applies.

There is a right of appeal against the making of a Parenting Order under this section to the Crown Court for which Board granted ABWOR is available. The ABWOR merits test for proceedings in the Crown Court is slightly different. The merits test will be based on the general reasonableness test under Regulation 22(6) of the Legal Advice and Assistance Regulations 1989 i.e. an application for ABWOR approval may be refused if it appears unreasonable that approval should be granted in the particular circumstances of the case.

Where a child has been convicted of an offence in the youth or magistrates' court (Section 8(1)(c))

This is a criminal order but the parent will not be a party to the criminal proceedings against the child. Representation may be provided by the duty solicitor or an application may be made to the Board for ABWOR where the duty solicitor is unavailable or the circumstances of the case are complex.

Where a child has been convicted of an offence in the Crown Court (Section 8(1)(c))

A parent may apply to the Board for ABWOR to cover representation on an application for a Parenting Order in the Crown Court.

If an order is made against the parent under Section 8(1)(c), there is a criminal right of appeal as if the offence which led to the making of the order were an offence committed by the parent. Board granted ABWOR or criminal legal aid will be available subject to the usual tests.

Where a parent has been convicted of an offence under the Education Act 1996 (Section 8(1)(d))

These orders are criminal and will be made in the magistrates' court. As the parent will already be a party to the proceedings, he or she will be entitled to seek assistance from the duty solicitor and/or criminal legal aid in the usual way. Criminal legal aid will also be available for an application to vary or discharge a Parenting Order made under this section or where an appeal is made to the Crown Court. Board granted ABWOR will also be available for appeals.

As Child Safety Orders and Parenting Orders are currently available only on a pilot basis, proceedings involving these orders will be excluded from the crime and family franchise categories for the time being. Legal advice and assistance (but not ABWOR) will be available within those categories.

Any queries please contact Katherine Pears, Legal Advisor, 0171 813 1000.

New Guidance Manual on Civil Legal Aid Means Assessment

In April 1997, the Legal Aid Board took over responsibility for civil means assessment work from the Benefits Agency Legal Aid Assessment Office (see Focus 23, p.6) and that work was integrated into the Board's area offices. The transfer began in October 1997 and ended in February 1998. The Board issued comprehensive guidance to its new assessment officers to ensure a consistent approach to means assessment decision making.

We are committed to openness in our decision making processes and have published a users guide to the key parts of the guidance. This manual will help practitioners to better judge the likely outcome of the means test, and to give advice to applicants in response to decisions received. It will be of particular relevance to those practitioners who grant emergency legal aid under their devolved powers.

The manual is priced at £21, including updates for the first year. If you have not already expressed an interest and would like to receive a copy, or copies, please write to:

Denise Flindall,
Business Support Unit,
12 Roger Street,
London, WC1N 2JL

enclosing a cheque for the necessary amount (made payable to the Legal Aid Board) . Please include details of how many copies you are ordering, your name, firm, address (DX where applicable) and telephone number.

Legal Aid Handbook 1998/1999 Now Available

The Legal Aid Handbook 1998/99 was published in October by Sweet & Maxwell. The price of the new edition is £13.50 and orders can be placed on Sweet & Maxwell's telephone order line – 0171 449 1111 (Customer Services). The ISBN reference is 0-421-64100-2. The Handbook is also available from all good legal bookshops.

The new edition contains 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.

Family Mediation Pilot Project Reaches Third Phase

Applications are now being invited for **Phase III** of the Legal Aid Board's Family Mediation Pilot Project.

If you would like to apply for your family mediation service to be included in Phase III, please fax your details to the project team on

0171 813 5330

Alternatively you can write, asking for an application form, to:

Family Mediation Pilot Project, 6th Floor, 29-37 Red Lion Street, London WC1R 4PP.

The deadline for completed applications is 11 January 1999.

Mediation in non-family cases

A new opportunity

The recent decision of the Board's Costs Appeals Committee in the Wilkinson case received widespread publicity. The decision by the Committee arose out of a case brought by law firm Irwin Mitchell regarding Mr Wilkinson, a legally aided client whose case had been settled on mediation. The Committee certified the following point of principle (CLA23).

Mediation in Non-Family Proceedings

Work carried out by legal representatives in advising on, preparing for and, where appropriate, attending a mediation hearing can in principle be allowable on assessment in a non-family case. In such cases an appropriate share of the reasonable costs of the mediation may also be claimed as a disbursement under the certificate.

This important decision gives the legal aid scheme the flexibility to allow cases to be dealt with by mediation where appropriate, potentially saving costs to clients and to the legal aid fund. The Board will be consulting with mediation bodies and others before issuing final guidance on the impact of the decision. Meanwhile, here are the key points to bear in mind:

- The decision only affects the position in non-family cases. Family mediation is already provided for through the Board's pilot scheme under Part IIIA of the Legal Aid Act 1988.
- Although the point of principle was concerned with civil legal aid, mediation work is also within the scope of advice and assistance so that preparation for and attendance at a mediation and mediator fees can, in principle, be paid under an extended Green Form. However, a substantial Green Form extension for mediation could be refused by the area office if it was thought more appropriate to proceed under a limited legal aid certificate.
- As for all legal aid work, work in relation to mediation will only be paid for if it is reasonable in nature and amount as determined on taxation or assessment. Solicitors are entitled to apply for a prior authority for mediation to take place pursuant to Regulation 61(2)(d) of the Civil Legal Aid (General) Regulations 1989, but are not obliged to do so. Applications for prior authority should contain sufficient information to allow the area office to address the issues set out below.
- In deciding whether to authorise and what costs to allow in relation to mediation, area offices will consider both whether the mediator's fee is reasonable, and whether the total costs of the mediation, both mediator's fees and solicitor's costs, are reasonable in the circumstances of the case.
- As for other types of legal aid decision, the area office will consider the position of a reasonable private fee-paying client and whether the benefits from mediation (as opposed simply to direct negotiation between the lawyers) justify the likely costs. For some established mediation schemes which have a very low fixed cost to the parties, this test will be relatively easy to satisfy. However, more substantial mediation costs will be harder to justify save for the very largest cases.
- It will usually only be reasonable to pay for mediation where a properly trained mediator is involved, who has been trained through a recognised body such as ADR Group or CEDR (Centre for Dispute Resolution).
- A solicitor's work in relation to mediation is claimable under the usual legal aid remuneration rates, attendance at the mediation being claimable at the preparation rate.
- Since the costs of mediation will always be shared between the parties, an individual legal aid certificate will only cover a proportion of the costs, typically half the mediator fees if there are two parties involved in the mediation.
- The Board will be consulting with mediation providers as to appropriate charging rates, but for the time being area offices will bear in mind existing legal aid prescribed rates for lawyers in forming a view as to whether the fees proposed by a mediator are reasonable. Legally qualified mediators may be entitled to a higher fee than others.
- Special payment arrangements exist for mediation in the Central London County Court. For the time being, these special arrangements will continue and payment for Central London County Court cases can be made by using a form available from the court. In such cases, payment is made through legal aid head office, rather than being paid under the individual legal aid certificate.

Guidance: Exercise of Devolved Powers – Update

- General – Advice & Assistance
- General – Means Assessment – Legal Advice & Assistance/ABWOR
- General – Civil
- Family/Matrimonial – Civil
- Personal Injury – Civil
- Housing – Civil
- Crime – Advice & Assistance and Civil
- Mental Health – Advice & Assistance
- Mental Health – ABWOR
- Clinical Negligence

Amendments to Guidance: Exercise of Devolved Powers

The Guidance: Exercise of Devolved Powers is to be updated by **Issue 8** which is being sent to franchisees and subscribers prior to the implementation date. The implementation date is **Thursday, 31 December 1998** with the exception of the new Clinical Negligence franchise category which will take effect from **Monday, 1 February 1999.**

The main changes in the update are:

- To allow for the fact that franchisees will, subject to certain exceptions, immediately upon the grant of a franchise be able to exercise all the devolved powers within the relevant franchise category or categories.
- To introduce the new Clinical Negligence franchise category (see pages 7-8 and 25-31 in this issue of Focus).

Other changes in the update are:

1. To refer to obtaining information as to the existence of any previous advice and assistance prior to the signature of the application form (para. 1.3.2, General – Advice & Assistance).
2. To include new guidance regarding the availability of green form legal advice and assistance to cover mediation in non-family cases. This follows a recent decision of the Board's Costs Appeals Committee (see page 19 in this issue of Focus).
3. To amend the guidance regarding means assessment for legal advice and assistance/ABWOR to confirm that it constitutes the Board's guidance in accordance with paragraph 3 to Schedule 2 Legal Advice and Assistance Regulations 1989, as well as to indicate that housing benefit and council tax benefit are not required to be taken into account in assessing income.
4. To amend the guidance at para. 3.2.2.1, General – Civil, to make it clear that certificates covering appeals from a court, tribunal or other judicial body (as opposed to an administrative body) cannot be amended under devolved powers. On this basis an appeal to the county court against a local authority finding of homelessness is not excluded from the devolved power.
5. To amend para. 3.2.10.5 of General – Civil to allow for a certificate to be embargoed where it has been inappropriately amended as to a costs limitation.
6. To amend the Family/Matrimonial – Civil as well as the Personal Injury and Housing guidance, having regard to the implementation of the enforcement provisions of the Protection from Harassment Act 1997.
7. To include guidance in the Crime section regarding advice and assistance/ABWOR in relation to the Crime and Disorder Act 1998 (see pages 16-17 in this issue of Focus).
8. To amend the guidance in the area of Mental Health to clarify the position where an application for advice and assistance/ABWOR is made on behalf of a patient and so as to recognise that, in limited circumstances, it may not be possible to obtain the signature of a patient to the application form. The ABWOR guidance on Mental Health also has been amended to give additional examples of cases where it may be appropriate to obtain an independent psychiatric report.
9. The amended guidance of relevance to non-franchisees appears below with amendments to existing text shown in bold type.

General – Advice & Assistance

1.3 Pre-signature work

1.3.2 The solicitor cannot collect any administration fee e.g. for opening a file. See also Costs Appeals Committee decision LAA7 which makes it clear that information which is part of the application for advice and assistance must be provided to the solicitor at the same time as the completion (including signing and dating) of the approved form (the green form – **now Claim 10). Information as to the existence of any previous advice and assistance should be obtained prior to the signature of the form – see also Costs Appeals Committee decision LAA11.** See also Costs Appeals Committee decision LAA10 which makes it clear that work done prior to an attendance on the client's behalf – pursuant to Regulation 10 Legal Advice and Assistance Regulations 1989 – should not be claimed.

1.4 Consideration of Extension Applications – General

1.4.1 If an extension application mentions previous advice/previous solicitors it should be refused unless:

a) Area Office authority is attached, or
b) a franchised firm has exercised its devolved powers to grant authority or
c) it is clear that the previous advice was not given under legal advice and assistance (e.g. was funded privately), or
d) it is clear that the claim for costs for any earlier advice and assistance was submitted 6 months (or more) previously so that the matter is treated as a separate matter (NFG 2-20).

See also Costs Appeals Committee decision LAA11 which deals with previous advice and assistance.

Recoverable Disbursements

Accident report fees.

Birth and other certificates.

Counsel's fees.

Enquiry agents' and interpreters' fees.

Experts' fees including for medical reports.

Fees recoverable on oaths.

Mediators' fees (see also paragraph 5.6.10).

Newspaper advertisements.

Photographers' accounts.

Search fees.

Stamp duties of a nominal amount e.g. the fee paid on a power of attorney.

Irrecoverable Disbursements

Ad Valorem stamp duties.

Capital duty.

Client's travelling and accommodation expenses.

Contact centre fees

Court fees (unless for a search/photocopies/bailiff service).

Discharge of debts owed by the client, e.g. rent or mortgage arrears.

Fee payable on voluntary petitions in bankruptcy.

Mortgagees' or lessors' solicitors costs and disbursements.

Passport fees.

Probate fees.

Travelling expenses of a solicitor, including a solicitor in the capacity of McKenzie friend.

The following paragraph regarding recognised conciliation services has been deleted and replaced with the text at 5.6 below:

5.5.8 Where a solicitor refers a client to a recognised conciliation service, a fixed amount can be allowed under green form/legal advice and assistance. This is currently £33.13 (£33.00 for non-franchisees) which is broken down as to £23.35 for the report (i.e. the disbursement for the service's fee) and £9.78 (£9.65 for non-franchisees) for the solicitor's costs. An extension to the costs limit may or may not be needed to undertake this work – depending on the work already reasonably undertaken when the referral is to be made.

5.6 Mediation/Conciliation

5.6.1 The Costs Appeals Committee of the Board has decided that work carried out in advising on, preparing for and, where appropriate, attending a mediation hearing can in principle be allowable on assessment in a non family case. In such cases an appropriate share of the reasonable costs of the mediation may also be claimed as a disbursement (Costs Appeals Committee decision CLA23). The decision applies to advice and assistance and ABWOR. A family case is defined at section 13A(2) Legal Aid Act 1988.

5.6.2 As a starting point it should only be regarded as reasonable to make payments in relation to mediation if either the mediator is affiliated to CEDR, ADR Group or Mediation UK or the mediation is part of a recognised well established mediation scheme, i.e. currently

the Central London County Court Mediation Pilot, the Bristol Law Society Mediation Scheme, the Court of Appeal Mediation Initiative and the NHS Mediation Scheme.

5.6.3 **In principle, and subject always to an assessment of what is reasonable, work in preparing for, attending at and thereafter advising on a mediation hearing may be covered. Any reasonable waiting time and travel time and costs can be claimed in the normal way.**

5.6.4 **Preparation time will depend on the nature of the case, but will usually be very limited as the lawyer should already be fully acquainted with the case. Some time to review the issues and to reflect on how mediation may address them could be justified, but it is very unlikely to exceed 20 units (two hours). Attendance time will depend on the nature of the mediation. A substantially longer hearing than three hours is unlikely to be justified, except in a substantial High Court case – see also para. 5.6.8 below.**

5.6.5 **Solicitors should not incur mediation costs unless the total costs of preparation, attendance and the mediator's fees/ costs are proportionate to the size and importance of the claim or case and a private client would choose to incur the expenditure. A private client test should be applied, namely asking whether a reasonable client paying privately might be prepared to incur his or her share of the mediator's fees in order to improve the chances of obtaining an early and fair settlement of the case.**

5.6.6 **In a mediation involving two parties, only half the costs of the mediation should be allowed. If there were three parties only a third of the costs should be paid, and so on. The mediator's fee will normally include a sum for overheads. Only exceptionally would a separate accommodation fee be justified.**

5.6.7 **Fees payable to a mediator can only be claimed as a disbursement. As a starting point, it should be assumed that a mediator should be paid no more than a solicitor would be paid under the regulations to prepare for and attend the mediation hearing. As a further check on the reasonableness of the fee, one would expect a mediator's fee to be significantly less than what would be considered a reasonable brief fee for junior counsel at the hearing of the action.**

5.6.8 **In principle work in relation to non family mediation can be covered under legal advice and assistance to the same extent as under civil legal aid, but it will not necessarily be appropriate to approve substantial extensions to the costs limit for this purpose. It is important to apply a merit and cost benefit test to decide whether expense in relation to mediation is reasonable in the circumstances of the case. In general such a step will be reasonable only in relation to those cases which have sufficient prima facie merit to justify the grant of a limited legal aid certificate. If there is doubt about the merits, or if the extension requested is substantial (say, in excess of £350 including a share of the mediator's fee but excluding travelling time and travelling expenses) a limited certificate may be a better vehicle to progress mediation than an extension to the costs limit.**

5.6.9 **In a family case an extension should not be granted/payment made if there is a mediator contracted with the Board under Part IIIA Legal Aid Act 1988 in the region who could have dealt with the mediation. If there is no contracted mediator available payment could be to made a non contracted mediator provided he or she is trained by one of the recognised bodies (i.e. National Family Mediation, Family Mediation Association, Solicitors Family Law Association, Law Wise, Law Group).**

5.6.10 **The starting point for payment in such cases should be the standard figure of £23.35 for a conciliation report. However, the fixed fee payment should be seen as no more than a guideline. Different payments may be appropriate where reasonable in all the circumstances. Gradually this practice will diminish as the full mediation pilot is extended.**

General – Means Assessment – Legal Advice & Assistance – ABWOR

1. Means Assessment

1.1 **How are the means assessed?**

1.1.2 **..... This guidance constitutes the Board's guidance in accordance with paragraph 3, Schedule 2 to the Legal Advice and Assistance Regulations 1989.**

1.7 Disregarded Income

1.7.1 Certain state benefits are disregarded as income in the assessment. They are:-

(a) to (d) *as before.*

(e) Payment of housing benefit;

(f) Payment of council tax benefit.

General – Civil

3.2.2 Case Types

3.2.2.1 The devolved power relates to all case types with the exception of the following:

(a) to (d) *as before.*

(e) All cases going forward on appeal whether from a final or interlocutory decision of a **court, tribunal or other judicial body**, including an appeal to the Court of Appeal from a finding of the Social Security Commissioners;

3.2.10.5 In considering the exercise of the devolved powers the Area Office will categorise the decision and take action as follows:

(a) *as before.*

(b) the franchisee has exercised devolved powers partially outside (and partially within) the specific or general guidance (i.e. the guidance for subject categories relating to particular circumstances, or the general guidance in this manual) (category 4):

The amendment will be issued but the certificate will be embargoed, by way of restrictive amendment (limited to work to-date), and/or a further limitation will be applied or other action taken such that future work is limited to that identified as being within the guidance. A standard letter will be faxed to the franchisee giving reasons for the decision.

(f) to (h) *as before.*

Family/Matrimonial – Civil

7. Injunctions – Part IV Family Law Act 1996/Protection from Harassment Act 1997

7.1 Explanatory Notes

7.1.1 The Board will not require proceedings under Part IV to be commenced/conducted in any particular venue. Applications for leave by children will in any event be required by the procedural rules to be made to the High Court and applications will **usually** be made to the Court which is already dealing with other family proceedings.

7.1.7 Where an order made under Part IV, including a power of arrest, is breached, cover for both the applicant and respondent extends to representation on the consideration of the breach by the court following exercise of the power of arrest. However, cover does not, without a specific amendment, extend to applying for the issue of a warrant of arrest (where a power of arrest has not been attached to the order) nor to representation for either party in contempt of court proceedings. In the event of an application for an amendment relevant factors would be the extent of any alleged breach and the likelihood of success in the proceedings, given all the facts and circumstances of the case. **See 7.5 below regarding enforcement in proceedings under the Protection from Harassment Act 1997.**

7.1.8 A respondent's certificate, **in respect of proceedings under Part IV**, which covers representation on arrest, either following the exercise of a power of arrest or the execution of a warrant, will also extend to applying for bail and to representation on any adjourned hearing. Likewise, the application's certificate once extended to cover the application for the issue of a warrant/to commit will cover representation as to bail and at any adjourned hearing.

7.5.6 Legal aid is only likely to be granted to apply for the issue of a warrant of arrest/committal where:

(a) in respect of a warrant of arrest only, an order, rather than an undertaking, has been breached. An undertaking cannot be enforced by a warrant of arrest but only by committal;

(b) the defendant has not previously been convicted of a criminal offence relating to the same conduct;

(c) the extent of the alleged breach and the likelihood of success, given all the facts and circumstances of the case, are sufficient to justify enforcement proceedings; and

(d) in the case of an order, rather than an undertaking, information has been provided that a report to the police has been ineffective or as to why it would not, given all the facts and circumstances of the case, be more appropriate to report the alleged breach to the police and ask for it to be dealt with as a criminal offence, having particular regard to the absence of costs and the likely effectiveness of a criminal prosecution.

Personal Injury – Civil

6. Protection from Harassment Act 1997
Relevant Notes for Guidance 4, 5, 6, 7

6.5 Legal aid is only likely to be granted to apply for the issue of a warrant of arrest/committal where:

(a) in respect of a warrant of arrest only, an order, rather than an undertaking, has been breached. An undertaking cannot be enforced by a warrant of arrest but only by committal;

(b) the defendant has not previously been convicted of a criminal offence relating to the same conduct;

(c) the extent of the alleged breach and the likelihood of success, given all the facts and circumstances of the case, are sufficient to justify enforcement proceedings; and

(d) in the case of an order, rather than an undertaking, information has been provided that a report to the police has been ineffective or as to why it would not, given all the facts and circumstances of the case, be more appropriate to report the alleged breach to the police and ask for it to be dealt with as a criminal offence, having particular regard to the absence of costs and the likely effectiveness of a criminal prosecution.

Housing – Civil

5. Protection from Harassment Act 1997

5.1.5 Legal aid is only likely to be granted to apply

for the issue of a warrant of arrest/committal where:

(a) in respect of a warrant of arrest only, an order, rather than an undertaking, has been breached. An undertaking cannot be enforced by a warrant of arrest but only by committal;

(b) the defendant has not previously been convicted of a criminal offence relating to the same conduct;

(c) the extent of the alleged breach and the likelihood of success, given all the facts and circumstances of the case, are sufficient to justify enforcement proceedings; and

(d) in the case of an order, rather than an undertaking, information has been provided that a report to the police has been ineffective or as to why it would not, given all the facts and circumstances of the case, be more appropriate to report the alleged breach to the police and ask for it to be dealt with as a criminal offence, having particular regard to the absence of costs and the likely effectiveness of a criminal prosecution.

Mental Health – Legal Advice & Assistance

1.2 Difficulties in Taking Instructions/Providing Advice & Assistance

1.2.4 Due to his condition a client may **need** advice and assistance/ABWOR but may decline to sign the relevant application form. Unless/until the appropriate application form is completed and signed the solicitor is at risk as to costs. Where the form is not signed, then no costs will be recoverable from the legal aid fund. On this basis the franchisee should consider the possible use of the special arrangement whereby an application for legal advice and assistance can be sent by post or, more realistically in the area of mental health, **the acceptance of an application on behalf of the patient from a Mental Health Act receiver or nearest relative or guardian (Regulation 14(3)(b) Legal Advice and Assistance Regulations 1989)** or the possible use of the automatic devolved powers available to him in relation to acceptance of applications on behalf of patients (see paragraph 1.4 below). **In an exceptional case where it is not appropriate to use any of the possibilities for the application to be made on the patient's behalf and the patient will not sign the application due to his condition, then the solicitor may annotate the form to that effect, and sign the application himself, also obtaining appropriate confirmation from the relevant medical authorities of the attendance on the patient to take instructions.**

1.4.4 Where an application is accepted on behalf of a patient then it is the means of the patient which must be assessed, **although the solicitor may when dealing with the matter take into account the views of the applicant and the patient unless/until there is a conflict of interest between them.** The solicitor must apply Schedule 2 to the Legal Advice and Assistance Regulations 1989 in carrying out the means assessment. The application form should be completed in the name of the patient but signed by the other person on the patient's behalf (with an annotation to that effect). As to the completion of applications generally the solicitor should have regard to decision LAA7 of the Costs Appeals Committee (NFG 2-59).

1.4.6 The purposes of the provisions differ in that the former *(Regulation 10 Advice and Assistance Regulations 1989)* is simply a method of obtaining completion of the application form whereas the latter *(Regulation 14(3))* is a method of accepting an application for advice and assistance from someone other than the patient (but on the patient's behalf). Where the patient is hospitalised either option may be justified but justifying acceptance of instructions on behalf of the patient requires consideration of whether the patient should give instructions himself having regard to his desire and ability to do so **(see also para. 1.4.4 above).**

Mental Health – ABWOR

1.3 ABWOR Prior Permission

1.3.4 In deciding whether to obtain a **independent psychiatric report**, the following should be considered:-

a) does the Responsible Medical Officer's report contain (or is it known that it will contain or be likely to contain):
   - a diagnosis about which there is any reasonable doubt and/or
   - recommendations (e.g. as to **detention**, treatment, **transfer and/or aftercare**) which are not acceptable to the patient?

b) if so, is it likely that an independent psychiatric report would assist the patient in achieving an outcome more acceptable to the patient in all the circumstances of the particular case, including as to treatment (possibly in another geographical area) and/or hospital parole?

1.3.5 Generally an independent report should not be obtained from any expert (including a psychiatrist **– see para. 1.3.4 above**) if the issues are such that the outcome is not likely to be materially affected by an expert view. Where an independent report has been obtained which is not helpful to the assisted person a second report covering the same ground should not be commissioned merely in the hope of obtaining a more favourable opinion.

Clinical Negligence

Guidance: Exercise of Devolved Powers

Legal decision making guidance to support the Clinical Negligence Franchise Category

The following extracts from the December 1998 update to the Guidance: Exercise of Devolved Powers are of relevance to all approved suppliers and to those non-approved suppliers who have ongoing clinical negligence cases. The guidance will be applied from **1 February 1999**.

LEGAL ADVICE & ASSISTANCE

1. Accepting initial instructions

1.1 Specialist practitioners (i.e. those with a clinical negligence franchise or those which have passed a clinical negligence preliminary franchise audit) alone are able to accept instructions from clients and provide advice, assistance and representation.

1.2 All personal injury franchisees are considered to be clinical negligence franchisees (within the obligations set out in the Franchising Specification, 2nd Edition, March 1995) until 31 July 1999. However, after that date additional requirements, specific to the clinical negligence franchise, must be met, and a clinical negligence franchise awarded, if PI franchisees wish to continue to provide legally aided advice, assistance and representation in respect of clinical negligence for new cases.

1.3 Non franchisees may continue to provide advice & assistance for a client where the application for legal advice and assistance is made, i.e. signed by the client, prior to 1 February 1999. They must not provide legally aided advice and assistance to new clients from that date.

2. Distant solicitors

2.1 It is accepted that clients seeking advice about clinical negligence may be at a distance from a solicitor/adviser, in particular because of the requirement that only specialist practitioners deal with this work. Accordingly, the Board expects that franchisees will travel to see clients where this is reasonable and necessary. Guidance is set out below.

2.2 Special arrangements are available to franchisees which make it administratively easier to accept an application for advice and assistance where issues of access can be demonstrated. These are postal applications, telephone advice and the payment of outward travel disbursements but not travelling time. (General guidance on the use of these special arrangements is given at Section 1, General – Advice & Assistance – paragraph 9.2.)

2.3 Franchisees considering using one of these arrangements should consider whether it is, in all the circumstances, appropriate to accept instructions having regard to the service to be provided to the client, and the costs of providing that service. Factors in favour of accepting instructions will include:-

a) any legitimate expectation of the client of specialist assistance in light of the subject matter, i.e. by a specialist practitioner dealing with other similar cases;
b) the lack of availability of that expertise in the client's geographical area;
c) the nature, complexity and/or significance of the subject matter such as to justify the involvement of a distant solicitor;
d) the possibility of advising without the need for personal attendance; and
e) significant previous knowledge/dealings with the client such as to justify renewed involvement even though the client is at a distance.

These factors need to be balanced against the distance between the client and franchisee in terms of accessibility for the client and increased costs of travel/travelling time. The greater the distance the greater the justification which will be required.

2.4 It is unlikely to be justified for a franchisee to travel to attend on a client at a significant distance from his/her home or office, involving a one way travelling time of more than 3 hours, on the basis that it would be more appropriate for the matter to be dealt with by a franchisee more local to the client. This will, however, depend on the circumstances of the case and the availability of another franchisee closer to the client.

2.5 Where a franchisee does consider a longer travelling time to be justified in a particular case (e.g. possibly because the client's claim relates to a specialist area and the franchisee has particular experience of handling other similar cases), a note outlining that justification should be made and retained on the file.

2.6 Where longer travelling time cannot be justified the franchisee must consider what assistance can be provided to ensure that the client is referred to an appropriate source of information regarding other franchisees with relevant expertise (who may or may not be more local to the client). If necessary the franchisee may consult the Board, either at the local area office, or by using the Board's free helpline 0500 282 300.

3. Advice and assistance from more than one solicitor

3.1 Franchisees may use the devolved power to self-authorise the acceptance of an application for advice and assistance from a client who has previously received advice and assistance in the same matter from another solicitor, without the need to refer to the area office. This devolved power must be exercised in

accordance with the relevant regulations and the general guidance to franchisees, in Section 1, General – Advice & Assistance, paragraphs 2.5 and 9.3.4 respectively.

3.2 When considering the use of this devolved power it should be borne in mind that authority should not be given if the client merely finds the first advice unpalatable and wants a second opinion (Section 1, General – Advice & Assistance, paragraph 2.5.5 (a)). In an exclusive environment lack of expertise by the previous solicitor (who will also be a franchisee) would not normally be a justifiable reason for exercising the devolved power.

3.3 Where the client indicates dissatisfaction with the service provided by the first solicitor, and no other justification can be provided for the authority to be given, the client should be informed about the exclusive provision of specialist advice for clinical negligence, and advised that the most appropriate course of action would be to use the complaints/service improvement procedure at the first franchisee's firm.

4. Initial attendance and case screening

4.1 At the first attendance the specialist practitioner should take instructions from the client about what happened, how it happened and what injuries and losses have resulted. It may or may not be possible to consider clinical/medical records at this stage, depending on whether any have already been requested by the client or provided following a complaint through the NHS complaints procedure (see paragraph 5.2 below for guidance on obtaining clinical/medical reports). Once the basic information has been obtained by way of a statement from the client, the specialist practitioner should carry out an initial screening of the case to determine the most appropriate course of action.

4.2 Initial case screening is the first stage in the Board's three stage approach to pre-issue investigative work undertaken in a clinical negligence case. It allows the specialist practitioner to consider the information available initially, and to apply the statutory tests relating to legal merits and reasonableness to that information. (These tests are re-applied to the different levels of information available at each stage of the case). This screening will determine whether a fee paying client of moderate means would be advised to incur the costs of further investigation. Although the information available at this stage may be very limited, the decision as to whether the costs of further investigation are justified is made by a specialist with the benefit of experience and exercising common sense and skill in considering the information. Moreover in many cases technical in-house support is also available.

4.3 If a client is eligible for advice and assistance, initial case screening is carried out within the initial two hour limit. This will cover taking instructions, considering any relevant clinical/medical records (if any are available at that stage), the provision of initial advice as to the law, procedure, costs and statutory charge, and applying for legal aid.

4.4 The reason for the client pursuing the case is an important consideration during the initial screening. Applications for legal aid should only be submitted if the primary purpose of the applicant is to claim damages in respect of clinical negligence. During the initial screening the solicitor is able to identify cases for which applications for legal aid should be made, and those for which other methods of resolving clients' concerns would be more appropriate.

4.5 Specialist practitioners should reject cases following initial screening if there is no prima facie evidence of negligence, or if even at this early stage it is clear that it would be unreasonable to proceed with a claim because the likely costs of the case would outweigh the potential benefit to the client. (See the section on Civil Legal Aid, paragraphs 2.2.3 – 2.2.8.)

4.6 The initial screening stage is likely to be satisfied if there is prima facie evidence of negligence (legal merits), and it appears that the cost/ benefit criteria will be met (reasonableness).

4.7 In relation to legal merits:

- There must be reasons to consider that the injury to the client could have been caused by negligence. This involves some information to indicate the possibility that negligent acts or omissions were responsible for the injury, or for an outcome which is not an acceptable one in view of the clinical/ medical procedures involved.
- Uncertainty over the merits at the initial screening stage (as opposed to there being no prima facie evidence) would not necessarily result in the solicitor refusing to take forward an application, particularly where the claim involves serious injuries or traumatic events leading to a substantial claim in damages.
- However, the fact that a client has experienced a less than satisfactory clinical/medical result, or is suffering in a way that was not anticipated, is not, in the absence of prima facie evidence of negligence, sufficient for legal aid, even in a limited form, to be granted.

4.8 In relation to reasonableness:

- The cost benefit criteria must be likely to be met at all stages of the case.
- If it appears very likely from the initial screening that a case will not meet the cost benefit criteria at some stage in the future, then an application for legal aid is not appropriate. This is because it is not reasonable to fund cases which subsequently become non-viable in cost benefit terms. Such cases are likely to be discharged at a later stage with a loss to the Fund and disappointment for the client.
- Claims with an estimated value of £5,000 or below would be unlikely to pass the initial screening stage because the potential costs of the case would be likely to outweigh the probable benefit to the client. However, if liability is accepted, or in an exceptional case the estimated costs of the case are

exceeded by the likely damages to such an extent that a fee paying client of moderate means would consider it reasonable to pursue litigation, then the case may proceed.

4.9 Where the solicitor considers that an alternative course of action is more appropriate, the two hour initial limit will cover taking instructions, advising on other relevant avenues, assisting with a complaint to the NHS complaints procedure or, in appropriate circumstances, referring the client to a specialist agency or support network such as AVMA.

4.10 Solicitors may consider that an alternative course of action is appropriate if:

- An application for legal aid is unlikely to be successful (either because there is no prima facie evidence of negligence or because potential costs would exceed likely benefit).
- The client is not seeking to pursue a claim in damages by way of court action.
- An application would be premature because the client is still recovering from an injury, and the client is advised to return after a specified period.

4.11 It may be that a client, while dissatisfied with his/her clinical care, does not wish to pursue a claim for compensation through the courts. The client may be seeking an explanation, a reassurance as to future standards, and/or an apology following the investigation of the complaint. In these circumstances, consideration should be given to the use of the NHS complaints procedure as a way to resolve the client's problems and concerns.

4.12 If, following the initial screening, the solicitor is not prepared to submit an application to the area office, this should be explained to the client (or set out in a letter) and a note of the reasons (or copy letter) should be retained on file.

4.13 Decisions as to whether to carry out initial screening for particular clients must be left to individual firms. However, it would not normally be appropriate for firms to undertake initial screening where they are unlikely to have the capacity to progress the case to investigation and beyond.

4.14 All applications for civil legal aid (both initial applications and those for amendments) should be checked and approved by the category supervisor before being sent to the area office. A note that this has been done should be recorded on the file. This function may also be carried out by other clinical negligence panel members in the firm (or during short periods when the supervisor or panel member is temporarily unavailable by a deputy), provided that the authority to do so has been delegated to them by the category supervisor.

5. Extensions to the financial limit

5.1 General

5.1.1 General guidance on the use of the devolved power to self authorise an extension to the financial limit is provided in Section 1, General – Advice & Assistance, paragraph 9.5. The following category specific guidance should also be applied.

5.2 Medical records

5.2.1 Neither the disclosure of clinical/medical records nor the obtaining of clinical/medical records would normally be dealt with at the initial screening stage of the case, and an extension to the financial limit for this purpose is unlikely to be granted. It is noted that where the relevant records were produced after 1 November 1991 they are available to the client on request under the Access to Records Act 1990, and therefore some clients may bring some or all of their clinical/medical records with them when seeking legal advice.

5.2.2 It is also likely that clients will provide relevant clinical/medical records and other information at the first attendance if they have pursued a complaint through the NHS complaints procedure. Where such information is available from the outset, it should be used to inform the initial screening process in deciding whether or not an application for legal aid is justified. As consideration of records can be limited to those strictly related to the negligent act at this stage, an extension to the financial limit for the purpose of extensive consideration of detailed records would not be appropriate.

5.3 Medical reports to negotiate settlement

5.3.1 Extensions to cover obtaining and considering medical reports may be approved in clinical negligence cases in exceptional circumstances only. If the client is acting in person in a claim of insufficient value for an application for legal aid to be justified, but where there are good/ excellent prospects of success or liability is not in dispute, and a medical report is needed to issue proceedings or to reach settlement without proceedings, an extension of **10 to 20 units (1 to 2 hours)** might be justified **(plus the medical report cost).**

5.4 Consideration of findings following referral to the NHS complaints procedure

5.4.1 An extension of 10 to 20 units (1 to 2 hours) may be approved to allow a franchisee to assist the client with a complaint to the NHS complaints procedure. A shorter extension may be sufficient for cases which are determined by the local resolution procedure where there is limited documentation. However, a longer extension may be needed if the complaint is dealt with by an independent review panel where substantial documentation may be generated.

5.5 Appeals for legal aid

5.5.1 If an application for legal aid is refused, it might be reasonable to grant an extension for the purpose of preparing an appeal. The usual extension would be for **5 units (30 minutes)**. In exceptional cases solicitors may be able to justify an additional **5-10 units (30-60 minutes)** if specific research is necessary, e.g. to find literature to support a causal connection between a birth defect and the handling of the birth.

6. SUGGESTED TIMES FOR GREEN FORM EXTENSION REQUESTS

Reason for extension	Paragraph reference	Suggested time (1 unit = 6 mins)
Medical reports to negotiate settlement	5.3.1	10 – 20
Consideration of findings following referral to the NHS complaints procedure	5.4.1	10 – 20
Appeals for legal aid	5.5.1	5 – 10

CIVIL LEGAL AID

1. Dealing with initial applications

1.1 General

1.1.1 The guidance about accepting initial instructions (provided in paragraph 1 of the Legal Advice & Assistance part, earlier in this section) also applies to applications for civil legal aid. Specifically, non franchisees will be able to continue to act for clients where the application for a certificate was made, i.e. signed by the client, prior to 1 February 1999, but will not be able to submit applications made after that date. Provided the application has been determined, it does not matter if an offer is accepted or an appeal against refusal is allowed after that date.

1.1.2 There is a three-stage approach to the investigative work which needs to be completed in clinical negligence cases before an application for the amendment of a certificate to cover the issue of proceedings can be made. The three stages are:

- Stage one: Initial screening
- Stage two: Preliminary investigation
- Stage three: Full pre-issue investigation

The merits test is applied at all three stages, but at each stage more information is available.

1.2 The merits test

1.2.1 The statutory tests relating to legal merits and reasonableness are applied to the initial application, and re-applied at each stage of the case. While the nature of the tests remains the same, the information available at each stage increases.

1.3 Initial screening – stage one

1.3.1 The first stage of the investigative process is the initial screening of the client's case by the specialist practitioner. Legal aid funding is available for this stage if the client is eligible for Legal Advice and Assistance. Detailed guidance on initial screening is provided earlier in that section (see Advice and Assistance paragraph 4 – Initial Attendance and Case Screening). This guidance deals with its role in the application process.

1.3.2 The purpose of initial screening, which takes place before an application for civil legal aid is submitted to the area office, is to allow the specialist practitioner to apply the statutory legal merits and reasonableness tests to the limited information available at that stage. In this way the specialist practitioner identifies cases where an application for legal aid would be appropriate, as against those for which an alternative course of action would be more suitable.

1.3.3 No application for civil legal aid should be submitted unless the specialist practitioner has carried out an initial screening and is satisfied from the limited information available that further investigation is justified. This means that the specialist practitioner is satisfied that on the basis of the limited information available at that initial stage the case meets the statutory legal merits and reasonableness tests i.e. that there is prima facie evidence of negligence, and that it is reasonable from a cost/benefit view to proceed further.

1.3.4 An application for legal aid, even limited to a preliminary investigation, will not be granted in the absence of prima facie evidence of negligence. To satisfy the prima facie test there must be some information to indicate to a specialist practitioner the possibility that negligent acts or omissions were responsible for the injury, or for an outcome which is not an acceptable one in view of the clinical/medical procedures involved. The fact that a client has experienced a less than satisfactory clinical/medical result, or is suffering in a way that was not anticipated, would not, in the absence of such prima facie evidence of negligence, be sufficient for legal aid to be granted.

1.3.5 In the case of smaller claims (those to a value of no more than £10,000) if there is little prima facie evidence of negligence, legal aid is likely to be refused on the merits, and on the basis that the NHS complaints procedure may be a more appropriate avenue to pursue. The procedure is not designed to resolve allegations of clinical negligence but is intended to provide the complainant with an explanation of what occurred. (Guidance on the Board's approach to the use of the NHS complaints procedure is provided earlier in this section, see Advice and Assistance paragraph 4.11).

1.3.6 Legal aid is unlikely to be granted for disputed claims with an estimated value of £5,000 or less. This is because the potential costs of the case would be likely to outweigh the probable benefit, and the reasonableness part of the merits test would not be satisfied. However, if liability is accepted or, in an exceptional case, where the estimated costs of the case are exceeded by the likely damages to such an extent that a fee paying client of moderate means would consider it reasonable to pursue litigation, then the case may proceed. (See paragraphs 2.2.3 – 2.2.10 in this section in relation to cost benefit and risk assessment).

1.3.7 Legal aid to take proceedings for clinical negligence will not be granted unless the primary purpose of the applicant is to claim damages arising from clinical negligence. The initial screening process provides for the consideration of alternative remedies. (See Advice and Assistance paragraph 4.4).

1.4 Preliminary investigation – stage two

1.4.1 All applications for civil legal aid (both initial

applications and those for amendments, including amendments relating to costs limitations) should be checked and approved by the category supervisor before being sent to the area office. A note that this has been done (or at the least a copy of the application form countersigned by the supervisor) should be retained on file. This function may also be carried out by other clinical negligence panel members in the firm (or during short periods when the supervisor or panel member is temporarily unavailable by a deputy), provided that the authority to do so has been delegated to them by the category supervisor.

1.4.2 The second stage of the investigative process is the preliminary investigation. This allows for further merits screening by a specialist practitioner before the commitment of the substantial levels of time and costs involved in a full pre-issue investigation. It is particularly relevant in cases where the estimate of damages is modest, i.e. less than £25,000, or where there are specific concerns about a case at this very early stage.

1.4.3 A legal aid certificate, limited in terms of scope to a preliminary investigation, will be subject to a costs limitation of £2,000. This is a maximum figure, and it is expected that most cases suitable for a preliminary investigation will conclude that investigation well within this amount. The limitation will enable a specialist practitioner to identify the relevant and necessary notes and records and to obtain an expert's preliminary view, but not to investigate subsidiary issues in detail until a positive view has been obtained. In some cases a preliminary investigation may result in the specialist practitioner advising the Board that the case should not be taken further because there are no reasonable prospects of success or because costs would exceed benefit.

1.4.4 Although the standard first limitation on a certificate will be to a preliminary investigation, there may be circumstances (for example, where liability is admitted and causation is not in issue, or where the specialist practitioner believes that a preliminary investigation would result in a duplication of costs without contributing significantly to the screening process) when it is appropriate for the certificate to cover a full investigation.

1.4.5 If a specialist practitioner seeks initial cover for a full rather than a preliminary investigation, full reasons as to why this is appropriate in the particular circumstances of the case must be provided.

2. Dealing with applications for amendments

2.1 Full pre-issue investigation – stage three

2.1.1 Once the preliminary investigation is completed, the legal merits and reasonableness tests will be re-applied in the light of the additional information gathered from the client, the clinical/medical records and the expert's preliminary view. It is expected that this additional information will enable the specialist practitioner to revise his/her initial views on prospects of success, quantum and potential costs. The application for amendment form will provide the area office with a record of the developing views of the specialised practitioner about the case.

2.1.2 The purpose of a full pre-action investigation is to provide both the client and the Board with as accurate an assessment as possible, in the absence of the full case of the defendant, of the prospects of success and quantum.

2.1.3 An application to amend a certificate to cover a full pre-issue investigation is unlikely to be granted if:

- it appears that there are no reasonable prospects of success; or
- the estimated costs of the case are more than the potential damages (in that the Board seeks to avoid funding cases in which costs are disproportionate to the amount claimed); or
- liability is in dispute and the potential damages are estimated at £5,000 or less (unless in an exceptional case the estimated costs of the case are less than the damages to such an extent that a fee paying client of moderate means would consider it reasonable to pursue the litigation).

2.1.4 An amendment to cover a full pre-issue investigation will enable the specialist practitioner to work in accordance with the Clinical Disputes Pre-Litigation Protocol to:

- obtain and examine all relevant clinical/medical records
- obtain detailed statements from all relevant witnesses
- instruct expert(s) to prepare medical report(s)
- prepare and send the letter of claim
- consider the defendant's response to the plaintiff's letter of claim
- consider the relevant evidence with counsel and expert(s) (if necessary)
- obtain counsel's opinion (the need to involve counsel might not arise if the issues are such that the specialist solicitor is able to advise the area office without the benefit of counsel's view; for example, if the expert(s) is(are) unwilling to support the case or because the case is very strong).

2.1.5 The costs limitation would normally be increased to a sum not exceeding £5,000 (to include costs and disbursements but to exclude VAT). However, although it is expected that most cases will conclude full investigations well within this figure, this standard amount can be varied subject to the breakdown of the work to be undertaken and costs incurred, which is submitted with the application for amendment. Where steps with associated costs exceeding the standard £5,000 limit are immediately foreseeable, that additional work must be justified and fully detailed in the breakdown of work/costs. Note that any subsequent amendment(s) to the cost limitation will not be made other than to cover additional steps which were not previously foreseeable and therefore were not included in the

original estimate (see paragraph 2.4 below).

2.2 The issue of proceedings and steps up to (but excluding) trial

2.2.1 Unless the limitation period is about to expire, an application to amend a legal aid certificate to cover the issue of proceedings is unlikely to be granted before the completion of the full investigation stage in accordance with the Clinical Disputes Pre-Litigation Protocol.

2.2.2 An application to amend a certificate to cover the issue of proceedings before full pre-action investigations are completed in accordance with the protocol is likely to be granted if:

- the limitation period will expire before the investigative stage can be completed;
- it appears that there are reasonable prospects of success;
- the estimated costs will not exceed the potential damages, and
- the value of the claim exceeds £5,000 (unless, if less than £5,000, in an exceptional case the estimated costs of the case are exceeded by the likely damages to such an extent that a fee paying client of moderate means would consider it reasonable to pursue the litigation).

2.2.3 When the full pre-issue investigation is complete, the specialist practitioner is in a position to discuss with and advise the client as to estimates of three key pieces of information: the predicted amount of the damages if the proceedings are successful (A), the probability of success (P), and the estimated costs (C).

2.2.4 For the purposes of this exercise at the pre-issue stage the estimate of costs should take into account any prospects of settlement. The C figure should comprise the sum of the estimated profit costs exclusive of VAT (at legal aid rates with enhancement if appropriate) and the estimated disbursements to include counsels' fees incurred to the stage at which settlement is expected or up to and including trial if no settlement is anticipated. If costs are to be estimated on the basis of prospective settlement, an explanation of why this is appropriate in the particular circumstances of the case must be provided.

2.2.5 An application to amend following the conclusion of a full pre-issue investigation is likely to be successful if a consideration of the key information (i.e. A, P and C) produces a result on a risk-based assessment in the following ranges:

Prospects of success (P)	Damages compared to costs (A:C)
less than 50%	whatever the ratio the application is likely to be refused
50% – 60%	estimated damages must be at least 1.5 times costs
more than 60%	estimated damages must be at least equal to costs

2.2.6 Specialist practitioners are required to estimate within a wide banding range at this stage. If an area office is concerned about any of the estimates of key information provided by a specialist practitioner, clarification may be sought. However, if doubts about the validity of the key information lead to a refusal of an amendment, a report would normally be obtained from AVMA (see paragraph 3 below).

2.2.7 The cost benefit ratio which applies at this stage must take into account a factor to reflect a level of risk assessed on the practitioner's view as to the probability of success. The ratio is different to that used when full disclosure has been made because of the differing amounts of information available. Moreover, the ability to take any realistic prospects of settlement into account at this stage, when estimating costs, ensures that smaller claims can continue.

2.2.8 While these figures are best estimates and not exact predictions, they are made by specialist practitioners on the basis of the increasing amounts of information available at each stage. The use of this risk based assessment approach provides consistency and justifiability of decision making by the Board.

2.3 Amendments to cover trial

2.3.1 The three pieces of key information are equally important to the consideration of amendments to increase the scope of the certificate to cover trial. Moreover at this stage the estimates of this key information are likely to be much more accurate than those provided before the issue of proceedings.

2.3.2 At this stage in the proceedings the estimate of costs should include all costs incurred and those to be incurred up to and including the trial. Such costs would consist of estimated profit costs (at legal aid rates with enhancement if appropriate) and estimated disbursements to include counsels' fees. VAT should be excluded.

2.3.3 An application to amend following the conclusion of all steps up to and including mutual exchange of statements and reports is likely to be successful if a consideration of the **key information** (i.e. A, P and C) produces a result on a risk-based assessment in the following ranges:

Prospects of success (P)	Damages compared to costs (A:C)
less than 50%	whatever the ratio the application is likely to be refused
50% – 60%	estimated damages must be at least 2 times costs
60% – 80%	estimated damages must be at least 1.5 times costs
more than 80%	estimated damages must be at least equal to costs

2.4 Amendments to increase costs limitations

2.4.1 All applications to amend certificates to increase

costs limitations at any stage in the proceedings will be considered subject to the requirements of paragraphs 2.2 – 2.3. In addition, amendments will only be approved where the costs directly relate to an additional step, which itself can be justified (i.e. they will not be approved to cover additional costs associated with work for which a breakdown has already been provided). Detailed breakdowns of work to be undertaken and costs to be incurred (together with work and costs already undertaken/incurred) must be provided with all applications for amendment, together with revisions of the key information.

2.5 **Offers to settle/Payments into court**

2.5.1 The general guidance in the current Legal Aid Handbook at note 5 of NFG 12-02 applies to offers to settle and payments into court. While the Board must be informed of an offer to settle only if it is unreasonably refused by the assisted person, all payments into court that are declined must be reported to the Board.

2.5.2 Where the other side has made a substantial offer it is likely to be reasonable to refuse that offer provided that a consideration of the key information produces a risk-based assessment in the ranges specified in paragraph 2.3.3 above. However, the percentage probability of success must be looked at in terms of the prospect of beating the payment into court.

3. Appeals and the use of AVMA merits screening

3.1 Whenever an area office decides to refuse an initial application for a certificate, or for an amendment leading to a discharge, and the refusal/discharge is appealed there must be consideration of whether an AVMA merits screening report is appropriate in the particular circumstances.

3.2 AVMA will be provided with all the information supplied to the area office. In order to prepare the merits screening report, they may also contact the specialist practitioner directly to discuss the case, and to clarify issues if necessary. A copy of the report will be sent to the specialist practitioner.

3.3 If the AVMA report is unfavourable, the appeal will be listed for an area committee hearing.

3.4 However, if the AVMA report is favourable, the area office will review its decision to refuse by re-applying the statutory merits test in accordance with this guidance, and in the light of any additional information including the report from AVMA .

3.5 If the application is not granted on review, the area office will confirm its refusal, providing amended reasons as appropriate. The appeal will be listed for an area committee hearing.

3.6 Appeals against refusals of legal aid applications, or against discharge or refusals to amend will involve referral to AVMA if:

- the refusal or discharge is based on grounds relating to legal merits, as opposed to reasonableness, and the appeal is supported by the specialist practitioner; or
- the refusal or discharge is based upon a combination of legal merits and reasonableness (as opposed to those based solely upon grounds of reasonableness) and the appeal is supported by the specialist practitioner; or
- the refusal or discharge is based upon a dispute with the specialist practitioner as to quantum; or
- an assisted person is refusing to accept the advice of his/her specialist practitioner (who is not supporting a legal merits related appeal) and wishes to change solicitors, provided that the area office is satisfied that in the absence of clear and unambiguous evidence such a report is necessary because there are relevant disputed, complex issues (see paragraph 4 below).

3.7 All appeals involving a referral to AVMA will be dealt with by an area committee with at least one clinical negligence panel member.

4. Requests for a change of solicitor

4.1 Requests to amend the acting solicitor in clinical negligence cases are subject to the Note for Guidance provided in the Legal Aid Handbook (NFG 10-03), but are likely to be approved (subject to that guidance) where:

- the legal aid certificate is to be transferred to a franchised firm from a non franchised firm; or
- the solicitor with conduct of the case (whether franchised or not) has moved to a new firm and has carried out sufficient work in the matter to justify taking the case with him/her.

A non-franchised firm may also nominate another solicitor in the practice to assume conduct of a clinical negligence case following the departure of the nominated solicitor (subject to them demonstrating competence in accordance with Practice Rule 12.02). In these circumstances no application for an amendment for change of solicitor is necessary.

4.2 Amendments to change from one franchised firm to another are unlikely to be granted other than where the client or solicitor moves and an amendment can be justified on the basis of significant inconvenience in relation to access and where limited additional costs only will be incurred. Given the franchise exclusivity for clinical negligence work, client dissatisfaction with service or advice already provided will not usually be considered acceptable justification for a change of solicitor unless the client has exhausted the complaint/ service improvement procedure at the original firm and/or where the client is able to demonstrate, to the area office's satisfaction, that the service or advice provided fell below the franchised standard.

FOCUS on FOCUS

Legal aid is undergoing a period of fundamental reform. At this time of change, it is more important than ever that everyone who deals with legal aid work reads Focus. It is essential in order to understand the current operation of the scheme and the implications of the initiatives for the future.

This has recently become an official requirement as the revised version of the Legal Aid Franchise Quality Assurance Standard specifies that all franchised organisations, and those applying for a franchise, must keep recent copies of Focus.

Focus contains:

- News about recent events, decisions, announcements and initiatives
- Invitations to participate in the projects and consultations that will help to shape the future of legal aid
- Timetables of all the key dates and deadlines for consultations, franchising and contracting
- Updates on ongoing pilots, projects and systems
- New eligibility rates every spring and updates on remuneration
- Points of principle – summaries of important decisions made by the costs appeals committee
- Guidance: Exercise of Devolved Powers – a summary of the latest changes
- Payment dates

Where articles about particularly complex issues are included you will find a contact name and telephone number of someone at the Legal Aid Board who will answer any questions that you might have.

Make sure that everyone involved with legal aid work in your organisation sees Focus – photocopy it if necessary.

Receiving Focus

Focus is sent automatically to all legal aid account holders, free of charge. It is usually published four times a year. It is not strictly quarterly, as it is produced whenever we need to communicate important information to the profession, rather than according to a rigid timetable.

Focus is distributed using the names and addresses of all legal aid account holders, details of which are held on our Master Index database. If you have not received a copy of Focus it may be because you have not alerted the Master Index Section to any changes to your name, address or DX. Please make sure that you send any relevant changes to them, at 85 Gray's Inn Road, London, WC1X 8AA, or DX 328 London, or fax them to 0171 813 8624. Please quote your legal aid account number.

Your copy of Focus will be addressed to the individual in the organisation named on the Master Index database, but it is important that it is circulated to all those who are involved in legal aid work. To help you to circulate Focus, you may make as many photocopies as you need.

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Legal Aid