Transforming legal aid: delivering a more credible and efficient system

Ministry of Justice Consultation Paper CP14/2013

Response of the Official Solicitor to the Senior Courts

The capacity in which the Official Solicitor is responding

1. The Official Solicitor to the Senior Courts is an independent statutory office holder appointed under the Senior Courts Act 1981. His office derives from the long established duty of the State to protect the interests of those who lack capacity to protect themselves either because of minority or because of lack of mental capacity. His duties and responsibilities derive from statute, rules of court, direction of the Lord Chancellor, common law, or established practice. One of his primary functions is to act as last resort litigation friend in civil and family proceedings.

2. In the majority of cases in which the Official Solicitor acts as litigation friend, he retains solicitors to act for and provide legal services to the incapacitated person or child. Those solicitors must take their instructions from the Official Solicitor as litigation friend. The funding arrangements under which the Official Solicitor or any other litigation friend retains a solicitor for a child litigant or a litigant lacking capacity are discussed further in paragraphs 24-25 and the Annex to this response below. In particular however many of those for whom the Official Solicitor acts as litigation friend are eligible for legal aid to fund legal representation. The Official Solicitor presently acts as litigation friend in some 2697 cases across a range of civil, family and Court of Protection proceedings.

3. The Official Solicitor also responded to the earlier consultation: 'Proposals for the Reform of legal aid in England and Wales: Ministry of Justice consultation paper CP12/10'. Many of the concerns he raised in that response are relevant to this consultation. To avoid repetition a copy of his response to that consultation is at **Annex 1** and should be read in conjunction with this response. It is also published on the Justice website here[1]: About the Official Solicitor and Public Trustee

4. Further background as to the Official Solicitor's aims, functions and business activities is set out in his response to the earlier consultation and its annex.

5. In this response the Official Solicitor explains some overarching concerns and comments on those questions of particular relevance to those who lack litigation capacity and who are not therefore able to either retain their own solicitor **or act in person in proceedings.** Because of their lack of capacity a protected party or "P" or child is not able to

[1] http://www.justice.gov.uk/about/ospt

compromise the proceedings through alternative dispute resolution without the assistance of a person entitled to take binding decisions on their behalf.

6. The Official Solicitor reiterates that persons who require the appointment of a litigation friend do so precisely because their ability to make relevant decisions is significantly impaired. Those for whom he acts (the Official Solicitor being the last resort litigation friend), are often isolated in the community, have no support network, may be unknown to statutory or voluntary agencies at the time when the matters in issue arise, or if known may not meet the criteria for the provision of services. This response focuses on those with impaired mental capacity (protected parties and - in the Court of Protection - 'P') and children, in relation to whom rules of court contain the requirement, subject to limited exceptions, that they act by a litigation friend[2]. The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity; and the court is concerned not only to protect its own process but to provide protection to all parties to litigation which comes before it[3]. Many of the issues highlighted are also relevant in relation to the larger class of parties or potential parties who are vulnerable (but not lacking mental capacity) by reason of age, illness or disability and who may be similarly isolated.

7. As a matter of law a litigation friend cannot recover his costs of acting as litigation friend; however the cost of provision of legal services to the protected party, "P" or child does need to be funded. Even as last resort litigation friend, the Official Solicitor, save in the very limited circumstances described below, is not funded either to provide the legal services necessary to conduct the proceedings 'in house' or otherwise to subsidise the provision of legal services. He therefore makes his appointment as litigation friend conditional on the costs of obtaining or providing legal services being secured either from the person's own funds or from external sources. The only exception being cases in the Court of Protection involving decisions about serious medical treatment, where his involvement has long been regarded a matter of necessity. Nonetheless even in such cases he seeks to recover one half of his costs from the public body bringing the proceedings. Litigation friends other than the Official Solicitor similarly require funding to retain solicitors to act for the protected party, "P" or child.

8. Those external sources of funding legal services include the Legal Aid Agency where the protected party, "P" or child is eligible for legal aid. Alternative means of funding are often not available in practice to persons who lack litigation capacity either because such persons lack financial capacity as well, or because lenders are not willing to advance money to them. Even if the person, although lacking litigation capacity, retains financial capacity, that person is still likely to be particularly vulnerable to financial exploitation by the unscrupulous. In the Official Solicitor's experience therefore where a party lacking litigation capacity is not in a position to meet the costs of legal representation (especially where the

[2] Part 21, Civil Procedure Rules 1998; Parts 15 & 16 Family Procedure Rules 2010 & Part 17; Court of Protection Rules 2007

[3] *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 [65].

protected party may need to bring proceedings to protect his interests) or a CFA arrangement cannot be entered into, or an undertaking to meet the costs is not forthcoming from the other side, legal aid is the only way of securing such services.

Consequences of there being no funding

9. Where there is no funding and in consequence no person willing to accept appointment as litigation friend, the litigation or proposed challenge cannot proceed; the consequence not only for the protected party or P or the child, but also for the other party or parties, is that there can be no determination by the court of the matters at issue. As noted above the route of achieving a compromise through alternative dispute resolution is not likely to be open to a protected party, "P" or child.

10. Previous changes to the eligibility rules already cause enormous practical difficulty in securing funding for legal services, leading to significant delay and the disproportionate use of the Official Solicitor's scarce resources to try to address this issue.

11. There is a clear risk that the proposed changes will give rise to a significant increase in cases where there is no practical way to resolve funding issues and proceedings either cannot be brought for the incapacitated person or child thereby denying justice to the most vulnerable, or, if issued, cases in the civil and family courts, and Court of Protection where proceedings will effectively be stayed either for a prolonged period or indefinitely, thereby denying justice to all parties involved.

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Chapter Three: Eligibility, Scope and Merits

Question 4*:* Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

Answer

12. No.

Comment

13. The Rules of Court do not permit a litigant, who lacks capacity to conduct their own proceedings, to present their own case as a litigant in person. Subject to the court being given a discretion to permit a child to conduct their own proceedings where that child, having regard to their understanding, is able to give instructions in relation to the proceedings, the same is true for a child. It follows that access to justice is denied to protected parties, P or a child excluded from being able to apply for legal aid by virtue of the proposed residence test,

notwithstanding that they may either have a case to be brought, or that they are joined to proceedings by virtue of court rules or on the application of others.

14. The only rationale give for the second limb of the test (12 months lawful residence in the UK, Crown Dependencies or British Overseas Territories) is that it is considered that will indicate that the individual has *"more than just a passing connection …. but also represents a test which is not unduly restrictive for those people who are present in this country"* (paragraph 3.52).

15. Paragraph 3.42 of the consultation expresses concern that *'individuals with little or no connection to this country'* are able *'to claim legal aid to bring civil legal actions at UK taxpayers' expense'.* The proposed residence test is intended *'to introduce a common sense test to address this anomalous situation'.*

16. The 12 month time period is arbitrary. The assumption underlying the rationale for this proposal has no regard to the position of individuals who may be lawfully present (for example, because an EU national exercising their right to move and reside freely within the EU) but not have acquired 12 months lawful residence and disregards the jurisdictional rules.

17. Further it disregards the position of persons who may have to respond to proceedings brought by others - for example, where such proceedings are brought by a public authority here because of concern either about the welfare of children (in the family court under Part IV Children Act 1989) or the welfare of incapacitated adults (in the Court of Protection under the Mental Capacity Act 2005). In such cases, a person may properly have a case to be put (for example, a parent living outside the UK, whose child is the subject of proceedings here) but again not meet the residence test. Respondents are not bringing civil legal actions - in the examples given the action is brought by the State. It would be unconscionable for a parent or child whether unlawfully here or lawfully here for less than 12 months or (in the case of a parent) simply residing outside the UK to be denied effective legal representation where the State is applying to remove the child into care and the care plan may be one for placement for adoption. The Official Solicitor notes that it is intended to introduce in primary legislation an expectation that public law children cases will be completed in 26 weeks. The impact on such proceedings of adult litigants in person (particularly if they have little or no English) and lack of legal representation for the subject child would be an impediment to achieving that aim.

18. The jurisdictional rules, contrary to the concerns expressed in the consultation, do have regard to the person's connection with this country; further they may operate such that proceedings can only be brought in the UK - the connecting factor in such cases is generally either habitual residence or (in the case of urgency) physical presence - see for example, Chapter II, Council Regulation (EC) No. 2001/2003 and Part 2, Schedule 3 Mental Capacity

Act 2005. Habitual residence is more than simple residence but does not correlate as a matter of course to 12 months lawful residence.

19. In some classes of case - for example, return and access applications under the 1980 Hague Convention, it is inherently unlikely that the applicant could satisfy the residence test. The Official Solicitor notes that although paragraph 3.53 refers to legal aid continuing to be available where necessary to comply with obligations under EU or international law, no detail is given, although those obligations must already be known.

20. The Official Solicitor reiterates that in such cases if a party is a protected party, P or a child, not only may it not be open to them to avoid proceedings, but they are not able to act in person if such proceedings are brought and will therefore be denied access to justice.

21. Similarly imposition of a residence test without discretion would deny access to justice where there is a proper case to be brought on behalf of an incapacitated person. By way of explanatory background to case study A below, save in wholly exceptional circumstances as here, the Official Solicitor does not act in asylum and immigration claims, which are Tribunal matters, there being no provision for a litigation friend within the Tribunal system. This is one such exceptional case where, had the residence test operated to refuse access to legal aid serious injustice would have been done:

Case study A

Mrs X entered the UK lawfully as the spouse of a British national. The marriage was very unhappy. A few months after she entered the UK to join her husband, Mrs X suffered an 60% burn injury in suspicious circumstances from turpentine poured over her head and body which was set alight. Mrs X had horrific life threatening injuries to her face, neck and upper body. The exact circumstances were never established as the police were unable to interview her; very shortly after emergency admission to hospital she suffered cardio-respiratory arrest leading to severe hypoxic brain injury and is now severely disabled being in the minimally conscious state, cortically blind, gastrostomy fed, with spastic tetraplegia, severe lower limb spasticity, and extensive burn scarring. She is cared for in a nursing home where she receives a high level of skilled medical and nursing care and has the benefit of specialist equipment. Mrs X's family stated she was lonely, mistreated and suffered violence during her marriage, but the solicitors were not able to obtain any first hand information or a statement from Mrs X and there was no independent evidence which could be relied on as her disclosures had only been to family members. Mrs X had an in time application for leave to remain (made by solicitors acting pro bono) which failed; the Home Office was not satisfied that she was able to establish that her marriage broke down as a result of domestic violence and nor that her circumstances were compassionate or compelling enough for her application to be considered outside of the Immigration Rules. The expanded reasons for their decision demonstrated a serious lack of understanding of Mrs X's need for skilled and continuing nursing care and access to health care - among the

reasons given were that psychiatric treatment was available in all major cities in her country of origin (although Mrs X is in the minimally conscious state and so this is irrelevant), that the drugs she requires are freely available there, that the amount of medication she requires is low (disputed by the expert subsequently instructed), that she is not suffering from any major psychological condition (again irrelevant as she has neurological injuries based on severe hypoxic brain injury) and that her immediate family live there and there is no reason to suggest she they would not adequately support and assist her on return. A return to her country of origin would have inevitably meant being nursed at home by family. Mrs X's solicitors did not have the resources to continue to work pro bono for the purpose of bringing an appeal as they considered independent expert evidence would be required about whether Mrs X could return and still receive appropriate care and treatment. Mrs X had no financial resources and was unable to access State benefits because of her immigration status. Without funding an appeal could not be brought. Having regard to the exceptional facts of Mrs X's case, the Official Solicitor applied on an urgent basis to the Court of Protection for authority to bring legal proceedings in her name and on her behalf. The court made an urgent order enabling the Official Solicitor to instruct solicitors to obtain legal aid for her for the purpose of appealing the decision. At the request of the instructed solicitors the Home Office agreed to review their own decision, but arrived at the same decision following a review. An appeal therefore had to be brought. The solicitors instructed an independent consultant in neurological rehabilitation. The expert noted that Mrs X's immediate family did not fully comprehend the permanent nature of her condition, and that the care home staff were of the opinion that her family would be unable to comprehend the complexities of her care regime; as such she would be at risk because of their lack of understanding of the nature of her disability, her needs and her extreme vulnerability. In the expert's opinion Mrs X was not fit to travel, her condition is incompatible with life if returned to her country of origin and the views expressed by the Home Office do not reflect the reality of her situation or the complexity of her case. In her opinion her care needs could never be met within a family setting. The Immigration Judge allowed the appeal.

22. Additionally there is one class of cases where the proposed residence test would have a wholly disproportionate effect - community care / public law challenges (by way of application for judicial review) for incapacitated parties who are destitute or in dire need and who will be denied access to justice under this proposal. In some circumstances these parties are profoundly mentally and/or physically disabled or otherwise have serious and enduring health conditions. The Official Solicitor draws attention to the fact that for a case for community care provision to be arguable, a person has to have immigration status or an immigration application that is not obviously hopeless or abusive[4]. Some case studies follow.

[4] *Birmingham City Council v (1) Clue (2) Secretary for the Home Department (3) Shelter* [2010] EWCA Civ 460

Case study B

Mr IS is aged 60, with a heart condition, is registered blind and is diagnosed with vascular dementia, which is progressive. IS is unable to provide very much factual information to his solicitor but from enquiries that have been made his solicitor has ascertained that he has been resident in the UK for some 12 years and does not appear to have made an application for leave to remain. IS appears to have worked as a tailor prior to going blind but now exists on limited handouts from a family member and begging. He is supported by a charity to access his medical appointments. IS's lack of immigration status means that he is not entitled to benefits. A different charity has now agreed to consider assisting him to regularise his immigration status. As IS has become unwell he has become unable to manage his day to day life and is being evicted from his privately rented accommodation; he will therefore shortly be homeless, without alternative accommodation or the possibility of obtaining such. Currently his legal advisors, through the Official Solicitor acting as proposed litigation friend are seeking to obtain care and support for him; if his solicitor is unable to do so by way of negotiation then he will challenge the local authority's position by way of Judicial Review. If the residence test had applied IS would not have had any legal representation in either the possession proceedings nor for the purpose of attempting to access community care support and provision. It was his solicitor, instructed by the Official Solicitor, who identified a charity to help him in trying to regularise his immigration status; it is unlikely he would have been able to do so by himself. Given his limited capacity it is likely he would not have been able to access any real help and given the time it takes to glean any idea of his position it would be very unlikely that he would have progressed to a point where he could have convinced a solicitor to seek exceptional funding to pursue these issues for him.

Case study C

KS is from the Ivory Coast. She has HIV and impairment of the brain both as a result of brain damage associated with the illness and a tumour. She is depressed and her physical health is deteriorating to the point where she regularly falls due to fatigue. She came to this country to escape an arranged marriage, entering with false French identification and served 6 months in prison where her health deteriorated to the extent that she needed intensive care. She did not claim asylum, although she was given leave to remain on 1 February 2013. She has been here for 15 years and has lived in her current accommodation for 9 years. Her neighbour provides a lot of care for her but the local authority has now commenced possession proceedings to evict her for rent arrears. It is not clear if she is eligible for benefits. It is arguable that the assessment of her needs is unlawful and a challenge by judicial review is contemplated. However, under the new proposal she would not be eligible for legal aid to challenge the decision.

23. The Official Solicitor notes that there is an exception to the residence test for asylum seekers, on the basis that they are considered to be amongst the most vulnerable in society. However, this exception would not include vulnerable people with a mental impairment such as a learning disability or mental illness who may have been entitled to asylum but not claimed it (for instance because they have not understood the need to seek legal advice on how to regularise their stay in the UK or have done so but have not understood the advice they have received and therefore not take necessary steps). Nor would it include those individuals who have failed to regularise their immigration status and who may now, often through debilitating illness or injury, lack the understanding to do and who may have been failed by others in assisting them to do so once in the UK.

24. LASPO does not assist; the mechanism for exceptional funding only allows exceptional access to funding where that area is out of scope. As the application of the proposed residence test is to disallow all access where the test is not met, the availability of exceptional funding does not assist in relation to cases which are in scope.

Children

25. The Official Solicitor also acts for child parties; the application of the proposed residence test would mean that any child less than one year old cannot have any entitlement to funding.

Generally

26. There is no recognition of the fact that a protected party or 'P' or a child may not have access to the documentary evidence required to satisfy the residence test, or the practical resources or ability to be able to obtain such evidence. In the Official Solicitor's experience obtaining the supporting documents for the purpose of satisfying the financial eligibility test is time consuming, often challenging and not always possible. The time and resources necessary for this is an already disproportionate use of resource; that resource is not only his as he may need to approach others including public authorities for this purpose.

***Question 5**: Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.*

Answer

27. No.

Comment

28. The assumption that the provider is in the best position to know the strength of their client's case and the likelihood of their client being granted permission to proceed does not take account of the fact that in a case where that person lacks capacity to instruct solicitors (either because a child or because of mental impairment) the litigation friend (the Official Solicitor or another person) does not have a personal knowledge of the factual background. In such cases additional relevant information often emerges at a later stage and after the application for judicial review has been lodged.

29. Further, given the nature of the difficulties suffered by those without capacity to instruct solicitors, it is only usually when their situation has reached crisis point that the matter comes to the attention of others because the protected party does not have the insight into their own needs due to their mental impairment.

30. The nature of the judicial review challenges which the Official Solicitor brings as litigation friend are such that time is of the essence because of the serious risk to the health or even life of someone who is extremely vulnerable. The possible outcome of not acting quickly in community care cases is often too serious to delay issuing a claim, for the purpose of making enquiries to obtain all information, or for potentially protracted negotiations and possible settlement to take place. The risk to the provider that they will not be paid is likely to lead to the Official Solicitor not being in a position to instruct solicitors to bring such challenges on behalf of the protected party.

31. The cases where the Official Solicitor is asked to act as litigation friend include such serious situations as:-

(a) the protected party is about to be evicted and made homeless as a result;
(b) community care services which enable the protected party's day to day welfare and health (including mental health) needs to be met are about to be, or have been withdrawn;
(c) where a statutory assessment of the person's need for such services has not been carried out by a local authority;
(d) where the liberty of the individual is affected.

32. Additionally when acting as litigation friend in proceedings addressed initially to a single issue (see, for example, 31(a) above) it is not unusual for other issues to be identified arising from breach of statutory duties (for example, the absence of an assessment of the

need for community care services) and in respect of which a formal challenge by way of proceedings brought.

33. It is often the act of lodging proceedings for judicial review that results in the necessary steps are taken by the public body statutorily responsible (thereby making the case academic); in such circumstances it is unsurprising if permission is then refused but that does not negate the fact that proceedings were issued on a proper basis.

34. Further having regard to the types of situations listed above, if providers are not to be paid unless they are willing to spend time drafting lengthy costs submissions (that may not result in an order for costs) this is likely to result in the provider being less inclined to take such cases.

35. The Official Solicitor notes the reference to the system which exists for funding immigration and asylum Upper Tribunal appeals but would equally note that the Upper Tribunal is an inquisitorial forum and as the Tribunal Rules do not provide for the appointment of a litigation friend in proceedings before it. The consultation paper makes no reference to how incapacitated parties manage such proceedings (and consideration of the position of such parties appears absent throughout) or whether they are disproportionately disadvantaged as a consequence. He would point out that in case study C above the only basis on which the appeal of Mrs X (a severely disabled and incapacitated person) could practicably be brought was with the benefit of legal aid and with his involvement acting as authorised by the Court of Protection.

Case study D

Ms CF has suffered from schizophrenia for 38 years. She also has poor short-term memory and problems retaining and understanding information and following instructions. She has a lifelong habit of self-neglect. She needs support not only with basic self-care such as bathing, cooking and managing her incontinence, but also with taking her medication to manage her mental illness. For the past 10 years she has received in excess of 40 hours support each week, including additional on call assistance. Following a reassessment she is to receive only half an hour of support each week. It is not clear why as there has been no change in her presentation. An independent social worker report commissioned on her behalf has concluded that without a significant amount of help "the risks to her independence are immense with major self-neglect leading to mental ill health, hospitalisation or even loss of life". Despite the fact that she is clearly eligible for services and requires this care and support, the local authority has refused to continue to fund the same. It is only because the provider previously funded to provide this care by the local authority has agreed to continue to support her without charge that more urgent steps have not been taken to date. The independent social work assessment is now 5 months old; the local authority continue to simply assert that CF does not meet their eligibility criteria for providing community care services. The local authority has fought even the most simple of requests that would benefit CF, which has increased the costs associated with the claim

and is making the proposed litigation increasingly complex. Despite the attempts of the solicitor instructed by the Official Solicitor for CF to try to resolve the matter without litigation it is now apparent that a judicial review challenge is inevitable. If, after the claim is drafted and lodged, the local authority does then agree to fund the services previously provided, the challenge will become academic. Whilst this will result in the benefit to the client which the solicitors have been seeking to achieve, the judicial review should not have been necessary in light of the independent social worker's assessment. Under the proposal it is unlikely that a provider will want to take on the risk of drafting the proceedings for which they may not be paid; the Official Solicitor will not be in a position to instruct a solicitor for which he has no budget to pay if this is the possible outcome. In such circumstances, the challenge would not be brought and CF is highly unlikely to receive the services which she needs notwithstanding that the independent social work assessment clearly identifies that this very vulnerable, disabled individual is at serious risk.

36. The Official Solicitor's response is that it is inevitable that disabled people will be disproportionately and adversely affected by this proposal.

***Question 6**: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success? Please give reasons. Do you agree with the proposals to **exclude** the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.*

Answer

37. No

Comment

38. The Official Solicitor's concern is that on an initial assessment an incapacitated person's case may appear borderline, particularly given the evidential issues that can arise with a potential party who lacks capacity. It is of further concern that while the proposal is that any applicant refused civil legal aid funding on the basis of a merits assessment could appeal to an Independent Funding Adjudicator, it is unclear (and there is no indication that this has been considered) how those lacking capacity will be able to effectively access this appellate system to bring an appeal.

Chapter Seven: Expert Fees in Civil, Family and Criminal Proceedings

Question 33*: Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.*

Answer

39. No.

Comment

40. The Official Solicitor is concerned about this proposal given that expert reports provide the litigation friend with important information about an incapacitated party's needs and circumstances where a serious issue has arisen. In such situations the litigation friend must make decisions in the proceedings in that party's best interests. Experts with relevant qualifications, experience and background are not necessarily easily found.

41. The Official Solicitor's experience within his recent and current case load, prior to this proposed cut in fees, has been that on a number of occasions, experts have refused to undertake work/reports on the current legal aid rates. In addition, lesser qualified or experienced experts when instructed have provided inadequate reports resulting in additional costs/delay as further evidence has had to be obtained.

42. The Court of Protection when exercising its welfare jurisdiction in particular will be making best interests decisions that may be very finely balanced, life changing for P or others, and engage in particular Articles 5 and 8 of the ECHR.

43. If the proposed 20% reduction in expert fees leads to fewer experts willing to undertake this work, at the same time as the number of welfare cases in the Court of Protection is rising, this would have a disproportionate impact on the incapacitated party and would severely constrain the expert evidence as to capacity or best interests available to the court.

Chapter Eight: Equalities Impact

Question 34: *Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.*

Question 35: *Do you agree that we have correctly identified the extent of impacts under*

these proposals? Please give reasons.

***Question 36**: Are there forms of mitigation in relation to impacts that we have not considered?*

Answer

44. No.

Comment

45. There is no evidence in the consultation paper that consideration has been given to either the position of incapacitated parties generally, in civil and family proceedings, or to the Court of Protection in particular as a specialist jurisdiction. Specific consideration was given in earlier consultations to patients detained under the Mental Health Act 1983 and to that of P where P is deprived of their liberty under the provisions of Schedule A1 to the Mental Capacity Act 2005 (see: *Proposals for the reform of legal aid in England and Wales*, Consultation Paper CP12/10, November 2010).

46. Inevitably P or a protected party by definition is likely to be more vulnerable than others in society. Both are identified in the Rules of Court as a distinct class of litigants in respect of whom special provision is made. There is no evidence that this has been considered in line with the Government's public sector equality duty as defined under section 149 Equality Act 2010. For example: no statistical data is set out in the consultation paper as to whether there has been a reduction in experts willing to undertake publicly funded work post LAPSO 2012, there is no mention of the Court of Protection nor of the needs of clients with mental impairment or mental health difficulties, nor is there any evidence that before making these proposals the government has consulted with relevant bodies such as MIND, the Court of Protection User Group, the Department of Health or (in the case of the proposal concerning experts) representative bodies such as the Health and Care Professions Council or the General Medical Council. It is therefore simply not possible to comment on whether these proposals could be a proportionate measure to reach a legitimate aim.

47. The impact assessment refers (paragraph 24 - see also paragraph 9(i)) to the behavioural response of the client being uncertain and states: "*Individuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all".* As explained at length in the Official Solicitor's response to the earlier consultation and above these options are not open to a child, a protected party, or 'P'.

48. The Official Solicitor notes that the risks and uncertainties do not appear to include the impact of any potential rise in litigants in person in proceedings before the civil and family courts and the Court of Protection. Paragraph 28 is only addressed to the potential for a decrease in the number of civil cases going before courts/tribunals. As the legal aid rules in relation to both scope and financial eligibility only changed on 1 April 2013 it is too soon to evaluate the impact of those initial changes in terms of the impact on the justice system of an increased number of litigants in person generally. Likewise in relation to the fact that there will be a greater number of cases where there is no security for costs and, therefore, no litigation friend for a protected party, 'P' or a child.

49. There are a number of assertions made in the consultation paper, for example at Annex K in respect of expert fees for which the evidential base is nowhere to be found in the consultation document. In fact the consultation sets out at paragraph 7.3 and 7.4 the difficulties in collecting robust data due to the fact that the then LSC did not contract directly with experts:

5.13.2 Impact on clients:

> *A reduction in the fee paid to experts is considered unlikely to have any negative equality impact on legal aid clients. The resultant effect of the proposed reduction in expert fees would mean that clients would receive the same level of expert service but this would be at a reduced*

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ANNEX 1

PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES: MINISTRY OF JUSTICE CONSULTATION PAPER CP12/10

RESPONSE OF THE OFFICIAL SOLICITOR TO THE SENIOR COURTS

The capacity in which the Official Solicitor is responding

1. The Official Solicitor to the Senior Courts is an independent statutory office holder appointed under the Senior Courts Act 1981. His office derives from the long established duty of the State to protect the interests of those who lack capacity to protect themselves either because of minority or because of lack of mental capacity. His duties and responsibilities derive from statute, rules of court, direction of the Lord Chancellor, common law, or established practice. One of his primary functions is to act as last resort litigation friend in civil and family proceedings.

2. In many of the cases in which the Official Solicitor acts as litigation friend, he retains external solicitors to act for and provide legal services to the person for whom he is acting as litigation friend. Those external solicitors must take their instructions from the Official Solicitor as litigation friend. Many of those for whom he acts as litigation friend are eligible for legal aid in respect of the legal services they receive from those external solicitors retained by the Official Solicitor to act for them. The funding arrangements under which the Official Solicitor or any other litigation friend retains those external solicitors are discussed further in paragraphs 24-25 and the Annex to this response below. The Official Solicitor currently has on his books some 2039 cases in which his client has the benefit of legal aid.

3. Further background as to his aims, functions and business activities is set out in the extract from the Annual Report for April 2009-March 2010 for the Office of the Official Solicitor and the Public Trustee at the Annex below.

4. In this response he has explained some overarching concerns and commented on those questions of particular relevance to those who lack capacity.

"1 Executive Summary

1.2 The Government strongly believes that access to justice is a hallmark of a civil society. The proposals set out in this consultation paper represent a radical, wide-ranging and ambitious programme of reform which aims to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice or representation is justified".

Comments

5. The Official Solicitor's overarching concerns are as follows

- the Mental Capacity Act 2005 provides the legal framework for acting and making particular decisions on behalf of individuals who lack the mental capacity to make those decisions for themselves. The Court of Protection is the specialist court for making those decisions when judicial intervention is required in respect of them

- mental capacity, namely the capacity to conduct litigation (litigation capacity), also arises in proceedings in the civil and family courts. There are two classes of persons who are unable to conduct their own proceedings when involved in litigation in the civil and family courts - those who lack the mental capacity to do so and those who are unable to do so by virtue of being children. The procedures of the civil and family courts make special provision by statutory schemes contained in the Rules for the protection of those parties, the other party or parties, and the court's own process

- as a matter of law individuals who lack the mental capacity to conduct their own litigation, and the majority of children, are not permitted to conduct their own litigation

- those statutory schemes only have effect within the scope of legal proceedings and legal aid is a vital enabler for the effective operation of those schemes which provide access to justice to those who lack mental capacity or are children

- persons who lack capacity to conduct litigation will not acquire the capacity to deal with their legal problems simply by virtue of denying them access to the courts – when a person lacks litigation capacity that is because they lack the capacity to conduct the litigation even with the assistance of a solicitor; it is self evident, therefore, that they will lack the capacity to resolve any dispute to which they are a party without such properly constituted assistance

- no alternative dispute resolution method has been identified in the Consultation Paper which would provide the protection currently recognised as necessary both for persons who would lack litigation capacity in court proceedings and for the other party or parties to the dispute

- in the case of those lacking litigation capacity, the proposals for reform will not achieve one of the aims identified, namely ensuring that legal aid is targeted at those who need it most

- there is a very serious risk that the proposals would act to limit access to justice for some of the most vulnerable in society

- please also see paragraph 4.93 of the Consultation Paper

6. While this response focuses on the minority (those with impaired mental capacity and children) in relation to whom rules of court make special provision for representation, many of the issues highlighted are relevant in relation to the larger class of parties or potential parties who are vulnerable (but not lacking mental capacity) by reason of age, illness or disability. Such individuals are often isolated in the community, have no support network, may be unknown to statutory or voluntary agencies at the time when the matters in issue arise, or if known may not meet the criteria for the provision of services.

"Protected parties" and in the Court of Protection "P"

7. Rules of court[5] provide that certain classes of litigants ('P'[6], a protected party[7], and children) must act by a litigation friend. The requirements for the appointment of a litigation friend arises where a person lacks the capacity to conduct proceedings arise from public policy reasons. The need for appointment of a litigation friend can become apparent at any stage of proceedings. With some conditions, litigation capacity can fluctuate. A child (save in specific circumstances and classes of proceedings) must act by a litigation friend.

Assessment of capacity

8. The relevant rules of court contain referential definitions. They import definition provisions from the Mental Capacity Act 2005 ('the MCA 2005') which provide that

> "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain"[8].

9. The assessment of capacity is therefore in two stages: first the identification of the impairment of, or disturbance in the functioning of the mind or brain, and second consideration of whether that impairment or disturbance gives rise to a lack of capacity. The MCA 2005 identifies four distinct functional elements for capacitated decision making:

- the ability to understand the information relevant to the decision
- the ability to retain that information
- the ability to use or weigh that information as part of the process of making the decision, and
- the ability to communicate the decision (whether by talking, using sign language or any other means).[9]

In the context of proceedings the relevant information includes legal advice.

10. It follows that in the context of the second stage where one or more of the functional elements are absent, a party will be a protected party precisely because their ability to make relevant decisions is significantly impaired.

Public policy – protection of those lacking mental capacity and children

11. Having regard to the interests of society as a whole, the State has put in place procedural bars to prevent children and those lacking litigation capacity from conducting their own litigation. The rules of court[10] require that they must act by a litigation friend. While capacity is the pivotal issue in balancing the right of the individual to autonomy in decision making and the right of the vulnerable to protection from harm, the court is also concerned to protect its own process and to provide protection to other parties. For example, a defendant is

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[5]Civil Procedure Rules 1998 ('CPR 1998'), Family Proceedings Rules 1991 ('FPR 1991'), Family Procedure (Adoption) Rules 2005 ('FP(A)R 2005'), and (from 6/4/11 in substitution for the FPR 1991 and FP(A)R 2005), Family Procedure Rules 2010 ('FPR 2010')) and Court of Protection Rules 2007 r141.

[6]Definition: Court of Protection Rules 2007, r6, P is defined as "any person (other than a protected party) who lacks or, so far as consistent with the context, is alleged to lack capacity to make a decision or decisions in relation to any matter that is the subject of an application to the Court of Protection". Another party to Court of Protection proceedings who lacks capacity to conduct the proceedings is known, as in proceedings in other courts, as "a protected party".

[7] Definition: CPR 1998 r21.1(2), FPR 1991 r9.1, FP(A)R 2005 r6, FPR 2010 r2.3 uniformly define a protected party as a party or intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings.

[8] Section 2(1) of the Mental Capacity Act 2005.

[9] MCA 2005, section 3(1)

[10] CPR 1998 (Part 21), COPR 2007 (Part 17), FPR 1991 (Part IX), FP(A)R 2005 (Part 7), FPR 2010 (Parts 15-16).

entitled to expect that he will not be required to defend proceedings brought by a person of unsound mind acting without a litigation friend. The corollary of this is that where one party is a protected party or a child, the other party may not be able to achieve a resolution of their cause of action (for example obtain a divorce) unless a litigation friend accepts appointment.

Policy considerations underpinning the Consultation proposals

12. Great emphasis as policy considerations is placed on (1) the perceived seriousness of the particular class of cases in respect of which legal aid is, or is not, to be available, and (2) to potential litigants resolving their disputes through alternative dispute resolution ("ADR"). But those who lack capacity are in need of special protection and are unlikely to be able to resolve their disputes in a fair way with a just outcome through ADR. The Official Solicitor's experience is that, while the disputes in which he acts as litigation friend can be amenable to resolution through ADR, that will only be in the context of litigation itself, and with the additional protection that the outcome agreed on behalf of the protected party will be subject to the approval of the court.

13. A person must have the necessary mental capacity if they are to conduct and compromise a legal claim by means of ADR.

Impairment or disturbance in the functioning of the mind or brain

14. The Official Solicitor draws attention to the range of examples of an impairment or disturbance in the functioning of the mind or brain which may cause a lack of capacity cited in paragraph 4.12 of the MCA 2005 Code of Practice

- conditions associated with some forms of mental illness
- dementia
- significant learning disabilities
- the long-term effects of brain damage
- physical or medical conditions that cause confusion, drowsiness or loss of consciousness
- delirium
- concussion following head injury
- the symptoms of alcohol or drug use

He notes that these are examples only.

15. It is unclear in the context of these proposals how a person with impaired mental capacity (or a child party) will be protected by the State if funding for legal representation is removed from classes of cases in which rules of court require appointment of a litigation friend but alternative funding is not available in practice. In such cases the person is at risk of being left without effective access to justice.

16. It is also unclear how it is intended, in cases where a person has impaired mental capacity, that ADR (family mediation or otherwise) will be a fair process in determining the issues and arriving at a legally effective decision having regard to the functional elements of capacitated decision making referred to above. A person who lacks capacity to conduct proceedings will be vulnerable both to their illness or disability going unrecognised or insufficiently recognised in this context (in particular by the person facilitating the alternative dispute resolution, although it may be known to the other party), and to misinterpretation of their actions, including the risk of perceived unwillingness to engage in the process.

17. The ability of the individual to engage effectively is often highly dependent on the establishment of a relationship of trust (see references in the reports of research in 2010[11] to the importance of the solicitor/client relationship in this regard); in the case of a person with mental illness or impairment, it often takes considerable time to establish trust.

18. There will also be those cases where the extent and severity of the illness or disability will be such that it will simply not be possible for the person to engage effectively in the ADR process.

19. Even where, with support, a person might be enabled to engage effectively in ADR the necessary support may be unavailable in practice. In this last context the Official Solicitor draws attention to the following, that

- lay advocacy support (for the learning disabled or mentally ill) is not uniformly available across England and Wales
- where lay advocacy support is available it is often not available to the extent necessary to enable capacitated participation in the decision making process
- it is unlikely to be part of the role of carers or professionals providing support to the ill or disabled (for example, community care services) to assist in the conduct of legal proceedings or ADR
- access to State provided community care services is determined by the Fair Access to Care Services guidance and rising costs pressures and limits on resources are already leading to some local authorities imposing higher thresholds for the provision of services and therefore for the provision of a professional support network
- it is unclear who would be responsible for assessing, funding, providing or organising such support as may be necessary to enable the ill or disabled to engage in ADR

20. There would be a significant risk that the other party or parties may invest both financially and emotionally in a flawed decision making process in good faith, only for any decision to subsequently be impugned or set aside for want of capacity on the part of the person who lacks capacity.

21. The Official Solicitor can find no consideration in the consultation proposals or in the impact assessments of the position of protected parties, and only limited consideration of the position of child parties or, in the context of Court of Protection proceedings, of "P".

Role of the party's solicitor in recognising a lack of capacity

22. The concerns referred to above include the risk that a party's illness or disability is unrecognised or insufficiently recognised, and the allied concern of misinterpretation of a party's conduct. This is most acute in the context of those classes of cases proposed to be removed from scope altogether. It is established at common law that the test for litigation capacity should be such that, in the ordinary case, the need for a litigation friend should be readily recognisable by an experienced solicitor, the solicitor being under a duty to raise with the court if they have doubt about their client's capacity to give instructions[12]. In such cases the court will give directions as to the evidence to be obtained. In other cases the potential litigation friend may apply for their own appointment provided their application is supported by evidence. If there is a dispute or a conflict in the evidence about capacity, as there may well be, it is for the court to apply the law to the facts of the case and determine whether or not the party has the capacity to conduct their own litigation, either in person or

[11] Research commissioned by the Ministry of Justice, carried out by the British Market Research Bureau (BMRB) and Liverpool John Moores University which focussed on victims and witnesses in criminal cases and parties to civil proceedings: *Court experiences of adults with mental health conditions or learning disabilities.*

[12] *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511.

by retaining a solicitor. Issues relating to capacity can be complex irrespective of the class of case and are of vital importance to the party concerned.

Litigation friend needs to retain a solicitor to act for the incapacitated party or child

23. Where a litigation friend is appointed to conduct the proceedings for the incapacitated party or child, the duty of the litigation friend is to "fairly and competently" conduct the proceedings in what they consider to be the best interests of the incapacitated party or the child in the proceedings. The litigation friend effectively steps into the shoes of the protected party or "P" for the purposes of conducting the litigation. A litigation friend is neither a McKenzie Friend nor a lay person granted rights of audience, as to which see: the Practice Guidance: McKenzie Friends (Civil and Family Courts): issued by Lord Neuberger of Abbotsbury, Master of the Rolls and Sir Nicholas Wall, President of the Family Division on 12 July 2010. A litigation friend must retain a solicitor to provide legal services to the incapacitated party or child.

Funding legal representation

24. As a matter of law a litigation friend cannot recover his costs of acting as litigation friend but the cost of provision of legal services to the protected party, "P" or child needs to be funded. The Official Solicitor makes his appointment as litigation friend conditional on the costs of obtaining or providing legal services being secured either from the person's own funds or from external sources (except in cases in the Court of Protection involving serious medical treatment, where his involvement has long been regarded a matter of necessity). Those external sources include the Legal Service Commission where the protected party or "P" or child is eligible for legal aid. Litigation friends other than the Official Solicitor will similarly require funding to retain solicitors to act for the protected party, "P" or child.

25. Alternative means of funding are often not available in practice to persons who lack litigation capacity either because they lack financial capacity as well, or because lenders are not willing to advance money to them. Even as last resort litigation friend, the Official Solicitor, save in very limited circumstances, is not funded either to provide the legal services necessary to conduct the proceedings 'in house' or to otherwise to subsidise the provision of legal services. In his experience where the protected party has insufficient funds to pay for the provision of legal services, or a CFA arrangement cannot be entered into or an undertaking to meet his costs is not forthcoming from the other side, legal aid is the only way of securing such services.

Consequences of there being no funding

26. Where there is no funding and in consequence no one willing to accept appointment as litigation friend, the litigation cannot proceed; the consequence not only for the protected party or P or the child, but also for the other party or parties, is that there can be no determination by the court of the matters at issue.

27. Previous changes to the eligibility rules already cause enormous practical difficulty in securing funding for legal services, leading to significant delay and the disproportionate use of the Official Solicitor's scarce resources to try to address this issue.

28. There is a clear risk that the proposed changes will give rise to a significant number of civil and family court cases where there is no practical way to resolve funding issues and the proceedings will effectively be stayed either for a prolonged period or indefinitely, thereby denying justice to all parties involved.

****

"Proposals for reform

1.11 ... Recognising that some individual cases will continue to require public funding even once they are removed from scope, the chapter proposes retaining a power to grant legal aid in certain circumstances".

Comment

29. The circumstances in which public funding otherwise removed from scope will be available is proposed to be very narrowly prescribed.

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"Impact Assessments

1.18 The Government has assessed the potential impacts of the proposed reforms in line with existing duties on gender, race and disability and with particular reference to users and providers of legally aided services in both the private and not for profit sectors. These assessments of the potential impact of these proposals have been published alongside this document".

Comment

30. The proposals, or some of them, have the potential to affect disproportionately the ill and the disabled, in particular those lacking mental capacity, and also children, when compared with the population as a whole. The reason for that given, at the 1st bullet point at 1.18 on page 9 of the EIA on *Legal Aid Reform: Cumulative Impact*, is that that results from those groups (among others) being overrepresented as users of civil legal aid services. But another reason is that the proposals would put those groups at a particular disadvantage when compared with people with whom they do not share the relevant characteristic of lack of litigation capacity or minority.

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"2 Introduction
The case for reform

2.11 To help establish the right balance, we have been guided in particular by the following considerations:

- *the desire to stop the encroachment of unnecessary litigation into society by encouraging people to take greater personal responsibility for their problems",*

Comment

31. In the case of persons who lack mental capacity and children, the proposition that they can take greater responsibility for resolution of their legal problems must be questionable.

"and to take advantage of alternative sources of help, advice or routes to resolution";

Comment

32. Alternative means of funding are often not available in practice to persons who lack litigation capacity either because they lack financial capacity as well, or because lenders are not willing to advance money to them.

****

"Legal aid reform

2.27 In civil and family legal aid, our aim is to introduce a targeted scheme which directs resources to those areas of law we judge to be priority. Our consideration of the justification for public funding for civil and family cases is based on an assessment of the nature of the rights involved, the client's ability to represent his or her own case"

Comment

33. Leaving aside the prohibition on those who lack mental capacity and children from conducting their own proceedings (either personally or through solicitors), there appears to have been no consideration of the ability of those persons to represent their own case. The fact that rules of court require the appointment of a litigation friend is not an effective remedy to the lack of litigation capacity where it is not possible for a potential litigation friend to secure funding of legal services for that person. If the person lacks litigation capacity (in other words the capacity to instruct a solicitor to act on their behalf), how will they have the capacity to conduct the litigation in person? There is a marked difference between the assistance, which both the court and the professional advocates for the other parties, have traditionally provided to a litigant in person, and the conduct of the proceedings on behalf of the person who lacks litigation capacity or child by their litigation friend.

"and the availability of alternative assistance, remedies or funding"

Comment

34. The Consultation Paper does not contain any reference to consideration of the ability of persons who lack litigation capacity

- to access alternative assistance and remedies or
- even where they are a property owner, to utilise their capital to fund their litigation or secure alternative forms of funding

in the ways that a person with capacity should be able to do so.

35. The Official Solicitor is aware that many of the litigants who lack capacity, for whom he would act as litigation friend were they able to access funding, are unable to raise that funding through their property. This already creates particular difficulties in ancillary relief cases and arises in part from the existing limit on the capital disregard. He would also observe that such persons are often at risk of, or have in fact suffered, financial abuse, and having regard to their impaired mental capacity will be particularly vulnerable in the context of alternative funding arrangements.

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"2.30 We have reviewed who should qualify for legal aid and in Chapter 5 we have set out our proposals for reforming the eligibility rules. These are designed to limit availability to those who really need it while ensuring that those who can afford to contribute should do so. Those who have access to funds, for example, through equity in a property, would, under the proposals in this paper, be required to use them first before accessing legal aid."

Comment

36. Recent changes to the financial eligibility rules have already made it impossible for some of those who lack mental capacity to secure funding for legal services.

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2.37 We have considered the impact of the proposed reforms both on the various client groups and on providers of legal aid, and our detailed assessments are published separately. Overall, we believe that the likely impact of these proposals is proportionate to

most in need".

Comment

37. There is no evidence of consideration of the impact on those lacking litigation capacity and children both of who are identified by rules of court as a class of litigants in respect of whom special measures are required in order to ensure access to justice for that class.

****

"3 Background Civil and family legal aid

3.16 In certain types of proceedings, legal aid is available free to all, for example, for parents in care or supervision proceedings and in child abduction proceedings, and for certain types of mental health or capacity proceedings where an individual is challenging his or her detention and for the child where they are a party in family proceedings. But all other services under the Community Legal Service are means tested".

Comment

38. In the Court of Protection non means tested legal aid is freely available only in those cases where there is an application under section 21A of the Mental Capacity Act 2005 as a challenge to a standard authorisation for deprivation of liberty or a condition thereof. There are many other classes of case dealt with by the Court of Protection including others where deprivation of liberty under section 16 of the 2005 Act is at stake where, although legal aid is available, it is means tested. See paragraphs 53-59 below.

39. Legal aid is not freely available to a child party (for example to a child intervener in care proceedings) unless that child is the subject of public law proceedings, otherwise legal aid is only available on a means and merits test.

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"4 Scope

Civil legal aid

4.12 In reaching our view about which types of issue and proceeding should continue to justify legal aid, we have taken into account the importance of the issue, the litigant's ability to present their own case"

Comment

40. A person who lacks capacity to conduct proceedings is not permitted as a matter of law to present their own case; nor are child parties save in specified circumstances and then only where legal representation is available (rule 9.2A of the Family Proceedings Rules 1991 requires a solicitor's assessment).

"(including the venue before which the case is heard, the likely vulnerability of the litigant"

Comment

41. There is no evidence that the position of those litigants who lack litigation capacity or children has been taken into account.

"and the complexity of the law), the availability of alternative sources of funding"

Comment

42. Alternative sources of funding available to those with capacity are often not available in practice to those who lack capacity or to children. Alternative means of funding are often not available in practice to persons who lack litigation capacity either because they lack financial capacity as well, or because lenders are not willing to advance money to them.

****

"The importance of the issue

4.17 We consider that proceedings where clients are primarily seeking monetary compensation will not generally be of sufficient importance to merit public funding, unless there is another significant aspect to the claim that considerably increases its importance. For example, a damages claim which arises out of the abuse of a child or vulnerable adult, or out of serious abuse of state power, has an importance that goes beyond a simple money claim".

Comment

43. But, for example, in catastrophic personal injury cases, a "simple money claim" is for the purpose of providing the capital on which the claimant's future social, nursing and personal care will depend. Where those costs are not recovered from the tortfeasor, or more usually the tortfeasor's insurers, they will necessarily be borne by the taxpayer. If there is no recovery of damages, then the person who has suffered catastrophic injury is not likely to get the standard of care necessary (for example by way of targeted rehabilitation) to restore them as near as possible to their pre-accident state, severely affecting their quality of life. State provision is a safety net, but does not provide the standard of care which a court's award of damages will provide, and is itself being cut back.

****

"The litigant's ability to present their own case

4.22 There are several aspects we have considered in deciding whether litigants are likely to be able to present their own case. We have taken into account the form of proceedings and the forum in which they are resolved, for instance, whether they are inquisitorial or adversarial and whether they are intended to be sufficiently user-friendly that the individual could navigate their way through the process without having to rely on a legal representative".

Comment

44. These factors are generally not relevant considerations in the case of persons who lack litigation capacity or child parties. Indeed, as set out in paragraph 11 above, the public policy is that those who lack litigation capacity and (as a general rule) children are not permitted to conduct their own litigation and require a litigation friend.

****

"4.23 We have considered whether, in each type of case, the litigants bringing proceedings are likely to be predominantly from a particularly physically or emotionally vulnerable group, for example, as a result of their age, disability or the traumatising circumstances in which they are bringing proceedings".

Comment

45. Litigants who lack capacity to conduct proceedings are a defined class of litigants, and so are children. In both cases they are identified by court rules as a particular class in respect of whom special provision is made. The exclusion from scope of classes of case will have a disproportionate effect on those classes of litigants – because of the characteristics shared by those classes of litigants and not the rest of the population.

"4.24 We have also looked at whether the nature of the case itself is likely to be particularly complex. We recognise that the law can seem complex, but we have considered whether the type of case, by its very nature, may be routinely of such exceptional complexity that it is unlikely that a litigant would be able represent themselves effectively".

Comment

46. Litigants who lack capacity to conduct their proceedings are not permitted as a matter of law to represent themselves. Even if the subordinate legislation which provides for that was amended to remove the bar, it is nevertheless self evident that such self representation by them could not be effective representation.

****

"Taking these factors into account

4.28 In weighing up these considerations, no one factor has been determinative. We have sought to balance these considerations in reaching our proposals, which are set out below.

4.29 Taken together, they have led us to propose a revised civil legal aid scheme which focuses resources on those cases where the litigant is at risk of very serious consequences".

Comment

47. Consequences which may properly be regarded as not serious to those with capacity may nevertheless be very serious to those who lack litigation capacity.

****

"Proposals for retaining or removing areas of law from scope

4.34 The Government intends to replace this with a new scheme to provide legal aid for excluded cases where the Government is satisfied that the provision of some level of legal aid is necessary for the United Kingdom to meet its domestic and international legal obligations, including those under the European Convention on Human Rights (ECHR, in particular article 2 and article 6)... It is not intended that exceptional funding will generally be available except where it can be demonstrated that it is necessary to discharge those legal obligations...

4.35 This scheme will not compensate for the withdrawal of funding for the types of case and proceeding we propose to remove from scope. Given the need to reduce public spending and target available resources effectively, we propose to draw the scheme narrowly while ensuring that cases which require legal aid are able to secure it".

Comment

48. The intention is to draw the proposed scheme narrowly while ensuring that cases which require legal aid are able to secure it. It is unclear how the proposed scheme will provide for representation for litigants who lack litigation capacity or child parties where no other source of funding for legal services is available in practice and having regard to the fact that such litigants are not permitted, as a matter of law, to present their own case.

****

(a) "Areas of civil and family law proposed for retention in the legal aid scheme

Claims against public authorities

4.43 Currently, civil legal aid is generally available for claims against public authorities, including claims for negligence and personal injury claims in certain specified circumstances (clinical negligence cases against public authorities are dealt with separately below).

4.44 Claims against public authorities are brought into scope by the Lord Chancellor's Authorisation on Scope of the Community Legal Service where they concern "(i) 'serious wrong-doing', or (ii) abuse of position of power or (iii) significant breach of human rights, or (iv) where they are of Significant Wider Public Interest (v) and where they form part of a Multi-Party Action where the likely damages exceed £5,000)."

4.45 We do not generally view primarily financial matters as being of sufficiently high importance to warrant intervention and support in the form of legal aid and we are less likely to view as justified uses of civil legal aid for cases which merely concern financial advancement".

Comment

49. Generally damages are not for financial advancement but to restore the wronged claimant to the position that that they would be in if the wrong had not been committed.

"4.51 We recognise that there may be cases involving very serious negligence, which should properly fall within the legal aid scheme, but which may not always comfortably fall within the criteria for 'abuse of position of power' or 'significant breach of human rights'. In order to bring these cases within legal aid, we propose to provide funding for claims against public authorities arising from "negligent acts or omissions falling very far below the required standard of care"".

Comment

50. The proposals are to bring back into scope cases where actions have been 'very far below' the required standard of care but these provisions are imprecise (how is 'very' far below to be defined), and it is unclear how that threshold is to be measured and how establishing it will be funded. It is not clear whether it is intended to create a new tort? Will it apply in cases where a duty of care is being argued to exist in novel circumstances? The Official Solicitor has in mind as examples *X v Hounslow London Borough Council [2009]*

EWCA Civ 286 and Maga (by his Litigation Friend, the Official Solicitor to the Senior Courts) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256 (albeit that the latter claim was not against a public authority).

"4.53 This ensures that cases of very serious negligence are still within scope… We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused. We consider that the class of individuals bringing these claims is not necessarily likely to be particularly vulnerable"

Comment

51. Why not and what if they are?

****

"Family mediation in private law family cases

4.69 The Government believes that, wherever possible, it would be in the best interest of those involved in private law family cases which do not involve domestic violence to take a more direct role in their resolution, using mediation and keeping court proceedings to the minimum necessary.

4.70 However, we recognise that some individuals within the eligibility limits for legal aid will need assistance in resolving their disputes without recourse to court-based solutions. For this reason we are proposing that legal aid be retained for family mediation in private law family cases, including private law children and family proceedings and ancillary relief proceedings. This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is present, we intend to offer support through family mediation, as some couples may still be able to obtain value from the mediation process."

Comment

52. Please see paragraphs 16-21 above for the concerns relating to ADR, including family mediation, in cases in which one party to the dispute lacks litigation capacity and possibly capacity in other respects.

****

"Mental health

4.92 Legal aid currently funds all cases where the primary legal issue relates to mental health, particularly where this is covered by the Mental Health Acts of 1983 and 2007, and the Mental Capacity Act 2005".

Comment

53. The purpose of the Mental Capacity Act 2005 is not directed to issues of the treatment of mental illness, that is the scope of the Mental Health Acts, but rather it provides the legal framework for acting and making particular decisions on behalf of individuals who lack the mental capacity to make those decisions for themselves. The Court of Protection is the specialist court for making those decisions when judicial intervention is required in respect of them.

54. Currently an authorisation given under section 6(8) of the Access to Justice Act 1999 brings certain cases before the Court of Protection within scope, namely those cases where

> *"(i) the proceedings fall within paragraph 6 below AND*
> *(ii) the Court has ordered or is likely to order an oral hearing at which it will be necessary for the applicant for funding to be legally represented.*
>
> *6. The proceedings specified in paragraph 5 above are those which, in relation to the person whose personal welfare is the subject of the proceedings, concern that person's:*
>
> - *Life*
> - *Liberty*
> - *Physical safety*
> - *Medical treatment (including psychological treatment)*
> - *Capacity to marry or enter into a civil partnership*
> - *Capacity to enter into sexual relations OR*
> - *Right to family life"*

(the full text of the Lord Chancellor's Direction is set out at Annex B to this response).

55. Save in relation to "appeals" under section 21A MCA 2005, legal aid is currently subject to the means and merits tests. It is unclear whether it is proposed that the provision of legal aid in accordance with the authorisation will continue. It should be noted that "appeals" under section 21A are not the only cases in which "P" may be already deprived of their liberty. Although it is to be hoped that local authorities will not continue to deprive people of their liberty without first obtaining authorisation from the Court of Protection (in those cases not falling within Schedule A1 because the place of intended deprivation is not either a hospital or care home), experience in relation to the Children Act shows that occasionally local authorities still remove children without lawful authority. So restricting non means tested legal aid to those cases brought under section 21A is not consistent with the problems which can arise in fact.

56. For the reasons given in paragraph 4.93 of the Consultation Paper, the Official Solicitor's view is that it is essential that legal aid should remain available for 'P' and other parties in the Court of Protection in proceedings covered by the authorisation. In those proceedings 'P's capacity and best interests are at issue. The resolution of either or both of the capacity and best interest's issues is of vital importance to the person concerned. As with public law children proceedings such proceedings are usually brought by public authorities (the local authority or a NHS Trust). The focus is often on whether State provision or arrangement of care and accommodation is necessary in 'P's best interests - whether, for example, 'P' should be removed from their family home into residential care, or, discharged from hospital into residential care rather than returning home. The public authority may also be seeking to regulate the arrangements for 'P's care or his contact with others including close family members. Deprivation of liberty and restraint issues, outside the scope of section 21A of the Mental Capacity Act 2005, also frequently arise; and there may be other serious risks to 'P's welfare including the risk of removal from the jurisdiction.

> *4.93 We consider that most of these cases concern a very important issue – the individual's liberty. Due to the nature of their illness, many of this client group will be very*

vulnerable and are unlikely to have the capacity to represent themselves properly at a tribunal without legal assistance. Although advice is available from other sources, through voluntary sector organisations such as Mind, which provides a legal advice service, we do not consider that these are sufficient, or that there are alternative sources of funding which would enable individuals to resolve these issues without publicly funded legal assistance. Nor do we consider that these cases are ones where the individual could be expected to resolve the issue themselves given the involvement of the state and the nature of the illness.

4.94 We therefore propose to retain legal aid for mental health and capacity detention cases, including appeals to the Court of Protection on deprivation of liberty issues".

Comment

57. The Official Solicitor is concerned that this defines deprivation of liberty issues too narrowly (see paragraphs 55 and 56). The Court of Protection determines deprivation of liberty issues not only as "appeals" under section 21A of the Mental Capacity Act 2005 against authorisations granted under Schedule A1 to that Act but also under section 16 of the Act.

58. As stated above it is unclear whether this constitutes a proposal to remove from scope of legal aid the healthcare and welfare best interests proceedings in the Court of Protection which are covered by the Lord Chancellor's authorisation.

59. The Official Solicitor notes the rationale set out at paragraph 4.93 in relation to funding for legal services for persons detained under the Mental Health Act 1983 and would observe that in large part the same rationale would apply to any party who lacks capacity to conduct proceedings – namely

- due to the nature of their illness or disability, many of this client group will be very vulnerable and (by definition) will not have capacity to represent themselves in court proceedings

- advice may be available from other sources, through voluntary sector organisations but it will not be sufficient, given the finding as to lack of capacity, to enable effective representation

- the concern about the impracticability or impossibility of obtaining alternative funding is made in paragraphs 24-28, 32, 35 and 36.

Inherent jurisdiction of the High Court

60. There is also no mention of whether those cases which do not fall within the jurisdiction of the Court of Protection (because the subject of the proceedings has capacity in respect of the matters about a decision is, or decisions are to be made but rather are to be determined under the High Court's inherent jurisdiction in relation to vulnerable adults. It appears that these cases, which may similarly involve questions of interference by public authorities and/or complex questions of law and are of vital importance to the individuals concerned, would be out of scope.

***Question 1**: Do you agree with the proposals to **retain** the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme? Please give reasons.*

Answer

61. Yes for, but subject to, the reasons given above.

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"(b) Areas of civil and family law proposed for exclusion from the legal aid scheme

4.145 In this section, we set out the areas of law which we propose to remove from the scope of the civil legal aid scheme, explaining the considerations we have taken into account in making each proposal.

4.146 The need to reduce public spending, and provide access to public funding for those who need it most, has required some very difficult choices to be made about where publicly funded legal assistance is no longer affordable. In making these proposals, we have applied the factors we set out in paragraphs 4.13 to 4.29 to determine whether funding is justified:

- *the objective importance of the issue, taking into account the matters at stake;*
- *the litigant's ability to present their own case;"*

Comment

62. There appears to be no assessment of the ability of litigants who lack capacity to conduct the proceedings to present their own case or the ability of children to do so. Paragraphs 1-23, 33, 40, 44, 45, 46, and 55-59 are repeated.

- *the availability of alternative sources of funding; and*

Comment

63. Or of the ability of persons who lack such capacity, even where they may be an owner of property, to utilise their capital to fund their litigation in the way that a person with capacity should be able to do so.

- *the availability of other routes to resolution, and the advice and assistance available to individuals to help them achieve a resolution, including the extent to which the individual could be expected to work at resolving the issue themselves.*

Comment

64. The concerns about the availability of other routes to resolution and accessibility of advice and assistance are set out in paragraphs 16-21 above.

4.147 Funding may still be available for some cases which we propose to exclude from the scope of the scheme, where the particular circumstances require it. Paragraphs 4.246 to 4.262 explain the funding scheme for excluded cases in more detail.

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"Ancillary relief cases (where domestic violence is not present)

4.156 In addition, there is advice available online to help couples to navigate the divorce process. The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified."

Comment

65. In the case of those who lack capacity, an alternative, such as online advice, which relies on individuals having online access *and* the skills both to navigate the online service, and to use the information available, is not likely to be realistic. Text based information is not necessarily an appropriate format if that information is to be accessible to the individual concerned.

"4.157 The evidence also suggests that these cases can often be resolved by the parties reaching an agreement between themselves. In 2008, 73% of ancillary relief orders were not contested, indicating that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown. We propose to fund mediation in these cases, to support individuals to reach an agreement without recourse to the courts (as set out in paragraphs 4.69 to 4.72 above)."

Comment

66. It is unclear whether the 73% referred to includes those cases resolved by consent order after prolonged negotiation (with the assistance of legal advice) and/or interim hearing(s) (with legal representation). The comments in paragraphs 16-21 about ADR in cases in which a party lacks capacity apply here.

"4.158 Although we recognise that the issues which arise in these cases will sometimes be of high importance, it is necessary, in order to reduce spending on legal aid, to target scarce resources in a fair and balanced way at those cases for which legal aid is most justified. Having taken into account all the factors set out above, we therefore propose that all legal aid other than family mediation services should be excluded from the scope of the scheme for all ancillary relief cases other than those where domestic violence is present."

Comment

67. Please see paragraphs 16-21 and 64 above for the risk of the ill and disabled being placed at particular disadvantage in the context of an ADR process. Additional considerations are that they might be disadvantaged because of their illness or disability going unrecognised or because of the interpretation placed by others on their presentation, or because of the impact on their ability to properly engage with the process.

"4.161 We propose to make changes to the courts' powers to enable the Court to redress the balance in cases where one party may be materially disadvantaged, by giving the judge the power to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party. In doing so, the Court would also incentivise the contributing party to negotiate a settlement. The materially disadvantaged party could apply for an order at any stage of the proceedings, where they could demonstrate that they could not reasonably procure legal advice by any other means (as is currently permissible under maintenance pending suit provisions. Any order made would include the payee's undertaking to pay the sum to their legal representative to cover the

costs of the proceedings. This would be credited against any ultimate liability that the payer might have to pay or part-pay towards the costs. Although these proposed changes to the courts' powers are not a precondition for the proposed changes in scope, we would anticipate that this power to award interim lump sum orders would be brought into effect either in advance of or at the same time as any changes to the scope of legal aid."

***Question 2**: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party? Please give reasons.*

Answer

68. The Official Solicitor would welcome this proposal in principle but notes that there is no detail as yet

- as to the criteria to be adopted when arriving at a decision as to whether a party has the means to fund the costs of representation for the other parties
- in particular as to how large the disparity between the parties' financial means would need to be.

If this proposal in practice has bearing only on 'big money' cases, then it will have relatively little impact on the vast majority of those cases where he presently acts. The application for an interim lump sum may itself be vigorously contested and there is no proposal for funding for the purpose of making such an application.

69. If an interim lump sum order is made against a protected party, then this proposal would give rise to similar difficulties in terms of implementation as arise in the context of securing funding for legal services for the protected party - namely if the protected party lacks financial capacity there would need to be a person with lawful authority to make payment from the protected party's estate on their behalf (for example, a financial deputy, or an attorney under a registered Enduring Power of Attorney or Lasting Power of Attorney or a litigation friend with authority from the Court of Protection).

****

"Private law children and family cases (where domestic violence is not present)

4.206 We have considered carefully whether legal aid provision continues to be justified in private law children and family cases where domestic violence is not present. We recognise that these cases may raise important issues about family life, and about the best interests of children."

Comment

70. Please see paragraphs 80-89.

"4.207 While we understand that those going through relationship breakdown may be dealing with a difficult situation, both emotionally and often practically too, we do not consider that this means that the parents bringing these cases are always likely to be particularly vulnerable (compared with detained mental health patients, or elderly care home residents, for example), or that their emotional involvement in the case will necessarily mean that they are unable to present it themselves. There is no reason to believe that such cases will be routinely legally complex. As noted in paragraph 4.156,

there are also other sources of advice available to help couples following the breakdown of their relationship."

Comment

71. Whilst a party's emotional involvement in a case will not necessarily mean that they are unable to present it in person, a lack of capacity to conduct the proceedings will have that effect. Individuals with significant learning difficulties or mental health problems are particularly vulnerable by reason of their illness or disability and their ability to present their own case will be impaired (irrespective of whether they lack capacity).

72. Private family law cases may be legally very complex and may involve fact finding about the most serious of issues (for example: sexual abuse), significant restrictions on the exercise by a parent of parental responsibility for their child (for example: prohibited steps orders and special guardianship orders), or the imposition of a threshold requirement on the parent's ability to bring an application in respect of their child (for example: under section 91(14) of the Children Act 1989).

"4.210 We do not consider that it will generally be in the best interest of the children involved for these essentially personal matters to be resolved in the adversarial forum of a court. The Government's view is that people should take responsibility for resolving such issues themselves, and that this is best for both the parents and the children involved. We therefore consider that scarce resources should be targeted to areas where publicly funded legal assistance is more likely to be justified and of practical benefit to the parties involved.

4.212 In order to assist individuals to resolve children and family matters between themselves, we propose to continue providing access to mediation (see paragraph 4.72). We recognise that there will potentially be issues of financial imbalance between the parties, and that the party with the funds to pay for their own legal representation may sometimes seek to avoid mediation or a reasonable settlement. As set out in paragraphs 4.159 to 4.161, we also propose to amend the courts' powers to enable the judge to grant an interim lump sum payment against the party who has the means to fund the costs of representation for the other party.

4.215 In light of these considerations, we therefore propose to exclude private law children and family matters where domestic violence is not present from the scope of legal aid (except for international child abduction which will remain in scope (see paragraph 4.88), and rule 9.5 and 9.2A cases (see paragraph 4.106)) for all levels of service other than mediation".

Comment

73. Paragraphs 16-21 are repeated.

74. Drilling down, rule 9.2A applies only to proceedings under the Children Act 1989, Part 4A Family Law Act 1996 or the inherent jurisdiction of the High Court with respect to children. It operates to exempt children of sufficient understanding (in the assessment of their solicitor) from the general rule that a child must act by a litigation friend. Further rule 9.5 operates to enable the court (if it appears that it is in the best interests of the child to be made a party) to appoint a litigation friend for that child but not otherwise. It is therefore of serious concern that a child party who falls outside the operation of these rules, but who is nonetheless required to act by a litigation friend will not be able to access legal aid (including child parties where joinder is automatic rather than a question of judicial discretion), for

example, a respondent minor parent who is not rule 9.2A competent, or a child applicant/respondent to a declaration of civil status under the Family Law Act 1986.

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"Tort and other general claims

4.239 Because the civil legal aid scheme is very broad in scope, legal aid is currently available for a range of tort and other general claims (for example, assault, negligence, nuisance, breach of a statutory duty, false imprisonment, and malicious prosecution). These will primarily be claims where damages are sought, although some may involve, for example, injunctions.

4.242 On balance, we do not consider that funding for these claims is justified, and we propose to remove legal aid for these cases from all of the categories of law in the civil legal aid scheme.

4.243 As noted above, we propose retaining civil legal aid for certain other types of monetary claim of a higher priority for funding, namely discrimination claims (paragraph 4.135), claims against public authorities (paragraph 4.43), and claims arising from allegations of abuse or sexual assault (paragraph 4.56).

Comment

75. The impact of the proposals is such that clinical negligence cases would be removed from scope in their entirety. The clinical negligence cases in which the Official Solicitor acts as litigation friend are almost entirely cases where the adult or child has suffered serious, often catastrophic, injury and is in need of compensation to provide the claimant and their family (where the individual lives with their family), with some quality of life. In the case of children, the compensation obtained often enables them to be cared for at home with their birth family, when that family could not otherwise cope given the very limited State domiciliary help that is available.

76. The Official Solicitor accepts that clinical negligence cases are particularly expensive to pursue but would point to the reasons for this: it is rare that an assessment of liability can be made (as opposed, for instance, to the situation in road traffic accident cases) from obtaining a statement or statements of events alone. Copies of medical records, frequently numerous, expert's reports, are all likely to be required. In some cases the reports of a number of experts in different disciplines will be required before any proper assessment of the merits of the claim can be made. Reports are expensive. It is likely that solicitors will no longer be prepared to take on those cases which require extensive investigation before an assessment of merits can be made, but only those cases where it appears at the outset that there is fault and that is can be easily ascertain with perhaps one report. If such claims are taken out of scope and left to the existing conditional fee arrangement regime the result will be that many seriously and catastrophically injured children and brain injured adults will lose the chance of the compensation which would enable choice in where they live and by whom they are cared for.

77. Should the Jackson proposals be adopted so that there is a reduction in success fees to 25% of damages (excluding future loss and care), the willingness of solicitors to take on uncertain cases is likely to decrease further. The maximum damages for catastrophic injury for pain, suffering and loss of amenity is in the region of £280,000, and most claimants are

awarded less than this. In a case where disbursements may be in six figures, 25% of damages, will not be a sufficient incentive to solicitors to take on a case that has uncertain prospects and will do little to compensate for the lost profit costs and cost of disbursements in any lost or abandoned case - the premise on which CFA success fees were brought in.

78. The increase of 10% in general damages will do little to offset the loss to the claimant of having to meet the success fee. Given that in most cases general damages are to be used in the purchase of a property but awards are not made for the full cost of a necessarily adapted property, the claimant would always lose out as it is other heads of future loss, in addition to general damages, which have to be 'raided' to meet the cost of adaptations. The non-recoverability of ATE premiums would further reduce the number of claims that could be brought in view of the very high level of premium demanded in clinical negligence cases.

79. These are generally cases where the victim has suffered because of failures by the State in its duty of care to citizens. The State should provide the means whereby the individuals concerned, in particular those who are unable to present their own case, should be able to obtain redress through compensation, to put them back in the position, as near as possible, that they would have been in absent that failure.

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***Question 3**: Do you agree with the proposals to **exclude** the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.*

Answer

Ancillary relief cases (where domestic violence is not present)

80. The Official Solicitor, in this area of work, as others, is the litigation friend of last resort. In divorce and ancillary relief cases there is often no other person suitable and willing to act, as the parents of those involved may be elderly, their own children are often minors or have a conflict of interest, and siblings rarely get involved. Family members while willing to provide personal support are often unwilling to act as litigation friend, for fear their involvement in conducting the proceedings will further exacerbate already difficult family relationships.

81. Many of the individuals for whom he acts in such cases have mental health difficulties or brain injury arising out of a range of conditions (including accident, dementia or illnesses such as Huntingdon's)

- their mental health difficulties may be significant and of longstanding but have gone unrecognised and untreated

- the breakdown of the marriage may itself have led to a deterioration in the mental health of the party concerned (either giving rise to a mental illness such as depression or exacerbating an existing mental illness)

- the extent of the brain injury or mental health difficulties may be such that the party is unable to engage at even the most basic level and have no understanding of the divorce proceedings or of their financial position (for example advanced dementia or severe brain injury)

- a party may be particularly vulnerable because there are no statutory or voluntary agencies involved, the person who has been their carer has ceased to provide support and commenced divorce proceedings, and they are not able, because of their own difficulties, to seek alternative sources of support

- they may be unable to read or write.

82. The proposals stress the need for parties to 'take responsibility'; as observed above, in the case of a protected party who by definition has impaired capacity to make decisions this is a questionable proposition.

83. In the context of ADR persons with mental health difficulties or significant learning difficulties will be particularly vulnerable

- they may have no, or inadequate knowledge of their own or their former partner's financial circumstances

- the family finances may have been wholly controlled by their former partner

- they may have been subject to financial abuse including the transfer of assets

- they may have insufficient understanding of the relevant information to arrive at a properly informed agreement, and/or if agreement is reached, they may not be able to take the necessary steps to implement that agreement

- divorce litigation cases may be referred to the Official Solicitor at an early stage of the proceedings, but often are referred by the court some time after the commencement of the ancillary relief proceedings and only after the gradual realisation that the failure by a party to comply with court directions is not a question of litigation misconduct but rather derives from illness or disability

- in some cases, this realisation is only arrived at after a prolonged period when the party simply does not respond to correspondence, whether from the court or from the other party, does not attend hearings, and has been made subject to adverse costs' orders.

- in a minority of cases both parties are protected parties

84. In approximately 75% of the divorces cases where the Official Solicitor acts as litigation friend, the protected party is legally aided. Before the introduction of the £100,000 limit on equity the vast majority of the cases in which the Official Solicitor acted were legally aided. The changes in the eligibility rules have already led to a significant increase in the work involved in securing funding for legal services. Such work is irrecoverable by the tax payer, unlike the cost of funding legal services under a legal aid certificate where the

statutory charge operates. There are already an increasing number of cases where because of changes in the financial eligibility rules the Official Solicitor has enormous difficulty in securing the cost of legal services leading to significant delay in progression of the litigation or in the litigation being stalled.

Examples:

Case study A:
Mrs A lived a reclusive life. Following the issue of divorce and ancillary relief proceedings by Mr A, she did not respond to correspondence either from the court or from her husband's solicitors. The court invited the Official Solicitor to act as Mrs A's litigation friend. The Official Solicitor, as her litigation friend, was able to instruct solicitors to apply for legal aid on her behalf, and thereafter to enter into extensive negotiations to resolve the financial issues. The settlement achieved meant that Mrs A was able to retain the matrimonial home as her residence.

Case study B:
Following the issue of divorce and ancillary relief proceedings by Mrs B, Mr B failed to respond effectively to any correspondence from the court or from Mrs B's solicitors. The court invited the Official Solicitor to act as Mr B's litigation friend. Mr B repeatedly sent the same short letter (which had no relevance to the proceedings) to the court and to the Official Solicitor. Although formerly employed and owning his own home, Mr B had completely isolated himself both from the community and from his own family. He had money in his account which he did not access and survived on small sums of money posted through his front door by concerned family members with whom he refused to engage. After considerable effort, the Official Solicitor was able to involve the social and mental health services, leading to assessments both of Mr B's capacity to conduct the proceedings and of his mental health generally. Mr B was detained under the Mental Health Act 1983 for treatment. As his litigation friend, the Official Solicitor was able to instruct solicitors to apply for legal aid on his behalf and conduct the ancillary relief proceedings on his behalf achieving an outcome which enabled Mr B to retain his property. With treatment he gradually recovered his mental health and was able to return to live in his own home.

85. In both cases there was costs' recovery by the Legal Aid Fund.

86. The proposals refer to parties obtaining alternative funding and using their property and capital to fund legal representation. This option is not available to many of those for whom the Official Solicitor acts as litigation friend. Most of those for whom he acts in divorce and ancillary relief proceedings lack not only litigation capacity but also financial capacity. They cannot therefore access their own funds or take out loans against property unless there is lawful authority for another person to do so on their behalf, for example, because the incapacitated person has, before losing capacity, executed an Enduring Power of Attorney or (post 01.10.05) a Lasting Power of Attorney, or as a result of proceedings in the Court of Protection either for the appointment of a financial deputy, or to secure the costs of legal representation from that person's estate by way of Court of Protection order.

87. If a protected party will no longer be eligible for legal aid irrespective of their financial means, but does not have sufficient accessible assets to fund the costs of legal services, then it is difficult to see how practicably the cost of legal services can be secured.

> *Case study C*
> Mr and Mrs C divorced a number of years previously without resolving the financial issues arising out of their divorce. Mr C continued to live in the matrimonial home. Mrs C, now elderly, instructed solicitors and issued an application for ancillary relief. Mr C initially instructed solicitors but stopped providing his solicitors with instructions. His solicitors applied to come off the court record, and Mr C became a litigant in person. Mr C did not attend any of the subsequent court hearings. At the final hearing an order was made requiring him to vacate the matrimonial home within 28 days. He was in breach of that order. A voluntary worker took Mr C to meet with a solicitor. The solicitor contacted the Official Solicitor as there was no other person willing and able to act as litigation friend for Mr C. The Official Solicitor obtained evidence that Mr C was suffering from dementia and lacked litigation capacity. Mr C is financially ineligible for legal aid because of his pension income; that income is sufficient to meet his day to day living expenses but insufficient to fund the costs of legal representation. Mr C does not have the capital resources from which to fund the costs of legal representation. Rather he has approximately £45,000 in debts and loans, although there is no evidence that he had benefited from that indebtedness and he has no recollection of incurring the debts. Mr C is repeatedly distressed when he is told he is in debt as he is unable to retain the information. Mr C is a protected party, is in breach of court order, but remains without legal representation as to date it has not been possible to identify any alternative source of funding.

88. If a litigation friend cannot be appointed (because there is no security for the costs of legal representation), then the litigation cannot proceed as a protected party, by definition, cannot act as a litigant in person. It follows that the parties are unable to obtain a decree of divorce or resolve the financial issues arising of the marriage breakdown.

89. Under the proposals legal aid will remain available in cases of alleged domestic violence. This is of particular concern in cases where such allegations are made against persons who are unable, because of their illness or disability, to rebut the allegations made either because they have no recollection or because the extent or severity of their illness or disability is such that they are unable to assist with any factual question. Issues of equality of arms arise.

Tort and other general claims

90. The cases proposed for exclusion will leave the vulnerable without an effective remedy to recover assets rightfully belonging to them thereby in many cases increasing their reliance on financial support from the State. In many cases any benefit from a saving in the legal aid budget will be more than offset by the increased demand on State support for the cost of future care. The main types of claim to which this concern relates are as follows:

Actions to set aside a Property Transfer and Claims under the Trusts of Land and Appointment of Trustees Act 1996

91. The Official Solicitor acts as litigation friend for vulnerable property owners whose property has been transferred to others in circumstances where that person does not have the requisite capacity to understand the nature of the transaction. In such cases the vulnerable

person (usually learning disabled) has been induced to transfer their property either in whole or in part to another person (sometimes a family member, sometimes just someone who has taken advantage of their vulnerability). Legal aid has funded the action for the transfer to be set aside. Such transfers may be for the direct benefit of the person who has taken advantage of the vulnerable person, but may also arise as a result of relatives seeking to ensure they have the benefit of the property as opposed to its being used to fund the vulnerable person's future care costs. As a result those care costs have to be borne by the State. Funding authorities such as local authorities frequently approach the Official Solicitor to act as litigation friend in such cases and recover property fraudulently transferred. In cases where property is recovered as a result of these proceedings such property can properly be used to fund care costs as opposed to the burden falling on public funds. The Official Solicitor does not see how those claims will be funded in the absence of legal aid; almost by definition the vulnerable person has no other assets and is therefore totally reliant on public funding to recover their property. If legal aid is removed such cases will not be brought leaving relatives or others with the financial gain and the public purse bearing the cost of future care.

Claims under the Inheritance (Provision for Family and Dependants) Act 1975

92. Such claims involve applications to Court by a person, within the scope of the Act, who feels that reasonable financial provision has not been made for them either under a will or on intestacy. The Official Solicitor acts as litigation friend for vulnerable adults and children in many such cases. It is common for parents of mentally disabled children (both adults and minors) to believe that the State will look after their children and therefore make no provision for them in their will, thus freeing up the estate for more financially independent beneficiaries. Again, without public funding many of these cases will not be brought. By refusing public funding for such claims the State is denying the vulnerable the opportunity to recover in cases where the court would determine they should rightly have and in so doing substantially increases the reliance of the vulnerable on State funding for their future care.

Debt cases

93. The Official Solicitor acts as litigation friend for an increasing number of vulnerable debtors where their lack of capacity has given rise to the indebtedness. The most concerning example is the increasing use of bankruptcy proceedings by public authorities such as local authorities or HMRC for non payment of relatively small amounts of tax. As a direct result of the vulnerability of the tax payer they do not engage with the tax recovery process and in many cases such engagement would have demonstrated that no tax liability existed (or at least a lesser amount than the amount claimed).

94. Once bankruptcy proceedings have been initiated the involvement of the trustee in bankruptcy inexorably leads to a hugely disproportionate increase in the costs of the bankruptcy with such costs being borne by the bankrupt. As all the bankrupt's assets would be under the control of the trustee in bankruptcy any vulnerable person made bankrupt will be totally reliant on public funding in order to apply to the Court for the annulment or rescission of the bankruptcy.

95. While it is accepted that in many of the cases public funding will still be available because the bankrupt's home will be at risk, nevertheless, in the Official Solicitor's experience there will still be a good number of cases where this will not apply but where justice requires that the vulnerable person should have representation.

Case study D:
Ms D was made bankrupt as a result of non-payment of council tax, the debt being approximately £5,000. Ms D suffered from depression and alcohol related problems. As a result of her depression she had not completed an application for council tax benefit although she was eligible. Ms D was known to her community mental health team. Ms D did not seek legal advice until the trustee in bankruptcy had obtained a possession order and was seeking an order for sale of her home. The proceedings concluded prematurely as a result of Ms D's death in a house fire. But by the time the matter concluded the trustee in bankruptcy's costs were in the region of £70,000.

Case study E:
The court annulled a bankruptcy order where the bankrupt had lacked capacity at the time of personal service of both the statutory demand and bankruptcy petition owing to long-term chronic mental impairment, which included an irrational phobia of opening mail. The court also considered the relevance of the disability discrimination legislation, and its jurisdiction to hear the application in circumstances where it had already twice been refused.

The Official Solicitor as (H), the applicant's litigation friend applied to annul, or alternatively to rescind, a bankruptcy order made against her at the petition of the second respondent HMRC. H had suffered chronic mental illness for years. She received disability benefit. An anonymous letter to the Revenue reported that she was running a profitable equine business. The Revenue sent a demand to H for back tax of almost £200,000. H's mother advised that H's involvement with horses was a therapeutic hobby, that she was unfit to manage her affairs and did not open her own post. Six months later, a statutory demand was personally served on H at home. She took the envelope but told the process server that she could not open it because she was "under the Mental Health Act". A pile of unopened post was noted. Two months later, a bankruptcy petition, not in an envelope, was served on her personally. The Revenue notified H of hearing dates, the making of the bankruptcy order and the appointment of a trustee. The trustee in bankruptcy seised H's horses and she was suicidal as a result. On receipt of tax returns, the Revenue conceded that no tax was due, but H's application to annul the bankruptcy order was twice dismissed. The court was required to determine (i) whether it had jurisdiction to hear the application; (ii) whether H had lacked relevant capacity at the time of service of relevant documentation; (iii) whether the Revenue had discriminated against H on the ground of her disability; (iv) who should pay the trustee's fees if annulment or rescission was appropriate. Capacity had not been considered at either of the previous annulment hearings.

The court held (1) Where a repeated application to annul raised issues or material that had not previously been deployed, the court had a discretion whether to entertain it and was likely to exercise it in the applicant's favour. In the instant case the issues were of potential cardinal importance to H and discretion would be exercised accordingly. It was questionable, where capacity and disability discrimination were concerned, whether a state entity such as the Revenue should properly seek to suggest otherwise. (2) It was clear from the facts and evidence that H had, more probably than not, lacked capacity at the time of service of both the statutory demand and the petition, and that the bankruptcy order ought therefore to be annulled or

rescinded. H had been suffering from an irrational phobia, secondary to her mental illness, which prevented her from opening mail. Her judgement had been distorted by the phobia so as to render it invalid. Owing to acute anxiety, she had, at both service points, failed to appreciate the importance and significance of what was happening, and had been unable to weigh information or seek help from others. (3) The Revenue had breached its duty under the disability discrimination legislation. It had known of H's mental impairment and its substantial and long-term effect on her normal activities but had failed to make reasonable adjustments. The relevant provisions of the Disability Discrimination Act 1995 did not mean that a disabled person would be precluded from relying upon the terms of the Act in an application to rescind or annul a bankruptcy order. Likewise the Act did not render H's complaint unlawful; even though the filing of a tax return and the raising of a determination were acts done pursuant to statute, the Taxes Management Act 1970 s.28C(1A) made it clear that the power to determine tax where no return had been filed was discretionary. (4) Although the Revenue was not guilty of an abuse of process, it should, in principle, be responsible for the trustee's remuneration and expenses.

96. The withdrawal of public funding from these types of cases will inevitably result in the perpetuation of the original injustice. As with all examples of property cases referred to in this section, the loss of the vulnerable person's assets as a result of an injustice that could have been rectified had public funding been available will add to further calls for financial assistance from the State on the part of the vulnerable person. It is a common feature of such cases where the vulnerable are involved that it is no fault of the vulnerable party that legal proceedings have to be issued to recover or obtain property that is rightly theirs.

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***Question 4**: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.*

Answer

97. The Official Solicitor refers to his comments elsewhere in this response with regard to the exclusion of classes of cases. He does not see that the proposals for funding individual cases excluded from the proposed general scope of legal aid will address the concerns he has raised, unless the proposals enable the grant of legal aid in those cases where a protected party is unable to secure funding for legal representation by a different route.

****

"Litigants in person
4.266 We recognise that the proposals to reduce the scope of legal aid will, if implemented, lead to an increase in the number of litigants representing themselves in court in civil and family proceedings. This may potentially lead to delays in proceedings, poorer outcomes for litigants (particularly when the opponent has legal representation), implications for the judiciary, and costs for Her Majesty's Courts Service."

Comment

98. The rules of court require that a protected party act by a litigation friend for the various public policy reasons discussed above, namely (i) the State's duty to protect the person lacking capacity, (ii) to protect the court's process, and (iii) to protect the other parties. Given that the party's solicitor is likely to be the first person to have concern that they might lack capacity and require a litigation friend, it is unclear how the judge is to distinguish between a litigant in person who makes ill-judged decisions in the litigation but has capacity, and a litigant in person who should in fact be a protected party. Although this must currently be a problem, it would be exacerbated by the proposals. If the litigant in person should be a protected party, then they should not be conducting the litigation themselves (a) because the rules prohibit them from doing so, and (b) for the policy reasons described. What about cases where a party is a child? The Official Solicitor suggests that these are not easy problems to side step.

> *"4.267 We believe that many of the cases currently funded through legal aid could be resolved without recourse to the courts".*

99. As discussed elsewhere in most cases alternative dispute resolution is going to need funding and the person who (in the context of proceedings) would be found to lack capacity to conduct those proceedings is going to need assistance and some forum for having the dispute effectively compromised on their behalf. It should not be forgotten that the Civil Procedure Rules 1998 require any settlement of claim concerning a protected party or a child must be approved by the court. While those rules do not apply in the absence of proceedings in which they are applicable, the Official Solicitor would suggest that the policy behind the rule requires consideration when considering the appropriateness and/or effectiveness of alternative dispute resolution outside of proceedings.

***Question 6**: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.*

Answer

100. A party who lacks capacity to conduct the proceedings cannot act as a litigant in person. Others who act as litigants in person will do so for a variety of reasons, but often because they have made a choice not to use funds to pay for legal representation on the basis that they feel sufficiently articulate, resourceful and able to present their own case and are able to devote the requisite time to doing so. It is inevitable that the proposals would compel many more litigants to act in person, there being no other choice realistically open to them, including litigants who are vulnerable by reason of age, illness or disability. Without appropriate support including legal representation vulnerable litigants are likely to be overwhelmed and unable to effectively participate in the proceedings; there will be those cases where the impact on a vulnerable party of being unable to access legal advice and representation will be such that they will lose capacity to conduct the proceedings.

101. The Official Solicitor notes the reference to the 2005 research conducted by the former Department for Constitutional Affairs and the finding that there was not a significant difference between cases conducted by a litigant in person and those in which clients were represented in terms of court time. He assumes that the 2005 research referred to is that carried out by Professor Richard Moorhead and Mark Sefton, reported on in: *Litigants in Person: Unrepresented litigants in first instance proceedings* published in March 2005. While the Official Solicitor notes that the size of the sample considered by the researchers was small (the research relied on data on unrepresented litigants from four first instance courts) he also notes in the context of the finding as to use of court time that

- cases where both parties were unrepresented were rare[13] and the research was carried out between 2002-2003 before the further changes in the financial eligibility rules

- the Official Solicitor would suggest that if the proposals are carried into effect it is inevitable that cases where both parties are unrepresented will no longer be rare

- in such cases the approach of the judiciary identified by the researchers of reliance on the represented party's lawyers to summarise the issues and to take on the procedural case preparation (such as preparation of the trial bundle)[14], will not be possible

- for the purposes of the data collected by the researchers, any person who was party to litigation but who at some stage during the proceedings was not represented by a lawyer acting on the record, was treated as a litigant in person, including those who might be receiving advice from a lawyer or other organisation, and including businesses or other institutions such as local authorities, housing associations or HMRC, or were individuals already experienced in the conduct of litigation[15]

102. He would also draw attention to other aspects of the research, in particular that

- insolvency cases were excluded from the project (please see paragraphs 94-97 with regard to debt cases)[16]

- the finding that unrepresented litigants made more mistakes including in relation to substantive law and procedure

- although the research focused on procedural or administrative matters and not strategic decisions about the conduct of the proceedings the researchers still noted instances where a case demonstrated fundamental misunderstandings of relevant issues[17]

- the significance of whether or not a person was represented depended on a number of factors including the competence of the litigant to conduct cases unrepresented (because of experience, intellectual skills and emotional objectivity)[18]

- on the information available to the researchers, unrepresented litigants did increase the workload of the family courts

- in civil proceedings unrepresented defendants were unlikely to defend cases - the researchers concluded that the lower level of defences from unrepresented litigants was likely to indicate some level of prejudice arising out of the absence of representation

- a significant minority of unrepresented litigants in family cases had a specific indication of some vulnerability on their part such as being victims of violence, depression, alcoholism/drug use, or mental illness or being extremely young parents

[13] Page i
[14] See, for example, pp181 and 185
[15] Pages 4-5, page 11
[16] Page 6
[17] Pages ii, 129-138 and 255-256
[18] Page 1

- the researchers felt that the figures identified might underestimate the extent of the problem as they were dependent on the documents on court files (748 case files were looked at) for an indication as to whether there was any vulnerability on the part of unrepresented litigants[19].

103. The Official Solicitor also draws attention to

- the problems for unrepresented litigants identified by the researchers particularly with court process and identification of the salient issues[20]
- the researchers' overall conclusion that lack of representation prejudices the interests of unrepresented litigants in both family and civil proceedings.[21]

104. He notes (in relation to those litigants who are ill or disabled but not necessarily incapacitated) that more recent research published in 2010[22] (and see further below) indicates that carers and lay advocates rely on legal professionals' ability to explain details of the case to them, in order to enable them to provide support as they are unlikely to have any experience of court cases themselves and were rarely able to provide information without support from legal professionals. In the Official Solicitor's experience whilst carers and advocates may support and assist an ill or disabled litigant to contact a solicitor and may continue to provide support during the course of a case, that support is in parallel with, not a substitute for the legal services provided. It is not his experience that carers or lay advocates are generally willing (or funded) to go further. The 2010 research highlights that lay support provided to this class of litigants is not a substitute for legal advice and representation but rather an important supplement to legal services having regard to the particular difficulties experienced by vulnerable litigants[23].

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"Provision of advice and information services by telephone"

***Question 7**: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.*

Comment

105. There is a significant risk that this proposal will act as a barrier to the vulnerable accessing justice, in particular to those whose capacity is impaired by virtue of illness or disability. Such persons are more likely than the majority of the population to require support and assistance to locate legal advice and representation, and in order to properly explain the nature of their case to others, and to retain information provided to them as to the steps to follow; they are more likely to be deterred from pursuing a case if their own difficulties are not recognised at an early stage. The Official Solicitor notes the reference to 'mental impairment' in paragraph 4.275 but remains concerned that sole reliance on a telephone gateway will place the incapacitated at risk of their legal rights not being enforced.

106. Research commissioned by the Ministry of Justice was carried out by the British Market Research Bureau (BMRB) and Liverpool John Moores University which focussed on

[19] Report, p251
[20] Report, Chapter 8, pages 154-172 and 176-180
[21] Report, pages 258-259
[22] Research commissioned by the Ministry of Justice, carried out by the British Market Research Bureau (BMRB) and Liverpool John Moores University which focussed on victims and witnesses in criminal cases and parties to civil proceedings: *Court experiences of adults with mental health conditions or learning disabilities.*
[23] Report 2

victims and witnesses in criminal cases and parties to civil proceedings: *Court experiences of adults with mental health conditions or learning disabilities.* The 6 reports presenting the background, findings and recommendations arising out of that research were published in July 2010.

107. The researchers identified that in criminal cases the Witness Care Unit often relied on risk assessments conducted by telephone to identify any special needs but that practitioners in mental health and learning disability fields such as community practice nurses and support workers thought this reduced the likelihood of identifying mental health conditions, learning disabilities and limited mental capacity, as the signs are easier to recognise in face-to-face communication[24]. A wide range of signs of mental health problems and learning difficulties has been identified in guidance such as: *A common sense approach to working with defendants and offenders with mental health problems* published by Together Forensic Mental Health Services (London) in October 2010, guidance which would equally apply to parties or intended parties to civil and family proceedings[25].

108. The Official Solicitor draws attention to

- the 4 key issues identified in report 1 of the 2010 research, as having a key impact: early identification of conditions requiring support, opportunities for disclosing vulnerabilities, access to personal support and access to legal advice and representation[26]

- to the researchers recommendation 5.5 (Access to legal advice and representation)[27] including (as stressed elsewhere in the reports) to the fact that litigants with mental health conditions, learning disabilities and limited mental capacity require improved access to legal representation and more resources to be made available if they are to have effective access to justice

***Question 8**: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.*

Answer

109. For the reasons given elsewhere in this response the Official Solicitor does not agree that specialist advice through at telephone helpline is a substitute for face-to-face advice where there is any indication that a person has a mental health condition, learning difficulties or limited mental capacity. The question should not be considered solely in the context of the categories of law but also have regard to the characteristics of the client as well.

***Question 9**: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?*

Answer

[24] Report 1, p17
[25] www.together-uk.org
[26] Report 1, p13
[27] Report 1, p30

110. As addressed above if there is *any* indication (whether or not by reason of disclosure by the person concerned) that the person has a mental health condition, learning difficulties or impaired mental capacity, they should be referred for face to face advice.

****

Question 13*: Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons.*

Answer

111. Securing the payment of legal aid contributions from income already causes considerable difficulty and can involve a disproportionate use of scarce resources (both administrative and of in terms of court process) if an application has to be made to the Court of Protection to secure payment of such contributions from a person's estate. Litigants who are protected parties often are unable to understand the requirement for the contribution, or unable to make the requisite financial arrangements. Often there is no other person with lawful authority to make the arrangements on their behalf. A litigation friend does not have authority by virtue of appointment to make payments from the protected party's estate.

112. A common thread in the reports of the 2010 research is that the introduction of fixed fees of itself created a disincentive for solicitors to take cases where a client has a mental health condition or learning disabilities as they are perceived as requiring greater resources and time for the same fee. The Official Solicitor does not doubt that such cases do require greater resources and time if the party is to receive effective representation. It is already his experience that in many such cases, the work is referred to more junior staff than formerly, notwithstanding that these are clients who need the most experienced representation. If (as proposed see paragraph 5.16) the solicitor is required to secure that payment (the costs payable to the firm being reduced by that amount), then that will act as a further financial disincentive for firms to accept instructions in such cases.

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ANNEX A: EXTRACT FROM THE ANNUAL REPORT OF THE OFFICIAL SOLICITOR AND THE PUBLIC TRUSTEE FOR THE YEAR 2009-10

1 Aims, functions and business activities of the Official Solicitor

1.2 His aims are

1.2.1 To prevent injustice to the vulnerable by:

- acting as last resort litigation friend, and in some cases solicitor, for adults who lack mental capacity and children (other than those who are the subject of child welfare proceedings) in court proceedings because they lack decision making capacity in relation to the proceedings. As litigation friend the Official Solicitor "steps into the shoes" of the client who lacks litigation capacity. His role is to carry on the litigation on behalf of the client and in his best interests. For this purpose the litigation friend must make all the decisions that the client would have made, had he been able. The litigation friend is responsible to the court for the propriety and the progress of the proceedings.

- acting as last resort administrator of estates, trustee and as financial deputy in relation to Court of Protection clients

- being appointed, in place of a parent, to act as the registered contact in the administration of the Government's Child Trust Fund scheme for looked after children in England and Wales when there is no other suitable person to do so.

1.2.2 to assist the High Court, Court of Protection and Court of Appeal by

- acting as advocate to the court[28] providing advice and assistance to the court; and

- under *Harbin v Masterman*[29] making enquiries and reporting to the court on any matter which the court thinks fit to direct in order to "ascertain the truth" or "find out the facts".

1.3 He also:

- through the International Child Abduction and Contact Unit (ICACU) carries out in England and Wales the operational functions of the Lord Chancellor, who is the Central Authority under the Hague and European Conventions on Child Abduction. The ICACU processes both incoming and outgoing cases. For incoming cases the ICACU assesses applications, arranges translations and makes referrals to panel solicitors. For outgoing cases the ICACU transmits completed applications with any necessary translations to the relevant Central Authority, and thereafter, the ICACU will monitor the progress of the case, liaise with the Central Authority of the requested state and the applicant, give advice about English law and do all that it can to help to bring the case to a successful conclusion. The ICACU provides a point of contact between the applicant or solicitor and the Central Authority of each country

[28] Pursuant to the Joint Memorandum of the Attorney General and the Lord Chief Justice of 19.12.01.
[29] [1896] 1 Ch 351.

but it cannot force another country to decide cases or enforce laws in a certain way. It will, however do all it can to press for a swift resolution.

- through the Reciprocal Enforcement of Maintenance Orders (REMO) Unit carries out in England and Wales the operational functions of the Lord Chancellor who is the Central Authority for international maintenance claims. The role of the unit is to transmit and receive applications to enforce maintenance orders, arranging translations where necessary. It does not provide legal advice to applicants or others; however it will provide general procedural guidance. The REMO system is based on mutual co-operation and the REMO Unit has no influence or control over the administrative procedures of another jurisdiction, or over the enforcement measures that may be taken in that jurisdiction. Once the application has been transmitted to the other jurisdiction, it is dealt with according to the laws and procedures of that country. The role of the REMO Unit is of a limited nature, and does not include responsibility for ensuring that maintenance payments are made.

- administers estates and trusts as administrator/trustee of last resort[30], among which he manages a number of trust funds for children, most of which arise from awards by the Criminal Injuries Compensation Authority. He is the property and affairs deputy of last resort appointed under the Mental Capacity Act 2005. He also acts as registered contact for the Child Trust Funds of looked after children where there is no parent or no suitable parent.

1.4 Civil Litigation Division: there is a wide range of cases in which the Official Solicitor acts as litigation friend e.g. personal injury claims, possession actions or applications in respect of estates. Other cases may involve representing an estate of a deceased person, usually in circumstances in which some person wishes to claim against an estate for which no-one is willing to act and where no grant has been taken out. He acts for claimants in applications for judicial review of decisions of public authorities and acts in applications for the displacement of nearest relatives under the Mental Health Act 1983. Another activity is to review the cases of people committed to prison for contempt of court. Most of this litigation is conducted through external solicitors, but a minority is handled in-house.

1.5 Divorce Litigation Division: the Official Solicitor acts as next friend or guardian ad litem in divorce and ancillary relief proceedings, representing adults who lack capacity. In most cases, external solicitors are instructed, save with regard to the main suit, which is (generally) handled in-house.

1.6 Family Litigation Division: the Official Solicitor acts as guardian ad litem and next friend of adults who lack capacity and of children in family proceedings (but not of a child whose welfare is the

[30] Both the Official Solicitor and the Public Trustee operate a strict policy of accepting new cases only in the last resort. The broad acceptance criteria applied are to accept cases only where:

- the beneficiaries (or one of them) are vulnerable or under legal disability (minority or lack of mental capacity) and no-one else is apparently able or suitable to act for them;
- a trustee or personal representative is necessary to resolve legal proceedings and a suitable or agreed alternative cannot be found;
- without intervention, the assets might be lost or fall into the wrong hands because the real beneficiary(ies) have not been ascertained;
- the Public Trustee is named as executor and there is no suitable alternative person available and willing to act.

In addition they will usually wish to be satisfied that funding is available for their fees or costs and that the total costs of administration will not exhaust the net estate or fund.

subject of the proceedings, as that is the responsibility of CAFCASS). The majority of the cases in which he acts are public law children proceedings where he acts as the *guardian ad litem* of a parent or intervener who lacks capacity in care proceedings and litigation friend of a parent in placement proceedings, but he is also increasingly asked to act in private law cases as either next friend or guardian ad litem of a parent. In most cases, external solicitors are instructed.

1.7 Healthcare and Welfare Cases: the Official Solicitor acts as litigation friend of "P" (and any protected party)[31] in proceedings in the Court of Protection relating to 'P's welfare. The Official Solicitor acts as solicitor for "P" in healthcare cases and instructs external solicitors to provide litigation services in other welfare cases.

1.8 Court of Protection: Property and Affairs: the Official Solicitor acts as litigation friend and solicitor for people who lack capacity in proceedings concerning their property and affairs before the Court of Protection.

1.9 The Official Solicitor expects 3 criteria to be established[32] before he will accept appointment as litigation friend or guardian ad litem or next friend

- that there is evidence (or the court has made a finding) that the party (or intended party) lacks capacity to conduct the proceedings (or in Court of Protection proceedings evidence or a finding with regard to P's decision making capacity)
- that, on the basis of the information available to him, there is no one else suitable and willing to act as litigation friend[33]
- that there is security for the costs of legal representation of the protected party or the case falls in one of the classes in which, exceptionally, he funds the litigation services out of his budget, in accordance with long standing practice.

1.10 As last resort litigation friend, the Official Solicitor has never sought to, and indeed could not in many cases, recover his costs of being litigation friend. But the Official Solicitor may make his involvement in proceedings conditional on his costs of obtaining or providing legal services being secured from external sources, except in cases involving medical treatment, where his involvement has long been regarded a matter of necessity, or where he is invited by the court to provide an advocate to the court or make enquiries under *Harbin v Masterman.*

1.11 Those external sources may be

- the Legal Service Commission where the Official Solicitor's client is eligible for public funding
- the client's own funds where either the client has financial capacity or the Court of Protection has given the Official Solicitor authority to recover the costs from the client
- a Conditional Fee Agreement (e.g. in personal injury claims)

[31] "P" is the name given by the 2005 Act and the Court of Protection Rules 2007 to a party who lacks, or may lack, capacity and whose personal welfare is, or property and affairs are, the subject of an application to the Court of Protection. Other parties to Court of protection proceedings who lack capacity to conduct the proceedings are known, as in proceedings in other courts, as "protected parties".

[32] The exception to this is the Court of Protection property and affairs cases where historically the Official Solicitor has acted as both litigation friend and solicitor on record. It would be open to the Court of Protection to appoint a lay litigation friend who could choose to instruct a different solicitor but to date there has been no change to the existing practice.

[33] This is a question that the Official Solicitor normally puts to the protected party's solicitor. It is a matter for the solicitor to investigate - it is the solicitor who has to sign the certificate of suitability in respect of a lay litigation friend.

- an undertaking from another party to pay his costs
- the funds in dispute where the case involves a trust or estate

ANNEX B

"BUTTERWORTHS NEW LAW GUIDE: THE MENTAL CAPACITY ACT 2005

10.88: PUBLIC FUNDING
No public funding was available for proceedings before the old Court of Protection at all. For applications concerning purely property and affairs it remains the case that they fall outside of the scope of legal aid. Full legal aid, subject to a means and merits test was (and is) available for proceedings in the High Court heard under the court's inherent jurisdiction.

The new Court of Protection is not part of the High Court and therefore advocacy brought before it is excluded by Sch 2 to the Access to Justice Act 1999. However a Direction has been issued under s 6(8) of that Act which brings certain cases before the Court of Protection within the scope of Community Legal Services ('CLS') funding. Legal aid will therefore be available for those cases for which it would have been available previously in best interest's cases before the High Court.

Where legal services are required for eligible clients in relation to issues under the MCA 2005, which do not need to be taken to court, Legal Help will be the normal vehicle for funding advice and assistance. Under the new fee schemes which apply to Controlled Work in the Mental Health category from 1 January 2008, Legal Help in relation to the MCA 2005 is funded as Level 1 Non-MHRT work under the rules contained in the Unified Contract Civil Specification.

Legal Representation at a formal hearing will be available for cases before the court which raise fundamental issues, for example cases concerning decisions over the giving or withholding of medical treatment.

> The text of the authorisation is:
>
> '1. This is an authorisation by the Lord Chancellor under section 6(8) of the Access to Justice Act 1999 ("the Act"). It authorizes the Legal Services Commission ("the Commission") to fund, in the circumstances specified below, services generally excluded from the scope of the Community Legal Service Fund by Schedule 2 to the Act.
>
> 2. References in this authorisation to which services the Commission may fund are to the levels of service defined in those terms in the Commission's Funding Code ("the Code").
>
> 3. All applications under this authorisation remain subject to the relevant regulations under the Act and all relevant criteria in the Code.

4. The Lord Chancellor authorizes the Commission to fund Legal Help, Help at Court and Legal Representation in relation to proceedings or potential proceedings before the Court of Protection in the circumstances specified below.

5. The circumstances are where:

(i) the proceedings fall within paragraph 6 below AND

(ii) the Court has ordered or is likely to order an oral hearing at which it will be necessary for the applicant for funding to be legally represented.

6. The proceedings specified in paragraph 5 above are those which, in relation to the person whose personal welfare is the subject of the proceedings, concern that person's:

- Life
- Liberty
- Physical safety
- Medical treatment (including psychological treatment)
- Capacity to marry or enter into a civil partnership
- Capacity to enter into sexual relations OR
- Right to family life

7. The Lord Chancellor authorises the Commission to fund Legal Help in relation to the making of Lasting Powers of Attorney and advance decisions where the client is:

(a) aged 70 or over; or

(b) a disabled person within the meaning of section 1 of the Disability Discrimination Act 1995."