Cost Recovery in Pro Bono Assisted Cases
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Consultation on proposals for secondary legislation

A consultation produced by the Department for Constitutional Affairs.
This information is also available on the DCA website at www.dca.gov.uk
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Executive summary

This paper seeks your views on proposals to implement clause 185 of the Legal Services Bill [HL], Payments in respect of representation provided pro bono. Your comments will inform the development of the secondary legislation and Civil Procedure Rule changes required.

The clause has been designed to enable costs to be awarded in cases where legal representation has been provided free of charge. This change will remove the anomaly that currently exists in costs law, whereby an unsuccessful party may benefit from the court’s inability to award costs to the successful party, assisted pro bono, owing to the operation of the indemnity principle. Consequently, it will create a more level playing field, with both parties to the litigation potentially liable for costs.

It is intended that the sums recovered would go, not to those providing the representation but, to a prescribed charitable body that will administer and distribute monies received to voluntary organisations that provide free legal support to the community.
Introduction

This paper sets out for consultation, proposals for secondary legislation to implement clause 185 of the Legal Services Bill [HL]. The consultation is aimed at those with an interest in or views on the clause, in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 50, have been followed.

An initial Regulatory Impact Assessment (RIA) was undertaken for this clause as part of the wider RIA for the Legal Services Bill. This assessment indicated that the judiciary, the legal professions, the voluntary and not for profit sectors are likely to be particularly affected and the proposals might lead to additional costs or savings for these groups. A Partial Regulatory Impact Assessment is attached at page 43. Comments on this Regulatory Impact Assessment are particularly welcome.

Copies of the consultation paper are being sent to:

1. AdviceUK
2. Bar Council
3. Bar Pro Bono Unit
4. Cabinet Office
5. Citizens’ Advice
6. Civil Justice Council
7. Civil Procedure Rules Committee
8. Cost Judges
9. CRS Network
10. Department for Constitutional Affairs Consumer Panel
11. Department for Trade and Industry
12. Free Representational Unit
13. Her Majesty’s Treasury
14. Institute of Legal Executives
15. Law Centres Federation
16. Law Officers
17. Law Society
18. LawWorks
19. Legal Services Commission
20. London Legal Support Trust
21. Members of the Attorney General’s Pro Bono Co-ordinating Committee
22. MPs in England and Wales
23. Office of Fair Trading
24. Peers who spoke during the Lords’ consideration of the Legal Services Bill¹
25. Senior judiciary
26. Trade Unions Congress
27. Young Solicitors’ Group

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper. Copies of this consultation paper will be available from the Libraries of both Houses.

¹ Up to but not including 16 April 2007
The proposals

1. The Legal Services Bill was introduced in the House of Lords on 23 November 2006 and published on 24 November 2006. It completed its Committee Stage in the Lords on 6 March 2007.

2. The Bill establishes a new framework for the regulation of legal services in England and Wales. Its key features are:

- the establishment of a Legal Services Board - a single oversight body independent from the Government and other existing regulators,
- the establishment of an Office for Legal Complaints, and
- the development of Alternative Business Structures to enable lawyers and non-lawyers to work together on an equal footing.

3. Part 8 of the Bill - Miscellaneous Provisions About Lawyers - contains clause 185, designed to allow the courts to make costs Orders when a pro bono assisted party is successful.

4. It is acknowledged that the various sources of legal representation - private sector, legal aid (as provided by the Community Legal Service) and the not for profit sector – cannot alone meet all legal need. Pro bono work is an important adjunct to the main strands of the provision of legal services. However, there is an injustice caused by the fact that costs cannot be recovered from the losing party if the successful party is represented pro bono, even though a pro bono assisted party would be liable for his opponent’s costs if his opponent won. In such cases, the opponent is aware that if he loses, he will not be asked to pay the other party’s costs because that party is represented pro bono.
5. The Attorney General’s Pro Bono Co-ordinating Committee (which includes in its membership representatives of all the main pro bono organisations, not for profit bodies, legal professional bodies, the DCA and educational organisations) has been considering how this costs anomaly might be addressed to create a more level playing field.

6. Initially, Conditional Fee Agreements (CFAs) were considered. CFAs potentially offer a suitable vehicle for lawyers, acting for clients on a pro bono basis, to recover reasonable costs from opponents and for that money to be passed on to a charity. The Law Society has recently amended its Practice Rules\(^2\) to accommodate this possibility and allow a Solicitor to share fees with a charitable third party.

7. A sub-group of the Attorney’s Committee has developed an appropriate ‘pro bono CFA’ to be used in such cases, with the funds recovered going to a nominated ‘pro bono’ charity. However, there are concerns that such an agreement could be confusing for the client and discussions with Her Majesty’s Revenue and Customs have highlighted the difficulties associated with lawyers’ National Insurance and VAT contributions, in relation to costs.

8. The Government, therefore, decided to bring forward a clause in the Legal Services Bill to enable the indemnity principle to be abrogated in pro bono assisted cases. The clause allows the recovery of costs without the client paying the cost of the legal representation incurred.

9. The implementation of the provision is, of course, dependent on the Legal Services Bill’s progress through Parliament. Developing the secondary legislation while the Bill is in Parliament should help to minimise the implementation period following Royal Assent.

\(^2\) Solicitors’ Practice Rules 1990, rule 7. (http://www.lawsociety.org.uk/professional/conduct/guidance/view=article.law?POLICYID=286142)
Clause 185 - Payments in respect of representation provided pro bono.

10. The latest version of the Legal Services Bill [HL] and related papers are available at

11. The Bill includes a clause (clause 185 in the version of the Bill as amended in Committee, printed on 6 March 2007) which would give a Court the power to order a party to make a payment to a prescribed charitable body in respect of another party’s legal representation where:

(i) an Order for costs has been made in the other party’s favour; and

(ii) that party’s legal representation has been provided, fully or partly, without charge (or ‘pro bono’).

12. The clause gives the Secretary of State the power by Order to prescribe the charitable body to whom the Court may order a payment to be made.

13. We envisage this body would have charitable status, be limited by guarantee, and managed by a board of Trustees. It would receive and distribute funds recovered to enable the further provision of free legal advice, assistance, or representation. It would not fund disbursements and would have no interest in the litigation in relation to which the order is made. The body would be required to utilise funds received effectively, promptly and transparently to help meet unmet legal need.

14. The clause also allows for Rules of Court to be made to:

- specify the types of proceedings in which the Court may make an order pursuant to the clause;
- set out the procedure to be followed in relation to these orders. This may include how other parties are informed of pro bono representation, how a
claim for one of these orders might be made or the procedure by which the rules will be introduced, and;

- set out the factors to which the Court will have regard when deciding whether to make the order. This may include, for example, the type of case or the nature of the person against whom the order is made.

15. It is envisaged that, as far as possible, pro bono assisted cases should be dealt with in the same way as funded cases for the purposes of costs assessments, as provided for in Parts 43 to 48 of the Civil Procedure Rules (CPR). The normal rule that costs should follow the event would apply, though the court could make any other order at its discretion. Courts would be encouraged to make a Summary Assessment in these cases.

16. More detailed background on the context in which these proposals are being brought forward, including a discussion of the relevant costs law and how we envisage the provisions will be applied, is attached at Annex A.

Questions - Payments in respect of representation provided pro bono

Cases to be covered

17. Subsection 1 of the clause lays down the type of proceedings that would be covered by this legislation. We intend that they should only be civil cases where a legal representative has provided representation free of charge for either the whole or part of the case. It is envisaged that the CPR will define the categories of case within civil proceedings in which such costs orders may or may not be made. For the purposes of this paper it may be taken that ‘civil proceedings’ includes family proceedings.
Costs recovery in pro bono assisted cases

Consultation Paper

Question 1
Do you consider that all civil cases should be included in this legislation? If not, which categories do you think should be excluded and why?

Cases that have partial paid representation or civil legal aid

18. Subsection 2 permits an order to be made in cases where legal representation was not provided wholly on a pro bono basis e.g. where the party had both pro bono and paid legal representation. This could include cases where a solicitor is acting pro bono but the barrister was retained on a paid basis or vice versa; or in circumstances where civil legal aid under the Community Legal Service was available to pursue part of the litigation.

Question 2
Is the division of cost awards in these circumstances likely to present a problem to the Courts?

Destination of the costs awards

19. Subsection 3 gives the court the power to order payment of the amount of the costs award to a prescribed charitable body. The clause has been purposely designed for this to be a single body, which is currently in the process of being established. This body would be wholly separate from the litigation. We envisage it will be a national charitable foundation, limited by guarantee, managed by Trustees and set up to administer and distribute monies received to support the provision of pro bono services and thus enable currently unmet legal need to be met. The body would develop distribution principles and would be free to distribute directly or through regional agencies.

20. It is not envisaged that the body would fund disbursements nor is it intended that this provision should extend to cases where Community Legal Service legal aid provision or other funding is available.
Question 3
Do you have any comments on the proposals regarding the prescribed charitable body?

How costs will be determined

21. Subsection 4 sets out what factors the court will have regard to before it makes an order for costs in these cases.

22. The parties will need to know from the earliest point, ideally at the outset of the case, that it is the pro bono assisted litigant’s intention to apply for a cost order under clause 185, should the case be successful.

23. The Court will consider whether costs would have been awarded had the representation been provided on a paid basis and, if so, what the amount ordered would have been. This will keep pro bono cases in line with other cases in which costs orders are made. Suitable provisions will be set out in greater detail in the CPR.

24. As far as possible, the CPR should apply to pro bono cases in the same way as for any other costs assessment, including those to which fixed costs apply. The normal rule that costs should follow the event would apply, although the court could make any other order if it considered it appropriate to do so.

25. We propose that a Rule (or Practice Direction) be made to say that the court will generally make a Summary Assessment in these cases unless there is good reason not to do so, replicating Practice Direction 44 Paragraph 13.2(3). Both parties will be asked to provide submissions. The paying party will have the opportunity to respond to the successful party’s Statement of Costs and could still request a Detailed Assessment should he choose to do so.

26. Summary Assessment, particularly in long and complex cases, is an inexact science and costs are very often reduced on Detailed Assessment or by
agreement between the parties. It is therefore expected that the Court will err towards a lower figure in Summary Assessment than it might otherwise have done. This should prove acceptable to all parties – the successful party because the costs are not theirs to recover and the unsuccessful party because he has not been prejudiced by not insisting on a Detailed Assessment.

27. The professional bodies may wish to issue guidance to their members regarding the seeking of an order under clause 185.

Question 4

Do you think any special costs provisions should be made in the Civil Procedure Rules in respect of the making of costs orders in pro bono cases under clause 185?

Question 5

How might we best ensure the widest use of Summary Cost Assessments in pro bono cases under clause 185?

Unsuccessful pro bono cases

28. Subsections 5 and 6 prevent the court from making an order under clause 185 against an unsuccessful party who was represented entirely by civil legal aid via the Community Legal Service or entirely by pro bono legal representation. Ordering costs in such cases could create undue pressure on civil legal aid funding and might discourage pro bono help.

Changes to Civil Procedure Rules

29. Subsection 7 allows Rules of Court to be made.
30. As indicated, the power will be used to enable the making of costs orders in pro bono cases. We intend that, as with all cases, costs recovered should be reasonable and proportionate and should be assessed in the same way as other cases and that as far as possible the normal Court rules will apply to the assessment of these costs.

31. Changes to the CPR would include the making of a Rule (or Practice Direction) on the use of Summary Assessment in pro bono cases as described at subsection 4 of the clause.

32. It is envisaged that the party who is represented pro bono will provide notice to that effect to the other parties in the proceedings. The CPR will set out the procedures to be followed in these cases.

**Distributing the amounts recovered**

33. Subsection 8 gives the Secretary of State the power to specify by Order the approved body described in subsection 3 of the clause. Giving this power to the Secretary of State will ensure that the funds go to an impartial receiving body and the organisation will be wholly separate from the litigation process. It will permit the examination of the body’s suitability to administer funds received and to use them effectively, promptly, and impartially in the furtherance of the provision of pro bono representation. Subsection 9 provides that the prescribed body is to be a charity registered under section 3 of the Charities Act 1993 (c10) that is dedicated to supporting the provision of pro bono assistance.

**Definitions**

34. Subsection 10 prescribes certain definitions – for the terms ‘legal representative’ and ‘civil court’ and ‘free of charge’.
1. Introduction

1.1 The Government’s policy is to overrule the indemnity principle in circumstances where a party (the ‘receiving party’), who is represented free of charge by a solicitor or barrister in civil proceedings, receives a costs order against a party who is privately funded (the ‘paying party’). The indemnity principle is a common law principle which provides that the receiving party is not able to recover from the paying party more than he is liable to pay his own solicitor. The Government has brought forward legislation to overrule the principle in the circumstances described to enable pro bono organisations to benefit from costs recovery as a source of revenue, and to encourage better litigation behaviour in pro bono cases.

1.2 This background paper -

- explains the current position in relation to ‘inter partes’ costs awards;
- explains how pro bono work is generally conducted;
- sets out detailed instructions on the policy intention.

2. Overview

2.1 Clause 185 provides that the court has a power to order costs to be paid by a party against whom an award of costs has been made to a prescribed charity
which serves the express purpose of receiving and distributing funds received to enable provision of further free advice or assistance where the party with the benefit of the costs order was represented ‘pro bono’ in the litigation. The power is an enabling one that will permit an Order and rules of court to be made to provide some of the detail.

3. Current Law

General provisions about costs

3.1 ‘Costs’ means the costs that a party is liable to pay his solicitor for advocacy and litigation services in proceedings before the court. It includes ‘fees, charges, disbursements, expenses and remuneration’.

3.2 The general position is that, in litigation, where one party is successful in the litigation (or in relation to a particular issue), the court will order that the unsuccessful party pay the costs that the successful litigant is contractually bound to pay to his solicitor. This includes disbursements, such as counsel’s fees.

3.3 The liability for meeting the costs of a solicitor in an action rests with the client; and is founded on the contract between solicitor and client. Therefore, to the extent that any amount cannot be recovered from the other party, the client is liable for the shortfall.

Costs in the discretion of the court

3.4 The general rule is that costs incurred in civil litigation are in the discretion of the court. Section 51(1) of the Supreme Court Act 1981 (“SCA 1981”) states that-

“subject to the provisions of this and any other enactment and to rules of court, the costs of and incidental to all proceedings in the Court of Appeal (Civil Division), the High Court and any county court shall be in the

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3 Section 87(1) Solicitors Act 1974.
discretion of the court and the court shall have full power to determine by whom and to what extent costs are to be paid”.\textsuperscript{4}

3.5 This very broad discretion is fettered in particular by the following:

(1) the common law rule, sometimes referred to as the indemnity rule or the English rule, which confirms the practice that costs should follow the event, that is, the loser pays the successful party’s costs; and

(2) Civil Procedure Rules, rule 44.4(2), which says that, in assessing the costs payable by the losing party, the court will only award costs that are reasonable and proportionate, and any doubts about those costs will be resolved in favour of the paying party.

The ‘English Rule’

3.6 The ‘English Rule’ has a long history, with its origins in the Middle Ages. It first found its way into rules of court in the 1870s. The rule says that costs should follow the event. This is confirmed in CPR rule 44.3(2), which states-

“The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.”

3.7 The general rule is expressed to be subject to any other order the court may make, reflecting the court’s very broad discretion in respect of costs.

3.8 The mirror image of this rule is the indemnity principle.

Indemnity Principle

3.9 The indemnity principle is a common law principle that has been the foundation of costs for many decades. It says, put simply, that the receiving (successful) party is not able to recover from the paying (unsuccessful) party more than he is liable to pay his own solicitor. His right is a right to be indemnified against the

\textsuperscript{4} Note, the power does not include a power to determine to whom costs may be paid.
costs actually incurred in bringing or defending the proceedings. Without such an obligation to pay the solicitor’s costs, there is no indemnity to be satisfied.

3.10 This principle is founded in common law, and even as long ago as the nineteenth century was very well developed.

3.11 Bramwell B. in *Harold v Smith*\(^5\) established that:

> “‘Costs’ as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed can also be ascertained.”

3.12 That was followed by the leading case of *Gundry v Sainsbury*\(^6\). The terms of the retainer in this case are not absolutely clear, but it may have been an early exemplar for pro bono representation. The plaintiff asserted in cross-examination that he could not afford to pay costs and his solicitor had agreed to act for no fee. Accordingly, the court found there was no damnification to be indemnified against and costs could not be recovered from the other side.

3.13 So far as solicitors costs are concerned, the common law principle has been enshrined in statute by section 60(3) of the Solicitors Act 1974, which says-

> “A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.”

3.14 A contentious business agreement is an agreement as to remuneration in respect of contentious business\(^7\). Contentious business is:

\(^5\) (1865) H & N 381 at 385
"business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator."  

Abrogation of the Indemnity Principle

3.15 In recent times, the indemnity principle has come under attack from some commentators who say it is not germane to the modern costs regime. There have been calls to abolish it altogether, including from the Law Society. In its defence it is said that the principle acts to keep down recoverable costs. However, its opponents say that market forces and the principle in the CPR that costs should be reasonable and proportionate act as a more effective brake on costs.

3.16 During the debate in the House of Lords on the Access to Justice Bill, Lord Clinton-Davies moved an amendment whose effect would have been to abolish the principle. The Lord Chancellor accepted that the time might come to abolish the principle. But, he countered, it had its roots in a long history and operated to place a limit on costs that may be recovered, therefore suggested a proper consultation exercise was a necessary pre-requisite.

3.17 The amendment was withdrawn. But, a limited consultation exercise did take place during the course of passage of the Bill. The practical problems of abolishing the principle altogether meant that it survived. However, the compromise that was reached at the time was section 31 of the Access to Justice Act (in relation to which see paragraph 3.39).

3.18 The principle’s longevity and its inherent complexity make abolishing it extremely difficult have meant that so far those calls to abolish it have been resisted.

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6 [1910] 1 KB 1645
7 Section 59 Solicitors Act 1974
8 Section 87 of the Solicitors Act 1974
9 Conditional Fees and the Access to Justice Act: from Gradual Change to a Big Bang – can and should the indemnity principle survive?
10 Hansard, 26 January 1999, Column 982.
3.19 Nevertheless, some ad hoc inroads have been made.

The Employed Solicitor

3.20 In Re Eastwood (deceased) Lloyds Bank Limited v Eastwood and others\textsuperscript{11} the Court of Appeal overturned the taxing master’s\textsuperscript{12} decision not to allow recovery of the Attorney General’s costs on the basis that the Attorney General was an employee of the Crown.

3.21 This case concerned a specific example of a party being represented by an employed solicitor. However, the Court said that the question of principle would apply equally to a local government authority, a nationalised industry or a business conducting litigation through its own legal department of which all the expenses, including the salaries of solicitors, are paid by it, rather than by instructing an independent firm to act for it.

3.22 The Court pointed out that the organisation had incurred costs – overheads, salaries, etc- but that it was too difficult to disentangle the overhead and profit element of an in-house legal department. Consequently, it made the presumption that the payment of costs that the court assessed as reasonable would not infringe the indemnity principle\textsuperscript{13}. It decided that it would be proper to deal with a bill of costs as if it were a bill of an independent solicitor.

The Organisation Lawyer

3.23 In Adams v London Improved Motor Coach Builders Limited\textsuperscript{14} the plaintiff was a member of a trade union, which entitled him to legal assistance. The union instructed solicitors on the plaintiff’s behalf and consequently became liable for the solicitor’s costs.

3.24 It was argued that the plaintiff was not in a position to claim that recovery of costs was to indemnify himself because he had no liability for those costs.

\textsuperscript{11} [1974] 3 All ER 603
\textsuperscript{12} Assessment of costs was previously called taxation and carried out by a taxing master.
\textsuperscript{13} per Russell LJ at 608
\textsuperscript{14} [1920] All ER 340, followed in R v Miller and Glennie [1983] 3 All ER 186.
3.25 The Court held that the plaintiff had instructed the solicitor, therefore the solicitor was entitled to be remunerated by the client. It said that in the absence of an agreement that the solicitor would not seek remuneration or would seek it from a third party, the client is liable to pay.

3.26 In most cases, the notion that the client is liable to pay will be a fiction. Nevertheless this constituted a mechanism by which the Court could circumvent the operation of the indemnity principle.

Litigants in person

3.27 Fairly nominal amounts may be paid to a litigant in person under the Litigants in Person (Costs and Expenses) Act 1975. In this case, there is not a representative but in a sense it is an abrogation of the indemnity principle in that the party being awarded costs would not have been liable to another for payment of those costs.

Fixed Costs

3.28 Section I and Section II of Part 45 make provision for fixed recoverable costs in certain cases, for example in road traffic accident cases valued under £10,000. It is accepted that there may be cases where the recoverable costs exceed the actual costs incurred; others where they will be less.\(^\text{15}\)

Conditional Fee Agreements

3.29 Dating back to the Statute of Westminster in 1275, contingency fee agreements - where the payment of some or all of a solicitor’s costs is contingent on the success of a case – have been unlawful.

3.30 Champerty (where a party agrees to maintain the action of another in return for which he will receive a share of the proceeds) and maintenance (where a person provides support, usually financial assistance, for another’s litigation,

\(^{15}\text{In Nizami v Butt [2006] All ER 140, the court accepted that the indemnity principle should not apply to the figures recoverable under that scheme.}\)
where there is no reasonable cause) were at once criminal offences and tortious.

3.31 The Criminal Justice Act 1967 abolished both the tort and the criminal offence, but the invalidity of such agreements remains.

3.32 However, conditional fee agreements (“CFAs”), introduced by the Courts and Legal Services Act 1990\(^{16}\) (“CLSA”), represent a relaxation of these rules, and a further erosion of the indemnity principle.

3.33 Statutory provision for CFAs, with or without a success fee, was first made by section 58 of the CLSA. It authorised the Lord Chancellor to permit CFAs in respect of all categories of work, except family and criminal, by Order, after consultation with various persons. The Conditional Fee Agreements Order 1995, and accompanying regulations, came into force on 5 July 1995 limiting CFAs to a few specified proceedings. From that date, it was lawful for a solicitor to enter into an agreement with his client whereby costs would be recoverable from the client only in certain circumstances and the normal costs could be increased by a percentage uplift of 100% should those circumstances occur.

3.34 On 30 July 1998, by the Conditional Fee Agreements Order 1998\(^{17}\), the categories were extended to all civil proceedings.

3.35 On 1 April 2000, section 27 of the Access to Justice Act 1999 substituted a new section 58 and introduced a new section 58A.

3.36 Section 58 and 58A of the Courts and Legal Services Act (as amended) provide-

“[58 Conditional fee agreements]

[(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason

\(^{16}\) Section 58
\(^{17}\) S.I. 1998/1860
only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this section and section 58A—

(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and

(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(3) The following conditions are applicable to every conditional fee agreement—

(a) it must be in writing;

(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the [Lord Chancellor].

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—

(a) it must relate to proceedings of a description specified by order made by the [Lord Chancellor];

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and
(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the [Lord Chancellor].

(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.

[58A Conditional fee agreements: supplementary]

[(1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—

(a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and

(b) family proceedings.

(2) In subsection (1) “family proceedings” means proceedings under any one or more of the following—

(a) the Matrimonial Causes Act 1973;

[(b) the Adoption and Children Act 2002];

(c) the Domestic Proceedings and Magistrates' Courts Act 1978;

(d) Part III of the Matrimonial and Family Proceedings Act 1984;

(e) Parts I, II and IV of the Children Act 1989;

(f) Part IV of the Family Law Act 1996; . . .

[(fa) Chapter 2 of Part 2 of the Civil Partnership Act 2004 (proceedings for dissolution etc of civil partnership);]
(fb) Schedule 5 to the 2004 Act (financial relief in the High Court or a county court etc);

(fc) Schedule 6 to the 2004 Act (financial relief in magistrates’ courts etc);

(fd) Schedule 7 to the 2004 Act (financial relief in England and Wales after overseas dissolution etc of a civil partnership); and

(g) the inherent jurisdiction of the High Court in relation to children.

(3) The requirements which the [Lord Chancellor] may prescribe under section 58(3)(c)—

(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and

(b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(4) In section 58 and this section (and in the definitions of “advocacy services” and “litigation services” as they apply for their purposes) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(5) Before making an order under section 58(4), the [Lord Chancellor] shall consult—

(a) the designated judges;

(b) the General Council of the Bar;

(c) the Law Society; and

(d) such other bodies as he considers appropriate.
(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee)."

3.37 Consequently, an agreement whereby a solicitor charges his client one rate if he wins a case and another if he loses is an enforceable agreement provided that the solicitor complies with the relevant regulations.

‘CFA-lites’

3.38 Section 31 of the AJA amends section 51(2) of the Supreme Court Act 1981 making explicit provision to allow rules of court to curtail the indemnity principle. The amended section, commenced in 2003, now reads-

“(2) Without prejudice to any general power to make rules of court, rules of court may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.” (The words in italics were inserted).

3.39 This power has enabled rules of court to be made\textsuperscript{18} which recognise a simplified form of CFA – or ‘CFA-lite’. The rules came into force on June 2\textsuperscript{nd} 2003.

\textsuperscript{18} Civil Procedure (Amendment No.2) Rules 2003 (S.I. 2003/1242)
3.40 The rules provide that the receiving party can receive reasonable and proportionate costs notwithstanding that he is only liable to pay his own solicitor to the extent that those costs are able to be recovered from the other party.\textsuperscript{19}

3.41 These rules also allow an additional liability – that is a success fee or an after the event insurance premium – to be recovered from the other party.\textsuperscript{20}

3.42 Consequently, the simplified CFA will say that the client is liable to pay only to the extent that the costs are recovered. If the costs are not recovered, there is no liability. This is a circumvention of the indemnity principle in a quite circular way, because the effect of the agreement in practice will be that the client is not liable to pay his solicitor’s costs.

3.43 Section 51 of the Supreme Court Act 1981, as amended could not be used to create a power of the type proposed for the following reasons:

- it does not appear to offer a solution where no costs would have been paid by a party to his representative in any circumstance;
- payment of costs to a third party seems to be beyond the scope of section 51;
- if the power is contained in primary legislation, there can be no question of vires, whereas there may be a question whether abolishing a common law principle transcends the vires of the rule making power in the Civil Procedure Act 1997.\textsuperscript{21}

\textit{Survival of the indemnity principle}

3.44 It is clear that in spite of all of the inroads, the indemnity principle generally remains intact. In \textit{Awaad v Geraghty},\textsuperscript{22} the court made it clear that contingency fee agreements will only be allowed only in so far as statute permits it.

\textsuperscript{19} CPR rule 43.2(3) introduced by Civil Procedure (Amendment No. 2) Rules 2003 (S.I. 2003/1242)
\textsuperscript{20} CPR rule 44.3A
\textsuperscript{21} Section 2
\textsuperscript{22} [2000] 1 All ER 608
4. Pro Bono representation

Pro Bono Work

4.1 ‘Pro bono’ legal work means legal advice or representation provided by lawyers to individuals or community groups who cannot afford to pay for that advice or representation and where public funding is not available. It is work that is free to the client, without payment to the lawyer or the law firm, and provided voluntarily by the lawyer or his firm.

4.2 Pro bono legal services in practice are those performed without payment or compensation including but not limited to services provided to:

- persons of limited means or other disadvantaged persons;
- charitable, religious, civic, community, governmental, health and educational organisations in matters that are designed primarily to address the needs of a person of limited means or other disadvantaged persons, or to further their organisational purpose;
- individuals, groups or organisations seeking to secure or protect civil rights, civil liberties or public rights, or to improve the law, the legal system or the legal profession.

Pro Bono organisations

4.3 Pro bono work tends to be organised through a pro bono organisation or not-for-profit agency. Examples of pro bono organisations are:

(1) Bar Pro Bono Unit (www.barprobono.org.uk). The Bar Pro Bono Unit, founded in 1996 and spearheaded by the Attorney-General, Lord Goldsmith QC, has several thousand barristers registered with it. It matches barristers with those who need their services. It tends to provide representation in areas where no public funding is available;

(2) Solicitors Pro Bono Group (www.lawworks.org.uk). The SPBG operates under the name of Lawworks. It is a registered charity and runs a number of
projects including LawWorks Clinics, which matches law centres needing assistance with firms that are able to provide it;

(3) Free Representation Unit (FRU) (www.freerepresentationunit.org.uk). FRU is a registered charity, which mainly undertakes work before the employment and social security tribunals where there are no restrictions on rights of audience.

4.4 The not-for-profit organisations, such as the Citizens Advice Bureaux and the Law Centres Federation, usually refer work to these organisations but may also assist in arranging representation through a law firm.

Pro Bono and the Indemnity Principle

4.5 Currently pro bono lawyers may not recover any costs owing to the operation of the indemnity principle, which operates to prevent a party recovering costs for which he has no liability to pay (i.e. the client has no liability as the solicitor is acting for free).

Costs recovery in pro bono cases

4.6 There has been a feeling in some circles for a time that there is an injustice caused by the fact that costs cannot be recovered from the losing party if the successful party is represented pro bono.

4.7 First, it has the consequence that there is not a level playing field. The pro bono represented party is liable for his opponent’s costs if his opponent wins, though in practice if the court makes such an order it is rarely enforced. But, the opponent knows that if he loses, he will not be asked to pay the other side’s costs because that party is represented pro bono. If the latter thought that he might be liable for the pro bono party’s costs, it may encourage early settlement and better litigation behaviours generally\(^23\).

\(^{23}\) It is understood that this may make the court more likely to order the pro bono organisation to pay costs (a power it already has though rarely exercises). But, again this will encourage better litigation behaviours and perhaps settlement.
4.8 Furthermore, there is good reason for seeking costs recovery as a means to fund the pro bono organisations. They have overheads, expenses and salaries to pay. This would provide them with a dedicated funding stream to allow them to carry on their work, and free them from the task of raising funds from other sources.

Pro Bono and CFAs

4.9 Efforts have been made to respond to these concerns by using the device of CFAs. Following the changes brought about by the AJA and specifically the commencement of S.31, it was suggested that solicitors could enter into a ‘pro bono CFA’ with their pro bono clients.

4.10 A sub-group of the Pro Bono co-ordinating committee (with representatives from the Bar, Law Society, Department for Constitutional Affairs and main pro bono organisations) was set up to design a standard ‘pro bono CFA’ with accompanying client care letter. This has not been completed as some issues remain concerning income tax and fund distribution issues.

4.11 Under the agreement the client is ‘liable to pay our charges only if you become entitled to recover legal costs from the an opponent or third party, and only to the extent that our charges are actually recovered’ and is liable to pay expenses irrespective of the result of the case. The agreement resembles the form of CFA expressly permitted by CPR rule 43.2.

4.12 Consequently, costs may be recovered from the other party if the litigation is successful. And, the solicitor would pass on those sums that are recovered by way of costs to the nominated fund or pro bono organisation, in accordance with a prior agreement between the solicitor and charity.

4.13 The Law Society has recently amended its practice rules to allow a solicitor to share fees with a charitable third party.24

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24 Solicitors’ Practice Rules 1990, rule 7. (http://www.lawsociety.org.uk/professional/conduct/guidance/view=article.law/POLICYID=286142)
Current Proposal

4.14 Despite the progress with CFAs, there remain concerns that the use of CFAs is not appropriate for pro bono cases.

(1) The key limitation of a pro bono CFA is that, such an agreement being entered into, there is a liability for the client to pay the individual legal representative and not to fund the pro bono organisation, and so a separate agreement has to be entered into with the pro bono organisation;

(2) Transparency. When CFAs were introduced, one of the incentives was that solicitors were already entering into tacit agreements to this effect. It was felt at the time that enshrining them in statute would allow the agreements to be transparent and also to be properly regulated.

To enter into a CFA in a pro bono situation places a constraint on an organisation or legal representative's ability to enter into a completely transparent relationship with the client concerning costs, because in reality the client is not liable for those costs.

(3) There may be confusion caused to the client. It is in the interests of all concerned that there should be clarity for consumers in contractual arrangements. The Department recognises that clients are not always versed in legal proceedings and may misconstrue the agreements they have entered into. The pro bono client, having been told that he will pay nothing to his solicitor may not understand why the agreement states that there is a liability.

(4) There may be a conflict with the pro bono ethic if the conditional fee arrangement suggested any possibility of a conflict of interest, i.e. if it appeared the representative might have a financial interest in the case;

4.15 In outline, the proposal is as follows:
(1) the court should have a discretion in litigated civil cases to make a costs order against the paying party where the receiving party was represented pro bono in respect of a sum equivalent to the pro bono lawyers’ costs;

(2) the court should have the power to order that the costs should be paid to a charitable body wholly separate from the litigation process that would receive and distribute funds to further pro bono help and assistance.

5. Clause 185 of the Legal Services Bill

5.1 Clause 185 creates a power in primary legislation for the court to make an order that-

(a) The paying party pay a sum equivalent to the costs of the solicitor or barrister\(^{25}\) whose services have been provided pro bono; and

(b) such sum should be paid to a prescribed charitable body designated by the Secretary of State

5.2 It is envisaged that as far as possible the provision should apply in the same way as for a normal fee paid costs assessment and as provided for in Parts 43-48 of the Civil Procedure Rules. The normal rule that costs should follow the event would apply though the court could make any other order.

5.3 Part 44 of the CPR sets out the general rules about costs, with rule 44.4 in particular setting out the basis for assessment and rule 44.5, the factors to be taken into account in deciding the amount of costs.

In what cases should the power apply?

5.4 The power can apply in all litigated cases in the civil courts. Specific types of case could be excluded through secondary legislation. This is the same scope

\(^{25}\) For ease, these instructions refer to a solicitor or barrister. But, there may be persons authorised to provide litigation and advocacy services other than a solicitor or barrister, for example, a ILEX representative with
as Section 58 of the CLSA\textsuperscript{26}. It should apply whether it is the claimant or the defendant or a third party who is represented pro bono.

What if the paying party is also represented pro bono?

5.5 The power should apply only if the paying party is privately funded; i.e. not if the paying party receives services funded by the Legal Services Commission as part of the Community Legal Service within the meaning of Part I of the Access to Justice Act 1999 or is also represented pro bono.

When may the order be made?

5.6 The order may be made whenever a party who is represented pro bono receives an award of costs against a privately funded party.

5.7 When the court makes an order for costs in the proceedings it may-

(1) summarily assess the costs based on a statement prepared by the solicitors before the hearing. Summary assessment is carried out by the judge who made the order, at the hearing, or at a further hearing before the same judge\textsuperscript{27};

(2) order a detailed assessment of costs by a costs assessor. Detailed assessment is a lengthy and rigorous procedure in which the receiving party submits a bill of costs, which the paying party may dispute. There may follow a detailed assessment hearing.

5.8 The court may make the order when costs are assessed summarily or on a detailed assessment. In the former case, the court would allow the payment of a sum no greater than that which it would normally order.

5.9 There would not need to be a power to make an interim award of costs\textsuperscript{28}. The purpose of that award is to reimburse a party who has actually been required to

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\textsuperscript{26} See Section 58A above
\textsuperscript{27} CPR PD 44 13.8
\textsuperscript{28} CPR 47.15 permits the court to make an interim award of costs.
pay money in respect of costs with an amount pending a final assessment of
the costs owed to him. (However, the power to make such an award should not
be compromised if a party is only partially represented pro bono – see
paragraph 5.28)

5.10 The power will not only be available where a party who is represented pro
bono wins the case. There are circumstances in which a costs order may be
made in favour of a party who has not won the case – if that party is
represented pro bono the court should be able to make the same order.
Examples of where a party has been successful generally in the litigation but
nonetheless has a costs order made against him are where-

(1) the other party has made a Part 36 offer or payment which the
'successful' party has failed to beat; or

(2) the 'successful' party pursued an issue in the litigation improperly or
unreasonably and the court exercises its discretion to penalise him by
ordering him to pay his opponent's costs in fighting on that issue.

How will the power be invoked?

5.11 It is envisaged that rules will provide that the party who is represented pro
bono should provide a Notice of Funding (probably with its claim or defence).
Consequently, when the court makes an award of costs in favour of that party,
it will make the award to the pro bono organisation identified in the Notice or to
the foundation.

To whom may the payment be made

5.12 The payment will be ordered to be made to a charitable foundation
expressly created to administer and distribute the monies received to further
pro bono legal work.

29 CPR Part 36 Offers to Settle and Payments into Court. Explanation of failing to beat an offer may be found in
rule 36.20.
30 Similar provision is made in respect of a funding arrangement in CPR rule 44.15 and PD 44, paragraph 19.1
Costs recovery in pro bono assisted cases

5.13 Work is currently underway under the auspices of the pro bono coordinating committee to establish such a foundation (working name the ‘New Foundation’) which would become a the single point to receive and distribute money generated by such costs recovery, interest recovered and unclaimed client monies.

5.14 The New Foundation will be a company limited by guarantee, registered with the Charity Commission and established to distribute and manage costs recovered in pro bono assisted cases.

What sums may be recovered?

5.15 The general rules about costs will apply, therefore the amount recoverable should be reasonable and proportionate.

5.16 Sums recoverable should be restricted to such as would constitute reasonable remuneration for services that themselves are reasonable and proportionate, having regard to the subject matter of the litigation and any specific issue or issues to which the services related.

5.17 The solicitor or barrister will present a statement of the costs sought based on an hourly rate deemed to be reasonable, as in a normal fee paying case. As to the rates, the court will impose the same limits on recovery as it does in relation to costs generally. The Supreme Court Costs Office issue guidance biennially of hourly rates for different bands of fee earner in different parts of the country\(^{31}\). Therefore, if a solicitor seeks to recover at a rate not reasonable having regard to the case and to the location of the proceedings, the court will not permit such sums.

5.18 Detailed provision about what sums may be recovered could be contained in rules of court.

\(^{31}\) http://www.hmcourts-service.gov.uk/publications/guidance/scco/appendix_2.htm
5.19 The rule making power should be sufficiently broad to allow rates to be fixed or the discretion to be exercised having regard to other factors.\textsuperscript{32}

How will it apply in cases where fixed costs would otherwise be ordered?

5.20 Section I and Section II of Part 45 make provision for fixed costs in certain cases, for example in road traffic accident cases under £10,000. The court may vary the amount, but those sections provide the default position on recoverable costs in cases to which they apply.

5.21 It is envisaged that, in these cases, the court would apply the fixed costs in Sections I and II.

What if a client is partially represented pro bono?

5.22 We would not wish to exclude cases where only part of the representation is on a pro bono basis. This may be, for example where a case is initially funded by the Legal Services Commission and taken forward on a pro bono basis, or where the solicitor is paid but the barrister acts without charge, or vice versa.

5.23 It is envisaged that the court would make separate orders: one in respect of the costs incurred pro bono (which may be dealt with under this power) and one in respect of the costs that are privately funded or funded by the LSC.

What if a client is represented by a lay representative?

5.24 It is envisaged that this power will only be available where a person is represented by a practising solicitor or barrister exercising rights of audience in the civil courts.

What if the representation by the solicitor or barrister has not been arranged by a pro bono organisation?

\textsuperscript{32} The factors the court must consider are found in CPR rule 44.5
5.25 It is envisaged that the power should be available where a person is represented by a solicitor or barrister pro bono, irrespective of how the representation was arranged. In cases where the client is represented by a solicitor or barrister whose representation has not been arranged through a pro bono organisation, the money may be paid to the foundation or a particular organisation if requested.

What if the parties agree costs?

5.26 In the more complex cases, where the court orders that a party pays the costs of the other party, those costs are ‘to be assessed’. This is often by means of a detailed assessment.

5.27 Rather than submit the costs to detailed assessment, what normally happens is that the parties will agree the costs.

5.28 The parties are still able to agree costs. There will be no obligation to pay costs to one of these prescribed organisations unless the court makes an order, however mindful that the court may make such an order, it is hoped that parties would be encouraged to make a payment to the foundation or pro bono organisation.

What if a client who is represented pro bono is the paying party?

5.29. To ensure a level playing field: if the opposing party wins, he can recover his costs, but if he loses he may be required to pay.
Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

1. Do you consider that all civil cases should be included in this legislation? If not, which categories do you think should be excluded and why?

2. Is the division of cost awards in these circumstances likely to present a problem to the Courts?

3. Do you have any comments on the proposals regarding the prescribed charitable body?

4. Do you think any special costs provisions should be made in the Civil Procedure Rules in respect of the making of costs orders in pro bono cases under clause 185?

5. How might we best ensure the widest use of Summary Cost Assessments in pro bono cases under clause 185?

Thank you for participating in this consultation exercise
About you

Please use this section to tell us about yourself

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If you would like us to acknowledge receipt of your response, please tick this box

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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

________________________________________________________________________

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________________________________________________________________________
How to respond

Please send your response by 9 July 2007 to:

Anne Johnston
Department for Constitutional Affairs
Claims Management & Private Funding Branch
3.10
Selborne House
54-60 Victoria Street
London
SW1E 6QW

Tel: 020 7210 1427
Fax: 020 7210 0613
Email: anne.johnston@dca.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.dca.gov.uk/index.htm.

Publication of response

A paper summarising the responses to this consultation will be published by mid-October. The response paper will be available on-line.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000
(FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.
Partial Regulatory Impact Assessment

1. Title of proposal

1.1 Recovery of costs in pro bono assisted cases under clause 185 of the Legal Services Bill introduced in the House of Lords on 23 November 2006.

2. Purpose and intended effect

(i) Objective

2.1 To establish fairer litigation behaviour whilst preserving access to justice by amending the current cost law and allowing the Courts to make cost Orders in pro bono assisted cases where, in fact, no costs have been incurred. This will level the playing field so that pro bono assisted cases can be treated in the same way as other cases before the Court, from a costs perspective. It will also remove the benefit currently enjoyed by those opposing a pro bono representative, who know from the outset that a costs order would rarely be enforced.

2.2 It is intended that this provision will cover civil cases only. Consultation will determine if all categories of civil law are appropriate for inclusion.

(ii) Background

2.3 In successful cases, where representation is provided on a pro bono basis (or free of charge), cost Orders cannot be made. This is because the indemnity principle dictates that an Order cannot be made for more than the client is liable to pay his solicitor. This provides an unfair advantage to the opposing party that can give them the upper hand in fighting or settling cases.

(iii) Rationale for Government Intervention

2.4 It has long been considered in legal circles that the current cost regime provides an unfair advantage to unsuccessful parties in cases where the successful litigant has pro bono representation. For some years, the Attorney General’s Pro Bono Co-ordinating Committee has been working to see how this might be rectified. Changes to the rules governing the use of Conditional Fee Agreements in June 2003 abrogated the effect of the indemnity principle in relation to CFAs and the CFA (Amendment) Regulations provided for a lighter regulatory regime (CFA ‘lite’) that conformed to certain requirements.

2.5 This looked to be a possible solution to the problems of costs in cases assisted by pro bono representation. A sub group of the Attorney General’s Committee (made up of the representatives of the Bar, Law Society, DCA and major pro bono organisations) made considerable progress in designing a specific CFA and client care letter for use in pro bono cases. In June 2006, the Law Society
changed its Fee Sharing Rules to accommodate this approach. However HM Revenue and Customs decided against changes to the Gift Aid scheme and to Class 4 National Insurance Contributions because of the small numbers affected. These changes were necessary to ensure that lawyers were not financially penalised by using the ‘pro bono’ CFA.

2.6 This meant another route needed to be considered and the Attorney General approached DCA ministers to see if a suitable legislative vehicle might be found to accommodate a proposal to abrogate the indemnity principle in pro bono assisted cases. After a scoping exercise a clause – 185 – was included in the Legal Services Bill.

2.7 It is estimated that 10% of all lawyers (some 10,000 individuals) undertake legal pro bono work each year and in 95% of the cases, the help is mainly of an ‘initial advice’ nature. It is envisaged that a similar proportion of the funds, raised by costs awards, would go to increase the groundwork done in local legal clinics and advice centres. Recent examples of pro bono help include the prompt establishment of a pro bono legal helpline to provide advice and support to victims of the 7/7 bombings – including how to deal with insurance claims and probate.

2.8 Research undertaken by the Legal Services Commission acknowledges that advice in the early stage of a problem can prevent it from escalating and spiralling into something more complex, i.e. debt problems leading to crime. In their Civil Law and Social Justice Report 2006, they state that 33% of the population experience a justiciable problem each year, but that 10% of people take no steps to address the problem because they don’t know where to go for advice, think no advice is available or are unable to pay for the advice.

2.9 This action will be in the public interest (especially for those middle income clients with limited means, but no access to Community Legal Service help groups) and would not mean that the number or cases coming to Court would dramatically increase.

3. Consultations

(i) Within government

3.1 The Law Officers, Treasury, Home Office and members of the Domestic Affairs committee.

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33 This is anecdotal information provided by pro bono organisations. DCA are intending to undertake a more detailed study and to provide supporting statistics for publication of with the full RIA

(ii) Public Consultation

3.2 Consultations have taken place with senior costs judges, members of the legal profession and the Attorney General’s Pro Bono Co-ordinating Committee, who have all signalled their support for the proposal. The idea was suggested as an alternative to a ‘pro bono’ CFA by respondents to the ‘Making Simple CFAs A Reality’ consultation in 2004.

3.3 A full public consultation will be held between 16 April and 9 July 2007.

4. Options

4.1 The following section sets out the options considered:

1. No change
2. A ‘pro bono’ Conditional Fee Agreement (CFA)
3. Cost Orders for pro bono assisted cases

(i) Sectors and groups effected

4.2 These groups will be affected by all the options:

- The legal professions - those who provide pro bono services and those who may consider undertaking pro bono work.
- The judiciary - they have responsibility for assessing and directing the Orders for costs.
- The pro bono sector - their funding provisions may be affected.
- The not for profit sector - those who refer clients to pro bono organisations.
- Those requiring legal help or assistance in civil cases and are unable to afford legal fees or are ineligible for Community Legal Service legal aid.

(ii) Equality Impacts

4.3 We have undertaken an Equality Impact Assessment Initial Screening which did not identify any adverse impacts on equality.

(iii) Legal Aid Impact

4.4 Clients receiving pro bono support are normally provided with free help because they are ineligible for civil legal aid, or any entitlement has been exhausted. We have considered and discussed the issue with colleagues in the Legal Aid Strategy Division who have confirmed that these changes will have no impact on litigants with legal aid or on the legal aid budget.

5. Costs and Benefits
(i) Option 1 - No change

Benefits

5.1 There would be no need to design and lay before Parliament, the secondary legislation that would be required to commence the provision and the Civil Procedure Rule Committee would not have to make changes to the Civil Procedure Rules to accommodate it. Those involved in pro bono cases would not have to make themselves familiar with new rules and procedures associated with such cases. There would be no implementation or training costs.

Costs

5.2 To take no action would leave the present inequality of costs in pro bono assisted cases unaddressed, leaving the opposing party aware from the outset that there will be no cost liability should they lose. This could encourage cases to be pursued that, should a cost penalty be involved, might be settled earlier and possibly out of Court.

5.3 The pro bono community would perceive it as a regressive step. DCA ministers have historically lent their support to the ethos of pro bono and have encouraged the sector to take forward proposals that might raise additional funds to support free legal help and assistance.

5.4 The pro bono sector would lose the possibility of an avenue of additional funding, projected to be in the region of £800,000 per annum, which could have been directed to meet unmet legal need. To put this into perspective, during the period 2004-7 the Legal Services Commission and DCA jointly funded the LawWorks Clinics project with £600,000. Indicative figures show that by the end of this period, 85,000 members of the public will have been given advice via the project, the majority of whom would have been ineligible for civil legal aid, or would not have been able to afford paid representation.

(ii) Option 2 – the ‘Pro Bono’ CFA

Benefits

5.5 CFAs are widely used and accepted in the legal world. The introduction of CFA ‘lite’ offers a suitable vehicle for lawyers acting for clients on a pro bono basis to recover reasonable costs from opponents and to pass those costs onto a charitable pro bono organisation to support pro bono work. They would offer the possibility of a fairer outcome for clients and could facilitate a growth in pro bono work.

5.6 The Attorney General’s Committee has already designed a draft CFA and client care information for use in pro bono cases and has discussed how this might be rolled out to the professions. The Law Society has also changed its Fee Sharing rules to accommodate it. If the problems raised by HM Revenue and Customs (as specified at 2.5) can be resolved, this option could be implemented immediately.
Costs

5.7 The use of CFAs in pro bono cases raises ethical concerns and is seen by some in the pro bono community as clouding the purity of the pro bono ethos. Satisfactorily explaining to clients the complexities of CFA agreements and why the lawyer is directing costs to a charity of his choice are sources of disquiet.

5.8 The Law Society consulted HM Revenue and Customs in 2006 to clarify tax liabilities for lawyers willing to enter into ‘pro bono’ CFAs. They made it clear that they could not see a way of providing full tax relief for such arrangements. A change in the income tax relief provision would not be appropriate because of the limited number of National Insurance contributors affected and introducing tax relief for charitable donations for the self employed could not be considered in isolation. It is possible that the financial impact of this decision could deter many lawyers from using the ‘pro bono’ CFA.

5.9 The use of ‘pro bono’ CFAs would be entirely voluntary and a programme of promotion and education would need to be undertaken by both the Attorney General’s Committee and the Law Society.

5.10 Most pro bono work takes place in debt, housing, environmental law and related areas where currently CFAs are used to a fairly limited extent.

(iii) Option 3 – Cost orders in pro bono cases

Benefits

5.11 Enabling the courts to make cost Orders in pro bono assisted cases will allow them to be treated in the same way as other cases. It will establish a fairer costs regime, one where all will know from the outset that should they lose, they will be liable for costs.

5.12 This power will not be mandatory. The lawyer providing pro bono assistance will have to advise the Court at the start of the case that they will be seeking an Order for costs if successful. Parties to the action will know the potential extent of their liability from the outset and that this liability could apply to all in their situation. It will not change the Courts’ ability to decide if an award was appropriate and proportionate but it will allow them to make an award if they so wished.

5.13 The orders will be made in favour of a prescribed body registered with the Charity Commission and managed by Trustees. To ensure its impartiality and effectiveness, it will be prescribed by Order of the Secretary of State. It will not be involved in the litigation process; its role would be purely to administer and distribute funds to enable the provision of legal help and advice to those otherwise unable to access it. Such a body would be able to move more speedily in response to emerging needs than more traditional funding streams. It could also be the receiving body for other streams of funding that are being investigated, including Interest and Lawyers Trust Accounts and Unclaimed Client Monies.
5.14 It is estimated that 10% of all lawyers (some 10,000 individuals) undertake legal pro bono work each year and in 95% of the cases, the help is mainly of an ‘initial advice’ nature. It is envisaged that a similar proportion of the funds raised by cost awards would go to increase the groundwork done in local legal clinics and advice centres.

5.15 Currently, only 5% of cases handled by pro bono lawyers will come to court – about 1,000 each year. In theory, costs would apply to most of these cases. Indications are that an average cost award in civil cases is approximately £800 so we envisage that the total amount of awards in any one-year would be in the region of £800,000.\(^{35}\)

**Costs**

5.16 It is possible that those in pro bono organisations and the not-for-profit sector, who currently receive central or local government funding, may perceive the clause as a potential withdrawal from funding commitments.

**6. Small Firms Impact Test**

6.1 We have not identified any obvious disadvantages in relation to small firms but will be undertaking further consultations with the Federation of Small Businesses.

**7. Competition Assessment**

7.1 The competition filter test has been undertaken and has raised no areas of concern.

**8. Enforcement, sanctions and monitoring**

8.1 The Secretary of State will not prescribe the receiving charity until he is convinced of its impartiality and its credibility in the pro bono and not for profit communities. He will also satisfy himself of its ability to respond quickly to emerging need, in support of the provision of free legal advice and assistance.

8.2 Cost awards will be made direct to the prescribed charity. Lawyers involved will not receive any of the award.

**9. Compensatory Simplification/Administrative Burden Reduction**

9.1 There are no obvious impacts.

**10. Local Authority impact**

\(^{35}\) These estimates are based on sample information supplied by the Supreme Courts Costs Office.
10.1 We have completed a local authority burden pro forma and have not identified any impacts on local authorities resulting from this proposal.

Contact point

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The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department’s effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.
Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation process rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler  
Consultation Co-ordinator  
Department for Constitutional Affairs  
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54-60 Victoria Street  
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If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the How to respond section of this paper at page 41.