



Public Law Project briefing on the Legal Aid Means Test Review consultation (Civil proposals)

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Overview: Impact of proposals on access to justice for vulnerable groups

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Click on a question number to jump to our detailed responses.

KEY	Significant Positive impact	Positive impact	Potential for negative impact	Potential for significant negative impact	Unclear
CH.2 OVERARCHING PROPOSALS					
Q1	OECD modified model		Q7	MSVCC payments	
Q2	Actual housing and childcare included		Q8	VOTC payments	
Q3	Pension contributions		Q9	Back to work bonus excluded	
Q4	Pension contributions limited to 5%		Q10	Housing benefit excluded	
Q5	Prisoner's earnings		Q11	Income passport legacy benefits	
Q6	Priority debt		Q12	Income passport guarantee pension credit	
CH. 3 CIVIL INCOME					
Q13	Increase gross income		Q21	Upper disposable income limit (£946)	
Q14	Lower gross income threshold		Q22	Dependent's allowances	
Q15	Remove cap on single housing costs		Q23	People supporting temporarily	
Q16	Deduct actual council tax		Q24	£500 UC earnings threshold	
Q17	Increase work allowance to £66		Q25	Admin impacts of Q24	
Q18	Cost of living allowance		Q26	Suggestions to mitigate Q24	
Q19	Cost of living allowance set at £622		Q27	Income contributions	
Q20	Median spending as upper limit		Q28	£20 minimum contribution threshold	
CH. 4 CIVIL CAPITAL					
Q29	Increase capital thresholds		Q35	Disregard child abuse compensation	
Q30	Increase equity disregard		Q36	Disregard VOTCS payments	
Q31	ED applies despite temporary absence		Q37	Disregard backdated benefits	
Q32	Increase SMOD disregard		Q38	Discretion to disregard compensation	
Q33	Remove trapped capital discretion		Q39	Introduce capital passporting	
Q34	Simplify pensioners disregard				
CH. 5 IMMIGRATION & ASYLUM, CHILDREN & NON-MEANS TESTED					
Q40	Certificated immigration capital limits		Q46	Means test u18s (controlled work)	
Q41	UT immigration contributions		Q47	Light touch u18s means test	
Q42	Immigration legal help capital limits		Q48	[Omitted, outside our expertise]	
Q43	[Omitted, outside our expertise]		Q49	Non-means test inquests (LH)	
Q44	Non means test u18s (certificated)		Q50	Backdating LH for inquests	
Q45	Do not means test on turning 18 years				
CH.8 IMPLEMENTATION					
Q87	Staggered approach		Q93	Transitional issues (UC/pensioners)	
Q88	Non-means tested areas first		Q94	[Omitted, outside our expertise]	
Q89	Civil before criminal		Q95	Further comments on transition	
Q90	[Omitted, outside our expertise]		Q96	Future review of the means test	
Q91	Further comments on implementation		Q97	Impact on protected characteristics	
Q92	Transitional issues (reassessment)		Q98	Admin burdens (Representation)	
Q99	Sustainability		Q100	Admin burdens (Legal Help)	

Executive summary and recommendations:

1. Long overdue increases to overall income and capital limits will make more people eligible for legal aid and new 'disregards' will make the tests fairer by excluding certain types of income and capital. Whilst some specific proposals such as these may have a positive impact, fundamentally the Means Test Review will not ensure access to justice for the most vulnerable people or arrest the sustainability of the civil legal aid system.
2. These proposals:
 - a. Lack effective safeguards, excluding people who cannot afford to pay privately
 - b. Disadvantage single parents, low-income homeowners, and disabled people
 - c. Increase administrative burdens upon applicants for and providers of civil legal aid, and
 - d. Threaten the sustainability of civil legal aid
3. In addition, the lack of a clear timetable for implementation or a commitment to review and update thresholds/disregards on an annual basis means that positive improvements risk being quickly eroded by the increasing cost of living.

Reform of legal aid means testing is urgently needed

4. Provision of legal aid to individuals who seek redress is not simply a matter of compassion, it is a key component in ensuring the constitutional right of access to justice, itself inherent in the Rule of Law¹. The courts have repeatedly upheld the principle that a failure to provide legal aid can amount to a breach of fundamental rights².
5. Reform of civil legal aid means testing in England & Wales is long overdue. The proportion of the population eligible for legal aid has fallen dramatically over time, from 80% in 1950 when it was first introduced, to 25% in 2016, in the last available Ministry of Justice (MoJ) data³. The present income and capital limits do not reflect financial reality and have not been increased since 2009, despite £1 that year being the equivalent of £1.29 in 2021⁴. Under the proposed changes, 27% of the population would be eligible for legal aid.
6. Failure to increase the financial thresholds in real terms has produced a situation that is unduly stringent for all types of applicants and is particularly prejudicial towards certain groups. For example, housing costs allowed for single people, capped at £545 per month, are woefully out of date and unrealistic⁵, while the £45 allowance for 'employment expenses' is inadequate to account for the work related costs (such as travel to the office) of many working people.

¹ Echoing the words of Lord Reed in [R\(Unison\) v Lord Chancellor \[2017\] UKSC 51](#) at §6 and §66.

² *R (oao Gudaviciene & Others) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622.

³ 'Spending of the Ministry of Justice on legal aid' House of Commons Library briefing, 21 October 2020, available at <https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf> repo

⁴ <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>

⁵ ONS data for October 2020 to September 2021 shows that in London the median monthly 'room' rate (i.e., in a house share) in London was £650.

7. The present system requires people on low incomes to pay contributions towards legal costs which they cannot afford without falling below a socially acceptable standard of living. Research commissioned by the Law Society in 2018⁶ compared the means test with the Minimum Income Standard ('MIS') for households both under, and just above, the disposable income limit. For all household types considered, income was already below the MIS before any spending on legal costs. Over 3 years of inflation have worsened the position since then.
8. The present system also requires people on low incomes to contribute their life savings above £3,000 towards the costs of their legal proceedings and excludes people with capital of more than £8,000 altogether. In contrast to other areas of public life (such as welfare benefits or support with care needs at home) individuals seeking assistance with legal problems are often required to sell their homes (or borrow against them).
9. Setting aside the reasonableness of such an expectation, evidence suggests that it is often impossible to sell a home quickly enough or to borrow against it⁷. A discretion to waive trapped/inaccessible capital only began to be exercised following a legal challenge⁸ by a Public Law Project (PLP) client and remains underutilized due to a lack of awareness, guidance, poor LAA decision making, administrative burdens and other disincentives.
10. The complexity of the present means test creates administrative burdens and financial risks for providers. These disincentives decrease the accessibility of legal aid for individuals⁹ and the sustainability of civil legal aid work for providers¹⁰. In addition, there is no independent right of appeal¹¹ where mistakes are made.
11. The MTR proposals will not correct these fundamental issues and there is a risk of any positive impact being quickly eroded by the rising cost of living:
 - a. Nothing has been done to make sure that people of modest means excluded from the means test can actually afford legal services.
 - b. People in receipt of Universal Credit (UC) will be expected to contribute towards legal aid.
 - c. The new eligibility limits are set based on household spending information from 2019/20 but may not take effect until 2023 or later and won't be reviewed for another 3-5 years.
 - d. People will still be expected to sell their homes to pay for vital legal services.
 - e. The MoJ accepts in its impact assessment that the means test is getting more complex and administrative burdens are increasing.

⁶ 'Priced out of justice: Means testing legal aid and making ends meet' Donald Hirsch, 2018 available at https://repository.lboro.ac.uk/articles/report/Priced_out_of_justice_Means_testing_legal_aid_and_making_ends_meet/947089_Z

⁷ See 'Report on the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold' Dr Lisa Whitehouse, March 2018, available at <https://www.lawsociety.org.uk/en/topics/legal-aid/legal-aid-means-test-review-re-started>

⁸ R (oao GR) v Director of Legal Aid Casework [2020] EWHC 3140 (Admin) available at <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3140.html>

⁹ See 'Trapped capital' and financial eligibility for legal aid, Dr Emma Marshall and Daniel Rourke, April 2022 (§4.3.1-4.3.3), available at https://publiclawproject.org.uk/content/uploads/2022/04/Trapped-capital-FINAL_.pdf

¹⁰ See 'Droughts and Deserts: A report on the immigration legal aid market', Jo Wilding, 2019 (p31-33), available at <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>

¹¹ Regulation 45(1)(a) of the Civil Legal Aid (Procedure) Regulations 2012 excludes means testing decisions.

Overarching proposals lack effective safeguards

12. The Legal Support Action Plan which announced the Means Test Review emphasised the need to *'appropriately protect access to justice, particularly with respect to those who are vulnerable.'* However, the resulting proposals are underpinned by an assumption that households of modest means, at or above national median levels of income and capital, do not fall within *'those who need it most'* (§90 of the Consultation document).
13. This assumes, without evidence, that households of modest means (for example those not receiving means tested benefits) can afford to pay privately. The Means Test Review ('MTR') did not attempt to establish the actual costs of accessing legal services on a privately paying basis or the capacity of people with varying levels of income/capital to meet them. The new test is set to exclude around 73-77% of the UK population (§102 of the Impact Assessment – Civil).
14. Whether the Government decides to make money available or not, the public and Parliament deserve to have access to an unvarnished assessment of how much access people have to the courts and to legal advice and representation. Only once that information is known can a clear-eyed assessment of Government's policy be made.

Recommendation 1

The Ministry of Justice should begin to gather data on the costs of accessing legal services on a privately paying basis, to inform future reviews of the means test.

15. Safeguards exist in other parts of the legal aid scheme to protect fundamental rights. 'Exceptional Case Funding' allows legal aid to be granted for issues normally treated as 'out of scope' if there is a risk of a breach of fundamental rights¹². In criminal legal aid, it is possible to request a hardship review in relation to overall capital and income limits or the level of contributions. In contrast, there is currently no equivalent in civil legal aid where a person cannot afford to pay privately, or that contributions be waived because they are unaffordable and would cause hardship.
16. As the Ministry of Justice acknowledges that certain groups will be disadvantaged by the approach taken, it is important that a safeguard is introduced for civil means testing decisions also:

Recommendation 2

Introduce a right to request a hardship review, following which normal civil income and capital limits can be disappplied, and/or contributions waived.

17. The means test is already highly complex, and the MTR proposals will exacerbate this problem. Legal aid providers are not properly paid for work assessing potential client's means and work at risk of their means assessments being disputed by the LAA. The impact of greater complexity is

¹² 'Exceptional Case Funding' currently exists as a safeguard where an individual requires assistance for a matter which is not in scope. However, this form of legal aid remains subject to the means test and there is no general discretion to waive the legal aid income and capital limits.

that providers will be paid even less for their work and will likely take on fewer legal aid cases, particularly where the means of the client are complicated to assess.

18. There will be more areas where providers and Legal Aid Agency (LAA) decision makers are expected to make choices and apply complex rules. There is currently no independent right of appeal against LAA means testing decisions and no way for providers to ask the LAA to agree their means testing decisions in complex cases.
19. Throughout our responses to the consultation, we have indicated ways to make the tests less complex and reduce administrative burdens. For example, income and capital passporting all those in receipt of UC, including low-income homeowners. However, absent a radical shift in approach, complexities will remain. We make the following recommendations to attempt to reduce the impact of this complexity:

Recommendation 3

Introduce a right to appeal means testing decisions, so that an Independent Funding Adjudicator can consider if these complex rules have been correctly applied.

Recommendation 4

Confirm that the LAA will not interfere with means assessments unless they are manifestly unreasonable and introduce a mechanism by which providers can seek early confirmation from the LAA that their means assessment is agreed.

Income changes disadvantage single parents and disabled people while creating significant administrative burdens for providers

20. We welcome proposals to increase income thresholds, remove the cap on allowable housing costs and deduct new categories of essential spending. However, we are deeply concerned that proposed changes to income rules may adversely impact single parent households¹³. The model used to calculate spending needs has been criticised for underestimating the needs of these families. For this reason, Donald Hirsch recommends introducing a supplementary cost of living allowance for lone parent households¹⁴. There is no effective safeguard to ensure that the income tests only exclude people who can afford to pay privately, or that contributions required are affordable (see Recommendation 2).
21. Proposals to end passporting for UC recipients earning over £500 per month and include housing benefit in the gross income calculation will require contributions from people who have been assessed as eligible for means tested benefits. They will disproportionately impact single parents, who have proportionately higher housing costs compared with other adults. People living in areas

¹³ 'More affordable justice: Proposals to reform the legal aid means tests and implications for living standards', Donald Hirsch, May 2022, available at: <https://www.lawsociety.org.uk/topics/research/more-affordable-justice-legal-aid-means-test-report>

¹⁴ Ibid, p28.

of the country with higher housing costs will also be impacted, despite the benefits system recognizing that they need to spend more money on housing.

22. We are further concerned that the proposed 'cost of living allowance' does not adequately account for the needs of disabled people. While PIP and DLA are excluded from income, not everyone living with a disability receives these benefits and they do not always cover all the additional costs of living with a disability. This 'extra' income is needed to meet those disability related costs and should be excluded from the legal aid means assessment.

Recommendation 5

Continue passporting for all recipients of Universal Credit.

or

If these proposals proceed, introduce additional allowances for single parents and disabled people to ensure they are not disproportionately impacted and increase the dependent's allowance for children under 14.

Capital changes increase eligibility, but increase admin burdens, and abandon homeowners with 'trapped capital'

23. Proposals to increase the capital thresholds, equity and Subject Matter of Dispute disregards and introduce capital passporting for some UC recipients will increase access for some. 'Trapped capital' situations, where a person is refused legal aid due to value in property that they cannot sell, will arise less often. However, the decision to exclude UC recipients earning more than £500 per month and low-income homeowners are of particular concern. Further, proposals to address 'trapped' or 'inaccessible' capital where it does arise, are inadequate and unworkable.
24. The decision not to passport homeowners on UC through the capital test is a missed opportunity to reduce the complexity and administrative burdens of means testing. It continues the expectation that these people must sell their homes in order to secure access to justice, as they are unable to pass affordability checks for further borrowing while on UC.

Recommendation 6

Extend capital passporting to all Universal Credit recipients and low-income homeowners in receipt of means tested benefits.

25. 'Trapped' capital occurs where property is included in the means assessment, such as a family home, but it cannot be sold. The judgment in *R (oao GR) v Director of Legal Aid Casework [2020] EWHC 3140 (Admin)* established that in this situation, property can be valued 'equitably', for example at £0, so that a person can pass the means test without selling their home. This issue often affects domestic abuse survivors in family proceedings.
26. Trapped capital will be less likely to arise under the proposals, however it will still arise, particularly affecting domestic abuse survivors in family proceedings solely concerning

arrangements for children. The new mandatory disregard is defined so narrowly that it will be much harder to meet than the current discretion. Where the test is met, applicants will be expected to pay back legal aid afterwards, despite the LAA accepting they have no means to pay.

27. Two of the capital proposals will have a positive impact, making 'trapped capital' less likely:
 - a. The full value of any property that is part of the dispute will be excluded from the means assessment. This would end the situation where domestic abuse survivors are refused legal aid to help them ensure they receive a fair share of a jointly owned property, due to the value of the property itself. Legal aid is required as the property cannot be sold until the dispute is resolved and the survivor cannot be expected to negotiate effectively with their abuser. Although this could result in legal aid being granted to people who will eventually receive a share of a valuable asset, the 'statutory charge' will apply at that point, turning the legal aid received into a loan secured against the property.
 - b. The increase in the 'equity disregard' and confirmation that it will apply where the applicant has temporarily fled the home due to domestic violence means that homeowners are more likely to be assessed as falling within the disposable capital limit.
28. However, we do foresee situations where 'trapped capital' will continue to arise, in particular where the property is not co-owned with the opponent and so the 'Subject Matter in Dispute' disregard does not apply. A common example would be where a survivor of domestic violence needs help with a dispute in the family court about who the children live with but selling their home would uproot the children and make it harder for the survivor to accommodate them.
29. The MoJ proposes to remove the current discretion and introduce a new mandatory disregard for 'inaccessible capital'. The new disregard would not apply to *'Property which is saleable but which an individual may not want to sell – such as their family home ... nor would property on which a loan could be secured.'* This is much narrower than the current discretion which allows capital to be disregarded wherever it is considered 'equitable'.
30. Although it might appear preferable for there to be a mandatory disregard, with greater certainty for applicants and less administration for providers and the LAA, it adds little to the other proposal to fully exclude property that is 'subject matter of dispute'. That is because where property actually cannot be sold, it will usually be because the co-owner does not consent, and this will usually be the ex-partner who is the opponent in the proceedings.
31. It would leave domestic abuse survivors who need assistance with disputes solely about children with no choice but to sell their homes. This is problematic given the evidence that some abusers bring vexatious family court proceedings as a form of economic abuse. It would also appear to exclude survivors who require an urgent protective order, as they will not be able to promptly provide evidence capital in the home is inaccessible or without exposing themselves to harm.
32. In addition, the proposals introduce a new type of 'statutory charge', turning legal aid into a loan secured against the property with the 'trapped capital'. The legal basis for creating the charge is unclear, and it is not known whether interest will accrue, despite the LAA accepting the applicant has no means to pay in the foreseeable future.
33. The proposals therefore risk undermining the improvements resulting from the judgment in *R (oao GR) v Director of Legal Aid Casework [2020] EWHC 3140 (Admin)*. Overall, there would be a more positive impact if the MoJ made changes to the equity disregard and SMOD disregard but kept the existing discretion and implemented the recommendations in our 'trapped capital' report.

Recommendation 7

Abandon the proposed charging system for 'trapped capital', maintain the current discretion but implement the recommendations set out in our trapped capital report including training for LAA staff, clearer guidance, and an independent right of appeal.

Alignment of immigration capital limits welcome, but contributions risk destitution

34. We welcome proposals to align capital thresholds in immigration work but the omission of asylum support as a passporting benefit is a missed opportunity to avoid unnecessary means testing. Proposals to require contributions in immigration and asylum representation in the Upper Tribunal risk forcing people with no right to work into destitution.

Recommendation 8

Abandon plans to introduce contributions for Upper Tribunal work

or

Implement Recommendation 2 (hardship review).

Recommendation 9

Make asylum support a 'passporting' benefit.

Missed opportunities to extend non-means tested areas and decrease administrative burdens

35. Removing the means test for children for all types of civil representation is extremely welcome and will reduce unnecessary burdens on providers. However, the omission of Legal Help for children from the non-means testing proposals is disappointing. It runs contrary to the aim of resolving more matters at the initial advice stage, perpetuates unnecessary admin burdens and risks leaving children without recourse if adults responsible for them are unable to pay privately.
36. We also welcome the inclusion of inquest work engaging Art. 2 or where there is significant wider public interest. However, the proposals stop short of remedying the inequality of arms in other inquests where the state has an interest. We look forward to reading the recommendations of other organisations with more experience in this area.
37. There are also compelling reasons to exclude urgent domestic violence survivors and victims of trafficking/modern slavery from means testing, given the unique difficulties that these groups have in gathering evidence to demonstrate their eligibility when they require urgent assistance. Given that domestic abuse survivors are more likely to be single parents, who are disproportionately impacted by the proposals, we are concerned survivors will be unable to access legal support to ensure their safety and that of their children. We are also concerned that the sustainability of this area of practice will be disproportionately impacted.

Recommendation 10

Remove the means test for children, victims of trafficking/modern slavery and domestic abuse survivors.

Delays in implementation and review risk quickly eroding improvements

38. The failure to ensure an adequate mechanism for annual uprating in line with an appropriate measure of and the long-time frame for implementation of the proposals risks eroding much of the positive impact of these proposed reforms:

Recommendation 11

Ensure that means testing thresholds and allowances are uprated automatically on an annual basis against CPI (CPIH for the gross income limit, which includes housing costs) and review how the overall scheme is operating every 3 – 5 years.

Impacts on sustainability

39. MoJ projections about the impact of these proposals indicate that the practice of civil legal aid will become even less sustainable. The impact assessment predicts around £1m to £3m less will be spent on Civil Representation after the changes, with £5m to £9m *more* being spent on Legal Help. This is due to a prediction that people assessed as needing to pay a contribution towards Civil Representation (contributions are not required in Legal Help) will decline the offer and proceed without representation, which is concerning, as it indicates contributions are unaffordable.
40. The impact on providers is that there will be an increase in the availability of the most poorly paid work and a decrease in the volume of the least poorly paid work. We understand that the LAA does not obtain or publish data about capacity in the Legal Aid sector, however the evidence that is available indicates that in some areas of practice, such as immigration, there is no more capacity for additional initial advice work, as practice has become so unsustainable¹⁵.
41. The changes effectively amount to a cut in legal aid funding for civil representation that will impact the sustainability of providers. Our previous recommendations, in particular Recommendation 5 (continuing passporting for UC recipients or additional allowance for single parents) would go some way to addressing these concerning impacts.
42. The increasing complexity of the means test and associated administrative burdens effectively amounts to a further cut for providers, as the full time spent undertaking means assessments is not chargeable. This particularly impacts providers undertaking large volumes of Legal Help work, where fixed fees are already extremely low.

¹⁵ A Huge Gulf: Demand and Supply for Immigration Legal Advice in London, June 2021, Justice Together Initiative available at <https://justice-together.org.uk/wp-content/uploads/2021/06/A-Huge-Gulf-FINAL-report.pdf>

Recommendation 12

Ensure that Legal Aid Providers are fully remunerated for undertaking means testing.

43. We recognise that the sustainability of Legal Aid fee levels is not the subject of this consultation, however, the Legal Aid Agency does need to urgently address this issue. If it does not, the numbers of providers available to actually assist people who have benefited from changes in the means test will continue to decline, and areas of the country where there are no legal aid providers for certain areas of law will continue to grow.

Response to consultation questions

Ch. 2: Overarching Proposals

Question 1: do you agree with our proposal to take household composition into account in the means test by using the OECD Modified approach to equivalisation? Please state yes/no/maybe and provide reasons.

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44. **Maybe**, if adjustments are made to better account for the needs of single parent families and disabled people. The MoJ has chosen to adopt the 'OECD Modified approach to 'equivalisation'. The OECD approach, although widely used, has been 'criticized for underestimating the costs of key groups. [1] The Social Metrics Commission (SMC) has found that the OECD modified equivalence scale:
- o Is likely to underestimate the needs of children;
 - o Might not differentiate adequately between the needs of children of different ages;
 - o Might overestimate the needs of pensioner families; and
 - o Could underestimate the needs of lone parent families.'
45. The 'Minimum Income Standard' developed by the Joseph Rowntree Foundation more accurately reflects the income that different households require to maintain a socially acceptable living standard. It is based on what people need to be able to both meet their material needs and participate in society. The MIS metric has been shown to more accurately reflect the costs people need to live (rather than survive). It factors in the additional costs faced by certain groups, notably lone parents for whom raising a child is more expensive than it is for a couple, as the additional costs are only borne by one adult.
46. As the MoJ identifies in paragraph 207 of the consultation document, lone parents also stand to be disadvantaged by proposed changes to income passporting. The impact of the proposals on lone parents therefore warrants particularly close scrutiny. We accept that there are advantages and disadvantages of any approach to equivalisation, and no measure is perfect. However, if the OECD modified scale is used, then thought needs to be given as to how to address its shortfalls.

47. Firstly, those surrounding the costs of raising a child and of being a lone parent. We therefore would support an additional supplementary cost of living allowance be allocated to applicants living in lone parent households and a more generous rate of dependants allowance (see our response to [Q22](#) below).
48. Secondly, the additional costs due to disabilities have not been factored into the income or capital limits. We explore these costs further in our responses to [Q18](#) and [Q29](#) and would support an additional allowance for disabled people.
49. We consider an appropriate safeguard would be to introduce a hardship review process, like the one available in criminal legal aid. This would allow the LAA to consider an applicant's need to incur additional expenditure or retain additional capital, above the normal limits. Following a successful review, the LAA could disapply income or capital thresholds or contributions.

References: [1] Equivalisation in poverty measures: Can we do better?, A technical paper of the Social Metrics Commission, December 2019 <https://socialmetricscommission.org.uk/wp-content/uploads/2019/12/SMC-Equivalisation-Report-2020-01-03-Web.pdf>

Question 2: do you agree that we should continue to deduct actual rent and mortgage payments and childcare costs for the civil and criminal means assessments? Please state yes/no/maybe and provide reasons.

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50. **Yes**, we agree with this approach. Single households under the civil legal aid means test do not currently have their actual rent or mortgage payments deducted. This deduction is capped at £545 per month regardless of the true amount of rent/ mortgage payment. We welcome the MoJ's proposal to remove the cap which we address in our response to [Q15](#).

Question 3: do you agree with our proposal to deduct jobholder pension contributions as part of the disposable income assessments for civil and criminal legal aid? Please state yes/no/maybe and provide reasons.

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51. **Yes**, we are in favour of deducting pension contributions in principle. We do not see the rationale for limiting the deduction to 5% of earnings. It would be more sensible to simply deduct the full amount of pension contributions that the applicant makes (see response to [Q4](#)).

Question 4: do you agree with our proposal to limit the amount of jobholder pension contributions we deduct as part of the civil and criminal means assessments to 5% of earnings? Please state yes/no and provide reasons.

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52. **No**. The full amount of pension contributions a person makes should be deducted. We have a broader concern about the effect of this measure and others on providers in terms of generating more unpaid administrative work. This is one of many examples of a proposal that is on the surface beneficial for prospective applicants, but – taken together with other changes – will result in an increased administrative burden for providers.

53. Instead, the full level of pension contribution should be deducted. Limiting to 5% will mean the provider has to go through the individual's pay slips and calculate 5% of earnings in a month (more complex if earnings fluctuate month to month). Whereas permitting the full pension contribution to be deducted would enable the provider to use the amount quoted on the pay slip in their calculation, rather than do their own calculation, and would therefore be marginally less burdensome in terms of admin.
54. Our assumption is that any additional cost to the LAA of deducting the full amount of pension contributions (rather than 5%) is likely to be negligible to minor. We would expect that most of those on lower than median incomes (i.e., the group that are eligible for legal aid) are unlikely to have elected for higher pension contributions. We suggest there is a broader public policy interest in those that are more likely to be nearing retirement being able to increase pension contributions at this stage of life, and not being penalised on the income assessment.

Question 5: do you agree with our proposal to deduct any Prisoners' Earnings Act levy as part of the disposable income assessment for legal aid? Please state yes/no/maybe and provide reasons.

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55. **Yes.** We agree with the proposal to disregard Prisoners Earning Levy but query why the levy is not simply deducted at gross income assessment stage rather than disposable income assessment stage, considering prisoners never see the 40% of their income that gets absorbed by the levy.
56. This would cut out an unnecessary calculation for providers because the levy would be deducted from the outset rather than included in the gross income calculation and then deducted from the disposable income calculation. This will (very marginally) reduce administrative burdens but would be highly unlikely to increase costs by making more people eligible for legal aid. Because of the extremely low amounts that prisoners earn in prison it would be unlikely for a prisoner to exceed the gross income threshold even if the full amount of prisoners' earnings (including levy) were included in the gross income assessment.

Question 6: do you agree with the proposal to deduct agreed repayments of priority debt and student loan repayments taken directly from salary or deducted as part of the applicant's tax return as part of the disposable income assessment for civil and criminal legal aid? Please state yes/no/maybe and provide reasons.

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57. **Yes.** We support the MoJ's proposals to deduct agreed repayments of student loan repayments. We strongly agree with deducting debt repayments from the income assessment but in our view all types of debt should be covered by this proposal (not just priority debt). We also acknowledge the admin burden this proposal will put on providers and urge careful consideration of the evidential requirements imposed.
58. Currently, the disposable income assessment makes no allowance for debt repayments (except rent arrears). The MTR proposals are confined to disregarding student loan debt and 'priority debt', the latter defined with reference to the Money Advice Service as 'debts that carry the

most serious consequences if you don't pay them' including criminal conviction, a fine, disconnection of utilities, repossession, or eviction.

59. The rationale behind the proposal is to align the means test with 'the cross-government approach to people facing problem debt'. The National Audit Office Report 'Tackling Problem Debt' [1] defines the problem debt as 'when someone becomes unable to pay their debts or other household bills.' This definition was also used by the Cabinet Office in its recent consultation on debt management [2].
60. If the intention is to tackle problem debt (something we strongly support) it is not clear why the MoJ has restricted proposals to 'priority debt' and not other forms of (non-priority) debt, non-payment of which is also likely to have negative consequences, such as onerous financial penalties or interest being accrued and visits from debt collectors. While we can see the convenience in simply adopting an already established definition of 'priority debt', this does not meet the stated policy aim of 'tackling problem debt'.
61. We also note research into 'debt spirals' which indicates both that those in debt routinely take on further borrowing to keep up with existing repayments, and that a large proportion of people in problem debt use credit to pay for essential living costs [3]. This indicates that some people use other forms of credit to avoid taking on 'priority debt', such as utility or rent arrears, but their financial situation may be just as precarious.
62. In our view, all forms of debt repayments taken from a person's income, including credit card debt and personal loans, should be deducted. Bank statements or loan statements showing the level of repayment should be sufficient evidence of this. Although we recognise that repayments of debt to friends and family may require additional evidence over and above the individual's bank statements e.g., obtaining evidence in the form of a letter from the family member. We would also strongly advocate for the DLAC to take a more relaxed approach to evidential requirements when it comes to evidencing debt. This is important because clients in problem debt often will not have a full and accurate picture of their financial situation. Evidence from a debt adviser as to the existence of the debt and agreed level of debt repayment should be treated as sufficient evidence.
63. Finally, we note that some legal aid applicants will have taken on debt because of abuse or exploitation. A highly informative report by Surviving Economic Abuse Report into the legal aid means test identifies that *'running up debt in the name of a partner is a common form of economic abuse (in 60% of cases). Taking these debts into account when assessing income is also important to prevent abusers from further benefiting from their controlling behaviour.'*[5] Survivors of human trafficking can be left in debt by their trafficker who – for example – may have signed up to credit cards in their names. We have proposed in our responses to [Q7](#) and [Q49](#) that these groups – survivors of domestic abuse and survivors of human trafficking – be exempt from means testing.

References: [1] National Audit Office <https://www.nao.org.uk/wp-content/uploads/2018/09/Tackling-problem-debt-Report.pdf>; [2] Cabinet Office Fairness in Government Debt Management: A Call for Evidence, June 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895296/Fairness_in_gov_debt_management_Call_for_evidence_WEB.pdf; [3] Citizens Advice, Stuck in Debt, August 2017

<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Debt%20and%20Money%20Publications/Stuck%20In%20Debt.pdf> [4] See page 3, Surviving Economic Abuse, Denied Justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives, October 2021 <https://survivingeconomicabuse.org/wp-content/uploads/2021/10/Denied-justice-October-2021.pdf>

Question 7: do you agree with our proposals to disregard Modern Slavery Victim Care Contract (MSVCC) financial support payments from the income assessment? Please state yes/no/maybe and provide reasons.

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64. **Yes.** We agree with the proposal to disregard Modern Slavery Victim Care Contract (MSVCC) financial support payments from the income assessment. We would advocate going further in relation to survivors of modern slavery and suggest that anyone in receipt of the MSVCC financial support payments within their recovery and reflection period or receiving ongoing support via the Recovery Needs Assessment (RNA) should be entitled to non-means tested legal aid.
65. The government acknowledges it must expand who is eligible for support, however the proposal to disregard MSVCC payments may not, in practice, make many more slavery survivors eligible for legal aid because many present with complicated evidence of means. Instead, being in the NRM should mean a survivor is eligible for legal aid, regardless of their financial situation.
66. Survivors of modern slavery are a cohort with unique needs. Moreover, access to legal advice is a recognised support entitlement for survivors of modern slavery across multiple international frameworks. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ('The Palermo Protocol'), provides at Article 6(3)(b) that survivors should receive: 'Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand.'
67. Both the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), and Directive 2011/36/EU (Trafficking Directive) state that the provision of support and information, specifically in relation to legal advice and rights should be provided without delay and should be free of charge. Article 12(2) of the Trafficking Directive states: 'free of charge where the victim does not have the financial resources.' Further clarity is provided by the UN Joint Commentary, which encourages member states to 'ensure access to free legal aid is not restricted to criminal proceedings but covers all legal proceedings related to the person's victim status, including criminal, civil or labour procedures, for the purpose of compensation, as well as proceedings in relation to immigration status or asylum.' This is because survivors are an inherently vulnerable population who have been consistently found to have high rates of Post-Traumatic Stress Disorder (PTSD), Complex PTSD, depression, and anxiety disorders [1].
68. While potential victims are entitled to legal aid when they enter the NRM on receipt of a positive reasonable grounds decision, many face obstacles to accessing legal advice because they fail to meet the financial eligibility criteria. Under the current upper limits of the income and capital thresholds, many survivors are unable to pass the stringency of the means test [2]. While the proposal to disregard payments to survivors in the MSVCC is welcome, it will leave many in the NRM ineligible for legal aid because it fails to acknowledge the diverse and often complex

financial reality for many survivors. Moreover, it presumes that survivors of modern slavery with modest means or assessed to have disposable income just above the upper limit are not classed as 'those who need it most'. This results in a significant barrier to justice for people who are not eligible and denies them a key entitlement under the international frameworks.

69. In *R(K & AM) v SSHD* [2018] EWHC the High Court found that subsistence under the MSVCC to mean a level beyond 'the minimum sum needed to stave off destitution' because the purpose of the duty to provide material assistance is to ensure effective continuous support for psychological recovery and reintegration. The approach taken to setting the 'Cost of Living' allowance, is inconsistent with this, excluding of 'culture and recreation' categories of ONS spending.
70. The proposed disregard will not assist those who are in employment and working as part of their recovery. Many will still exceed the eligibility threshold, dissuading them from work and impacting on their recovery. We reiterate our overall concerns about the failure to establish the actual costs of accessing legal services on a privately paying basis (response to [Q1](#)).
71. The difficulty of providing evidence of capital due to resources and assets in the survivor's country of origin (and the administrative burdens this creates) are a further reason to provide non-means tested legal aid to this group. This issue has been reported by the Anti-Trafficking, Labour & Exploitation Advisory Unit (ATLEU) in their recent submission to The Group of Experts on trafficking in human beings (GRETA):

'The requirement that applicants demonstrate that assets held abroad should not be considered in legal aid calculations is extremely onerous. For example, in a case where the applicant, a victim of trafficking from Hungary, had been coerced into signing over a property in Hungary by their traffickers. Although the victim no longer had access to the property, and the traffickers actions in respect of the property was one of the reasons for her seeking legal advice, legal aid was only granted following pro bono assistance from solicitors in Hungary who were able to obtain documents confirming that the traffickers had taken over the victim's property. This was the result of ATLEU working in partnership with others internationally to meet the victim's needs. This service would not normally be available to victims approaching private legal aid providers in the UK and those in similar circumstances would likely just be refused legal aid on eligibility grounds.'

72. Survivors also face barriers providing evidence on assets held abroad when their documents are in a different language. The LAA only consider and review documentation submitted in English, Welsh, or French meaning survivors face delays in their initial application at a time when there is no legal aid in place because they are reliant on pro-bono assistance to translate their documents.

References: [1] Porter and Haslam 'Predisplacement and post displacement factors associated with mental health of refugees and internally displaced persons: a meta-analysis(2018); [2] The Anti-Trafficking Monitoring Group, 'Joint Submission to the Group of Experts on Action against Trafficking in Human Beings Response to the Third Evaluation Round of the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings: Access to justice and effective remedies for victims of trafficking in human beings in the United Kingdom' (Published February 2020) available at https://www.antislavery.org/wp-content/uploads/2020/03/GRETA_submission_Final-Feb20.pdf

Question 8: do you agree with our proposals to disregard Victims of Overseas Terrorism Compensation Scheme (VOTCS) payments from the income assessment? Please state yes/no/maybe and provide reasons.

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73. **Yes.** We agree with disregarding Victims of Overseas Terrorism Compensation Scheme (VOTCS) payments from the income assessment, but please see our concerns around making this discretionary, rather than mandatory, set out in detail in our response to [Q36](#).

Question 9: do you agree with our proposal to remove Back to Work Bonus payments from the civil and criminal income disregards regulations? Please state yes/no/maybe and provide reasons.

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74. **Maybe.** We cannot respond to this question because we do not know enough about the Back to Work bonus to know whether it is right that, because the scheme was abolished in 2004, no one would still have this payment.

Question 10: do you agree with our proposal to remove housing benefit payments from the civil and criminal income disregards regulations? Please state yes/no/maybe and provide reasons.

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75. **No.** We are concerned that the proposal to include housing benefit in gross income will have a disproportionately negative impact on people living in more expensive parts of the country. The proposal may disproportionately impact single parents (indirectly discriminating against women, who are more likely to be single parents) and disabled people. Donald Hirsch's report analyses this in more detail and recommends disregarding income from housing benefit and the housing element of UC in the gross income assessment [1].
76. A single parent may be entitled to as much housing benefit as a couple, but all the housing benefit would count towards their gross income (rather than being shared between two), making it more likely they would exceed the gross income limit. Disabled people and people with disabled children would be more likely to be entitled to housing benefit for an extra bedroom, either because they or their children cannot share a room due to their disability, or because they need a room for an overnight carer. Again, receiving this higher rate of housing benefit would reduce the amount a disabled person could earn before the gross income limit.
77. This proposal will disproportionately impact applicants in London and other areas where housing costs are highest. The amount of housing benefit a person receives depends on the Local Housing Allowance in their local authority area, whereas the gross income threshold is the same across England and Wales. According to DirectGov, the Local Housing Allowance rate in Central London for a two-bedroom accommodation is c. £1586 per month [2]. This is more than half the gross income threshold of £2913 per month. The applicant would only need to be earning c.£1328 per month to exceed the gross income threshold. By contrast, an applicant living in a less expensive area would be able to earn a lot more than this before the gross income threshold was exceeded. We further note that housing benefit is also not income in the traditional sense because it can only be used for one purpose (paying rent) and will often be paid direct to a person's landlord.

78. Equivalent concerns also apply to the inclusion of the UC housing costs element in the gross income limit. This will impact UC recipients who earn more than £500 per month, as they will no longer be passported through the income test. Like housing benefit, UC housing costs element is linked to the Local Housing Allowance rate, the level of which depends on where in the country a person lives and the make-up of their household. We are concerned that the same groups mentioned above i.e., those who live in more expensive areas, lone parents, people with children, and disabled people, will be disadvantaged by the proposal because they will be assessed as having a higher amount of gross income and therefore will be more likely to exceed the gross income threshold.
79. We are therefore in favour of disregarding housing benefit and the housing element of UC from the gross income limit but deducting actual housing costs (netted off against housing benefit received).

References: [1] Donald Hirsch, 'More affordable justice: Proposals to reform the legal aid means tests and implications for living standards', May 2022, available at: <https://www.lawsociety.org.uk/topics/research/more-affordable-justice-legal-aid-means-test-report> ; [2] <https://lha-direct.voa.gov.uk/SearchResults.aspx?Postcode=SW1&LHACategory=2&Month=5&Year=2022&SearchPageParameters=true&Total=2&Couples=0&SingleMales=1&SingleFemales=0&MaleChildren=0&FemaleChildren=0&MaleYouths=0&FemaleYouths=1&BedroomCalculatorPageParameters=true#>

Question 11: do you agree that we should continue to passport any remaining recipients of income-based Jobseeker's Allowance, income-related Employment Support Allowance, and Income Support through the income element of the civil and criminal means tests? Please state yes/no/maybe and provide reasons.

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80. **Yes.** We agree with the proposal to continue to passport any remaining recipients of income based JSA, income related ESA, and Income Support. We note that due to the roll out of Universal Credit this is likely to be a dwindling group of applicants.

Question 12: do you agree that we should continue to passport recipients of the Guarantee element of Pension Credit through the income element of the civil and criminal means tests? Please state yes/no/maybe and provide reasons.

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81. **Yes.** We agree with the proposal of continuing to passport recipients of the guarantee element of Pension Credit.

Ch. 3: Civil income thresholds, passporting and contributions

Question 13: do you agree with our proposal to raise the gross income threshold for civil legal aid for a single person to £34,950 per year? Please state yes/no/maybe and provide reasons.

82. **Yes.** We are strongly in favour of uprating the current gross income threshold, which has not been increased for over a decade. PLP's research paper published in 2018 found that 'the financial limits are unduly harsh and exclude from legal aid people who are already unable sustain an acceptable standard of living' [1]. An increase is needed urgently, and inaction is continuing to cause serious access to justice problems. But an increase to the thresholds cannot be a one-off event.
83. The positive impact of uprating will be quickly swallowed by rising costs of living unless it happens on a regular basis (i.e., annually). As it stands, the proposed gross income threshold of £2,913 per month is based on the gross median income of an individual in the financial year ending 2020. By the time the proposals are implemented this will be years old. It is vital that there is a robust uprating mechanism to ensure that thresholds do not fall behind again (we address this further at paragraph [Q96](#)).
84. Further, we disagree with the assumption that underlies the calculation of the gross income threshold – namely those with 'median' incomes can afford to privately pay for legal costs. This assumption is flawed, and it is problematic that MoJ does not appear have carried out any analysis of the cost of legal services or individuals' ability to pay for them.
85. LASPO heavily restricted the scope of legal aid, with the purpose of 'refocus[ing] legal aid on those who needed it most, for the most serious cases in which legal advice or representation [is] justified.' LASPO also stripped funding away from preventative early advice services. The starting point is that individuals are expected to privately fund their own legal representation in all but the most vital of cases, where some form of formal dispute resolution or litigation is likely to be needed.
86. Costs in civil litigation are notoriously hard to predict and will depend on a multitude of factors, many of which will be outside of the client's or their lawyer's control. In family cases with a history of domestic abuse between the parties, generating costs in the litigation is a common tactic used by perpetrators. In public law, we would estimate the costs of a 'straightforward' judicial review matter to conclusion at a one-day hearing to be over £50,000 on a privately paying basis.
87. Alternative funding arrangements are generally not available in the areas of work that remain within the scope of legal aid. Family proceedings for example do not lend themselves to funding arrangements like 'no win no fee' because litigants are not seeking compensation, and costs are rarely awarded. In jurisdictions where the individual can recover their legal costs if they win, such as in judicial review cases, the litigant must also factor in the risk of having to pay the other side's costs if they lose, something that would put privately funded litigation out of reach for anyone except for the wealthiest. This wider reality should be acknowledged and considered.

88. It is also worth noting that individuals are unlikely to be able to save up for legal costs in advance if their legal issue has arisen at a point of crisis in their lives, which is common, or if they need to meet short court deadlines. This issue was highlighted by Lord Reed in relation to the employment tribunal fees at paragraph 55 of the Unison judgment. Disbursements like court fees or expert fees can be substantial and require upfront payment.
89. We would welcome greater analysis by the MoJ as to the level of income that is required to be able to privately fund legal costs which we expect would be considerably higher than the proposed thresholds linked to median earnings. As set out in [Q1](#) we recommend the MoJ introduce a safeguard – in the form of a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

[1] 'The gap between the means regulations and financial reality', Isaac Richardson, July 2018 https://publiclawproject.org.uk/content/uploads/2018/07/Means_threshold_for_web.pdf

Question 14: do you agree with our proposal to introduce a lower gross income threshold for civil legal help cases, with the threshold set at £946 per month? Please state yes/no/maybe and provide reasons.

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90. **Yes.** We agree that wherever gross income already falls below the disposable income limit, there should be no need to undertake a full means assessment and that this creates unnecessary administration for providers.

Question 15: do you agree with our proposal to remove the £545 monthly cap on allowable housing costs for applicants for civil legal aid with no partner or children? Please state yes/no/maybe and provide reasons.

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91. **Yes.** We support the proposed removal of the £545 cap on housing costs for those for whom no dependent's allowance deduction applies. The £545 housing cap (which has applied since December 2001) is an unrealistic allowance for the cost of housing and falls far short of the Local Housing Allowance rates for one-bedroom properties in many local authority areas. Taking account of an applicant's full housing costs is a much fairer approach and one we support.
92. We note that the question states that the cap applies to 'applicants for civil legal aid who have no partner or children', but in fact the cap (as interpreted by the LAA) presently extends further than that to any applicant that is not eligible for a dependents allowance deduction. This includes applicants with shared child custody arrangements; whose child or children mainly live with their ex-partner but spend some time living with them. The LAA's non-statutory Means Assessment guidance at page 253 states that dependent's allowance cannot be split and instead attracts to 'the main carer (i.e., the parent with whom the children normally reside).'
93. This means that, for example, if a couple have separated and the children live with their father three days a week and mother four days a week, with a bedroom in each house, the current

means test (as applied by the LAA) operates to deny the father a dependent's allowance deduction because he is not 'the main carer', ignoring his need for a second bedroom when his children stay. This is another way that the housing cap causes unfairness to a specific group of applicants, as well as more broadly.

Question 16: do you agree with our proposal to deduct actual Council Tax as part of the civil means assessment? Please state yes/no/maybe and provide reasons.

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94. **Yes.** We agree with the proposal to deduct actual council tax as part of the means assessment, thus better reflecting household expenditure and making the income test fairer for individuals. However, we note that this is one of many proposals that will result in an increased administrative burden on providers. Working out a client's monthly council tax is not necessarily straightforward. Council tax is usually paid in 10 instalments over the course of a year, which will need to be converted into a monthly figure. That monthly figure will need to be adjusted to include any discounts (such as for students and disabled people), discounts which may not apply throughout the entire 10-month period.
95. This goes to illustrate the administrative burden involved in what is on the face of it a beneficial change that will increase eligibility. Work carried out to means assess claimants is complex, time consuming but largely unpaid, meaning that providers simply do not have the ability to carry out these calculations. We have proposed several mechanisms to mitigate these administrative burdens including paying providers for this work (see [Q98](#) and [Q100](#)).

Question 17: do you agree with our proposal to increase the work allowance in the civil legal aid means test to £66 per month? Please state yes/no/maybe and provide reasons.

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96. **Maybe.** We agree in principle with increasing the work allowance. However, we note that the proposal is to use a 2019 Lloyds / You Gov report on average work monthly travel costs. This is already three years out of date and by the time the MTR proposals are implemented it will be even more out of date. Since 2019 there has been a considerable rise in fuel costs which hit record highs in early 2022 along with an increase to public transport costs. A more recent estimate should be used to calculate the work allowance.
97. However, if a more recent estimate is used this should be calculated based on the average cost of a person travelling into work every day. We note that since 2019 the rise of homeworking has resulted in many people travelling into work less, so statistics on average work costs from 2019 onwards could be depressed for that reason. However, the trend towards homeworking has been concentrated amongst higher earners. Lower than average earners (i.e., those who would be eligible for legal aid) are less likely to be able to work from home.
98. In addition, the 'work allowance', which exists to cover monthly work travel costs, should be extended to cover students who may need to travel for the purposes of study. This is required for the same reason that justified the extension of the childcare costs' deduction to those with student income, by way of amendment to the Means Regulations in 2014. Most students, except those enrolled on a solely remote course, will have to incur some form of travel costs to attend

education. Some students, like student nurses, spend a lot of their time on work placements and will incur similar levels transport costs as those in employment, but as it stands cannot make use of the work allowance.

Question 18: do you agree with our proposal to use a Cost of Living Allowance drawing on essential household spending as the basis of our proposed lower income threshold? Please state yes/no/maybe and provide reasons.

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99. **Maybe.** We support an increase to the current thresholds, which is urgently needed. However, any Cost of Living Allowance should take into account what people need to maintain a socially acceptable living standard, which is the approach taken by the Minimum Income Standard, rather than using the amount that people actually spend (when this may not achieve an acceptable standard of living). This amount has been limited further by disregarding spending that is deemed to be 'non-essential'.
100. We query the MoJ's classification of certain items as non-essential expenditure for both the civil lower and upper disposable income thresholds. In our view the exclusion of all spending on alcoholic drinks is not in keeping with broader societal attitudes. As well as this we disagree with the exclusion, under 'education spending', of the cost of school trips. These are a valuable part of participation in education that families should not be expected to forego.
101. We also disagree with the exclusion of all recreation and culture from the lower disposable income threshold (we note some recreational spending is allowed under the upper threshold). Our understanding of the ONS data is that 'recreation and culture' includes the cost of a TV licence (which until recently were publicly funded for over 75 year olds); TV subscriptions; newspapers; sports activities and attending any social events. We suggest that the cost of having a television and some sports, leisure and social activities should be classed as essential, particularly for families with children. We note that a child attending swimming lessons or attending another child's birthday party would be classed as 'non-essential' and we do not think this reflects how people view their personal expenditure. Being able to watch television is particularly important for people that are socially isolated through age or disability.
102. We also note relevant criticisms made by the Supreme Court in *Unison*, of the Lord Chancellor's suggestion that expenditure should be sacrificed to be able to pay employment tribunal fees. The Court relied on the Minimum Income Standard thresholds in their analysis. When presented with a case study as to how paying the Tribunal fee would impact on a family's budget, Lord Reed stated at paragraph 55 that '...fundamentally, the question arises whether the sacrifice of ordinary and reasonable expenditure can properly be the price of access to one's rights.'
103. **People face additional costs due to living with a disability.** We consider that the Cost of Living allowance does not adequately account for these costs and therefore indirectly discriminates against disabled people. We understand that DLA and PIP will continue to be excluded from the income assessments, as these payments are made to cover disability related costs (see paragraph 124 of the MTR Consultation). However not all people who are 'disabled' under the Equality Act definition are in receipt of DLA or PIP [1] and not all additional disability related costs are met by DLA and PIP (for example, some people subject to immigration control are excluded).

104. Disability related costs include those relating to management of the individual's condition, as well as 'concomitant costs'. Costs relating to the management of the condition can include medical treatment, therapies, catering for dietary needs, special clothing and footwear, medications, specialist equipment (and upkeep of that equipment) and home adaptations. Some of these costs will be covered by other sources of income e.g., local authority funding or NHS free prescriptions cover, but not all.
105. Concomitant costs are non-specialist goods and services that the individual spends more on due to their disability. These include transport and energy costs. Increased usage of power and water can result from needing to charge electrical equipment, wash clothing and bedding more frequently. Increased usage of heating can be due to spending longer periods of time indoors due to health conditions, or because health conditions limit mobility and cause individuals to feel colder. In its 2018 report 'Out in the Cold' [2], Scope found that over 900,000 households with a disabled person in England were living in fuel poverty. If, as might be the case in 2022, domestic bills continue to rise, this figure may increase to 2.1 million [3].
106. In its 2019 report 'the Disability Price Tag, Scope estimated that disabled adults faced an average of £583 worth of extra costs monthly. That estimate, however, is derived from a dataset compiled in 2016/17. Since February 2016, the inflation rate has increased meaning that £583 is likely to be an underestimate of the extra costs incurred by disabled people. A comparative analysis of estimates of extra costs of having a disability in the UK between 2003 and 2016 found that they varied from £66 to £3576 depending on the study and the severity of the disability. Meanwhile, those in receipt of DLA or PIP can receive between £94.80 and £608.60 per month [5]. This accords with Scope's findings that more recipients of PIP and DLA disagreed than agreed (36% compared to 28%) that the extra costs they faced were accurately assessed in the assessment process. For some people, their DLA or PIP will be used to cover just one element of their disability related expenses, for example the cost of their social care or access to a motability car, but any additional costs (e.g., fuel) would need to be met out of their other income.
107. The legal aid means test should include a standard amount of disability related expenditure to be deducted when the client identifies as being disabled under the Equality Act 2010 and asserts that they incur costs because of their disability. Whether the client is disabled is already a question on the legal aid form. This minimises administrative burdens for the provider. Precedent for this 'standard deduction' approach can be found in the way that some local authorities approach social care charging assessments, for example Nottingham County Council allows for a £20 per week in disability related expenditure allowance in all cases, without proof needing to be provided by the applicant [6]. However, the allowable sum should be based on evidence of the additional cost of having a disability in 2022.
108. As set out in [Q1](#) we recommend the MoJ introduce a safeguard – in the form of a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disappplied or contributions waived.

References: [1] NAT CEN, *The Uses of Health and Disability Benefits* (published January 2022) <https://committees.parliament.uk/publications/8745/documents/88599/default/>; [2] Scope, *Out in the Cold*, (2018) <https://www.scope.org.uk/campaigns/extra-costs/out-in-the-cold/#:~:text=More%20than%20900%2C000%20households%20with,them%20below%20the>

[%20poverty%20line](#)); [3] BBC News, 22 March 2022 <https://www.bbc.co.uk/news/business-60823763>; [4] John E., Thomas, G. and Touchet, A. (2019). The Disability Price Tag 2019 <https://www.scope.org.uk/campaigns/extra-costs/disability-price-tag/>; [5] Schuelke, L., Munford, L. & Morciano, M. Estimating the additional costs of living with a disability in the United Kingdom between 2013 and 2016. Eur J Health Econ 23, 313–327 (2022); [6] Nottingham County Council guidance on disability related expenditure <https://www.nottinghamshire.gov.uk/media/3769687/whatisadisabilityrelatedexpenditure.pdf>

Question 19: do you agree with our proposal to set the Cost of Living Allowance at £622 per month for an individual? Please state yes/no/maybe and provide reasons.

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109. **Maybe.** While we strongly support an increase in the 'Cost of Living' allowance / lower disposable income threshold and note that it represents a considerable increase from the current threshold of £316, we do not agree with the approach taken to determine its level, for the reasons given to [Q18](#). We are further concerned by the lack of annual uprating and the lack of any mechanism to waive income limits or contributions in cases of hardship/inability to afford private legal costs.
110. We are already concerned that the ONS data being relied on dates from financial year ending 31 March 2020, and therefore reflects the cost of living from March 2019 – March 2020. The average cost of living has increased significantly since then due to rising inflation and prices, in particular domestic energy costs. Domestic energy costs increased considerably in Autumn 2021, again in April 2022 (around a 50% increase) and they are forecasted to rise again in Autumn 2022. For this reason, we advocate for uprating on an annual basis in proportion to CPI, in addition to the 3–4 reviews of the overall means test.
111. As set out in [Q1](#) we recommend the MoJ introduce a safeguard – in the form of a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

Question 20: do you agree with our proposal to use median household spending as the basis for the proposed upper income threshold? Please state yes/no/maybe and provide reasons.

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112. **No.** As set out under Questions 18 and 19, any income thresholds should be set at a level that ensures that individuals excluded from legal aid can afford to pay privately for in scope legal services. If that approach is not taken, safeguards need to be put in place.
113. As set out in [Q1](#) we recommend the MoJ introduce a safeguard – in the form of a hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.
114. Any 'Costs of Living' allowance should be based upon what households need to maintain a decent standard of living such as the MIS, rather than what households spend (and avoid making moralistic judgments on what is 'essential').

115. As set out in [Q1](#) we recommend the MoJ introduce a safeguard – in the form of a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

Question 21: do you agree with our proposal to set the upper disposable income threshold at £946 per month for an individual? Please state yes/no/maybe and provide reasons.

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116. **Yes.** We strongly support raising the threshold from the current level of £733. However, we reiterate our objections to an approach that does not attempt to assess the affordability of private legal costs (Question 18 above), takes a restrictive view of essential living costs (Question 19 above) and our concerns that the increase will be quickly eroded by inflation (Question 19 and 20 above). It is vital that the threshold is uprated annually in proportion to CPI. We reiterate that the proposals will result in a means test that excludes people who cannot afford to pay privately for legal services. As set out in [Q1](#) we recommend the MoJ introduce a safeguard – in the form of a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

Question 22: do you agree with our proposal to set allowances for dependents at £448 per month for each adult and child aged 14 or over, and £211 for each child under 14? Please state yes/no/maybe and provide reasons.

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117. **No.** The OECD modified scale has been criticised for significantly underestimating the cost of a child and ignoring the greater cost to single parent of having children compared to a couple [1]. We consider that the allowances for all dependents should be increased and uprated annually in proportion to CPI (with no differentiation in the age of children). As recommended by Donald Hirsch, there should be an additional allowance for single parent families (equivalent to half the entitlement for an additional adult in the household) [2].
118. The under 14 year old allowance (£211) is lower than the UC additional entitlement for having a child which is £290.00 (for a first child) and £244.58 (for another child), with a further £132.89 or £414.88 payable if the child is disabled or severely disabled. As the MoJ is proposing to get rid of UC income passporting, UC recipients that earn more than £500 per month will now be fully means assessed. Those UC recipients with young or disabled children will be expected to use social security money paid by the state for the purpose of providing for the child and instead to put it towards paying their legal costs. Those children have no say in whether legal costs are incurred.
119. We query the rationale for differentiating so starkly between the two age groups. The proposed thresholds suggest that the monthly cost of raising a child more than doubles on their 14th birthday, which is of course nonsensical. It is also another complication to the means test. While at present the dependent's allowance of £307.64 per month is too low, there is only one rate to consider, and the benefit of cross-referring to the Income Support Regulations is that these rates are uprated by the DWP, so there is less of a chance that the rates will lag so far behind rising costs of living.

References: [1] For analysis of OECD modified's shortcomings in respect of lone parents see Donald Hirsch et al. 'The Minimum Income Standard and equivalisation: reassessing relative costs of singles and couples and of adults and children.' January 2021, Loughborough University. Journal contribution. <https://hdl.handle.net/2134/11407368.v1> [2] Donald Hirsch, 'More affordable justice: Proposals to reform the legal aid means tests and implications for living standards', May 2022, available at: <https://www.lawsociety.org.uk/topics/research/more-affordable-justice-legal-aid-means-test-report>

Question 23: do you agree with our proposal to not take into account the means of anyone providing temporary assistance to the applicant in the civil legal aid means assessment? Please state yes/no/maybe and provide reasons.

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120. **Yes.** We agree with the proposal to exclude the means of a person providing temporary assistance to the applicant. This is currently permissible under Regulation 16(4) or (5) of the Means Regulations. It can lead to very unfair outcomes, particularly in circumstances where a friend or distant family member has shown considerable kindness in supporting an applicant through a life crisis usually to avoid them becoming destitute. It is completely unreasonable to expect their generosity would or could extend to privately funding the client's legal representation. However, it would be preferable to amend the Means Regulations themselves rather than the guidance.
121. We understand that the MoJ is proposing to apply the wording that currently exists in the Criminal Legal Aid Manual to the Lord Chancellor's Civil Legal Aid Guidance, to make clear that the means assessment will '*not normally include someone providing lodgings and food on a temporary basis.*' While we agree this would be a positive change, it would still leave significant uncertainty as to the circumstances in which regulation 16 will be applied. This is inconsistent with the aim of creating a predictable scheme and reducing administrative complexity for both the DLAC and providers.
122. We also recommend the following measures:
123. First, the MoJ should end the means assessment of children in all cases. We note that the MoJ are already proposing to do this for certificated work. We explain why this should be extended to all types of legal aid in our response to [Q46](#).
124. Second, the MoJ should consider curtailing the power in Regulation 16(5) of the Means Regulations, which is a wide power permitting the DLAC to take into account assets belonging to persons other than the applicant and treat them as the applicant's resources. In the alternative, we would be in a favour of introducing a presumption that (other than in the case of a partner or spouse) someone that is maintaining an individual would not have their resources assessed along with the applicant, except for in exceptional circumstances. We think this is justified on the basis that, on occasions where a client does receive some financial support from wider family or friends with essential living costs, it is highly unlikely that their benevolence would extend to funding litigation on their behalf.

125. In our experience, the Regulation 16(5) power is rarely used by the DLAC but causes significant uncertainty for clients and providers. It is unclear what scenario it would apply to, other than the scenario mentioned at paragraph 3.2(4) of the Lord Chancellor's Guidance concerning an adult client being supported by a wealthy family, even though they themselves have no assets.
126. We expect this scenario to be very rare and note that even where a person's wealthy family member was helping them with essential living costs, it would nevertheless be unlikely that they would be willing to privately fund legal fees. We note that there is separate power in regulation 44(6) for the DLAC to request a contribution from an individual who may benefit from the proceedings who can reasonably be expected to contribute to the cost of legal services.
127. Therefore, we suggest that regulation 16(5) should either be omitted or more tightly drafted so that it clearly applies to the scenario stipulated in the guidance. This would also ensure greater clarity for DLAC decision makers and ensure better consistency in decision making.
128. While regulations (4) and (5) remain in force unamended the change to the guidance proposed by [Q23](#) is far less impactful, because ultimately it is the regulations (and not the guidance) that determine means eligibility. What is being proposed is just a small fix whereas there are much wider issues with Regulation 16 that warrant more detailed consideration.

Question 24: do you agree with our proposal to implement a £500 earnings threshold for applicants in receipt of UC who are currently passported through the income assessment for civil legal aid? Please state yes/no/maybe and provide reasons.

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129. **No.** We strongly oppose this proposal, which will reduce legal aid eligibility for those on benefits and considerably increase the administrative burden on legal aid practitioners. We are particularly concerned by the equalities implications and the unintended adverse consequences that may result. More work is needed to understand these impacts.
130. The MoJ's policy rationale is reducing unfairness and inconsistency between UC recipients and non-UC recipients who have a similar level of income, including those who cannot claim UC such as pensioners or students. The MoJ impact assessment at paragraph 17 states that the 'proposed reforms to passporting those on UC would create a level playing field for benefit recipients and those in employment, incentivizing work'. This overlooks that a considerable proportion of UC recipients are in employment (hence the proposed earnings threshold). Further, in the case of disabled people unable to work and single parents with childcare responsibilities who do not work, there is no appropriate in-work comparator who is 'disadvantaged'.
131. According to the MoJ's analysis 73% of UC recipients would be eligible for non-contributory civil legal aid under the new proposal. In our view there is a rationale for treating this group differently; namely that this group have already been means assessed by the state and the cost of reassessing them (both to providers and the public purse) would be disproportionate.
132. The proposal will reduce eligibility for legal aid amongst a cohort which has already been assessed by the Government to be sufficiently impecunious such as to require means tested benefits. If the MoJ's assessment is correct, that a considerable number of these people will nevertheless fail the legal aid financial eligibility requirements. Consideration should be given to making the income

test more generous, particularly for those groups that stand to be disproportionately impacted. We set out in our response to [Q18](#) and [Q22](#) the reasons we consider an additional allowance is needed for single parent households and disabled people.

133. Linked to that, we are very concerned about the equalities implications of this proposal. We expect that a considerable number of the applicants who would no longer be passported will be those on a higher rate of benefit because they receive extra money for having a child, or disabled child, or caring for a disabled person. The MoJ has acknowledged that people with children, particularly lone parents, are likely to be particularly affected by this proposal (paragraph 207 of the consultation). The MoJ's Equalities Assessment based on Baseline 2 (which assumes full transition to UC) has identified that women are more likely to be detrimentally impacted in terms of the take up of legal aid than men (paragraph 43). It is vital that the MoJ put measures in place to limit the disproportionate impact of these proposals on women and children. We set out in our answer to [Q99](#) how this measure is likely to severely impact domestic abuse survivors, their children and the financial sustainability of providers who work with them.
134. One of the legacy benefits that UC has replaced is housing benefit. As we have already stated under Question 10, we disagree with the housing costs element of UC being included in the gross income assessment. As the housing costs element of UC is calculated based on Local Housing allowance rates, it is higher for people living in more expensive areas like London, as well as people with children, particularly lone parents, disabled persons, and those with disabled children. These proposals create the risk that these groups could exceed the gross income limit due to having high housing costs which is something that may be out of their control. This raises equalities issues due to the potential unfair impact on lone parents (disproportionately women) and disabled people.
135. The proposal will also result in considerable administrative costs for providers, estimated in the impact assessment to be c. £2million per year, as well as considerable cost for the LAA. We have expanded on this further below. We are especially concerned by the risk that this additional burden, particularly at legal help stage, could create a perverse incentive for providers to choose not to means assess UC applicants that are in employment, and simply take on clients that remain passported (i.e., those not in employment). Anecdotal discussions with providers have suggested this is a risk, but in our view more work is needed to understand and quantify this risk. Such consequences would achieve the exact opposite of the MoJ's stated policy intention, which is to make the means test fairer for those in work.

Question 25: what administrative impacts do you anticipate our proposal to implement a £500 earnings threshold for applicants in receipt of UC will have for providers and applicants?

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136. From our experience the administrative impact of this proposal will be significant. At present, means assessing clients that are passported through the income test is relatively simple. At Legal Help stage, the provider normally simply needs to check that UC is being paid into the client's bank account. When it comes to filling in an online legal aid application, the CCMS form contains an in built 'benefit checker' which links up with the DWP system and confirms whether the client is in receipt of a passporting benefit. These proposals would much the process much more complicated.

137. It is important to note that it will not just be UC recipients with monthly household earnings exceed £500 that would 'undergo a full income assessment'. The reality is that any UC recipient that is working would need to be fully means assessed by the provider (otherwise how would the provider know whether their monthly earnings exceed the £500 monthly threshold or not). It is not clear whether the Civil Impact Assessment – which puts the additional administrative costs of passporting changes to providers at around £2million per year (see paragraph 93, IA) – factors this in, but we expect it does not. This translates to a lengthy process of obtaining bank statements and pay slips made even more complicated when a person's income fluctuates each month, or they have changed jobs recently.
138. According to the DWP Quarterly Statistics from January 2022, on 9 December 2021 42% of UC recipients were in employment [1]. So nearly half of UC recipients who seek legal aid would need to be means assessed even though (by MoJ's own analysis) most of them will end up being found eligible by the provider.
139. We do not collect data on how long it takes us to means assess clients, so we cannot provide an average time frame and compare those clients that are passported and those that are not. We note from the impact assessment that the MoJ does not hold data on provider administrative work. However, it would be possible to commission research and data gathering into this issue and the MoJ should consider doing so before proceeding with these proposals, so any adverse consequences can be better understood.
140. Suffice to say it takes a considerable amount of time to go through a person's bank statement(s) and work out what payments relate to and whether they count as income or not. Means testing takes much longer where clients who require an interpreter; have limited digital skills; or lead chaotic lives meaning that obtaining evidence and records of their finances is much more time consuming. Individuals living in poverty are frequently forced to rely upon informal forms of credit. For example, borrowing money from friends and family until the date they receive their benefit. This can leave a trail of transactions on bank statements that must be individually accounted for (to demonstrate that it is not undisclosed income) which can be time consuming for practitioners. It is also common for clients to be in informal or less predictable types of employment which means their income fluctuates.
141. Providers will feel this administrative burden not only at the start of case, but every time the client's income needs to be reassessed due to a change in circumstances. Currently, Regulation 20 of the Means Regulations provides that (for certificated work) an increase in disposable income of more than £60 or decrease in disposable income of more than £25 triggers a reassessment. This will be particularly burdensome when a client's income fluctuates.
142. We expect that this proposal will harm access to justice, because it creates an adverse incentive for legal aid providers, to prioritise potential clients who are passported through the income test and avoid potential clients who are not passported. PLP's research into 'trapped capital' issues show that providers are more reluctant to take on clients whose means eligibility is not straightforward, due to the risk of not being paid and the additional (unpaid) administrative work that is required.[2] LAPG's Legal Aid Census identified that firms already refuse to take on family legal help work because it is not cost effective.[3] We expect this would become even more common if these passporting proposals are introduced.

References: [1] <https://www.gov.uk/government/statistics/universal-credit-statistics-29-april-2013-to-13-january-2022/universal-credit-statistics-29-april-2013-to-13-january-2022>
[2] https://publiclawproject.org.uk/content/uploads/2022/04/Trapped-capital-FINAL_.pdf
[3] Legal Aid Census Report, March 2022, page 56, <https://lapg.co.uk/lapg-launches-2021-legal-aid-census-to-show-true-state-of-social-justice-sector/>

Question 26: do you have any suggestions for ameliorating any administrative burden that our proposal to implement a £500 earnings threshold for applicants in receipt of UC (if enacted) may cause for providers and applicants?

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143. We strongly recommend maintaining the current passporting rules at legal help stage (i.e., at most, only introducing these proposals at certificated stage). As legal help rates are so low, any additional administrative burdens at this stage will be particularly difficult to bear at this stage. The risk of creating adverse incentives for providers to turn away non-passported clients at legal help stage is particularly high, because many firms already view this work as non-profitable or loss making [1].
144. Careful consideration needs to be given by both the MoJ and the LAA as to proportionate evidential requirements to be placed on providers. We would be in favour of providers being given greater flexibility to rely on the UC journal as evidence of a client's monthly earnings (as opposed to relying on bank statements or payslips) but we would note that the UC journal is far from a fool-proof solution. There are well reported digital accessibility issues with the journal, and less digitally literate clients often do not know how to access it. Also, the journal records employment income in arrears i.e., in the previous computation period – so the legal aid rules may need to be changed to allow this.
145. The 'change in circumstances' thresholds that trigger a reassessment under regulation 20 of the Means Regulations are currently very low and should be uprated. We have addressed this in more detail and made further suggestions for ameliorating the administrative burden of the proposals on providers at paragraph [Q98](#) and [Q100](#).

References: [1] Legal Aid Census Report, March 2022, page 40 – 42 https://lapg.co.uk/wp-content/uploads/We-Are-Legal-Aid_Findings-from-the-2021-Legal-Aid-Census_Final.pdf

Question 27: do you agree with our proposal to use a tiered model approach (40%/60%/80%) to determine the monthly income contribution? Please state yes/no/maybe and provide reasons.

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146. We agree with having a tiered model i.e., with the contribution level being higher for those who are assessed to have higher disposable income. The MoJ's proposal is to increase the contribution bands and it is important that affordability of contributions are assessed.
147. Research into the current means test indicates that contributions are a significant barrier to access to justice. Law Society research into the experience of domestic violence survivors found

that 16% of callers to the National Centre for Domestic Violence helpline who were eligible to apply for a domestic violence injunction were not able to proceed with their application because they could not afford the income contributions.[1] SEA's Report found victim-survivors could only afford the contributions by taking on debt.[2] Professor Hirsch's Report 'Priced out of Justice' found that the current disposable income thresholds would leave some households paying contributions despite having less than half of what they needed to live on (as judged against the minimum income standard).[3] We agree that the increase to the income thresholds will make the contribution system fairer than it is currently, but problems remain.

148. The contribution thresholds are still likely to be unaffordable for some even under the new means test, because the MoJ's income assessment underestimates the real cost of living, particularly for certain groups, including those with children and lone parents. This can be illustrated by reference to the MoJ's own 'Example 2' found at Annex E (page 138) of the Consultation. In that example, 'Applicant B' is a single parent with a child aged 15 and a gross household income of £2,368 per month. After the disposable income assessment is carried out, B is found to have a disposable income of £682 per month and is therefore liable to pay a 40% income contribution towards her legal costs of £166.90 per month. However, based on the Minimum Income Calculator (which relies on the Minimum Income Standard) a single parent with a secondary school age child is assessed to need a gross household income of £2,572 per month (rounded to the nearest pound).[4] So, after the income contribution is deducted 'Applicant B' is left with a monthly gross income which is £371 (rounded to the nearest pound) lower than the MIS. While this is better than the current system, where Applicant B's contribution would be even higher, this illustrates that the revised contribution system is still likely to result in certain applicants being unable to access legal aid or being forced to take on debt to afford contributions.
149. We also note that, due to the changes in the passporting rules, applicants on UC will for the first time be required to make contributions towards their legal costs. The MoJ acknowledges in its Impact Assessment that this will deter UC recipients from taking up an offer of legal aid (paragraph 106). We are concerned by the proposal that people living on baseline minimum that social security benefits represent will have income taken from the state to contribute to legal fees. The consultation justifies this on the basis that the DWP means test and the legal aid means test have different aims as the former *'aims to support the day-to-day living of individuals and support them into work where possible, while the legal aid means test aims to provide short term financial support for legal costs to those most in need'* (paragraph 208). Our view is that to the extent these two aims conflict – which they clearly do when contributions are applied to UC recipients – the DWP aim of supporting essential living costs should take precedent, particularly at a time of high inflation and rising cost of living. The appropriateness of deducting contributions from UC recipients should be reconsidered.

References: [1] Law Society, September 2018, 'Research into the impact of the legal aid capital and contribution thresholds for victims of domestic violence' [2] Surviving Economic Abuse, Denied Justice, October 2021 [3] Donald Hirsch, 2019, Priced out of justice? Means testing legal aid and making ends meet, page 27. [4] This is correct as of 16.05.2021

Question 28: do you agree with our proposals for setting a minimum monthly income contribution of £20? Please state yes/no/maybe and provide reasons.

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150. Yes. We agree with the proposal to set a minimum monthly income contribution and that it is a waste of LAA resources to recover very low-level contributions from applications.

Ch. 4: Civil capital thresholds, passporting and contributions

Question 29: do you agree with our proposal to increase the lower capital threshold to £7,000 and the upper capital threshold to £11,000? Please state yes/no/maybe and provide reasons.

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151. **Yes.** We support an increase but consider the proposals do not go far enough. The current capital limits have not been updated since 2009. An increase is therefore long overdue. The current capital limits do not allow for a basic level of saving to account for emergencies and one-off capital expenses. Although the upper capital limit is £8,000, in most certificated work, the current rules require that all capital above the lower capital limit (£3,000) is contributed towards legal aid.
152. The current limits result in significant unfairness and particularly impacts certain groups, including disabled people, who often need to save capital to pay for large, one-off capital expenses (such as disability related equipment). These limits also impact those who suffer a disruption in their means tested benefits, resulting in a back-dated payment if they succeed in the benefits tribunal. This backdated income is then treated as capital by the LAA.
153. The reality is that people who suffer a disruption in their benefits are often forced to forego essential expenditure for a prolonged period, suffering significant hardship and relying on family, community, or charitable support. It is deeply unfair to deprive people of their arrears of means tested benefits, which can be considered a form of recompense for maladministration by the state.
154. Following LASPO changes to scope, Legal aid is now only available for issues of the utmost importance. The current limits leave people facing eviction, domestic violence, or unmet care needs with an inadequate safety net. They are inconsistent with the approach taken in other areas of public policy, such as welfare benefits (where the limit is £16,000 and the primary residence is not included) and getting help with long term care. We do not accept that asking people on very modest incomes to liquidate their life savings to deal with legal problems is fair, nor do we consider there to be adequate justification to depart from the capital limits in welfare benefits.
155. The proposed levels do not appear to be based on any analysis of the cost of legal services or people's ability to pay for them. Instead, they are based upon a crude measure of three months expenditure for the median UK household. The consultation document itself (para 228) acknowledges that this will mean some households are asked to make a capital contribution that would put them in financial difficulty.
156. However, there is nothing in the current or proposed means tests that would mitigate this unfairness (such as a general discretion to waive eligibility limits based on hardship). It appears likely that this measure will most affect single parent households and larger families. It therefore

appears likely to indirectly discriminate against both women (who are more likely to be single parents) and children. We address the impact on low-income homeowners in our later responses.

Question 30: do you agree with our proposal to increase the equity disregard from £100,000 to £185,000? Please state yes/no/maybe and provide reasons.

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157. **Yes.** However, we do not consider that people facing serious legal problems should be forced to sell their homes to ensure they are able to access justice and enforce their rights. There is insufficient justification to depart from the position in welfare benefits or for care needs at home, where the primary residence is excluded for the purposes of the assessment. Sale of the family home is likely to adversely impact the health and wellbeing of applicants and their children.
158. Further, there is evidence that most households which pass the income test but fail the capital test due to 'disposable capital' in a family home would not be eligible for a remortgage, further advance or second charge mortgage due to such loans being deemed 'unaffordable' under the FCA's regulatory framework ('Report on the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold', Lisa Whitehouse, March 2018).
159. If this approach to means testing is to be maintained, we would support increasing the equity disregard but would urge the Ministry of Justice to regularly review the threshold to ensure it keeps pace with rising house prices, exclude trapped/inaccessible capital and include a mechanism to request the capital limit be disapplied on grounds of hardship (see response to [Q1](#)).

Question 31: do you agree with our proposal to amend the means test so that where a victim has temporarily left their home, the equity disregard should be applied? Please state yes/no/maybe and provide reasons.

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160. **Yes.** However, our position is that the existing regulations around the equity disregard are capable of being read as including applicants in this situation. Further, we consider that interpretation is the only one compatible with Art. 6 and 8 of the European Convention on Human Rights and the common law right of access to the Court. We are aware, however of legal aid applications being initially refused on this basis. While we do not accept that an amendment to the means test is required in this scenario, we would welcome clarity that avoids the Director of Legal Aid Casework continuing to refuse applications in these circumstances.

Question 32: do you agree with our proposal to remove the £100,000 cap on the disregard for assets which are the Subject Matter of Dispute? Please state yes/no/maybe and provide reasons.

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161. **Yes.** We would welcome this proposal as this capital is clearly unable to fund legal proceedings as it is trapped/inaccessible, and it is irrational to refuse legal aid to people based on capital they cannot access. However, we consider that reform is needed to the statutory charge (the legal charge which attaches to assets preserved or recovered through legal aid).

162. The statutory charge operates in these cases to turn legal aid into a loan, which attaches most often to the applicant's home, accruing interest at a commercial rate of 8% (which is much higher than current mortgage rates). This acts as a disincentive to accessing legal aid and places people in a worse position than people who can afford to pay privately.
163. It is typically domestic violence survivors in family proceedings who will be placed in this position, as it is the only in scope area of legal aid which concerns disputed property. Placing domestic abuse survivors in a position where their only way to escape paying interest on their legal fees is to sell their home, undermines the various disregards that apply to housing and risks further impacts to their health and wellbeing (as well as affected children).

Question 33: would you support creating a new mandatory disregard in relation to inaccessible capital, and introducing a charging system to recoup legal costs in these cases? Which legal services should this charge apply to? For example, Licensed Work only, or Licensed Work and controlled work? What legal costs should be recoverable? Do you agree that the value of the charge should be any capital over the capital thresholds, once any disregards have been applied, up to the estimated cost of the legal services provided? Do you think a waiver should apply (that is, do you think there are any cases in which we should not apply such a charge), and if so in what circumstances should it apply? Do you have any concerns in terms either of how this proposal would operate practically, or its impact on access to justice?

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164. **No.** We strongly oppose this proposal, which raises the prospect of an additional 'statutory charge' being applied in cases which do not involve the recovery of an asset. We view this proposal as potentially undermining the improvements resulting from the judgment in R (oao GR) v Director of Legal Aid Casework [2020] EWHC 3140 which established that the Director has a discretion to disregard capital in property wherever she considers it 'equitable' to do so.
165. Trapped capital will be less likely to arise if the proposals in [Q29-Q32](#) are implemented, however it will still arise, particularly affecting domestic abuse survivors in family proceedings solely concerning arrangements for children. The new mandatory disregard is defined so narrowly that it will be much harder to meet than the current discretion. Where the test is met, applicants will be expected to repay their legal aid, despite the LAA accepting they have no means to pay.
166. Although it might appear preferable for there to be a mandatory disregard, with greater certainty for applicants and less administration for providers and the LAA, it adds little to the other proposal to fully exclude property that is 'subject matter of dispute'. That is because where property actually cannot be sold, it will usually be because the co-owner does not consent, and this will usually be the ex-partner who is the opponent in the proceedings.
167. It is important to note the current discretion is extremely broad and can include situations of hardship falling short of a breach of convention rights. In contrast, the proposed disregard uses an overly restrictive definition of 'inaccessible capital' which would exclude situations where there are good reasons not to sell the home (such as the welfare of children). In our experience 'trapped capital' scenarios commonly occur in family law cases involving domestic abuse, where the welfare of the children and the stability of their living situation is extremely important.

168. The proposal would leave survivors who need assistance with disputes solely about children with no choice but to sell their homes. Ministry of Justice evidence indicates that abusers frequently use court procedures to perpetuate abuse, inflicting further harm and draining the survivor's resources [1]. This proposal particularly prejudices domestic abuse survivors involved solely in child arrangements proceedings. It would also appear to exclude survivors who require an urgent protective order, as they will not be able to promptly provide evidence capital in the home is inaccessible or without exposing themselves to harm.
169. If there is a concern around the administrative burden of applying the trapped capital discretion, there are other more effective ways of doing so while ensuring access to justice. These would include exempting the entirety of the primary residence from assessment and including low-income homeowners within the proposals for capital passporting.
170. Alternatively, the current discretion could remain, but with steps taken to implement the recommendations in PLP's April 2022 report on this issue [2]. Recommendations 1-6 and 8, summarized below, do not impact eligibility for legal aid (focusing on improving processes and decision making under the current rules) and should be implemented promptly in any event. This is important as the consultation indicates the current means testing regime will remain in place for some time before any reforms are enacted.
171. In our report, we have made a number of practical recommendations around 'trapped capital': better monitoring and publishing of LAA data, developing better resources, removing financial disincentives for providers, specific training to LAA staff, better information for the public, develop a non-exhaustive list of scenarios in which discretion will be exercised, ensure legal aid be made available in all cases where capital cannot practically be accessed and provide a right of appeal to an independent funding adjudicator against refusals.
172. The proposal also appears unworkable. It is unclear what the legal basis would be for charging an asset that is co-owned or subject to other legal interests (such as the rights of mortgagees). If the proposal were to be enacted in controlled work, it would impose significant additional administrative burdens upon providers. This would make undertaking work on cases involving trapped capital less sustainable (see further our response to [Q98](#) and [Q100](#)). It would increase the disincentives to taking on clients with trapped capital and exacerbate the uneven access to funding identified in our report referenced above.
173. If the Ministry of Justice proceeds with this proposal the charge should be waived in family proceedings concerning children and applications for urgent domestic abuse injunctions. Waiver should not be discretionary, as that would create uncertainty that would discourage applicants and providers. However, waiver on its own is insufficient to ensure access to these types of proceedings given that the proposal narrows the test in the way set out above.
174. Overall, there would be a more positive impact if the MoJ made changes to the equity disregard and SMOD disregard but kept the existing discretion and implemented the recommendations in our 'trapped capital' report. However, if the MoJ proceeds with this proposal it is essential that safeguards are put in place, including a mechanism to request that capital limits are disapplied on the basis they would cause hardship to the applicant or their children (see response to [Q1](#)).

References: [1] 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 8.5, p 130, available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf; [2] 'Trapped Capital and financial eligibility for legal aid' Dr Emma Marshall and Daniel Rourke, available at <https://publiclawproject.org.uk/resources/trapped-capital-still-barrier-to-legal-aid-research-shows/>;

Question 34: do you agree that we should revise the pensioners disregard as set out, by: a) increasing the qualifying age to the State Pension Age b) increasing the disposable income bands to align with the proposed lower disposable income threshold for civil legal aid; and reducing the number of income bands? Please state yes/no/maybe and provide reasons.

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175. Modeling the impact of these proposals is complex and beyond our expertise.

176. However, we reiterate concerns that the Means Test Review did not attempt to establish whether legal services are affordable for pensioners who do not qualify under these rules. We consider it essential that the LAA introduce a mechanism in the form of a discretion to disapply contributions, capital, or income limits based on hardship (see our response to [Q1](#)). This would mitigate potential unfairness and ensure access to justice where individuals cannot afford to pay privately.

Question 35: do you agree with our proposal to disregard payments under the Scotland and Northern Ireland Redress Schemes for historical child abuse from the capital assessment? Please state yes/no/maybe and provide reasons.

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177. **Yes.** We agree that victims of child abuse should not be expected to spend their damages on legal costs and agree that there should be a mandatory disregard for such damages.

Question 36: do you agree with our proposal to create a discretion for the DLAC to disregard VOTCS payments? Please state yes/no/maybe and provide reasons.

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178. **Maybe.** We agree with the proposal to introduce a disregard for VOTCS payments but consider making this discretionary (rather than mandatory) will result in administrative burdens on providers, mistakes on the part of the LAA and unfair decisions that do not carry a right of appeal to an independent person. We recommend that an amendment be made to the legal aid procedure regulations so that refusals made on means grounds carry a right of appeal to an Independent Funding Adjudicator.

Question 37: do you agree with our proposal to create a discretionary disregard for benefit and child maintenance back payments from the capital assessment? Please state yes/no/maybe and provide reasons.

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179. **Yes.** We agree with the proposal to introduce a disregard for benefit and child maintenance payments but consider making this discretionary (rather than mandatory) to be deeply unfair. Often families will have informally borrowed money from others to cope during a period of deprivation or gone without essential expenditure. These payments can be seen as compensation for maladministration by the state.

180. Further, it will result in administrative burdens on providers, mistakes on the part of the LAA and unfair decisions that do not carry a right of appeal to an independent person. We recommend that an amendment be made to the legal aid procedure regulations so that refusals made on means grounds carry a right of appeal to an Independent Funding Adjudicator.

Question 38: do you agree with our proposal to create a discretion to allow the DLAC and providers to disregard compensation, damages and/or ex-gratia payments for personal harm? Please state yes/no/maybe and provide reasons.

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181. **Yes.** We agree that these payments should be disregarded for capital assessment purposes. However, we consider that where the payment is intended to compensate for personal harm, the disregard should be mandatory. We are concerned that a discretionary disregard introduces additional complexity and may result in unfair decisions that do not carry a right of appeal to an independent third person. We recommend that an amendment be made to the legal aid procedure regulations so that refusals made on means grounds carry a right of appeal to an Independent Funding Adjudicator.

182. Further, we are concerned that the operation of a discretionary disregard creates additional administrative burdens and financial risk for providers (as their work is unpaid if their assessment is overturned on assessment by the LAA). We make two recommendations to mitigate these risks. Firstly, legal aid guidance should make clear that provider's assessments will not be overturned unless they are 'manifestly unreasonable' (i.e., in the *Wednesbury* sense, that no reasonable decision maker would have reached the same conclusion on the evidence available). Secondly, we recommend you introduce a mechanism by which providers can seek early confirmation from the LAA that their means assessment is agreed (similar to the system of 'prior authority' for disbursements).

Question 39: do you agree with our proposal to reintroduce capital passporting for nonhomeowners in receipt of passporting benefits through the capital assessment for civil legal aid? Please state yes/no/maybe and provide reasons

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183. **Yes.** We would support the reintroduction of capital passporting for all individuals in receipt of passporting benefits. Capital passporting of these groups represents an unnecessary administrative burden. However, we strongly object to the exclusion of low-income homeowners from these proposals. Evidence commissioned by the Law Society [1] indicates that low-income homeowners are generally unable to sell their homes quickly enough to realise the funds for use in legal proceedings, or to meet affordability checks for additional borrowing against their home. This is particularly true of individuals on means tested benefits. It is troubling that the Means Test Review did not attempt to establish the actual costs of obtaining legal services or to assess the

ability of these groups to pay.

References: [1] Donald Hirsch, Priced out of justice: Means testing legal aid and making ends meet' Donald Hirsch, 2018 available at https://repository.lboro.ac.uk/articles/report/Priced_out_of_justice_Means_testing_legal_aid_and_making_ends_meet/9470897 and 'Report on the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold' Dr Lisa Whitehouse, March 2018, available at <https://www.lawsociety.org.uk/en/topics/legal-aid/legal-aid-means-test-review-re-started>

Ch. 5: Immigration and asylum, under-18s and non-means tested cases

Question 40: do you agree with our proposal to align the immigration representation Upper Tribunal capital threshold (currently £3,000) with those usually used for civil legal aid – namely a lower threshold of £7,000 and an upper threshold of £11,000? Please state yes/no/maybe and provide reasons.

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184. **Yes.** We welcome the MoJ's proposal to increase both the lower and upper capital thresholds for immigration and asylum cases in the Upper Tribunal. This change is long overdue and will bring immigration and asylum cases in line with the newly proposed thresholds for civil legal aid, which will see the capital upper threshold raised from £3,000 to £11,000.
185. **However, we reiterate that in our view capital limits should be aligned with welfare benefits (see our response to [Q29](#)) exclude the primary residence (see our response to [Q30](#)) and properly exclude trapped/inaccessible capital (see our response to [Q33](#)).**

Question 41: do you agree with our proposal to remove the exemptions on the payment of income and capital contributions for immigration and asylum representation in the Upper Tribunal, replacing them with the new proposed income and capital thresholds for civil legal aid? Please state yes/no/maybe and provide reasons.

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186. **No.** We have concerns that many asylum and immigration applicants will have no recourse to public funds and will be relying on their capital to survive. Requesting a contribution towards legal funds for these people will quickly deplete their capital and could lead to destitution. If the MoJ proceeds with this proposal, there is a need for a hardship / eligibility review process.

Question 42: do you agree with our proposal to increase the immigration representation First-tier Tribunal capital threshold from £3,000 to £11,000? Please state yes/no/maybe and provide reasons.

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187. **Yes.** We are pleased to see a similar proposal to increase the capital threshold for controlled

work in the First-tier Tribunal and we support this being increased to £11,000 in line with the upper capital threshold proposed in the wider Means Test Review. **However, we reiterate that in our view capital limits should be aligned with welfare benefits (see our response to [Q29](#)) exclude the primary residence (see our response to [Q30](#)) and properly exclude trapped/inaccessible capital (see our response to [Q33](#)).**

188. As noted in our answers to [Q41](#), we have concerns that many asylum and immigration applicants will have no recourse to public funds and so will be relying on their capital to survive. Requiring these people to pay for their own legal representation if their capital exceeds £11,000 will lead to depletion of capital and ultimately, could lead to destitution. As raised in response to previous questions, we would recommend the introduction of a hardship review process to request that income/capital thresholds or contributions be waived.

189. We note that at present, individuals who are directly or indirectly in receipt of Asylum Support under s.4 or s.95 of the Immigration and Asylum Act 1999 are ‘passported’ through both the income and capital means tests for immigration and asylum proceedings. This should remain the case and we recommend that this regulation is extended to include all areas of civil legal aid, making Asylum Support a ‘passporting’ benefit.

190. We note that the lower capital threshold is referenced as £7,000 in para 300 of the consultation, and £3,000 in para 301. It appears this is likely to be an error. To be clear, we would support the lower capital threshold being set at £7,000 in line with the capital contributions outlined in paras 226–232.

Question 43: [Omitted]

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191. *PLP is not well placed to respond to this question but would encourage others with relevant expertise and experience to do so.*

Question 44: *do you agree with our proposal to non-means test applicants under 18 for all civil representation? Please state yes/no/maybe and provide reasons.*

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192. **Yes.** We support the MoJ’s proposal to remove the means test for applicants under 18 for all types of civil representation (including controlled legal representation). The administration of means applicants under 18, and in some circumstances their maintaining adult as well, is burdensome for providers, clients and the LAA. Removing the means test altogether will promote access to justice for children, who the MoJ quite rightly point are a particularly vulnerable client group.

Question 45: *do you agree with our proposal to introduce guidance which indicates when the means testing of an applicant who has turned 18 during their case may be unnecessary? Please state yes/no/maybe and provide reasons.*

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193. **Yes.** To reduce uncertainty and administrative burdens, the guidance should indicate a presumption that reassessment is not necessary unless the client indicates that there has been a change in circumstances (e.g., starting work). Given the particular vulnerabilities and needs of child clients, we would be grateful if the MoJ would consider consulting on any proposed guidance with providers, and in particular those working with child clients before this guidance is finalised.

Question 46: do you agree with our proposal to continue means-testing applicants under 18 for civil legal help, family help (lower and higher) and Help at court? Please state yes/no/maybe and provide reasons.

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194. **No.** Removal of the means test for applicants under 18 should extend to legal help in all areas of civil legal aid including civil legal help, family help (lower and higher) and Help at court and we recommend that the MoJ consider extending their proposals. Children are ‘most in need’ for legal aid as they are generally dependent upon others to advance their interests.
195. The current situation where children can be refused legal aid for matters of overwhelming importance to them (such as asylum claims) due to aggregating the resources of the maintaining adult, inevitably leads to some children going without assistance if their maintaining adult is unable or unwilling to pay privately. We are aware of examples of children being refused legal aid due to aggregation where they are temporarily being looked after by relatives following a breakdown in previous care arrangements or fleeing their country of origin to seek asylum. One of our clients was also refused legal aid for education matters due to her prospective adoptive parents means, where she was still ultimately under the care of the local authority.
196. The merits test for controlled work already requires that the applicant derive a ‘sufficient benefit’ from the grant of funding. This is an appropriate safeguard to ensure that legal aid is being used to advance their interests. If a maintaining adult also derives some indirect benefit, in our view that is a welcome additional benefit.
197. It has been established that that early legal advice can help resolve legal problems more quickly than if advice is not received at an early stage [1]. The government itself has recently piloted a new ‘early advice scheme’. Providing early advice is highly likely to lead to earlier resolutions, therefore reducing costs which would be incurred through litigation (including costs to the court and the LAA). Removing the means test for children under 18 at the legal help stage will mean that all children have access to early legal advice, for example through legal help.
198. Means testing maintaining adults as well as applicants under 18 also causes a considerable administrative burden for providers and clients and can be particularly complicated, meaning errors are more likely which may discourage providers from feeling able to take on cases. It creates financial risk for providers if they decide it is inequitable to aggregate means but are concerned the LAA may later dispute their assessment.
199. If the MoJ maintains the means test for applicants under 18, we consider that guidance on when it is considered inequitable to aggregate means should be extended. In particular, we consider that guidance should make clear that means should not be aggregated where the applicant is a former looked after child, being looked after by another relative who isn’t their parent or

unaccompanied asylum-seeking child. We would again suggest that the MoJ should consult on any updated guidance with stakeholders before finalising it.

References: [1] Analysis of the potential effects of early legal advice/intervention, Nov 2017, <https://prdsitecore93.azureedge.net/-/media/files/topics/research/impact-of-early-legal-advice-nov-2017.pdf?rev=cb19f5903372462c8cc62267c549aced&hash=8A562B2452D66BE8E72155079E8F8B45>

Question 47: do you agree with our proposal to introduce a simplified means test for applicants under 18 for civil legal help, family help (lower and higher) and Help at court? Please state yes/no/maybe and provide reasons.

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200. **Maybe.** Whilst we consider that the means test for those under 18 applying for legal help ought to be removed in its entirety, if the MoJ do not agree with this proposal, at the very minimum, we would support the extension of the simplified ‘light touch’ means test to all applicants aged under 18 where it is not considered equitable to aggregate their income with their maintaining adult.

Question 48: [Omitted]

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201. *PLP is not well placed to respond to this question but would encourage others with relevant expertise or experience to do so.*

Question 49: do you agree with our proposal to remove the means test for legal help at inquests where the case relates to a potential breach of ECHR obligations or significant wider public interest? Please state yes/no/maybe and provide reasons.

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202. **Yes.** PLP are not well placed to answer this question in detail. However, we have concerns about the wording of the consultation suggesting that the merits assessment for the new-means test will be a higher threshold than the current test for a means waiver. We would not support a higher threshold for the merits test and would suggest the threshold remains as it currently is. We have been able to see a copy of INQUEST’s draft response to the MTR consultation and share their broad concerns about the availability of public funding for bereaved families at inquests.
203. We also consider that there are compelling reasons for why the means test should be removed for survivors of modern slavery (see our response to [Q7](#)) and domestic violence. Survivors of domestic violence are often subject to economic abuse and coercive control, which can impact their ability to demonstrate their financial eligibility for legal aid. They may not have access to detailed information about their finances or be able to access it without putting themselves at risk. Further, survivors often have significant levels of credit card or other debt that the abuser

has run up in their name. Individuals subject to domestic violence also often have ‘trapped capital’. Please refer to our response to [Q33](#) which addresses this issue in detail.

204. Further legal aid provided to survivors of abuse also often directly or indirectly benefits vulnerable children affected by the abuse. At present, income and capital thresholds can be waived in applications for protective orders for domestic abuse survivors, but not in the case of protective orders for their children or for private law children work (such as disputes over who a child lives with or has contact with). The existing situation leaves children at risk of harm. There is a risk that the situation will be exacerbated through the introduction of contributions for applicants in receipt of UC, as contributions cannot be waived in any event and there are no safeguards to ensure they are affordable.
205. It is submitted that the aim of ensuring legal aid is available to the most vulnerable is met through providing non-means tested legal aid for these issues. A more restrictive approach would be to provide non-means tested legal aid for urgent protective orders for survivors and their children, combined with a general discretion to waive eligibility limits or thresholds in individual cases on the basis of hardship (see our response to [Q1](#)). This would carry greater administrative burdens than non-means tested legal aid but would be better than the current situation.

Question 50: do you agree with our proposal to amend backdating provisions so that providers can continue to have funding for legal help in relation to an inquest backdated to the date of application (whether for standalone legal help or following a successful ECF grant)? Please state yes/no/maybe and provide reasons.

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206. **Yes.** PLP are not well placed to answer this question in detail. However, we are concerned that the wording of this question appears to contradict the proposals in paragraph 342. Para 342 says that an ‘applicant may be entitled to any legal help carried out prior to a successful application for ECF or standalone legal help’, and question 50 implies that it will only be possible to backdate legal help ‘to the date of the application’. It is not clear which position the MoJ are proposing. We would support the proposition in para 342 which, as we understand it, seems to be in line with the current position and so would allow providers to make representations to the LAA for legal help to be backdated to a date earlier than the determination date of means-free legal help.
207. Again, we have been able to see a copy of INQUEST’s draft response to the MTR consultation and share their broad concerns about the availability of public funding for bereaved families at inquests.

Ch. 8: Implementation and review of the new legal aid means tests

Question 87: do you agree with our proposal to implement the new means tests via a staggered approach, rather than on a single date? Please state yes/no/maybe and provide reasons.

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208. **Maybe.** We are clear that the new means test should be implemented as soon as possible to ensure those who are entitled to obtain legal aid, are able to obtain it. In principle, we support the idea of a staggered approach if it enables quicker implementation of the new means test when compared to implanting the new means test on one date.

209. However, we are deeply concerned by the uncertain timeframe for implementing the new means test and would be concerned if the staggered approach led to further delay. At present, the figures used for the means test review to establish new thresholds are already out of date and so the longer it takes to put the new means test in place, the less impactful changes become as they are eroded by increases in the cost of living over time.

210. Further, the criterion for prioritisation appears to be firstly, the ease with which digital systems can be updated and the numbers of people who stand to benefit. The MoJ should also consider the seriousness of the consequences for people who are unable to access representation in the meantime. These vary by area of law (and the type of assistance), and we lack the expertise to comment across all areas, but we make some relevant comments at [Q88](#) below.

Question 88: do you agree with our proposal to implement the non-means tested areas of civil legal aid (if confirmed following consultation) before any other areas? Please state yes/no/maybe and provide reasons.

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211. **Maybe.** Again, our primary stance is that implementation ought to take place as soon as possible (see response to [Q87](#)). We note that some of the proposals, if implemented, will require wholesale changes to LAA digital. We accept that the changes to income and discretionary disregards reflect significant changes in approach and updating digital systems and guidance will require more work. We consider that there are other areas suitable for prioritisation.

212. The following civil proposals also impact large numbers of people and only require existing limits to be removed or updated (rather than a wholesale change in approach), so should require fewer complex changes to digital systems:

- a. [Q2](#) – Actual housing costs (removing the £545 cap for single people).
- b. [Q29](#) – Increase in capital thresholds.
- c. [Q30](#) – Increase in the equity disregard.
- d. [Q32](#) – Removal of the £100,000 cap on Subject Matter of Dispute ('SMOD').
- e. [Q40](#) – Alignment of immigration capital limits with other areas of civil representation.

213. The following proposals could be affected by simple changes in policy, or regulations, without a need for upgrade of digital systems:

- f. [Q23](#) – Do not means assess people providing temporary support.
- g. [Q31](#) – Equity disregard applies where a person is temporarily absent.
- h. [Q42](#) – Alignment of immigration capital limits with other areas of civil controlled work.
- i. [Q45](#) – Do not means test children upon turning 18 years.

214. In addition, we have made further recommendations that could be implemented promptly as

they could be instituted without upgrades to digital systems:

- j. [Q42](#) – Include asylum support as a passporting benefit.
- k. [Q18](#), [Q21](#), [Q29](#), [Q30](#), [Q33](#), [Q34](#), [Q42](#) – Introduce a mechanism to request a hardship/eligibility review.
- l. [Q38](#), [Q100](#) – Introduce a ‘prior authority’ email for means assessments.
- m. [Q33](#), [Q36](#), [Q37](#), [Q38](#) – Introduce a right of appeal for means testing decisions.
- n. [Q7](#), [Q46](#) – Remove the means assessment for children, domestic violence survivors and victims of trafficking/modern slavery.

215. We also consider that these changes benefit areas of law where the consequences of delay are more severe for the applicants who stand to benefit. The capital changes highlighted above will particularly benefit survivors of domestic violence in family cases (who often have an interest in the family home) and people subject to immigration control who face removal from the UK.

Question 89: do you agree with our proposal to implement the remainder of the new civil means test as Phase 2 of the implementation process, in advance of the new criminal means tests? Please state yes/no/maybe and provide reasons.

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216. **Maybe.** Again, our primary stance is that implementation ought to take place as soon as possible. Please see our answer to [Q88](#). An additional argument for prioritising civil legal aid would be that there is currently greater discretion in criminal means testing (the ability to request hardship or eligibility reviews) which allows greater scope to mitigate the impact of delay. However, we acknowledge availability of criminal legal aid potentially impacts the applicant’s liberty and are not best placed to comment in detail on the impact of delaying criminal changes behind civil ones.

Question 90: [Omitted]

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217. *PLP is not well placed to respond to this question but would encourage others with relevant expertise and experience to do so.*

Question 91: do you have any further comments in relation to the implementation phasing of the new means tests? Please state yes/no/maybe and provide reasons.

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218. **Yes.** We take the opportunity to reiterate our concerns about the impact of delay (see our answer to [Q87](#)) and additional areas that should be prioritised (see our answer to [Q88](#)). It is troubling that the speed of the implementation appears to depend largely on the success of the upgrade of digital systems and could be significantly delayed if there are issues with these. There have been widespread issues with the current system (CCMS) since it was first implemented. If digital upgrades are subject to delays, the MoJ should explore contingency measures (such as reverting to paper application forms for some applicants).

Question 92: do you agree with our proposal to allow existing recipients of legal aid to seek a reassessment under the new means-testing rules, when implemented? Please state yes/no/maybe and provide reasons.

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219. **Yes.** We support allowing existing recipients of legal aid to seek a reassessment under new-means testing rules. However, we query the fairness of asking people who would be entitled to pay a lower contribution, or no contribution, at all under the new rules to continue to do so whilst systems are updated, and new rules put into place.
220. The longer it takes to implement new rules, the more likely it is that a requirement to pay contributions will cause hardship. We reiterate the need for a procedure to request a hardship review and powers to waive contributions (in full or in part) – see our responses to [Q1](#) and [Q27](#).

Question 93: do you agree with our proposal that reassessments for civil legal aid recipients should be carried out under the new means-testing regime, but with the proviso that recipients who have benefitted from the previous rules on UC income passporting and/or the pensioner disregard should continue to be subject to the previous means-testing rules in these areas? Please state yes/no/maybe and provide reasons.

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221. **Yes.** We support this proposal as a proportionate way of reassessing those applicants that have relied on the two rules specified here, subject to the proviso that applicants should be able to opt for assessment under the new rules if these would produce a more favorable outcome for them. Please refer to our answers to [Q24](#), [Q25](#), [Q26](#), and [Q34](#) for our proposals in relation Universal Credit passporting and the pensioner disregard.

Question 94: [Omitted]

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222. *PLP is not well placed to respond to this question but would encourage others with relevant expertise and experience to do so.*

Question 95: do you have any further comments about our proposals in relation to the transition from the old to the new means-testing regime?

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223. PLP are very concerned about the delay in implementation of the new means test. We appreciate that this is a complex and lengthy process, however waiting years for implementation is very problematic, particularly given the current economic climate. In our view, it must be one of the MoJ's priorities to implement the new means test as quickly and efficiently as possible to ensure the most vulnerable people in society have access to justice.

Question 96: do you agree with our proposal to carry out a review of the means test thresholds within 3-5 years after the implementation of the new means tests? Please state yes/no/maybe and provide reasons.

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224. **No.** Whilst we are strongly in favour of regular monitoring and uprating of the new means test, income and capital thresholds, 3–5 years is too long for a review of the means test thresholds. It is important that there is a clear commitment to uprating on a regular basis, in proportion to CPI (or in the case of the gross income limit which includes housing costs, CPIH). Annual uprating in line with inflation is recommended by Donald Hirsch in his report into these proposals. He makes the important point that *‘the progress made by these changes risks being very seriously undermined without more frequent and systematic inflation uprating than proposed – particularly in the present period of high inflation.’* [1]

225. The figures being relied upon in the MTR consultation are based on data for the financial year ending in 2020. We understand that these figures may be reconsidered prior to the implementation of the new means test review and we would strongly recommend this takes place, else they will have been significantly eroded by cost of living increases in the interim.

226. Until 2009, uplifting took place on an annual basis. As well as uplifting being conducted on an annual basis, further safeguards are required to ensure that the means test reflects the current cost of living. We recommend that the MoJ implements ‘trigger points’, which would automatically trigger a review of the means thresholds for legal aid. We would urge the MoJ to consider this further and suggest appropriate triggers. We are not able to suggest appropriate triggers in such a short timescale and without the appropriate expertise, however an example could include monitoring of the CPI and CPIH.

References: [1] Donald Hirsch, ‘More affordable justice: Proposals to reform the legal aid means tests and implications for living standards’, May 2022, available at: <https://www.lawsociety.org.uk/topics/research/more-affordable-justice-legal-aid-means-test-report>

Question 97: do you have any views on the potential impact of our proposals on groups with protected characteristics? These are: age; race; disability; sex; sexual orientation; gender reassignment; marriage and civil partnership; pregnancy and maternity; religion or belief. We would particularly welcome information on the protected groups which we do not have legal aid data on: gender reassignment, marriage and civil partnership, pregnancy and maternity, and religion or belief.

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227. We note that the MoJ has struggled to assess the impact of changes because they significantly affect people in receipt of UC, who will now be subject to full means testing if they are in work and earning more than £500 per month. We have set out our objections to ending passporting for all recipients of UC in our response to [Q24](#).

228. However, not all households in receipt of means tested benefits have moved onto UC and these households are in receipt of ‘legacy’ benefits (which will continue to be ‘passporting’ benefits). We have set out our reasons for supporting capital passporting in our response to [Q39](#), which we consider should be extended to all those in receipt of UC.

229. The numbers of people moving from legacy benefits to UC will increase over time, which creates difficulty in modelling the impact as we understand UC recipients may be negatively impacted, as

they may be subject to contributions, while those on legacy benefits may benefit, as they will now be 'passported' through the capital test in addition to the income test.

230. In our view, the difficulty in assessing the impact on protected characteristics should be considered as an additional factor against removing passporting for UC recipients. We note that the MoJ has, due to the incomplete UC rollout, approached its impact assessment by:
- a. Firstly, comparing the impact of the changes ('Option 1') against doing nothing ('Option 0') but assuming all benefit recipients are still on their 'passporting' legacy benefits. This is referred to as 'Baseline 1'.
 - b. Secondly, comparing Option 1 against Option 0 but assuming all benefit recipients have been transferred to Universal Credit (no longer a passporting benefit where the recipient earns >£500 per month). This is referred to as Baseline 2.
231. At present around 65% of individuals have moved to UC (in May 2022). We focus our comments on the impacts identified in Baseline 2. We acknowledge Baseline 2 will underestimate the numbers of people who benefit from the proposed changes but note that the current situation is closest to Baseline 2 and continually moving towards a situation closer to Baseline 2. It is also reasonable to assume that Baseline 2 will provide an ever more accurate picture of the impact the more time elapses from the point at which the consultation document was written.
232. The complexity of the modelling to assess the impact makes it very difficult to provide detailed comments on the potential impact of the changes, but we have been able to identify several points of particular concern.
233. Firstly, we are concerned that, contrary to the stated intention to 'create a level playing field for benefit recipients and those in employment, incentivising work' [§17, Civil Impact Assessment]. Although it is the case that some people in receipt of UC are on benefits while seeking employment, UC also covers people who are unable to work or who are in low paid employment. Removing passporting would also impact these groups, but not incentivise work. There will be a disproportionate negative impact on some groups on UC, for example lone parents who are in work. The proposals could lead to the reverse effect, if providers are unable to take on clients who receive UC and cannot be passported due to their earnings, where people in work may find it more difficult to access legal aid and could be disincentivised from working.
234. Secondly, in relation to disability, the Civil impact Assessment lacks information about how the additional costs that people have, as well as additional payments that they receive to cover these, have been considered in the proposals and any risk of discrimination as a result. We set out in our response to [Q18](#) the reasons we consider additional provisions, and a hardship/eligibility review process is required as a safeguard to ensure any disability related costs and capital are properly considered.
235. Thirdly, the projected impacts that women would be more likely to be detrimentally affected than men, and that lone parents would suffer a detrimental impact from the proposed changes, is of significant concern, given that there could be a disproportionate impact on lone parents, particularly women, who are in receipt of UC as a means-tested benefit and may have higher household costs than other groups. There are also many contexts in which women experience structural forms of disadvantage and discrimination (for example, the gender pay gap [1], or where women are more likely to have caring duties and therefore be in part-time work, which has

a further consequence such as lesser pension contributions over a lifetime) and any disproportionate impact on women and children should be carefully considered against the potential benefits of the changes. We note that the proposed changes to the passporting arrangements are perceived to have a legitimate aim in line with the rationale and policy objectives. However, as we outline in our response to [Q24](#), it is likely that a considerable number of the applicants who would no longer be passported *will be those on a higher rate of benefit because they receive extra money for having a child, or disabled child, or caring for a disabled person*. If the consequence of the proposals is that these groups of UC claimants would have legal aid eligibility removed in order align them with people in work of an equivalent income who are not subject to the additional costs for which UC is intended to compensate, then this would not create a fairer or more equitable system of legal aid. It is also unclear from the proposals exactly who would become ineligible under the new passporting rules, due to the complex modelling, data limitations and lack of indicative case studies, or whether these groups could realistically afford to pay for legal services, given that they are still in receipt of means tested benefits.

236. Finally, where groups are identified as being more likely to be disadvantaged than other groups, in some cases this is identified as being because they either represent a group that represents a higher proportion of legal aid recipients, or because they are made up of people with a high take up or eligibility for UC. Given that some groups will be disproportionately affected by the proposed changes, the equalities assessment should also be updated to make clear the causes of disproportionate impacts on particular groups, as at present it does so in more detail for some groups than others. For example, the Equalities Assessment document for civil legal aid in relation to Baseline 2 identifies that 'black, African, Caribbean or black British individuals' are less likely to benefit from the proposals than other groups, but additional explanation of this should be provided (paragraph 40). This is also a group that experiences high levels of structural racism, discrimination and disadvantage, and careful consideration should be given as to whether a disproportionate impact on this group can be properly justified in relation to the rationale of equity.

References: [1] Office for National Statistics, 'Gender pay gap in the UK: 2021' (26 October 2021) [2] Runnymede Trust, 'England Civil Society Submission to the United National Committee on the Elimination of Racial Discrimination' (July 2021) https://assets-global.website-files.com/61488f992b58e687f1108c7c/61bca661b8abd33d2f6f579c_Runnymede%20CERD%20report%20v3.pdf

Question 98: do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for civil representation, increase it or leave it broadly similar?

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237. **These proposals will increase the administrative burden for providers and applicants for civil representation.** We consider that the following decisions represent a missed opportunity to remove significant administrative burdens on providers:

- a. Including the primary residence when assessing capital, see our response to [Q30](#).
- b. Continuing means testing children (and therefore adults maintaining them) in Legal Help cases, see our response to [Q46](#).

238. Further, the following proposals are liable to increase administrative burdens:

- a. Ending passporting for UC recipients earning over £500 will particularly increase administrative burdens, see our response to [Q24](#).
- b. Excluding low-income homeowners from capital passporting, see our response to [Q39](#).
- c. Making new capital disregards discretionary, rather than mandatory, see our responses to [Q36](#), [Q37](#) & [Q38](#).
- d. Introducing contributions for applicants for immigration matters in the Upper Tribunal, see our response to [Q41](#).

239. The proposals around trapped capital are harder to assess. The current situation imposes a significant administrative burden on providers as significant time must be spent engaging with the LAA and providing evidence to secure an exercise of discretion. However, other measures could address this (see our response to [Q33](#) summarising our recommendations). The proposals to increase capital limits, equity disregard and SMOD mean that trapped capital is less likely to occur, which would indicate a lower admin burden. However, where it does occur LAA proposals for a complex charging system are likely to impose significant administrative burdens.

240. We recognise that proposals to introduce a minimum threshold for contributions, apply the equity disregard in cases of temporary absence, exclude the means of those temporarily providing support and changes to means testing for children are likely to decrease admin burdens. We also recognise non-means tested funding for some inquests will decrease admin burdens, but only on providers who practice inquest work. Overall, these proposals are welcome, but the proposals that create additional burdens are likely to arise in more cases than the proposals that reduce them.

241. Given the potentially significant overall increase in the administrative burden on providers, to mitigate these issues, we recommend that the thresholds triggering reassessment of means should be increased. Reg 20 of the Means Regulations provides that (for certificated work) an increase in disposable income of more than £60 or decrease in disposable income of more than £25 triggers a reassessment. As does an increase in capital of more than £750. These thresholds should be uprated, particularly the income reassessment thresholds which are very low.

Question 99: do you think these proposals, if enacted, will improve the sustainability of civil legal aid? Please state yes/no/maybe and provide reasons. / Question 101: do you think these proposals, if enacted, will improve the sustainability of civil legal aid? Please state yes/no/maybe and provide reasons.

242. **No.** Questions of sustainability are closely linked to the administrative burdens on legal aid providers. As highlighted in our response to [Q98](#) and [Q100](#), without changes to the proposals there will be a significantly increased administrative burden on legal aid providers. Additional administrative burdens will exacerbate existing sustainability issues.

243. Recent research by LAPG highlights problems with the hourly rates for providers under the current system, including most practitioners working more hours than they were remunerated for and having to undertake unpaid work [1]. This includes work on means assessment. At present, only time for completing the legal help form can be claimed, [2] not time for doing the means assessment (which can be very time consuming) [3]. The basic time that can be claimed for completing the means section of the CCMS form is 30 minutes [4] and any excess time claimed

needs to be justified. The allowance of 30 mins is completely unrealistic at present and even more so under the proposed plans, as it does not factor in the significant time spent obtaining and analysing bank statements and other administrative tasks. If the outcome of the assessment is that the applicant is ineligible, there is no payment whatsoever.

244. Where legal aid providers need to make complex assessments of eligibility for legal aid it can also deter them from taking on clients with certain types of cases (e.g., we have observed this in our research on Exceptional Case Funding [5] and in our recent work on trapped capital [6]). Reasons include the need to undertake unpaid administrative work (see further below) and financial risks (see our response to [Q100](#)).

245. We recommend that these issues could be mitigated to some extent by ensuring providers are paid for their work conducting means assessments. As at present there is no proposal for providers to be paid for carrying out the means test on these types of cases, there may be much higher volumes of work for which they are unable to claim back their costs, and the Impact Assessment explicitly acknowledges that the new assessment process will be more complex:

‘For legal aid cases paid a fixed fee or hourly rates, providers are not explicitly paid for the time taken to undertake the means assessment. Because the new test is slightly more complex, this means that provider administrative costs for each application would increase under the new arrangements, without a respective increase in remuneration. Only in certain circumstances can administrative time be claimed for reporting the case information to the LAA’ (Impact Assessment, paragraph 123).

246. It is also concerning that the proposals are expected to reduce demand for civil representation and increase the demand for Legal Help (p 22 of the Civil Impact Assessment). We doubt that suppliers will be able to fully meet this demand due to the concerns about capacity in the sector set out in our response to [Q99](#). If providers do undertake more Legal Help cases and less Civil Representation, this will result in proportionally more administrative work on means assessment for lower pay. This is because Legal Help is more poorly remunerated and higher turnover. Many providers indicate that rates of payment for Legal Help work is already unsustainable, so additional administrative burdens will be particularly difficult, if not impossible, for providers to bear.

References: [1] Legal Aid Practitioners Group, ‘Legal Aid Census’ (2021) <https://lapg.co.uk/lapg-publishes-the-findings-of-the-2021-legal-aid-census/> [2] LAA Costs Assessment Guidance; [3] Ibid. see paragraphs 2.59 and 2.64. [4] Ibid. see paragraph 2.61 [5] Joe Tomlinson and Emma Marshall, ‘Improving Exceptional Case Funding: Providers’ Perspectives’ (Public Law Project, January 2020) <https://publiclawproject.org.uk/content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf> [6] Emma Marshall and Daniel Rourke, “‘Trapped capital’ and financial eligibility for legal aid” (Public Law Project, April 2022) https://publiclawproject.org.uk/content/uploads/2022/04/Trapped-capital-FINAL_.pdf

Question 100: do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for civil legal help, increase it or leave it broadly similar?

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247. **The proposals will increase the administrative burden for providers of legal aid for civil legal help.** The concerns set out in our response to [Q98](#) apply equally here. As set out in our response to [Q99](#), these burdens will impact the sustainability of civil legal aid. However, in relation to the sustainability of Legal Help, we have additional concerns.

248. In our response to [Q99](#), we set out that research shows providers are more reluctant to take on cases involving complex means assessments due to administrative burdens. These problems are even more acute in Legal Help, where providers are additionally dissuaded by the financial risk of a 'nil assessment' (not being paid at all for work completed) if the LAA considers the applicant was ineligible for funding when the file is assessed, sometimes years later during an audit. To resolve provider concerns about nil assessments, we recommend that an early 'prior authority' mechanism be introduced for the legal help stage – an email address which would allow providers to secure an LAA determination of the client's eligibility at legal help stage where the means position is unclear (due to discretions, unclear disregards, etc.) This would provide certainty for providers, reduce the administrative burden of disputing nil assessments, and reduce the risk of clients being turned away due to providers not being confident they pass the means test.

Contact

Our casework team regularly advises clients on eligibility issues, under alternative funding. We welcome opportunities to work with partners on research and policy work into legal aid issues.

Our current priorities are to increase numbers of people eligible for and/or practically able to access civil legal aid and secure greater engagement in the need to ensure civil legal aid sustainability among key audiences.

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