



Ministry  
of Justice

# Legal Aid Means Test Review

March 2022

CP 646



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of Justice

## **Legal Aid Means Test Review**

Presented to Parliament

by the Lord Chancellor and Secretary of State for Justice

by Command of Her Majesty

March 2022



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ISBN 978-1-5286-3246-1

E02729412

03/22

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of Her Majesty's Stationery Office

# About this consultation

<b>To:</b>	Civil and criminal legal aid providers and all those who have been, are or may in future be recipients of legal aid.
<b>Duration:</b>	From 15/03/2022 to 07/06/2022
<b>Enquiries (including requests for the paper in an alternative format) to:</b>	Legal Aid Means Test Review Ministry of Justice 102 Petty France London SW1H 9AJ  Email: <a href="mailto:legalaidmeanstestreview@justice.gov.uk">legalaidmeanstestreview@justice.gov.uk</a>
<b>How to respond:</b>	Please send your response by 07/06/2022 to:  Legal Aid Means Test Review Ministry of Justice 102 Petty France London SW1H 9AJ  Email: <a href="mailto:legalaidmeanstestreview@justice.gov.uk">legalaidmeanstestreview@justice.gov.uk</a>
<b>Additional ways to feed in your views:</b>	A series of stakeholder meetings is also taking place. For further information please use the “Enquiries” contact details above.
<b>Response paper:</b>	A response to this consultation exercise is due to be published in Autumn 2022.

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# Ministerial foreword

Everyone deserves access to justice, whatever their financial circumstances. Legal aid is absolutely crucial to a fair justice system because it opens up legal representation to people who would otherwise be unable to pay for it.

In February 2019, the government announced a review of the means test for legal aid as part of the Legal Support Action Plan. We wanted to understand how effective current means testing arrangements are in protecting access to justice, and whether they are working for those who need legal aid most. The review looked at means testing in the round, including the thresholds for legal aid entitlement and the eligibility arrangements for people receiving certain benefits.

The proposals set out in this consultation draw on the review's findings. They represent a significant investment in our justice system, creating fairer means testing that will protect access to justice in the short, medium and long term, and focus finite public funds on those who are least able to pay themselves.

We are proposing to increase significantly both the income and capital thresholds for legal aid eligibility, and remove the means test entirely for some civil cases. These include legal representation for children, and legal representation for parents whose children are facing proceedings in relation to the withholding or withdrawal of life-sustaining treatment. We also want to remove the upper disposable income threshold for legal aid in the Crown Court, so that anyone can get support if they need it.

We want to do even more to support victims of domestic abuse – for whom legal proceedings can be both traumatic and costly. Under our plans, domestic abuse victims applying for a protective order or other proceedings would benefit from the more generous means test for civil legal aid. And any disputed assets – including property – will not be included in a means assessment. This is much fairer for domestic abuse victims who are contesting a property and who cannot use their equity in that property to fund the legal proceedings.

Our proposals will make a real difference to the way people are able to access legal services – whether they are seeking to protect themselves from harm, to stop their home being repossessed, or to defend themselves at a criminal trial. Our aim for these reforms is to deliver a more dynamic and efficient justice system for the future.

I value greatly the contributions made by all of our stakeholders so far, and extend my sincere thanks to everyone who has shared their views and given evidence to our review. I look forward to their continued engagement in this consultation, as we strive to create a fairer legal aid system that allows every person in our country to access the legal representation they need.

**Lord Wolfson of Tredegar**

Parliamentary Under Secretary of State for Justice

# Executive summary

1. In February 2019, the Ministry of Justice announced the Legal Aid Means Test Review, as part of the Legal Support Action Plan. This paper sets out for consultation our proposed changes to the means test for legal aid.
2. Legal aid pays for legal advice, assistance, and representation for individuals who require these services. Most criminal and civil legal aid is means tested, to ensure that public resources are directed to those most in need.
3. The process of means testing is a vital aspect of determining whether someone qualifies for legal aid. It aims to ensure both that those most in need receive help with paying their legal costs, and that those who can afford to contribute towards their legal costs do so. These principles were set out in the 2010 consultation Proposals for the Reform of Legal Aid in England and Wales, and they form the basis for the proposals set out in this consultation.
4. This has been an open and collaborative review. The Ministry of Justice has held a large number of consultative meetings with a range of interested parties, including legal practitioners from across the legal aid sector, third-sector organisations, the judiciary and academic specialists. This constructive collaboration has helped us form the policies found within this document.
5. We are proposing a wide range of changes to the legal aid means test, with the aim of ensuring access to justice. In some cases, we are proposing to align our approach to civil and criminal legal aid more closely. Specifically, we are proposing:
  - to use a cost of living-based approach for the civil legal aid means test, as we already do for the Crown Court and magistrates' court means test
  - to use the OECD Modified approach to adjust gross and disposable income for different household compositions
  - to disregard Council Tax from the civil legal aid means test (as for the Crown Court and magistrates' court means test), and to remove the £545 per month cap on housing costs
  - to uprate the existing work allowance for the civil legal aid means test, and to implement a similar allowance into the Crown Court and magistrates' court means test
  - to deduct priority debt and student loan repayments, and pension contributions up to 5% of earnings, from the disposable income assessment.

6. For civil legal aid, we are proposing:
  - a significant increase to the income thresholds, using a cost of living-based approach
  - increases to the disposable capital thresholds and the equity allowance
  - to disregard compensation, ex-gratia and damages payments for personal harm, and backdated benefit and child maintenance payments, from the capital assessment
  - to disregard property which is the subject matter of dispute in the case the individual is applying for legal aid for
  - to disregard inaccessible capital, while putting a charge on the asset in question with the aim of recovering the legal aid costs
  - to exempt recipients of certain welfare benefits who are not homeowners from the capital assessment
  - to require recipients of Universal Credit with household earnings above £500 per month to go through an income assessment, rather than being passported as at present
  - a time cap of 24 months on the maximum length of time for which income contributions are payable
  - to remove the means test for civil representation for children under the age of 18 and for parents or those with parental responsibility whose children are facing the withdrawal or with-holding of life-sustaining treatment
  - to remove the means test for legal help in relation to inquests which relate to a possible breach of ECHR rights (within the meaning of the Human Rights Act 1998) or there is likely to be a significant wider public interest in the individual being represented at the inquest.
  
7. For criminal legal aid, we are proposing:
  - to increase the income thresholds for legal aid at the Crown Court and the magistrates' court, to take into account increases in the cost of living and private legal fees
  - to remove the upper disposable income threshold for legal aid in the Crown Court
  - to increase the maximum contribution period for income contributions at the Crown Court to 18 months, and implement a tiered contribution rate (40%/60%/80%)
  - to continue passporting all recipients of relevant means-tested benefits (including Universal Credit) through the income assessment
  - to remove the current exemption from paying a capital contribution for homeowners convicted at the Crown Court who are in receipt of passporting benefits
  - to align the criminal advice and assistance and advocacy assistance means tests with our proposed new civil legal aid means test.

8. After we have received and considered the responses, we will publish a consultation response outlining our final policies. We will then start the necessary work required to amend legislation and guidance, and make the required changes to Legal Aid Agency digital systems.

# Introduction

9. Access to justice is a fundamental principle underpinning the rule of law; and for access to justice to be effective, we must have a legal aid system which is accessible to those who need it.
10. Means testing has played a role in the legal aid system for a very long time, for good reasons; it is important to focus taxpayer resources on those who need them most, rather than on those who can afford to pay for private legal advice and representation.
11. The Rushcliffe Report of May 1945, which established the foundations of the legal aid system in England and Wales as we know it, recommended: “Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something towards costs.”
12. Similarly, the consultation [Proposals for the Reform of Legal Aid in England and Wales \(2010\)](#) stated (Chapter 5):  
*“This chapter sets out the Government’s proposals for reform to the eligibility rules for legal aid. The Government’s rationale for reform is to ensure that those who can afford it should pay for, or contribute towards, the costs of their case.”*
13. However, as a number of respondents to the Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) pointed out, the legal aid means tests and thresholds have remained static for some years, with only minor changes to eligibility brought in via LASPO and other legislation. We decided, therefore, to take a fresh look at this area.
14. In February 2019, alongside the publication of the Post-Implementation Review, the Ministry of Justice published the Legal Support Action Plan. Amongst other commitments, this announced the Legal Aid Means Test Review, as follows:  
*“We will conduct a review into the thresholds for legal aid entitlement, and their interaction with the wider criteria. This review will assess the effectiveness with which the means testing arrangements appropriately protect access to justice, particularly with respect to those who are vulnerable. The review will include looking at the capital thresholds for victims of domestic violence and evidence gathered during the review of legal aid for inquests. Whilst the review is ongoing, we will continue to passport all recipients of Universal Credit through the means test. We are bringing together data, evidence and expertise from across government to ensure that the*

*process is as consistent as possible. We are also keen to work with experts from across the field to explore this issue.” (p. 11)*

15. The proposals we have set out represent a significant investment in our justice system which will widen access to legal aid and help ensure individuals can access legal services when they need them.

## **Scope and structure of the Legal Aid Means Test Review**

16. The Means Test Review has considered the legal aid means tests in the round, including not only the income and capital thresholds for legal aid eligibility, but also wider eligibility criteria in relation to means (including benefits passporting), and the income and capital contributions potentially payable towards the costs of representation in civil and family matters and at the Crown Court. We have also specifically considered the experiences of domestic abuse victims. As far as possible, we have revisited the existing rationales for our approach in these areas and further developed these where appropriate.
17. The Means Test Review has not considered the merits and interests of justice tests for legal aid eligibility, the legal aid fee schemes or which services are in scope of legal aid.
18. We appreciate that it is essential that any proposals we make are not only operationally deliverable but straightforward for the Legal Aid Agency to implement and for legal aid applicants and practitioners to understand. We have, therefore, worked closely with the Legal Aid Agency and legal aid providers, who have played an essential role in testing and shaping our proposals.
19. This consultation is structured as follows:
20. First, we summarise the existing legal aid means tests and our overarching approach for the proposed new legal aid means tests.
  - Chapter 1 summarises the existing legal aid means tests.
  - Chapter 2 details the framework we are proposing for legal aid eligibility and our proposals for areas that are relevant for both civil and criminal legal aid. These include debt, disregarded types of income and capital, and benefits passporting.
21. Then, we detail our proposals in relation to civil representation and controlled work.
  - Chapter 3 lays out our proposals in relation to the income thresholds for civil legal aid, including benefits passporting and income contributions.
  - Chapter 4 lays out our proposals in relation to the capital assessment for civil legal aid, including the thresholds, equity disregard, pensioners' capital disregard,

disputed assets (which we consider will particularly benefit victims of domestic abuse), inaccessible capital and benefits passporting.

- Chapter 5 lays out our proposals in relation to legal aid for immigration and asylum and civil legal aid for under-18s. It also considers non-means tested areas of civil legal aid.
22. Finally, we detail our proposals in relation to criminal legal aid, and to implementation and review of the new means tests.
- Chapter 6 lays out our proposals in relation to the Crown Court means test, including income thresholds, benefits passporting and income and capital contributions.
  - Chapter 7 lays out our proposals in relation to the magistrates' court income thresholds and those for criminal advice and assistance and advocacy assistance, including benefits passporting.
  - Chapter 8 addresses the implementation of the new means test, including transitional provisions, and considers our approach to future reviews and uprating of the legal aid means tests.

## Strategic aims of the Legal Aid Means Test Review

23. [The government response to the Reform of Legal Aid in England and Wales Consultation](#), published in June 2011, set out the four objectives that the package of reforms implemented by Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was intended to achieve. These were:
- a. To discourage unnecessary and adversarial litigation at public expense
  - b. To target legal aid to those who need it most
  - c. To make significant savings to the cost of the scheme
  - d. To deliver better overall value for money for the taxpayer.
24. Objective (b), the targeting of legal aid to those who need it most, has been the governing principle behind the Means Test Review. We have laid out how we are interpreting this objective in more detail in Chapter 2 (paragraphs 87–90).
25. We have also developed three additional strategic aims for the legal aid means test:
- Fairness** – to ensure that the legal aid means test delivers fair outcomes, enabling people to access justice based on what they are able to contribute towards their legal costs.
- Efficiency** – to deliver public value, saving cost, time and resource where appropriate for all users.
- Sustainability** – to be future proofed and adaptive, securing access to justice in the short, medium and long term.

26. Throughout our policy development, we have aimed to balance these strategic aims appropriately, whilst ensuring that our proposals secure access to justice. We have worked closely with legal aid providers and the Legal Aid Agency to understand the administrative burden of the current means test for providers, applicants and the LAA, and to ensure that our proposals reduce administrative complexity whenever possible, and keep it to a minimum.
27. Inevitably there is sometimes a tension between these aims. For instance, we have proposed that priority debt repayments should be deducted as part of the assessment of an applicant's disposable income. This proposal will require applicants for legal aid to provide evidence to providers and/or the LAA of any agreed debt repayments. However, we think that this additional administrative requirement is justified, because we think it is fair that applicants for legal aid do not have to choose between paying priority debt and paying legal aid contributions or private legal fees.
28. We have set out the rationale behind our proposals throughout this consultation and provided analysis of the impacts in the accompanying Impact Assessments and equalities assessment. The Impact Assessments indicate that some demographic groups are likely to be particularly affected, both positively and negatively. For civil legal aid, individuals from an ethnic minority, women, those aged 31–40 and those who are Muslim are more likely to be affected. For criminal legal aid, men are more likely to be positively and negatively affected, Muslims are more likely to be negatively affected, and younger adults are more likely to benefit. The proposals are likely to lead to some additional costs for businesses, charities or the voluntary sector. Comments on the Impact Assessments are very welcome.
29. We have addressed future uprating of the means test in more detail in Chapter 8.

## Previous consultations

30. As part of our policy development work, we have considered a number of previous consultations covering legal aid eligibility, stretching back to those published by the Lord Chancellor's Department in the 1990s.<sup>1</sup> This work has helped us better understand the current system, which has been crucial when considering whether, and to what extent, we should recommend changes.
31. The Means Test Review has also considered responses to two previous government consultation exercises. The first, [Legal Aid Financial Eligibility and Universal Credit](#), published on 16 March 2017, set out proposals to limit the passporting of Universal Credit recipients to those with zero income from employment. No response to this

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<sup>1</sup> This Department was a predecessor department to the Ministry of Justice.

consultation was published; instead, the Means Test Review has addressed this issue and this consultation includes policy proposals in this area. set out proposals to limit the passporting of Universal Credit recipients to those with zero income from employment. No response to this consultation was published; instead, the Means Test Review has addressed this issue and this consultation includes policy proposals on this area.

32. The second, the [Review of Legal Aid for Inquests](#), was published on 19 July 2018 as a call for evidence. [A response](#) to this call for evidence was published in February 2019; however, this stated that means-testing of legal aid at inquests would be considered separately as part of the Means Test Review.
33. In September 2021, we announced, in our [response to the Justice Select Committee's May 2021 report on the Coroner's Service](#), and taking into account relevant responses to the Review of legal aid for inquests, that we would amend regulations to remove the means test for legal representation at inquests via the Exceptional Case Funding (ECF) Scheme. These amendments to regulations have now been made, and came into force on 12 January 2022. We have additionally considered legal help in relation to inquests; our policy proposals are covered in paragraphs 334–342 below.

## Accelerated items

34. In December 2020, we laid a statutory instrument (SI) to disregard compensation and ex-gratia payments from specific schemes (such as relevant infected blood support schemes and the Criminal Injuries Compensation Authority) from the capital assessment for civil legal aid. This SI also removed the cap on the amount of mortgage debt that can be deducted from a property's value, so that all mortgage debt is now deducted. These changes were made to ensure that victims applying for civil legal aid are not disadvantaged by payments they have received from the specified scheme and also ensure that the means assessment reflects more accurately the capital a person has, thus better determining who is most in need of legal aid.
35. As mentioned in paragraph 33 above, as of 12 January 2022 the means test for legal representation at inquests via the ECF scheme has been removed, and non-means tested legal help is available in relation to an inquest for which ECF has been granted for legal representation.

## Our approach

36. The Means Test Review has been an open and collaborative process throughout, and we are enormously grateful for the detailed feedback provided by legal aid providers and representative bodies on both the current means tests and on early iterations of our policy proposals.
37. In developing the proposals set out in this consultation, we drew on a range of available evidence, including:
- a wide range of LAA qualitative and quantitative data, including detailed feedback on our proposals from LAA operational colleagues
  - feedback on the existing legal aid means test, and suggestions for improvement, from legal aid providers at a series of regional focus groups we ran in February and March 2020, and from a series of interviews we ran with judges across all the relevant jurisdictions at the same time
  - detailed feedback on our initial proposals provided by our Stakeholder Advisory Group (which has met regularly since October 2019, except during the period April to August 2020), and from specialists in particular areas of law
  - the analytical microsimulation model we have built to estimate the potential costs and equalities impacts of our proposed policies, which draws on data from the Family Resources Survey,<sup>2</sup> the Department for Work and Pensions' Policy Simulation Model,<sup>3</sup> and the Legal Aid Agency.
38. This consultation is aimed at anyone with an interest in the legal aid means test in England and Wales. This will include, but is not limited to, legal aid providers and their representative bodies, third-sector organisations providing support to those in need of legal advice or representation, members of the judiciary, defendants in criminal proceedings, those who have been, are currently or may in future be involved in civil legal proceedings (whether represented or as litigants in person), academics and others involved in the justice system. A Welsh language summary is available.

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<sup>2</sup> Family Resources Survey: GOV.UK ([www.gov.uk](http://www.gov.uk))

<sup>3</sup> DWP's policy simulation model and the Family Resources Survey - Office for Budget Responsibility ([obr.uk](http://obr.uk))

# Chapter 1: The current legal aid means tests

39. To be eligible for legal aid, an applicant's legal matter must be in scope for legal aid and they must pass both a merits and a means test. The merits test (for civil legal aid) and the interests of justice test (for criminal legal aid) assess the merits of the case, including the likelihood of success and the benefit to the client. The means test assesses an applicant's financial eligibility. The exception to this is cases which are exempt from the means test ("non-means tested").
40. This chapter summarises the existing legal aid means tests, including the current system for when contributions are payable towards the cost of an individual's legal aid.
41. There are some similarities between the means tests for legal aid for civil and family proceedings, for criminal representation at the Crown Court and at the magistrates' court, and for criminal advice and assistance and advocacy assistance. However, there are also some significant differences between these tests.
42. Therefore, this chapter first outlines elements that are common to all of these means tests, and then describes each specific means test in detail.<sup>4</sup>

## Structure of means test

43. At present, applicants for most types of means-tested legal aid must go through first a gross and then, in some cases, a disposable income assessment.<sup>5</sup>
44. The gross income assessment includes not only the means of the individual applying for legal aid, but also those of their partner, if they have one, unless the partner has a contrary interest (e.g. in a matrimonial dispute). It may include anyone else who is substantially maintaining the applicant (for instance, the parent(s) or guardian(s) of a child under 18). The gross income assessment includes all types of income, before any tax and National Insurance is deducted, unless it is specifically disregarded.

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<sup>4</sup> The governing regulations for the legal aid means tests are the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013; the Criminal Legal Aid (Financial Resources) Regulations 2013; the Criminal Legal Aid (Contribution Orders) Regulations 2013; and the Civil Legal Aid (Statutory Charge) Regulations 2013.

<sup>5</sup> For criminal advice and assistance and advocacy assistance, only a disposable income assessment applies.

Disregarded types of income include benefits intended for a specific type of purpose, such as Personal Independence Payments.<sup>6</sup>

45. The disposable income assessment assesses an applicant's household income following deductions, which include tax and National Insurance, housing and childcare costs and allowances for dependents. The details of how disposable income is calculated vary between the different means tests, and are therefore summarised in the sections about each means test below. Subject to the result of the disposable income assessment, applicants for legal representation in civil and family matters, and at the Crown Court, may be required to make monthly income contributions towards the cost of their legal aid.
46. Applicants for civil legal aid and for criminal advice and assistance and advocacy assistance must additionally go through a capital assessment (outlined in paragraphs 56–61 and 80 below).
47. In the event of a change of financial circumstances, the LAA may reassess the means of legal aid recipients, potentially resulting in higher or lower (or no) contributions being payable, or the individual being found ineligible for legal aid.

## **Civil legal aid means test**

48. The current civil legal aid means test was established in 2001, with some subsequent changes. The income thresholds were increased annually until 2009. To be eligible for legal aid in civil and family matters, an applicant must pass both the income and capital assessments.
49. Civil legal aid encompasses legal representation, which is primarily certificated work (that is, provided via a legal aid certificate issued by the LAA to the provider), and controlled work, for which means and merits decisions are delegated to providers. Controlled work includes legal help (for example, early advice and assistance before court proceedings), family mediation, and controlled legal representation (for certain immigration and mental health matters).

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<sup>6</sup> A full list of income disregards can be found in **Annex A**, and in Regulation 24 of the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013 and Regulation 11 of the Criminal Legal Aid (Financial Resources) Regulations 2013.

### **Income assessment**

50. The gross income threshold for civil legal aid is £2,657 per month (£31,884 per year). If an applicant has more than four dependent children, this threshold is increased by £222 per month for each additional dependent child. Applicants with gross income above this threshold are not eligible for civil legal aid.
51. Applicants with gross income below this threshold then progress to a disposable income assessment. An applicant's disposable income, for the purposes of civil legal aid eligibility, consists of their gross income with deductions for:
- tax and National Insurance
  - child maintenance contributions
  - criminal legal aid contributions
  - rent/mortgage (where the applicant's actual rent/mortgage payments are deducted, except for applicants with no partner or children for whom there is a £545 cap in place)
  - childcare (actual costs arising from work or study outside the home).
52. Additional deductions are made for any other adult or child dependent living in the same household. These allowances, which are taken from those set by the Department for Work and Pensions (DWP) for Income Support purposes, are currently set at £185.54 per month for a partner and £298.08 for any other dependent, including a child of any age. An additional work allowance of £45 per month, to recognise the additional costs of being in work, is applied for each adult in the household who is in work.
53. Applicants with disposable income not exceeding £733 per month following these deductions and allowances are eligible for civil legal aid (subject to the separate capital test, below). Those with disposable income of between £315 and £733 may be required to pay a monthly income contribution towards the costs of their legal representation; however, no income contributions are payable towards legal help or advice, or controlled legal representation.
54. A sliding scale, with three progressive bands, is used to calculate the amount of the monthly income contribution which must be paid for the lifetime of the case: applicants pay 35% of their disposable income between £311 and £465; 45% between £466 and £616; and 70% between £617 and £733. Non-payment of the monthly income contribution may result in withdrawal of the legal aid certificate. If the contributions paid exceed the cost of the case, any excess is refunded at the end of the case.

### Civil legal aid income test: worked examples

#### Example 1

Applicant A has a partner and 3 children aged 3, 5 and 8, and gross household income of £3,500 per month.

**Gross income assessment:** A has gross income above the threshold of £2,657 per month, and is therefore **ineligible for legal aid**, irrespective of their disposable income.

#### Example 2

Applicant B is a single parent with a child aged 15, and gross household income of £2,368 per month.

**Gross income assessment:** B has gross income below the threshold, so progresses to the disposable income assessment.

**Disposable income assessment:** after deduction of tax (£224), NI (£164), rent (£1,000) and dependent's allowance (£298) per month, B has disposable income of £682 per month, and is therefore **eligible for legal aid with a monthly income contribution** of £166.90 for the lifetime of her case.

55. There are also certain payments that are disregarded from the income assessments. Disregarded types of income include payments for a specific purpose, e.g. Disability Living Allowance, and payments for compensation for harm, e.g. payments from the Criminal Injuries Compensation. A table setting out the current income disregards for civil and criminal legal aid can be found in **Annex A**.

### Capital assessment

56. The capital test assesses all of a person's capital, including savings and non-monetary capital such as property, unless it is specifically disregarded. Disregarded types of capital include compensation payments from schemes including the Criminal Injuries Compensation Authority. Once any disregards have been applied, all remaining capital is considered disposable capital. A table setting out the capital disregards for civil and criminal legal aid can be found in **Annex A**.
57. As with income, the resources of the applicant's partner and any other maintaining adult are usually taken into account unless there is a contrary interest.
58. Applicants with disposable capital below £3,000 are eligible for legal aid (assuming they have passed the income assessment) without any capital contribution. Applicants with disposable capital above £8,000 are ineligible for legal aid. Those with capital between £3,000 and £8,000 are required to pay a capital contribution of all their capital above £3,000, up to the estimated cost of their case. As individuals with over £8,000 capital are ineligible, this results in a maximum capital contribution payable of £5,000. For legal help, no contributions are required so only the upper

threshold applies. For certain immigration matters, the capital limit is lower than for other civil cases, and is set at £3,000.<sup>7</sup>

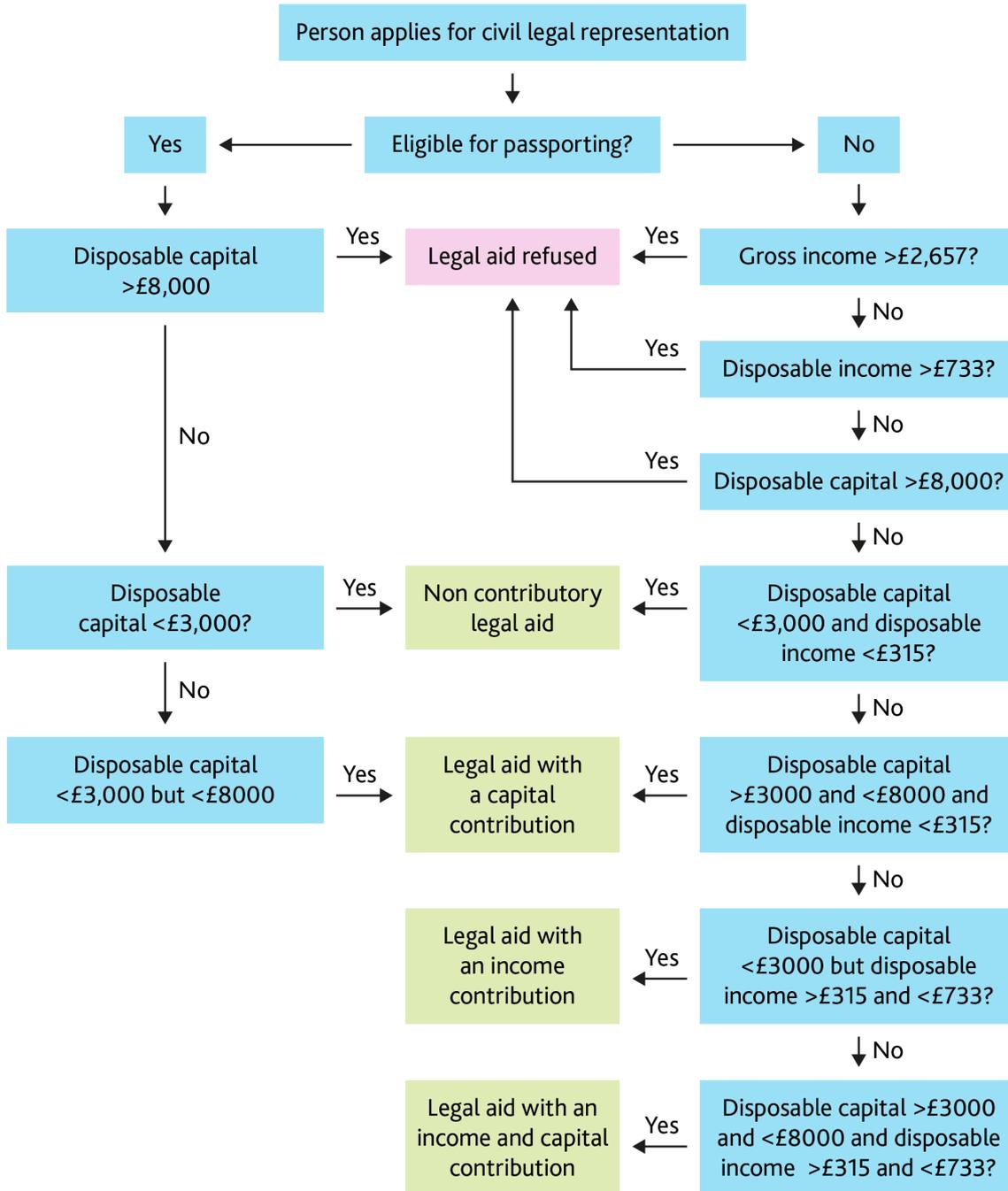
59. The value of any property owned by an individual is included as their capital in the means test, but there are various disregards in place which apply to property. The amount of any mortgage or other debt secured on the property is deducted from the property's value, and where a property is an individual's main residence up to £100,000 of equity is also disregarded.
60. Where an applicant's asset is the subject matter of the dispute – i.e. the subject of the case for which they want legal aid – there is an additional disregard of up to £100,000.
61. The means test contains a capital disregard for pensioners, whereby those aged 60 or over on low incomes can have up to £100,000 of additional capital disregarded, and can therefore be eligible for legal aid whilst having more capital than those aged under 60. The amount of capital disregarded depends on the applicant's disposable income:

<b>Monthly disposable income (excluding net income derived from capital)</b>	<b>Amount of additional capital disregarded</b>
Recipient of a passporting benefit <sup>8</sup>	£100,000
£0-25	£100,000
£26-50	£90,000
£51-75	£80,000
£76-100	£70,000
£101-125	£60,000
£126-150	£50,000
£151-175	£40,000
£176-200	£30,000
£201-225	£20,000
£226-315	£10,000
Above £315	£0

<sup>7</sup> The lower threshold of £3,000 applies to proceedings regarding immigration detention, immigration and domestic violence, modern slavery and human trafficking.

<sup>8</sup> Passporting benefits are defined later in this chapter (paragraph 80 and footnote).

*The current legal aid means test for civil representation*



**Legal aid at the Crown Court**

62. The current means test was introduced at the Crown Court in 2010; it was modelled on the means test for the magistrates’ court, which was introduced in 2006 (see below), but with an additional contributory element and with no upper threshold (however, an upper disposable income threshold was introduced in 2014). The Crown Court means test has not been uprated since its introduction in 2010.

63. All applicants for criminal legally aided representation undergo an initial means test, which assesses their gross income. The Crown Court income test does not have an upper gross threshold but does have an upper disposable income threshold.
64. The Crown Court test also has a lower gross income threshold, currently £12,475 per year. Those with gross income below this level (adjusted for household composition) are entitled to non-contributory legal representation without going through a disposable income assessment.
65. Disposable income is measured by deducting the following from gross income:
  - tax, National Insurance, housing, Council Tax, childcare and child maintenance (actual costs)
  - a fixed cost of living allowance, currently £5,676 per year for a single person
  - further deductions for partner/children (when relevant)
66. It is worth noting that this approach is distinct from that used for the civil legal aid means test, which does not deduct a cost of living allowance when assessing disposable income.
67. Unlike for the civil legal aid means test, the Crown Court means test does not use set allowances for partners and children, but instead uses the McClements equivalisation approach, for both the gross and disposable income assessment, to allow for the additional costs incurred by households of different sizes.<sup>9</sup>
68. Applicants whose annual disposable income is £3,398 or less are entitled to non-contributory legal aid; those with annual disposable income between £3,399 and £37,500 are entitled to legal aid with a monthly income contribution. Legal aid recipients who consider that their assessed monthly income contribution is unaffordable may apply to the LAA for a hardship review; this review may result in a reduced income contribution.

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<sup>9</sup> Equivalisation uses a weighted scale to adjust household incomes according to their size and composition. The McClements scale is as follows; each value is expressed as a proportion of the allowance for a single person (1).

Partner/Spouse	0.64
Each child aged 0-1	0.15
Each child aged 2-4	0.30
Each child aged 5-7	0.34
Each child aged 8-10	0.38
Each child aged 11-12	0.41
Each child aged 13-15	0.44
Each child aged 16-18	0.59

69. Applicants with disposable incomes above £37,500 per year are ineligible for Crown Court legal aid, unless they successfully apply to the LAA for an eligibility review, which takes into account additional outgoings and the potential costs of private representation.<sup>10</sup> In the event that they have applied for legal aid, been refused on grounds of disposable income and are subsequently acquitted, they may claim back the private cost of their defence, capped at legal aid rates, via a Defendant's Costs Order.
70. Those applicants who are liable to pay an income contribution make up to 6 payments at monthly intervals (these are refunded with 2% interest if the applicant is later acquitted). Each monthly income contribution is calculated at 1/12<sup>th</sup> of 90% of their annual disposable income. In practice, this means the minimum monthly income contribution is £255 (£3,399/12 x 90%). To incentivise payment, the applicant is exempt from the 6<sup>th</sup> monthly (or final) income payment if the first five payments are made on time.
71. At the end of the trial, if the applicant is acquitted, any income contributions they have paid are refunded. If they are convicted, they may be liable to pay any outstanding legal aid costs from any capital assets in excess of £30,000. A range of collection and enforcement tools may be used to secure the debt, including placing a charging order against a convicted individual's property. If they have paid income contributions in excess of the cost of their defence, any excess is refunded.

#### **Crown Court income test: worked examples**

##### *Example 1*

Defendant C has a partner and two children aged 16 and 18. The household gross income is £33,000 per year.

**Gross income assessment:** C's gross income is divided by 2.82 to take his family members into account. His adjusted gross income is £11,702. This is below the gross income threshold of £12,475, and **C is therefore entitled to non-contributory legal aid** without undergoing a further disposable income assessment.

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<sup>10</sup> Further details about the hardship and eligibility review processes can be found in the Criminal Legal Aid Manual ([publishing.service.gov.uk](http://publishing.service.gov.uk)).

*Example 2*

Defendant D has a partner and one child aged 2. The household gross income is £50,000 per year.

**Gross income assessment:** D's gross income is divided by 1.94 to take his family members into account. His adjusted gross income is £25,773. This is above the gross income threshold of £12,475, so D must undergo a disposable income assessment.

**Disposable income assessment:** after deduction of tax (£5,484), National Insurance (£3,652), mortgage (£9,800), council tax (£1,818), childcare (£3,600) and Cost of Living Allowance (£5,676 x 1.94), D has a disposable income of £14,635 per year. This is above the lower disposable income threshold of £3,398 per year but below the higher disposable income threshold of £37,500 per year, so **D is entitled to legal aid but must pay an income contribution.**

**Income contribution:** D must pay a monthly income contribution of £1,098 (90% of his disposable income) for up to 6 months.

## Legal aid at the magistrates' court

72. Unlike the Crown Court means test, the magistrates' court means test does not have a contributory element, and there is no capital assessment. It was last updated in 2008.
73. As for the Crown Court means test, any applicant with gross income of £12,475 per year or below (when adjusted for household composition) is entitled to legal aid at the magistrates' court without undergoing an additional disposable income assessment. The magistrates' test also has an upper gross income threshold: applicants with gross incomes above £22,325 are not eligible for legal aid. For applicants with gross income of more than £12,475 but less than £22,325, eligibility is dependent on a further assessment of an applicant's disposable income.
74. The disposable income assessment uses the same approach as that for legal representation at the Crown Court (see paragraphs 65–68 above). The disposable income allowance of £3,398 is derived from the estimated typical cost of a private defence when the magistrates' court means test was introduced in 2006, and is meant to ensure that defendants who fail the means test are able to pay privately for their representation.
75. However, if an applicant has failed the means test but believes they cannot pay privately for their defence (due to extra unavoidable expenditure and/or legal costs they consider unaffordable), they can apply to the LAA for a hardship review, which may result in them being found eligible for legal aid.

## **Criminal advice and assistance/advocacy assistance**

76. Legal aid in relation to criminal advice and assistance (A&A) and advocacy assistance (AA) is available for a range of criminal matters, spanning pre-charge to post-conviction proceedings. Many of these matters are non-means tested (for example, advice at a police station upon arrest; see **Annex B** for a full list), however some areas (such as Prison Law, and advice on appealing a sentence or conviction) are means tested (see Chapter 7, paragraph 459).
77. Where the means test applies, there are different thresholds depending on whether the matter falls under A&A or AA. Neither test assesses gross income. A&A sets a threshold of £99 disposable income per week and £1,000 of disposable capital. AA has a disposable income threshold of £209 per week and disposable capital threshold of £3,000.
78. Disposable income is defined in this context as gross income with deductions for tax, National Insurance, child maintenance payments, and other certain disregarded benefits and payments. There are also further deductions for applicants with partners/children (which, as for civil legal aid, are taken from those set by DWP for Income Support purposes, and are currently set at £42.70 per week for a partner and £68.60 per week for a dependent child). Therefore, unlike other areas of the means assessment, there are no deductions for criminal legal aid contributions, rent/mortgage, or childcare costs.
79. Disposable capital includes all of a person's capital with deductions for the individual's household furniture and effects, clothes, tools and implements of the individual's trade, and any 'back to work bonus' payment. An individual's property is included in this assessment, although the first £100,000 of equity and the first £100,000 of any mortgage on the property is disregarded. As with income, there are some additional capital allowances for applicants with dependants (£335 for a first dependent, £200 for a second dependent and £100 for each additional dependent).

## **Benefits passporting arrangements**

80. Those in receipt of specific means-tested benefits are passported through the income assessment of the various legal aid means tests – i.e. they are deemed eligible for non-contributory legal aid without going through a full means assessment, though

they may still have to undergo a capital assessment.<sup>11</sup> Since 2013, Universal Credit has been considered a passporting benefit on an interim basis. Applicants in receipt of passporting benefits are passported through the income means assessment for all types of civil and criminal legal aid and the capital means assessment for criminal legal aid at the Crown Court and for criminal advocacy assistance.<sup>12</sup>

## Non-means tested legal aid

81. Non-means tested legal aid is available for some specific situations and legal proceedings. Current proceedings exempt from means testing include but are not restricted to: proceedings in relation to the use of accommodation to restrict liberty for a child; care and supervision order proceedings; legal help in relation to Terrorism Prevention and Investigation Measures; proceedings challenging a deprivation of liberty order made by a hospital or care facility; and cases heard by the Mental Health Tribunal.<sup>13</sup>
82. Non-means tested legal aid is also available for advice and assistance at a police station following arrest, duty solicitor support at the police station and magistrates' court, advocacy assistance before magistrates' court or the Crown Court, and for an individual appealing a conviction or sentence to the Court of Appeal or Supreme Court, as well as other types of proceedings.<sup>14</sup>

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<sup>11</sup> The following benefits are passporting benefits: Income Support (IS); income-based Jobseeker's Allowance (JSA); Universal Credit (UC); Guarantee Credit element of Pension Credit (GC); income-related Employment and Support Allowance (ESA). For criminal advice and assistance and advocacy assistance, working tax credit with a disability element, or working tax credit alongside Child Tax Credit, are passporting benefits where the individual's gross income does not exceed £14,213.

<sup>12</sup> Capital passporting benefits for criminal advocacy assistance are limited to Income Support, Income-based Jobseeker's Allowance and Guaranteed State Pension Credit.

<sup>13</sup> A full list of non-means-tested areas of civil legal aid can be found in **Annex B** and in Regulation 5 of the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013.

<sup>14</sup> A full list of proceedings exempt from means testing for criminal legal aid can be found in **Annex B** and in Regulation 5 of the Criminal Legal Aid (Financial Resources) Regulations 2013.

## Chapter 2: Overarching proposals

83. As part of the Means Test Review, we have considered when alignment between the civil and criminal legal aid means tests is justified, and when we should take a different approach. In several areas, we are proposing to increase alignment, as we think there is a strong argument for developing a common approach across some or all of the different means tests.
84. This chapter therefore lays out policy proposals that we are proposing would apply across the various means tests. We are not proposing total alignment in all of these areas, as we consider that in some cases there is a strong argument for different approaches. We have provided more detail about the rationale for our approach under the areas in question.
85. These proposals fall under the following areas:
- Eligibility for legal aid
  - Equivalisation
  - Assessment of disposable income
  - Income disregards
  - Benefits passporting
  - Income contributions

### Eligibility for legal aid

86. As laid out in the Introduction (paragraph 23), one of the objectives of the Legal Aid Reform programme launched in 2011 was that legal aid should be targeted at those who need it most. In line with our historic approach to eligibility for legal aid, we have interpreted this objective as follows.
87. First, the scope of the legal aid scheme should be targeted at those who need it most, for the most serious cases in which legal advice and representation is justified. As well as a defined list of services within the scope of the civil and criminal legal aid schemes, there is also the ability for an individual to apply for ECF, which ensures that legal aid is available where failure to provide legal services would be a breach, or risk of a breach, of an individual's human rights or retained enforceable EU law rights, or (for advocacy at an inquest) where there is a wider public interest. The Means Test Review and this consultation do not consider the scope of legal aid, or the merits test (for civil legal aid) and interests of justice test (for criminal legal aid), which are laid out in Chapter 1 (paragraph 39).

88. Secondly, for most types of legal aid, legal aid should be targeted at those with fewer financial resources available to them, and who are therefore unlikely to be able to pay privately for legal advice or representation.
89. However, there are some types of legal aid where we do not consider that applicants should be excluded solely on grounds of their means. These include some areas of civil and criminal legal aid (such as legal representation in ‘Special Children Act’ proceedings<sup>15</sup> or in front of the Mental Health Tribunal, and advice at a police station following arrest) for which there is no means test at all. There are also some areas, such as applications for protective injunctions, where legal aid is available to all applicants (assuming they pass any necessary merits or interests of justice test, and the waiver of eligibility limits is applied), but, depending on an applicant’s income and/or capital, a contribution may be payable.
90. We consider that applicants with median or above median incomes should not be eligible for most means-tested areas of legal aid, as we do not consider them most in need. However, this approach does not extend to defendants at the Crown Court. Our detailed proposals for legal aid eligibility can be found in Chapters 3 (civil income thresholds), 4 (civil capital thresholds), 6 (Crown Court) and 7 (magistrates’ court and criminal advice and assistance/advocacy assistance).

## Equivalisation

91. Equivalisation is the process by which income is adjusted to take account of the needs of households of different sizes. This helps ensure fairness in the way legal aid resources are allocated, as household composition can have a direct bearing on living costs, and hence whether the individual can afford to pay for or contribute towards their legal costs.
92. At present, the means tests take differing approaches to equivalisation. The civil means test sets a single gross income threshold (with additional allowances for families with 5 or more dependent children), but deducts fixed allowances to cover a partner and any other adult or child dependent living in the same household. These allowances are derived from those set by DWP for Income Support purposes. In contrast, the means tests for criminal legal representation at the Crown Court and magistrates’ court use the McClements approach to equivalisation for both gross and disposable income assessment purposes. The McClements approach, originally

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<sup>15</sup> Special Children Act proceedings are found under part 4 and 5 of the Children Act 1989 (legislation.gov.uk)

developed in 1977, uses different weighting factors depending on the specific age of individual children in a household.

93. We propose to standardise our approach to equivalisation across the civil and criminal legal aid schemes, as we consider it is reasonable to use one single approach to take account of the needs of different household compositions. We propose to use the OECD Modified scale, which over recent years has become the most widely adopted equivalisation scale internationally, and is used by the Office for National Statistics (ONS) as well as DWP. It provides both a Before Housing Costs (BHC) and After Housing Costs (AHC) measure – this is important, as housing costs are a significant driver of the difference in financial needs for larger families. We propose to use the BHC metric when assessing gross income and the AHC metric when assessing disposable income, in line with the means test approach, by which housing costs are deducted from gross income and therefore not taken into account in the disposable income assessment (see paragraphs 99–104 below).
94. For gross income assessment purposes, we therefore propose to adjust the gross income threshold upwards depending on the size of the household. Using the BHC equivalisation metric, for each additional adult or child aged 14 or over, the threshold would increase by 50% of the gross threshold for a single adult; for each child under the age of 14, the corresponding figure is 30%.
95. For disposable income assessment purposes, we propose to set fixed allowances for additional adults and children, based on an AHC equivalisation of the relevant Cost of Living Allowance. The AHC equivalisation metric is 72% of the Cost of Living Allowance for each additional adult or child aged 14+; and 34% of the Cost of Living Allowance for each child under 14.
96. We will lay out the value of these specific allowances, with worked examples, in Chapters 3, 6 and 7, which outline our proposed income thresholds (including the Cost of Living Allowance) for each means test.

**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.

## Assessment of disposable income

97. We consider that our approach towards assessing disposable income should be the same across civil and criminal legal aid, unless there is a specific reason to differentiate. We are proposing some changes to the assessment of disposable income, which we have outlined below.

### Housing, council tax and childcare costs

98. At present, both the civil and criminal means tests deduct the amount applicants pay towards their rent or mortgage costs as part of the disposable income assessment. An exception is applicants for civil legal aid who have no partner or children, for whom there is a £545 monthly cap in place.

99. The Crown Court and magistrates' court means tests also deduct actual Council Tax as part of the disposable income assessment; however, the civil legal aid means test does not. Instead, applicants for civil legal aid are expected to pay Council Tax from their disposable income.

100. We consider that it is fair to deduct actual housing costs. This is because the significant variation in housing costs (including Council Tax), depending on household composition and between different regions of England and Wales, and the fact that housing costs change frequently, mean that to set any type of fixed allowance or cap on housing costs would be complex and difficult. Deducting actual housing costs enables a more accurate assessment of an applicant's disposable income.

101. We therefore propose to continue to deduct actual rent and mortgage payments for the civil and criminal means assessments, and to continue to deduct actual Council Tax as part of the Crown Court and magistrates' means tests.

102. We propose to continue to deduct applicants' actual childcare costs, as at present, there is a wide variation between childcare costs depending on type of provision and location.

103. For the civil legal aid means assessment we propose to remove the £545 cap on housing costs for applicants with no partner or children, and to deduct actual council tax paid as part of the disposable income assessment (as for the Crown Court and magistrates' court means tests). This will align our approach for civil means assessment with that for means assessment at the Crown Court and magistrates' court. We have asked a consultation question on this proposal in Chapter 3, paragraph 169.

**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.

### **Pension contributions**

104. We also propose to deduct **pension contributions** as part of the disposable income assessment for all means-tested legal aid. Since 2001, when the current civil legal aid means test was developed, the government has instituted automatic enrolment, by which employers must automatically enrol qualifying jobholders (unless they specifically opt out) into a pension scheme. We therefore propose that, to ensure alignment with wider government policy, jobholder pension contributions up to 5% of earnings are deducted as part of the disposable income assessment. We have chosen 5% as this is what a jobholder would have to contribute if their employer makes the lowest contribution as required by law, which is 3%.

**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.

**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.

### **Prisoner Earnings Act levy**

105. We propose to deduct any Prisoners' Earnings Act levy as part of the disposable income assessment, for all types of legal aid. Prisoners who work (either inside or outside of prison) have a maximum 40% levy deducted from net income earned over £20 per week. The money is never received by the prisoner and therefore is not available to be used to pay for legal services; however, it is currently considered as disposable income within the means assessment. This proposal will enable a more accurate assessment of disposable income.

**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.

### **Work allowance**

106. The civil legal aid means test includes an additional allowance of £45 per month for any members of the household who are in work, to take account of work travel costs and any other work-related costs. We propose to keep this allowance, as it is aligned with wider government policy to encourage work and ensure that working-age adults are better off in work than out of it.
107. As the current allowance has not been updated since 2001, we propose to raise it to £66 per month, in line with a 2019 Lloyds/YouGov report on average monthly work travel costs<sup>16</sup> (as ONS do not capture this element of spending, and we are not aware of any other recent quantitative research on this topic).
108. At present, the means tests for legal representation at the Crown Court and magistrates' court do not include a work allowance. However, we think that there is a strong rationale for such an allowance, to take account of work-related costs incurred by defendants who are in employment or self-employment. We therefore propose to introduce a work allowance of £66 per month into the Crown Court and magistrates' court means tests.
109. We have included consultation questions on this issue in Chapters 3 (paragraph 171), 6 (paragraph 357) and 7 (paragraph 436).

### **Treatment of debt**

110. At present, the initial means assessments for civil and criminal legal aid do not take into account any debt repayments or liabilities (except mortgage or rent arrears). However, defendants found ineligible for legal aid at the Crown Court or magistrates' court, or required to pay income contributions in Crown Court proceedings which they consider unaffordable, can apply for a review, which considers financial commitments not taken into account by the disposable income test, including debt payments.
111. In recent years, the government's approach to debt has developed, following engagement with a wide range of stakeholders. In October 2018, HM Treasury published a consultation on a "Breathing Space scheme", intended to give people in problem debt the opportunity to take control of their finances and place them on a sustainable footing.
112. On 4 May 2021, the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 came into effect. These provisions give those in problem debt or facing a mental health crisis the right to legal protections from their creditors, who must pause enforcement activity of a "qualifying debt" for a standard period.

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<sup>16</sup> lloyds-bank---commuting-.pdf (lloydsbankinggroup.com)

113. HMT is also developing a Statutory Debt Repayment Plan (SDRP), which plan would enable someone in problem debt to enter a statutory agreement to repay their debts to a manageable timetable. The government plans to consult on draft SDRP regulations and intends, following consultation, to lay those regulations by the end of 2022. When these regulations have been finalised, we will consider our approach to SDRP payments in the context of the legal aid means test.

#### *Our proposals*

114. We consider that the legal aid means test should broadly align with the cross-government approach to people facing problem debt. We are therefore proposing that the means assessment for civil and criminal legal aid deducts agreed repayments of priority debt as part of the disposable income assessment. By agreed, we mean that the applicant should be able to evidence regular repayments, and/or demonstrate a repayment agreement with the creditor.

115. Priority debts are defined by the government-funded Money Advice Service as “debts that carry the most serious consequences if you don’t pay them”. Non-payment of these debts may result in a criminal conviction (potentially resulting in a prison sentence), a fine, disconnection of utilities, repossession or eviction.

116. These include:

- court fines and orders
- Council Tax arrears
- TV Licence arrears
- child maintenance arrears
- gas and electricity arrears
- Income Tax, National Insurance and VAT arrears
- mortgage, rent and any loans secured against your home
- hire purchase agreements, if what is bought is essential – such as a vehicle that is required for work purposes
- missed payments owed to DWP or HMRC
- payments in relation to Individual Voluntary Arrangements.<sup>17</sup>

117. We consider that MoJ should not be asking applicants for legal aid to choose between paying legal aid contributions and paying off priority debt; and that applicants for legal aid should not be found ineligible solely due to being pushed over the upper disposable income threshold by income that is being used for repayment of priority debt.

118. We additionally propose that student loan repayments taken directly from salary (or, for self-employed people, deducted as part of their tax return) should be deducted as

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<sup>17</sup> Priority debts are defined similarly (but more formally) in the FCA handbook.

part of the disposable income assessment, as it is government policy that students should contribute to the cost of their studies, and we consider that these repayments should not be considered as disposable income.<sup>18</sup>

**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.

### **Cost of Living Allowance**

119. At present, the means test for criminal representation draws on a Cost of Living Allowance, which was originally established for the magistrates' court means test in 2005 and then extended to the Crown Court in 2010.
120. This allowance uses median household expenditure (as captured by the annual ONS living costs survey) on a range of items, including all spending considered essential but excluding alcohol and tobacco, restaurants and hotels, and culture and recreation. This enables us to assess how much income individuals need to cover their essential living costs before we consider they are able to contribute anything towards their legal costs.
121. We propose to uprate the Cost of Living Allowance for legal aid at the Crown Court and magistrates' court in line with this existing approach, so that it better reflects ONS data on living costs. Our detailed proposals for this uprating are covered in Chapter 6, paragraphs 358–360.
122. We also propose to introduce a Cost of Living Allowance for the civil legal aid means test. This will be slightly different from the Cost of Living Allowance for the Crown Court and magistrates' court. Our rationale and detailed proposals for this Cost of Living Allowance are covered in Chapter 3, paragraphs 172–178.

### **Income disregards**

123. As outlined in Chapter 1 (paragraph 45), the means test disregards some types of income when assessing an applicant's gross or disposable income, as we consider that these payments should not be counted as money that could be used to pay for legal services. Some income disregards are the same across civil and criminal legal aid, for instance, benefits (like Disability Living Allowance) which are designed to support the additional cost of disability. However, there are some differences; for

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<sup>18</sup> DfE master short document template (publishing.service.gov.uk)

instance, reasonable living expenses provided for as an exception to a restraint order are only disregarded from the criminal legal aid assessment.<sup>19</sup>

124. In evaluating which income payment should be disregarded, we consider that payments made to cover a specific need, for example, to cover disability costs or compensation for harm, should not be taken into account for the income assessment. This is because these payments are intended for a specific purpose, so we would not expect the individual to use this money to pay for legal services.
125. We also consider that we should not disregard payments intended as income replacements. We consider an income replacement to be a payment or (more often) a series of payments made to support general living costs. It will often be made to reflect the fact that an individual is unable or unlikely to be able to work, either full-time or at all. We consider the following are examples of income replacements: state pension, Jobseeker's Allowance and Employment and Support Allowance.
126. We consider that income replacement payments are analogous to earnings, and therefore can potentially be used to pay for legal services, as earnings would normally be taken into account as part of the income assessment. The exception would be where the payment is a passporting benefit, where no income assessment is required.
127. Furthermore, as part of the current income assessment, payments are disregarded on either a discretionary or mandatory basis. Where the disregard is mandatory, the Director of Legal Aid Casework (DLAC) must disregard the payment. On the other hand, where the disregard is discretionary, the DLAC has the discretion to disregard the payment, taking into account any relevant guidance, for example the Lord Chancellor's guidance, but is not obliged to do so. The majority of payments currently disregarded from the income assessment are disregarded on a mandatory basis (see table in **Annex A**). However, there are some payments where the DLAC has an option to exercise their discretion, for example Criminal Injuries Compensation Authority payments.
128. We propose that the following additional payments should be disregarded from the means assessment for all types of legal aid:

**Modern Slavery Victim Care Contract (MSVCC) financial support payments**

129. The National Referral Mechanism (NRM) is the process by which the UK identifies and supports potential victims of modern slavery by connecting them with appropriate

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<sup>19</sup> This is because, under the Proceeds of Crime Act 2002 (POCA), income, property and other capital assets subject to a restraint order cannot be used by the defendant to pay for their defence costs, either privately or in the form of legal aid contributions. However, a restraint order must allow an exception for legal costs for civil and family proceedings.

support, which may be delivered through the specialist Modern Slavery Victim Care Contract (MSVCC), local authorities and asylum services.

130. Potential victims and victims of modern slavery who have entered the NRM, received a positive Reasonable Grounds decision and consented to support from the MSVCC, will be paid financial support on a weekly basis. This payment will continue while they remain in MSVCC support – until they have received a Conclusive Grounds decision. Where an individual has received a positive Conclusive Grounds decision, they will continue to receive financial support for as long as they are assessed to have a recovery need for this assistance through a Recovery Needs Assessment. Financial support is intended to meet the potential victim's essential living needs during this period and assist with their social, psychological and physical recovery.
131. Therefore, we propose disregarding these payments on a mandatory basis when assessing an applicant's income for both the civil and criminal means tests, as these payments are intended for a specific purpose and we would not expect applicants for legal aid to use them to pay for legal services.

**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.

### **Victims of Overseas Terrorism Compensation Scheme (VOTCS)**

132. This government-funded scheme, which has existed since 2012, is designed to compensate victims who sustain injuries from terrorist incidents overseas. The payments under this scheme can either be paid as a lump sum payment or multiple payments. This means that it can be considered as part of the capital assessment and also the income assessment. Proposals to disregard these payments from the capital assessment can be found in Chapter 4, paragraphs 266–268.
133. We propose to disregard these payments on a discretionary basis when assessing an applicant's income for both the civil and criminal means tests. This is because the scheme provides a mixture of payments for compensation for harm as well as payments for loss of earnings.

**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.

134. We also propose that the following payments that are currently disregarded should no longer be disregarded:

### **Back to Work Bonus**

135. Any Back to Work Bonus made under section 26 of the Jobseekers Act 1995 is currently disregarded from the income and capital assessment for civil and criminal legal aid. This scheme was created to encourage unemployed people or those who had been unable to work due to illness or disability to take part-time work and then move into full-time work, with a maximum amount of £1,000 being paid. However, this scheme was abolished on 25 October 2004 and no new payments have been made since. It is highly unlikely that an individual would still have this payment and we do not consider that these payments fit within our rationale as this is not a payment to compensate for harm or for a specific purpose. We therefore propose that these payments are no longer disregarded from the income and capital assessments.

**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.

### **Housing benefit**

136. Housing benefit is currently disregarded from gross income for both the civil and Crown Court and magistrates' court means tests. Actual housing costs (netted off against housing benefit received) are then deducted as part of the disposable income assessment. This disregard was introduced into the civil legal aid means test in 2001, alongside the creation of a threshold limiting eligibility for civil legal aid to applicants with a gross household income below £24,000, whatever the size of household. Previously, the means test had only assessed disposable income.

137. We consider there is no need for housing benefit to be disregarded from gross income in the new means test, as our proposed approach to gross income assessment (see above, paragraphs 92–96), has been designed to take into account the different needs of households of different sizes and compositions, including housing costs.

138. We therefore consider it is fairer to consider housing benefit as income, and to deduct the applicant's actual housing costs as part of the disposable income assessment. This means that we will be treating recipients of housing benefit in the same way as we treat applicants who do not receive housing benefit.

**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.

## Benefits passporting

139. Passporting is the process via which applicants who are in receipt of certain means-tested benefits are deemed eligible for non-contributory legal aid without going through a full means assessment. The following benefits are used as passporting benefits: Income Support (IS); income-based Jobseeker's Allowance (JSA); Universal Credit (UC); Guarantee Credit element of Pension Credit (GC); income-related Employment and Support Allowance (ESA). Currently, applicants in receipt of these benefits are passported through the income means assessment for civil and criminal legal aid, and the capital means assessment for legal aid at the Crown Court which determines whether individuals in receipt of legal aid are required to pay a capital contribution following conviction.
140. Passporting aims to streamline the means assessment process for applicants who have had their means assessed by the Department for Work and Pensions and who are therefore very likely to be eligible for non-contributory legal aid if they underwent a full means assessment. In the interests of having a fair, sustainable and efficient means test, we have considered whether the current policy ensures that passported individuals are likely to have income and capital below the proposed thresholds for non-contributory legal aid. When developing our proposals, we have sought to ensure that applicants will only be passported where it is very likely they would be eligible for non-contributory legal aid.
141. DWP are currently projecting that all recipients of income-based Jobseeker's Allowance, income-related Employment Support Allowance and Income Support will be transferred to Universal Credit by 2024. We propose to continue passporting any remaining recipients of these benefits through the income element of the civil and criminal means tests. Changing our policy on passporting recipients of these benefits for potentially a very short period until these benefits are replaced by UC would create an unnecessary administrative burden. In any case, there is a long history of passporting these benefits, and individuals in receipt of them have to be on a low income and are unable to work over 16 hours per week, so would be unlikely to fail our proposed new means tests.

**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.

142. Individuals in receipt of the Guarantee Credit element of Pension Credit are currently passported through the income assessment for civil and criminal legal aid. Our analysis suggests that most individuals in receipt of legacy passporting benefits,

including Guarantee Credit, would qualify for non-contributory legal aid under the proposed means test (97% for legal help cases and 80% for civil representation). In addition, continuing to passport these individuals will make the means test more efficient, reducing administrative costs for the LAA and providers. We therefore propose to continue passporting recipients of Guarantee Credit.

**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.

143. Our proposals for passporting Universal Credit recipients do not apply to the different means tests in the same way. They are therefore included in chapters 3 (civil legal aid income passporting), 4 (civil legal aid capital passporting), 6 (Crown Court legal aid) and 7 (magistrates' court and criminal advice and assistance/advocacy assistance).

## Income contributions

144. Our proposals in relation to income contributions have been driven by our desire to ensure fairness for the individual. As currently configured, the calculation of the income contribution for Crown Court legal aid is structured such that a defendant whose annual disposable income is £3,398 (equivalent to £283 per month) pays no income contribution, but at £3,399 pays a monthly contribution based on 90% of their total annual disposable income, rather than based on that amount above a specific threshold.

145. This contrasts with the approach taken for civil legal aid where the application of a tiered approach to disposable income above £315 per month (set at 35%/45%/70% of their total annual disposable income – see Chapter 1, paragraph 54) allows for a more progressive calculation of the income contribution.

146. At the same time, a single contribution band set at 90% provides very little financial cushion for the individual. Whilst the new proposed Cost of Living Allowance means that we would not be asking individuals to forsake essential expenditure in order to pay their income contribution, we recognise that some additional flexibility may be helpful (for example, to cover emergency household repairs).

147. Therefore, we propose to align our approach for both the Crown Court and civil legal aid by adopting a progressive and unified tiered approach to calculate the monthly income contribution.

148. We are proposing to draw on the existing tiered system for civil income contributions, but updating the bands to 40%, 60% and 80%. We think that this slightly increased level of contributions will be affordable for legal aid applicants in the light of our proposals in relation to disposable income assessment and the Cost of Living Allowance, aligning with our position that legal aid recipients who can afford to contribute towards the cost of their legal aid should do so.
149. This calculation will apply only to disposable income above the proposed new thresholds, so eliminating any risk of a “cliff edge”. We have set the minimum contribution at 40% as this creates a financial buffer zone for those on lower disposable incomes. As the bands apply progressively, this approach allows us to collect proportionately more from those with higher disposable incomes.
150. In reviewing the existing arrangements, we have also focused on the payment period for income contributions. At the Crown Court, since 2010, the payment period has been pegged at a maximum 6 months to reflect what was previously the average length of time that a trial took to complete from the date of charge. However, as a significant proportion of cases may take much longer to conclude, we have explored options to extend the maximum payment period.
151. For civil legal aid, our analysis of the payment period starts from a different angle as monthly income contributions currently continue for the lifetime of the case. However, we are conscious that some applicants, including those with a meritorious case, may decline an offer of contributory legal aid because of uncertainty about the total amount they may have to pay in income contributions.
152. We believe there is scope to achieve a greater degree of alignment to our approach to the payment period: for civil legal aid, we propose setting a maximum payment period of 24 months, whilst at the Crown Court extending the payment period to a maximum 18 months. We set out our thinking in more detail, with consultation questions, in Chapters 3 and 6.

## Chapter 3: Civil income thresholds, passporting and contributions

153. The current civil means test came into force in December 2001. Its aim (as set out in a consultation document of July 2000<sup>20</sup>) was “to ensure that the available resources are spent on people who most need help, and that people who can afford to contribute towards the cost do so”.
154. The July 2000 consultation document stated, “In most respects, the financial conditions that have been set initially for the new scheme are the same as those that previously applied to legal aid.” The changes proposed were summarised as follows:
- to set the same financial eligibility limits for all levels of [civil and family] service
  - to simplify the rules for means testing and ensure that, so far as possible, the same rules apply to all levels of service
  - to make a number of other changes to make the financial conditions more consistent and fairer.
155. Between 2002 and 2009, the gross and disposable income thresholds for civil legal aid were updated most years in line with inflation. However, the thresholds have not been updated since 2009, and a number of legal aid practitioners have raised concerns that the level at which the thresholds are now set means that some applicants for civil legal aid are finding themselves ineligible on means grounds without being able to afford any private legal fees.
156. As outlined in Chapter 2, we have developed a proposed new approach to civil income thresholds. We consider that it is important that, when setting the new income thresholds, our approach allows for spending on essential living costs. At the same time, we have aimed to balance the needs of those seeking to access legal aid with affordability for the taxpayer, while securing access to justice. Alongside this, we have developed an updated approach to income passporting and contributions for civil legal aid.
157. Our proposals will be consistent with the legal aid reform programme objective that legal aid should be targeted at those who need it most, and the Means Test Review strategic objectives outlined in the Introduction (paragraphs 23–25).

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<sup>20</sup> Community Legal Service: Financial conditions for funding by the Legal Services Commission (Lord Chancellor’s Department, July 2000)

158. The existing civil legal aid means test is summarised in Chapter 1.

## Proposed changes to gross income thresholds

### Upper gross income threshold

159. As laid out in Chapter 1, the civil legal aid means test currently has a gross income threshold of £31,884. Applicants for legal aid with income above these thresholds are found ineligible for legal aid without having to go through a disposable income assessment.
160. This reduces the administrative burden for legal aid applicants and providers, by removing the need for anyone with gross income above these thresholds to go through the disposable income test, given that their gross income means they would be very unlikely to have disposable income below the relevant threshold.
161. We propose to raise the gross threshold, in line with our proposal (see Chapter 2, paragraph 90) that those with median or above median incomes should not be eligible for most forms of means-tested legal aid. We therefore propose to set a new gross income threshold of £34,950 (£2,913 per month) for an individual, as according to Office for National Statistics this figure was the UK median gross income of an individual in the financial year ending 2020.<sup>21</sup>

**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.

162. We additionally propose to adjust (“equivalise”) the gross income threshold to reflect household size and composition using the OECD Modified approach (Before Housing Costs), so that households consisting of more than one individual can have a higher gross income before being found ineligible for legal aid. Using the BHC equivalisation metric, for each additional adult or child aged 14 or over, the threshold would increase by 50% of the gross threshold for a single adult; for each child under the age of 14, the corresponding figure is 30%.
163. Our proposals in this respect, with an accompanying question, are covered in Chapter 2, paragraphs 92–96.

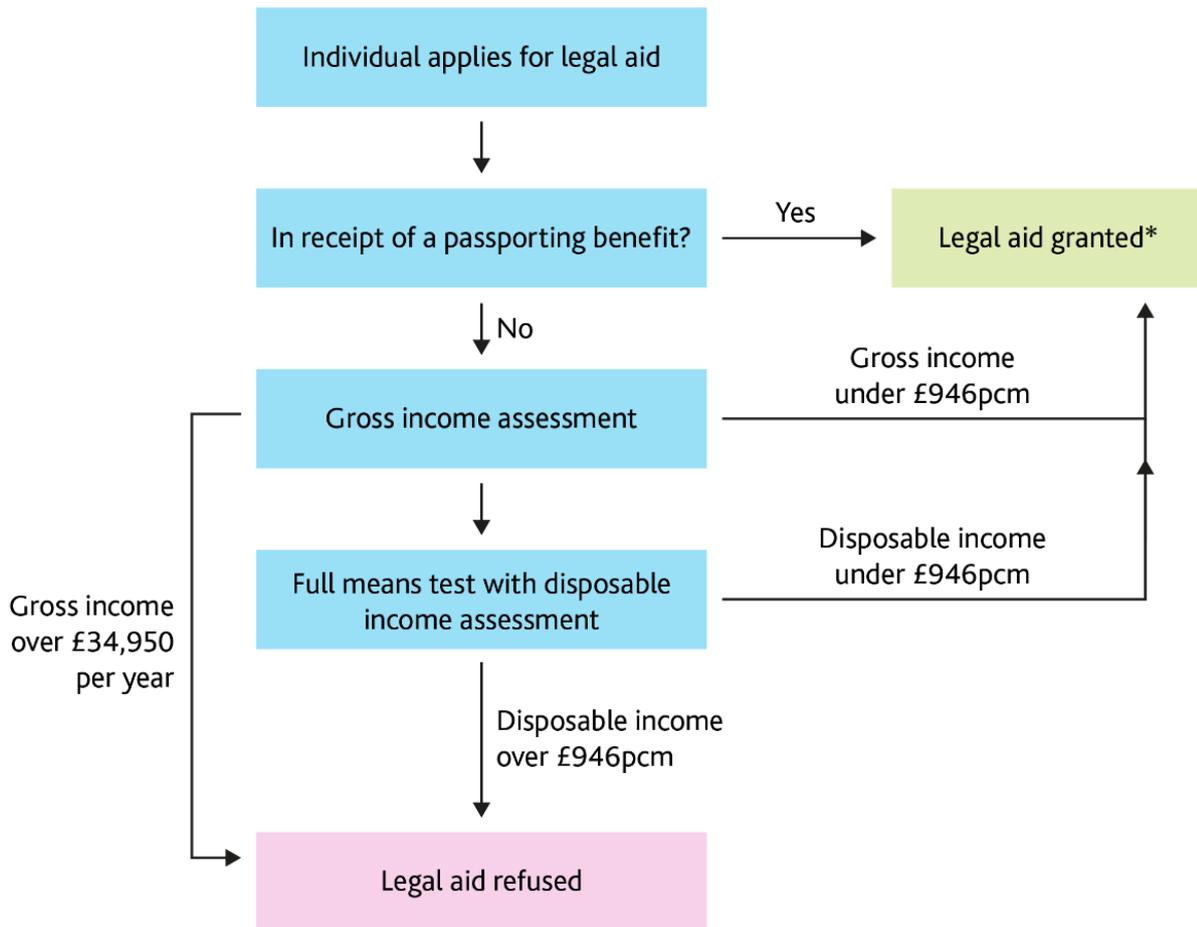
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<sup>21</sup> See **Annex C** for details as to how we have calculated this gross income figure.

### **Lower gross income threshold for controlled work**

164. Throughout the Means Test Review, we have tried to identify ways we might make the means test simpler to administer, for both the LAA and for providers.
165. The means test for the magistrates' court has two gross income thresholds. If an applicant has gross income above the upper threshold, they are not eligible for legal aid. If they have gross income between the two thresholds, they must undergo the full disposable income assessment. If an applicant has gross income below the lower of these thresholds, they do not have to undergo the full disposable income assessment.
166. We propose to introduce a lower gross income threshold for civil controlled work cases as well. This would mean that where an applicant is not passported, the first stage of the means test would be to assess their gross income. If this was below the lower gross income threshold, the applicant would be deemed eligible for legal aid without undergoing the disposable income test. This would mean that applicants with low gross income who are certain or almost certain to pass the disposable income test do not have to go through a full disposable income assessment, reducing the time it takes to means test applicants and the associated cost.
167. We propose to set the lower gross income threshold at the same level as the proposed disposable income threshold for civil controlled work: £11,352 per year (£946 per month) – please see paragraphs 179–181 for more details on the proposed upper disposable income threshold. This will allow for a swift and accurate assessment and in addition, avoids adding another threshold, reducing complexity.

*Proposed income assessment process for civil controlled work*



\*This does not take into account the capital assessment

**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.

## Proposed changes to disposable income assessment and thresholds

168. As laid out in Chapter 2 (paragraph 98), we propose that our approach towards assessing disposable income is the same across civil and criminal legal aid, unless there is a specific reason to differentiate. We are proposing various changes to our approach to assessing disposable income for the purposes of the civil legal aid means test, which are summarised below.

## Housing costs

169. As laid out in Chapter 2 (paragraph 104), we are proposing to remove the £545 monthly cap on allowable housing costs which is currently in place for applicants for civil legal aid who have no partner or children. We are also proposing to deduct actual Council Tax as part of the disposable income assessment. This is because we consider it is fair to deduct actual housing costs, as we consider that this enables a more accurate assessment of an applicant's disposable income.

**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.

**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.

## Proposed additional deductions

170. As laid out in Chapter 2, paragraphs 105–119, we are proposing to deduct pension contributions, any Prisoner's Earnings Act levy, priority debt repayments and student loan repayments from salary as part of the disposable income assessment for all types of legal aid. We have included questions on these proposed deductions in Chapter 2.

171. As laid out in Chapter 2, paragraphs 107–108, we are additionally proposing to keep the monthly work allowance for applicants for legal aid and their partners who are in work, and raise it from its current value of £45 per month to £66, in line with a 2019 Lloyds/YouGov report on average monthly work travel costs. We think that this aligns with wider government policy to encourage work and ensure that working-age adults are better off in work than out of it.

**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.

## Proposed Cost of Living Allowance and lower disposable income threshold

172. We are proposing a new civil Cost of Living Allowance, based on the annual ONS survey of household expenditure (titled the Living Costs and Food survey), which will form the new lower disposable income threshold for civil legal representation. The aim of this approach is to put in place a regime which means that applicants for civil legal aid do not need to forgo expenditure on essential living costs to fund their legal aid contributions, while ensuring that those who can afford to contribute do so.

173. As outlined above, we propose that civil legal aid should not be available to those with median or above median household income. For the same reason, we propose to use the average spending of the lower 50% of the population (by income), as captured by the most recent (2019–20) ONS Living Costs and Food survey, as a basis for the civil Cost of Living Allowance.
174. The ONS Living Costs and Food survey breaks down expenditure into a number of categories. We consider the following ONS categories to be essential spending: food and non-alcoholic drinks, clothing and footwear, utilities, household goods and services, health, transport, communication, and miscellaneous goods and services. Therefore, we have included these elements in full. The breadth of coverage of the ONS Living Costs and Food Survey means that it captures all types of household expenditure, including not only day-to-day spending on food, clothing, transport and utilities but also items (such as insurance or furniture) which households purchase annually or less often. This means that this approach enables households to accrue for major purchases. We have included a full breakdown of the elements we are proposing to include in our Cost of Living Allowance in **Annex C**.
175. When the existing criminal cost of living allowance was developed, it was decided not to include average expenditure on alcohol, tobacco, hotels and restaurants, and culture and recreation when finalising the composition of the living allowance, on the grounds that it was fair to discount these categories.
176. For our new civil Cost of Living Allowance, we propose not to include any expenditure on alcohol, tobacco, culture, recreation and hotels, as we do not consider this to be necessary spending. However, we have included spending on restaurant, café and takeaways meals, as we consider that not to do so would risk underestimating spending on food. Including this spending also means that recipients of non-contributory civil legal aid should be able to afford some level of social and cultural participation.<sup>22</sup> We have not included education as spend in this category comprises almost entirely school fees, which since 2001 have not been an allowable deduction for civil legal aid purposes.
177. Using this approach, our proposed lower disposable income threshold for civil legal aid would be **£622 per month** for a single adult, compared to £316 at present.

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<sup>22</sup> To be specific: we have included £11.55 per week from the ONS restaurants and hotels line, to cover food and non-alcoholic drink out of the house, as otherwise our food and non-alcoholic drink allowance would not account for all food spend. This also means that, although we have not included an allowance for social and cultural expenditure, in practice an applicant with spending in line with the national average would be able to use this weekly amount for a takeaway with friends, or socialising in a café or similar establishment.

178. See paragraphs 182–185 below for our proposals in relation to different household compositions.

**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.

**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.

### **Upper disposable income threshold**

179. The upper disposable income threshold sets the boundary between those entitled to contributory civil legal aid and those not entitled to legal aid.

180. In line with our overarching approach to civil legal aid eligibility, we propose to set the upper disposable income threshold at the average spending of the median UK household, based on the ONS Living Costs and Food survey. This is because, as laid out in Chapter 2 (paragraph 90), we do not think that means-tested civil legal aid should be available to those with average or above average incomes, because we do not consider them most in need. Similarly, we consider that it is reasonable that civil legal aid is not made available to those who can sustain above average spending. We have made only minor exclusions from the list, removing spend on alcohol, tobacco, gambling and (as laid out in paragraph 176 above) education.

181. This would set the **upper disposable income threshold at £946 per month**, compared to £733 at present.

**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.

**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.

### **Allowances for dependents**

182. As discussed in Chapter 2 (paragraphs 92–96), we are proposing to use the OECD Modified approach to equivalisation to ensure that the legal aid means test takes into account the costs of different household compositions.

183. For disposable income assessment purposes, we propose to set fixed allowances for additional adults and children, based on the OECD Modified After Housing Costs equivalisation metric. This stands at 72% of the Cost of Living Allowance for an adult or child aged 14 or over and 34% for a child under 14, and rounded to the nearest pound.
184. If, as proposed, the Cost of Living Allowance is set at £622 pm for a single adult, then the allowances for other household members would therefore be as follows:
- For each additional adult and child aged 14 or over:  $£622 \times 0.72 = £448$
- For each child under 14:  $£622 \times 0.34 = £211$
185. These allowances would be deducted from an applicant's income as part of the disposable income assessment, as at present.

**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.

**Worked examples: proposed new civil means test**

Example 1

Applicant E has one child aged 12 and monthly gross household income of £3,000 (£36,000 per year).

**Gross income assessment:** Applicant E's adjusted gross income threshold would be £34,950 per year with an additional allowance of 30%; hence £45,435. They would therefore pass the gross income assessment.

**Disposable income assessment:** following deductions for income tax, National Insurance, childcare, pension contributions, housing costs and council tax (£1,893 in total), the work allowance of £66, and a deduction of £211 for one dependent under the age of 14, Applicant E's disposable income would be **£830 per month**.

Applicant E would therefore be eligible for non-contributory civil legal help, and for civil legal representation with an income contribution of £102.60 per month.

*Example 2*

Applicant F has a partner and two children aged 6 and 3, with a monthly gross household income of £5,000 (£60,000 per year).

**Gross income assessment:** Applicant F's adjusted gross income threshold would be the base threshold of £34,950 per year with an additional allowance of 50% for their partner and 30% for each child; hence £73,395. They would therefore **pass the gross income assessment**.

**Disposable income assessment:** Following deductions for income tax, national insurance, pension contributions, childcare, housing costs and council tax, (£3,547 in total), the work allowance of £66 for both Applicant F and their partner, and a deduction for one adult dependent (£448) and two dependents under 14 (£211 each), Applicant F's disposable income would be **£451 per month**.

Applicant F would therefore be eligible for civil legal representation and civil legal help without any requirement to pay a contribution.

*Example 3*

Applicant G has no dependents and a monthly gross household income of £2,400 (£28,800 per year).

**Gross income assessment:** Applicant G has gross income below our proposed threshold and therefore **passes the gross income assessment**.

**Disposable income assessment:** Following deductions for income tax, national insurance, pension contributions, student loan repayments, housing costs and council tax (£1,483 in total), and the work allowance of £66, Applicant G's disposable income would be £851.

Applicant G would therefore be eligible for non-contributory civil legal help, and for civil legal representation with an income contribution of £113.60 per month.

*Example 4*

Applicant H has a partner and two children aged 4 and 7, with a monthly gross household income of £6,250 (£75,000 per year).

**Gross income assessment:** Applicant H's adjusted gross income threshold would be the base threshold of £34,950 per year with an additional allowance of 50% for their partner and 30% for each child; hence £73,395. Applicant H would be therefore ineligible for civil legal aid due to having gross income over the threshold.

## **Income disregards**

186. As set out in Chapter 2, paragraphs 129–133, we are proposing a number of changes to the payments which are disregarded from the income assessment. We propose that payments made to cover a specific need, for example, to cover disability costs or compensation for harm, should not be taken into account for the income assessment, whereas payments that are intended as income replacements should not be disregarded.
187. Specifically, we are proposing to disregard payments in relation to the Modern Slavery Victim Care Contract (MSVCC) and Victims of Overseas Terrorism Compensation Scheme (VOTCS) from the income assessment for civil and criminal legal aid. We are also proposing to remove two existing income disregards, for housing benefit and Back to Work allowance.
188. Please see Chapter 2, paragraphs 129–138, for consultation questions on these proposed changes to income disregards.

## **Approach to means assessment for applicants receiving temporary support**

189. As laid out in Chapter 1 (paragraph 44), the legal aid means test takes into account not only the resources of the individual applying for legal aid but also those of his or her partner, and of anyone else who is substantially maintaining the applicant.
190. The criminal legal aid guidance states clearly that the means assessment “would not normally include someone providing lodgings and food on a temporary basis”.<sup>23</sup> However, the civil legal aid guidance does not cover this point, and we have had a number of questions from stakeholders on our policy approach in this area.
191. We consider we should not take into account the means of someone who is supporting the applicant on a purely temporary basis – for instance (as in one scenario which has been raised with us), a relative who is temporarily supporting a separated migrant child whilst their immigration/asylum claim is settled. Doing so might risk an individual being denied legal aid on the basis of resources that they do not have access to.
192. We therefore propose that that the civil legal aid means test, like that for criminal legal aid, does not take into account such resources.

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<sup>23</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1033018/criminal\\_legal\\_aid\\_manual\\_november\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033018/criminal_legal_aid_manual_november_2021.pdf) p.78

**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.

## Benefits passporting

193. As set out in Chapter 2 (paragraphs 139–140), applicants who are in receipt of certain means-tested benefits are deemed eligible for non-contributory legal aid without going through a full means assessment. We refer to these benefits as passporting benefits. We have reviewed the current list of passporting benefits with the aim of understanding whether recipients of these would be likely to pass the civil means test for non-contributory legal aid and have developed proposals on this basis.
194. As also laid out in Chapter 2, we propose to continue passporting remaining recipients of income-based Jobseeker’s Allowance, income-based Employment and Support Allowance and Income Support, plus recipients of the Guarantee element of Pension Credit, through the income assessment for all types of legal aid.
195. However, we are proposing a different approach for Universal Credit, which we explain below.

### **Universal Credit (UC) as a passporting benefit**

196. Since 2013, all recipients of UC have been passported through the civil and criminal legal aid means tests, on an interim basis. UC replaces six other benefits, known as ‘legacy benefits’ of which three are passporting benefits (income-based Jobseeker’s Allowance, income-related Employment Support Allowance, and Income Support) and three are not passporting benefits (Child Tax Credit, Working Tax Credit and Housing Benefit).
197. As UC incorporates a wider range of benefits than the previous passporting benefits, some applicants receiving UC are currently being passported where, if they had been means assessed, they would be required to pay income contributions or be ineligible for legal aid. This is also due to the structure of UC, which aims to support people to work where possible and to make work pay. It does this by slowly reducing an individual’s UC entitlement as their earnings increase (via a “taper”).
198. Passporting all UC recipients has therefore generated a significant cost and results in inconsistent outcomes for civil legal aid applicants who do not receive UC but have similar levels of income. Some individuals are unable to apply for UC and are therefore disadvantaged by the current system (e.g. pensioners, students and those

on non-passporting legacy benefits). This disparity will remain if we continue passporting all UC recipients.

### **Our proposals for Universal Credit passporting**

199. We propose to implement a household earnings threshold of £500 per month for UC recipients applying for civil legal aid, with DWP's 'take home pay' figure used as the measure of earnings. Take home pay is what is left after tax, National Insurance and any pension contributions have been deducted. Universal Credit recipients with household earnings over £500 per month would not be passported and would instead undergo a full income assessment.
200. We consider that a £500 earnings threshold represents a good balance between passporting as many individuals as possible to maximise operational efficiency, while minimising passporting individuals who would not otherwise be eligible for non-contributory legal aid.
201. In 2017, we published a consultation titled *Legal aid financial eligibility and Universal Credit*, in which we proposed to passport only Universal Credit recipients with zero earnings (that is, those who before the introduction of Universal Credit would typically have been eligible for income-based Jobseeker's Allowance or Employment and Support Allowance). We did not publish a response to this consultation.
202. Having carried out detailed analysis, we have concluded that 99% of households earning between £0 and £500 per month would be eligible for non-contributory legal aid under the new proposed means test. We use this comparison because this is broadly equivalent to the passporting system before the introduction of UC. In contrast, if we continued to passport all UC recipients through the civil legal aid means assessment, only 73% of passported individuals would be eligible for non-contributory legal aid under the new proposed means test. Please see the Impact Assessment for civil legal aid for more details on this analysis.
203. This policy creates much more parity in the means-testing treatment of those in receipt of UC and not in receipt of UC, making the means test fairer.
204. We acknowledge that this will increase the administrative burden for civil legal aid practitioners, as more individuals will undergo a full means assessment compared to our current policy of passporting all UC recipients. However, when UC has been fully rolled out and the new means test is implemented, the number of passported applications will remain broadly the same as at present, and will be greater than the number of passported applications prior to the introduction of UC (5.1m adults or 11% of the population will be passported through the income assessment, compared to 4.5m adults or 9% under the legacy system). This is because prior to UC, people in receipt of some in-work benefits were not passported, whereas they can be under our proposals where their earnings do not exceed £500pcm. However, it is likely that

there will be a medium-term increased administrative burden, as it will take time for all legacy benefits recipients to be moved onto UC.

205. We acknowledge that this may result in an additional administrative burden on practitioners, particularly for legal help cases. We have therefore considered how we can reduce the administrative burden placed on practitioners and we are proposing some changes to the means test which we think will reduce the admin burden – notably the introduction of a lower gross income threshold for legal help cases, as set out above in paragraphs 164–167, and the reintroduction of capital passporting for individuals on passporting benefits who do not own property (see Chapter 4, paragraphs 283–287). We welcome views on other ways we can reduce the administrative burden of the means test.
206. Some applicants for civil legal aid will be negatively affected by this proposal, in comparison to our current policy of passporting all UC recipients. Individuals would be disadvantaged if they have household earnings over £500pcm and their gross and/or disposable income is over the proposed threshold for non-contributory legal aid. These individuals would no longer be passported and would have to go through a full assessment. This could result in either having to pay an income contribution or in some cases being ineligible for legal aid.
207. We have analysed the types of household which are particularly likely to be affected and found that this is the case for people with children, particularly lone parents. This is likely to be because these applicants will benefit from the UC work allowance, which allows individuals to retain UC payments whilst having a higher level of earnings than other UC claimants. In addition, parents on UC receive the child element of UC, which can exceed the proposed allowances for children in the civil legal aid means test. Please see the Impact Assessment for civil legal aid for more details on how different household types are affected.
208. We consider it reasonable that some applicants will be negatively affected compared to the current policy as it will mean applicants on UC are treated in the same way as those who are not on UC, which we think is fair, particularly as we are proposing significant increases to the disposable income thresholds. In addition, DWP's means test has different aims to the legal aid means test: it 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. Some UC households will be on middle incomes, sometimes exceeding £40,000 a year, and receiving only a small amount of UC. As a result, DWP may consider an individual eligible for UC whilst we may consider that same individual is able to contribute to their legal costs. In relation to parent households specifically, we consider that the proposed allowances in the means test for children are fair.

209. The Means Test Review considered continuing to passport all applicants in receipt of UC through the income assessment for civil legal aid. However, this policy option would fail to align outcomes for applicants in receipt of UC and applicants not in receipt of UC. Further, significant numbers of applicants would be passported who would not otherwise be eligible for non-contributory legal aid if they had undergone the income assessment. This option would therefore not be in line with the objective of the legal aid reform programme that legal aid should be targeted at those most in need and would in turn result in a significant cost pressure on the legal aid fund.

**Worked example of an applicant who is no longer passported**

Applicant I has two children aged 7 and 5 and monthly gross household income of £2,366 (£28,392 per year), which is made up of £900 earnings plus Universal Credit and child benefit.

**Gross income assessment:** Applicant I's adjusted gross income threshold would be £34,950 per year with an additional allowance of 30%+30%; hence £55,920. They would therefore **pass the gross income assessment**.

**Disposable income assessment:** following deductions for income tax, national insurance, pension contributions, housing costs and council tax (£934 in total), plus the work allowance of £66 and £422 for two dependents under 14, their disposable income would be £944.

Applicant I would therefore be eligible for non-contributory civil legal help, and for civil legal representation with an income contribution of £192.84 per month.

**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.

**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?

**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?

## **Income contributions**

210. Our current approach to income contributions for civil representation is summarised in Chapter 1 (paragraphs 53–54). As laid out in Chapter 2 (paragraphs 147–148), we are proposing to align, in some respects, our approach to income contributions for representation in civil and family proceedings and at the Crown Court.

### **Payment period**

211. As discussed in Chapter 2 (paragraphs 150–152), we are proposing to limit the period for which income contributions are payable, to a maximum of 24 months (or the lifetime of the case, if shorter). This will enable applicants for civil legal aid to have certainty about the maximum possible amount they may have to pay in income contributions.
212. For civil certificated work, some offers of contributory legal aid are not accepted by the client. In 2018/19 and 2019/20, nearly 1,000 offers of contributory legal aid were declined each year, representing about 20% of all contributory offers made by the LAA during this period.
213. We believe that, in some cases, non-acceptance is linked to the perceived unaffordability of the individual monthly income contribution. Our changes to the income thresholds should help to address this. However, stakeholders have suggested that some individuals may decline an offer given the financial uncertainty over the total number of monthly income payments they will have to make.
214. In addition, we are aware that some cases may take longer to conclude than others, through no fault of the client – this could be for many reasons, which may have been exacerbated by the Covid-19 pandemic.
215. Drawing on nearly 11,000 cases that concluded pre-pandemic (these covered the calendar years 2017, 2018 and 2019), we identified an average mean case duration of 23 months (case duration is measured from the point that the certificate is granted to conclusion of the case).
216. Other behavioural drivers may be at play where the client does not accept the offer of legal aid. For example, an emergency funding certificate may be granted by the solicitor and it is possible that no further work is required once the formal offer of contributory legal aid is subsequently made; cases may also resolve before the offer is made – it can take weeks or months for the application to be processed, particularly if complex finances are involved.

217. We are proposing a time cap of 24 months, to reflect the mean case duration (rounded up) as we believe this would provide an adequate incentive to influence behaviours by providing greater certainty for the individual. If the individual's case concludes within the time cap then, as at present, no further income contributions will be required from the date the case finishes.

**Tiered contribution model**

218. We are also proposing (see Chapter 2, paragraph 148) to maintain the tiered contribution approach, but to increase the percentage rates payable (see Table 1). As laid out in the Introduction (paragraph 25), we consider that those who can afford to contribute to their legal aid should do so, and we consider that these slightly increased contribution rates will be affordable in the context of our increased income thresholds. The contribution rates would consist of three bands of £108 each, distributed evenly between the proposed lower and higher disposable income thresholds. The existing contribution rates are shown in Table 2.

219. We believe that the progressive structure of our proposed approach allows the contribution to be calculated in the fairest way, and think that these increased contribution rates should be affordable, given our proposed increases to the disposable income thresholds

<p><i>Table 1: proposed new income contribution rates, per month</i></p> <p>Band A (40%): applies to disposable income between £622 and £730</p> <p>Band B (60%): applies to disposable income between £730 and £838</p> <p>Band C (80%): applies to disposable income between £838 and £946</p>
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<p><i>Table 2: existing income contribution rates, per month</i></p> <p>35% band: applies to disposable income between £311 and £465</p> <p>45% band: applies to disposable income between £466 and £616</p> <p>70% band: applies to disposable income between £616 and £733</p>
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**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.

### **Worked examples**

#### *Example 1*

Applicant J has monthly disposable income of £800.

For her monthly income contribution, she pays 40% of her disposable income between £622 and £730 (£43.20) and 60% of her disposable income between £730 and £800 (£42).

She therefore pays a total monthly income contribution of **£85.20**.

#### *Example 2*

Applicant K has monthly disposable income of £920.

For his monthly income contribution, he pays 40% of his disposable income between £622 and £730 (£43.20); 60% of his disposable income between £730 and £838 (£64.80); and 80% of his disposable income between £838 and £920 (£65.60).

He therefore pays a total monthly income contribution of **£173.60**.

#### *Example 3*

Applicant L has monthly disposable income of £700.

For her monthly income contribution, she pays 40% of her disposable income between £622 and £700 (£31.20).

She therefore pays a total monthly income contribution of **£31.20**.

### **Minimum contribution**

220. We also propose to increase the minimum contribution payable per month to £20 (currently £1.75). This means that only those with more than £672 disposable income per month will have to pay an income contribution. This will create an additional buffer to support financial commitments that are not allowed for by the Cost of Living Allowance.

221. At the same time, raising the minimum monthly contribution to £20 is more cost effective for the LAA, which will no longer have to divert administrative resource to collect much lower value contributions.

**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.

## **Chapter 4: Civil capital thresholds, disregards and passporting**

222. This chapter sets out our proposals in relation to the capital test for civil legal aid. This includes the capital thresholds, capital disregards and capital passporting arrangements. In order to be eligible for legal aid, individuals must pass both the income and capital tests.
223. As set out in Chapter 1, the current civil means test for civil legal representation contains a lower capital threshold of £3,000, whereby individuals with capital up to this amount are eligible for legal aid (assuming they have passed the income assessment) without any capital contribution. The upper threshold, above which individuals are ineligible for legal aid, is £8,000. For controlled work, only the upper threshold of £8,000 applies as there are no contributions.
224. These thresholds have been set at this level for over twenty years. The rationale for these thresholds was alignment with DWP's thresholds for Income Support, in order to ensure parity between legal aid applicants receiving Income Support (who were passported through the capital test at that time) and other applicants. However, the thresholds used in the means test for welfare benefits have since increased to £6,000 and £16,000, so they are no longer aligned with those used in the legal aid means test.
225. We consider that means-tested civil legal aid should not generally be available to claimants with median or above median capital, as these claimants cannot be considered "most in need" from a financial point of view. This aligns with our approach to the income thresholds, as set out in Chapter 2, paragraph 90. This forms the basis for our proposals on the capital elements of the means test.

### **Disposable capital thresholds**

226. We propose to increase the lower capital threshold from £3,000 to £7,000, and to increase the upper threshold from £8,000 to £11,000. As is currently the case, individuals with capital between the thresholds would be required to pay a capital contribution of all their capital over the lower threshold, up to the estimated cost of their case.
227. We consider the purpose of the lower capital threshold links to financial security: people may be subject to unexpected necessary expenses on top of their day-to-day living costs, so it is important that the means test enables individuals to retain a level

of savings for such costs. The rationale for increasing the lower threshold to £7,000 is based on advice from the Money and Pensions Service (MaPS, an arm's-length body of DWP) that individuals should aim for three months' essential expenditure available in savings; however, saving what you can afford regularly, even if it is below this amount, is an important behaviour the MaPS wants to encourage. The purpose of encouraging people to save is so that they can build a financial cushion which could cover a period of unemployment or unforeseen costs. MaPS consider three months' expenditure a suitable amount because it gives individuals a reasonable amount of time to adjust to a change in their financial circumstances – for example, by finding a new job.

228. What constitutes essential expenditure will vary for everyone depending on their living costs and personal circumstances, but we have calculated a proxy for this in line with our objectives that civil legal aid will not generally be available to those with above average wealth. We have used data from the ONS Living Costs and Food survey on average monthly expenditure for the median UK household to calculate a figure for three months of £7,000.<sup>24</sup> Setting the threshold at this level should generally avoid individuals being asked to make a capital contribution which could put them in financial difficulty, as they will be able to retain MAS's suggested three months' essential expenditure. This will help to protect access to justice by making legal aid capital contributions more affordable.
229. We have developed a better measure for essential expenditure by using the average expenditure of the median UK household but removing categories of spending which we do not consider are essential. Where possible, we have aligned the categories of essential spending with those used in the Cost of Living Allowance (COLA) proposed in Chapter 2, but in areas where the COLA uses an applicant's actual spend (e.g. housing costs) we have used ONS's average expenditure figure in the data. We took this approach because using an applicant's actual spend would result in a different capital threshold for each individual applicant, which would be very complex to administer and would make it difficult for applications to understand eligibility requirements. In addition, it is more appropriate to use an applicant's actual spend for income than for capital, because the purpose of the lower capital threshold is to provide a financial safety net, whereas the COLA relates to costs that an applicant will certainly need to pay each month.
230. The threshold will be the same for all households, as equivalisation is an approach that has been developed specifically in relation to income, and as far as we are aware, there are no comparable approaches being used in relation to capital. This is likely to be because people may use savings for a wide range of costs, many of

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<sup>24</sup> 'Detailed expenditure by region and gross income decile group, UK, financial year ending 2017 to financial year ending 2019'

which (for example, household repairs) do not necessarily increase with household size.

231. The purpose of the upper capital threshold is to identify those who are ineligible for legal aid. The proposed upper threshold figure of £11,000 is based on median household financial wealth, i.e. the median value of households' financial assets, such as savings accounts or investments.<sup>25</sup> The rationale for this approach is that those with above average wealth should not generally be eligible for legal aid as they cannot be considered the "most in need" from a financial perspective. Please see **Annex D** for a detailed explanation of how we calculated both capital thresholds.
232. We are not proposing to align the capital thresholds, or the legal aid means test more generally, with the means test for welfare benefits. This is because we consider the legal aid means test should reflect the aims of legal aid policy, which are different to the aims of welfare benefits policy. For example, welfare policy aims to encourage responsible saving by claimants, whereas MoJ might expect those individuals to use their savings to contribute towards their legal costs, as a privately paying client would be expected to do.

**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.

## Equity disregard for the main residence

233. Under the current means test, where a property is an individual's main residence up to £100,000 of equity is disregarded. This is known as the equity disregard. The equity disregard exists to avoid those on low incomes and with no other capital having to sell their homes to fund a legal case – other than in cases where they have a substantial sum of money locked up in the value of their house. It also exists to allow for the relative difficulty a person might have in accessing the capital compared to more liquid forms of capital. Individuals on low incomes, including those in receipt of benefits, may find it hard to secure a loan on their house, so they may have to sell it in order to access the capital, and this may take several months or more.
234. The current £100k value of the equity disregard was introduced in 1996 and was last reviewed in 2010–11 as part of the *Proposals for the Reform of Legal Aid in England*

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<sup>25</sup> 'Financial wealth: wealth in Great Britain, July 2006 to June 2016/ April 2014 to March 2018', Table 5.6

*and Wales* consultation. Prior to 1996, the whole value of the primary residence was disregarded.

235. We propose increasing the equity disregard to the average (median) level of equity in homes. This would increase it to £185k, based on the latest ONS data.<sup>26</sup> This would address the devaluation of the existing disregard caused by rising house prices since it was last reviewed. This is a substantial amount of capital to disregard, particularly since 37% of people do not own a home,<sup>27</sup> but we think this is justified because it allows for the greater difficulty of accessing capital tied up in property, whilst also ensuring that legal aid is targeted at those most in need.
236. We acknowledge that some people may still have to choose between selling or taking out a loan on their house, not bringing their case to court (where possible) or representing themselves. There are other ways of funding legal services (e.g. pro bono services, no win no fee arrangements and legal insurance) but these may not be available to everyone. However, we think this proposal is fair because legal aid should be directed at those who are most in need, and we do not consider that this includes those who own property and have above average levels of equity.

### Worked examples

These examples use the full proposed means test – for example, they use the proposed capital thresholds, as well as the proposed equity disregard. They also assume the applicant has passed the income test and has no other capital – e.g. savings. In all four examples, the applicant would currently be ineligible for legal aid due to capital above the current thresholds.

#### *Example 1*

Applicant M owns a property worth £200,000 with no mortgage.

Under our proposed means test, Applicant M would have 3% of the value of the property (£6,000) deducted for selling costs, following which the £185,000 equity disregard would be applied.

Applicant M would therefore have remaining capital of £9,000, which is above the lower capital threshold of £7,000 but below the upper capital threshold of £11,000. Applicant M would therefore **be eligible for legal aid with a capital contribution of up to £2,000.**

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<sup>26</sup> Summary statistics on equity held in main residence by age of household reference person (HRP) - Office for National Statistics (ons.gov.uk). This data refers to equity levels in April 2016 to March 2018.

<sup>27</sup> Home ownership - GOV.UK Ethnicity facts and figures (ethnicity-facts-figures.service.gov.uk)

*Example 2*

Applicant N owns a property worth £420,000, with a £225,000 mortgage.

Under our proposed means test, Applicant N would have the entire value of the mortgage deducted, as well as 3% of the value of the property (£12,600) deducted for selling costs.

Following this, the equity disregard of up to £185,000 would be applied to the remaining £182,400 of equity.

Applicant N would therefore have no remaining capital, and would be **eligible for legal aid without a capital contribution**.

*Example 3*

Applicant O owns a property worth £250k with no mortgage.

Under our proposed means test, Applicant O would have 3% of the value of the property (£7,500) deducted for selling costs, following which the £185,000 equity disregard would be applied.

Applicant O would have £57,500 of capital remaining, which is above the upper capital threshold of £11,000. Therefore, Applicant O would remain **ineligible for legal aid**.

*Example 4*

Applicant P jointly owns a property (in equal shares with a co-owner) worth £600,000, with a £200,000 mortgage.

Under our proposed means test, Applicant P would have the entire value of the mortgage deducted, as well as 3% of the value of the property (£18,000) deducted for selling costs.

The value of the remaining equity would then be divided between the parties, leaving Applicant P with £191,000 as their share of the equity.

Following this, the equity disregard of £185,000 would be applied, leaving Applicant P with £6,000 of capital, which is below the lower capital threshold of £7,000. Therefore, Applicant P would be **eligible for legal aid without a capital contribution**.

**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.

**Application of equity disregard where a domestic abuse victim flees the home**

237. The civil means test contains a disregard for equity in an applicant's main residence only. We propose to amend the means test so that where a domestic abuse victim has temporarily left their home but intends to return in the near future, or once it is

safe to do so, the equity disregard should be applied. This will ensure victims are not penalised for fleeing their home to secure their safety.

238. Where a victim has permanently left the property they own and has no intention of returning (e.g. they have taken on a new tenancy elsewhere and have no plans to seek an occupation order), the equity disregard would not apply as it only applies to an individual's main residence.

**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.

## Subject Matter of Dispute (SMOD) disregard

239. In some cases, the asset a person has an interest in is also the subject matter of dispute (SMOD) – i.e. the subject of the case they want legal aid for. In such cases, there is currently a specific disregard of up to £100,000, which reflects the fact that it may not be possible for the owner to sell or take out a loan on a contested asset.<sup>28</sup> The £100,000 cap was introduced in 2005 to avoid legal aid being given to those contesting valuable assets, on the grounds that the asset should be used by the parties to fund their case.
240. We propose to remove the £100,000 cap on the SMOD disregard so that assets of any value will be disregarded completely where they are the subject matter of the case. We consider that contested assets should be disregarded as the owner is likely to find it difficult to use the asset to fund a legal case about that asset – financial lenders are unlikely to provide a loan secured on a contested asset, though it might be possible to use the asset where a lawyer is willing to defer payment until the case has concluded.
241. The scope of legal aid has narrowed since the £100,000 cap was introduced in 2005, so most cases involving the SMOD disregard today are family disputes about property that involve domestic abuse. Our proposal to disregard SMOD assets will therefore support the government's wider agenda to tackle violence against women and girls.
242. The statutory charge would continue to apply to SMOD cases where relevant.

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<sup>28</sup> Assets restrained by a court cannot be sold, but these are currently disregarded.

**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.

## Inaccessible capital

243. We are aware there may be other examples, in addition to disputed assets, where individuals own property which is inaccessible. Property can be inaccessible for a variety of reasons, including legal, geographical, regulatory or other factors, and sometimes property may be inaccessible because the applicant is being denied access to it by the other party to litigation (e.g. cases of domestic abuse, where a victim might be prevented from accessing property or other capital. Whether property is inaccessible for these purposes will be assessed by DLAC.
244. The DLAC already has a discretion to value property (and all other non-monetary capital) which is inaccessible at a value that they deem equitable. The discretion means that where an applicant provides evidence in their application that capital is inaccessible and therefore cannot be used to fund litigation, the LAA has to assess whether fair and effective justice would be denied if the person were denied legal aid, including whether the applicant's rights under the European Convention of Human Rights would be breached without representation.
245. We think it is important that those who need legal aid are not prevented from getting it due to assets to which they do not have access. However, we are also mindful that legal aid resources should be directed at those who are most in need, which would not include individuals with valuable assets that they may one day be able to access.
246. We therefore propose to create a new mandatory disregard for inaccessible capital, under which non-monetary capital must be disregarded where it cannot be used to fund litigation, even if a person's ECHR rights are not engaged. The existing discretion would no longer exist. In parallel, we propose to introduce a charging system for such situations, whereby individuals with inaccessible capital could have this disregarded for legal aid eligibility purposes but, where possible, a contractual charge or other restriction would be placed upon the asset to recover the legal costs. Individuals would have to agree to such a charge to receive legal aid. We propose that the value of the charge would be any capital over the capital thresholds, once any disregards have been applied, up to the estimated cost of the legal services provided.

247. The government would seek to recoup the costs when the applicant came to sell their property. If the asset is jointly owned and the co-owner objects to a charge being registered on it, the LAA would apply for a restriction to be registered instead.
248. Property which is saleable but which an individual may not want to sell – such as their family home – would not be considered inaccessible, nor would property on which a loan could be secured. This would be set out in the relevant guidance.
249. We would welcome stakeholders' views on how this proposal might operate.

**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?

## Pensioners' disregard

250. The current means test contains a capital disregard for pensioners, whereby those aged 60 or over on low incomes can have up to £100k of additional capital disregarded. The amount of capital disregarded depends on the applicant's disposable income – see table at paragraph 253 below. We consider that this disregard takes into account the fact that some pensioners may need their capital to supplement their income – for example, it may constitute their pension pot. As they are less likely to be earning any income, they may also be less able to replace any savings they spend on legal costs.
251. The basis for the qualifying age for the pensioners' disregard was the State Pension age, which was 60 for women and 65 for men in 2001 when the disregard was last increased. This was also the age at which those on Income Support would receive the pensioner premium, or the pensioner version of certain other benefits.

252. The maximum value of the disregard was last increased in 2001 from £35k to £100k. The rationale was to reflect changes to the arrangements for pensioners seeking Income Support.<sup>29</sup>
253. In order to qualify for the disregard, pensioners must have disposable income below the threshold for non-contributory legal aid, which is £315 per month. There are ten disposable income bands below that threshold, which increase in increments of £25 up to the highest band, which is larger because the upper figure has been increased over time in line with the threshold for non-contributory legal aid. The table below shows the amount of capital that can be disregarded via the pensioners' disregard under the current system.

<b>Monthly disposable income (excluding net income derived from capital)</b>	<b>Amount of additional capital disregarded</b>
Someone receiving a passporting benefit	£100,000
£0-25	£100,000
£26-50	£90,000
£51-75	£80,000
£76-100	£70,000
£101-125	£60,000
£126-150	£50,000
£151-175	£40,000
£176-200	£30,000
£201-225	£20,000
£226-315	£10,000
Above £315	£0

254. We propose to retain the disregard for the reasons set out in paragraph 250. However, we plan to revise the disregard to reflect wider policy changes and to make it simpler.
255. We propose to revise the disregard by:
- Increasing the qualifying age to the individual's State Pension age (currently 66). The disregard is intended to benefit pensioners, so it is appropriate to use State Pension age. This means that individuals aged between 60 and 65 will no longer benefit from the disregard.
  - Updating the disposable income bands to reflect the proposed lower income threshold for civil legal aid. As the existing disposable income bands derive from

<sup>29</sup> 'Community legal Service: Financial conditions for funding by the Legal Services Commission' (2000), p8.

the threshold for non-contributory legal aid, updating the bands to reflect our new proposed threshold will ensure consistency and fairness within the means test.

- Simplifying it by reducing the number of disposable income bands from ten to three. We consider that having ten income bands is overly complex, and this approach is not taken elsewhere in the means test – for example, there are only three income bands to determine the level of an individual’s income contribution. While reducing the number of bands from ten to three will create bigger differences in the amount of capital disregarded for people with similar incomes, we consider this is outweighed by the advantages of a simpler system. In addition, individuals will not lose out due to the policy change because we have made the disregard more generous overall, by applying the highest applicable capital disregard from the current system to all individuals in the new broader bands. For example, the lowest amount of capital that will be disregarded under the new system is £35,000, whereas under the current system it is £10,000.

256. The table below shows the amount of capital that can be disregarded via the pensioners’ disregard under the new proposed system.

**Our proposed new system**

<b>Monthly disposable income (excluding net income derived from capital)</b>	<b>Amount of additional capital disregard</b>
Someone receiving a passporting benefit	£100,000
£0-£207	£100,000
£207-£415	£65,000
£415-£622	£35,000
Above £622	NIL

257. We do not propose to increase the £100,000 maximum value, though this has remained the same since 2001, as the average pensioner income has increased significantly since then. While pensioners’ incomes were below average in 2001, in 2017/18 pensioners’ incomes had increased to be in line with the average income of the wider population.<sup>30</sup> Therefore, we consider pensioners have less need for additional capital than they did in 2001. In addition, a pensioner benefitting from both the recommended equity disregard and the pensioners’ disregard could have £285,000 of capital disregarded, which is higher than the average value of a home.<sup>31</sup> A higher disregard would not meet the aim of the legal aid reform programme to

<sup>30</sup> *Pensioners’ Income Series: An analysis of trends in Pensioner Incomes: 1994/95 to 2017/18*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/878355/pensioners-incomes-series-2017-18-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878355/pensioners-incomes-series-2017-18-report.pdf), accessed 26/01/2022

<sup>31</sup> Using house prices November 2021 according to the UK House Price Index.

direct legal aid resources to those most in need. Therefore, we do not consider that we need to increase the level of the disregard.

258. We also considered removing the pensioners' disregard. This would treat pensioners consistently with those of working age and would lead to some small savings. However, we are not proposing this as it could result in some pensioners losing capital intended to supplement their low income.

### **Worked examples**

These examples use the full proposed means test – for example, they use the proposed capital thresholds and equity disregard. They also assume the applicant has no other capital – e.g. savings.

#### *Example 1*

Applicant Q is aged 64, below State Pension Age. They have disposable income of £25 per month. They own a property worth £200k with no mortgage and have no other capital.

Deduction of 3% (£6,000) for selling costs: £194k

Equity disregard of £185k applied: £9,000

Under our proposals, the applicant no longer benefits from the pensioners' disregard due to their age. The applicant has capital of £9,000, which is above the lower capital threshold of £7,000, so they will be eligible for legal aid with a contribution of £2,000 or the estimated cost of their case, whichever is smaller. Under the current means test, they are eligible for legal aid with no contribution.

#### *Example 2*

Applicant R has reached their State Pension Age. They have disposable income of £350 per month. They own a property worth £250k with no mortgage and have no other capital.

Deduction of 3% (£7,500) for selling costs: £242,500

Equity disregard of £185k applied: £57,500

Pensioners' disregard of £65,000 applied: -£7,500

The applicant has capital below the lower capital threshold of £7,000. Under our proposals, they are eligible for legal aid with no contribution. Under the current means test, they are ineligible and do not benefit from the pensioners' disregard as their disposable income is too high.

**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.

## Other capital disregards

259. As outlined in Chapter 1 (paragraph 55), certain types of payments are disregarded from the capital assessment for civil legal aid, e.g. Windrush Compensation Scheme payments. These types of payments are disregarded because we consider they should not be considered as available capital that could be used to fund legal services. They are typically lump sum compensation or ex-gratia payments for a specific purpose or to compensate for harm.
260. We summarised our rationale for disregarding certain payments from the income assessment in Chapter 2 (paragraphs 124–127). Similarly, the rationale for disregarding payments from the capital assessment is that payments should be disregarded when they are intended to compensate an individual for personal (non-monetary) harm, (e.g. Windrush compensation payments), or where the payment is earmarked for a specific purpose (e.g. benefits for additional disability costs). Again, we do not think payments should be disregarded if the payment is intended to compensate for loss of earnings or support general living costs. We consider such payments as analogous to earnings, which could be used to pay for legal services as earnings are typically taken into account as part of the means test.
261. Payments are also disregarded from the capital assessment on a mandatory or discretionary basis for the same reasons outlined in Chapter 2 (paragraph 128). As we laid out, where the payment is clearly and always a payment to cover a specific need and/or compensation for harm, it will be disregarded on a mandatory basis. On the other hand, where the disregard is discretionary, the DLAC has the discretion to disregard the payment, taking into account any relevant guidance, for example the Lord Chancellor’s guidance, but is not obliged to do so.
262. The current list of payments disregarded from the capital assessment and whether they are disregarded on a mandatory or discretionary basis can be found in **Annex A**.

## Our proposals

263. We propose that the additional payments listed below should be disregarded from the legal aid capital assessment.

### *Payments under the Scotland and Northern Ireland Redress Schemes for historical child abuse*

264. This redress scheme, which went live in December 2021, will make payments will be paid to victims of historical child abuse in care. The payment will be paid as a lump sum to acknowledge and provide tangible recognition of the harm suffered.

265. We propose disregarding these payments on a mandatory basis from capital assessments for civil legal aid, as we consider that this is a payment to compensate for harm and therefore the beneficiary should not be expected to spend this payment on legal services.

**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.

### *Victims of Overseas Terrorism Compensation Scheme (VOTCS)*

266. We set out our proposals to disregard these payments from the income assessment in Chapter 2 (paragraph 132–133). Because these payments can also be paid as a one-off lump sum, they may be considered as part of the capital assessment as well.

267. Therefore, we propose disregarding these payments from the capital assessment for civil legal aid as a compensation payment for personal harm. We propose that these payments are disregarded on a discretionary basis because the scheme provides a mixture of payments covering both compensation for harm and loss of earnings, the latter not being a payment that fits with our rationale.

268. The scheme has a tariff of payment similar to the Criminal Injuries Compensation Authority (CICA) which sets out the different amounts for the different categories of injuries, e.g. physical and mental injuries or injuries from sexual and physical abuse. We envisage using a similar approach here and intend to set out the suggested factors to be considered by the DLAC when applying the discretion. The Means Assessment Guidance<sup>32</sup> sets out relevant factors for CICA payments that DLAC may (but is not obliged to) consider. These include factors such as whether the compensation payment has been paid to the individual within the last 12 months leading up to the date of the legal aid application and whether the payment is

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<sup>32</sup> Means Assessment Guidance (publishing.service.gov.uk)

intended to cover special expenses. We intend to mirror this approach for VOTCS payments.

**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.

*Backdated benefits and child maintenance back payments*

269. A number of stakeholders have raised with us the question of how back payments of benefits and child maintenance should be treated.
270. When paid in a timely fashion, benefits and child maintenance are received as income. Some benefits (such as Personal Independence Payments) are disregarded from the income assessment for legal aid because they are intended to support specific regular costs (e.g. the additional costs of disability), whereas child maintenance, and other benefits such as tax credits, are taken into account in the income assessment for legal aid.
271. However, at present there is no provision to disregard back payments of benefits from being counted as capital. Therefore, individuals may fail the legal aid capital test, or have to pay a capital contribution, due to a benefit back payment made as a lump sum following a tribunal/court decision or the correction of an administrative error. This applies equally to benefits that are disregarded from the income assessment, to benefits that are taken into account in the income assessment, and to benefits which passport recipients through the income assessment of the legal aid means test.
272. This same issue is also relevant for child maintenance back payments. Although child maintenance is considered as part of the income assessment, we consider it disproportionate to count back payments of child maintenance as available capital in all cases, as the money is not for loss of earnings but rather for a specific purpose – that of supporting a child.
273. We are therefore proposing that the DLAC (and, for delegated work, legal aid providers) should have a discretion to disregard benefit and child maintenance back payments from the capital assessment for civil legal aid.
274. To ensure that the means assessment is relatively straightforward for the DLAC and providers to carry out, we propose that the guidance sets out that back payments received up to 24 months before the legal aid application should typically be disregarded. We believe it is generally reasonable to expect recipients to have spent these funds (which, in many cases, are intended for a specific purposes, such as disability costs or child support) within 24 months. If a recipient who has been

receiving such payments as income saves some or all of the money, this would typically be counted as disposable capital for the purposes of the legal aid means assessment, so we consider that this time-limited discretion is appropriate to ensure consistency with the approach to savings.

275. However, if the payment covered a particularly long period, and it was therefore unreasonable to expect the recipient to have spent it within 24 months, then the DLAC and providers will be able to exercise their discretion to disregard this capital.
276. We will draft the Lord Chancellor's guidance to guide the DLAC and provider decisions by setting out two key factors to consider: firstly how long the payment was received before the date of the legal aid application, and specifically whether the payment was received less than 24 months before the date of application, and secondly the period covered by the back payment.

**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.

*New discretionary disregard for compensation, damages or ex-gratia payments for personal harm*

277. At present, we need to lay secondary legislation every time we want to add a disregard in relation to a specific compensation or support scheme. This takes time, including parliamentary time, and potentially causes delays to having certain payments (which would fit our rationale) disregarded for those applying for legal aid. The current process has also previously put pressure on resources due to the need of a quick turnaround when a new scheme is established from which we want to disregard any payments (as happened with the Windrush Compensation Scheme). There may also be other payments that we are not aware of but that we would consider disregarding.
278. In light of this, we are proposing a new discretionary disregard that will enable the DLAC and providers (when they consider it appropriate) to disregard further types of income and capital which fall within our broad rationale and enable us to future proof the disregards for the income and capital assessment.
279. This will create a general power to allow the DLAC and providers to disregard compensation payments, ex-gratia payments and damages for personal harm (whether physical or psychological), made by public bodies – for instance, damages paid by the Home Office following a case of unlawful detention – or privately, for instance compensation paid by a private organisation to victims of abuse. This is in line with our rationale for disregarding certain payments from the capital assessment

i.e., we do not consider it fair to expect these types of payments to be used to pay for legal services.

280. We do not intend that “personal harm” would cover financial harm or payments that are analogous to loss of earnings, e.g., damages paid to cover loss of earnings following employment tribunal proceedings, because we consider such payments could be used to pay for legal services.

281. In some cases, we are aware that individuals may receive payments that include compensation for both personal harm and loss of earnings. Therefore, we propose a discretionary disregard to give the DLAC and providers the flexibility to decide the level of such payments to be disregarded, bearing in mind the policy intention and overall rationale.

282. We hope that this proposal will future proof this element of the means test by removing the need to legislate every time a future scheme emerges with payments that fit our rationale above. However, to ensure clarity for the DLAC and providers, we will regularly update guidance to include the names of the schemes which we consider fit within our rationale.

**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.

## Capital passporting

283. Our current approach to legal aid applicants is laid out in Chapter 1, paragraph 81. As we set out there, at present applicants in receipt of passporting benefits undergo the capital assessment for civil legal aid in the same way as non-passported applicants do.

284. Before LASPO, applicants in receipt of passporting benefits were passported through the capital test as well. However, the capital thresholds in the means test for the relevant welfare benefits were more generous than the civil legal aid capital thresholds and (unlike the welfare benefits test) the civil legal aid test did not disregard all capital held in the primary residence. Therefore, capital passporting resulted in some passported individuals (an estimated 6,000 from the Impact Assessment) receiving legal aid where, if they had been means assessed, they would have been required to pay a capital contribution or would be ineligible for legal

aid.<sup>33</sup> As a result, LASPO removed capital passporting for civil legal aid to 1) generate savings, and 2) ensure parity between individuals in receipt of passporting benefits and those not receiving benefits.

285. The means test for welfare benefits will remain more generous than that for civil legal aid under our proposed changes, most notably in that the assessment for welfare benefits disregards the main residence whereas the legal aid means test will not. We do not propose this for legal aid as it would mean homeowners with very substantial capital would be able to receive legal aid, which is not in line with our objective that legal aid should be targeted at those who need it most. As a result, introducing capital passporting for all recipients of welfare benefits would result in individuals receiving legal aid where, if they had been means assessed, they would have been required to pay a capital contribution or would be ineligible.
286. Our analysis suggests that almost all passporting benefit recipients (including UC recipients) who would fail the legal aid capital test would do so because they are homeowners, rather than because they have other forms of capital (e.g. savings).
287. Therefore, we propose to capital passport all non-homeowners who are in receipt of passporting benefits (including all UC recipients). This proposal will improve the efficiency of the civil means test by reducing the number of capital assessments for applicants in receipt of benefits by around 80%, while generating a minimal cost and ensuring passported and non-passported applicants are generally treated equivalently.

**Question 39:** do you agree with our proposal to reintroduce capital passporting for non-homeowners 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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<sup>33</sup> Post-Implementation Review of Part 1 of LASPO, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf), p167. This represents 4,000 clients who would become ineligible, and 2,000 who would be required to pay a contribution.

## **Chapter 5: Immigration and asylum, under-18s and non-means tested cases**

288. This chapter outlines our proposed changes to means-testing arrangements for some types of civil legal aid proceedings which are not subject to standard civil means-testing arrangements; or which we propose should no longer be subject to these arrangements.
289. In particular, it outlines our proposed changes to the means test for immigration and asylum proceedings. We plan to align the means test for these proceedings with our proposed new civil means test.
290. This chapter also outlines our proposals to remove the means test for people under the age of 18 applying for civil legal representation, and to simplify the means test for people under the age of 18 applying for civil legal help.
291. Further, we have included our proposals to make two additional areas non-means tested:
- legal representation for parents and those with parental responsibility (PR) whose children are facing withdrawal or withholding of life-sustaining treatment.
  - legal help in relation to an inquest where the inquest relates to a possible breach of Human Rights Act (HRA) Convention Rights, or there is likely to be a significant wider public interest (WPI) in the client being represented at the inquest.

### **Means-testing for immigration and asylum proceedings**

292. Applicants for civil legal aid for immigration and asylum representation must pass a means and merits test to receive civil legal aid. Representation at the First-tier Tribunal (Immigration and Asylum Chamber) is designated as controlled work (that is, the means and merits tests are delegated to providers) whereas representation at the Upper Tribunal (Immigration and Asylum Chamber) is designated as licensed work, for which the LAA carry out the means and merits assessment and issue a certificate to qualifying providers.
293. In most respects, the means test in use for immigration and asylum proceedings replicates the standard civil legal aid means test outlined in Chapter 1. However, for representation at certain immigration cases, the means tests in use are slightly different. These proceedings include:

- immigration detention
- joint immigration and domestic abuse cases
- modern slavery and human trafficking cases.

294. In particular, there is currently a single capital threshold of £3,000 for legal aid for proceedings at both the First Tier and Upper Tribunals, with no capital contributions payable. This compares to a single £8,000 threshold for most types of controlled work, and an £8,000 upper threshold (with a capital contribution required from any capital above £3,000) for most types of licensed work.

295. Moreover, no income contributions are payable for Upper Tribunal representation, in contrast to the standard civil legal aid means test for licensed work; and, even for proceedings (such as asylum representation and separated migrant children) where the standard £8,000 threshold applies, there is an exemption from any requirement to pay a capital contribution.

296. We consider there is a strong argument, for reasons laid out below, to align the means test for these proceedings with our new proposed civil means test.

### **Representation at the Upper Tribunal**

297. The reason for the discrepancy between the Upper Tribunal means test and that for other licensed work is historic. Until 2018, Immigration and Asylum Upper Tribunal representation was designated as controlled work, so the responsibility for the means test was delegated to providers (see Chapter 1, paragraph 49 for background on controlled work). In 2007, the department proposed to increase the threshold from £3,000 to £8,000, to align with the approach for civil legal representation.<sup>34</sup> This proposal would also have required applicants with capital over £3,000 to pay a contribution towards their legal costs, as for civil representation more generally.

298. However, concerns were raised by providers, some of whom (for instance, law centres) are unable by the terms of their constitution to collect contributions from applicants. Therefore, the proposal was not taken forward, and the threshold of £3,000 was retained for immigration representation, to allow for the fact that no contributions could be collected.

299. In 2018, representation in the Upper Tribunal became licensed work, where the means test is carried out by the Legal Aid Agency (LAA), rather than providers. This means that it would now be possible for the LAA to collect contributions for this work.

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<sup>34</sup> Explanatory Memorandum to the Community Legal Service (Financial) (Amendment) Regulations 2007 No.906 (legislation.gov.uk)

300. We are therefore proposing that the disposable capital threshold for Upper Tribunal representation should be brought in line with the usual civil thresholds being proposed for licensed work as part of the wider Means Test Review. This comprises a lower threshold of £7,000 and an upper threshold of £11,000. Applicants with capital between £7,000 and £11,000 would be subject to capital contributions in line with wider civil legal aid – see Chapter 4, paragraphs 226–232. Applicants with disposable capital over £11,000 would not be eligible for legal aid.

**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.

301. We also propose to remove all current exemptions on income and capital contributions in the Immigration and Asylum Upper Tribunal, bringing the Upper Tribunal contributions system in line with the approach elsewhere in civil legal aid, meaning that recipients of legal aid in these cases would pay capital contributions from capital above £3,000. However, our proposals in relation to removing the civil representation means test for under 18s and updating guidance in relation to the reassessment of legal aid recipients who turn 18 in the court of the legal proceedings (see paragraph 313–318 below) mean that separated migrant children will only be means tested when they have turned 18 and the Legal Aid Agency consider they may have income or capital above our proposed new lower thresholds.
302. These proposals will bring the means test for immigration and asylum representation at the Upper Tribunal in line with the means test for other types of licensed work, therefore simplifying our approach to means-testing. We believe this is a fair and proportionate approach as it is our policy (see Introduction, paragraph 10) to target the provision of public funding at those in the greatest financial need whilst ensuring that those who can afford to pay some or all of their legal costs do so.
303. Introducing contributions will not affect any children, including asylum-seeking children or separated migrant children. This is because we are proposing to non-means test all under 18s applying for civil legal representation (as outlined in paragraph 315 below) so under 18s will be deemed automatically eligible for non-contributory legal aid until they are 18.
304. Young legal aid recipients who reach the age of 18 before their case has concluded may be subject to a means assessment at the LAA's discretion, and asked to pay a contribution if they have sufficient income or capital – subject to the proposed changes to guidance outlined in paragraph 318 below.

**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.

### **First-tier Tribunal Representation**

305. First-tier Tribunal (Immigration and Asylum Chamber) representation is still controlled work, where the means test is carried out by providers. Generally, for controlled work, we use the upper capital threshold only and no contributions are required. We propose to retain this approach for immigration First-tier Tribunal representation. We therefore recommend that the disposable capital threshold should be raised from £3,000 to £11,000, in line with the upper capital threshold proposed as part of the wider Means Test Review (see Chapter 4, paragraphs 226–232).
306. This increase will mean the same thresholds would apply to First-tier Tribunal (Immigration and Asylum Chamber) representation and other controlled work matters, making the test fairer for applicants and simpler for providers to administer. It would also increase eligibility for legal aid for this cohort, many of whom are likely to be particularly vulnerable and may find it difficult to represent themselves or understand the legal position in this area without professional support (therefore ensuring access to justice).

**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.

### **Legal aid applicants aged under 18**

307. Currently, criminal defendants under the age of 18 are exempt from the means test for full criminal representation (though they must still pass the interests of justice test) in the youth court or Crown Court. This approach recognises the vulnerability of children and young people under 18 within the Criminal Justice System, and the potentially serious impact of a criminal conviction on their future. We are therefore proposing to retain this approach for criminal legal representation.
308. On the other hand, under 18s are currently means tested for legal aid in relation to some criminal advice and assistance/advocacy assistance cases, and for civil representation and civil and family legal help.
309. We are proposing some changes to this approach, which we have set out below.

### **Criminal advice and assistance/advocacy assistance (A&A/AA)**

310. For criminal advice and assistance (A&A), most cases are exempt from the means test, but there are some means-tested areas of A&A and advocacy assistance (AA) – as fully outlined in Chapter 7. In these proceedings, applicants aged under 18 are means tested, and their means are aggregated (pooled) with the resources of their maintaining adult, unless it is inequitable to do so. This is (usually when a conflict of interest exists between the maintaining adult and child or young person).<sup>35</sup> Post 18, if an applicant for A&A/AA has a partner, their means will be aggregated for the purposes of financial assessment. As the current thresholds are very low, many applicants will fail the means test if they have a partner (whether or not they are in prison). It is presumed that, if the child fails the means test and seeks legal assistance, their private legal costs will be covered by their maintaining adult.

311. We propose to exempt those aged under 18 from the legal aid means test for A&A/AA, bringing the policy in line with our approach to representation at the youth court and Crown Court, and more generally, the wider approach to under-18s in the Criminal Justice System. Stakeholders have commented that the maintaining adults of applicants under 18 in A&A/AA matters are not necessarily willing to contribute towards legal costs and can be un-cooperative with the means testing process. In such cases, those aged under 18 could be prevented from accessing legal aid and hence be deprived of legal advice relating to their conviction. Further to this, there is a risk that the child or young person will be unrepresented at a disciplinary hearing, where extra time could be added to their sentence, or at a Parole Board hearing where their liberty is at stake. Under our new proposals for A&A/AA (Chapter 7), under 18s, especially those in custody, are likely to pass the means assessment.

312. The MoJ accepts that a child or young person’s experience of the criminal justice system will play a critical role in determining how they will be reintegrated into their families, education and wider society. An inability to access A&A/AA for Prison Law matters may result in their feelings or needs not being heard. Therefore, we consider it important that those aged under 18 in custody have proper access to A&A/AA.

**Question 43:** do you agree with our proposal to remove the means test for applicants under 18 for criminal advice and assistance and advocacy assistance? Please state yes/no/maybe and provide reasons.

### **Civil representation**

313. Currently, when someone aged under 18 applies for non-family representation, their eligibility is assessed solely on their individual resources, irrespective of their

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<sup>35</sup> In this chapter, we are using “young person” as shorthand for those aged 16 or 17.

maintaining adult's<sup>36</sup> resources. A different approach is taken for family representation, where the means of a child or young person are aggregated with their maintaining adult (unless a conflict of interest exists between them, in which case the child or young person's finances are assessed independently). In ECF representation, the means test applied is whichever is relevant to the case type – either family or non-family.

314. Following a review of Legal Aid Agency data, we have concluded that there are very few family representation cases initiated by a person under 18 where aggregation actually occurs, owing to the nature of proceedings in these cases, which usually involve a conflict of interest between a maintaining adult and the child or young person. Moreover, given that the law now requires all young people in England to continue in education or training until at least their 18th birthday<sup>37</sup> (16 in Wales), they are therefore unlikely to be working full time, and therefore unlikely to have sufficient income or capital to fail our proposed new civil means test.
315. We therefore propose to remove the means test for applicants under 18 for all types of civil representation (including controlled legal representation<sup>38</sup>). This will improve consistency in our approach to family and non-family civil matters and ensure access to justice for under 18s, as well as reduce the administrative burden for providers, the LAA and applicants, as they will no longer have to undertake the means test for these matters.
316. Removing the means test for those under 18 applying for civil representation (including controlled legal representation) will recognise the vulnerability of under 18s within the civil and family courts system. MoJ considers this cohort a distinct group, with needs that are different from those of other age groups, and we therefore think it is highly unlikely that a person under 18 would be able to effectively represent themselves in court.
317. We have considered whether there is a risk of a maintaining adult bringing proceedings under the name of a person who is under 18 to benefit from non-means tested representation. We consider this risk is low, given that in most cases there is a conflict of interest between the child or young person bringing the case and their maintaining adult. Moreover, we consider the current legal aid merits test for

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<sup>36</sup> Defined as a parent, guardian or any other person who is responsible for maintaining a child, or who usually contributes substantially to the maintenance of that child

<sup>37</sup> Update to Participation Statutory Guidance FINAL ([publishing.service.gov.uk](https://publishing.service.gov.uk))

<sup>38</sup> legal representation for proceedings in the Health, Education and Social Care Chamber of the First-tier Tribunal, the Mental Health Review Tribunal for Wales and the Immigration and Asylum Chamber of the First tier Tribunal.

representation (which requires the applicant to be a party to proceedings) to be a sufficient safeguard to mitigate any remaining risk of this type.

318. Those who reach the age of 18 (therefore becoming adults) before their case has concluded may be subject to a means assessment at the DLAC's discretion. In some cases, for instance if the 18-year-old is in full-time employment, this may be appropriate. However, in other cases, for instance if the 18-year-old is unable to work because their asylum claim is still being reviewed, it may not be appropriate. We propose, therefore, to clarify in guidance the factors the DLAC should consider when deciding whether an assessment is necessary. For example, we propose that if an 18-year-old is not dependent on their parents or is not able to work and has no recourse to public funds, an assessment of means should not be undertaken. The aim of this policy is to minimise the administrative burden for legal aid recipients, providers and the Legal Aid Agency by limiting means assessments of 18-year-olds to those who may have disposable income or capital above our proposed new lower thresholds.

**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.

**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.

### Legal help

319. For means-tested legal help (including family help and Help at court), the means of applicants under 18 are aggregated with their parents, as it is assumed that where court representation is not required, legal costs should be covered by the parent where their interests are aligned with that of their child.
320. We propose to retain means testing for applicants aged under 18 for legal help and other forms of controlled work (with the exception of controlled legal representation). As explained above (paragraph 314), a key reason we propose to introduce non-means testing for family representation is efficiency; because we rarely aggregate resources for family representation, applicants under 18 nearly always pass the means test. However, this rationale is less applicable to legal help and other forms of civil and family controlled work, where the interests of the child or young person are more likely to be aligned with their maintaining adults,' which means that aggregation is more frequent.

321. When representation is not required, we consider it appropriate that resources be aggregated where it is equitable to do so, and that legal costs should be covered by the adult where they have enough income or capital to do so. Therefore, in order to ensure that legal aid is being directed towards those most in need, we propose to retain means testing for under 18s for legal help.
322. At present, a simplified “light touch” means test is currently undertaken for applicants for legal help aged under 16 years, whereby the applicant is asked whether they have any regular income or capital of more than £2,500. If the answer to both questions is negative, they are assumed to be eligible for non-contributory legal aid and the full means assessment is not carried out.
323. To alleviate the administrative burden of the means test for under 18s, we propose to extend the “light touch” means test to all applicants for legal help aged under 18 where it is not considered equitable to aggregate their income with their maintaining adult. We believe that this is a sensible approach considering the high probability of an applicant under 18 passing the means test when their means are not aggregated with a maintaining adult.

**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.

**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.

## Non-means tested legal aid

324. As mentioned in the Introduction (paragraph 10), means testing is used in the legal aid system to help focus taxpayer resources on those who need them most. However, for some types of proceedings, a means test is not required when determining eligibility for legal help and/or legal representation. We have set out a list of proceedings exempt from the means test for both civil and criminal legal aid in **Annex B**.
325. We are now proposing to remove the means test for two additional areas of civil legal aid.

### **Proceedings relating to the withdrawal or withholding of life-sustaining treatment from children**

326. Legal aid is available without a means test for some proceedings (which are set out in **Annex B**), including Special Children Act (SCA) cases, which are proceedings involving Care and Supervision orders, Child Assessment Orders and Emergency Protection Orders. These orders are sought where intervention is required by a local authority where there is a likelihood of harm to the child (care and supervision); where the child must be present for a specific purpose e.g. medical appointment (child assessment) or where there is fear of imminent harm (emergency protection). Orders for care and supervision and emergency protection orders could potentially lead to permanent removal of the child. Proceedings for orders for the return of a child from another state or child abduction proceedings are also currently non-means tested.
327. This position acknowledges that such matters are so significant, in terms of the welfare of the child, and of the consequences to their parents, that the parents or those with parental responsibility (PR) for the child<sup>39</sup> should be represented whatever their means.
328. We are proposing to expand the types of proceedings for which non-means tested legal aid is available to parents and those with parental responsibility for the children concerned, by adding proceedings related to the proposed withdrawal or withholding of life-sustaining treatment for a child under the age of 18. We are defining life-sustaining treatment as any treatment that serves to prolong life without reversing the underlying medical condition.<sup>40</sup>
329. These proceedings, which typically involve a dispute between the parent(s) and the hospital trust are relatively rare, but, for obvious reasons, can be enormously difficult for all concerned. Such proceedings are usually a matter of last resort. They are highly emotive and typically have a direct impact on the life expectancy of the child in question.
330. At present, civil legal services for these proceedings involving children are in scope of legal aid, but on a means and merits tested basis. During these proceedings the child in question is typically represented by an independent guardian appointed by the court/CAFCASS, or the Official Solicitor in cases heard under the Mental Capacity Act 2005, and the hospital trust involved is also legally represented.

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<sup>39</sup> Parental Responsibility is defined in section 3(1) Children Act 1989 as being: “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”

<sup>40</sup> M. Watson et al, Oxford Handbook of Palliative Care, 3rd edn, Oxford University Press, 2019

331. These cases require an understanding of complex medical and legal arguments and private representation can therefore be expensive. Parents and those with PR must currently pass a means test to be eligible for legally aided representation and may therefore find themselves ineligible for legal aid on financial grounds. Parents/those with PR are therefore often faced with trying to represent themselves, which may be very difficult considering both the complexity and the highly emotive context.

#### *Our proposals*

332. We are proposing to remove the means test for legal representation for parents and those with PR whose children (aged under 18) are facing the contested provision or withdrawal/withholding of life-sustaining treatment as defined in paragraph 328. This is because we consider that parents facing a decision on whether their child will live or die should have legal assistance to ensure their position can be properly represented.

333. We are proposing non-means tested legal representation (as opposed to legal help) as this is typically where the issues identified above arise. This aligns with our approach to SCA cases more broadly.

**Question 48:** Do you agree with our proposal to remove the means test for legal representation for parents/those with parental responsibility whose children are facing proceedings in relation to the withdrawal or withholding of life-sustaining treatment? Please state yes/no/maybe and provide reasons.

#### **Legal help at inquests**

334. Legal aid for representation at an inquest is provided as “other legal services” under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) and is only available via Exceptional Case Funding (ECF). Funding is available where the applicant can show that either

- it is required to comply with Article 2 or other HRA Convention Rights; OR
- the Director of Legal Aid Casework (DLAC) determines that there is a “wider public interest” (WPI) in the family being represented at the inquest.

335. As of January 2022, there is no means test for ECF in relation to representation at an inquest, and applicants who are granted ECF in relation to an inquest are automatically entitled to non-means tested legal help throughout the remainder of the inquest process.

336. Legal help in relation to an inquest is in scope of legal aid, and hence available for a family member before and throughout any inquest hearing, subject to a means and merits test, which is delegated to providers.

337. Currently, where an individual fails the means test for legal help, the Director of Legal Aid Casework (DLAC) may waive the income and capital eligibility limits of the means test “where it is equitable to do so”, having particular regard to any applicable rights under ECHR Article 2.<sup>41</sup>

*Our proposals*

338. We are now proposing to remove the means test for legal help in relation to inquests when the inquest relates to a possible breach of rights under the ECHR (within the meaning of the Human Rights Act 1998) (HRA Convention Rights) or there is likely to be a significant wider public interest (WPI) in the individual being represented at the inquest.

339. We are proposing to replace the current waiver process with a new test which will require applicants to provide evidence that the inquest pertains to the above criteria but will not require the provision of any means or estimated fee information. This will remove the burden on families of having to provide financial information in difficult circumstances and will also simplify the legal help application process for applicants, practitioners and LAA caseworkers.

340. We consider it reasonable that, in order to be eligible for means-free legal help in relation to an inquest, legal aid providers must continue to apply to the LAA for a decision. Cases involving or potentially involving HRA Convention Rights or WPI significance are often complex, and maintaining LAA oversight mitigates against the risk of providers’ decisions being overturned at audit and the loss of any related fees.

341. Alongside this proposed change to legal help at inquests potentially involving a breach of HRA rights or significant WPI, we are proposing to retain the option to apply for legal help for inquests via the existing route, which is delegated to providers. This will allow cases which would pass the means test to receive legal help without needing to evidence a potential breach of HRA convention rights or WPI relevance, thus keeping the administrative burden for applicants, providers and the LAA to a minimum. The LAA will continue to audit providers for consistency, as at present.

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<sup>41</sup> Article 2 (the right to life) – Section 10(3) of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO), Article 2 ECHR may require legal aid to be granted for representation before the Coroners’ Court. Funding will be granted where: The procedural obligation under Article 2 ECHR arises and, in the particular circumstances of the case, representation for the family of the deceased is required to discharge it.

**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.

342. If, following consultation, we proceed with this proposal, then we propose to make a technical amendment to regulations<sup>42</sup> regarding backdating, whereby the applicant may be entitled to any legal help carried out prior to a successful application for ECF or standalone legal help. These amendments will mean that providers can continue to have funding for legal help at an inquest backdated when legal help is available via a new means-free test (whether standalone or following a successful ECF grant), rather than the current waiver.

**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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<sup>42</sup> The Civil Legal Aid (Procedure) Regulations 2012 (legislation.gov.uk) Regulations 23, 35 and 68 provide for a discretion to backdate.

## **Chapter 6: Crown Court income and capital thresholds, passporting and contributions**

343. This chapter outlines our proposals for the Crown Court means test and associated contributory regime, including our approach to benefits passporting and the means tests for appeals and sentencing hearings at the Crown Court.
344. The current Crown Court means test was phased in between January and June 2010, drawing on the magistrates' court means test which was introduced in October 2006. On implementation of the Crown Court scheme, there was no upper financial threshold – all defendants at the Crown Court were eligible for legal aid. However, in January 2014 an upper disposable income threshold of £37,500 was introduced, limiting eligibility for legally aided representation at the Crown Court for defendants with the highest incomes. The current Crown Court means tests is summarised in Chapter 1 (paragraphs 62–71).
345. This chapter sets out our proposals to add some further deductions to the disposable income assessment; raise the lower disposable and lower gross thresholds for legal aid at the Crown Court to reflect cost increases since the thresholds were last raised, to remove the upper disposable income threshold, and to make some changes to our approach to income and capital contributions.

### **Income thresholds**

346. The Crown Court has no upper gross income threshold – applicants for legal aid with high gross incomes are not ruled out of eligibility as they are for civil legal aid and legal aid at the magistrates' court. We have no plans to set such a threshold, as we consider that Crown Court defendants should not be ruled out of eligibility by their gross income, which by definition does not take into account whether the defendant may be able to pay for their defence at private rates.

### **Lower gross income threshold**

347. The lower gross income threshold for legal aid at the Crown Court and magistrates' court, which is currently £12,475, is intended to reduce the administrative burden for applicants, providers and the LAA, by identifying applicants whose gross incomes are low enough that they are overwhelmingly likely to pass the disposable income test.

348. Following analysis of the current lower gross income threshold, we found that the threshold allows for a significant proportion of applicants to receive non-contributory legal aid at the Crown Court when, had they gone through the disposable income assessment, they would have been required to pay an income contribution. Similarly, it allows some applicants to receive legal aid at the magistrates' court when they would have failed the current disposable income test.
349. To redress this, we are proposing to amend the lower gross income threshold so that it is likely to be passed only by applicants who would also pass our proposed disposable income test. We propose that the new lower gross income threshold for both magistrates' and Crown Courts tests should be set at £13,000. This will align the lower gross threshold with the proposed changes to the Crown Court and magistrates' court disposable income thresholds (outlined in paragraphs 364–366 below and Chapter 7, paragraphs 437–450).

**Question 51:** do you agree with our proposal to increase the lower gross income threshold for legal aid at the Crown Court to £13,000 for an individual? Please state yes/no/maybe and provide reasons.

350. As laid out in Chapter 2 (paragraphs 92–96), we are also proposing to change our approach to equivalising the gross income threshold, by using the OECD Modified approach (Before Housing Costs (BHC)) to take into account the costs of different household compositions. Using the BHC equivalisation metric, for each additional adult or child aged 14 or over, the threshold would increase by 50% of the gross threshold for a single adult; for each child under the age of 14, the corresponding figure is 30%.
351. Please see Chapter 2, paragraph 97 for a consultation question on this proposed approach.

### **Assessment of disposable income**

352. As outlined in Chapter 1 (paragraph 66), for the purposes of the Crown Court means test, disposable income is calculated by deducting the following from gross income:
- the applicant's tax, NI, housing, Council Tax, childcare and child maintenance payments
  - a set Cost of Living Allowance (currently £5,676 per year for a single person)
  - further deductions for partner and/or dependent children (when relevant).
353. Applicants with disposable annual income of £3,398 or less are entitled to non-contributory legal aid; those with disposable income above £3,398 and no more than £37,500 are entitled to legal aid with a monthly income contribution.

354. Applicants with disposable incomes above £37,500 per year are ineligible for Crown Court legal aid, unless they successfully apply to the Legal Aid Agency for an eligibility review, which takes into account additional outgoings and the potential costs of private representation.<sup>43</sup> In the event that they have applied for legal aid, been refused on grounds of disposable income and are subsequently acquitted, they may claim back the private cost of their defence, capped at legal aid rates, via a Defendant's Costs Order.
355. As laid out in Chapter 2 (paragraphs 99–119), we are proposing to make some additional deductions from the disposable income assessment for all types of legal aid. These consist of jobholder pension contributions up to 5% of earnings; student loan repayments taken from salary, and agreed repayment of priority debts. We have asked some questions about these proposed deductions in Chapter 2.
356. At present, the civil legal aid means test includes an additional allowance of £45 per month for any members of the household who are in work, to take account of work travel costs and any other work-related costs.
357. The means tests for the Crown Court and magistrates' court do not currently include a work allowance. We are proposing to incorporate such an allowance into these means tests, as we consider that it is aligned with wider government policy to encourage work and ensure that working-age adults are better off in work than out of it. As outlined in Chapter 2 (paragraphs 107–108), we are proposing to uprate this allowance of £66 per month for all members of the household who are in work, drawing on recent research into work travel costs.

**Question 52:** do you agree with our proposal to incorporate a work allowance for all members of the household who are in work into the Crown Court means test? Please state yes/no/maybe and provide reasons.

**Question 53:** do you agree with our proposal to set the work allowance at £66 per month? Please state yes/no/maybe and provide reasons.

### **Cost of Living Allowance**

358. As laid out in Chapter 1 (paragraph 66), the Crown Court means test uses a Cost of Living Allowance, following an approach originally developed for the magistrates' court means test. This is currently £5,676 per year (£473 per month), having last been uprated in 2008.

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<sup>43</sup> Further details about the hardship and eligibility review processes can be found in the Criminal Legal Aid Manual ([publishing.service.gov.uk](http://publishing.service.gov.uk)).

359. As originally constructed, the Cost of Living Allowance uses average household expenditure (as captured by the annual ONS Living Costs and Food survey) on a range of items, including all spending deemed essential but excluding alcohol and tobacco, restaurants and hotels, and culture and recreation, to assess how much income individuals need to cover their essential living costs before they are able to contribute anything towards their legal costs.
360. We consider that this approach remains robust, as it takes into account average household spending on essential items, therefore ensuring that defendants do not have to sacrifice essential spending to pay income contributions towards their legal aid costs. We have therefore drawn on the 2019–20 ONS Living Costs and Food Survey to develop an updated allowance. Using this approach, our proposed monthly Cost of Living Allowance for the Crown Court would be £713 (£8,556 per year).

**Question 54:** do you agree with our proposal to increase the Cost of Living Allowance for the Crown Court means test to £713 per month (£8,556 per year)? Please state yes/no/maybe and provide reasons.

### **Deductions for dependents**

361. As laid out in Chapter 2 (paragraphs 92–96), we are also proposing to change our approach to equivalisation, by using the OECD Modified approach (After Housing Costs (AHC)) to take into account the costs of different household compositions. Please see Chapter 2, paragraph 96 for a consultation question on this proposed approach.
362. For disposable income assessment purposes, we propose to set fixed allowances for additional adults and children, based on an AHC equivalisation of the Cost of Living Allowance. The AHC equivalisation metric is 72% of the lower disposable income threshold for each additional adult or child aged 14 or over; and 34% of the lower disposable income threshold for each child under 14.
363. Therefore, the proposed deduction for an additional adult or child aged 14 or over would be £513 per month, and the proposed deduction for a child under 14 would be £242 per month.

**Question 55:** do you agree with our proposed deductions for dependents of £513 per month for each adult and child aged 14 or over, and £242 per month for each child under 14? Please state yes/no/maybe and provide reasons.

### Lower disposable income threshold

364. At present, disposable income is defined differently in the criminal and civil legal aid tests. In the civil legal aid test, disposable income is defined as income remaining after the deduction of tax, NI, housing and childcare costs and deductions for other household members. However, in the criminal means test, disposable income is defined as income remaining after not only these deductions but also the deduction of the Cost of Living Allowance.
365. Defendants with disposable income (under the current regime) lower than £3,398 per year are entitled to non-contributory Crown Court legal aid. This £3,398 allowance was developed for the magistrates' court means test and set to broadly approximate the costs of private representation there, to ensure that defendants at the magistrates' court who failed the means test could afford to pay for a private defence (see Chapter 7, paragraphs 443–445).
366. We consider this allowance is not needed for the Crown Court test, where applicants with income above the lower disposable income threshold but below £37,500 per year are still entitled to legal aid, with income contributions. We plan, therefore, to structure the disposable income threshold for the Crown Court in the same way as for civil legal aid, such that the lower disposable income threshold is equivalent to the applicable Cost of Living Allowance for a single person; and that anyone with disposable income above this level may be required to pay an income contribution. This approach will make our Crown Court thresholds easier to understand (stakeholders have told us that they find the current approach confusing) and improve consistency between the civil and criminal means tests. **Annex E** includes worked examples of the new means test.

**Question 56:** do you agree with our proposal to align the Crown Court lower disposable income threshold with the Cost of Living Allowance? Please state yes/no/maybe and provide reasons.

### Upper disposable income threshold

367. Until 2014 there was no upper eligibility threshold for legal aid in the Crown Court – all applicants were eligible for legal aid, though those with incomes above the lower disposable income threshold may have been required to pay income contributions. The rationale for the upper disposable income threshold was laid out in the MoJ consultation *Transforming Legal Aid* (2013), paragraph 3.29, which stated:
- “We consider that a defendant with this level of annual disposable income should generally be able to afford to pay for legal services in the Crown Court on a private basis.”*

368. If a defendant has applied for legal aid but has been found ineligible due to their disposable income being above the upper threshold and is acquitted, they are entitled to a partial refund of their private defence costs, via a Defendant's Cost Order (DCO), based on legal aid rates rather than what they paid privately.
369. Some concerns have been raised about this approach, as a defendant at the Crown Court who has been acquitted of a crime may nevertheless find themselves out of pocket, due to the discrepancy between the private legal fees they have paid for their defence and the refund they receive at (typically lower) legal aid rates.
370. We therefore propose to revert to the Crown Court means testing policy in place before the upper disposable income threshold was implemented, by removing the upper disposable threshold for legal aid at the Crown Court. This means that all defendants, whatever their means, will be entitled to legally aided representation. As at present, defendants who decide not to apply for or take up an offer of legally aided representation will not have any private costs refunded following an acquittal.
371. The proposed change means that a small number of high-income individuals who are not currently entitled to legal aid at the Crown Court will benefit from publicly funded representation. However, such individuals, if they take up an offer of legal aid, will typically be liable to pay monthly income contributions for up to 18 months (see paragraph 375 below). We envisage that, in many cases, these income contributions will cover the full legal aid cost of representation, particularly for lengthier cases. Moreover, individuals who have high capital assets may, if convicted, become liable to pay the balance of any outstanding legal aid costs from their capital assets via the imposition of a Capital Contribution Order.

**Question 57:** do you agree with our proposal to remove the upper disposable income threshold for legal aid at the Crown Court? Please state yes/no/maybe and provide reasons.

### **Worked examples**

#### *Example 1*

Defendant S has one child aged 12 and monthly gross household income of £3,000.

**Disposable income assessment:** Following deductions for income tax, national insurance, childcare, pension contributions, housing costs and council tax (£1,893 in total), the work allowance of £66, and a deduction of £242 for one dependent under the age of 14, Defendant S's disposable income would be £799.

Defendant S would be **eligible for legal aid at the Crown Court with a monthly income contribution.**

#### *Example 2*

Defendant T has a partner and two children aged 6 and 3, with a monthly gross household income of £5,000.

**Disposable income assessment:** after deductions for income tax, national insurance, pension contributions, childcare, housing costs and council tax (£3,547 in total), the work allowance of £66 for both Defendant T and their partner, and a deduction for one adult dependant and two dependents under 14 of £997. Defendant T's disposable income would be £324.

Defendant T would be **eligible for legal aid at the Crown Court without any requirement to pay a contribution.**

## **Contributions**

372. As stated in the introduction (paragraph 25), we consider that those who can afford to contribute to the cost of their legal representation should do so. Chapter 1 (paragraphs 68–71) outlines our current approach to income and capital contributions at the Crown Court. Annually, about 8,000 to 9,000 defendants at the Crown Court are required to pay an income contribution order (ICO). Approximately 1,500 to 2,000 capital contribution orders (CCOs) are also issued each year, representing between 2% and 3% of the legally aided population at the Crown Court, and with an average value of £15,000.

### **Income contributions**

373. Chapter 2 (paragraphs 144–152) outlines our proposed new approach to income contributions for both civil and Crown Court representation.

*Payment period*

374. At the Crown Court, the existing 6 monthly income contribution payment period was based on the average duration of a Crown Court case in 2008/09 (as measured from the date of charge to completion of the trial). In practice, an average of 4 monthly payments are due under each income contribution order. Yet some cases can last much longer and cost much more to defend. As such, we believe it is reasonable and fair to ask defendants to pay proportionately more than they would do in a shorter case.
375. We are therefore proposing to extend the period for which income contributions are payable, to a maximum of 18 months (or the lifetime of the case, if shorter). In tandem with the proposed lifting of the £37,500 threshold, this will allow us to collect proportionately more from very high-earning individuals who do not currently qualify for legal aid.
376. As 98% of all Crown Court cases conclude within 18 months (based on 2019–20 data), the LAA may collect more ICO payments from longer cases from those with higher disposable incomes compared to the existing maximum 6 month payment period. As happens now, if the case concludes within the payment period, no further payments would be required beyond this earlier point.
377. The extended payment period would still give certainty to the defendant about the maximum possible amount they may have to pay in income contributions. At the same time, we will maintain the overarching safeguard that acquitted defendants are refunded any income contributions with interest.
378. We acknowledge the potential for higher value refunds of ICO payments, as some defendants will pay more under the proposed 18 month payment period rather than the current 6 month payment period (this may occur in relation to acquitted defendants but also to those convicted defendants whose income contributions may exceed their final defence costs). Whilst this may give rise to an additional administrative burden, the retention of a cost cap per offence class<sup>44</sup> should mitigate, though not completely eliminate, the risk of any defendant paying more than their likely case costs. The cap is based on the average legal aid cost per class of offence, though it excludes the 10% most expensive cases so that “outlier” cases do not disproportionately skew the figure. If the defendant’s cumulative monthly income payments reach the cap, any further income payments are paused. As the current

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<sup>44</sup> We will review the potential impact of CLAIR, particularly in respect of any changes to fee structures or amounts, and will adjust the cost cap mechanism to reflect such changes, as appropriate. Details of the current cost cap are set out at Regulation 15 of Criminal Legal Aid (Contribution Orders) Regulations 2013/SI No.483.

cap was set in 2010, we propose to update it to reflect the costs per offence class in the immediate pre-pandemic period.

379. Currently the defendant is exempt from the 6<sup>th</sup> monthly payment of their ICO if the first five payments are made on time. We propose to maintain the payment incentive principle by extending this proportionately to an 18 month payment period. This would mean that a one month payment exemption would be applied to the repayment schedule at months 6, 12 and 18, provided payments at months 1 to 5, 7 to 11, and 13 to 17 are made on time. As now, the defendant will have the option to settle their total income contribution liability in a lump-sum payment benefitting from the same payment incentive discount.

**Question 58:** do you agree with our proposal for a maximum income contribution payment period of 18 months? Please state yes/no/maybe and provide reasons.

**Question 59:** do you agree with our proposal for a payment incentive to be built into the 18 month repayment schedule based on an exemption at months 6, 12 and 18 provided all previous monthly payments (months 1 to 5, 7 to 11, and 13 to 17) are made on time? Please state yes/no/maybe and provide reasons.

**Question 60:** do you agree with our proposal to maintain the option for the defendant to settle their total income contribution liability through one or more lump-sum payments? Please state yes/no/maybe and provide reasons.

**Question 61:** do you have any wider thoughts or views about the effectiveness with which the payment incentive or lump sum payment facility help to improve and incentivise overall payment compliance by the defendant? Please state yes/no/maybe and provide reasons.

#### *Tiered contribution model*

380. Currently, defendants with gross annual income above £12,475 undergo an assessment of their annual disposable income – if this exceeds £3,398, they must pay a monthly income contribution calculated at 1/12<sup>th</sup> of 90% of their annual disposable income (not just on that part of their disposable income above the £3,398 threshold). Whilst, administratively, this calculation is relatively straightforward, the £3,398 threshold effectively operates as a ‘cliff edge’, given that a defendant whose disposable income is at or below this threshold pays no income contribution whatsoever.
381. As we transition to the new means testing arrangements, including the new thresholds, we wish to ensure that we adopt a more progressive mechanism through which to calculate the income contribution.

382. Consequently, we are proposing (see Chapter 2, paragraph 148) to introduce a tiered contribution mechanism that will also harmonise our policy approach on this issue with civil legal aid. Therefore, for those defendants whose gross annual income exceeds the proposed lower gross income threshold of £13,000, we propose to set contribution rates at 40%/60%/80% of their monthly disposable income, to apply as follows:

40% rate to apply between £697 and £1,000

60% rate to apply between £1,000 and £1,250

80% rate to apply over £1,250

### **Worked examples**

#### *Example 1*

Defendant U has monthly disposable income of £1,100

For his monthly income contribution, he pays 40% of disposable income between £697 and £1,000 (£121.20); 60% of disposable income between £1,000 and £1,250 (£60).

Total monthly income contribution = £181.20

#### *Example 2*

Defendant V has monthly disposable income of £1,500

For her monthly income contribution, she pays 40% of disposable income between £697 and £1,000 (£121.20); 60% of disposable income between £1,000 and £1,250 (£150); and 80% of disposable income above £1,250 (£200).

Total monthly income contribution = £471.20

### *Minimum monthly contribution*

383. Alongside the considerations outlined above, we also need to ensure that any new means testing model is administratively cost-effective. In conjunction with the LAA, who manage the collection of income contributions, we estimate that the minimum monthly income contribution needs to be set at £100 to be operationally viable.

384. Whilst on average 4 monthly payments are due under each ICO, corresponding with the typical length of a Crown Court case, approximately 30% to 40% of ICOs engage only 1-2 monthly payments (typically, this arises in very short trial cases or where there has been a guilty plea); consequently, any minimum monthly payment less than £100 poses risks to the cost-effective collection of income contributions from these shorter cases. In practice, the increase of the Cost of Living Allowance and the new minimum monthly payment means we effectively raise the monthly disposable income threshold at which no income contribution is payable from £697 to £947.

**Question 62:** do you agree with our tiered model approach (40%/60%/80%) with a minimum monthly payment of £100 to determine the income contribution? Please state yes/no/maybe and provide reasons.

*Review process*

385. Where a defendant considers that the income contributions they are required to pay are unaffordable (typically, due to extra unavoidable expenditure which is not taken into account as part of the standard disposable income assessment), they can apply to the LAA for a hardship review, which may result in their income contribution being reassessed. We propose to continue the hardship review process as at present.

**Question 63:** do you agree with our proposal to continue the hardship review process for legal aid at the Crown Court? Please state yes/no/maybe and provide reasons.

*Applying interest to unpaid ICO contributions*

386. Currently the LAA's Director of Legal Aid Casework (DLAC) has the discretion to add 6% compound interest to unpaid ICO contributions. Going forwards, we propose that the decision should remain subject to the DLAC's discretion – when income contributions fall due, the individual has not been convicted and so to mandate interest may appear punitive.

387. To ensure consistency in the application of the discretionary power, the MoJ and LAA will publish guidance in due course. In outline, we would not add interest if the payment is made on time. We acknowledge that a payment date may be missed if there are practical challenges in contacting the defendant (for example, those held on remand); this does not mean the defendant is being evasive and once contact has been made, payments may be commenced or resumed – we would not envisage charging interest in such cases. However, we may add interest in cases if there is evidence of significant unwillingness by the defendant to comply.

388. In setting interest, we propose to adopt HMRC practice in applying simple (not compound) interest to unpaid tax. HMRC relies on the following formula – Bank of England base rate (currently 0.5%) plus 2.5%. Therefore, we would propose to add 3% simple interest per year to unpaid ICO contributions. If the base rate further fluctuates ahead of implementation, we would adjust our proposed rate accordingly. However, in order to provide certainty for the individual, we would not propose to apply a variable rate of interest after implementation of this proposal but to keep the interest rate fixed, although we would commit to review it as part of our wider policy commitment to review the new means test within 3 to 5 years of implementation.

**Question 64:** do you agree with our proposal to apply simple interest on a discretionary basis to unpaid ICO contributions, relying on the Bank of England base rate at the time of implementation of this proposal plus 2.5% in order to fix the relevant rate of interest?

Please state yes/no/maybe and provide reasons, including whether you would favour adoption of a variable rather than fixed interest rate, as well as your views on the actual rate of interest proposed.

#### *Interest added to income contribution refunds*

389. We currently add 2% compound interest to income contributions refunded following acquittal or overpayment. In transitioning to the new means test arrangements, we propose aligning our approach broadly with that of HMRC which refunds tax overpayments at simple interest 1% below the Bank of England base rate, subject to a minimum 0.5%. If the base rate fluctuates again in advance of implementation, we would adjust our proposed rate in accordance with this formula. However, we would not intend to adjust the rate further by following a variable rate after implementation but would keep the interest rate fixed; we would commit to review the interest rate as part of our wider policy commitment to review the new means test within 3 to 5 years.

**Question 65:** do you agree with our proposal to add simple interest to refunds of income contributions following acquittal or overpayment? For the purpose of setting the interest rate, we would rely on the Bank of England base rate minus 1%, subject to a minimum 0.5%.

Please state yes/no/maybe and provide reasons, including whether you would favour adoption of a variable rather than fixed interest rate, as well as your views on the actual rate of interest proposed.

#### **Capital contributions**

390. If the defendant is convicted at the Crown Court, they may become liable to pay the balance of any outstanding legal aid costs from their capital assets. The total amount payable under a capital contribution order (CCO) takes account of any income contributions which may have already been paid.

391. Approximately 1,500 to 2,000 CCOs are issued each year, impacting between 2% and 3% of the legally aided population at the Crown Court. The average value of each CCO is £15,000. Going forwards, our policy proposals to end Crown Court capital passporting arrangements for homeowners in receipt of passporting benefits, set out in paragraphs 413–415 below, allied to the removal of the £37,500 upper disposable income threshold, are expected to increase CCO volumes and revenues.

392. We support the fundamental principle that those convicted at the Crown Court should be liable to contribute towards any outstanding legal aid costs from their capital assets. However, we are concerned that those who hold only modest capital assets should continue to be afforded some protection so that we recoup costs from those most able to contribute. This also helps us to deliver on the wider legal aid reform programme objective to target legal aid resources on the basis of need.

#### *Capital allowance*

393. When Crown Court means testing was phased in during 2010, the capital allowance was set at £30,000. In practice, this means that only an individual with more than £30,000 in capital assets, including equity in their property, may become liable to pay a CCO. Operationally, by setting the capital allowance at £30,000, this ensured the scheme could also be more cost-effective as it meant that collection could be focused on those individuals who held more substantial capital assets, rather than recovering a series of smaller amounts from a larger pool of individuals.

394. As the value of the capital allowance has not been adjusted since 2010, we have considered whether an uprating may now be appropriate, particularly given recent property inflation, which is reflected in our proposal to increase the equity disregard in the civil legal aid capital assessment (see Chapter 4, paragraphs 233–236).

395. However, we consider that a more generous disregard is justified under the civil scheme, given that we require up-front payment of the capital contribution before granting the legal aid certificate. In contrast, for defendants appearing before the Crown Court, capital status is not relevant to the decision about whether or not to grant legal aid; instead, it serves only to identify liability to a CCO if the defendant is convicted. We therefore propose to maintain the capital allowance at £30,000.

**Question 66:** do you agree with our proposal to maintain the capital allowance at £30,000? Please state yes/no/maybe and provide reasons.

#### *Timing of the valuation of capital assets*

396. As part of the legal aid application, the defendant must provide details of their capital assets, including any properties. In cases which subsequently result in conviction, the LAA assesses the defendant's potential liability to a CCO relying on the information provided at the time of the application. If this process gives rise to further queries, the LAA may contact the defendant for clarification.

397. Given that the value of capital assets may have fluctuated since the application was submitted, we believe it is fairest to the defendant to undertake a contemporary valuation of capital post-conviction. As there is the potential for capital assets both to

increase or decrease in value, this ensures that the defendant's liability to the CCO most accurately reflects their ability to pay.

398. As happens now, defendants will still be able to apply for a reassessment of any potential ICO or CCO liability on the grounds of a change in their financial circumstances; they will also remain entitled to seek a reassessment through the hardship review mechanism.

**Question 67:** do you agree with our proposed policy regarding when we should undertake the valuation of capital assets? Please state yes/no/maybe and provide reasons.

*Applying interest to unpaid capital contributions*

399. Currently, the LAA's Director of Legal Aid Casework has discretion to add 6% compound interest to unpaid CCOs but has not previously chosen to do so. Moving forwards, we are proposing that, rather than discretionary, interest must be applied to unpaid CCO debt (this would only apply in cases where the representation order is granted after the means test changes are introduced; we do not propose adding interest to existing CCO debt where none has previously been applied).
400. Our rationale for more direct intervention is based on fairness as interest prevents those who do not pay on time from gaining a financial advantage over those who do. By adding interest, we also protect the debt in real terms when to not do so would see the debt depreciate in value and potentially act as a disincentive to payment.
401. In setting interest, we propose to adopt HMRC practice in applying simple (not compound) interest to unpaid tax. HMRC relies on the following formula – Bank of England base rate (currently 0.5%) plus 2.5%. Therefore, we would propose to add 3% simple interest per year to unpaid CCO debt. If the base rate further fluctuates ahead of implementation, we would adjust our proposed rate accordingly. However, in order to provide certainty for the individual, we would not propose to apply a variable rate of interest after implementation but to keep the interest rate fixed, although we would commit to review it as part of our wider policy commitment to review the new means test within 3 to 5 years.

**Question 68:** do you agree with our proposal to mandate the payment of simple interest on unpaid CCO debt, relying on the Bank of England base rate at the time of implementation plus 2.5% in order to set the relevant rate of interest?

Please state yes/no/maybe and provide reasons, including in particular whether you would favour adoption of a variable rather than fixed interest rate, as well as your views on the actual rate of interest proposed.

**Question 69:** in your opinion, what behavioural impacts will the mandating of interest have on defendants; for example, do you agree that it will incentivise payment or may it trigger other behaviours? Please state yes/no/maybe and provide reasons.

### Worked example

#### *Example 1*

Applicant W is in receipt of Universal Credit and hence is passported through the income assessment. He is convicted at the Crown Court, having incurred legal aid costs of £12,000. As he is a homeowner, he is now assessed for a potential liability to a capital contribution order.

**Capital assessment:** Applicant W has one capital asset: his flat, which is valued post-conviction at £120,000. Following deductions for the outstanding mortgage of £42,000 and the capital allowance of £30,000, Applicant W has remaining capital of £48,000.

Applicant W is therefore issued with a capital contribution order (CCO) for £12,000. The LAA places a charge over his flat in order to protect the CCO debt. Simple interest of 3% is added to the debt annually until its payment.

### Crown Court appeals

402. The same Crown Court means test for income is used to determine whether appellants who appeal to the Crown Court against their conviction and/or sentence at the magistrates' court should be liable to pay a contribution if their appeal fails or is abandoned. This contribution is currently fixed at £500 for an unsuccessful appeal against conviction and £250 for an unsuccessful appeal against sentence. If the appeal is against conviction and sentence, and the appeal against conviction is abandoned or dismissed but the appeal against sentence is allowed, the contribution is set at £250. The fixed contributions for Crown Court appeals reflect average legal aid costs in 2010. To ensure the way we calculate disposable income for appeal cases is fair, we deduct £500 to represent the cost of an appeal.
403. We propose to continue this approach towards means-testing of Crown Court appeals, as we consider that those who can afford to contribute to their legal aid costs should do so.
404. However, we propose to increase the fixed contribution to reflect the current average cost of a legally aided appeal, which since 2010 has risen to £800 for an appeal against conviction and to £400 for an appeal against sentence.<sup>45</sup> As we are

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<sup>45</sup> These figures are based on appeals in FYs 2017/18 to 2019/20. The more recent rise is attributed in part to the 2018 AGFS fee increase.

proposing to raise the fixed contribution to £800, we will also adjust upwards from £500 to £800 the deduction from gross annual income when calculating an appellant's disposable income (see paragraphs 352–363).

**Question 70:** do you agree with our proposal to increase the fixed contribution for unsuccessful Crown Court appeals from £500 to £800 for an unsuccessful appeal against conviction; from £250 to £400 for an unsuccessful appeal against sentence; and from £250 to £400 for an unsuccessful appeal against conviction but where the appeal against sentence is allowed? Please state yes/no/maybe and provide reasons.

**Question 71:** In calculating the applicant's disposable income for the purpose of a legally aided appeal, do you agree with our proposal to increase the deduction for the cost of an appeal from £500 to £800? Please state yes/no/maybe and provide reasons.

## Sentencing hearings at the Crown Court

405. In December 2021 the government published the Independent Review of Criminal Legal Aid (CLAIR). Amongst other issues, the review raised a specific concern about the means-testing treatment of committals for sentence, a procedure by which a defendant who has pleaded guilty is sent from the magistrates' court to a Crown Court for sentencing where the seriousness of the offence potentially warrants a longer sentence than the magistrates can give.
406. CLAIR proposed that legal aid eligibility for Crown Court sentencing hearings follows that for Crown Court appeals, where legal aid is available based on the Crown Court means test and subject to an interests of justice test; an income contribution may be payable.
407. Having considered this matter, we believe that sentencing hearings at the Crown Court, following a guilty plea at the magistrates' court, should continue to fall under the magistrates' court means test. If our proposed increase to the income thresholds at the magistrates' court is implemented, any defendant found ineligible at the magistrates' court on grounds of means should be able to afford to pay privately for representation at the sentencing hearing.
408. The average legal aid cost for representation at a Crown Court sentencing hearing is £446. The average legal aid cost of a full trial at the magistrates' court is approximately £670 and our proposed new thresholds have been developed to ensure that a defendant found ineligible on grounds of means can afford a private defence (see Chapter 7, paragraphs 443–452). As a defendant who fails the magistrates' court means test and who makes an early guilty plea will not incur the

privately funded cost of a substantive trial, we consider that they should be able to fund private representation at a sentencing hearing. Individuals may also apply for a hardship review, if they consider that the disposable income assessment does not take into account all of their essential expenditure.

**Question 72:** Do you agree with our proposal that the sentencing hearings at the Crown Court, following a guilty plea at the magistrates' court, should continue to fall under the magistrates' court means test? Please state yes/no/maybe and provide reasons.

## Benefits passporting

### Income passporting

409. As set out in Chapter 2, paragraphs 139–140, applicants who are in receipt of certain means-tested benefits are deemed eligible for non-contributory legal aid without going through a full means assessment. We refer to these benefits as passporting benefits. We have reviewed the current list of passporting benefits with the aim of understanding whether recipients of these would be likely to pass the means test for non-contributory legal aid and have developed proposals on this basis.
410. We propose to continue to passport all recipients of passporting benefits through the income assessment for crime cases in the Crown Court, and this includes all UC recipients. We are proposing different thresholds for criminal legal aid, compared to civil legal aid, which means that the vast majority of applicants in receipt of passporting benefits would be eligible for legal aid and would not be required to pay an income contribution if they underwent an income means assessment. In the Crown Court around 97% of passported applicants would be eligible for non-contributory legal aid (the remaining 3% would pay an income contribution). This means the cost of passporting all UC recipients is much lower for criminal legal aid than for civil legal aid. Please see the Impact Assessment for criminal legal aid for more details on this analysis.
411. In addition, passporting makes means-testing quicker by reducing the need for an income assessment and the associated evidential requirements, which is more important in the magistrates' court because cases tend to come to court quicker.
412. Therefore, limiting the numbers of applicants passported would reduce the efficiency of the means test and significantly increase the administrative burden for the LAA and criminal practitioners for minimal financial savings.

**Question 73:** do you agree with our proposal to continue to passport all recipients of existing passported benefits for the Crown Court means test? Please state yes/no/maybe and provide reasons.

### **Capital passporting in the Crown Court**

413. There is no capital eligibility assessment for legal aid at the Crown or magistrates' court. However, convicted defendants at the Crown Court may be required to make a contribution towards their legal aid costs from any capital assets over £30,000 (including equity in property as well as liquid assets). Currently, convicted defendants in receipt of a passporting benefit (including UC) are passported through the capital assessment in the Crown Court and do not have to make a capital contribution.
414. It is very unlikely that such defendants have more than £30,000 in liquid assets, given that the capital threshold for eligibility for passported means-tested benefits is £16,000 (other than for Pension Credit where there is no upper capital limit).<sup>46</sup> However, as DWP disregard an applicant's primary residence from their capital, our modelling suggests that a number of applicants (around 2,000, or 2.5% of Crown Court defendants) who will be passported on UC have over £30,000 in capital as equity in their property. These individuals are not required to pay a capital contribution, whereas if they were not in receipt of a passporting benefit, they would have to. While this is a relatively low proportion of all applicants, the estimated savings from this proposal indicate that most of these individuals have a substantial amount of capital over £30,000. This situation leads to an inconsistency between treatment of those who are and are not in receipt of passporting benefits.
415. We propose to continue to capital passport individuals on relevant benefits who do not own a property, as our modelling suggests that it would be very rare for such applicants to be required to pay a capital contribution if they were means tested. We propose that applicants in receipt of passporting benefits who do own property will undergo a full capital means assessment (of their property and any other capital) and would be required to contribute towards their legal aid where they have capital above the threshold of £30,000. This approach is in line with our position that those who can afford to contribute towards their legal aid should do so, and treats those in receipt of passporting benefits consistently with those who are not.

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<sup>46</sup> Where individuals applying for Pension Credit have more than £10,000 in savings and investments, every £500 over £10,000 counts as £1 income a week.

**Question 74:** do you agree with our proposal to limit capital passporting for legal aid in the Crown Court to non-homeowners in receipt of passporting benefits? Please state yes/no/maybe and provide reasons.

## Chapter 7: Magistrates' court and criminal advice and assistance/advocacy assistance means tests

416. Covered in this chapter are our proposed approaches to the means tests for criminal legal aid at the magistrates' court and criminal advice and assistance/advocacy assistance, including our proposed approach to passporting.
417. The current magistrates' court means test came into force in 2006 and the income thresholds have not been updated since 2008. Similarly, the income thresholds for Criminal Advice and Assistance/Advocacy Assistance have not been updated since 2009, with the capital thresholds being left unchanged since at least 2001.
418. This chapter sets out our proposal to raise these thresholds to reflect cost increases since the thresholds were last raised, to ensure that those who need legal aid the most can access it; and to align the means tests for criminal advice and assistance and advocacy assistance. We are asking respondents to consider these proposed increases and state whether they agree, disagree or agree in part with our proposed approach, providing reasons for their views.

### Magistrates' court representation

419. Unlike the Crown Court means test, the magistrates' court test is an 'in/out' scheme, meaning an applicant is found either eligible for legal aid or not. Legal aid at the magistrates' court does not require applicants to pay contributions towards their legal aid costs. We consider that this approach remains fitting for the magistrates' court as many cases involve a single hearing and are generally less complex and shorter than those heard in the Crown Court, meaning they cost less. Further, unlike the Crown Court, magistrates' hearings work to tighter deadlines and there is a very small window of opportunity to apply for and be granted legal aid.

**Question 75:** do you agree with our proposal that legal aid at the magistrates' court should continue to be non-contributory? Please state yes/no/maybe and provide reasons.

### **Upper gross income threshold**

420. As laid out in Chapter 1, the means test for representation at the magistrates' court currently has an upper gross income threshold of £22,325. Applicants for legal aid with income above this threshold (when adjusted for household size) are found ineligible for legal aid without undertaking a disposable income assessment.
421. When originally set in 2005, the upper gross income threshold was £20,740 for a single defendant without dependent children. This threshold was derived from the then upper gross income threshold for civil legal aid, which was £27,500. However, the figure was reduced to reflect the fact that the gross threshold for the magistrates' court, unlike that for civil legal aid, would be equivalised to take into account the composition of the applicant's household, and therefore better determine which applicants could genuinely afford to pay for their defence costs.
422. As outlined in Chapter 2 paragraphs 93–96, equivalisation is the process by which income is adjusted to take account of the needs of households of different sizes. For our purposes, we adjust the threshold based on the number of dependants over and under 14 years old, following the OECD Modified approach outlined in Chapter 2. This helps ensure fairness in the way legal aid resources are allocated, as household composition can have a direct bearing on living costs, and hence whether the individual can afford to pay for or contribute towards their legal costs.
423. The upper gross income threshold was also designed to filter out applicants who were extremely unlikely to pass the disposable income test, which included an allowance to reflect an applicant's ability to afford private representation if they were not eligible for legal aid (see paragraphs 443–446 below). The threshold was increased in 2008 to £22,325 to reflect inflation.
424. The upper gross income threshold reduces the administrative burden for legal aid applicants and providers, by removing the need for anyone with gross income above the threshold, who would be very unlikely to pass the disposable income test, to go through the full disposable income assessment. We think that this rationale for having a gross upper income threshold remains sound.
425. As outlined in Chapter 3 (paragraphs 183–185), we are proposing to equivalise the gross income threshold for the civil legal aid means test, using the OECD modified approach (as outlined in Chapter 2, paragraph 95) for both the civil and the criminal means tests. We therefore propose to set the same gross upper income threshold for the magistrates' court as for civil legal aid, as was originally proposed in the Criminal

Defence Service Bill consultation of 2004,<sup>47</sup> but altered due to the different approach to equivalisation.

426. We consider, as for civil legal aid, that those with median or above median incomes should not be eligible for legal aid at the magistrates' court, as we do not consider people with such incomes are those most in need, for whom the legal aid scheme is designed. We therefore propose to set a new gross income threshold of £34,950 (£2,913 per month) for an individual, as according to Office for National Statistics this figure was the UK median gross income of an individual in the financial year ending 2020.<sup>48</sup>
427. This income figure includes earned income, other income (such as pensions, rental income, investment income and imputed income<sup>49</sup> and some benefits, but does not include any sources of income which are currently disregarded (for instance, Carers' Allowance, Personal Independence Payments, and other benefits designed to cover the additional costs of disability), as we do not take income from these sources into account when assessing eligibility for legal aid. See **Annex A** for a full list of types of income that are currently disregarded from the legal aid means assessment.
428. Our analysis confirms that very few individuals with equivalised gross incomes above this threshold would pass the disposable income test for legal aid at the magistrates' court.

**Question 76:** do you agree with our proposal to set a new upper gross income threshold of £34,950 (£2,913 per month) for an individual? Please state yes/no/maybe and provide reasons.

### **Lower gross income threshold**

429. As laid out in Chapter 6 (paragraph 347), the lower gross income threshold for legal aid at the Crown Court and magistrates' court is intended to reduce the administrative burden for applicants, providers and the Legal Aid Agency (LAA), by identifying applicants whose gross incomes are low enough that they are overwhelmingly likely to pass the disposable income test.
430. Following analysis of the current lower gross income threshold, we found that the threshold allowed for a significant proportion of applicants to get legal aid at the magistrates' court when they would have failed the current disposable income test.

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<sup>47</sup> Source: Draft Criminal Defence Service Bill: Consultation Paper and Explanatory Notes, May 2004, pp. 32–35

<sup>48</sup> See **Annex C** for details as to how we have calculated this gross income figure.

<sup>49</sup> Benefits employees receive that aren't part of their salary or wages (like access to a company car or a gym membership) but still get taxed as part of their income.)

We also found that some applicants with incomes below the lower gross threshold may be eligible for non-contributory legal aid at the Crown Court when, had they taken the disposable income assessment, they would have been required to pay an income contribution.

431. We are therefore proposing to amend the lower gross income threshold so that it is likely to be passed only by applicants who would also pass the disposable income test. We propose that the new lower gross income threshold for both magistrates' and Crown courts tests should be set at £13,000. The existing lower gross income threshold is £12,475. This will also align the lower gross threshold more closely with the proposed changes to the Crown Court and magistrates' court disposable income thresholds (outlined in Chapter 6, paragraphs 365–366 and below in paragraphs 443–445).

**Question 77:** do you agree with our proposal to set a new lower gross income threshold at the magistrates' court of £13,000 for an individual? Please state yes/no/maybe and provide reasons.

432. As laid out in Chapter 2, paragraphs 93–96, we are also proposing to change our approach to equivalising the gross income threshold, by using the OECD Modified approach (Before Housing Costs ("BHC")) to take into account the costs of different household compositions. Using the BHC equivalisation metric, for each additional adult or child aged 14 or above the threshold would increase by 50% of the gross threshold for a single adult; for each child under the age of 14, the corresponding figure is 30%.
433. Please see Chapter 2, paragraph 96 for a consultation question on this proposed approach.

### **Assessment of disposable income**

434. As outlined in Chapter 1, for the purposes of the magistrates' court means test, disposable income is calculated by deducting the following from gross income:
- the applicant's tax, NI, housing, Council Tax, childcare and child maintenance payments
  - a set cost of living allowance (COLA; currently £5,676 per year for a single person)
  - further deductions for partner/children (when relevant).
435. If the applicant has an annual disposable income greater than £3,398 per year (£283 per month), they are not eligible for legal aid to fund defence costs in the magistrates' court.

436. We have considered each element of the disposable income threshold below, and proposed changes where we think appropriate.
437. As for the Crown Court means test, we are proposing some additional deductions as part of the disposable income assessment. We are proposing to deduct employee pension contributions up to 5% of earnings, student loan repayments, a work allowance of £66 per month for applicants and (when relevant) their partners who are in employment, and priority debt repayments. We consider that these additional proposed deductions will enable a more realistic picture of an applicant's cost of living expenditure; see Chapter 2 (paragraphs 100–104) and Chapter 6 (paragraph 355) for further detail.

**Question 78:** do you agree with our proposal that the magistrates' court means test should deduct pension contributions up to 5% of earnings, student loan repayments, a work allowance of £66 per month and priority debt repayments from disposable income? Please state yes/no/maybe and provide reasons.

### **Cost of Living Allowance and additional deductions**

438. The magistrates' court uses the same Cost of Living Allowance as the Crown Court means test, currently £5,676 per year. As outlined in Chapter 6 (paragraphs 358–360), COLA is based on average household expenditure (as captured by the annual ONS Living Costs and Food survey) and we have used the 2019–20 survey to set an updated allowance for both the magistrates' and Crown Courts.
439. The updated allowance we are proposing (as discussed in Chapter 6) is £713 per month (£8,652 per year).

**Question 79:** do you agree with our proposal to set the magistrates' court means test Cost of Living Allowance at £713 per month, as proposed for the Crown Court means test? Please state yes/no/maybe and provide reasons.

### **Deductions for dependents**

440. As laid out in Chapter 2 (paragraphs 93–96), we are also proposing to change our approach to equivalisation, by using the OECD Modified approach (After Housing Costs (AHC)) to take into account the costs of different household compositions. Please see Chapter 2, paragraph 96 for a consultation question on this proposed approach.
441. For disposable income assessment purposes, we propose to set fixed allowances for additional adults and children, based on an AHC equivalisation of the Cost of Living Allowance. The AHC equivalisation metric is 72% of the Cost of Living Allowance the

for each additional adult or child aged 14 or above and 34% of the lower disposable income threshold for each child under 14.

442. Therefore, the proposed deduction for an additional adult or child aged 14 or above would be £513 per month, and the proposed deduction for a child under 14 would be £242 per month. This is the same proposed deductions as for the Crown Court means test, as we are proposing to use the same Cost of Living Allowance for both means tests.

**Question 80:** do you agree with our proposed deductions for dependents of £513 per month for each adult and child aged 14 or over, and £242 per month for each child under 14? Please state yes/no/maybe and provide reasons.

### Disposable income allowance

443. The disposable income allowance was designed, alongside the Cost of Living Allowance, in 2005 and included in the wider Criminal Defence Service Bill. This allowance accounts for an applicant's ability to pay privately for their defence from their disposable income, with the Government's consultation response stating: "*the intention [is] that only those who demonstrate an appropriate level of disposable income when tested will become ineligible*".<sup>50</sup>
444. The allowance was initially set at £3,156 per year, with a supporting explanation that "*a threshold of £3,156 reflects a level above which it is reasonable to ask the applicant to pay for their defence costs. Taking into account that private client defence costs will in all likelihood exceed the average cost of a publicly funded case in the magistrates' courts (currently £515), we consider that this threshold is fair*".<sup>51</sup> When the allowance was introduced in 2005 the then Legal Services Commission estimated that the average private cost for a trial (around £1,500) was approximately three times the publicly funded cost of a defence.<sup>52</sup>
445. The Criminal Defence Service Bill consultation and supplement documents outline that the allowance should be approximately twice the value of the then private defence cost at the magistrates' court, or 6 times the legal aid cost. As £3,156 is an annual figure, the monthly allowance was £263, which suggests that those with disposable incomes just over the threshold for legal aid would be expected to pay for

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<sup>50</sup> Source: Criminal Defence Service Bill Framework Document CM 6572 (publishing.service.gov.uk), pg.5

<sup>51</sup> Source: Criminal Defence Service Bill Statement to the Framework Document CM 6678 (publishing.service.gov.uk), p. 6

<sup>52</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272190/6678.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272190/6678.pdf)

the cost of a typical private defence over approximately six months. The allowance was updated in 2008 to £3,398 but has not increased since.

446. We consider that the policy rationale to take into account in the means test the typical cost of a private defence via a disposable income allowance remains sound. However, given that the allowance has not been increased since 2008, we have reviewed typical legal aided and private defence costs to ensure our new magistrates' court means test reflects up-to-date costs.
447. We have considered the cost of a substantive trial (that is, where the defendant has pleaded not guilty), as we consider it is important that a defendant who pleads not guilty can afford their defence.
448. In the absence of published private fees by legal providers themselves, we have drawn on the hourly rates paid to court-appointed advocates in the magistrates' court. Court-appointed advocates are private practitioners (generally solicitors) appointed to advocate on behalf of an individual who is unable to represent themselves in court, for instance when the accused has a disability, or the accused cannot cross examine a witness (e.g. in a sexual assault case). They are paid from Government central funds via hourly rates set by the Master of the Rolls on the advice of the Civil Justice Council. These guideline hourly rates are based on data gathered from the judiciary and the legal profession<sup>53</sup> and are broken down by experience and geography. We have used a rate of £200 per hour based on the guideline rate published for an outer London or National Band 1 solicitor with around 4 years' experience.<sup>54</sup> However, to note that these guideline rates are not prescriptive, and each claim is assessed separately by the LAA.
449. When a defendant has paid privately for their defence and is subsequently acquitted, they are entitled to apply for a Defendant's Cost Order (DCO), which refunds the cost of their defence at legal aid rates. Through assessing a sample of DCO applications, we have estimated that a private practice solicitor would typically do 10–12 hours' work in preparation for and during a trial at the magistrates' court. Taken together with the typical private fee, these estimates suggest a typical cost of between £2000 and £2400 for a private defence at the magistrates' court.
450. For comparison purposes, we have considered the median legal aid cost of all trials at the magistrates' court in 2019–20, which is approximately £670 per case. This includes trials paid at standard (lower or higher) fees and non-standard fees, to ensure that we are considering both more complex and less complex trials. This

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<sup>53</sup> Source: 20210108-GHR-Report-for-consultation-FINAL.pdf (judiciary.uk) p. 12

<sup>54</sup> Source: [ARCHIVED CONTENT] Publications - Guidance - Previous guideline rates (nationalarchives.gov.uk)

suggests a multiplier of between about 3 and 3.5 between legal aid and private defence costs.

451. We propose, as in 2005, to set a disposable income allowance of twice the typical private fee. To ensure access to justice, we are proposing to use the upper end of the typical private fee range, £2400, resulting in a disposable income allowance of £4800 per year or £400 per month. The current average length of time from charge to conviction or acquittal at the magistrates' court is 6 months. Therefore, we consider that our proposed disposable income allowance should enable us to distinguish between defendants who can afford to pay the typical private fee over the typical 6-month timeframe, at £400 per month, and those who cannot. This means that our proposed disposable income threshold for legal aid at the magistrates' court will be £1113 per month (£13,356 per year) for an individual. Defendants who are found ineligible for legal aid, but consider they are unable to meet the cost of a private defence, will continue to have the option of the hardship and eligibility review, as outlined in Chapter 1 (paragraph 75).
452. We would be grateful for views as on whether our pricing assumptions for private costs are broadly accurate and, therefore, whether the allowance we have proposed will enable access to legal aid for those who need it most.

**Question 81:** do you agree with our proposal to increase the disposable income allowance to £400 per month? Please state yes/no/maybe and provide reasons.

### **Review process**

453. Where a defendant has failed the means test but believes they cannot pay privately for their defence (due to extra unavoidable expenditure and/or legal costs they consider unaffordable), they can apply to the LAA for a hardship review, which may result in them being found eligible for legal aid. We propose to continue the hardship review process as at present.

**Question 82:** do you agree with our proposal to continue the hardship review process for legal aid at the magistrates' court? Please state yes/no/maybe and provide reasons.

### **Benefits passporting**

454. As set out in Chapter 2 (paragraphs 139–140), applicants who are in receipt of certain means-tested benefits are currently deemed eligible for non-contributory legal aid without going through a full means assessment. We refer to these benefits as passporting benefits. We have reviewed the current list of passporting benefits with the aim of understanding whether recipients of each benefit would be likely to pass

the means test for non-contributory legal aid, and have developed proposals on this basis.

455. We propose to continue to passport all recipients of passporting benefits through the income assessment for criminal cases in the magistrates' court, and this includes all UC recipients. We are proposing more generous thresholds for criminal legal aid, compared to civil legal aid, which means that the vast majority of applicants in receipt of passporting benefits would not be found ineligible for legal aid at the magistrates' court. In the magistrates' court 98% of passported applicants would be eligible for legal aid (with the remaining 2% ineligible for legal aid). By comparison, only 73% of UC recipients would be eligible for non-contributory civil legal aid. This means the cost of passporting all UC recipients is much lower for criminal legal aid than for civil legal aid. Please see the Impact Assessment for criminal legal aid for more details on this analysis.
456. In addition, passporting makes means-testing quicker by reducing the need for an income assessment and the associated evidential requirements, which is more important in the criminal court because cases tend to come to court quicker.
457. Therefore, limiting the numbers of applicants passported would reduce the efficiency of the means test and significantly increase the administrative burden for the LAA and criminal practitioners for minimal financial savings.

### **Worked examples**

#### *Example 1*

Applicant X has one child aged 10 and gross income of £3,667 per month (£44,000 per year).

**Gross income assessment:** Applicant X's adjusted gross income threshold would be the base threshold of £34,950 per year with an additional allowance of 30% for their child; hence £45,435. They would therefore **pass the gross income assessment**.

**Disposable income assessment:** Following deductions for income tax, National Insurance, pension contributions, childcare, housing costs and council tax, the work allowance of £66 and £241 for a dependent under 14, Applicant X's disposable income would be £1,032 per month.

Applicant X would therefore be eligible for legal aid at the magistrates' court.

*Example 2*

Applicant Y lives alone and gross income of £3,333 per month (£40,000 per year).

**Gross income assessment:** Applicant Y's gross income is above the upper gross threshold of £34,950, and they are therefore **ineligible for legal aid at the magistrates' court.**

**Question 83:** do you agree with our proposal to continue to passport all recipients of existing passported benefits for the magistrates' test? Please state yes/no/maybe and provide reasons.

## **Criminal advice and assistance/advocacy assistance**

458. The scope of legal aid for criminal advice and assistance (A&A) and advocacy assistance (AA) spans a broad range of criminal matters. A&A consists of legal advice, negotiation or case preparation outside of a hearing, whilst AA consists of representing a client at an oral hearing.
459. Many A&A/AA matters are not subject to the means test, such as advice at police station upon arrest. We are not proposing any change to the non-means tested areas of A&A/AA, which are outlined in **Annex B**.
460. The proposals outlined below relate only to the areas of A&A/AA which are currently means tested. These are:
- Free-standing A&A (for pre-charge work such as interviews undertaken by non-police agencies such as DWP);
  - A&A on appeals against a conviction or sentence, or appeals to the Criminal Cases Review Commission; and
  - A&A or AA within Prison Law (sentence disputes, prison disciplinary cases and Parole Board hearings). Most means tested A&A/AA (both in terms of volume and spend) falls under Prison Law.
461. As outlined in Chapter 1 (paragraphs 76–79), where the means test applies, there are different thresholds depending on whether the matter falls under A&A or AA, of which all (except for the AA income threshold) are lower than in any other area of the overall means test. Neither the A&A or AA test assesses gross income, but both have a disposable income threshold. A&A sets a threshold of £99 disposable income per week and £1,000 of disposable capital. AA has a disposable income threshold of £209 per week and disposable capital threshold of £3,000.

462. Pre-2001, means tested civil legal help and criminal A&A were categorised together under the 'Green Form Scheme', whilst elements of civil Controlled Legal Representation were categorised alongside criminal AA as 'Assistance By Way of Representation'. Since these areas of work were separated into respective schemes, the A&A/AA thresholds (particularly for capital) have not been updated in the same way as the civil thresholds.

### **Our proposals**

463. We are proposing to align the A&A and AA means tests, as we understand that these schemes of work often overlap in practice. Having the same thresholds will therefore ensure consistency for applicants, as well as making the test easier for providers to administer.

**Question 84:** do you agree with our proposal to align the A&A and AA tests? Please state yes/no/maybe and provide reasons.

464. In determining what the new means test for A&A and AA should be, we considered our approach for other areas of legal aid. As laid out in Chapters 3 and 4, we consider that means-tested civil legal aid should not be available to those with average or above average income and capital, and we think that this rationale also applies to means-tested A&A/AA – given that in those cases, the immediate threat to liberty typically does not arise in the same way as with a trial at the Crown Court or magistrates' court.

465. Therefore, we propose to align the A&A/AA means test with the proposed means test for civil legal help and controlled work in all areas, including income and capital thresholds, equivalisation, and income and capital disregards. We consider there are similarities between the types of work covered by legal help and controlled work and A&A/AA, given that both areas consist mostly of legal advice and non-court representation. Alignment with this test also captures the fact that contributions cannot be collected for this work – this is because, like the civil legal help means test, the A&A/AA means test is undertaken by providers, who have no mechanism to collect legal aid contributions.

466. As laid out in Chapters 3 and 4, the proposed thresholds for civil legal help are set to reflect necessary spending, and average capital savings and equity. We consider that for A&A and AA, as for civil legal help, these thresholds will ensure that legal aid is available for those most in need.

467. This change will make the test more generous for the majority of A&A/AA applicants. Whilst most of these applicants are prisoners, who generally have minimal cost of living expenses and low incomes (and are therefore less likely to fail the means test),

some applicants are not in prison and/or may have a partner who is earning income which can be means tested. We propose to continue including the resources of an applicant's partner when assessing their means, to ensure that legal aid is targeted at those who need it most.

**Question 85:** do you agree with our proposal to align the A&A and AA tests with the proposed civil legal help and controlled work means test? Please state yes/no/maybe and provide reasons for your answer.

### **Benefits passporting**

468. We propose that the passporting arrangements for A&A/AA applicants will also mirror those set out for civil legal aid in Chapters 3 and 4. For income passporting, this means that applicants in receipt of Universal Credit will no longer be passported where their household earnings exceed £500 per month. Most applicants for criminal advice and assistance are prisoners, and as prisoners are in most cases unable to claim Universal Credit, we do not anticipate the introduction of an earnings threshold having a significant effect on prisoners' eligibility for legal aid, or on the workload of practitioners. However, we consider it fair that any applicants for legal aid who are in receipt of Universal Credit and earning more than £500 per month should go through a full income assessment.

**Question 86:** do you agree with the proposal to align the passporting arrangements for advice and assistance with those for civil legal aid? Please state yes/no/maybe and provide reasons.

## **Chapter 8: Implementation and review of the new legal aid means tests**

469. This chapter includes our proposals for implementing the new means tests via a phased approach, including our proposed transitional provisions for those who are already in receipt of legal aid when the new means tests are implemented. It also includes our proposals for monitoring the impact of the new means tests, and for reviewing the income and capital thresholds. We have also asked some questions in relation to the potential impact on providers of our policy proposals, and the potential equalities impacts.

### **Implementation**

470. Following the conclusion of the Means Test Review consultation period, we will analyse the consultation responses and then publish a summary of responses alongside the full details of our new means tests. We will aim to publish this within 12 weeks of the closure of the consultation.

471. We will then prepare any necessary amendments to regulations, and the accompanying guidance for legal aid providers and applicants. At the same time, work will start on making the necessary changes to Legal Aid Agency (LAA) digital systems.

472. We appreciate that many legal aid providers and potential applicants will want to see the new means tests in operation as soon as possible, given that, in the round, our proposals would result in an increase in those eligible for legal aid.

473. However, these proposed changes will affect a large number of LAA digital systems, and (depending on the final policy options decided) will require significant changes to these systems. Until the details of the new means tests are finalised following consultation, we are unable to develop a full digital implementation plan. However, we consider it is important that we include outline proposals on implementation in this consultation, so affected parties have a chance to comment on them.

474. We have considered proposing to implement all of the new means tests on a single date. However, given the number of digital systems involved, we think that this approach is likely to increase the risk of delays or other problems. We therefore propose to stagger the implementation of the new means tests, which will enable us to accelerate implementation of some areas. At the same time, we are mindful that

any implementation plan needs to take into account the needs of legal aid providers and applicants, and therefore to be as straightforward as possible.

475. Rather than implementing all the proposals at the same time, at present, we are not able to specify dates for the individual phases outlined below, but hope to be able to supply further detail in our consultation response.

**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.

### Phase 1

476. In phase 1, we propose to implement the non-means tested areas of civil legal aid – that is, non-means tested legal aid for legal representation for under-18s, parents or those with parental responsibility facing withdrawal/withholding of life-sustaining treatment for children under 18 and legal help for inquests involving a potential breach of ECHR rights or significant wider public interest (subject to these proposals being agreed following consultation). Implementing these changes should be comparatively straightforward from a digital point of view, and will also increase access to legal aid in these areas while reducing the administrative burden for legal aid providers and applicants.

**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.

### Phase 2

477. We propose to implement the rest of the new civil means test and contributory system next, before the new criminal means tests. This is because, according to our analysis, more legal aid applicants will benefit from the proposed changes to the civil means test: 13,000 people will benefit per year from our proposed changes to civil legal aid, compared to 11,000 from our proposed changes to criminal legal aid.<sup>55</sup>

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<sup>55</sup> This assumes Universal Credit (UC) has been fully rolled out by the time the new means tests are implemented. If UC has not been fully rolled out by this point, the number of applicants for civil legal aid who will benefit from the implementation of the new civil means test will increase.

**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.

### Phase 3

478. The third phase will consist of the implementation of the new criminal means tests – that is, the new Crown Court, magistrates’ court and criminal advice and assistance and advocacy assistance means tests, and the updated Crown Court contributory system, with the exception of the removal of Crown Court capital passporting for benefits recipients who are homeowners.

### Phase 4

479. The fourth phase will consist of the removal of Crown Court capital passporting for benefits recipients who are homeowners, if that change is made following consultation.

**Question 90:** do you agree with our proposal to implement the new criminal means tests as Phase 3, and the removal of Crown Court capital passporting for benefits recipients who are homeowners as Phase 4? Please state yes/no/maybe and provide reasons.

**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.

## Transitional provisions

480. The transition to the new means tests raises questions about our approach to existing legal aid recipients at the point of transition, particularly those who are paying regular income contributions towards the cost of their legal aid.

481. When considering our proposals in this respect, we have sought to avoid such legal aid recipients suffering any detriment from the transition to a new means test.

482. Individuals who have previously applied for and been refused legal aid on the grounds of means will, from the relevant implementation date for the means test in question, be entitled to submit a fresh application for legal aid under the new means testing rules.

483. For individuals granted non-contributory or contributory legal aid before the relevant implementation date, the existing certificate or representation order will remain in place, along with any relevant income contribution order and payment schedule. Under current regulations, the LAA may be required to carry out a reassessment if

the client's financial circumstances change; new information emerges or there has been an administrative error. The criminal legal aid scheme also allows for a review on 'hardship' grounds.

484. Under existing regulations, the individual has no right to request a reassessment following a change to means-testing rules. We propose to change this, giving both civil and criminal legal aid recipients a right to ask for their means to be reassessed under the new means-testing regime. This may result in legal aid recipients paying a lower monthly contribution, or no contribution at all.
485. The extant certificate or representation order would remain in place during reassessment to ensure continuity and avoid disruption to the case or trial. Any capital or income contributions made or owing from the pre-implementation rules would be unaffected by the reassessment.
486. We are proposing (see Chapter 3, paragraph 217) to introduce a maximum fixed payment period of 24 months for civil legally aided representation, instead of (at present) payments for the lifetime of the case. If this proposal is confirmed, the LAA will automatically pause future income contributions from clients who at the "go-live" date have already reached or exceeded the maximum payment period.

**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.

487. We appreciate that there are some specific scenarios where existing legal aid recipients may suffer a detriment by transferring to the new regime. We are not proposing compulsory or automatic reassessment following the introduction of the new regime, so we envisage that the majority of such recipients will simply continue on the existing regime.
488. However, in some cases (for instance, a change of income), the regulations require the Legal Aid Agency to carry out a means reassessment. We have included below our proposals for this situation.

### **Civil legal aid**

489. The majority of civil legal aid recipients are likely to see a more favourable means outcome following an assessment under the new rules. Therefore, we propose that, as a default, any reassessment should be carried out under the new rules.

490. However, we acknowledge that some may be disadvantaged, namely:
- UC recipients who were passported through the income test regardless of their earnings level may now lose out if their monthly earnings exceed £500, and they are therefore required to go through a full means assessment; and
  - Those between 60 and normal pension age, who may be disadvantaged by the change in age criteria for the pensioner capital disregard.
491. Therefore, we propose that if an individual has benefitted from the pre-implementation rules on UC income passporting and/or the pensioner disregard, the pre-implementation rules regarding those two specific elements will continue to be applied on any reassessment.

**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.

### **Criminal legal aid**

492. As legal aid at the magistrates' court and for criminal advice and assistance and advocacy assistance is non-contributory, the focus of these proposals is on defendants paying income contributions towards the cost of their legally aided representation at the Crown Court.
493. Whilst defendants at the Crown Court will generally benefit from the proposed changes to the means test in that their monthly income contribution is likely to be lower post-reassessment, the proposed extension of the maximum income contribution payment period from 6 months to 18 months may result in a potential detriment to the individual.
494. We therefore propose that, as a default, reassessments in relation to a change of income should be carried out under the pre-implementation rules. However, the defendant would be able to opt for reassessment under the new rules if they preferred, as of course would a defendant who specifically sought a reassessment under the new rules to reduce or eliminate their monthly income contribution, or for any other reason.
495. Following reassessment under the new rules, if the defendant moves to a reduced monthly contribution under the proposed maximum payment schedule of 18 months, any monthly payments made under the pre-implementation rules will be deducted from the new payment schedule. The value of income contributions paid up to reassessment will count towards the cost cap under the new means test

(see Chapter 6, paragraph 378). Equally, any monthly payments still owing under pre implementation rules must be paid before they are offset against the new cost cap and deducted from the number of total monthly payments under the new payment schedule.

496. A defendant who opted for reassessment under the new rules would not then be able to opt back to the old rules (operationally, managing multiple reassessments across different contribution regimes would not be practicable nor technically feasible). New guidance, including a ready reckoner, will allow the defendant and their legal representative to reach an informed decision before they make an application.

**Question 94:** do you agree with our proposal that, following the implementation of the new Crown Court means test, any reassessments carried out due to a change of income, new information, administrative error or hardship should use the previous means test as a default, but allow the defendant to opt for the new means test if they prefer? Please state yes/no/maybe and provide reasons.

**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?

## Upgrading

497. During the course of stakeholder engagement as part of the Means Test Review, a number of stakeholders have raised concerns about whether, following the implementation of the new means test, income and capital thresholds will continue to be monitored, and (if necessary) updated.
498. We agree that it is important that we monitor the income and capital thresholds, to ensure that they take account of changes in the cost of living and any other factors that may affect access to justice in the context of means testing.
499. We therefore propose that the MoJ regularly reviews the income and capital thresholds for legal aid (including the earnings threshold for UC passporting, if implemented), with the first review within 3 to 5 years of the new means test coming into operation in its entirety. That is, the first review would be published no earlier than 3 years and no later than 5 years after the new means test comes into operation. This aligns with typical government post-implementation review timeframes.
500. At present, we do not have a definite date for when the new means test will come into operation, but this will be clearer by the time we publish the Means Test Review

consultation response.<sup>56</sup> We would not set specific time limits for subsequent reviews at this point.

501. We propose that the scope of this review would include an aim to ensure access to justice and that the means test thresholds continue to operate in a way that is consistent with one of the original LASPO objectives, to target legal aid at those who need it most.
502. The review could take into account factors including (but not necessarily limited to), the most recent ONS Living Costs and Food survey results (which form the basis of the proposed new means tests); ONS figures on average equity in houses (for the equity disregard); recent inflation figures; Spending Review timelines; and wider government finances.

**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.

## Equalities and provider impact

503. Alongside this consultation, we have included a detailed analysis of the estimated impact of these proposals on groups with protected characteristics, as far as our existing data allows. We are interested in respondents' views on these potential impacts, including in relation to groups with protected characteristics where we currently have no or minimal data on to what extent these groups are currently represented amongst legal aid recipients.

**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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<sup>56</sup> To note, additionally, that the thresholds proposed in this consultation are drawn from the 2019–20 ONS Living Costs and Food Survey. The 2020–21 ONS Living Costs and Food Survey will be published shortly; however, as this covers the period of the Covid-19 lockdowns, it may not reflect typical household spending. We will cover this issue in our response to this consultation.

504. Throughout this consultation, we have asked various questions about the potential impact of specific proposals on legal aid providers, including in relation to administrative burden. We have included impact assessments of the estimated impact of these proposals on civil and criminal legal aid providers. We are also interested in providers' views about our proposed reforms as a whole, and about their impact on the sustainability of the civil and criminal legal aid professions.
505. We are therefore asking some additional questions on the potential impact of our proposals, taken as a whole, on providers of civil, criminal and family legal aid.

**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?

**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 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?

**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.

**Question 102:** do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for public family cases, increase it or leave it broadly similar?

**Question 103:** do you think these proposals, if enacted, will improve the sustainability of legal aid for public family matters? Please state yes/no/maybe and provide reasons.

**Question 104:** do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for of legal aid for private family cases, increase it or leave it broadly similar?

**Question 105:** do you think these proposals, if enacted, will improve the sustainability of legal aid for family matters? Please state yes/no/maybe and provide reasons.

**Question 106:** do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for of legal aid at the Crown Court and magistrates' court, increase it or leave it broadly similar?

**Question 107:** do you think these proposals, if enacted, will improve the sustainability of criminal legal aid? Please state yes/no/maybe and provide reasons.

**Question 108:** do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for criminal advice and assistance/advocacy assistance, increase it or leave it broadly similar?

**Question 109:** do you think these proposals, if enacted, will improve the sustainability of legal aid for criminal advice and assistance/advocacy assistance matters? Please state yes/no/maybe and provide reasons.

# Annex A: Payments currently disregarded from the legal aid means test

## Payments currently disregarded from the capital assessments for civil legal aid and criminal advice and assistance/advocacy assistance (AA/A&A)

\* (m) is for payments disregarded on a mandatory basis and (d) is for those disregarded on a discretionary basis

Payment	Civil	Criminal AA/A&A
Jobseeker's Back to Work Bonus	X (m)	X (m)
Any capital payment made out of the Independent Living Funds	X (m)	
Payments made out of the Social fund or arrears of direct payments for disabled child or vulnerable adult	X (m)	
Payments made under Windrush Compensation Scheme or any Windrush connected payment	X (m)	X (m)
Grenfell Tower Fire payments	X (d)	
Infected Blood Support Scheme payments	X (m)	
Payment under the Vaccine Damage Payment Act	X (m)	
Compensation for a person diagnosed with variant Creutzfeldt-Jakob disease (vCJD)	X (m)	
Payments from the Criminal Injuries Compensation Authority schemes in Great Britain and Northern Ireland	X (d)	
Payment made by the National Emergencies Trust	X (d)	
Payments from the We Love Manchester Fund.	X (d)	
Payments from the London Emergencies Trust Fund.	X (d)	
The first £100,000 of the value of the individual's interest in the main or only dwelling in which the individual resides	X (m)	X (m)

**Payments currently disregarded from the income assessment for criminal<sup>57</sup> and civil legal aid**

*\*\*subject to change due to consultation proposals*

<b>Payment</b>	<b>Civil</b>	<b>Criminal</b>
Attendance Allowance	X(m)	X(m)
Severe Disablement Allowance	X(m)	X(m)
Exceptionally Severe Disablement Allowance	X(m)	X(m)
Carer's Allowance	X(m)	X(m)
Disability Living Allowance	X(m)	X(m)
Constant Attendance Allowance	X(m)	X(m)
Council Tax Benefit**	X(m)	X(m)
Payment made out of Social Fund	X(m)	X(m)
Housing Benefits**	X(m)	X(m)
Independent Living Fund payment	X(m)	X(m)
Community Care and Special Needs direct payments	X(m)	X(m)
Pensions paid under the Naval, Military and Air Forces (Disablement and Death) service Pensions order	X(m)	X(m)
Armed forces independence payment	X(m)	X(m)
Personal independence payments paid under Part 4 of the Welfare Reform Act 2012	X(m)	X(m)
Financial support paid under an agreement for the care of a foster child	X(m)	X(m)
Any direct payments made out of the Social Fund or arrears of direct payments for disabled child or vulnerable adult	X(m)	X(m)
Payments of any Back to Work Bonus received under section 26 of the Jobseekers Act 1995**	X(m)	X(m)
Payments made under the Windrush compensation scheme and Windrush connected payments	X(m)	X(m)
Transfer advances for Universal Credit	X(m)	X(m)
Grenfell Tower Fire payments	X(d)	

<sup>57</sup> These disregards apply to criminal legal aid for AA/A&A, magistrates' court and Crown court

<b>Payment</b>	<b>Civil</b>	<b>Criminal</b>
Welsh Independent Living Grant	X(m)	X(m)
Any reasonable living expenses provided for as an exception to a restraint order under section 41 of the Proceeds of Crime Act 2002	-	X(m)
Relevant Infected Blood Support Schemes	X(m)	-
Payments under the Vaccine Damage Payment Act	X(m)	-
Compensation for person diagnosed with variant Creutzfeldt-Jakob disease	X(m)	-
Payments from the Criminal injuries Compensation Authority schemes in Great Britain and Northern Ireland	X(d)	-
Payments from the National Emergencies Trust	X(d)	-
Payments from the We Love Manchester Fund	X(d)	-
Payments from the London Emergencies Trust Fund	X(d)	-

## Annex B: Proceedings currently exempt from the legal aid means test

Civil and family	Criminal
<p>Children Act 1989 cases</p> <ul style="list-style-type: none"> <li>• Care and supervision orders</li> <li>• Use of accommodation to restrict liberty</li> <li>• child assessment order</li> <li>• emergency protection order and duration of emergency protection</li> </ul> <p>Mental health</p> <ul style="list-style-type: none"> <li>• Protecting those of enhanced vulnerability and potential of depriving their liberty – when challenging a DoLs order made by a hospital or care facility</li> <li>• Use of powers under the Deprivation of Liberty act through courts which are not eligible for non-means tested legal aid</li> <li>• Urgent authority order (Section 4B cases) in changeover to LPS</li> </ul> <p><b>Family mediation</b> (in relation to Mediation Information and Assessment meeting, EU and international agreements)</p> <p>Upholding international agreements</p> <ul style="list-style-type: none"> <li>• child protection, cross-border disputes and child maintenance</li> </ul> <p><b>Protection against the extension of powers by the state</b> (e.g. Certain aspects of Terrorism Prevention and Investigation Measures)</p> <p><b>Housing possession court duty scheme</b> provides emergency legal advice and representation on the day of the hearing, on a non-means tested basis, for anyone facing possession proceedings.</p> <p><b>Inquests</b>, where:</p> <ul style="list-style-type: none"> <li>• advocacy is sought under the ECF scheme for matters concerning Article 2 and also where a Wider Public Interest determination has been made;</li> <li>• advice and assistance is sought under the legal help scheme, where advocacy is being provided under the ECF scheme.</li> </ul>	<p>Advice and assistance</p> <ul style="list-style-type: none"> <li>• advocacy assistance before magistrates' court or the Crown Court;</li> <li>• advice &amp; assistance provided by a duty solicitor or provided to a volunteer during voluntary attendance;</li> <li>• advice and assistance provided at a police station during an interview in connection to a serious service offence.</li> </ul> <p>Representation for criminal proceedings</p> <ul style="list-style-type: none"> <li>• Where an individual appeals a conviction or sentence to the Court of Appeal</li> <li>• Proceedings set out in Reg 25(2) of the Criminal Legal aid general regulations e.g.</li> <li>• individual has been committed to the Crown Court for sentence, but only where that individual did not apply for, or was not granted, representation for the proceedings that took place in the magistrates' court.</li> </ul>

# Annex C: Technical note on calculating the proposed income thresholds for civil and criminal legal aid

1. This note explains how we have calculated our proposed means test disposable income thresholds. This note also covers the calculation of the proposed civil legal aid and criminal magistrates' court gross income threshold.

## The disposable income thresholds

2. A Cost of Living Allowance approach forms the basis of our proposed civil lower disposable income threshold and provision for partners and dependents, as well as our criminal Crown Court and magistrates' court disposable income thresholds. The aim of our approach is to ensure that our thresholds allow for adequate household expenditure, and that applicants are not forced to choose between paying for private legal services or legal aid contributions and meeting their essential living costs.
3. To determine the value of average living costs, we have used the most recent ONS "Living Costs and Food survey", which comprises data on median household expenditure in the UK for the financial year ending 31 March 2020.<sup>58</sup> Our methodology consisted of firstly weighting the ONS data, to convert the data from household expenditure to single adult household expenditure. We did this by determining the number of first adults, additional adults and children in each sample, and using the weighting values set by the OECD Modified Scale (0.72 per additional adult and child over 14, and 0.34 per child under 14) to calculate an average weighting value for each decile. As the ONS data does not differentiate between children aged under and over 14, we used a proxy estimate based on the proportion of children under 14 within the whole population.

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<sup>58</sup> Family spending in the UK - Office for National Statistics (ons.gov.uk). To note that the 2020–21 ONS Living Costs and Food Survey will be published shortly. As this covers the period of the Covid-19 lockdowns, it may not reflect typical household spending. We will cover this issue in more detail in our response to this consultation.

4. After weighting the data, we then excluded certain categories of expenditure (see below), including those categories which are accounted for elsewhere within the means test (e.g. housing costs).<sup>59</sup>

### Civil lower disposable income threshold

5. The proposed Cost of Living Allowance for the civil lower disposable income threshold is £622 per month, which represents the average (mean) value of essential living expenditure of an individual within the lowest 50% of the population when sorted by gross income.

The breakdown of essential expenditure for this category is as follows:

Essential expenditure	Non-essential expenditure
Food and non-alcoholic drinks	Alcoholic drinks, tobacco and narcotics
Clothing and footwear	Recreation and culture
Maintenance, repair and miscellaneous services relating to the dwelling	Education (school fees)
Water, electricity, gas and other fuels	Accommodation services (holidays and room hire)
Household goods and services	Holiday spending and travel insurance
Health	Licences, fines and transfers (cash gifts and donations)
Transport <sup>60</sup>	
Communication	
Restaurant, café, canteen and takeaway meals (minus alcoholic drinks)	
Miscellaneous goods and services, including toiletries and insurance (minus travel insurance)	

### Civil upper disposable income threshold

6. The proposed civil upper disposable income threshold is £946 per month, which represents the overall median value of individual living costs, when accounting for

<sup>59</sup> The ONS data we have used contains some 'suppressed values' where the figure was not published by the ONS due to small sample sizes. For the purposes of calculating the thresholds, we have assumed this data to be '0'. If we took a different approach (e.g. assuming another value), our civil thresholds may have been marginally higher.

<sup>60</sup> Our transport element deducts £33 per month to allow for the proposed work allowance of £66 month, which is intended to cover work-related travel costs. We have deducted £33 because we estimate that approximately half of legal aid applicants are in work; deducting half of the work allowance therefore should ensure a broadly cost-neutral approach.

the whole population. The breakdown of allowed expenditure for this category is as follows:

<b>Allowed expenditure</b>	<b>Non-allowed expenditure</b>
Food and non-alcoholic drinks	Alcoholic drinks, tobacco and narcotics
Clothing and footwear	Gambling payments
Maintenance, repair and miscellaneous services relating to the dwelling	Education (school fees and trips)
Water, electricity, gas and other fuels	Licences, fines and transfers (cash gifts and donations)
Household goods and services	
Recreation and culture (minus spending on gambling), holiday spending	
Accommodation services (holidays and room hire)	
Health	
Transport	
Communication	
Restaurant, café, canteen and takeaway meals (minus alcoholic drinks)	
Miscellaneous goods and services	

7. In line with our overarching approach to civil legal aid eligibility, we propose to set the upper disposable income threshold at the average spending of the median UK household.<sup>61</sup> We have made only minor exclusions from the list as we believe it appropriate that civil legal aid applicants should be able to afford some level of social and cultural participation – but we do not think it is unreasonable to ask applicants to balance this type of expenditure with legal aid contributions.

### **Crown Court and magistrates’ court disposable income threshold**

8. The proposed Cost of Living Allowance for the Crown Court and magistrates’ court disposable income calculation is £713 per month, which represents the overall median value of individual essential living costs, when accounting for the whole population. This approach, which was originally established in 2005 for the magistrates’ court means test, is slightly different from our approach to the civil income thresholds. This is because we consider that legally aided representation at

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<sup>61</sup> Specifically, we are using this figure as a proxy for the median household because it's the average spending of the 5th and 6th percentile.

the Crown Court should be available to all defendants (subject to a potential income contribution from defendants with means above the lower disposable income threshold), because of the potential serious consequences that could arise from being convicted of an offence at the Crown Court. Therefore, we consider that we should use the median spending of the entire population, rather than the lower half of the population as for civil legal aid, as a basis for our proposed lower disposable income threshold.

The breakdown of allowed expenditure for this category is as follows:

<b>Essential expenditure</b>	<b>Non-essential expenditure</b>
Food and non-alcoholic drinks	Alcoholic drinks, tobacco and narcotics
Clothing and footwear	Recreation and culture
Maintenance, repair and miscellaneous services relating to the dwelling	Education (school fees and trips)
Water, electricity, gas and other fuels	Accommodation services (holidays and room hire)
Household goods and services	Holiday spending
Health	Licences, fines and transfers (cash gifts and donations)
Transport	
Communication	
Takeaway and canteen meals (minus alcoholic drinks)	
Miscellaneous goods and services (including travel insurance)	

*All categories: summary table*

<b>Spending categories 2019–20</b>	<b>Spending allowance (per week) for a single person</b>		
	<b>Civil lower COLA</b>	<b>Civil upper threshold</b>	<b>Crime COLA</b>
Food and non-alcoholic drinks (excluding catering)	£31.84	£34.10	£34.10
Clothing and footwear	£8.48	£10.56	£10.56
Fuel and power (utilities)	£23.90	£21.82	£21.82
Household goods & services	£15.25	£17.06	£17.06
Health	£3.78	£4.27	£4.27

Spending categories 2019–20	Spending allowance (per week) for a single person		
	Civil lower COLA	Civil upper threshold	Crime COLA
Transport	£19.36	£34.72	£34.72
Communication	£10.56	£11.61	£11.61
Recreation and culture	£0	£33.94	£0
Restaurants & hotels	£11.88	£22.63	£6.53
Miscellaneous goods & services	£18.06	£23.41	£22.90
Other expenditure items	£0	£3.59	£0
<b>Total</b>	<b>£143.13</b>	<b>£217.72</b>	<b>£163.57</b>
<b>Total per month (rounded)</b>	<b>£622</b>	<b>£946</b>	<b>£709</b>

### The gross income threshold

9. As outlined in Chapters 3 and 7, we have proposed a £34,950 gross income threshold for civil and magistrates' court legal aid (equivalised to account for household size). The aim of our approach is to ensure that civil and magistrates' court legal aid should not be made available for those with above median household income.
10. In order to calculate this value, we used ONS data "Effects of taxes and benefits on household income", which collects data on household gross incomes for the financial year ending 31 March 2020.<sup>62</sup> The equivalised gross income data (found in table 2C) indicates the median gross household income to be £35,379.50.
11. However, as part of the means test, we disregard certain benefits from our income assessment at gross income stage, where they are intended to supplement an individual's additional needs (for example, Personal Independence Payment). We therefore propose to also deduct these disregarded benefits from our calculation of what constitutes gross income. The median value of the disregarded benefits in this dataset totals £429.50 (Disability Living Allowance, Personal Independence Payment, Attendance Allowance, Carer's Allowance, Military pensions and Severe Disablement Allowance). Deducting £429.50 from £35,379.50 results in the figure of £34,950 (our proposed gross income threshold).

<sup>62</sup> Table 2C: Effects of taxes and benefits on household income - Office for National Statistics (ons.gov.uk)

# Annex D: Technical note on calculating the proposed capital thresholds for civil legal aid

**This note explains how we have calculated the proposed lower and upper capital thresholds, which are part of the means test for civil legal aid.**

## **The lower capital threshold**

12. Applicants for legal aid for civil representation who have capital below the lower threshold are eligible for legal aid with no requirement to pay a capital contribution. The purpose of the threshold is set out in more detail in Chapter 4.
13. In setting the lower capital threshold, our policy aim is to reflect the cost of three months' essential expenditure. What constitutes essential expenditure will vary for everyone depending on their living costs and personal circumstances, but we have calculated a proxy for this in line with our objectives that civil legal aid will not generally be available to those with above average wealth. To do this, we have used the most recent "Living Costs and Food survey" published by the Office for National Statistics, which contains data on household expenditure in the UK for the financial year ending 31 March 2020.<sup>63</sup> Using this data, we have estimated the essential expenditure of the median income household in the UK.

## **Methodology**

14. Rather than use the specific median income household's actual spending, we consider that it is more appropriate to take an average (mean) spending value for households that are very close to the median. This avoids the figure being skewed by one individual household's spending habits. Therefore, we calculated the average spending of the 5th and 6th deciles, using ONS's survey data.
15. We excluded certain categories of spending (see paragraph 523) to arrive at a measure of 'essential expenditure', rather than the average total expenditure of households.

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<sup>63</sup> Family spending in the UK - Office for National Statistics (ons.gov.uk)

16. We have totalled the costs for the remaining areas of expenditure to generate a figure for weekly essential expenditure.
17. Recognising that the average household size of the 5<sup>th</sup> and 6<sup>th</sup> deciles is different to that of the general population (and therefore spending is likely to be different), we have weighted the average essential spending of the 5<sup>th</sup> and 6<sup>th</sup> deciles against the national household size. This means our final figure represents an average of all households in the population, rather than the average household size for households with income in the 5<sup>th</sup> and 6<sup>th</sup> deciles. We used the resulting weekly expenditure figure to calculate a figure for three months' of essential expenditure, then rounded this figure up to the nearest thousand pounds for ease of use.
18. The ONS data we have used contains some 'suppressed values' where the figure was not published by the ONS due to small sample sizes. Where data is suppressed for one of the 5<sup>th</sup> or 6<sup>th</sup> deciles, we have used the value reported for the other decile (e.g. for Purchase of motorcycles and other vehicles). Where data is suppressed for both the 5<sup>th</sup> and 6<sup>th</sup> deciles (e.g. for combined transport fares) we have assumed the value to be zero. If we took a different approach (e.g. assuming another value), our civil thresholds may have been marginally higher.

### Excluded categories of spending

19. The breakdown of essential expenditure for this category is set out in the table below. Where we have determined areas to be 'non-essential' this is because we consider that individuals could temporarily forgo spending in these areas if they needed to.

Essential expenditure	Non-essential expenditure
Food and non-alcoholic drinks	Alcoholic drinks, tobacco and narcotics
Clothing and footwear	Recreation and culture
Housing, fuel and power	Education
Household goods and services	Alcoholic drinks (away from home)
Health	Accommodation services (holidays and room hire)
Transport	Non-package holiday, other travel insurance
Communication	Licences, fines and transfers
Catering services (excluding alcoholic drinks)	Holiday spending
Miscellaneous goods and services (excluding non-package holiday, other travel insurance)	Money transfers and credit

<b>Essential expenditure</b>	<b>Non-essential expenditure</b>
Housing: mortgage interest payments, council tax etc.	Other insurance
Life assurance and contributions to pension funds	Purchase or alteration of dwellings, mortgages
Income tax, payments less refunds	Savings and investments
National insurance contributions	Pay off loan to clear other debt

*All categories: summary table*

<b>Spending categories 2019–20</b>	<b>Expenditure per week, per household</b>
Food and non-alcoholic drinks (excluding catering)	£63.15
Clothing and footwear	£19.55
Housing, fuel and power	£85.50
Household goods & services	£31.60
Health	£7.90
Transport	£78.40
Communication	£21.50
Restaurants & hotels (catering services)	£31.55
Miscellaneous goods & services	£42.40
Other expenditure items	£43.45
Life assurance and contributions to pension funds	£19.80
Income tax, payments less refunds	£55.10
National insurance contributions	£27.00
<b>Total per week</b>	<b>£526.90</b>
Weighted against national household size	£514.19
Figure for three months' essential expenditure	£6,684.41
Rounded figure	£7,000.00

### **The upper capital threshold**

20. In determining the upper capital threshold, we have used the Office for National Statistics' 'Financial Wealth: wealth in Great Britain' dataset.<sup>64</sup> This shows the level of financial wealth held by households, including savings and investments. The upper threshold is based on the financial wealth of the 50<sup>th</sup> percentile point (i.e. the median). This is £11,000.
21. We have used gross financial wealth rather than net financial wealth. Net financial wealth takes into account any outstanding financial liabilities, but as the means test does not deduct the value of debts from capital, we think gross financial wealth is the more appropriate measure.

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<sup>64</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/datasets/financialwealthwealthingreatbritain>, Table 5.6

## Annex E: Worked examples

This annex draws together all of the worked examples in the consultation document, for easy reference.

### Existing civil legal aid income test: worked examples

#### Example 1

Applicant A has a partner and 3 children aged 3, 5 and 8, and gross household income of £3,500 per month.

**Gross income assessment:** A has gross income above the threshold of £2,657 per month, and is therefore ineligible for legal aid, irrespective of their disposable income.

#### Example 2

Applicant B is a single parent with a child aged 15, and gross household income of £2,368 per month.

**Gross income assessment:** B has gross income below the threshold, so progresses to the disposable income assessment.

**Disposable income assessment:** after deduction of tax (£224), NI (£164), rent (£1,000) and dependent's allowance (£298) per month, B has disposable income of £682 per month, and is therefore eligible for legal aid with a monthly income contribution of £166.90 for the lifetime of her case.

### Existing Crown Court income test: worked examples

#### Example 1

Applicant C has a partner and two children aged 16 and 18. The household gross income is £33,000 per year.

**Gross income assessment:** C's gross income is divided by 2.82 to take his family members into account. His adjusted gross income is £11,702. This is below the gross income threshold of £12,475, and **C is therefore entitled to non-contributory legal aid** without undergoing a further disposable income assessment.

#### Example 2

Applicant D has a partner and one child aged 2. The household gross income is £50,000 per year.

**Gross income assessment:** D's gross income is divided by 1.94 to take his family members into account. His adjusted gross income is £25,773. This is above the gross income threshold of £12,475, so D must undergo a disposable income assessment.

**Disposable income assessment:** after deduction of tax (£5,484), National Insurance (£3,652), mortgage (£9,800), council tax (£1,818), childcare (£3,600) and Cost of Living Allowance (£5,676 x 1.94), Applicant D has a disposable income of £14,635 per year. This is above the lower disposable income threshold of £3,398 per year but below the higher disposable income threshold of £37,500 per year, so Applicant D is entitled to legal aid but must pay an income contribution.

**Income contribution:** Applicant D must pay a monthly income contribution of £1,098 (90% of his disposable income) for up to 6 months.

## Worked examples: proposed new civil means test

### Example 1

Applicant E has one child aged 12 and monthly gross household income of £3,000 (£36,000 per year).

**Gross income assessment:** Applicant E's adjusted gross income threshold would be £34,950 per year with an additional allowance of 30%; hence £45,435. They would therefore pass the gross income assessment.

**Disposable income assessment:** following deductions for income tax, National Insurance, childcare, pension contributions, housing costs and council tax (£1,893 in total), the work allowance of £66, and a deduction of £211 for one dependent under the age of 14, Applicant E's disposable income would be **£830 per month**.

Applicant E would therefore be eligible for non-contributory civil legal help, and for civil legal representation with an income contribution of £102.60 per month.

### Example 2

Applicant F has a partner and two children aged 6 and 3, with a monthly gross household income of £5,000 (£60,000 per year).

**Gross income assessment:** Applicant F's adjusted gross income threshold would be the base threshold of £34,950 per year with an additional allowance of 50% for their partner and 30% for each child; hence £73,395. They would therefore **pass the gross income assessment**.

**Disposable income assessment:** Following deductions for income tax, national insurance, pension contributions, childcare, housing costs and council tax, (£3,547 in total), the work allowance of £66 for both Applicant F and their partner, and a deduction for one adult dependent (£448) and two dependents under 14 (£211 each), Applicant F's disposable income would be **£451 per month**.

Applicant F would therefore be eligible for civil legal representation and civil legal help without any requirement to pay a contribution.

### **Example 3**

Applicant G has no dependents and a monthly gross household income of £2,400 (£28,800 per year).

**Gross income assessment:** Applicant G therefore **passes the gross income assessment**.

**Disposable income assessment:** Following deductions for income tax, national insurance, pension contributions, student loan repayments, housing costs and council tax (£1,483 in total), and the work allowance of £66, Applicant G's disposable income would be £851.

Applicant G would therefore be eligible for non-contributory civil legal help, and for civil legal representation with an income contribution of £113.60 per month.

### **Example 4**

Applicant H has a partner and two children aged 4 and 7, with a monthly gross household income of £6,250 (£75,000 per year).

**Gross income assessment:** Applicant H's adjusted gross income threshold would be the base threshold of £34,950 per year with an additional allowance of 50% for their partner and 30% for each child; hence £73,395. Applicant H would be therefore ineligible for civil legal aid due to having gross income over the threshold.

## **Worked example of an applicant who is no longer passported for civil legal aid**

Applicant I has two children aged 7 and 5 and monthly gross household income of £2,366 (£28,392 per year), which is made up of £900 earnings plus Universal Credit and child benefit.

**Gross income assessment:** Applicant I's adjusted gross income threshold would be £34,950 per year with an additional allowance of 30%+30%; hence £55,920. They would therefore **pass the gross income assessment**.

**Disposable income assessment:** following deductions for income tax, national insurance, pension contributions, housing costs and council tax (£934 in total), plus the work allowance of £66 and £422 for two dependents under 14, their disposable income would be £944.

Applicant I would therefore be eligible for non-contributory civil legal help, and for civil legal representation with an income contribution of £192.84 per month.

## Worked examples: income contributions for civil legal aid

### Example 1

Applicant J has monthly disposable income of £800.

For her monthly income contribution, she pays 40% of her disposable income between £622 and £730 (£43.20) and 60% of her disposable income between £730 and £800 (£42).

She therefore pays a total monthly income contribution of **£85.20**.

### Example 2

Applicant K has monthly disposable income of £920.

For his monthly income contribution, he pays 40% of his disposable income between £622 and £730 (£43.20); 60% of his disposable income between £730 and £838 (£64.80); and 80% of his disposable income between £838 and £920 (£65.60).

He therefore pays a total monthly income contribution of **£173.60**.

### Example 3

Applicant L has monthly disposable income of £700.

For her monthly income contribution, she pays 40% of her disposable income between £622 and £700 (£31.20).

She therefore pays a total monthly income contribution of **£31.20**.

These examples use the full proposed means test – for example, they use the proposed capital thresholds, as well as the proposed equity disregard. They also assume the applicant has passed the income test and has no other capital – e.g. savings. In all four examples, the applicant would currently be ineligible for legal aid due to capital above the current thresholds.

## Civil legal aid equity disregard examples

### Example 1

Applicant M owns a property worth £200,000 with no mortgage.

Under our proposed means test, Applicant M would have 3% of the value of the property (£6,000) deducted for selling costs, following which the £185,000 equity disregard would be applied.

Applicant M would therefore have remaining capital of £9,000, which is above the lower capital threshold of £7,000 but below the upper capital threshold of £11,000. Applicant M would therefore **be eligible for legal aid with a capital contribution of up to £2,000**.

### **Example 2**

Applicant N owns a property worth £420,000, with a £225,000 mortgage.

Under our proposed means test, Applicant N would have the entire value of the mortgage deducted, as well as 3% of the value of the property (£12,600) deducted for selling costs.

Following this, the equity disregard of up to £185,000 would be applied to the remaining £182,400 of equity.

Applicant N would therefore have no remaining capital, and would be **eligible for legal aid without a capital contribution**.

### **Example 3**

Applicant O owns a property worth £250k with no mortgage.

Under our proposed means test, Applicant O would have 3% of the value of the property (£7,500) deducted for selling costs, following which the £185,000 equity disregard would be applied.

Applicant O would have £57,500 of capital remaining, which is above the upper capital threshold of £11,000. Therefore, Applicant O would remain **ineligible for legal aid**.

### **Example 4**

Applicant P jointly owns a property (in equal shares with a co-owner) worth £600,000, with a £200,000 mortgage.

Under our proposed means test, Applicant P would have the entire value of the mortgage deducted, as well as 3% of the value of the property (£18,000) deducted for selling costs,

The value of the remaining equity would then be divided between the parties, leaving Applicant P with £191,000 as their share of the equity.

Following this, the equity disregard of £185,000 would be applied, leaving Applicant P with £6,000 of capital, which is below the lower capital threshold of £7,000. Therefore, Applicant P would be **eligible for legal aid without a capital contribution**.

These examples use the full proposed means test – for example, they use the proposed capital thresholds and equity disregard. They also assume the applicant has no other capital – e.g. savings.

## Pensioners disregard worked examples (civil legal aid)

### Example 1

Applicant Q is aged 64, below State Pension Age. They have disposable income of £25 per month. They own a property worth £200k with no mortgage and have no other capital.

Deduction of 3% (£6,000) for selling costs: £194k

Equity disregard of £185k applied: £9,000

Under our proposals, the applicant no longer benefits from the pensioners' disregard due to their age. The applicant has capital of £9,000, which is above the lower capital threshold of £7,000, so they will be eligible for legal aid with a contribution of £2,000 or the estimated cost of their case, whichever is smaller. Under the current means test, they are eligible for legal aid with no contribution.

### Example 2

Applicant R has reached their State Pension Age. They have disposable income of £350 per month. They own a property worth £250k with no mortgage and have no other capital.

Deduction of 3% (£7,500) for selling costs: £242,500

Equity disregard of £185k applied: £57,500

Pensioners' disregard of £65,000 applied: -£7,500

The applicant has capital below the lower capital threshold of £7,000. Under our proposals, they are eligible for legal aid with no contribution. Under the current means test, they are ineligible and do not benefit from the pensioners' disregard as their disposable income is too high.

## Crown Court worked examples

### Example 1

Defendant S has one child aged 12 and monthly gross household income of £3,000.

**Disposable income assessment:** Following deductions for income tax, national insurance, childcare, pension contributions, housing costs and council tax (£1,893 in total), the work allowance of £66, and a deduction of £242 for one dependent under the age of 14, Defendant S's disposable income would be £799.

Defendant S would be **eligible for legal aid at the Crown Court with a monthly income contribution.**

### **Example 2**

Defendant T has a partner and two children aged 6 and 3, with a monthly gross household income of £5,000.

**Disposable income assessment:** after deductions for income tax, national insurance, pension contributions, childcare, housing costs and council tax (£3,547 in total), the work allowance of £66 for both Defendant T and their partner, and a deduction for one adult dependant and two dependents under 14 of £997. Defendant T's disposable income would be £324.

Defendant T would be **eligible for legal aid at the Crown Court without any requirement to pay a contribution.**

### **Example 3**

Defendant U has monthly disposable income of £1,100

For his monthly income contribution, he pays 40% of disposable income between £697 and £1,000 (£121.20); 60% of disposable income between £1,000 and £1,250 (£60).

Total monthly income contribution = £181.20

### **Example 4**

Defendant V has monthly disposable income of £1,500

For her monthly income contribution, she pays 40% of disposable income between £697 and £1,000 (£121.20); 60% of disposable income between £1,000 and £1,250 (£150); and 80% of disposable income above £1,250 (£200).

Total monthly income contribution = £471.20

## **Crown Court capital contribution worked examples**

### **Example 1**

Applicant W is in receipt of Universal Credit and hence is passported through the income assessment. He is convicted at the Crown Court, having incurred legal aid costs of £12,000. As he is a homeowner, he is now assessed for a potential liability to a capital contribution order.

**Capital assessment:** Applicant W has one capital asset: his flat, which is valued post-conviction at £120,000. Following deductions for the outstanding mortgage of £42,000 and the capital allowance of £30,000, Applicant W has remaining capital of £48,000.

Applicant W is there issued with a capital contribution order (CCO) for £12,000. The LAA places a charge over his flat in order to protect the CCO debt. Simple interest of 3% is added to the debt annually until its payment.

## Magistrates' court worked examples

### Example 1

Applicant X has one child aged 10 and gross income of £3,667 per month (£44,000 per year).

**Gross income assessment:** Applicant X's adjusted gross income threshold would be the base threshold of £34,950 per year with an additional allowance of 30% for their child; hence £45,435. They would therefore **pass the gross income assessment**.

**Disposable income assessment:** Following deductions for income tax, National Insurance, pension contributions, childcare, housing costs and council tax, the work allowance of £66 and £241 for a dependent under 14, Applicant X's disposable income would be £1,032 per month.

Applicant X would therefore be **eligible for legal aid at the magistrates' court**.

### Example 2

Applicant Y lives alone and gross income of £3,333 per month (£40,000 per year).

**Gross income assessment:** Applicant Y's gross income is above the upper gross threshold of £34,950, and they are therefore **ineligible for legal aid at the magistrates' court**.

# Questionnaire

We would welcome responses to the following questions set out in this consultation paper, respond online at: <https://consult.justice.gov.uk/legal-aid/legal-aid-means-test-review>

**Thank you for participating in this consultation exercise.**

# About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

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

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## Contact details/How to respond

Please send your response by 07/06/2022 to:

Legal Aid Means Test Review  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

**Email:** LegalAidMeansTestReview@justice.gov.uk

## Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

## Extra copies

This consultation is also available online at <https://consult.justice.gov.uk/legal-aid/legal-aid-means-test-review>. Further paper copies and alternative format versions can be obtained from the address above.

## Publication of response

A paper summarising the responses to this consultation will be published in Autumn 2022.

## Representative groups

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

## Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities

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

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

E02729412

978-1-5286-3246-1