



Ministry of
JUSTICE

Proposals for the Reform of Legal Aid in England and Wales

**Consultation Paper CP12/10
November 2010**



Proposals for the Reform of Legal Aid in England and Wales

**Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty**

November 2010

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This publication is available for download at www.official-documents.gov.uk and on our website at www.justice.gov.uk

ISBN: 9780101796729

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID P002398535 11/10

Printed on paper containing 75% recycled fibre content minimum.

About this consultation

- To:** This consultation is aimed at providers of publicly funded legal services and others with an interest in the justice system.
- Duration:** From 15 November 2010 to 14 February 2011
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- Welsh language version:** A Welsh language version of the Executive Summary of this consultation paper is available at www.justice.gov.uk
- Response paper:** A response to this consultation exercise is due to be published by Spring 2011 at: www.justice.gov.uk

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Ministerial Foreword



The modern legal aid scheme was established in 1949 with a laudable aim: to provide equality of access and the right to representation before the law. However, the scope of legal matters covered was very tightly drawn.

The current scheme bears very little resemblance to the one that was introduced in 1949. It has expanded, so much so that it is now one of the most expensive in the world, available for a very wide range of issues, including some which should not require any legal expertise to resolve. I believe that this has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the availability of taxpayer funding for unnecessary litigation. There is a compelling case for going back to first principles in reforming legal aid.

There have been many attempts to reform the system by previous administrations. Since 2006, there have been over thirty separate consultation exercises on legal aid. Although successive changes have managed to contain the growth in overall spending, they have not addressed the underlying problems facing the scheme. With some justification, lawyers have complained that they cannot reasonably be expected to manage their practices against a background of almost constant change.

To continue like this is unsustainable, and I want to use these lessons as an opportunity for fundamental reform of the scheme. I want to discourage people from resorting to lawyers whenever they face a problem, and instead encourage them, wherever it is sensible to do so, to consider alternative methods of dispute resolution which may be more effective and suitable. I want to reserve taxpayer funding of legal advice and representation for serious issues which have sufficient priority to justify the use of public funds, subject to people's means and the merits of the case.

Legal aid must also play its part in fulfilling the Government's commitment to reducing the fiscal deficit and returning this country's economy to stability and growth. The proposals on which I am consulting are therefore designed with the additional aim of achieving substantial savings.

It is an approach which demands that we make tough choices to ensure access to public funding in those cases that really require it, the protection of the most vulnerable in our society and the efficient performance of our justice system.

My legal aid reform proposals complement the wider programme of reform which I will be bringing forward to move towards a simpler justice system: one which is more responsive to public needs, which allows people to resolve their issues out of court using simpler, more informal, remedies where they are appropriate, and which encourages more efficient resolution of contested cases where necessary. But these legal aid proposals are not dependent on the implementation of those wider reforms.

Today, I am also publishing a consultation on implementing recommendations on civil funding and costs arrangements set out in Lord Justice Jackson's *Review of the Costs of Civil Litigation*.

I intend to consult on reforms of sentencing, as well as other proposals designed to deliver an improvement in the way we seek to punish offenders while reducing their propensity to re-offend. Next year I am expecting to receive final recommendations for reforming family proceedings, which are being developed under the independent chairmanship of David Norgrove. And early next year, I also intend to set out my proposals for simplifying and reforming the procedures used in the civil courts, making greater use of mediation to deliver the services clients want in a way that suits their needs.

In the meantime, I have been working with the Home Secretary and the Attorney General on ways in which we can transform procedures in the criminal justice system. We will be announcing details in due course.

I would welcome your views on the proposals in this paper. We will need to consider responses within the overall fiscal context. However, I am sure that they will provide a helpful contribution to the development of a fair, balanced and sustainable legal aid scheme for the future.



Kenneth Clarke
Lord Chancellor and Secretary of State for Justice

1 Executive Summary

- 1.1 We said in our document *The Coalition: our programme for government* published in May 2010, that we would undertake a review of legal aid in England and Wales.
- 1.2 The Government strongly believes that access to justice is a hallmark of a civil society. The proposals set out in this consultation paper represent a radical, wide-ranging and ambitious programme of reform which aims to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice or representation is justified.
- 1.3 Against a backdrop of considerable financial pressure on the Legal Aid Fund, the proposals set out in this paper have been developed with the aim of providing a substantial contribution to the Ministry of Justice's target of a real reduction of 23% in its budget, worth nearly £2bn in 2014–15.¹ Sound finances are critical to the delivery of the Government's ambitions for public services: reducing the burden of debt by reducing public spending is essential to economic recovery.
- 1.4 Decisions on how the Ministry of Justice will allocate its resources over the next spending round have not yet been made and they will, in any event, need to be reviewed in the light of actual expenditure and emerging pressures. Nevertheless, we estimate that the proposals set out in this consultation would, if implemented, deliver savings of some £350 million in 2014–15² from legal aid. This is an estimate and the final package of proposals that we decide to implement following consultation might in the event achieve more or less.
- 1.5 These proposals complement the wider programme of reform to move towards a simpler justice system: one which is more responsive to public needs, which allows people to resolve their issues out of court without recourse to public funds, using simpler, more informal, remedies where they are appropriate, and which encourages more efficient resolution of contested cases where necessary. But these legal aid proposals are not dependent on the implementation of those wider reforms.
- 1.6 Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

¹ This target was announced on the 20 October 2010 when the Government announced its spending plans for the four years to 2014/15.

² This estimate is based on 2008–09 data and takes account of the assumption that, as in recent years, fees will not be uprated by inflation over the four years to 2014–15. It should be noted that the figures in the accompanying Impact Assessments are long run steady state savings which take account of the continued impact of the policy proposals beyond the four year period to 2014–15.

The approach to reform

- 1.7 Although economic recovery is one of the main drivers, legal aid is, in any event, in need of fundamental reform. It is an expensive scheme which has expanded far beyond its original intentions. The programme of reform, on which this paper seeks views, was developed with the aim of achieving a fair balance between the need to reduce spending, the need to protect the interests of justice and the wider public interest. We have sought to develop an approach which provides access to public funding for those who need it, the protection of the most vulnerable in our society, the most efficient performance of the justice system and compliance with our legal obligations.
- 1.8 As set out in **Chapter 2** of this paper (**Introduction**), the Government's proposed reforms to legal aid are intended to encourage people, rather than going to court too readily at the taxpayer's expense, to seek alternative methods of dispute resolution, reserving the courts as a last resort for legal issues where there is a public interest in providing access to public funding.
- 1.9 They form part of a wider radical programme to move towards a simpler justice system; one which is more responsive to public needs, which allows people to resolve their issues out of court, using simpler, more informal remedies where they are appropriate, and which encourages more efficient resolution of contested cases where necessary.
- 1.10 **Chapter 3** sets out some **background** to the current legal aid scheme, including the history of its evolution, a summary of previous reviews, information about the services available under the scheme and its current operation, breakdown of spend, recent trends and international comparisons.

Proposals for reform

- 1.11 The scope of legal aid has expanded since the scheme was first established and the Government believes that it is right in principle that it should be reduced. **Chapter 4** consults on a series of proposals to limit the **scope** of the scheme in terms of the types of case which attract legal aid to fund legal advice and representation. The Government believes that anyone accused of, and/or charged with a criminal offence should have access to public funding subject to the interests of justice, and (where relevant) means. The chapter sets out the principles which have informed the Government's consideration of which types of case merit public funding and applies those principles to the wide range of civil and family cases. It sets out the rationale for retaining certain categories of law in scope and seeks views on whether to remove from scope those which the Government believes do not routinely justify public funding. Recognising that some individual cases will continue to require public funding even once they are removed from scope, the chapter proposes retaining a power to grant legal aid in certain circumstances.
- 1.12 **Chapter 5** sets out proposals for reforming the **eligibility** rules for civil and family legal aid. There are no proposed changes to eligibility rules for criminal legal aid as means testing has only recently been re-introduced for Crown Court cases. The proposals seek to ensure that those who, on the basis of their

disposable capital or income, have the ability to pay for, or contribute towards, the costs of their case should be asked to do so. Some of the proposed changes are aimed at ensuring that where people have a certain level of disposable capital, including equity in property, this should be fully taken into account when assessing eligibility. A waiver scheme is proposed where the client might be unable readily to access their equity, with a requirement to repay costs, or have a charge placed on their property, at the end of the case. It is also proposed to increase the level of contributions from disposable income from those who currently contribute towards their costs.

- 1.13 **Chapter 6** focuses on proposals for consultation on reform of **legal aid remuneration in criminal cases**. It signals the Government's intention to move, during the course of 2011–2012, to introduce competition into the pricing of criminal legal aid services. This chapter also signals the Government's intention to move subsequently to competitive pricing in civil and family legal aid for services delivered face to face. However, in the meantime, the Government is keen to seek views on proposals for changes to the structure of criminal fees that can be implemented over a shorter timescale. These have been designed to encourage, in appropriate circumstances, quicker and more efficient justice.
- 1.14 **Chapter 7** sets out more limited proposals for reform of **fees in civil and family proceedings**. Chapters 4 and 5 set out proposals on changes to scope and eligibility which, if implemented, would represent a radical programme of reform in civil and family legal aid. The Government believes that seeking to introduce a complete restructuring of fees at the same time would be confusing for suppliers. The chapter therefore sets out proposals for consultation designed to reduce fees across the board by 10% as well as other proposals allowing Government to exert greater control over costs.
- 1.15 **Chapter 8** sets out the Government's proposals for introducing a new system of **fees for expert witnesses**, in order to help contain rising expenditure. This consultation also seeks views on the proposal to codify the Legal Services Commission's benchmark rates for experts, reduced by 10%. It also seeks views on moving towards fixed or graduated fees in the longer term.
- 1.16 **Chapter 9** sets out proposals for two **alternative sources of funding**, as a means of supplementing the legal aid fund. It seeks views on how we might establish a scheme to consolidate the interest accruing on client accounts held by solicitors, to help offset some of the costs of legal aid. It also sets out proposals for a Supplementary Legal Aid Scheme, in which a proportion of a legally aided claimant's awards made in successful damage claims are collected and used to supplement the legal aid fund.
- 1.17 **Chapter 10** on **governance and administration** confirms the Government's intention to bring the administration of legal aid within an executive agency of the Ministry of Justice, abolishing the Legal Services Commission as a Non-Departmental Public Body. It also seeks views on proposals for reducing bureaucracy associated with the legal aid scheme.

Impact Assessments

- 1.18 The Government has assessed the potential impacts of the proposed reforms in line with existing duties on gender, race and disability and with particular reference to users and providers of legally aided services in both the private and not for profit sectors. These assessments of the potential impact of these proposals have been published alongside this document.³

Consultation

- 1.19 The Government would welcome responses to the questions set out in this paper. We would prefer responses to be submitted online at <http://survey.euro.confirmat.com/wix/p485462495.aspx>. Those who would prefer to submit their responses via email may send them to legalaidreformmoj@justice.gsi.gov.uk. Those who would prefer to submit views in hard copy should send their responses to Annette Cowell, Legal Aid Reform, Ministry of Justice, 102 Petty France, London, SW1H 9AJ.
- 1.20 The deadline for responses is 12:00 noon on Monday 14 February 2011. The Government will be responding to the consultation during Spring 2011.

³ See: <http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm>

Schedule of Consultation Questions

Scope

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

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

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

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

Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.

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

The Community Legal Advice Telephone Helpline

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

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

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

Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline? Please give reasons.

Financial Eligibility

Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons.

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

Question 14: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons.

Question 15: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)? Please give reasons.

Question 16: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

Question 17: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

Question 18: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)? Please give reasons.

Question 19: Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases, capped at £100,000 for all levels of service? Please give reasons.

Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.

Question 21: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients? Please give reasons.

Question 22: Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.

Question 23: Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.

Criminal Remuneration

Question 24: Do you agree with the proposals to:

- pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and
- remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?

Please give reasons.

Question 25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- the proposal to enhance fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates' Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and
- access to special preparation provides reasonable enhancement for the most complex cases?

Please give reasons.

Question 26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences? Please give reasons.

Question 27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000? Please give reasons.

Question 28: Do you agree with the Government's proposal to:

- a) remove the premium paid for magistrates' courts cases in London; and
- b) reduce most 'bolt on' fees by 50%?

Please give reasons.

Question 29: Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates? Please give reasons.

Question 30: Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases? It would be helpful to have your views on:

- the proposed role of the assessor;
- the skills and experience that would be required for the post; and
- whether it would offer value for money.

Please give reasons.

Question 31: Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages? Please give reasons.

Civil Remuneration

Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.

Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction? Please give reasons.

Question 35: Do you agree with the proposals:

- to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and
- to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?

Please give reasons.

Question 36: The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

Question 37: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

Question 38: Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply? Please give reasons.

Expert Remuneration

Question 39: Do you agree that:

- there should be a clear structure for the fees to be paid to experts from legal aid;
- in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;
- in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;
- the categorisations of fixed and graduated fees shown in Annex J are appropriate; and
- the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?

Please give reasons.

Alternative Sources of Funding

Question 40: Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.

Question 41: Which model do you believe would be most effective:

Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or

Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

Question 42: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:

- a) mandatory model;
- b) voluntary opt-in model; or
- c) voluntary opt-out model?

Please give reasons.

Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.

Question 44: Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?

Governance and Administration

Question 45: The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.

Question 46: The Government would welcome views on the administration of legal aid, and in particular:

- the application process for civil and criminal legal aid;
- applying for amendments, payments on account etc.;
- bill submission and final settlement of legal aid claims; and
- whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

Question 47: In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

Question 48: Are there any other factors you think the Government should consider to improve the administration of legal aid?

Impact Assessments

Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

Question 51: Are there forms of mitigation in relation to client impacts that we have not considered?

2 Introduction

- 2.1 We said in our document, *The Coalition: our programme for government*, published in May, that we would undertake a review of legal aid in England and Wales.
- 2.2 The Government strongly believes that access to justice is a hallmark of a civilised society. The proposals set out in this consultation paper represent a radical, wide-ranging and ambitious programme of reform which aims to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice or representation is justified. It is an approach which demands tough choices to ensure access to public funding for those who need it most, the protection of the most vulnerable in our society, and the efficient performance of the justice system.
- 2.3 Against a background of considerable financial pressure on the legal aid fund, the proposals set out in this paper have been developed with the aim of providing a substantial contribution to the Ministry of Justice's target of a real reduction of 23% in its budget, worth nearly £2bn in 2014–15.⁴ Sound finances are critical to the delivery of the Government's ambitions for public services: reducing the burden of debt, by reducing public spending, is essential to economic recovery.
- 2.4 Decisions on how the Ministry of Justice will allocate its resources over the next spending round have not yet been made, and they will, in any event, need to be reviewed in the light of actual expenditure and emerging pressures. Nevertheless, we estimate that the proposals set out in this consultation would, if implemented, deliver savings of some £350⁵ million in 2014–15 on legal aid by the final year of the spending review period. This is an estimate, and the final package of proposals that we decide to implement following consultation might in the event achieve more or less.
- 2.5 These proposals support wider plans to move towards a simpler justice system; one which is more accessible to the public, which limits the scope for inappropriate litigation and the involvement of lawyers in issues which do not need legal input; and which supports people in resolving their issues out of Court, using simpler, more informal remedies.
- 2.6 Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

⁴ See footnote 1 above.

⁵ See footnote 2 above.

The case for reform

- 2.7 Although reducing spend is one of the main drivers for reform, the Government also believes that there is an overwhelming case for reform of the legal aid system. Since the modern scheme was established in 1949 its scope has been widened far beyond what was originally intended. By 1999 legal aid was available for very wide range of issues, including some which should not require any legal expertise to resolve.
- 2.8 We believe that this has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the availability of taxpayer funding for unnecessary litigation. There is a compelling case for going back to first principles in reforming legal aid.
- 2.9 The expansion of the legal aid scheme has also had inevitable consequences for its cost. The scheme now costs over £2bn per annum. While comparisons with other countries are difficult (because their systems of justice operate differently and their budgets are distributed differently), evidence suggests that we spend more on legal aid than other comparable countries in Europe and elsewhere.⁶ Further information on international comparisons is set out in Chapter 3.
- 2.10 These problems were recognised by previous administrations, but their attempts at reform were piecemeal. As set out at Annex E, since 2006 there have been over thirty separate consultation exercises on reform of legal aid. While the resulting reforms managed to contain the growth in the overall cost of the scheme, they did not address the underlying causes. The Government recognises the difficulties that providers must have faced in planning and managing their practices during a period of almost constant change. The reforms set out in this paper are designed to place legal aid on a sustainable long term financial footing.
- 2.11 To help establish the right balance, we have been guided in particular by the following considerations:
- the desire to stop the encroachment of unnecessary litigation into society by encouraging people to take greater personal responsibility for their problems, and to take advantage of alternative sources of help, advice or routes to resolution;
 - the need to improve and reduce the costs of the whole criminal justice system through the removal of perverse incentives; and
 - the extent to which the market can provide other ways of accessing funding and
 - the need to fulfil our domestic and international legal obligations (including those under the European Convention on Human Rights).

⁶ *European judicial systems: Edition 2010 (data 2008): Efficiency and quality of justice European Commission for the Efficiency of Justice (CEPEJ); International comparison of publicly funded legal services and justice systems University of York October 2009; <http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf>*

The system of justice

- 2.12 Legal aid forms a vital part of a system of justice of which we are rightly proud. Our system of justice aims to dispense justice fairly, and impartially, without fear or favour. But it can be opaque: it can move slowly and it tolerates inefficiency. It is a system which is difficult for the public to understand and hard for them to navigate. Sometimes, these difficulties lead to poor outcomes for those directly involved and unnecessary costs to taxpayers.
- 2.13 Reforms to legal aid cannot, in themselves, solve all the problems of the justice system, but they have an important part to play in encouraging more efficient and effective resolution of contested issues. We are separately looking at reform of other aspects of the justice system. The proposals set out in this consultation have been developed to complement the wider strategy for reform across many elements of civil, criminal and family justice. But these are stand-alone proposals and are not dependent on the implementation of those wider reforms.
- 2.14 Key to the efficient use of resources is reform of the criminal justice system. We are committed to system-wide reform, focussing particularly on improving the efficiency of the current system, for example, by cutting bureaucracy, improved case management and information sharing between the agencies. We are also concerned to regulate demand more effectively, and our policy reforms are designed with the intention that each case is resolved at the most appropriate stage and in a way which takes into account the interests of justice, the risks to society and the potential costs.
- 2.15 Demand at various stages of the criminal justice process links closely with our assessment of sentencing policy, which we also announced in our programme for government.
- 2.16 Our sentencing assessment fits into a programme of work to deliver a 'rehabilitation revolution'. The Ministry of Justice (MoJ) will publish a Green Paper which will describe our ambition to fundamentally reform the criminal justice system. These reforms will mean more effective punishment and greater payback to victims and society while rehabilitating offenders to reduce crime and make the public safer.
- 2.17 The Government will be setting out its proposals for reform in these areas in December with a view to legislation when Parliamentary time allows. But in the meantime we have already asked the Sentencing Council to consider how sentence discounts might form part of a package of measures to encourage those who acknowledge their guilt to do so at the earliest opportunity. The earlier the guilty plea, the less trauma likely to be suffered by victims and witnesses at the prospect of giving evidence in court; and the lower the costs to the courts and other agencies. This reform will support proposals in Chapter 6 for restructuring criminal legal aid fees, which should help to encourage efficient upfront preparation and the earliest possible resolution of cases.

- 2.18 Published alongside this paper is the Government's consultation⁷ on Lord Justice (Sir Rupert) Jackson's recommendations on funding and costs arrangements in civil litigation set out in his *Review of Civil Litigation Costs: Final Report* (published 14 January 2010).⁸ That report made a series of proposals to make costs more proportionate. In particular, the Government is consulting specifically on proposed reforms to Conditional Fee Agreements (CFAs – also known as 'no win no fee' agreements), including removing the recoverability of success fees and 'after the event' insurance premiums. Our view is that, subject to the outcome of consultation, these should be taken forward in parallel with our proposal in this paper for introducing a Supplementary Legal Aid Scheme (see Chapter 9), to ensure that CFAs continue to offer a suitable alternative to legal aid in appropriate circumstances.
- 2.19 We are developing proposals for reforming how the system of civil justice delivers its services, on which we plan to consult early next year. We will seek to support users by preventing the unnecessary escalation of legal problems or disputes wherever possible. At the same time, where it is determined that court-based solutions are the most appropriate mechanism for resolving a civil dispute, we are developing proposals to help us offer a range of speedier and more efficient services that meet the needs of court users, while delivering an effective and proportionate route to justice.
- 2.20 The Government is also committed to reforming the system of family justice on similar principles. To achieve this, an independent Family Justice Review has been established by the MoJ and the Department for Education.⁹ This is the first comprehensive review of the family justice system since the introduction of the Children Act 1989. The Review is due to report next year and is considering how the family justice system could work more efficiently while continuing to provide services that offer the best outcome for families. It will look at how alternative dispute resolution services could be better utilised to help citizens take a greater role in resolving their problems.
- 2.21 As part of our wider efficiency drive, we have recently closed consultations¹⁰ on the rationalisation of our courts estate, in recognition of the current position nationally whereby magistrates' courts sit for only 64% of their available time and county courts courtrooms sit on average for just 130 days per year. Should all of these proposals be implemented, we estimate that magistrates' courts' utilisation would be around 80% and the county court would move towards the target of courtrooms sitting on average 200 days per year. We are currently considering the responses and will announce decisions later in the year on whether and which courts should close.
- 2.22 We are committed to giving communities better access to local justice and to getting them more involved in action to tackle low level crime and anti-social

⁷ See: <http://www.justice.gov.uk/consultations/jackson-review-151110.htm>

⁸ See: <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/index>

⁹ <http://www.justice.gov.uk/reviews/family-justice-intro.htm>

¹⁰ <http://www.justice.gov.uk/consultations/consultations.htm>

behaviour. Giving people good quality information is an important first step and we have already started to publish more and better information about crime and what is being done about it, to improve local accountability and trust in sentencing and court outcomes in particular. We want to go further and encourage people to attend local crime and justice meetings to start a meaningful dialogue between communities and local crime and justice practitioners. We also want to explore how we can involve local people directly in the delivery of justice, through testing innovative models such as Neighbourhood Justice Panels and increasing use of alternative resolution processes such as restorative justice as pre-court interventions and to divert some cases from the courts entirely.

2.23 We will bring forward more detailed plans for increasing community access to local justice by March 2011.

2.24 These measures constitute a wide-ranging programme of reform that seeks to achieve the Government's overall aim of simplifying proceedings and avoiding waste across all areas of the justice system. It therefore offers opportunities to reduce the amount of work required for cases to be taken forward through the courts.

Legal aid reform

2.25 The policy assessment has considered every aspect of legal aid. Given the need to reduce substantially spending on legal aid, we have developed proposals for reform across scope, eligibility and remuneration of legal aid, covering legal advice and representation in:

- civil cases: which include private disputes between individuals (or groups of individuals) and cases against public authorities;
- family cases: which cover both public law, i.e. cases involving public bodies, usually related to the care and supervision of children; and private law, typically proceedings to settle the financial and care arrangements when relationships break down; and
- criminal proceedings: which includes the prosecution of individuals for criminal offences and can lead to penalties including loss of liberty.

2.26 We have looked from first principles at the criteria both for the scope of and eligibility for the legal aid scheme. In Chapter 4, we look at which types of issue justify publicly funded support. We believe that it is clearly right that we should continue to provide legal aid for those accused of criminal offences provided that it is in the interests of justice and subject to the appropriate tests of the individual's means (see Chapter 3), as this underpins the right to a fair trial.

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

- 2.28 This leads us to conclude that some types of case should continue to remain in scope, for example, public law cases involving the care or supervision of children. For other proceedings, such as disputes involving consumer law, our view is that, given the need to reduce legal aid expenditure, the issues are not of sufficient priority to justify publicly funded support. For the issues which we propose to exclude from the future scheme, however, we recognise that there will be cases in which the specific circumstances require funding, even though the case would not ordinarily be within the scope of the revised scheme. Accordingly, we propose to have a funding scheme for excluded cases to meet our domestic and international legal obligations including those under the European Convention on Human Rights.
- 2.29 We have also considered alternatives to face to face services (such as the extension of telephone-based options) and out of court solutions. The introduction of the Legal Services Community Legal Advice (CLA) helpline has demonstrated that advice delivered via the telephone can be as good quality as, or better than, face to face advice, and is preferred by many vulnerable groups in society.¹¹
- 2.30 We have reviewed who should qualify for legal aid and in Chapter 5 we have set out our proposals for reforming the eligibility rules. These are designed to limit availability to those who really need it while ensuring that those who can afford to contribute should do so. Those who have access to funds, for example, through equity in a property, would, under the proposals in this paper, be required to use them first before accessing legal aid. The proposals also seek to address differences between the eligibility rules for certain welfare benefits (on which basis clients are currently automatically eligible for legal aid) and the legal aid means test.
- 2.31 The Government aims to ensure that we get the best value for money in the way in which legal services are procured. As signalled in Chapter 6, it is our intention to move to competitive procurement of legal aid services, under which market forces would determine their price, and providers would be paid for work completed, rather than remunerated for the number of hours worked. This was recommended by Lord Carter of Coles as long ago as 2006.¹²
- 2.32 Initially, our proposal is to introduce price competition for legal aid in criminal proceedings. In the longer term, we intend to introduce competition into the purchase of legal aid for civil and family proceedings delivered face to face (the provision of telephone advice services are already competed).

¹¹ The Community Legal Advice (CLA) Satisfaction Survey demonstrates that client satisfaction with the specialist services provided through the CLA helpline is higher than equivalent face to face service, and that the service is highly regarded among vulnerable clients. For example, 87% of disabled clients and 90% of Black, Asian and Minority Ethnic (BAME) clients said that they would recommend the service to others.

¹² *Legal Aid: A Market Based Approach to Reform*. Lord Carter of Coles, July 2006. <http://www.legalaidprocurementreview.gov.uk/>

- 2.33 The Government recognises that it will take time to make sure we have the right arrangements in place to promote strong and effective competition. We intend to launch a detailed consultation in 2011 on how best to achieve this for criminal cases. In the meantime, however, there is a need to move quickly to eliminate waste and inefficiency. Too often criminal cases proceed slowly to a conclusion, sometimes for tactical reasons, but often through poor case management. The Government has identified options to make some structural changes to the legal aid fee regime over a shorter timescale, which, complemented by reforms to the criminal justice system highlighted above, will help to ensure that cases are brought quickly and efficiently to justice.
- 2.34 In civil and family proceedings, we have proposed some reductions to fees as detailed in Chapter 7. We will keep this position under review until the impact of any changes to scope can be assessed. In Chapter 8 we have also set out proposals for reducing the costs of experts.
- 2.35 We have looked at options for supplementing the legal aid budget, by promoting alternative mechanisms to help people access justice as well as options for generating income to offset the overall costs of the scheme. In particular, as set out in Chapter 9, we would welcome views on two specific proposals which have had some measure of success in generating revenue in other jurisdictions; a supplementary legal aid scheme (under which a proportion of any successful claim for damages would be retained by the legal aid fund) and a fund, made up of the interest generated by funds held by solicitors in client accounts, to offset the costs of legal aid.
- 2.36 The final chapter sets out the reform, under which the administration of the legal aid scheme will become the responsibility of an executive agency of the MoJ. This was announced by the previous administration in response to Sir Ian Magee's review of the delivery of legal aid¹³ and fits within this Government's wider programme of reform of public bodies. We also seek views on which might be the priority areas for simplifying the processes for legal services suppliers, so that any bureaucracy is limited to that necessary to ensure the proper stewardship of public funds and that clients receive a high quality service.
- 2.37 We have considered the impact of the proposed reforms both on the various client groups and on providers of legal aid, and our detailed assessments are published separately.¹⁴ Overall, we believe that the likely impact of these proposals is proportionate to our aims, including that of ensuring that limited resources continue to be targeted to those most in need.

¹³ *Review of Legal Aid Delivery and Governance*; Sir Ian Magee, 3 March 2010.
<http://www.justice.gov.uk/publications/docs/legal-aid-delivery.pdf>

¹⁴ See footnote 3.

3 Background

Introduction

- 3.1 The modern legal aid scheme was established in 1949. For most of the first forty years, it was administered by the Law Society of England and Wales, and services were delivered by solicitors and barristers in private practice. Any qualified legal practitioner was able to undertake publicly funded work.
- 3.2 Until 1970, legal aid was mainly provided in criminal cases, and in divorce and matrimonial cases. However, during the late 1960s, there was a growing view, based in part on the development of legal aid schemes in other countries, that public funding should be available for a wider range of issues, including money claims, and personal injury cases. As a result, in 1970, the scope of legal aid was expanded to cover representation for individuals in most proceedings before the courts (with the exception of defamation).
- 3.3 There have subsequently been a number of changes to the operation of the schemes, the most notable being:
- in 1988, the Legal Aid Board was established, bringing responsibility for administering legal aid within a non-departmental public body;
 - in 1999, the Access to Justice Act (the 1999 Act) saw the creation of the Criminal Defence Service (through which the criminal legal aid scheme is delivered), and the Community Legal Service (under which legal aid is provided for civil and family cases). It established the Legal Services Commission (LSC) to administer these schemes; and
 - the 1999 Act also introduced limitations on the scope of the scheme, removing most personal injury cases and boundary disputes. And, for the first time, the LSC was empowered to set standards for service provision so that legal aid services could only be provided by suppliers who met minimum standards (known at the time as 'franchising'). It also introduced a more stringent merits test for civil and family cases (see the Funding Code¹⁵) thereby removing unmeritorious cases from the system.
- 3.4 In 2005, Lord Carter of Coles undertook a review of legal aid expenditure. His report,¹⁶ published the following year, made a series of recommendations for moving towards a market based approach to procuring legal aid services. To prepare suppliers for this radical reform, he proposed the introduction of more fixed and graduated fees to encourage in suppliers a proper understanding of their cost drivers.

¹⁵ http://www.legalservices.gov.uk/civil/guidance/funding_code.asp

¹⁶ See footnote 12.

- 3.5 His recommendations were largely accepted by the then Government, and set in train a programme of reform¹⁷ with the aim of moving to Best Value Tendering once the fee reforms had been implemented. The reform programme saw the introduction of fixed fees for advice provided at the police station in January 2008; revised standard fees for work in the magistrates' courts in April 2007 and the Litigators Graduated Fee Scheme in January 2008, as well as changes to the Advocates Graduated Fee Scheme in April 2007.
- 3.6 In civil and family cases, fixed fees were introduced in social welfare law, family and immigration in October 2007, followed by mental health in January 2009.
- 3.7 However, plans to introduce Best Value Tendering (BVT) were delayed. The most recent proposal, to pilot BVT in Greater Manchester and Avon and Somerset, was postponed in December 2009. The previous Government announced at that time that it had been persuaded that the proposals were unlikely to meet the aims set by the Carter review.
- 3.8 Earlier this year, Sir Ian Magee conducted a review into the delivery of Legal Aid.¹⁸ Among his recommendations was that consideration should be given to transferring the administration of the legal aid scheme to an executive agency of the Ministry of Justice (MoJ). The Government has already announced that they agree with this recommendation.¹⁹ We intend to establish a new statutory framework for the administration of legal aid, including the establishment of an executive agency to administer the scheme. Legislation will be brought forward as soon as Parliamentary time allows.

Services available under the legal aid scheme

- 3.9 There are a variety of services available under the legal aid scheme to support people with their legal problems, subject to different tests. Legal aid is only available to individuals, and businesses are specifically excluded.

Criminal legal aid

- 3.10 Criminal legal aid, provided under the Criminal Defence Service, covers:
- advice and assistance at the police station: free advice, regardless of income, for anyone being questioned by the police in connection with a suspected criminal offence, whether or not they have been arrested. The questioning may be at the police station or elsewhere under caution. Clients are able to access advice from the Duty Solicitor, Criminal Defence Service Direct (telephone advice) or their own solicitor;
 - advice and assistance: help from a solicitor including general advice, writing letters, negotiation, getting a barrister's opinion and preparing a written case.

¹⁷ *Legal Aid: The Way Ahead*: Cm 6993, Ministry of Justice, November 2006.

¹⁸ See footnote 13.

¹⁹ Parliamentary Questions: [HL668] 29 June 2010, column WA270; [11122] 27 July 2010, column 911W.

- advocacy assistance: help from a solicitor in preparing a case and representation in certain proceedings in the magistrates' and Crown Court. This also covers representation for prisoners facing disciplinary charges before the prison governor/controller or adjudicator, and for discretionary and automatic life sentences and those detained at 'Her Majesty's Pleasure' whose cases are referred to the Parole Board; and
 - representation: help from a solicitor in preparing a defence before a court hearing as well as representation at court by a solicitor or barrister. This includes dealing with issues such as bail and appeals.
- 3.11 The award of criminal legal aid must meet the 'interests of justice' test, which is set out in schedule 3 to the 1999 Act.²⁰ In applying the 'interests of justice' test, the court takes a number of factors into consideration, including whether the charge is so serious that, if convicted, the defendant is likely to be imprisoned or suffer a loss of livelihood. Other relevant circumstances and factors which take into account the complexity of the case and the capacity of the individual to represent themselves, for example, if they are unable to follow proceedings because of an inadequate knowledge of English.
- 3.12 Defendants who appear before the Crown Court for trial are automatically deemed to have met the 'Interests of Justice' test.²¹
- 3.13 Anyone detained at a police station, or who is unrepresented at their first appearance before the magistrates' courts, is entitled to free advice from a solicitor. However, for all other criminal cases a means test is applied. Those on certain types of welfare benefits (i.e. Income Support, Job Seekers Allowance, Employment and Support Allowance or State Pension Credit) are automatically eligible for legal aid without having to undergo a separate means assessment (these are known as passporting benefits). In addition, anyone who is under the age of 18 at the time the application is made is also passported through the means test. For everyone else:
- for cases before the magistrates' courts, a simple test is applied under which free representation is available to those whose income is within prescribed limits (see Annex B); and
 - for cases before the Crown Court, free legal aid is available for those whose assessed disposable income and capital are below the threshold. Those whose income and capital are above the threshold, are eligible for legal aid provided they make a contribution. Details of the income and capital thresholds applied are also set out at Annex B. Where the defendant is acquitted, any contributions paid are usually refunded.

²⁰ Full details are set out at chapter 26 of the LSC's Funding Manual see: http://www.legalservices.gov.uk/civil/lsc_manual.asp

²¹ Criminal Defence Service (Interests of Justice) Regulations 2009 (SI 2009/2875).

Civil and family legal aid

- 3.14 Under the Community Legal Service, eligible clients can access civil legal assistance. This is currently provided in one of two ways:
- initial help and advice with a problem. There are varying degrees of legal help/advice: this can be provided over the telephone from the Community Legal Advice Helpline or face to face at law centres, citizens advice bureaux, or solicitors' offices;
 - Legal Representation at court and, in exceptional circumstances, at a tribunal (such as mental health, immigration or asylum), which is provided by solicitors and barristers.
- 3.15 In family cases, Family Help is an intermediate level of service between help and representation. It is available in both private and public proceedings (subject to relevant criteria being met) and is granted to facilitate negotiation or referral of a client to mediation and can take a client up to representation in court (although not in public law cases) but does not cover representation at a final contested hearing or at an appeal.
- 3.16 In certain types of proceedings, legal aid is available free to all, for example, for parents in care or supervision proceedings and in child abduction proceedings, and for certain types of mental health or capacity proceedings where an individual is challenging his or her detention and for the child where they are a party in family proceedings. But all other services under the Community Legal Service are means tested.
- 3.17 Those on passporting welfare benefits are automatically eligible in the same way as for criminal legal aid. Legal aid is also available free for those whose disposable income and capital fall below prescribed thresholds and, on a contributory basis, for those whose income and capital fall between upper and lower thresholds. Further details of the means tests applied in civil and family proceedings are set out at Annex C.
- 3.18 In civil and private family cases (but not for public family proceedings), a merits test is applied to all applications for representation. The test is designed to place the applicant in a similar position to a well advised, privately funded, client and seeks to ensure that legal aid is only provided for reasonable cases, which have reasonable prospects of success.
- 3.19 Different tests are applied depending on the type of case. For example, for a Legal Help case the criterion for granting assistance is whether or not there is sufficient benefit to the client. For Legal Representation, the availability of alternative funding must be considered, for example, the availability of Conditional Fee Agreements in certain categories of law. Full representation will be refused if the prospects of success are unclear or if they are borderline (save if there is a wider public interest) or poor. Any potential damages must justify the likely costs of the case. Some cases (for example, representation of parents in a case where their children may be taken into care) are not subject to a merits

test, so clients are represented even if they have extremely poor prospects. Full details can be found at Part C, Chapter 4 of the LSC's Funding Code.²²

Legal aid fees

- 3.20 Under the current regime, almost all fees are set administratively (although the fees paid for Community Legal Advice telephone services have been set through competition). Most criminal cases are now paid under a system of standard and graduated fees, including the following:
- a system of fixed fees has been introduced for advice at the police station;
 - remuneration for proceedings in the magistrates' courts is paid under a standard fee scheme. There are different standard fees depending on the type of cases (for example, guilty pleas and trials) and on the location of the court. In certain cases, a higher (non-standard) fee may be paid (above a specified threshold) provided the supplier can demonstrate that the work has been reasonably and necessarily undertaken;
 - in the Crown Court, fees are paid under the two graduated fee schemes: the Litigators' Graduated Fees Scheme for litigators (who are responsible for the management of a case) and the Advocates' Graduated Fees Scheme²³ for advocates (who speak on behalf of clients in court). The schemes take account of five criteria in determining the fee to be paid: the nature of the alleged offence; the type of case (for example, trial or guilty plea), the length of the trial; the complexity of the case (measured using the number of pages of prosecution evidence as a proxy) and the number of prosecution witnesses;²⁴
 - special arrangements are in place for remunerating Very High Cost Criminal Cases (usually trials expected to last more than 60 days (for advocates) and 40 days (for litigators) which are paid using hourly rates, but on the basis of a plan agreed with the LSC in advance and reviewed regularly throughout the life of the case by dedicated contract managers; and
 - even where fixed and graduated fees are in operation there are limited mechanisms in place which allow the most expensive cases to be remunerated outside of the fee on an exceptional basis: for example, payments made for special preparation where a case raises a very unusual or novel point of law or factual issue.
- 3.21 The most recent contracts for criminal work, covering advice at the police station, proceedings in the magistrates' courts, and Very High Cost Criminal Cases came into effect on 14 July 2010 following a tender exercise. Fees paid for Crown Court work, under the Advocates' and Litigators' Graduated Fees

²² See: [http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples\(Sections1-14\)Sept07.pdf](http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf)

²³ See Annex D for further details.

²⁴ The criterion for the number of prosecution witnesses only applies to the Advocates' Graduated Fees Scheme.

Schemes, are set by regulation. Further details of the criminal fee structures are set out at Annex D.

- 3.22 Civil and family cases are also generally remunerated on the basis of a series of standard fees, although there are some exceptions. There is a range of different fees payable depending on the type of case, and the venue of proceedings. For example, in social welfare law there is one fee per category of law; for mental health, family and immigration there are a variety of different fees set for each category of law.

Summary of recent consultations

- 3.23 Under the 1999 Act, the Lord Chancellor is required to consult the professional bodies on any remuneration order made under the Act. However, it has been the practice of the MoJ, and the LSC, to consult on proposals for reform of the legal aid scheme, even when not strictly required to do so under the Act.
- 3.24 Since 2006, the MoJ and LSC have issued over 30 separate consultation exercises on legal aid. A full list of all consultations is set out in Annex E. Some of the more significant proposals during that period are summarised below.
- 3.25 Following a consultation which opened in November 2008, means testing in the Crown Court was implemented across England and Wales between January and June 2010.
- 3.26 In December 2008, the Government set out proposals for harmonising the amounts paid to solicitors and barristers for advocacy in family proceedings in the consultation paper, *Family Legal Aid Funding from 2010*.
- 3.27 In March 2009, *Best Value Tendering of CDS Contracts 2010* was published, setting out proposals for introducing price competition in the purchase of criminal legal aid services. However, (as set out in paragraph 3.7 above) the previous Government subsequently decided to postpone implementation of the proposed pilots. An earlier consultation (in December 2007) had identified the need for further work to inform development of detailed proposals for a BVT scheme.
- 3.28 *Legal Aid: Refocusing on Priority Cases* (July 2009) contained a series of proposals to target resources better. Following the consultation, changes to the Funding Code Criteria and Procedures were introduced on 1 April 2010 in relation to strengthening public interest considerations; refusing funding for prison/probation claims where the matter could be resolved via the Prisons and Probation Ombudsman; introducing a requirement of a minimum damages level for claims, other than the lead claim, within a Multi-Party Action; and introducing the power to notify proposed opponents when civil legal aid is applied for.

- 3.29 In August 2009, *Legal Aid: Funding Reforms* was published, setting out proposals to reform fees for police station attendances, the fees paid to litigators and advocates in publicly-funded criminal cases and measures to reduce spending on experts' fees in all legal aid cases. In its response to the consultation, published in December 2009, the previous Government set out its intention to reduce police station fixed fees in areas where fees were most expensive and there was evidence of strong demand for the work, and to introduce a single fixed fee for committals work, remunerated under the Litigators' Graduated Fees Scheme. The consultation response also set out the Government's intention to consult separately on proposed changes to advocates' fees.
- 3.30 A response to consultation on experts' fees was published separately²⁵ in March 2010. This concluded that further work was required to improve our understanding of the costs of experts to inform a revised fee structure. It announced the establishment of a working group, including representative bodies and other interested stakeholders, to help develop detailed proposals for reform of expert fees.
- 3.31 Following the consultation *Legal Aid: Reforming Advocates Graduated Fees*, which was published in December 2009, the previous Government implemented a staged reduction in the fees paid to advocates under the Advocates Graduated Fee Scheme in order to bring the rates paid under legal aid more closely into line with the fees paid by the Crown Prosecution Service. A staged reduction of 4.5% per annum was introduced with effect from April 2010 for a three year period (13.5% in total).
- 3.32 This also introduced changes to Very High Cost (Criminal) Cases, which had been the subject of a separate consultation in December 2009.
- 3.33 The impact of these changes, where relevant, has been factored into the assessments we have made on their anticipated impact of the reforms set out in this consultation.
- 3.34 In August 2010, the LSC published a Post Implementation Review of the Litigators' Graduated Fee Scheme, following its introduction in January 2008.²⁶

Legal aid expenditure

- 3.35 In 2008–09, the latest year for which audited information is available, total spend on legal aid was £2.1bn, a breakdown of which is set out in Table 1 below. The LSC's provisional outturn for 2009–10 indicates that there has been an increase of around 3½% (in cash terms) in the overall cost of legal aid. In criminal legal aid, the increase is around 2½% and in civil and family, just over 4%.

²⁵ <http://www.justice.gov.uk/consultations/docs/legal-aid-funding-experts-response.pdf>

²⁶ http://www.legalservices.gov.uk/docs/about_us_main/LGFS_Review_Group_Recommendations_-_August_2010.pdf

Table 1: Legal aid expenditure by category 2008–09

	Cost £m
Criminal Cases	
Advice	192
Magistrates' courts	291
Crown Court (and higher)	<u>699</u>
Total Criminal Legal Aid	1,182
Civil and Family Cases (net cost)	
Help (including immigration proceedings)	257
Representation	<u>660</u>
Total: Civil Legal Aid	917
Total: Legal Aid	2,108²⁷

- 3.36 These services were delivered through 1,781 criminal contracts and 2,613 civil and family contracts between the LSC and legal service providers. Of the civil providers, 360 contracts are with not for profit organisations.²⁸

Trends in legal aid expenditure

- 3.37 During the 1990s and the early years of the 2000s, spending on legal aid rose steadily. Between 1988–89 and 2003–04 the total cost of legal aid increased by over 160% in real terms (at 2008–09 prices). The increase in spending was seen across all categories of spending: Crime Higher (cases before the Crown Court and Court of Appeal) rose by over 230%; Crime Lower (advice and magistrates' courts cases) by over 100%; civil representation by over 135%; and civil help by over 240% (all in real terms).
- 3.38 This led to the introduction of a series of measures to contain growth in spend. In 2004 the LSC introduced major reforms in relation to immigration and asylum law, and a fixed fee scheme for advice and assistance in civil and family law. Changes to tighten up the merits tests for civil representation were also introduced: for example, enforcing the use of complaints procedures before litigation and removing some exemptions from the assessment of assets in civil means testing and the statutory charge. Community Legal Service Direct (now Community Legal Advice) was launched providing specialist legal advice via its helpline and information via a website and leaflet series.
- 3.39 In 2006 means testing (which had been abolished in 2000) was reintroduced to the magistrates' court. This, combined with the interests of justice test and other factors, means that the defendant is legally aided in around one third of magistrates' courts proceedings. From April 2007 onwards, in a series of

²⁷ Source: Legal Services Commission.

²⁸ Legal Services Commission data, as at 31 March 2009.

remuneration reforms following the recommendations of the Carter Review, fixed and graduated fees and rate cuts were delivered to further control the budget in civil and criminal legal aid.

- 3.40 Since 2003–04, the increase in legal aid spending has been contained, and the overall cost of legal aid has fallen by around 11% in real terms. Nevertheless, by 2008–09, legal aid expenditure was more than double its cost in 1988–89 in real terms.

International comparisons

- 3.41 The legal aid scheme in England and Wales is considered to be one of the most comprehensive, and generous, in the world.
- 3.42 Making international comparisons is complicated by differences in data collection methods and definitions. Costs in our justice system are distributed differently to those in other jurisdictions. A more inquisitorial style system is likely to spend more on inquisitors and the court process, and less on legal aid; and expenditure may be categorised under different budgets.
- 3.43 In 2009 the Centre for Criminal Justice Economics & Psychology at the University of York was commissioned by the MoJ to provide explanations as to why we appeared to spend more on legal aid in England and Wales than most other countries.²⁹ That study concluded that, having adjusted for differences in justice systems, spending on the legal aid scheme in England and Wales remained higher than the other countries studied. They found that this was due to three main factors:
- more cases per capita are funded for criminal and non-criminal areas;
 - more criminal suspects are brought to court, and more of this group are given criminal legal aid; and
 - there is higher spending per case on criminal and non-criminal cases.
- 3.44 The research highlighted the areas where practice in England and Wales could be leading to higher costs:
- higher income ceilings on eligibility;
 - wider scope in terms of what is covered; and
 - our adversarial rather than inquisitorial legal tradition.
- 3.45 The report has provided a helpful background to the development of proposals for reform of legal aid.

²⁹ See footnote 6 above.

4 Scope

Introduction

- 4.1 This chapter sets out the Government's proposals to refocus the scope of the legal aid scheme. The proposals have been designed with the aim of making substantial savings in legal aid expenditure. Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.
- 4.2 What is meant by 'scope' in this context is the type of issue or case for which legal aid is available. Except for a small number of priority areas, the granting of civil legal aid is subject to tests of financial eligibility and the merits of the case. Legal aid provides for legal services including Legal Help (initial advice and assistance) and, where applicable, Help at Court and Legal Representation. In family cases, legal services comprise Legal Help, Family Mediation, Family Help and Legal Representation.³⁰
- 4.3 The Government is committed to controlling public expenditure to reduce the deficit. But we also believe in light of the way the scheme has expanded since its establishment, that it is right in principle to reduce its scope. We have concluded that it is no longer affordable to provide legal aid for the extensive range of issues for which it is currently available. Nor does the Government believe that it is always appropriate to do so: in many matters, we would expect individuals to work to resolve their own problems, rather than resorting to litigation at a significant cost to the taxpayer.
- 4.4 Refocusing the scope of the legal aid scheme on those who need it most has required us to make very difficult choices about where funding continues to be justified. The starting point for our consideration has been to examine, from first principles, which issues should attract public funding in the light of the financial constraints. In reaching our proposals, we have taken into account our domestic, European and international legal obligations, including the European Convention on Human Rights (ECHR), and have also taken into account a number of factors as set out in paragraphs 4.13 to 4.29.
- 4.5 The Government's spending plans, set out in the 2010 Comprehensive Spending Review, include a reduction of 23% in the Ministry of Justice (MoJ) budget in real terms over the four years to 2014–15. These proposals are intended to make a substantial contribution to the required savings.

Criminal legal aid

- 4.6 All criminal cases are potentially within the scope of the criminal legal aid scheme, subject to the application of the interests of justice test and the means

³⁰ For definitions see Chapter 3.

test, as set out in Chapter 3. The Government considers that those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it. We do not therefore consider that it is appropriate to restrict further legal aid in criminal cases.

Civil legal aid

- 4.7 The remainder of this chapter focuses on proposals for reforming civil and family legal aid.
- 4.8 Subject to the outcome of this consultation, if there are to be significant changes to the scope of civil and family legal aid, the Government intends to introduce primary legislation as soon as parliamentary time allows. In practice, this would mean that any changes to the scope of legal aid are unlikely to be implemented before 2012.
- 4.9 The current civil legal aid scheme established under the Access to Justice Act 1999 is very broad: legal aid funding is available to provide legal advice ('Legal Help') on almost any area of law, other than personal injury and damage to property, conveyancing, boundary disputes, defamation or malicious falsehood, the making of wills, trust law and business cases, which are explicitly excluded.³¹ Personal injury cases are excluded because the availability of conditional fee agreements (CFAs)³² ('no win no fee') means that legal aid is not required. The other areas of law are excluded because they are not considered to have sufficient priority to justify a share of public funds.
- 4.10 The Access to Justice Act 1999 also sets out the cases for which public funding is available for Representation at Court. These include any case before the county court, the High Court, the Court of Appeal, the Supreme Court and for family matters before the magistrates' court. Legal aid is not generally available for Legal Representation for the coroners' courts, where the inquisitorial nature of inquests³³ means that it is not required in most circumstances (see proposals for legal assistance for inquests set out in paragraphs 4.119 to 4.122). Nor is it generally available for tribunal proceedings which are relatively informal, simple and designed to be accessed by participants without the need for Legal Representation.

³¹ Paragraph 1 of Schedule 2 to the Access to Justice Act 1999 lists various categories of case which cannot be funded under the civil scheme. Paragraph 2 of Schedule 2 lists the circumstances in which Legal Representation (advocacy) can be provided.

³² CFAs are the most common type of 'no win no fee' arrangement in England and Wales. Under these agreements, lawyers are not paid if they lose a case, but can charge an uplift on top of their base costs – otherwise known as a 'success fee' – if they win. In theory, success fees allow lawyers to cover the costs of cases they take on which do not succeed. The success fee can be up to 100% of base costs and is currently recoverable from the losing opponent if the case is won.

³³ Legal representation is most often required where two parties are in conflict. In an inquisitorial legal system, the court or part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system, where the role of the court is that of an impartial referee between parties.

- 4.11 The scheme in its current form is no longer sustainable financially if the Government is to meet its commitment to reduce the public financial deficit. We have therefore had to make tough decisions about where best to target resources.
- 4.12 In reaching our view about which types of issue and proceeding should continue to justify legal aid, we have taken into account the importance of the issue, the litigant's ability to present their own case (including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law), the availability of alternative sources of funding and the availability of alternative routes to resolving the issue. We have also taken into account our domestic, European and international legal obligations. Each of these factors is explained in more detail below.

The importance of the issue

- 4.13 We recognise that people will always feel that their case is an important one, but we have considered whether the consequences of the case at hand are objectively so serious as to add weight to the case for the provision of public funds.
- 4.14 We have considered where issues fall on a spectrum of objective importance. At the highest end of the spectrum are cases where the individual's life is at stake, or they are at risk of serious physical harm. Also of high importance are cases where the individual's liberty is at stake and cases where the individual faces intervention from the state in their family affairs, which may result in their children being removed from their care.
- 4.15 We also consider that proceedings where the individual faces homelessness are of high importance, given the potential impact on the livelihood, health, safety and well-being of the individual and their family. Some of these cases will be against private individuals, but other cases will be about holding public authorities to account for their statutory duties.
- 4.16 In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.
- 4.17 We consider that proceedings where clients are primarily seeking monetary compensation will not generally be of sufficient importance to merit public funding, unless there is another significant aspect to the claim that considerably increases its importance. For example, a damages claim which arises out of the abuse of a child or vulnerable adult, or out of serious abuse of state power, has an importance that goes beyond a simple money claim.
- 4.18 We have also considered the extent to which the individual's personal choices have played a part in the issue arising and the extent to which they might be expected to resolve it themselves. The Government recognises that there are many types of dispute where individuals may need to rely on legal aid to assist

them in matters where external factors beyond their control have affected their lives. For example, an individual who has been detained because of their mental health may wish to challenge matters relating to their detention.

- 4.19 However, there is a range of other cases which can very often result from a litigant's own decisions in their personal life, for example, immigration cases resulting from decisions about living, studying or working in the United Kingdom. Where the issue is one which arises from the litigant's own personal choices, we are less likely to consider that these cases concern issues of the highest importance.
- 4.20 We recognise that there are arguments that withdrawal of legal aid for any issue could lead, by a chain of events, to serious consequences. But our consultation proposals for the future scope of legal aid focus on cases where, in the case at hand, there could be very serious direct consequences for the client. We consider that this is the appropriate way to target resources and do not propose to devote limited public funds to less important cases on the basis that they could, indirectly, lead to more serious consequences for the litigant.
- 4.21 We have also considered whether the case is one which is covered by a European or international agreement. Because these agreements usually provide other European citizens with reciprocal access to legal assistance abroad, the provision of legal aid for these issues in England and Wales is important to guarantee these rights.

The litigant's ability to present their own case

- 4.22 There are several aspects we have considered in deciding whether litigants are likely to be able to present their own case. We have taken into account the form of proceedings and the forum in which they are resolved, for instance, whether they are inquisitorial or adversarial³⁴ and whether they are intended to be sufficiently user-friendly that the individual could navigate their way through the process without having to rely on a legal representative.
- 4.23 We have considered whether, in each type of case, the litigants bringing proceedings are likely to be predominantly from a particularly physically or emotionally vulnerable group, for example, as a result of their age, disability or the traumatising circumstances in which they are bringing proceedings. For example, litigants seeking publicly funded legal assistance in relation to community care issues, such as obtaining or challenging an assessment by a local authority for care in the home are much more likely to be elderly, frail or disabled and may therefore be more likely to need legal aid to help them find a resolution to their problem.
- 4.24 We have also looked at whether the nature of the case itself is likely to be particularly complex. We recognise that the law can seem complex, but we have

³⁴ In an inquisitorial legal system, the court or part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system, where the role of the court is that of an impartial referee between parties.

considered whether the type of case, by its very nature, may be routinely of such exceptional complexity that it is unlikely that a litigant would be able to represent themselves effectively. This may be, for example, because of the complexity of the subject matter, the particular complexity of the law in the area, or the complexity of the evidence.

The availability of alternative sources of funding

- 4.25 Where litigants are able to fund their case in other ways, such as through a CFA,³⁵ or legal expenses insurance (for example, provided with house insurance), we consider that they should use these other sources of funding to bring or defend proceedings. The Government believes that legal aid should, in principle, be the ‘funder of last resort’. The existing merits criteria in the civil legal aid scheme already reflect this principle to an extent and our proposals build on them. Where the majority of cases in a category of law³⁶ could be brought using alternative funding, such as clinical negligence where damages can be sought through a CFA, our view is that those alternatives should be the first recourse and legal aid should not routinely be available for such cases. Reforms to the current CFA regime have been proposed by Sir Rupert Jackson in his *Review of Civil Litigation Costs*,³⁷ on which the Government is currently consulting.

The availability of other routes to resolution

- 4.26 The Government is of the view that very significant sums are currently spent on providing legal advice for issues where individuals are in fact looking for practical advice rather than the specific professional expertise offered by a lawyer. We have explored whether there are alternative forms of advice or assistance available to help individuals to resolve their issues, instead of seeking expensive legal advice, which may not be needed. For example, several voluntary sector organisations offer advice on welfare benefits, housing and other benefits. Where there are alternative forms of advice and assistance in a particular area of law and there is no reason to believe that these will cease to be available, we consider that it is proper to take them into account in deciding how high a priority should be accorded to the provision of publicly funded legal advice and representation in that area of law.
- 4.27 We have also considered whether there are other ways of resolving the issue, such as the existence of an ombudsman or complaints procedure, for example, OTELO³⁸ for complaints relating to telecommunications, such that it should not ordinarily be necessary to seek redress through the courts. This too may indicate that problems can be resolved without the need for publicly funded legal assistance.

³⁵ Ibid.

³⁶ The LSC defines areas/categories of law (such as education, housing, etc.) thematically and contracts for the provision of advice and representation based on the categories.

³⁷ See footnote 8.

³⁸ Office of the Telecommunications Ombudsman.

Taking these factors into account

- 4.28 In weighing up these considerations, no one factor has been determinative. We have sought to balance these considerations in reaching our proposals, which are set out below.
- 4.29 Taken together, they have led us to propose a revised civil legal aid scheme which focuses resources on those cases where the litigant is at risk of very serious consequences. Examples include facing the removal of their children, physical harm, or homelessness, or where legal aid is justified to ensure a fair society through empowering citizens to hold the state to account or to meet our legal obligations, for example, in relation to reciprocal arrangements on international child abduction.

Proposals for retaining or removing areas of law from scope

- 4.30 The next section of this chapter sets out in more detail the areas of law for which we propose that some or all publicly funded legal services should remain and the reasons for this. In section (b) we set out in detail those areas of law which we propose to remove in whole or part from the scope of the legal aid scheme.
- 4.31 For each type of issue, we have sought to take into account each of the factors outlined above in order to inform our conclusions about the justification for retaining or ceasing the routine provision of legal aid in all such cases. A summary of all the proposed amendments to the civil and family legal aid scheme is set out in Annex F.
- 4.32 The existing legal aid scheme is very broad and allows public funds to be expended on any issue not explicitly excluded. In order to target legal aid resources in a more focused way on specific issues, we propose to specify the types of issue and levels of service which are available under the revised scheme³⁹ in legislation, when the Parliamentary timetable allows. Civil legal aid will not routinely be available for any other issue.
- 4.33 The Government recognises that this analysis cannot capture the specific circumstances of every litigant bringing a case in relation to particular issues. Currently, the Lord Chancellor has the power to grant civil legal aid in an individual case which is excluded from the scope of funding where the Legal Services Commission (LSC) requests it.⁴⁰ This is referred to as 'exceptional funding'. The extent of the current exceptional funding scheme is set out in guidance made by the Lord Chancellor as amended from time to time.⁴¹

³⁹ The list of matters for which civil legal aid is currently available are set out in the *Lord Chancellor's Authorisation on the Scope of the Community Legal Service*, the *Lord Chancellor's Authorisation on Tribunals*, the *Lord Chancellor's Authorisation on Funding in Proceedings Under Section 5A of the Protection from Harassment Act 1997*, and the *Lord Chancellor's Authorisation on Funding in Certain Proceeds of Crime Act Cases*.

⁴⁰ Section 6(8)(b) of the Access to Justice Act 1999.

⁴¹ The Lord Chancellor's Guidance on Exceptional Funding made under section 23 of the Access to Justice Act 1999.

- 4.34 The Government intends to replace this with a new scheme to provide legal aid for excluded cases where the Government is satisfied that the provision of some level of legal aid is necessary for the United Kingdom to meet its domestic and international legal obligations, including those under the European Convention on Human Rights (ECHR, in particular article 2 and article 6), or where there is a significant wider public interest in funding legal representation for inquest cases (see paragraphs 4.255). It is not intended that exceptional funding will generally be available except where it can be demonstrated that it is necessary to discharge those legal obligations, or where we are satisfied that the relevant test for legal representation has been met in inquest cases.
- 4.35 This scheme will not compensate for the withdrawal of funding for the types of case and proceeding we propose to remove from scope. Given the need to reduce public spending and target available resources effectively, we propose to draw the scheme narrowly while ensuring that cases which require legal aid are able to secure it.
- 4.36 An analysis of the current exceptional funding scheme and the reason why we propose it should be replaced is provided in paragraphs 4.246 to 4.262.

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

- 4.37 This section sets out the areas of law where the Government proposes to continue to fund some or all levels of service. For civil cases, these level of services are Legal Help and, where applicable, Help at Court and Legal Representation. In family cases, legal services comprise Legal Help, Family Help, Legal Representation and Family Mediation.

Asylum

- 4.38 Legal aid currently funds Legal Help and Representation on issues relating to asylum. This includes legal advice for nearly all asylum applicants at the application stage, representation for most asylum appeals before the First-tier and Upper Tribunal (Immigration and Asylum Chamber), and advice on appealing to higher courts.⁴²
- 4.39 We propose to continue to provide this publicly funded legal assistance in asylum cases. In making this judgement we have considered the nature of the issues at stake. In these cases, they are about the immediacy and severity of the risk to the individual: if an applicant for asylum is returned to an unsafe country, they could suffer persecution, torture or death.
- 4.40 We have also taken into account the particular vulnerability of this group. When making their case, asylum applicants may have recently fled persecution or torture. In these circumstances, it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves.

⁴² The Court of Appeal and the Supreme Court.

- 4.41 We also recognise the importance of continuing to provide free legal assistance and/or representation in the event of a negative asylum decision as set out under Article 15 of the 2005 EU Asylum Procedures Directive.⁴³
- 4.42 Therefore the Government considers it appropriate to retain Legal Help and Controlled Legal Representation for asylum cases. However, in paragraphs 4.216 to 4.223 below, we propose to remove all welfare-related issues from the scope of legal aid. This will include applications for asylum support under sections 4 and 95 of the Immigration and Asylum Act 1999.

Claims against public authorities

- 4.43 Currently, civil legal aid is generally available for claims against public authorities, including claims for negligence and personal injury claims in certain specified circumstances (clinical negligence cases against public authorities are dealt with separately below).
- 4.44 Claims against public authorities are brought into scope by the *Lord Chancellor's Authorisation on Scope of the Community Legal Service* where they concern "(i) 'serious wrong-doing', or (ii) abuse of position of power or (iii) significant breach of human rights, or (iv) where they are of Significant Wider Public Interest (and where they form part of a Multi-Party Action where the likely damages exceed £5,000)."
- 4.45 We do not generally view primarily financial matters as being of sufficiently high importance to warrant intervention and support in the form of legal aid and we are less likely to view as justified uses of civil legal aid for cases which merely concern financial advancement. However, we recognise that there are some claims which raise issues about public safety and the misuse of state power where the grounds for providing public funds are much stronger.
- 4.46 There is a substantial overlap between the current criteria for claims against public authorities in the *Lord Chancellor's Authorisation*. A serious claim will arguably involve serious wrong-doing, the abuse of a position of power *and* a significant breach of the claimant's human rights.
- 4.47 'Serious wrong-doing' was always intended to mean exactly that; the Funding Code⁴⁴ has been clear that it means deliberate harm or behaviour going well beyond simple negligence or breach of contract.⁴⁵

⁴³ Council Directive 2005/85/EC of 1 December 2005 Article 15.

⁴⁴ The Funding Code is the document created under section 8 of the Access to Justice Act 1999 which sets out the criteria for granting civil legal aid in different kinds of case, and the procedures covering legal aid grants. The criteria include factors such as the prospects of success, the costs/benefit ratio, and whether there are any special features (e.g. significant human rights issues) that add weight to the case for funding.

⁴⁵ See 17.2 of the Funding Code guidance.

- 4.48 The case of *R(G) v Legal Services Commission* [2004] EWHC 276⁴⁶ has created uncertainty about what ‘serious wrong-doing’ means and this creates the possibility that less serious claims will, in fact, fall within this definition. The Court rejected the notion that ‘serious wrong-doing’ required an element of deliberate, malicious or dishonest conduct and held that a negligent omission could suffice if the authority’s duty of care had been sufficiently important.
- 4.49 This judgment potentially widens the scope of the claims which fall within ‘serious wrong-doing’ to include a range of less serious cases. We want to clarify the criterion and make it absolutely clear that simple negligence is insufficient to fall within this category, as was always intended.
- 4.50 We consider that it is unnecessary to have a separate criterion of ‘serious wrong-doing’. The kind of wrong-doing that the criterion is directed at capturing is, in general, perfectly adequately captured by ‘abuse of position of power’ and/or ‘significant breach of human rights’. It is therefore unnecessary to have an additional category of ‘serious wrong-doing’ that overlaps with these.
- 4.51 We recognise that there may be cases involving very serious negligence, which should properly fall within the legal aid scheme, but which may not always comfortably fall within the criteria for ‘abuse of position of power’ or ‘significant breach of human rights’. In order to bring these cases within legal aid, we propose to provide funding for claims against public authorities arising from “negligent acts or omissions falling very far below the required standard of care”.
- 4.52 We therefore propose that claims against public authorities should continue to receive legal aid where they concern:
- i) abuse of position of power; and/or
 - ii) significant breach of human rights; and/or
 - iii) negligent acts or omissions falling very far below the required standard of care.
- 4.53 This ensures that cases of very serious negligence are still within scope while ensuring that less serious cases of negligence are properly out of scope. We consider that cases where state agents are alleged to have abused their position of power, significantly breached human rights, or are alleged to have been responsible for negligent acts or omissions falling very far below the required standard of care have an importance beyond a simple money claim. We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused. We consider that the class of individuals bringing these claims is not necessarily likely to be particularly vulnerable and some cases will be suitable for funding through CFAs. However, we believe that the determining factor is the role of such cases in ensuring that the power of public authorities is not misused. We therefore propose that legal aid is retained for these claims against public authorities,

⁴⁶ The claimant challenged the decision of the LSC not to grant public funding for a proposed action against a local authority. The substantive claim had alleged that the local authority negligently and in breach of its statutory duty, failed to take a child into its care.

subject to the availability of alternative sources of funding, such as CFAs (see paragraph 4.265).

- 4.54 Chapter 9 sets out our proposals on alternative sources of funding. These include a related proposal to introduce a supplementary legal aid scheme, under which a percentage of funds would be recovered from cases where successful claims for damages have been made and the claimant was in receipt of legal aid.
- 4.55 We do not propose to retain the existing rule in the Funding Code that brings back into scope of civil legal aid any issue for which it is argued that Significant Wider Public Interest applies (see paragraphs 4.252 to 4.254).

Claims arising from allegations of abuse and sexual assault

- 4.56 We intend to retain legal aid for money claims against both private individuals and public authorities where (i) they arise out of allegations of the abuse of a child or vulnerable adult; or (ii) they arise out of allegations of sexual assault. This provides legal aid for cases concerning, for example, allegations of abuse in local authority care, or in private educational or care institutions.
- 4.57 We consider that money claims which arise out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault, have an importance that goes beyond a simple money claim. While stronger claims may be suitable for alternative sources of funding such as CFAs, we consider that victims may well be vulnerable and need assistance in pursuing a claim. We do not consider that the alternative forms of advice or assistance which are available are sufficient to justify the withdrawal of legal aid.
- 4.58 In the light of the importance of the issue at stake, the seriousness of the alleged harm suffered by the litigant, the likelihood of their vulnerability and the lack of sufficient alternative forms of assistance to justify the withdrawal of legal aid, it is our view that the provision of legal aid funding is justified. We propose that it is retained for these claims.

Community care

- 4.59 Legal aid is currently available to fund advice (through Legal Help) for individuals who are unable to look after themselves because of age, illness or disability. This may include legal advice to obtain or challenge an assessment for adequate services, challenging care home closures or contesting involuntary removal from a home by a local authority. We consider that the issues at stake in these cases are very important because they can substantially affect the individual's ability to live an independent and fulfilled life. We have also taken into account the fact that, typically, these are likely to be very vulnerable people who may not be able to present their own case without legal assistance. As these will usually be cases against the state, we do not consider that these are issues that this class of individuals can resolve themselves. Nor do we consider that the alternative forms of advice or assistance available are sufficient to justify the withdrawal of legal aid, or that there are viable alternative sources of funding.

- 4.60 The Government believes that because of the potential vulnerability of the clients, and because this area of law is focused on safeguarding the rights of the elderly and infirm to be cared for adequately and with dignity, there continues to be a role for the state in supporting legal assistance for eligible people in these cases. We propose that legal aid remain available for Legal Help in this category and for challenges to public authorities by means of judicial review (see paragraphs 4.95 to 4.99 below) to help enforce the rights of these individuals. It will also remain available for civil injunctions against non-state care institutions which concern community care issues.

Debt matters where the client's home is at immediate risk

- 4.61 The legal aid scheme currently provides funding for a range of debt issues. The majority of funding is provided for Legal Help, with the remainder for Representation.
- 4.62 The Government considers that, in general, cases which are primarily of a financial nature are less deserving of state intervention through legal aid than those involving fundamental rights. Individuals who have debt problems are able to get help and advice from a number of other sources, such as the National Debtline and the Money Advice Trust and it is right to expect individuals to take responsibility for their own financial affairs. However, we recognise that some debts could lead to the debtor's home being immediately at risk and in line with our view of housing repossession cases set out in paragraph 4.74 to 4.81 below, we consider that funding is justified in such cases because of the severity of the potential impact on the livelihood, health, safety and well-being of the litigant and their family.
- 4.63 We therefore propose to retain within scope legal aid for debt cases where, as a result of rent or mortgage arrears, the client's home is at immediate risk of repossession. Although legal aid will remain available for Legal Representation in appropriate cases, in practice the merits test will continue to mean that most cases are funded at the Legal Help level.

Domestic violence

- 4.64 Legal aid is currently available for both legal advice and representation for domestic violence and forced marriage cases. The Government is committed to supporting victims of domestic violence and forced marriage. In domestic violence cases involving, for example, non-molestation orders and occupation orders, the victim is at risk of physical harm and we therefore view these proceedings as at the high end of the spectrum in terms of importance of the issues at stake. We recognise that the state has a role to play in helping claimants to obtain protection and consider that those in abusive relationships need assistance in tackling their situation. The police can provide protection and perpetrators of domestic violence are prosecuted but there will be cases where this does not occur. And while it is possible for litigants to represent themselves in these proceedings, we consider that victims of abuse may be particularly vulnerable. We have therefore concluded that the importance of the issue and the characteristics of the litigants are such that funding is justified.

- 4.65 Legal aid funding is also available for issues relating to forced marriage. We consider that these should continue to be funded through legal aid, given the importance of the issues at stake for the person requiring protection, including loss of liberty and risk of physical harm. We also propose to retain civil legal aid for applications under the inherent jurisdiction of the High Court for a wardship order relating to a 16 or 17 year old who has been abducted abroad for the purposes of forced marriage. Usually in these cases, a sibling applies for legal aid and the child who has been abducted is joined as a party to the proceedings.
- 4.66 Therefore we propose to retain legal aid for all domestic violence and forced marriage cases for both Legal Help and Representation.
- 4.67 We recognise that domestic violence may also be an important element of certain ancillary relief cases (disputes about money and property on divorce) and private law children and family cases (such as child contact and residence disputes). Given the need to direct resources at the issues of highest importance in a fair and balanced way, we consider (see paragraphs 4.154 to 4.158 and 4.205 to 4.215 below) that legal aid is not routinely justified for ancillary relief proceedings and private law family and children proceedings. But we recognise that where there is an ongoing risk of physical harm from domestic violence, different considerations apply. In these cases, we consider that the provision of legal aid is justified where the client may be unable to assert their rights and may face intimidation because of risk of harm. We therefore propose that the following cases are retained in scope for the client at risk:
- ancillary relief, or private law children and family proceedings, where the LSC is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last twelve months and an order was made, arising from the same relationship;
 - ancillary relief, or private law children and family proceedings, where there are ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, where the applicant has funded proceedings privately or has acted as a litigant in person, or where there have been such proceedings in the last twelve months and an order was made, arising from the same relationship;
 - ancillary relief, or private law children and family proceedings, where there is a non-molestation order, occupation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or in the case of forced marriage, against any other person); and
 - ancillary relief, or private law children and family proceedings, where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).
- 4.68 While we are clear that protection of those at risk of domestic violence is a priority, it is necessary to ensure that there is clear objective evidence of the need for protection in the main proceedings. Paragraph 4.67 sets out the

situations in which we consider that this will be the case. However, we welcome views on whether there are any additional circumstances in which such evidence may be present.

Family mediation in private law family cases

- 4.69 Given the need to reduce the deficit we are committed to funding in accordance with our priorities. The Government believes that, wherever possible, it would be in the best interest of those involved in private law family cases which do not involve domestic violence to take a more direct role in their resolution, using mediation and keeping court proceedings to the minimum necessary. For this, and the other reasons set out below (see paragraphs 4.205 to 4.215), we consider that legal aid can no longer be justified routinely for such cases. This approach is consistent with our wider policy of diverting cases away from court, which often gives rise to higher costs, both for those directly involved and the taxpayer.
- 4.70 However, we recognise that some individuals within the eligibility limits for legal aid will need assistance in resolving their disputes without recourse to court-based solutions. For this reason we are proposing that legal aid be retained for family mediation in private law family cases, including private law children and family proceedings and ancillary relief proceedings. This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is present, we intend to offer support through family mediation, as some couples may still be able to obtain value from the mediation process.
- 4.71 Since the requirement to consider mediation was made mandatory for the legally aided sector in 1997, the number of publicly funded mediations has risen year on year from 400 to almost 14,500 in 2009.⁴⁷ This indicates clearly that by improving knowledge about mediation and the benefits it offers, the take-up of these services increases. The full and partial success rate of publicly funded mediations now stands at 70%⁴⁸ (with the full resolution of cases accounting for 66% of this).
- 4.72 Given the wider benefits that mediation offers, both to those involved, by creating a less stressful environment in which to reach resolution, and to the taxpayer, by reducing the volume of business that ends up in court, we therefore propose that family mediation services currently funded by legal aid remain in scope. This will include the initial assessment and subsequent stages, as now. We also propose that, where the client enters mediation, a fixed amount of Legal Help will be available to assist clients by providing advice during the mediation and immediately following the mediation to formalise and give legal effect to any agreement reached. Based on LSC data, as agreed by the National Audit Office, the average amount of time spent by solicitors assisting with such mediations equated to £150 of work and we would propose to set the

⁴⁷ Source: Legal Services Commission data 1997–2009.

⁴⁸ Source: Legal Services Commission data 2009–10.

payment fee at this level (and the fee would be payable whether the mediation succeeded or not).

- 4.73 The MoJ, along with the Department for Education, is sponsoring the first comprehensive independent review of the family justice system⁴⁹ in over twenty years. We expect that this will further consider the role of mediation in family cases, building on the outcome of this consultation, as part of a fundamental consideration of how the family justice system operates and the type of services it delivers. We believe that the Family Justice Review, which is due to report in 2011, will present recommendations to Government that offer us the opportunity to develop a stronger, more efficient system that leads to better results for children and families.

Housing

- 4.74 The legal aid scheme currently funds help with issues related to where litigants live and the condition of their property. These include possession and eviction, homelessness and housing disrepair.
- 4.75 Given the need to target limited resources, we have reviewed whether in housing cases the importance of the issues at stake and the seriousness of the consequences in the case at hand, are sufficiently great to justify funding. In our view, some housing cases are of high importance, given the potential impact on the livelihood, health, safety and well-being of the litigant and their family. Though many litigants bringing these claims will be capable of presenting their own case, in our view, where the case concerns repossession and the litigant is at risk of homelessness, we consider legal aid to be justified, given the gravity of the consequences.
- 4.76 We therefore propose to retain legal aid for repossession cases, including actions for possession due to rent, service charge, or mortgage arrears, adverse possession and similar matters arising out of tenancy agreements. Following the same logic, we also consider that funding is justified for those damages claims for disrepair, where they are brought as a counterclaim in rent arrears possession cases. These cases could be considered a defence to a possession order, where the litigant or their family may be at immediate risk of being made homeless.
- 4.77 We also propose to retain appeals to the county court on points of law under section 204 of the Housing Act 1996 which relate to the obligations of local authorities to those who are homeless or threatened with the risk of homelessness. We also propose to retain actions under the Mobile Homes Act 1983 where the site owner is seeking eviction, as these are analogous to housing repossession proceedings.
- 4.78 We also consider that funding is justified for serious housing disrepair cases where the litigant is not primarily seeking damages, but is seeking a repair of such significance that without it the life or health of the litigant or their family

⁴⁹ See Chapter 2 for further details on the Family Justice Review, chaired by David Norgrove.

may be at serious risk (such as the repair of gas equipment). Given the risk to health in these serious disrepair cases, we propose too that legal aid is justified for these cases.

- 4.79 We recognise that there are other issues – for example, welfare benefits cases or general debt problems – which, in time, could lead to a home being at risk if they are not dealt with expeditiously. However, we consider that the priority for funding is where the home is at immediate risk. We need to prioritise funding effectively and we consider that it would be inappropriate to devote limited funds to a range of less important cases on the basis that they could, ultimately, lead to more serious consequences for the litigant.
- 4.80 Civil legal aid is also currently available for litigants against whom Anti-Social Behaviour Orders (ASBOs) are being brought in the county court. Typically, this is where a local authority is seeking an ASBO alongside possession proceedings on the basis of a nuisance. For all other ASBOs, heard in the magistrates' court, legal aid is available under the Criminal Defence Service. Civil legal aid is also available for injunctions concerning anti-social behaviour.⁵⁰
- 4.81 On balance, we consider that civil legal aid is justified in these ASBO proceedings and for injunctions concerning anti-social behaviour. We consider that these civil proceedings are important, given the potential restrictions placed upon a person's liberty. For ASBOs, the seriousness of the issues at stake is reflected in the fact that proceedings are subject to the criminal standard of proof and that a criminal sanction may be applied in the event of a breach.

Immigration detention

- 4.82 These cases concern an immigration or asylum applicant, or a person to be deported or removed from the United Kingdom, who is detained and is specifically seeking to challenge their detention, or is on bail and seeking a variation or extension of their bail, or is facing forfeiture of their bail.
- 4.83 In these cases, the issue at stake – the appellant's liberty – is extremely important. We do not consider that there are sufficient alternative forms of advice or assistance, or alternative sources of funding, in relation to these issues to justify the removal of legal aid. Nor do we consider that these cases are ones in which the individual could be expected to resolve the issue themselves.
- 4.84 Given the importance of the issues at stake, and the absence of other routes to fund or resolve them, we therefore consider that legal aid is justified and propose that cases involving challenge to detention under immigration powers should continue to attract legal aid for advice and representation before the First-tier and Upper Tribunals, and higher courts. However, we do not propose that legal aid will be available for claims by detainees or bailees that do not

⁵⁰ Under section 153A of the Housing Act 1996 (as amended by the Anti-social Behaviour Act 2003).

relate directly to their detention or asylum (for example, claims in relation to the individual's immigration application – see paragraphs 4.198 to 4.203).

- 4.85 We also propose to continue to provide publicly funded legal assistance for proceedings before the Special Immigration Appeals Commission (SIAC).⁵¹ In making this judgement, we have taken into account the importance of the issues considered by SIAC – the removal or exclusion of an individual from the United Kingdom on national security or other public interest. These are not cases which the litigant could resolve themselves, since they may not be able to see all the evidence against them, or could use alternative forms of advice or assistance or access alternative funding. We therefore consider that legal aid is justified for these cases.

International child abduction

- 4.86 We consider that the abduction of a child is an issue of high importance, given the impact on both the child and its parent of being taken to another country without their agreement. We do not consider that there are adequate alternative forms of advice or assistance to justify the withdrawal of legal aid. We also recognise that it will be very difficult for the left-behind parent to present their own case when they are fighting for the return of their children across international borders, and the litigant may not be familiar with our legal system.
- 4.87 We recognise the importance of the reciprocal arrangements on international child abduction set out in the 1980 Hague Convention,⁵² the 1980 Luxembourg Convention⁵³ and the Council Regulation (EC) No 2201/2003 (Brussels IIa),⁵⁴ and we consider it important to continue to provide legal aid reciprocally under these agreements.
- 4.88 We propose to retain legal aid for all international child abduction cases, whether they are covered by the agreements above or not, given their importance. We also propose to retain the existing eligibility rules for these cases.⁵⁵

⁵¹ The Special Immigration Appeals Commission (SIAC) is a superior court of record created by the Special Immigration Appeals Commission Act 1997. It deals with appeals where the Home Secretary exercises statutory powers to deport or to exclude someone from the United Kingdom on national security grounds or for other public interest.

⁵² The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

⁵³ European Convention [Council of Europe] on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children signed in Luxembourg on 20 May 1980. The 1980 Hague and Luxembourg Conventions apply to persons from Contracting States.

⁵⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Brussels IIa applies to persons domiciled or habitually resident in the EU Member State concerned.

⁵⁵ Hague applications are non-means tested, but non-Hague applications are means tested.

International family maintenance

- 4.89 From 2011, both the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, and the EU Maintenance Regulation 4/2009⁵⁶ are being implemented.
- 4.90 These reciprocal agreements set out when free legal assistance should be made available for international applications, appeals and enforcement proceedings concerning family maintenance and child support (2007 Hague), and where legal assistance should be made available for international child maintenance applications (Regulation 4/2009).
- 4.91 We recognise the importance of these reciprocal arrangements concerning international child and family maintenance and child support, and we consider it important to continue to provide legal aid reciprocally under these agreements. We do not consider that the litigant would generally be able to self-represent, given the cross-border nature of these cases. We therefore propose to continue providing funding for them.

Mental health

- 4.92 Legal aid currently funds all cases where the primary legal issue relates to mental health, particularly where this is covered by the Mental Health Acts of 1983 and 2007, and the Mental Capacity Act 2005. The majority of funding is used to provide assistance to sectioned clients appealing the terms of their detention before the First-tier (Mental Health) Tribunal, and the Mental Health Review Tribunal for Wales.
- 4.93 We consider that most of these cases concern a very important issue – the individual's liberty. Due to the nature of their illness, many of this client group will be very vulnerable and are unlikely to have the capacity to represent themselves properly at a tribunal without legal assistance. Although advice is available from other sources, through voluntary sector organisations such as Mind, which provides a legal advice service, we do not consider that these are sufficient, or that there are alternative sources of funding which would enable individuals to resolve these issues without publicly funded legal assistance. Nor do we consider that these cases are ones where the individual could be expected to resolve the issue themselves given the involvement of the state and the nature of the illness.
- 4.94 We therefore propose to retain legal aid for mental health and capacity detention cases, including appeals to the First-tier (Mental Health) Tribunal, and onward appeals to the Upper Tribunal, and appeals to the Court of Protection on deprivation of liberty issues. As set out in paragraphs 4.95 to 4.99, legal aid will also remain available for judicial review challenges to help enforce the rights of this client group. It will not, however, be available for tort⁵⁷ or other general

⁵⁶ Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in matters relating to Maintenance Obligations.

⁵⁷ A civil wrong, for which an action for damages exists.

damages claims (see paragraph 4.241), unless the claims are of a very serious nature (see from paragraph 4.43 on claims against public authorities).

Public law

- 4.95 Public law principally covers the challenging of public authorities in the High Court by way of judicial review, equivalent proceedings of habeas corpus,⁵⁸ proceedings in the Upper Tribunal where it is exercising its 'judicial review' jurisdiction,⁵⁹ and judicial review applications transferred to the Upper Tribunal from the High Court.⁶⁰ It also covers other challenges of a public law nature, for example, statutory appeals, for instance, in homelessness cases. Legal aid for judicial review challenges is available for all issues other than most business cases.
- 4.96 Before an applicant can obtain a judicial review of a public authority decision, they must apply to the High Court for 'permission'. The permission stage is an important part of the process as it helps to establish whether the applicant has an arguable case, and helps to focus both the Court's time and legal aid resources on meritorious cases.
- 4.97 In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities. For example, a decision by a public authority to detain someone without sufficient reason would be a very important issue as the case concerns the litigant's liberty. Similarly, a challenge to a decision to refuse a litigant a life-saving medical treatment on an irrational basis would be of great importance as their life is at risk.
- 4.98 In general, we do not consider that the class of individuals bringing these proceedings is likely to be particularly vulnerable, although they may be where the judicial review concerns mental health or community care. However, where alternative forms of dispute resolution, such as complaints procedures or referral to an ombudsman, have not succeeded we do not consider that there are further appropriate alternative forms of advice or assistance to justify the withdrawal of legal aid.
- 4.99 We therefore consider that legal aid for most public law challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance, and we propose that it be retained. However, we do not consider that business cases are important enough for legal aid to be justified for public law challenges concerning business matters, and we propose that, as at present, legal aid should continue not to be available for public law in business cases.

⁵⁸ An important common law remedy enabling an individual to challenge the legality of their detention.

⁵⁹ Under section 15 of the Tribunals, Courts and Enforcement Act 2007.

⁶⁰ Under section 31A of the Supreme Court Act 1981.

Public law children

- 4.100 Public law children is an area of law which covers proceedings under the Children Act 1989 where the state is considering commencing, or has commenced, care or supervision proceedings in respect of a child, proceedings for a child assessment order, or proceedings for an emergency protection order. This may occur, for example, where the local authority is concerned that a child is suffering or is likely to suffer significant harm if they remain at home. Legal aid is also available for other public law proceedings, such as proceedings concerning adoption. In addition, it is also available for wardship and inherent jurisdiction of the court cases which are heard in the High Court.
- 4.101 In the Government's view, the issues at stake in these cases are extremely important, and the very emotional nature of the subject matter, and the personal circumstances of the individuals involved, will often make it difficult for them to present their own case. We recognise that families must have a practical means of taking part in proceedings brought by public authorities that affect the integrity of the family unit. We do not consider that there are viable alternatives to legal aid. We therefore consider that legal aid funding is justified.

Registration and enforcement of judgments under European Union legislation

- 4.102 Currently the Courts of England and Wales recognise a range of family and civil judgments which are made in other Member States of the European Union, and legal aid is available for the registration and enforcement of these judgments.⁶¹
- 4.103 We recognise the importance of the reciprocal arrangements on family matters (such as maintenance under Brussels I, or divorce, separation, annulment and matters relating to parental responsibility including, in European Union terms, rights of custody and access, under Brussels IIa) and also on civil matters (under Brussels I) set out in these agreements. We consider it important to continue to provide legal aid reciprocally under these agreements, and we therefore propose to retain funding for these cases.
- 4.104 On the same basis, we also propose to make legal aid available for the 1996 Hague Convention on Parental Responsibility and Measures for the Protection of Children,⁶² which covers a wide range of civil measures of protection concerning children and which is due to come into force in the United Kingdom in 2011.

⁶¹ Under the Council Regulation (EC) No 44/2001 (Brussels I) and the Council Regulation (EC) No 2201/2003 (Brussels IIa).

⁶² Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

Representation of children in rule 9.5 (and 9.2A) private law children cases

- 4.105 Children are not normally parties to private law proceedings but the judge can, in certain circumstances (under Rule 9.5 of the Family Proceedings Rules 1991), make a child a party to the proceedings if it is in their best interests. In such cases the judge will usually appoint a guardian ad litem ('a guardian') for the child, unless the child is of sufficient understanding and can participate as a party in the proceedings without a guardian. Making the child a party to the proceedings is a step that is only taken in cases which involve an issue of significant difficulty and consequently should occur in only a minority of cases. Usually a guardian will be appointed by CAFCASS or CAFCASS Cymru,⁶³ and they will instruct a solicitor on the child's behalf. Legal aid is available for advice and representation for the separately represented child. Under Rule 9.2A of the Family Proceedings Rules 1991, a child may also need to be represented where they are instructing directly.
- 4.106 In these cases, since the litigant for whom legal aid is provided is a child, they will not be able to participate without assistance. We do not think that the child is in a position to resolve these issues in the same way as an adult might be expected to do so. We therefore consider that legal aid is justified for these cases, and we propose retaining Legal Help and Representation for children who are separately represented under rule 9.2A or 9.5.

Miscellaneous

- 4.107 Legal aid is currently provided for advice and representation in a very wide range of other areas of civil law not included in the specific categories listed above.
- 4.108 We have examined the areas of law where civil legal aid is currently provided and considered whether the provision of public funds continues to be justified. Of the areas of law classified by the LSC in the 'Miscellaneous' category for funding purposes, we propose to retain the following areas in scope, as set out in paragraphs 4.109 to 4.131 below.

Confiscation proceedings

- 4.109 Currently, legal aid is available for a range of proceedings in the Crown Court and magistrates' courts relating to offences under the Proceeds of Crime Act 2002. These are in the main proceedings connected with the confiscation of criminal assets. Civil legal aid is available principally where the confiscation proceedings (such as an application for a restraint order to prevent a person dealing with property) are taking place independently from a criminal prosecution, or where the recipient is a third party who may have a claim over the restrained assets.

⁶³ Children and Family Court Advisory and Support Service (www.cafcass.gov.uk).

- 4.110 We do not consider that the class of individuals in these cases is likely to be particularly vulnerable. Nor do we consider that these cases are of high importance given that they principally concern financial matters, although we recognise that there may be other implications for the litigant which are more important, such as potential homelessness if the home is seized.
- 4.111 However, we recognise that these cases are unusual in that the litigant's assets will have been restrained by the state, preventing them from paying privately for Legal Representation. We also consider that litigants may have difficulty representing themselves in these proceedings if they are very complex, and these cases cannot be resolved without recourse to the courts, given the involvement of the state. On balance, therefore, we consider that funding for these cases is justified and we propose retaining legal aid for the full range of confiscation cases currently within the scope of civil legal aid.
- 4.112 Civil legal aid funding is also available for cash forfeiture proceedings in the magistrates' courts and the Crown Court. We consider that funding should not be retained for cash forfeiture and this is dealt with below (see paragraphs 4.229 to 4.230).

Injunctions concerning gang-related violence

- 4.113 On its commencement, section 34 of the Policing and Crime Act 2009 will allow the Court to impose an injunction on an individual if it is satisfied that the individual has engaged in, or has encouraged or assisted, gang-related violence, and that an injunction is necessary to prevent gang-related violence, or to protect an individual from gang-related violence. Because these proceedings take place in the county court, they currently fall within the scope of civil legal aid.
- 4.114 We consider that these civil proceedings are important, given the potential restrictions placed upon a person's liberty as a result of such an injunction. Breach of an injunction can lead to contempt of court proceedings which, for 14 to 17 year olds, can result in a supervision order or a detention order being made under the Crime and Security Act 2010, and for those aged 18 years or over can result in up to two years in prison and/or an unlimited fine.
- 4.115 Since gang injunctions may be imposed on individuals aged 14 and above, it is likely that a significant proportion of respondents will be either children or young adults. We do not consider that this class of individuals would generally be able to present their case effectively. Because these cases involve the state, it is not appropriate for parties to resolve these matters themselves, and we are unaware of alternative forms of advice or assistance that might help to justify the withdrawal of legal aid. For these reasons, we consider that civil legal aid is justified for these proceedings concerning gang-related violence.

Independent Safeguarding Authority Appeals (Care Standards)

- 4.116 Civil legal aid is currently available for an appeal to the First-tier (Care Standards) Tribunal⁶⁴ in relation to inclusion on a list of individuals who are considered unsuitable to work with children and vulnerable adults or in relation to prohibiting an individual from teaching and related activities.
- 4.117 We consider that the issues at stake in these cases are important. Inclusion on this list will have a significant and lasting impact on the life and the livelihood of an appellant who may have been included on the list in error. We consider that this class of individuals is not likely to be particularly vulnerable, or have difficulties presenting their case given that these cases are heard before a tribunal. However, we do not consider that there are any significant alternative sources of advice or representation to justify the withdrawal of legal aid, nor that individuals can resolve the matter themselves, given the involvement of the state.
- 4.118 On balance, we consider that legal aid is justified in these cases, even though they are before a tribunal, given the importance of the issue and potential consequences. We propose therefore to retain legal aid for these cases for both the First-tier Tribunal and the Upper Tribunal.

Legal Help at inquests

- 4.119 Inquests are inquisitorial processes rather than adversarial court proceedings. Participants do not have to present legal arguments, and can ask coroners to question witnesses on their behalf. Legal Help is currently available at inquests, and can be used to assist bereaved families in making written submissions to the coroner (for example, a list of questions they wish him or her to ask other witnesses).
- 4.120 Finding the answer to the questions concerning the death of a family member, or someone close, can be an important element in enabling those who have been bereaved to move on with their lives.
- 4.121 Inquests themselves are not directly comparable to other court or tribunal proceedings. Nor are the issues they consider comparable with those dealt with in civil litigation. There is generally no need for representation in inquests because of the inquisitorial nature of the proceedings and the fact that participants are not required to present legal argument. However, we do consider that Legal Help can be an important means of allowing families to engage with the process successfully, especially when they need support in preparing for these unique proceedings and have particular questions or issues which they wish the coroner to explore with other witnesses. We do not consider that there are viable alternative funding mechanisms, covering preparatory work for inquests, which bereaved families are able to access, which would help justify the withdrawal of legal aid.

⁶⁴ Under sections 4 and 4A of the Protection of Children Act 1999, sections 86 and 87 of the Care Standards Act 2000, and section 144 of the Education Act 2002. From October 2009, these appeal rights were combined under the Safeguarding Vulnerable Groups Act 2006.

4.122 We consider that, on balance, Legal Help is justified for inquest cases because of the importance of the issue. However, in weighing up the need for advocacy, we do not consider that funding for Legal Representation is generally justified, even though the issues are of high importance, because of the non-adversarial and accessible nature of the proceedings (see paragraphs 4.152 and 4.153). In paragraphs 4.246 to 4.262, we set out the proposed arrangements for funding individual cases which, if these proposals were implemented, would be excluded from the revised civil legal aid scheme where the particular circumstances require it. As now, we propose that separate criteria will generally need to be met for representation in individual cases before the coroners' courts to be funded. We therefore propose that Legal Help only for inquests remain in scope.

Protection from Harassment Act 1997

4.123 The Courts have the power, under sections 5 and 5A of the Protection from Harassment Act 1997,⁶⁵ to make a restraining order, either on conviction for a violent offence or on acquittal, where they consider that the victim needs additional protection. The subject of the restraining order can apply to vary or discharge the order, and criminal legal aid is available to help them to do this. Civil legal aid is available to the victims if they wish to oppose the varying or discharge of the restraining order where they feel that they may be at risk of danger or harassment from, for example, an ex-partner.

4.124 We consider that legal aid funding for such victims is justified on the basis that the issues at stake are important, as the litigant's physical safety is potentially at risk. We therefore propose that funding for victims in these cases be retained.

4.125 Legal aid is also available for bringing or defending injunctions against anti-social behaviour under section 3A of the Protection from Harassment Act 1997. We consider that these civil proceedings are important because of the nature of the rights at stake, given the potential restrictions placed upon a person's liberty as a result of an injunction. Although we do not consider that the litigants defending these injunctions are likely to be particularly vulnerable or unable to present their own case, we are not aware that there are adequate sources of alternative advice or assistance to justify the withdrawal of legal aid, or alternative sources of funding for such cases. On balance, we consider that civil legal aid is justified in these injunction proceedings, given the importance of the rights at stake, and we therefore propose that it be retained.

Quasi-criminal proceedings

4.126 Civil legal aid is currently available for any civil case where the penalty is considered to be criminal in ECHR terms. Where a civil case has a penalty which is criminal in ECHR terms, we consider that similar considerations apply as apply in criminal cases.

4.127 Case law establishes that there are three criteria which determine whether a case should be treated as criminal for ECHR purposes: (i) how proceedings are

⁶⁵ As amended by the Domestic Violence, Crime and Victims Act 2004.

categorised in domestic legislation; (ii) the nature of the relevant offence or conduct; and (iii) the nature and severity of the applicable penalties.

4.128 In deciding whether civil legal aid is available for such cases, the LSC must consider whether:

- the proceedings concern penalties which the Courts have declared to be criminal in ECHR terms (or the appellant reasonably seeks to argue that they are); and
- it is in the interests of justice (see Chapter 3) for the client to be legally represented (the usual test for the granting of criminal legal aid).

4.129 The penalty may be deemed quasi-criminal in a range of issues. For example, some of the Variable Monetary Penalties imposed by civil regulatory regimes established under the Regulatory Sanctions and Enforcement Act 2008 may be deemed to be quasi-criminal.⁶⁶

4.130 While we do not consider that the class of individuals involved in the proceedings will be necessarily unable to present their own case, we consider that these cases are important, because of the nature and severity of the penalties which may result. We are not aware of any alternative sources of advice or assistance, which would help justify the withdrawal of legal aid.

4.131 On balance, we therefore propose to retain legal aid for these cases. Because it is not possible to identify exhaustively all of the proceedings and offences which are deemed to be 'quasi-criminal', we propose to include within the scope of civil legal aid a general provision for all 'quasi-criminal' cases which meet the above tests for all venues.

Cross-cutting issues

4.132 A number of legal issues will regularly arise in more than one of the categories of law considered in this chapter. We have considered these issues in their own right, rather than in the context of the various categories in which they might be funded, and our proposals for reform are set out at paragraphs 4.133 to 4.144 below.

Discrimination proceedings

4.133 Currently, civil legal aid is available, either for Legal Help or for both Legal Help and Representation, for a range of claims arising from allegations of unlawful

⁶⁶ Another example of the type of 'quasi-criminal' case is an appeal to the First-tier (Tax) Tribunal which meets the above tests, and onward appeal to the Upper Tribunal, where the Tribunal is exercising functions transferred to it from: (i) the Commissioners for the general purposes of the income tax established under section 2 of the Taxes Management Act 1970; (ii) the Commissioners for the special purposes of the Income Tax Acts established under section 4 of the Taxes Management Act 1970; or (iii) the VAT and duties tribunals established under Schedule 12 to the Value Added Tax Act 1994. The judgment in *Han & Yau* (2001) has confirmed that penalties under the VAT Act 1994 and the Finance Act 1994 are criminal in terms of Article 6 of the ECHR, which is why these tax tribunal proceedings are in scope.

discrimination. These claims can arise in a variety of contexts, for example, discrimination in educational provision or consumer claims. The claims that are currently funded in this area are generally low value damages claims, and although we do not generally consider that legal aid is likely to be justified in cases which are primarily about money, we recognise that the nature of the issues at stake – addressing societal prejudice and ensuring equality of opportunity – adds weight to the case that funding be retained.

- 4.134 Although many litigants will be able to present their own case, some – particularly those with profound disabilities – may find it difficult to do so. There are also alternative sources of advice. The Equality and Human Rights Commission offers legal assistance to a limited number of cases, and offers advice through its helpline and online resources. Other sources of advice may be available in some areas of law, for example, advice from trades unions on employment matters.
- 4.135 However, on balance, we consider that funding for these claims is justified, given the importance of the issues. The Government therefore proposes that legal aid be retained for all unlawful discrimination claims currently within scope, regardless of the category in which they arise.
- 4.136 We are not, however, proposing to extend routine legal aid funding to discrimination cases which are currently out of scope. For example, this means that legal aid for representation in discrimination proceedings before the Employment Tribunal or the Special Educational Needs and Disability Tribunal would continue to be unavailable under the new regime (although Legal Help for these claims would remain within scope).
- 4.137 In the present financial circumstances, it is necessary to allocate funding in a fair and balanced way. In spite of the importance of the discrimination proceedings that may be brought in a tribunal, we consider that there are sufficient alternative sources of advice and assistance to justify the withdrawal of legal aid, and that the procedures before the tribunal are generally more accessible and user-friendly than other proceedings within the discrimination category. Although we consider that Legal Help is justified for discrimination cases, given the importance of the issues, in our view it is not necessary to fund Legal Representation at the tribunal as well, since it provides an easily accessible route to justice. We therefore propose that it be excluded from scope.

Environmental matters

- 4.138 The legal aid scheme currently funds a variety of actions that concern environmental issues. These are principally judicial reviews, but can include, for example, injunctions against private companies or individuals.
- 4.139 We consider that these claims are of high importance. They can concern serious health risks which could affect the lives of one or perhaps many people. We also recognise that legal aid in environmental claims is important because it

helps the United Kingdom to meet its obligations under the Aarhus Convention⁶⁷ to provide access to justice in environmental matters which is not prohibitively expensive. In our view, the class of individuals bringing these claims is neither likely in general to be particularly vulnerable, nor to have particular difficulty presenting the case themselves. Set against this, we are not aware of substantial sources of alternative advice and assistance in relation to these issues that make funding less likely to be justified. Some cases may be suitable for alternative sources of funding such as CFAs, but we do not consider that this will generally be the case. We recognise that Sir Rupert Jackson in his *Review of Civil Litigation Costs: Final Report*⁶⁸ proposes qualified one-way costs shifting for judicial review cases, including environmental claims, and we are seeking views on those reforms separately.

4.140 On balance, we consider that legal aid is justified for environmental cases, given their importance, and we propose that legal aid be retained for them. However, we do expect litigants to fund these cases if they can, or to contribute to the legal aid costs if they cannot fund them in full.

European Union cross-border cases

4.141 Currently legal aid is available by agreement⁶⁹ to those who are domiciled or habitually resident in one European Union Member State to bring cross-border litigation in another. We consider that this is an important reciprocal agreement which provides access to other European Union legal aid schemes for cross-border disputes. The importance of the issues in these cases will vary, depending upon the issues at stake. Although we do not consider that the class of individuals bringing these cases is likely to be particularly vulnerable, we are not aware of any alternative forms of advice or assistance being available, which would make the provision of legal aid less likely to be justified. Nor do we consider that there are any alternative sources of funding for the majority of these cases, given the range of subject matters that may be covered. On balance, we propose to retain legal aid for these type of cases, given the importance of our reciprocal legal obligations and the potential inability of the litigants to bring proceedings without legal assistance.

The forum in which cases are heard

4.142 Under the current legal aid scheme, all appeals (other than for those issues already excluded from legal aid) to the Court of Appeal and Supreme Court fall within scope. Seeking a reference from the European Court of Justice is also in scope for legal aid funding, if the referral is made by a court or tribunal within scope (unless the area of law is excluded).

⁶⁷ The United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

⁶⁸ See footnote 8 above.

⁶⁹ Council Directive 2002/8/EC of 27 January 2003 which improves access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

4.143 We have considered whether funding remains justified for all of the appeals where it is currently provided. In doing so, we have considered whether the fact that these cases are before a higher court automatically outweighs other considerations. In our view, it does not. We consider that the importance of the issue will vary with the type of case, as will the vulnerability of the appellant. We recognise that some appellants may have difficulty presenting their case before the upper courts if it is a complex case, but not all cases before these courts will necessarily be complex. Where such difficulties occur, appellants will be able to seek assistance under the funding scheme for excluded cases (see paragraphs 4.246 to 4.262 for more details).

4.144 We therefore consider that funding for appeals to the Court of Appeal and Supreme Court and references to the European Court of Justice should only remain in scope where the appeals or references arise in an area of law which we propose to retain in scope on the basis that it is justified.

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

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

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

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

- the objective importance of the issue, taking into account the matters at stake;
- the litigant's ability to present their own case;
- the availability of alternative sources of funding; and
- the availability of other routes to resolution, and the advice and assistance available to individuals to help them achieve a resolution, including the extent to which the individual could be expected to work at resolving the issue themselves.

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

Areas of law currently excluded

- 4.148 We have considered carefully whether to continue to exclude areas of law currently already excluded from scope. We consider that personal injury cases will vary in importance, depending upon the nature of the claim. We do not consider that the class of individuals bringing these claims is likely to be particularly vulnerable, although clients who have suffered a disabling injury may be more vulnerable. We consider that there are widely available alternative sources of funding in the form of CFAs. Reforms to the current regime have been proposed by Sir Rupert Jackson in his *Review of Civil Litigation Costs*⁷⁰ on which the Government is currently consulting. We propose that personal injury cases should continue to be excluded from the scope of civil legal aid because of the availability of alternative sources of funding.
- 4.149 We also propose that cases relating to damage to property, conveyancing, boundary disputes, defamation or malicious falsehood, the making of wills, trust law, and business cases should continue to be excluded from the civil legal aid scheme as the issues are of low importance, when compared with other cases concerning, for example, fundamental rights such as life or liberty.
- 4.150 We consider that the issues raised in inquests are of high importance. For this reason, we have proposed that Legal Help remain in scope for inquests to provide assistance to bereaved families in making written submissions to the coroner (see paragraph 4.122).
- 4.151 However, inquests are not court proceedings, participants are not required to put forward legal arguments, and coroners are well used to assisting bereaved persons in asking witnesses about any questions they have. We do not consider that, in general, those participating in an inquest are likely to be particularly vulnerable (compared, for example, with a detained mental health patient, or elderly care home resident), and we consider that the vast majority of individuals will be able to participate in inquests without Legal Representation.
- 4.152 Given the non-adversarial nature of the proceedings, on balance we therefore do not consider that funding for advocacy before the coroners' court is justified, notwithstanding the importance of the issues at stake. Section 51 of the Coroners and Justice Act 2009 (the 2009 Act) would have amended the Access to Justice Act 1999 to bring advocacy at certain inquests into the scope of the civil legal aid scheme (for example, deaths in custody and deaths in active military service). Section 51 of the 2009 Act has not been commenced and, in light of the proposals in this consultation paper, we propose that it be repealed. We do, however, consider that, as now, legal aid should remain available for representation for individual inquests where there are exceptional circumstances, and we propose that the current criteria for funding these inquests be retained (see paragraph 4.255).
- 4.153 We consider that legal aid for advocacy before most tribunals is not justified given the ease of accessing a tribunal, and the user-friendly nature of the

⁷⁰ See footnote 8 above.

procedure. We consider that the importance of the issue will vary from tribunal to tribunal, but on balance we do not consider this to be an outweighing factor, and therefore propose that funding for Legal Representation before most tribunals should continue to be generally excluded from the scheme, whatever the issue.

Ancillary relief cases (where domestic violence is not present)

- 4.154 Legal aid is currently available for legal advice and representation in disputes concerning the division of financial assets on the dissolution of a relationship. This includes financial provision on divorce, claims by cohabitants for interests in property, and claims under the Inheritance (Provision for Family and Dependents) Act 1975. These can include disputes about the marital home or other assets, and involve, for example, applications for property adjustment, periodical payments, lump sums, or pension sharing orders.
- 4.155 It is our view that these cases range in importance. Many cases will be about dividing the marital assets equitably and are therefore about obtaining or preserving money or property. Some cases will have an importance beyond this, where, for example, they concern the right to remain in the marital home with dependent children. Other cases will not involve property at all, but may concern, for example, possession of a tenancy. We do not consider that these cases will generally be of sufficiently high priority routinely to receive legal aid support, when compared with those cases which concern issues such as liberty or physical safety. As a result of relationship breakdown people often need to reorganise their financial affairs, and frequently this will also mean that they need to re-house themselves. While the home, or a share in the home, is frequently at issue in these cases, we do not consider that in general litigants face the same issues as clients who are at immediate risk of being made homeless. These cases are about the division of the assets rather than possession, and the court has a much wider discretion in these cases than in possession proceedings to make whatever orders seem appropriate.
- 4.156 In addition, there is advice available online to help couples to navigate the divorce process. The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified.
- 4.157 The evidence also suggests that these cases can often be resolved by the parties reaching an agreement between themselves. In 2008, 73% of ancillary relief orders were not contested,⁷¹ indicating that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown. We propose to fund mediation in these cases, to support individuals to reach an agreement without recourse to the courts (as set out in paragraphs 4.69 to 4.72 above).
- 4.158 Although we recognise that the issues which arise in these cases will sometimes be of high importance, it is necessary, in order to reduce spending

⁷¹ Table 2.6, Judicial and Court Statistics 2008 (www.justice.gov.uk/about/docs/judicial-court-statistics-2008-05-chapt5.pdf).

on legal aid, to target scarce resources in a fair and balanced way at those cases for which legal aid is most justified. Having taken into account all the factors set out above, we therefore propose that all legal aid other than family mediation services should be excluded from the scope of the scheme for all ancillary relief cases other than those where domestic violence is present.

- 4.159 We do, however, recognise that in spite of efforts to engage in negotiation prior to and during ancillary relief proceedings, some cases will still reach court. In family matters, except in very limited circumstances, the parties are generally expected to meet their own legal costs. In some cases, there may be an imbalance in the financial position of the parties during the proceedings which may disadvantage one party, particularly in the absence of publicly funded legal assistance.
- 4.160 At present, lump sum orders in ancillary relief proceedings can only be made after Decree Nisi. The current court rules state that “the general rule in ancillary relief proceedings is that the Court will not make an order requiring one party to pay the costs of the other”,⁷² except in some circumstances relating to the conduct of a party in the proceedings. There is provision in legislation to allow the Court to make an interim order for the payment of a lump sum⁷³ but this remains unimplemented.
- 4.161 We propose to make changes to the courts’ powers to enable the Court to redress the balance in cases where one party may be materially disadvantaged, by giving the judge the power to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party. In doing so, the Court would also incentivise the contributing party to negotiate a settlement. The materially disadvantaged party could apply for an order at any stage of the proceedings, where they could demonstrate that they could not reasonably procure legal advice by any other means (as is currently permissible under maintenance pending suit provisions⁷⁴). Any order made would include the payee’s undertaking to pay the sum to their legal representative to cover the costs of the proceedings. This would be credited against any ultimate liability that the payer might have to pay or part-pay towards the costs. Although these proposed changes to the courts’ powers are not a precondition for the proposed changes in scope, we would anticipate that this power to award interim lump sum orders would be brought into effect either in advance of or at the same time as any changes to the scope of legal aid.

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

⁷² Family Proceedings (Amendments) Rules 1991, r 2.71 (4)(a).

⁷³ Family Law Act 1996, Schedule 2 – Financial Provision.

⁷⁴ Matrimonial Causes Act 1973 s.22. See also Court of Appeal *Currey v Currey (No2)* [2007] 1 FLR 946 for current law on legal costs element of maintenance pending suit.

4.162 A proportion of the public money spent each year on ancillary relief cases is recovered. In many ancillary relief cases, litigants will preserve or recover some money or property. In these cases, the statutory charge arises and the litigant will be required to repay their legal aid costs. This repayment must take place immediately if possible, but the LSC has the discretion to postpone the repayment as a 'statutory charge' placed on the funded litigant's property if they are unable to repay it immediately. Where repayment is postponed in this way, it attracts interest of 8% (simple). However, in 2008–09, the net cost, after repayments, to the Government of providing legal aid in ancillary relief cases was £19 million. We do not therefore consider that the recoupment of costs is at a level sufficient to enable the continued inclusion of ancillary relief within the scope of the revised scheme.

Clinical negligence

4.163 Legal aid currently funds Legal Help and Representation for litigants who have suffered negligent medical or dental treatment to seek damages against any type of public or private medical practitioners, including doctors, nurses and dentists.

4.164 While these claims are for monetary compensation, we consider that they may well be about very serious issues. This is particularly likely to be the case where litigants have suffered very severe injuries, and are seeking damages to meet their needs for the future. Some of the litigants making these claims will be vulnerable where they are suffering from serious disabilities as a result of their medical conditions.

4.165 Alternative sources of funding are available for many of these cases, most obviously in the form of CFAs, which are the most common type of 'no win no fee' arrangement in England and Wales. Since the development of the CFA market, legal aid has contributed to containing National Health Service legal costs, since legally aided cases do not attract the success fee (the uplift on top of base costs which lawyers charge if they win the case). Reforms to the current CFA regime have been proposed by Sir Rupert Jackson in his *Review of Civil Litigation Costs*.⁷⁵ The Government is currently consulting on these proposals on funding arrangements, as we believe that these have the potential to help make the cost of civil litigation more proportionate and could help generate significant savings to defendants in these cases.

4.166 Therefore, although in our view the issues likely to arise in clinical negligence cases will sometimes be very important, we consider that legal aid funding is not justified for these cases because there is a viable alternative source of funding, enabling the targeting of limited resources to other priority areas. We therefore propose to exclude from civil legal aid all clinical negligence cases, because we consider that CFAs are likely to be more readily available in these cases than in other claims (for example, those brought against public authorities: see paragraphs 4.43 to 4.55).

⁷⁵ See footnote 8 above.

- 4.167 The Government recognises that there are likely to be cases, such as obstetrics cases, with high disbursement costs, which are currently funded by legal aid but for which clients may find it hard to secure funding under a CFA. However, we do not consider that this represents a sufficiently high proportion of cases to justify retaining clinical negligence within scope. The funding scheme that we propose to design for excluded cases will ensure that individual cases of this type continue to receive legal aid where necessary for the United Kingdom to meet its legal obligations (see paragraph 4.246 to 4.262 below for more details).
- 4.168 Further details on Sir Rupert Jackson's proposals are at Chapter 9. This also sets out a related proposal to introduce a supplementary legal aid scheme, in which a percentage of funds is recovered from cases where successful claims for damages have been made and the claimant was in receipt of legal aid, and uses those funds to supplement the legal aid costs of other cases. Any such scheme would be brought in at the same time as reforms to CFAs to ensure that clients are not disadvantaged by pursuing one funding option rather than the other. These arrangements could apply to clinical negligence cases if these remain, following consultation, within the scope of legal aid, or these arrangements could apply to those cases which are funded as part of the excluded cases funding arrangements.
- 4.169 It is worth noting that Sir Rupert Jackson made various recommendations about the handling of clinical negligence cases which are being taken forward separately. For example, the Government is currently considering how best to reform the approach in particular for low value claims. We are concerned that the time taken to settle such claims is too long and that the costs are disproportionate to the damages awarded. The Department of Health is looking at how parties can work more effectively prior to pursuit of an actual claim in order to facilitate faster resolution of claims and to reduce associated costs.

Consumer and general contract

- 4.170 Legal aid is currently available for Legal Help and Representation for litigants to bring civil law actions regarding contracts and their enforcement, where, for example, there has been a breach of contract, a dispute over possession, or consumer credit issues. This area of law also covers Legal Help and Representation in professional negligence proceedings, except where the alleged negligence relates to services provided in relation to the client's business.
- 4.171 These claims are essentially financial in nature, and we consider that the issues involved are relatively less important than, for example, claims which involve more fundamental issues such as safety and liberty. There are other sources of advice and assistance available to these litigants. For instance, individuals may be able to obtain general consumer advice and advice relating to consumer credit issues from public sector or voluntary sector organisations, such as Trading Standards. Additionally, there may be alternative, non-court-based routes to resolution, such as the Financial Ombudsman's Service (for financial disputes) or OTELO for complaints relating to telecommunications. CFAs will also often be available for cases involving damages. The presence of these alternatives is not determinative, but makes the provision of legal aid in these

cases less likely to be justified. In our view, the individuals bringing these claims are not likely, in general, to be particularly vulnerable, compared with detained mental health patients, or elderly care home residents, for example, or to be unable to present their own case.

- 4.172 On balance, we have concluded that legal aid funding for these cases is not justified because these issues are not of sufficient priority to qualify for legal aid support, and we propose that these cases are excluded from scope of the civil legal aid scheme.

Legal Help for the Criminal Injuries Compensation Authority

- 4.173 Legal advice is currently available to assist victims making applications for compensation from the Criminal Injuries Compensation Authority (CICA). We recognise that, for those involved, obtaining compensation for the injuries they have suffered as a result of being a blameless victim of crime is of personal importance. However, set against providing legal assistance for cases where the immediate consequences of the case at hand affect the personal safety or liberty of the person concerned, we do not consider that the issue at stake is as important, since it is primarily a financial one.
- 4.174 We recognise that some of the people making these applications may be vulnerable if the injury they suffered was serious or traumatising, but the process for making an application to CICA is a relatively straightforward one, for which legal expertise should not be required. Applications can be made either online or by telephone and should take no more than thirty minutes to complete, and CICA staff are able to assist applicants with the process. In addition, some voluntary sector organisations, such as Rape Crisis and Women's Aid, also offer help to some victims of crime with the application process.
- 4.175 On balance, we do not consider that legal advice is justified for this issue, given the primarily financial nature of the case at hand, the straightforward and succinct nature of the application process and the availability of other forms of assistance.

Debt matters where the client's home is not at immediate risk

- 4.176 Debt problems can be extremely difficult and stressful for the individuals concerned. However, what is often required for those in debt is advice on managing their finances and on the practical measures to resolve the situation, rather than legal advice.
- 4.177 We consider that, in general, financial issues, important though they are for the individual, have a lower objective importance in terms of legal aid funding when considered against cases involving fundamental issues such as safety and liberty, and this therefore makes the provision of publicly funded legal services less likely to be justified.
- 4.178 We have also considered the characteristics of the individuals involved in these cases and the assistance available to them. While we recognise that the class of individuals involved in these cases is more likely to report being ill or disabled

in comparison with the civil legal aid client base as a whole, there are many alternative sources of help with debt issues available to them, including Credit Action, the National Debtline, the Money Advice Trust and local authorities which also signpost people to local sources of advice and assistance on debt matters. The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified.

- 4.179 Having taken all these considerations into account, we consider that legal aid for the vast majority of debt issues is not justified because they are not of relatively high enough importance, and we note that there are other ways for individuals to obtain help and advice. We therefore propose to exclude all legal aid for debt issues, including cases relating to insolvency loans, credit card debts, overdrafts, utility bills, court fines, or hire purchase debts. We will however retain legal aid for debt cases where, as a result of rent or mortgage arrears, the client's home is at immediate risk of repossession (as set out in paragraph 4.61 to 4.63), which link directly to the issues that we propose to retain in scope within the housing category of law.

Education

- 4.180 The legal aid scheme currently funds Legal Help (initial advice and assistance) on a range of educational matters, such as school admissions and exclusions, out of school provision, bullying, school and nursery reorganisation proposals, and student disputes with universities and further education institutions. It also includes advice on appealing to the First-tier (Special Educational Needs and Disability – SEND) Tribunal and the Special Educational Needs Tribunals for Wales. Legal aid also funds advocacy on appeals from the First-tier (SEND) Tribunal, to the Upper Tribunal, and higher courts. Legal aid is also available for advice and advocacy to bring civil law actions for issues such as damages for negligence, and actions for breach of contract in provision of education services.
- 4.181 We recognise that many of the education issues for which legal assistance is currently provided are of importance to the parents and children involved, since they may affect a child's educational attainment and future life choices. Cases typically involve deciding the detail of a Special Educational Needs (SEN) statement, which determines the level of additional support that a child receives at school, contesting exclusion from school, or failure to gain admission to a preferred school.
- 4.182 However, while we have taken into consideration the importance of the issues to the litigants involved, in our view, they cannot be accorded the same level of importance as the immediate threat to life or safety, liberty or the roof over their heads faced by litigants in other types of cases. In addition, some of the cases may arise from personal choices, such as the conduct of children at school, and to the extent that this is true the provision of legal aid is less likely to be justified. In addition, educational damages claims concerning, for example, negligence, and actions for breach of contract in provision of education services, are primarily about monetary compensation and, as such, are of a lower objective importance for funding than cases concerning fundamental issues such as safety and homelessness.

- 4.183 We have also considered the class of individuals who are likely to bring cases in this area of law, the nature of the proceedings themselves, and the alternative sources of assistance and funding available to them. We do not consider that the class of individuals bringing these cases (usually the parents on the child's behalf) is in general likely to be particularly vulnerable, or that those parents involved will necessarily be unable to present their own case, whether before the Tribunal or courts.
- 4.184 A large proportion of the Legal Help given on education issues is legal advice for the parents of children with Special Educational Needs (SEN), including advice for those appealing to the First-tier (SEND) Tribunal. We consider that legal advice for those applying to the First-tier (SEND) Tribunal is less likely to be justified because the Tribunal is designed to be accessible to individuals without legal assistance, and they can generally present their case without specialist legal knowledge or representation. Individuals should only need to present the facts to the Tribunal; it is for the judge to interpret them in the light of the law. The Tribunal provides written guidance to appellants, and a free DVD (*The Right to be Heard*) which explains what to expect when attending the Tribunal. Although the cases concern the child's needs, it will be the parents who are seeking to appeal, rather than the child itself. However, we do recognise that disabled children are more likely to live with one or more parents with a disability (as defined under the Disability Discrimination Acts 1995 and 2005) than non-disabled children.⁷⁶
- 4.185 We also note that there are alternative sources of basic help for education issues. For exclusion, these include parent partnerships (which are statutorily established in each Local Authority Area). The Advisory Centre for Education provides advice on a range of education issues, including admissions, exclusions, special educational needs, attendance and bullying. The charity IPSEA – Independent Parental Special Educational Advice – has trained volunteers who provide free advice to families whose children have SEN. The presence of these alternatives is not determinative, and we recognise that all sectors are reviewing how best to use resources, but the presence of such alternatives makes the provision of legal aid in these cases less likely to be justified. Where clients do have a strong case for damages, we envisage that they will be able to obtain alternative funding, for example, a CFA.
- 4.186 Because of the need to design an affordable legal aid scheme which prioritises spending on issues of the highest importance, we have taken the view that education issues are relatively less important than cases concerning more fundamental issues such as an individual's immediate physical safety or liberty and that funding can no longer be justified. In addition, for those cases before the Tribunal, individuals (or, in the case of children, their parents) should be able to present their case themselves without legal assistance, and we note the availability of other forms of advice and help, and the likelihood of alternative sources of funding for meritorious damages claims.

⁷⁶ *Prevalence of childhood disability and the characteristics and circumstances of disabled children in the UK: secondary analysis of the Family Resources Survey*, Blackburn Clare M et al (2010) (<http://www.biomedcentral.com/1471-2431/10/21>).

4.187 We therefore propose to exclude all education cases from the scope of legal aid. As with other areas of law, we recognise the importance of being able to challenge public authorities' decisions on such matters via judicial review, and this will remain in scope.

Employment

4.188 Employment claims are generally dealt with via the Employment Tribunal. Civil legal aid is currently available for advice (through Legal Help) in relation to a range of employment matters, such as unfair and wrongful dismissal, redundancy, employment contracts, strike action, data protection and employee confidentiality, terms and conditions, and wages issues. Legal aid is available for advice in respect of an Employment Tribunal claim (though not for advocacy before the Tribunal), and for both advice and representation for appeals to the Employment Appeal Tribunal. Advice and representation is also available for the small number of employment cases, for example, breach of contract, which are heard before the Court rather than the Tribunal. The vast majority of legal aid for employment cases is for Legal Help, rather than Legal Representation.

4.189 We recognise that recipients value advice on employment matters, but because these cases are generally concerned with monetary damages or earning potential, given the need to reduce legal aid expenditure, we do not consider that they are sufficiently important to merit support from legal aid. In our view, the issues at stake in cases which are primarily financial are not of the same order of importance in comparison with, for example, those concerning safety or liberty.

4.190 We do not consider that those bringing these claims are generally likely to be particularly vulnerable, or that they will be unable to present the case themselves. In respect of advice concerning proceedings before the Employment Tribunal, we also consider that appellants are able to present their case themselves because of the easily accessible and user-friendly procedure of the tribunal.

4.191 We note that damages-based agreements are available in employment cases and that there are other sources of help available in this area of law. For example, some Trade Union members are usually entitled to legal assistance, the employer may be willing to engage in civil mediation (which is sometimes paid for by the employer), or, if the dispute concerns unfair dismissal or flexible working disputes, and there are no complex legal issues, the Advisory, Conciliation and Arbitration Service (ACAS) provides a free arbitration service. The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified.

4.192 Taking all these considerations into account, we believe that legal aid is not justified in this area of law. In our view, the issues at stake are relatively less important than the areas for which we propose to prioritise spending. In tribunal cases, appellants are able to present their cases themselves given the user-friendliness of the proceedings, and we note the availability of other sources of advice and funding and other routes to resolution. For these reasons, we propose to exclude all employment cases from the scope of civil legal aid.

Other housing matters

4.193 As set out at paragraphs 4.74 to 4.76, we consider that cases concerning homelessness, or where litigants are seeking remedy for serious disrepairs which threaten health, are sufficiently important to justify legal aid funding, given the seriousness of the immediate consequences.

4.194 However, the legal aid scheme currently funds a variety of other issues concerning property or the home, such as re-housing, or less serious housing disrepair cases, or those where the litigant is primarily seeking damages. These proceedings do not directly concern homelessness or eviction, and nor do they concern the safety of clients. These cases include a variety of issues, such as:

- an action to enforce a Right to Buy;
- an action to enforce a Right to Buy a freehold or extend the lease;
- actions to set aside a legal charge (for example, a mortgage) or the transfer of a property;
- actions for damages and/or an injunction for unauthorised change of use of premises;
- an action under the Housing Grants, Construction and Regeneration Act 1996;
- applications for a new tenancy under the Landlord and Tenant Act 1954;
- an action for re-housing;
- an action under the Access to Neighbouring Land Act 1992;
- an action for wrongful breach of quiet enjoyment;
- housing disrepair proceedings where the primary remedy sought is damages, including damages for personal injury;
- an action for trespass; or
- an action under the Mobile Homes Act 1983 which does not concern eviction.

4.195 We have considered the fact that the class of individuals bringing these proceedings is more likely to report being ill or disabled compared with the civil legal aid client base as a whole. However, many of these cases are simply about money or property, improvements to property, or access to property, and we consider that these issues are not of high importance when compared, for example, with fundamental issues such as homelessness.

4.196 We also note that there is a variety of alternative sources of advice which clients can draw on in this area, including local authority in-house services, and voluntary sector organisations, such as Shelter. The Local Government Ombudsman can also offer assistance. The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified. Where damages are available, as in actions for damages in relation to an injury (due to a failure to carry out repairs to a property), private sector CFAs may be available to provide representation.

4.197 Given the need to prioritise funding in those cases where the issues at stake are most important, we do not consider that legal aid for proceedings that do not directly concern homelessness or eviction and the immediate safety of clients, is justified and we propose that all housing cases, other than those concerning homelessness or serious housing disrepairs, be excluded from the scope of legal aid funding.

Immigration where the individual is not detained

4.198 Legal aid currently funds a variety of immigration issues, including those relating to citizenship, leave to enter or remain in the United Kingdom for visits, study or employment, and deportation. This includes advice on applications, advice and representation concerning appeals to the First-tier and Upper Tribunal (Immigration and Asylum) and advice on onward appeals.

4.199 The issues which are funded by legal aid include Legal Help and Representation in relation to issues covered by the Immigration Rules (HC395) and the Immigration (European Economic Area) Regulations 2006. This includes (but is not limited to) the following issues:

- *Grant/variation of leave to remain*: this covers advice and representation in relation to an application for a non-asylum grant of leave to remain, and an application to vary or extend that leave;
- *Entry clearance applications*: this covers advice and representation in relation to applications for leave to enter the United Kingdom, including but not limited to employment, visits, students, training and work experience. It also includes applications for entry clearance for refugee family reunion; and
- *European applications*: this covers advice to a European Economic Area national and their dependents wishing to live, work or study in the United Kingdom.

4.200 Legal aid is also available for:

- *Citizenship and travel documents*: advice to applicants wishing to apply for British Citizenship, or who require a travel document and are unable to obtain one from their own state; and
- *Applications under concessions or policy outside of the Immigration Rules*: this covers any application made which does not relate to a defined category within the Immigration Rules (HC395).

4.201 We recognise that some of these cases may be of importance, in that they raise issues of family or private life, although individuals are not in any immediate risk as a consequence of the decision in their case. However, these cases do not raise issues of such fundamental importance as asylum applications, where the issue at stake may be, literally, a matter of life and death. In contrast to those cases, an individual involved in non-detention immigration cases will usually have made a free and personal choice to come to or remain in the United Kingdom, for example, where they wish to visit a family member in the United Kingdom, or to fulfil their desire to work or study here. We therefore consider that routine public funding is less likely to be justified.

- 4.202 As the tribunal is designed to be user-accessible, and interpreters are provided free of charge for hearings, we do not consider that the class of individuals in these immigration cases will be incapable of navigating their way through the tribunal system. We do not consider that individuals in these immigration cases are likely, in general, to be particularly vulnerable. They will not face the same potential traumatising issues as those seeking asylum, and are more likely to be able to represent themselves, given that these cases do not generally involve complex legal issues.
- 4.203 On balance, the Government does not consider that immigration issues are of sufficiently high importance in general to justify continued legal aid funding. We recognise that there will be cases in which important issues arise, such as the right to a family life. However, individuals will generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate. We do not consider therefore that the routine provision of legal aid is justified in these cases, since we need to focus our limited resources on higher priority areas for funding.
- 4.204 The First-tier and Upper Tribunals (Immigration and Asylum) also consider a small number of appeals on discrimination grounds. As set out in paragraphs 4.133 to 4.135 above, we propose to retain funding for discrimination cases currently within scope, even where they arise in areas which we propose to remove from scope. Where a discrimination ground forms part of an excluded non-detention immigration appeal, the conditions on funding excluded proceedings in mixed cases in paragraphs 4.250 to 4.262 below will determine whether the excluded immigration claim may also receive funding. We will work to ensure that the guidance on these excluded cases reflects the principle that funding should only be provided in those cases where a discrimination ground is genuinely material to a wider appeal.

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

- 4.205 Legal aid is currently available for advice, representation and mediation in a range of disputes arising from relationship breakdown. This area of law covers a range of proceedings relating to children and families. These include:
- orders for child contact and/or residence (including rule 9.5/9.2A cases, on which see paragraph 4.106);
 - parental responsibility orders;
 - prohibited steps or specific issue orders;
 - parenting orders;
 - adoption;
 - family maintenance;
 - divorce, judicial separation, nullity and dissolution of civil partnership; and
 - international child abduction (see paragraphs 4.86 to 4.88).

- 4.206 We have considered carefully whether legal aid provision continues to be justified in private law children and family cases where domestic violence is not present. We recognise that these cases may raise important issues about family life, and about the best interests of children.
- 4.207 While we understand that those going through relationship breakdown may be dealing with a difficult situation, both emotionally and often practically too, we do not consider that this means that the parents bringing these cases are always likely to be particularly vulnerable (compared with detained mental health patients, or elderly care home residents, for example), or that their emotional involvement in the case will necessarily mean that they are unable to present it themselves. There is no reason to believe that such cases will be routinely legally complex. As noted in paragraph 4.156, there are also other sources of advice available to help couples following the breakdown of their relationship.
- 4.208 Recent research⁷⁷ demonstrates that, in 2007, in the vast majority of cases parents agreed contact arrangements informally without resort to the Courts. In only a small number of cases were the arrangements agreed by the Court – 8% where the resident parent was surveyed, and 17% where the non-resident parent was surveyed. In a further minority of cases, the arrangements were agreed with the help of lawyers or mediators without resort to the Court – in 7% where the resident parent was surveyed, and 8% where the non-resident parent was surveyed.
- 4.209 The vast majority of children had the contact arrangements with their non-resident parent arranged informally without the assistance of the Courts, lawyers or mediators (85% of children whose resident parent was surveyed and 75% of children whose non-resident parent was surveyed). We are concerned that the provision of legal aid in this area is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases which can have a significant impact on the long-term well-being of any children involved.
- 4.210 We do not consider that it will generally be in the best interest of the children involved for these essentially personal matters to be resolved in the adversarial forum of a court. The Government's view is that people should take responsibility for resolving such issues themselves, and that this is best for both the parents and the children involved. We therefore consider that scarce resources should be targeted to areas where publicly funded legal assistance is more likely to be justified and of practical benefit to the parties involved.
- 4.211 The Government is also concerned about the impact that legal aid provision has on the opponents of those who receive funding. Legal aid funding can be used to support lengthy and intractable family cases which may be resolved out of court if funding were not available. In such cases, we would like to move to a

⁷⁷ *Omnibus Survey Report No. 38: Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey*, produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D) (2008) (Office for National Statistics).

position where parties are encouraged to settle using mediation, rather than protracting disputes unnecessarily by having a lawyer paid for by legal aid.

- 4.212 In order to assist individuals to resolve children and family matters between themselves, we propose to continue providing access to mediation (see paragraph 4.72). We recognise that there will potentially be issues of financial imbalance between the parties, and that the party with the funds to pay for their own legal representation may sometimes seek to avoid mediation or a reasonable settlement. As set out in paragraphs 4.159 to 4.161, we also propose to amend the courts' powers to enable the judge to grant an interim lump sum payment against the party who has the means to fund the costs of representation for the other party.
- 4.213 In the longer term, we would also expect that the Family Justice Review,⁷⁸ given its terms of reference, will make recommendations for simplification of court procedures. If this takes place, it will benefit individuals who are unwilling or unable to resolve these matters informally. However, the proposed changes to the scope of family legal aid are not contingent on the outcome of the Review.
- 4.214 Given the financial context in which these reform proposals are made, the Government needs to focus its limited resources on the areas of highest priority importance. In reaching a view on the justification for continuing to fund such cases, we have weighed up the relative importance of these issues in relation to the other vital calls on the legal aid budget, our view that resolving issues without resorting to court-based solutions is in the best interest of any children involved, our proposal to continue to fund family mediation in private law family cases to enable people to do so, and our judgement that parents are not likely in general to be particularly vulnerable, in comparison with other client groups.
- 4.215 In light of these considerations, we therefore propose to exclude private law children and family matters where domestic violence is not present from the scope of legal aid (except for international child abduction which will remain in scope (see paragraph 4.88), and rule 9.5 and 9.2A cases (see paragraph 4.106)) for all levels of service other than mediation.

Welfare benefits

- 4.216 Legal aid currently funds legal advice in relation to decisions about benefits such as Disability Living or Attendance Allowance, Incapacity Benefit, Income Support and Housing Benefit. This includes advice (but not advocacy) for appeals to the First-tier (Social Security) Tribunal. These appeals concern, for example, cases where a benefit has been refused, or cases dealing with overpayments. Legal aid is not currently available for onward appeals to the Upper Tribunal. The vast majority of legal aid funding in this area of law is spent on Legal Help, rather than Legal Representation.
- 4.217 We consider that these issues are of lower objective importance (because they are essentially about financial entitlement), than, for example, fundamental

⁷⁸ See footnote 9.

issues concerning safety or liberty. While we recognise that the class of individuals bringing these cases is more likely to report being ill or disabled in comparison with the civil legal aid client base as a whole, we have also taken into account the fact that the accessible, inquisitorial, and user-friendly nature of the tribunal means that appellants can generally present their case without assistance. For appeals to the First-tier Tribunal with respect to welfare benefits, the appellant is required only to provide reasons for disagreeing with the decision in plain language. In many cases, decisions are overturned simply because the tribunal is able to elicit additional information which was not available to the Department for Work and Pensions.

- 4.218 We note that help and advice are available from a number of other sources, including Job Centre Plus and the Benefits Enquiry Line. In some cases, voluntary sector organisations may provide some help and advice, for example, AgeUK on Disability Living Allowance, Attendance Allowance and other benefits. The Child Poverty Action Group and Disability Alliance may assist in some cases. Pro bono groups such as the Free Representation Unit may also be able to assist in representation at tribunals. Some matters may be suitable for resolution by the Parliamentary Ombudsman. The presence of these alternatives is not determinative, but makes the provision of legal aid in these cases less likely to be justified.
- 4.219 We therefore consider that legal aid is not justified in these cases because the issues are not generally of sufficiently high importance to warrant funding, and the user-accessible nature of the tribunal will mean that appellants are able to represent themselves. In addition, they may also have access to help and advice from other sources in order to help them resolve their issues without recourse to publicly funded legal assistance. Having taken all these factors into account, we propose to exclude all welfare benefits issues from the scope of civil legal aid.
- 4.220 We are aware that there are appellants who are appealing against decisions which affect their entitlement to Housing Benefit and who may face difficulties in paying their housing costs if their appeal fails. We do not consider that this is enough to warrant legal aid in these tribunal proceedings, for the reasons given above. Where a negative appeal decision places appellants at risk of immediate loss of their home due to rent arrears, legal aid will remain available for legal advice on how to resolve their debt problem as set out above (see paragraph 4.63). Where they are facing repossession, legal aid for advice and representation in repossession proceedings will remain available as set out above at paragraph 4.76.
- 4.221 Legal aid is also available to assist asylum seekers and failed asylum seekers and their dependants with applications for asylum support under sections 4 and 95 of the Immigration and Asylum Act 1999.
- 4.222 We have considered support for asylum support cases as akin to support for other welfare benefits as set out above. We recognise that asylum support applications relate to issues which, in our view, are of high importance, since they enable successful applicants to access housing and meet basic

subsistence needs. As set out in paragraph 4.40, we also recognise the particular vulnerability of asylum applicants as a group.

4.223 However, we have also taken into consideration the fact that applications for asylum support are relatively straightforward and fact-specific, and do not require legal expertise to complete. There are also clear guidance notes accompanying each application form to advise applicants on their completion. In addition, some voluntary sector organisations provide free independent advice on asylum support applications. The presence of these alternative sources of help is not determinative, but makes the provision of legal aid less likely to be justified. Given the straightforward nature of the asylum support application process and the availability of other routes by which asylum seekers are able to obtain help and advice, we therefore propose to exclude asylum support cases from the scope of civil legal aid on the basis that funding is not justified.

4.224 As with other areas of law, funding for judicial review will continue to be available for benefits cases. Such cases are likely to occur where there are delays in making decisions on applications for benefits, or delays in making payments, or where there has been suspension of benefits by authorities pending investigation.

Miscellaneous

4.225 Legal aid is currently provided for Legal Help and Representation in a very wide range of other areas of civil law not included in the specific categories listed elsewhere.

4.226 We have examined the areas of law where civil legal aid is currently provided and considered whether the provision of public funds continues to be justified. The issues classified by the LSC under 'Miscellaneous' for funding purposes which we propose to retain in scope are set out in paragraphs 4.107 to 4.131 above.

4.227 There is a range of other 'Miscellaneous' areas where legal aid is currently provided for Legal Help and Representation. These include:

- appeals to the Upper Tribunal from the General Regulatory Chamber of the First-tier Tribunal (see paragraphs 4.231 to 4.235 below);
- cash forfeiture actions under the Proceeds of Crime Act 2002 (see paragraphs 4.229 and 4.230 below);
- legal advice in relation to a change of name;
- actions relating to contentious probate or land law, for example, actions to challenge the validity of a will;
- court actions concerning personal data, such as actions relating to inaccurate or lost data or rectification of personal data;
- actions under section 14 of the Trusts of Land and Appointment of Trustees Act 1996; and

- legal advice on will-making for (i) the over 70s; (ii) disabled people; (iii) the parent of a disabled person; and (iv) the parent of a minor who is living with the client but not with the other parent, and the client wishes to appoint a guardian for the minor in a will.

4.228 We have considered these issues and it is our view that they generally concern financial issues of low objective importance when compared with other cases involving fundamental issues such as homelessness or domestic violence. We do not consider that the class of individuals bringing these claims is generally likely to be particularly vulnerable, or that they will be unable to present the case themselves. We therefore consider that legal aid is not justified for these and any other 'Miscellaneous' matters. Further details on cash forfeiture and Upper Tribunal appeals are set out below.

Cash forfeiture

4.229 Money may be seized by a customs officer or police officer because they have reasonable grounds for suspecting that it is intended for use in unlawful conduct. Such seized cash may be forfeited by order of a magistrates' court. The decision of the magistrates' court may be appealed to the Crown Court. Civil legal aid funding is available for both the magistrates' court and Crown Court appeal.

4.230 Given that these proceedings are essentially about preserving a sum of cash, we consider that these cases are not of high importance and accord them a lower priority than cases involving more fundamental issues such as liberty or homelessness. We do not consider that the class of individuals bringing these claims is generally likely to be particularly vulnerable, or that they will be unable to present the case themselves. While we recognise that these are issues that cannot be easily resolved between individuals, given the involvement of the state in these cases, on balance we consider that legal aid is not justified for these issues and we propose that they be excluded from scope.

Upper Tribunal appeals

4.231 Currently, civil legal aid is available for appeals to the Upper Tribunal in relation to decisions made by First-tier tribunals within the General Regulatory Chamber of the Tribunals Service. Legal aid is available for advice before the First-tier Tribunals, but not for advocacy.

4.232 The General Regulatory Chamber contains the following First-tier Tribunals: Charity; Claims Management Services; Consumer Credit; Environment; Estate Agents; Gambling Appeals; Immigration Services; Information Rights; Local Government Standards in England; and Transport. Appeals from these tribunals are usually to the Upper Tribunal.

4.233 These tribunals concern a range of regulatory matters, including:

- appeals concerning the issuing of consumer credit licences to those, for example, wishing to operate a consumer credit or consumer hire business;

- appeals against an Office of Fair Trading prohibition against acting as an Estate Agent;
- appeals against licensing decisions of the Gambling Commission;
- appeals against decisions of the claims management regulator, for example, to refuse authorisation to operate a claims management service, or to impose sanctions;
- appeals against a decision of the Information Commissioner;
- appeals against decisions of the Immigration Services Commissioner, for example, to impose disciplinary charges on immigration advisors;
- appeals against the Traffic Commissioners concerning, for example, heavy goods vehicle licences, or registration of driving instructors; and
- appeals from the Adjudication Panel for England about the imposition of disciplinary measures in respect of the conduct of local authority councillors.

4.234 We do not consider that the issues dealt with in these tribunals – including the Upper Tribunal – are of high importance, when compared, for example, with issues of safety or homelessness. The tribunal is designed to be accessible for the public (notwithstanding that many of these cases will concern businesses, in relation to which legal aid is not available in any case) and its proceedings are fact-based and involve inquisitorial procedures. We do not consider that the class of individuals appealing to these tribunals is generally likely to be particularly vulnerable, or to have difficulty in presenting their case to the tribunal.

4.235 For these reasons, we propose that appeals in relation to these issues be excluded from the civil legal aid scheme.

Cross-cutting issues

Public interest cases

4.236 Currently, civil legal aid is available for any type of case (except business cases) which is out of scope but which has ‘significant wider public interest’. ‘Significant wider public interest’ allows cases to be funded, even where the benefits to the individual litigant alone might not justify the likely costs, because they have the potential to benefit other people.

4.237 We recognise that public interest is an important factor in deciding whether cases should be granted funding, and we consider that this should continue to be reflected in the Funding Code merits criteria (see paragraphs 4.263 and 4.265). Nonetheless, we do not consider that the presence of this factor should constitute an automatic entitlement to publicly funded legal services, particularly where an area of law has been excluded because it is considered insufficiently important to merit public funds, because there are alternative sources of funding, or because the procedure is simple enough that litigants can present their case without assistance. We consider that the presence of ‘significant wider public interest’, while an important consideration, is not of such

importance that it can be solely determinative in deciding whether legal aid should be available.

4.238 We propose that, in future, public interest will be a relevant feature in the civil legal aid merits criteria (in particular, for cases where the benefit to the litigant alone would not otherwise pass the cost/benefit test for funding), but it will no longer be a basis for bringing back into scope otherwise excluded cases (see paragraphs 4.252 to 4.256).

Tort and other general claims

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

4.240 The subject matter of these claims can vary widely from private matters such as a nuisance claim between two individuals, to a range of claims concerning, for example, education or housing. These claims are usually considered a part of the category of law in which they feature, for example, a mental health damages claim is considered as part of the mental health category of law.

4.241 We consider that these claims are generally not of high importance. The majority will be damages claims seeking a financial award, and we do not consider that primarily financial matters are of a high enough priority for funding. We do not consider that the litigants bringing these claims are likely in general to be particularly vulnerable, or that they will be unable to present their own case. In stronger cases, alternative sources of funding will be available, such as CFAs. There may be other forms of advice or assistance available, depending on the nature of the claim.

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

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

Mixed cases

4.244 Under the current civil legal aid scheme, cases arise where the proceedings are mostly within scope but which also include specific issues or causes of action which are excluded from scope. These excluded proceedings are currently funded by legal aid where any of the following conditions apply:⁷⁹

⁷⁹ Section 3.3, *The Legal Services Commission Manual: Funding Code Volume 3*, Legal Services Commission (2010) (www.legalservices.gov.uk).

- the client is a defendant or third party in proceedings brought against them by an opponent;
- the excluded issues were introduced into existing proceedings by an opponent, for example, the opponent seeks to amend pleadings to raise new causes of action; or
- the client is bringing proceedings but it is, or would have been, impracticable for the client to bring the proceedings without also covering the excluded proceedings. It is not sufficient that it would be more convenient to deal with the excluded and in scope issues within one set of proceedings.

4.245 We do not propose to change the current arrangements for 'mixed cases'.

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

Funding for excluded cases

4.246 At paragraph 4.34 we set out our proposal to replace the current exceptional funding scheme with a new scheme.

Current exceptional funding scheme

4.247 Under the current scheme, the Lord Chancellor has the power to grant civil legal aid in an individual case which is excluded from the scope of the civil legal aid scheme where the LSC requests it.⁸⁰ Before recommending that 'exceptional' funding is granted, published guidance sets out that the Lord Chancellor expects the LSC to be satisfied that the case meets the applicable merits test, and that it meets the Lord Chancellor's additional exceptional funding criteria for excluded cases. Excluded cases must also meet the means test, although this can be waived for inquests.

4.248 At present, guidance sets out that, for most currently excluded cases, one of the following criteria for funding must be met:

- there is a 'significant wider public interest' (as currently defined in the Funding Code) in the resolution of the case and funded representation will contribute to it; or
- the case is of 'overwhelming importance to the client' because the case has exceptional importance to the client, beyond the monetary value (if any) of the claim, because the case concerns the life, liberty or physical safety of the client or his or her family, or a roof over their heads (as defined in the Funding Code); or
- there is convincing evidence that there are other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings, or the lack of

⁸⁰ Under section 6(8)(b) of the Access to Justice Act 1999.

public funding would lead to obvious unfairness in the proceedings (*Jarrett complexity*⁸¹).

4.249 For advocacy before the coroners' courts, the criteria are different. The relevant criteria are:

- there is a significant wider public interest (as defined in the Funding Code) in the applicant being legally represented at the inquest; or
- funded representation for the family of the deceased is likely to be necessary to enable the coroner to carry out an effective investigation into the death, as required by Article 2 of the ECHR.

Proposed funding scheme for excluded cases

4.250 The Government intends to replace the existing exceptional funding scheme with a new scheme to provide legal aid for excluded cases where the Government is satisfied that the provision of some level of legal aid is necessary for the United Kingdom to meet its domestic and international legal obligations, including those under the ECHR (and, in particular, article 2 and article 6), or where there is a significant wider public interest in funding legal representation for inquest cases (see paragraph 4.122). It is not intended that exceptional funding will generally be available except where it can be demonstrated that it is necessary to discharge those legal obligations, or where we are satisfied that the relevant test for legal representation has been met in inquest cases.

4.251 In formulating these proposals, we have considered the case for retaining the existing criteria (set out from paragraph 4.247) for excluded cases.

Significant wider public interest

4.252 In our view, the current exceptional funding criterion for non-inquests which allows exceptional funding to be granted where the case is of 'significant wider public interest' does not focus limited resources effectively enough. 'Significant wider public interest' means that the resolution of the case has the potential to benefit other people, and legal aid will assist in delivering those benefits. We do not consider that this is a sufficiently strong ground for legal aid to be granted to excluded areas of law in future. These will range in importance and the simple fact that there are a number of other people who may be assisted by the resolution of the case should not be determinative of the case being granted legal aid, given that the case concerns an issue which has not been deemed to be one where legal aid is ordinarily justified. This criterion can currently be used, for example, to grant legal aid for business cases where there is a difficult regulatory or contractual matter, from the resolution of which many other business people in similar circumstances will also benefit.

4.253 Because we do not consider that this criterion focuses resources on priority cases, we propose that it will not form part of the excluded cases scheme for non-inquest cases.

⁸¹ *R v Legal Services Commission ex parte Jarrett* [2001] EWHC (Admin) 389.

- 4.254 We have factored significant wider public interest considerations into our overall analysis on scope. We consider that individual cases that genuinely have the potential to yield significant wider benefits to the public are most likely to arise in categories of law which we intend should be retained in scope (for example, judicial review or claims against public authorities).
- 4.255 For inquest cases, different considerations arise. Legal Representation before an inquest is already excluded from the scope of civil legal aid and we do not propose to amend this policy, given the inquisitorial nature of the proceedings (see paragraphs 4.119 to 4.122 for a fuller explanation of why we have come to this conclusion). However, where Legal Representation is provided for an inquest on the basis that there is a 'significant wider public interest' in the applicant being legally represented at the inquest, this is usually because there is the potential for lessons to be learned about potentially life-threatening practices which could affect other lives. The 'significant wider public interest' test is also more narrowly drawn for inquests in that it is the litigant's representation at the inquest which must provide wider benefits, not merely the holding of the inquest itself. Because inquests by their very nature concern a very important issue (a person's death), we consider that there is a case for 'significant wider public interest' to continue to be a funding criterion for these cases and we propose that it be retained.
- 4.256 As set out above, while it is proposed that public interest will no longer allow legal aid to be granted in out of scope areas (except inquests), it will continue to be a relevant feature in the civil legal aid merits criteria (in particular, for cases where the benefit to the litigant alone would not otherwise pass the cost/benefit test for funding).

Overwhelming importance to the client

- 4.257 In our view, the current criterion for non-inquests which allows exceptional funding to be granted where the case is of 'overwhelming importance to the client' is no longer necessary.
- 4.258 We have made this judgement firstly because, in conducting our review of the scope of civil legal aid, we have prioritised and retained within the scope of the scheme those cases which concern life, liberty, physical safety, or homelessness. Because the issues which meet this criterion are generally those which we have proposed retaining within scope, we do not consider that it is necessary to have a separate criterion to allow funding to be granted for excluded cases of this type.

'Jarrett Complexity'⁸²

- 4.259 The Funding Code currently provides that exceptional funding may be granted where there is convincing evidence that the case involves exceptional circumstances such that without public funding for representation it would be

⁸² Ibid.

practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings.

- 4.260 At present, the LSC generally uses as a benchmark for funding those cases in which the European Court of Human Rights has indicated that the right of access to the courts has effectively been denied because of the lack of public funding. As set out above, the Government's proposals for a new funding mechanism for excluded cases will ensure that legal aid is provided for those individual cases in which it is required to meet the United Kingdom's obligations under the ECHR.
- 4.261 We do not propose to set out at this stage the detailed excluded cases funding criteria, since the exact composition of these criteria will depend on the outcome of the consultation proposals. For example, the criteria for determining whether provision of legal aid is required in an individual case may need to be different if, as proposed, most private law family cases are excluded from the scope of the legal aid scheme compared with if they are not.
- 4.262 Once a decision has been taken on the proposals in this consultation, we will publish further details on the operation of the scheme for funding excluded cases. We will also be considering in further detail how the excluded cases funding scheme will be operated under the reformed governance arrangements for legal aid (see Chapter 10).

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

The Funding Code

- 4.263 The Funding Code⁸³ is the document created under section 8 of the Access to Justice Act 1999 which sets out the criteria for granting civil legal aid in different kinds of case, and the procedures covering legal aid grants. The criteria include factors such as the prospects of success, the costs/benefit ratio, and whether there are any special features (for example, significant human rights issues) that add weight to the case for funding.
- 4.264 We intend to retain the civil legal aid merits test. The current criteria are set out in the Funding Code, although we are considering whether the Code should continue in its current form. For example, it could be contained in secondary legislation.
- 4.265 In this consultation, we are proposing one change to the merits criteria. At present legal aid is generally refused for an individual case that is suitable for

⁸³ See footnote 15 above.

alternative sources of funding, such as a CFA.⁸⁴ However there are currently a number of exemptions from this requirement in the Funding Code. For example, under the current system, legal aid will not be refused for an individual clinical negligence case, or certain claims against public authorities, even if a CFA is potentially available. We propose that the Funding Code criteria should be amended so that, where this is not presently the case, legal aid will be refused for any individual case which is suitable for an alternative source of funding, such as a CFA. This would apply to all civil cases other than family cases.

Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.

Litigants in person

- 4.266 We recognise that the proposals to reduce the scope of legal aid will, if implemented, lead to an increase in the number of litigants representing themselves in court in civil and family proceedings. This may potentially lead to delays in proceedings, poorer outcomes for litigants (particularly when the opponent has legal representation), implications for the judiciary, and costs for Her Majesty's Courts Service.
- 4.267 We believe that many of the cases currently funded through legal aid could be resolved without recourse to the courts. Nevertheless, litigants are entitled to bring their cases to court, and to represent themselves, if they wish. We also expect that many of the litigants representing themselves will be doing so in fora where the proceedings are particularly suitable for litigants in person.
- 4.268 There is, however, little substantive evidence on the impact that a litigant-in-person has on the conduct and outcome of proceedings. Research conducted by the former Department for Constitutional Affairs in 2005⁸⁵ did not find a significant difference between cases conducted by a litigant-in-person and those in which clients were represented by lawyers, in terms of court time. The size of the sample was, however, small. In terms of cost per case, given the difference in activity between individual cases, it is very difficult to assess whether a case involving a litigant costs more than a case where there are two represented parties.
- 4.269 We are undertaking further research into this area, and we will report our findings as part of the Government's response to this consultation. We will also be conducting a full post-implementation review of the impact of those reforms we decide to pursue following this consultation.

⁸⁴ See Section 5 of the Funding Code.

⁸⁵ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Department for Constitutional Affairs (2005).

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

Provision of advice and information services by telephone

4.270 Too often, those seeking civil legal aid find the process time-consuming, inconvenient and stressful. For those in work, taking time out of the working day to visit a lawyer is difficult; for the elderly or the immobile, getting out to visit a lawyer is problematic; for the vulnerable living in small communities, a visit to a high street lawyer can be inconvenient. We need to redesign the system so that it caters much better for the needs of its clients, makes the most of advances in technology and acknowledges changes in the structures of our lives. It must also provide the value for money that is essential in view of the need to reduce legal aid expenditure.

4.271 We believe that clients should be able to access information and legally aided advice via the telephone and online:

- at a time and place convenient to them;
- without needing to travel or wait for an appointment with a face to face provider;
- over extended hours (compared with face to face), enabling them to resolve their problems more swiftly, reducing stress and anxiety;
- to obtain earlier resolution in order to help prevent problems multiplying and escalating; and
- to help identify when Alternative Dispute Resolution (such as mediation) would be the most appropriate route to problem resolution.

4.272 We propose that, in future, we will provide a simple, straightforward telephone service, based on the current Community Legal Advice (CLA) helpline (first established nationally in 2004). This advice service will be able to refer clients to the source of advice most appropriate to them, and will act as a reliable one-stop shop for clients looking for legal advice. The CLA helpline will be established as the single gateway to civil legal aid services. All clients will be able to access the first tier of the service (the Operator Service) while the second tier will offer specialist advice to eligible clients in all categories of law within the scope of civil legal aid. In the vast majority of cases this will mean that clients will make their initial contact to access civil legal aid services through the Operator Service, rather than through a face to face provider. However the services will be designed to minimise the risk that clients with emergency cases experience delay in accessing the help they need.

4.273 Clients calling the helpline will, as at present, initially speak to an operator who will diagnose their problems, and determine their eligibility for legal aid services. The operator will discuss with clients the range of options available to them and route them to the service most suited to their circumstances, including legal aid specialists, a paid for service, or alternative sources of help.

Legally aided advice

- 4.274 In cases where the diagnosis at the Operator Service stage is that more detailed advice is the most suitable route, clients will be able to access specialist services if their case is within the scope of legal aid and they meet the relevant financial eligibility criteria. In the majority of these cases, CLA operators will transfer the call to the CLA specialist telephone advice service. This service will be available in all categories of law within the proposed scope of civil legal aid.
- 4.275 Clients will be assessed to identify whether they have particular needs (for example, specific language requirements) and the CLA helpline service will seek to accommodate them. Face to face advice provision will be available where cases are too complex to be dealt with appropriately by telephone or where the client's specific needs would not be met (for example, due to mental impairment). This will be assessed on a case-by-case basis and, where appropriate, clients will be referred to face to face advice services.
- 4.276 The number of cases that are likely to be dealt with by face to face specialist advice services will vary between categories of law depending on the nature of the case in that category and the needs of the client groups who most typically experience these problems.

Non-legally aided advice

i) Paid-for service

- 4.277 We also propose to expand the CLA service to include the option for paid-for advice services for clients who are ineligible for legal aid.
- 4.278 Under this proposal, in addition to providing advice services to legally aided clients, CLA operators would be able to refer clients who are ineligible for legal aid to a paid-for service. The Operator Service would discuss with the client the options available to them, explain the charges associated with the paid for service, and make the relevant referral.
- 4.279 The LSC would set out in the relevant tender the requirements in respect of quality standards, maximum rates to be charged, assurances about standards of service for both eligible and non-eligible clients, and so on. This proposal would enable CLA operators to route non-eligible clients to quality assured paid services seamlessly.
- 4.280 This approach will ensure that those who are not eligible for legal aid will still be helped to find a source of advice. It could also lead to legal aid fund savings, as it is expected that CLA specialist telephone advice providers could offer a referral fee.

(ii) Other sources of help

4.281 As all clients will receive an initial diagnosis of their problems, it will be easier for the Operator Service to identify cases where other forms of help, such as Alternative Dispute Resolution services, are the most appropriate route to resolving the problem.

4.282 In addition, the CLA has already developed successful strategic partnerships with a range of other national advice helplines. We propose to develop these relationships to provide a better, more coherent service for the end-user, with the CLA providing not just a gateway to legal aid advice services, but also enabling access to the wider advice services market, including the voluntary sector. In many cases, this will enable clients to access free assistance from specialist services suited to their needs seamlessly.

4.283 This will be of particular importance for clients who are financially ineligible or who have problems that will be out of scope of the proposed civil legal scheme. Other organisations could benefit from the infrastructure of the CLA Operator Service, gaining referrals from clients who have already been triaged.

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

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

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

Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline? Please give reasons.

5 Financial Eligibility

Introduction

- 5.1 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.
- 5.2 The proposals have been designed with the aim of making substantial savings in legal aid expenditure. Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.
- 5.3 The proposals focus on eligibility for civil and family legal aid. The Government has considered a number of options for making adjustments to financial eligibility for legal aid in criminal proceedings. These are set out in paragraph 5.65.

Civil Legal Aid

- 5.4 The civil legal aid scheme (which includes legal aid for family law proceedings) is designed to help people of modest means pay for legal advice, mediation and legal representation. Civil legal aid is not means tested for certain types of proceedings, including for parents in childcare or supervision proceedings, or child abduction proceedings, or for people detained under mental health or mental capacity legislation seeking release.⁸⁶ It is important to note that none of the changes below will affect those cases not subject to means testing.
- 5.5 Where civil legal aid is means tested, the means test looks at both the applicant's income and his or her capital. In order to be eligible for civil legal aid, the applicant must pass both the income and the capital eligibility test.
- 5.6 We have looked carefully at the current means test and consider that it should be reformed in a number of ways to ensure that limited public resources are more effectively targeted. We believe that those who, whether on the basis of their disposable capital or income, have the ability to pay for or contribute towards their costs in civil litigation, should be asked to do so. Where people have the means, a requirement to make a financial contribution to the costs of legal services should incentivise a greater sense of personal responsibility by giving them a greater financial interest in the conduct of their case, as well as helping to act as a deterrent to unnecessary litigation.

⁸⁶ Full details of the eligibility rules are available in *The LSC Manual: Civil Volume 2 – The Community Legal Service (Financial) Regulations 2000 (as amended)*, Regulation 3.

- 5.7 Subject to the outcome of the consultation, changes to the eligibility criteria will be made by amending existing secondary legislation and, where necessary, through primary legislation.

Capital eligibility

- 5.8 We have considered a number of proposals on capital eligibility for civil legal aid⁸⁷ which seek to achieve greater internal consistency in the way in which the resources of individuals are taken into account, but which continue to preserve access for those without the means to pay for legal services.

Abolition of capital passporting

- 5.9 At present, some clients are automatically financially eligible for civil legal aid – they can be described as being passported through the Legal Services Commission’s (LSC) means assessment process (on both income and capital) – if they are in receipt of certain income-based benefits.⁸⁸ Passporting is essentially an administrative convenience for the LSC. It allows the LSC to dispense with a detailed means assessment for cases where the client is clearly on a low income, having been assessed by the Department for Work and Pensions as eligible for income-based benefits. However, the capital eligibility tests for civil legal aid and income-based benefits are not the same: benefits have become increasingly generous in terms of the capital which recipients are able to hold while still qualifying for the benefit. This means that clients in receipt of passporting benefits are currently eligible for civil legal aid even though they may have up to £16,000 in disposable capital (and there is no upper limit for pension credit), whereas non-passported clients with disposable capital in excess of £8,000⁸⁹ are financially ineligible for civil legal aid.
- 5.10 In order to achieve greater internal alignment and fairness to all applicants for legal aid, the Government proposes that in future people in receipt of passporting benefits should have their capital assessed in the same way as it is assessed for others (although receipt of these benefits would still ‘passport’ the applicant through the income side of the means test).
- 5.11 This proposal would apply to all types of legal assistance (Legal Help, Help at Court, Family Mediation, Family Help and Legal Representation, and such other services that are authorised by specific orders or directions from the Lord Chancellor).

⁸⁷ The current rules on capital eligibility found in the Community Legal Service (Financial) Regulations 2000 are set out at Annex C.

⁸⁸ These are: Income Support, income-based Jobseekers Allowance, income-related Employment and Support Allowance, or Guarantee State Pension Credit (‘Guarantee Credit’). National Asylum Support is also a passporting benefit for immigration and asylum cases for some levels of service, but is not covered by this proposal.

⁸⁹ £3,000 for Controlled Legal Representation in Immigration cases.

- 5.12 This proposal would have two main implications for clients in receipt of passporting benefits:
- first, those with disposable capital in excess of £8,000⁹⁰ would no longer be financially eligible for civil legal aid (even though they would still be eligible for benefits). They would also become subject to the capital assessment with respect to their property (see proposed changes to this assessment from paragraph 5.22). These clients would be expected to rely on their own capital resources to fund their proceedings just as non-passported clients on similar incomes are expected to do at present; and
 - second, clients in receipt of passporting benefits with capital of £8,000 or less may become liable to pay capital contributions towards their legal costs, based on an assessment of their disposable capital. This change would place passported clients on the same footing as non-passported clients who may, in fact, have similar disposable incomes to passported clients.
- 5.13 The Department for Work and Pensions has recently announced reforms to the system of financial support for people of working age, including a proposal that combines income-related benefits and Tax Credits into a Universal Credit.⁹¹ We will work together closely to ensure that the legal aid passporting provisions for income are appropriately aligned.

Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons.

Minimum capital contribution

- 5.14 The Government considers that it is desirable for legally aided clients to have a direct financial interest in their case through contributing personally towards the costs of it, where they can afford to do so. Where clients contribute to the costs of their case, we consider that they are more likely to approach litigation in a similar way to privately paying litigants, and unnecessary litigation may be deterred. Such contributions also off-set the costs to the public purse of providing legal aid and help to ensure that funding is available for other individuals.
- 5.15 Under the current rules, clients are required to make a lump sum contribution towards their legal costs from capital if their disposable capital exceeds £3,000. Contributions are payable where clients receive 'certificated' levels of service i.e. Family Help (higher) or Legal Representation (consisting of investigative help or full representation), but not for 'controlled work' i.e. Legal Help (initial advice and assistance), Help at Court, Controlled Legal Representation in Immigration and Asylum cases, Family Help (lower) or Family Mediation. The level of the contribution varies with the anticipated costs of the case, but clients

⁹⁰ £3,000 for controlled legal representation in immigration cases.

⁹¹ *Universal Credit: welfare that works*: Cm 7957, November 2010
<http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/universal-credit/>

can be asked to contribute all disposable capital in excess of £3,000 (up to the disposable capital eligibility limit of £8,000, above which they no longer qualify for legal aid). This means that currently clients with up to £3,000 of disposable capital (and less than £316 in monthly disposable income) make no contribution towards their case. For these people, litigation is essentially cost free, and there is no restraint on their decision to use the courts to resolve issues.

- 5.16 The Government therefore proposes to reform the capital contribution scheme to ensure that more clients contribute financially towards the cost of their proceedings where they have access to disposable capital. We propose that in future any client with £1,000 or more disposable capital who applies for Legal Representation, Family Help (higher) or Controlled Legal Representation in Immigration cases (see also proposals on scope changes for immigration cases at paragraphs 4.82 to 4.85 and 4.198 to 4.204), would be liable to pay a one-off capital contribution of £100. As at present, this capital contribution would be in addition to any contributions required from income. However, unlike the current system for income contributions, this contribution would be collected by the legal aid provider. The provider would undertake that he or she had collected the contribution, and the LSC would deduct that contribution from the payments due to the provider. This would allow for a less bureaucratic system and would avoid the need for additional transfers of funds.
- 5.17 This contribution is designed to help encourage a potentially more responsible approach to litigation, and greater parity with those who pay for litigation privately. We consider that £100 is affordable for those assessed as possessing £1,000 of disposable capital, representing just 10% of their disposable capital. The contributory threshold of £1,000 is set in recognition that applicants may have a legitimate need to draw on their disposable capital for other purposes, and that £1,000 provides a reasonable contingency. As under the current contributions scheme, these contributions would be refunded to the client at the end of the case if they were successful and had their costs paid by the other side.
- 5.18 It is proposed that capital contributions from the existing scheme should be offset against the £100 sum. This would mean that all clients with capital between £3,001 and £3,100 would also pay a contribution of £100, and clients with capital in excess of £3,100 would, as now, be liable to contribute £1 for each pound over the limit.
- 5.19 A new capital contribution scheme will be introduced for Controlled Legal Representation in Immigration cases, but the contribution scheme will be slightly different to other contributory levels of service. In these cases, the £100 contribution would be required where the client had disposable capital of between £1,000 and £3,000. The maximum disposable capital limit for Controlled Legal Representation in Immigration cases is £3,000, so clients would only be required to make a maximum capital contribution of £100 in these cases.

5.20 The proposed new capital contribution scheme is set out below:

Current Capital Contribution Scheme	
<i>disposable capital</i>	<i>capital contribution</i>
£0–£3,000	£0
£3,001+	+ £1 per £1 over £3,000 up to the maximum likely costs of the case

New Capital Contribution Scheme	
<i>disposable capital</i>	<i>capital contribution</i>
£0–£999	£0
£1,000–£3,100	£100
£3,101+	+ £1 per £1 over £3,100 up to the maximum likely costs of the case

Current Capital Contribution Scheme in Controlled Legal Representation in Immigration cases	
<i>disposable capital</i>	<i>capital contribution</i>
£0–£3,000	£0

New Capital Contribution Scheme in Controlled Legal Representation in Immigration cases	
<i>disposable capital</i>	<i>capital contribution</i>
£0–£999	£0
£1,000–£3,000	£100

5.21 As under the current scheme, where the LSC has the power to postpone the payment of capital contributions, if a client were unable to pay this capital contribution because they did not have an available liquid asset, the legal aid provider would have the discretion to postpone payment of the contribution for a reasonable period until such time as the client did have available capital.

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

Abolition of capital disregards

- 5.22 In assessing an applicant's financial eligibility on capital under the current means assessment, very significant sums associated with capital (including interests in land) are disregarded. Firstly, up to £100,000 of mortgage outstanding on a person's interest in land (referred to in this chapter as 'property') is disregarded (the 'mortgage disregard'). Then the applicant is able to benefit from a further £100,000 of equity in their main dwelling which is disregarded (the 'equity disregard').
- 5.23 Pensioners on lower incomes (not exceeding £315 assessed disposable income per month) can also benefit by up to a further £100,000 of capital (of any kind) which is disregarded (the 'pensioner disregard').
- 5.24 These capital disregards mean that, at present, clients can still be provided with public funds for their case where they own a home worth up to £200,000. The

combination of the capital disregards with the pensioner disregard mean that pensioners on lower incomes are able to receive public funds for their case even where they own a home worth up to £300,000, or have up to £100,000 of cash in the bank.

- 5.25 The Government believes that it is inappropriate that limited legal aid resources should be directed at clients who potentially have a substantial amount of equity or other capital which could be used to fund their case. Where clients have access to a capital resource, we believe it is right that this should be their first recourse before seeking public funds. In the following three sections, we set out our proposals in relation to pensioner, equity and mortgage disregards.

Pensioner disregard

- 5.26 We therefore propose to abolish the existing pensioner disregard. Given the tightened financial circumstances that we face, it is particularly important that where clients do have significant capital which they can use to fund their case, they should use this before turning to public funds.

Equity and mortgage disregard in cases other than contested property cases

- 5.27 The proposals in this section relate to cases in which clients are not contesting property. In cases where clients are contesting property, different arrangements currently apply for assessing financial eligibility. Proposals for reform of capital eligibility in contested property cases are set out from paragraph 5.39 below.
- 5.28 In non-contested property cases, clients are able to benefit from £100,000 of equity which is disregarded from the capital means assessment. Because we believe that clients who have substantial capital, whether in the form of equity or otherwise, should use it to fund their own proceedings where they are able to do so, rather than relying on public funds, we propose to abolish the equity disregard. The effect of this proposal is that it would be possible in all cases to take into account the client's (and partner's) share in their home when judging whether they have over £8,000 capital. This is in addition to the proposal above to abolish the pensioner disregard.
- 5.29 This proposal to abolish the equity disregard would apply to all levels of service in all cases where means testing takes place,⁹² although there is a proposed form of exemption for Legal Help (see paragraph 5.38 below). Non-means tested cases would not be affected and, under these proposals, the LSC would continue to have the discretion to waive the financial eligibility limits for victims of domestic violence seeking protective injunctions from harm.
- 5.30 The Government recognises that for some clients who hold property, a large proportion of their capital will be subject to a mortgage. Therefore we propose to retain the existing mortgage disregard, extending it so that it would no longer be limited to the first £100,000 of outstanding mortgage. The capital means test would therefore focus on the actual, rather than notional, equity held.

⁹² See paragraph 5.4 above for those cases where a means assessment is not made.

- 5.31 We are concerned to ensure that our limited resources are targeted to individuals of modest means. We recognise that uncapping the mortgage disregard could make individuals with high mortgages on very expensive properties eligible for legal aid. We do not consider that it is appropriate for limited public funds to be available for such individuals. We therefore propose to introduce a gross capital limit of £200,000 in cases other than contested property cases for all levels of service, including Legal Help and Representation. Pensioners with a monthly disposable income of £315 or less would have a higher gross capital limit of £300,000 in recognition of the existing capital disregard from which that group benefits. These gross capital limits have been selected because they are broadly the maximum current value of a property that individuals can own under the current legal aid scheme and still qualify financially for legal aid. The gross capital limit would apply to all of the individual's properties whether main dwelling or not and would be counted as the value of capital before any reductions or disregards (including for mortgages).
- 5.32 Under the current scheme, the mortgage disregard can be applied to any of the client's properties. Unlike the current scheme, the proposed unlimited mortgage disregard would only apply to a single property in which the client had an interest. This would usually be the client's main dwelling, but this rule recognises that there may be occasions where the client is not living in the property they own (for example, after a relationship breakdown). If the client had an interest in more than one property, the mortgage disregard would not apply to the second property and the full value would be taken into account in assessing the client's capital eligibility for legal aid, with no allowance for an outstanding mortgage on that second property. Given the significant pressures on public funds, we do not consider it appropriate to offer generous eligibility allowances to those with multiple properties, and we would expect those individuals to rely on their own capital resources.

Property eligibility waiver

- 5.33 We recognise that there may be situations where the client might find it difficult to access their equity readily. For that reason, it is proposed that the LSC would have the power to waive the capital limits in certain circumstances. This waiver would not apply to all capital, but only to capital held as equity in the client's properties. Clients with property or properties with a gross total value of £200,000 or less could apply for the waiver.
- 5.34 Pensioners with an assessed disposable income of £315 or less would be eligible to apply for the waiver if their property or properties were worth a gross total value of £300,000 or less.
- 5.35 The following conditions are proposed for the exercise of the property waiver:
- first, clients who benefit from the property eligibility waiver would be expected to repay their legal aid costs at the end of the case, if they were able to do so (for example, by selling property or obtaining a competitive loan) unless the client's costs were paid by the other side or the existing 'statutory charge' arose. This may be appropriate where, for example, the

individual's case was so urgent that it was impossible for them to obtain finance at the outset of the case but, after the proceedings, they are able to do so; and

- second, where clients benefit from a property eligibility waiver, a charge would be placed on their property at the point at which the case concludes. Clients would need to agree to this charge at the point that they applied for legal aid. This charge would be similar to the existing 'statutory charge' which arises where clients recover or preserve assets in cases concerning money or property. This new charge would in future apply more widely than the statutory charge. It would apply in cases which did not involve the recovery or preservation of money or property, as well as those in which the funded client lost the case. Enforcement of the charge could be postponed where it would be unreasonable for the client to repay what they owed immediately (for example, where enforcing the charge would effectively make the client homeless). As with the existing statutory charge scheme, clients would not need to make regular repayments towards this debt, although voluntary payments could be paid. In line with the existing statutory charge scheme, 8% simple interest would accrue on a deferred charge – from the point that the final bill is settled – as an encouragement to clients to repay the charge where they are able to do so.

5.36 We consider that situations where it would be appropriate for the property eligibility waiver to be exercised are:

1. Urgency: where urgent assistance is needed, for example, if the client's safety or liberty is at issue and the homeowner could not be expected to obtain private finance in the time available.
2. Inability to obtain credit: the client would be expected to make genuine attempts to obtain borrowing from two or more reputable lenders either by telephone, internet or face to face. Evidence of such attempts would need to be provided, specifying why any application for a loan was refused, if this was known. This is in line with the current requirements in assessing clients' alternative sources of funding in ancillary relief proceedings.⁹³
3. High interest: where, because of their credit rating, a client is only able to obtain finance at a prohibitively high rate.
4. Other liabilities: if clients had other significant debt liabilities. This approach is similar to the current approach in ancillary relief proceedings, mentioned above.
5. Inability to service loan repayments: this may be because the client is on a very low income, or may be as a result of a disability, illness or age.
6. Expiry of limitation period: applicable where, for exceptional reasons, the client has not been able to bring the case in good time and the deadline is imminent. What is exceptional will be based on the facts of each individual case, for example, where someone is able to demonstrate that they were taken ill suddenly, just before they intended to lodge a claim.

⁹³ See section 20.20 of the LSC Funding Code Decision Making guidance, and Funding Code Criteria 11.2.7.

- 5.37 Where an individual has applied for Legal Representation to obtain domestic violence protection, the LSC has an existing discretion to waive the eligibility limits for those individuals. In future, we would expect that where an individual was seeking domestic violence protection but was financially ineligible based on capital from property, the LSC would continue to consider exercising their general discretion to waive the eligibility limits in relation to that domestic violence application and the individual would not need to request a property eligibility waiver for that application.

Capital eligibility for Legal Help, Help at Court, Family Help (Lower) and Family Mediation in cases other than contested property cases

- 5.38 We recognise that some clients are able to resolve their problem with the help of early advice or assistance through Legal Help, Help at Court, Family Help (lower) or Family Mediation without needing to take court proceedings. Where clients are financially ineligible for these levels of service in non-contested property cases on the basis of equity as a result of the abolition of the equity and pensioner disregards, we consider that it would be unduly bureaucratic to operate a property eligibility waiver discretion. Therefore we propose to have an exemption for Legal Help so that individuals who are financially ineligible for these levels of service on the basis of disposable capital held as equity will automatically qualify for the property eligibility waiver if their property or properties are worth £200,000 or less in total (i.e. the same maximum property level as the waiver). Pensioners with an assessed disposable income of £315 or less would automatically qualify for the property eligibility waiver for these levels of service in non-contested property cases where their property was worth £300,000 – again, to reflect the maximum property limit for these clients under the proposed waiver.

Question 14: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons.

Question 15: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)? Please give reasons.

Question 16: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

Question 17: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

Question 18: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)? Please give reasons.

Abolition of capital disregards: contested property cases

- 5.39 Currently, different arrangements apply for assessing financial eligibility for legal aid in cases where clients are contesting property. These are generally family cases relating to financial provision on divorce (ancillary relief), or claims by cohabitants for interests in property (see separate scope proposals on ancillary relief from paragraphs 4.154 to 4.158).
- 5.40 In assessing an individual's financial eligibility for a contested property case, the LSC usually treats the contested property (where the title is in joint names) as equally divided between the parties.
- 5.41 In assessing eligibility for 'controlled work' such as Legal Help, Family Mediation and Controlled Legal Representation in Immigration and Asylum cases, the LSC entirely disregards any assets that are in dispute. In assessing eligibility for Family Help (higher) and Legal Representation, the LSC similarly disregards up to £100,000 of capital which is the subject matter of the dispute. This form of disregard is known as the 'subject matter of the dispute' disregard. Under the current scheme, the 'subject matter of the dispute' disregard is applied first to the client's main dwelling if in dispute and then, if any of the allowance remains, it can be applied to other disputed property or capital.
- 5.42 Individuals in contested property disputes also benefit from the same mortgage and equity and capital disregards that apply in cases where the property is not the subject matter of the dispute (see paragraphs 5.27 to 5.32 above). The capital means assessment for Legal Representation in contested property cases currently works as follows:
- any outstanding mortgage, up to a value of £100,000, is subtracted from the value of the property;
 - the remaining equity is divided equally between the parties;
 - the first £100,000 of each person's equity is then disregarded under the 'subject matter of the dispute' rule;
 - where the individuals remain resident in the property (i.e. where it is their main or only home) each person with an interest in the house receives a further £100,000 equity disregard;
 - pensioners on lower incomes may benefit from up to a further £100,000 capital disregard.

- 5.43 If the remaining equity exceeds the £8,000⁹⁴ capital limit for legal aid, the client will be financially ineligible for legal aid.
- 5.44 This means that potentially very significant sums of capital associated with property are disregarded in these contested property cases, which means that public funds may be available for Legal Representation for clients contesting their share of properties worth up to half a million pounds or, in the case of pensioners, up to nearly three quarters of a million pounds. Legal Help is potentially available to those with multi-million pound properties.
- 5.45 While the Government recognises that people may find it difficult to have ready access to capital in cases where property is the subject matter of the dispute, we believe that it is not appropriate for limited public resources to be used in cases where people are arguing over very substantial assets.
- 5.46 For contested property cases we therefore propose to:
- abolish the equity disregard (consistent with our proposal for non-contested cases);
 - retain the ‘subject matter of the dispute’ disregard for Legal Help, Help at Court, Family Help (lower), Family Mediation, and Controlled Legal Representation in Immigration and Asylum cases, but cap this at the first £100,000 of disputed assets (which is currently uncapped); and
 - retain the existing £100,000 ‘subject matter of the dispute’ disregard for Family Help (higher) and Legal Representation.
- 5.47 We consider that a £100,000 ‘subject matter of the dispute’ disregard is appropriate and strikes the right balance between reflecting the difficulty that some individuals may have in accessing their capital in contested cases, while focusing legal aid funds on those of modest means. It also simplifies administration of the scheme by applying the same means limit for disputed assets at both controlled work and certificated levels. The ‘subject matter of the dispute’ disregard would, as now, be applied first to the client’s main dwelling if in dispute and then, if any of the allowance remains, to other disputed property or capital.
- 5.48 The Government recognises that for some clients who hold property, a large proportion of their capital will be the subject of a mortgage. In order that the capital means test should focus on the actual, rather than notional, equity held, we propose to retain the existing mortgage disregard, and extend it so that it would no longer be limited to the first £100,000 of outstanding mortgage. This is consistent with, and would work in the same way as, our proposal for the mortgage disregard in cases in which the property is not in dispute (see paragraphs 5.27 to 5.32).

⁹⁴ £3,000 for Controlled Legal Representation in Immigration cases.

- 5.49 We are concerned to ensure that our limited resources are targeted to individuals of modest means. We recognise that uncapping the mortgage disregard could make individuals with extremely expensive properties eligible for legal aid. We do not consider that it is appropriate for limited public funds to be used to dispute ownership of very high value assets. We therefore propose to introduce a gross capital limit of £500,000 in contested property cases for all levels of service, including Legal Help and Representation. This gross capital limit has been selected because it is broadly the maximum current value of a property that an individual can own jointly under the current legal aid scheme and still qualify financially for legal aid for a contested property case.⁹⁵ The gross capital limit would apply to all of the individual's properties, whether main dwelling or not, and would not be counted as the value of capital before any reductions or disregards (including for mortgages).
- 5.50 We do not consider it appropriate to have a higher gross capital limit for pensioners in contested cases (in recognition of the pensioner disregard to which they are entitled under the current scheme). This is because we do not consider that the scheme should be used to fund disputes about properties worth up to nearly three quarters of a million pounds. The intention is to focus legal aid on those of modest means.
- 5.51 We have considered whether the power to waive the property eligibility limits described above, for cases other than those involving contested property, should also be available in contested property disputes. We recognise that clients may find it difficult readily to access equity when they are involved in a property dispute. Rather than operate a bureaucratic system of discretionary waivers in these cases, we have decided instead that it would be more sensible to retain the existing fixed waiver of £100,000 of disputed assets (the 'subject matter of the dispute' disregard). For this reason, we do not consider it appropriate to extend the discretionary waiver provision to contested property cases.
- 5.52 For cases other than those involving contested property, we have said that individuals seeking legal aid for Legal Help, Help at Court, Family Help (lower) and Family Mediation would benefit automatically from a property eligibility waiver if their property or properties were worth £200,000 or less (£300,000 or less for pensioners). We do not consider it appropriate to have any similar provision for contested property cases which are excluded on the basis of capital because clients will have previously benefited from a fixed waiver of £100,000 of disputed assets.

⁹⁵ For example, under the current scheme an individual contesting a £500,000 house would first benefit from a £100,000 mortgage disregard, then the house would be equally divided between the parties, giving the individual £200,000 of equity. They would then benefit from a further £100,000 'subject matter of the dispute' disregard, and a £100,000 equity disregard (for main dwelling), bringing their capital to zero.

- 5.53 For the avoidance of doubt, the statutory charge will continue to apply in contested property cases that go on to Legal Representation. We will review the rules on postponing the statutory charge on a home so that they match the postponement provisions for the new charge in uncontested property cases (see paragraph 5.35) and the charge will only be postponed when it is unreasonable for the client to repay what they owe immediately.

Question 19: Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases, capped at £100,000 for all levels of service? Please give reasons.

Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.

Question 21: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients? Please give reasons.

Income eligibility

Income contributions

- 5.54 Under the current means test, clients other than those in receipt of passporting benefits are assessed to determine whether they are financially eligible for civil legal aid based on their gross and disposable income. Their disposable income is also assessed to determine whether they are liable to pay monthly income contributions towards their legal costs. Certain types of legal assistance, such as Legal Help and Family Mediation, do not require contributions, and contributions are not required where funding is provided without reference to means.
- 5.55 When calculating a client's disposable income, the LSC makes specific allowances for a number of outgoings.⁹⁶ Where clients have a disposable monthly income of £316 or more, they are required to pay monthly contributions towards their legal costs throughout the life of the case. The Government recognises that this lower income limit is built into the means test to reflect essential expenditure on food, utilities and other items which do not have a specified allowance, and that it broadly reflects the level of subsistence benefits payments which are intended to cover basic essentials. We therefore do not propose to lower the £316 threshold.

⁹⁶ These include: (i) income tax; (ii) national insurance; (iii) employment expenses (standard allowance of £45 per month); (iv) actual expenditure on child-care incurred because of remunerative work; (v) rent or mortgage repayments (capped at £545 per/month for clients with no dependants, otherwise uncapped); (vi) a fixed allowance for partner and dependent children/and/or relatives living with the client; (vii) maintenance payments; and (viii) amounts due under a criminal legal aid contribution order.

- 5.56 The current level of income contribution is determined by reference to three bands of disposable monthly income. Table 2 below indicates how contributions are calculated under the existing scheme, and illustrates the contribution levels paid by clients at the top, middle and bottom of each of the three disposable income bands.

Table 2: Legal Aid contributions in Civil and Family cases

Band	Contribution rate	Monthly disposable income	Current monthly contribution
A (£316–£465)	25% of income over £311	£316.00	£1.25
		£390.50	£19.88
		£465.00	£38.50
B (£466–£616)	£38.50 + 33% of income over £465	£466.00	£38.83
		£541.00	£63.83
		£616.00	£88.83
C (£617–£733)	£88.85 + 50% of income over £616	£617.00	£89.35
		£675.00	£118.35
		£733.00	£147.35

- 5.57 Under the current system, the contributions vary from 0.4% to 20% of the client’s monthly disposable income, with clients with greater disposable incomes required to contribute a larger proportion of their income.
- 5.58 The Government believes that it is appropriate for people with disposable income to contribute towards the cost of their litigation, and considers that a limited increase in contributions from income would encourage even greater financial ownership of the case for those who can afford it. Taking into account the other potential calls upon income (for example, debt payments and pension contributions), we therefore propose to introduce a relatively modest increase in contributions and to limit the increase so that the new contribution equates to no more than 30% of the client’s disposable income (currently, the maximum is 20%). We also propose that the new scheme should take a smaller proportion of disposable income from those who are less well off than from those who have a higher disposable income.
- 5.59 Set out below are two options for reforming the income contributions scheme which we consider are proportionate and fair, and which are consistent with the two design principles set out above. The new contributions scheme would apply to the same levels of service and case types as the current scheme (contributory levels of service but not Legal Help or Mediation).
- 5.60 The first option is based on the current scheme, in that it requires a larger proportion of disposable income from those who are better off and may be better placed to contribute more. Under this option, the proportion of disposable income required ranges from 0.6% to 27.8%.

Table 3: Proposed increase in contributions (Option 1)

Option 1					
Band	Contribution rate	Monthly disposable income	New monthly contribution	Contribution as % of disposable income	Current monthly contribution in this band
A (£316– £465)	increased from 25% to 35% of income over £311	£316.00	£1.75	0.6%	£1.25
		£390.50	£27.82	7.1%	£19.88
		£465.00	£53.90	11.6%	£38.50
B (£466– £616)	£54 (highest contribution from band A) + increased from 33% to 45% of income over £465	£466.00	£54.45	11.7%	£38.83
		£541.00	£88.20	16.3%	£63.83
		£616.00	£121.95	19.8%	£88.83
C (£617– £733)	£122 (highest contribution from band B) + increase from 50% to 70% of income over £616	£617.00	£122.70	19.9%	£89.35
		£675.00	£163.30	24.2%	£118.35
		£733.00	£203.90	27.8%	£147.35

5.61 The second option is based on a simplified scheme which consists of a single band, regardless of monthly disposable income, where 50% of all disposable income over £311 is required as a contribution. This proposal does not taper the level of contribution for those on lower incomes but, because these clients have a lower disposable income, they still pay a smaller proportion of their disposable income than clients with greater resources. This second scheme generally increases contributions by more than the first option, but has the advantage of being simpler to understand and administer.

5.62 Table 4 below quantifies the impact such a scheme would have on each of the current three bands (the nine sets of figures represent the bottom, middle and top of each band) for ease of comparison. As the table shows, the contributions under this scheme range from 0.8% to 28.8% of disposable income, which lies within the proposed modest increase in contribution level (to no more than 30% of disposable income).

Table 4: Proposals for increasing contributions (Option 2)

Option 2				
Contribution rate	Monthly disposable income	New monthly contribution	Contribution as % of disposable income	Current monthly contributions
50% of disposable income above £311	£316.00	£2.50	0.8%	£1.25
	£390.50	£39.75	10.2%	£19.88
	£465.00	£77.00	16.6%	£38.50
	£466.00	£77.50	16.6%	£38.83
	£541.00	£115.00	21.3%	£63.83
	£616.00	£152.50	24.8%	£88.83
	£617.00	£153.00	24.8%	£89.35
	£675.00	£182.00	27.0%	£118.35
	£733.00	£211.00	28.8%	£147.35

- 5.63 The Government believes it is appropriate for people with disposable income to contribute towards the cost of their case, and that people should, where possible, have a financial interest in their case.

Question 22: Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.

Question 23: Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there alternative models we should consider? Please give reasons.

Criminal legal aid

- 5.64 Criminal legal aid is also subject to financial eligibility criteria, which differ depending on whether the proceedings are in the magistrates' court or the Crown Court. The current criteria are set out in Annex B.
- 5.65 The Government has considered a number of options for making adjustments to financial eligibility for legal aid in criminal proceedings. However, the Government is of the view that any contributory scheme in magistrates' courts or changes to income thresholds should be informed by lessons learned from the Crown Court contributory scheme, which has only recently been introduced in England and Wales.⁹⁷ A comprehensive end-to-end assessment of implementation and evaluation of the scheme will take place in the middle of 2012. The data gathered from that assessment will inform future policy on the scope for making further changes to financial eligibility in both the upper and lower courts. For this reason, the Government is not proposing to consult at this stage on changes to the financial eligibility tests for legal aid in criminal proceedings.

⁹⁷ All Crown Court centres started applying the new contributory scheme test from June 2010.

6 Legal Aid Remuneration: Criminal Fees

Introduction

- 6.1 This chapter sets out the Government's proposals for reform of fees paid for criminal legal aid services. These proposals have been designed with the aim of making substantial savings on legal aid expenditure. Views are invited on the questions set out in this consultation. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.
- 6.2 In this consultation, we are signalling our intention to move to new arrangements under which the price paid for services is determined through competitive processes (see paragraphs 6.51 to 6.63 below). The Government believes that competition is the best way to promote innovation and efficiency.
- 6.3 It is the Government's intention that the initial phase of competition will be limited to criminal matters, although subsequently we intend to extend competition to civil and family cases.
- 6.4 Any additional financial savings from competition are likely to be realised over the longer term, with the majority coming outside this spending period which ends in 2014–15. However, there is a pressing need to reduce public spending on legal aid over the next four years. The Government is therefore proposing to make a number of reforms to criminal legal aid fees in advance of the introduction of competition.
- 6.5 Legal aid is one element of the criminal justice process. While one of the main drivers for reform is to achieve financial savings, the proposals set out in this chapter have been designed to be consistent with, and support, the Government's wider programme of reform, in particular:
- streamlining criminal justice procedures so that unnecessary costs to the public purse are avoided;
 - reviewing the prosecution's duty of disclosure in cases which generate large volumes of investigative material, where a disproportionate part of the disclosure cost burden lies; and
 - limiting court proceedings to those matters that require a formal sanction, and using sentence discounts to encourage defendants to acknowledge their guilt at the earliest opportunity.
- 6.6 The Government accepts that these proposals to restructure fees are in addition to the fee reductions implemented in April 2010 to address existing pressures on Ministry of Justice (MoJ) expenditure.

- 6.7 The proposals on fee restructuring in this chapter are freestanding. They are not dependent on decisions the Government may take regarding competition in due course or wider reforms to the system of justice.

Criminal legal aid fees

- 6.8 Under the current scheme, remuneration rates for legal aid work are set administratively. The current structure of criminal fees has developed over time, but has become complex and cumbersome. A description of the current structure of legal aid fees is set out in Chapter 3 and in Annex D to this paper. There are considerable variations in the level of fees for the same types of case depending on whether the case is heard in the magistrates' court or the Crown Court. There is also a considerable difference between the fees paid for an early guilty plea and a late guilty plea (cracked trial) in the Crown Court. These differences do not necessarily reflect the amount of work done on a particular case; rather, fees are determined by the venue or the stage in proceedings at which the guilty plea is entered.
- 6.9 A simple approach to reducing cost would be to apply a general reduction to the amounts paid under the various fee schemes to achieve a particular level of saving. However, this would do nothing to address, and might even reinforce, some of the problems identified with the current scheme. For this reason, we have rejected that approach, and have developed a series of proposals for reform of criminal fees designed to promote swift, efficient justice, complementing wider objectives for the criminal justice system, while ensuring that there remains a sufficient supply of good quality practitioners to undertake criminal legal aid work.

The case for reform

- 6.10 Too many criminal cases that could adequately be dealt with in the magistrates' court are going to the Crown Court. Increasing numbers of those cases go on to plead guilty, often at a late stage in the proceedings. This is inefficient and ineffective for the criminal justice system as a whole and does not represent best value in legal aid expenditure.
- 6.11 Since 2006, we have seen some significant shifts in the workloads of the Crown Court and magistrates' courts:
- the number of cases received for trial in the Crown Court increased by over 26% (around 20,000 cases) to 98,000 cases.⁹⁸ The majority of the increase is accounted for by either way cases committed for trial, which increased by 15,750, or 33%. The increase in the volume of indictable only cases was 4,400, or 14%;

⁹⁸ Source: Judicial and Court Statistics 2009, Ministry of Justice, September 2010, <http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm>

- in contrast, the number of defendants proceeded against in the magistrates' courts fell by 13% between 2007 and 2009;⁹⁹ and
- the proportion of Crown Court cases that resulted in a plea of guilty also rose by 35% between 2006 and 2009.¹⁰⁰ Legal aid data indicate that the average overall expenditure on guilty pleas and cracked trials within the Advocates' Graduated Fee Scheme (AGFS) has increased by 103% and 67% respectively since 2007, taking into account changes in the volume of cases.

6.12 While there are likely to be a number of factors behind these trends, it is notable that almost 60% (around 39,000) of defendants in either way cases sentenced in the Crown Court received a sentence on conviction that a magistrates' court could have imposed. This suggests that although more cases are being committed to the Crown Court, it is not necessarily more serious work, and most could appropriately have been dealt with in the magistrates' courts.

6.13 In 2008–09, 63,000 either way cases were committed for trial in the Crown Court. Of those cases, nearly three quarters (73%) entered a guilty plea at an average total cost of both litigation and advocacy of over £1,700 (for guilty pleas) or just over £3,200 (for cracked trials).¹⁰¹ In comparison, we estimate that the average fees available for all either way cracked trials and guilty pleas in the magistrates' court is around £295¹⁰² (excluding VAT and disbursements). There has therefore been a significant cost to the legal aid fund in cases which might more efficiently have been handled in the magistrates' courts.

6.14 The Government is keen to ensure that criminal cases are resolved quickly, efficiently and cost effectively. However, we are concerned that the current legal aid fee structures may not fully support that aim, and the proposals set out below seek to address this.

Fees in either way cases suitable for summary trial

6.15 Either way cases committed for trial at the Crown Court attract fees under the Litigators' Graduated Fee Scheme (LGFS) and the AGFS, whereas those handled in the magistrates' courts attract a lower single fee under the Magistrates' Courts Standard Fee Scheme. A litigator in a case that pleads guilty before the magistrates' court is likely to be paid a lower or higher standard fee for the whole case. If the same case were to plead in the Crown Court, then the litigator would be paid a graduated fee, plus a fixed fee for the committal. The advocate – whether counsel or a higher court advocate – would also be paid their own separate graduated fee.

⁹⁹ Earlier data series on magistrates' courts workload before 2008 are not comparable with these data.

¹⁰⁰ Ibid.

¹⁰¹ Source: MoJ management information.

¹⁰² Source: MoJ management information.

- 6.16 We wish to reform the fee structure so that it does not inadvertently lead to delay or potentially discourage the defence team from giving consideration to plea with the defendant early in proceedings and before questions of venue have been determined. We have therefore considered a number of options which seek to address this.
- 6.17 One option for cracked trials that we considered was to pay all either way cases under the magistrates' courts fee scheme, regardless of the venue for proceedings. However, the Government recognises that either way cases cover a broad spectrum, and that in practice this proposal would be unlikely to be workable without significant restructuring of the magistrates' courts fee scheme. For these reasons, we believe that any wider reform of all fees in either way cases would be better addressed at the point of competition.
- 6.18 Our alternative and more limited proposal focuses on those cases which the magistrates' court determines are suitable for summary trial but where the defendant elects for trial in the Crown Court, and the case results in a guilty plea or cracked trial. We propose to:
- pay a single fixed fee of £565 for a guilty plea in an either way case tried in the Crown Court which the magistrates' court has determined is suitable for summary trial;
 - enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme by 25% for either way cases; and
 - remove the separate fee for a committal hearing under the LGFS for all cases committed to the Crown Court for trial. This saving will be used to fund the enhanced lower standard fee (and also the enhanced Crown Court early guilty fees proposed below).
- 6.19 The proposal concentrates on those cases in the Crown Court that could, in the opinion of the magistrates' court, realistically have been dealt with in the magistrates' court. (Cases that magistrates decided to commit to the Crown Court and which subsequently pleaded guilty or resulted in a cracked trial would be paid in the same way as indictable only cases discussed below.) In these cases, we do not believe that there is any reason why we should pay significantly more for a guilty plea based on the venue in which the proceedings took place.
- 6.20 The proposed single fixed fee for these cases would be payable to the litigator to cover both litigation and advocacy (in the same way as under the magistrates' court scheme). There would be no separate fee payable under the AGFS for this group of cases. Solicitors could either do the work in-house using a higher court advocate or instruct counsel, negotiating a price directly with that barrister.
- 6.21 The average standard fee for either way guilty pleas in the magistrates' courts is some £353 (excluding VAT) when adjusted to take account of the proposed 25% enhancement to the lower standard fee. However, we have decided to pitch the proposed fixed fee in the Crown Court at the higher level of £565, in line with the average of the Higher and Non Standard fees paid in the magistrates' courts. This recognises that there will be an additional hearing in

the Crown Court. Moreover it also ensures that there is a degree of 'swings and roundabouts' built into the fixed fee, when taken with the proposal to enhance magistrates' courts lower standard fees for either way guilty pleas by 25%.

- 6.22 We know that the Bar has in the past expressed concerns about the introduction of a single fee for Crown Court cases. However, we believe that for this narrow group of cases it is appropriate to replicate more closely the existing payment provisions for magistrates' courts cases, in which the total fee is paid to the litigator who decides whether to perform the advocacy or instruct a member of the Bar to act on an unassigned basis. The new single fee will also cover both litigation and advocacy. As set out above, the fee is pitched at a level higher than the average magistrates' court guilty plea payment for either way cases. If a barrister were instructed then the fee would be a matter to be agreed between the litigator and the advocate. It is difficult to justify spending additional public money on either way cases that the judiciary has objectively determined to be suitable for summary trial simply because the case is heard in a different venue, particularly when the matter does not proceed to trial.

Question 24: Do you agree with the proposals to:

- pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and
- remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?

Please give reasons.

Fees for guilty pleas and cracked trials in indictable only and either way cases where magistrates have declined jurisdiction

- 6.23 Under the current AGFS and LGFS, advocates and litigators are paid:
- a fee for a guilty plea which is accepted at an early stage in proceedings i.e. before or at the Plea and Case Management Hearing (PCMH);
 - a higher fee for a guilty plea accepted later in proceedings. It is treated as a cracked trial if the plea is accepted later, generally after the PCMH but before the start of the trial.
- 6.24 In many cases, the cracked trial fee is more than twice the fee paid for a guilty plea entered before the case is listed for trial, whether or not any additional work has been undertaken. As highlighted in paragraph 6.11 above, payments for cracked trials and guilty pleas have risen considerably since 2007.
- 6.25 The Government sees no reason why it should pay more for a guilty plea offered later in proceedings, than one offered earlier. We therefore propose to harmonise the fees paid for cracked trials and guilty pleas. In Crown Court cases, this would mean that the same fee would be paid for a guilty plea or a cracked trial, regardless of the point in the proceedings at which it was offered.

The approach would have the benefit of promoting efficiency by removing any potential discouragement in the fee scheme for the defence team to give consideration to the plea early in the Crown Court proceedings.

- 6.26 This would apply to all cases that must be tried on indictment (indictable only cases), and it would also apply to the more serious either way cases (i.e. those that the magistrates determined would not have been suitable for summary trial). The actual fee payable for a case would continue to be determined by factors such as the category of offence and the amount of prosecution evidence that are taken into consideration under the current LGFS and AGFS (as set out in Chapter 3).
- 6.27 The Government recognises that, in some cases, the fee currently paid for an early guilty plea would not be sufficient to cover all the work litigators and advocates may have reasonably and necessarily undertaken when a trial cracks late in proceedings. We believe that the best way to achieve an appropriate balance would be to enhance the fee for a guilty plea so that, on average, it provides a reasonable level of overall remuneration when considered across the wider group of cases. We therefore propose to increase the fees currently paid for a guilty plea in the Crown Court by 25% in order to achieve a better balance between the incentives to address plea early, while ensuring that overall payments are reasonable for the wider group of cases, both cracked trials and guilty pleas.
- 6.28 We also recognise that the most complex cases require a significant amount of work in preparation which may not be sufficiently covered by the fee for a guilty plea, even with the proposed enhancement, when averaged across the full range of cases. However, there is an existing facility under the legal aid scheme for an additional fee for special preparation in certain circumstances, including in cases involving more than 10,000 pages of prosecution evidence. We believe that access to an additional fee for special preparation would provide a reasonable and adequate enhancement for the most complex cases.

Question 25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- the proposal to enhance the fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates' Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and
- access to special preparation provides reasonable enhancement for the most complex cases?

Please give reasons.

Adjustments to Some Graduated Fees Categories

Murder and/or manslaughter

- 6.29 Fees paid in cases of murder and manslaughter (category A cases under the LGFS and AGFS) attract significantly higher fees than those offered for other very serious cases (such as serious sexual offences), under both the LGFS and the AGFS. These higher rates reflect the trends in payments made historically under the former 'ex post facto' arrangements (where payments were assessed after the event) prior to the introduction of graduated fees. In 2008–9, the legal aid fund made 4,500 payments totalling just over £90 million in category A cases.¹⁰³
- 6.30 Although cases of murder and manslaughter have a much higher public profile, they do not necessarily raise more complex matters of law or fact than other very serious offences, such as rape and serious sexual offences. The latter cases typically attract fees that are around 25% lower for advocates and around 40% lower for litigators. Although murder carries a mandatory life sentence, many other serious offences also carry a maximum sentence of life imprisonment, including rape and some other serious sexual offences. While cases of murder and manslaughter often involve high volumes of prosecution evidence, such as witness statements, forensic and psychiatric reports, this is separately recognised through the enhancements available for pages of prosecution evidence.
- 6.31 For the reasons set out above, we do not consider that the uniquely high level of fees for category A cases can be justified. The Government therefore proposes to change the fees paid under the LGFS and AGFS for all category A cases (including trials) to those paid for category J (rape cases and other serious sexual offences). The Criminal Defence Service (Funding) Order 2007 (as amended) sets out the rates for category J cases.

Question 26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences? Please give reasons.

Offences of dishonesty

- 6.32 The AGFS and LGFS pay three different sets of fees for offences of dishonesty, depending upon the value of the offences concerned. Offences concerning amounts less than £30,000 are remunerated in category F; those over £30,000 but under £100,000 in category G; and those over £100,000 in category K. This last category was introduced in April 2007 following Lord Carter's review of legal aid procurement¹⁰⁴ while the £30,000 distinction between categories F and G dates back to the original version of the AGFS some ten years earlier. Uplifts are also paid based on the number of pages of prosecution evidence disclosed.

¹⁰³ Source: MoJ management information.

¹⁰⁴ See footnote 12 above.

- 6.33 We do not believe that the value of an offence provides a particularly reliable proxy indicator for the complexity of the case. For example, a single transaction of over £30,000, such as the fraudulent cashing of a single cheque, may be legally and factually less complex than a series of lesser value transactions conducted over a long period, such as the systematic theft of small amounts from an employer that totalled less than £30,000. We believe that the enhancement available for pages of prosecution evidence provides a reasonable and adequate reward for case complexity, as more complex cases will generally have a greater number of pages of evidence.
- 6.34 We considered the case for removing all the distinctions between cases of dishonesty based on value. However, on balance we thought the better course was to:
- amalgamate categories F and G, remunerating most cases of dishonesty (including trials) at the category F level, with fee enhancements available as at present based on the number of pages of prosecution evidence; and
 - retain category K for the most serious offences of dishonesty, with values over £100,000.

Question 27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000? Please give reasons.

Other fee changes

Pages of prosecution evidence

- 6.35 As explained in Chapter 3 and Annex D, the number of pages of prosecution evidence served on the Court is one of the proxies for case complexity used by both graduated fees schemes in determining payments for litigators and advocates in Crown Court cases. Electronic service of evidence is likely to increase over the next few years as prosecutors, defence practitioners and the Courts adopt more efficient ways of working. We propose to work with the Crown Prosecution Service (CPS) and defence practitioners with the aim of formulating a revised definition of evidence that will capture appropriately the types of evidence likely to be served in the future and is sufficiently robust to act as a proxy for case complexity within the graduated fees schemes.

Aligning magistrates' court fees in London with other major urban areas

- 6.36 There are, at present, three different sets of fees payable for magistrates' court work depending on the location (i.e. Rural Areas,¹⁰⁵ Urban Areas and London). The fees in London are the highest of the three sets of fees. For example, the Lower Standard Fee for a guilty plea is £221.59 in urban areas and £284.35 in London and the Higher Standard Fee for a contested trial is £792.71 in urban areas and £1,005.49 in London. We do not believe that such a differential in fees can be justified, particularly as there is a more than adequate supply of

¹⁰⁵ Travel and waiting is paid separately in rural areas only.

solicitors willing to undertake criminal work in London. An indication of the number of providers that are willing to work in the magistrates' courts is that the 18 police station schemes with the most members are all in London, and all 31 London schemes are in the busiest 50 in the country. For example, there are over 140 firms of solicitors on the duty rota in Central London.

- 6.37 Fees for Crown Court work provide no additional allowance for work carried out in London. We propose, therefore, to remove the distinction in magistrates' courts fees payable in London, bringing them into line with the fees paid in other major urban areas.

Advocates' Graduated Fees – 'bolt ons'

- 6.38 The AGFS includes a number of ancillary payments, or 'bolt ons', for specific tasks. The number of such 'bolt ons' was reduced following Lord Carter's Review of Legal Aid procurement,¹⁰⁶ with a number of them being incorporated within the basic fees payable to advocates. (The first five standard appearances and the first three conferences, for example, are now included in the basic fee.) Many of the remaining 'bolt ons' were increased in value. The CPS scheme for advocates does not incorporate any ancillary fees within the base fee and follows more closely the defence AGFS scheme structure prior to the Carter changes. In addition, some CPS rates¹⁰⁷ are considerably lower than the defence rates. For example, a standard appearance is currently paid £96 under the AGFS, whereas the CPS pays £46.50 and a sentencing hearing is currently paid £119 under the AGFS, whereas the CPS pays £60.

- 6.39 Lord Carter also proposed that the total amount spent on 'bolt ons' should be capped at just over £10 million per annum. However, current expenditure on 'bolt ons' is now nearly double this amount at approximately £20 million per annum. We intend to reduce expenditure on 'bolt ons' to bring it more closely into line with what Lord Carter originally proposed. However, we do not propose to incorporate 'bolt ons' within the base fees, as Lord Carter had suggested, as this would spread the money across all cases including those that did not justify any additional payment. Instead, we propose to reduce the relevant 'bolt on' fees by 50% to ensure that the money, though reduced, is targeted to appropriate cases. Special preparation for cases with more than 10,000 pages will continue to be paid at current rates as it provides appropriate enhancement for the most paper heavy cases, as set out above. Fees for appeals against conviction or sentence, and fees for committals for sentence are fixed fees, rather than 'bolt ons', and therefore will remain unchanged.

Question 28: Do you agree with the Government's proposal to a) remove the premium paid for magistrates' courts cases in London; and b) reduce most 'bolt on' fees by 50%? Please give reasons.

¹⁰⁶ See footnote 12 above.

¹⁰⁷ Most CPS Ancillary Fees attract a 10% uplift per each additional defendant.

Payments in Very High Cost Criminal Cases

- 6.40 Very High Cost Criminal Cases (VHCCCs), which are defined as cases expected to last more than 40 days (and some expected to last 25–40 days) at trial for litigators and more than 60 days for advocates, are managed under individual contracts. Work is negotiated in approximately three month stages with an LSC contract manager. Case plans and stage plans are agreed, which provide litigators and advocates with the maximum number of hours and the maximum hourly rate that they may claim for specific items of work.
- 6.41 Payments for VHCCCs have consumed a very high proportion of legal aid spend. There are around 100 cases contracted as VHCCCs each year which represents only 0.1% of Crown Court cases by volume. But payments for these cases totalled £95 million¹⁰⁸ or a little under 13% of total spend on Crown Court cases in 2009–10.
- 6.42 Following consultation, the previous Government introduced new fees for all VHCCC work and changed the scope of the scheme for advocates. The VHCCC scheme for advocates was amended with effect from July 2010, so that it now covers cases with an estimated trial length of over 60 days instead of 40 days, with cases of between 41 and 60 days now paid under the AGFS. As a result of both these changes, the number of VHCCCs is likely to fall to around ten per year for advocates (under the AGFS) with overall costs expected to fall by around £10.8 million per annum.¹⁰⁹
- 6.43 The previous Government decided not to pursue a similar change to the way in which litigators are remunerated for VHCCCs, on which it consulted during 2009–10.¹¹⁰ The reason was that at that stage the LGFS had only been recently introduced and a post-implementation review had not been completed. That review¹¹¹ has now been completed and shows that some cases are paid more generously under the LGFS while some others are paid less generously, relative to payments under the former scheme. Significantly, the full level of savings has not been realised, in part because a number of paper heavy cases that ought to have been contracted as VHCCCs have been paid through the LGFS.
- 6.44 We believe that the inconsistent approach to a VHCCC (depending on whether it is for litigation or advocacy) is difficult to justify as there is little difference in a case from the point of view of litigator and advocate. Fundamentally, the VHCCC scheme rewards inputs (hours worked), whereas graduated fees

¹⁰⁸ Source: Legal Services Commission.

¹⁰⁹ See the Impact Assessment at <https://consult.legalservices.gov.uk/gf2.ti/f/184610/3762181.1/pdf/-/Legal%20Aid%20%20Reforming%20Advocates%20Graduated%20Fees%20and%20Very%20High%20Cost%20Crime%20Cases%202010%20%20Impact%20Assessment%20%20Apr%202010.pdf>

¹¹⁰ *Legal Aid: Reforming Advocates Graduated Fees*: MoJ CP 54/09, 16 December 2009. <http://www.justice.gov.uk/consultations/docs/consultation-legal-aid-reform-advocates-fees.pdf>

¹¹¹ See footnote 26 above.

reward outputs (cases completed). We wish to reward efficient providers through the graduated fees schemes and to move away from hourly rates payment wherever possible. We therefore propose to align the VHCCC scheme for litigators so that it covers the same cadre of cases as is covered by the scheme for advocates.

Question 29: Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates? Please give reasons.

Independent assessor for VHCCCs

6.45 In future, for the reasons set out above, we anticipate that there will be a much smaller number of VHCCCs because only those trials expected to last more than 60 days would be treated as VHCCCs. We are also considering whether it would now be practicable, and provide value for money, for the LSC to appoint an independent assessor for VHCCCs. The role of the assessor would be to review and challenge the defence representative's assessment of a case, potentially providing the LSC with more effective control over the management and costs of a case.

6.46 To be effective in this role, the assessor would need to have extensive experience in managing complex cases. He or she might well be a retired or seconded serving senior judge, or alternatively a pre-eminent litigator or advocate experienced in lengthy, complex proceedings. Their role could support decision making by contract managers and lawyers within the LSC's Complex Crime Unit (CCU), taking a pro-active role in challenging assessments of work by representatives. This could in part replace the current appeals system whereby representatives can appeal a decision of the CCU to refuse to allow particular items of expenditure. Appeals are currently heard by experienced lawyers, acting either as a single adjudicator or as a committee drawn from an appeal panel established by the LSC. Moving and expanding this role as proposed could, we believe, reduce expenditure on VHCCCs. However, employing an assessor (possibly more than one to deal with cases where conflicts of interest arise between defendants) would be an additional administration cost to the LSC.

Question 30: Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases? It would be helpful to have your views on:

- the proposed role of the assessor;
- the skills and experience that would be required for the post; and
- whether it would offer value for money.

Please give reasons.

Limiting the use of leading counsel, and/or multiple advocates

- 6.47 The normal rule in legally aided criminal cases is that defendants should be represented by a single junior counsel. However, the Court does have the power to make a representation order appointing leading counsel, leading and junior counsel, or two junior counsel in certain circumstances.¹¹² In 2008–9, payments were made to Queen’s Counsel (QCs) or leading junior counsel in over 1,500 cases at a total cost of £52 million.¹¹³
- 6.48 We are concerned to ensure that such orders are made only where it is in the interests of justice, and where the appointment of leading, or multiple counsel, is the most cost effective means of managing the case. We propose to work with the senior judiciary and prosecutors to ensure that the framework for two advocates is working properly and ensure that leading or multiple advocates are only appointed in cases in which it is justified.
- 6.49 We have also reviewed the criteria and propose that two of the criteria for granting two junior advocates be amended. Under the current arrangements to allow two junior advocates, the Court must currently be satisfied that:
- 1) the case for the assisted person involves substantial, novel or complex issues of law or fact which could not be adequately presented by a single advocate; and
 - 2) either:
 - i) two or more advocates have been instructed on behalf of the prosecution;
 - ii) the case for the assisted person is exceptional compared with the generality of cases involving similar offences;
 - iii) the number of prosecution witnesses exceeds 80; or
 - iv) the number of pages of prosecution evidence exceeds 1,000.
- 6.50 We no longer believe that the criterion at (2) (iv) is pitched at the right level. Our analysis indicates that the average number of pages of prosecution evidence in trials of up to 25 days has increased by 65%¹¹⁴ since 2004–05. Our analysis looked at those case categories where leading counsel or multiple advocates were likely to have been granted. This increase, in part, could be due to the volume of digitally stored media that is now available to prosecutors. For example, in some cases large volumes of mobile telephone records are included within the evidence to show contact between co-conspirators or to locate defendants within a particular mobile telephone cell at a particular time. We believe that it is necessary to re-examine the level of the page threshold,

¹¹² Set out in the Criminal Defence Service (General) (No. 2) Regulations 2001. <http://www.legislation.gov.uk/ukSI/2001/1437/contents/made>

¹¹³ Source: MoJ management information.

¹¹⁴ This is the weighted average, taking into account offence type and length of trial, and used only for trials of up to 25 days because trials of over 25 days may have been contracted as VHCCCs in 2004–05.

which is intended to ensure that only the weightiest complex cases are allowed two junior advocates. While we believe an increase in the pages of evidence threshold in line with the increase in pages of 65% would be justified, we propose to take a more cautious approach and amend the criterion so that two advocates may be granted in cases where the number of pages of prosecution evidence exceeds 1,500 (provided, of course, that criterion 1) is also satisfied).

Question 31: Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages? Please give reasons.

Introducing price competition

- 6.51 While it is possible over the short term to address the financial pressures on public expenditure, the Government recognises that it is unlikely to be sustainable in the longer term to continue to tighten remuneration indefinitely within broadly the current fee and market structures.
- 6.52 We therefore intend in the longer term to replace the current system of administratively set rates with a model of competitive tendering. Ultimately, our aim is to be in a position whereby we would define the services we wish to purchase, but would let the market determine how those services were delivered. Suppliers would be able to bid a price for a volume of work that suited their business model and which would allow them to deliver services innovatively and profitably. They would also have the opportunity to expand should they wish to do so. The Government as purchaser would have confidence that it was paying the right price to secure sustainable supply and achieving value for money by selecting the most efficient providers.
- 6.53 A move to full market competition is likely to present significant challenges in design and delivery. It will also provide challenges for providers who will need to determine the right price to offer for their services in line with their particular business model in order to bid effectively. Nevertheless, we are clear that competition is the right way forward. The Government intends in the first phase to restrict competitive tendering to criminal work only, and intends over a longer period to introduce competition in civil and family services provided face to face (the provision of telephone advice services is already competed).
- 6.54 There have been previous attempts to develop and implement a form of competition within the criminal legal aid market. This has included the LSC's plans to pilot Best Value Tendering, which the previous Government felt were insufficiently ambitious and would not deliver the restructured legal services market envisaged by Lord Carter. More recently, there has been the policy statement on restructuring the Criminal Defence Service published by the previous Government in March 2010 following the decision not to proceed with the Best Value Tendering pilots.¹¹⁵ The fact that there have been these previous

¹¹⁵ *Restructuring the delivery of Criminal Defence Services* (March 2010).
See <http://www.justice.gov.uk/publications/restructuring-delivery-criminal-defence-services.htm>

attempts to introduce competitive tendering is testament to the complexity of the criminal defence services market. Proper consideration needs to be given to the design of an appropriate model of competitive tendering. We intend to undertake further analysis to develop detailed proposals and to set out our plans in a subsequent consultation paper during 2011.

- 6.55 While we are currently considering what form competition might take and have not reached any firm conclusions at this stage, we consider that the proposals set out by the previous administration in March have a number of attractions that merit further, more detailed consideration. For example, the proposal that a more limited form of competition be introduced under which providers would bid against existing administrative fees may have advantages, as providers are already familiar with these structures.
- 6.56 Similarly, we agree in principle that unnecessary contractual obligations should be removed in order to encourage innovation and reduce the costs of delivery. The design of the competition will also seek to remove any unnecessary barriers to entry, and ensure that all potential suppliers are able to compete on a level playing field.
- 6.57 We also think that there could be benefits in inviting bids at criminal justice system (CJS) area level, where this made sense in terms of the current structure of supply and geography, as it would offer providers scope to expand should they wish to do so and it could help to ensure supply is secured across both rural and urban areas. However, in some parts of England and Wales, it would be more difficult practically for providers to cover the whole CJS area, or to do so would build in extra costs that would be reflected in the prices achieved through a tender. Further analysis is therefore needed before we can come to firm conclusions on the pricing structure and on the appropriate geographical bid area.
- 6.58 Competition will inevitably result in changes to the current structure of provision of criminal legal aid, and we believe there is likely to be scope for greater efficiencies by moving away from a model under which the LSC contracts with some 1,700 criminal providers working from over 2,000 offices. However, the Government does not have a fixed view on the number of firms that should hold contracts, and nor do we believe that the service needs to be delivered exclusively by a particular size of firm. Rather, the shape of the market following competition should be determined through the individual decisions of participants on the basis that their bids offer the best price, and through an open and fair competitive tender process.
- 6.59 We envisage tendering the full range of mainstream criminal defence work from police stations to the Crown Court on a competitive basis, and that following the full implementation of competition, only successful bidders would be able to undertake publicly funded criminal defence work. However, we are considering arrangements that would allow successful contractors to deliver the range of services required through sub-contracting or consortia relationships with other providers. This could create a more flexible market and offer opportunities for different types of business model, including those that did not directly win

contracts. We expect to award contracts to those firms that meet a set of entry and assessment criteria and can offer the services we require at the best price.

- 6.60 This subsequent consultation paper will set out the areas we intend to tender on a competitive basis and how we will phase implementation. Given the financial pressures faced by the Government, it is likely that we will tender the most urbanised areas first, as the volumes of work are greater, there are more providers and thus competition is likely to be stronger, and there is the greatest potential for savings. Where volumes of work are lower and there are fewer providers, we would expect to tender these areas later, but we will also consider retaining the current administrative pricing regime in the most rural areas.
- 6.61 We will also review the existing crime contract to identify any opportunities to streamline contractual requirements consistent with the need to ensure appropriate quality assurance processes and effective audit controls. For example, we will be looking at whether providers should have greater discretion to exercise their professional judgment in determining whether a police station attendance is necessary or whether they could provide the necessary advice over the telephone. We will examine the current police station fee structures and arrangements for allocating duty slots and consider the scope for simplification. We will also consider in detail the selection criteria against which participants in a competitive tender will be judged in addition to price criteria. This includes, for example, quality criteria and any necessary criteria to assess capacity to deliver the work for which participants in the tender have bid.

Indicative timetable

- 6.62 We intend to consult separately on a competitive tendering model in 2011. This consultation will be accompanied by an impact assessment. Subject to the outcome of that further consultation, we will look to open a price competitive tender in selected areas during 2011, with new contracts coming into effect in these areas in 2012. Further competitive tenders will follow in other areas on a rolling timetable. Further detail will be provided in the subsequent consultation.
- 6.63 Decisions on the fee restructuring proposals outlined earlier in this chapter are not, however, dependent on the outcome of this further consultation. If we decide, following this consultation, to implement the fee restructuring proposals, we would do so whether or not the subsequent competition proposals are implemented.

7 Legal Aid Remuneration: Civil and Family Fees

Introduction

- 7.1 This chapter sets out our proposals for reform to the fees paid in civil and family proceedings. The proposals, which are set out later in this chapter, have been designed with the aim of making substantial savings in legal aid expenditure. Views are invited on the questions set out in this chapter. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.
- 7.2 The legal aid fee regime operating for civil and family proceedings is very different to that for criminal cases. Details of these, and of recent changes, are set out in Chapter 3.
- 7.3 In Chapters 4 and 5 of this consultation paper, the Government sets out a series of proposals for limiting the scope of, and eligibility for, legal aid in civil and family proceedings. Subject to the results of this consultation, if these changes are implemented, they will represent a significant programme of reform to the legal aid scheme.
- 7.4 In the longer term, the Government's intention is to introduce competition to set legal aid prices. Although in the first phase this is limited to criminal cases (see Chapter 6), subsequently we also intend to extend competition to civil and family cases.

Proposals for reform

- 7.5 In light of the need to reduce overall spending on legal aid, the Government believes that it is right, in advance of the longer term goal of competitive price tendering being introduced in civil cases, that opportunities for further efficiency savings are considered. At this stage, and until such time as any changes to scope and eligibility have had time to be implemented, the Government proposes only to make relatively simple changes to the fees paid in civil and family proceedings, rather than to undertake complete restructuring of fees.¹¹⁶

¹¹⁶ In respect of family legal aid, this needs to read in the light of paragraph 7.26, which refers to two new family fee schemes (the Private Family Law Representation Scheme and the Family Advocacy Scheme) which have been the subject of full previous consultation. These were due to be introduced in October 2010 but implementation has been delayed following the Law Society's successful judicial review of the family tendering process. We have recently confirmed our intention, subject to necessary statutory consultation, to bring forward a Funding Order to introduce these schemes as soon as it is possible to do so.

- 7.6 Specifically, we propose to reduce all fees paid under the civil and family legal aid scheme – including fees for ‘controlled work’ (legal advice) and fees for ‘certificated work’ (primarily funding for representation at court) – by 10%. This level of fee reduction has been proposed to draw a balance between:
- on the one hand, the need to reduce spending, and to encourage providers to be efficient and innovative; and
 - on the other, ensuring that clients can continue to access legally aided services.
- 7.7 This reduction would apply both to prescribed hourly rates and to all civil and family standard and graduated fees. However, it would not apply to ‘risk rates’ currently paid in non-family high cost cases which are already well below other rates when enhancements are taken into account. In paragraphs 7.15 to 7.21 below, we propose a significant extension in the use of risk rates as well as proposals to rationalise some aspects of the schemes relating to certificated legal aid work.

Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.

Civil non-family certificated work

- 7.8 The Legal Services Commission’s (LSC) total annual spend for representation in non-family civil cases in 2008–09 was some £97 million: £70 million to solicitors, and £27 million to barristers. The largest proportion of this was on housing cases, followed by clinical negligence, actions against the police (and other public bodies), and judicial review cases. For some of these types of case, alternative forms of funding, such as Conditional Fee Arrangements (CFAs), are available, and the availability of legal aid may be encouraging people, and their lawyers, to bring cases which have too little chance of success to attract a CFA. Legal aid may also put clients in an advantageous position compared with private clients. Neither of these is an appropriate use of public money.

Payments to solicitors and barristers

- 7.9 The hourly rates paid to solicitors for representation in civil cases are set out in the LSC’s contracts.¹¹⁷ For example, the current non family High Court hourly rate for preparation is £79.50 in London (£75 outside London). The rate for attending court with counsel is £37 per hour. On top of this, these rates can be ‘enhanced’ (i.e. increased) on assessment by up to 100% for cases heard in the county court, and by up to 200% for cases in the High Court. Enhancements are based upon a range of factors including the skill, competence, expertise and speed of the work, and complexity of the case. Typically, enhancements are between 30% and 50%, making the typical hourly rate paid for preparation between £103.35 and £119.25.

¹¹⁷ http://www.legalservices.gov.uk/docs/civil_contracting/payment_annex_2010_-_Dec_09.pdf

- 7.10 In many other areas of law, the same rates are now paid to those carrying out advocacy and related tasks, regardless of whether they are solicitors or barristers. In the long term, we aim to make similar provisions for the fees paid in civil non-family cases. Solicitors' hourly rates are prescribed, as set out above. Barristers' hourly rates, on the other hand, are at present agreed on an overall rate basis, based on an unpublished set of 'benchmark' or 'reasonable' rates held by the LSC, with no provision for enhancements. For solicitors, as described above, enhancements can be applied item by item to reflect the necessary skill required to undertake each piece of work within the firm. The position with barristers is different, in that work is distributed to barristers dependent upon the required skill and they are currently separately remunerated on that basis. At present, there are no hourly rates for barristers set out in contract or regulations.
- 7.11 For 'standard' cases, the 'reasonable' range for a barrister approved by the LSC is £120–£150 per hour. For more complex cases, the benchmark rates vary according to level of barrister, the role they play and the level of court, from £120 per hour for junior counsel in the county court, to £200 per hour for leading senior counsel in the House of Lords. Prior approval from the LSC is required for the use of Queen's Counsel.

Capping enhancements

- 7.12 In order to make payments more predictable and bring costs under greater control, we propose that the enhancements which can be paid to solicitors (see paragraph 7.9 above) should be capped at 100% for cases in the High Court, Court of Appeal and Supreme Court and 50% for all other courts. We believe that this should provide sufficient flexibility to allow appropriate enhancements in a complex case, while maintaining consistency between the fees mandated and the actual fees paid. At the same time, we propose that the LSC should issue detailed criteria for setting enhancements. This would provide greater certainty for all involved by providing prospective, rather than retrospective, determination and reduce the costs of assessment at the end of the case.

Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

Codifying barrister rates

- 7.13 Payments to barristers are on the basis of 'benchmark' rates. These are as set out in Table 5 below. We propose that these should be codified to provide greater clarity and control, and subject to a further 10% reduction in line with the general reduction in rates described above. Although the base rates for barristers are already significantly higher than those for solicitors, this is balanced to an extent by the fact that enhancements are not available. These proposed rates would apply in cases where 'risk rates' were not used.

Table 5: Proposed hourly rates

	Current hourly rate	Proposed hourly rate (-10%)
Junior counsel in county court	£120.00	£108.00
Senior counsel alone or leading in High Court	£150.00	£135.00
Led junior counsel in High Court or Court of Appeal	£125.00	£112.50
Leading senior counsel in Court of Appeal	£175.00	£157.50
Queen's Counsel (where approved for instruction by LSC) in the High Court or Court of Appeal	£200.00	£180.00
Leading senior counsel in the Supreme Court	£200.00	£180.00
Queen's Counsel (where approved for instruction by LSC) in Supreme Court	£250.00	£225.00
Noter/Pupil/2 nd led junior counsel	£40.00	£36.00

7.14 It is proposed that rates for Queen's Counsel in the Supreme Court are set at higher rates than those in the High Court or Court of Appeal to reflect the novelty and complexity of the case issues being advocated. At present, this is the case in criminal legal aid, where there are fixed rates for the Crown Court with a maximum of £145 per hour and 'brief' and 'refresher' benchmarks published by the Supreme Court.

Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5 above, subject to a further 10% reduction? Please give reasons.

'Risk rates'

7.15 In most civil non-family proceedings, costs may be recovered from the 'losing' party and retained by the legally aided lawyers if the case succeeds. However, cost awards are more predictable in some categories of case, such as damages claims (for example, actions against the police and other public bodies) than in others, such as judicial review. A different set of payment rates from those described above applies at present in civil non-family cases costing more than £25,000 (known as Very High Cost Cases or VHCCs). In these types of case, where costs will be recoverable in the event of the claim succeeding, lawyers are paid at 'risk rates': £70 per hour for solicitors; £50 per hour for junior barristers; and £90 per hour for senior barristers,¹¹⁸ without general enhancements. Letters and telephone calls are paid on the basis of time spent. Travel and waiting is paid for solicitors at a quarter of the hourly rate. These rates are payable if the legally aided party is unsuccessful, if the Court does not make a costs order, or if the opponent fails to satisfy an order to pay the assisted person's costs. Higher rates are offered for cases categorised by the LSC as 'borderline': cases which are so uncertain that lawyers require an incentive to take them on. There are strict criteria for borderline cases, which are only funded if the case is considered to be of 'significant wider public interest', or to be of 'overwhelming importance to the client', or to raise significant human rights issues. For these cases, the rates are increased by 30%.

¹¹⁸ Senior barristers are considered to be those of ten years' call and above, including Queen's Counsel.

- 7.16 At present, the 'risk rates' only apply once the costs of the case have reached £25,000, and it has been identified as a VHCC. If the legally aided client is successful in the case the costs will normally be paid by the opponent at a higher rate. The reason the risk rates were applied from £25,000 was for administrative simplicity, and to avoid an incentive for lawyers to delay reporting of cases as very high cost. The principle was that lawyers would have the opportunity to assess the risks of the cases before 'risk rates' applied.
- 7.17 We believe that the system of 'risk rates' discourages lawyers from proceeding with cases which have little chance of success. Since the introduction of the civil VHCC scheme in 2000, the success rate in the main VHCC non-family cases has increased by over 10%, and the net cost to the fund of each case has reduced by over 30%.¹¹⁹ Looking at civil VHCCs alone, the success rate in clinical negligence cases has risen from 80% to 91%, while the average net cost of a case to the legal aid fund has reduced from £13,308 to £5,495. In cases involving actions against the police and other public bodies, the success rate is up from 51% to 92%, with average net costs down from £25,905 to £4,840. Finally, in public law cases, the success rate is up from 30% to 50%, with average net costs reduced from £47,396 to £33,762. The introduction of risk rates has been a significant contributor to this improved rate of success for clients and greater value for money for the legal aid fund.
- 7.18 We consider that there is no reason in principle why 'risk rates' should not apply to cases not defined as VHCCs, and at an earlier stage, before costs have reached the £25,000 total. Once the investigative work on a case is complete, the lawyers are in a position to assess the risks of proceeding with the case, and it would make sense for 'risk rates' to apply from that point on. We therefore propose that in all civil non-family cases where costs would normally be recoverable (see paragraph 7.21 below), 'risk rates' should become payable for both solicitors and counsel as soon as the investigative stage of the case is completed, or once the total costs reach £25,000, whichever is the sooner.
- 7.19 For practical purposes we propose that the definition of the end of the 'investigative stage' should be the point at which the case moves from Investigative Help¹²⁰ to Full Representation¹²¹ as defined in the Funding Code. Where a case goes straight to Full Representation (with no Investigative Help payments), 'risk rates' would be payable from the point at which the legal aid certificate was issued.

¹¹⁹ Source: Legal Services Commission.

¹²⁰ '*Investigative Help*' means Legal Representation which is limited to investigation of the strength of a proposed claim. Investigative Help includes the issue and the conduct of proceedings only so far as necessary to obtain disclosure of relevant information or to protect the client's position in relation to any urgent hearing or time limit for the issue of proceedings.

¹²¹ '*Full Representation*' means a grant of Legal Representation other than Investigative Help.

- 7.20 The 30% enhancement for 'borderline' cases would continue to be available in appropriate cases for counsel and for solicitors in the High Court. Where a 'borderline' case is funded in the county court, then we propose that payment for solicitors remain at solicitors' standard rates.
- 7.21 We consider that many civil non-family cases would be suitable for 'risk rates'. Damages claims, including those against public authorities, are particularly likely to be suitable and we would generally expect 'risk rates' to apply to them.
- 7.22 There are a small number of cases where the Government does not believe that it would be appropriate to apply risk rates. There are some exceptional cases where, even in the event of success, an order for costs is unlikely to be made; for example, 'best interest' cases, where the Court is asked to determine an issue such as whether a life support machine should be switched off. These limited types of case would continue to be paid at prescribed rates (as described at paragraph 7.9 above).
- 7.23 In judicial review cases, while costs often follow the event, if the decision under challenge is amended at the pre-permission stage, it would be less common to receive costs. We therefore propose that in judicial reviews, 'risk rates' will apply either after the initial application for permission has been considered, or when the costs of the case reach £25,000, whichever is the sooner.

Question 35: Do you agree with the proposals:

- to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and
- to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?

Please give reasons.

Question 36: The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23 above) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

Family certificated work

Capping enhancements

- 7.24 Work by solicitors falling outside the standard fee schemes (or escaping from them under relevant provisions) are paid at hourly rates with enhancements, similar to those for civil non-family cases (see paragraph 7.9 above). However, in family cases, there are minimum enhancements of 15% for members of certain relevant panels¹²² and the maximum allowable enhancement is 100%. We propose that these enhancements should be capped and defined in the

¹²² The Law Society's Family Law Panel (Advanced), the Resolution Accredited Specialist Panel and, in respect of proceedings relating to children, the Law Society's Children Panel.

same way as for civil non-family cases, set out above. This means that for family cases, the 50% cap would apply to cases in the Family Proceedings Court and county court. We propose however to maintain the minimum enhancement of 15% for members of the relevant panels.

- 7.25 We propose that the LSC should issue detailed criteria for setting enhancements. We believe that this would allow sufficient flexibility to provide appropriate enhancements for complex cases, while maintaining consistency, certainty and transparency.
- 7.26 Two new payment schemes have been developed following full public consultation: the Private Family Law Representation Scheme and the Family Advocacy Scheme. The Private Family Law Representation Scheme will introduce standard fees for representation (excluding advocacy) in most private law family cases, and the Family Advocacy Scheme will introduce a graduated fee scheme which pays the same fees for advocacy to both barristers and solicitors. Introduction of these schemes has been delayed following the Law Society's successful judicial review of the LSC's family tendering process. The Government has recently confirmed its intention, subject to statutory consultation, to bring forward a Funding Order to introduce these schemes as soon as it is possible to do so.
- 7.27 For the avoidance of doubt, the proposal to reduce fees by 10% (see paragraphs 7.5 to 7.7 above) would apply to all payment rates and fees for family in force at the point of implementation.

Use of Queen's Counsel in family cases

- 7.28 We are also concerned to ensure that the use of Queen's Counsel (QCs) in family proceedings is controlled better, so that they are only used in complex, novel or exceptional cases which require that level of skill, expertise and experience.
- 7.29 At present, in family proceedings, QCs are funded by legal aid predominantly in care proceedings. In a minority of cases, the legally aided client is bringing proceedings against a privately funded individual (usually a family member). The total amount of legal aid paid to family QCs is approximately £5–7 million per year, representing only around 300 certificates, with QCs' fees typically ranging from £10,000 to £100,000 per case. A QC in a VHCC is currently paid by the LSC at an 'event rate' of £2,310 per day for hearings, advocates' meetings or conferences with clients.

- 7.30 We believe that such an expensive, and very specialised, resource should only be provided at public expense where it is absolutely necessary. We therefore propose to tighten the guidance covering the engagement of a QC in a family case (whether the case is above or below the VHCC threshold) to make clear that they should only be approved by the LSC if they meet provisions equivalent to those applying in criminal cases.¹²³ In brief, these provisions are that:
- the case involves substantial, novel or complex issues of law or fact which could only be adequately presented by a QC; and
 - either the opposing party has engaged a QC or senior Treasury Counsel, or the case is exceptional for some other reason.
- 7.31 Where QCs are used, we also propose to reduce payments under the ‘events model’ by 10% in line with the proposed reductions in other civil and family rates.

Remuneration for excluded cases

- 7.32 Individual cases that are currently excluded from the scope of the civil legal aid scheme, but which are in the event funded exceptionally, are remunerated on a discretionary basis.
- 7.33 We propose that in future individual cases that are excluded from the scope of the civil legal aid scheme but which in the event are funded through the new scheme for excluded cases, should be paid at the current appropriate fixed fee, or hourly rate for the category of law and level of service, depending on the type of case. For example, a housing law case that is excluded from scope but which is funded individually would be paid at the current housing fixed fee rate for Legal Help, and at the appropriate civil representation rate for Legal Representation. The rates for cases that fall into no specific category – for example, inquests (which are already out of scope) will continue to be paid at the current discretionary rates – subject to paragraph 7.34 below.
- 7.34 The proposals for fee reductions and restrictions, outlined earlier in this chapter, would also apply to remuneration for cases which are funded under the new funding scheme for excluded cases. For example, the reduction of 10% in all fees and rates would also apply to individual cases which are funded through the funding scheme for excluded cases.

Question 37: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

Question 38: Do you agree with the proposals to restrict the use of Queen’s Counsel in family cases to cases where provisions similar to those in criminal cases apply? Please give reasons.

¹²³ Set out in regulation 14 of the Criminal Defence Service (General) (No 2) Regulations 2001.

8 Expert Fees: Civil, Family and Criminal Proceedings

Introduction

- 8.1 This chapter sets out the Government's proposals for the reform of expert fees in civil, family and criminal proceedings. The proposals, which are set out below, have been designed with the aim of contributing towards the substantial savings required in legal aid expenditure. Later in this chapter, we invite views on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

Background

- 8.2 As set out in the consultation paper '*Legal Aid: Funding Reforms*' issued in 2009,¹²⁴ experts are a disparate group, with a wide range of specialist skills and knowledge, who are used to provide information in court cases. For some experts, this is their sole professional activity. Others deliver these services alongside their 'day job', working in their private time. The experts' market is complex, with a number of different bodies involved – some of them based on particular professions, others on the practitioners' role as an expert. Experts in court cases are chosen and commissioned by solicitors, and selection of the right expert is said by many lawyers to be critical to the outcome that they can achieve for their client. On the other hand, it has been argued that excessive or inappropriate commissioning of expert evidence plays a part in delaying proceedings and increasing costs.
- 8.3 The Legal Services Commission (LSC) does not contract directly with experts. The costs incurred by solicitors for expert evidence are included in the bill they present to the LSC for disbursements which also include travel and the other 'out of pocket' expenses of the case.¹²⁵
- 8.4 The amount paid for experts' costs is not recorded separately by the LSC, but is estimated to be around two-thirds of the total spent per year on disbursements in criminal, civil and family cases. This total was £192m in 2007–08, of which £21.4m was recovered from unsuccessful opponents. Gross spend on disbursements increased to £205.4m in 2008–09 and to £232.4m in 2009–10. The most significant increase in disbursement spend was in public law family work, which increased by 46.6% between 2005–06 and 2008–09. In light of the need to reduce spending on legal aid, these cost increases are unsustainable.
- 8.5 Although payments to experts are not recorded separately, there is a risk that the LSC is paying different amounts for the same work by different experts and across different categories of law. This is in potential conflict with the LSC's

¹²⁴ <http://www.justice.gov.uk/consultations/docs/legal-aid-funding-reforms.pdf>

¹²⁵ In criminal proceedings, experts are paid from Central Funds, for costs related to their attendance at court, and by the LSC (as disbursements) for their reports.

responsibility under the Access to Justice Act 1999 to achieve value for money in the services it funds. The lack of control over amounts paid to experts also makes expenditure unpredictable and prevents the LSC from reducing disbursement expenditure to a more sustainable level, particularly important given the need to reduce expenditure on legal aid.

- 8.6 For these reasons, the Government is clear that a new structure for the fees for expert witnesses needs to be put in place which will facilitate greater control over rising expenditure.

Current arrangements

- 8.7 Most experts' fees are currently paid at hourly rates. There are no published guideline rates in civil matters. In criminal matters, the Ministry of Justice (MoJ) has set out guideline rates for the purposes of guiding court staff dealing with claims from expert witnesses in respect of court attendance under the Costs in Criminal Cases Regulations 1986. These rates are used as broad guidelines by the Crown Prosecution Service, Her Majesty's Courts Service (for payments from Central Funds) and the LSC, with exceptional circumstances taken into consideration. The LSC seeks to control expenditure through a process of 'prior authority', where providers have to seek permission to incur experts' costs, and through the application of benchmark rates as to what is a reasonable hourly rate. However, there is no requirement on the LSC to apply the benchmark rates, it is not compulsory to seek prior authority, and higher rates may be allowed by the Court on final assessment than those agreed by the LSC. The ultimate decision on whether an expert is to be used lies with the Court, as, particularly in family proceedings, the primary purpose of the expert's involvement is to assist the Court to make its decision.
- 8.8 Examination of the issues around the quality and supply of experts underpinned the (then) Chief Medical Officer, Sir Liam Donaldson's, proposals published in *Bearing Good Witness* in 2006.¹²⁶ The LSC is currently working with the Department of Health on a pilot of commissioning multi-disciplinary teams of health professionals from the National Health Service and other public, private or voluntary sector organisations to provide jointly instructed health expert witness services to family courts in public law childcare proceedings, as proposed in *Bearing Good Witness*. In line with the *Bearing Good Witness* focus on quality and supply, rather than cost, the pilot is testing the benefits of using multi-disciplinary teams, including whether a team consensus gives reassurance to the Court that the appropriate conclusions have been reached; and whether the potential for the Court to be heavily influenced by an individual in the courtroom is reduced.

¹²⁶ *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases – A report by the Chief Medical Officer, Dept of Health, 30 October 2006.* http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4140009.pdf

- 8.9 The majority of experts paid for by the LSC are psychiatrists and psychologists, principally those participating in criminal and family proceedings. A number of steps have been taken in recent years to attempt to control the costs of experts in family proceedings in particular, including removing payment for residential assessments in care proceedings (where families stay in medical facilities for psychological/parenting assessments) from the scope of legal aid. Reductions in experts' travel payments were introduced in the new crime contract from July this year. The use of experts in family proceedings also falls within the scope of the Family Justice Review, which is due to report next year. The Review will, however, not specifically examine the amounts paid to experts.

Previous consultation on expert witness fees

- 8.10 In 2009, the consultation paper *Legal Aid: Funding Reforms*¹²⁷ invited comments on proposals intended to prioritise better what we spend on legal aid, including on experts' fees. The proposals focused on fixing a set of hourly rates for experts in regulations, based on Costs in Criminal Cases Regulations 1988. Respondents to the consultation argued that these rates were well below what experts were usually paid, and that implementing the proposals could lead to serious problems with the supply of experts, particularly in family cases. It was also argued that some experts might respond to the implementation of a simple hourly rate by increasing the time taken to prepare reports and carry out assessments. It was, however, widely recognised that action should be taken to regulate rates charged and make costs more predictable for all concerned.
- 8.11 The consultation response¹²⁸ recognised that greater control of expert witness expenditure was still needed but that additional analysis of this complex area should be undertaken to inform any future fee proposals. A project 'Analysis of expert witness fees paid in legal aid work' is currently underway to increase understanding of the type of work experts undertake and the current rates paid. This involves additional data gathering, in the form of a file review exercise, and in-depth interviews with expert bodies. Two advisory groups – a Working Group and a larger Reference Group – made up of representative bodies and other interested parties have been set up to assist in the interpretation of the findings of the file review and to discuss emerging recommendations.
- 8.12 Data gathered from the file review and interviews appear to confirm that there is a wide variation in fees charged by experts for the same or similar work, and supports the concern that the LSC is not currently achieving best value for money in this area. Most experts appear to charge by the hour, and for the key areas of expenditure examined so far the median level of charges appears to be in line with the benchmark rates applied by the LSC.

¹²⁷ Ibid.

¹²⁸ Published on 3 March 2010 and available on the MoJ website at <http://www.justice.gov.uk/consultations/legal-aid-funding-reforms.htm>

Proposals for reform

- 8.13 In the long term, the Government wishes to build on this existing work to put in place a new set of fees for expert witnesses, wherever possible made up of fixed fees, graduated fees (where specific totals are set for particular activities) and a limited number of hourly rates. This fee structure will build on the information received from respondents to the previous consultation, the outputs of the recent file review, interviews with members of the Working Group and Reference Group and responses to this consultation. During and after this consultation we will be continuing to discuss the various options with the Working Group and, where appropriate, the wider Reference Group. Subject to this further work, the Government proposes to consult further on the proposed amount of the new fees within the new structure. This will however, be in the context of any changes that, for example, come out of the Family Justice Review.
- 8.14 In the short term, however, the Government proposes that the benchmark hourly rates currently applied by the LSC when considering whether experts' charges are reasonable, should be codified and subject to a 10% reduction (consistent with the approach adopted to fees in civil and family proceedings). The rates would be the maximum allowable for the type of expert charge, subject to exceptional circumstances (see below). These proposed rates, representing the benchmark rates less 10% are set out in Annexes H and I.
- 8.15 In some cases, the benchmark rates paid in London are lower than those paid outside London. This reflects the greater supply of experts in London, which allows more competitive rates to be paid. The 'benchmark' rates were developed by the LSC on the basis of the experience and expertise of case workers dealing with experts' bills. Although there are limitations on the data collected in the file review (due to the diverse nature of experts and their work), it does show that the median level of fees charged by experts in some key categories is in line with the LSC's benchmark rates. We believe that codification (and the accompanying publication) of the rates will increase clarity and transparency, and ensure that experts carrying out the same type of work are consistently paid at the same rates.
- 8.16 It is envisaged that the new rates (and, in due course, the new fee structure) will bind the Court to prevent expert costs from increasing at the assessment stage (see paragraph 8.7 above), and that the LSC should have discretion to authorise that they be exceeded in 'exceptional' circumstances. At this stage, it is suggested that 'exceptional' circumstances should be defined as those where: the experts' evidence is key to the client's case; and either the complexity of the material is such that an expert with a high level of seniority is required or the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence. The intention is that in the short term the codified hourly rates and, in the longer term, the new fee structure, will achieve more transparency in the management of public expenditure, and provide greater clarity and certainty for experts and for the solicitors who engage them, and that these factors will help ensure that supply is maintained. The Family Justice Review, and other work to improve proceedings in civil and criminal cases, is looking at how experts can be used

more effectively in proceedings (the codified rates proposals in this chapter are not though dependent on the outcome of that work).

- 8.17 At Annex J is an initial outline of the proposed fee structure to be applied in the longer term. This consists of a list of experts and the work that they do, with an indication whether the fee (to be specified) is proposed to be fixed, graduated or hourly. The categorisations in Annex J are based primarily on in-depth discussions with members of the Working Group and the Reference Group. In general terms, the Government's intention is:
- i) to provide a set of fixed fees where an activity is 'routine' and one-off – such as a General Practitioner's report or a straightforward DNA analysis;
 - ii) to provide a separate fee for each activity, where the expert's involvement in the case is more extensive, and involves several different activities – for example, where they are asked to carry out an assessment, to provide a written report on the results, and to give evidence of the results in court.
- 8.18 The proposed fee structures will not include publicly funded Independent Social Work (ISW) because ISW rates were the subject of a separate consultation as part of the *Family Legal Aid Funding from 2010*¹²⁹ consultation. As set out in the response to that consultation, publicly funded ISW fees will be capped at rates charged by the Children and Family Court Advisory and Support Service (Cafcass) and CAF/CASS Cymru with the introduction of the new Civil Contracts, which has been delayed by the successful Judicial Review of the LSC's recent tender for Family legal aid contracts.

Question 39: Do you agree that:

- there should be a clear structure for the fees to be paid to experts from legal aid;
- in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;
- in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;
- the categorisations of fixed and graduated fees shown in Annex J are appropriate; and
- the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?

Please give reasons.

¹²⁹ <https://consult.legalservices.gov.uk/gf2.ti/f/137410/2284101.1/pdf/-/Family%20Legal%20Aid%20Funding%20From%202010%20%20With%20Cover.pdf>

9 Alternative Sources of Funding

Introduction

- 9.1 Currently, legal aid is funded in its entirety through tax revenue. We have considered in previous chapters the role of Government in providing legal services and have questioned the degree to which the state should assume responsibility for providing legal assistance in some civil and family matters.
- 9.2 In this chapter, we consider two alternative sources of funding that have had some degree of success in other jurisdictions. The first measure, securing the interest on client accounts, would provide an additional source of funding from legal activity and the other would supplement the legal aid fund direct by transferring costs to successful clients in cases where damages have been awarded.
- 9.3 The proposals have been designed to make a contribution towards the substantial savings in legal aid expenditure. Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

Securing the interest on client accounts

- 9.4 We recognise that the legal profession already makes a vital and significant contribution through pro bono legal services and corporate social responsibility programmes. However, we believe that there is scope to put in place a more structured scheme for generating additional revenue to complement public funding of legal assistance, by securing the interest generated by monies that solicitors hold on behalf of clients in general client accounts.
- 9.5 Under existing arrangements, solicitors can hold client money in two types of account, either in a 'separate designated client account' for individual clients or in a 'general client account', which pools money received from a number of clients. As set out by the Solicitors Account Rules (1998),¹³⁰ any interest on money held in a separate designated client account is the property of the client, and must always be paid to that client. For money held in a general client account, a solicitor is not required to pay interest to a client:
- if the amount calculated is £20 or less; or
 - if the solicitor holds a sum of money not exceeding the amount shown in the left hand column in Table 6 below for a time not exceeding the period indicated in the right hand column.

¹³⁰ Solicitors Regulation Authority, <http://www.sra.org.uk/solicitors/code-of-conduct/accounts-rules/part-c-accounts-rules.page#p-c>

Table 6: Rules on when a solicitor is not required to pay a sum in lieu of interest to a client

Amount	Time
£1,000	8 weeks
£2,000	4 weeks
£10,000	2 weeks
£20,000	1 weeks

- 9.6 There are also rules associated with the calculation of interest that must be paid to the client. Broadly, these state that the rate of interest must be at least equal to the rate of interest the client could have achieved in an individual account at the bank or building society at which the money is held.
- 9.7 There are two ways in which solicitors can profit from money held in general client accounts. Firstly, they can keep any interest less than £20, and/or interest earned on money held for short periods of time, as set out in the table above. Secondly, general client accounts are likely to have higher balances and can therefore achieve higher amounts and sometimes higher rates of interest, than designated client accounts. Solicitors can keep any interest generated from the pooled accounts over and above the rate which would be achieved through a designated client account.
- 9.8 There are existing models of interest generation schemes from general client accounts in England and Wales. We are aware, for example, of schemes whereby law firms aggregate designated client accounts into a single general client account, maximise the interest generated, and donate this additional revenue to a legal advice centre.

Schemes in other jurisdictions

- 9.9 Following banking regulations changes in Australia in the 1960s, which prohibited interest to be paid on money held by solicitors on behalf of clients, the Law Institute of Victoria pioneered a scheme for getting banks indirectly to credit interest and to direct that money to public interest work, such as legal aid. Similar schemes were then set up in other federal states of Australia. Other such schemes exist also in New Zealand, Zimbabwe, South Africa, Canada and the United States of America (USA).
- 9.10 Reported revenue from such schemes varies from source to source, fluctuates with changing interest rates, and is dependent on the model implemented. It has been reported that income in the USA was as much as \$370 million in 2007, before falling to around \$92 million in 2009.¹³¹ The change in revenue has been attributed directly to the reduction in interest rates over this period.
- 9.11 There are now several different models for such schemes, and we have considered two here.

¹³¹ http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/

Interest on lawyers' trust account schemes in the USA

- 9.12 Schemes found in all states of the USA (as well as in Australia) are referred to as Interest on Lawyers' Trust Account (IOLTA) schemes and the proceeds are used to support charities, legal education and legal aid.
- 9.13 In the USA, before 1980, client funds were typically held in non-interest bearing accounts because banking regulations, in existence since the Great Depression, prohibited banks from paying interest on these funds. Banks benefited from holding clients' money. When Congress authorised federally insured banks to pay interest on some categories of account referred to as 'NOW accounts' in 1980, Florida adopted the first IOLTA programme. This operated by allowing client funds to be placed in NOW accounts providing that all the interest on such accounts be used for charitable purposes.
- 9.14 Most states in the USA have a mandatory scheme but some operate a voluntary scheme (or a voluntary opt-out scheme where the default position is for solicitors to use IOLTA accounts unless they decide to opt out).

CARPA schemes in France

- 9.15 A different model has been implemented in France, where it is known as the *Caisse Autonome des Règlements Pécuniaires des Avocats* (CARPA): this model was introduced primarily to guarantee the secure handling of client funds and to monitor the origin and use of the funds to prevent money laundering.
- 9.16 The first scheme was devised in the 1950s by the Paris Bar to ensure financial probity: the intention was that the interest generated by the CARPA would enable it to be self-financing.
- 9.17 There are now 173 CARPA schemes in France and each holds a single account with a bank, centralising all client funds within this account and controlling all withdrawals and deposits. This means that the residual balance of the account is sufficiently high to generate interest. Each CARPA insures the capital against the possibility of bank failure and the schemes are rigorously audited to prevent money laundering.
- 9.18 The national CARPA oversight body, the Union Nationale des CARPA, has advised that because the scheme was set up to ensure financial probity and to be self-financing, the majority of funds raised through interest are used to meet the costs of administration, insurance and audit of the account. Sometimes the CARPA account can generate a source of funding for legal help for clients on low income, but this is localised at the discretion of each Bar Association.

Interest on client accounts scheme: possible models

- 9.19 Drawing on what has been learned from an examination of these schemes in other jurisdictions, the Government is considering two possible models for introduction in England and Wales.

Remitting interest to the Government

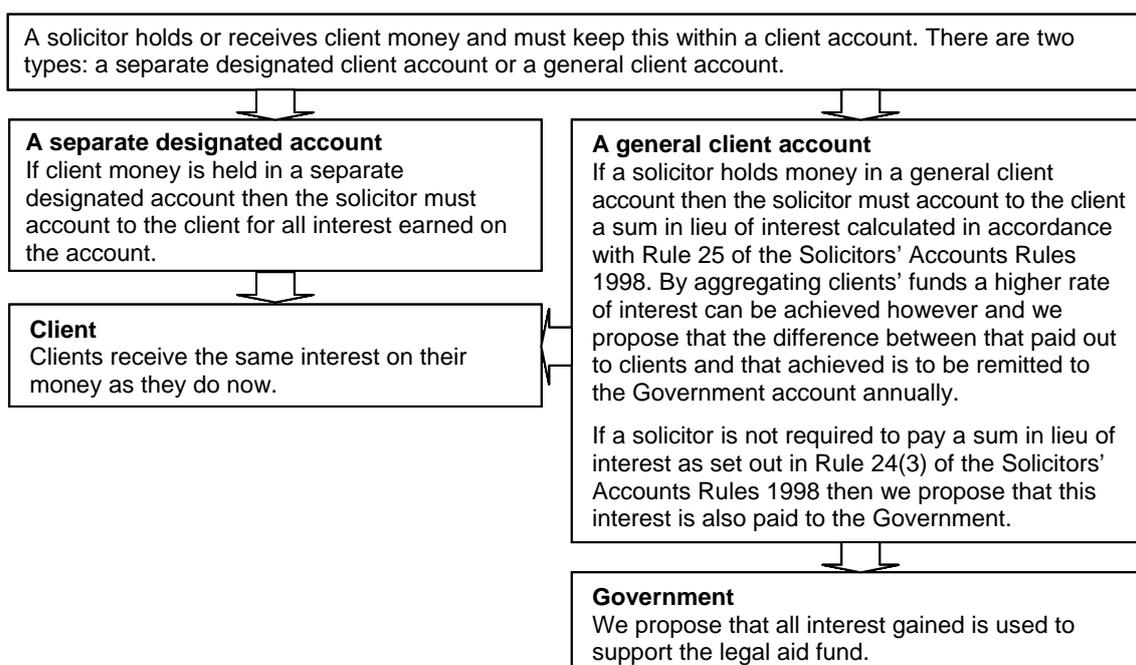
9.20 The first model envisages that while solicitors would continue to hold clients' money in a general client account, they would be asked or required (depending on whether a compulsory or voluntary model were to be implemented) to remit to the Government:

- any interest gained through holding a client's funds in a general client account where a solicitor is not required to pay a sum of interest to their client according to the rules as they exist now; and
- any additional interest gained in cases where funds are aggregated into a single general client account and clients are paid a fair sum in lieu of interest.

9.21 Clients would continue to receive the same interest as under current arrangements. Solicitors would be required to inform their banks that they wished to remit interest which did not have to be paid to clients to the Government annually. If a compulsory scheme were to be implemented, then we propose that it would be enforced by making it a gross misconduct disciplinary offence leading to being struck off the roll of solicitors not to transfer interest in this way. We propose that all interest gained is used to supplement the Legal Aid Fund.

9.22 The flowchart below sets out how such a model would operate.

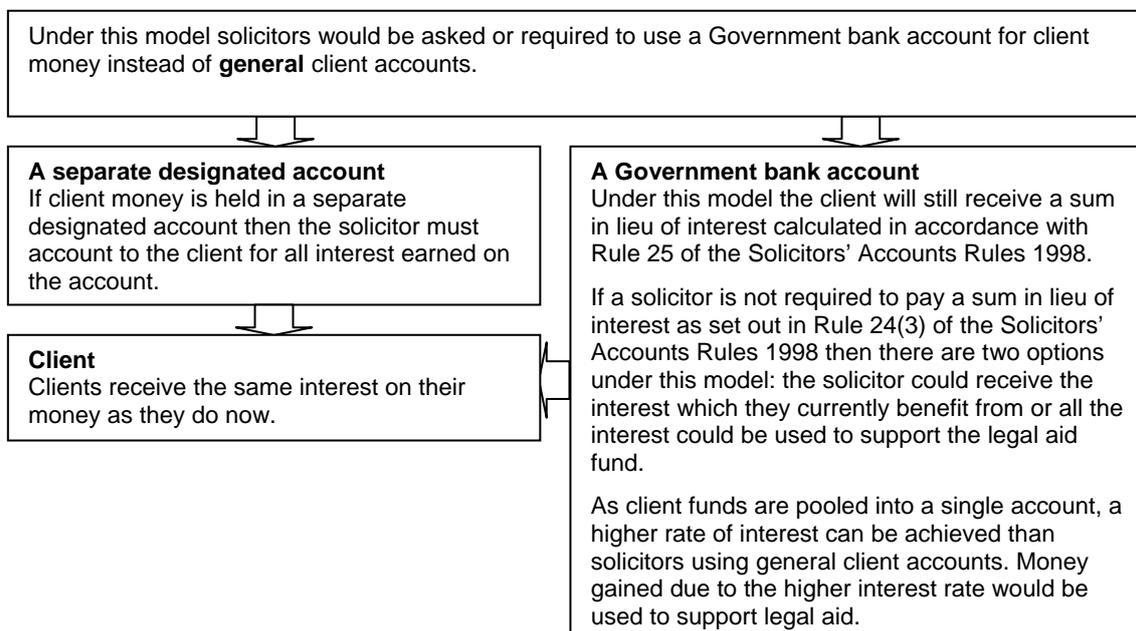
Chart 1: Flowchart for remitting interest to the Government



Pooling general client accounts into a Government bank account

- 9.23 A second model, more closely aligned to French CARPA schemes, would be to set up a Government bank account (this might be either a single national account, or several set up on a regional basis) and ask or require (depending on whether a compulsory or voluntary model were to be implemented) solicitors to use the Government bank account instead of general client accounts. Solicitors would still be able to hold client money in separate, individual, client accounts as necessary.
- 9.24 This pooling of client funds would enable a higher rate of interest to be secured. Clients would be paid a fair sum in lieu of interest that they receive under the current arrangements and the remaining interest would be used to support the legal aid fund. Due to the fact that more money can potentially be gained in interest payments than through holding separate smaller accounts, an alternative option would be also to pay to solicitors the interest which they currently benefit from and the Government would only receive the additional interest gained through the pooling of client funds.

Chart 2: Flowchart for pooling general client account monies into a Government account



Conclusion

9.25 While it is helpful to learn lessons from the operation of schemes in other jurisdictions, given that no such scheme has been implemented in England and Wales previously, it has not been possible to assess fully the impact of the proposal, or its feasibility in practical terms, and to quantify potential benefits. For example, there are no centrally collected data on the sums of money currently held in such accounts in England and Wales, and therefore it is not possible to quantify the level of annual income such a scheme might generate. The experience of other jurisdictions suggests that, depending on interest rates, such schemes offer the potential to generate significant sums.

9.26 The revenue would be used as an additional revenue stream for legal aid. Due to the fluctuation in interest rates, we recognise that it would not be possible to rely on any revenue generated as a permanent funding stream, but believe that it could be used to supplement allocated public funds.

Question 40: Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.

Question 41: Which model do you believe would be most effective:

Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or

Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

Question 42: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:

a) mandatory model;

b) voluntary opt-in model; or

c) voluntary opt-out model?

Please give reasons.

A Supplementary Legal Aid Scheme

9.27 A Supplementary Legal Aid Scheme (SLAS) is a scheme in which a percentage of funds are recouped from cases where successful claims for damages have been made and the claimant was in receipt of legal aid, and uses those funds to supplement the legal aid costs of other cases.

9.28 The Government believes that a SLAS would not only create an alternative funding stream to supplement the legal aid fund, but also provide the opportunity to address the inter-relationship between legal aid and proposals on

the reform of Conditional Fee Agreements (CFAs) made in Sir Rupert Justice Jackson's *Review of Civil Litigation Costs: Final Report*.¹³²

- 9.29 The SLAS would apply to all civil cases where a legally aided client had been successful and awarded general damages. Categories of case include clinical negligence, actions against the police and some education and housing cases where general damages are awarded. The SLAS would also apply to claims for damages which are successful in securing funding for excluded cases. It would therefore still apply if the proposed scope changes were implemented following this consultation.

Sir Rupert Jackson's Review of Civil Litigation Costs

- 9.30 Sir Rupert Jackson was appointed in December 2008 to review the rules and principles governing the costs of civil litigation and to make recommendations to promote access to justice at proportionate cost. His independent report makes a broad range of recommendations for reducing costs in the civil justice system in England and Wales. In particular, the review recommends substantial reforms to funding arrangements, including the operation of CFAs. The Government is currently consulting on Sir Rupert's proposals for funding arrangements¹³³ as we believe these have the potential to help make the costs of civil litigation more proportionate.
- 9.31 CFAs are the most common type of 'no win no fee' arrangement in England and Wales. Under CFAs, lawyers are not paid if they lose a case, but can charge an uplift on top of their basic costs – otherwise known as a 'success fee' – if they win. Success fees allow lawyers to cover the costs of cases they take on which do not succeed. The success fee can be up to 100% of base costs and is recoverable from the losing opponent if the case is won.
- 9.32 Sir Rupert proposes abolishing the recoverability of success fees from opponents so that claimants are responsible for paying their own lawyer's uplift if they win their case. He proposes that success fees should be limited to 25% of damages (excluding damages awarded for future care and loss). In order to assist claimants to meet the cost of the success fees for which they would then be liable, he also recommends an increase of 10% in the level of any general damages awarded.
- 9.33 If these proposals were introduced without any changes to the legal aid scheme, legal aid would be a more attractive funding route because claimants would keep all of the general damages awarded. Legally aided claimants could also benefit from the additional 10% to the level of general damages proposed by Sir Rupert. A SLAS, which drew on a percentage of damages set at a level commensurate with that for CFA success fees (Sir Rupert recommends 25%) would re-balance the system so that publicly funded legal aid does not become a more attractive funding option than privately funded CFAs.

¹³² See footnote 8 above.

¹³³ See footnote 7 above.

Possible funding models

- 9.34 We have considered two different models for a SLAS: a self funding and a partially funded model. It may be possible to establish a self-funding SLAS if cases are selected based on a risk assessment, and the percentage adjusted so that it is set higher in those cases which are considered to be higher risk. However, in order to make the SLAS self-funding this might mean that in higher risk cases some legally aided clients would need to pay a high percentage of their damages to the scheme or that cases would need to be cherry-picked so that only those cases with a high chance of success are funded. The SLAS in Hong Kong has demonstrated that if a scheme is to be profitable only a small number of cases can be funded. A self-funding SLAS would also require initial capital investment because it would take time for cases to pass through the courts and any damages awarded to be paid into the scheme.
- 9.35 A SLAS model which is partially self-funded does not need to focus primarily on the cases with the highest chance of success. The percentage of damages could also be set at a level commensurate with that for CFA success fees ensuring that CFAs remain an attractive alternative to legal aid. It is for these reasons that the Government believes this is the more suitable model.
- 9.36 An alternative to a SLAS is a Contingent Legal Aid Fund (CLAF), which is a privately run, stand-alone, self-financing scheme. Cases are funded entirely by the CLAF and the CLAF seeks to make a return by accruing funds from successful claims equal to or greater than its outgoings. This model requires initial capital investment (raised privately or publicly) and then the establishment of an operating model that accrues sufficient funds from claims to sustain itself: the latter factor is particularly problematic because cases can be cherry-picked based on their very high chance of success and less clear-cut cases do not receive funding. Adopting this model would also potentially only cover a limited number of cases.

Methods of recovery

- 9.37 There are a number of options for how the funds under a SLAS which is not self-funding could be calculated and collected:
- a percentage of damages paid by the successful legally aided claimant;
 - a percentage of the inter-party costs awarded to the claimant lawyer at the conclusion of the case paid by the successful claimant lawyer; or
 - a percentage of costs paid by the unsuccessful defendant.
- 9.38 Only the first option is consistent with the proposed changes to CFAs suggested by Sir Rupert (which would limit success fees to a percentage of damages awarded) and would ensure that CFAs were equally attractive to potential claimants. This is therefore the Government's preferred option. The second and third options could leave the claimant, successful claimant's lawyer or the unsuccessful defendant with a significant financial obligation.

Recovery levels

9.39 The Government has considered whether the amount recoverable from such a scheme should be a percentage of general damages only – as Sir Rupert Jackson recommends in respect of CFAs – or a percentage of both general and special damages awarded. General damages are awarded to compensate claimants for pain and suffering, while special damages are carefully defined and awarded to cover any losses or costs incurred as a result of the injury suffered, or future expenses which will be incurred such as care costs. As these awards are calculated against specific costs it would be difficult to see how a percentage could be accrued from those sums without having a detrimental impact on the claimant. We therefore propose that the percentage to be collected should only apply to general damages.

Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.

Question 44: Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?

Legal protection insurance

- 9.40 We have also considered legal protection insurance, sometimes called 'before the event' insurance, as a further means of funding legal services without recourse to the public purse. This provides the policyholder with protection against some legal costs for certain issues incurred as a result of legal action.
- 9.41 Around 59% of people in the United Kingdom currently have some form of legal protection insurance,¹³⁴ mostly in the form of an addition to widely used types of insurance such as home contents or motor vehicle insurance, although it is also available as a stand-alone product. Coverage in Sweden, for example, is much higher than in the United Kingdom, partly because legal protection insurance is typically included within other policies, rather than as an optional add-on. Take-up of stand-alone policies is also higher in Germany, where distribution models are based on brokers selling insurance, where there is a culture of less reliance on legal aid and where the justice system has more fixed costs.
- 9.42 Sir Rupert Jackson in his *Review of Civil Litigation Costs: Final Report* suggests that positive efforts should be made to encourage the take-up of legal protection insurance by householders as an add-on to household insurance policies. The Government agrees that a greater use of insurance in some cases, such as employment or housing cases for example, presents an affordable and feasible alternative to publicly funded legal aid for funding legal protection, and would welcome the development of a market in this area.

¹³⁴ See: *The Market for 'BTE' Legal Expenses Insurance*, FWD (Prepared on behalf of the Ministry of Justice), July 2007.

10 Governance and Administration

Introduction

- 10.1 The Government is committed to tightening its stewardship of the legal aid fund, establishing clear lines of ministerial accountability and ensuring that the Ministry of Justice (MoJ) has strict controls in place to manage the cost of the scheme.
- 10.2 On 3 March 2010, the previous administration published its decision to abolish the Legal Services Commission (LSC) as a Non-Departmental Public Body (NDPB) and to replace it with an executive agency of the MoJ. The Government has stated its intention to take this forward as part of the announcement of proposals for the reform of public bodies on 14 October. Subject to the results of a final evaluation of the costs and benefits, will introduce the necessary legislation as soon as parliamentary time allows. This will return statutory responsibilities, functions and powers to the Lord Chancellor. The intention is that the new agency will work alongside the family of agencies and other bodies responsible for the administration of criminal and civil justice. This will allow a more holistic approach to the Government's development of policy across the justice system and is consistent with the Government's wider programme of reform of public bodies.
- 10.3 The Government and the new agency, working closely with providers and other partners, will have a responsibility to create a framework that ensures value for public money and a scheme which is built on solid foundations that will last for the long term.

A new statutory framework for the administration of legal aid

- 10.4 The Access to Justice Act 1999 (the 1999 Act) contains a broad mix of statutory functions, responsibilities and powers for the administration of legal aid and divides these between the LSC and the Lord Chancellor. The LSC is an executive NDPB and therefore exercises its statutory responsibilities at arm's length from ministers.
- 10.5 The 1999 Act gives the LSC a broad range of functions and responsibilities including to establish, maintain and develop a Community Legal Service (CLS) and Criminal Defence Service (CDS), to set priorities for CLS funding and prepare a funding code setting criteria for the funding of individual CLS cases and routes of appeal. These provisions vested in the LSC are complemented by a range of order and direction-making powers vested in the Lord Chancellor, for example, to set financial eligibility limits and to set payment rates for representation in CDS cases.

- 10.6 In October 2009, the previous administration asked Sir Ian Magee to review the existing delivery and governance arrangements for legal aid.¹³⁵ The Magee Review, which was published in March 2010, raised a number of concerns about the relationship between the LSC and the MoJ including that there was lack of clarity among staff and provider groups about the respective roles, responsibilities and priorities of each organisation.
- 10.7 Sir Ian's report contained recommendations to strengthen governance and accountability arrangements, streamline policy functions and establish a more rigorous approach towards legal aid fund forecasting and financial management. The report also included options for further investigation, including the restructure of the LSC to an executive agency of the MoJ. The previous administration endorsed Sir Ian's recommendations and announced it would bring the LSC in-house as an executive agency of the MoJ.
- 10.8 The Government agrees that the creation of an executive agency will address the concerns raised in Sir Ian's report and realise a number of benefits. These include:
- one policy voice and one set of priorities for legal aid;
 - clear lines of ministerial accountability;
 - improved financial management and performance;
 - shared priorities and improved collaboration with other criminal and civil justice bodies; and
 - opportunities for administrative efficiencies through greater use of shared services across the MoJ and wider government.
- 10.9 To make these changes, the Government will need to introduce primary legislation as soon as Parliamentary time allows. Legislation is required to abolish the LSC, provide for the transfer of LSC staff to the MoJ and vest all relevant functions and responsibilities for the administration of legal aid in the Lord Chancellor. The day-to-day operational and case management functions, as currently undertaken by the LSC, will continue under Agency arrangements.
- 10.10 Although the Lord Chancellor will have ultimate responsibility for the legal aid schemes, the Government believes it is important that individual funding decisions should continue to be made fairly and objectively under agency status. Under the new arrangements, we intend to ensure that there will continue to be clear and transparent criteria to underpin funding decisions and processes for review and appeal. The Government is also considering whether further safeguards should be in place to distance ministers from the day to day decisions being taken by the executive agency on individual cases.

¹³⁵ See footnote 13 above.

The existing LSC reform programme

- 10.11 It is important to recognise the work which the LSC has undertaken to respond not only to the recommendations in the Magee Review, but to the National Audit Office's (NAO) qualification of the LSC's 2008–09 accounts and actions agreed at the subsequent Public Accounts Committee whose report was published in February 2010.
- 10.12 The LSC is developing a more rigorous approach towards legal aid fund forecasting and financial management. It is improving integration of its systems and processes better to meet the needs of providers and clients. Integrated system development is geared towards greater compatibility between the systems for managing payments and providers' case management software. Not only should this result in reduced administrative costs to the LSC (and subsequently to the executive agency) and providers, but it should also help realise significant control benefits to the Legal Aid Fund itself, for example, through a reduction in duplicate payments and overpayments.
- 10.13 The qualification of the LSC's accounts requires them to be able to demonstrate credible control and assurance functions that can ensure proper financial control and assess quality of service provided by those from whom it is procuring legal services. The LSC has taken significant steps to achieve this, recognising the balance that must be struck between what is required by the NAO and the administrative burden placed on providers.
- 10.14 The Government is aware of concern among providers about the current auditing arrangements and quality requirements¹³⁶ with a view expressed by some that they are too onerous. It is true that the LSC performs a number of audit activities, intended to ensure that the terms of legal aid contracts are adhered to and that providers claim the right amount of money for work carried out. This activity is increasingly risk based. In addition the LSC has two basic quality requirements: holding a quality standard (e.g. the Specialist Quality Mark or Lexcel); and employing appropriate supervisors (who may need to hold external accreditation). Finally there is peer review, now also undertaken on a sampling basis rather than being applied to every provider. While the Government is in favour of quality being assured through independent regulation wherever practicable, we are clear that it is important that clients are assured that they will receive a high quality service from legal aid providers. Robust central auditing of legal aid contracts must continue due to the NAO qualification.

Question 45: The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.

¹³⁶ http://www.legalservices.gov.uk/civil/how/how_audit_works.asp

New ideas for improving efficiency and reducing bureaucracy

- 10.15 The Government believes that the transition from NDPB to executive agency presents an opportunity to look afresh at what further improvements can be made to improve efficiency and reduce bureaucracy in the administration of legal aid. Building on the existing programme of process improvements, and taking into account concerns about existing administrative processes, we wish to consider what more can be done to ensure we get the most value for money for the public purse.
- 10.16 The processing of legal aid can broadly be broken down into four areas:
- the application process;
 - processes applied during the lifetime of the case (including amendments, extensions, prior authorities, etc.);
 - provider claims; and
 - payment mechanisms.
- 10.17 The Government is eager to build on initial analysis conducted by the LSC through provider surveys and reference groups to inform how its administrative processes could be improved. Given the extent of use of provider case management systems, the Government is particularly interested in opportunities for better electronic working with providers and software vendor companies to gain further efficiencies and process improvements.
- 10.18 It will be important to manage this carefully against a backdrop of change over the next year, with the intended creation of the new agency and implementation, subject to this consultation exercise, of the policy proposals on scope, eligibility, fee reductions and restructuring and the move to competition. Final decisions about process improvements will need to await the outcome of the consultation and will not be fully implemented until the overall package of reforms and the new executive agency are in place. However, at this stage the Government would welcome initial views about the priorities for improvement. In considering proposals for priority areas for reform, it will be important to recognise the fact that rigorous procurement and contracting procedures will continue to be required. Any improvements will need to be made in a manner that is consistent with the highest standards of accounting practice. This is essential not only to meet European and domestic legal obligations, but to ensure the best possible value for clients and the taxpayer. Providers delivering services to legally aided clients will continue to have a vital role to play in achieving that aim.

Question 46: The Government would welcome views on the administration of legal aid, and in particular:

- the application process for civil and criminal legal aid;
- applying for amendments, payments on account etc.;
- bill submission and final settlement of legal aid claims; and
- whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

Question 47: In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

Question 48: Are there any other factors you think the Government should consider to improve the administration of legal aid?

11 Impact assessments

- 11.1 The Government is mindful of the importance of considering the impact of these proposals on different groups, with particular reference to users and providers of legally aided services. We have therefore considered the impact on client groups and on providers in both the private and not for profit sector of all the measures in the package in line with the existing duties on gender, race and disability. Our assessments of the potential impact of these proposals have been published alongside this document.¹³⁷

Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

Question 51: Are there forms of mitigation in relation to client impacts that we have not considered?

¹³⁷ See: <http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm>

12 Next Steps

- 12.1 The consultation will close at 12:00 noon on 14 February 2011. Following consultation, we intend to publish our response by Spring 2011 setting out those proposals we intend to take forward.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
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.

Contact details/How to respond

Please respond online at: <http://survey.euro.confirmit.com/wix/p485462495.aspx>.

Alternatively please send your response to: Annette Cowell at legalaidreformmoj@justice.gsi.gov.uk

or by post to her at:

Legal Aid Reform
Ministry of Justice
102 Petty France
London SW1H 9AJ

The deadline for responses is 12:00 noon on Monday 14 February 2011.

Publication of response

A response to this consultation is due to be published in Spring 2011 and will be available online at www.justice.gov.uk

Representative groups

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

Confidentiality

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

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

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult:** formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises:** consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact:** consultation documents should be clear about the consultation process, what is being proposed, the scope to influence the proposals and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises:** consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation:** keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises:** consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult:** officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation process rather than about the topic covered by this paper, you should contact Sheila Morson, Ministry of Justice Consultation Co-ordinator, on 020 3334 4498, or email her at consultation@justice.gsi.gov.uk

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

Sheila Morson
Consultation Co-ordinator
Ministry of Justice
6.36, 6th Floor
102 Petty France
London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the How to respond section of this paper at page 146.

Annex A: Glossary

Act of assistance	An event which gives rise to a unique claim for remuneration from a solicitor or not for profit service provider for giving advice, assistance or representation to one or more people.
Advocates' Graduated Fee Scheme	The fee scheme which governs fees paid to advocates (barristers or solicitor advocates) who represent clients in criminal proceedings in the Crown Court, other than in cases which have been classified as Very High Criminal Cost Cases. Payment is determined by proxy measures, namely, the seniority of the advocate, the type of offence, the number of pages of prosecution evidence, the number of prosecution witnesses (excluding the first 10) and the number of days that the advocate spends at court at trial.
Ancillary relief	Arrangement for financial support to a party to a marriage, on divorce, nullity or judicial separation. It may be awarded on presentation of a claim to a court for resolution of resulting financial issues. In a divorce case the court can make the following orders: regular maintenance, a lump sum, or a transfer of property.
Arbitration	A form of alternative dispute resolution – specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party (the arbitrator(s) or arbiter(s)) for resolution.
Category/area of law	The Legal Services Commission defines areas of law (education, housing etc) thematically and contracts for the provision of advice and representation based on the categories.
Certificated work	The Legal Services Commission issues funding certificates following a successful application for legal aid funding for certain types of work. The main type of work covered under certificated work is representation in court proceedings.
Civil	The area of law that concerns the rights and relations of private citizens – for example, disputes relating to unpaid debts or the enforcement/breach of contracts. It does not include criminal matters.
Community Legal Advice (CLA)	A service which provides legally-aided initial advice and assistance to clients in civil cases. Community Legal Advice (formerly known as Community Legal Advice Direct) provides the information via a telephone helpline, information leaflets and a website.
Community Legal Service (CLS)	A service established, maintained and developed by the Legal Services Commission for the purpose of promoting the availability to individuals of (legal) services and, in particular, for securing that individuals have access to services that effectively meet their needs, excluding services required to be funded by the Criminal Defence Service.

Conditional Fee Arrangement/ Agreement	An agreement with a person providing advocacy or litigation services which provides for his or her fees and expenses, or any part of them, to be payable only in specified circumstances.
Controlled work	Work under the Legal Services Commission's civil contract that covers the basic levels of legal advice and representation, including initial meetings and in family cases negotiations, and is referred to as Legal Help or as Family Help Lower. It also encompasses Help at Court and representation in front of Mental Health Review Tribunals and the Asylum and Immigration Tribunal.
Court of Protection	A Superior Court of Record created under the Mental Capacity Act 2005. It has jurisdiction over the property, financial affairs and personal welfare of people who lack mental capacity to make decisions for themselves.
Cracked Trial	A case in which proceedings are stopped due to the defendant(s) pleading guilty or the prosecution offering no evidence after the accused is indicted but before the trial begins.
Criminal	The area of law that defines conduct which is prohibited by the Government because it is held to threaten, harm or otherwise endanger the safety and welfare of the public, and that sets out the punishment to be imposed on those who breach these laws.
Criminal Defence Service (CDS)	A service, for which the Legal Services Commission contracts, to ensure access for individuals involved in criminal investigations or proceedings to such advice, assistance and representation as the interests of justice require, subject to a means test.
Criminal Higher	Legal representation in the Crown Court and higher courts.
Criminal Lower	Work carried out by legal aid providers at police stations and in magistrates' courts in relation to people accused of or charged with criminal offences.
Either way offence	An offence which can be tried either before the magistrates' court, or before a jury at the Crown Court. The appropriate venue is determined at a Mode of Trial hearing at the magistrates' court. If the magistrates determine that the matter is too serious or complex for summary trial, they can commit it to the Crown Court. If the magistrates determine that the case is suitable for summary trial, the defendant can elect for trial by jury.
European Convention on Human Rights	A binding international agreement. The Convention enshrines and protects fundamental civil and political rights (e.g. right to life, right to fair trial, right to respect for private and family life). The Convention was drafted in 1950 and entered into force in 1953. It is a treaty of the Council of Europe and established the European Court of Human Rights.
First-tier Tribunal	Adjudicates on specific civil issues. Appeals may be made to the Upper Tribunal.

Hague Convention	An international treaty on the treatment of child abduction cases. The principle underpinning the Hague Convention is that matters concerning custody of a child are best decided in the country of the child's habitual residence. The Convention requires the judicial and administrative authorities in any Convention State to which a child has been removed to act swiftly to determine whether the child has been wrongly removed.
Indictable offence	A criminal offence that can only be tried in the Crown Court. Indictable offences are classified as 1, 2, 3 or 4. Murder is a class 1 offence.
Inquisitorial system	A legal system where the Court or a part of the Court is actively involved in determining the facts of the case, as opposed to an adversarial system, such as that in the UK, where the role of the Court is that of an impartial referee between parties.
Interests of justice test	The test is applied to both criminal and civil cases as part of the process to determine whether a client receives funding. In deciding whether the test is satisfied, the following factors must be taken into account: <ul style="list-style-type: none"> • whether the individual would be likely to lose his liberty or livelihood or suffer serious damage to his reputation; • whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law; • whether the individual may be unable to understand the proceedings or to state his own case; • whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual; and • whether it is in the interests of another person that the individual be represented.
Investigative Help	A level of legal service which is only available where prospects of success of a case for which an application for legal aid has been made are unclear. It covers only the cost of investigating a potential claim.
Judicial Review	A procedure in English administrative law by which the courts supervise the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority, such as a minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the Administrative Court (a division of the High Court) for judicial review of the decision and have it set aside (quashed) and possibly obtain damages. A Court may also make mandatory orders or injunctions to compel the authority to do its duty or to stop it from acting illegally.
Junior counsel	Any barrister below the rank of Queen's Counsel.
Legal Help	Advice and assistance about a legal problem, not including representation or advocacy in proceedings.

Legal Services Commission	The body responsible for commissioning civil, family and criminal legal aid services from solicitors, barristers, advice agencies, and family mediators across England and Wales. It also commissions services to be provided over the telephone and the internet as well as in person.
Levels of service	The level of service determines the description and extent of legal assistance or representation that can be provided to a client under the particular grant of funding. Detailed definitions can be found in Sections 1 and 2.1 of the Legal Services Commission's Funding Code Criteria.
Litigators' Graduated Fee Scheme	The fee scheme which governs fees paid to solicitors who represent clients in criminal proceedings in the Crown Court, other than in cases which have been classified as Very High Cost Cases. Payment is determined by proxy measures, namely, the type of offence, the number of pages of prosecution evidence, and the number of days of trial.
Matter start	An instance of help given by a service provider to a legally-aided client under Controlled Work.
Means test	The process by which an assessment of clients' financial eligibility for public funding is made.
Mediation	Involves an independent third person helping parties in dispute to reach a resolution. The mediator does not make decisions or impose a settlement. They encourage and facilitate a settlement that is decided by and acceptable to the parties themselves. Before funding for mediation is granted, an assessment is made of whether mediation appears suitable to the dispute, the parties and the circumstances.
Merits test	The consideration of all the legal circumstances of a case to assess whether a case has sufficient legal merit to justify the provision of public funding.
Not for profit service provider	A provider that the Legal Services Commission recognises as aiming not to make a profit from performing Contract Work.
Passporting benefits	Clients who receive one or more of the following benefits are currently not subject to a means test: <ul style="list-style-type: none">• Income Support;• Income-Based Job Seekers Allowance;• Income-related Employment and Support Allowance; and• Guarantee Credit (under section 1(3) (a) of the State Pension Credit Act).
Plea and Case Management Hearing	A hearing that takes place at the Crown Court, once the case has been sent there from the magistrates' court. The accused can enter a plea of guilty or not guilty. If the plea is not guilty, the case management part then takes place.

Prospects of success test	The prospects of success test assesses the likelihood of the client obtaining a successful outcome in the proceedings, assuming the case were determined at trial or other final hearing. In civil cases this is used as part of the merits test to determine whether the client receives funding.
Quasi-criminal	Cases defined as civil under domestic law, but which have been determined by European Convention on Human Rights case law to be criminal for the purposes of access to justice and therefore requiring legal aid provision in the same circumstances as other criminal cases.
Statutory charge	Where the Legal Services Commission pays for a service as part of the Community Legal Service, it may apply a charge to anything preserved or recovered in a settlement relating to that work.
Summary offence	A criminal offence that can only be tried in the magistrates' courts.
Upper Tribunal	Adjudicates on specific areas of civil law. It has four main functions: <ul style="list-style-type: none"> • to hear appeals from the decisions of the First-tier Tribunal; • to decide certain cases that do not go through the First-tier Tribunal; • to exercise powers of judicial review in certain circumstances; and • to deal with enforcement of decisions, directions and orders made by tribunals.
Very High Cost Criminal Case	A criminal case in which a representation order has been granted and which the Legal Services Commission classifies as a Very High Cost Criminal Case on the grounds that: <ul style="list-style-type: none"> • in relation to litigators' fee: <ul style="list-style-type: none"> • if the case were to proceed to trial, the trial would be likely to last for more than 40 days, and there are no exceptional circumstances which make it unsuitable to be dealt with under the arrangements for Very High Cost Criminal Cases; or • if the case were to proceed to trial, the trial would be likely to last between 25 and 40 days and there are circumstances which make it suitable to be dealt with under the arrangements for Very High Cost Criminal Cases; • in relation to advocates' fees, if the case were to proceed to trial, the trial would be likely to last for more than 60 days, and there are no exceptional circumstances which make it unsuitable to be dealt with under arrangements for Very High Cost Criminal Cases.
Very High Cost Civil Case	A civil case where the costs are likely to exceed £25,000. The Legal Services Commission manages these under individual case contracts.

Acronyms

AAP	Action Against the Police (and other public bodies)
ACAS	Advisory, Conciliation and Arbitration Service
AGFS	Advocates' Graduated Fees Scheme
ASBO	Anti-Social Behaviour Order
ATE	After the Event
BIS	Department for Business, Innovation and Skills
BAME	Black, Asian Minority Ethnic
BVT	Best Value Tendering
CAFCASS	Children and Family Court Advisory and Support Service
CARPA	Caisse des Règlements Pécuniaires des Avocats
CCU	Complex Crime Unit (a unit within the Legal Services Commission)
CDS	Criminal Defence Service
CFA	Conditional Fee Agreement/Conditional Fee Arrangement
CJS	Criminal Justice System
CLA	Community Legal Advice
CLAF	Contingent Legal Aid Fund
CLR	Controlled Legal Representation
CLS	Community Legal Service
DPA	Data Protection Act 1998
DSCC	Defence Solicitor Call Centre
ECHR	European Court of Human Rights
FAS	Family Advocacy Scheme
FE	Further Education
FOIA	Freedom of Information Act 2000
HMCS	Her Majesty's Courts Service
HMT	Her Majesty's Treasury
HSF	Higher Standard Fee
IOLTA	Interest on Lawyers' Trust Account scheme
IPSEA	Independent Parental Special Educational Advice
IoJ	Interests of Justice (Test)
ISW	Independent Social Work
JR	Judicial Review
LGFS	Litigators' Graduated Fees Scheme
LJ	Lord Justice
LSC	Legal Services Commission
LSF	Lower Standard Fee
MoJ	Ministry of Justice
NAO	National Audit Office
NDPB	Non-Departmental Public Body
NHS	National Health Service
NMS	New Matter Start
NSF	Non Standard Fee
OTELO	Office of Telecommunications Ombudsman

PACE	Police and Criminal Evidence Act 1984
PCMH	Plea and Case Management Hearing
PPE	Pages of Prosecution Evidence
QC	Queen's Counsel
SEN	Special Educational Needs
SLA	Service Level Agreement
SLAS	Supplementary Legal Aid Scheme
UKBA	United Kingdom Border Agency
VAT	Value Added Tax
VHCC	Very High Cost Cases (could be criminal, civil or family cases)

Annex B: Means Testing in Criminal Cases

Means testing in the magistrates' court

The means test in the magistrates' court establishes whether an applicant is financially eligible for legal aid. Her Majesty's Courts Service (HMCS) currently undertakes this work on behalf of the Legal Services Commission (LSC) under a Service Level Agreement (SLA). The applicant completes the relevant application form (CDS 14 and/or CDS15) and submits it to the magistrates' court for processing along with any required supporting evidence. Passported applicants are those individuals who automatically pass the means test.

There are two levels of means tests:

The initial means test: the applicant's gross annual household income is weighted to take account of family circumstances. The result of this is the applicant's *adjusted income*. If the applicant's *adjusted income* is:

- **£12,475 or less:** they pass the initial means test and are eligible for legal aid (subject to passing the Interests of Justice test);
- **£22,325 or more:** they have failed the means test and are ineligible for legal aid;
- **More than £12,475 and less than £22,325:** a full means test will be carried out to determine eligibility.

The full means test: the applicant's gross annual household income, allowable outgoings and a weighted living allowance are combined. The result is the applicant's *disposable income*. If the applicant's *disposable income* is:

- **£3,398 or less:** they pass the full means test and are eligible for legal aid;
- **More than £3,398:** they have failed the full means test and are ineligible for legal aid.

If an applicant is refused legal aid after the means test they can submit an Application for Review on the Grounds of Hardship form (CDS16) and supporting evidence direct to the LSC's National Courts Team (NCT). The LSC will review applications on the grounds of hardship if applicants show they genuinely cannot fund their own defence.

Means testing in the Crown Court

Legal aid is available for everyone committed for trial or sentence, or appealing a sentence or conviction against a decision of the magistrates, subject to the submission of a fully completed form. The means test determines whether the applicant has a financial liability and whether there is an income contribution and/or a capital contribution to be made towards their defence costs.

Crown Court Trials

The Crown Court scheme is a means test which consists of calculating both available income and capital.

Income

The income threshold levels applied to Crown Court means testing is the same as in the magistrates' court. No income contribution is required if:

- the applicant passes the initial income means test; or
- the applicant's annual disposable income is £3,398 or less.

The applicant will be required to make an income contribution (maximum number of six) if their annual disposable income is more than £3,398.

Capital

If the applicant has pleaded or been found guilty, they will have to pay defence costs from their capital if:

- they have more than £30,000 of capital; and
- their defence costs have not already been covered by income contributions.

Committals for Sentence

These hearings are only subject to the income means test and follow those levels in the magistrates' court. Please refer to the 'means testing in the magistrates' court' above for further detail on the thresholds.

Appeals to the Crown Court

Those who appeal from the magistrates' court to the Crown Court may make an application for legal aid. All applications are subject to the Interests of Justice test.

Appellants to the Crown Court undergo the same application process as those committed for trial or sentence. An allowance is made in the disposable income threshold to reflect the average costs of a magistrates' court case (£500). If an applicant has their appeal dismissed *and* they fail the means test, they will be subject to a contribution at the end of the appeal.

Summary – Initial means test outcomes

Annual Adjusted Income	Result	Magistrates' court	Committal for Sentence	Appeal to Crown Court	Crown Court trial
£12,475 or less	Pass	Funded	Funded	Funded	No income contribution
More than £12,475 but less than £22,325	Go to full means test	Depends on outcome of the full means test		Possible fee, depending on outcome of the full means test	Possible income contribution, depending on outcome of the full means test
£22,325 or more	Fail	Not funded	Not funded	Possible fee, depending on outcome of appeal	Income contribution

Summary – Full means test outcomes

Annual Disposable Income	Result	Magistrates' court	Committal for Sentence	Appeal to Crown Court	Crown Court trial
£3,398 or less	Pass	Funded	Funded	N/A	No income contribution
More than £3,398	Fail	Not funded	Not funded	N/A	Income contribution

Annex C: Means Testing in Civil and Family Cases

Generally, legal aid funding is available to anyone who qualifies, provided that the case is within the scope of the legal aid scheme through the Community Legal Service. Each application is considered on an individual basis and is subject to the statutory test of the applicant's means. In addition to qualifying financially, an applicant must also show that the merits of the case justify the grant of public funding. The application is considered against criteria specific to the type of case; these criteria are set out in a document called the Funding Code. Broadly speaking, the test is designed to measure, taking all the circumstances into account, whether a privately paying client of moderate means would be prepared to spend his or her own money on taking the case. The Legal Services Commission (LSC) must consider, for example, the prospects of success, any alternative sources of funding, and any other circumstances such as wider public interest or overwhelming importance to the applicant.

Those in receipt of Income Support, income-based Jobseeker's Allowance, or Guarantee credit, or income-related Employment Support Allowance automatically qualify financially for legal aid without payment of a contribution: i.e. they are passported on both income and capital. Otherwise, applicants can obtain 'free', or non-contributory assistance, if they have a gross monthly income not exceeding £2,657, a monthly disposable income not exceeding £315 and disposable capital of £3,000 or less. If their monthly disposable income is between £316 and £733, or disposable capital between £3,000 and £8,000, they will be offered funding on the basis that they agree to pay contributions towards their legal costs.

In order to determine financial eligibility the LSC first calculates the gross income that an applicant will receive within the calendar month up to and including the date of application. This means the total income from all sources, including the applicant's partner and any third parties such as friends or relatives. Certain state benefits, including Housing Benefit, Council Tax Benefit, Independent Living Fund payments, and Disability Living Allowance, and any payments out of the Social Fund, are disregarded from the total gross income. If an applicant's gross income is less than the gross income cap, the LSC will go on to assess disposable income and disposable capital.

To reach the disposable income figure, a number of allowances are offset against gross income. These include income tax; National Insurance; maintenance payments to an ex-partner and children living in a separate household; a set amount (£45 per month) for employment expenses and any childcare expenses incurred because of work, including those incurred by self-employed people; and rent or mortgage repayments. An allowance is also given for dependents living within the applicant's household (based on Income Support allowances for dependants). Clients are eligible

on income grounds if their income does not exceed £733 per month.¹³⁸ Where disposable income is above £733 per month funding is refused.

Clients must however also be eligible on capital grounds in order for legal aid to be granted. The applicant's disposable capital must not exceed £8,000. Disposable capital will include all assets of a capital nature (but excludes household furniture and effects and articles of personal clothing (unless they are of exceptional value). Disposable capital also includes any remaining equity in an applicant's home after allowances are given for mortgage(s) or secured loans (up to a maximum value of £100,000) and an 'equity disregard' of the first £100,000 of equity in the property. A further disregard of up to £100,000 is available for assets that are in dispute in the proceedings for which legal aid is sought.

Pensioners on low incomes (not exceeding £315 assessed disposable income per month) can also benefit by up to a further £100,000 of capital (of any kind) which is disregarded in the assessment of capital (the pensioner disregard).

Band	Monthly disposable income	Monthly contribution
A	£316 to £465	1/4 of income in excess of £311
B	£466 to £616	£38.50 + 1/3 of income in excess of £465
C	£617 to £733	£88.85+ 1/2 of income in excess of £616

Fixed rate allowances (per month) from 12 April 2010	
Work related expenses for those receiving a wage or salary	£45
Dependence Allowance:	
For partner	£162.08
Children aged 15 and below	£250.16
Children aged 16 and above	£250.16
Housing cap for those without dependants	£545

¹³⁸ Eligibility may be subject to a contribution, as indicated above. Also, built in to the £733 per month limit is an amount to reflect other essential expenditure such as food and utility payments so that contribution payments are calculated so as to leave a funded client with a general living allowance (also known as the lower income limit). This is currently £315 per month.

Annex D: Legal Aid Remuneration in Criminal Cases

1. Criminal Investigations

This class of work broadly covers all work up to the point of charge, both at or outside the police station.

Work conducted at the police station

Scope

A person is entitled to police station advice and assistance free of charge if they have been arrested and held in custody or if they are a volunteer (i.e. someone who has not been arrested but volunteers to attend the police station to assist with an investigation). A volunteer may be a suspect (and therefore will be interviewed under caution), or they may be a possible witness. A witness who is not a suspect will not normally be expected to receive advice, unless there is a complicating factor, and if a statement is given, they need advice on self-incrimination. Means tested freestanding advice and assistance (see below) then applies.

Solicitors must apply a sufficient benefit test – the case must relate to English law and there must be sufficient benefit to the client to justify providing advice and assistance, but this test will be met automatically in most cases because the client has a right to legal advice under Police and Criminal Evidence Act 1984 (PACE). S58(1) of the Act states that “A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.”

A solicitor¹³⁹ or an accredited representative may attend.

Solicitors are required to endeavour to contact the client (in person or by phone) within 45 minutes of first accepting the case and to meet this target in 80% of cases.

Solicitors have some discretion over whether to attend or offer telephone advice only. The sufficient benefit test requires solicitors to determine the extent of the advice required, including whether an attendance is necessary. However, they must attend, once they have accepted a case, if the client has been arrested and there is to be an interview in order to provide advice and attend all interviews, unless exceptional circumstances exist which justify non-attendance or there is an identity parade (although attendance at video identity parades is discretionary).

¹³⁹ Subsequent references to solicitors within the police station context include accredited representatives.

Non-police agencies

With the exception of Revenue & Customs, police station advice and assistance will only apply to non-police investigations (e.g. post office, trading standards, etc.) if a constable is present, even though these agencies are bound by the provisions of PACE. This may mean the investigators have to take the individual to a police station. Alternatively, (means-tested) freestanding advice and assistance can be offered.

Process

The detainee will be asked if they want the duty solicitor, or their own solicitor. The police will then telephone the Defence Solicitor Call Centre (DSCC), passing on the details provided by the detainee. The DSCC will then contact the duty or named solicitor, or CDS Direct, as appropriate.

CDS Direct

If the case relates to one of the relatively minor offences dealt with by CDS Direct, the Defence Solicitor Call Centre (DSCC) will automatically refer it to them for telephone advice. This work falls outside the Unified Contract (Crime).

CDS Direct deals with:

- non-imprisonable offences;
- clients arrested on a bench warrant for failing to appear and being held for production before the Court;
- clients arrested on suspicion of drink driving offences; and
- clients detained in relation to breach of police or court bail conditions.

There are exceptions where an attendance is required even in these cases for example, if there is to be an interview or identity procedure, or if the client is vulnerable and therefore eligible for an appropriate adult to be present (for example, youths and adults with mental health problems) or the client can't communicate over the telephone.

Fees

A solicitor can provide telephone advice on a non-CDS Direct matter for a fixed fee of £30.25 (£31.45 in London).

If the solicitor decides to attend, he or she will normally receive a fixed fee. The fee is based on average historic costs in a duty scheme and it varies across the country. On average it is around £245 and includes travel and waiting.

If the case is unusually long and complex, the solicitor may be able to claim more than the standard fixed fee. The solicitor must work out how much they would have been able to claim based on hourly rates for attendance, travel and waiting. If this amount exceeds the exceptional case threshold, they will be paid the fixed fee, plus hourly rates for any work carried out over and above the threshold.

2. Criminal Proceedings

This class of work broadly covers post-charge court work and covers the following:

- advice and assistance from a court duty solicitor;
- advocacy assistance from a court duty solicitor;
- representation in a magistrates' court (client's own solicitor);
- advocacy assistance or representation in the Crown Court in relation to criminal and other prescribed proceedings;
- representation in the High Court or county court for proceedings relating to criminal cases;
- fees where a representation order is refused on the Interests of Justice test or the means test.

Advice and assistance/advocacy assistance from the Court Duty Solicitor

Scope

Advice and assistance and/or advocacy assistance is available to a client provided that the sufficient benefit test is met and subject to the further conditions below.

If a client wants advice, the duty solicitor must provide it if the client is in custody or it is related to a bail application (unless they have had advice previously on the latter) or the individual is involved in prescribed proceedings (i.e. those civil procedures prescribed as criminal in the CDS regulations, for example, Anti-Social Behaviour Orders (ASBOs)). They may also provide advice and/or advocacy if the client is in custody and is pleading guilty, or if they client is not in custody but charged with an imprisonable offence. They can also provide advice and/or advocacy if the client has failed to pay a fine previously imposed and is therefore at risk of imprisonment or is seeking to vary police bail conditions. They can also help eligible clients to apply for a representation order.

However, the duty solicitor is not allowed to provide advice or advocacy for a non-imprisonable offence (i.e. one that would fail the Interests of Justice). Non-imprisonable offences include driving offences, drunk and disorderly and TV licence payment evasion. Nor can they provide advocacy assistance in committal proceedings or at a not guilty trial.

Fees

Duty solicitors are paid at hourly rates for attendance and waiting (normally £53.85, or £55.15 in London), but during a session they may see many different clients.

Advocacy assistance at the Virtual Court

Scope

Solicitors may claim for advocacy where a case is disposed of at the virtual court hearing (or at a hearing later the same day), or where further hearings are held but the client does not have a representation order. Providers may attend at the police station or court.

There is no means test and the sufficient benefit test is automatically fulfilled.

Fees

A fixed fee of £150 is paid (£200 in London) with a fee of £180 (£240) if unsociable hours are involved. If the solicitor goes on to represent the client under a representation order at future hearings, the virtual court fee cannot be claimed, but the time is taken into account for the purpose of calculating the magistrates' court standard fee.

Representation in the magistrates' court (own client)

Scope

This covers representation in criminal proceedings in the magistrates' court, including advice on an appeal and related bail proceedings in the Crown or High Court.

The magistrates' court fee scheme excludes cases sent or committed to the Crown Court for trial,¹⁴⁰ and Very High Cost Criminal Cases (VHCCCs)¹⁴¹ which can only be undertaken by firms under separate contract to the LSC.

To qualify for a representation order, a client must pass both the Interests of Justice test and the means test.

Fees

Broadly the magistrates' courts fees categories are as follows:

- category 1 – guilty pleas;
- category 2 – contested trials;
- category 3 – committal proceedings which are discontinued or withdrawn.

Cases committed to the Crown Court for sentence receive a category 1 or 2 fee, plus a fixed fee for the sentence hearing in the Crown Court, payable under the Litigators' Graduated Fees Scheme (LGFS).

With effect from April 2010, there is no longer any payment under the magistrates' court fee scheme for cases successfully committed to the Crown Court for trial. Instead, a fixed fee of £318 is payable under the LGFS to reflect work done in the magistrates' court (as was already the case for sent cases).

If the cost of the case (based on LSC hourly rates) exceeds the lower limit, the higher fee applies. If they exceed the higher limit, the whole fee is paid on hourly rates. For example, the hourly fee for preparation is £49.70 (except London) and for advocacy it is £62.35.

Extradition cases that are publicly funded are also paid through the magistrates' courts scheme.

¹⁴⁰ Work done at the magistrates' court on these cases is claimed under the Crown Court fee scheme (Litigators' Graduated Fees Scheme).

¹⁴¹ Cases expected to last more than 40 days if they went to trial, or if those expected to last between 25 and 40 days where certain conditions are met (for example, large numbers of defendants or pages of evidence, fraud cases).

3. Crown Court

The crime contract does not cover work done in the Crown Court. For Crown Court work, payment is calculated according to the Advocates' and Litigators' Graduated Fees Schemes (AFGS and LGFS) set out in the Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174) as amended.

A graduated fee for advocates is calculated based on the following proxies for complexity:

- the nature of the alleged offence;
- the type of case (for example, if there is a guilty plea or if the case goes to full trial);
- the length of trial;
- the number of pages of prosecution evidence; and
- the number of prosecution witnesses.

Different fees are payable to different categories of advocate, for example, Queen's Counsel and juniors. Provision is also made for cases where a guilty plea is entered, for cracked trials and for fixed fees for other court appearances such as admissibility/withdrawal of plea hearings, case management hearings and 'standard' hearings.

There are also hourly rates for 'special preparation' or 'wasted preparation', though those are payable only in limited circumstances. The litigators' graduated fee is similarly based on proxies for complexity. It is intended that the AFGS and LGFS are comprehensive – the LSC may pay advocates and litigators in Crown Court cases only in accordance with the relevant Schedules of the Order.

Very High Cost Criminal Cases

The main exception to fixed/graduated fees is in relation to Very High Cost Criminal Cases (VHCCCs). Since 2003, the LSC have run very large criminal cases under contract. From July 2010 this regime applies to cases due to last over 40 days (as far as litigators are concerned) and over 60 days (as far as advocates are concerned). There are only around 100 or so cases a year that are treated as VHCCCs – roughly 0.1% of volume, but they consume nearly £100m per annum. The scheme operates differently from a graduated fee scheme, in that defence teams agree (with their contract manager) an overall case plan and then three-month blocks of work (stage plans), which establish the number of hours to be spent doing various tasks (for example, reading pages of evidence, taking instructions, etc.) at a set hourly rate for each task. In this way, defence costs can be more tightly managed, with regular opportunities for the contract manager to question the work being negotiated.

The maximum hourly rates for the various categories of case (which reflect the complexity or 'weight' of cases, split between fraud and non-fraud) are set out in the LSC's VHCCC contract.

Annex E: Summary of Consultations on Legal Aid between 2006 and 2009

Name and Summary	Open	Link
Very High Cost (Crime) Cases 2010 The proposals set possible options for a replacement scheme.	02 Dec 2009	https://consult.legalservices.gov.uk/consult.ti/VHCC2010/consultationHome
Legal aid: funding reforms Proposals to reform the fees paid to litigators and advocates in publicly-funded criminal cases and measures to reduce spending on experts' fees in all legal aid cases.	20 Aug 2009	http://www.justice.gov.uk/consultations/legal-aid-funding-reforms.htm
Legal Aid: refocusing on priority cases Ministry of Justice/Legal Services Commission consultation on reforming the legal aid rules to ensure that limited resources are focused on priority cases.	16 Jul 2009	https://consult.legalservices.gov.uk/consult.ti/prioritycases/consultationHome
Eligibility Rules for Membership of Duty Solicitor Schemes And Local Scheme Boundaries: A Consultation Proposed changes to the way that eligibility is determined for Duty Solicitor Schemes.	15 May 2009	https://consult.legalservices.gov.uk/consult.ti/DSS09/consultationHome
Best Value Tendering for CDS Contracts 2010 Focused on proposals for the procurement of new contracts through best value tendering.	27 Mar 2009	https://consult.legalservices.gov.uk/consult.ti/BVT2010/consultationHome
Phase 1 Civil Fee Schemes Review: Proposed Amendments from 2010: A Consultation Proposed amendments to Phase 1 Civil Fee Schemes in legal aid following a review as set out in the Deed Of Settlement with The Law Society.	01 Apr 2009	https://consult.legalservices.gov.uk/consult.ti/phase1review/consultationHome
Prison Law Funding Proposals for the reform of prison law funding.	10 Feb 2009	https://consult.legalservices.gov.uk/consult.ti/Prisonlaw09/consultationHome
The Future of Very High Cost Cases (December 2008) The proposals set possible options for a replacement scheme.	19 Dec 2008	https://consult.legalservices.gov.uk/consult.ti/VHCCProject08/consultationHome
Family Legal Aid Funding from 2010 Fee structures and funding changes that form the second phase of family reform.	17 Dec 2008	https://consult.legalservices.gov.uk/consult.ti/FamilyFees2008/consultationHome

Name and Summary	Open	Link
Means Testing and the Crown Court Proposals on the introduction of Means Testing in the Crown Court.	06 Nov 2008	https://consult.legalservices.gov.uk/consult.ti/crowncourt_manager/consultationHome
Civil Bid Rounds for 2010 Contracts Bid criteria and award process for civil legal aid contracts that will be introduced from 2010.	31 Oct 2008	https://consult.legalservices.gov.uk/consult.ti/2010Contracts/consultationHome
Virtual Court Consultation on the amendments to the Unified Contract and Crime Specification necessary to support the national Virtual Court pilot.	10 Oct 2008	https://consult.legalservices.gov.uk/consult.ti/virtualcourt/consultationHome
Proposed changes to family guidance Consultation on the changes to the Legal Services Commission Manual. The proposed changes anticipated the implementation of the Children and Adoption Act 2006.	10 Sep 2008	https://consult.legalservices.gov.uk/consult.ti/familyguidance2008/consultationHome
Reforming the Legal Aid Family Barrister Fee Scheme Ministry of Justice/Legal Services Commission consultation on interim changes to the Family Graduated Fee Scheme.	18 Jun 2008	https://consult.legalservices.gov.uk/consult.ti/FGF2008/consultationHome
Unified Contract (Crime) July 2008 Consultation on the terms and contents of the Unified Contract (Crime), which replaced the General Criminal Contract (January 2008).	31 Jan 2008	https://consult.legalservices.gov.uk/consult.ti/cds.contract/consultationHome
Best Value Tendering for Criminal Defence Services Consultation on a possible future system of best value tendering (BVT) for criminal legal aid.	10 Dec 2007	https://consult.legalservices.gov.uk/consult.ti/bestvaluetendering/consultationHome
Very High Cost Cases (Crime) Contract Consultation on the terms and content of the Very High Cost Cases (Crime) Contract for the panel running from 14 January 2008 for 18 months.	06 Feb 2008	https://consult.legalservices.gov.uk/consult.ti/CarterVHCC/consultationHome
Unified Contract Specification – Family Mediation category specific provisions Consultation on proposed fees and detailed rules for undertaking Family Mediation work.	29 Jun 2007	https://consult.legalservices.gov.uk/consult.ti/family.mediation/consultationHome

Name and Summary	Open	Link
<p>Proposed Amendments to the General Criminal Contract (implementation Oct 2007) Consultation on proposed amendments to the General Criminal Contract.</p>	28 Jun 2007	https://consult.legalservices.gov.uk/consult.ti/AmendGeneralCriminal07/consultationHome
<p>Litigator Graduated Fees Scheme Consultation on the LSC's proposals for a fixed and graduated fee scheme for litigators who undertake work in the Crown Court.</p>	26 Jun 2007	https://consult.legalservices.gov.uk/consult.ti/litigator.graduated.fee/consultationHome
<p>Quality assurance scheme for advocates Joint MoJ/LSC consultation on proposals to develop a quality assurance pilot scheme for all publicly funded criminal defence advocates working in the Crown Court and above.</p>	22 Jun 2007	https://consult.legalservices.gov.uk/consult.ti/quality.assurance/consultationHome
<p>Unified Contract specification – Mental Health category specific provisions Consultation on proposed fees and detailed rules for undertaking Mental Health work.</p>	22 Jun 2007	https://consult.legalservices.gov.uk/consult.ti/mental.health.spec/consultationHome
<p>Market Stability Measures Consultation in response to Lord Carter's recommendations that the LSC introduces measures to mitigate market fragmentation and allow firms to begin the process of restructuring.</p>	27 Apr 2007	https://consult.legalservices.gov.uk/consult.ti/market.stability/consultationHome
<p>Duty Solicitor Call Centre and CDS Direct Consultation on the Commission's proposal to expand the role of the Duty Solicitor Call Centre and of the CDS Direct pilot to cover own client work.</p>	09 Mar 2007	https://consult.legalservices.gov.uk/consult.ti/dscc.cdsoverdirect/consultationHome
<p>Child Care Proceedings and Funding Code changes Proposed changes to our funding criteria for representation in Child Care proceedings.</p>	01 Mar 2007	https://consult.legalservices.gov.uk/consult.ti/ccpfc/consultationHome
<p>Unified Contract Specification (Civil) Consultation on the specification for civil contracts.</p>	01 Mar 2007	https://consult.legalservices.gov.uk/consult.ti/unified.civil.contract/consultationHome
<p>Family Fee Schemes Consultation on family fee schemes.</p>	01 Mar 2007	https://consult.legalservices.gov.uk/consult.ti/family.fee.schemes/consultationHome
<p>Police station reforms Consultation on proposals to introduce fixed fees for police station work.</p>	12 Feb 2007	https://consult.legalservices.gov.uk/consult.ti/police.station.reforms/consultationHome
<p>Very High Cost Case (VHCC) Panel Consultation on proposals to establish a panel of providers for VHCCs.</p>	12 Feb 2007	https://consult.legalservices.gov.uk/consult.ti/vhcc/consultationHome

Name and Summary	Open	Link
<p>Amendments to General Criminal Contract (Early Cover) Consultation on amendments to the General Criminal Contract. The amendments surrounded CDS Act changes and Early Cover provision.</p>	<p>11 Dec 2006</p>	<p>https://consult.legalservices.gov.uk/consult.ti/GCC.early/consultationHome</p>
<p>Making Legal Rights a Reality in Wales Consultation on how policies for the reform of the CLS could be implemented in Wales taking account of Welsh policy, geography, language and culture.</p>	<p>05 Dec 2006</p>	<p>https://consult.legalservices.gov.uk/consult.ti/legal.rights.wales/consultationHome</p>
<p>LSC Unified Contract and General Criminal Contract Consultation on proposals for a unified contract for civil work.</p>	<p>01 Oct 2006</p>	<p>https://consult.legalservices.gov.uk/consult.ti/unified.criminal.contract/consultationHome</p>

Annex F: Summary of Proposals for Reform of the Scope of Civil and Family Legal Aid

The following table summarises the proposed changes to the scope of civil and family legal aid, as set out in Chapter 4 of the consultation paper.

All the types of case and proceeding which are excluded from the scope of the current legal aid scheme will remain out of scope.

The Government intends to replace the current exceptional funding scheme with a new scheme to provide legal aid for excluded cases where the Government is satisfied that the provision of some level of legal aid is necessary for the United Kingdom to meet its domestic and international legal obligations, including those under the European Convention on Human Rights (and, in particular, article 2 and article 6), or where there is a significant public interest in funding Legal Representation for inquest cases. It is not intended that exceptional funding will generally be available except where it can be demonstrated that it is necessary to discharge those obligations, or where we are satisfied that the relevant test for Legal Representation has been met in inquest cases.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Asylum	<p>This category covers Legal Help and Controlled Legal Representation relating to asylum issues, particularly applications and appeals.</p> <p>This includes:</p> <ul style="list-style-type: none"> • advice at the application stage • Representation before the First-tier Tribunal (Asylum and Immigration), and Representation before higher courts • advice to clients in detention on making a bail application; • advice on grant or variation of leave in the UK; • advice to Unaccompanied Asylum Seeking Children. 	<p>We propose to retain the current scope of Legal Help and Controlled Legal Representation with the exception of advice on applications for asylum support under section 4 and section 95 of the Immigration and Asylum Act 1999 (see Welfare Benefits, below).</p>		<ul style="list-style-type: none"> • Importance of issues: relatively high (immediate and severe risk to clients; international legal obligations: article 15 of the 2005 EU Asylum Procedures Directive); • Ability to self-represent: poor, client group, vulnerable, may be traumatised. 	
Claims against public authorities	<p>This category covers claims against public authorities, including claims for both simple and gross negligence, and personal injury claims in certain circumstances.</p> <p>Claims are funded where they concern:</p> <ul style="list-style-type: none"> (i) “serious wrong-doing, or (ii) abuse of position of power or (iii) significant breach of human rights”, or (iv) where they are of Significant Wider Public Interest (and, where they form part of a Multi-Party Action, where the likely damages exceed £5,000). 	<p>We propose to provide funding for claims against public authorities arising from “negligent acts or omissions falling very far below the required standard of care”. We therefore propose that claims against public authorities should continue to receive legal aid where they concern:</p> <ul style="list-style-type: none"> (i) abuse of position of power; and/or (ii) significant breach of human rights; and/or (iii) negligent acts or omissions falling very far below the required standard of care. <p>Where there is potential for an individual case to be dealt with by means of an alternative source of funding, this source to be used instead.</p>		<p>Importance of issues: relatively high (public safety, misuse of state power).</p>	<p>Importance of issues: relatively low (financial claims).</p> <p>Alternative sources of funding: CFAs available for stronger cases.</p> <p>Ability to self-represent: less likelihood of specific vulnerability issues.</p>

¹⁴² In addition to the international legal obligations set out here, we have taken into account our obligations under the European Convention on Human Rights (ECHR).

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
			We propose to exclude cases which do not fall into one of the three categories proposed for inclusion (abuse of position of power; significant breach of human rights; or negligent acts or omissions falling very far below the required standard of care). We do not propose to retain the existing rule that brings back into scope of civil legal aid any matter for which it is argued that Significant Wider Public Interest applies.		Importance of issues: relatively low (financial claims, negligence). Ability to self-represent: less likelihood of specific vulnerability issues. Alternative sources of funding: CFAs may be available.
Claims arising from allegations of abuse and sexual assault	This category covers legal aid for monetary claims under the abuse of a child or vulnerable adult, or where they arise out of allegations of negligence or wrongful act, including a medical accident.	We propose to retain the current scope of Legal Help and Representation.		Importance of issue: relatively high (while largely financial claims, their importance goes beyond this). Ability to self-represent: victims likely to be vulnerable as a result of injuries sustained.	Alternative sources of funding: CFAs available for many cases.
Clinical negligence	This category covers Legal Help and Representation relating to pursuing actions for clinical negligence. This includes: <ul style="list-style-type: none"> • Legal Help and representation in cases where a client incurs loss because of medical treatment that is not of a reasonable standard of competence; and • advice and representation for claims under the Fatal Accidents Act 1976, which allows claims to be brought by the dependants of someone who dies as a result of negligence or wrongful act, including a medical accident. 		We propose to remove all Legal Help and Representation in this category.	Importance of issue: relatively high (though primarily financial claims, client may have been seriously injured). Ability to self-represent: some litigants may be vulnerable as a result of injuries sustained.	Alternative sources of funding: CFAs available for many cases.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Community care	<p>This category covers advice in relation to cases involving litigants who are unable to look after themselves because of age, illness or disability.</p> <p>This includes:</p> <ul style="list-style-type: none"> •advice on obtaining or challenging an assessment by local authority; •advice on obtaining or challenging the type or level of services provided by local authority; •advice on challenging care home closures or contesting involuntary removal from home by a local authority. 	We propose to retain the current scope of advice and representation.		<p>Importance of issues: relatively high (clients' ability to live independent and fulfilled lives, safeguarding rights of elderly and infirm to be cared for adequately and with dignity).</p> <p>Ability to present case: client group less able and disproportionately vulnerable.</p> <p>Alternative routes to resolution; none, as cases are brought against the state; alternative forms of advice and assistance are insufficient.</p> <p>Alternative sources of funding: none.</p>	
Consumer and general contract	<p>This category includes Legal Help and Representation in relation to consumer law issues, such as breach of contract and professional negligence.</p> <p>It includes advice and representation relating to:</p> <ul style="list-style-type: none"> •breach of contract; •professional negligence (other than medical negligence); •recovery of property; •fraud; •consumer credit issues; •personal data issues. 		We propose to remove all Legal Help and Representation in this category.	Ability to self-represent.	<p>Importance of issues: relatively low (financial claims).</p> <p>Ability to present own case: no specific issues of complexity; less likelihood of specific vulnerability issues.</p> <p>Alternative sources of funding: CFAs widely available.</p> <p>Alternative routes to resolution: e.g. Financial Ombudsman's Service, OTELO; other sources of advice available e.g. Trading Standards.</p>

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Legal Help for the Criminal Injuries Compensation Authority	Legal Help is currently available for litigants making an application to the Criminal Injuries Compensation Authority (CICA).		We propose to remove this Legal Help from scope.	Ability to self-represent: some victims may be vulnerable if the injury was serious or traumatising.	Importance of issues: claims primarily financial. Ability to self-represent: straightforward, accessible process. Alternative routes to resolution: support from CICA staff to complete application; some voluntary organisations assist specific victims of crime.
Debt	This category covers Legal Help and some Legal Representation in relation to all debt issues. This includes: <ul style="list-style-type: none"> •advice in relation to bank loans, credit cards, other regulated credit debts; •advice in relation to rent, mortgage, council tax, utilities and court fines; •representation on an action to recover monies due or owing against the opponent; and •advice and representation in relation to bankruptcy or Individual Voluntary Arrangements. 	We propose to retain existing Legal Help and Representation only for those debt matters where the client's home is at immediate risk, as a result of rent or mortgage arrears. Although it is proposed that legal aid will remain available for Legal Representation in appropriate cases, in practice the merits test will continue to mean that most cases are funded at the Legal Help level.		Importance of issues: relatively high (impact on clients' livelihood, health, safety and well-being from loss of the home) Ability to self-represent: more likely to be ill or disabled.	Importance of issues: relatively low (financial issues). Alternative routes to resolution: many sources of help with debt issues, e.g. National Debtline, Money Advice Trust.
			We propose to remove all Legal Help and Representation in relation to debts such as council tax, utilities, credit card debts, fines, unsecured personal loans, overdrafts and hire purchase debts.	Ability to self-represent: more likely to be ill or disabled.	Importance of issues: relatively low (financial issues). Alternative routes to resolution: many sources of help with debt issues, e.g. National Debtline, Money Advice Trust.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
			We also propose to remove all Legal Help and representation for proceedings under the Insolvency Act 1986, including: <ul style="list-style-type: none"> •proceedings concerning the making, discharge or annulment of a bankruptcy order; and •matters concerning an Individual Voluntary Arrangement. 	Ability to self-represent: more likely to be ill or disabled.	Importance of issues: relatively low (financial issues).
Discrimination proceedings	Currently, civil legal aid is available (either for Legal Help or for both Legal Help and Representation) for a range of claims arising from allegations of unlawful discrimination. These claims can arise in a variety of contexts, for example, discrimination in educational provision, employment matters or consumer claims.	We propose that legal aid is retained for all claims of unlawful discrimination currently within scope, regardless of the category in which they arise.		Importance of the issues: relatively high (addressing societal prejudice, and ensuring equality of opportunity). Ability to self represent: some client groups may face difficulties.	Importance of the issues: primarily damages claims. Alternative routes to resolution: Equality and Human Rights Commission offers advice and legal assistance.
Education	This category covers Legal Help and some Legal Representation in relation to alleged failures in education provision. This includes: <ul style="list-style-type: none"> •advice on appealing to local authority or tribunal in relation to establishing, revising, or acting on a statement of special educational need; •representation at the Upper Tribunal in appeals against decisions of the First-tier Tribunal in special educational needs cases; •advice on claims for negligence in the provision of education; and •advice in relation to long term exclusion from, or refusal to provide education. 		We propose to remove all Legal Help and Representation on education matters.	Ability to self-represent: parents of disabled children involved in SEN cases are more likely to be disabled themselves.	Importance of issues: relatively low (some financial claims; some issues arise from personal choices, e.g. conduct at school). Ability to self-represent: Tribunal accessible to lay people. Alternative sources of funding: damages claims suitable for CFAs. Alternative routes to resolution: help available from parent partnerships, charities (e.g. IPSEA).

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Employment	<p>This category covers Legal Help in relation to employment law and Legal Representation for appeals to the Employment Appeal Tribunal.</p> <p>This includes advice in relation to:</p> <ul style="list-style-type: none"> •unfair and wrongful dismissal; •redundancy; •employment contracts; •discrimination; •strike action; •data protection and employee confidentiality; •terms and conditions; and •wages issues. <p>It includes Legal Help and Representation for appeals to the Employment Appeal Tribunal. Legal Help and Representation is also available for the small number of employment matters, for example, breach of contract, which are heard before the court rather than the Tribunal.</p>		We propose to remove all Legal Help and Representation on employment matters.		<p>Importance of issues: relatively low (financial claims).</p> <p>Ability to self-represent: less likelihood of specific vulnerability issues; Employment Tribunal accessible to lay person.</p> <p>Alternative sources of funding: damages-based agreements available in employment cases, legal assistance via Trades Union membership, mediation (employer-funded).</p> <p>Alternative routes to resolution: mediation (employer-funded), ACAS arbitration service.</p>
Environmental matters	<p>Currently civil legal aid funds a variety of actions that concern environmental matters.</p> <p>These are principally judicial reviews, but can include, for example, injunctions against private companies or individuals.</p>	We propose to retain existing Legal Help and Representation for environmental matters.		<p>Importance of issues: relatively high (serious health risks affecting one or more people); international legal obligation to ensure access to environmental justice not prohibitively expensive (Aarhus Convention¹⁴³).</p> <p>Alternative sources of funding: few, but some cases suitable for CFAs.</p>	<p>Ability to self-represent: no specific issues of complexity; less likelihood of specific vulnerability issues.</p>

¹⁴³ The United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
European Union cross-border cases	Currently legal aid is available by agreement to those who are domiciled or habitually resident in one EU Member State to bring cross-border litigation in another.	We propose to retain the current scope of Legal Help and Representation.		<p>Importance of the issues: variable but can be relatively high; reciprocal international legal obligations: Council Directive 2002/8/EC.</p> <p>Ability to self-represent: low, given cross-border nature of cases.</p> <p>Alternative sources of funding: insufficient.</p> <p>No alternative sources of advice or assistance.</p>	Ability to self-represent: less likelihood of specific vulnerability issues.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
<p>Family law (private): (a) ancillary relief</p>	<p>The family (private) category of law covers Legal Help, Family Mediation, Family Help and Legal Representation in relation to private family disputes over financial issues.</p> <p>This includes advice and representation in legal actions relating to:</p> <ul style="list-style-type: none"> •disputes about the division of financial assets; •applications for a lump sum payment or maintenance; •transfer of tenancy; and •divorce following relationship breakdown. 	<p>We propose to retain advice and representation for proceedings where related domestic violence issues can be demonstrated in one of the following ways:</p> <ul style="list-style-type: none"> •Ancillary relief proceedings where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship; •Ancillary relief proceedings where there are ongoing privately-funded domestic violence (or forced marriage) proceedings, or where there have been such privately-funded proceedings in the last 12 months (or proceedings brought by a litigant in person) and an order was made, arising from the same relationship; •Ancillary relief proceedings where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced marriage, against any other person); •Ancillary relief proceedings where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent). <p>We propose to retain the current funding of mediation in private law family cases.</p>	<p>We propose to remove all advice and representation for ancillary relief cases where domestic violence is not present.</p>	<p>General:</p> <ul style="list-style-type: none"> •Importance of issues: range (from primarily financial e.g. dividing assets to right to remain in marital home with dependent children); in best interests of family to resolve issues themselves outside court, with help from a mediator if required. <p>Domestic violence / forced marriage:</p> <ul style="list-style-type: none"> •relatively high (for domestic violence, safety of litigants; for forced marriage, risk of harm, loss of liberty); •Ability to self-represent: vulnerability of, and potential intimidation faced by, alleged victims; •Alternative sources of funding: none; •Alternative routes to resolution: insufficient. 	<p>General:</p> <ul style="list-style-type: none"> •Importance of issues: range (from primarily financial e.g. dividing assets) to right to remain in marital home with dependent children); in best interests of family to resolve issues themselves outside court, with help from a mediator if required; •Ability to self-represent: no specific issues; less likelihood of specific vulnerability issues (though high emotional involvement in some cases); •Alternative sources of funding: proposed changes to court powers to enable Court to make interim lump sum order to redress material imbalance between parties; •Alternative routes to resolution: majority of individuals reach agreement without recourse to the courts; alternative sources of advice available, including online resources.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
<p>Family law (private): (b) children and family cases</p>	<p>The family (private) category of law for private children disputes covers Legal Help, Family Mediation, Family Help and Legal Representation in relation to private family disputes, such as child contact.</p> <p>This includes advice and representation in legal actions relating to:</p> <ul style="list-style-type: none"> •disputes about contact and residence of children; •injunctions against ex- partners; •Prohibited Steps Orders; and divorce following relationship breakdown. 	<p>We propose to retain advice and representation for proceedings where related domestic violence issues can be demonstrated in one of the following ways:</p> <ul style="list-style-type: none"> •Private Law Children proceedings where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship; •Private Law Children proceedings where there are ongoing privately-funded domestic violence (or forced marriage) proceedings, or where there have been such privately-funded proceedings in the last 12 months (or proceedings brought by a litigant in person) and an order was made, arising from the same relationship; •Private Law children proceedings where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced marriage, against any other person); Private Law Children proceedings where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent). <p>We propose to retain the current funding of mediation in private law family cases.</p>	<p>We propose to remove all advice and representation for private law children and family cases where domestic violence is not present.</p>	<p>General:</p> <ul style="list-style-type: none"> •Importance of issues: issues in these cases will sometimes be of relatively high importance (family life, and best interests of children); •Ability to self-represent: high level of emotional involvement in some cases. <p>Domestic violence / forced marriage:</p> <ul style="list-style-type: none"> •Importance of issues: relatively high (for domestic violence, safety of litigant; for forced marriage, risk of harm, loss of liberty); •Ability to self-represent: vulnerability of, and potential intimidation faced by, alleged victims; •Alternative sources of funding: none; •Alternative routes to resolution: insufficient. 	<p>General:</p> <ul style="list-style-type: none"> •Ability to self-represent: no specific complexity issues; •Alternative routes to resolution: in best interests of family to resolve issues themselves outside court, with help from a mediator if required, rather than protracting disputes through the courts; arrangements agreed informally without recourse to courts in vast majority of cases; continuing provision of legal aid funding for mediation; alternative sources of advice available.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Family law (private): (c) domestic violence and forced marriage	<p>The family (private) category of law covers Legal Help, Family Mediation, Family Help and Legal Representation in relation to domestic violence and forced marriage.</p> <p>Domestic violence cases may involve, for example, non-molestation orders and occupation orders.</p> <p>Forced marriage cases include forced marriage injunctions, and applications under the inherent jurisdiction of the High Court for a wardship order relating to a 16 or 17 year old abducted abroad for the purposes of forced marriage.</p>	We propose to retain the current scope of advice and representation for domestic violence and forced marriage cases.		<p>Importance of issues: relatively high (litigant at risk of physical harm and, in forced marriage cases, loss of liberty).</p> <p>Ability to self-represent: alleged victims of abuse may be particularly vulnerable.</p> <p>Alternative sources of funding: none.</p> <p>Alternative routes to resolution: none.</p>	
Family law (private): (d) international child abduction	<p>The family (private) category of law covers Legal Help, Family Mediation, Family Help and Legal Representation in relation to international child abduction cases.</p> <p>This includes advice and representation in legal actions relating to disputes about contact and residence of children.</p>	We propose to retain the current scope of advice and representation for international child abduction cases.		<p>Importance of issue: relatively high (return of child to home country; reciprocal international obligations under 1980 Hague Convention,¹⁴⁴ 1980 Luxembourg Convention,¹⁴⁵ and the Council Regulation (EC) No 2201/2003 (Brussels IIa)¹⁴⁶</p> <p>Ability to self-represent: low, given cross-border nature of cases</p> <p>Alternative routes to resolution: none.</p>	

¹⁴⁴ The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

¹⁴⁵ European Convention [Council of Europe] on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children signed in Luxembourg on 20 May 1980. The 1980 Hague and Luxembourg Conventions apply to persons from Contracting States.

¹⁴⁶ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Brussels IIa applies to persons domiciled or habitually resident in the EU Member State concerned.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴⁷	
				Factors for retention	Factors for removal
Family law (private): (e) international family maintenance	The family (private) category of law covers Legal Help and Representation for international applications, appeals and enforcement proceedings concerning family maintenance and child support, and Legal Help and Representation for international child maintenance applications.	We propose to retain free legal assistance for the international family maintenance cases.		Importance of issues: relatively high (family life); reciprocal international legal obligations: 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, and the EU Maintenance Regulation 4/2009. ¹⁴⁷ Ability to self-represent: low, given cross-border nature of cases.	
Family law (private): (f) representation of children in rule 9.5 proceedings	The family (private) category of law covers Legal Help, Family Mediation, Family Help and Legal Representation in relation to private family disputes. Under Rule 9.5 (and 9.2A) of the Family Proceedings Rules 1991, the judge can make a child a party to the proceedings if it is in their best interests.	We propose to retain funding for advice and representation for separately represented children under Rule 9.5 (and 9.2A) of the Family Proceedings Rules 1991, making a child a party to the proceedings if it is in their best interests.		Importance of issues: relatively high (future care of child) Ability to self-represent: low, since the child is a party to the proceedings and will require assistance.	
Higher courts: The Court of Appeal, the Supreme Court, and European Court of Justice	Legal Help and Representation is available for onward appeals to the Court of Appeal and the Supreme Court, and references to the European Court of Justice, in cases where legal aid for advocacy is available in the lower court. Currently, all appeals to the Court of Appeal and Supreme Court fall within the scope of legal aid unless the category of law is	We propose that legal aid will only be available for onward appeals to these courts in categories of cases where legal aid remains in scope.	We propose to remove legal aid for onward appeals to these courts where the category of law would no longer be in scope.	Importance of issues: variable. Ability to self-represent: varies with complexity of issues.	Importance of issues: variable. Ability to self represent: varies with complexity of issues.

¹⁴⁷ Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in matters relating to Maintenance Obligations.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
	excluded.				
Higher courts: Upper Tribunal appeals	<p>Currently civil legal aid is available for appeals to the Upper Tribunal in relation to decisions made by First-tier Tribunals within the General Regulatory Chamber of the Tribunal Service.</p> <p>The General Regulatory Chamber contains the following First-tier Tribunals:</p> <ul style="list-style-type: none"> ●Charity; ●Claims Management Services; ●Consumer Credit; ●Environment; ●Estate Agents; ●Gambling Appeals; ●Immigration Services; ●Information Rights; ●Local Government Standards in England; and ●Transport. <p>Appeals from these tribunals are usually to the Upper Tribunal.</p>		We propose to remove all Legal Help and Representation currently within scope in this category.		<p>Importance of issues: generally relatively low.</p> <p>Ability to self-represent: high, Tribunal is designed to be accessible; proceedings are fact based and inquisitorial; no specific vulnerability issues.</p>

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Housing	<p>This category covers advice and representation relating to issues concerning property or the home, particularly homelessness and disrepair issues.</p> <p>This includes:</p> <ul style="list-style-type: none"> •representation in an action for possession of property and/or demotion of tenancy and, if appropriate, for arrears of rent and/or other remedies in the same action; •advice and representation in relation to homelessness or threat of homelessness; •advice and representation in relation to possession for rent arrears; •representation in an action for judicial review; •advice and representation in actions regarding anti-social behaviour; and •advice and representation in an action for housing disrepair against the opponent. 	<p>We propose to retain Legal Help and Representation for:</p> <ul style="list-style-type: none"> •advice and representation for repossession cases, including actions for possession due to rent, service charge, or mortgage arrears, adverse possession and similar matters arising out of tenancy agreements; •advice and representation for damages claims for disrepair, where they are brought as a counterclaim in rent arrears possession cases; •appeals to the county court on points of law under section 204 of the Housing Act 1996 which relate to the obligations of local authorities to those who are homeless or threatened with the risk of homelessness; •actions under the Mobile Homes Act 1983 where the site owner is seeking eviction. 		Importance of issues: relatively high (immediate risk to clients' livelihood, health, safety and well-being).	Ability to self-represent: no specific complexity issues.
		<ul style="list-style-type: none"> •housing disrepair (where the action is for a remedy other than damages and the case involves serious disrepair); 		Importance of issues: relatively high (immediate risk to clients' health, safety and well-being).	Ability to self-represent: no specific issues of complexity.
		<ul style="list-style-type: none"> •advice and representation for clients challenging Anti-Social Behaviour Orders in the county court, typically alongside possession proceedings, and for injunctions concerning anti-social behaviour. 		Importance of issues: relatively high (restrictions on liberty, criminal sanction in case of breach).	

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
			<p>We propose to remove all advice and representation in this category other than for homelessness and housing disrepair (non-damages) cases.</p> <p>This includes:</p> <ul style="list-style-type: none"> ● an action to enforce a Right to Buy; ● an action to enforce a right to buy a freehold or extend the lease; ● actions to set aside a legal charge (for example, mortgage) or the transfer of a property; ● actions for damages and/or an injunction for unauthorised change of use of premises; ● an action under the Housing Grants, Construction and Regeneration Act 1996; ● applications for a new tenancy under the Landlord and Tenant Act 1954; ● an action for re-housing; ● an action under the Access to Neighbouring Land Act 1992; ● an action for wrongful breach of quiet enjoyment; ● housing disrepair proceedings where the primary remedy sought is damages, including damages for personal injury, ● an action for trespass; or ● an action under the Mobile Homes Act 1983 which does not concern eviction. 	<p>Ability to self-represent: more likely to be ill or disabled.</p>	<p>Importance of issues: relatively low (financial and property cases; some cases arise from personal choices).</p> <p>Ability to self-represent: no specific issues of complexity.</p> <p>Alternative sources of funding: CFAs for damages cases.</p> <p>Alternative routes to resolution: e.g. Shelter, Local Government Ombudsman.</p>

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Immigration	<p>This category covers Legal Help and Controlled Legal Representation for a variety of immigration issues, including questions relating to nationality, leave to enter or remain in the United Kingdom (UK), and deportation.</p> <p>This includes:</p> <ul style="list-style-type: none"> •advice and representation for applications in relation to detention; •advice and representation for refugee family re-union applications; •advice and representation for family visit application/appeals; •advice on visa applications and appeals for prospective students wishing to study in the UK; •advice for former students already in the UK who wish to remain in the UK under the Training and Work Experience scheme; •advice for applicants on Work Permits; •advice for applicants who have been granted leave to remain previously and now want to vary or extend that leave; •advice to applicants wishing to apply for British Citizenship; •advice to an EU citizen wishing to live/work/study in the UK; •advice on any application made to the Home Office (UK Borders Agency /Entry Clearance Officer) which is not defined as a category within the Immigration Rules (HC395); •proceedings before the First tier Tribunal and Upper Tribunal (Immigration and Asylum Chamber); and •Proceedings before the Special Immigration Appeals Commission. 	<p>We propose to retain Legal Help and Controlled Legal Representation for claims brought by detainees that directly challenge their detention.</p> <p>We also propose to retain Legal Help and Controlled Legal Representation for proceedings before the Special Immigration Appeals Commission (SIAC).</p>		<p>Importance of issues: relatively high (client is detained or at risk of detention; or at risk of removal or exclusion from UK on national security or other public interest grounds).</p> <p>Alternative sources of funding: none.</p> <p>Alternative routes to resolution: none.</p> <p>Alternative forms of advice or assistance: insufficient.</p>	

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
			<p>We propose to remove all Legal Help and Controlled Legal Representation for immigration matters, other than for persons seeking release from detention or proceedings before the SIAC.</p> <p>These include but are not limited to:</p> <ul style="list-style-type: none"> • Grant/variation of leave to remain; • Entry clearance applications; • European applications; • Citizenship and travel documents; and • Applications under concessions or policy outside of the Immigration Rules (HC395). 	<p>Importance of issues: some are relatively high (family, private life).</p> <p>Ability to self-represent: more likely to be ill or disabled.</p>	<p>Importance of issues: many applications will be of relatively low importance (e.g. personal choices about where to live/work).</p> <p>Ability to self-represent: Tribunal accessible to the lay person; interpreters free of charge; cases do not involve complex legal issues; no specific traumatisation issues.</p>
Mental health	<p>This category covers Legal Help and Controlled Legal Representation for all cases where the primary legal issue relates to mental health, particularly around detention issues.</p> <p>This includes:</p> <ul style="list-style-type: none"> • advice and representation supporting sectioned clients appealing the terms of their detention before the First-tier (Mental Health) Tribunal; • onward appeals to the Upper Tribunal; and • representation before the Court of Protection, which deals with issues arising out of the Mental Capacity Act 2005 (including issues of liberty, and other associated financial, health and welfare problems). 	<p>We propose to retain the current provision of Legal Help and Controlled Legal Representation.</p>		<p>Importance of issues: relatively high (client is detained or at risk of detention).</p> <p>Ability to self-represent: low; high levels of vulnerability (mental health issues).</p> <p>Alternative sources of funding: none.</p> <p>Alternative routes to resolution: insufficient alternative forms of advice or assistance.</p>	

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Miscellaneous: a) Cash forfeiture proceedings	The legal aid fund provides Legal Help and Representation in relation to defending and challenging forfeiture orders in the magistrates' court and Crown Court.		We propose to remove all Legal Help and Representation for cash forfeiture matters.	Alternative routes to resolution: none.	Importance of issues relatively low (financial). Ability to self-represent: no specific issues of complexity; less likelihood of specific vulnerability issues.
Miscellaneous: b) Confiscation proceedings	The legal aid fund provides Legal Help and Representation for a range of proceedings in the Crown Court and magistrates' courts relating to offences under the Proceeds of Crime Act 2002. These are in the main proceedings connected with confiscation. Civil legal aid is available principally where the confiscation proceedings (such as an application for a restraint order to prevent a person dealing with property) are taking place independently from a criminal prosecution, or where the recipient is a third party who may have a claim over the restrained assets.	We propose to retain the current provision of Legal Help and Representation.		Importance of issues: range (primarily financial, but potential homelessness as a direct consequence). Ability to self-represent: proceedings may be particularly complex. Alternative routes to resolution: none, client's assets are restrained by the state, preventing private payment for legal assistance.	Importance of issues: range (financial, potential homelessness). Ability to self-represent: less likelihood of specific vulnerability issues.
Miscellaneous: c) Injunctions concerning gang-related violence	We propose to make civil legal aid available for injunctions imposed by the Court under section 34 of the Policing and Crime Act 2009 to prevent gang-related violence.	We propose to include these injunctions within the scope of civil legal aid, when section 34 of the Policing and Crime Act 2009 is commenced.		Importance of issues: relatively high (restrictions to liberty). Ability to self-represent: significant proportion may be children or young adults. Alternative routes to	

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
				resolution: none.	
Miscellaneous: d) Independent Safeguarding Authority appeals (Care Standards)	Civil legal aid is currently available for an appeal to the First-tier (Care Standards) Tribunal ¹⁴⁸ in relation to inclusion on a list of individuals who are considered unsuitable to work with children and vulnerable adults or in relation to prohibiting an individual from teaching and related activities.	We propose to retain the current scope of Legal Help and Representation in relation to these cases.		Importance of issues: relatively high (serious consequences for life and livelihood). Alternative sources of funding: none. Alternative routes to resolution: none, due to the involvement of the state.	Ability to self-represent: no specific issues of complexity; less likelihood of specific vulnerability issues.
Miscellaneous: e) Inquests	Legal Help is currently available at inquests, and can be used to assist bereaved families in making written submissions to the Coroner (for example, a list of questions they wish him or her to ask other witnesses). Legal aid for Legal Representation is not generally provided.	We propose to retain the current provision of Legal Help, with separate criteria to be met for Representation in individual cases before the coroners' courts to be funded.		Importance of issues: relatively high (ascertaining circumstances of a family member's death). Alternative sources of funding: insufficient.	Ability to self-represent: inquisitorial nature of inquests.
Miscellaneous: f) Protection from Harassment Act 1997	Civil legal aid is provided to victims if they wish to oppose the varying or discharge of a restraining order made under sections 5 and 5A of the Protection from Harassment Act 1997, where they feel that they may be in danger from, for example, an ex-partner. Legal aid is also available for bringing or defending injunctions against anti-social behaviour under section 3A of the Act.	We propose to retain the current provision of Legal Help and Representation for restraining orders made under sections 5 and 5A.		Importance of issues: relatively high (courts have decided that victim needs additional protection).	

¹⁴⁸ Under sections 4 and 4A of the Protection of Children Act 1999, sections 86 and 87 of the Care Standards Act 2000, and section 144 of the Education Act 2002. From October 2009, these appeal rights were combined under the Safeguarding Vulnerable Groups Act 2006.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
		We propose to retain the current provision of Legal Help and Representation for injunctions under sections 3A.		Importance of issues: relatively high (restrictions on liberty). Ability to self-represent: relatively high complexity of proceedings. Alternative sources of funding: none. Alternative routes to resolution: insufficient.	Ability to self-represent: less likelihood of specific vulnerability issues.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Miscellaneous: g) Quasi-criminal proceedings	<p>It is not possible to identify exhaustively all of the proceedings and offences which are deemed to be 'quasi-criminal'; we currently fund all 'quasi-criminal' cases where the ECHR have declared penalties to be criminal, and where it is required by the interests of justice.</p> <p>Whether a case is 'quasi criminal' is assessed against the following criteria:</p> <ul style="list-style-type: none"> •how proceedings are categorised in domestic legislation; •the nature of the relevant offence or conduct; and •the nature and severity of the applicable penalties. <p>In deciding whether civil legal aid is available for such cases, the LSC must consider whether:</p> <ul style="list-style-type: none"> •the proceedings concern penalties which the courts have declared to be criminal in ECHR terms (or the appellant reasonably seeks to argue that they are); and •it is in the interests of justice for the client to be legally represented (the usual test for the granting of criminal legal aid). 	<p>We propose to retain the current scope of Legal Help and Representation for all 'quasi-criminal' cases which meet the requisite tests.</p>		<p>Importance of issues: relatively high (severity of potential penalties).</p> <p>Alternative sources of funding: none.</p> <p>Alternative routes to resolution: none.</p>	<p>Ability to self-represent: no specific issues of complexity; less likelihood of specific vulnerability issues.</p>

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Miscellaneous: h) Other matters	There are a range of other issues funded under the Miscellaneous category of law. Tort and other general claims falling under this category are dealt with below. There are also a few other matters which fall within this category. These are principally claims concerning: <ul style="list-style-type: none"> ● probate matters; ● personal data; ● infringement of copyright; ● advice on changes of name; and ● advice on making of wills. 		We propose to remove all Legal Help and Representation for all other matters.		Importance of issues: relatively low (generally financial or other low importance issues). Ability to self-represent: no specific complexity issues; no specific vulnerability issues.
Public law	Public Law principally covers the challenging of public authorities in the High Court by way of judicial review (JR), equivalent proceedings of habeas corpus, proceedings in the Upper Tribunal where it is exercising its 'judicial review' jurisdiction, ¹⁴⁹ and JR applications transferred to the Upper Tribunal from the High Court. ¹⁵⁰ It also covers other challenges of a public law nature, for example, statutory appeals, for instance, in homelessness cases. Legal aid for JR challenges is available for all issues other than most business cases.	We propose to retain the current scope of Legal Help and Representation for public law proceedings.		Importance of issues: relatively high (primary means for litigant to hold state to account). Ability to self-represent: generally no specific vulnerability issues, but some clients may have issues, e.g. where JR concerns mental health or community care. Alternative sources of funding: none. Alternative routes to resolution: none; insufficient	Ability to self-represent: less likelihood of specific vulnerability issues.

¹⁴⁹ Under section 15 of the Tribunals, Courts and Enforcement Act 2007.

¹⁵⁰ Under section 31A of the Supreme Court Act 1981.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Public law (children)	<p>This category covers Legal Help and Representation for litigants challenging or defending legal actions taken by the state in relation to the care of children.</p> <p>This includes advice and representation for proceedings under the Children Act 1989 where the state is considering undertaking, or has begun:</p> <ul style="list-style-type: none"> ● care or supervision proceedings in respect of a child; ● proceedings for a child assessment order; ● proceedings for an emergency protection order; or ● proceedings concerning adoption. 	We propose to retain the current scope of Legal Help and Representation.		<p>Importance of issues: relatively high (care of the children in question).</p> <p>Ability to self-represent: low (extremely emotive issues, challenging personal circumstances).</p> <p>Alternative sources of funding: none.</p> <p>Alternative routes to resolution: none.</p>	
Registration and enforcement of judgments under EU legislation	<p>Currently the courts of England and Wales recognise¹⁵¹ a range of family and civil judgments which are made in other Member States of the European Union, and legal aid is available for the registration and enforcement of these judgments.</p>	We propose to retain the current provision of advice and representation.		<p>Importance of issues: high (registration and enforcement of legal judgments) reciprocal international legal obligations: including Brussels I, Brussels IIa, and Hague Convention 1996.</p>	

¹⁵¹ Under the Council Regulation (EC) No 44/2001 (Brussels I) and the Council Regulation (EC) No 2201/2003 (Brussels IIa); Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
Tort and other general claims	<p>Currently legal aid is provided for a range of tort and other general claims. These will primarily be claims where damages are sought, although some may involve, for example, injunctions.</p> <p>This includes:</p> <ul style="list-style-type: none"> ● assault; ● negligence; ● nuisance; ● breach of a statutory duty; ● false imprisonment; and ● malicious prosecution. 		We propose to remove all Legal Help and Representation for tort and other general claims.		<p>Importance of issues: relatively low (primarily damages claims).</p> <p>Ability to self-represent: no specific complexity issues; less likelihood of specific vulnerability issues.</p> <p>Alternative sources of funding: CFAs for strong cases.</p> <p>Alternative routes to resolution: some available, depending on nature of case.</p>
Welfare benefits	<p>This category covers advice (and some representation in higher courts) in relation to the provision of welfare benefits.</p> <p>This includes legal advice on appeals to the First-tier (Social Security) Tribunal in relation to the award of:</p> <ul style="list-style-type: none"> ● Disability Living Allowance; ● Disability Attendance Allowance; ● Incapacity Benefit; ● Income Support; ● Housing Benefit; ● Social Fund payments; ● Jobseekers' Allowance; and ● other benefits. <p>Legal aid is not currently available for onward appeals to the Upper Tribunal.</p>		We propose to remove all Legal Help and Representation for welfare benefits matters.	Ability to self-represent: more likely to be ill or disabled.	<p>Importance of issues: relatively low (financial entitlement).</p> <p>Ability to self-represent: no specific issues of complexity; Tribunal accessible to lay person; cases do not involve complex legal issues.</p> <p>Alternative routes to resolution: advice available from e.g. AgeUK, Child Poverty Action Group, Disability Rights Alliance, Free Representation Unit.</p>

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
			We propose to remove advice and representation for applications for asylum support.	Importance of issues: relatively high (basic subsistence needs, potential homelessness). Ability to self-represent: client group vulnerable, may be traumatised.	Ability to self-represent: applications are straightforward and fact-based – no legal expertise required. Alternative routes to resolution: some voluntary sector organisations provide free advice.

Annex G: Summary of Proposed New Criminal Fees

1. This annex sets out the new fees that would be payable if the proposals in Chapter 6 were implemented.
2. The tables in section A show the proposed fees for advocates for cracked trials and guilty pleas (excluding either way cases committed for trial at the election of the defendant, which will be covered by the arrangements described in paragraph 3 below) and the proposed fees for ancillary payments (or 'bolt ons'). The fees shown reflect the phased reduction to Advocates' Graduated Fees implemented by the previous administration in April 2010, on the assumption that the changes proposed in Chapter 6, if implemented, will not come into force any earlier than 1 April 2011, although the precise date (should the proposed changes be implemented) has not been determined at this stage. The tables also reflect the proposals that category A cases should be paid at category J rates, category G cases should be paid at category F rates, and that the current guilty plea rates should be uplifted by 25%.
3. Section B sets out the proposed fixed fee covering both litigation and advocacy for cracked trials and guilty pleas in either way cases committed for Crown Court trial at the election of the defendant.
4. The tables in section C show the proposed fees for litigators for cracked trials and guilty pleas (excluding those either way cases committed for trial at the election of the defendant covered in paragraph 3). These tables also reflect the proposals that category A cases will be paid at category J rates, category G cases will be paid at category F rates and that the current guilty plea rates will be uplifted by 25%.
5. The table in section D sets out the proposed magistrates' courts fees, including the 25% enhancement to lower standard fees for guilty pleas in either-way cases and the harmonisation of the fees payable in London with the other major urban areas.

Note:

6. All figures exclude VAT.

Section A: Advocates graduated fees – proposed fees

Table A: Fees and uplifts in guilty pleas and trials which crack (excluding those cases committed for trial at the election of the defendant)

Class of Offence	Proposed fees until March 2012			Proposed fees from April 2012		
	Basic Fee	Evidence uplift per page of prosecution evidence (pages 1 to 1,000)	Evidence uplift per page of prosecution evidence (1,001 to 10,000)	Basic Fee	Evidence uplift per page of prosecution evidence (pages 1 to 1,000)	Evidence uplift per page of prosecution evidence (1,001 to 10,000)
QC						
A	2254	3.75	1.88	2143	3.56	1.79
B	1716	2.36	1.19	1631	2.25	1.13
C	1610	1.69	0.84	1530	1.60	0.80
D	1716	3.75	1.88	1631	3.56	1.79
E	1423	1.20	0.60	1351	1.15	0.58
F	1423	1.58	0.80	1351	1.50	0.76
G	1423	1.58	0.80	1351	1.50	0.76
H	1610	2.18	1.08	1530	2.06	1.03
I	1610	2.11	1.05	1530	2.01	1.00
J	2254	3.75	1.88	2143	3.56	1.79
K	2254	2.09	1.05	2143	1.99	1.00
Leading Junior						
A	1690	2.83	1.41	1606	2.69	1.34
B	1288	1.78	0.89	1224	1.69	0.84
C	1208	1.26	0.64	1148	1.20	0.60
D	1288	2.83	1.41	1224	2.69	1.34
E	1066	0.91	0.45	1014	0.86	0.44
F	1066	1.19	0.60	1014	1.13	0.58
G	1066	1.19	0.60	1014	1.13	0.58
H	1208	1.63	0.81	1148	1.55	0.76
I	1208	1.59	0.79	1148	1.51	0.75
J	1690	2.83	1.41	1606	2.69	1.34
K	1690	1.58	0.79	1606	1.49	0.75

Class of Offence	Proposed fees until March 2012			Proposed fees from April 2012		
	Basic Fee	Evidence uplift per page of prosecution evidence (pages 1 to 1,000)	Evidence uplift per page of prosecution evidence (1,001 to 10,000)	Basic Fee	Evidence uplift per page of prosecution evidence (pages 1 to 1,000)	Evidence uplift per page of prosecution evidence (1,001 to 10,000)
Led Junior						
A	1126	1.88	0.95	1071	1.79	0.90
B	859	1.19	0.59	816	1.13	0.56
C	805	0.84	0.43	765	0.80	0.40
D	859	1.88	0.95	816	1.79	0.90
E	711	0.60	0.31	676	0.58	0.29
F	711	0.80	0.40	676	0.76	0.38
G	711	0.80	0.40	676	0.76	0.38
H	805	1.09	0.55	765	1.04	0.53
I	805	1.06	0.53	765	1.00	0.50
J	1126	1.88	0.95	1071	1.79	0.90
K	1126	1.05	0.53	1071	1.00	0.50
Junior Alone						
A	1288	1.56	0.78	1224	1.49	0.74
B	913	1.08	0.54	868	1.01	0.51
C	590	0.79	0.40	561	0.75	0.38
D	913	1.56	0.78	868	1.49	0.74
E	538	0.46	0.23	510	0.44	0.21
F	538	0.71	0.35	510	0.68	0.34
G	538	0.71	0.35	510	0.68	0.34
H	644	0.71	0.36	613	0.68	0.35
I	751	0.56	0.29	714	0.53	0.28
J	1288	1.56	0.78	1224	1.49	0.74
K	1288	1.34	0.68	1224	1.28	0.64

Table B: Fixed Fees

Category of work	Proposed fees until March 2012				Proposed fees from April 2012			
	Type	Fee for QC (£)	Fee for leading junior (£)	Fee for led junior or junior alone (£)	Type	Fee for QC (£)	Fee for leading junior (£)	Fee for led junior or junior alone (£)
Standard appearance	PD	91	69	46	PD	87	65	44
Paper plea and case management hearing	PC	14	14	14	PC	13	13	13
Abuse of process hearing	HD	137	103	69	HD	130	98	65
	FD	262	182	125	FD	249	173	119
Hearings relating to disclosure	HD	137	103	69	HD	130	98	65
	FD	262	182	125	FD	249	173	119
Hearings relating to the admissibility of evidence	HD	137	103	69	HD	130	98	65
	FD	262	182	125	FD	249	173	119
Hearings on withdrawal of guilty plea	HD	137	103	69	HD	130	98	65
	FD	262	182	125	FD	249	173	119
Deferred sentencing hearing	PD	171	125	91	PD	162	119	87
Sentencing hearing	PD	137	91	57	PD	130	87	54
Ineffective trial payment	PD	148	103	69	PD	141	98	65
Special preparation (over 10,000 pages)	PH	77	59	41	PH	74	56	39
Special preparation (other)	PH	39	30	21	PH	37	28	20
Wasted preparation	PH	39	30	21	PH	37	28	20
Conferences and views	PH	39	30	21	PH	37	28	20
Proceedings relating to breach of an order of the Crown Court	PD	114	80	57	PD	108	76	54
Adjourned appeals, committals for sentence and breach hearings	PD	91	69	46	PD	87	65	44
Bail applications, mentions and other applications in appeals, committals for sentence and breach hearings	PD	91	69	46	PD	87	65	44
Second and subsequent days of an application to dismiss	HD	137	103	69	HD	130	98	65
	FD	262	182	125	FD	249	173	119
Noting brief	PD	0	0	57	PD	0	0	54

* Fee types are: PD (per day), PC (per case), HD (half day), FD (full day), PH (per hour)

Section B: Guilty pleas and cracked trials (where cases are committed for Crown Court trial at the election of the defendant) – proposed fee

Fixed fee covering all litigation and advocacy – £565

Section C: Litigators' graduated fees – proposed fees

Cracked trial or guilty plea (other than cases committed for trial at the election of the defendant) where the number of pages of prosecution evidence is less than or equal to the PPE Cut-off

Class of offence						
Type of case	A	B	C	D	E	F
Cracked trial	932.04	761.80	606.73	885.43	253.01	268.24
Guilty plea	932.04	761.80	606.73	885.43	253.01	268.24

Class of offence					
Type of case	G	H	I	J	K
Cracked trial	268.24	261.60	239.18	932.04	877.86
Guilty plea	268.24	261.60	239.18	932.04	877.86

Cracked trials and guilty pleas (other than cases committed for trial at the election of the defendant) where the number of pages of prosecution evidence exceeds the PPE Cut-off

Class of offence	PPE range	Incremental fee	
		Initial fee (£)	per page of prosecution evidence (£)
A	0–79	932.04	0.0000
A	80–399	932.04	7.6965
A	400–999	3,394.91	4.0589
A	1000–2799	5,830.26	2.5958
A	2800–4599	10,502.59	2.5958
A	4600–6399	15,174.90	1.5319
A	6400–8199	17,932.33	1.5319
A	8200–9999	20,689.76	1.5319
A	10,000	23,445.66	0
B	0–69	761.80	0.0000
B	70–399	761.80	6.1871
B	400–999	2,803.55	3.1168
B	1000–2799	4,673.63	1.9895
B	2800–4599	8,254.69	1.9895
B	4600–6399	11,835.76	1.4576
B	6400–8199	14,459.39	1.4576
B	8200–9999	17,083.01	1.4576
B	10,000	19,705.18	0

Proposals for the Reform of Legal Aid in England and Wales

Class of offence	PPE range	Initial fee (£)	Incremental fee per page of prosecution evidence (£)
C	0–39	606.73	0.0000
C	40–399	606.73	3.6491
C	400–999	1,920.39	1.9964
C	1000–2799	3,118.18	1.0835
C	2800–4599	5,068.40	1.0835
C	4600–6399	7,018.64	1.0835
C	6400–8199	8,968.88	1.0835
C	8200–9999	10,919.11	1.0835
C	10,000	12,868.25	0
D	0–79	885.43	0.0000
D	80–399	885.43	7.1674
D	400–999	3,178.99	3.7619
D	1000–2799	5,436.13	2.3424
D	2800–4599	9,652.33	2.3424
D	4600–6399	13,868.54	1.4559
D	6400–8199	16,489.01	1.4558
D	8200–9999	19,109.46	1.4559
D	10,000	21,728.48	0
E	0–39	253.01	0.0000
E	40–399	253.01	4.0051
E	400–999	1,694.85	1.7165
E	1000–2799	2,724.75	0.6321
E	2800–4599	3,862.60	0.6321
E	4600–6399	5,000.45	0.6321
E	6400–8199	6,138.30	0.6321
E	8200–9999	7,276.15	0.6321
E	10,000	8,413.36	0
F	0–49	268.24	0.0000
F	50–399	268.24	3.8823
F	400–999	1,627.03	1.3550
F	1000–2799	2,440.01	0.4360
F	2800–4599	3,224.75	0.4360
F	4600–6399	4,009.49	0.4360
F	6400–8199	4,794.23	0.4360
F	8200–9999	5,578.96	0.4360
F	10,000	6,363.26	0
G	0–49	268.24	0.0000
G	50–399	268.24	3.8823
G	400–999	1,627.03	1.3550
G	1000–2799	2,440.01	0.4360
G	2800–4599	3,224.75	0.4360
G	4600–6399	4,009.49	0.4360
G	6400–8199	4,794.23	0.4360
G	8200–9999	5,578.96	0.4360
G	10,000	6,363.26	0

Proposals for the Reform of Legal Aid in England and Wales

Class of offence	PPE range	Initial fee (£)	Incremental fee per page of prosecution evidence (£)
H	0–39	261.60	0.0000
H	40–399	261.60	3.8266
H	400–999	1,639.16	1.3565
H	1000–2799	2,453.08	0.4331
H	2800–4599	3,232.68	0.4331
H	4600–6399	4,012.30	0.4331
H	6400–8199	4,791.91	0.4331
H	8200–9999	5,571.54	0.4331
H	10,000	6,350.69	0
I	0–39	239.18	0.0000
I	40–399	239.18	4.2768
I	400–999	1,778.80	1.8670
I	1000–2799	2,899.03	0.6976
I	2800–4599	4,154.83	0.6976
I	4600–6399	5,410.61	0.6976
I	6400–8199	6,666.41	0.6976
I	8200–9999	7,922.23	0.6976
I	10,000	9,177.33	0
J	0–79	932.04	0.0000
J	80–399	932.04	7.6965
J	400–999	3,394.91	4.0589
J	1000–2799	5,830.26	2.5958
J	2800–4599	10,502.59	2.5958
J	4600–6399	15,174.90	1.5319
J	6400–8199	17,932.33	1.5319
J	8200–9999	20,689.76	1.5319
J	10,000	23,445.66	0
K	0–119	877.86	0.0000
K	120–399	877.86	7.2030
K	400–999	2,894.70	4.0094
K	1000–2799	5,300.33	3.7339
K	2800–4599	12,021.30	3.7339
K	4600–6399	18,742.28	2.8474
K	6400–8199	23,867.51	2.8474
K	8200–9999	28,992.75	2.8474
K	10,000	34,115.13	0

Section D: Magistrates' courts standard fees

London and national designated areas standard fees

	Lower Standard Fee	Lower Standard Fee Limit	Higher Standard Fee	Higher Standard Fee Limit
Category 1 (summary cases)	£221.59	£298.45	£477.41	£517.10
Category 1 (either way cases)	£276.99	£298.45	£477.41	£517.10
Category 2	£473.08	£512.70	£792.71	£854.40

Undesignated area standard fees

	Lower Standard Fee	Lower Standard Fee Limit	Higher Standard Fee	Higher Standard Fee Limit
Category 1 (summary cases)	£173.45	£298.45	£417.20	£517.10
Category 1 (either way cases)	£216.81	£298.45	£417.20	£517.10
Category 2	£382.81	£512.70	£702.40	£854.40

Annex H: Legal Services Commission Guidance on Expert Fees in Civil Cases

The table below sets out the benchmark rates for the payment of experts in civil and family matters (including the proposed 10% reduction).

Expert	Guidance hourly rate	London guidance hourly rate
Accident reconstruction	£90	£67. 50
Accountant	£50–£135	£50–£144
Architect	£99	£90
Cell telephone site analysis	£90	£90
Computer experts	£90	£90
Consultant engineer	£90	£68
Disability consultant	£68	£68
DNA (per person)	£90 (£315 per test)	£90 (£315 per test)
Employment consultant	£68	£68
Enquiry agent	£32	£23
Handwriting expert	£90	£90
Interpreters	£32	£25
Lip-Reader/Signer	£72	£41
Mediators fees	£126	£126
Meteorologist	£126	£180 fixed fee
Photographer	£32	£23
Process server	£32	£23
Risk assessment expert	£63	£63
Surveyor	£50	£50
Telecoms expert	£90	£90
Translator	£98 per 1,000 words	£50 per 1,000 words
Vet	£90	£90
Voice recognition	£117	£90
A&E consultant	£126	£135
Anaesthetist	£135	£135
Cardiologist	£144	£144
Child psychiatrist	£135	£90
Child psychologist	£126	£90
Dentist	£117	£117
Dermatologist	£108	£108
Doctor (GP)	£99	£90
ENT surgeon	£126	£126

Expert	Guidance hourly rate	London guidance hourly rate
General surgeon	£135	£90
Geneticist	£108	£108
GP (Records report)	£63	Fixed fee up to £90
Gynaecologist	£135	£90
Haematologist	£121	£90
Medical consultant	£135	£90
Medical microbiologist	£135	£135
Midwife	£90	£90
Neonatologist	£135	£135
Neurologist	£153	£90
Neuropsychiatrist	£158	£90
Neuroradiologist	£171	£171
Neurosurgeon	£171	£90
Nursing expert	£81	£81
Obstetrician	£135	£135
Occupational therapist	£68	£68
Oncologist	£140	£140
Orthopaedic surgeon	£144	£144
Paediatrician	£135	£90
Pathologist	£153	£540 fixed fee
Pharmacologist	£122	£122
Physiotherapist	£81	£81
Plastic surgeon	£135	£135
Psychiatrist	£135	£90
Psychologist	£117	£90
Radiologist	£135	£135
Rheumatologist	£135	£135
Speech therapist	£99	£99
Surgeon	£135	£90
Toxicologist	£135	£135
Urologist	£135	£135

Annex I: Legal Services Commission Guidance on Expert Fees in Criminal Cases

The table below sets out the benchmark rates to be paid to experts in criminal proceedings (including the proposed 10% reduction).

Expert	Guidance hourly rate	London guidance hourly rate	Comments
A&E consultant	£126	£135	
Accident reconstruction	£90	£68	
Accountant	£50–£144	£50–£144	Partner: £144. Manager: £108. Accountant: £81. General Staff: £50.
Anaesthetist	£135	£90	
Architect	£99	£90	
Back calculations	£180 fixed fee	£189 fixed fee	Can be higher if medication involved
Benefit expert	£90	£90	
Cardiologist	£144	£90	
Cell site analysis	£90	£90	
Child psychiatrist	£135	£90	
Child psychologist	£126	£90	
Computer experts	£90	£90	
Consultant engineer	£90	£68	
Dentist	£117	£90	
Dermatologist	£108	£90	
Disability consultant	£68	£68	
DNA (per person)	£90 (£315 per test)	£90 (£315 per test)	
Doctor (GP)	£99	£90	
Drug expert	£90	£90	
Employment consultant	£68	£68	
Enquiry agent	£32	£23	If being used to take statements, the enquiry agent must be undertaking the tracing of witnesses too. Otherwise this is considered to be fee-earners' work not a disbursement.
ENT surgeon	£126	£90	
Facial mapping	£135	£90	
Fingerprint experts	£90	£47	
Firearm expert	£90	£90	

Expert	Guidance hourly rate	London guidance hourly rate	Comments
Fire investigation	£90	£68	
Forensic scientist	£113	£90	
General surgeon	£135	£90	
Geneticist	£108	£90	
GP (Records report)	Fixed fee up to £63	Fixed fee up to £90	
Gynaecologist	£135	£90	
Haematologist	£122	£90	
Handwriting expert	£90	£90	
Interpreters	£32	£25	
Lip-Reader/Signer	£72	£41	
Mediators fees	£126	£126	
Medical consultant	£135	£90	
Medical report	£99	£90	
Medical microbiologist	£135	£90	
Meteorologist	£126	£180 fixed fee	
Midwife	£90	£90	
Neonatologist	£135	£90	
Neurologist	£153	£90	
Neuropsychiatrist	£158	£90	
Neuroradiologist	£171	£90	
Neurosurgeon	£171	£90	
Nursing expert	£81	£81	
Obstetrician	£135	£90	
Occupational therapist	£68	£68	
Oncologist	£140	£90	
Orthopaedic surgeon	£144	£90	
Overnight expenses	Inner London £77 Elsewhere £50		B & B only. Overnight expenses can only be granted where it would be unreasonable for the solicitor or expert to travel the required distance each day and not possible to use someone more local. If the expenses are for a solicitor to attend a Crown Court trial we cannot give a prior authority for any costs to be justified on taxation.
Paediatrician	£135	£90	

Expert	Guidance hourly rate	London guidance hourly rate	Comments
Pathologist	£153	£540 fixed fee	Mortuary fees may form part of the costs and the pathologist often has to travel to the morgue.
Pharmacologist	£122	£90	
Photocopying	5p per sheet	4p per sheet	
Photographer	£32	£23	
Physiotherapist	£81	£81	
Plastic surgeon	£135	£90	
Process server	£32.00	£23	
Psychiatrist	£135	£90	
Psychologist	£117	£90	
Radiologist	£135	£90	
Rheumatologist	£135	£90	
Risk assessment expert	£63	£63	
Speech therapist	£99	£90	
Surgeon	£135	£90	
Surveyor	£50 per hour	£50 per hour	Usually a fixed fee. On average £225 per property
Telecoms expert	£90	£90	
Toxicologist	£135	£90	
Transcripts	£2.20 per minute	£1.42 per minute	Court transcripts – each court has only one official transcription firm; therefore we must accept their quote. Translation and transcription of tape – £4 per minute.
Translator	£98 per 1,000 words	£50 per 1,000 words	London – we can allow up to £72 per 1,000 words for Somali
Urologist	£135	£90	
Vet	£90	£90	
Voice recognition	£117	£90	

Annex J: Possible Structure for Expert Fees

Proposed Banding details

Type of expert	Non-exhaustive list of experts included
Medical band 1	Dentist
	GP
	Midwife
	Nurse
	Physiotherapist
	Vet
Medical band 2	A & E Consultant
	Anaesthetist
	Cardiologist
	Gynaecology
	Haematologist
	Neonatologist
	Obstetrics
	Ophthalmologist
	Paediatrician
	Pathologist
	Radiologist
	Rheumatologist
	Surgeon
	Urologist
Medical band 3	Neurologist
	Neuropsychiatrist
	Neuroradiologist
	Neurosurgeon
Psychiatry	Adult
	Child
	Forensic psychiatrist
	Learning difficulties
Psychology	Adult
	Behavioural
	Child
	Educational
	Forensic

Type of expert	Non-exhaustive list of experts included
Psychotherapist	Adult
	Child
	Independent systematic family
Enquiry agent	Enquiry agent
	Private investigator
Foreign country expert	Foreign country expert
Laboratory	Document authentication
	Fingerprint
	Toxicology
	Drug testing
	Age determination
	Fire assessor/explosives expert
Traffic	Accident reconstruction
Identification	Handwriting expert
	Voice recognition expert
	Facial mapping expert
	Imagery expert
Media and IT	Cell phone site analysis
	Computer records expert
	Telecoms expert
Accountancy	Accountant
Structural expert	Surveyor
	Engineer
	Architect
Engineering	Engineer
Forensic science	Forensic scientist
Other	Employment consultant
	Meteorologist
	Photographer

Possible fees structure for expert witnesses

Type of expert	Activity	Hourly rate/fixed fee	Proposed hourly rate/fee	
Medical band 1	Initial report	Fixed		
	GP report	Fixed		
	Report writing	Hourly		
	Conference attendance	Fixed	£ up to half day, £ full day	
	Hearing attendance	Fixed	£ up to half day, £ full day	
	Routine scientific/forensic test	Fixed		
Medical band 2	Initial report	Fixed		
	Report writing	Hourly		
	Conference attendance	Fixed	£ up to half day, £ full day	
	Hearing attendance	Fixed	£ up to half day, £ full day	
	Routine scientific/forensic test	Fixed		
Medical band 3	Initial report	Fixed		
	Report writing	Hourly		
	Conference attendance	Fixed	£ up to half day, £ full day	
	Hearing attendance	Fixed	£ up to half day, £ full day	
	Routine scientific/forensic test	Fixed		
Psychiatry	Initial report	Fixed		
	Capacity assessment	Fixed		
	Psychiatric assessment	Hourly		
	Report writing	Hourly		
	Conference attendance	Fixed	£ up to half day, £ full day	
	Hearing attendance	Fixed	£ up to half day, £ full day	
Psychology	Initial report	Fixed		
	Capacity assessment	Fixed		
	Psychological assessment	Hourly		
	Report writing	Hourly		
	Conference attendance	Fixed	£ up to half day, £ full day	
	Hearing attendance	Fixed	£ up to half day, £ full day	

Type of expert	Activity	Hourly rate/fixed fee	Proposed hourly rate/fee
Psychotherapist	Initial report	Fixed	
	Psychotherapy session/assessment	Hourly	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
Enquiry agent	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
	Routine scientific/forensic test	Fixed	
Foreign country expert	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
Laboratory	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
	Drug test	Fixed	
	Alcohol test	Fixed	
	DNA test	Fixed	
	Fingerprint test/analysis	Fixed	
	Other routine scientific/forensic test	Fixed	
Traffic	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
	Routine scientific/forensic test	Fixed	

Type of expert	Activity	Hourly rate/fixed fee	Proposed hourly rate/fee
Identification	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
	Handwriting analysis	Fixed	
	Routine scientific/forensic test	Fixed	
Media and IT	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
Accountancy	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
Structural expert	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
Engineering	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	
	Hearing attendance	Fixed	
Forensic science	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
	Routine scientific/forensic test	Fixed	

Type of expert	Activity	Hourly rate/fixed fee	Proposed hourly rate/fee
<i>Other</i>			
Employment consultant	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day
Meteorologist	Initial report	Fixed	
	Report writing	Hourly	
	Conference attendance	Fixed	
	Hearing attendance	Fixed	
Photographer	Initial report	Fixed	
	Report writing	Hourly	
	Photographs	Fixed	
	Conference attendance	Fixed	£ up to half day, £ full day
	Hearing attendance	Fixed	£ up to half day, £ full day

Annex K: Data Tables

Table A: Legal aid spending (cash) 1988–89 to 2008–09

	Criminal Higher £m	Criminal Lower £m	Civil & Family Representation £m	Civil & Family Legal Help £m	Total £m
1988–89	118	156	132	68	474
1989–90	134	187	166	79	566
1990–91	156	216	220	91	683
1991–92	186	272	330	118	906
1992–93	220	269	463	141	1,093
1993–94	236	270	544	160	1,210
1994–95	262	282	602	152	1,298
1995–96	286	307	643	155	1,391
1996–97	313	330	671	162	1,476
1997–98	349	385	634	157	1,525
1998–99	386	393	659	185	1,623
1999–00	370	413	565	203	1,551
2000–01	422	451	560	231	1,664
2001–02	474	508	476	258	1,716
2002–03	569	527	483	330	1,909
2003–04	645	534	514	384	2,077
2004–05	682	510	490	355	2,037
2005–06	696	501	547	284	2,028
2006–07	642	529	548	261	1,980
2007–08	692	487	584	260	2,023
2008–09	700	487	650	263	2,100

Source: Legal Services Commission

Table B: Legal aid spending (real terms) 1988–89 to 2008–09

	Criminal Higher £m	Criminal Lower £m	Civil & Family Representation £m	Civil & Family Legal Help £m	Total £m
1988–89	221	293	248	128	889
1989–90	235	327	291	138	991
1990–91	253	350	357	148	1,108
1991–92	285	417	505	181	1,388
1992–93	327	400	688	210	1,624
1993–94	341	391	787	231	1,750
1994–95	373	402	857	216	1,849
1995–96	396	425	890	215	1,926
1996–97	418	440	896	216	1,970
1997–98	454	501	825	204	1,983
1998–99	492	501	839	236	2,067
1999–00	462	516	706	254	1,937
2000–01	520	556	690	285	2,052
2001–02	572	613	574	311	2,070
2002–03	665	616	564	386	2,230
2003–04	733	607	584	436	2,360
2004–05	754	564	542	392	2,252
2005–06	755	544	594	308	2,201
2006–07	677	558	578	275	2,087
2007–08	709	499	598	266	2,073
2008–09	700	487	650	263	2,100

Source: Legal Services Commission



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