



# Terms of Reference for an Economic Analysis of Civil Legal Aid

## Purpose

### Overview of requirement

The Ministry of Justice is undertaking a review of civil legal aid. As part of that review, the Ministry is seeking a Supplier to conduct an economic analysis of the structure of the civil legal aid market and a comparative analysis of civil legal aid systems in other countries. A background to the civil legal aid market is set out in Annex A.

The findings from this research will form part of the evidence base of the review and inform our long-term strategy for civil legal aid.

### Economic analysis of the structure of the civil legal aid market

The economic analysis has two main aims. The first is to conduct an in-depth analysis of the civil legal aid market to assess how it is currently working and what is driving problems and gaps in the market. The second is to identify options on what structural changes (e.g. in terms of how civil legal aid is commissioned, procured, contracted and delivered) could be made to ensure a more efficient and effective civil legal aid system. The options will prioritise sustained provision across England and Wales, and will provide the evidence needed to assess the value for taxpayer's money of future policy options, and the wider budgetary restraints on the department.

### Comparative analysis of civil legal aid systems in other countries

The main aim of this contract is to conduct a comparative analysis of civil legal aid systems and identify promising approaches which could be transferred to England and Wales in terms of increasing the efficiency and effectiveness of civil legal aid and access to justice.

## Outcomes

1. The ultimate objective of the civil legal aid system is to provide advice and representation to those who most need it, in line with the Lord Chancellor's statutory duty to ensure that legal aid is made available, and to uphold and ensure the constitutional right to access to justice. This objective will provide the foundation for all analysis and recommendations.
2. In order to achieve this overarching objective, the options identified should focus on outcomes that will ensure the civil legal aid system:
  - a. **Is easy and quick to access.** All those eligible know how to access it, and this early access helps solve issues at the earliest point in the process.
  - b. **Encourages, where appropriate, the early resolution of disputes,** providing swift access to justice through early legal advice and mediation.
  - c. **Is technologically adept and adaptive, simplified and flexible.** It enables civil legal aid users to engage with the legal process and provides support to meet their needs, uses digital technology where appropriate, works cohesively with non-legal aid support, and supports the smooth running of the civil justice system.

- d. **Is widely respected** for its ability to uphold the rights of individuals and to drive improvements in society for the most vulnerable.
- e. **Offers a financially viable business option for legal aid providers** (both private and non-profit) and is an attractive career option that attracts a high calibre workforce.

## Scope

- 3. The review will consider the civil legal aid system in its entirety; from how services are procured, how well the current system works for users and how civil legal aid impacts the wider justice system.
- 4. The review will cover all eleven contract categories covered by the Legal Aid, Sentencing and Punishment of Offenders Act 2012<sup>1</sup>, however, an in-depth analysis will be conducted of the following categories where data has highlighted particular concern with respect to the long-term sustainability of civil legal aid:
  - a. Family
  - b. Housing (including the Housing Possession Court Duty Scheme)
  - c. Mental Health
  - d. Education
  - e. Discrimination
  - f. Immigration.
- 5. The review will consider all parties involved directly and indirectly in the civil legal aid market; this includes:
  - a. The 'buyer' - Legal Aid Agency (LAA),
  - b. 'Sellers' - civil legal aid providers who have a contract with the LAA to deliver civil legal aid services,
  - c. Voluntary organisations providing legal support and advice outside the legal aid framework,
  - d. End-users ("clients").

## Out of scope

- 6. The Ministry's review concerns the civil legal aid market and will not consider criminal legal aid.
- 7. Current work on eligibility for civil and family legal aid will not be considered, except where changes to financial eligibility might underpin or interact with a substantially different model for delivering civil legal aid.
- 8. The economic analysis will not propose options on specific individual fees.
- 9. The economic analysis of the structure of the civil legal aid market will only consider the provision of civil legal aid in England and Wales, although systems and reforms in other jurisdictions will be considered in the comparative analysis review where they provide a

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<sup>1</sup>Claims Against Public Authorities, Clinical Negligence Category, Community Care, Discrimination, Education, Family, Housing & Debt, Immigration and Asylum, Mental Health, Public Law, Welfare Benefits. [2018 Standard Civil Contract Category Definitions \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614242/2018-Standard-Civil-Contract-Category-Definitions.pdf)

useful indication of how reforms might affect the provision of civil legal aid in England and Wales.

## Process

10. The review will seek to develop proposals and draw conclusions from an evaluation of a wide array of sources, including current and emerging evidence across government.
11. The economic analysis will seek to draw on existing evidence where possible, including: legal aid and HMCTS datasets, quantitative data obtained from the Law Society of England and Wales through the Data Share agreement and qualitative evidence gathered from previous user research exercises.
12. The different phases of the review (with estimated durations) will be as follows:
  - a. Tender for external research (3 months)
  - b. Internal data consolidation (Ongoing since Aug 2022)
  - c. External research project: economic analysis and comparative research (7 months)
  - d. Conclusion of the comparative research
  - e. Report on economic analysis
  - f. Policy consideration (5 months)
  - g. Develop assessment and criteria for Call for Evidence (5 months)
  - h. Call for Evidence (4 months)
  - i. Final Policy consideration (3 months)
13. This timetable may be adapted, e.g. by the publication of evidence gaps or further end-user research. The general aim is to conclude the outcome by 31 March 2024.
14. The review will reflect on previous reviews of the legal aid sector and previous attempts at reform and will ensure that lessons learned from these experiences are reflected within its policy thinking.

## Governance

15. Daniel Flury (Director, Access to Justice Policy) is the SRO for the review and is accountable for the governance of the review. The SRO will maintain close oversight of the work of the review team to ensure it meets these terms of reference and identifies robust, feasible evidence-based options.
16. The civil and family legal aid policy team will report to the SRO of the review (and through them to the Lord Chancellor, Ministers and the Permanent Secretary) and will meet with them monthly to provide an update on the progress of the review.
17. The SRO will report to Ministers at regular intervals on the progress of the review.

## Reporting and Outputs

18. The Lord Chancellor will consider the options together with the economic analysis, the responses to the Call for Evidence and other materials, to publish the Government's vision for reforming the civil legal aid system in the form of a final paper.
19. The MoJ will work with other interested Government Departments to determine timelines for the publication of the report, evidence papers and any additional materials.

## Annex A - Background

20. Civil legal aid funds access to legal advice, assistance, representation and mediation for those who meet certain statutory criteria, including means and merits testing. When we refer to civil legal aid, this encompasses legal aid in relation to proceedings heard not just in the civil courts, but also the family courts and the tribunals system.
21. Alongside the common law duty to uphold access to justice, the Lord Chancellor has a duty under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to secure the availability of the statutory legal aid scheme. Failure to secure sufficient access (for example, where there are too few providers to meet geographic needs) could risk a systemic failure to meet this duty.
22. Day-to-day, the Legal Aid Agency (LAA) keeps civil legal aid provision under constant review. When the LAA has concerns that access could be threatened, immediate action is always taken through supplementary contract tender activities and amending contractual requirements to encourage new providers into the market. However, the effectiveness of these activities in securing new providers is diminishing over time.
23. Across civil legal aid we have concerns about the sustainability of legal aid provision. We have seen a year-on-year decline in the number of providers since the introduction of LASPO and have begun to see gaps in provision open up particularly in certain areas of law (for example, housing).
24. We know there are issues with the civil legal aid market as we see increasing incidences of providers exiting the market, despite legal need remaining high. However, we lack certainty on what interventions would solve these issues which means that our current direction of travel is based almost entirely on anecdotal evidence from the LAA and legal aid providers.
25. Our existing evidence base about the civil market and the impact on the market, of specific changes to contracts, is limited. It is difficult for us to answer the following questions, all of which are important for designing the ideal market structure and considering reform.
  - a) What interventions will sustain the market and drive a better service for users?
  - b) What changes will drive earlier resolution of issues and reduce incidences of problems?
  - c) What are the right incentives to attract and retain quality providers?
  - d) How can we drive innovation in service delivery in the civil legal aid market?
  - e) Does the civil legal aid scheme ensure the right incentives are in place for providers to help us meet our objectives?

f) What, if any, viable alternatives are there to the current civil legal aid scheme?

g) How is early legal advice and support best provided?

26. The aim of this review is therefore to provide a set of evidence-based options for moving to a more effective and efficient system of access to civil justice.