1 INTRODUCTION

1.1 The Advice Services Alliance (ASA) is gravely concerned by the Proposals for the Reform of Legal Aid in England and Wales (the Green Paper).

1.2 The proposals are incompatible with the Government’s stated commitment to fairness. The Green Paper fails to recognise that equal access to the law is fundamental to the functioning of democracy. People need to have the means to enforce their legal rights. These proposals will remove such means from some of the most disadvantaged groups in society.

1.3 We strongly oppose plans to remove from the scope of legal aid advice on welfare benefits, education and immigration, and a significant proportion of housing and debt. These are areas of law that particularly affect poor and disadvantaged people.

1.4 If implemented, the proposals will lead to considerable hardship and stress for people who face legal problems. The proposals will also significantly reduce people’s faith in the fairness of the law and public administration.

1.5 We also strongly oppose plans to introduce a compulsory single gateway for civil legal aid and to shift a significant proportion of the delivery of legal advice and casework to the telephone. We agree with the Impact Assessment that this development will create significant access problems for some clients and an "additional layer of complexity" which, in our view, could lead to additional expense.

1.6 Similarly, we oppose the proposals to further limit financial eligibility for legal aid. These are expected to achieve relatively small savings, but will deny people access to the legal advice that they need.

1.7 Finally, we oppose the proposal to reduce all remuneration rates by 10%. We anticipate that, on its own, this proposal will lead to some Not-for-Profit (NfP) agencies becoming insolvent.

Purpose of legal aid

1.8 ASA does not accept that the legal aid scheme has expanded beyond its original purpose. Rather, the scheme has adapted to keep pace with changes in law and society.

1.9 In social welfare law, in particular, there has been significant expansion in and frequent revision of the legal framework that governs the provision of housing, employment, immigration, welfare benefits and education. Important legal developments followed the introduction of the Human Rights Act 1998. The need for debt advice has grown out of the increased availability of credit over the last 20 years or so.

1.10 The Green Paper implies that legal advice leads to unnecessary litigation, although it cites no evidence in support of the assertion that people rush to court without good reason. There is evidence that the contrary is true:

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1 Provision of Telephone Advice, Impact Assessment, para 36
• In 2004, the Better Regulation Taskforce\(^2\) described claims of a growing "compensation culture" in the UK as an "urban myth" largely fuelled by the media.

• Research\(^3\) into unrepresented litigants found that a proportion of the cases taken by them were "inherently weak, either because they had not had the benefit of lawyers discouraging them from bringing cases in the first place, or because they were motivated to bring poor cases because of other grievances . . . ".

1.11 It is the experience of the NfP advice sector that most people are very reluctant to go to court or tribunal to assert their rights. Early advice can prevent problems from escalating and thereby prevent the need for court or tribunal proceedings. In any event, the legal aid scheme has strict safeguards to prevent the waste of public money on unnecessary litigation.

1.12 Legal aid, as part of the justice system, has an important role in helping disadvantaged people to gain their entitlements. It also helps to ensure that the law is respected by those who are in a position of power.

Impact on clients

1.13 Legal Aid is the biggest single funder of specialist advice in social welfare law. The Impact Assessment\(^4\) suggests that the number of non-family Legal Help cases will be reduced by nearly 291,000.

1.14 We fear that this figure is an underestimate as no account has been taken of those cases, currently in scope, that are delivered over the telephone. Our estimate is that at least 360,000 people\(^5\) will no longer receive the specialist help that they need with non-family problems.

1.15 However, it seems likely that the need for specialist legal advice will grow over the next few years caused, amongst other things, by:

- planned fundamental changes in the benefit system
- public sector spending reductions leading to increased unemployment and cuts to public services
- predicted interest rate rises leading to people struggling with debts.

1.16 The Green Paper suggests that the impact of removing some areas of law from the scope of legal aid will be ameliorated by the availability of alternative sources of advice, mostly in the voluntary sector. This response will demonstrate that this is not the case.

1.17 Without access to specialist legal help, some people will seek support from other, sometimes inappropriate, agencies. Others will try to pursue their cases on their own. Some will decide to "lump" it. All of these options have their costs.

1.18 There is evidence that a significant number of people will turn to the NHS. Research\(^6\) published in 2006 found that adverse physical and mental health consequences follow a third of civil justice problems and that 27% of civil justice problems led to


\(^3\) Litigants in Person, Moorhead and Sefton, March 2005, MoJ (page 221)

\(^4\) Scope Changes, Impact Assessment


stress-related illness. Nearly a quarter of the people affected by stress sought medical treatment, with an average of 9 visits each to a general practitioner.

1.19 In addition to increased pressure on the NHS, we anticipate that people will seek advice from other statutory bodies such as the police and social services. People will also increasingly seek support from local councillors and their Member of Parliament. These individuals are unlikely to have the capacity or expertise to provide the advice that people need.

1.20 Some people will try to pursue their cases on their own and will turn to the Tribunal and Court system for support. There is evidence that the money saved in cutting legal aid will simply have to be spent on increasing the capacity of the courts to deal with unrepresented litigants.7

1.21 Those who decide to "lump" it may well be storing up more serious problems for the future. The proposal to remove welfare benefits and much of debt and housing from the scope of legal aid is likely to be a false economy. People will be forced to wait until their problem is critical before getting advice. This will increase the cost and reduce the effectiveness of legal help.

1.22 As the Impact Assessment8 (Scope Changes) acknowledges, people may address their dispute in a number of ways which could lead to wider social and economic costs including reduced social cohesion, increased criminality and increased costs for other Departments.

1.23 The proposed single gateway may increase access to advice for some people, but it will reduce access for others. In our view, there is a risk that problems may be misdiagnosed. We are also concerned that clients will be forced to accept telephone advice when they need a face-to-face legal service.

**Impact on the NfP sector**

1.24 The impact of the proposed cuts to legal aid on the advice sector is made starkly clear in the impact assessments. Total legal aid funding to NfP agencies will be cut by 77%.9 The average impact on NfP providers will be a 92% cut10 in income from legal aid.

1.25 These proposed legal aid cuts should not be considered in isolation. The NfP advice sector is facing significant cuts to other funding streams. On 19th January 2011, an announcement was made in the House of Commons that the "Financial Inclusion Fund will close at the end of March this year". This funding supported the provision of debt advice to over 77,000 people a year. Specialist advisers funded by this programme are currently working out their notice.

1.26 In addition, it is clear that a number of local authorities will be making significant cuts to their funding of advice agencies. However, at the time of writing, only a few local authorities have made public statements about their spending intentions for 2011-12.

1.27 It is important to emphasise that these cuts are not only affecting organisations such as CABx and Law Centres, whose main focus is the provision of advice. The cuts are affecting organisations such as community groups, Age Concerns, disabled people’s groups and youth agencies, for whom advice provision is one part of their service.

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7 Please see our full answer to question 6.
8 Scope Changes, Impact Assessment,
9 Cumulative Impact, Equalities Impact Assessment
10 See above note 9
In her evidence\textsuperscript{11} to the Justice Select Committee Gillian Guy, Citizens Advice's Chief Executive, anticipated that Citizens Advice Bureaux are facing an overall cut in their funding of 45\%. Julie Bishop, Director of the Law Centres Federation, has told us that the equivalent figure for Law Centres is 70\%.

1.28 It seems clear that the advice sector is being disproportionately hit by the current financial situation. Unless action is taken, the advice sector will be significantly diminished in two to three years' time. Whilst it is too early to predict what will survive and where, it is very likely that there will be large areas of England and Wales without NfP provision of face-to-face specialist legal advice.

1.29 The cuts will therefore lead to a dramatic increase in the unmet need for advice.

**What the Government should be doing**

1.30 In our view, there is potential to reduce the need for legal advice and save waste by:

- ensuring that people can obtain advice early
- improving the performance of public services, notably the Department for Work and Pensions, by introducing a "polluter pays" principle into the funding of legal aid
- improving the drafting of laws and regulation, so that they are clear and unambiguous
- limiting the number of changes made to laws and regulation.

1.31 The ASA is very willing to work with Government on initiatives to save waste.

2 ABOUT THE ADVICE SERVICES ALLIANCE

2.1 ASA is the umbrella body for independent advice networks in the UK. Full membership of ASA is open to national networks of independent advice services.

2.2 Our current full members are:

- AdviceUK
- Age UK
- Citizens Advice
- DIAL UK (part of Scope)
- Law Centres Federation
- Shelter
- Shelter Cymru
- Youth Access

2.3 A draft copy of this submission has been sent to our members for their comments. However, we are aware that individual members are responding separately. Therefore, please note that this response does not necessarily represent any individual member's views.

2.4 Between them, our members represent 1,743 organisations which provide advice services in England and Wales. We estimate that our members currently provide support to over 5 million people every year. In addition, the advice sector provides some 20 million pieces of information annually to members of the public - via

\textsuperscript{11} On 1st February 2011
websites and through leaflets. These services are largely funded through public sector grants and contracts, and charitable fundraising.

2.5 The voluntary advice sector provides support to the poorest and most vulnerable people e.g. disabled people, those facing homelessness, young people from disadvantaged backgrounds and older people. People often seek advice at times of personal, medical or financial crisis.

2.6 Prior to the most recent Legal Services Commission (LSC) tender, 377 voluntary advice organisations held contracts to deliver legal aid services.

2.7 This response is limited to those parts of the consultation most relevant to our members, the advice agencies they represent and the clients of those agencies. This should not be taken to mean that we agree with the other changes proposed.

3 SCOPE

Introduction

3.1 The Green Paper suggests that the future of legal aid should be decided by considering
- 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 other routes to resolution.

3.2 We accept that these criteria are a good starting point for prioritising limited resources. However, we strongly disagree with how they have been interpreted and are very concerned about the impact of this interpretation on the most vulnerable people in our society.

3.3 In particular, we do not accept the judgement that all "money claims" should have lower priority. For those who are very poor or destitute, the ability to secure an entitlement to a relatively small amount of money - for food, heating or other essentials - is critically important.

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?

3.4 We agree with the proposals to retain the types of case and proceedings listed, but are concerned about the lack of clarity on some issues.

Housing and debt

3.5 In relation to housing (and debt) cases, the meaning of the Green Paper was unclear. The Green Paper refers to:
- types of "proceedings" as remaining in scope, in relation to possession proceedings and appeals to the County Court in relation to homelessness
- debt cases being in scope when the client’s home is at “immediate” risk of repossession.

3.6 We were pleased to receive the following clarifications from the MoJ:
For the avoidance of doubt, our proposal is that all cases where the claimant is homeless or threatened with the risk of homelessness and is seeking homelessness assistance under Part VII of the Housing Act 1996 will remain within scope. This includes, for example, legal aid to assist a party to make an application for homelessness assistance, or for a review of that decision under section 202 of the Housing Act 1996, or further appeals. \(^{12}\)

In both categories we would not expect proceedings to have been issued before legal aid would be available. It could be granted, for example, on receipt of a letter which threatens such action. \(^{13}\)

**Discrimination**

3.7 We welcome the proposal that legal aid will be retained for all unlawful discrimination claims that are currently within scope. However, we are concerned that discrimination cases are not mentioned in the sections of the Green Paper covering employment or consumer law.

3.8 There are also practical questions to be considered as to how such cases will be handled. Will discrimination become a stand-alone category, with its own contract rules and supervisor requirements? If not, how will the quality of discrimination advice be ensured?

*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?*

3.9 We do not propose to answer this question.

*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?*

3.10 We do not agree with these proposals and will take each subject in turn.

**Consumer and general contract**

3.11 We do not agree with the removal from scope of professional negligence cases. These are complex cases and it is very unlikely that a member of the public would be able to pursue such a claim without legal advice and representation.

3.12 We are unclear what the Green Paper is proposing in relation to discrimination in goods and services cases. Our understanding is that many of these cases are currently conducted under the consumer and general contract category. In our view, these cases should be retained within the scope of legal aid and should be incorporated into the new discrimination category.

**Criminal Injuries Compensation**

3.13 We do not agree with the removal from scope of legal advice on CICA applications. Applicants may be vulnerable and may have suffered significant physical and/or mental trauma, for example rape victims or victims of trafficking.

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\(^{12}\) Email from Stephen Jones, Head, Civil Legal Aid Eligibility & Scope Branch, 26 January 2011

\(^{13}\) Email from Stephen Jones, 27 January 2011
Debt

3.14 There is a huge and growing demand for legally aided debt advice. More debt cases were started in 2009-10 than in any other category apart from family. According to the LSC’s statistical information, 146,735 debt cases were started in 2009-10 representing a ten per cent increase from the 132,936 cases started in 2008-09. For the first time, more debt cases were started than housing cases or welfare benefits cases. 14

3.15 A report published by the Money Advice Trust in December 2010 predicts that a rise in unemployment will lead to a rise in demand for debt advice. 15 The report found that the unemployment rate and the average cost of credit are most closely associated with future demand for debt advice. The research suggests that a balanced forecast16 would see demand for debt advice rising steadily from current levels (approximately 1.4 million clients in 2010) through 2011 up to approximately 1.6 million individuals seeking advice from the free-to-client advice sector in 2013 (this exceeds that seen at the peak of the financial crisis in late 2009).

3.16 A recently published report by the Department of Health shows that low income and debt are associated with higher rates of mental illness. Rates of debt for people with no mental health problems are 8%. The rates for those with depression and anxiety are 24%, and for those with psychosis 33%. 17 Studies suggest that the effect of low income on mental health may largely be explained by the effect of debt. Moreover, people with mental health problems are more likely to get into problematic debt.

The impact of debt on people’s lives

3.17 Recent research18 has highlighted the impact of debt on people’s lives:

- debt problems were found to have contributed to health difficulties, relationship breakdown, job loss, difficulty finding a new job, loss of housing and deterioration in relationships with children
- 89% of clients reported worrying about their money problems “most” or “all” of the time, 48% of clients described the impact of problems on their health as “great”, and 43% felt that their health had suffered “to some extent”.

The impact of debt advice

3.18 The same research found that:

- debt advice can contribute to lowering debt and have a significant positive impact on stress, general health and relationships
- the number of those worrying “all” or “most” of the time about their money problems reduced from 89% at initial advice, to 59% at six months and 31% at twelve months
- at both six and twelve month follow-up, about two thirds of clients stated that their health had improved a little or a lot since the initial interview. Most of those

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14 LSC Statistical Information 2009/10 – Table CLS2
15 http://www.moneyadvicetrust.org/content.asp?ssid=105
16 A balanced forecast takes a midpoint between the OBR forecast for unemployment 2011-2015 and that of a range of independent economic forecasts.
17 The economic case for improving efficiency and quality in mental health, Department of Health 2011, para 4.2
experiencing improvements linked these to the advice they had received for their debt problems

- the average cost to the public of one person’s debt (including lost economic output) is estimated to be over £1000, with more serious debts costing many times this amount.

3.19 The effectiveness of debt advice is also confirmed by LSC outcomes data. In 2009-10, 94% of concluded debt cases were considered to have produced a substantive benefit to clients.19

Specialist debt advice is legal advice

3.20 The Green Paper states that “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” [para 4.176]. This suggests to us a fundamental misconception as to the nature of specialist debt advice.

3.21 A debt, by definition, is a breach, or alleged breach of contract, attracting legal consequences, which are defined and/or limited by numerous statutes and regulations (and some case law). Enforcement procedures are also so defined and/or limited. Debt advisers need to:

- explore the nature and extent of a client’s debts
- deal with emergencies, such as bailiff’s warrants, threats of disconnection of utilities, or actions that could result in the loss of a client’s home or liberty
- check whether a client is actually liable for a debt, and if so, to what extent
- advise on ways to maximise income, for example by claiming benefits or tax credits, reducing their tax liability, or receiving money due to them under employment legislation
- negotiate with priority and non priority creditors.

3.22 Debts vary considerably in terms of the legal rules that apply to them. There is a major distinction between those that are and those that are not subject to the Consumer Credit Acts. Special rules apply also to debts concerning child support, council tax, Magistrates Court fines, gas and electricity charges, income tax, mortgage arrears, rent arrears, social fund repayments, tax credit overpayments, water charges and traffic penalties.

3.23 As the Debt Advice Handbook points out

Sometimes, nothing will be payable because a contract has not been made in the correct way or the rules governing the ways in which public authorities can demand money have not been complied with. In other cases, it may be possible to reduce the amount owed because the law says that a term of the contract is ‘unfair’, or (in the case of credit agreements) there is an ‘unfair relationship’, or there has been irresponsible lending. Even if the adviser has established that a debt does exist, it is still possible that the client is not liable to pay it, either because liability actually falls on someone else, or because the contract is not enforceable – e.g. the creditor is outside the time limit for taking court action to recover the debt.20

3.24 Other examples of liability issues include debts incurred by people under 18 or people without legal capacity, debts incurred as a result of undue influence or misrepresentation, debts incurred in purchasing goods or services that turn out to be

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19 LSC Statistical Information 2009/10 – Table CLS4
faulty, and whether default charges are challengeable.\textsuperscript{21} Clients also need to be advised of the consequences of challenging a debt on liability (e.g. lack of future access to catalogue purchases, or effect on credit rating).\textsuperscript{22}

3.25 Central to debt advice work is the distinction between priority and non-priority debts. This is a distinction based on the severity of the legal remedies available to creditors.\textsuperscript{23} It is not a distinction that clients will naturally appreciate. “Clients often believe that priorities must be decided on the basis of the amount owed, or that any debt that is subject to a court order should be a priority.” \textsuperscript{24}

3.26 Advisers need to correctly advise the client about and deal with priority debts. This requires detailed knowledge of the different kinds of enforcement action available in relation to priority debts. They also need to correctly advise clients about and deal with non-priority debts. This may include advising clients on the implications of a County Court Judgment, especially if the client is a home owner at risk of an application for a charging order or an order for sale, or has a job that requires a good credit rating.\textsuperscript{25}

3.27 The Legal Services Commission peer reviewers’ guide points out that:

- The advisor needs to know court procedures such as setting aside judgement, redetermination, variation, postponement of possession orders, suspension of eviction warrants, acknowledgement of service, admissions, part admissions and defences
- The adverse consequences of wrong advice could include an increase in the amount owed, allocation to the Fast Track with adverse cost consequences, or missing time limits for an application to set aside judgement. \textsuperscript{26}

3.28 In addition, advisors need detailed knowledge of:

- Magistrates Court procedures for enforcing financial penalties and dealing with council tax debts
- the different types of bailiffs and their powers
- procedures for dealing with personal insolvency by way of Administration Orders, Individual Voluntary Arrangements, Bankruptcy and Debt Relief Orders.

3.29 It should be noted in particular that one remedy, Debt Relief Orders, can only be applied for through an approved intermediary, who has been authorised by competent authorities such as Citizens Advice and the Institute of Money Advisers. It is a condition of debt contracts with the LSC that legal aid providers should have an approved intermediary on their staff.

3.30 We do not have recent statistics from the LSC giving a breakdown of debt cases. The figures we have from 2005-06 suggest that half of debt cases involve multiple debts and that approximately 70\% involve rescheduling debts.\textsuperscript{27} Even if most cases involve negotiating with creditors rather than advising about court proceedings, such negotiations take place in the context of the legal provisions applying to debt and debt recovery. As in other areas, these take place in the shadow of the law.

\textsuperscript{21} See note 20, pp116-122
\textsuperscript{22} See the LSC peer reviewers’ guide \textit{Improving Your Quality – Debt} (3\textsuperscript{rd} ed, August 2010)
\textsuperscript{23} See note 20, p 182
\textsuperscript{24} See note 20
\textsuperscript{25} See the LSC peer reviewers’ guide \textit{Improving Your Quality – Debt} (3\textsuperscript{rd} ed, August 2010)
\textsuperscript{26} See note 25
\textsuperscript{27} Case Lengths, Case Costs and Fixed Fees, ASA, 2007
Other sources of help

3.31 The Green Paper suggests that clients could obtain advice from other sources, such as 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.  

3.32 We do not believe that these sources can replace the work currently done under the legal aid scheme. Our understanding is that:

- Credit Action, which describes itself as "The Money Education Charity" provides resources, tools and training, but does not give advice to members of the public.
- National Debtline (NDL) is run by the Money Advice Trust, which does not itself otherwise offer advice to members of the public. NDL dealt with approximately 150,000 debt advice enquiries in 2010. It generally refers debt cases that require specialist legal debt advice to face-to-face providers. This includes clients who are classed as 'vulnerable', which typically includes clients with literacy, language or mental health problems. NDL is not planning to expand the number of its advisers in the short to medium term.

3.33 A few local authorities currently provide debt advice. We do not know how many will continue to do so. Obviously, local authorities are only able to signpost people to local sources of advice and assistance that actually exist.

Education

3.34 We strongly disagree with the proposal to remove education law from the scope of legal aid. The Impact Assessment indicates that withdrawing education from the scope of legal aid would save £1 million - a tiny proportion of the overall budget.

3.35 In 2009-10 the NfP sector delivered approximately 30% of the face-to-face education cases. These services have been developed in response to local demand.

3.36 We disagree with the reasons set out in the Green Paper for justifying the proposal to remove education advice from the scope of legal aid.

Relatively low importance

3.37 We strongly disagree with the suggestion that education cases are of "relatively low" importance.

3.38 In our view, the reasoning used for judging community care advice as having "relatively high" importance applies equally to education advice.

3.39 Most cases involving school age children concern their special educational needs, either directly or indirectly. Most education cases are about special educational needs and are fundamentally about ensuring that children and young people are able to develop into fulfilled adults, living as independently as possible.

3.40 We assume that the Green Paper is referring to exclusion cases when it asserts that some cases "arise out of personal choices e.g. conduct at school". However, this statement fails to take into account the findings of a 2002 Audit Commission report which stated "it is well established that children with SEN account for the vast

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28 Green Paper para 4.178
29 Legal Aid Reform: Scope Changes Impact Assessment, p.17
30 LSC Statistical Information 2009/10, Table CLS2
majority of permanent exclusions". The report found that 87% of excluded primary school children had SEN (most without statements), as did 60% of secondary school excluded pupils. In view of these findings, exclusion cases can not be properly characterised as arising from "personal choices" by school age children.

**Parents’ ability to self-represent**

3.41 We do not accept the suggestion that it would be straightforward for parents to self-represent. It is simply not true that parents "only need to present the facts to the Tribunal".

3.42 In many cases, in order to have any chance of success, parents will need to have independent expert evidence. Parents who are financially eligible for legal aid will not be able to afford such expert evidence and will therefore be at a significant disadvantage.

3.43 The Green Paper asserts that people taking education cases are unlikely to be "particularly vulnerable", but cites research which demonstrates that disabled children are more likely to live with one or more parents with a disability than non-disabled children.

3.44 This same research found that disabled children are more likely to live with "low income, deprivation, debt and poor housing". This includes a greater likelihood of living:

- in a lone parent family (34% as opposed to 26% for non-disabled children)
- with 1 or more siblings with a disability (25% as compared with 7%)
- in rented accommodation (47% as compared to 33%)
- in a household in debt (27% as compared to 16%)

In our view, the above factors indicate the likelihood of greater vulnerability.

3.45 There is a significant risk that the removal of education from the scope of legal aid will further exacerbate the current perception that SEND tribunals are more accessible to those who are articulate and monied. A survey of local authorities and parent partnership services in England found that that local authorities felt that "SENDIST only advantaged some parents, namely those that had money and the skills to afford legal representation and cope with the complexities of SENDIST."

**Other sources of help**

3.46 Finally, we do not accept that there are alternative sources of help. Our understanding is that both The Independent Parental Special Education Advice (IPSEA) and The Advisory Centre for Education (ACE) are "swamped".

3.47 As the MoJ will be aware, CFAs are only appropriate where the case involves monetary compensation and this does not apply to most education cases.

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**Employment**

3.48 The Green Paper suggests that employment should be removed from scope because

- employment cases are generally concerned with monetary damages or earning potential
- employment clients are not generally likely to be particularly vulnerable
- appellants can present their own case because of the “easily accessible and user-friendly procedure of the tribunal”
- other sources of help are available.

3.49 The Green Paper is unclear whether discrimination cases in employment will remain in scope.

*The nature of employment cases*

3.50 While it may be true to say that employment cases are generally concerned with monetary damages or earning potential, this is not in itself a convincing argument in favour of removing employment work from scope. Losing a job is often a trigger for other problems such as welfare benefits, debt and homelessness.

3.51 Firstly, there are many cases that are not just about money. Reinstatement or re-engagement is achieved in some cases. Others concern important issues involving equality of opportunity, such as flexible working, maternity, paternity and adoption leave. Equality of opportunity is recognised as a vital issue in the Green Paper’s discussion of discrimination (para 4.133) and the same principle applies in many employment cases. As the Law Society points out in their draft response:

*Practitioners report that it is not uncommon for a successful claimant to be satisfied with a declaration and not go on to seek monetary compensation. In respect of the right to request flexible working, a claimant will often prefer to achieve flexibility and continue in employment rather than compensation for having lost that employment.*

3.52 Secondly, there are vital issues concerning fairness and the rule of law. As we argue elsewhere, it is vital that legal rights do not become effectively unenforceable. Employers need to know that they cannot act with impunity, ignore employees’ rights and expect to get away with it. This is a point that is clearly recognised by the Impact Assessments, in their discussion of the wider social and economic costs of the scope changes.

3.53 Thirdly, as we have already stated, it is wrong to underestimate the importance of money to people who do not have any, who may have lost their job, or may be in low paid employment and not receiving the money properly due to them. Legal aid clients rarely have any capital to fall back on in times of hardship. Their ability to support themselves and their families may crucially depend on their ability to enforce their employment rights, or to receive compensation when those rights have been breached.

*Discrimination*

3.54 We are unclear whether the Green Paper is proposing that discrimination cases in employment should remain in scope. The section on discrimination suggests that
such cases will be in scope.\textsuperscript{35} The section on employment is silent on this issue however, and the tables on pages 175 and 176 give conflicting messages.

3.55 We trust that this lack of clarity is merely a drafting issue. For the reasons given by the Green Paper in the section on discrimination, we agree that it is essential that discrimination cases in employment remain in scope.

\textit{Vulnerability}

3.56 We do not agree that employment clients are not vulnerable. The eligibility rules themselves ensure that they are likely to be either unemployed or in low paid employment. Those that are in work are likely to work in sectors characterised by low union membership and low pay, such as cleaning and hospitality. The Equalities Impact Assessment states that at least 24\% of employment clients are from BAME groups, as compared to a national average of 8\%.\textsuperscript{36}

3.57 Some employment cases concern particularly vulnerable clients such as migrant domestic workers, many of whom have been trafficked to the UK for what amounts to domestic servitude. These cases are often about enforcing the national minimum wage, rather than discrimination. These women are generally destitute and often traumatised after they escape from their employers, so they would not be able to pay privately for legal advice. Trade Union representation would also not be available to them.

\textit{Employment Tribunals}

3.58 We do not agree that Employment Tribunals are accessible and user-friendly, save in the simplest of cases, such as claims for unpaid wages. People need legal advice to help them to prepare their cases.

3.59 Employment law itself is extremely complex. The procedural requirements of Employment Tribunals will often require applicants to plead their case properly, to respond to requests for further and better particulars and discovery of documents, to prepare documents such as witness statements by the applicant and other witnesses and a schedule of losses, and to prepare well ordered bundles of documents.

\textit{Employment Appeal Tribunals}

3.60 In our view, it is vital that appeals to the Employment Appeal Tribunal (EAT) remain in scope of legal aid. These cases can only be taken on a point of law and it is quite unrealistic to expect eligible people to take such appeals on their own. It is equally unfair to expect them to defend appeals taken by their employers (or former employers) without the benefit of legal advice and representation. It is likely that unrepresented litigants will take up more expensive court time than those who are represented.

3.61 If legal aid is not available for EAT cases, there is a risk that some cases would not be taken and that clarification of law in areas which mainly concern poor people will not happen.

\textit{Other sources of help}

3.62 The Green Paper suggests that other sources of help include damage-based agreements, Trade Unions, civil mediation or arbitration via ACAS. However, our understanding is that:

\[\text{\textsuperscript{35} Green Paper paras 4.134 and 4.136 in particular}\]

\[\text{\textsuperscript{36} Legal Aid Reform: Scope Changes -- Equalities Impact Assessment p.37}\]
damages based agreements are unlikely to be available for disputes where the primary remedy sought is non-monetary or where the damages sought are modest

- civil mediation is not widely available and is rarely provided in employment cases. It is rare for employers to fund mediation other than for senior employees
- most employees are not members of Trade Unions
- ACAS officers cannot advise and assist applicants in the way that a legal adviser can. They cannot advise on the merits of a case or what it is worth, draft a claim or undertake the various tasks required by the tribunal that are mentioned above.

3.63 Similarly, NfP organisations will not be able to fill the gap that would be created if employment is removed from scope. As we have stated elsewhere, the advice sector faces a considerable loss of funding and will not be able to maintain their current caseloads, let alone take on more.

3.64 There is also a serious risk that commercial and unregulated advisers might seek to exploit the gap in availability of advice. We might well see a growth in the number of companies that prey on people’s fear of courts, call themselves “law firms” and charge high fees for poor quality work.

### Housing

3.65 We welcome the proposals to retain in scope cases concerning repossession, homelessness, or serious disrepair. We have been reassured subsequently that the MoJ’s intention is to retain county court duty possession schemes, which are not mentioned in the Green Paper.

3.66 However, we consider that the Green Paper misapplies its own principles in relation to several other types of housing cases. To suggest that cases are less important because they are “simply about money or property, improvements to property or access to property” [para 4.195] is misguided. These issues may be of fundamental importance.

3.67 The proposals must be seen in the context of the current housing market and other government proposals. Rising house prices and the reduced availability of mortgages have made it increasingly difficult for people, especially younger people, to become homeowners, and are likely to force increasing numbers into the private rented sector.

3.68 The Decentralisation and Localism Bill intends to introduce major changes to housing and homelessness law. The proposed changes to housing benefit are expected to cause considerable problems for many tenants, some of whom will need to find alternative accommodation. The Government is also considering changes to limit the duration of public sector tenancies.

3.69 The demand for specialist advice on housing, and housing benefit is likely to increase.

3.70 We do not agree that the scope of legal aid housing advice should be limited to those facing the immediate risk of homelessness. Advice must be available at an earlier stage, when people may still have options open to them, and when timely advice on issues such as housing benefit may be enough to stabilise their position, and avoid possession proceedings.
3.71 The Equalities Impact Assessment highlights the vulnerability of clients affected by these proposals, noting that at least 31% are from BAME groups, 60% are female, and at least 27% are disabled.37

3.72 The Green Paper contains a list of proceedings that could be excluded from scope, but is silent about certain types of cases. It does not mention disrepair cases that are considered to be less than “serious” (as defined in paragraph 4.78), nuisance or housing benefit.

Proposals to remove from scope

3.73 The specific proposals are to remove from scope

- 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 unauthorized 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
- an action under the Mobile Homes Act 1983 which does not concern eviction.

3.74 We have not seen any figures for the numbers of cases of advice or representation involving these issues. We suspect that some of these cases are extremely rare and/or unlikely to be relevant to people who are financially eligible for legal aid. We therefore doubt whether any significant costs savings would be achieved by these proposed cuts.

3.75 We would not object to the first two, concerning the Right to Buy, being removed from scope.

3.76 We do object to the removal from scope of the other types of action. These remedies are useful in conjunction with other remedies sought. As HLPA point out, by way of example, in a disrepair case against a Local Authority landlord, execution of repairs may require access from neighbouring private land, which might necessitate an application under the Access to Neighbouring Land Act 1992.

3.77 We do not agree that actions to set aside a legal charge should be removed from scope. As HLPA point out in their draft response:

This would mean that it would not be possible to protect a vulnerable person from the owner of a charge making an application to obtain an order for sale. The charge may have been obtained through misrepresentation, fraud or undue influence, in which case legal aid should be available to assist a client in setting aside that charge. It is easy to conceive of circumstances in possession proceedings where it will be

37 Legal Aid Reform: Scope Changes – Equalities Impact Assessment p.136
necessary to set aside a charge in order to properly protect a client from losing their home. Would such representation be covered?

3.78 Advice and representation in relation to re-housing issues covers, as we understand it, issues concerning transfers and assignments of tenancies and issues regarding the allocation policies of local authorities. These can involve meeting sometimes complex legal requirements and are vitally important to tenants with an urgent need for rehousing (for example on grounds of ill-health and/or disability and/or overcrowding) or those seeking to gain access to a local authority's housing register. Advice on re-housing is in some circumstances an alternative to advice to clients under the homelessness legislation.

3.79 As HLPA point out:

HLPA is particularly concerned with the proposal to remove from scope actions for re-housing. This would appear to limit the ability to bring any actions in respect of Part 6 of the Housing Act 1996. This would prevent any challenge to Local Authority allocation schemes. Some schemes are unlawful in principle and there have been challenges by way of Judicial Review. Other allocation schemes, whilst lawful are administered unlawfully and arbitrarily with prejudice to applicants on the housing list. The removal from scope of these cases could have significant consequences for the vulnerable, the disabled and children living in unsuitable accommodation.

3.80 While judicial review may be available in some cases, there are others where an alternative remedy needs to be pursued first.

3.81 Actions for wrongful breach of quiet enjoyment and trespass must not be excluded from scope. We can only assume that their inclusion in this list is a mistake. These actions are primarily about harassment and unlawful eviction. On this issue, we agree with Shelter's draft response to the Green Paper, which states:

Advice in this area often concerns the safety and well-being of vulnerable individuals. Landlords can often resort to heavy-handed tactics to try and remove tenants from properties. Despite harassment and illegal eviction being criminal offences, police do not in most cases intervene and in some of our cases have assisted the landlord in perpetrating illegal evictions. The police in many cases state that such cases are civil matters on which the tenant should seek advice from a solicitor . . . . If this area is taken out of scope, it will become almost impossible for vulnerable, low-income clients to take any action to enforce their rights to occupy their home without such harassment continuing.

3.82 The Green Paper may be assuming that such actions are purely claims for damages. This is far from correct. They are often actions for specific performance, to restore the tenant to their home and to protect them from further illegal action.

3.83 It makes no sense to say that a tenant will be able to get legal aid if their landlord tries to evict them through the courts, but will be unable to get legal aid if the landlord evicts them unlawfully.

3.84 As far as disrepair cases are concerned, the Green Paper proposals appear to be based on a distinction being made between at least three kinds of cases

- “serious” cases where the litigant is not primarily seeking damages but is seeking a repair necessary to avoid the serious risk to the health or life of the litigant or their family [para 4.78], which will remain in scope
- proceedings where the primary remedy sought is damages, including damages for personal injury (which it proposes should be excluded from scope)
• less serious cases where the litigant is seeking repairs rather than damages, but
the risk to the life or health of the family is less than “serious”.

3.85 These distinctions are difficult to justify and difficult to operate in practice:
• Who is to decide whether a repair sought is “serious” enough, and how does the
tenant get to the position that such a decision can be made, unless they have
access to Legal Help?
• How is it to be decided what the primary remedy sought is, when the repairs and
damages sought have to be claimed together, and the situation may change
during the life of a case, if repairs are carried out?
• Why should damages only claims be excluded, if they are substantial enough to
warrant legal aid, and there is good reason to believe that any award of damages
and costs can be enforced? 38

3.86 The position with regard to actions in nuisance is not clear from the Green Paper. As
the Law Society have pointed out in their draft response:

Nuisance actions form part of repair actions and their removal from scope may
hamper the pursuit of some of those actions, for example those involving
infestations. The most common nuisance actions are those involving the infestations
by, for example, vermin or cockroaches, sometimes including whole blocks. In
certain cases, the removal of funding for nuisance may prevent any form of action for
serious infestation.

3.87 Nuisance can also provide an alternative to a repairs action where there is a strong
case but there are difficulties in proving notice.

3.88 Nuisance should therefore remain in scope, as should advice in relation to
applications under Section 82 of the Environmental Protection Act 1990.

3.89 Housing benefit is not mentioned in the Green Paper section on housing. We
assume that it will remain in scope. It seems to us axiomatic that you cannot properly
defend an action for rent arrears, if the rent arrears are attributable in whole or part to
problems with housing benefit, unless you can also deal with the housing benefit
problems.

Alternative sources of advice

3.90 The Green Paper suggests that there is a variety of alternative sources of advice in
housing, including local authority in-house services and voluntary sector
organisations such as Shelter.

3.91 In their draft response, Shelter point out that they were not consulted on this point. If
the present proposals are implemented in full, Shelter estimates that they could face
a reduction of 70% in their income for legal aid advice work. In such a situation
“Shelter could not possibly fill the gap left by such major cuts.”

3.92 Other NfP organisations will be equally unable to cope, faced as they are with cuts in
their income from legal aid and other sources. They will not be able to continue their
current workload if the current proposals are implemented, let alone take on clients
who would previously have been funded by legal aid.

3.93 As far as local authority in-house services are concerned, Shelter comment:

38 They could also contribute to a Supplementary Legal Aid Scheme, if one is established.
We remain to be convinced that local authority in-house advice services, valuable as they are, are geared up to absorb the amount of unmet need these proposals would create. . . In any event, there would be a conflict of interest in local authority in-house services representing clients on reviews to the local authority itself. Often Shelter finds itself in the position of challenging, on behalf of clients, the decisions and actions of precisely those in-house teams.

Immigration

3.94 We disagree with the suggestion that immigration cases do not raise issues of fundamental importance, and reject the characterisation of the legal aid immigration client as a person choosing to move around the globe to look for work or visit family.

3.95 Immigration cases may involve:

- reuniting families when one member has been recognised as a refugee and has no option to return to the country they have fled
- an individual being removed from a country in which they have lived for years and leaving children and other close family members behind
- women fleeing from violent and abusive situations, for example when they have travelled to the UK as a spouse or domestic worker.

3.96 In these cases, decisions made by the UKBA are of crucial importance to people’s futures and in some cases may be matters of life and death.

3.97 Furthermore, as ILPA point out in their draft response:

the requirements of the immigration rules mean that where cases involving work and study remain within scope, it will be rare that the individual will meet the means test for legal aid. This is also true for all but the poorest applicants in family immigration cases; in very many of the immigration rules cases where the applicant is required to show as a minimum that they will have adequate accommodation and support in the UK without recourse to public funds, they will not be eligible for legal aid.

3.98 We disagree with the suggestion that people will be able to represent themselves and navigate their way through a user-friendly tribunal service. A court hearing is daunting for anyone. Many applicants will not have a good grasp of English and if they are able to understand court procedure and directions, their ability to prepare witness statements and skeleton arguments will be limited.

3.99 Procedure aside, immigration law is a complex web of domestic and international statute and case law, of which clients will have no knowledge or understanding.

3.100 Given the importance of the issues, we anticipate that people will attempt to represent themselves. This will have the effect of slowing down hearings as judges attempt to make their way through disorderly and incomplete papers and extract the facts from ill-prepared appellants and witnesses. This will lead to the injustice of winnable cases being lost because appellants lack the skills and knowledge to present their cases properly. It is also likely that it will increase the cost to the court and tribunal service of immigration appeals and further appeals.

3.101 We understand that cases where the UKBA appeals against an initially successful decision on a point of law, will not be in scope. It is neither realistic, nor in the interests of justice that an individual should represent themselves, where what is at issue is a point of law.
3.102 The Green Paper suggests that people may be able to get advice from alternative sources such as the voluntary sector. Following the 2010 tender process, NfP agencies hold 58 contracts to deliver advice in non-detention immigration. Withdrawal of these contracts will, for most of them, remove their entire capacity to carry out immigration work.

3.103 The rest of the voluntary sector does not have the capacity to take up the slack. We have already set out our fears about the vulnerability of the voluntary sector to other funding cuts. This will severely restrict agencies’ ability to continue to deliver existing services, let alone take on high volumes of new clients.

3.104 Moreover, it is a criminal offence for an organisation to give advice on immigration matters unless it is regulated by the Office of the Immigration Services Commissioner (OISC). Becoming regulated is a time-consuming process that would require the development of expertise or recruitment of new staff. This will be far beyond the reach of most voluntary sector organisations.

3.105 We fear that people with serious immigration problems will fall prey to exploitative private providers of immigration advice. Whilst immigration advisers are regulated by the OISC, its existence has not eliminated unscrupulous and exploitative provision. In 2009-10, the OISC received 131 new complaints about illegal activity and prosecuted 43 individuals. 39

3.106 Removing the means by which people can access good quality, free legal advice, simply opens up new potential markets for exploitative providers. In saying this, we are not suggesting legal aid clients have the means to pay privately for advice, but given no alternative they may resort to any means necessary to secure help.

3.107 Our comments on asylum support are set out below in the section of our response dealing with Welfare Benefits.

Welfare Benefits

The importance of welfare benefit advice

3.108 The proposal to remove all welfare benefits work from scope is, in our opinion, fundamentally wrong. It represents a failure to apply the principles set out in the Green Paper, and a failure to protect the most vulnerable members of society.

3.109 As we have already indicated, it is our view that welfare benefits advice concerns matters that have very serious direct consequences for clients, concerning questions as fundamental as whether they will have any income at all, whether they will be able to meet their food, heating and housing costs, and whether they will receive recognition for the extra costs of being disabled.

3.110 Welfare benefits problems are often the underlying cause of other issues, such as debt and homelessness. To describe them as being “essentially about financial entitlement” and therefore less important than issues concerning safety or liberty (para 4.217) is to seriously underestimate their importance to people who rely on them to be able to feed and clothe their families, provide a roof over their heads, and heat their home. For disabled people, entitlement to Disability Living Allowance, for example, determines whether or not their mobility and care needs can be met.

3.111 In particular, the proposal makes no sense in the context of a decision to prioritise the prevention of homelessness (in both debt and housing categories). Very often,

39 OISC Annual Report and Accounts 2009/10 p24-25
saving a client’s home will involve having to sort out their benefit entitlement (especially housing benefit and help with mortgage interest) and/or their other debts.

3.112 Indeed, early welfare benefit advice can prevent people from getting to the stage that their home is at risk. Strict backdating rules and appeal deadlines in housing benefit mean that early advice is much more likely to be successful in retaining someone’s home.

3.113 Finally, when appealing benefit decisions to the Tribunal, people often need to present medical evidence. Without legal help, it is unlikely that people will be able to afford the evidence they need to properly make their appeal.

Growing need for welfare benefit advice

3.114 There is a large and growing demand for legally aided welfare benefits advice. Welfare benefits cases overtook housing cases in the number of cases started in 2009-10 and were only marginally fewer than the number of debt cases. 143,814 cases were started in 09-10, representing a 5% increase on the 2008-09 figure of 137,557.40

3.115 This demand is likely to grow as a result of the benefit changes proposed by the Government in the short term, in relation to tax credits, housing benefit and incapacity benefit, and in the longer term, in relation to the proposal for Universal Credit. The proposed changes to housing benefit are particularly complex and far reaching. Claimants will need expert advice to clarify how the changes will affect them. In some cases, they may have to consider uprooting their families and moving to other areas.

3.116 Welfare benefits advice works. LSC outcomes data for 2009-10 show that 88% of concluded cases produce a substantive benefit for clients.41

3.117 The Green Paper states that consideration has been given, in each type of case, to whether clients are likely to be from a particularly physically or emotionally vulnerable group, for example as a result of their age or disability (para 4.23). It appears to overlook the finding of the Equalities Impact Assessment that at least 63% of welfare benefits clients are disabled.42

Specialist welfare benefit advice is legal advice

3.118 The Green Paper appears to assume that welfare benefits cases are not particularly complex and largely concern the need for “practical” rather than legal advice (see para 4.26). We accept that this is true of some benefit advice given outside the legal aid scheme, by generalist advisers and others.

3.119 However, this is not true for welfare benefit advice given currently under the legal aid scheme which is available only if there is a legal issue. The most recent figures available suggest that half of welfare benefits cases involve appeals or reviews of clients benefits’ entitlements.43

3.120 The Green Paper suggests that the “accessible, inquisitorial, and user-friendly nature of the tribunal means that appellants can generally present their case without assistance” (para 4.217). In our view, this misses the point. Legal aid does not cover

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40 LSC Statistical Information 2009/10 – Table CLS2
41 LSC Statistical Information 2009/10 – Table CLS4
42 Equalities Impact Assessment: Scope Changes, p.136
43 Cases classed as reviews or appeals constituted 47% of all cases. See Case Lengths, Case Costs and Fixed Fees, ASA, 2007, p 27
representation at the First-tier Tribunal. What we are talking about is whether, before taking their case to the Tribunal, clients should receive proper advice on whether they should appeal, and if so on what grounds, and using what evidence.

3.121 The lack of specialist advice in cases involving appeals and reviews is likely to have three main impacts:

- people will pursue appeals when they should have been advised that their case has no merit
- people whose case has merit will pursue their case but, without advice, will not present it effectively or will be unable to provide the evidence needed
- people who should be appealing and whose entitlements have been denied will not do so.

3.122 There is a serious risk that the First-tier Tribunal will be overwhelmed by ill-advised and unprepared appeals.

Asylum support

3.123 The Green Paper considers the position of asylum support claimants. It recognises that the issues involved are of high importance, since they enable successful applicants to access housing and meet basic subsistence needs (para 4.222). It recognises the particular vulnerability of asylum applicants as a group, and yet argues that funding is not justified on the basis that the law is straightforward and that there are voluntary sector organisations providing advice in this area.

3.124 We agree with the paper that asylum support cases are of high importance; the result of a failed application may well be destitution including homelessness. We therefore think that the Ministry of Justice (MoJ) has not applied its importance criterion correctly. In our view, there are clear parallels with the proposal to continue to fund legal aid for the prevention of homelessness.

3.125 Furthermore, asylum support clients are extremely vulnerable; they are likely to speak little English and will have experienced trauma sufficient to have forced them to leave their home countries. If homelessness is of enough importance to the client to remain within scope, then we can see no justification for the removal of asylum support.

3.126 We do not share the view that asylum support cases are straightforward. Refusals of asylum support are written in English and claimants are given 5 days to submit an appeal. The tribunal may then issue them with directions requiring preparation of witness statements and gathering of other evidence such as doctors’ letters and bank statements. Not only is this difficult work, but there may well be a cost involved.

Alternative sources of support

3.127 The paper suggests that voluntary sector agencies exist to help asylum seekers with their applications. Some claimants may receive help with filling in the application form but in many cases this is not enough. As the Refugee Council points out:

Whilst it is true that the voluntary sector does provide basic advice and assistance with completion of the forms applying for support there frequently comes a point
where qualified legal advice is required. Asylum seekers frequently need legal advice simply to establish their entitlements.\(^{44}\)

3.128 Furthermore, as we have pointed out elsewhere in our response, the voluntary sector is facing significant cuts from other funding sources. It is unlikely that voluntary sector agencies will be able to continue with work at existing levels let alone take on large volumes of clients previously eligible for legal aid.

3.129 The Green Paper suggests that judicial review will be available to challenge delays in making decisions, delays in making payments, or suspension of benefits by authorities pending investigation. [Para 4.224] If this becomes the only way in which such decisions can be challenged, one can only expect the number of such challenges to increase.

3.130 The Green Paper also suggests that help and advice are available from a number of other sources including Job Centre Plus and the Benefits Enquiry Line, AgeUK (on certain benefits), the Child Poverty Action Group, Disability Alliance and the Free Representation Unit [para 4.218]. Reliance on these sources seems to us to be fundamentally misplaced.

3.131 The Department for Work and Pensions is not a provider of independent advice, or indeed, in many cases, a provider of advice (as opposed to information) at all. The DWP is a reasonable source of factual information, but not a disinterested provider of advice on the application of the benefit rules to a client’s circumstances.

3.132 AgeUK has stated:

> Our concern is that while it is true that both Age UK nationally and our partners in local Age UKs and Age Concerns do provide some help and advice with welfare benefits it is most often not at a level comparative to that provided through legal aid. Primarily local Age UK and Age Concern organisations offer welfare benefits advice limited to improving the take up of benefits amongst those of retirement age... . In the main Age UKs and Age Concerns look to refer clients with more complex welfare benefits advice needs to other local providers, often those with legal aid contracts.

3.133 The Child Poverty Action Group website states:

> Unfortunately we do not have the resources to provide direct advice to people who are claiming benefits.\(^{46}\)

3.134 The Disability Alliance has stated:

> We are particularly concerned that Ministers are made immediately aware that potential changes to Legal Aid and reductions in support simply cannot be met by small charities like Disability Alliance— despite the statement included in the consultation.\(^{47}\)

3.135 The Free Representation Unit has stated


\(^{45}\) Extract from e-mail from Age UK to the MoJ, dated 29th November 2010

\(^{46}\) Extract from statement on CPAG website: http://www.cpag.org.uk/

\(^{47}\) Extract from statement on Disability Alliance website: http://www.disabilityalliance.org/legalaidref.htm
We should point out that the consultation document gives a misleading impression of FRU. It [MOJ] wrongly uses the role of FRU to support one of its conclusions. It points out correctly that FRU represents clients in tribunals. It then illogically uses FRU's representation work in tribunals as part of the justification for withdrawing Legal Help for initial advice work in welfare benefits cases. FRU does not provide initial advice to clients. The work that FRU does can therefore be no part of the justification for withdrawing Legal Help in this area. FRU is in no position to replace the invaluable work of publicly funded solicitors, law centres and Citizens' Advice Bureaux in giving initial advice. 48

**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.

3.136 While we agree that there needs to be an exceptional funding scheme, we consider that the proposed test is too narrow. In our view, the present criteria should remain. If the proposed restrictions on scope are implemented, there is an even stronger case for retaining the present criteria.

3.137 Continuing to support cases with significant wider public interest would enable test cases to be brought in the categories of law that are excluded from scope. These cases are likely to be taken on behalf of those who are most likely to be affected, for example by changed practices or procedures by benefit authorities, creditors or employers.

3.138 Similarly, continuing to support cases of overwhelming importance to the client would enable some cases to be funded where an individual faces an overwhelming impact from circumstances, or the actions of others, that occur within categories of law that are excluded from scope. As we argue elsewhere in this response, factors beyond life, liberty, physical safety and homelessness must be taken into account.

3.139 Similarly, the reductions in scope are likely to increase the number of situations of “Jarrett Complexity”, that must be eligible for consideration under the exceptional funding scheme.

3.140 There is a widespread concern that the present scheme takes far too long to make decisions. It is vital that adequate resources are available and an improved procedure devised for the present scheme and its replacement.

**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.

3.141 We are concerned by the wording of this question. Paragraph 4.265, which immediately precedes it, states that the proposal is that legal aid “will” be refused in such circumstances, not that it “can” be.

3.142 The proposal refers to cases being suitable for a CFA. There is a difference however between suitability, and availability and affordability.

3.143 We would not disagree with the suggestion that funding can (or even should) be refused in an individual case where an alternative source of funding is actually available to the client, is affordable by him or her, and is suitable to the individual case. That however does not seem to be what is proposed here. We object to the introduction of a blanket ban on cases being legal aid funded, where the MoJ or LSC thinks they should be funded by a CFA.

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.

3.144 We agree with paragraph 4.266 that the proposed changes will lead to an increase in the number of cases involving unrepresented litigants. This is a matter of serious concern in terms of its impact on court resources and on the ability of the courts to achieve justice.

Inequality of arms where only one person represented

3.145 The Moorhead and Sefton research referred to in the Green Paper found that unrepresented litigants make more mistakes and mistakes of a more serious nature than represented parties. For example, more than half of cases involving individual litigants in person involved the litigant filing at least one flawed document. Serious issues mainly involved misunderstanding the legal and procedural issues. In several such cases this appears to have led or contributed to cases being lost.

3.146 Contrary to the suggestion made in the Green Paper, this is a clear indication that court paperwork and procedure are technically difficult and that unrepresented litigants may rarely have the knowledge or skills to act in their own best interests.

Unrepresented litigants achieve poorer outcomes.

3.147 Research from Australia found that in their Federal Court 54% of unrepresented litigants had their case dismissed compared with 31% of represented parties. The Moorhead and Sefton research also found that unrepresented litigants achieved poorer outcomes. One of the main reasons for this was that lack of representation meant they were unable to represent their cases in the best light if at all.

Need to increase capacity of courts to deal with unrepresented litigants

3.148 There is also evidence that money saved in cutting legal aid will simply have to be spent on increasing the capacity of the courts to deal with unrepresented litigants.

3.149 While there may be some evidence to suggest that there is little difference in terms of court time between cases conducted by litigants in person and those in which clients were represented by lawyers, this is only part of the picture.

3.150 The increased demand on court staff is also relevant. The Moorhead and Sefton research found that the bulk of unrepresented participation took place via the court office and not the court room and involved back office procedure such as dealing with documents and talking to court staff. The Australian research found that the

50Ibid 136.
52Moorhead and Sefton 221.
53Ibid 255.
rise in litigants in person experienced there increased the workload for judicial officers and meant they had to work longer hours and deal with the increasing frustration of court users.\(^{54}\)

3.151 Moorhead and Sefton also found that one of the reasons why litigants in person achieved poorer outcomes than represented litigants was that they brought weak cases because they had not had legal advice to dissuade them from doing so or because they had other grievances against their opponents.\(^{55}\) The removal of funding for specialist legal advice is likely to increase the incidence of these types of cases, meaning not only more litigants in person but an increase in the number of cases brought overall.

3.152 Another finding relevant to the issue of costs is that unrepresented litigants may be less likely to settle cases.\(^{56}\) Litigants tended to explain this by saying that they thought settlement was prohibited once proceedings had started or because they feared exploitation by their opponent’s lawyer.

3.153 The research also found that unrepresented parties tended to proceed further through the procedural steps and their cases more often involved hearings, whereas there was generally a high level of settlement in civil cases where both parties were represented. This is another indication that unrepresented litigants will use up more court resources than those with representation.

**Other considerations**

3.154 The Australian research found that in cases with one unrepresented party, costs for the represented party increased as the number of interlocutory hearings went up and more time was spent by legal representatives explaining procedures to the litigant in person.\(^{57}\) Similarly, the Moorhead and Sefton research found that in cases with one represented party, judges often rely on the opponent lawyer to provide summaries and also do extra preparation such as trial bundles.\(^{58}\)

3.155 The Australian research also reported that family law practitioners in particular had witnessed an increase in anger, violence and threats directed at judicial officers, other parties and legal representatives by litigants in person.\(^{59}\)

## 4 THE COMMUNITY LEGAL ADVICE TELEPHONE HELPLINE

### Introduction

4.1 We welcome the proposal for a gateway, that could direct callers to legal aid and other advice services, but do not agree that this should act as the single gateway to access civil legal aid advice. Clients need to be able to approach face-to-face providers directly, especially ones they have used before, and trust, or which have been recommended to them by people that they trust.

4.2 We agree that it would be helpful for specialist advice to be offered through the CLA helpline in all categories of law, although we have doubts as to the value of such a

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\(^{54}\) Law Council of Australia 68-9.  
\(^{55}\) Moorhead and Sefton 221.  
\(^{56}\) Ibid 257.  
\(^{57}\) Law Council of Australia 72.  
\(^{58}\) Moorhead and Sefton 182-185.  
\(^{59}\) Law Council of Australia 74.
service in categories of law that will overwhelmingly require face-to-face advice such as asylum or emergency homelessness.

4.3 We agree that some work that is currently done face-to-face could be done by telephone, although the situation will vary between categories of law depending on the types of cases, characteristics of clients, and availability of providers. It is possible that most education advice will have to be provided by phone, as it is now. It is also possible that more cases could be dealt with by phone in some other categories, such as employment, welfare benefits and debt.

4.4 However, we do not believe that the shift from face-to-face to telephone advice can or should be on anything like the scale suggested in the Green Paper and, in particular, the Impact Assessments.

4.5 Our responses to these questions assume that our arguments about scope have been accepted.

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

4.6 As stated above, we welcome the idea of a gateway. There are however a number of reasons why we cannot agree that it should act as the single gateway to legal aid services.

**Ensuring access for clients**

4.7 We accept that for some people, such as some blind people, telephone advice may be easier to access than face-to-face advice. However, this is not the case for others, such as clients without access to a telephone, those for whom English is not their first language, those who have a speech or hearing impediment, those who cannot afford the charges, and those who cannot find the privacy to make telephone calls (such as an abused spouse).

4.8 Clients need to be able to approach face-to-face providers directly, especially ones they have used before, and trust, and who know them and their circumstances.

4.9 Many clients are referred to providers by local community organisations or respected local individuals (previously referred to by the LSC as problem-noticers) who have developed a relationship of trust and confidence in local advice providers. This relationship plays a vital role in providing access to many people who would not know where to seek help, or indeed that they needed to seek help.

4.10 In some categories of law, such as immigration and asylum, providers have particular specialisms (e.g. in relation to asylum claims for people from a particular country) that are known more widely to NGOs and other providers, which can also result in speedy referral for clients to an appropriate (or indeed the most suitable) provider.

4.11 Clients’ ability and willingness to use the telephone to access services varies between different client groups. Research by Youth Access, for example, suggests that:

- Young people are currently far more likely than the general population to access advice face-to-face rather than by telephone;
- Their preference for face-to-face over telephone advice relates primarily to trust, confidence and communication skills;
- The cost of calling (even some ‘free’) helplines can be prohibitively expensive for young people, who tend to use mobile phones with text-focused call packages;
• A significant minority of the most disadvantaged young people, i.e. those with the greatest problems, did not have access to a telephone at all;
• Young males were far less likely than young females to access the Connexions Direct service by telephone.\textsuperscript{60}

4.12 As a matter of principle, as well as a solution to issues such as these, clients must be able to choose whether to receive telephone or face-to-face advice. They must also be able to choose the provider they wish to use, provided that the provider has achieved the relevant quality standard and has a contract to provide the service sought. This is important for trust.

4.13 Preserving client choice will help to ensure that a local provider base is maintained of a sufficient size to ensure both its financial viability and its ability to provide a service of sufficient breadth and depth. The need for such providers to develop and retain local links with their community, and a local reputation, should also help to maintain quality.

4.14 There may need to be some restriction (as there is now) on the number and type of cases that face-to-face providers can take on, but the principle of direct access must be retained for non-emergency cases as well as emergency cases.

\textit{Lack of transparency}

4.15 We object also to the idea that one organisation, holding the gateway contract, should be given so much power. This is dangerous in principle, and in practice.

4.16 The provider of the gateway service will, in effect, be deciding on a client's entitlement to a public service - will they get triage advice only, will they get telephone or face-to-face advice? The service will need to be accountable for these decisions and, in our view, there will need to be an appeal process for people who are unhappy with the decision.

4.17 There is a risk that the gateway service will be taking into account factors other than what is in the client's interest. As the Impact Assessment says:

\textit{This option offers LSC greater control over how they fund cases as the service can be set up to apply a more rigorous approach to taking any action on cases, including advising when other channels are more appropriate.}\textsuperscript{61}

4.18 The gateway may therefore be under pressure to avoid referrals to either telephone or face-to-face specialists.

4.19 It is essential that there is full transparency about the factors taken into account by the single gateway when making its decisions.

4.20 There is a risk that, under such pressure, operators will misdiagnose cases. In particular, there is a risk that discrimination cases will not be identified. Clients who have suffered discrimination often initially present their cases in a different way, for example as unfair dismissal.

4.21 We are also concerned that the operator service will be pressured to inappropriately suggest "self-help resources" or "online advice tools", or other helplines, in order to

\textsuperscript{60} James Kenrick, Young people's access to advice – the evidence, Youth Access, October 2009, Chapter 2, states that 72\% of callers to Connexions Direct were female.

\textsuperscript{61} Impact Assessment para 55
screen out what are considered to be “easy” problems. There should be rigorous follow up of a sample of calls to ensure that clients were able to understand and use any such resources.

Practical problems

4.22 There are a number of practical problems in having a single gateway as proposed. For example:

- How will the operator service cope if demand is significantly more than is anticipated?  
- How will the operator deal with a caller who wants a level or type of service, or referral to a named provider, that the operator does not consider to be suitable?
- How will telephone specialists deal with callers referred to them who say, or insist, that they want or need referral to a face-to-face provider?
- Will providers with face-to-face contracts have any discretion to start cases without receiving approval from the gateway?
- Will such providers be able to ring the gateway on behalf of clients who wish to instruct them, or will the gateway insist on talking to the client to see if a referral to face-to-face advice can be avoided?

4.23 Many of these problems can be avoided if the client’s right to access face-to-face providers in non-emergency situations is retained.

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.

4.24 As stated above, we agree that it would be helpful, in due course, for specialist advice to be offered through the CLA helpline in all categories of law. However, we have doubts as to the value of such a service in categories of law that will overwhelmingly require face-to-face rather than telephone advice, such as asylum or emergency homelessness.

4.25 We agree that some work that is currently done face-to-face could be done by telephone, although the situation will vary between categories of law depending on the types of cases, characteristics of clients, and availability of providers. It is possible that most education advice will have to be provided by phone, as it is now, and that more employment cases could be provided by phone. It is also possible that more cases could be dealt with by phone in some other categories, such as welfare benefits and debt.

4.26 However, we do not believe that the shift from face-to-face to telephone advice can or should be on anything like the scale suggested in the Green Paper and, in particular, the Impact Assessments. The latter documents make it clear that what is envisaged is a transfer of approximately 75% of all cases from face-to-face to telephone, not just the “majority” of cases in “some categories”.

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62 We understand that CLA already has at least two online advice tools in employment (covering reduction of wages and redundancy) and two in debt (one on magistrates court fines and a “debt remedy tool”, which was developed by the LSC in conjunction with CCCS).

63 The Impact Assessment suggests that the number of calls could treble, from around 600,000 to around 1.8 million per year. However this seems to assume that, apart from calls arising from cases currently dealt with face to face, demand will otherwise remain constant. It seems to us that this is unlikely to be the case.
The size of the shift proposed

4.27 The Impact Assessment (IA) refers consistently to "residual face to face services". The Equalities Impact Assessment (EIA) states that clients would be referred to face-to-face provision either due to their personal circumstances or to the circumstances of their case, such as extreme complexity [our emphasis] or the need for emergency assistance. 64

4.28 It estimates that face-to-face providers will see an overall reduction in income of 76% as a result of the shift to telephone advice (assuming no other changes are made as a result of the Green Paper proposals). 65 NfP providers would face an 85% reduction in income, and solicitors a 75% reduction. 66 The EIA suggests that this differential impact is due to the fact that a large proportion of acts of assistance delivered by NfPs are in categories of law such as Debt and Housing where we anticipate that the vast majority of specialist advice will be delivered by telephone 67 [our emphasis].

4.29 The IA states that "the LSC expect that around 580,000 cases could appropriately be offered specialist advice over the phone, rather than face to face." 68 No explanation for this figure is provided. However the IA states that the proposals have been assessed in relation to current legal aid scope and eligibility. 69 The base year for all the calculations is 2008/09. In that year, just under 800,000 cases were started by face-to-face providers, and just over 100,000 by CLA specialists. 70 580,000 represents 73% of face-to-face cases started in 2008/09.

The impact on clients

4.30 The impact assessments accept that a transfer of cases from face-to-face to telephone on this scale would have serious consequences for many clients.

4.31 The Impact Assessment acknowledges that:

Delivering a greater proportion of advice by telephone may cause access problems for some clients, for example due to literacy issues, language barriers, problems acting on advice given, or an inability to pick up on non-verbal clues. In addition, telephone providers are likely to have diminished local knowledge. The requirement to access services through the CLA Operator Service also adds an additional layer of complexity for the client in cases where face-to-face help is ultimately required or in an emergency situation, and also represents a reduction in client choice. 71

4.32 The EIA acknowledges that:

Disabled people . . . may find it harder to manage their case paperwork through phone services. They may also find it harder to communicate via the phone or manage any emotional distress more remotely. 72

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64 Equalities Impact Assessment para 1.1
65 Ibid p.23
66 Ibid p. 25
67 Ibid para 1.60
68 Impact Assessment, para 51
69 Ibid para 21
70 See Griffith Face-to-face and telephone advice under legal aid, paras 3.3 and 3.4. The actual face-to-face figure comes to 792,961, including immigration but excluding housing duty possession cases. The telephone figure is 100,851.
71 Impact Assessment para 36
72 Equalities Impact Assessment para 1.47
Neither document suggests that these impacts need to be ameliorated however. The impacts are presented as unavoidable, and therefore acceptable, consequences of the shift to telephone advice. We do not agree. In our view, these impacts indicate clearly the limits to any such shift. These consequences are not acceptable and cannot be allowed to happen.

**The justification**

A further problem presented by these proposals is the lack of any proper justification for them. The IA claims that cases dealt with by telephone “cost more than 45% less than the equivalent face-to-face service”.73 The EIA claims that the saving is 40%.74 No evidence is provided in support of either claim.

The alleged saving is considerably greater than the amounts previously claimed by the LSC. In November 2007, when CLA was launched, replacing CLS Direct, the LSC claimed that “the cost to legal aid is 10-35% less than for the same help face-to-face”.75

In the past, the LSC has put forward two arguments as to why telephone cases are cheaper:

- because they can be done more quickly and
- because telephone advisers are paid less.

The first reason predominates in the LSC’s report on the original telephone advice pilot.76 This claimed that there was strong evidence that telephone advice cases on average take a shorter time to reach the same endpoint code than face-to-face ones, especially in debt and welfare benefits.77

Figures contained in the recent evaluation of the family helpline pilot suggest a different picture: that the time spent on the telephone is only 8% less than face-to-face for equivalent cases, but that telephone advice is 44% cheaper, due primarily to the difference in the hourly rate paid to providers.78

Information released recently by the LSC for 2009/10 suggests that telephone cases are cheaper both because of the average hourly rates (ranging between £43.93 and £46.91) agreed with CLA specialists and shorter case lengths (averaging 60 minutes in family, 120 minutes in welfare benefits, 128 minutes in housing, 148 minutes in debt, 170 minutes in employment and 191 minutes in education).79

The proposals assume that the savings currently achieved by telephone advice will be replicated if telephone advice expands to cover approximately 75% of all cases. This seems to us to be unwarranted on the evidence so far available.

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73 Impact Assessment paras 13, 26
74 Equalities Impact Assessment para 12
75 LSC press release 12 November 2007
76 Jill Hobson and Peter Jones “Telephone Advice Pilot”, in Report on Evaluation Research on Alternative Methods of Delivery, LSC, July 2004
77 Ibid pp.24-25
78 Family Community Legal Advice Helpline Pilot Evaluation, January 2009, para 11.2. On our calculations the face-to-face advice cost £88.24 per hour (including VAT) and the telephone advice £53.86 per hour (including VAT).
79 Information provided by the LSC under the Freedom of Information Act, in an email to Matthew Howgate on 7 February 2011
Different cases?

4.41 The evidence suggests that cases dealt with so far by telephone have tended to be shorter and simpler, on average, than those dealt with face-to-face. This is strongly indicated by the average case lengths referred to above. The LSC’s reports on its telephone advice pilots in civil and family law suggest that they dealt with many one-off matters, probably more like requests for information than legal casework.

4.42 The outcomes achieved for telephone advice also suggest that simpler cases are being dealt with. The data for debt cases in the original pilot report (in 2004) and the data for housing cases in 2009/10 show much higher proportions of cases where the recorded outcome is that the client has been “advised” (and either enabled to plan and/or manage their affairs better, or to take action themselves or with help from a third party) than in comparable face-to-face data.

4.43 In the reported housing cases dealt with by telephone in 2009/10, 59% were reported as “client advised and enabled to plan and/or manage their affairs better”, and 5% were reported as “client housed, re-housed or retains home”. We do not have comparable face-to-face data for 2009/10, but our analysis of face-to-face cases for 2005/06 showed that 8% were reported as “client advised etc” and 28% as “client housed, re-housed or retains home.”

4.44 If the cases handled by telephone are different from those handled face-to-face, as the evidence suggests, it may not follow that significant savings will be made if more complicated cases are transferred to the telephone.

Different clients?

4.45 It must also be remembered that, so far, clients have been able to choose whether to have telephone advice, and are therefore self-selecting.

4.46 We have received strong anecdotal evidence from NfP providers who deliver both types of services that the people choosing telephone advice are different from those who choose face-to-face advice and that those who choose telephone advice tend to be more resourceful.

4.47 Information recently released by the LSC includes monitoring and diversity data for face-to-face and telephone advice in 2008/09. This suggests that, in some respects, the two services are reaching different types of clients.

4.48 In housing, face-to-face advice has about twice the proportion of non-white clients, with 32.4% white clients, compared to 66.1% for telephone advice. Overall, the proportions of clients described as disabled is quite different, being 38.8% for face-to-face, compared to 17.9% for telephone advice. The difference varies between the different categories of law and is greatest in welfare benefits, where face-to-face advice has 63.5% of clients described as disabled, compared to 22.4% for telephone advice.

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80 In the 2004 report, it is stated that most of the cases were resolved quickly and that only 11% took longer than two hours to deal with (p.18). In the family evaluation in 2009, only 7% of the sampled cases proceeded beyond initial advice.
81 Information provided by the LSC to the Social Welfare Law Representative Bodies on 8 December 2010
82 Case Lengths, Case Costs and Fixed Fees, ASA, 2007
83 Information provided by the LSC under the Freedom of Information Act attached to a letter to Matthew Howgate 3 February 2011.
4.49 The IA says that it is possible that case outcomes may be worse for phone contact in certain types of cases compared to face-to-face, and that “the LSC are currently researching whether case outcomes are dependent on the channel used.” We agree with others who have suggested that it is essential to evaluate the results of such research before designing a new compulsory scheme of the type envisaged.

4.50 We doubt however whether the LSC will be able to reach any firm conclusions. Even if they are able to control for type of case, they will be extremely hampered if they have to rely on their current outcome codes. As the LSC’s 2004 evaluation points out:

*The abstract nature of the codes makes it difficult to base firm conclusions upon them about the outcomes achieved for clients using any method of delivery.*

4.51 A further problem is that many of the matters which the Green Paper says will remain in scope will be matters in which specialist telephone advice has not yet been tested directly:

- community care has not been available via the telephone service before
- we would be surprised if the telephone service has done a lot of discrimination casework in education, employment or consumer (goods and services)
- hardly any cases in the family telephone advice pilot involved domestic violence.

4.52 We understand that enquiries about serious or urgent cases, such as immediate risk of repossession, have usually been referred out for face-to-face advice.

*Research on telephone advice*

4.53 The fact is that there is little independent research comparing telephone and face-to-face advice provision. In particular, the efficiency and effectiveness of telephone-only contact for dealing with ongoing complex social welfare law cases remains to be evaluated. Research into users of telephone advice “hotlines” in the United States, however, found that 21% of callers had not acted on the advice they had been given, many of them because they had not understood it. The callers reporting the highest level of unfavourable outcomes included those classed as Spanish-speaking, of Hispanic ethnic origin, having no income and having low education levels. In particular, it was found that 47% of Spanish-speaking callers had not understood the advice they were given.

4.54 A recent small-scale qualitative research study in the UK explores differences between face-to-face and telephone advice. Perhaps the most significant conclusions are the following:

- Telephone only advice may be a more cost efficient way of providing one-off advice or information on straightforward matters. However, once the case becomes more complicated, particularly where detailed client instructions are needed, or there is complex documentation, or where clients are less straightforward to deal with, the restrictive nature of telephone only contact can make it less efficient in providing a full casework service.

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84 Impact Assessment para 33
85 Hobson and Jones p.27
87 Ibid p.47
88 Marie Burton *Dial L for Lawyer: Telephone-only advice and the lawyer-client interface*
• In terms of effectiveness, face-to-face has a number of advantages, especially concerning the quality of communication between adviser and client and the ability of the adviser to make assessments and reach informed judgements about the client’s credibility and the evidence in the case.

• Where the client has poor English, the telephone is unlikely to be more efficient, particularly if the client requires an interpreter. The absence of non-verbal clues and the greater pace of telephone interaction make it more difficult to overcome language barriers over the telephone. Notwithstanding the availability of interpreters, face-to-face would appear more effective where there are language issues involved.

• The interpersonal relationship between adviser and client can determine the success or failure of a case, and trust is essential to this relationship. The lawyers interviewed felt that it is often easier to establish trust in a face-to-face setting.

4.55 There is clearly a need for comprehensive research into the potential implications of a shift to the delivery of legal advice by telephone. The research needs to consider which types of cases can be effectively delivered by phone. The research also needs to consider whether telephone advice can be sufficiently accessible and effective for some client groups. In our view, this research should be completed before these proposals are implemented.

4.56 For all the reasons stated above, we do not consider that a transfer of cases from face-to-face to telephone on the scale proposed can be justified. It may be possible for some simpler cases to be transferred to telephone advice, but a wholesale transfer cannot be justified.

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

4.57 The LSC’s evaluation of the original telephone pilot states as follows:

**Suitability of telephone advice for legal aid clients**

The socio-economic groups eligible for the Telephone Pilot Services included a high proportion of people with literacy problems, learning difficulties, little spoken English and even mental health issues. Telephone advice is not suitable to all clients and all problems. Clients need to be able fully to understand the advice that is given over the telephone; and the adviser needs to be able to discern the facts of the case and take proper instructions over the telephone or by correspondence. It can be difficult for clients to describe the documents they have been sent, or to explain their exact circumstances, and it may be impractical for a large quantity of documents to be sent to the adviser by post. The capabilities of the client influence the complexity of the problem that can be dealt with. In the pilot a number of clients were advised over the telephone with the support of other professionals such as social workers, residential care staff or other local advice workers able to aid communication, but for others referral to a face-to-face service was the best option.

4.58 We endorse this conclusion.

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89 The significance of non-verbal communication in establishing trust has been confirmed in a subsequent work. Buck A, Smith M, Sidaway J and Scanlan L, (2010) Piecing it Together: Exploring One-Stop Shop Legal Service Delivery in Community Legal Advice Centres, London, Legal Services Commission

90 Hobson and Jones p.10
When an eligible caller rings the gateway, a discussion will have to take place between the caller and the operator, as to whether telephone or face-to-face advice is more convenient, desirable or appropriate. The key questions will involve the wishes and capabilities of the client and the complexity and urgency of the problem. As the LSC points out, the capabilities of the client influence the complexity of the problem that can be dealt with. Other factors may also be relevant.

Relevant factors concerning the client’s capabilities are likely to include cases where:

- the client has problems of comprehension, competence or literacy
- the client has mental health issues or other emotional needs
- there are communication issues, for example where the client has poor English
- clients are less straightforward to deal with.

Relevant factors concerning the complexity of the case are likely to include cases:

- involving legal and factual complexity
- involving significant numbers of documents
- where it is necessary to take instructions from two clients together
- where it is necessary to prepare witness statements from clients.

Relevant factors concerning urgency are likely to include cases where:

- proceedings have already started or are about to be issued
- it is important that action is taken promptly.

Other relevant factors might include cases where:

- local knowledge (e.g. as to the practices of local landlords or local authorities) or good relationships with other organisations (e.g. agencies whose decisions are being challenged) are important
- the client is homeless
- there is a concern that the caller may be influenced by relatives or other people who can listen in to the call.

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

We anticipate that Community Legal Advice (CLA) would want to work with a wide range of stakeholders. This would need to include those organisations who already provide helplines, for example Shelter and the National Domestic Violence Helpline. CLA would also need to work with the advice sector (including ASA) and the wider community sector in order to ensure that the needs of potential clients from hard-to-reach groups are met.

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.

We consider that this proposal is worth exploring and can see how it could benefit clients who are ineligible for legal aid. However, we do have a number of concerns.

Firstly, we are concerned at the suggestion that bidders for telephone contracts would have to bid to provide both legal aid and paid-for services. As the IA points

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91 In the family pilot, most finance issues were seen as problematic for dealing with by telephone due to the level of paperwork required. See note 78, para 12.4
out, this could prevent NfP providers from bidding. We do not see that such a requirement is necessary. Providers should be allowed to bid for one or other or both types of service.

4.66 Secondly, if the proposal is implemented, it will be essential to guarantee the quality of the service provided, by requiring that the providers achieve a peer review rating of 1 or 2, as they are required to do at present.

4.67 Thirdly, the introduction of such a service could distort the legal services market. By diverting clients away from some providers, the service could have a detrimental impact on the accessibility of legal services as a whole. We therefore suggest that a full assessment of the impact should be conducted before any steps are taken to implement this proposal.

5 FINANCIAL ELIGIBILITY

Introduction

5.1 In our view, the proposals are wrong and we urge the MoJ not to proceed. The Cumulative Impact Assessment suggests that these proposals would save only £4m - £10m, in terms of service reductions and increased payments.

5.2 We are extremely concerned that these proposals will lead to an increase in the administrative burden for providers and the LSC.

5.3 We disagree strongly with the various suggestions made that clients who contribute to their case are likely to be deterred from unnecessary litigation. As the Law Society and others have pointed out:

- There is no evidence that, with the current restrictions in the scope of legal aid and the application of the merits test, unnecessary litigation is being undertaken with public funding.
- The cost/benefit rules operated by the LSC are such that they exclude many cases that a privately paying litigant would consider reasonable to bring.
- Funding is withdrawn by the LSC where it considers that litigation is being conducted unreasonably.
- Court rules require litigation to be conducted in a proportionate manner and publicly funded litigants are subject to the same restraints by the courts as others.
- Financial cost is not the only, or even the most important, cost for litigants. Emotional stress, uncertainty of outcome and commitment of time are for most people as important as legal costs as deterrents to litigation. For most people, including those who qualify for public funding, litigation is a last resort, and is not used if it can be avoided.

5.4 We are concerned at the lack of evidence on which these proposals are based. The Impact Assessment betrays a high degree of uncertainty:

- regarding the number of people who would be affected by the proposal to abolish capital passporting and the capital available to them
- regarding the percentage of people who might choose not to pay the £100 contribution and therefore not accept legal aid
- as to the percentage of legal aid clients likely to possess sufficient equity in their property so as to be affected by the abolition of capital disregards
regarding the number of people who would be affected by the proposal to increase contributions from income, and their income distribution.

5.5 The Impact Assessment states that the estimates are based on the Family Resources Survey (FRS), but accepts that there is a risk that the FRS may not accurately represent the distribution of capital for the legally aided client base. It seems to us that this may be a high risk, as we are not clear how the FRS data can provide estimates of the amounts of equity held by this section of the population.

5.6 We have had the benefit of seeing draft responses on the eligibility questions from Shelter, the Law Society and the Legal Aid Practitioners Group. These responses come to similar conclusions, which we largely agree with and endorse.

5.7 At present there are different rules and procedures applicable to Legal Help and some other “lower” levels of service and Legal Representation and some other “higher” levels of service. In what follows we refer to “Legal Help” and “Legal Representation” only, but many of our comments apply equally to other levels of service.

Home ownership

5.8 The promotion of home ownership has been government policy for several decades. The latest estimates suggest that 68% of homes are occupied by their owners.92

5.9 The problem with the Green Paper proposals, taken together, is that (with the exception of the limited types of cases that are not subject to a means test) they make it very unlikely that a homeowner will be eligible for legal aid. This follows from the proposal to remove the equity disregard, the capping of the subject matter of dispute disregard, and the gross capital cap.

5.10 We appreciate that the property eligibility waiver will assist many of those affected by the removal of the equity disregard, but the capital cap will in its turn limit the number who are eligible for the waiver. It will also mean that many people who are on means tested (and previously passporting) benefits will be ineligible for legal aid.

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.

5.11 We do not agree with this proposal. Applicants for legal aid who are in receipt of passporting benefits should be passported in relation to capital and income as they are now.

5.12 Where people have been assessed as having income and capital low enough to qualify for the “safety net” benefits, they should be accepted as having insufficient means to be able to contribute to their legal costs.

5.13 We agree with the Law Society draft response:

We do not believe that those in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants. Such benefit claimants are in receipt of the minimum the state deems necessary for a person to survive. The majority of claimants are unlikely to have any capital at all, and it is iniquitous that those who have small or modest capital amounts in reserve for emergency expenses that cannot be met from their income, such as a leaking roof, replacement of an

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92 The Wealth and Assets Survey for the Office for National Statistics states that 68.1% of “main residences” were owned in 2006/08.
essential domestic appliance or even winter fuel bills, should be expected to deplete this capital in order to have access to justice.

The approach taken by the paper fails to recognise a fundamental difference in the role capital plays in the lives of, on the one hand, those in work and, on the other, passporting benefit recipients and pensioners. People in work can, on the whole, be expected to replenish capital which has been spent on legal expenses. That assumption, on which the paper’s proposals are based, cannot be made for welfare benefit recipients and pensioners.

5.14 The proposal seems to assume that people receiving passporting benefits can access the equity in their home as easily as those who are working. It seems to us that this is highly unlikely.

5.15 The proposal carries further implications as a result of its link to the other proposals:

- it would make ineligible anyone in receipt of such benefits who owned a home worth more than £200,000 (as a result of the property cap)
- it would mean that those who are eligible, with capital of more than £1000, would be expected to make a contribution to the costs of Legal Representation. This could act as a serious disincentive to enforcing their rights.

5.16 The proposal also has serious practical disadvantages. The present rule is simple and easy to explain to clients. The Green Paper recognises the administrative convenience to the LSC of the present passporting arrangements. There are very practical reasons for having the present rule. The alternative proposed would require providers (for Legal Help) and the LSC (for Legal Representation) to carry out detailed capital assessments for all clients on passported benefits.

5.17 This will require detailed investigation of the value of the client’s home, and the equity in it, at both levels, and a detailed investigation of all the client’s assets (and liabilities) at Legal Representation level, given the proposal that clients should pay contributions if they have disposable capital of £1,000 or more.

5.18 The Impact Assessment acknowledges that “there is likely to be a significant ongoing administration cost from the increased volume of capital tests” but does not attempt to estimate the additional cost. We believe that there is a serious cost benefit issue here that needs to be considered.

**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.**

5.19 We do not agree with this proposal. As Shelter point out:

£1000 is a very low level of capital. This represents a substantial lowering of the existing contribution threshold from £3000 and the reality is that it is likely to be unaffordable for many clients. Those that are eligible and have capital at this level are likely to have variable capital; it may be over that level just after they have been paid, and at zero before next pay day.

5.20 The “disposable capital” of £1000 or more might also represent money that the client has put by in expectation of receiving significant household or other bills such as a tax bill for a self-employed person.

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93 Legal Aid Reform: Financial Eligibility Impact Assessment, p.2
“Disposable capital” currently means the amount that is left after applying certain disregards. It is not necessarily readily available as cash. It could be the value of the home but also could be other assets (such as insurance policies, savings in fixed term accounts, or the former matrimonial home that the client has left) which the client cannot readily access. The capital might therefore be “disposable” but not available.

The Green Paper recognises this to some extent in paragraph 5.21, which refers to a client not having “an available liquid asset”. However it suggests only that the 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”. Since the paper also proposes that the LSC would deduct the £100 from the payments due to the provider, the likely effect of this is that the provider would have to accept a reduction in payments due to them, whenever a client is unable to pay the contribution.

We note Shelter's concern about the administrative burden of collecting the £100 contribution as well as the introduction of:

*a different element to the relationship between provider and client that was not previously there, and in the case of bodies such as Shelter, Law Centres and other non-private practice agencies that provide Legal Representation not there in respect of any cases.

**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.**

We do not agree with these proposals. The disregards are there for a reason. The equity disregard recognises that house prices have increased significantly in recent years, without necessarily providing an asset that can be easily realised at a reasonable cost. The proposed property eligibility waiver recognises this in several of the situations set out in paragraph 5.36.

The pensioner disregard was introduced so as not to penalise the thrifty pensioner who had savings (see also the higher capital allowance for pensioners applying for means tested benefits) or those whose homes had risen in value while their incomes had not. Abolishing the disregard flies in the face of this.

We are concerned at the lack of evidence in support of this proposal. The Impact Assessment expresses uncertainty as to the percentage of legal aid clients likely to possess sufficient equity in their property so as to be affected by the abolition of capital disregards. It suggests that 1% to 5% of legal aid clients might be affected, with a concomitant annual “benefit” estimated as being between £4m and £20m. The Law Society suggests that “the stated savings are conjecture”, and we can only agree with them.

It is likely that the effect of this proposal will be higher in areas of the country, such as London and the South East, which have experienced higher than average rises in house prices in recent years.

We appreciate that these proposals are intended to be offset by the property eligibility waiver, for those clients whose properties are valued at less than the proposed caps. However, it is very likely that the proposed property eligibility waiver will apply in the majority of cases, and that the costs of administering the waiver as
well as registering and enforcing any charge will exceed the value of any savings made.

5.29 Where clients are not eligible for the waiver, they are likely to be discouraged from seeking advice if the cost of doing so is to put their home at risk, either by selling it or borrowing on the strength of doing so, in order to seek advice.

**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.

5.30 Taken on its own, we agree to the proposal to retain the mortgage disregard and remove the £100,000 limit. We disagree however with the linked proposals to abolish the equity and pensioner capital disregards and to introduce the gross capital limit of £200,000.

5.31 As we understand it, the gross capital limit is intended to apply whatever equity there may be in the property, and even if there is negative equity.

5.32 No rationale is given for the figures used for capital limits, other than to relate them to the current £100,000 disregards for mortgage and equity. However, the current limits were introduced many years ago, have never been increased, and have been outstripped by house price inflation.

5.33 The gross capital limit is unfair for a number of reasons

- It would apply even to people who are receiving passported benefits.
- It overlooks the fact that people’s circumstances can change. The fact that someone has in the past been able to buy a property that is now worth more than £200,000 does not mean that they should be assumed to be able to pay their own legal costs now. Their financial position could easily have worsened due to a loss of employment, lower pay or the loss of a partner (by death, divorce, separation or otherwise).
- It assumes that anyone with equity will be able to access it, notwithstanding the contrary assumptions contained in the conditions proposed for the property eligibility waiver (for those whose properties are valued at less than £200,000).
- It is arbitrary because a homeowner whose property is worth £199,000 could be financially eligible without any capital contribution, or a very small contribution (depending on the size of their mortgage) whereas a homeowner whose house is worth £201,000 would be ineligible on capital.
- It effectively disqualifies the majority of homeowners in London and the South East and possibly also the South West and East regions.

5.34 According to the Wealth and Assets Survey for the Office for National Statistics, the mean value of the main residence of property owners in Great Britain in 2006/08 was £231,500, and the median value was £190,000. In London the median net household property worth was £220,000. In the South East the figure was £200,000.

5.35 A gross capital limit also brings with it serious practical problems to do with the valuation of property that is close to the limit. The value of a property is what it will sell for on the open market and not what a speculative estate agent might estimate that an owner can get. Who will determine whether a property is worth £199,000 or £201,000? As the Law Society point out in their draft response:
House price valuation is not an exact science and, a property worth something in the region of £200,000 could be valued several thousand pounds either way depending on the views of the estate agent or surveyor, [the] time of year, [the] neatness of the garden or [the] colour of the bathroom.

**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.

5.36 As previously stated, we disagree with the removal of the equity and pensioner disregards, which makes such a scheme necessary. However, if the disregards are removed, we agree that such a scheme is necessary.

5.37 We also disagree with the proposed gross capital limits, and would argue that any such scheme should be applied without reference to them.

5.38 We find paragraph 5.35 rather confusing. It seems to suggest that clients would be expected to repay their legal aid costs at the end of the case and accept a charge on their property. We would have thought that these were alternatives, as suggested by the Impact Assessment.94

5.39 The general situations listed in paragraph 5.36 seem to be reasonable. We are concerned however at the suggestion that clients would be expected to demonstrate their inability to obtain credit by showing that they have applied and have been refused credit by at least two “reputable” lenders. This could cause a significant burden to lenders who will have to process large numbers of applications that are likely to be futile. Repeated applications for credit can adversely affect a person’s credit rating, so clients may suffer as a result. They could also be reluctant to apply knowing that they will be refused. The meaning of “reputable” would also need to be clarified.

5.40 It is very likely that waivers will be the norm rather than the exception, thus adding to the administrative burden of suppliers and the LSC. The Impact Assessment assumes that 10% of those affected by these changes will be unsuccessful in applying for the waiver (and therefore that 90% will be successful). It further assumes that, of those applying successfully, 10% will repay their costs at the end of the case, and 90% will be subject to a charge on their property.

5.41 The cost of administering the waiver and registering any charge may be considerable and may even exceed the value of any savings made. As the Law Society point out, it would be simpler if applicants could opt for repayment (or a charge) under the waiver scheme, rather than requiring a discretionary decision to be made in every case.

**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.

94 Legal Aid Reform: Financial Eligibility Impact Assessment para 65
5.42 If such a scheme is necessary, due to the implementation of the other proposals, then the conditions are reasonable, at least as far as Legal Representation is concerned.

5.43 There is also a likelihood that people will be put off from seeking advice if they have to agree to a charge on their property – particularly people who do not want their partner to know they are seeking advice or where the partner is not co-operative. This happens quite often. We receive quite a few queries about situations where the client’s partner takes the view that it is the client’s problem and the partner refuses to be involved at all.

5.44 The proposed interest rate of 8% is very high, as compared to current interest rates. We agree with Shelter that an uplift to the Bank of England base rate, say 1% over base rate, but with a cap of 8%, would be a fairer solution.

**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.**

5.45 As previously stated, we do not agree with the proposed £200,000 limit.

5.46 If a waiver scheme is necessary, we do agree that it should apply automatically in Legal Help cases.

5.47 It was not clear to us whether people advised under legal help would be required to repay costs and be subject to a charge. This would place a disproportionate additional administrative burden on providers and the LSC.

5.48 However, we were pleased to receive the following clarification from the MoJ:

> Clients who receive Legal Help would not be required to repay the cost of their Legal Help after receiving advice, or have a charge on their property for the Legal Help.95

**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.**

5.49 Although the £100,000 limit currently applies to Family Help (Higher) and Legal Representation, it does not follow that it should apply for all levels of service. The figure is ultimately an arbitrary one.

5.50 The Green Paper recognises that clients may find it difficult readily to access equity when they are involved in a property dispute (paragraph 5.51) but still proposes to only disregard the first £100,000. Clients involved in property disputes are unlikely to be able to borrow against the value of the contested property in order to fund legal action. We doubt very much if someone whose lender was seeking possession would be able to borrow against the value of their home. It seems to us that this proposal would disqualify anyone facing mortgage repossession proceedings who had more than £100,000 in equity.

5.51 Given that these cases concern property, it would be simpler to disregard the value of contested property and require the client to repay from property recovered or preserved, via the statutory charge.

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95 E-mail from Stephen Jones, 9th February 2011
Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.

5.52 We do not agree to this, for the reasons in our answer to question 14. In contested property cases, the equity is unlikely to be available to the client to release or borrow against.

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.

5.53 We agree that the mortgage disregard should be retained and uncapped. We disagree with gross capital limits in principle, as they will always rule out some deserving cases. We also consider that they are unnecessary in the context of disputes over property, due to the operation of the statutory charge.

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.

5.54 We do not agree with this proposal. We consider that the existing contribution levels are set high enough already. We believe that they have led to significant numbers of applicants rejecting offers of legal aid, although we have not seen any recent figures on this.

5.55 As Shelter point out:

In most cases, certainly at the bottom of the contribution bands, clients will be dependent on benefits or on very low incomes and with no corresponding up-rating of benefits levels or the minimum wage it is difficult to see how an increase could be affordable. As the paper itself says at para 5.55 the “lower income limit is built into the means test to reflect essential expenditure…it broadly reflects the level of subsistence benefits payments which are intended to cover basic essentials”. Any increase in contributions, therefore, will drive people who are at just above “basic subsistence levels” back closer towards those levels.

The definition of disposable income in the regulations in fact only allows deductions for tax and national insurance, housing costs, and small fixed amounts for employment expenses and each dependent. In reality, of course, household expenditure covers many more essential items such as food, utilities, transport, school costs, etc

Under the current system, someone on a disposable income of £733 would be permitted to retain £585.65 of it; under option 1 that would go down to £529.10 and under option 2 to £522. In short, this proposal is to remove up to 10% of the monthly disposable income of those who are already in the lowest income quintile. That is simply unaffordable for many and will act as a real deterrent to seeking justice.”

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.

5.56 We consider that both models are inequitable. However, if a choice has to be made, we prefer option 1 as it has less impact on poorer clients.
6  CRIMINAL REMUNERATION

6.1 We do not propose to answer Questions 24-31 concerning criminal fees.

7  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.

7.1 We strongly oppose the proposal to reduce fees by 10%. We believe that it will result in insolvencies and a diminution in quality.

7.2 Many NfPs suffered financially when fixed fees were introduced. Research undertaken by the Law Centres Federation and provided to the previous Minister’s study of Legal Advice at a Local Level showed that Law Centres subsidised the introduction of the current fixed scheme from reserves, which were largely depleted as a result.

7.3 We do not believe that there is any margin in the current fees for most NfPs or indeed for solicitors in private practice. This proposed change is likely to lead to the withdrawal from legal aid work of many providers, particularly when coupled with the other proposals, if implemented. On its own, this proposal has the potential to bring about the insolvency of many legal aid practices.

7.4 As Shelter has pointed out:

The Impact Assessment is certainly right that it is a “key assumption” that the market can sustain a 10% reduction without “adverse implications” for supply. Unfortunately, there is no evidence whatsoever to support that “key assumption”. By contrast, all the analysis and modelling of the legal aid sector that has been carried out over the last few years, by Otterburn 96 and others, has pointed to the fragility of the sector and the tight margins on which it operates. All the evidence, therefore, is that there is no basis whatsoever for that unsupported “key assumption”.

We are very concerned not only about this proposal in isolation, but also the cumulative effect of it taken with all others. In particular, the government estimates that over 70% of cases will go to the telephone gateway; of the remainder our own projections are that over 60% of our social welfare cases will go out of scope; if on top of that there are fee cuts of 10% on the very few cases that remain to us, it is very unlikely that we will have economically viable contracts. The degree of cuts proposed are far beyond what our charitable resources can underpin.

It is difficult to say whether there is some merit in considering a radical restructuring of fees as no such proposals are put forward. We are not wedded to the form of the existing fee structure and would consider any alternatives that may be put forward, but a fundamental starting point has to be economic viability. These proposals do not deliver that.

We are already concerned that fixed fees create a perverse incentive to take on simple and straightforward cases at the expense of long and complicated ones; a lower fee will simply strengthen the incentive. This will have clear implications for

96 For Lord Carter of Coles’ Legal Aid Procurement Review
access to justice, particularly for vulnerable clients and those with the most difficult cases.

Quality

7.5 In addition, there is evidence to suggest that quality may be affected. In the LSC’s pilot, *Quality and Cost*[^97], four groups of providers were paid in different ways and their quality compared. Group 1 were paid an hourly rate, Group 2 were paid a certain amount of money and were told to do as much advice and assistance work as possible with that amount, Group 3 were given a fixed amount of money and were asked to do a certain number of cases (basically a fixed fee system), and Group 4 were paid for a certain number of hours irrespective of the number of cases. In the three areas of peer review, client satisfaction and endpoints, the group funded to provide a fixed number of matter starts for a fixed fee, performed worst.

7.6 The MoJ’s own research, in 2009, asked LSC peer reviewers whether they had noticed any changes in provider behaviour since the introduction of fixed fees. A large number of peer reviewers commented that providers were under pressure to finish cases more quickly, that some providers were only doing the minimum amount of work and that clients were not being advised fully.

7.7 74% of peer reviewers said they had seen evidence of more cases being handled by junior staff. Of those, 34% of peer reviewers thought the junior staff appeared to be insufficiently qualified and 31% inadequately managed.

7.8 There must be a danger therefore that a reduction of fixed fees by 10% will lead to some providers only doing the minimum amount of work, and to more cases being handled by junior staff who are insufficiently qualified and inadequately managed.

**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.

7.9 We would endorse the response by Shelter on this point:

*We do not agree with this. For many providers certificated work, with the access to enhanced rates and inter partes costs that it brings, cross-subsidises uneconomic Legal Help work.*

**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.

7.10 We would endorse the response by Shelter on this point:

*Yes. The rates set out are still substantially higher than the rates payable to solicitors and advisers, notwithstanding that barristers are self-employed with lower overheads. Beyond the specific proposals, we see no good reason for maintaining a payment distinction between barristers and solicitor advocates doing the same work. We note the proposed Family Advocacy Scheme removes this anomaly, and suggest the same approach is taken to all civil work.*

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.

7.11 We would endorse the response by Shelter on this point:

No, we do not agree with this proposal. As set out in our answer to question 33, it is enhancement and inter partes rates that cross-subsidise the rest of legal aid work.

Whilst this proposal would not affect the availability of inter partes rates, it would affect the rates payable in cases where inter partes costs are theoretically available but in practice not recovered. Many cases are resolved before trial on the basis of an agreed settlement with no order for costs; if in such cases solicitors were only able to recover at risk rates – instead of standard rates often with enhancement – there is likely to be a perverse incentive not to settle in pursuit of inter partes costs.

In other cases costs are not awarded for various reasons and this proposal is likely to generate further satellite litigation as arguments about costs are pursued and taken to appeal. In still other cases inter partes costs are not recoverable either because of a lack of resources of the opponent or because the opponent is legally aided.

This proposal therefore has significant risks for access to justice, by impacting the viability of providers and by creating market conditions in which some cases will not be taken because of costs considerations, rather than considerations regarding the merit or justice of the case.

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.

7.12 We would endorse the response by Shelter on this point:

As set out in our answer to question 35, we do not support this proposal at all. However, if it were to be implemented, certain types of cases would cause us particular concern and we consider should be excluded.

In particular, we would suggest all defences should be excluded for the reasons given above – defendants do not choose to become a party to litigation and an assessment of whether to take a case on should be based on the strength of the case, not the identity of the claimant.

Within our own sphere of expertise, this would especially apply to defences to possession proceedings, where the defendant has not just money but the roof over their head at stake.

We would also suggest that judicial review claims be excluded; para 7.23 is right as far as it goes, but in our experience cases often reach a negotiated settlement with no order for costs after the permission stage and right up to trial as well. Equally, external circumstances can change which renders the case no longer necessary and result in the claim being withdrawn by consent. A relatively common example of the
latter in our work is judicial review of a local authority decision not to accommodate a destitute family with no recourse to public funds; if the family are awarded immigration status during the course of the case the issue at stake is no longer relevant and so the matter is withdrawn by consent with no order for costs. But it was absolutely right to bring the claim in the circumstances that existed at the time. We would also suggest that judicial reviews relating to homelessness more widely be included, since the issues at stake are of vital importance and costs considerations should not play a part in deciding whether to bring the case.

We would also include non-damages claims, such as those for reinstatement following illegal eviction and specific performance in disrepair, since again the issues are of overwhelming importance and (unlike in damages claims) an assessment of the merits of the claim would not necessarily include an assessment of the ability of the defendant to pay.

**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.

7.13 We do not propose to answer this question.

**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.

7.14 We do not propose to answer this question.

8 **EXPERT FEES: CIVIL, FAMILY AND CRIMINAL PROCEEDINGS**

**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.

8.1 We do not have sufficient information about the range of problems with expert fees that these proposals seek to tackle. The Green Paper highlights the increase in expenditure on disbursements in public law family and criminal cases.

8.2 We note with great concern the argument made by HLPA (the Housing Law Practitioners Association), in their draft response, that the proposed rates could make it not viable for tenants to bring disrepair cases and disrepair counterclaims, to successfully defend some possession cases and to challenge decisions concerning homelessness applications.
8.3 HLPA argues in particular that the proposal to cap surveyors fees at £50 per hour is quite unacceptable:

*All the Chartered Surveyors and Environmental Health Consultants HLPA contacted would cease to do the work for the proposed rates. Professionals undertaking this work are not doing so in their spare time as a boost on top of a salaried job. Most are self employed or have a small business. On a time/ expense calculation the proposed rate of £50 per hour would not cover the normal overheads of their office, secretarial / admin support, car or other travel costs etc.*

8.4 As HLPA point out:

- housing disrepair cases and counterclaims frequently result in costs orders being obtained against the opponent, thus involving no net cost to the legal aid fund
- the Housing Disrepair Protocol is working well
- the proposal is incompatible with the use of single joint experts
- the proposal would produce serious inequality of arms between tenants and their landlords
- there are various other methods by which experts’ fees are controlled.

9 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.*

9.1 In principle we welcome the introduction of such a scheme. In practice it is difficult to see that such a scheme would raise a great deal of money at present, since interest rates are so low. We note the concerns raised by the Law Society and others about the practicalities of such a scheme, and suggest that the operational details should be discussed with the relevant professional bodies if it is decided to proceed with this proposal.

9.2 Some NfP agencies have client accounts, typically holding very small amounts of money. We agree with Shelter’s suggestion that there should be an exemption for the NfP sector and for firms whose legal aid practice represents more than say 50%
of their turnover, since they are already making a substantial contribution to access to justice.

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

9.3 We do not agree with this proposal. The Impact Assessment suggests that a 25% contribution would raise £9m a year from clinical negligence cases and £1m a year from housing cases.

9.4 The cumulative Impact Assessment however suggests that a scheme would only raise £1-2m, presumably because clinical negligence would be out of scope. This is clearly a minimal benefit, which would not justify the introduction of such a scheme.

*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?*

9.5 If clinical negligence cases stay in scope, we cannot see any justification in requiring such clients, or housing clients, to contribute anything like 25% of their general damages. However, any fair proportion, say 5% to 10%, would reduce the net benefit to approximately £3m a year, which is also unlikely to justify the introduction of such a scheme.

10 **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.*

10.1 The LSC already requires organisations to submit themselves to:

- Specialist Quality Mark audits
- contract compliance audits and
- peer review audits.

10.2 We do not think there is room for any more regulatory activity to be carried out by anyone else.

10.3 If the MoJ goes ahead with its plans to cut fees by 10%, we think that the LSC’s main concern should be monitoring the impact of this on the quality of advice given to clients. We are very concerned that fees will be so low that only the most junior staff will be able to do legal aid work and that they will not have the skills, knowledge or time to act in their clients’ best interests.

*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**?
10.4 We have no doubt that there is scope for a fundamental review of the administration of legal aid, which is disproportionately burdensome. This review should involve provider representatives. ASA is very willing to participate in such a review.

10.5 We would welcome proposals to delegate authority for more decisions to providers with a good track record of quality.

10.6 We anticipate that NfP providers would need the system of Standard Monthly Payments to be retained. A move to payment as billed could cause serious cashflow problems to many.

*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.*

10.7 We have, in the past, been involved in discussions with the LSC about electronic working. Our experience is that most NfPs are ready and willing to work electronically.

10.8 However, from experience, we know that it is important that the introduction of new ways of electronic working is carefully planned, with adequate preparation. Further, there needs to be a sufficient lead-in period for any changes. Also, it is essential that there is full consultation with provider representative bodies.

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

10.9 We note the proposal to transfer LSC functions to the MoJ. We believe that it is important that the MoJ considers how this change will affect work in Wales.

10.10 We value our involvement in the Wales Committee for the CLS which promotes important liaison between relevant organisations. In our view, there should be a successor body, with a similar structure, to ensure co-ordinated policy planning for Wales.

11 **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.*

*Will there be a viable face-to-face service?*

11.1 The impact assessments fail to give an overall picture of the impact of the proposals on the likely future landscape of face-to-face legal aid advice.

11.2 The focus of the Green Paper is very much on what the MoJ wants to take away. There is little clarity about what the MoJ actually wants to have left in place and how this might be achieved.

11.3 For example, we are seriously concerned about whether there will be a sufficient number of viable providers left to provide the face-to-face advice that the MoJ appears to want for "residual" cases, such as emergencies. Further, it is unclear
whether enough organisations with sufficient expertise will be left to deliver advice at
the county court housing duty schemes.

11.4 We will illustrate the above point with an example. In 2010, the LSC sought to
procure 980 debt, 570 housing and 680 welfare benefit cases in Northumberland.

11.5 We estimate that the introduction of the proposed scope changes would leave 245
debt and 364 housing cases (these figures are based on the estimates in the Impact
Assessments).

11.6 The shift to telephone advice is expected to lead to an overall reduction in the
number of face-to-face cases by 76%. In Northumberland, this would leave 61 debt
and 91 housing face-to-face cases. This contract would be worth about £27,000 p.a.

11.7 It is very unlikely that such a small contract for face-to-face advice in two areas of
law would be financially viable.

Some impacts not sufficiently highlighted

11.8 We are concerned that the Impact Assessments do not always identify likely
detrimental impacts. For example, in our view:

- taking areas of law such as welfare benefits and some housing out of scope will
  lead to a significant rise in the number of court and tribunal cases, and the
  number of litigants in person
- the shift to telephone advice may well have a detrimental effect on quality
- a 10% fee cut will also have a detrimental effect on quality.

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

11.9 We are concerned that having identified detrimental impacts, the Green Paper does
not suggest how these might be mitigated.

11.10 In particular, we are concerned that no proposals are made about how the telephone
advice proposals might affect BAME and disabled clients, and clients with language
difficulties who need an interpreter.

11th February 2011