



House of Commons  
Justice Committee

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# Government's proposed reform of legal aid

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Third Report of Session 2010–11

*Volume I*

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House of Commons  
Justice Committee

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**Third Report of Session 2010–11**

***Volume I***

*Volume I: Report, together with formal minutes. Oral and written evidence are contained in Volume II. Additional written evidence is contained in Volume III, available on the Committee website at [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee)*

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## The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The following Members were also members of the Committee during the Parliament:

Jessica Lee (Conservative, Erewash)  
Anna Soubry (Conservative, Broxtowe)

### Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

### Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee). A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

### Committee staff

The current staff of the Committee are Tom Goldsmith (Clerk), Emma Graham (Second Clerk), Hannah Stewart (Committee Legal Specialist), Gemma Buckland (Committee Specialist), Ana Ferreira (Senior Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant), and Nick Davies (Committee Media Officer).

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## Summary

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The Government's proposals for reforming legal aid are fundamental, extensive and bold. They are intended to reduce by £350 million a year the cost of the system (which, with expenditure of more than £2 billion annually, is one of the most expensive in the world) at a time when the Ministry of Justice has to reduce its overall spending by almost a quarter.

The main way in which the Government is seeking to make those cuts is by taking certain areas of law outside the scope of legal aid, with some areas being removed in their entirety and some remaining partially within scope. This is where we focus most attention in our Report.

The Government proposes to remove from scope many areas of family law, although where domestic violence is present, it intends to keep cases within scope. We are not convinced that using domestic violence as a proxy for the most serious cases is advisable and we call on the Government to look at other ways legal aid can be focussed on the most serious family law cases. If the Government does continue to use domestic violence as a criterion for eligibility, it should broaden the definition to include non-physical domestic abuse.

We welcome the Government's support for mediation services in family cases, but it is not a panacea. Further work needs to be done on how difficult and unresolved cases can be dealt with if legal aid is not available. The implementation of the proposals regarding family law should not happen before the Family Justice Review Panel has produced its full report.

We encourage the Government to look at other possible ways of reducing costs, including creating a financial incentive for public bodies such as the Department for Work and Pensions to get their decisions right first time, and so avoid expensive court and tribunal cases. We also think that the Government should reconsider whether legal aid should be available for certain types of judicial review.

We consider the effect the proposals will have on the providers of legal aid services, including the not-for-profit sector, and we look at the steps the Government is taking to try to alleviate those effects. We examine the Government's case that, where it is removing legal areas from scope, alternative sources of help exist and individuals will be able to represent themselves, because tribunals are user-friendly and the cases concerned are not particularly complex.

There is a degree of consensus amongst all political parties that the cost of legal aid needs to be reduced, but it is imperative that there is a careful assessment of the impact of the proposed changes on those people most dependent on legal aid. We call on the Government to assess more fully the likely impact of its reforms, for example, on the operation of courts and tribunals, and for public expenditure more generally, before deciding whether to implement them. The Government needs to refine its proposals further before introducing a major change in the way the accessibility of the justice system has come to be viewed.



# 1 Introduction

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## Our inquiry

1. The Government's proposed reform of the legal aid system is fundamental, extensive and bold. The Lord Chancellor's foreword to the consultation paper makes it clear that the motivation is two-fold: to stop the taxpayer funding unnecessary legal interventions; and to save money.<sup>1</sup> Furthermore, in oral evidence, Jonathan Djanogly MP, the Minister with responsibility for legal aid, made the points that: there can be inherent unfairness in the system where, in some cases, it is available for one party in a case but not another; and that there are significant inefficiencies in its delivery.<sup>2</sup> In attempting to realise its objectives, the Government is proposing to: restrict the scope of legal aid; reduce the level of fees paid to providers; tighten the financial eligibility rules for certain categories of people; make more litigants contribute to the cost of proceedings and increase the level of contributions required; take greater account of the capital people have when determining their eligibility for legal aid; introduce alternative sources of funding; and improve efficiency and reduce bureaucracy in the administration of legal aid. There is a degree of consensus amongst all political parties that the cost of legal aid needs to be reduced, but it is imperative that there is a careful assessment of the impact of the proposed changes on those people most dependent on legal aid.

2. The Government's consultation paper was published in November 2010 and the consultation period which followed it closed on 14 February. The Government intends to respond to the consultation (which generated 5,000 submissions) before Easter.<sup>3</sup> In view of the importance of the legal aid system and the fundamental nature of the Government's proposed reform of it, we have conducted a short inquiry into those proposals and have produced this Report in time to inform the Government's response to the consultation. In that timescale we have not had the opportunity to consider in detail many aspects of the proposals. In particular, while we received written evidence relating to the Government's proposed implementation of recommendations in Lord Jackson's *Review of the Cost of Civil Litigation*, we do not focus on the issues raised in that evidence in this Report. However, we are publishing the written evidence on our website<sup>4</sup> and may return to this issue in future work. In certain other areas we have been unable to do little more than highlight some of the evidence presented to us and give our headline conclusions.

3. Our principal objective in this Report is to consider the impact of the Government's proposed reform on: the cost of legal aid; litigants; the operation of courts and tribunals; and the not-for-profit sector and the legal professionals who provide services. Our focus, extensively but not exclusively, has been on civil legal aid. We also examine the cost-drivers for the legal aid system (described by the Lord Chancellor as "one of the most

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1 *Proposals for the Reform of Legal Aid in England and Wales*, Consultation Paper CP12/10, November 2010, Cm 7967, p 3 (from here on referred to as the Government's Consultation Paper)

2 QQ 350, 369 and 370

3 Q 414

4 [www.parliament.uk/justicectee](http://www.parliament.uk/justicectee)

expensive in the world”<sup>5</sup>) and consider whether other viable means of savings might be implemented, possibly as an alternative to some of the Government’s proposals.

4. The Committee has received written and oral evidence from a wide range of individuals and organisations and we are extremely grateful to all of them for providing that evidence, especially in the relatively short timescale in which the inquiry has been conducted.

## 2 The cost and operation of the current system

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### The current system

5. For twenty years from the inception of the modern legal aid system in 1949, legal aid was mainly provided in criminal cases and in matrimonial and divorce cases. In 1970, its scope was widened to encompass representation for individuals (businesses being specifically excluded) in most court proceedings, other than defamation. The Access to Justice Act 1999 removed most personal injury and boundary disputes from the scope of legal aid; it also established: the Criminal Defence Service (which provides criminal legal aid); the Community Legal Service (which provides legal aid for civil and family cases); and the Legal Services Commission (LSC), which administers the two schemes.

### *Criminal legal aid*

6. Free, non-means-tested, advice and assistance is available for anyone being questioned by the police in connection with a suspected criminal offence and such advice may be provided by the client's own solicitor, by the Duty Solicitor or by telephone, via Criminal Defence Service Direct. Other services relating to criminal cases — including advice and assistance (which might include a solicitor's help in writing letters or preparing a case, for example), advocacy assistance, and representation — are provided in the magistrates' courts, subject to both a means test and an interests of justice test (the latter considers, for example, whether the charge is sufficiently serious that it could result in imprisonment or loss of livelihood, and whether the individual has the capacity to represent themselves). In the Crown Court defendants are automatically deemed to have met the interests of justice test.

7. Means-testing was re-introduced in the magistrates' courts in 2006 and in the Crown Court in 2010 (having been removed in 2001 following the Access to Justice Act 1999). People under the age of 18, on low incomes, or who are entitled to certain "passport" benefits are deemed to have met the means test. To those not meeting any of those criteria, in the magistrates' court, free representation is available for those whose income is within prescribed limits; in the Crown Court, free legal aid is provided for those whose disposable income and capital are below a threshold, while those whose income and capital are above the threshold are eligible for legal aid provided they make a contribution.<sup>6</sup>

8. In 2009–10 the Criminal Defence Service facilitated 1,534,000 acts of assistance, which were provided via the 1,700 contacts held with providers.<sup>7</sup>

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6 The Government's Consultation Paper, p 23

7 Legal Services Commission, *Annual Report and Accounts 2009–10*, HC 575, pp 5–6

### *Civil and family legal aid*

9. The Community Legal Service offers various levels of legal help and advice (for example, through face-to-face meetings at citizens advice bureaux, law centres or solicitors' offices, or telephone advice via the Community Legal Advice Helpline) as well as legal representation in courts and, exceptionally, at tribunals. An intermediate level of service – Family Help – is available in private and public family proceedings and can facilitate negotiation or referral to mediation services.<sup>8</sup> The number of acts of assistance provided under the legal aid scheme within each area of civil and family law in the last six years was as follows:<sup>9</sup>

	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10
<b>Family</b>	407,143	419,115	413,106	381,506	412,049	451,154
<b>Mental Health</b>	31,085	34,509	34,547	35,663	36,718	38,632
<b>Immigration</b>	96,095	93,032	92,826	86,646	97,268	101,633
<b>Debt</b>	58,686	102,954	121,689	111,834	133,378	147,196
<b>Housing</b>	95,050	135,170	172,993	169,455	186,241	184,944
<b>Welfare Benefits</b>	72,630	98,999	125,200	126,628	137,605	143,865
<b>Employment</b>	9,578	23,145	22,309	22,702	28,261	31,796
<b>Community Care</b>	4,048	4,904	5,186	5,549	8,449	9,605
<b>Actions Against police</b>	5,475	5,483	5,721	5,336	5,799	5,898
<b>Consumer</b>	4,458	4,413	4,336	3,812	3,577	3,250
<b>Clinical Negligence</b>	9,322	7,941	7,919	7,697	7,480	7,472
<b>Education</b>	3,177	7,668	12,298	9,284	7,362	5,541
<b>Personal Injury</b>	3,449	2,933	2,823	1,900	1,668	1,747
<b>Public Law</b>	2,609	2,958	2,955	3,302	3,897	3,959
<b>Miscellaneous</b>	11,146	12,017	11,058	7,962	7,765	5,592

10. Most services provided under the Community Legal Service are means-tested, although “in certain types of proceedings, legal aid is available and free to all, for example, for parents in care or supervision proceedings and in child abduction proceedings, and for certain types of mental health or capacity proceedings where an individual is challenging his or her detention and for the child where they are a party in family proceedings”.<sup>10</sup>

8 The Government's Consultation Paper, p 25

9 HC Deb, 19 January 2011, col 809W

10 The Government's Consultation Paper, p 25

Where means tests do apply, those people on passporting benefits are automatically eligible; services are also provided free to those whose disposable income and capital fall below certain thresholds and, for those whose income and capital is between certain thresholds, on a contributory basis. Other than in public family proceedings, various merits tests are applied; for example, in relation to legal help, assistance is provided contingent on sufficient benefit being likely to accrue to the client; in relation to representation, consideration must be given as to whether Conditional Fee Arrangements or other alternative sources of funding are available, and full representation “will be refused if the prospects of success are unclear or if they are borderline (save if there is a wider public interest) or poor. Any potential damages must justify the likely costs of the case. Some cases (for example, representation of parents in a case where their children may be taken into care) are not subject to a merits test, so clients are represented even if they have extremely poor prospects”.<sup>11</sup>

### **The financial context**

11. The context in which the Government is proposing to reform the legal aid system is one in which dramatic savings have to be found and public expenditure curtailed. Legal aid constitutes approximately 25% of the Ministry of Justice’s budget,<sup>12</sup> and the proposed reforms are intended to make a “substantial contribution” to the MoJ’s target of a real reduction of 23% in its budget—approximately £2 billion—in 2014–15.<sup>13</sup> **The Government’s dramatic proposed reform of legal aid is consequent upon the need to make drastic reductions in public expenditure — the Ministry of Justice must cut its spending by almost a quarter, and reductions in legal aid costs will form an important part of that. In that context we accept the necessity of certain changes, and the fact that there are other grounds for making some of them, but we make specific recommendations about how we think the Government’s proposals should be refined.**

### **The cost of legal aid in the last decade**

12. Between 2000 and 2010 expenditure on legal aid rose by almost 3% in real terms. Spending peaked at £2,414 million in 2003–04 but has since stabilised at approximately £2,100 million in each of the last four years. The relative proportions of the budget consumed by criminal and civil legal aid have shifted over the same period. In 2000/01 expenditure was split almost equally between criminal and civil cases, but as the cost of civil legal aid has fallen (by 6%), that of criminal legal aid has risen (by 9%), so the former now accounts for only 44% of the annual spend.

**Table 2**

£m cash (at 2009–10 prices)	2000–01	2001–02	2002–03	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10
Civil	998	905	972	1,044	956	923	869	928	941
Criminal	1,101	1,211	1,310	1,370	1,348	1,330	1,258	1,207	1,205
<b>Total Legal Aid</b>	<b>2,099</b>	<b>2,117</b>	<b>2,282</b>	<b>2,414</b>	<b>2,304</b>	<b>2,253</b>	<b>2,128</b>	<b>2,135</b>	<b>2,146</b>

Source: AJ 61

11 The Government’s Consultation Paper, pp 25–26

12 Ministry of Justice, *Cumulative Legal Aid Reform Proposals, Impact Assessment*, p 5

13 The Government’s Consultation Paper, p 5

### Spending on criminal legal aid

13. Expenditure on criminal legal aid peaked at £1,370 million in 2003–04 but has since fallen to approximately £1,200 million per annum. Over the last ten years, there has been a 6% drop in costs for defence services provided at police stations and magistrates’ courts, whereas for those provided at Crown Courts or higher courts costs have risen by 9%. Expenditure on very high cost cases peaked at £125 million in 2007–08 and has since stabilised at approximately £98 million.

Spend on Criminal Legal Aid (CDS) at 2009–10 prices

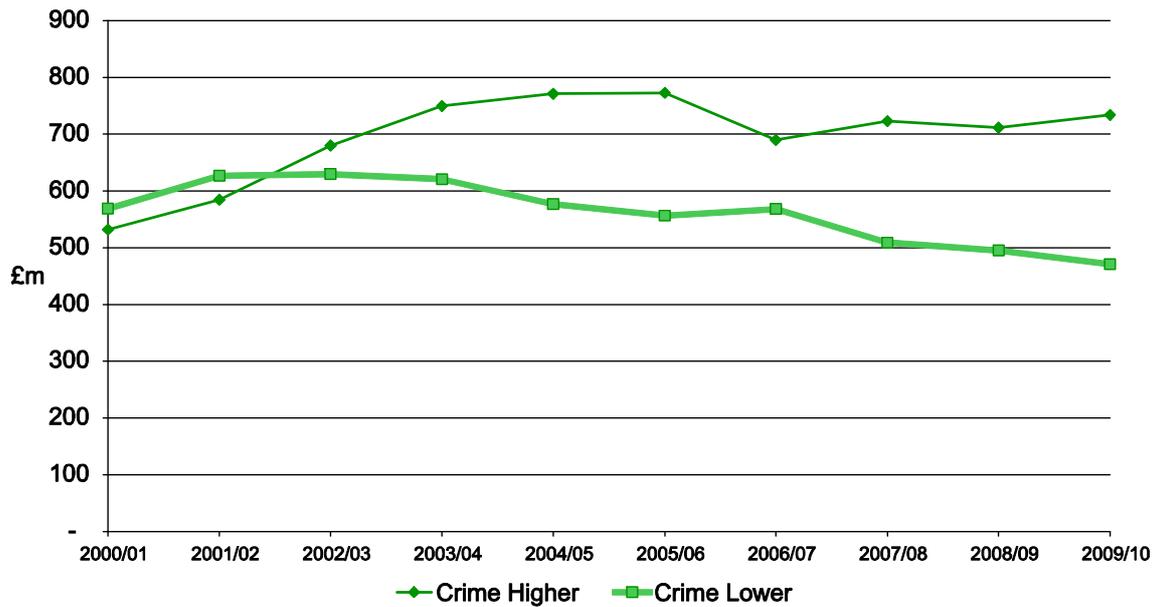


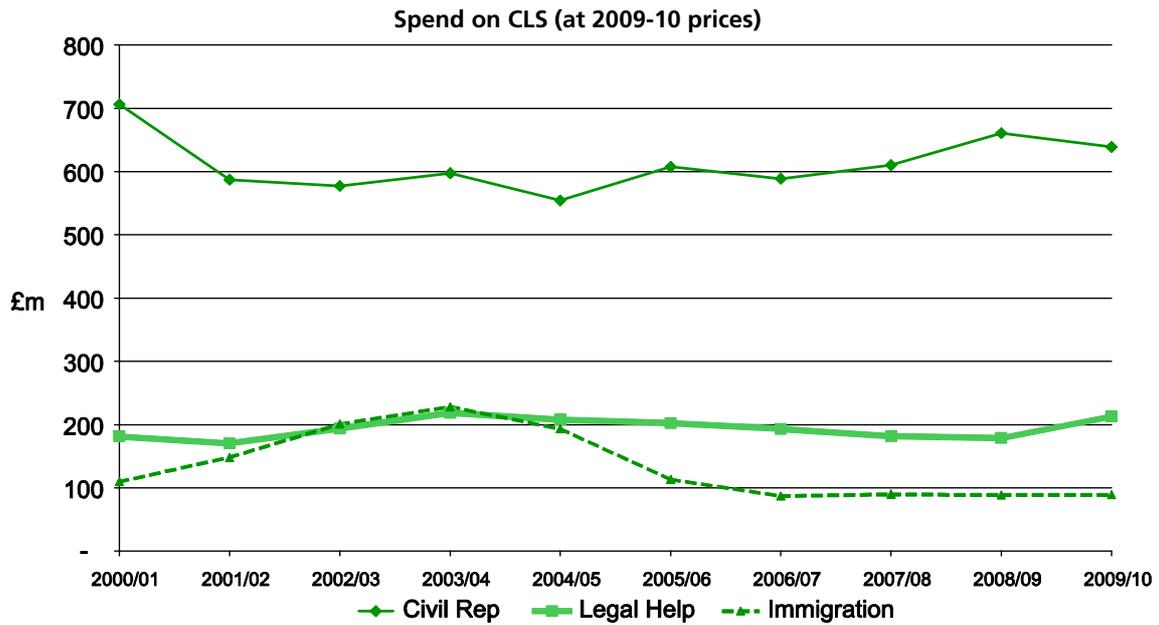
Table 3

£m cash (at 2009–10 prices)	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10
Crime Higher	532	285	680	750	771	773	690	723	712	734
Crime Lower	569	627	630	621	577	556	568	509	495	471
Total criminal	1101	1211	1310	1370	1348	1330	1258	1232	1207	1205

Source: AJ 61

### Spending on civil legal aid

14. The cost of civil legal aid has also fallen since 2003–04, from a peak of £1,044 million, but costs have been rising since 2006–07 and do not appear to have stabilised. Spending on civil representation has fallen by 9%, whereas that for legal help has risen by 15%, contributing to a 7% fall in overall expenditure over the last decade.



**Table 4: Spending on community legal services between 2004 and 2010**

Expenditure (£m)	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Family	554	598	590	609	634	597
Mental health	54	31	30	33	32	36
Immigration	193	113	88	91	89	89
Debt	9	28	26	22	27	33
Housing	53	54	56	54	60	60
Welfare benefits	12	26	25	23	24	28
Employment	6	8	6	6	6	8
Community care	5	3	4	4	5	6
Actions against police	7	6	6	5	5	5
Consumer	7	3	1	0	3	2
Clinical negligence	32	32	28	29	28	16
Education	6	6	5	4	3	3
Personal injury	-1	-1	-6	-7	-4	-4
Public law	8	6	6	6	9	7
Misc.	12	12	5	7	9	55
<b>Total</b>	<b>957</b>	<b>924</b>	<b>872</b>	<b>888</b>	<b>932</b>	<b>941</b>

Sources: AJ 61 and HC Deb, 19 Jan 2011, col 810W. Figures have been adjusted to 2009-10 prices

Note: Values are net expenditure which is the total amount paid on final bills together with payments on account (POAs) in ongoing cases, less recoupment of POAs together with income from contributions and recovery of costs and damages on behalf of assisted persons. As some payments will relate to cases completed in previous years some categories appear as negative spend.

## Cost drivers

15. We sought an explanation of the key factors that have contributed to the trends in spending described above from some of our witnesses. Sarah Albon, Director for Civil, Family and Legal Aid Policy at the Ministry of Justice told us that the level of expenditure is primarily dictated by the volume of cases.<sup>14</sup>

### *Criminal legal aid*

16. The Ministry of Justice attributed the shift in the distribution of costs of defence services from lower to higher courts that has characterised spending on criminal legal aid to changes in the volume of cases received at Crown Court relative to the magistrates' courts since 2006. Over this period, there was a 26% increase in cases received for trial at Crown Court, stemming from 33% more triable either way cases and 14% more indictable only cases, and a 13% reduction in the number of defendants proceeded against in the magistrates' courts. A 35% increase in Crown Court cases resulting in a guilty plea has further exacerbated the rise in Crown Court costs. Extraneous factors affecting costs per case include advances in digital technology fuelling an increase in the volume of evidence in criminal cases; in Crown Court trials the average page count has increased by 65% in the last six years.

17. Other drivers of the higher cost of criminal cases include the greater complexity of legal work, for example, as a result of changes to criminal justice legislation which have increased the time that cases take to pass through the court system and created additional avenues of appeal.<sup>15</sup> Many new criminal offences have been created in recent years. Furthermore, additional legal mechanisms require more time to be spent on individual cases, for example, those relating to bad character applications and applications for the use of hearsay evidence.

### *Civil legal aid*

18. The overall reduction in the cost of civil legal aid since 2000 masks shifts in the balance of expenditure between civil representation and legal help and for specific areas of law. For example, within the context of a 10% fall in expenditure on civil representation, a higher volume of public law children cases in the aftermath of the Baby Peter case has, along with a higher cost per case, contributed to an 8% increase in expenditure on civil representation over the last four years. On the other hand, outlay on immigration has been flat over the same period as case volumes have fallen and the nature of legal issues has changed, resulting in fewer asylum cases and more immigration and nationality cases. By contrast, the 19% increase in spending on legal help over the last 10 years can be attributed to increased demand in areas of social welfare law, including debt, housing, employment, and welfare benefits. The Ministry of Justice and Legal Services Commission have found no evidence that the complexity of law has operated as an inflationary pressure for the costs of civil and family legally-aided work.

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14 Q 304

15 AJ 61; Please note: Written evidence is referred to throughout this Report by the prefix 'AJ', followed by a reference number. The full list of evidence received, and the corresponding AJ reference number, can be found at the back of the Report.

## Recent attempts to reduce costs

19. Several attempts have been made to control — and ultimately prevent — the escalation of costs of legal aid in recent years.

### *Criminal legal aid*

20. The Ministry of Justice has implemented a number of initiatives with the aim of reducing the costs of criminal cases, including:

- the introduction in 2001 of graduated fees for Crown Court advocates, which were extended to cracked trials and guilty pleas in 2005, revised in 2007 and further extended to include cases of up to 60 days in July 2010;
- the introduction of individual case contracts for all very high cost cases (VHCCs) from 2004–05;
- the re-introduction of means testing in magistrates' courts from 2006–07;
- the introduction of civil and family fixed fees and revised magistrates' courts standard fees in 2007;
- the introduction of Crown Court Litigators' fees and Police Station Duty Solicitor fees in 2008;
- the re-introduction of means testing in Crown Courts in April to June 2010.

### *Civil legal aid*

21. Despite a sharp increase in the volume of mental health cases, expenditure in this area fell after the introduction of a new fees scheme in 2008. Nevertheless, as the majority of civil and family work is already funded by fixed fees, the volume of cases is the key cost driver and therefore the obvious focus for efforts to reduce cost. There are limits to what can be done to control extraneous factors affecting volume, such as the recession and the impact of the Baby Peter case. However, the Access to Justice Act 1999 has succeeded in reducing costs by limiting the scope of civil representation, specifically by removing personal injury and other money claims. Expert fees, particularly in family law and child protection cases are an additional driver of cost per case.<sup>16</sup>

## International comparisons of spending

### *Trends in comparative spending on legal aid*

22. When announcing the Government's proposed reforms, the Justice Secretary stated that England and Wales currently has "one of the most expensive legal aid systems in the

world”.<sup>17</sup> In seeking explanations for the relatively high costs of the system we discovered that international comparative research on legal aid is surprisingly limited.

23. In October 2009, the Ministry of Justice published a comparative study, commissioned from the University of York, of publicly-funded legal services and justice systems of England and Wales, Australia, Canada, France, Germany, Netherlands, New Zealand and Sweden. The data examined covered the period 2000–01 to 2006–07.

24. The Council of Europe also publishes comparative data on European judicial systems compiled by the European Commission for the Efficiency of Justice (CEPEJ) bi-annually. Table 5, composed from a combination of these data, illustrates that the cost of legal aid per inhabitant in England and Wales is higher than ANZAC countries, continental European jurisdictions and other nations in the United Kingdom and the Republic of Ireland.

**Table 5: Comparative costs of legal aid per inhabitant**

Country	Amount per inhabitant in Euro (from 2006 CEPEJ data)
Australia	13.05 (Note 1)
Canada	11.84
New Zealand	14
France	4.8
Netherlands	21.1
Norway	32.4
Ireland	15
England and Wales	56.2 (Note 2)
Northern Ireland	55
Scotland	46.9

Note 1: ANZAC costs relate to 2004 data from the University of York study

Note 2: This had fallen to 34.5 Euro by 2008

## Factors contributing to high costs

25. Professor Roger Bowles, one of the co-authors of the University of York study, explained that “on almost all of the components of the [legal aid] expenditure” more was spent in England and Wales than in the comparator countries; he attributed this to a “particularly unusual combination of ... high volumes [of cases supported] and high costs per case.”<sup>18</sup> According to the report, other contributory factors are: high income ceiling on eligibility; wide (if narrower than previously) coverage of areas of law; and the adversarial legal tradition of a common law country which necessitates a higher level of representation in court.<sup>19</sup> Professor Bowles considered that there are “lots of reasons” underlying this, including: the intention behind the establishment of the legal aid system; the way in which

17 Ministry of Justice press release, *Clarke unveils plans for radical reform of justice*, 15 November 2010, <http://www.justice.gov.uk/news/newsrelease151110b.htm>

18 Q 261; Q 275

19 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, Roger Bowles and Amanda Perry, University of York, p 36 [www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf](http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf)

the system has evolved and grown; and the way in which people are accustomed to resolving disputes.<sup>20</sup>

### **Criminal legal aid**

26. The comparatively high number of legally-aided criminal cases — identified in the report as the most important single driving factor of higher expenditure — was explained by a combination of: higher rates of recorded crime in England and Wales; a high proportion of cases being brought to court; and a higher proportion of defendants in those cases receiving legal aid.<sup>21</sup> The key indicator of differences in levels of demand for legal aid between EU and Commonwealth countries is the ratio of the number of criminal cases being brought to court relative to the crime rate; in continental Europe a higher proportion of cases were resolved without resort to court;<sup>22</sup> this may be a reflection of the way that legal advice is delivered.<sup>23</sup> The authors concluded that there was no evidence of a “common law” effect producing higher spending per capita.

27. Despite the income ceilings at which defendants were eligible for legal aid in criminal cases being high in England and Wales, they were not significantly disproportionate to those of other high income EU countries (with the exception of France) but were much higher than levels in the ANZAC countries; it should be noted that the period of this study coincided with the abolition of means-testing, which has since been reinstated in both Crown and Magistrates’ Courts.<sup>24</sup>

### **Civil legal aid**

28. The number of civil and family legally aided cases is higher in England and Wales than other countries although the variance is much smaller than for criminal cases. The average spending per case was also 30% higher. The report notes that there were significant changes in the composition of expenditure in England and Wales over the period studied; family matters accounted for less than half of civil legal aid spending in 2001 and more than two-thirds by 2007. Factors driving these changes included: the high number of divorces and the legislation applying to procedure; and eligibility rules. Professor Bowles observed that merits tests are “comparatively standard”; they tend to focus on whether a private individual with moderate means would spend their personal money on the matter in question.<sup>25</sup>

29. Notwithstanding differences in the volume of cases, the cost per case was also relatively high. Ms Albon and Ms Downs agreed that there was no “definite evidence” of the contributory factors to high cost per case.<sup>26</sup> On the other hand, Professor Bowles believed

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20 Q 261

21 Q 261; Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, Roger Bowles and Amanda Perry, University of York

22 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, Roger Bowles and Amanda Perry, University of York, p32

23 Q 277

24 Q 206

25 Q 277

26 Qq 305–306

that this was primarily due to the level of “legal inputs into a typical criminal case” including the way in which expenditure on such services is managed, and the amount of legal services used in a particular case, which is determined to some extent by the operation of law and procedural issues — for example, related to the operation of the courts — that dictate the steps that must be followed.<sup>27</sup> He cited, for example, the relative expense of using the Crown Court for those offences that are triable either way, and the level of resources that are inevitably expended prior to a guilty plea being given in Crown Court.<sup>28</sup> The Ministry of Justice noted that almost 60% of defendants in either way cases tried in the Crown Court received a sentence on conviction that a Magistrates’ Court could have imposed and that a guilty plea was entered in 73% either way cases committed for trial at Crown Court.<sup>29</sup>

30. Professor Bowles described difficulties in calculating hourly rates for legal services that could be usefully compared across jurisdictions. He stated that it would be necessary to unpick variances in a range of areas, including, for example: the way in which courts work and the level of the court involved; the way cases are heard; the role that is assigned to the person who is making the decisions relative to what matters have to be discussed by legal representatives; the complexity of legal issues; the kinds of lawyers used; and the involvement of counsel.<sup>30</sup> Ms Albon highlighted further limitations in collating quantitative data of sufficient quality to provide more definitive evidence in terms of the resources required, for example, for data and IT systems and to cover the human cost of monitoring and analysis.<sup>31</sup> **We are disappointed in the dearth of evidence on legal aid expenditure at case level to enable the identification of key influences on cost. We note the difficulties in collating quantitative evidence for useful national and international observations to be made, and we believe that a series of small-scale domestic qualitative research studies, examining the drivers of cost per case, would provide the Government with more valuable data to inform its efforts to reduce spending. It may be possible to reduce the amount of legal work required, for example, by reducing the complexity of particular areas of law, and thereafter to adjust the level of fixed fees accordingly.**

### ***Legal aid in the context of spending on the wider justice system***

31. Continental systems tend to have higher judicial and court costs. Council of Europe data on judicial systems across Europe illustrate that when the costs of courts, public prosecution services and legal aid are combined, the budget in England and Wales as a percentage of the GDP per capita is equal to the average.<sup>32</sup> Expenditure on running the courts and on public prosecution in England and Wales was comparatively low, suggesting that the high legal aid costs may be offset by lower budgets elsewhere in the system. The lower expenditure may be attributed to the major role played in England and Wales by the

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27 Qq 264–6; Q 301

28 AJ 61

29 AJ 61. For cases committed to Crown Court the average total cost of both litigation and advocacy is over £1,700 (for guilty pleas) and just over £3,200 (for cracked trials), compared to estimated average fees available for all either way cracked trials and guilty pleas in the magistrates’ court of approximately £295 (excluding VAT and disbursements).

30 Qq 266, 269, 273

31 Q 340

32 European Commission for the Efficiency of Justice, *Efficiency and quality of justice*, Edition 2010 (data 2008), Council of Europe

lay magistracy, at much lower cost than the professional judges who deal with all or most cases in other European countries.

### Lessons from international research for efforts to reduce costs

32. Professor Bowles told us that “dramatic” changes would be required to bring about significant savings.<sup>33</sup> Indeed his report concluded that: “[a] major overhaul of criminal law in England and Wales, including changes in the role of judges and legal representatives, would be needed before a reduction in the number of court cases (per offence committed or suspect charged) might be anticipated. The investment costs of such reform would be huge.”<sup>34</sup> Nevertheless, several proposals were made in the report for addressing cost issues, including:

- more effective gatekeeping or triage that matched people with legal problems, through a consultation process, to a variety of possible solutions, not just approaches that relied on formal legal process;
- greater use of mediation and other forms of dispute resolution, similar to practices in Sweden, particularly in family law;
- review of cases or firms where the postponement of hearings occurred frequently;
- review of the scope for procedural change to enable reductions in the proportion of matters in which court hearings were required i.e. enabling cases to be assigned to administrative bodies (this had been controlled more effectively for criminal cases in other common law jurisdictions<sup>35</sup>); and
- continuing analysis of legal aid expenditure at case level to identify key correlates of high spending per case and high demand for support.<sup>36</sup>

33. Professor Bowles drew our attention to two more radical approaches with the potential for bringing down the legal aid budget: 1) to find mechanisms to enable disputes to be internalised within a particular sector, comparable to contingency fee arrangements introduced for personal injury and 2) to rely more heavily on legal expenses insurance, as is the case in Germany. For each of these options there is a risk that costs will still fall on the public sector, albeit from a different budget, although this may be partially offset by a greater incentive to operate within the law.<sup>37</sup>

34. Some caution should be exercised in learning lessons — and more importantly in transferring policies — from other jurisdictions on the basis of comparative research. By the co-author’s own admission, the study that the Ministry of Justice commissioned was

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33 Q 275

34 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, p 32, Roger Bowles and Amanda Perry, University of York, [www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf](http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf)

35 *Ibid*, p 37

36 *Ibid*

37 Q 280

“relatively small-scale” and did not probe into legal systems and cost drivers in any “great depth”.<sup>38</sup> In the report, the authors explained that “additional analysis of data collection methodologies might have revealed alternative explanations for some of the differences found.”<sup>39</sup> For example, commenting on 2006 data collated by the Council of Europe, Professor Bowles noted that the disproportionately higher level of spend in Scotland, Northern Ireland and England and Wales than other EU countries “prompted the question of whether the British data had been collected in a way that differs in some critical respect from the way data were assembled for other countries. A further analysis of the technicalities of the data collection methodology might be revealing but would take us beyond the study remit.”<sup>40</sup> In addition, no judgments were made about the comparative quality of the legal work delivered. In seeking to learn how best to reduce costs from other jurisdictions, Ms Albon admitted that the Ministry of Justice had found it “difficult to find some other area, look at it and think they are providing a much better and cheaper service than us. Mostly, when they are spending a lot less, it is because they are buying a lot less.”<sup>41</sup>

35. Furthermore, the authors note that significant differences in the methodology and the reporting of data associated with justice systems means that making comparisons is complex and that any conclusions should be treated with caution. They identified two particular issues: “First, particularly in the federal systems such as Australia and Canada, there was sufficient variation even within single countries, at provincial level, to preclude [comparison] from being feasible within the time and space limits. Secondly, as regards the EU countries surveyed, the sources of comparative data were regarded as insufficiently robust to support much in the way of inferences.”<sup>42</sup>

36. In addition, as noted above, legal aid expenditure has stabilised since the period studied. This may suggest that measures that have already been introduced to reduce the inflation of costs, including the extension of fixed fees and the reintroduction of means testing, have had some success. Council of Europe data indicates that in England and Wales costs per inhabitant fell by 23% between 2004 and 2008, in the context of a 23% average rise across Europe.<sup>43</sup>

37. Professor Bowles cautioned against making significant changes to the legal aid system based on practice in other jurisdictions, for example, taking whole areas of law out of scope, without deeper understanding of the wider legal and policy frameworks in which legal aid arrangements are embedded.<sup>44</sup> He explained that although such reforms may be attractive as a means of controlling expenditure, it is difficult to unravel the likely consequences and cost implications as legal aid arrangements develop over long periods of time: “Legal aid as a public resource to settle matters can be a costly option, but there is

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38 Q 272

39 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, Roger Bowles and Amanda Perry, University of York, p 36

40 *Ibid*, p 18

41 Q 339

42 Ministry of Justice, *International comparison of publicly funded legal services and justice systems*, Roger Bowles and Amanda Perry, University of York, p 1

43 European Commission for the Efficiency of Justice, *Efficiency and quality of justice*, Edition 2010 (data 2008), Council of Europe, p 34

44 Qq 281, 284

then also the issue of what the cost would be of not having those arrangements in place. Those can be considerable for people as well.”<sup>45</sup> The Ministry of Justice told us that it had consulted other jurisdictions about their approaches both to legal aid and to court procedures, in particular in relation to family law, including, for example, some US states, Australia and Canada as well as Scotland and Northern Ireland.<sup>46</sup> **The Ministry of Justice needs to develop a greater understanding about what is driving demand and the cost of cases in order for there to be confidence in its estimates of the impact of its proposals for reform. Reducing spending on legal aid may have financial implications — and indeed may inflate costs — in other parts of the legal system.**

38. The legal aid landscape in England and Wales has changed significantly since the period considered in the University of York study. Nevertheless, we are encouraged that the Ministry of Justice has sought to learn from other jurisdictions to inform its consideration of the potential for reducing legal aid costs. The findings of the study have been valuable in enabling the Ministry of Justice and the Legal Services Commission to gain a better understanding of cost drivers and potential means of controlling them. **The research, however exploratory, suggests to us that having critically scrutinised the way our legal procedures have evolved there is potential for the Government to devise longer-term options for reform, rather than concentrating on simple options, such as reducing scope.**

39. **International comparisons are difficult, because of the many variables between different systems, and there are significant gaps in the research. However, it remains the case that the legal aid system in England and Wales is one of the most expensive in the world and, in the context of the budget savings the Government needs to find, this strengthens the case for examining legal aid costs to see where they can be reduced.**

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45 Q 281

46 Qq 338–9

## 3 The Government's proposed reform: scope

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40. The Government's proposed reform of the legal aid system is far-reaching and involves reducing the level of fees paid to providers, tightening the financial eligibility rules for certain categories of people, making more clients contribute to the cost of proceedings, introducing alternative sources of funding and improving efficiency and reducing bureaucracy in the administration of legal aid. However, the most controversial aspect of the reform is that regarding scope, and the removal of legal aid provision for certain types of cases or issues. While the Government is not proposing further to restrict legal aid in criminal cases it is intending to make extensive changes to the availability of legal aid in civil and family cases.

41. The consultation paper notes that funding for legal help is available with regard to almost every area of law, other than personal injury and damage to property, conveyancing, boundary disputes, defamation or malicious falsehood, the making of wills, trust law and business cases, which are explicitly excluded. Personal injury cases are also excluded because of the availability of Conditional Fee Arrangements. The paper also notes that legal aid is available for representation at Court in relation to any case before the county court, the High Court, the Court of Appeal, the Supreme Court and for family matters before the magistrates' court (although it is not generally available for legal representation at coroners' courts nor at tribunal proceedings). The paper argues that this range of provision "is no longer sustainable financially if the Government is to meet its commitment to reduce the public financial deficit" and that it has "therefore had to make tough decision about where best to target resources".<sup>47</sup> In reaching those decisions, it has taken into account: "the importance of the issue, the litigant's ability to present their own case (including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law), the availability of alternative sources of funding and the availability of alternative routes to resolving the issue. [It has] also taken into account our domestic, European and international legal obligations".<sup>48</sup>

42. While it notes that no one factor has been determinative, the consultation paper states that "taken together, they have led us to propose a revised civil legal aid scheme which focuses on those examples where the litigant is at risk of very serious consequences. Examples include facing the removal of their children, physical harm or homelessness, or where legal aid is justified to ensure a fair society through empowering citizens to hold the state to account or to meet our legal obligations...".<sup>49</sup> The application of these factors led the Government to conclude that some categories of issues or cases should be taken out of scope entirely, that others should remain entirely within scope, and that in some areas only the most important cases should remain in scope. Those areas to remain within scope, and those to be removed from it, are summarised below:

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47 The Government's Consultation Paper, pp 32–33

48 *Ibid*, p 33

49 *Ibid*, p 36

### Category of law/type of proceeding to remain within scope

- **Asylum:** the current scope of Legal Help and Controlled Legal Representation, except for advice on applications for asylum support under sections 4 and 96 of the Immigration and Asylum Act 1999
- **Claims against public authorities:** claims against public authorities which concern: abuse of position of power; and/or significant breach of human rights; and/or negligent acts or omissions falling very far below the required standard of care (although where a case may be dealt with by means of an alternative source of funding, that source is to be used)
- **Claims arising from allegations of abuse and sexual assault:** current scope of Legal Help and Representation
- **Community care:** the current scope of advice and representation
- **Debt:** only for those cases where the client's home is at immediate risk, as a result of rent or mortgage arrears
- **Discrimination proceedings:** to be retained for all claims of unlawful discrimination currently within scope
- **Environmental matters:** All Legal Help and Representation
- **European Union cross-border issues:** All Legal Help and Representation
- **Family law (private) (ancillary relief and children and family cases):** advice and representation for proceedings where related domestic violence issues can be demonstrated<sup>50</sup>
- **Family law (private) (domestic violence and forced marriage, international child abduction, international family maintenance, representation of children in rule 9.5 proceedings):** current scope of advice and/or representation as appropriate
- **Higher courts (the Court of Appeal, the Supreme Court and European Court of Justice):** only for onward appeals in categories of cases where legal aid remains in scope
- **Housing:** Legal Help and Representation: for repossession cases; damages claims for disrepair, where they are brought as a counterclaim in rent arrears possession cases; appeals to the county court on points of law under section 204 of the Housing Act 1996 relating to the obligations of local authorities to those who are homeless or threatened with homelessness; action under the Mobile Homes Act 1983 where the site owner seeks eviction; housing disrepair, where the action is for a remedy other than damages and involves serious disrepair; clients challenging ASBOs in the county court, typically alongside possession proceedings, and for injunctions concerning anti-social behaviour)
- **Immigration:** Legal Help and Controlled Legal Representation for claims brought by detainees that directly challenge their detention and for proceedings before the Special Immigration Appeals Commission
- **Mental health:** the current provision of Legal Help and Controlled Legal Representation
- **Confiscation proceedings:** the current provision of Legal Help and Representation
- **Injunctions concerning gang-related violence:** to be included when section 34 of the Policing and Crime Act 2009 is commenced
- **Independent Safeguarding Authority appeals (Care Standards):** the current scope of Legal Help and Representation
- **Inquests:** the current provision of Legal Help, with separate criteria to be met for Representation in individual cases before the coroners' courts to be funded
- **Protection from Harassment Act 1997:** the current provision of Legal Help and Representation for restraining order made under sections 5 and 5A

50 See pp 178–179 of the consultation paper for the ways in which related domestic violence may be demonstrated.

- **Quasi-criminal proceedings:** the current scope of Legal Help and Representation
- **Public Law (principally covering the challenging of public authorities in the High Court by way of judicial review and equivalent proceedings):** the current scope of Legal Help and Representation
- **Public Law (children):** the current scope of Legal Help and Representation
- **Registration and enforcement of judgments under EU legislation:** the current provision of advice and representation

#### Category of law/type of proceeding which is it proposed to remove from scope

- **Claims against public authorities:** those cases which do not involve abuse of position of power; and/or significant breach of human rights; and/or negligent acts or omissions falling very far below the required standard of care. It is also proposed not to retain the rule that brings back into scope any matter for which it is argued that Significant Wider Public Interest applies
- **Clinical negligence:** all Legal Help and Representation
- **Consumer and general contract:** all Legal Help and Representation
- **Legal Help for the Criminal Injuries Compensation Authority:** to be removed
- **Debt:** all Legal Help and Representation in relation to debts such as council tax, utilities, credit card debts, fines, unsecured personal loans, overdrafts and hire purchase debts. All Legal Help and Representation for proceedings under the Insolvency Act 1986, including those relating to bankruptcy orders and Individual Voluntary Arrangements
- **Education:** All Legal Help and Representation
- **Employment:** All Legal Help and Representation
- **Family law (private) (ancillary relief and children and family cases):** advice and representation where domestic violence is not present
- **Higher courts (the Court of Appeal, the Supreme Court and European Court of Justice):** to be removed for onward appeals where the category of law would no longer remain in scope
- **Higher courts (Upper Tribunal appeals):** All Legal Help and Representation
- **Housing:** All advice and representation other than for homelessness and housing disrepair (non-damages) cases
- **Immigration:** All Legal Help and Controlled Legal Representation other than for persons seeking release from detention or proceedings before the SIAC
- **Cash forfeiture proceedings:** all Legal Help and Representation
- **Other issues funded under 'miscellaneous' category,** including tort, probate matters, personal data, infringement of copyright, advice on changes of name and advice on making of wills: all Legal Help and Representation
- **Tort and other general claims** where, primarily, damages are sought, but which might involve injunctions, including assault; negligence; nuisance; breach of a statutory duty; false imprisonment; and malicious prosecution: all Legal Help and Representation
- **Welfare benefits:** all Legal Help and Representation
- **Applications for asylum support:** advice and representation.<sup>51</sup>

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51 This summary is based on Annex F of the consultation paper, pp 170–194.

## 4 Other means of reducing costs

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### Measures in the consultation paper

43. Before examining the likely impact of the Government's proposals relating to scope we turn now to other measures suggested for reducing the cost of legal aid, including those outlined in the consultation paper, and others put to us by witnesses. We have not had the opportunity in this brief inquiry to examine in detail the remaining proposals in the consultation paper aimed at reducing costs, namely those which would: reduce the level of fees paid to providers; tighten the financial eligibility rules for certain categories of people; make more clients contribute to the cost of proceedings and increase the level of contributions required; take greater account of the capital people have when determining their eligibility for legal aid; introduce alternative sources of funding; and improve efficiency and reduce bureaucracy in the administration of legal aid. However, one aspect of the changes which has been commented upon in evidence are the proposals regarding fees in civil and family matters.

44. It was put to us by a number of witnesses that the 10% reduction proposed for all fees paid in civil and family matters would be an important contributory factor in the decision of providers to withdraw from the market, with a consequent adverse impact on clients. For example, the Legal Aid Practitioners Group told us that

Profit margins are very low at present. The hourly rate in legal aid work varies depending on the area of law and the type of case. Rates of pay in some areas of law have remained static for over 10 years or have decreased. Practitioners who would be allowed rates of over £200 per hour by their local county courts for privately paying work will be paid rates starting at £50 – £70 per hour for many legal aid cases. The proposed reduction across the board in civil fees of 10% will make it extremely difficult for many providers to continue.<sup>52</sup>

The Advice Services Alliance made a similar point:

the proposed 10% reduction in all fees, expected to be introduced in October 2011, is likely to result in some insolvencies. Some organisations are already struggling with increasing costs whilst incomes have not increased with inflation.<sup>53</sup>

45. The Government's impact assessment makes it clear that there are risks associated with this policy, namely that:

- service quality may decline, possibly affecting case outcomes and/or the client experience
- customer choice might be adversely affected
- there might be shortages in the supply of legally aided services in the event of market exit

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<sup>52</sup> AJ 41, para 3.3

<sup>53</sup> AJ 44, para 3.4

The potential savings accruing from this policy are estimated to be £72 million annually.<sup>54</sup>

46. By far the largest area of savings in the Government’s proposed reforms is the removal from scope of various categories of law, and it is on this area that much of our evidence has focused and on which we concentrate in this Report. However, a further important saving — £72 million annually — would be realised from the Government’s proposed 10% reduction in fees for civil and family legal aid. We do not underestimate the difficult situation faced by many legal aid providers. In some cases they have been subject to a fees standstill for ten years. The ability of smaller firms, particularly in rural areas, to provide services has been significantly reduced by tests and procedures implemented by the Legal Services Commission. We are aware that the other proposed changes, such as those to scope, will exacerbate those difficulties. However, given the extent of savings which the Ministry of Justice is having to make, we think in principle that it is correct that fees are reduced rather than, for example, further changes made to scope. We expect the Department to monitor closely the impact this change, combined with others, has on the supply of legal aid providers. It should be prepared to respond quickly — and potentially explore whether the pool of providers can be expanded, particularly by allowing smaller firms to provide services — if supply threatens to diminish to a critical level. We shall scrutinise the performance of the Department in this respect throughout the remainder of this Parliament.

47. We also welcome the steps the Government is taking to reduce bureaucracy and costs in the administration of legal aid but we are concerned that such steps are carried out in such a way as to ensure that real administrative savings are made.

## Other means of reducing costs

### *Criminal cases*

48. The main focus of the Government’s proposed reforms is on legal aid in civil and family cases, and we reflect that focus in this Report. However, in the context of reducing costs in criminal cases more generally, we wish to highlight comments put to us in January 2011 by Keir Starmer QC, the Director of Public Prosecutions. In particular, Mr Starmer noted that 75% of cases are resolved by guilty pleas, but alluded to the fact that these cases require resource-heavy preparation and, sometimes, numerous hearings. He told us that “what we think ought to happen... is that we ought to aim for the speediest fair disposal of guilty pleas.... We think there should be, if at all possible, one hearing before the court to deal with the guilty plea and get it disposed of. There will be some cases where more is necessary, but the vast majority should be dealt with much more swiftly and without preparing by default as if it is a trial until the point at which it is clear it is a guilty plea.” In that context, Mr Starmer welcomed the early guilty plea scheme which has been running in Liverpool, where, “working with our prosecutors, the court does identify the cases that go into that early guilty plea list and they can be disposed of very swiftly”. Mr Starmer emphasised that the scheme in Liverpool has been successful because “people went in with the right attitude. They went in prepared to adjust the model month on month where they found problems with it and they worked really hard at it in the 18 months or so that the

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54 Ministry of Justice, *Legal Aid Reform: Legal Aid Remuneration — Civil and Family Fees, Impact Assessment*, p2

scheme has been up and running. That was about a mindset. It was about clarity about the outcome and a real determination. That needs to be replicated across as many courts as possible.”<sup>55</sup>

**49. While we welcome the Government’s recognition that reductions in scope cannot readily be made in the field of criminal legal aid, we were struck by the evidence of the Director of Public Prosecutions that cost savings could be achieved by greater efficiency in the courts, which in turn depends on all the agencies concerned working together more effectively. We expect the Ministry of Justice to take a lead in pushing this work forward.**

### **Judicial review**

50. A further possible means of reducing legal aid expenditure was put to us by Sir Anthony May, President of the Queen’s Bench Division. Sir Anthony noted that asylum and judicial review cases are to remain within scope and thought that, while it might be appropriate for such cases to attract legal aid without a rigorous merits test for the initial claim for judicial review or first asylum appeal, “a view could be taken... that legal aid should not automatically be available for a second attempt within the court system, where the first has failed, unless the court is persuaded that the second attempt has merit.”<sup>56</sup> He pointed out that almost all emergency applications in the Administrative Court in asylum cases are “a kind of surrogate version of the [previously refused] reconsideration application” and in oral evidence he said that the Court sometimes had to deal with 20 or more such applications daily, “a large number of which have no merit”.<sup>57</sup> He told us “that it could be regarded as proportionate and sensible if these did not attract automatic legal aid, but only if the initial (unsupported) application was successful, so that the case proceeded to a full merits hearing. The judge could then order legal aid funding for the permitted proceedings. The merits judgment for legal aid purposes would reside in the judge’s decision to permit the case to proceed.”<sup>58</sup>

51. Sir Anthony drew an analogy between such a process and what happens already in appeals in criminal cases to the Court of Appeal Criminal Division, where legal aid extends to advice on appeal and the drafting of grounds on appeal but, if leave to appeal is refused, legal aid is not provided for a subsequent renewal of the leave application (unless that application succeeds). Sir Anthony said that this “has the salutary effect of reducing the number of meritless renewed applications.” He also thought that consideration could be given to extending the principle to renewed applications for permission to bring judicial appeal proceedings or any renewed application for permission to appeal in civil proceedings.<sup>59</sup>

**52. While we support the Government’s retention within scope of judicial review and asylum matters, we were interested in Sir Anthony May’s suggestion that consideration**

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55 Uncorrected transcript of oral evidence taken on 18 January, 2011, QQ 12 and 29, HC 745-i

56 AJ 63

57 Q 155

58 AJ 63

59 *Ibid*

be given to removing automatic legal aid for those judicial review applications which are, in effect, seeking reconsideration of previously dismissed appeals, an example being emergency applications within the Administrative Court in asylum cases. We recommend that the Government assesses the potential cost savings which might be made from this change and consult on its merits. The Government should also consult on whether the principle could be applied to other areas of judicial review.

### *Reducing the number of cases prompted by poor decision-making*

53. One option for driving down costs in the system is to reduce the number of cases which reach tribunals where the appellant seeks to overturn a decision made by a public authority. The most obvious example relates to the work of the Social Entitlement Chamber which deals, amongst other things, with Social Security and Child Support (SSCS) appeals.

54. There has been a recent dramatic increase in the number of social security appeals, from 242,800 appeals received in 2008–09 to 339,000 appeals in 2009–10. The volume of appeals is expected to increase further, rising to an estimated 370,000 in 2010–11 and 436,000 in 2011–12, before falling to 409,000 in 2013–14.<sup>60</sup> Of the 67,600 cases cleared at hearing in the latest quarter for which figures are available (Quarter 2, 2010–11), a decision in favour of the appellant was made in 23,100 (34%) of cases.<sup>61</sup> While it is beyond our remit to look into the various contributory factors behind these statistics, it is clear that they represent a significant volume of incorrect decision-making on behalf of those tasked by the Department for Work and Pensions (DWP) to make decisions about benefits.

55. Action is being taken to address poor-decision making. In October 2010 the Government announced its Fraud and Error Strategy, designed to cut the £5.2 billion of taxpayers' money which is lost through fraud and error in benefits and tax credits each year. The Strategy includes steps to drive down levels of official error by providing further support for staff, including enhanced IT and a system of accreditation for those attaining a certain standard of processing accuracy.<sup>62</sup>

56. Within the SSCS jurisdiction, appeals are lodged with the decision-making agency or department, at which point there is an opportunity for that body to reconsider its decision. The President of the Social Entitlement Chamber — who has previously said that many appeals reaching tribunals should have been resolved at the reconsideration stage — reports that the DWP “has begun to make more effective use of reconsideration” and that, supported by a joint exercise with the Tribunals Service and the development of new methods of judicial feedback, “early results show up to 24% of Employment and Support Allowance decisions under appeal being revised in the appellant’s favour without a tribunal hearing.”<sup>63</sup>

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60 *Senior President of Tribunals’ Annual Report*, February 2011, p 39

61 Ministry of Justice/Tribunals Service, *Quarterly Statistics for the Tribunals Service, 2<sup>nd</sup> Quarter 2010–11*, January 2011, p 29

62 HM Revenue and Customs/DWP, *Tackling fraud and error in the benefit and tax credits systems*, October 2010, p8

63 *Senior President of Tribunals’ Annual Report*, February 2011, pp 40–41

57. While we welcome the steps being taken to resolve meritorious appeals at an early stage, we think more could be done to encourage correct decision-making in the first place, and so we were interested in the possibility of charging public authorities for poor-decision making which leads to costs for the courts and tribunals. The Law Society, for example, told us that “public authorities whose administrative decisions are overturned by courts and tribunals should be required to pay the costs of the claimant to the legal aid fund, together with a surcharge.”<sup>64</sup> (In this section we are focusing on the decisions of the DWP although we believe the principles are applicable across the public sector.)

58. The Ministry of Justice told us that the DWP does provide funding for the tribunals system if it creates burdens for it and that this funding derives from its responsibility to fund the additional cost of any policy change rather than being consequent upon the success rate of the Department at the tribunal. Currently the DWP is funding additional costs resulting from the introduction of Employment Support Allowance (the successor to Incapacity Benefit), appeals against which have been the principal reason for the large increase in SSCS appeals described above. £1.3million in 2008–09, £9million in 2009–10 and an expected £21.1million for 2010/11 has been transferred from DWP in relation to Employment Support Allowance for training costs and the cost of increased appeal hearings. There has also been a small transfer of funds as a result of changes to the child maintenance system to the value of £0.2m for each of the years 2008–09 and 2009–10.<sup>65</sup>

59. The Minister, Mr Djanogly, said that the mechanism by which the DWP paid the amounts described above meant that there was already an element of “polluter pays” approach in the system. He also said that it was important that the DWP got decisions right at an early stage and that the MoJ has “a significant project” with the DWP on that issue. He was sceptical, however, about the benefits of charging the DWP (or other publicly-funded bodies) for the effects of their poor decision-making and said that having one Department pay another would be “like robbing Peter to pay Paul”.<sup>66</sup>

**60. We welcome the steps being taken by the Department for Work and Pensions to increase the quality of decision-making, and the work undertaken by that Department and the Tribunals Service to ensure that cases which do not need to be dealt with at tribunal are resolved earlier. We note that funds are transferred from the DWP as recompense for the expense caused to tribunals as a result of policy changes. However, we think there is potential for such a “polluter pays” principle to be extended considerably, with the DWP (and other public authorities whose decisions impact upon the courts and tribunals) required to pay a surcharge in relation to the number of cases in which their decision-making is shown to have been at fault. We think that in rejecting this idea as a “robbing Peter to pay Paul” transfer of funds around the public purse, the Minister is overlooking the potential benefit such a policy would have in providing a financial incentive to public authorities to get their decisions right first time. We accept that there would be bureaucratic hurdles to be jumped over in creating such a system, but we think the potential benefits merit further consideration and that, in the long-term, cost-savings could accrue from such a policy.**

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64 AJ 05, para 3.3.3

65 AJ 60

66 Qq 355–58

61. In addition to the proposals for charges for poor decision-making by public authorities noted above, we also welcome the range of proposals put to us by the Law Society for looking at ways of reducing some of the other cost-drivers for legal aid, including:

Every consultation paper that introduces new rights or offences should identify the costs of enforcement and state how those are to be met.

Judges should be trained, and encouraged to use modern case management procedures for ensuring that cases progress efficiently and that unnecessary costs to the parties are eliminated....

Greater investment in new technology (e.g. video links with prisons, improved listing arrangements and greater use of electronic communications) would reduce the time wasted by solicitors and others in attending courts unnecessarily.

Courts should use their wasted costs powers to penalise public authorities and others who cause unnecessary costs to be incurred by practitioners and the Legal Aid Fund.

The CPS should review its charging policy in Very High Cost Cases (VHCCs). A more strategic approach is needed to reduce costs in complex VHCCs.

62. The Law Society has also proposed that individual practitioners should not make significant sums of money out of legal aid, and suggests that this should be capped at £250,000 per year. In addition, the Society has put forward the following proposals for increasing the efficiency of the legal aid system:

Consideration should be given to granting powers to a local body to allocate funds, and identify local priorities and gaps in order to mitigate the disadvantages of a pure market approach.

The Defence Solicitor Call Centre should be abolished and replaced with local arrangements.

Firms should have greater choice and flexibility to determine how they take on and run cases.

Simplification of contractual requirements for firms and specifying an element of tolerance for unintentional non-compliance.

Streamlining of accreditation schemes to ensure that they are pitched at the correct level to ensure quality and to avoid duplication.

Rationalisation of hourly rates to make it easier to identify the relevant fee.<sup>67</sup>

**63. While we have not had time to assess these measures in detail, we recommend that the Government assesses the merits of the cost-saving proposals put forward by the Law Society. While we understand the need for short-term savings and support many of those set out in the consultation paper, we hope that the Government will now turn its mind to addressing some of the long-term cost drivers of legal aid, not least with a view**

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67 AJ 05, para 3.5

to reducing the extent of some of the limitations to scope proposed in the consultation paper, the impacts of which we consider below.

## 5 Impacts of the proposed reform

### Impact of scope changes on vulnerable clients

64. Of the £350 million annual savings the Government hopes to realise from its proposed reform of legal aid,<sup>68</sup> by far the largest tranche of savings (£279 million) is estimated to result from the changes to scope. For legal help, this would result in around half a million fewer cases falling within the scope of legal aid funding annually, which equates to 68% of all existing cases. 45,000 fewer cases would fall within scope for the purposes of Legal Representation, equating to 44% of existing cases. The Government's Impact Assessment sets out the likely reduction in numbers of eligible cases by category:<sup>69</sup>

**Reduction in legal aid for customers (by volume of cases) 2008–09**

LSC Statistical Category	Legal Help		Legal Representation	
	Reduction in case volumes	Proportion of existing cases	Reduction in case volumes	Proportion of existing cases
Combined Family	n/a	n/a	n/a	n/a
Financial Provision	n/a	n/a	n/a	n/a
Help with Mediation	n/a	n/a	n/a	n/a
Other Family Matters	n/a	n/a	n/a	n/a
Priv. Law Children Act	n/a	n/a	n/a	n/a
<b>Total Family</b>	<b>211,000</b>	<b>83%</b>	<b>53,800</b>	<b>48%</b>
Actions Against Police	2,200	55%	100	22%
Consumer	3,200	100%	630	100%
Education	2,100	97%	70	26%
Clinical Negligence	3,600	100%	2,500	99%
Community Care	0	0%	0	0%
Debt	75,000	75%	220	57%
Employment	13,300	100%	70	94%
Housing	38,000	36%	2,400	22%
Immigration	37,300	41%	6,400	29%
Miscellaneous	3,800	75%	920	76%
Personal Injury	0	0%	0	0%
Public Law	0	0%	10	1%
Welfare Benefits	113,100	100%	10	27%
<b>Total Civil</b>	<b>291,000</b>	<b>60%</b>	<b>12,400</b>	<b>33%</b>
<b>Grand Total</b>	<b>502,000</b>	<b>68%</b>	<b>45,000</b>	<b>44%</b>

65. The breadth and depth of the Government's proposed reform – and in particular the wholesale removal of certain legal categories and the partial removal of others from scope – has caused serious concerns amongst the providers of legal aid services and others about the effect such cuts will have on clients. For example, Advice Network and Advice Centres for Avon told us that “we believe that [the reduction in numbers of cases eligible for legal

68 The Government's Consultation Paper, p 5

69 Ministry of Justice, *Legal Aid Reform: Scope Changes*, p 16

aid as a result of scope changes] will represent a disaster for the thousands of individuals unable to seek redress for issues that affect their fundamental well-being — we believe that these proposals will directly lead to more and more vulnerable individuals becoming literally destitute, leading to increased homelessness, higher costs in social care and greater damage to individuals’ and families’ health, leading to increases in spending in the health budget that will dwarf the ‘savings’ being made by cutting legal aid”.<sup>70</sup> A similar point was made by Greenwich Housing Rights:

The proposed reforms will ... reduce access to both the civil courts and tribunal systems for those seeking to challenge actions brought by, for example, local authority housing departments, or decisions made by, for example, the DWP. If, as we anticipate, the proposals contribute to the complete closure of services (including housing services) tenants, employees and benefit applicants will not be able to access the advice that would help them to identify challengeable decisions, illegal employment practices and defensible possession claims. Without access to specialist advice fewer tenants will mount a defence or apply to remain in their homes. Fewer benefit applicants will challenge erroneous decisions by the DWP. Fewer employees will bring claims against their employers. It is the remit of the court and tribunal systems to decide on the merit of claims and submitted defences: it is not the MOJ’s remit to remove the ability of employees, tenants and benefit claimants to participate in the judicial system.<sup>71</sup>

66. The Government’s own equalities impact assessment notes that “the proposals have the potential to disproportionately affect female clients, BAME clients, and ill or disabled people, when compared with the population as a whole. This is as a result of those groups being overrepresented as users of civil legal aid services. However, it should be noted that, due to the significant proportion of clients for whom illness or disability information is not known, findings in relation to this group, and to a lesser extent the BAME group, should be treated with caution”.<sup>72</sup> While we note the Government’s caution regarding the absence of data, evidence from provider groups suggests that the impact of the reforms will have a disproportionate effect on specific groups. Advice UK told us that “typical client breakdowns at AdviceUK member advice centres show, for example:

<b>Agency A</b>	
Mental Health Difficulties	48% of clients
Physical Health Difficulties	50% of clients
BME	37% of clients
English Language and Literacy	30% of clients
Carers	25% of clients
Families with Children under 4	15% of clients

**Agency B**  
 70% of our welfare benefits clients are BME, also 70% are disabled  
 95% of our immigration clients are BME, 20% are disabled  
 50% of our housing clients are BME, 52% are disabled.”<sup>73</sup>

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70 AJ 24, para 4

71 AJ 27, para 2.2

72 Ministry of Justice, *Legal Aid Reform: Cumulative Impact, Equalities Impact Assessment (EIA)*, p 9

73 AJ 32, para 4.8

67. Shelter told the Committee that it believes “that the proposals would exclude large numbers of vulnerable people, including many who are ill or disabled. They may have complex, inter-related problems relating to housing and homelessness, welfare benefits and debt. By definition they will be poor, as they would have been eligible for legal aid”.<sup>74</sup> Scope told us of its specific concerns, stating that “disabled people will be disproportionately affected by the removal of areas of social welfare law from the scope of legal aid and by the tightening of the eligibility criteria. There is no real scope for restricting legal aid further without denying access to justice for disabled people”.<sup>75</sup> When concerns were raised with the Minister about the impact of the reforms on vulnerable people, he noted that if an individual’s “life, liberty or home is at risk, then they will be eligible” for legal aid and that, for those who would not remain eligible “it would be more suitable...[to use] non-court alternatives such as mediation”.<sup>76</sup>

68. The Government has acknowledged that there is likely to be an increase in the number of litigants in person in the courts as a result of its reform.<sup>77</sup> We look at the wider impacts of this in more detail below, but the Minister did accept that there were concerns about the ability of people with mental health problems, disabilities, drug dependency or alcohol addictions to represent themselves and said that the Department would be “interested to see how people respond to the consultation on these particular issues”. He also said that this area would be re-assessed following the consultation exercise.<sup>78</sup> The Equalities Impact Assessment published with the consultation paper conceded that there were information gaps relating to data about clients and stated that the Department intends to conduct a survey of legal aid clients to address the “significant non-response rates as to race and disability client characteristics”. It further states that the consultation response will “feature an accompanying full Equalities Impact Assessment, which will incorporate any improved evidence base established during the consultation period.”<sup>79</sup>

**69. According to the Government’s own figures, the changes it is proposing to the scope of legal aid will result in 500,000 fewer instances of legal help and 45,000 fewer instances of legal representation being funded by legal aid annually. The Government has conceded that it does not know the extent to which these reductions would impact upon people with disabilities and black and minority ethnic people because of information gaps. While it is taking some steps to address those gaps, evidence we have received, and the Government’s own thinking, suggest that these people, as well as other vulnerable groups, rely more on legal aid services than do the less vulnerable, and so there is the potential for them to be disproportionately hit by the changes. If this were to happen it would sit uneasily with the Government’s commitment to protect the most vulnerable in society.**

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74 AJ 34, para 18

75 AJ 39, para 18

76 QQ 379–381

77 Q 399

78 QQ 401 and 403

79 Ministry of Justice, *Legal Aid Reform: Cumulative Impact, Equalities Impact Assessment (EIA)*, pp 11 and 23

## Impact of scope changes: family law

70. Having looked at the impact of the proposed scope changes on the overall volume of help and representation provided by legal aid, and the possible effects for people who are in vulnerable groups, we now look at the likely impact of scope changes in specific areas, starting with family law.

71. Legal aid expenditure on family law is the single most expensive area of legal aid provided through the community legal service, accounting for more than half of all community legal service expenditure. Expenditure over the last six years was as follows:<sup>80</sup>

Expenditure, £million	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10
Family	490.0	537.8	549.1	582.7	623.6	596.8
All community legal service	845.9	831.0	808.9	851.1	917.0	940.0
Percentage of spending on	58	65	68	68	68	63

72. Given the scale of expenditure on family law, it is not surprising that the Government is proposing to make changes in this area. In cases where related domestic violence is not present, the Government proposes to remove from scope all advice and representation for ancillary relief cases (covering, for example, disputes about the division of assets; applications for lump sum payments or maintenance; transfers of tenancy; and divorce) and for private law children and family cases (relating to: disputes about contact and residence of children; injunctions against ex-partners; Prohibited Steps Orders; and divorce). The Government proposes to retain in scope: the current funding of mediation in private law family cases; the current scope of advice and representation for domestic violence, forced marriage, international child abduction cases and international family maintenance cases; funding for advice and representation for separately represented children under Rule 9.5 (and 9.2A) of the Family Proceedings Rules 1991 (making a child a party to the proceedings if it is in their best interests). The consultation paper also proposes retaining the category of public law children cases within scope.

73. The Government anticipates that the removal from scope of the areas of family law described above will lead to a reduction in case volumes of 211,000 (83% of existing cases) for legal help and 53,800 (48%) for legal representation and lead to reductions in spend of £50million (82% of existing spend) for legal help and £128 million (41%) for legal representation.<sup>81</sup> Combined, this represents around half of all the savings the Government is seeking to realise from its proposals, and is therefore central to the success of those proposals.

74. The green paper sets out the reasons why the Government believes this change to scope is justified, summarised as follows:

<sup>80</sup> HC Deb, 19 Jan 2011, col 810W

<sup>81</sup> Ministry of Justice, *Legal Aid Reform: Scope Changes, Impact Assessment*, pp 16 and 17

*In relation to ancillary relief:*

- Many cases will be about dividing marital assets which will not generally be of sufficient priority to justify legal aid when compared to cases which involve matters of liberty or physical safety
- Advice is available online to help couples navigate the divorce process
- Evidence suggests that cases can be resolved by parties reaching agreement and the Government is proposing to fund mediation to assist this process
- The Government proposes to make changes to the courts' powers by giving judges powers to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party, thus helping to redress the balance in cases where one party is materially disadvantaged
- While some public money spent on ancillary relief cases is recovered, the Government does not consider this to be at a level sufficient to enable to continue to include this area within scope as, in 2008–09, the net cost, after repayments, of providing legal aid in ancillary relief cases was £19 million.<sup>82</sup>

*In relation to private law children and family cases:*

- While the circumstances may be difficult, the parents bringing these cases are not always likely to be particularly vulnerable and their emotional involvement in the case may not necessarily mean they are unable to present it themselves
- There is no reason to believe the cases will be routinely legally complex
- Online advice is available
- Research suggests that in the vast majority of cases parents agree contact arrangements informally without recourse to the courts
- The Government is concerned that legal aid is creating unnecessary litigation and encouraging lengthy, acrimonious cases which can impact on the child's well-being
- The Government is also concerned about the impact of legal aid provision on the opponents of those who receive funding and would like to move to a position where parties are encouraged to settle using mediation (which it will continue to fund in private law family cases).<sup>83</sup>

75. The assertion that people concerned in such cases will not generally be vulnerable, or that they will be able to cope because the procedure is not complicated has been disputed by some witnesses to our inquiry. The Family Law Bar Association (FLBA) does not

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82 The Government's Consultation Paper, pp 59–60

83 *Ibid*, pp 69–71

believe that many parents will be able effectively to access a court or represent themselves in it. They told us that “many parents in the throes of relationship/family breakdown suffer from learning disabilities, or mental ill-health, or have lives affected by abuse of drink or drugs, or do not speak English as a first language. Many people are from cultures where accessing a court would be uncommon, even unacceptable”. They further argue that many people concerned “suffer acute anxiety, stress and depression; it is reasonable to predict that many of these people will be deterred from seeking relief through the courts if they know that they will have to represent themselves”. The Association fears that this inability or reluctance to access the family court will lead to the following adverse consequences:

- “non-resident parents may abandon genuine claims for contact (or increased contact) with their children;
- parents will hold back in expressing their concerns about the care or contact arrangements for their children (which may genuinely be adversely affecting the welfare of the children) because they cannot face embarking on litigation unrepresented;
- cases which verge on the edge of child protection will go undetected.
- In each situation, it is the children who suffer.”<sup>84</sup>

76. The Law Society is also concerned about the removal of legal aid from this area, telling us that “without legal aid, issues of neglect, abuse or simple obstruction by one party will go unaddressed. This may cause harm to the child and, in extreme cases, lead to parties taking the law into their own hands.”<sup>85</sup>

77. The FLBA refer to what they describe as a “worrying contradiction” in the proposals as to the assessment of the nature of the rights of various parties involved. They ask:

Can it be said on the one hand that all parties who face removal of children from the family should have legal aid (even if they have not had any interest in/contact with the child for many years), but that a father who is being unreasonably denied any contact, and therefore at risk of losing his relationship with his child, should not?<sup>86</sup>

78. This point relates to the proposed retention within scope of public law children cases, which cover proceedings under the Children Act 1989, where the state is considering commencing, or has commenced, care or supervision proceedings in respect of a child, proceedings for a child assessment order, or proceedings for an emergency protection order. The Government proposes to retain these cases within scope because “the issues at stake... are extremely important, and the very emotional nature of the subject matter, and the personal circumstances of the individuals involved, will often make it difficult for them to present their own case. We recognise that families must have a practical means of taking

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84 AJ 16, pp 6–7

85 AJ 05, 2.1.1

86 AJ 16, p 9

part in proceedings brought by public authorities that affect the integrity of the family unit. We do not consider that there are viable alternatives to legal aid.”<sup>87</sup>

**79. The Government is right to retain legal aid in scope in cases where actions by a public authority “affect the integrity of the family unit”. We accept there is a philosophical difference between the state intervening to remove a child from a family and an absence of contact between a parent and child as a result of relationship breakdown, and that the case for the taxpayer to fund legal costs is significantly stronger in the former than in the latter case.**

**80. We note concerns put to us that many of the parents involved in difficult cases involving children will face problems in accessing a court and representing themselves and that this could impact adversely on the wellbeing of the children concerned. We note further the argument put to us by the Family Law Bar Association that, while the consultation paper appears geared towards meeting the interests of the party seeking legal aid, it does not meet the interests of children involved in proceedings. We call on the Government to address these issues specifically in its response to the consultation.**

***Domestic violence as a criterion***

81. The Government proposes to retain within scope family law (private) cases where “related” domestic violence issues can be demonstrated in one of the following ways:

<p><b>Ancillary relief</b></p> <p>Ancillary relief proceedings where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship;</p> <p>Ancillary relief proceedings where there are ongoing privately-funded domestic violence (or forced marriage) proceedings, or where there have been such privately-funded proceedings in the last 12 months (or proceedings brought by a litigant in person) and an order was made, arising from the same relationship;</p> <p>Ancillary relief proceedings where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant’s ex-partner (or, in the case of forced marriage, against any other person);</p> <p>Ancillary relief proceedings where the applicant’s partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).</p>
<p><b>Children and family cases</b></p> <p>Private Law Children proceedings where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship;</p> <p>Private Law Children proceedings where there are ongoing privately-funded domestic violence (or forced marriage) proceedings, or where there have been such privately-funded proceedings in the last 12 months (or proceedings brought by a litigant in person) and an order was made, arising from the same relationship;</p>

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87 The Government’s Consultation Paper, p 49

Private Law children proceedings where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced marriage, against any other person);

Ancillary relief proceedings where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).

82. A number of witnesses were worried that the proposed use of domestic violence as a criterion for eligibility for legal aid was too narrowly drawn. Concerns were raised that the proposals used a definition which referred exclusively to physical violence and that this did not encompass the full range of domestic abuse. The Association of Lawyers for Children told us "No definition of what is meant by "domestic violence" is provided anywhere in the Green Paper, although reference is made (in paragraph 4.64) to "those in abusive relationships" needing "assistance in tackling their situation". It is unclear what is to be encompassed within "abusive relationships". If it is only physical violence, then that would run counter to the research evidence as to the scope and definition of abuse and, indeed, to the impact of other types of abuse on the children of the family. It also runs counter to the definition of domestic violence which was stated as recently as 2008 to be the ACPO, Crown Prosecution Service and government's definition of that term. It would also run counter to the Legal Services Commission's current policy on funding in this type of case."<sup>88</sup> A recent Parliamentary Answer indicated that domestic violence was only present in a small proportion of cases in which legal aid was provided in ancillary and relief and private law cases. For example, in 2008–09, £157.2 million was spent on legal representation on private law children proceedings where domestic violence was not present, and £15.6 million was spent in cases where it was present.<sup>89</sup>

83. Sir Nicholas Wall, President of the Family Division, was also concerned about the apparent narrowness of the proposed definition. He said

I think the Government is very ill advised to concentrate on violence in the context of domestic violence. "Domestic abuse" is the term which we currently use because much domestic abuse is not violent. It is psychological, often financial and emotional... if the Green Paper stands we will be forced to deal with abuse in terms of violence, but abuse is much broader. The ACPO definition of domestic abuse is much, much broader than physical violence. Indeed, common sense dictates that.<sup>90</sup>

When he gave oral evidence to us, the Minister was cognisant of such concerns about the need for domestic abuse to encompass more than physical violence, stating that in consultation meetings this had "come up as an issue very frequently. We can see it is an important issue and it is one that we will be studying very carefully in our responses to the consultation". He said he had "absolutely" not yet reached a conclusion on the matter.<sup>91</sup>

88 AJ 48, para 4.2.1

89 The respective figures for ancillary relief proceedings were £14.9 million and £1.9 million. <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-0354.pdf>

90 Q 145

91 QQ 374 and 375

84. Witnesses had further reservations about the definition used of domestic abuse, relating to the consultation paper's apparent requirement for injunctive action to have been taken in order to qualify for legal aid. Sir Nicholas Wall told us that "there is a perverse incentive, it seems to me, in the proposals...that people will be obliged to take out injunctive proceedings against a former spouse. They will be obliged to litigate in order to open the gateway to legal aid. As you know only too well, so much domestic abuse is hidden. It is not brought into the public domain. It is not brought forward into police action. It is not brought into prosecution".<sup>92</sup> The FLBA argued that "proof of domestic violence as an act of physical harm is a crude and inapposite test for the grant of public funds" and said that "many women who fear domestic violence may not seek injunctive relief (it should not be overlooked that the perpetrator will usually make sure that there is no opportunity for the non-violent parent or the children to speak freely) but would nonetheless wish to have support in resolving issues concerning the children."<sup>93</sup>

85. Furthermore, even where an injunction is sought, cases are often resolved by means of an undertaking as to future conduct, rather than by an order which, as the Association of Lawyers for Children told us, "protects the applicant, but involves no finding of the court as to whether or not the respondent has been responsible for the behaviour complained of." They point out that this approach can save time and money and reduce levels of tension and that the unintended consequences of making it necessary to obtain an order would be that:

- Most cases will be contested by respondents in order to limit the adverse consequences upon them of findings in relation (particularly) to arrangements for the division of parenting time;
- The Legal Aid fund will accordingly have to meet the much higher costs of contested domestic violence proceedings for the applicants, and there will be knock-on effects on other agencies;
- It is highly probable that many respondents will be able to demonstrate entitlement to public funding to meet the allegations against them.<sup>94</sup>

Sir Nicholas Wall was also critical of the proposal in this respect, telling us that "most injunctions these days are dealt with by way of undertakings. A man will frequently say, "I undertake not to assault or molest in the future, irrespective of my conduct in the past." That undertaking is accepted by the court and the case proceeds on the basis of that undertaking. That will no longer be possible."<sup>95</sup>

86. Sir Nicholas also noted the proposal's creation of a "perverse incentive not only to litigate to obtain an injunction but also to make allegations of domestic violence as opposed to abuse in order to open the gateway to legal aid", which he considered "very detrimental".<sup>96</sup> The Association of Lawyers for Children also said that using allegations of

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92 Q 145

93 AJ 16, p 8

94 AJ 48

95 Q 145

96 *Ibid*

domestic violence as an “exclusive gateway” to public funding would lead to an increase in “allegations which are ultimately found to be false or exaggerated”. Even if the allegations are not false, they suggest, “there is also likely to be the putting forward of abusive acts which would not have been argued previously in order to obtain funding. There are very few relationship breakdowns which involve no abuse but detailing these will invariably focus the attention of the parties on past conflict rather than the present situation where judges and lawyers try to encourage parties to consider the children and move forward to arrange their future.”<sup>97</sup>

**87. Given that family law is the single most expensive area of legal aid provided through the community legal service we understand why the Government is seeking to reduce spending on it. However, we are concerned that using the presence of domestic violence as a proxy for the most important cases will lead to a perverse incentive to make false allegations of such violence or, where such violence has occurred, cause it to feature in disputes before the courts where it might otherwise not have done so. As well as potentially harming children in such circumstances, this could add unnecessary expense, including the cost of legal aid for persons accused of domestic violence. Additionally, there is the converse problem of victims of domestic abuse who do not want such abuse to be brought to court and who will therefore be ineligible for legal aid. We therefore call on the Government to reconsider its use of domestic violence as a gateway to legal aid funding and to bring forward alternative proposals by which to focus family law legal aid expenditure on the most deserving cases.**

**88. If the Government does insist on retaining domestic violence as a criterion for legal aid eligibility it should adopt a definition of domestic abuse which explicitly incorporates non-physical abuse and we welcome the Minister’s statement that he will consider this matter further in light of the consultation responses. Further to broadening the definition of domestic abuse, the Government should ensure that undertakings as to future conduct rather than orders of the court are sufficient to confer eligibility.**

### **Mediation**

89. The consultation paper proposes the continuation of funding for legal aid for mediation in private law family cases, including private law children and family proceedings and ancillary relief proceedings. The Government intends that this will principally be used in cases where domestic violence is not an issue, but it will be offered even in those cases. The paper notes that, since the requirement to consider mediation was made mandatory in the legally aided sector in 1997, the number of publicly-funded mediations has increased from 400 to almost 14,500 in 2009 and that “the full and partial success rate of publicly-funded mediation now stands at 70% (with the full resolution of cases accounting for 66% of this).” In addition to continuing to retain family mediation services in scope, the Government is proposing that, when a client enters mediation, a fixed amount of legal help (equated to £150 of work) will be available to facilitate the input of a

solicitor in providing advice during the mediation and to formalise and give legal effect to any agreement made following it.<sup>98</sup>

90. The use of mediation is key to the Government's sensible aspiration to divert cases away from the courts where possible. The Minister made clear his personal commitment to it and the importance of highlighting its availability, telling us "this is an issue of particular concern to me. Since I have been a Minister I have made some half a dozen speeches on the issue. We are publicising it. We are providing a new website which will be on the Directgov website. People will have easy access to mediators. In the last few months the number of mediators across the country and also the number of mediation outlets has increased dramatically."<sup>99</sup>

91. The LSC ran a tendering exercise in 2010 for publicly funded family mediation services, as a result of which there are now 201 organisations delivering mediation from 1,000 locations under legal aid. Furthermore, the Government is "working with the Family Mediation Council to enable this growth to continue and to meet the increase in demand for services. This includes a programme of training courses for new mediators and 'refresher' events for those who may not have done mediation work for some time". The Ministry of Justice has also told us there are at least 600 family mediation services in England and Wales listed on the database of the Family Mediation Helpline service and that "organisations responding to the consultation have indicated to us that there has been increased interest in training for mediation as a result of the Government's legal aid proposals."<sup>100</sup>

92. The utility of mediation and its retention within scope has been widely welcomed, for example by FLBA which told us that it "recognises that mediated agreements and negotiated outcomes for children bring many advantages to parents who are wrestling with the difficulties of relationship breakdown. It is obviously highly desirable that arrangements are reached with the minimum of conflict and stress"<sup>101</sup>

93. Useful though mediation is, and accepting it may be possible to extend its use, it will not be sufficient to resolve all disputes. Resolution – an association of lawyers which is committed to non-adversarial resolution of family disputes, and which trains and accredits mediators – told us that

we have concerns about the lack of clear evidence about the benefits of directing all couples to only mediation, which is essentially a voluntary process, and about mediation outcomes. Mediation, like other options, has some disadvantages. These include that the mediator cannot offer legal advice to indicate that the agreement the couple are heading towards is plainly wrong; it often cannot work where there is a significant power imbalance between the parties in terms of the dynamics and history of the relationship; some parties are simply not equipped with the skills and abilities to use the mediation process effectively; and not all mediators are trained in

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98 The Government's Consultation Paper, pp 43–44

99 Q 410

100 AJ 60

101 AJ 16, para 18

family finance law with the result that many mediated finance settlements don't always produce the right result and which also raises the issue of mediator capacity to deal with all elements of cases and without delay.<sup>102</sup>

94. The Legal Aid Practitioners Group made related points, stating that the back-up of the courts was needed in cases where people did not comply with mediated outcomes, and also argued that for the Government to cite the statistic that 73% of ancillary relief orders were not contested as evidence that the majority of individuals were able and willing to take responsibility for their own financial affairs was “wholly misleading” as many of those agreements would have relied on legal advice and might not have been achieved via mediation.<sup>103</sup>

95. The FLBA also felt that there would be large numbers of cases not capable of resolution by mediation and that mediation would be inappropriate in many cases (for example, where a parent has a mental illness or where there is alleged harm of a child). They made the point that mediation is generally considered to be a voluntary process and that “compelled mediation has a poor prospect of success”. The FLBA was particularly concerned about difficult-to-resolve cases which, they contend “will be no more resolvable by mediation in the future, and will require court intervention. Yet it is in these difficult cases that the Government has proposed that parents will have to enter the court process unrepresented.”<sup>104</sup>

96. This view was echoed by Sir Nicholas Wall, who made the point that mediation was not a cure-all:

Mediation works best with legal help. Most mediators will tell you that, I think. They like their clients to have good legal advice, particularly if you are dealing with all issues in mediation and you are mediating on money as well as on children.... Mediation is simply one of many very good alternative dispute resolution procedures. As I have already mentioned, many of the mediators get their mediations because, at the first appointment, the Judge, District Judge or CAFCASS officer says, “Why don't you try mediation to resolve this dispute? It is much better that you should do so.” Mediation is one of the factors in alternative dispute resolution, but it is by no means a panacea. To be fair to the mediators, they will say to you it is not a panacea. They will say it is very good for a particular category of case where both parties are willing to discuss the issue frankly and openly and make concessions. It is not a panacea in any sense of the term.<sup>105</sup>

97. David Jockelson, a family solicitor, gave an example of a type of case in which mediation will not help:

A woman has been caring for three children for some years, separated from her husband or ex-husband. There was previously a long history of bullying and

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102 AJ 12, para 14

103 AJ 41, para 4.3.b

104 AJ 16 paras 19 to 23

105 Q 148

oppressive behaviour. She remains frightened of him. She is not very well educated or confident and certainly cannot deal with documents by herself.

He applies for the children to come and live with him. He is able to afford legal representation. He makes false allegations about her mental health or her ability as a mother. He will claim to offer a better quality of life for the children.

The court may insist on mediation but without advice and support she is at a huge disadvantage. Outside of mediation, he may approach her and pressurise her to give in. She cannot get an injunction to stop that. He does not accept the outcome of mediation. He ignores it or sabotages it.

Mr Jockelson concludes that “mediation often works because behind it there is always the real possibility of the matter going to court. Remove or weaken that possibility and mediation becomes far less convincing and much less likely to succeed. Why co-operate with mediation and why compromise when you think you can press on regardless?”<sup>106</sup>

**98. The Government’s commitment to the provision of mediation in private law cases is very welcome and its aspiration to use mediation to divert as many cases as possible from the courts is prudent and generally in the best interest of both parties and any children involved. However, we agree with the President of the Family Division that mediation cannot be a panacea and that it will not work in all cases. Further work needs to be done on how difficult and unresolved cases can be dealt with if legal aid is not available.**

99. The FLBA told us of their concerns about one specific category of people who might not be eligible for legal aid: the parents in ‘rule 9.5’ cases. These are private law children cases which raise issues of significant difficulty where the court joins the child to the proceedings as a party. Such cases may include circumstances where: there are allegations of physical, sexual or other abuse of the child; there are complex mental health or other medical issues; there are intractable disputes about contact or residence which may be causing harm to the child; there are international complications; or there is a contested issue about blood testing.<sup>107</sup> Some of these cases may not be suitable for mediation.

100. While, under the consultation paper proposals, legal aid would be available to support the child in rule 9.5 cases, parents will remain ineligible for public funds for representation. The FLBA states, therefore, that the Courts will have before them unrepresented litigants

Being required to marshal the relevant evidence in a case concerning physical or sexual abuse of a child, where there may be, for example, concurrent police involvement / investigations;

Having to deal with (and cross-examine on) expert evidence relevant to serious allegations of physical or sexual harm of a child,

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106 AJ 35 paras 10–13

107 AJ 16

Having to consider and deal with expert evidence relevant to the court practice of a foreign jurisdiction;

With “mental health issues”, who will be expected to represent themselves even though the “significant difficulty” envisaged in the case is precisely the fact that the parent has such a condition.<sup>108</sup>

**101. We share concerns raised with us that parents in rule 9.5 cases will not be eligible for legal aid, and that courts will have unrepresented litigants in cases which involve significant difficulty. We urge the Government to consider amending its proposals to permit legal aid provision in any rule 9.5 case where it is clearly necessary.**

### *Timing of the proposals*

102. Resolution told the Committee that it was “disappointing and worrying that the Ministry of Justice has made these proposals [concerning legal aid for family law] before the Family Justice Review Panel makes its interim recommendations”.<sup>109</sup> The Review, which is chaired by David Norgove, is wide-ranging and its role is to:

- examine both public and private law cases
- explore if better use can be made of mediation and how best to support contact between children and non-resident parents or grandparents
- examine the processes (but not the law) involved in granting divorces and awarding ancillary relief, and
- look at how the different parts of the family justice system are organised and managed.<sup>110</sup>

It will produce an interim report in Spring and a full report later in 2011.

103. The Association of Lawyers for Children also called for the Government to wait for the Review to report before considering legal aid changes which would affect family proceedings, in the context of noting that there are a number of proposals being considered by the review – namely, the provision of a Family Court with dedicated Family Court judges at all tiers, the introduction of no fault divorce, and addressing various “pinch points” in the Family Justice system notably with CAFCASS and HMCS – which could lead to reductions in expenditure on family legal aid. They told us that “it is wholly inappropriate for the Government to be setting out proposals at this stage which fundamentally affect entitlement to public funding in family law cases. The proper time to do that... is once it has been possible to digest the final conclusions of the Family Justice Review Panel, and not before. To do otherwise is contrary to the Government’s Code of Practice on Consultation.”<sup>111</sup>

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108 AJ 16

109 AJ 12, para 5

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

111 AJ 48, paras 3.1 to 3.6 and 4.1.4

104. The consultation paper notes the ongoing work of the Review and states that it will “present recommendations to Government that offer us the opportunity to develop a stronger, more efficient system that leads to better results for children and families.”<sup>112</sup>

**105. The Family Justice Review Panel is undertaking a fundamental reassessment of the family law system and its recommendations are likely to have a significant impact upon that system. The Government should wait until the Review Panel has produced its full report before implementing changes to the legal aid system in the area of family law.**

### Impact of scope changes: social welfare law

106. The Government is proposing to remove from scope legal aid provided in relation to:

- decisions about Disability Living or Attendance Allowance, Incapacity Benefit, Housing Benefit, Income Support and other benefits;
- housing matters, other than those concerning homelessness or serious disrepairs which threaten health; and
- debt matters where the client’s home is not at immediate risk.

107. The cost of legal aid for welfare benefits, housing and debt matter in 2009–10, the number of acts of assistance in each category, and the estimated savings expected to be made as a result of the consultation paper’s proposals is as follows:<sup>113</sup>

	Costs in 2009–10 £ million	Numbers of acts of assistance in 2009–10	Estimated savings to be made in consultation paper proposals (based on 2008–09 figures, rounded to nearest £1m) £ million
<b>Welfare benefits</b>	28.3	143,865	22
<b>Housing</b>	59.9	184,944	12
<b>Debt</b>	33.1	147,196	17

108. The reasons given by the Government for the removal of scope in these areas are as follows:

- These issues are of lower importance than fundamental ones concerning safety or liberty because they are essentially about financial or property matters
- Help and advice are available from a number of other sources

112 The Government’s Consultation Paper, p 44

113 Ministry of Justice, *Legal Aid Reform: Scope Changes, Impact Assessment*, pp 16 and 17 and HC Deb, 19 January 2011, cols 809–10W

- (In relation to welfare benefits) The accessible, inquisitorial and user-friendly nature of the tribunal means that appellants can generally present their case without assistance.<sup>114</sup>

We assess the validity of the three reasons given to justify the changes to scope below.

*The issues are of lower importance than fundamental ones concerning safety or liberty*

109. The Government does accept that “the class of individuals bringing these cases is more likely to report being ill or disabled in comparison with the civil legal aid client base as a whole”<sup>115</sup> and some of the providers of legal aid in this area gave us case studies of the kind of people and cases which would be affected by the proposed changes, for example:

Surinder Singh lives with his wife and one of his two children. He has worked as an electrician for 40 years, but was made redundant in 2009 after being diagnosed with Huntington’s disease, which made him increasingly unable to work safely. He applied for Disability Living Allowance and was awarded the lowest rate for care, and nothing at all to aid his mobility, despite the fact that he found it very hard to walk, and relied on his wife to care for him day and night. He approached Community Links who helped him make an appeal, which was successful, although the whole process from start to finish took almost a year. He was awarded the higher rate care and the lower rate for mobility, which has made a huge difference to his ability to manage his debilitating illness. (Community Links, AJ22, para 25)

Let’s take a client who has a welfare benefit appeal which relates to his or her disabilities or his or her housing costs and without that welfare benefit income the client will not be able to pay their housing costs to protect their family home or have any income upon which they can feed their family so as to ensure their family’s health and well-being. If they receive no financial assistance with their housing costs, no financial assistance which reaches subsistence levels and no means of redress via access to justice then as a society — we are leaving families with no choice other than to turn to other perhaps illegitimate means of feeding their families and keeping the roof over their families heads e.g. to crime... (Ms H Williams, Ty Arian Ltd (Solicitors), AJ47)

Sabir (not real name) was a 39 year old man with mental health problems. After losing his job and going through a difficult relationship breakdown Sabir ran into financial difficulty. His claim for benefits was turned down, he fell into arrears with his rent, received verbal threats about eviction proceedings from his landlord and ran unmanageable debts on his credit card. He came to BHT for assistance. Thankfully BHT’s caseworkers were able to successfully appeal his benefit decision, negotiate with his landlord (avoiding unnecessary and costly eviction proceedings), and agree a repayment plan for his credit cards. (Brighton Housing Trust, AJ28, para 4.3)

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114 The Government’s Consultation Paper, pp 71–73

115 The Government’s Consultation Paper, p72

110. The case studies suggest that while perhaps not as fundamental as issues concerning liberty or safety, the types of issues which people are assisted with by legal aid-provided assistance are of very great importance to the individuals concerned. Witnesses have also made the point that such problems, if not dealt with at an early stage, can become exacerbated. Riverside Advice told us

Cutting this particular legal aid SWL budget will mean ‘problems’ will not be dealt with at an early ‘preventative’ stage, which is imperative in terms of successful outcomes, and essential in terms of preventing small ‘problems’ escalating into major disasters for people. A Welfare Benefit issue for someone with a mental health problem, unresolved through expert means can soon turn into a debt and homelessness or hospitalisation situation...<sup>116</sup>

### *Help and advice are available from other sources*

111. A central argument put forward by the Government to justify reducing the scope of legal aid is the availability of assistance from alternative sources. For example, in relation to welfare benefits, the consultation paper states that help and advice is available from Job Centre Plus and the Benefits Enquiry Line and, “in some cases, voluntary sector organisations may provide some help and advice, for example AgeUK on Disability Living Allowance, Attendance Allowance and other benefits. The Child Poverty Action Group and Disability Alliance may assist in some cases. Pro bono groups such as the Free Representation Unit may also be able to assist in representation at tribunals.”<sup>117</sup>

112. However, according to evidence given to us by the Advice Services Alliance, this assertion has been disputed by most of the groups cited:

we should point out that the consultation document gives a misleading impression of FRU. .... 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”. (Free Representation Unit)

“Unfortunately we do not have the resources to provide direct advice to people who are claiming benefits”. (Child Poverty Action Group)

“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”. (Age UK)

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116 AJ 31, para 21

117 The Government’s Consultation Paper, p 72

“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”. (Disability Alliance)<sup>118</sup>

113. Citizens Advice Bureaux (CAB) are one of the main providers of legal aid-funded advice, as well as other types of advice which in some circumstances might be an alternative to legal advice. In 2009–10, the Legal Services Commission provided around 15% of income for bureaux, providing £27 million funding which helped over 450 specialists deal with 43,234 welfare benefit problems, 56,990 debt problems, 9,129 housing problems and 2,954 employment problems.<sup>119</sup> Citizens Advice (the national body representing bureaux) is alarmed at Ministry of Justice estimates that the not-for-profit sector will lose up to 97% of their legal aid funding and predicts the financial impact on bureaux will be as follows:<sup>120</sup>

Category of law	Current annual funding	Projected funding	Projected loss
Debt	£12,813,400	£3,203,350	£9,610,050
Welfare benefits	£8,789,711	£0	£8,789,711
Housing	£2,733,540	£1,749,465	£984,075
Employment	£769,580	£0	£769,580
Community care	£460,576	£460,576	£0
Immigration	£181,480	£74,407	£107,073
<b>Total</b>	<b>£25,748,287</b>	<b>£5,487,798</b>	<b>£20,260,489</b>

114. Citizens Advice told us that they were extremely concerned about the income cuts they faced, coming as they did not in isolation but alongside reductions in funding from local authorities and from the proposed discontinuation of the Financial Inclusion Fund. They feared that the legal aid reductions “would be very destabilising, and could present a critical situation for the CAB network” and that the loss of income would “have a significant impact on the ability of the service to deliver not only legal aid, but also other client services.”<sup>121</sup>

115. Law Centres too face funding difficulties, fearing that, factoring in the impact of the proposed telephone gateway for legal aid, almost 90% of their legal aid funding could be removed. Juxtaposed with the cuts they expect from other Government departments and local authorities, Law Centres believe they could lose 70% of their funding.<sup>122</sup>

116. Funding concerns were shared by AdviceUK, an organisation whose 860 members provide advice in the not-for-profit sector. A survey of its members which started in summer 2010 found that 41% of them had already experienced funding cuts, 58% expected cuts to be made in 2011–12, and 71% were subject to a review of voluntary sector or advice funding. A more recent survey, started in December 2010, suggested that the situation was

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118 AJ 44, para 4.6

119 AJ 18, para 4

120 AJ 30, para 5

121 *Ibid*, para 6

122 Q 107

even worse: it found that 89.5% of respondent organisations were experiencing major funding cuts, with an average of 64% reductions in advice funding per agency. This will have an impact on the service offered to clients: 80% of organisations responding said that the number of clients they were able to advise would be reduced; 76% said that particular advice projects or services would have to end; 68% said staff would be made redundant; and almost a third (32%) said their organisations might have to close.<sup>123</sup>

117. Generally, there was widespread scepticism from the not-for-profit sector that they would be able to fill gaps left by the removal of legal aid, or that, as the consultation paper suggests, Job Centre Plus or the Benefits Enquiry Line present viable alternative sources of advice. The following points were typical of those put to us by the not-for-profit sector:

The evidence of widespread cuts in funding for advice services indicates that the suggestion in the Green Paper that there are alternative sources of advice to pursue cases affected is erroneous. Some suggested sources of alternative advice, such as Job Centre Plus and the Benefits Enquiry Line are inappropriate. They are not independent agencies. It is certainly not the case that capacity exists to soak up demand spilled by reducing legal aid scope. In the half-million cases cut loose, people may well find no alternative source of legal advice. (AdviceUK, AJ32, paras 4.1 – 4.3)

The consultation papers offer no evidence regarding alternative funding for these kind of services, and we do not believe it actually exists in any meaningful way. The Government, in response to queries from MPs, seem to rest heavily on the CABx service, ignoring the fact that Bureaux across the country are losing funding at a frightening rate — from central Government, through these proposals and the decision to cut the Financial Inclusion Fund, from local government, due to cuts in local authority spending, and from charities and trusts due to the recession cutting incomes and increased demand for charitable funding. The simple fact is that advice agencies cannot meet current demand for services, and this demand will increase as changes to benefits, housing and other matters are implemented. (Advice Network & Advice Centres for Avon, AJ24, para 16)

The proposals will de-stabilise advice providers and the consortia or partnership arrangements put in place by advice providers to ensure access to essential services. The combined impact of the legal aid reforms, the loss or reduction of local authority funding and the loss of funding streams such as the Financial Inclusion Fund could spell the end for the majority of the not-for-profit advice sector. While other organisations will seek to provide ongoing support for their client groups, it will not be possible to replicate the services currently ensuring access to the justice system for the most marginalised members of society. (Greenwich Housing Rights, AJ27, para 4.3)

118. The Government accepts that the not-for-profit sector faces a very difficult period and is exploring ways of helping to alleviate those difficulties. The Financial Inclusion Fund has funded a face-to-face debt advice programme since 2006 which employs around 500 specialist advisors in Citizens Advice Bureaux and other advice agencies. The Financial Inclusion Fund itself is to close on 31 March 2011. However, on 12 February, the

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123 AJ 32, paras 3.4–3.6

Government announced that the face-to-face programme, which helps over 100,000 clients with complex debt problems each year, was to be funded for a further year (2011–12) at a cost of £27 million.<sup>124</sup>

119. A further potential source of funding is the £100 million Transition Fund announced in October. The purpose of the Fund is to “provide grants to many organizations to allow them to prepare for the future opportunities opened up by the Big Society.” The Cabinet Office has noted that, while 75% of charities receive no funding from the state, some organisations have become highly dependent on public funding and are particularly vulnerable to the spending reductions being made across the public sector. Successful applicants for funding had to: be spending at least 50% of their total income on the delivery of frontline public services; have approved annual accounts showing that total annual income was between £50,000 and £10m and that 60% of income came from taxpayer-funded sources; have evidence that between April 2011 and March 2012 the organisation would experience a reduction of at least 30% of the taxpayer-funded income received for the delivery of frontline services; and have free reserves which could pay the organisation’s total expenditure for no more than six months. Eligible bodies could apply for grants of a value up to 50% of the reduction in taxpayer funded income, up to a maximum of £500,000. Successful applicants have been told they would be able to spend the funding on “the changes your organisation needs to make to meet the programme outcome. In some cases it may be appropriate for you to spend a small amount of your grant on continuing to deliver services but you will need to explain why this will help you achieve the programme outcome”.<sup>125</sup>

120. Applications opened on 29 November 2010 and closed on 21 January 2011. Nick Hurd MP, the Minister for Civil Society, told us that a law centre (the Isle of Wight Law Centre) was one of the first 18 organisations to be announced as recipients of funds and that 93 providers of legal advice had applied to the Fund. Mr Hurd emphasised that grants from the Fund were “not funding for business as usual; it is funding for change, funding for transition, and funding to organisations who have the beginning of a plan to get out of the situation they were in, not least in terms of trying to develop sustainable and diverse income streams. That caused some frustration in the system, but we had to set some eligibility criteria that were robust. We had to send a signal that this was about trying to help organisations build a more sustainable future.”<sup>126</sup>

121. The Transition Fund is not a long-term funding source but rather, as Mr Hurd put it “a very short-term measure to help people who have been placed in a hole, need some help, and have a plan to get out of it themselves.”<sup>127</sup> Asked to give an example of the ways in which an organisation concerned might diversify its income sources, Mr Hurd said “I do not underestimate the difficulty of trying to develop more diverse income streams or more entrepreneurial models that suggest that you may have a more sustainable future, or put yourself in a more robust position in order to benefit from the future opportunities in

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124 HM Treasury Press Notice, 12 February 2011, *Funding of £27 million secures face to face debt advice programme*

125 <http://www.biglotteryfund.org.uk/transitionfund>

126 Q 424

127 Q 426

terms of delivering public services that we are absolutely committed to opening out.”<sup>128</sup> Mr Hurd confirmed that organisations which had not applied by 21 January had missed the opportunity to gain funding, although he left open a slight possibility of some extension of the Fund: “We are scrabbling round trying to find some opportunities to top it up, but most members of the Committee will recognise that there is not a magic money tree; there isn’t a great deal of money around. We recognise that there is a lot of demand for the money, and are doing what we can to pull together resources to try to top it up.”<sup>129</sup>

122. Mr Hurd also cited the Big Society Bank as a further means by which the not-for-profit sector might be able to find funds for its work. On 14 February, in a joint statement with Francis Maude MP, the Minister for the Cabinet Office, he announced a strategy “to grow the social investment market giving charities and social enterprises access to new, potentially multi-billion pound, capital...The strategy explains the role of the Big Society Bank as a cornerstone of the social investment market attracting more investment from wealthy individuals, charitable foundations and ultimately socially responsible everyday savers in social ISAs and pension funds”.<sup>130</sup> The fund will be financed by an estimated £400million from dormant bank accounts, with up to £100million being accessed in the first year, with an additional £200million given by the UK’s largest banks. The Bank will act as a wholesaler and use its balance sheet to co-invest, underwrite or guarantee investments along with private sources of capital. Mr Hurd told us that the Bank’s objective will be to grow the social investment market with “the ultimate goal” being “to make a much better connection between the social sector and the trillions of pounds of assets sitting in mainstream financial institutions being managed on our behalf as savers...Social investment is the bridge”. Mr Hurd pointed out that “this will not happen overnight; it is not a short-term panacea for the challenges [faced by the not-for-profit sector]”.<sup>131</sup>

**123. We welcome the Government’s provision of funding for face-to-face debt advice for a further year and the £100 million Transition Fund, designed to help not-for-profit organisations change to a business model which leaves them less reliant on public funds. However, long-term concerns remain: how will sufficient debt advice be provided once the deferred ending of the face-to-face service happens? How many organisations will be able successfully to adapt their income streams in the manner encouraged by the Transition Fund? What will happen to those who cannot and the clients who use their services? The answers to these questions are not known and the Government should be prepared to extend further the provision of face-to-face debt advice and offer a second round of Transition Fund grants if necessary.**

124. Mr Hurd said that the Government accepted that it had a task to complete in looking at the ability of the voluntary sector to pick up the slack left by the proposed removal of legal advice in certain areas. He said that this was why the Cabinet Office had become involved, and that it was carrying out three relevant tasks: mapping the effect of cuts for this sector on the ground; pulling together stakeholders to assess what can be done to help

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128 Q 428

129 Q 431

130 Cabinet Office press release, CAB 027–11, *Big Society Bank could back social ISAs for everyday savers*, 14 February 2011

131 Q 436

the sector in the short — and long-term, which should result in recommendations for action by the Government and the sector itself; and facilitating the Transition Fund (which we discuss above).<sup>132</sup>

125. Mr Hurd further noted that funding decisions made by local authorities were extremely important, and that there was an uneven picture across the country. In addition to the mapping exercise already referred to he told us that “the Secretary of State for Communities and Local Government [has] made it clear that we are prepared to set what he calls tests of reasonableness for the behaviour of local authorities — in the proportionality of cuts, the notice given for cuts and the time given to people on the wrong end of decisions to adjust what they are doing. He stated those tests of reasonableness, and also said that he is prepared to consider putting them on a statutory basis. That is quite a significant move in response to our very genuine concern about what is happening out there as a result of decisions by local authorities.”<sup>133</sup>

126. While the Cabinet Office has started taking steps to co-ordinate other Departments on this issue, Mr Hurd told us that there were some issues which were beyond the Cabinet Office’s remit, and where, consequently, we were not convinced that there was sufficient direction offered from the centre. For example, when asked whether the programme of face-to-face debt advice would be continued beyond the extra year recently announced, Mr Hurd said that was a matter for the Department for Business, Innovation and Skills and that “the Cabinet Office has been brought in really quite recently to pull this together. This is all very recent. These are conversations that are ongoing between officials and will be ongoing between Ministers ... but this is all quite recent. The issue is clearly under review within BIS, which has made that commitment for one more year — what happens after that is uncertain. But there needs to be clarity about it.”<sup>134</sup>

127. Mr Hurd was also reluctant to comment on the proposal we have mentioned above for a system of financial sanctions whereby the DWP and other public bodies might be obliged to pay for poor decision-making which caused work for the tribunals and courts. Despite being an inherently cross-governmental policy proposal, Mr Hurd said it was not his responsibility, but that of the Ministry of Justice, and that he was “uncomfortable going into terrain which is properly the responsibility of [MoJ] ministers”.<sup>135</sup>

**128. We note that the Government recognises the difficulties faced by the not-for-profit advice sector. It is unsatisfactory that, on the Government’s own admission, the Cabinet Office has been brought in at a late stage. We welcome the work it is doing to assess the situation and to find ways of helping the voluntary and not-for-profit sectors, but we are concerned that leadership and co-ordination across departments has not covered all relevant areas. Representatives of organisations in this field have made it clear they do not believe it will be possible for their organisations to meet all the unmet demand which will be created by the proposed changes to legal aid. That assertion casts**

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132 Q 420

133 Q 423

134 Q 443

135 QQ 448 and 453

doubt on a key condition for the Government’s proposed reforms – that clients will be able to access non-legal aid-funded sources of advice.

### *Self-representation at tribunals without assistance*

129. The third argument advanced by the Government for the removal from scope of welfare benefits law is that the inquisitorial, user-friendly nature of tribunals such as the First-tier (Social Security) Tribunal – to which appeals are made – means that appellants are generally able to present their case without assistance. Legal aid is currently available for advice regarding appeals to the Tribunal, although not for advocacy at it. Further onward appeals to the Upper Tribunal do not qualify for legal aid.

130. While the nature of tribunals means that representation might not be necessary (and 72% of appellants in the Social Security Tribunals are currently unrepresented<sup>136</sup>) HH Judge Robert Martin, President of the Social Entitlement Chamber, told us that the absence of legal help prior to the hearing was likely to have a number of adverse effects: “We will see more people with cases with no prospects of success because they have not been filtered out, as they are at the moment, through good advice. We suspect that many citizens with winnable cases will not reach the tribunal because, again, they are not getting the effective support at that early stage. The absence of legal help also means that cases will tend to be less well prepared for the tribunal, which will extend the amount of time we have to invest in the case to make sure that a good outcome is reached.”<sup>137</sup> Judge Martin also gave an example where, without legal help prior to the tribunal, appellants might find themselves unable to present their case adequately:

In many cases where a social security appeal turns on a person’s state of health, we see an appeal letter or correspondence from the appellant which says, “My GP knows all about my health problems. You are quite free to ring him up and he will help you.” But the tribunal really isn’t in a position to pick up the phone, interrupt a GP’s surgery and say, “We have an appeal on at the moment.” Legal help comes in where the advice worker can say, “The tribunal won’t be doing that, but I can do that for you,” and possibly even pay for a short medical report. The person then arrives at the tribunal equipped with that evidence.<sup>138</sup>

131. A further difficulty for people trying to navigate their way through tribunals is the increasing complexity of the law. HH Judge Martin noted “when Social Security Tribunals were first set up... The law that we used was encapsulated in a very slim handbook. The reference materials that we issue to our tribunals now extend to 7,500 pages spread over six volumes. The ability of tribunals to act in that simple, accessible, informed way is not assisted when the law itself becomes increasingly complex. We endeavour to live up to the original reasons to justify tribunals being informal, but that is against the formality of the court. For many of the people who appear unrepresented it is still a very daunting and stressful experience, no matter how friendly we try to be.”<sup>139</sup>

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136 Q 144

137 *Ibid*

138 Q 164

139 Q 159

132. While the nature of tribunals generally means that legal representation is not necessary, we are concerned that the removal of legal aid for legal help could cause more cases without a realistic chance of success to reach tribunals (thus increasing the tribunals' costs). We are also concerned that the ability of the most vulnerable people to present their cases will be weakened because they will not have had help and advice in preparing them. This could deny justice to the individuals concerned and increase the time and expense necessary to deal with the case at tribunal. The increasing complexity of procedure in some tribunals has made it difficult for vulnerable people to represent themselves. We urge the Government to initiate consultations in order to develop proposals to make tribunals more user-friendly and less legalistic.

### *Costs to the public purse of removing legal aid*

133. Citizens Advice gave us an example which they say illustrates the point that early interventions in the form of legal help paid for by legal aid can not only help vulnerable people, but save greater funds having to be spent by the public purse:

A 59 year old woman sought advice from a Lancashire CAB about a benefits and debt problem. Her right leg had been partially amputated in an operation to save her life, and her husband had gave up work to look after her. The care and mobility components of her disability living allowance (DLA) were reduced when DWP reviewed her claim. Consequently her husband lost his right to carers allowance. This meant a significant drop in their household income and they were unable to afford essential expenditure like heating. She asked for the decision to be reconsidered but it was not changed. She began to feel unwell and was treated for depression. A legal aid funded caseworker gave her advice on the relevance of the Contributions and Benefits Act 1992 for the various rates of the care component of DLA and lodged an appeal under the Decision Making and Appeals Act 1998, supported by medical evidence from her GP. The client's DLA was then restored without her needing to have a tribunal hearing. This early intervention saved substantial costs for both the DWP and the Tribunals Service and reduced the costs to the NHS of the client's treatment for depression. The cost of the help to the legal aid fund was £221 in total.<sup>140</sup>

134. Expanding upon this point, Citizens Advice told us of a cost-benefit analysis they have carried out, using data from the Civil and Social Justice Survey on the adverse consequence costs of legal problems and the Legal Services Commission's outcomes data from legal advice work which they state "sets off legal aid expenditure against the savings achieved from early advice (legal help) interventions. This analysis estimates that:

- For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.
- For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.

- For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.
- For every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.<sup>141</sup>

135. Other witnesses cited the work carried out by Citizens Advice and supported the argument that expenditure on legal help could obviate the need for greater expenditure at a later date. For example, Advice Network & Advice Centres for Avon told us that “timely, high-quality advice saves the state much more money than it costs, in decreased health, housing, legal and other social expenditure from demand-led budgets — cutting advice spending is a false economy.”<sup>142</sup> Similarly, Shelter asserted that “these proposals, if implemented, are likely to drive up the need for civil legal aid rather than reduce it and therefore increase costs to the taxpayer further down the line”.<sup>143</sup> In oral evidence to us, the Ministry of Justice agreed that the consultation paper’s estimate of £350 million savings from the reform of legal aid does not include any analysis of its impact on other Departments.<sup>144</sup>

**136. It has been put to us that the removal from scope of many areas of social welfare law will lead to significant costs to the public purse as a result of increased burdens on, for example, health and housing services. We are surprised that the Government is proposing to make such changes without assessing their likely impact on spending from the public purse and we call on them to do so before taking a final decision on implementation.**

### Impact of scope changes: immigration

137. In looking at scope changes we have focused mainly on family law and social welfare law, because these are where some of the largest savings are proposed and much of the evidence we received focused on them. We now look briefly at two other areas of law where concerns were raised with us: immigration; and education.

138. In 2009–10, £88.8 million was spent on legal aid providing 101,633 acts of assistance within the category of immigration.<sup>145</sup> The Government is proposing to retain within scope immigration detention cases concerning immigration or asylum applicants, or persons to be deported or removed from the United Kingdom, who are seeking to challenge their detention, or who are on bail and are seeking a variation or extension of bail, or where they face forfeiture of their bail. The Government contends that such cases are sufficiently important, and that there are insufficient alternative means of resolution, that they should remain within scope for advice and representation before the First-tier and Upper

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141 AJ 30, para 10

142 AJ 24, para 18

143 AJ 34, para 36

144 Qq 322–324

145 HC Deb, 19 January 2011, cols 809–10W

Tribunals and higher courts. Publicly funded legal assistance will also continue to be provided for proceedings before the Special Immigration Appeals Commission.<sup>146</sup>

139. The Government is proposing to remove from scope immigration cases where the individual is not detained, including those relating to citizenship, leave to enter or remain for visits, study or employment and deportation. While the Government recognises that some of these cases raise important issues concerning family or private life, it notes that individuals are not at immediate risk as a result of decisions, in contrast to asylum applications. With regard to the cases to be removed from scope the consultation paper states that individuals involved “will usually have made a free and personal choice to come to or remain in the United Kingdom, for example, where they wish to visit a family member... or to fulfil their desire to work or study here.”<sup>147</sup> Further, the Government believes that, as tribunals are designed to be user-friendly, and interpreters are provided free of charge, individuals should be capable of navigating their way through the system and representing themselves. They also consider that the individuals concerned are not likely to be particularly vulnerable (in contrast to asylum seekers).<sup>148</sup> Based on 2008–09 figures, the Government expects to save annually £12 million in relation to legal help and £6 million in relation to legal representation as a result of the immigration law scope changes.<sup>149</sup>

140. The Immigration Law Practitioners’ Association (ILPA) has questioned the premises put forward by the Government to justify its scope changes, for example, with regard to the contention that the issues concerned are largely a matter of choice. ILPA argues that in fact these cases often concern Article 8 of the European Convention on Human Rights (the right to family and private life) and are about “whether a person can be joined by a spouse, partner, child or elderly dependent relative. They are about what happens when a relationship breaks down. They are about cases of children whose claims for asylum having failed, cannot be returned to their country of origin because their safety and welfare cannot be guaranteed. They are about people who face removal from a country where they have lived for many years, including since childhood.”<sup>150</sup>

141. ILPA is particularly sceptical about the suggestion that most people will be able to represent themselves and makes the case that the Supreme Court (and before it the House of Lords) has given more judgments on Article 8 matters in recent years than on almost any other area of law, reflecting the complexity of those cases. They also argue that “the tribunals may have been designed to be simple to navigate, but they are not. There is a plethora of statute law, caselaw, regulations rules and guidance, relating not only to substantive matters but also to procedure. Changes in the law are frequent, necessitating understanding of previous provisions and transitional provisions. The weight of precedent, from the European Court of Justice, the European Court of Human Rights and the Higher Courts, is heavy. It overlays a system that largely defies comprehension and is not susceptible of interpretation by application of principles of common sense”. ILPA

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146 The Government’s Consultation Paper, pp 45–46

147 *Ibid*, p 68

148 The Government’s Consultation Paper, pp 68–69

149 Ministry of Justice, *Legal Aid Reform: Scope Changes, Impact Assessment*, p 17

150 AJ 19, p 5

quotes a number of members of the judiciary in support of their claims regarding the complexity of the law in this area, including Lord Justice Longmore in *AA(Nigeria) v SSHD* [2010] EWCA Civ 773:

I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done<sup>151</sup>

142. As with witnesses commenting on the social welfare law changes, ILPA were not convinced that money would be saved overall and said that expenditure would simply shift elsewhere. They told us that

Complex questions of immigration, asylum and nationality law will not go away but will fall to be dealt with in other parts of the system. For example:

- Detention cases often involve consideration of a deportation/removal case where the person is being detained against removal
- People who might otherwise not have advanced a claim for asylum may do so
- It is likely that there will be an increase in public law challenges (before the High Court) where otherwise the matter might have been dealt with, at less expense, before a tribunal
- Challenges to refusals to fund a case will be an area of litigation in themselves, and may prove more costly than funding the cases directly.<sup>152</sup>

143. **As with the social welfare scope changes, the Government's contention that immigration law (other than detention cases) should be removed from scope because the issues concerned are of relatively lesser importance and that the user-friendly nature of tribunals mean that individuals should be able to navigate their way through them without publicly funded assistance has been strongly criticised. Again, as with the other scope changes, it seems likely that there will be consequential costs for budgets other than legal aid, and we recommend that the Government assesses these fully before deciding whether to proceed with its proposals.**

144. **ILPA raised two questions about the Government's proposals, namely: whether immigration cases involving domestic violence will remain within scope; and whether claims based on Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman or degrading treatment or punishment) will remain within scope. We would appreciate clarification of the Government's position on these areas.**

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151 AJ 19, pp 5–6

152 AJ 19, p 4

## Impact of scope changes: education

145. The Government is proposing to remove from scope all education cases (other than those which involve judicial review, as in other areas). The consultation paper explains that

The legal aid scheme currently funds Legal Help (initial advice and assistance) on a range of educational matters, such as school admissions and exclusions, out of school provision, bullying, school and nursery reorganisation proposals, and student disputes with universities and further education institutions. It also includes advice on appealing to the First Tier (Special Educational Needs and Disability – SEND) Tribunal and the Special Educational Needs Tribunal for Wales. Legal aid also funds advocacy on appeals from the First-tier (SEND) Tribunal, to the Upper Tribunal and higher courts. Legal aid is also available for advice and advocacy to bring civil law actions for issues such as damages for negligence, and actions for breach of contract in provision of education services.<sup>153</sup>

146. In 2009–10, spending on education-related legal aid was £3 million, which provided 5,541 acts of assistance.<sup>154</sup> The savings to be made from the education scope changes are minimal: just £1 million from legal help (savings are rounded to the nearest £1 million, as a result of which no savings are listed for legal representation, although there will be some).<sup>155</sup> The reasons given by the Government for removing this area from scope are as follows:

- The issues, while important, are not as important as the immediate threat to life or safety, liberty or homelessness
- Some of the cases may arise from personal choices, such as the conduct of children at school
- Educational damages claims are primarily about money and, as such, are less important to fund than cases concerning fundamental issues
- Where there is a strong case for damages, alternative funding, such as a CFA, should be obtainable
- Those bringing cases are not particularly likely to be vulnerable or unable to present their own case
- Legal Help for those appealing to the First-tier (SEND) Tribunal is less likely to be justified because the Tribunal is designed to be accessible for those without legal knowledge
- Alternative sources of basic help are in place<sup>156</sup>

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153 The Government's Consultation Paper, p 64

154 HC Deb, 19 January 2011, cols 809–10W

155 Ministry of Justice, *Legal Aid Reform: Scope Changes, Impact Assessment*, p17

156 The Government's Consultation Paper, pp 64–66

147. The Legal Aid Practitioners Group told us that, according to LSC statistics, at least 92% of education cases are successful, and the majority relate to Special Educational Needs cases. They argue that, given the small overall costs of legal aid in education cases, “this represents extremely good value for money for the Government”. They point out that much of the work is completed under the legal help scheme, which pays at the rate of £53.60 per hour and that “the private rate for experienced education lawyers is often between £200 – £300 per hour.” They told us that the types of cases covered

include e.g. a disabled child unable to attend school but where no alternative was considered. The child was out of school for three years. Following legal advice an annual review was arranged (a statutory requirement but it had not taken place for three years) and the child is now in full-time specialist provision. We have many examples of local authorities not complying with their statutory obligations and disabled children being out of school but after legal intervention, they did comply and the child is now receiving education.<sup>157</sup>

148. Asked whether he feared the removal from scope of this area of law would have an adverse effect, HH Judge Robert Martin, President of the Social Entitlement Chamber, said

Yes. I agree that it will have a major impact on the Special Educational Needs Tribunal. It is a high rate of success, but what would count as success is any change in the original decision which is of benefit to the appellant. Without legal advice, because representation would not be covered, there is a risk that more polarised positions would be taken and there would be less willingness to compromise or go down the mediation route. The unadvised litigants in person would not really be in a position to evaluate an offer that had been made or compromise their intent to say, “Well, we go for the whole aim of our claim.” There will be adverse effects, not only because it may make it more antagonistic, but in my view because it would leave the unrepresented appellant feeling that the proceedings have been less than fair because of an inequality of arms. On the one side, the local authority will have access to educational experts and will have reports prepared. On the other, you are put in that defensive position of only being able to challenge or dispute someone else’s evidence. You would not be in a position to put forward alternative proposals by being able to afford your own expert evidence. So I think it will have an adverse impact.<sup>158</sup>

149. On 9 March 2011 the Government published its consultation paper on special educational needs and disability. Referring to cases where parents and local authorities disagreed about the special educational provision required for children, the paper notes that, where mediation had been used in the West Midlands, four out of five cases resulted in a settlement without going to the tribunal. The paper therefore proposes that parents and local authorities should always try mediation before a parent can register an appeal with the tribunal.<sup>159</sup>

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157 AJ 41, paras 4.7i– 4.7vi

158 Q 153

159 Department for Education, *Support and Aspiration: A new approach to special educational needs and disability*, Cm 8027, pp 54–55

150. We do not believe that it is generally in the interest of children with special needs that public funds should have to be devoted to funding legal representation in disputes about their needs. This inevitably diverts local authority funding into paying for lawyers, experts and court proceedings when those funds could be better spent on providing the facilities which special needs children require. We believe that, in the context of its consultation on special educational needs, the Government should aim to reduce dramatically the requirement for legal proceedings in this area.

### Overall impact of proposed scope changes

151. The scale of savings sought by the Government requires changes to be made to the scope of legal aid. However, we have outlined some concerns about the impact of some elements of those scope changes and hope the Government will address those concerns. The effect of doing so might be to reduce the level of savings realised; however, we have set out above some proposals for savings not covered in the consultation paper which, if implemented, could help offset any shortfall in savings accruing from the refinement of the scope proposals we are advocating.

### Impact of the proposals on the national provision of legal aid

152. Providers of legal aid services have told us of their fears that the changes to scope, combined with some of the other proposed changes, such as the reduction to fee rates, will lead to providers withdrawing from the market, with potentially adverse effects for the provision of a national network of legal aid. We have already discussed the situation of the not-for-profit sector. Representatives of the legal professions have told us of the difficulties the entire body of providers will face. The Law Society told us that

The Impact Assessment accompanying the Green Papers estimates that the proposals could lead to a 67% decrease in income in rural areas and a 59% decrease in urban areas. The consequence of this is likely to be that only the largest firms in cities will survive by employing lower quality staff, as firms already operate on the margins of viability. Inevitably expertise will be lost. In particular, specialist firms and advice agencies such as Law Centres and CABx, providing social welfare law services (debt, housing, employment, welfare benefits, education) are likely to be wiped out with catastrophic consequences for people in need. There have been no remuneration increases in cash terms since 2004 and efficiency savings have already been made against inflationary cost increases. The Society does not see how many firms can continue to operate in this environment.<sup>160</sup>

153. The charity Legal Action Group (LAG) told us that in 2000 there were around 10,000 providers of civil legal aid and 2,925 providers of criminal legal aid. There are now around 2,000 providers of civil legal aid and 1,697 providers of criminal legal aid. LAG believes that if the scope and other changes are made, about 60% of firms offering family law legal aid will be forced out of the system, and in terms of civil legal aid generally, they told us that

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160 AJ 05, para 1.1

It is difficult to estimate accurately the total numbers of providers which would be left in the system with such a large number of contracts being cut. LAG believes it would be around 900 firms of solicitors, but this figure could be much lower as it would not be viable for many firms to continue in the legal aid system especially with the proposed cuts to scope in family law. Around 100 NfP providers might remain, but again this figure could be much lower as the areas completely cut from scope, such as welfare benefits have a larger impact on NfP agencies. LAG believes if the government's proposals are implemented the attrition in the numbers of providers over recent years will become a rout and legal aid will cease to be viable as a nationwide public service.<sup>161</sup>

154. LAG contends that solicitors continuing to provide legal aid would tend to specialise in child protection and domestic violence cases, and would be concentrated in large urban areas, with people living outside these areas being unable to access legal aid services. They are also concerned that there might not be a sufficient number of firms to allow for conflicts of interest and have called for a more detailed impact assessment of the proposed changes in civil family legal aid to be undertaken, in order to model the number and location of firms specialising in family law which would remain in the system with a view to ensuring that family lawyers remain within reasonable travelling distances of the public nationally. LAG claims that the situation is worse with regards to other areas of law and that “the history of civil legal aid shows that the pattern of provision on the ground determines whether the public can access their legal rights. If no services are available the public are marooned from both advice and representation in civil law. LAG fears that if the planned scope changes go ahead this will be exacerbated, as the remaining legal aid services will be further concentrated, leading to a post code lottery for services, which the bulk of the population will lose.”<sup>162</sup>

155. The Government's impact assessment states that “it is estimated legal aid providers would no longer provide between £247m and £275m worth of current services.... For those services which are still provided, it is estimated legal services providers would receive between £144m and £154m less income. This would stem from the civil and criminal fee reforms and from the telephone advice reforms.” The assessment makes it evident that it is not clear what practical impact these reductions will have:

Given the uncertainty surrounding the possible client response to these proposals, the impact on providers is also subject to much uncertainty. The impacts on providers might take the following forms:

- there would be a loss of business for some legal services providers which are contracted with the LSC to provide legally aided services;
- there might be an increase in business for other service providers, including perhaps alternative resolution service providers or services which support self-resolution, which are funded by people who previously used to receive legal aid.

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161 AJ 21, pp 1-3

162 AJ 21

The overall impact on providers would also depend upon individual providers reliance on income from legally aided clients. In addition the impact on providers is dependent upon how they adjust to changing patterns of demand. For example, if providers are able to cut costs and identify other efficiencies, or if providers are able to move into other business areas the impact on the them is likely to be lessened.<sup>163</sup>

156. In oral evidence Mr Djanogly disputed the claim that legal aid would cease to be a national service, pointing out that the £350million proposed expenditure reduction was from a budget of £2.2 billion.<sup>164</sup> **We note the fears expressed by some providers that the Government’s proposals could result in the end of legal aid as a national public service. We are not convinced that this will necessarily be the case but we think that, for several reasons, there could be significant under-supply of providers in some areas of the country, or indeed some ‘advice deserts’. We note the Minister’s assertion that the savings to be made of £350 million have to be seen in the context of an overall budget of £2.2 billion. The Government’s own impact assessment notes that there is “much uncertainty” about the impact on providers and we urge the Government to conduct a more thorough assessment of the likely effect on geographical provision of each category of civil and family law before deciding whether to implement the proposals.**

157. While he sought to refute the notion that the Government’s proposals would result in the end of the national system of legal aid, the Minister did accept that the avoidance of legal aid deserts was an important issue and said that it would be dealt with by two means: implementing competitive tendering and introducing an effective telephone advisory service.<sup>165</sup>

158. Although the Government is reducing remuneration rates paid to legal aid providers, it accepts that relentlessly pursuing this approach is not sustainable in the longer term and so proposes to introduce a model of competitive tendering for services to replace the system of administratively set fees. The objective is for the Government to define the services it wishes to purchase and for suppliers to bid to deliver that work according to their preferred business model, which should facilitate innovation and profit. While the consultation paper recognises that “a move to full market competition is likely to present significant challenges in design and delivery” it is clear that “competition is the right way forward” and intends to introduce competitive tendering for criminal work in the first phase, and to subsequently extend it to the provision of face-to-face services for civil and family law. The Government is going to consult on a competitive tendering model, with a view to opening a price competitive tender in certain areas in 2012 with other areas following on a rolling basis.<sup>166</sup>

**159. The Government has begun a separate consultation on the introduction of a competitive tendering model for legal aid and its potential to encourage efficiencies and innovation. We note the reference to this work by the Minister in answer to a question about possible advice deserts and believe that any competitive tendering**

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163 Ministry of Justice, *Cumulative Legal Aid Reform Proposals*, pp 10–11

164 Q 384

165 Q 385

166 The Government’s Consultation Paper, pp 113–15

**model adopted should have as a key objective the avoidance of such deserts. We look forward to the outcome of the consultation exercise.**

160. The other means by which the Minister hoped the problem of advice deserts could be avoided was the introduction of an effective telephone advisory service. The consultation paper proposes to introduce “a simple, straightforward” telephone service, based on the current Community Legal Advice (CLA) helpline as a single gateway to civil legal aid services. Thus, the vast majority of clients will make initial contact with legal aid services through the telephone helpline, rather than through face-to-face services. The potential savings through offering services in this way are £50 – 70 million.<sup>167</sup> The paper states that clients should be able to access information and advice via the telephone and online:

- at a time and place convenient to them;
- without needing to travel or wait for an appointment with a face to face provider;
- over extended hours (compared with face to face), enabling them to resolve their problems more swiftly, reducing stress and anxiety;
- to obtain earlier resolution in order to help prevent problems multiplying and escalating; and
- to help identify when Alternative Dispute Resolution (such as mediation) would be the most appropriate route to problem resolution.<sup>168</sup>

The Minister explained that “we see an effective telephone advisory service as a way of helping those who are in remote rural areas, those who are disabled and those who can’t afford transport. You can call up this advisory service and they will call you back. You don’t even have to pay for the phone call. We see this as another way of directing our resources to where they are most important and getting the best advice to people. We think there is a lot we can do through the use of the telephone.”<sup>169</sup>

161. While the Government’s impact assessment notes that a telephone service may be preferable for some clients and may lead to greater consistency of advice and improved service quality, it also highlights the potential drawbacks of such an approach:

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 cues. 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.<sup>170</sup>

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167 Ministry of Justice, *Legal Aid Reform: Provision of Telephone Advice, Impact Assessment*, p 2

168 The Government’s Consultation Paper, p 82

169 Q 385

170 Ministry of Justice, *Legal Aid Reform: Provision of Telephone Advice, Impact Assessment*, pp 10 and 12

162. Providers of services also told us they were worried about the potential impact of having a single telephone gateway. For example:

Telephone advice has been suggested as a way forward. From RA's experience it would be impossible to successfully deliver most of the casework currently provided face to face for clients by telephone. There is a place for telephone advice, but it should be part of a range of options, and is only suited for a limited type of work, and for certain clients. The reality is that majority of telephone advice get referred on to face to face advice for complex matters. (Riverside Advice, AJ31, para 22)

As regards quality, whilst we recognise that telephone advice can be both cost efficient, effective and convenient for some clients, we are concerned that introducing a mandatory requirement to access Legal Aid Services via the CLA helpline (save for 'emergency cases') and driving the delivery of the 'vast majority' of casework over the phone will have a detrimental effect. We have particular concerns about the potential effectiveness of the delivery of Legal Advice over the telephone in connection with asylum claims. Many of these clients have experienced highly traumatic events including rape, torture and the death of family members. It can often take a period of time before clients feel able to disclose what has happened to them. In addition it can be very difficult, over the telephone, to gauge, whether the client and the interpreter understand each other. It is the experience of BHT that face to face interaction is, almost without exception, the most effective way of building the trust necessary to take effective witness statements in these situations. (Brighton Housing Trust, AJ28, paras 3.6 and 3.7)

**163. We accept there are concerns about the ability of some vulnerable clients to access services via a telephone helpline. However, the scale of the savings to be made through the use of such a helpline (£50 – 70 million annually) and the fact that some clients might benefit from such a service, means that this is an option worth pursuing. We encourage the Government to do so, but would also urge it to work with both public and private providers of services to make sure the helpline is designed in a way which makes it effective for vulnerable clients. We urge the Government to monitor closely the effectiveness of the helpline, particularly for vulnerable clients.**

## Impact of the proposals on courts and tribunals

164. The Government's impact assessment says of the likely effect of the reforms on the courts and tribunals:

The proposed reforms might lead to a reduction in the total volume of court and tribunal cases. A reduction in total case volumes might be associated with some types of one-off court and tribunal capacity adjustment costs and with other types of one-off court and tribunal capacity adjustment savings. The net position is subject to further consideration.

In addition the proposed reforms might lead to an increase in the volume of cases where clients choose to represent themselves in court or at a tribunal without using Legal Representation (litigants in person). It has been assumed that on balance any

such effect should not have a significant impact on ongoing court or tribunal operating costs.<sup>171</sup>

165. We understand why the Government assumes that reducing legal aid from certain areas of law is likely to lead to a reduction in the number of cases reaching court in those areas, and we think that assumption is probably correct in general. However, some witnesses did feel that the Government's proposals might lead to an increase in the number of cases reaching court. For example, Greenwich Housing Rights said that

The proposed reforms in relation to scope and financial eligibility are unlikely to reduce the number of cases in the local civil court within the social welfare law categories. The areas of housing law being removed from scope generate a small fraction of the cases in the civil courts. The areas of housing law remaining in scope generate much of the local court's civil caseload, but such actions are initiated by landlords. We anticipate that removing debt, welfare benefits and employment from scope may actually increase the number of housing cases in the local courts. The vast majority of clients assisted by [Greenwich Legal Advice Services] with housing possession cases during 2009–10 reported that the underlying causes of their inability to pay the rent were debt, benefit, employment and family law issues. By removing the majority of these issues from scope, clients will not be able to access the advice and support they need to resolve problems at an early stage. This will increase the pressure on tenants and home-owners and increase the likelihood that rent and mortgage arrears will escalate to the point that landlords and mortgagees will initiate formal court proceedings. The lack of available advice and support will increase the pressure on low-income and/or heavily indebted families, leading to more complicated and serious family law disputes (and therefore a greater number of civil court cases).<sup>172</sup>

166. We received evidence about the likely impact of increased numbers of litigants in person from Professor Richard Moorhead (who conducted research on this matter along with Mark Sefton for the then Department of Constitutional Affairs in 2005). Professor Moorhead believes that reductions in legal aid will discourage participation in court proceedings "where that participation would (usually) be in the clients' interest (and in the interests of justice)". His research found that the largest group of unrepresented litigants were defendants in housing and debt cases and that unrepresented *claimants* were relatively rare, suggesting that usually claimants will only bring cases if they can secure representation. Where claimants do wish to bring proceedings in the absence of representation, they need strong motivations to do so, and Professor Moorhead said that

this may lead to two particular classes of unrepresented claimant appearing before the court: litigants operating in a dispute where the emotional dimensions are very strong (which may be expected to impact on litigant behaviour and make those cases harder, and more resource intensive to manage) and litigants who are obsessive or otherwise difficult. Our research study found that obsessive/difficult litigants were a very small minority of unrepresented litigants generally, but posed considerable

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171 AJ 20

172 AJ 27, para 2.1

problems for judges and court staff. We also know from the Court of Appeal's annual reports that they contribute to the large volume of unrepresented litigants seeking to bring cases in the Court of Appeal (adding cost into that part of the system). It is likely that this small, but key, group will increase as a result of the changes increasing court costs unpredictably but potentially significantly. The other group: desperate litigants fighting over high-stakes issues such as the future of their children may also increase costs within the courts and for other relevant organisations (such as CAFCASS).<sup>173</sup>

167. Two other points from Professor Moorhead's evidence are of particular interest. Firstly, that "a system which is expected to successfully engage with unrepresented litigants needs to rethink its structures, policies and approaches", including (but not limited to) the training of judges, the simplification of procedural rules and a reassessment of the role of court staff. Secondly, that it is not clear whether the withdrawal of legal aid in family cases will reduce the number of applications in such cases or whether there will be an increased number of litigants in person (or both). This uncertainty is caused by a lack of historical data which leads Professor Moorhead to argue that "the Ministry of Justice's capacity to comment meaningfully on the significance of litigants in person must be in doubt in the absence of such basic data in their system."<sup>174</sup>

168. We were interested to hear the views of senior members of the judiciary concerning the impact of litigants in person on proceedings. Asked whether they shared the surprise of others commenting on the proposals at the assertion that any increased time spent in dealing with litigants in person would be offset by a reduction in the number of cases, Sir Nicholas Wall said he did share that surprise and that

One of the aspects which disturbs me most is not only the proposed withdrawal of public funding from that whole sphere but also the fact that legal advice will not be available. We in the family justice area rely very strongly on the lawyers to give sensible, practical, down-to-earth advice which settles cases. Most people settle their cases. It is only a minority who fight. But, with the absence of any advice, it seems to me the likelihood is that more cases will be contested. More cases will be contested on the basis that they have no legal representation. That will take longer, be more difficult and will slow the whole process down very substantially.<sup>175</sup>

Sir Anthony May said that he shared the surprise "in part" but that he did think "that to some extent there will be a balancing out. I think the likelihood is that if legal aid was withdrawn in Administrative Court cases one needs to identify what they would be. You would get an increase in unrepresented litigants and those individual cases would take longer and require more court, judicial and administrative time. But I do actually believe that there would be fewer cases."<sup>176</sup>

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173 AJ 20

174 AJ 20

175 Q 143

176 *Ibid*

169. The Ministry of Justice told us that its “ impact assessment attempted to look at the possible impact on HMCS, recognising on the one hand that there would probably be some increase in litigants in person, which would be likely to make some cases take longer, but on the other hand the best analytical assumptions that we could bring to it also suggested that there would probably be some reduction in the overall number of cases. We accept that this kind of prediction of behavioural change is extremely difficult. I don’t think we would try to suggest that there is any arithmetical certainty behind what are simply best estimates.”<sup>177</sup>

170. We asked the Department what steps it was taking better to understand the impact of litigants in person on the courts and tribunals system. They told us

The Department is pursuing three avenues of research. One is a literature review on the impact of litigants in person on the courts. This will look at international evidence as well as domestic research. It will look at questions such as

- who they are, how many there are, what are their motivations;
- what impact they may have on court processes;
- whether litigants in person have different outcomes compared to litigants with representation;
- what action works in assisting litigants in person.

Ministry of Justice social researchers are conducting the literature review, rather than an external researcher, as they are better able to complete the project within the necessary timeframe.

The second avenue of research is an analysis of court case files for the Family Justice Review. Subject to the number of cases obtained, we will explore this data to identify any findings about unrepresented litigants. Lastly, we are exploring the quality of administrative data held by HMCS with a view to analysing differences between cases where litigants are represented and not represented. This should enable us to better understand the impacts and will help to underpin the analysis in the final Impact Assessments due to be published alongside the legal aid consultation response in spring 2011. In addition, there will be a post-implementation review of any reforms.<sup>178</sup>

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177 Q 320

178 AJ 49

## 6 Conclusion

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171. The full cost implications of the Government's proposals cannot be predicted with a great deal of accuracy given the difficulties in knowing what impact behavioural change will have on the number of cases brought to the courts and the incidence of litigants in person.

172. There is insufficient information about the impact of litigants in person on court processes, although we welcome the literature review and related work being undertaken by the Department in order to gain a better understanding of this issue. In any event, it seems probable that the Government's proposals, if implemented, are likely to lead to an increase in the number of litigants in person. We urge the Government to build on the findings of its ongoing research by establishing an expert group, involving members of the judiciary, lawyers and others, to review what can be done to make more effective the manner in which the courts and tribunals handle litigants in person, with a view both to making recommendations aimed at containing costs and ensuring that justice is done.

173. We have identified a number of areas where more radical change, going beyond the savings required in the short-term, should be explored. These will require the building up of a better evidence base.

174. The Government's proposals to reduce the cost of legal aid are a response to the budgetary situation and to the high level of expenditure on legal aid in this country by comparison with others. The proposals present a severe challenge to many of those involved with the justice system, because they assume that less use will be made of legal proceedings, that voluntary and not-for-profit organisations in difficult financial circumstances will be able to find new ways of funding legal advice, and that courts and tribunals will make it easier for litigants to appear before them without legal assistance. In our view it will also be necessary for public bodies to improve their decision-making so as to generate fewer appeals to the courts and tribunals, an approach which needs to be encouraged by shifting financial responsibility for some of the costs to the bodies whose decisions incur them. Ministers need also to look at other proposals to reduce the cost of legal aid, such as stricter merit tests applied by the courts with regard to judicial review. The Government's proposals, which need considerable further refinement, assume a major change in the way the accessibility of the justice system has come to be viewed, and it is a change for which many of those involved are unprepared.

# Conclusions and recommendations

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## The financial context

1. The Government's dramatic proposed reform of legal aid is consequent upon the need to make drastic reductions in public expenditure — the Ministry of Justice must cut its spending by almost a quarter, and reductions in legal aid costs will form an important part of that. In that context we accept the necessity of certain changes, and the fact that there are other grounds for making some of them, but we make specific recommendations about how we think the Government's proposals should be refined. (Paragraph 11)

## Factors contributing to high costs

2. We are disappointed in the dearth of evidence on legal aid expenditure at case level to enable the identification of key influences on cost. We note the difficulties in collating quantitative evidence for useful national and international observations to be made, and we believe that a series of small-scale domestic qualitative research studies, examining the drivers of cost per case, would provide the Government with more valuable data to inform its efforts to reduce spending. It may be possible to reduce the amount of legal work required, for example, by reducing the complexity of particular areas of law, and thereafter to adjust the level of fixed fees accordingly. (Paragraph 30)

## Lessons from international research for efforts to reduce costs

3. The Ministry of Justice needs to develop a greater understanding about what is driving demand and the cost of cases in order for there to be confidence in its estimates of the impact of its proposals for reform. Reducing spending on legal aid may have financial implications — and indeed may inflate costs — in other parts of the legal system. (Paragraph 37)
4. The research, however exploratory, suggests to us that having critically scrutinised the way our legal procedures have evolved there is potential for the Government to devise longer-term options for reform, rather than concentrating on simple options, such as reducing scope. (Paragraph 38)
5. International comparisons are difficult, because of the many variables between different systems, and there are significant gaps in the research. However, it remains the case that the legal aid system in England and Wales is one of the most expensive in the world and, in the context of the budget savings the Government needs to find, this strengthens the case for examining legal aid costs to see where they can be reduced. (Paragraph 39)

## Reducing costs: Measures in the consultation paper

6. By far the largest area of savings in the Government's proposed reforms is the removal from scope of various categories of law, and it is on this area that much

of our evidence has focused and on which we concentrate in this Report. However, a further important saving — £72 million annually — would be realised from the Government's proposed 10% reduction in fees for civil and family legal aid. We do not underestimate the difficult situation faced by many legal aid providers. In some cases they have been subject to a fees standstill for ten years. The ability of smaller firms, particularly in rural areas, to provide services has been significantly reduced by tests and procedures implemented by the Legal Services Commission. We are aware that the other proposed changes, such as those to scope, will exacerbate those difficulties. However, given the extent of savings which the Ministry of Justice is having to make, we think in principle that it is correct that fees are reduced rather than, for example, further changes made to scope. We expect the Department to monitor closely the impact this change, combined with others, has on the supply of legal aid providers. It should be prepared to respond quickly — and potentially explore whether the pool of providers can be expanded, particularly by allowing smaller firms to provide services — if supply threatens to diminish to a critical level. We shall scrutinise the performance of the Department in this respect throughout the remainder of this Parliament. (Paragraph 46)

7. We also welcome the steps the Government is taking to reduce bureaucracy and costs in the administration of legal aid but we are concerned that such steps are carried out in such a way as to ensure that real administrative savings are made. (Paragraph 47)

### Other means of reducing costs: criminal cases

8. While we welcome the Government's recognition that reductions in scope cannot readily be made in the field of criminal legal aid, we were struck by the evidence of the Director of Public Prosecutions that cost savings could be achieved by greater efficiency in the courts, which in turn depends on all the agencies concerned working together more effectively. We expect the Ministry of Justice to take a lead in pushing this work forward. (Paragraph 49)

### Judicial Review

9. While we support the Government's retention within scope of judicial review and asylum matters, we were interested in Sir Anthony May's suggestion that consideration be given to removing automatic legal aid for those judicial review applications which are, in effect, seeking reconsideration of previously dismissed appeals, an example being emergency applications within the Administrative Court in asylum cases. We recommend that the Government assesses the potential cost savings which might be made from this change and consult on its merits. The Government should also consult on whether the principle could be applied to other areas of judicial review. (Paragraph 52)

## Reducing the number of cases prompted by poor decision-making

10. We welcome the steps being taken by the Department for Work and Pensions to increase the quality of decision-making, and the work undertaken by that Department and the Tribunals Service to ensure that cases which do not need to be dealt with at tribunal are resolved earlier. We note that funds are transferred from the DWP as recompense for the expense caused to tribunals as a result of policy changes. However, we think there is potential for such a “polluter pays” principle to be extended considerably, with the DWP (and other public authorities whose decisions impact upon the courts and tribunals) required to pay a surcharge in relation to the number of cases in which their decision-making is shown to have been at fault. We think that in rejecting this idea as a “robbing Peter to pay Paul” transfer of funds around the public purse, the Minister is overlooking the potential benefit such a policy would have in providing a financial incentive to public authorities to get their decisions right first time. We accept that there would be bureaucratic hurdles to be jumped over in creating such a system, but we think the potential benefits merit further consideration and that, in the long-term, cost-savings could accrue from such a policy. (Paragraph 60)

## Other cost savings

11. While we have not had time to assess these measures in detail, we recommend that the Government assesses the merits of the cost-saving proposals put forward by the Law Society. While we understand the need for short-term savings and support many of those set out in the consultation paper, we hope that the Government will now turn its mind to addressing some of the long-term cost drivers of legal aid, not least with a view to reducing the extent of some of the limitations to scope proposed in the consultation paper, the impacts of which we consider below. (Paragraph 63)

## Impact of scope changes on vulnerable clients

12. According to the Government’s own figures, the changes it is proposing to the scope of legal aid will result in 500,000 fewer instances of legal help and 45,000 fewer instances of legal representation being funded by legal aid annually. The Government has conceded that it does not know the extent to which these reductions would impact upon people with disabilities and black and minority ethnic people because of information gaps. While it is taking some steps to address those gaps, evidence we have received, and the Government’s own thinking, suggest that these people, as well as other vulnerable groups, rely more on legal aid services than do the less vulnerable, and so there is the potential for them to be disproportionately hit by the changes. If this were to happen it would sit uneasily with the Government’s commitment to protect the most vulnerable in society. (Paragraph 69)

## Scope: private law children and family cases

13. The Government is right to retain legal aid in scope in cases where actions by a public authority “affect the integrity of the family unit”. We accept there is a philosophical difference between the state intervening to remove a child from a family and an absence of contact between a parent and child as a result of relationship breakdown, and that the case for the taxpayer to fund legal costs is significantly stronger in the former than in the latter case. (Paragraph 79)
14. We note concerns put to us that many of the parents involved in difficult cases involving children will face problems in accessing a court and representing themselves and that this could impact adversely on the wellbeing of the children concerned. We note further the argument put to us by the Family Law Bar Association that, while the consultation paper appears geared towards meeting the interests of the party seeking legal aid, it does not meet the interests of children involved in proceedings. We call on the Government to address these issues specifically in its response to the consultation. (Paragraph 80)

## Domestic violence as a criterion

15. Given that family law is the single most expensive area of legal aid provided through the community legal service we understand why the Government is seeking to reduce spending on it. However, we are concerned that using the presence of domestic violence as a proxy for the most important cases will lead to a perverse incentive to make false allegations of such violence or, where such violence has occurred, cause it to feature in disputes before the courts where it might otherwise not have done so. As well as potentially harming children in such circumstances, this could add unnecessary expense, including the cost of legal aid for persons accused of domestic violence. Additionally, there is the converse problem of victims of domestic abuse who do not want such abuse to be brought to court and who will therefore be ineligible for legal aid. We therefore call on the Government to reconsider its use of domestic violence as a gateway to legal aid funding and to bring forward alternative proposals by which to focus family law legal aid expenditure on the most deserving cases. (Paragraph 87)
16. If the Government does insist on retaining domestic violence as a criterion for legal aid eligibility it should adopt a definition of domestic abuse which explicitly incorporates non-physical abuse and we welcome the Minister’s statement that he will consider this matter further in light of the consultation responses. Further to broadening the definition of domestic abuse, the Government should ensure that undertakings as to future conduct rather than orders of the court are sufficient to confer eligibility. (Paragraph 88)

## Mediation

17. The Government’s commitment to the provision of mediation in private law cases is very welcome and its aspiration to use mediation to divert as many cases as possible from the courts is prudent and generally in the best interest of both parties and any children involved. However, we agree with the President of the

Family Division that mediation cannot be a panacea and that it will not work in all cases. Further work needs to be done on how difficult and unresolved cases can be dealt with if legal aid is not available. (Paragraph 98)

### Rule 9.5 cases

18. We share concerns raised with us that parents in rule 9.5 cases will not be eligible for legal aid, and that courts will have unrepresented litigants in cases which involve significant difficulty. We urge the Government to consider amending its proposals to permit legal aid provision in any rule 9.5 case where it is clearly necessary. (Paragraph 101)

### Timing of the proposals

19. The Family Justice Review Panel is undertaking a fundamental reassessment of the family law system and its recommendations are likely to have a significant impact upon that system. The Government should wait until the Review Panel has produced its full report before implementing changes to the legal aid system in the area of family law. (Paragraph 105)

### Help and advice from other sources

20. We welcome the Government's provision of funding for face-to-face debt advice for a further year and the £100 million Transition Fund, designed to help not-for-profit organisations change to a business model which leaves them less reliant on public funds. However, long-term concerns remain: how will sufficient debt advice be provided once the deferred ending of the face-to-face service happens? How many organisations will be able successfully to adapt their income streams in the manner encouraged by the Transition Fund? What will happen to those who cannot and the clients who use their services? The answers to these questions are not known and the Government should be prepared to extend further the provision of face-to-face debt advice and offer a second round of Transition Fund grants if necessary. (Paragraph 123)
21. We note that the Government recognises the difficulties faced by the not-for-profit advice sector. It is unsatisfactory that, on the Government's own admission, the Cabinet Office has been brought in at a late stage. We welcome the work it is doing to assess the situation and to find ways of helping the voluntary and not-for-profit sectors, but we are concerned that leadership and co-ordination across departments has not covered all relevant areas. Representatives of organisations in this field have made it clear they do not believe it will be possible for their organisations to meet all the unmet demand which will be created by the proposed changes to legal aid. That assertion casts doubt on a key condition for the Government's proposed reforms – that clients will be able to access non-legal aid-funded sources of advice. (Paragraph 128)

## Self-representation at tribunals without assistance

22. While the nature of tribunals generally means that legal representation is not necessary, we are concerned that the removal of legal aid for legal help could cause more cases without a realistic chance of success to reach tribunals (thus increasing the tribunals' costs). We are also concerned that the ability of the most vulnerable people to present their cases will be weakened because they will not have had help and advice in preparing them. This could deny justice to the individuals concerned and increase the time and expense necessary to deal with the case at tribunal. The increasing complexity of procedure in some tribunals has made it difficult for vulnerable people to represent themselves. We urge the Government to initiate consultations in order to develop proposals to make tribunals more user-friendly and less legalistic. (Paragraph 132)

## Costs to the public purse of removing legal aid

23. It has been put to us that the removal from scope of many areas of social welfare law will lead to significant costs to the public purse as a result of increased burdens on, for example, health and housing services. We are surprised that the Government is proposing to make such changes without assessing their likely impact on spending from the public purse and we call on them to do so before taking a final decision on implementation. (Paragraph 136)

## Impact of scope changes: immigration

24. As with the social welfare scope changes, the Government's contention that immigration law (other than detention cases) should be removed from scope because the issues concerned are of relatively lesser importance and that the user-friendly nature of tribunals mean that individuals should be able to navigate their way through them without publicly funded assistance has been strongly criticised. Again, as with the other scope changes, it seems likely that there will be consequential costs for budgets other than legal aid, and we recommend that the Government assesses these fully before deciding whether to proceed with its proposals. (Paragraph 143)
25. ILPA raised two questions about the Government's proposals, namely: whether immigration cases involving domestic violence will remain within scope; and whether claims based on Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman or degrading treatment or punishment) will remain within scope. We would appreciate clarification of the Government's position on these areas. (Paragraph 144)

## Impact of scope changes: education

26. We do not believe that it is generally in the interest of children with special needs that public funds should have to be devoted to funding legal representation in disputes about their needs. This inevitably diverts local authority funding into paying for lawyers, experts and court proceedings when those funds could be better spent on providing the facilities which special needs children require. We

believe that, in the context of its consultation on special educational needs, the Government should aim to reduce dramatically the requirement for legal proceedings in this area. (Paragraph 150)

### Overall impact of scope changes

27. The scale of savings sought by the Government requires changes to be made to the scope of legal aid. However, we have outlined some concerns about the impact of some elements of those scope changes and hope the Government will address those concerns. The effect of doing so might be to reduce the level of savings realised; however, we have set out above some proposals for savings not covered in the consultation paper which, if implemented, could help offset any shortfall in savings accruing from the refinement of the scope proposals we are advocating. (Paragraph 151)

### Legal aid as a national public service

28. We note the fears expressed by some providers that the Government's proposals could result in the end of legal aid as a national public service. We are not convinced that this will necessarily be the case but we think that, for several reasons, there could be significant under-supply of providers in some areas of the country, or indeed some 'advice deserts'. We note the Minister's assertion that the savings to be made of £350 million have to be seen in the context of an overall budget of £2.2 billion. The Government's own impact assessment notes that there is "much uncertainty" about the impact on providers and we urge the Government to conduct a more thorough assessment of the likely effect on geographical provision of each category of civil and family law before deciding whether to implement the proposals. (Paragraph 156)

### Competitive tendering

29. The Government has begun a separate consultation on the introduction of a competitive tendering model for legal aid and its potential to encourage efficiencies and innovation. We note the reference to this work by the Minister in answer to a question about possible advice deserts and believe that any competitive tendering model adopted should have as a key objective the avoidance of such deserts. We look forward to the outcome of the consultation exercise. (Paragraph 159)

### Telephone helpline

30. We accept there are concerns about the ability of some vulnerable clients to access services via a telephone helpline. However, the scale of the savings to be made through the use of such a helpline (£50 – 70 million annually) and the fact that some clients might benefit from such a service, means that this is an option worth pursuing. We encourage the Government to do so, but would also urge it to work with both public and private providers of services to make sure the helpline is designed in a way which makes it effective for vulnerable clients. We urge the

Government to monitor closely the effectiveness of the helpline, particularly for vulnerable clients. (Paragraph 163)

## Conclusions

31. The full cost implications of the Government's proposals cannot be predicted with a great deal of accuracy given the difficulties in knowing what impact behavioural change will have on the number of cases brought to the courts and the incidence of litigants in person. (Paragraph 171)
32. There is insufficient information about the impact of litigants in person on court processes, although we welcome the literature review and related work being undertaken by the Department in order to gain a better understanding of this issue. In any event, it seems probable that the Government's proposals, if implemented, are likely to lead to an increase in the number of litigants in person. We urge the Government to build on the findings of its ongoing research by establishing an expert group, involving members of the judiciary, lawyers and others, to review what can be done to make more effective the manner in which the courts and tribunals handle litigants in person, with a view both to making recommendations aimed at containing costs and ensuring that justice is done (Paragraph 172)
33. We have identified a number of areas where more radical change, going beyond the savings required in the short-term, should be explored. These will require the building up of a better evidence base. (Paragraph 173)
34. The Government's proposals to reduce the cost of legal aid are a response to the budgetary situation and to the high level of expenditure on legal aid in this country by comparison with others. The proposals present a severe challenge to many of those involved with the justice system, because they assume that less use will be made of legal proceedings, that voluntary and not-for-profit organisations in difficult financial circumstances will be able to find new ways of funding legal advice, and that courts and tribunals will make it easier for litigants to appear before them without legal assistance. In our view it will also be necessary for public bodies to improve their decision-making so as to generate fewer appeals to the courts and tribunals, an approach which needs to be encouraged by shifting financial responsibility for some of the costs to the bodies whose decisions incur them. Ministers need also to look at other proposals to reduce the cost of legal aid, such as stricter merit tests applied by the courts with regard to judicial review. The Government's proposals, which need considerable further refinement, assume a major change in the way the accessibility of the justice system has come to be viewed, and it is a change for which many of those involved are unprepared. (Paragraph 174)

# Formal Minutes

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**Tuesday 15 March 2011**

Members present:

Rt Hon Sir Alan Beith, in the Chair

Mr Robert Buckland  
Ben Gummer  
Rt Hon Elfyn Llwyd

Claire Perry  
Yasmin Qureshi

The following declaration of interests relating to the inquiry were made:

Mr Robert Buckland declared interests as follows:

That he sat as a recorder in the Crown Court and that he had been a legal aid barrister for 20 years, and although he had no current cases, he was still in receipt of payments for criminal legal aid for cases completed before the election.

Rt Hon Elfyn Llwyd declared interests as follows:

That he had practised as a solicitor and barrister, and had done legal aid work, both civil and criminal, but had been non-practising since April 2010. He had also been a Member of the Law Society and the Family Law Bar Association.

Yasmin Qureshi declared interests as follows:

That although she was a barrister she had returned her practising certificate. She had received receipts for both criminal and civil legal aid cases and although she had not carried out any legal aid work since the election she was still in receipt of payments for legal aid for cases completed before the election.

Draft Report (*Access to Justice: Government's proposed reform of legal aid*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 174 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Third Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 22 March at 10.15am]

# Witnesses

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## Wednesday 15 December

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**Rt Hon Kenneth Clarke QC MP**, Secretary of State for Justice and Lord Chancellor

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## Tuesday 1 February 2011

**Emma Baldwin**, Free Representation Unit, **Rebecca Scott**, Legal Advice Manager, Royal Courts of Justice Advice Bureau, and **Sally Denton**, Senior Solicitor, Nottingham Law Centre

Ev 13

**Julie Bishop**, Director, Law Centres Federation, **Gillian Guy**, Chief Executive, Citizens Advice, and **Paul Newdick CBE**, Trustee, National Pro Bono Centre

Ev 20

## Monday 7 February 2011

**Rt Hon Sir Nicholas Wall**, President, Family Division, **Rt Hon Sir Anthony May**, President, Queen's Bench Division, and **HHJ Robert Martin**, President, Social Entitlement Chamber

Ev 28

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**Campbell Robb**, Chief Executive, and Simon Pugh, Head of Legal Services, Shelter

## Tuesday 8 February 2011

**Christina Blacklaws**, Chair, Law Society's Legal Affairs and Policy Board, **Steve Hynes**, Director, Legal Action Group (LAG), **Laura Janes**, Chair, Young Legal Aid Lawyers, and **Paul Mendelle QC**, Member of the Bar Council

Ev 42

## Monday 14 February 2011

**Professor Roger Bowles**, University of York

Ev 56

**Sarah Albon**, Director for Civil, Family and Legal Aid Policy, Ministry of Justice, and **Carolyn Downs**, Chief Executive, Legal Services Commission

Ev 62

## Wednesday 16 February 2011

**Jonathan Djanogly MP**, Parliamentary Under-Secretary of State and **Sarah Albon**, Director for Civil, Family and Legal Aid Policy, Ministry of Justice

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## Wednesday 2 March 2011

**Nick Hurd MP**, Parliamentary Secretary (Minister for Civil Society), Cabinet Office

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## List of printed written evidence

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- 1 Nottingham Law Centre (AJ 50)
- 2 Law Centres Federation (AJ 40&54)
- 3 Citizens Advice (AJ 18&30)
- 4 Sir Anthony May (AJ 63)
- 5 Shelter (AJ 34)
- 6 Law Society (AJ 05)
- 7 Family Law Bar Association (AJ 16)
- 8 Criminal Bar Association (AJ 17)
- 9 Legal Action Group (AJ 21)
- 10 Young Legal Aid Lawyers (AJ 29)
- 11 Bar Council (AJ 53)
- 12 Ministry of Justice (AJ 49, 56, 60, 61, 65&66)
- 13 Community Links (AJ 59)

## List of additional written evidence

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(published in Volume III on the Committee's website [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee))

- 1 Association of British Insurers (AJ 01 )
- 2 Z2K (AJ 02)
- 3 Honourable Society of the Inner Temple (AJ 03)
- 4 Claims Standards Council (AJ 04)
- 5 Association of Personal Injury Lawyers (AJ 06)
- 6 Medical Protection Society (MPS) (AJ 07)
- 7 Prince's Trust (AJ 08)
- 8 Irwin Mitchell Solicitors (AJ 09)
- 9 Legal Expenses Insurance Group (AJ 10)
- 10 Thompsons Solicitors (AJ 11)
- 11 Resolution (AJ 12)
- 12 Box Legal Limited (AJ 13)
- 13 Legal Services Board (AJ 14)
- 14 Consumer Justice Alliance (AJ 15)
- 15 Immigration Law Practitioners' Association (AJ 19)
- 16 Professor Richard Moorhead (AJ 20)
- 17 Community Links (AJ 22)
- 18 Santé Refuge Mental Health Access Project (AJ 23)
- 19 Advice Network & Advice Centres for Avon (AJ 24)
- 20 National Accident Helpline (AJ 25)
- 21 Money Advice Trust (AJ 26)
- 22 Greenwich Housing Rights (AJ 27)
- 23 Brighton Housing Trust (AJ 28)
- 24 Riverside Advice (AJ 31)

- 25 Advice UK (AJ 32)
- 26 Motor Accident Solicitors Society (AJ 33)
- 27 David Jockelson (AJ 35)
- 28 Youth Access (AJ 36)
- 29 Action Against Medical Accidents (AJ 37)
- 30 Forum of Insurance Lawyers (AJ 38)
- 31 SCOPE (AJ 39)
- 32 Legal Aid Practitioners Group (AJ 41)
- 33 Rochdale Law Centre (AJ 42)
- 34 PCS (AJ 43)
- 35 Advice Services Alliance (AJ 44)
- 36 Junior Lawyers Division (AJ 45)
- 37 Immigration Law Practitioners' Association (AJ 46)
- 38 Helen Williams, Ty Arian Lt (Solicitors) (AJ 47)
- 39 Association of Lawyers for Children (AJ 48)
- 40 Personal Support Unit (AJ 51)
- 41 DAWN (Advice) Ltd (AJ 52)
- 42 Lexis Nexis (AJ 55)
- 43 Michael Burrige (AJ 57)
- 44 Which? (AJ 58)
- 45 Stephensons Solicitors (AJ 62)
- 46 Crossroads Womens Centre (AJ 64)

# List of Reports from the Committee during the current Parliament

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## Session 2010–11

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770