House of Commons
Justice Committee

Government’s proposed reform of legal aid

Third Report of Session 2010–11

Volume III
Additional written evidence

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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.

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. 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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# List of additional written evidence

(published in Volume III on the Committee’s website www.parliament.uk/justicecttee)

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Written evidence from the Association of British Insurers (AJ 01)

The Association of British Insurers (ABI) is the voice of the insurance and investment industry. Its members constitute over 90% of the insurance market in the UK and 20% across the EU. Employing more than 300,000 people in the UK alone, it is an important contributor to the UK economy and manages investments of £1.5 trillion, over 20% of the UK’s total net worth.

Executive Summary

1. This is the ABI response to the Justice Committee’s invitation for written evidence in relation to the implementation of the Jackson review on civil litigation funding and costs that seek to effect a “fundamental reform of the system”. The ABI has a particular interest in the following question posed by the Justice Committee:

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

2. This submission deals only with the question outlined above.

The ABI’s Response

3. The ABI believes that our personal injury compensation system is too slow and too expensive. Reform is urgently needed to limit unnecessary costs—excessive legal costs for claimants and defendants, disproportionate litigation costs for the Government, and inflated insurance premiums for consumers. To put this into context by way of example, the ABI surveyed over 50,000 low value motor accident claims from September 2009 to March 2010, and found that for every pound paid in compensation, 87p was paid in legal costs. We believe that it is important to address the issue of disproportionate legal costs and that costs are appropriate to the issues and sums involved.

4. The ABI supports the implementation of the proposals set out in Lord Justice Jackson’s review as a package and in full. We are currently consulting our members in relation to the proposals set out in the Ministry of Justice’s consultation and will submit a full and detailed response by the deadline of 14 February 2011.

5. We are, however, concerned that the consultation does not deal with the issue of referral fees, and that the Government, as stated in the MoJ Jackson consultation (para 258, page 81), “will await the outcome of the LSB’s consultation before reaching a conclusion”. We are concerned about this decision because Lord Justice Jackson’s recommendations were designed to address the problems surrounding disproportionate and excessive civil litigation costs by proposing a coherent package of interlocking reforms. We do not agree with the omission of one of the fundamental recommendations from the consultation.

6. The ABI will set out its position on the subject of referral fees in a response to the LSB by 22 December 2010.

December 2010

Written evidence from Z2K (AJ 02)

Introduction

1. The Z2k Trust works with the poorest citizens when they are tangled in the complexities of the UK benefit system and the enforcement of fines and debts against deeply inadequate unemployment benefits and the national minimum wage. We have an increasing number of active volunteers, currently 32, servicing an increasing number of cases at any one time, currently 90. We invite the Committee to watch our nine minute video on Google—Youtube—friends in need Z2K justice for vulnerable debtors.

2. We are not in receipt of LSC funding nor are we seeking any.

The Committee’s Questions

3. We are addressing the following questions and summarise our answers as follows.

(a) What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

Without legal aid we are concerned that the important accumulation and source of knowledge and experience in the legal profession about social welfare law will wither on the vine.

(b) The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

At the point where vulnerable debtors, or volunteers helping them, need legal advice on complex welfare matters they will not be resolved.
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(c) What are the implications of the Government’s proposals?

We are concerned that the proposals in the green paper have ignored the relationship between debt and mental illness reported by the Government Office for Science and the consequential increase in the costs of mental illness in the health service and in the schools and homes of families, adults and pensioners in irreversible debt and stress.

BACKGROUND

10. Legal aid is to be retained in the highest priority cases—in debt when someone’s home is at immediate risk; that is too late. It is claimed there will be 500,000 fewer cases going to court. It is unclear how the figure of 500 000 has been calculated. In fact if early advice is not available there will be more cases going through courts, such as evictions and benefit overpayment claims. The existing LSC £167 homelessness advice case fee can stop eviction proceedings and prevent homelessness if advice can be given before the home is seriously at risk. Law Centers estimate that 90% of eviction cases could be avoided if there had been good early advice at the liability order stage, and that number of liability orders rose to over 3 million in the period 2008–2009. The existing LSC £167 homelessness advice case fee can stop eviction proceedings and prevent homelessness if advice can be given before the home is seriously at risk. Law Centers estimate that 90% of eviction cases could be avoided if there had been good early advice at the liability order stage, and the number of liability orders rose to over 3 million in the period 2008–2009, the last date we have figures for.

11. An example of this can be seen with local tax proceedings. Currently there is no legal aid available at the liability order stage, and there number of liability orders rose to over 3 million in the period 2008–2009, the last date we have figures for.

12. Until the introduction of legal aid for committal proceedings following the case of Benham v UK [1996] 22 EHRR 293 over 5,000 people were to committed to prison for poll tax arrears in error. This resulted in over
1,000 appeals to the High Court and proceedings compensation claims in Strasbourg for people wrongly jailed. Many of these unfortunate consequences could have been avoided had property safeguards and been in place.

13. We believe that removing the emphasis from routine social welfare law is a false economy when so much debt is generated by a welfare system which handles 19 million individual benefit claims for around 8 million households. The amounts owed last year by welfare claimants totalled around £3 billion due to the errors of claimants and officials in the delivery benefits, largely due to the complexity of the system. A further £2 billion is owed due to fraud. (See DWP white paper on welfare reform). Routine welfare is extremely complex. Lack of early intervention will lead to very expensive appeals.

**Possible Human Rights Implications.**

14. Under Art 6 of the ECHR a person is entitled to a fair hearing in proceedings which affect the rights of a person, including civil obligations (See Rommelfanger v Germany (1989) 62 DR 151 and Diennert v France (1996) 21 EHRR 554). As in Benham v UK certain forms of civil judgment and enforcement may have a more serious effect on the citizen’s Convention rights and liberties than criminal proceedings. (Ultimately, there can really be no abandonment of the Human Rights Act because its implementation in the UK was part of the Good Friday Agreement for peace in Ulster).

**Debt and Mental Illness**

15. No account has been taken in the Ministry of Justice of the poverty and debt related mental illness reported by in a Foresight Report for the Government Office for Science. (“Mental Capital and Wellbeing—making the most of ourselves in the 21st Century.”)

16. Professor Rachel Jenkins speaking at the launch of the Foresight report explained that scientists have known about a link between mental illness and low income, but more recent research has shown that the link is probably most accounted for by debt. Those in debt have two to three times the rate of depression, three times the rate of psychosis, double the rate of alcohol dependence, four times the rate of drug dependence compared to other members of the general public.

17. The cost of mental illness to the economy at large is £105 billion a year (NHS stats) including days lost at work, far more than cancer, heart disease or obesity.

18. It is routine assistance of vulnerable people when low income welfare leads to debt that relieves stress and depression which, in turn lead on to calls on the health service creating cost to the taxpayer. However the green paper states:

The Government considers that, in general, cases which are primarily of a financial nature are less deserving of state intervention through legal aid than those involving fundamental rights. Individuals who have debt problems are able to get help and advice from a number of other sources, such as the National Debtline and the Money Advice Trust and it is right to expect individuals to take responsibility for their own financial affairs.

19. The Ministry of Justice has failed to appreciate the debilitating effect of being in debt to the state as a result welfare complexity and the lack of capacity among claimants to deal with the law involved or to take responsibility for their own finances when threatened by enforcement and bailiffs.

20. The Frank Field report *The Foundation Years* published on Friday 3rd December states:

There is a complex relationship between parenting and poverty. Poor parenting exists across the income distribution, but tends to have less of an impact on better off children where other factors provide greater protection against poor outcomes. However, stress and conflict can disrupt parenting and a lack of money or debt is one of the major sources of stress for poorer families. Analysis using the Avon Longitudinal Study of Parents and Children study showed that a reduction in income and worsening mental health tend to lead to a reduction in parenting capacity.

21. The stress of debt is exacerbated by draconian enforcement of council tax against vulnerable debtors. The Ministry of Justice has persistently refused to provide a definition of vulnerability which could underpin the protection of such debtors from aggressive and excessive enforcement of debts against poverty incomes by bailiffs.

22. The introduction of the power to break in to people’s homes to enforce fines has led to panic borrowing from home credit companies at very high interest to pay fines by, for example, single mothers with small children defending their homes from unknown male bailiffs on their doorstep for a TV licence file. Early intervention prevents costs, the debt and the consequent stress mounting up.

23. We take cases of stress related illness from GPs in Tottenham. Welfare claimants, and our volunteers supporting them, need to be able refer to legal aid solicitors in cases where social welfare laws apply. Without legal aid in this field we are concerned that the important source of knowledge and experience in the legal profession about social welfare law will wither on the vine. The number of specialist lawyers in the field is already low.

24. In the case of *Garget v London Borough of Lambeth* [2008] 20 December Lord Justice Wall observed:
In my view it remains an apparently non-eradicable blemish on our operation of the rule of law that the poorest and most disadvantaged in our society remain subject to regulations which are complex, obscure and, too many, simply incomprehensible.

It will be many years before the delivery of welfare is so efficient that legal aid does not have to be used. Meanwhile failure to provide for its ironing out its legal complexities in the removal of legal aid from most social welfare law will result in increase costs to the taxpayer in the hospitals schools and the administration of justice.

**SHORTFALL FROM 2020 TARGET**

UNEMPLOYMENT BENEFITS AT APRIL 2009 AND 60% MEDIAN INCOME.

<table>
<thead>
<tr>
<th>Benefit Type</th>
<th>Threshold £ per week</th>
<th>2009 Actual £ per week</th>
<th>2010 Threshold £ per week</th>
<th>2010 Actual £ per week</th>
<th>Benefits from 2010 £ per annum</th>
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<tr>
<td>Childless couple</td>
<td>199</td>
<td>100.95</td>
<td>−98.05</td>
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<td>64.30</td>
<td>−51.70</td>
<td>−2,688</td>
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<tr>
<td>Couple one child</td>
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<td>174.36</td>
<td>−64.64</td>
<td>−3,361</td>
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<tr>
<td>Couple two children</td>
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<td>230.47</td>
<td>−92.53</td>
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<td>Lone parent one child</td>
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<td>137.71</td>
<td>−17.29</td>
<td>−899</td>
<td>140.42</td>
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<td>50.95</td>
<td>−65.05</td>
<td>−3383</td>
<td>51.85</td>
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*Source: House of Commons Library and DWP. December 2010*

**Written evidence from the Honourable Society of the Inner Temple (AJ 03)**

The Honourable Society of the Inner Temple is pleased to respond to the recent Justice Select Committee’s inquiry on Access to Justice and Sentencing Proposals. This memorandum is submitted by the Sub-Treasurer, Patrick Maddams, the Inn’s principal administrative officer.

This submission is intended to supplement other submissions from the Bar. It focuses on issues where we feel that we can offer additional insight and analysis, in particular on the following questions:

— “What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?; and
— “What are the implications of the Government’s proposals?”

**The Honourable Society of the Inner Temple**

1. The Inner Temple is one of the four Inns of Court. As holders of the exclusive right to call candidates to the Bar of England and Wales, the Inns continue to play an essential role in the recruitment of prospective barristers. In addition, we offer substantial scholarships to train for the Bar and provide education and training—notably in advocacy—to students, pupils, new and established practitioners.

2. The Inner Temple has a long history of encouraging legal debate. As part of this role and the Inn’s prominence as a place for dialogue on issues of concern to the profession, the Inn runs a series of seminars on topical issues. This includes an upcoming seminar in February 2011 on the future of legal education.

3. The Inn has over 8,000 qualified members, including judges, barristers (practising and non-practising) and pupils. Each year, roughly 450 students apply to the Inn with the intention of training for the Bar.

**Preamble**

4. Access to justice underpins the rule of law. As basic access to justice is restricted, the rule of law is consequently diminished. The outlined cuts to legal aid will amount to more of the most vulnerable members in our society having less opportunity to access quality legal advice and advocacy when they are most in need. In addition to crime and family, these include those involved in debt; immigration; employment; housing and welfare cases.

5. Ultimately, the knock-on effects of legal aid cuts will be a reduction in the number of barristers working in these fields, large regional areas without any publicly-funded advocates, a reduction in the number of pupillages available and fewer people from under-represented backgrounds aspiring to work in publicly-funded areas of law. This could lead not only to a constriction in exclusively publicly-funded barristers but to their
extinction at the junior end. Consequently, in the longer-term, there will be fewer senior specialist barristers in these fields and subsequently fewer judges from these practice areas.

6. Barristers who work in publicly-funded practice share a strong belief in the rule of law and importance of high-quality advocacy and advice. They commit themselves to these areas, despite the already low levels of remuneration, due to its importance as public service. As barristers move their practices away from this work, the likelihood of less qualified representation and the possibility of miscarriages of justice increases.

7. The Inner Temple has worked hard to encourage diversity and social mobility in the profession. These cuts will result in students from under-represented backgrounds being discouraged from entering legal professions. As the Bar constricts, so too will the number at its junior-end and the number of pupillages available. The best and brightest graduates will no doubt look to professions where their talents are properly recognised.

INTRODUCTION

8. The Bar of England and Wales has a strong reputation nationally and internationally for the quality of its legal advice and advocacy as well as cost-effectiveness. Under the Bar Code of Conduct, the cab rank rule ensures that barristers in independent practice must accept instructions provided that they are available and they are offered a “proper fee”. The Bar has long provided its specialist services to the public irrespective of need.

9. As of December 2009, there were 12,241 self-employed barristers. In addition, there were 3,029 employed “in-house” barristers and 462 pupil barristers in their “first six”. Of self-employed barristers, only 11% (1,318) were senior professionals appointed Queens Counsel (QC)1.

10. It has been estimated that approximately 50% of self-employed barristers undertake publicly-funded work in criminal defence or prosecution, family, immigration or administrative work. This would be supported by the Criminal Bar Association (CBA)’s estimated 5,000 members2 in addition to those in the Family Law Bar Association and other associated Specialist Bar Associations. Legal aid cuts will therefore affect over 6,000 self-employed barristers, the majority of which are junior barristers.

11. Recent research conducted by the Inn has shown that fewer qualified barristers are finding a lasting career in the profession. The progression from pupillage to tenancy is increasingly tenuous as publicly-funded work is reduced and funding is squeezed. While nearly 70% of Inner Temple pupils in 2005–06 are currently practising at the Bar, less than 40% of those from 2007–08 are doing so. The trend is clear that fewer pupils in practices dominated by legal-aid work are taken on for tenancy in Chambers or wish to continue. In addition, junior barristers are moving their practices away from publicly-funded work as it is not sustainable financially.

12. The criminal and family Bar have been two of the most competitive for entry, due to entrants’ strong belief in both areas. This seems to be particularly true for those entrants from non-traditional backgrounds that are under-represented in the legal professions. Legal aid cuts will have a destructive effect on our work to encourage access to and diversity in the legal professions.

ACCESS TO THE PROFESSION

13. The Inner Temple is working hard to raise the aspirations of young people and provide them with encouragement and support in order to progress into the legal professions. From working with schools on the pioneering Schools Project to connecting with external organisations to promote legal education, the Inn is working to ensure that the legal professions are well placed to flourish by being more representative of society as a whole. Some initiatives we have undertaken include:

— The Inner Temple Schools Project launched in 2008 aims to ensure that school students, regardless of their background, are aware of the opportunities available to them at the modern Bar and to raise aspirations towards the professions. The project challenges stereotypes about professional careers, provides state school students with information about the legal system of England and Wales and promotes social mobility at the Bar. Run in conjunction with Pathways to Law and the National Education Trust, the project was recently highlighted in the Advisory Panel for Judicial Diversity’s final report.

— In addition to attending over twenty law fairs, in the 2009–10 academic year the Inner Temple reached 1600 university students from every institution offering a qualifying law degree in England and Wales. The Inn now runs dozens of events a year to give university students information they require to make informed decision on legal careers.

In addition, the Inn has an established history of supporting its students and junior members financially.

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— In 2011, the Inn intends to make awards to a total value of £1,260,000. Overall, the Inns of Court will provide approximately £4,500,000. The majority of these scholarships are for the Bar Professional Training Course. The Inner Temple welcomes applicants from all backgrounds for its awards.

14. Of students pursuing the Bar course in 2006, 77% stated that they intend to practise at the self-employed Bar. 42% of respondents stated that they wished to work in criminal practice, 34% indicated civil and 29% indicated family. However, 31% of students noted that they had debts over £20,000. With no hope of recovering this from publicly-funded work, aspirations to work in these areas will no doubt plummet.

15. In addition, a lower proportion of ethnic minority respondents indicated that they wished to practise at the self-employed Bar or in legally-aided criminal and family practices due to financial instability. This is likely to further widen under the legal aid cuts regime.

16. As the lifeblood of the profession, we are particularly mindful of the junior Bar and prospective entrants. Reduction in the number of pupillages in publicly-funded practices will have the unintended consequence of further discouraging non-traditional students from entering the legal professions. This will negatively impact on the profession’s work in this area and the Government’s own focus on social mobility and access to the professions.

OUTLOOK

17. The Bar will respond to the cuts in legal aid by continuing its public service role and doing all that it can in the form of pro-bono work. The Inner Temple supports the Bar Pro-Bono Unit, which provides advice, representation and help at mediation in all legal areas, and the Free Representation Unit, which provides legal advice, case preparation and advocacy in tribunals—employment, social security and criminal injury cases—for those who are not otherwise able to obtain legal support. These organisations and others, such as Citizens Advice Bureaux, will be increasing called upon by the public at every level of legal proceedings.

18. In order to minimise the adverse impact of these cuts on the profession, the Bar has looked towards the future and implemented an ambitious modernisation agenda. This includes encouraging direct public access in certain areas, the ability to form partnerships with other barristers and alternative business structures. Models for alternative business structures include procurement companies (“ProcureCos”), a commercial face of Chambers that enable them to bid directly for contacts from public bodies and corporations. Others include Legal Disciplinary Partnerships, allowing barristers to work in entities with solicitors and accountants as a legal “one stop shop”. These reforms will ensure that the Bar is well placed to respond to the needs of society in an increasingly challenging economic climate.

19. With the restructuring of the Legal Services Commission as an executive non-departmental public body, we would call on the Justice Select Committee to carefully consider the importance of the bidding process for legal-aid contracts in the current climate. The Bar, with its low overhead costs and high-value specialist expertise, has been shown to be excellent value for money. The Bar will continue to embrace its fundamental professional ethos of working in the public interest as long as it given a fair and equitable opportunity to do so.

December 2010

Written evidence from the Claims Standards Council (AJ 04)

SUMMARY

Any civil justice system should have the claimant and access to justice centre stage. Every study has shown there is no compensation culture, an argument accepted by Government, yet Government plans to take action to deal with a perceived rather than real problem. Since the original Jackson report, costs have been fixed for 75% of cases by a negotiated agreement covering road accident cases in the fast track. The Government proposes to extend this regime to all cases in the fast track in 2012, so the remainder of cases to which the Green Paper proposals actually apply, analysed in this submission, are comparatively few in number and are either high value, complex in issues, or both. A high proportion of these will no longer be economically viable under the Jackson Green Paper; and the full Jackson proposals will encourage “cherry picking”, so challenging but worthwhile cases will not be brought. The proposals are anti-competitive. They should also be seen in the context of other changes in the pipeline, not set out in the Green Paper. The insurers’ strategies compound the problem with late admissions and inadequate first offers. A level playing field requires a cap on defendants’ costs. Recognising that there is an issue to be addressed, the way forward is to build on options in the Green Paper not for full abolition of recovery, but for a system of reduced recovery of success fees and ATE premiums in disputed cases, which could well be achievable without primary legislation.

MAIN SUBMISSION

1. The Claims Standards Council was established in 2004 to unite the industry and assist regulation of the claims management industry. The CSC is the trade association representing claims management businesses,
and aims to ensure that the claims management sector is fairly and effectively promoted to lawyers, insurers, and the Government, and to ensure a balanced view of the sector.

2. This submission will focus on the Green Paper, “Proposals for Reform of Civil Litigation Funding and Costs in England and Wales” (The “Jackson” Green Paper) and its impact on access to justice for those who have suffered personal injury for whom another is responsible.

3. The CJC recognises the Government’s concerns over the cost of litigation and wishes to work with the Government to find solutions that help reduce costs, whilst at the same time maintaining access to justice for those who would otherwise not be able to pursue legitimate claims. There is concern that the wider access to justice debate is monopolised by the legal aid Green Paper to the detriment of consideration of the many legitimate questions over the Jackson Green Paper proposals.

4. Any civil justice system must have accident victims and claimants centre stage as the people who lose out.

5. By way of preamble, it needs to be restated yet again that there is no compensation culture, only a media and public perception this is the case. Every one of the many studies looking at this has revealed the overall number of cases is stable or falling and found no such phenomenon actually exists.

6. A key factor in the level of costs is due to the liability insurers’ strategies for which they only have themselves to blame, including late admissions of liability causing claimants’ investigation costs to raise, and the insurers’ poor first offers, leading to claims becoming more protracted than they need to be.

7. Some costs are also inevitable and amount to an irreducible minimum, for example disbursements for medical reports, police reports, and if a case is litigated court fees, which are also set to rise.

8. The evidence base for the Green Paper is questionable. The MoJ have made clear they have inadequate evidence of the impact on claimants’ and their solicitors, and the consultation includes a complex form for solicitors to complete with case examples.

9. The Green Paper and its Impact Assessments make clear that the Government expect far fewer cases in the courts; and that the “winners” will be the liability insurance industry and the “losers” will be claimants and their lawyers (and by extension, legal expenses insurers).

10. This is not a surprising analysis when the proposals are examined.

11. Main Green Paper proposals (in summary)
   - Abolish recoverability of CFA success fees.
   - Increase damages for PSLA by 10% to allow solicitors to charge success fee to client
   - Cap at 25% the success fee that can be deducted from damages.
   - Abolish recoverability of ATE premiums with claimants paying own premiums.
   - If defendant fails to beat claimant’s Part 36 offer, 10% damages uplift.
   - possible cap on defendants’ costs.
   - Qualified One Way Costs Shifting (QOCS).
   - New tougher proportionality rule.
   - Damages based agreements (Contingency fees).
   - End of legal aid for clinical negligence.
   - Client account interest payable to Government to pay for legal aid.
   - Supplementary Legal Aid Scheme.
   - Litigants in person increase in hourly rate allowed.

12. The Government has indicated that its preferred option is full implementation of the proposals in the Green Paper, to all intents and purposes the complete Jackson package. However, this is to ignore what has actually happened since the Jackson report was published early in 2010.

13. The sequence of events is informative. The Jackson report was followed soon after by the new “portal” system which provides a fixed cost mechanism for resolving issues by agreement in 75% of cases, these being road traffic accident (RTA) cases valued below £10,000. Whilst there have been teething problems with the system, largely due to non-compliance with its requirements by liability insurers, to implement the Green Paper on the basis of “full Jackson” is to ignore progress post Jackson. The portal system was the result of an agreement between claimants’ and insurer representatives.

14. The Government confirmed at the MoJ round table meeting on 2 December that they are not planning to unstitch what has already been agreed so recently between the two sides, so the issue is therefore largely resolved for 75% of all personal injury cases.

15. The challenge now is to maintain access to justice for the remaining 25% of cases. It would be helpful first to identify what these are, as the Green Paper lumps all cases together, without analysing the effect on access which will be different for different cases.
16. The balance of the 25% of cases outside the portal comprise:
   - Employers liability accident fast track.
   - Employers liability disease fast track.
   - Employers liability accident multi track.
   - Employers liability disease multi track.
   - Public liability/Occupiers liability/ other misc. fast track.
   - Public liability/Occupiers liability/ other misc. multi track.
   - Clinical Negligence fast track.
   - Clinical Negligence multi track.
   - RTA multi track.

17. The above classes of case can be divided into early admission or liability disputed; and between fast track and multi track.

**Fast Track Cases**

18. The Government propose to extend the fixed costs regime from April 2012 to all fast track cases anyway, so why do they need to get bogged down in wholesale changes if fixed costs are to be introduced? Whilst it has not proved possible in the short time available for this submission to confirm the numbers involved, the vast bulk of the remaining 25% fall in this category, including most EL accident claims. Having said that, there are certain exceptional types of case for which a fixed costs regime is not suitable due to the intensive nature of investigation, often pre-claim, to establish if there are grounds on which to claim. We would propose to exclude from this regime these particularly problematic types of case:
   - clinical negligence;
   - EL disease; and
   - And a possible exceptional / test case rule, perhaps by application to the court.

What’s left?

19. Remaining is the comparatively small proportion of claimants particularly affected by the Green Paper proposals and for whom access to justice is probably the most important, given the seriousness of the consequences for them, making the proposals start increasingly to look like a sledgehammer to crack a nut:
   - RTA multi track serious injuries up to maximum severity.
   - RTA multi track liability disputed.
   - EL/PL/misc multi track accidents.
   - EL disease.
   - Clinical Negligence.
   - Exceptionally difficult cases.

20. Even in liability admitted multi track accident cases (EL/PL/OL/misc) investigation and litigation can still be problematical as causation and/or quantum especially in more serious cases can be in dispute. Disbursements are also potentially high and ATE is essential to underwrite these, but “disbursement only” policies are unlikely to be viable for ATE insurers. Success fees also offset the various risks involved, though it is accepted that those risks are lower if there is an early admission of liability.

21. Multi track liability disputed cases (RTA/EL/PL/OL/Misc) are too risky to run without cover from success fees/ATE. Without this, risk aversion by solicitors will inevitably impose a very high threshold of success as there will be no “swings and roundabouts” to compensate for unsuccessful cases. Many perfectly good but problematical cases will fall by wayside, as the proposed system will encourage, not dissuade, “cherry picking”. Damages Based Agreements do not resolve this underlying problem, as cases would still not be taken as the risk analysis would remain the same.

22. Disease cases are very risky to pursue due to high early investigation costs including often highly specialised medical evidence; and the comparatively high proportion of cases that ultimately cannot proceed. Disbursements are also potentially high and ATE is essential to cover these clients’ cases, as is success fee recoverability. Fast track disease cases will hardly be taken at all under a fixed costs regime, as these cases are especially unpredictable. As for multi track disease claims, a high proportion will not be viable without recoverability of success fees and ATE, as even “cherry picking” can be difficult in advance of substantial investigation.

23. Clinical Negligence claims are caught in a lacuna between the ending of legal aid for these cases proposed in the Legal Aid Green Paper and the Jackson Green Paper alternative, such as there is one. It is understood that the Government accept that lower value cases will not be capable of being pursued due to the high investigation costs including specialist medical evidence and the uncertainty of outcome, should the two Green Papers’ proposals be implemented.
24. Multi track claims face high costs even before they get to the stage of a claim, and many cases are weeded out before then. Success fees and ATE are essential to cover for these non-starters. An additional complication is that liability admissions generally come far too late, leaving the claimant and lawyers anticipating a dispute at trial and preparing accordingly. Multi track disputed liability clinical negligence claims are not viable without recoverability of ATE and success fees due to the volume of work involved, high disbursements, and the uncertainty of success. Clinical negligence cases are not generally viable for “cherry picking” either.

25. Exceptional cases which develop the common law are a vital part of our justice system. Without special provision for a costs regime for test cases and other cases of public importance, which by definition are entirely unpredictable and often only concluded on appeal, this development of the law from the claimants’ perspective will not happen. However, insurers will still be able to choose the cases they want to defend so as to establish a new principle of law (as recent test cases have demonstrated, particularly in relation to asbestos related claims) using all their resources against a costs limited claimant legal team.

26. Qualified One-way Costs Shifting is one of the novel proposals loosely based on the old legal aid rule, that costs would not be awarded against a legally aided party other than in exceptional circumstances. QOCS is suggested as an alternative to ATE. However, there are problems with this, as the subjectivity of the application of QOCS leads to uncertainty for litigants. One way costs shifting can only work if there is no qualification, except rightly for cases of fraud.

27. Under the proposed QOCS, claimants would only be liable exceptionally for defendants’ costs in a lost case, when costs would be assessed summarily and claimants would remain liable for their own disbursements and costs. These would be funded either by the claimant, the claimant’s solicitors or by ATE, if this system remains available, with possible recoverability of the ATE premium if the claimant proves no other form of funding is available.

28. QOCS would be subject to:
   - Financial resources of all the parties.
   - Conspicuously wealthy claimant, or impecunious defendant.
   - Frivolous, fraudulent conduct in connection with the dispute.
   - Unreasonable or abusive conduct in conduct of claim.

29. Such a QOCS system is doomed to create as many complications as it may solve, due to the subjective nature of the proposals. The liability insurers will inevitably commence enquiries into, and request disclosure of, a claimant’s means, both capital and income, particularly for middle class claimants; raise allegations about conduct prior to a claim even being brought (for example if an accident was not promptly reported) to avoid QOCS, and will continually raise objections as to the conduct of the case. The subjective nature of the limiting rules will deter claimants from either bringing claims or pursuing them as vigorously as they should. There will also be a raft of parallel litigation.

30. The newest Government argument is based on the Scottish system on which they heavily rely. This is in effect the English pre 1999 Act model, with non recoverability of ATE and CFAs. What this disguises is the incidence of claims brought compared with the number of accidents that would justify claims. Non-recoverability has a chilling effect on the number of claims and thus access to justice. Before the Access to Justice Act, the use of CFAs and ATE was very limited, as non-recoverability did not provide an adequate alternative funding model. Whilst things have clearly moved on since then, there is a major risk that non-recoverability will turn the clock back to the position where many accident victims with reasonable claims could not afford to pursue them.

31. The Government say the objective is to “rebalance” the civil justice system, implicitly in the favour of the liability insurers (and to the extent the Government is self insured for claims, in its own favour: the Government cannot be said to be an objective and impartial player in the debate).

32. However, any “rebalancing” ought to create the level playing field which has been sadly missing so far, with no controls (other than on assessment) on defendants’ costs and their spending in defending a claim.

33. A fair justice system needs equality of arms, so far as is practicable. This requires not just an equivalent (or perhaps lower figure, as the defence of a claim should be cheaper) cap on defendants’ costs to the extent to which claimants’ costs are capped, but in addition an overall cap on maximum spend by defendants, irrespective of recoverable capped costs, so as to prevent defendants running up costs on their cherry picked test cases, which claimants cannot match due to the cap on their individual spend.

34. Moreover, the Green Paper proposals for success fees and ATE recoverability cannot be seen in isolation in light of other proposals in the pipeline or under active consideration, including amongst others:
   - Fixed recoverable costs in fast track (see above) planned for April 2012, subject to consultation and part of wider civil justice reform.
   - Costs Council: this proposed new body is to have a wide remit, including setting guideline hourly rates and fast track fixed costs, inevitably exerting further downward pressures.
   - More costs and case management based on the current pilot in some Yorkshire county courts.
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— Possible restrictions on referral fees, awaiting the outcome of LSB consultation which started 29 September 2010.
— The predictable damages pilot proposed to be developed by June 2011 for cases up to £10,000 and which will pressure damages downwards, probably eliminating the benefit of the proposed 10% general damages uplift.
— And the failure to address the indemnity principle, which is the root cause of much of the bureaucracy and complication and indeed additional cost of the existing system: the Government is not proposing any change.

35. It can be seen that the consequences of the Jackson Green Paper for access to justice, if implemented as they stand, are serious especially for higher value and disputed cases.

36. The Government has advanced two less radical options which to them are second best, but which could well provide the basis for developing a reasonably balanced system that would achieve the Government’s policy objective of reducing costs but in a way that preserves access to justice for most cases, albeit with significant reduction in income for law firms and likely impact on Competitiveness.

37. Under the primary proposals (full Jackson implementation) there will inevitably be a contraction in the market with fewer solicitors able to make Personal Injury work profitable and fewer (if any) ATE insurers, as this market could well disappear completely. Fewer suppliers of services inevitably will create local monopoly suppliers with consequently reduced pressure on maintenance of quality of representation and which will drive up costs in the long run. This means further restriction on access to justice at the local level; and the growth of bigger more distant legal operations, as has already been happening as firms have progressively withdrawn from legal aid more generally, as they consider it insufficiently viable.

38. For success fees, the alternative packages include recoverability of success fees at a fixed rate only if there is no admission by the liability insurers during the protocol period or some shorter period. There would be no recovery from the claimant or charge to the claimant of CFA success fees or recovery of ATE premiums. No recovery would be permitted if the claimant had access to other forms of funding, for example BTE insurance.

39. The key question is at what level fees would be fixed, to determine whether this would provide sufficient cushion to enable the loss of riskier but worthwhile cases to be underwritten by success fees to the extent that they remain recoverable. It would be iniquitous to expect a single winning claimant to underwrite the consequences for another losing claimant of the costs of that loss: this burden rightly more fairly ought to lie with insurers who are in a better position to spread this risk.

40. Another risk is that of detailed enquiry, requests for disclosure and the prospect of consequent parallel litigation to establish whether in fact other means of funding was available. This also is in restriction of the claimant’s choice of representation and could ignore the many qualifications and limits placed on alternatives, like BTE policies which can be very limiting in cover.

41. For ATE premiums, one option suggested is to permit recovery of ATE premiums limited to 50% of damages (after deduction for contributory negligence). This would be unlikely to be viable for lower value claims or for more complex claims which attract higher premiums. It will need more detailed modelling to establish whether a viable ATE system can be maintained with such restrictions; or for “disbursement only” policies, another suggestion which is unlikely to be viable for many cases.

42. Nevertheless, whilst there are problems with each of these proposals, they are options that can be built on for a high proportion of those remaining 25% of cases currently outside the portal, which percentage will reduce even further if fast track fixed costs and the portal are extended more widely as the Government proposes from 2012.

43. There will also still be exceptions for which these options do not provide access to justice which is presently available, but more statistical work is needed to establish the extent of this problem.

44. One advantage of preserving recoverability of success fees and ATE premiums in some form, depending on the detail of the final package, is that it might be possible (subject to the detail) to implement such changes without primary legislation, which it is generally accepted would be needed for complete abolition, in accordance with the main recommendations in the Green Paper.

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Written evidence from the Association of Personal Injury Lawyers (AJ 06)

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with more than 4,700 members who help injured people to gain the access to justice they deserve. Our membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics who are all committed to, or sympathetic to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements to the law to enable injured people to gain full access to justice and promote their interests.

The aims of the Association of Personal Injury Lawyers (APIL) are:

— To promote full and just compensation for all types of personal injury.
— To promote and develop expertise in the practice of personal injury law.
— To promote wider redress for personal injury in the legal system.
— To campaign for improvements in personal injury law.
— To promote safety and alert the public to hazards wherever they arise.
— To provide a communication network for members.

APIL’s experience is limited to personal injury and clinical negligence.

EXECUTIVE SUMMARY

— APIL recognise the political appetite for further efficiencies and streamlining particularly given the current economic climate however, the most disadvantaged and poorest members of society will be hit the hardest.

— Lord Justice Jackson’s recommendations largely ignore the impact of the new process for lower value fast track road traffic accident (RTA) claims.

— The new road traffic accident claims process provides a procedure for dealing with 75% of all claims within a streamline fixed cost process.

— At a stroke the new RTA claims process which was introduced with industry wide consensus following negotiation (which took place during Jackson’s year long review on civil cost) has undermined his key conclusions that costs are disproportionate.

— Behaviours of defendants and their insurers who are not only responsible for the initial injury but also contribute to increased costs by making claimants jump through hoops causing delay or discouragement.

— Removal of legal aid for clinical negligence cases coupled with Jackson’s primary proposals will reduce access to justice and take damages from the most vulnerable.

— Leading counsel suggests that primary proposals for reform could discriminate against the disabled and infringe their human rights. There are also issues surrounding the Equality Act 2010 and Disability Discrimination Act 1995.

— The cost saving of 17 million to the legal aid budget if clinical negligence claims are excluded is less than 1% of the overall legal aid budget of 2.2 billion.

— Removing clinical negligence from legal aid whilst reducing the availability of no win no fee agreements will result in the NHS becoming even more unaccountable to those injured through its negligence.

— Damages are purely compensatory and therefore APIL believes that it is fundamentally wrong that costs should be paid out of them.

— Damages for pain suffering and loss of amenity are too low, meaning that it is totally unsatisfactory for costs to be deducted from damages also.

— Data from a catastrophic injury case load demonstrates that LJ Jackson’s proposal to end recoverability of success fees by offsetting with an increase in general damages would be wholly insufficient and would adversely affect the most seriously injured.

— There has been no consideration as to the impact alternative business structures may have on access to justice.

APIL understands the need for costs to be streamlined and systems to be efficient, particularly in the current economic climate. But this should never be at the expense of vulnerable, injured people, and cuts to legal aid coupled with Appeal Court Judge Lord Justice Jackson’s primary recommendations will have the effect of not only taking much-needed compensation from injured people but also baring access to justice. This will hit the poorest in society the hardest.

2. Lord Justice Jackson commenced his review of civil litigation costs, at the request of former Master of the Rolls, Sir Anthony Clarke, in November 2008. This review looked at civil litigation in the round and did not just concentrate on personal injury and clinical negligence as the most recent consultation appears to have done.
3. Jackson LJ’s work largely ignores the impact of the work undertaken by the Ministry of Justice (MoJ) at that time to streamline the process for lower value fast track road traffic accident cases. During Jackson LJ’s yearlong review the Ministry was working with both sides of the industry to improve the speed at which injured people received their compensation and to fix the amount of work involved in pursuing these claims in return for fixing the fees recoverable. The new claims process introduced this year deals with 75% of all personal injury claims.  

4. The conclusions reached by Jackson LJ, therefore, need to be approached with caution as a large percentage of the personal injury market has been reformed to be streamlined and more cost efficient and whilst teething problems are many, because of the speed with which the reforms were introduced, in the long term this process could be successful.

5. It is essential that we maintain individual human rights and prevent injury where possible through social responsibility. Negligent actions will unfortunately happen and when this occurs we must have a system that provides access to care, rehabilitation and full redress to ensure, so far as possible, that the injured person is put back into the position that he was in before the negligence occurred.

6. Whilst efficiency of process is important it must not be to the detriment of the injured person, who should be at the heart of our compensation system. APIL believes the civil justice system should provide:
   - The right to bodily integrity.
   - Equal access to justice for all in our society.
   - Protection for those who have been injured by the negligence of others.
   - Public confidence in the system.
   - Full redress.
   - Freedom to chose a lawyer.
   - An insurance system that offers protection to all concerned.

7. In every claim for personal injury the burden of proof rests with the injured person. Nothing about a case is presumed and the individual must prove each element of his claim, the facts of his case, duty of care, breach of duty, causation and quantum. The defendant not only caused the injury but is also free to make a claimant jump through hoops, causing delay or discouragement.

8. Removing legal aid for clinical negligence cases coupled with the primary proposals currently being consulted upon by the Ministry will have the effect of making it difficult for any person with a meritorious case but with difficulties on liability to pursue their claim. There is a streamlined process for the more straightforward road traffic accident claims and it is essential that it is recognised that the more complex cases must not be prevented from being brought by the removal of funding.

9. APIL along with PIBA obtained advice from leading counsel in September this year which advised on the implications of the Jackson proposals to reverse the recovery of CFA success fees; cap success fees at 25% of general damages and damages for past losses; and increase general damages by 10%. The advice expresses considerable doubts about whether the proposals could be defended under the European Convention of Human Rights, if applied to seriously or catastrophically injured claimants. Specifically, counsel have advised that the proposed changes would affect the right of access to justice of such claimants, which is guaranteed by Article 6 of the Convention (in conjunction with case law which deals with the issue of adequate means of funding) because they would be reliant on finding a suitable legal team prepared to forgo payment for the financial risk of conducting the claim on a CFA. Article 14 of the Convention protects such individuals who may be at a disadvantage in this way. Counsel was also of the view that the vast majority of claims could be vulnerable to challenge under section 21D of the Disability and Discrimination Act 1995 and section 19 of the Equality Act 2010.

   The actual cost of clinical negligence cases to the Government in funding is 17million a year out of a legal aid budget of 2.2 billion. Therefore the overall cost saving to the legal aid budget if funding is removed for clinical negligence case is less than a 1% saving.

11. In absence of legal aid or some other adequate method of funding clinical negligence cases there is little way of holding the NHS accountable for mistakes that it makes. Bringing a claim makes the NHS accountable for its actions in a way that the complaint procedure does not. In the period January to September 2009, 11,449 adverse incidents were reported to the Reporting and Legal Services Department at the National Patient Safety Agency. 3,679 incidents were reported to have resulted in death and 7,770 caused severe harm. In the...
same period only 6,652 claims were brought against the NHS.\textsuperscript{11} Approximately 55% of claims received by the NHSLA in the last 20 years have been successful.\textsuperscript{12}

Damages are purely compensatory and therefore APIL believes that it is fundamentally wrong that costs should be paid out of them. This is what is being proposed as an alternative to legal aid. We believe that the wrongdoer should pay. It is this principle that allows an injured individual to challenge the large defendants such as the NHS. A claim for damage is not a windfall but an attempt to restore the person, as far as possible to their pre-accident status,\textsuperscript{13} by those that have been negligent (to the extent that money can do this). Why then should the defendant and their insurance representative be given a rebate by not fulfilling their obligation.

In cases of serious injury damages for future losses, such future care, continuing medical costs and loss of earning capacity are likely to be the largest element of the compensation awarded. These losses are difficult to value accurately, because there can be no certainty about what will happen in the future or about what would have happened had the accident not occurred. Damages therefore have to be assessed on the basis of many assumptions about the future, as they will affect claimants personally and more widely.

The aim in assessing those damages is to provide a capital sum which can be invested to yield exactly enough to cover the anticipated needs and loss of earnings every year, for as long as they are expected to continue. The period of time over which these needs will continue will be determined by the court and/or agreed by the parties if a case is settled.

Given the difficulty with assessing these needs accurately and the anticipated return on investment of any award, a discount rate of 2.5% is currently applied. This rate was set in 2001 when the return on investments was considerably higher than it is now. The discount rate ensures that the injured person is not over compensated. Currently an investment of around 6 or 7% gross return needs to be found to ensure that their compensation keeps pace with inflation. Presently this is impossible. In addition to these problems claimants with accommodation needs are also prevented from full recovery of accommodation costs.\textsuperscript{14}

All these problems coupled with the Law Commission’s recommendations, (made over 10 years ago and still not fully acted upon) that concluded damages for pain suffering and loss of amenity were too low, mean that it is totally unsatisfactory for costs to be deducted from damages also.

17. APIL remains concerned about the handling of the 25\% of claims not covered by the new streamlined system. Research conducted by APIL president Muiris Lyons’ firm, Stewarts Law, showed that the proposal to offset abolishing recoverability of success fees by an increase to general damages of 10\% per cent would be nowhere near sufficient for those with serious injuries within this 25\% per cent bracket. The maximum net loss arose in a claim for a young tetraplegic man and would have resulted in a reduction in his damages of £236,044.

The Ministry of Justice has been provided with a full copy of this report and data.

None of the proposed reforms have been considered in the context of the effect that alternative business structures, which are to be introduced to the system next year, may have on access to justice.

\textit{December 2010}

\textbf{Written evidence from the Medical Protection Society (AJ 07)}

\textbf{Executive Summary}

MPS has long held deep concerns about the way in which costs have escalated in clinical negligence cases and we very much welcomed the proposals by Lord Justice Jackson. However the Green Paper setting out proposals for the implementation of Lord Justice Jackson’s recommendations is limited in sofar as it does not seek to deal with all of the recommendations. We would be concerned if Lord Justice Jackson’s proposals on conditional fee arrangements are ultimately implemented in isolation; we strongly feel that his recommendations, taken as a whole package, are a powerful tool in ensuring that litigation is affordable for society as a whole.

MPS also has an interest in the Green Paper on the provision of legal aid insofar as a small number of clinical negligence claims in England and Wales are conducted on the basis of legal aid funding. We believe firmly in the principle of affordable access to justice and are concerned that the Lord Chancellor proposes the abolition of legal aid funding for all clinical negligence cases subject to the availability of funds in exceptional cases. We feel that it is only right that legal aid funding be available to fund cases for the most vulnerable patients; for example children who have suffered severe brain or physical injuries.

\textsuperscript{11} NHSLA Report and Accounts 2009–10 page 13.

\textsuperscript{12} NHSLA Factsheet 3 as at June 2010.

\textsuperscript{13} Lord Blackburn in \textit{Livingstone v Rawyards Coal} (1880) 4 App Cas 25 : “I do not think that there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained a wrong...”.

\textsuperscript{14} Robert v Johnston [1989] QB 878.
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INTRODUCTION

1. The Medical Protection Society (MPS) is the leading provider of comprehensive professional indemnity and expert advice to more than 270,000 doctors, dentists and other health professionals around the world. We have over 100 years’ experience of the medicolegal environment and operate in 40 countries around the world. In the United Kingdom we have around 170,000 doctors, dentists and other healthcare professionals in membership comprising around 50% of all doctors and 70% of all dentists.

2. As a mutual, not-for-profit organisation we offer members help, on a discretionary basis, with legal and ethical problems that arise from their professional practice. This includes clinical negligence claims, disciplinary and professional regulatory investigations, inquests, complaints and general ethical and professional advice.

3. Our submission draws on our own experience of handling claims on behalf of our members in over 40 countries worldwide. Our experience is that the costs associated with claims in England and Wales are among the most expensive in the world. In this response we limit our comments to the issues arising out of the Ministry of Justice’s Green Papers on costs.

SPECIFIC ISSUES RAISED BY THE COMMITTEE IN THE TERMS OF REFERENCE

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

4. MPS recognises that patients who have suffered avoidable harm as a result of the negligence of a doctor should be fully compensated and that, generally, they will require legal assistance to enable them to advance their claim. MPS’s concern is not that the costs are incurred at all but that the costs incurred are often disproportionate and place an unreasonable burden on defendants.

5. Most claims are now funded by CFAs where the claimant’s lawyers are remunerated on a “no win no fee”. In order to take on cases for “free” and manage the risk of losing the case, lawyers can claim a success fee calculated as a percentage of their usual base costs. As they can claim up to 100% of their base costs this means that claimant lawyers can recover twice their normal costs. Claimants are encouraged to take out an “after the event” insurance policy (“ATE”) to cover them for the prospect that they lose and must pay the defendant’s costs. The cost of this policy is also payable by the unsuccessful defendant. Under these arrangements the claimant will never pay any costs and does not have any financial stake in the way the case is run so that there is little control on the way the claim is litigated. MPS often sees claimant costs far in excess of the damages paid to the claimant. For this reason we very much welcome the proposals by Lord Justice Jackson, in particular his recommendation that ATE cover and success fees associated with conditional fee arrangements should no longer be recoverable from the losing defendant.

6. The Green Paper setting out proposals for the implementation of Lord Justice Jackson’s recommendations is limited insofar as it does not seek to deal with all his recommendations. The consultation does not attempt to deal with referral fees, fixed recoverable costs in the fast track, the establishment of a Costs Council, costs and case management, before the event funding, third party funding, predictable damages and Lord Justice Jackson’s more specific recommendations in relation to case handling with clinical negligence indemnifiers. Our understanding is that these elements of Lord Justice Jackson’s recommendations are still under scrutiny and may be subject to further consultation in the future. We would be concerned if Lord Justice Jackson’s proposals on conditional fee arrangements are ultimately implemented in isolation; we strongly feel that his recommendations, taken as a whole package, are a powerful tool in ensuring that litigation is affordable for society as a whole.

7. One aspect of the Green Paper which is disappointing is the suggestion that in complex personal injury cases where, it is argued, it may be uneconomic to run the case under the capped success fee of 25% of damages, excluding any damages for future care or future losses, an option might be to have no cap or alternatively, to allow for success fees to remain recoverable in such cases from unsuccessful defendants. The consultation makes no attempt at defining what a “complex” case might be. It is important to note that a low value clinical negligence claim can be as complex as a high value claim and indeed the clinical and liability issues in a high value claim can be relatively straightforward. Our concern would be that ambiguity as to what “complex” means would lead to costly satellite litigation with claimant lawyers arguing for a more advantageous costs regime on those cases. We also question the fairness of an arrangement whereby the claimant’s entitlement to the inviolability of damages depends on a test of complexity. We would have concerns about any measures which seek to dilute Lord Justice Jackson’s proposals.

What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

8. MPS has an interest in the Green Paper on the provision of legal aid insofar as a small number of clinical negligence claims in England and Wales are conducted on the basis of legal aid funding. We can only agree with the Lord Chancellor’s views that the system requires fundamental review and we agree that the country can ill afford the current costs associated with the legal aid scheme. Nevertheless, we are concerned that the
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Lord Chancellor proposes the abolition of legal aid funding for all clinical negligence cases subject to the availability of funds in exceptional cases.

9. MPS believes firmly in the principle of affordable access to justice and we can well appreciate that there may be lawyers who would be unable or unwilling to take on highly complex cases requiring early expensive expert input on behalf of claimants with very limited financial means and indeed that there will be claimants who would be deterred in pursuing a claim for the same reason. We feel that it is only right that legal aid funding be available to fund cases for the most vulnerable patients; for example children who have suffered severe brain or physical injuries. We would suggest that a further refinement might be, subject to means testing, to allow legal aid funding to be available for preliminary investigations in such complex cases with claimant lawyers then undertaking to transfer the claim to a conditional fee arrangement if it became clear that the claim had merits. The costs which were incurred whilst the case was being handled under the legal aid scheme would be recoverable as part of the costs recovered by the claimant from the defendant in the event that the claimant is successful.

December 2010

Written evidence from the Prince’s Trust (AJ 08)

EXECUTIVE SUMMARY

The Prince’s Trust is very concerned that vulnerable young people have access to legal support. The young people we work with tend to have chaotic lives. They are young people who have been in care, in trouble with the law, have not succeeded at school and are unemployed. We also work with young refugees and asylum seekers, who can be extremely vulnerable and are navigating a complex asylum system. Our clients have often experienced debt, housing and benefit issues, the areas under proposed withdrawal of legal aid.

When a young person joins our programme we ask them what is the biggest challenge you face? Last year the majority of the 40,000 young people we worked with said levels of literacy and numeracy. We have concerns as to how these young people would be able to navigate the criminal justice system and advocate on their own behalf on issues that could compound their offending behaviour or destitution.

The transition to adulthood for the most vulnerable in our society can be a very difficult time when often the wrong lifestyle choices are made. We believe there is a special case for young people aged 24 years old and younger that they should retain legal aid support at all stages of the criminal justice system, as well as supporting the Howard League for Penal Reform’s particular campaign to improve access to justice for young adults in prison.

Below we outline more information about The Prince’s Trust, our involvement in the Transition to Adulthood Alliance and the recommendations of The Howard League for Penal Reform in their recent report Access to Justice Denied: Young Adults in Prison.

ABOUT THE PRINCE’S TRUST

The Prince’s Trust was founded in 1976 by The Prince of Wales to work with disadvantaged young people. Last year we worked with over 40,000 young people—around 3500 of those young people were in/leaving care.

We work with young people, aged 14–30, in difficult situations (1) struggling at school (2) long term unemployed (3) in /leaving care (4) in trouble with the law. We help them get back into training, education, volunteering or employment. Our programmes encourage young people to take responsibility for themselves.

TRANSITION TO ADULTHOOD ALLIANCE (T2A)

The Prince’s Trust is a member of The Transition to Adulthood (T2A) Alliance, a broad coalition of organisations and individuals working to improve the opportunities and life chances of young people (18–24 years old) in their transition to adulthood, who are at risk of committing crime and falling into the criminal justice system.

The T2A Alliance aims to raise awareness of the problems this group face and to secure policy change to improve their lives. Young adult offenders are a significant group within the criminal justice system and are responsible for a third of all crime.

Over a half of young adults in custody go on to reoffend within one year of release and up to two thirds reoffend within two years. In 2005, the Barrow Cadbury Trust’s Commission on Young Adults and the Criminal Justice System launched its report, Lost in Transition, which highlighted the complex needs of this often-ignored age group. The report received wide-spread support and subsequently, the Barrow Cadbury Trust has convened the Transition to Adulthood Alliance to make real progress in this area.

The T2A Alliance has produced a series of documents, including its Young Adult Manifesto which calls for pragmatic policy changes for this age group. The Alliance will also work with practitioners and statutory bodies to raise awareness of the distinct needs of young adults and to provide support and guidance. www.t2a.org.uk
A New Report Produced by One of the T2A Members

The Howard League for Penal Reform has recently published *Access to Justice Denied: Young Adults in Prison*. The Prince’s Trust fully supports the recommendations made in this report.

This briefing reveals considerable unmet legal need for young adults in prison and lack of awareness of rights. The evidence uncovers a huge problem that requires urgent attention and further investigation.

The access to justice service is run by the Howard League for Penal Reform alongside our case and policy work. The team members receive calls, emails and letters from young people themselves, advocates working within the secure estate, partners and carers, caseworkers and other outside agencies.

The work evidences that young adults find internal requests and complaints ignored or rejected out of hand. They need help to make sure that they are taken seriously. Many young adults in prison are unaware that they could get legal assistance to improve the failings of the system.

Prisoners’ ability to access justice is restricted by the costs of calls from custody and limited time out of cells. They experience difficulties in obtaining appropriate information from internal and external sources.

The report analyses the evidence from the Howard League’s access to service and legal work with young adults, legal problems experienced by young people, case studies and offers recommendations to improve the situation.

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**Written Evidence from Irwin Mitchell Solicitors (AJ 09)**

**Executive Summary**

— Irwin Mitchell is concerned that the proposals announced will have unintended consequences and will, in effect, turn back the clock and restrict access to justice for consumers, particularly victims of personal injury.

— We have undertaken analysis of 17 of our high value serious injury cases, concluded in April and May of this year and funded on a Conditional Fee Agreement, of these 15 claimants (88%) would suffer reduced damages under the proposals, with the average loss for these claimants being £45,863.

— The Motor Accident Solicitors Society also produced evidence that suggest that 26% of all cases run between May 2007 and February 2009 would be at risk of not being run with lower success fees due to the considerable financial risk law firms would have to take in running such cases.

1. *Introduction*

   1.1. As one of the largest law firms in the UK acting for thousands of individuals, as well as on behalf of major insurers and other businesses, Irwin Mitchell has a unique perspective on the issues affecting the provision of legal services.

   1.2. We are passionate about access to justice. We believe strongly that access to justice is a fundamental part of a civilised society and that it is vitally important that access to justice and the protection of consumers remains the highest priority of Government.

   1.3. We are concerned that there may be significant unintended consequences from the proposals put forward by the Government and our views are outlined below.

2. *What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?*

   2.1. We oppose the proposed removal of Legal Aid for Clinical Negligence and have serious concerns over the impact it could have on claimants affected—many of them very seriously injured and, in particular, brain injured children in need of lifelong care and support.

   2.2. Our gravest concerns are over any possible removal of Legal Aid for disabled people and in particular for children, who currently have to be represented by firms of solicitors who hold a clinical negligence franchise from the LSC. This would mean that, in future, any solicitor, irrespective of panel membership, would be able to represent a birth-injured child. This is important as the National Audit Office’s statistics show that there is a direct correlation between panel membership and recovery of damages in a clinical negligence case. It is axiomatic that achieving the best possible outcome is vital for every victim and family needing the money to fund a lifetime of care.

   2.3. The proposal also goes against Lord Justice Jackson’s own recommendations in his report, in which he makes the following unequivocal statement regarding Clinical Negligence funding (*inter alia*):
“It is vital that legal aid remains in these areas.”

2.4. We believe that removing legal aid from these cases would deny claimants—many of them the very people who need help the most—access to justice because, absent legal aid funding:
   — Claimants would have to primarily rely on lawyers to take their case forward on no win no fee agreements, as BTE insurance for such claims is limited.
   — These claims almost invariably require extensive up front investigation with independent expert reports in order to assess the merits of these claims which would place very heavy burdens on lawyers in funding the investigation of unsuccessful cases.
   — If claimants were to carry financial liability for disbursements, such as experts’ fees, they may be deterred from pursuing legitimate claims on their own behalf of or on behalf of their children—the more complex the disabilities of the claimant often the more expensive the reports.
   — Many law firms would, in prudently managing their businesses, have to be risk averse and have to turn away some cases because of an inability to fund the initial investigations required under a no win no fee agreement and to underwrite disbursement outlay for clients.

3. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

3.1. With regard to Legal Aid, we would argue strongly that they do not. The proposals for Legal Aid in areas such as Clinical Negligence to be withdrawn conflict directly with the recommendations made by Lord Justice Jackson, in his report, who made clear his strong opposition to any such change in the following terms:
   “I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas.”

3.2. We would again stress that we would not support the abolition of legal aid in Clinical Negligence cases and feel that such a move would hit some of the most vulnerable victims of NHS mistakes, including brain injured children and disabled children and adults in need of lifelong care.

4. What are the implications of the Government’s proposals?

4.1. We are concerned that the proposals—with particular regard to reforming the law in relation to conditional fee agreements—will have unintended consequences and will, in effect, turn back the clock and restrict access to justice for consumers, particularly victims of personal injury.

5. Recoverability

5.1. Our fundamental belief is that anyone who has to take legal action as the victim of a wrong committed by another party should be entitled to obtain independent and good quality legal advice. Equally, if their claim is successful they should be able to recover the compensation they are awarded in full so they are not out of pocket. The courts have consistently reinforced the principle of the entitlement of injured people to “full compensation” based on a proper assessment of their past losses and future needs. This principle should not be eroded.

5.2. We are therefore deeply concerned that the Government is proposing to abolish the right to recover some components of the legal costs incurred (success fees and ATE insurance premiums) from the losing party under No Win No Fee agreements, which would mean those funds would have to be paid out of claimants compensation. Removing the right of personal injury victims to recover their reasonable costs in full means they will instead have to meet some of their costs liabilities from their compensation, which is awarded for their past losses and future needs.

5.3. It is our view that victims of the most serious injuries are the ones most likely to be adversely affected, and to the greatest extent, under these proposals. These are very often claimants who are most in need of access to justice and whose compensation secured as a consequence is calculated to meet ongoing care needs and other losses, in many cases for the rest of their natural lives. It is therefore of deep concern to us that a settlement they need to fund a possible lifetime of care may be eroded through changes in legislation.

5.4. Further, we believe that the current proposal for insurers to contribute to the cost to claimants by paying an increase in general damages of 10% is insufficient and would still leave many thousands of personal injury claimants losing a substantial amount of their damages to pay the balance, again hitting the most vulnerable claimants the hardest.

5.5. We have undertaken analysis of 17 of our high value serious injury cases, concluded in April and May of this year and funded on a Conditional Fee Agreement, the benchmark for the purposes of the analysis being that we successfully recovered more than £250,000 in damages for our injured clients. Our findings were:

— Of the 17 cases, 15 claimants (88%) would suffer reduced damages under the proposal, with the average loss for these claimants being £45,863.

— Based on these cases, the uplift on general damages would need to be 50.1% to enable clients to fund success fees.

— More worryingly, even with an uplift of 50.1%, six claimants (35%) would find this insufficient to cover their fees, suffering a combined loss of £273,000 on damages calculated by the court as sufficient to compensate for their injuries.

5.6. This highlights clearly that any global increase to damages, even if made at a level sufficient to cover the cost of success fees overall, would merely serve to create winners and losers on a basis irrelevant to the facts of the case. That is a grave concern when considering that all of the claimants in this study had been seriously injured.

The potential impact on claimants—an example

Our client, a six-year-old boy at the time of the accident, was travelling in a car with his parents when they were hit by a vehicle travelling in the opposite direction, on the wrong side of the road. The crash changed their lives for ever. The young boy suffered brain injuries and the prognosis is such that he will be unable to work and will need a lifetime of care due to his condition. Now aged 17, at a recent five-day trial he was awarded compensation totalling more than £2.2 million. Costs before success fees were just over £200,000, less than 10% of the damages achieved for the client.

Under the proposed changes to the costs regime put forward by the Government, our seriously injured client would receive an uplift of 10% in his general damages of £100,000, awarded for his pain and suffering, increasing that by £10,000. However, if recoverability was abolished and success fees capped at 25%—as has been proposed—then our client would have to pay £50,000 in fees out of his own damages, leaving him £40,000 out of pocket through the changes currently being considered—money he needs to fund the care required for injuries sustained through no fault of his own.

5.7. Our figures also accord with separate findings from the Motor Accident Solicitors Society (MASS) which found that, in the most serious injury cases—for example, a tetraplegic client—damages would be reduced by more than £235,000,17 a heavy burden to be borne by a claimant and/or his/her family facing up to life-changing injuries and a lifetime of care needs.

6. Success Fees

6.1. MASS figures also demonstrate that the Jackson report proposals with regard to success fees would have a seriously detrimental effect on access to justice by making many more serious injury cases potentially unviable to run commercially. Their figures suggest that 26% of all cases run between May 2007 and February 2009 would be at risk of not being run with lower success fees due to the considerable financial risk law firms would have to take in running such cases.

6.2. This again highlights the importance of No Win No Fee agreements and fair success fees in providing access to justice. Since the abolition of legal aid for personal injury, law firms have taken on the risky task of funding litigation on no win no fee agreements. Lawyers risk millions of pounds in legal costs to pursue complex claims for people who have often suffered the most severe injuries. The successful cases help balance the books and in essence, pay for the costs of investigating many meritorious but unsuccessful cases.

6.3. Therefore, any new system must ensure that a fair system of success fees is still paid by the losing party. Without that, lawyers may become more risk-averse, leading to consumers with legitimate but complex claims struggling to find a lawyer to take on their case—exactly what Lord Justice Jackson said he wanted to avoid in his report.

6.4. In truth, there is much hyperbole about the level of success fees in no win no fee agreements. Therefore, it is very important to point out that costs are not just driven by the claimant’s side. Very often, it is the conduct of defendants and their lawyers which lead to costs being incurred or escalated unnecessarily.

6.5. In many areas of personal injury, recoverable success fees are already fixed on scales agreed by all sides of the industry working with the MOJ, including RTA claims, accidents at work claims and asbestos-related disease claims. These fixed success fee cases account for the vast majority of the overall volume of personal injury claims every year. The main areas in which we do not have fixed recoverable success fees are public liability claims and clinical negligence: numerically these represent a small minority of the overall number of PI cases each year.

6.6. We would welcome a consultation on introducing fixed recoverable success fees in areas of personal injury where they are not already in place, and to work constructively with insurers and public bodies towards reaching agreement on the scale of those fees within a framework to facilitate the preservation of the principle of recoverability of those fees.

17 John Spencer—Chairman of MASS, presentation to Law Society Conference 11 November 2010.
7. The deterrent effect

7.1. Our view is that the proposals may in fact have unintended consequences for many legitimate claimants in deterring them from bringing meritorious claims, and as a result, creating serious implications for the whole principle of access to justice, for the following reasons:

— Claimants need to be clear at the outset about the financial risks they are taking. The current system provides that clarity. Therefore, we believe that abolishing the right to recoverability would be a seriously retrograde step.

— Concerns about any personal liability for legal costs and disbursements would have a significant deterrent effect on those who wish to pursue legitimate claims for compensation—that impact is likely to be particularly profound amongst those claimants with the most serious injuries and those in lower income groups.

— An example of this would be a widow who has just lost her husband to mesothelioma. Under the proposed system, she may have to accept liability for disbursements and other costs in a long-running, complex claim, which could clearly deter her from bringing a claim and from gaining financial security for herself and her family.

— Clients want certainty at the outset over the risks they are taking—the more complex the system, the more difficult that is.

7.2. Equally, we are also strongly opposed to any arrangement which would see claimants have to fund their legal fees from their damages through so-called Damages-Based Agreements or Contingency Fees, which are used in the US legal system. Claimants must be able to continue to recover their compensation in full. To do otherwise would be unfair, would deter many from seeking proper and legitimate redress, and would hit the most vulnerable claimants the hardest.

7.3. In our view, increasing the complexity of funding rules will, in turn, increase the cost of litigation, not decrease it, and would risk reigniting the ‘costs wars’. Costs and funding rules have to be kept as certain and as simple as possible—the more variations, the more complex it will be and the more it will cost, with the bigger risk of satellite litigation.

7.4. The legal sector is already very heavily regulated in terms of costs, with hourly rates regulated and defendants able to challenge costs, with bills almost always being reduced. Though we would welcome increased competition for consumers, genuine competition would be hugely difficult in such a highly-regulated market.

8. Competition

8.1. Much is made in the consultation paper about the perceived impact of an absence of competition in relation to solicitors’ hourly rates and also success fees, and that because Claimants have no liability to pay costs they have no interest in the level of the fee. Conversely, if they were liable to pay fees when they win they would shop around for the best hourly rate and lowest success fee.

8.2. However, there is a substantial counter point to the perception that an absence of competition maintains high costs:

— Recoverable hourly rates payable by a losing party to litigation are determined by the Costs Advisory Committee.

— Through the Civil Justice Council, the MoJ has introduced fixed success fees for road traffic claims, for asbestos related disease claims and for accidents at work. These have been mediated across the industry based on evidence of outcomes and are thought to be fair and reasonable.

— Fixed costs are recoverable in the majority of road traffic claims which make up 75% of all personal injury claims.

— A Defendant found liable to pay damages to a Claimant at Trial or which reaches a settlement with a Claimant, thus avoiding the costs of a Trial, is required to pay the Claimant’s reasonable costs assessed in accordance with detailed rules by the Court (Civil Procedure Rules Part 47), which requires the preparation of line by line bills detailing all activities undertaken, the rates charged and the success fees sought. The Defendant is fully entitled to challenge the hourly rate and the seniority of the lawyer handling the claim, the level of the success fee (save where fixed), whether or not any item of work undertaken was necessary or reasonable, and the fall back is that the Court will determine the level of costs recoverable. Defendants always offer less than the full sum claimed in the bill and Courts regularly reduce the sums claimed where hearings take place.

8.3. Therefore, lawyers costs payable by a Defendant in PI litigation are highly regulated. There is no other professional services equivalent for the degree of regulation, scrutiny and opportunity for challenge.

9. Legal Aid

9.1. The current legal aid system for Clinical Negligence is effective in ensuring access to justice for legitimate claimants. In terms of qualification for funding based upon merits the bar is rightly set at a high
level, ensuring that only those cases with good merit progress and allowing both the system and lawyers to sift out the non-meritorious claims.

9.2. Our concern is that cases which previously had legal aid will have to be run on CFAs, pushing financial risk onto law firms and claimants. As Clinical Negligence claims are complex and require significant outlay on disbursements, the system will inevitably become more risk averse, blocking access to justice to legitimate claimants who would previously have qualified for legal aid.

9.3. Also, should one-way cost shifting be introduced, one consequence would be that claimants could litigate without liability for the defendant’s costs, which could see more cases being brought against the NHS and thus more expense for the NHS in extra staff and legal defence costs. However, the removal of the need for claimants with good claims to buy ATE insurance would also seriously damage the ATE insurance market, meaning disabled people would have to fund and carry liability for their own disbursements at the start of a case, a clear barrier for the majority of potential claimants which could see many seriously injured victims denied access to justice.

9.4. In other areas of Legal Aid work, many vulnerable groups would fall outside the scope of publically funded legal advice and assistance. Proposals such as cutting advice for parents of children with special educational needs and changing the financial eligibility criteria will result in an adverse costs burden on many other statutory funded sources.

Conclusion

— We agree that costs should be proportionate and indeed, in the vast majority of cases, they are. In our view, the current system works. Most costs issues are resolved by negotiation without the need to proceed to a court assessment but where that is not possible, the courts have the power to manage disproportionate costs. They are not afraid to use them, analysing costs line by line if necessary.

— Therefore, we feel that the focus should be on those few cases where costs are not proportionate. To propose radical reform of a system that works because of concern about a minority of cases where disproportionate costs may be incurred is taking a sledgehammer to crack a nut. The only people that will suffer are those who need justice the most.

— Further, we have just been through major reform in the PI sector, introduced as recently as April this year and with the express purpose of reducing costs, with the introduction of the streamlined process for RTA claims under £10,000, where costs are fixed. This affects 75% of all PI claims and has already begun to lead to a substantial reduction in the costs of pursuing PI claims. Of that minority of RTA claims not covered by the MOJ claims process, a substantial majority settle without recourse to litigation and with legal costs agreed between the parties.

— Therefore, we believe the Government should wait to assess the effect of this important change on the level of costs in PI claims before proceeding with further reforms.

December 2010

Written evidence from the Legal Expenses Insurance Group (AJ 10)

SUMMARY

Responsibility for any disproportionality in the present system can be laid in large part at the defendants’ insurers’ door. ATE insurance provides vital underpinning protection for a claimant and the proposed QOCS system does not provide the same security to a claimant. It will have a chilling effect on access to justice, due to the subjective nature of the proposed qualifications on costs shifting and their after the event interpretation. LEIG recognises the Government’s policy concerns and believes other alternatives, whilst preserving a degree of recoverability of ATE premiums, can be developed to achieve their objective of maintaining.

SUBMISSION

1. LEIG was formed in April 2006 by a number of leading legal expenses insurers. Members represent in excess of seven million motor legal expense policyholders and over 15 million policyholders in general and account for the great majority of the ATE legal expenses insurance market in the UK.

2. This submission will primarily focus on the Green Paper, “Proposals for Reform of Civil Litigation Funding and Costs in England and Wales” (The “Jackson” Green Paper) and its impact on access to justice for those who have suffered personal injury for whom another is responsible with particular reference to After the Event Insurance (ATE) and Qualified One Way Costs Shifting (QOCS).

3. The LEIG recognises the Government’s concerns over the cost of litigation and wishes to work with the Government to find solutions that help reduce costs, whilst at the same time maintaining access to justice for those who would otherwise not be able to pursue legitimate claims.

4. LEIG has seen in draft form the submission to the Justice Committee by the Claims Standards Council and generally adopt that submission as its own.
5. There are a number of additional points LEIG wishes to make.

6. The issue of disproportionately cannot be seen as a one way street, laying the problem entirely at the door of the claimants and their representatives. In the majority of cases when costs are disproportionate LEIG considers that the answer lies in earlier admissions by liability insurers; and sensible early offers by them equate to earlier settlements and a reduction in litigation. Further, sensible offers pre litigation offer costs ‘protection’ to defendants and their insurers.

7. The liability insurers’ solicitors (FOIL) apparently admit that defendants lose approaching 90% of litigated cases. This is effectively to say that in 90% of cases, claimants are forced to litigate unnecessarily because the defendant’s insurers failed to make appropriate pre litigation offers. In those cases it is the insurers who are primarily responsible for any disproportionately.

8. Base costs are already fixed through the RTA portal system which now includes 75% of claims. It would cover an increasing proportion of the remaining 25% if fixed costs in the fast track are extended from April 2012, as proposed by the Government. Costs are also restricted through the predictable costs regime and by the courts. Success fees in particular are also controlled in the majority of claims.

9. The Green Paper does not appear to take into account the development of the portal and its proposed extension, which are post the Jackson report.

10. The Green Paper proposal for Qualified One Way Costs Shifting (QOCS) would hand a massive advantage to defendants, given the uncertain position this creates for the claimant throughout the claims process. The only way that one could fairly approach one way cost shifting would be with a “no exceptions” rule: One Way Costs Shifting with no qualification (save for cases of fraud).

11. The immediate, obvious, and significant disadvantages to the claimant from a QOCS arise in a number of areas:

12. Costs orders against claimants in cases viewed as “unnecessary” and “frivolous” could mean both a failed case on the one hand (as by definition a lost case was unnecessary) and a low value claim one on the other (as by definition a low value claim could also be seen to be both unnecessary by many and frivolous by others).

13. Moreover the decision on this test is not at the start of the case as little or no evidence would have been collected (although defendant insurers would no doubt make such an implication tactically at the earliest possible opportunity) and is intended to be made at the end by when it is too late.

14. This would provide very fertile ground for disputes when defendants have deep pockets when it comes to parallel costs litigation to promote their wider interests. Who will fund the respondent claimant’s costs in the many costs appeals, like we have seen before in the previous “costs wars” over CFAs? The present balance provided by ATE protection would swing decisively in the defendant’s favour.

15. A further issue identified within the QOCS proposal is the costs consequences of a failure by a claimant to beat a defendant’s Part 36 offer, exposing the claimant to costs liability. This would put massive pressure on all claimants as soon as any P36 offer was made. They would face a risk, in lower value cases in particular, that not only all their damages but indeed an even greater sum could be lost. The effect of this proposal alone would be to dissuade liability insurers from making sensible and reasonable Part 36 offers (which ought to be encouraged) given the leverage this places on claimants and their solicitors the moment such an offer is made.

16. Furthermore, the proposition that solicitors might agree to fund such costs orders (after a failure to beat a Part 36 offer) because they “erred in their advice” would bring about real and understandable concerns that such advice would be influenced by the possible costs exposure of the claimant’s solicitors’ firm, rather than the sole interests of the client. The Dix case indicates the court’s view of such a proposition.

17. If the claimant’s exposure to defendant’s costs liability in litigation is protected as now by ATE, this provides a significant inducement for defendants to make appropriate Part 36 offers at the earliest opportunity so as to protect their position in the litigation.

18. QOCS is also qualified by the proposition that the financial position between claimants and uninsured defendants should be equalised. In such cases two way costs shifting would still apply. The claimant cannot know in advance the defendant’s insurance position until after a claim has started. Unlawfully uninsured motorists would be in a position to benefitting from their illegal act to the detriment of the claimant.

19. It is not correct to assert that claimants litigate without risk under the present arrangements. Whilst the claimant’s cost position might currently be protected in that liability denied cases might be considered initially as “costs risk free”, in any case where the defendant has made a pre issue offer, the claimant runs the risk of losing a proportion if not all of his or her damages.

20. LEIG would also like to highlight the responsible position of ATE insurers as filterers of cases, so as to exclude unmeritorious cases, particularly with regard to clinical negligence, disease and other high risk, potentially high costs cases. A QOCS system will not provide this filter as effectively as the tests applied by an ATE insurer who needs to be convinced on the balance of the merits to provide cover.
21. ATE insurers decline a significant proportion of such cases put to them for cover, so, in future, when compared to the current arrangements, QOCS could well lead to a significant increase in claims, including claims that would have to be investigated at cost to the NHS.

22. A comparison can be drawn with Employment Tribunals, where respondent costs are not recoverable. There is a fast developing “give it a go” trend in cases funded by contingency fees, leading to a “buy off” approach by employers as their cheaper option.

23. Recoverability of success fees and ATE premiums maintains a fair balance in litigation.

24. Nevertheless, recognising the Government’s policy objectives, alternatives in the Green Paper may provide a way both to maintain access to justice, for which ATE insurance plays a key underpinning role, and to reduce the costs of litigation. These include restricting recoverability to ATE premiums after the pre action protocol stage if liability is in dispute. LEIG would also suggest permitting recovery in litigated cases even after admission: such litigation will either be over quantum which can raise substantial disbursement issues, particularly in the multi track for serious injury cases, or over causation issues in disease cases, for example, which expose the claimant to serious litigation risks.

December 2010

Written evidence from Thompsons Solicitors (AJ 11)

INTRODUCTION

1. Thompsons is the UK’s largest personal injury (PI) law firm. It has a network of 30 offices across the UK, including in the separate legal jurisdictions of Scotland and Northern Ireland.

2. Thompsons only acts for trade union members and the victims of injury, never for employers or insurance companies. At any one time, the firm will be running over 70,000 claims.

3. The firm participates regularly in government consultations on legislative issues.

4. In this evidence we comment only on those questions posed by the Committee that relate to PI cases.

EXECUTIVE SUMMARY

5. Thompsons are not saying that the current civil justice system is perfect. We say that:
   A. In PI the person injured through no fault of their own has everything to prove. The defendant insurers don’t have anything to prove, they simply have to deny liability;
   B. The injured consumer has to take on a highly resourced insurance company with no commercial interest in paying out compensation unless they have to;
   C. Reforms to civil justice have to weighed against the impact they may have on access to justice or access to quality justice;
   D. We agree with Lord Young that there is no compensation culture but there is a perception of a compensation culture;
   E. Nothing that is proposed by Lord Justice Jackson will deal with the perception of a compensation culture;
   F. Nothing that is proposed by Lord Justice Jackson will reduce claim numbers unless they put people off claiming;
   G. The government will not save any money unless people are put off claiming;
   H. The government will lose revenue if people are put off claiming;
   I. The Jackson LJ reforms will save the insurers £millions;
   J. Nothing that is proposed by Lord Justice Jackson will reduce advertising on television by claims companies;
   K. If the reforms are introduced lawyers will be encouraged to cherry pick good cases and turn down cases which though they may have a greater than 50% chance of success are not ‘open and shut’;
   L. Nothing is being done about referral fees;
   M. The poorest and most vulnerable are unlikely to take out Before The Event insurance which Jackson LJ sees as part of the solution; and
   N. Whatever the outcome of the consultation it appears the government has made its mind up about the need for primary legislation. Although the consultation doesn’t finish until February 2011 the published Ministry of Justice Business Plan sets out a timetable to implement the changes from Spring 2011.
The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

6. Although the MoJ did not include any estimate of winners and losers from the proposals in the consultation, we have seen a number of claims about the impact of the reforms and new arrangements from those promoting them.

7. We have seen no independent or convincing evidence to back up the claims made. Academics and statisticians who have studied the proposals appear to agree there will be more net losers than winners. Our calculations appended to this evidence taken from real cases show substantial losses in compensation for injured clients.

8. We would suggest that those promoting the new arrangements on the basis that case numbers will drop should be tested on the legitimacy of the claims they are making.

9. Nothing in the reforms will in themselves reduce claim numbers. The only way there will be less claims is if people are put off making a claim even if that claim is legitimate. Putting consumers off making a legitimate claim is a denial of justice.

Why would the reforms put consumers off making a claim?

10. There will be no fund if you lose to pay the other sides’ costs or your own expenses eg for a medical report.

11. At the moment a consumer can find a lawyer to take on a case because the lawyer can take out an After The Event (ATE) insurance policy.

12. In successful cases, the polluter pays (“loser pays all”) and the consumer gets the ATE premium back from the losing party.

13. If the case is lost the ATE policy covers unavoidable disbursements in running the case, such as for an independent medical report, as well as the other side’s costs.

14. The existence of ATE and the recoverability of the premium in cases that are won doesn’t mean that lawyers will take on cases regardless as to whether they win or lose. As with any insurance, if they keep losing, insurers will refuse to provide cover.

15. It is suggested that the consumer’s risk as to the other side’s costs should be taken away by the introduction of “one way costs shifting” but that is “qualified” by Jackson LJ and very vague. It is based on judicial discretion.

16. If one way costs shifting were to be unqualified or the qualification set out clearly such that only very exceptional cases are exempted (say those pursued against uninsured individuals or those brought by the very wealthy) then the risk of having to pay the other side’s costs would go and one reason for having ATE could be removed without an adverse impact on consumers.

17. Unqualified one way cost shifting still won’t deal with the question of who is going to pay for a medical report if a case is lost or cannot be pursued. If there is no ATE consumers will either find that lawyers will not take a case on or they will be asked to pay disbursements up front.

18. Consumers likely to be hit particularly hard by having to meet the cost of a medical report at the start of their case would include those suffering from dermatitis, asbestos related conditions, industrial deafness and RSI where causation is almost always an issue and can only be established by evidence from medical experts.

19. There will be fewer cases because….Several hundreds of pounds as an up front payment will put the less well off in society from making a claim at all.

20. Lawyers will be unwilling to take on anything but easy cases.

21. Success fees are paid to lawyers in successful cases by the losing party to recognise the risk that if the case had been lost they wouldn’t have been paid their own costs and would have had to write those off: ‘No Win No Fee’

22. Success fees are used by law firms to build up a fund for their own costs when they lose a case and for the costs of investigating a case that they have to turn down. At Thompsons if a case has more than 50% chance of winning we will run it yet a high proportion—at least half of cases that we receive—are turned down after investigation. However efficient you are, investigation costs money.

23. As a result of an industry wide agreement mediated by the Civil Justice Council (CJC) success fees are fixed in 80% of personal injury cases.

24. The aim of the mediation was that the success fees once fixed should be cost neutral in a “basket” of cases, some of which would be turned down, some of which would be lost and some of which would be won.

25. Several CJC members formed part of Jackson LJ’s team. Another member of Lord Jackson’s team did the research and statistical modelling for the current success fees.
26. A major challenge in setting the current fixed success fees was to ensure that they would not damage access to justice and meritorious but risky cases would still be pursued.

27. When the statistical modelling indicated that the cost neutral success fee for accident at work cases was approximately 27%, further complex modelling was undertaken to produce staged success fees as where there were two 50/50 cases 27% recovered in the successful case would not pay for the 100% lost in the failed case.

28. The result was one figure applicable in cases settled pre-trial and another for those which are fought to trial. Based on the logic was that no insurer would fight a case to trial unless there was at least a 50% chance of a successful defence the success fee is set at 100% for those accident at work cases proceeding to trial but a reduced success fee for settled cases at 25%.

29. Jackson LJ appears to ignore the detailed work in the past of those on his own team. He chooses to shift the burden of success fees from the negligent party to the consumer injured through no fault of their own.

30. The effect of Lord Jackson’s artificial reduction of the success fee is to make it no longer cost neutral. This is particularly marked in cases which fight to trial.

31. On Lord Jackson’s own figures it will simply not be viable for solicitors to pursue the vast majority of cases to trial. The insurers will have the upper hand and be able to force low settlements in some cases and no settlement in others simply by contesting liability and/or quantum throughout.

32. Some say that lawyers will outbid each other and “the market” will drive success fees down to a low sum or nil so there is no deduction from compensation. If that happens consumers will get 100% of their compensation but only if they can find a lawyer to take it on. Lawyers will have no incentive to take on any cases that are difficult because there will be no fund they can draw upon should they have to turn the case down or if they lose.

33. No success fee in a straightforward case is problematic as it stops lawyers building up a fund for other claims. No success fee in any case that is less than straightforward means consumers will struggle to find a lawyer.

34. Advertising for cases on the television and in the tabloid press will however continue, but the cases will be screened harder with lawyers cherry picking only safe cases to run.

35. There will be fewer cases because...People injured through no fault of their own but who have more difficult or possible test cases will be unable to find a lawyer willing to take their case on.

36. Compensation will be significantly reduced.

37. Lord Jackson proposes that success fees can still be recovered but from the injured consumer rather than the insurer to the negligent defendant. Where they are recoverable they are to be capped at 25% of a claimants’ damages.

38. Deductions from damages have been widely condemned by consumer groups. They look like the system in the USA where lawyers take a slice of the claimant’s winnings. They have caused chaos in equal pay claims in the UK.

39. This may not put off a road traffic accident victim where there are no personal repercussions. But for the workplace accident victim who pursues a claim against their employer, with all the possible ramifications, the risk of losing or the prospect of taking on a claim only to end up having to hand over a significant chunk of their compensation to a lawyer may deter them from claiming altogether.

40. For employers, this presents an opportunity to cut health and safety corners, on the basis that employees are less likely to pursue a claim if this results in injury.

41. There will be fewer cases because...either cases will not be taken on or, if they can find a lawyer, the consumer—though they have been injured through no fault of their own—will be left with substantially less compensation and may decide not to bother making a claim at all.

42. The Jackson report proposals say Before the Event insurance (BTE) is the answer, but not everyone can afford BTE.

43. The consultation paper indicates that the government supports greater take up of BTE to resolve some access to justice issues. Lord Jackson accepts that the cost of BTE may go up due to his proposals and those consumers who are unwilling or unable to afford the luxury of BTE are likely to be the poorest and most vulnerable in society. They will end up getting less compensation. In some cases those without BTE will get up to 60% less compensation—see Appendix.

44. There will be fewer cases because...consumers who cannot afford or do not take out BTE will get substantially less compensation and may decide not to bother making a claim at all. A two tier justice system will have been created with the poorest and most vulnerable being the losers.
Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

45. No. Lord Jackson described his recommendations as a “coherent package of interlocking reforms”. Yet the consultation paper omits proposals on several of them.

46. Specifically, on referral fees the paper says: “In light of this ongoing work (the LSB consultation) the issue of referral fees is not included in this consultation paper. The Government will await the outcome of the LSB’s consultation before reaching a conclusion”.

47. We believe the current regime around referral fees is a major factor encouraging the advertising by claims firms which Lord Young identified as fuelling the perception of a compensation culture. Without movement on the issue of referral fees advertising will continue even if behind the scenes there is heavy “cherry picking”.

48. The proposals on referral fees from Lord Jackson would not deal with the issue and would have a negative impact on millions of consumers. An outright ban is not the answer because whilst the excesses of BTE insurers and claims companies would be caught by an outright ban on referral fees, so too would many other organisations that offer genuine access to high quality legal services.

49. The problem arises partly because the adoption of the current SRA definition of referral fees by Lord Justice Jackson would impact on the many bodies who represent injury victims and work closely with law firms to provide extensive services to those victims. These include charities, membership organisations and other not for profit organisations—asbestos support groups, serious injury charities, head injury charities and cycling clubs.

50. Unlike insures and claims companies, not for profit and charitable bodies exist to benefit their members/constituents, not to make a profit. They drive up the quality of the legal advice to their members by working only with firms that satisfy them on quality and experience and a commitment to pursue difficult and ground breaking cases.

51. In recognition of the referral of personal injury cases law firms often assist victims’ groups with free advice on state benefits, legal advice surgeries, training and the sponsorship of events. Jackson LJ's recommendation on referral fees would make this unlawful.

52. We favour an outcome in relation to referral fees which puts an end to the unacceptable abuses by BTE insurers and claims companies and thereby cuts off the attractiveness of saturation advertising but which supports access to high quality justice offered by membership organisations, charities and not-for-profit bodies.

53. There is a way to achieve this. One could keep the current definition of referral fees but permit them only where they satisfy all three of the following criteria:
   (i) they are reasonable in amount;
   (ii) they are provided wholly or mainly in services rather than as direct financial payments; and
   (iii) the beneficiaries are only membership organisations, charities and other not-for-profit bodies.

What are the implications of the Government’s proposals?

54. The government decision to implement part of the report will impact on all aspects of legal services to consumers injured through no fault of their own.

55. The government will lose revenue because fewer cases will mean less will be recovered by the Compensation Recovery Unit (CRU) in both benefits paid to injured people and NHS costs. In addition there will be reduced VAT due to reduced case numbers and less costs being paid in those cases that are pursued.

56. In practice the proposals will mean:
   (i) the end of being able to take out After the Event (ATE) insurance against losing a case. This may be offset (although only partly) by one way costs shifting;
   (ii) insurance for disbursements in cases that are lost and turned down will no longer be available—Lord Jackson expects injury victims to pick this up;
   (iii) No success fee means no fund for cases that are lost;
   (iv) a return to the old days of deductions from claimant’s damages (to be capped at 25% of damages);
   (v) a green light for contingency fees (the American system where the lawyer takes a part of any compensation won and which caused havoc in equal pay cases);
   (vi) reduced government revenue from less benefit recovery, less NHS costs recovery and reduced VAT payments.

56. The impact on vulnerable injured claimants of the government’s proposals also has implications for small businesses, as highlighted by Irwin Steltzer in the Times (21 October, Hounding no-win, no-fee lawyers is an attack on the poor).
57. Steltzer pointed out that the balance that favours large City law firms will be “tipped even more to disadvantage citizens whose only recourse is to no-win, no-fee law firms who must advertise to bring themselves to the attention of potential clients.”

58. Steltzer added that “these firms have little incentive to take on frivolous lawsuits” because they spend their own money doing the necessary research. Preventing them from “displaying their wares is an assault on entrepreneurial risk-takers who gamble that their skill in sorting out winning cases from sure losers will earn them a decent living”.

December 2010

APPENDIX

JACKSON CASE EXAMPLES

A proportionately reduced ATE premium, has been anticipated for in the examples below to provide funds to cover unrecovered disbursements should the case be lost.

The names have been changed to preserve confidentiality.

1. Adams

Work accident case. Warehouseman soft tissue injuries to back.

Settled for £1,275 post issue including general damages of £1,255.

Post Jackson:

Compensation would be initially £1,400.

Success fee payable out of damages capped at £350. Had the case gone to trial the cap would also have operated to limit the success fee to 6.7% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £125 in general damages but loses £910 (£350 + £560) meaning he recovers £490, a loss of 61.6%.

2. Brown

Work accident case. Residential social worker fracture of left arm.

Settled for £8,000 pre issue including general damages of £7,114.

Post Jackson:

Compensation would be initially £8,711.

Success fee payable out of damages (no cap) is £672.22. Had the case gone to trial the cap would have operated to limit the success fee to 31.4% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £711 in general damages but loses £1232.22 (£672.22 + £560) meaning he recovers £7478.78, a loss of 6.5%.

3. Clarks

Work accident case. Cleaner electrocuted.

Settled for £3,000 post issue including general damages of £2,800.

Post Jackson:

Compensation would be initially £3,280.

Success fee payable out of damages capped at £820. Had the case gone to trial the cap would also have operated to limit the success fee to 14.3% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £280 in general damages but loses £1380 (£820 + £560) meaning he recovers £1900, a loss of 36.6%.
4. Davey

Work accident case. Driver received soft tissue injuries to back, right hip and thigh.
Settled for £2,500 post issue including general damages of £2,400.
Post Jackson
Compensation would be initially £2,740.
Success fee payable out of damages capped at £685. Had the case gone to trial the cap would also have
operated to limit the success fee to 12.1% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damages estimated at £560.
So the Claimant gains £240 in general damages but loses £1245 (£685 +£560) meaning he recovers £1495 a
loss of 40%.

5. Edwards

Work disease case. Turner develops chronic dermatitis
Settled for £5,500 post issue including general damages of £5,450.
Post Jackson:
Compensation would be initially £6,045.
Success fee payable out of damages (no cap) is £1,108.25. Had the case gone to trial the cap would have
operated to limit the success fee to 22.7% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damages estimated at £560.
So the Claimant gains £545 in general damages but loses £1,668.25 (£1,108.25 + £560) meaning he recovers
£4376.75 a loss of 20.4%.

6. Fieldhouse

Work accident case. Welder developed pre patella bursitis in right knee.
Settled for £1,900 post issue.
Post Jackson:
Compensation would be initially £2,090.
Success fee payable out of damages capped at £522.50. Had the case gone to trial the cap would also have
operated to limit the success fee to 9.9% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damages estimated at £560.
So the Claimant gains £190 in general damages but loses £1,082.50 (£522.50 + £560) meaning he recovers
£1007.50 a loss of 47%.

7. Griffiths

Work accident case. Slipped on oil causing two year acceleration of pre existing back condition.
Settled for £2,000 all general damages at trial.
Post Jackson:
Compensation would be initially £2,200.
Success fee payable out of damages capped at £550. At trial the cap would also operate to limit the success
fee to 9% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning
cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damages estimated at £560.
So the Claimant gains £200 in general damages but loses £1,110 (£550 + £560) meaning he recovers £1090 a
loss of 45.5%.
8. *Harrison*

Work accident case. Health improvement specialist for a PCT slipped on wet floor, injuries to hip, spine and ribs.

Settled for £3,875 pre trial including general damages of £3,707.

Post Jackson:

Compensation would be initially £4,245.

Success fee payable out of damages capped at £1,061.25. Had the case gone to trial the cap would also have operated to limit the success fee to 17.4% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £370 in general damages but loses £1,621.25 (£1,061.25 + £560) meaning she recovers £2,623.75 a loss of 41.8%.

9. *Inglis*

Work accident case. Packing Manager suffered strain to left knee.

Settled for £2,500 all general damages.

Post Jackson:

Compensation would be initially £2,750.

Success fee payable out of damages capped at £687.50. Had the case gone to trial the cap would also have operated to limit the success fee to 12% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £250 in general damages but loses £1,247.50 (£687.50 + £560). Meaning he recovers £1,502.50 a loss of 39.9%.

10. *James*

Work accident case. Delivery driver fractured finger.

Settled for £3,500 post issue including general damages of £2,000.

Post Jackson:

Compensation would be initially £3,700.

Success fee payable out of damages capped at £925. Had the case gone to trial the cap would also have operated to limit the success fee to 15.6% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £200 in general damages but loses £1,485 (£925 + £560) meaning he recovers £2,215 a loss of 36.7%.

11. *Knights*

RTA case.

Settled for £4,800 post issue including general damages of £2,525.

Post Jackson:

Compensation would be initially £5,052.

Success fee payable out of damages (no cap) is £1,065. Had the case gone to trial the cap would have operated success fee would be 29.6% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £252 in general damages but loses £1,625 (£1,065 + £560) meaning he recovers £3,427 a loss of 28.6%.
12. Lawson

RTA case.

Settled for £5,000 post issue including general damages of £3,800.

Post Jackson:

Compensation would be initially £5,380.

Success fee payable out of damages (no cap) is £1,081.50. Had the case gone to trial the cap would operate
success fee would be 30.8% of the amount currently agreed by all parties as necessary to ensure there is a
fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £380 in general damages but loses £1,641.50 (£1,081.50 + £560) meaning he recovers
£3738.50 a loss of 25.2%.

13. Mildmay

Work accident case. Process Operator suffered soft tissue injuries to leg.

Settled for £1,200 post issue including general damages of £1,080.

Post Jackson:

Compensation would be initially £1308.

Success fee payable out of damages capped at £327. Had the case gone to trial the cap would also have
operated to limit the success fee to 6.3% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damages estimated at £560.

So the Claimant gains £108 in general damages but loses £887 (£327 + £560) meaning he recovers £421 a
loss of 64.9%.

14. Newgent

Work accident case. Catering Assistant suffered soft tissue injury to back.

Settled for £1,600 post issue including general damages of £1200.

Post Jackson:

Compensation would be initially £1,720.

Success fee payable out of damages capped at £430. Had the case gone to trial the cap would also have
operated to limit the success fee to 8% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damaged estimated at £560.

So the Claimant gains £120 in general damages but loses £990 (£430 + £560) meaning she recovers £730 a
loss of 54.4%.

15. Olivers

Work accident case. Crane driver suffered an injury to shoulder.

Settled for £1,300 post issue all general damages.

Post Jackson:

Compensation would be initially £1,430.

Success fee payable out of damages capped at £357.50. Had the case gone to trial the cap would also have
operated to limit the success fee to 6.8% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.

Insurance premium also payable out of damaged estimated at £560.

So the Claimant gains £130 in general damages but loses £917.50 (£357.50 + £560) meaning he recovers
£512.50 a loss of 60.6%,
16. Parsons
Work accident case. Retail Manager electrocuted.
Settled for £2500 post issue including general damages of £1600.
Post Jackson:
Compensation would be initially £2,660.
Success fee payable out of damages capped at £665. Had the case gone to trial the cap would also have operated to limit the success fee to 11.8% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damaged estimated at £560.
So the Claimant gains £160 in general damages but loses £1,225 (£665 + £560) meaning he recovers £1,435 a loss of 42.6%.

17. Randall
Work accident case. Manager at a children’s home sustained shoulder injury.
Settled for £8500 post issue including general damages of £8000.
Post Jackson:
Compensation would be initially £9,300.
Success fee payable out of damages (no cap) is £1,903.75. Had the case gone to trial the cap have operated success fee would be 30.5% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damaged estimated at £560.
So the Claimant gains £800 in general damages but loses £2,463.75 (£1,903.75 + £560) meaning he recovers £6836.25 a loss of 19.6%.

18. Simons
Work accident case. School employee suffered injuries to knee, neck and face.
Settled for £5,170 post issue including general damages of £5,000.
Post Jackson:
Compensation would be initially £5,670.
Success fee payable out of damages (no cap) is £1,210.63. Had the case gone to trial the cap would have operated, the success fee would be 23.5% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
Insurance premium also payable out of damaged estimated at £560.
So the Claimant gains £500 in general damages but loses £1,770.63 (£1,210.63 + £560) meaning he recovers £3899.37 a loss of 24.6%.

19. Turner
Work disease case. Trainee Probation Officer develops Repetitive Strain Injury.
Settled for £8,000 post issue including general damages of £6,000.
Post Jackson:
Compensation would be initially £8,600.
Success fee payable out of damages capped at £2,150. Had the case gone to trial the cap would also have operated to limit the success fee to 22.8% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £600 in general damages but loses £2,815 (£2150 + £665) meaning he recovers £5,785 a loss of 27.5%.
20. Underwood
Work accident case. Restaurant supervisor developed repetitive strain injury to neck and shoulder.
Settled for £3000 pre issue including general damages of £2,900.
Post Jackson:
Compensation would be initially £3,290.
Success fee payable out of damages capped at £822.50. Had the case gone to trial the cap would also have
operated to limit the success fee to 10.5% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £290 in general damages but loses £1,487.50 (£822.50 + £665) meaning he recovers
£1,802.50 a loss of 40%.

21. Venstrata
Work accident case. Rigging Operative suffered repetitive strain injury to back.
Settled for £3,800 post issue all general damages.
Post Jackson:
Compensation would be initially £4,180.
Success fee payable out of damages capped at £1,045. Had the case gone to trial the cap would also have
operated to limit the success fee to 13.7% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £380 in general damages but loses £1,710 (£1,045 + £665) meaning he recovers £2,470
a loss of 35%.

22. Wesley
Work disease case. Journalist developed work related upper limb disorder.
Settled for £8,000 post issue including general damages of £5,500.
Post Jackson:
Compensation would be initially £8,550.
Success fee payable out of damages capped at £2,137.50. Had the case gone to trial the cap would also have
operated to limit the success fee to 23.9% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £550 in general damages but loses £2,802.50 (£2,137.50 + £665) meaning he recovers
£5,747.50 a loss of 28.2%.

23. Yasminder
Work accident case. Welder developed hand and arm injuries.
Settled for £2,500 pre issue, all general damages.
Post Jackson:
Compensation would be initially £2,750.
Success fee payable out of damages capped at £687.50. Had the case gone to trial the cap would also have
operated to limit the success fee to 8.9% of the amount currently agreed by all parties as necessary to ensure
there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £250 in general damages but loses £1,352.50 (£687.50 + £665) meaning he recovers
£1,397.50 a loss of 44.1%.
Ev w32  Justice Committee: Evidence

24. Archibold
Deafness claim.
Settled for £5,000 post issue all general damages.
Post Jackson:
Compensation would be initially £5,500.
Success fee payable out of damages capped at £1,375. Had the case gone to trial the cap would also have operated to limit the success fee to 16.1% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £500 in general damages but loses £2,040 (£1,375 + £665) meaning he recovers £3,460 a loss of 40.8%.

25. Bellamy
Vibration White Finger case.
Settled for £6,665 post issue all general damages.
Post Jackson:
Compensation would be initially £7,331.
Success fee payable out of damages capped at £1,832.75. Had the case gone to trial the cap would also have operated to limit the success fee to 20.3% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £666 in general damages but loses £2,497.75 (£1,832.75 + £665) meaning he recovers £4,833.25 a loss of 27.5%.

26. Christou
Deafness claim.
Settled for £3,000 post issue all general damages of £3,000.
Post Jackson:
Compensation would be initially £3,300.
Success fee payable out of damages capped at £825. Had the case gone to trial the cap would also have operated to limit the success fee to 10.5% of the amount currently agreed by all parties as necessary to ensure there is a fund from winning cases to pay for losing cases and provide access to justice.
The post Jackson premium is estimated at £665.
So the Claimant gains £300 in general damages but loses £1,490 (£825 +£665) meaning he recovers £1,810 a loss of 39.7%.

Written evidence from Resolution (AJ 12)

INTRODUCTION
1. Resolution is an association of 5,500 family lawyers committed to the non-adversarial resolution of family disputes and achieving constructive and lasting outcomes when relationships break down.
2. Around two thirds of Resolution members do legal aid work. Resolution’s members work in around 1500 firms who form the bulk of family legal aid contract holders.
3. Resolution welcomes the inquiry which the Justice Select Committee has launched further to publication of the Green Paper Proposals for the Reform of Legal Aid in England and Wales by the Ministry of Justice.
4. Resolution’s submission relates to those questions highlighted by the Committee in its call for evidence which are of most relevance to Resolution members and families and children. Our submission is based on a preliminary analysis of the proposals.
5. It is disappointing and worrying that the Ministry of Justice has made these proposals before the Family Justice Review Panel makes its interim recommendations to that department and the Department of Education in the spring. Its recommendations are expected to deal with the promotion of informed settlement and agreement in family cases and improved management of the family justice system. The Committee may wish
to probe with the Ministry of Justice their approach to joined up thinking between the Green Paper proposals
and the Family Justice Review and the level of commitment to ensuring that the interests of families and
children using the family courts are served. Without targeted funding, for example, for early advice on all
non-court options, parenting information or solicitor negotiation, the courts could perversely become too easily the
option of first rather than last resort for families who don’t know where else to turn.

What impact will the proposed changes have on the number and quality of practitioners who offer family law services funded by legal aid?

6. Family law will sustain the largest proportion of scope cuts. The Green Paper proposes to take most private law cases out of the scope of legal aid. The Government estimates that there would be a reduction of 83% Family Legal Help cases compared to 2008-09 and 48% of Legal Representation cases. The combination of the proposals on scope and financial eligibility will result in a large and sudden reduction in our members’ legal aid workloads. It is likely that surviving by undertaking domestic violence and/or public law children cases alone is not a sustainable model. We believe that there will be insufficient amounts of work available to sustain the viability of legal aid providers especially in rural communities and they will simply close. The impact assessments recognise that rural providers may leave the market or move their business out of rural areas negatively affecting clients and providers in certain areas.

7. The introduction of the telephone single gateway to legal aid would have a significant, if not devastating, impact on the funding of both solicitor and not for profit providers (the Ministry of Justice estimates that solicitors would lose on average 75% of their funding and NfP providers would lose 85%). Resolution is also seriously concerned that this type of service will prevent firms gaining work by demonstrated quality and user recommendation leading to a reduction in quality. In particular there appears to no longer be any recognition of the importance of solicitor providers committing to their local communities. The proposals appear to remove the importance of firms committing themselves to forming relationships with local advice agencies and community groups.

8. The proposals assume that the market can sustain a 10% cut in fees. This proposed reduction will inevitably cut margins tighter in an already difficult environment and require providers to assess their future business plans and staffing.

Which family law cases will no longer be in the civil courts as a result of the proposed reforms and how will the issues they involve be resolved?

9. It is proposed that legal aid should no longer be available for divorce; ancillary relief, TOLATA 1996 cases and Inheritance Act 1975 claims where domestic violence is not present; and private law children and family cases where domestic violence is not present. There will be a limited funding scheme for exceptional cases that raise human rights or public interests issues. It is also proposed that the court will have powers to make interim lump sum orders against a party who has the means to fund the costs of representation of the other party.

10. Of course the proposals do not necessarily mean that these matters will not come before the courts to be resolved with people representing themselves in court. The Ministry of Justice’s own impact assessments raise a number of uncertainties including around how users of the family courts will behave if the changes are implemented. For example, it is simply not known whether more couples will leave issues totally unresolved, make agreements between themselves or exactly how many more will represent themselves in court. Nor is it known whether outcomes will be less fair than before with wider social and economic costs and adverse impacts on children.

11. However, it is clear that a family client suffering domestic abuse (which may present in many forms other than recent domestic violence as defined under the proposals), will not be represented in court to resolve their dispute if non-court options are unsuitable or unavailable.

12. A father who is not alleged to have abused his partner in any way and is looking for contact with his children, where the mother is not co-operating or being reasonable in mediation, will not have access to legal advice and support to help him seek to negotiate before high conflict develops. He would have little choice but to make an application to the court during which neither party would be legally represented. Even if they were affordable for the socially excluded individual, other services to fill the gap are not planned.

13. A cohabitant, however vulnerable and facing financial hardship, who has made career or financial sacrifices for the sake of their relationship and the children of that relationship will be expected to navigate on their own the complex law in relation to interests in property and to seek to reach a settlement. This will include where mediation with the economically stronger party is impossible or unsuccessful.

14. The Government proposes the continued funding of family mediation. This is of course welcome and will help some couples to resolve their issues. However, 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

15. There is some concern, however, that the market may not sustain the required level of provision. We are therefore concerned that there are a number of uncertainties including around how users of the family courts will behave if the changes are implemented.
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 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.

What are the implications of the Government's proposals?

15. As well as raising those issues highlighted above, the implications of the proposals include the following:

(a) With the volume of family legal aid cases being nearly halved, we are alarmed at the lack of the Ministry of Justice’s assessment of the impact on the Court Service of what will be the inevitable increase in litigants in person before the family courts. The Committee is specifically referred to the discussion of litigants in person at paragraphs 4.266 to 4.269 of the Green Paper.

(b) Court proceedings without the parties having the benefit of legally aided advice and representation will effectively be the only forum available for those cases which are highly unlikely to be resolved through mediation, for example, intractable contact disputes, removal from jurisdiction cases, or cases involving abuse not classified as domestic violence—these might include abuse of children and a consequential shift to the public law arena.

(c) The likely impact on the number of legal aid providers, especially in rural areas or where conflicts of interest arise, will have an access to justice consequence for those family members whose matters remain within the scope of legal aid and are financially eligible. This will include victims of domestic violence and parents and children involved in public law children proceedings who may be unable to access legal services or lack customer choice.

(d) Domestic violence related applications will be contested in far more (if not all) cases since the giving of undertakings under the Family Law Act 1996 will not give rise to the availability of legal aid. It appears that alleged perpetrators will not be eligible for legal aid resulting in the innocent respondent being unrepresented and the prospect of victims being cross examined by perpetrators.

(e) There may be more domestic violence related applications before the courts. We fear that if people don't have help in resolving their issues on divorce and separation, at an already often highly distressing and difficult time in their lives, then there will be increased conflict between some couples or escalated violence in some cases. If legal aid is only available in private family disputes where there is domestic violence, domestic violence allegations may be contrived or exaggerated by individuals in order to secure funding.

(f) Whilst continued legal aid funding for family mediation will benefit those couples where mediation is a suitable option for resolving their dispute, mediation will not be suitable for all couples. The proposals do not confirm the previous Government’s proposed extension of legal aid to collaborative law. This would offer both legally aided parties another supportive option, direct legal advice and a workable alternative to the court process and also provide the opportunity to reduce further the number of cases taking up court time and resources.

(g) Legal aid for limited legal support around mediation is helpfully proposed. However, funding to draft a consent order in a finance case is only available for those attending mediation, not for those who reach agreements themselves. This will potentially force people to mediate rather just to get a consent order drawn up and result in unnecessarily higher expenditure on mediation.

(h) Resolution will be examining in more detail the proposals for provision of advice and information services by telephone or on line and the consequences of such for our members and their clients. The earliest date proposed for the introduction of this new gateway is 2013–14, but this change would potentially affect the family legal aid landscape as much as the proposed changes in scope. We would have concerns about ascertaining and verifying eligibility for legal aid where mediation willingness and assessments are carried out on the phone or by email or by whatever other means may be envisaged to replace face to face meetings. Such methods of carrying out these meetings may prove extremely challenging when screening for domestic abuse and carrying out POCA checks.
recoverability of success fees and ATE premiums, increasing damages by 10% and introducing Qualified One Way Costs Shifting (QOCS). (“Jackson”).

(c) Its impact on personal injury claims where damages are less than £25,000 (“PI Claims”) other than Clinical Negligence claims (ie the overwhelming majority of PI Claims). Different considerations apply to high value PI Claims and Clinical Negligence claims, and different protocols and costs rules are currently applied to them without difficulty. This submission leaves open the question of how they should be treated.

EXECUTIVE SUMMARY

1. Jackson consists of two major proposals:

   1.1 Make success fees irrecoverable but award claimants an extra 10% damages in substitution.  
      **Intended result:** claimants will negotiate their own success fees and drive them downwards.

   1.2 Make ATE premiums irrecoverable and make successful defendants pay their own costs.  
      **Intended result:** the administration and profit element currently included in ATE policies will be saved.

2. Both these intended results can be achieved far more simply by capping the level of recoverable success fees and ATE premiums at relatively low levels—claimants will then negotiate their own success fees and ATE premiums. Success fees will be driven down as intended. ATE premiums will likewise be driven down making at least the saving contemplated in 1.2 above or indeed can be capped at a level guaranteed to achieve this result.

3. The Jackson proposals involve complex rules and exceptions which will decrease certainty, require a new body of precedent to be developed over a lengthy period, perpetuate the “costs war” and permanently increase both side’s administration.

4. The proposals exacerbate the “Compensation Culture”. The government predicts claims will increase as a result. Claimants will receive a windfall of up to 10% increase in damages. Defendants successfully resisting claims will no longer be reimbursed their costs and will become more risk adverse—any claim, however spurious will now involve them in cost.

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

**REPLY:** Jackson makes a number of “alternative” recommendations, and there are a considerable number of combinations and variations which could be introduced. Not all combinations/variations are set out in Consultation Paper CP 13/10 Cm 7947 (“the Green Paper”), and the combination of solutions set out in this submission is an example. In addition Jackson and the Green Paper may have different intended outcomes. The Jackson recommendations were principally aimed at cutting costs, whereas the government’s aim (Lord Young’s report etc) is also to reduce “the Compensation Culture” (see below).

What are the implications of the government’s proposals?

This submission looks at whether full compensation is achieved for claimants, the cost involved, and extraneous social effects:

FULL COMPENSATION FOR CLAIMANTS

1. This is economically desirable for society so temporarily injured people return to full productivity. Jackson appears to be broadly predicated on achieving full compensation and the Green Paper (despite Paragraph 60 on Page 23) does not state anywhere that it intends to move away from this objective. It is therefore valid to assess the proposals in the light of whether this aim is achieved.

COST

2. ATE premiums

   Jackson proposes abolishing their recoverability. It is overwhelmingly claimants who use ATE policies. The premiums collected are used to pay defendants’ costs when they are successful and claimants’ disbursements in the same circumstances. This part of the premium is not therefore a cost to the PI system but the restitution of the cost of those items which it is impossible to remove from the PI process. Jackson accepts that only the administration/profit element of ATE policies will be directly saved.

   2.1 Although removing this profit element would achieve a limited saving, it is worth noting that all activities require profit. There is no attempt to eliminate the much greater profit element in claimant solicitor costs or defendant insurer profit.

   2.2 There is no suggestion made that ATE insurers are making excessive profits.

   2.3 Few if any “household name” liability insurers have entered this market so its profitability is clearly not attractive to them.
3. As a direct consequence, Jackson recommends QOCS

3.1 The claimant will then not normally have to pay costs. Jackson proposes (Green Paper: Para 135) that the financial resources and conduct of all parties should be assessed at the end of the case and Jackson and the Green Paper contemplate the following exceptions where costs must be paid by the claimant:

3.1.1 The claimant has been fraudulent—this is often unclear. Faced with conflicting evidence, judges often have to decide they do not believe one party’s evidence—is this fraud? If the defendant alleges fraud and the claimant drops its case, the claimant may be simply taken a pragmatic view. There will then need to be a trial on this issue simply to determine costs!

3.1.2 The claimant has behaved unreasonably—this involves a review of the litigation procedures which have taken place, see 3.2 below. It often involves privileged issues of advice and discussions between solicitor and client—was the client advised to take that course of action?

3.1.3 The claimant is “wealthy”—the defendant’s conduct of a case (expenditure/offers) will be strongly influenced by whether or not it is going to recover costs. The defendant needs this information at the beginning of the case. How will the defendant obtain information from the claimant about his/her wealth?—see 3.2 below.

3.1.4 The defendant is an uninsured individual or uninsured small organisation (unless it appears they are wealthy) (Green Paper: Para. 145) 3.2 below again applies.

3.1.5 The claimant refuses a Part 36 offer and recovers less at trial. (Green Paper: Para 139).

3.1.6 The parties are on an equal financial footing (Green Paper: Para 137)—a further variation on some of the above formulas.

3.2 All of these require a myriad of procedures and reported court decisions to form a known body of rules. The “costs war” which has to date taken place between claimant and defendant is well documented (Green Paper: Para 137) and in relation to the introduction of CFAs has taken the best part of 10 years to bed down (Jackson Page 217 Para 2.2). It is important to note that court and appeals decisions take many years to distil into a coherent set of rules. These proposals will be sufficiently complex and open to appeal on individual issues, that the claimant and defendant time spent on them (both while they distil and operating them thereafter) will be enormous.

3.3 Jackson proposes that these issues should be assessed at the end of the case. The Green Paper (paragraphs 142–148) suggests possible refinements including the possibility of making a costs application at the outset but:

3.3.1 An application at the outset cannot be made in relation to suggested fraud, unreasonable behavior or Part 36 offers.

3.3.2 If cost applications are to be made at the beginning of a case, the defendant needs to make enquiries about a claimant’s wealth at the outset which will necessitate considerable additional administration on both sides in every single case.

3.3.3 The above means that a claimant will still require an ATE policy, either to protect himself against a cost application being made early in the case (and the costs of that application) or against the risk that there may be an application at the end of the case. If so, then although a much lower premium may be charged, the administration costs of the policy are likely to be similar/identical to those at present and the ATE insurer will need to make at least some profit on the policy. This largely wipes out the only direct saving which Jackson would otherwise achieve (the administration cost and profit element of an ATE policy)—the cost has simply been transferred to the claimant.

3.3.4 Since the claimant will not be entitled to recover the cost of this ATE policy, he must pay it himself out of his damages and will not therefore receive full compensation.

3.3.5 The proposed costs procedure ignores the fact that the vast majority of PI claims are settled without the issue of proceedings, let alone trial. Cases are dealt with based on perceived risks and threats or concessions in correspondence. To say that QOCS will cause uncertainty is an understatement. The additional time spent on advising and corresponding (on both sides) regarding these rules across what is many hundreds of thousands of cases per year will be substantial.

3.3.6 Applications for costs to be paid will inevitably be contested (they are very rarely agreed), so each will require a court hearing. The additional time and resources required by the courts will be substantial, as will the time spent by claimant and defendant representatives.

3.3.7 Simplicity for the many thousands of straightforward cases involved is the best guarantee of low overall costs.

3.4 QOCS involves by definition a different cost rule for claimants and defendants but which party becomes the claimant/defendant may be uncertain. In general commercial disputes it may well be wholly arbitrary. In a Motor claim where both vehicles are damaged/both parties injured, it will simply
be a matter of who sues first. There will of course be claims and counterclaims for each party and rules could treat them differently but the costs of claim and counterclaim in disputes regarding liability are notoriously hard to separate.

3.5 ATE Policies currently cover the claimant’s disbursements. The Green Paper (Paras 87–91) accepts that losing claimants (ie. injured people who are unable to recover compensation) must pay this themselves. This could be anything from £500 to many thousands of pounds for counsel’s fees etc and appears unrealistic. The alternative suggestion in the Green paper (Para 91) is to allow recoverability of an ATE policy which covers disbursements. The comments in 3.3.3 apply.

3.6 QOCS requires considerable legislation, with the consequential Parliamentary time involved.

3.7 The change to a position where claimants will now normally no longer be liable to pay costs even when they lose must inevitably heighten defendant fears of litigation and be a major boost to the “Compensation Culture” (see Para 7 below)

4. **ATE Policies—Proposed Solution**

Jackson accepts that the items which ATE premiums pay for (defendants’ legal work on the cases they win and claimants’ lost disbursements in those cases) should continue to be borne by defendants (effectively by society through insurance premiums) otherwise he would not have proposed QOCS. His objection instead was that premiums were unnecessarily high because of a lack of downwards market pressure. He reasoned that if claimants bore the cost, they would “shop around” and the cost would fall. If that is correct then a simple solution is available—introduce a maximum recoverable premium.

4.1 The government currently fixes many court costs and reviews them periodically/annually. There would be little difficulty in adding a maximum recoverable premium to this list, and reviewing this regularly. Jackson in any event concludes (Page 158 Para 5.8) that all fast track PI costs should be fixed, so this would be only a minor additional item.

4.2 Different maximum premiums could be set for different types of work. This could be refined to allow for the staged premiums (increasing fixed premiums for each stage of a case) which some ATE insurers offer.

4.3 Figures for premiums currently offered are regularly published in “Litigation Funding”—a Law Society publication. The recoverable premium could be capped at the lower end of the market, or just below it.

4.4 In many areas of PI the threat of government imposed figures has already led to industry wide agreement (fixed costs generally; fixed costs under the New Motor Process; agreed medical report fees etc)—maximum ATE premium levels are very likely to be agreed.

4.5 Part of the process of capping recoverable premiums would be to define a normal indemnity level and perhaps some key terms of the policy but this should be straightforward.

4.6 With limited recoverability, prices will be constrained by market forces as Jackson recommended.

4.7 If recoverability is limited, claimants will generally want to insure at the outset. This will have 3 effects:

4.7.1 Defendants will not have to pay the very large premiums which can be incurred when claimants insure close to trial—in some cases many thousands of pounds. This is currently unfair to defendants who cannot control the claimant’s insurance timing.

4.7.2 It should assist the ATE market to operate on normal insurance principles—large numbers of relatively low risk premiums.

4.7.3 Cases not insured at the outset have a heightened risk and require individual assessment. Currently this requires substantial administrative work by ATE insurers and claimant solicitors. When claimants seek to recover this substantial sum it requires detailed consideration/challenge by defendants. Removing this large volume of administration would be a real saving.

4.8 The Jackson “Alternative Package 1” proposes that recoverable ATE premiums should be capped at 50% of damages. Our proposal would cap them at a fraction of that eg Motor Premiums might be capped at around £300—£350.

4.9 “Alternative Package 1” suggests no recovery of ATE premiums where liability is admitted early. There is little merit in this—over 60% of Motor Claims are already being admitted within the New Motor Process. ATE insurers need to collect sufficient premiums to pay claims etc so the total amount to be collected will remain the same and there will be no saving to the defendant if that total is spread across all cases or only across the higher risk cases where liability is not admitted early. The latter course however will increase risk assessment administration and therefore the former course is preferable.

4.10 We wholeheartedly agree with “Alternative Package 1” Para 177 (j). Some ATE insurers control profit by regularly repudiating liability. We consider that this proposal should apply even where the ATE insurer has repudiated due to fraud. It will discourage the “Compensation Culture” if defendants are encouraged to vigorously defend spurious claims, knowing that their costs will be paid.

4.11 Under this proposal QOCS is not required.
Ev w38  Justice Committee: Evidence

4.12 Capping of additional liabilities can probably be achieved through secondary legislation/rules of court and avoids changes to primary legislation.

4.13 This proposal is supported by the Adam Smith Institute “Access to Justice” Briefing Paper (attached).

5. Success fees

Jackson believes that success fees are unnecessarily high because of a lack of downwards market pressure. The obvious solution is simply to reduce the percentage recoverable but instead Jackson proposes abolishing recoverability and replacing them with a 10% increase in damages.

5.1 Replacing costs with extra damages is rough and ready—there is no logical link between wasted solicitor work and damages.

5.2 Jackson says (Page xvii Para 2.8) “Most personal injury claimants will recover more damages than they do at present, although some will recover less”. This in itself is a major indictment of the proposal on both counts. If success fees do not fall then some claimants will not receive full compensation. If they do fall, and in many cases solicitors charge no success fee then claimants will receive a 10% windfall—this is wholly unfair to defendants and again a major boost to the “Compensation Culture”.

5.3 The benefit of this change depends on injured claimants shopping around for the lowest success fee—will this happen?

5.4 The overwhelming majority of damages are negotiated between the parties, not awarded by the court—how will we know that an additional 10% is being achieved?

6. Success Fees—Proposed Solution

Jackson’s view is that claimants should have an interest in negotiating the lowest possible Success Fee so that they “shop around” and the level on success fees will fall. If that is deemed desirable then the simplest solution is to cap recoverable success fees at a level below current rates and review regularly.

6.1 Under Part 45 of the Civil Procedure Rules success fees are already fixed in the Fast Track for: Motor claims (which make up approximately 90% of all PI claims), Employers Liability and Employers Liability Disease Claims. This means they already require solicitors to “take the rough with the smooth” ignoring the risk of any particular case.

6.2 It will be relatively simple to examine actual rates of success/failure and to adjust success fees to match those rates.

Social Effects—The “Compensation Culture”

7. The government is concerned about the perceived “Compensation Culture”. The meaning of this phrase is unclear—excessive lawyer profits, the encouragement of unmeritorious claims, too many claims, excessive compensation? A number of studies and Lord Young’s recent report concluded that the facts did not support these concerns, but that the fear of claims by potential defendants was very real, and this had led to a culture of risk adversity. Desirable activities (school outings, charity events, volunteer activities etc) were also being unnecessarily curtailed as a result. Jackson does not examine these consequences, but the Jackson proposals will heighten this fear:

7.1 Reducing the cost of processing claims is of course economically desirable but the reduction will be small and any reduction is likely to have an extremely small effect on defendants’ current fears and day-to-day behaviour.

7.2 Jackson will cause the number of PI Claims to rise (Government Impact Assessment No: MoJ 40 (attached) “Impact Assessment” Paras 2.2, 2.9 and 2.15) and more work for the Courts (Impact Assessment Para 2.12).

7.3 Jackson shifts the balance of power towards the claimant (Impact Assessment Paras 1.7, 2.8, 2.13, 2.15 and 2.19)

7.4 ATE insurers currently act as additional “gatekeepers” to claims—they refuse to cover some claims offered to them which solicitors would presumably otherwise pursue. These “gatekeepers” will now disappear allowing more questionable claims to be pursued.

7.5 Jackson’s proposal to give claimants an extra 10% damages and allow market forces to reduce success fees has severe flaws (see paragraph 5 above) but if it does at least reduce success fees then the extra 10% damages will be a windfall to claimants—they will be “overcompensated” and this can only encourage more claims.

7.6 If defendants cannot recover costs they will defend claims less rigorously and it will be economic to pay off unmeritorious claims and to settle by paying higher damages which will encourage further unmeritorious claims. (Impact Assessment Para 1.10).

7.7 Defendants will now know that however spurious the claim and however strong their defence, any claim brought against them will cost them money—if they are insured, their insurers will be involved in irrecoverable legal costs and will treat this as a claim on the defendant’s insurance policy. The present aim is to encourage local authority officials, employers etc to be less timid—they should carry
out legitimate activity and vigorously defend unwarranted claims. The Jackson proposals will make this encouragement impossible—defendants will know that they must avoid the risk of any claim however spurious. It is hard to think of proposals which would cause more harm to the government’s “Compensation Culture” aims.

CONCLUSION

Success fees represent work carried out by claimant solicitors on unsuccessful cases.

ATE premiums represent (i) work carried out by defendant solicitors and (ii) claimants’ out of pocket expenses on unsuccessful claims. Jackson does not reduce these, but introduces complex rules which will increase the overall level of work undertaken. The only direct saving would have been the administration and profit element in ATE policies, but these will still remain necessary (though irrecoverable). This is a sledgehammer to crack a nut, and moves backwards on compensation culture concerns. It can be achieved far more easily in the manner that this submission and the Adam Smith Institute recommends.

December 2010

Written evidence from the Legal Services Board (AJ 14)

The Legal Services Board (the “LSB”) is the organisation created by the Legal Service Act 2007 (the “LSA”) and is responsible for overseeing legal regulators, (referred to as the approved regulators (“Ars”) in the LSA) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system. The LSA gives the LSB and the ARs the same regulatory objectives—including promoting competition within the provision of legal services; improving access to justice, protecting the public interest—and a shared requirement to have regard to the better regulation principles.

The Government proposals that you are considering are not within our remit and we therefore offer no comment on them. We do, however, wish to provide you with some context on the legal services market and draw your attention to some of the emerging research in this area in order to support your forthcoming investigation.

The LSA ushered in a new era for regulation of legal services. With improved complaints handling through the Legal Ombudsman already in place and independent regulation increasingly secure, regulators are now able to focus on removing barriers to entry and improving the supervisory regime, so that consumers are better protected whilst having improved choice. The introduction of alternative business structures from October 2011 will allow new entrants to and a broader range of business models within the legal services market and thereby increase competitive pressures.

We recognise that the legal services professionals provide our judiciary and that public confidence in our legal system is at the core of our democracy. The LSB believes that the reform programme supports this wider public interest. We are confident that opening up the legal services market and removing unnecessary restrictions will improve access to justice and support the other regulatory objectives. Allowing investors, owners and managers freedom to innovate; opening up the legal profession to secure greater diversity, and building confidence in the legal profession through independent governance and better redress systems will ensure that public confidence is sustained and indeed enhanced.

There are, of course, divergent views on the future of the legal services market. We are clear that the drivers of change go beyond the LSA. Competitive forces appear to be on the rise, in the legal services market. At the corporate end of the market, consumers increasingly demand alternatives to hourly billing, such as fixed price contracts and cheaper legal services through “off shoring” and increasing use, of legal process outsourcing. This will have major consequences for the structure of the legal services market. Large firms are some of the most empowered consumers and the changes which they drive are likely to be a precursor to change throughout the market.

Increasing use of technology to support and deliver services is a common feature of competitive markets. For ordinary consumers in the legal services market, this is most evident in areas such as will writing where sophisticated software is increasingly being used to make it easier and cheaper for consumers to get a will. We have no doubt that this will continue and can impact on delivery of all legal services to all consumers.

There is, however, a dearth of empirical research on the legal services market to enable more fully informed views to emerge. That is why the Legal Services Board is undertaking a review of information, research and data across the sector. We expect to complete this soon after Easter 2011. We are also commissioning detailed research on the size, shape, structure and appropriate segmentation of the legal services market so that we (and others) can more accurately assess the impact of the reforms in the longer-term. The first parts of that research will also be available soon, after Easter 2011.

At present the two key pieces of research have been commissioned from economic consultants by our partners in the Approved Regulators. Oxera Consulting prepared their report on the impact of ABS on access to justice for the Law Society; whilst Europe Economics prepared a report on ABS for the Bar Standards
Board. Both are illuminating reports and can be obtained directly from the Law Society and Bar Standards Board respectively.\(^{18}\)

We will of course share our own research with the Committee as it becomes available and would be happy to discuss this with you at a suitable stage. We hope that this is useful for your forthcoming consideration of these important issues.

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**Written evidence from the Consumer Justice Alliance (AJ 15)**

1. **EXECUTIVE SUMMARY**

1.1 The Consumer Justice Alliance (CJA) exists to campaign on the impact that the Lord Justice Jackson’s (Jackson) proposals on civil litigation costs and funding will have on injured victims. The CJA is made up of representatives from charities, victims’ groups, insurers and law firms.

1.2 For the purposes of this written submission our comments are focused on the aspects of the terms of reference which refer directly to the Jackson proposals and the Government’s intention to implement them.

1.3 The Government’s consultation launched on 15 November 2010 does not cover all aspects of Jackson’s report but seeks views on the reform of Conditional Fee Arrangements—namely, abolishing the recoverability of CFA success fees and ATE insurance premiums—and the associated recommendations of increasing general damages and qualified one-way costs shifting. The consultation also covers permitting lawyers to use contingency fees or damages-based agreements (DBAs) in litigation, as an additional, alternative, form of funding which should be available to litigants in appropriate cases. Finally, the consultation covers a proposed increase in the hourly rate which successful litigants in person can claim from opponents where the litigant cannot prove financial loss.

1.4 The CJA firmly believes that the Government’s intention to implement these aspects of the Jackson proposals will have hugely negative consequences for injured victims seeking access to justice. In particular we believe they will:

- Restrict the ability of injured victims to gain access to justice at a time when they need it most.
- Only shift costs from an offender who has caused the injury onto the injured victim—not actually drive down costs themselves (Jackson’s primary objective).
- Restrict the damages received by the injured person. Damages are assessed on the needs of the injured person, including any medical treatment and care needed.
- Lessens accountability from the people who caused the injury in the first place.
- Restricts the work that a solicitor acting for an injured person can undertake and therefore seriously affect the way in which the injured person’s legal case is prepared. The proposals do not propose the same restrictions on those acting for defendants.
- Actually drive up costs due to an increase in “Litigants in Person”.

1.5 The CJA believes in the fundamental principle of our civil justice system, namely that all injured victims should have access to legal advice and support. What Jackson and the Government are proposing will greatly damage the ability of the legal profession to act on behalf of an injured victim, and will reduce their much-needed compensation. The CJA will be responding to the MoJ Consultation—“Proposals for Reform of Civil Litigation Funding and Costs in England and Wales”—under the parameters and timeline set out in the consultation.

1.6 The CJA would welcome the opportunity to provide further oral evidence to the committee to ensure the voice of the injured victim is clearly heard in the inquiry.

*Peter Walsh, Chief Executive of Action Against Medical Accidents (AvMA), and a member of the CJA:*

“Hindering deserving claimants’ access to legal representation will make our legal system more unequal, and our health service less safe. Preventing wronged patients from seeking legal redress erodes the accountability of medical providers and undermines patient safety. We should take pride in a civil litigation system that protects injured victims’ access to justice; making victims cover their legal costs out of their own damages will fundamentally undermine this access.”

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2. **THE CONSUMER JUSTICE ALLIANCE**

2.1 The CJA has been formed to highlight the impact that Lord Justice Jackson’s proposals on Civil Litigation will have on injured victims. The CJA is made up of representatives from charities, victims’ groups, insurers and law firms, all of whom feel the need to act against the potentially serious implications of the Jackson proposals which the Government is currently consulting on.

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\(^{18}\) “What will be the impact of alternative business’ structures on geographic access to justice?” Oxera Consulting for the Law Society, July 2010 and The future of the regulation by the Bar Standards Board following the Legal Services Act 2007. Europe Economics for the Bar Standards Board, November 2009.
2.2 The members of the CJA collectively feel there is a need to address the concerns which many key stakeholders in professional and voluntary sectors have over the recommendations in Lord Justice Jackson’s original report and the fact the Government intends to adopt them. It is of such importance that a single issue organisation has been created consisting of not only the legal sector but of all those organisations and individuals who are concerned about the rights of injured victims to access justice.

2.3 The CJA is campaigning to protect the rights of injured victims and members therefore supports the following aims in the CJA Charter:

— Equality of access to justice in all areas of the law that is not determined by an individual’s ability to pay.
— The preservation of claimants’ rights to retain their full damages.
— A coherent and joined-up approach to any reform preceded by adequate consultation and planning.
— Put forward proposals to drive down costs for litigants and the public.

2.4 The CJA is made up of over 18 Executive members. These include representatives from charities, victims’ groups, insurers and law firms. A full membership list is available at www.consumerjusticealliance.co.uk

3. THE JACKSON PROPOSALS

3.1 The Government launched its consultation document on 15 November 2010 following a statement to Parliament. This consultation is mainly concerned with the reform of Conditional Fee Arrangements, proposals to increase general damages and qualified one-way costs shifting. There are also proposals covering contingency fees (damages based agreements) and changes to the rates for litigants in person.

3.2 The Jackson Report made some 109 recommendations in nearly 600 pages. The Government is not consulting on all aspects but the CJA believes that some of the most important issues relating to individual access to justice are being considered and need appropriate scrutiny.

3.3 The Government is open in its support for Jackson’s work and proposals in the context of the consultation. In the foreword the Government states it is of the belief that civil litigation is too costly and that Sir Rupert has argued disproportionate costs do not advance access to justice. The CJA fundamentally disagrees with these assertions and wishes to work with the Government to bring forward alternative proposals.

3.4 The Government supports the concept of access to justice for claimants and defendants but asserts that “some defendants have complained that the disproportionate costs of defending claims against them mean that they are denied effective access to justice” and that there is an undue burden on the taxpayer who frequently pay the costs of compensation. The Government also states it is guided by the principles that: “In seeking to rebalance the costs of civil cases, we are endeavouring to ensure: that necessary claims can be brought; that reasonable claims should be settled as early as possible; that unnecessary or frivolous claims are deterred; and that as a result costs overall become more proportionate.”

3.5 In light of these assertions the CJA believes that the Government has not been appropriately guided by the Jackson proposals and that the changes, if implemented, will mean injured victims have poorer access to justice than is currently the case.

Lynn Griffiths, President of Carbon Monoxide Awareness, member of the CJA:

“It is unfair and unrealistic to expect injured victims to pay for their right to fair compensation. The system should be arranged to support access to justice for the most vulnerable, not discourage it through a heavy financial burden.”

4. IMPLICATIONS OF THE GOVERNMENT’S PROPOSALS

4.1 The overarching impact of the Government’s proposals are that they will restrict the ability of injured victims to seek fair access to justice. A fundamental principle of our civil justice system is that everyone is entitled to legal advice and support. This principle is now under threat.

4.2 It is no wonder that defendants do not like the current system and are calling for an overhaul, because unlike the previous legal aid system it puts claimants on an even playing field and provides access to justice for anyone who has a legitimate claim to bring—irrespective of their wealth.

Shifting costs onto the injured victim rather than driving down costs themselves

4.3 The primary proposal contained within the recent MoJ Consultation is to remove recoverability of success fees and ATE premiums. In his review Lord Jackson, and now the Government, suggest that ending recoverability will ultimately drive down litigation costs. The CJA believes that this is wide of the mark. Removing recoverability will not reduce costs, it will simply shift costs from defendants onto claimants.

4.4 The CJA questions why injured victims should have to take on these additional litigation costs that are currently borne by defendants. Our members would like to point out that the average injured victim does not have the same resources that large defendant insurance companies have at their disposal.
**Decrease in damages awards to injured victims**

4.5 The CJA do not think it is right or fair that injured victims should have to pay a proportion of their legal costs. Damages are assessed on the needs of the injured person, including any medical treatment and care needed. Any reduction in damages would result in the injured person receiving an unfair settlement and there being insufficient money to make up for their losses. It must be remembered that the injured person is the innocent victim and therefore they should not lose out through the fault of another, especially when the person or company causing the injury has insurance to pay the right level of compensation.

4.6 The CJA is concerned that the Government has been misled by the myth of compensation and damages awards that have appeared in parts of the media. The CJA would like to highlight that in reality damages awards are based on what that person requires in order to get his/her life back on track. The Judicial Studies Board for example recommends damages awards £35,000 for loss of an eye, £70,000 for total deafness, £75,000 for loss of an arm and £60,000 for the loss of a leg. We hope that members of the Select Committee agree that these awards are not unfair.

4.7 The Government has included a proposal of a 10% increase in general damages to offset the loss of recoverability. While the CJA welcomes the damages increase we are concerned that 10% might not be sufficient, and that an injured person will still be left with substantially less damages than required. Further to this we remain extremely concerned that the evidence supporting the benefits of the 10% has never been published.

**Increasing costs**

4.8 The Government intimates that by ending recoverability and forcing injured victims to take on a proportion of the costs, claimants on CFAs will take an interest in costs being incurred on their behalf. This suggests that claimant lawyers are actively driving up costs themselves. It makes absolutely no business sense for claimant lawyers to prolong litigation to increase costs. Claimant lawyers are the ones taking the financial risk by acting on behalf of a claimant, with no guarantee that they will receive a fee at the end of it all. There is every incentive to conduct proceedings as quickly and efficiently as possible in order to minimise the risk of taking on the case in the first place.

4.9 Well-established systems and processes exist to prevent defendant insurance companies being subject to unreasonable costs. Defendant insurers are able to take costs to a detailed assessment stage where they are subject to judicial review. Furthermore, defendant insurers as a matter of course instruct specialist costs negotiators to ensure that they can effectively identify and challenge any costs that are seen to be unreasonable.

4.10 If anything, it is in the interest of defendant lawyers and the insurance companies they represent to prolong litigation in order to force a settlement. Insurance companies have more resources and funds at their disposal than the average injured victim or the legal firm representing them. We have seen countless examples of defendants intimidating claimants by drawing out proceedings in order to force injured victims into accepting smaller compensation that they need or deserve.

4.11 The CJA believes that proposals regarding “Litigants in Person” will serve only to drive up costs.

**Hampering claimant lawyers from preparing their cases**

4.12 There is a risk that ultimately the plans will restrict the work that a solicitor acting for an injured person can undertake and therefore seriously affect the way in which the injured person’s legal case is prepared. The proposals will create huge uncertainty from claimants as to whether they qualify for the new arrangements, and it is worth pointing out that they will only be notified of their qualification at the end, not the beginning of proceedings—meaning that injured victims could eventually be landed with a heavy bill.

4.13 Qualified one way costs shifting, the introduction of which is proposed by the Department’s consultation document, will do little or nothing to remove claimants’ risk of incurring costs. A claimant would still face having to cover a proportion of the defendant’s costs if their claim was unsuccessful, and as such would still be compelled to take out insurance to cover a risk that could lead to financial ruin.

*Caret Whittingham, Chair and founder of SCARD (Support & Care After Road Death & Injury) and member of the CJA:*

“We see all too often the difference between highly organised and profitable insurance companies and those whom we look after. Anything which could impede the access to justice in these cases can only continue to increase the hurt and pain of those who we talk to.”

5. **Conclusions**

5.1 While no system can genuinely be described as perfect, the CJA believes that currently the balance between claimant and defendant works in ensuring access to justice. While we can all agree there is room for improvement and there are problems in the system with individual cases, our concern is that the Government has failed in its consultation to recognise the valuable service that the current civil litigation system affords to injured victims, particularly following the introduction of the new “portal” system for road traffic accident cases
5.2 The proposals represent a backwards step for injured victims, for access to justice, and will fall well short of achieving their primary aim of driving down costs.

December 2010

Written evidence from the Immigration Law Practitioners’ Association (AJ 19)

Introduction

The Immigration Law Practitioners’ Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, and other, ‘advisory groups. ILPA is a member of the Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission and the Legal Services Commission Immigration Representative Bodies group. ILPA has also provided evidence to the Justice Committee and its predecessors on the question of legal aid as it affects immigration and asylum law.

ILPA has drawn on its published and circulated material about the cuts in preparing this briefing.

The Cuts as they would affect Immigration, Asylum and Nationality Law

What would remain within the scope of legal aid?

— Asylum cases. These include claims for protection under the 1951 UN Convention relating to the status of refugees and cases where there is serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c) of the EU Qualification Directive). We should welcome confirmation that claims based on Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman or degrading treatment or punishment) remain within scope.

— Immigration detention cases (relating only to issues of detention and/or bail not a detainee’s substantive immigration case).

— Cases before the Special Immigration Appeals Commission.

— Public law.

— Certain money claims against public authorities, for example involving breaches of human rights, abuse of power or extreme cases of negligence.

— Mixed cases (i.e. part of the case is within scope of legal aid).

— Discrimination cases.

What would be cut from the scope of legal aid?

— All immigration and nationality cases, including appeals to the higher courts. We note that there is an exception made in the paper for family cases involving domestic violence. We should welcome confirmation that immigration cases involving domestic violence remain within scope. Rules exist to allow those whose relationships break down because of domestic violence to remain in the UK in an effort to ensure that people do not stay in abusive relationships because they fear removal. These rules provide essential protection.

— Certain money claims against public bodies not falling within the criteria for inclusion.

— Welfare-related issues arising in immigration and asylum cases including applications for asylum support at the initial stage (there is already no legal aid for appeals to the Asylum Support Tribunal).

General Proposals Affecting Asylum and Immigration

— Eligibility thresholds will be changed—fewer people will qualify for legal aid.

— Rates of funding for legal representatives will be cut.

— There will be a telephone gateway which will control access to representatives providing advice and representation funded by legal aid.

Why This Matters

These are cases about whether people are allowed to join spouses, partners and parents; about whether people will have to leave the country in which they have lived for years, sometimes for decades, leaving close family members behind. They are cases about whether a person who has fled domestic slavery can live safely in the UK away from those who abused them. They are cases about whether a person is entitled to work and
Ev w44  Justice Committee: Evidence

can thus support themselves or to a roof over their head and something to eat. They are cases where a wrong
decision, based on a misunderstanding of the evidence, threatens to change the course of a person’s whole life.
The law in this area is voluminous and extremely complicated.

Add to this that those affected include people unfamiliar with UK laws and procedures, with very limited or
no support networks in the UK, with little or no understanding of what they should be able to expect from a
Government department, let alone what they get from the UK Border Agency. Add to this that like any
other group of people, they include those with disabilities, in profound distress, ill, elderly, young and/or with
multiple difficulties in their lives and those who face racism and xenophobia.

Legal aid for immigration and asylum support cases does not support people’s lifestyle choices. The
immigration law applicable to persons who qualify for legal aid has little or no patience with these. Immigration
legal aid is used to provide protection where otherwise people might be unable to live anywhere in the world
with partners or children, or would be forced to leave the place where they grew up or have long made their
home, where they are destitute, homeless or hungry, or where family members would be left in dangerous
circumstances. These are not matters that most people, whether subject to immigration control or not, regard as
lifestyle choices, but rather as the most important elements of their existence. It is used to provide redress
against official mistakes, incompetence or misconduct and the effect of decisions that are in not in accordance
with the law.

MATTERS WORTHY OF FURTHER INVESTIGATION

A “comprehensive” spending review?

Tackling the behaviour of Government departments would result in savings not only in cases it is proposed
to take out of the scope of legal aid, but in cases that the Government proposes should still receive legal aid
funding and also in cases where people already do not receive legal aid but are paying their own legal costs.
The savings, which would benefit individuals, could be huge. While other departments are looking to make
cuts in their own budgets, we are aware of no evidence that suggests that the UK Border Agency is examining
how it could take steps that would reduce expenditure in the Ministry of Justice, whether on legal aid or in
the courts.

Moreover, legal aid plays an essential part in ensuring that Government departments spend money wisely,
and as parliament intended.

Instead of a comprehensive spending review, we have an approach to cuts legal aid that could increase total
Government expenditure, and will place all the burden of cuts on the poor.

Taking the UK Border Agency as an example, a “polluter pays” principle, whereby the department that
generates costs for the legal aid budget and for the courts, meets those costs, would tackle:
— The need for a department to consider whether it is appropriate to bring in new laws or procedures,
especially in haste, with provisions drafted in haste and the worse for that.
— The quality of decision-making.
— The Home Office’s conduct as a litigant.

This would produce savings not only in the Ministry of Justice but in the Home Office.

We should appreciate clarification from the Secretary of State as to the steps he is taking to ensure that the
Ministry of Justice is in a better position to identify the need for, and demand, legal aid impact assessments
and to challenge impact assessments produced by departments when these are inadequate?

2009, plus many more regulations and rule changes, many of which have been hastily devised and led to all
sorts of confusion. The behaviour of the UK Border Agency has driven judges to despair. Lord Justice Ward,
in the Court of Appeal in See eg MA (Nigeria) v Secretary of State for the Home Department [2009] EWCA
Civ 1229,19 said

“The history fills me with such despair at the manner in which the system operates that the preservation
of my equanimity probably demands that I should ignore it, but I steel myself to give a summary at
least… What, one wonders, do they do with their time?

…I ask, rhetorically, is this the way to run a whelk store?”

MOVING COSTS AROUND

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.

**AN OVERSIGHT—A DEARTH OF OTHER ADVICE OPTIONS**

To give immigration advice in the course of a business “whether or not for profit” an advisor must be a solicitor, barrister, or regulated by the Office of the Immigration Services Commissioner. When ILPA raised this it appeared that it was not a matter that had been considered by the Ministry of Justice. If legal aid is cut, then unless voluntary organisations take on the responsibilities and expense of becoming regulated advisors, then those too poor to pay will not receive assistance. Among those likely to be affected by this are MPs and their caseworkers, who are not regarded as giving advice “in the course of a business” and will be one of the few sources of advice on immigration left. ILPA has long strongly supported the notion of independent regulation of those giving immigration advice. But is perhaps sometimes forgotten that the greatest protection against poor advice is access to high quality advice and that protecting the pool of excellence and competence in legal representation is the first defence for clients. Those who cannot afford to pay for such advice are vulnerable to exploitation as they seek to find the necessary funds. They are also vulnerable to those giving poor quality advice.

**FALLACIOUS ARGUMENTS**

The Green Paper relies on some arguments that simply cannot be substantiated. It states:

The argument that these are matters of personal choice

“4.19 However, there is a range of other cases which can very often result from a litigant’s own decisions in their personal life, for example, immigration cases resulting from decisions about living, studying or working in the United Kingdom. Where the issue is one which arises from the litigant’s own personal choices, we are less likely to consider that these cases concern issues of the highest importance.”

Many of those studying or working in the UK will be excluded from legal aid because of the eligibility tests. Those who meet the current financial criteria for legal aid are likely to have extremely limited ‘personal choices’. Business matters are already excluded from the scope of legal aid. As to living in the UK, these cases often concern Article 8 of the European Convention on Human Rights, the right to family and private life. They are about whether a person can be joined by a spouse, partner, child or elderly dependent relative. They are about what happens to a person 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. There are about people who face removal from a country where they have lived for many years, including since childhood.

The argument that people can represent themselves

The Green Paper states

“4.203 ...We recognise that there will be cases in which important issues arise, such as the right to a family life. However, individuals will generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate.”

The Supreme Court, and its predecessor, the House of Lords, whose work is confined to deciding the most complex points of law, have given more judgments on Article 8 in recent years than on almost any other area of law.

We recall the recent comments of 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”. (Para 87)

The Hon Mr Justice Blake, speaking at the Annual Conference of the Office of the Immigration Services Commissioner on 6 December 2010, noted how the Tribunal had benefited from having Lord Justice Sedley, a Court of Appeal judge, sit in the tribunal including on a ‘devilishly complicated’ Article 8 case. He observed that the immigration judges of the tribunal need competent representatives to enable them to do their task and that targeted grounds of appeal enable the tribunal to do its job better. He recalled the hierarchy of laws with which the tribunal is dealing: domestic law, the cases of the European Court of Justice and those of the European Court of Human Rights.

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In his speech, Mr Justice Blake identified case management as critical. His predecessors have made the same points. The late Mr Justice Hodge, giving evidence before the Constitutional Affairs Committee, stated:

“The AIT and its judges, whenever they have been asked, have always said that we value representation and we want as many people to be legally represented as possible, and whenever we discuss these matters with the Legal Services Commission, which we do periodically, that is entirely what we say... the change in representation has been very much driven by the Legal Services Commission's worries about the total cost of their budget rather than anything to do with us.”

Mr Justice Collins was giving evidence in that same session and stated of litigants in person “...it makes it more difficult to give proper consideration when you do not have the evidence put before you in the form that it ought to be put.”

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. The comments of the judiciary testify to this. Lord Scott declared in *Chikwamba v Secretary of State for the Home Department*, [2008] UKHL 40:

“It is, or ought to be, accepted that the appellant’s husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it.”

The then Lord Justice Woolf in *R (Veli Tum) v Secretary of State for the Home Department* stated:

“... it is important to appreciate that under s 11 of the Immigration Act 1971 a person can be admitted into this country while an application is being considered, without being regarded from the legal point of view as having entered into this country. Davis J, not unreasonably in the court below, described this as an ‘Alice in Wonderland’ situation. Although that description is appropriate, the provisions of s 11 are of value because it enables a person who makes a claim to enter this country not to be detained but to be released temporarily while his position is considered.”

The Court of Appeal in *Lekpo-Bozua v London Borough of Hackney & Ors* [2010] EWCA Civ 909 described the provisions of domestic legislation pertaining to European free movement law as “labyrinthine”, an expression also used by the Court of Appeal in *Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310:

“I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine but, to cut a convoluted story short, she was a “person from abroad” pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful—unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000—she did not enjoy the right to reside here at the material time because she was not a “qualified person” as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in Abdrahman”

In the influential study, Tribunals for diverse users, Professor Hazel Genn and her team observed

“...there are limits to the ability of tribunals to compensate for users’ difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and the tribunal, but may be crucial to procedural and substantive fairness”

There is no legal aid for hearings before the Asylum Support Tribunal and the tribunal has expressed concern at the effect of this, as has the Joint committee on Human Rights. Citizens’ Advice has conducted two studies of asylum support appeals. In 2007 it looked at 223 cases and found that among the 36 represented appellants, the success rate was 58 per cent, but among the 187 unrepresented appellants it was 29 per cent.

21 Oral evidence Taken before the Constitutional Affairs Committee on Tuesday 21 March 2006, see http://www.publications.parliament.uk/pa/cm200506/cmselect/cmcoun/1006/6032/10066032103.htm
22 Genn, H, Lever, B and Gray, L, DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006.
23 See, in particular, the Asylum Support Adjudicators annual reports for 2000–01 and 2004–05.
For its June 2009 Evidence Briefing Supporting justice: The case for publicly-funded legal representation before the Asylum Support Tribunal it looked at 616 appeals and wrote:

“Among all 616 appeals the success rate was 45.3%. And it must be noted that, in the six-month period covered by our study, October 2008 to March 2009, the UKBA withdrew (or conceded) no fewer than 277 (27%) of the 1,027 new appeals lodged with the AST, before they reached an oral hearing or paper-only decision. Indeed, including appeals conceded by the UKBA, the AST’s own monthly outcome statistics show an overall success rate, in the six-month period October 2008 to March 2009, of 54.9%. Such an overall success rate is strongly suggestive of poor quality (or, at least, inadequately informed) initial decision-making by the UKBA.”

It looked at 115 appeals where the Asylum Support Appeals Project provided represented.

“Of these 115 appeals, 82 were allowed or remitted to the UKBA for a fresh decision—a success rate of 71.3%. Including the 46 cases in which the ASAP gave advice to the appellant immediately prior to the hearing, but did not represent him or her at the hearing, the success rate among the 161 appellants who received pre-hearing advice from the ASAP, or were legally represented at the hearing, was 60.9 per cent. Among the 316 oral appellants who received neither representation at the hearing nor prehearing advice from ASAP, however, the success rate was just 38.6%.”

On 17 November, the Chair of the Administrative Justice and Tribunals Council spoke on Radio 4’s Today programme, speaking on Today (R4—see), highlighted the failure of public bodies to get decisions right first time across many areas of public decision-making. He identified that, in immigration, there was a 37% success rate on appeal; and stressed that this (and similar figures in other areas) indicated the degree to which public bodies were getting decisions wrong. He expressed concern that this was only the tip of the iceberg because there were many more decisions made by public bodies that were not brought before tribunals, many of which would be correct decisions but others he feared would be wrong but just not remedied. He also voiced concern that public bodies fail to learn the lessons of cases brought to tribunals, perhaps putting the matter right in the individual case but repeating the same mistake in other cases. All this reflects ILPA’s experience.

The Committee may wish to ask the Secretary of State how justice can be delivered in these circumstances. It may wish to ask how case management can be delivered in tribunals where litigants are litigants in person.

**Sustainable Legal Representation**

The fixed fee for advising in an immigration case is £260; £459 in an asylum case. The nominal hourly rate for preparation is £58.50. That hourly rate is paid if the value of the case exceeds three times the fixed fee. If the case were to take just less than three times the fixed fee then only the fixed fee would be paid and the payment per hour would work out to just over one third of the nominal rate or around £19.50 per hour. Rates are essentially unchanged since 2001. Yet these are the rates that it is proposed to cut. For comparison Her Majesty’s Court Services current Guideline Hourly Rates for 2010 for a Grade B solicitor (over four years post qualification experience) would be £242 and for Outer London for a Grade C (less than four years post qualification experience) £165.

The Legal Services Commission has said that it considers that across the immigration and asylum caseload there will be “swings and roundabout”: that legal aid fixed fees will not cover the costs of all cases, but would more than cover the costs of others. It can be seen from the rates of pay above that this principle is dubious in the extreme.

We have seen nothing from the Legal Services Commission that examines the effect of removing legal aid from immigration cases not made any proposals to reassess whether it still considers that there will be “swings and roundabouts” if practitioners do only asylum cases.

It is clear from the above that a strategy for financial survival is likely to see firms seeking to specialise either in cases of exceptional complexity that will take three times the fixed fee, or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee. From the outset many organisations, including ILPA, have repeatedly expressed concerns that fixed fees will lead to “cherry-picking” of cases. That the concerns have proven founded is admirably summarised in the report Review of quality issues in legal advice: measuring and costing asylum work (June 2010) produced by the Information Centre for Asylum Seekers and Refugees for Refugee and Migrant Justice, the Immigration Advisory Service and Asylum Aid and the sources cited.

Other strategies for survival are to reduce the proportion of legal aid work a firm does. This is likely to be accelerated by the results of the current tender which, because of the way it was structured, has seen reputable firms fail to secure a contract and many more given a pro rata allocation of the number of case starts for which they bid. Legal aid work can only survive while there are firms not only willing, but also able to deliver it.

In various parts of the country, following the latest tender, there is no legal advice in immigration and asylum. Devon Law Centre has closed, and many of those in Plymouth now have to go as far afield as Bristol to find legal representation. In the Dover ports area no contracts have been let in asylum and immigration.

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25 http://news.bbc.co.uk/2/hi/today/hi/today/newsid_9197000/9197123.stm
26 Legal aid: the way forward Cm 6993, Legal Services Commission and Department for Constitutional Affairs.
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The Legal Services Commission has not responded to requests to know what its contingency plans for these areas are.

There is a desperate need for the Ministry of Justice to look at how it can best support the best lawyers and advisors doing legal aid work. And the more they are able to flourish, the better value the Government gets from the legal aid budget.

THE TELEPHONE ADVICE LINE

The proposal is for a two-tier system in which initial contact with an ‘operator’ will be the diagnostic stage and the stage at which the caller is advised whether or not they are eligible for Legal Aid. The operator will route the person to the most suitable service for their circumstances, including Legal Aid specialists. Face to face advice would be available where cases are too complex to be dealt with on the phone.

ILPA is concerned that the system could work to keep people out of the legal aid to which they are entitled, or to timely assistance, because the complexity of immigration law, not to mention the imperfect understanding many applicants have of the procedures in their own cases, gives rise to a risk that the diagnosis of the case will be imperfect.

We should appreciate clarification as to whether it is the intention that people will access legal advice online and on the telephone, and if so, how this is to be regulated, especially in the area of immigration law, where to give advice on an individual case is, with regulation, a criminal offence?

We should appreciate clarification as to who is to determine the level of complexity and how and as to how it will determined that a case is not eligible for legal aid, particularly on the grounds that the case has insufficient merit?

We should appreciate clarification as to what entitlements callers will have to challenge the decision that their case is not eligible for legal aid?

December 2010

Written evidence from Professor Richard Moorhead (AJ 20)

LEGAL AID INQUIRY

The author is Professor of Law at Cardiff Law School with a longstanding research interest in legal aid and access to justice. He has conducted numerous studies in these areas for, amongst others, predecessors of the Ministry of Justice and the Legal Services Commission (and its successor). He is a former member of the Civil Justice Council and has previously acted as Specialist Adviser to Select Committees on legal aid. Views expressed here are personal.

This submission focuses on limited areas of the Green Paper (hereafter ‘the Paper’) predominantly where there is research evidence which may be of particular interest to the Committee.

ARE WE MORE LITIGIOUS?

Part of the rationale for the Green Paper is the assumption that we are too litigious as a society and that such litigiousness is caused by legal aid. The Paper provides no evidence to support that assertion and most of the proposed cuts centre on areas of work which are not, in general, related to litigation (social welfare law in particular). Increasingly, the legal aid scheme is based around funding individuals to defend cases which are brought by the State. The two largest areas of expenditure are criminal defence and public law children cases. It is these state-sponsored cases which are largely behind the increasing cost of the legal aid scheme not “litigiousness” driven by legally aided claimants.

The Committee may benefit from a brief analysis of the factual accuracy of the claim that there is greater litigiousness in areas where legal aid does fund litigation and where the Paper proposes to make cuts.

The following data on family cases is drawn from the Ministry of Justice Website.\textsuperscript{27} The first graph considers disposal of ancillary relief applications.\textsuperscript{28}

\textsuperscript{27} http://www.justice.gov.uk/publications/courtstatisticsquarterly.htm

\textsuperscript{28} These figures will exhibit some time-lag (disposals will relate to cases some of which will have commenced prior to 2008).
The next graph looks at the disposal of domestic violence applications.

The third graph looks at private law children applications. Here the data is recorded as number of children involved in private law applications.
The final graph considers public law cases (cases brought not by “private” litigants but by decisions of local authorities—and where legal aid is not to be withdrawn).

The results (with some more detail) are summarised in the following table.

<table>
<thead>
<tr>
<th>Overall Change</th>
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<tr>
<td>Dissolution of marriage—Petition filed</td>
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<tr>
<td>Dissolution of marriage—Decrees nisi</td>
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<tr>
<td>Dissolution of marriage—Decrees absolute</td>
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<tr>
<td>Nullity of marriage—Petition filed</td>
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<tr>
<td>Nullity of marriage—Decrees nisi</td>
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<tr>
<td>Nullity of marriage—Decrees absolute</td>
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<tr>
<td>Judicial separation—Petition filed</td>
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<tr>
<td>Judicial separation—Decrees granted</td>
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<tr>
<td>Disposal of ancillary relief applications—Uncontested</td>
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<tr>
<td>Disposal of ancillary relief applications—Initially contested, subsequently consented</td>
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<tr>
<td>Disposal of ancillary relief applications—Contested</td>
</tr>
<tr>
<td>Disposal of ancillary relief applications—Total</td>
</tr>
<tr>
<td>Disposal of contested or initially contested ancillary relief cases—in respect of child(ren)</td>
</tr>
</tbody>
</table>
Domestic Violence applications made—Occupation  −19%
Domestic Violence applications made—Total  3%
Domestic Violence orders made—Non-molestation  15%
Domestic Violence orders made—Occupation  −30%
Domestic Violence orders made—Total  5%
Number of children involved in Public Law applications made in FPCs  11%
Number of children involved in Public Law applications made in county courts  11%
Number of children involved in Public Law applications made in the High Court  0%
Number of children involved in Public Law applications made in the all tiers of court  11%
Number of children involved in Private Law applications made in FPCs  −17%
Number of children involved in Private Law applications made in county courts  14%
Number of children involved in Private Law applications made in the High Court  0%
Number of children involved in Private Law applications made in the all tiers of court  8%

This data does not point to a significant or consistent rise in litigiousness sponsored by legal aid. The greatest rise is in cases brought by the State not by legally aided individuals. Disposals of private children applications have increased, with a mixed picture on domestic violence applications. It is possible this increase reflects reapplications or inaccuracies in the data. In 2006 MoJ announced there were 14,000 applications (children) when the figure was closer to 11,000.

It should also be emphasised that this is a very basic analysis of published data for the last three years.

This is further analysis is basic but it goes further than the Green Paper goes. Part of the philosophy behind the Green Paper is that legal aid incentivises litigation and so can be 'managed out' of the system without damaging the underlying interests of justice (through increased use of mediation in particular). Similar points can be made about data from the County Court (which suggests generally declining rates of litigation) and, with the principal exception of road traffic cases, with regard to personal injury cases (which largely fell outside the scope of legal aid in any event and which the reforms mooted in the paper will ensure fall completely out of scope).

The following table shows trends in personal injury claims (using Compensation Recovery Unit data). These data have the advantage of looking across a longer period (back to the time when most personal injury cases were taken out of scope). With the exception of road traffic (motor) cases, each category drops across the ten year period including the main area still funded, in part, within legal aid—clinical negligence claims:

<table>
<thead>
<tr>
<th>Year</th>
<th>Clin Neg</th>
<th>Employer</th>
<th>Motor</th>
<th>Other</th>
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<tbody>
<tr>
<td>2000/01</td>
<td>10,991</td>
<td>219,183</td>
<td>401,757</td>
<td>8,207</td>
<td>95,883</td>
<td>736,021</td>
</tr>
<tr>
<td>2001-02</td>
<td>9,779</td>
<td>170,554</td>
<td>400,445</td>
<td>6,548</td>
<td>100,989</td>
<td>688,315</td>
</tr>
<tr>
<td>2002-03</td>
<td>7,977</td>
<td>183,342</td>
<td>398,892</td>
<td>6,704</td>
<td>109,782</td>
<td>706,697</td>
</tr>
<tr>
<td>2003-04</td>
<td>7,121</td>
<td>291,210</td>
<td>374,761</td>
<td>5,698</td>
<td>91,453</td>
<td>770,243</td>
</tr>
<tr>
<td>2004-05</td>
<td>7,205</td>
<td>253,502</td>
<td>402,924</td>
<td>5,007</td>
<td>87,247</td>
<td>755,885</td>
</tr>
<tr>
<td>2005-06</td>
<td>7,762</td>
<td>198,067</td>
<td>452,584</td>
<td>5,104</td>
<td>84,655</td>
<td>748,173</td>
</tr>
<tr>
<td>2006-07</td>
<td>8,468</td>
<td>161,031</td>
<td>510,080</td>
<td>4,828</td>
<td>85,158</td>
<td>769,565</td>
</tr>
<tr>
<td>2007-08</td>
<td>8,876</td>
<td>87,198</td>
<td>551,905</td>
<td>5,299</td>
<td>79,472</td>
<td>732,750</td>
</tr>
<tr>
<td>2008-09</td>
<td>9,880</td>
<td>86,957</td>
<td>625,072</td>
<td>4,275</td>
<td>86,164</td>
<td>812,348</td>
</tr>
<tr>
<td>2009-10</td>
<td>10,308</td>
<td>78,744</td>
<td>674,997</td>
<td>6,251</td>
<td>91,025</td>
<td>861,325</td>
</tr>
<tr>
<td>Overall Percentage Change</td>
<td>−6%</td>
<td>−64%</td>
<td>68%</td>
<td>−24%</td>
<td>−5%</td>
<td>17%</td>
</tr>
</tbody>
</table>

In summary, the evidence does not suggest a general rise in litigiousness associated with legal aid. Importantly, the Government does not appear to have properly evidenced or analysed what it asserts is a key driver behind the reforms.

Mediation as an Alternative to Litigiousness?

I am assuming that the Committee will be receiving significant evidence from other sources on the administration’s approach to mediation. It is difficult to second guess the outcome of the Norgrove review, and the interactions between that and legal aid reforms need to be considered in the round (indeed to cut family legal aid prior to the outcome of the Norgrove review seems to put the cart rather before the horse). One matter which the Committee might like to pay attention to is that Australia has gone down a route which may be emulated by the Green Paper and the Norgrove Review. The Committee should note that the Australian shift required substantial investment (I have been told informally that the Australian authorities invested significantly to make their changes work—£250m in UK currency for a much smaller population). This may be indicative of the challenge facing this administration in seeking to make such changes with dramatically reduced resources.

I am grateful to Professor Judith Masson for the points in this paragraph about the accuracy of data.

One would expect government policy to be based on a much stronger analysis of how litigation rates relate to related social trends (such as divorce rates), for instance, and for such an analysis to have informed policy.
Litigants in Person

Discussion surrounding the Green Paper on legal aid reform has focused, in part, on litigants in person (LiPs). An idea which has received particular emphasis is the impact of LiPs on the courts. The research evidence points towards substantial issues impacting on how the courts conduct their business both judicially and administratively. This raises important issues of principle and resources; policy and practice. I base my evidence here principally on research I conducted with Mark Sefton funded by the DCA in 2005.

Cuts in legal aid will have twin effects. Mostly, in my view, it will discourage participation in court proceedings where that participation would (usually) be in the clients’ interests (and in the interests of justice). Our research looked at the profile of litigants in person in four courts. It showed that the largest group of unrepresented litigants were defendants often these be in housing and debt cases.

This suggests that withdrawal of support of debt cases and in housing cases will mean defendants will receive far less support towards participating in proceedings. Whether continuing to fund cases where a client’s home is under threat is sufficient to maintain supply of housing advice is moot. The proper resolution of debt cases, and housing cases in particular, are not aided—for debtor or creditor—by the non-participation of the defendants, yet withdrawal of advice funding will make this already serious problem worse. This may increase enforcement costs and is likely to contribute to diminishing respect for court process.

Our research also found that unrepresented claimants were relatively rare. This suggests it is usually (but not always) the case that claimants will only bring cases if they can secure representation. An unknown is how the withdrawal of legal aid in family cases will reduce the number of applications in children and finance cases or whether the numbers of unrepresented litigants bringing family cases will increase. One possibility is that it will do both. Our research was unable to track historical patterns in family cases of litigants in person because the Court Service (HMCS as it now is and the then DCA did not collect relevant data). The absence of data in this field is of concern. 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.

Our research did ascertain the levels of unrepresented litigants in family cases in the four courts studied. The following table is excerpted from our original report.

Table 9
FAMILY CASES LITIGANTS IN PERSON SUMMARY

<table>
<thead>
<tr>
<th>Cases involving fully represented parties</th>
<th>Case involves unrepresented party</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Inactive</td>
</tr>
<tr>
<td>Adoption</td>
<td>23.4%</td>
</tr>
<tr>
<td>Ancillary Relief</td>
<td>68.6%</td>
</tr>
<tr>
<td>Children Act</td>
<td>50.4%</td>
</tr>
<tr>
<td>Divorce</td>
<td>31.0%</td>
</tr>
<tr>
<td>Injunction</td>
<td>52.5%</td>
</tr>
</tbody>
</table>

The table emphasises the extent to which it was already the case that large proportions of cases have unrepresented parties and how rare it was for them to participate fully in the case.31

Claimants who wish to bring proceedings unrepresented need strong motivations to overcome the fear of acting unrepresented (as well as the technical barriers associated with lacking the relevant expertise). In my view, such motivations are most likely to arise where disputes are felt by the litigants themselves to be high stakes (children disputes may be one such area) or where the litigant is desperate or has a very strong sense of injustice that needs to be corrected. If that analysis is right 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 behavior 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 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 organizations (such as CAFCASS).

It is worth emphasizing that many defendants or putative claimants who do not participate because of cuts to legal aid will have critical interests at stake which will have gone unprotected. At the time of our research, 40% of unrepresented litigants in ancillary relief, children act or injunction cases did not participate in their cases. The impact of mediation on this constituency is uncertain. Are they more or less likely to engage? I can

31
only speculate. This is particularly important where one party knows that their unrepresented opponent is unlikely to issue or defend proceedings as their incentive to cooperate in mediation is lessened.

Our research showed that where a party was unrepresented their opponent tended to be represented. This is important for three reasons. One is that this inequality of arms exacerbates the litigants’ in person disadvantage. The second is that it makes the ethical position of the represented opponent more difficult (they struggle to balance their duty to the client with their duty to the public interest and their duty not to take advantage of their unrepresented opponent). A third difficulty is for the judges. They typically adopt the role of passive arbiter, consistent with an adversarial justice system. They have to balance the need to appear neutral with the need to assist litigants in person in the interests of justice. Represented opponents feel aggrieved if they can see the judge, as neutral umpire, assisting their opponent. A judge cannot effectively decide a case if they do not provide some assistance to litigants who are plainly out of their depth. It is a Catch 22 which can only be overcome a potentially radical restructuring of court process and new approaches to judicial management.

Judges are not trained in dealing with these circumstances which effectively require an inquisitorial approach within an adversarial system. Our research showed judges to have a range of approaches to dealing with litigants which were developed ad hoc, with apparently varying effectiveness, and without the necessary support to make such a system function. In my view, a system which is expected to successfully engage with unrepresented litigants needs to rethink its structures, policies and approaches. Simpler procedural rules and a judiciary explicitly trained and supported in delivering justice in such cases is only part of the solution. Matters of policy and principle need addressing both in the courtroom and beyond it.

To give an example of the latter, the requirement that court staff should not “give legal advice” is:

- overly inclusive (I would argue that staff could give advice on procedural matters but should not give advice on substantive matters);
- dangerous (where a landlord rings up and says, “I am going round this afternoon to kick my tenants out, can I do that?” not giving some ‘advice’ about the likely illegality may be dangerous to both sides); and
- applied with significant variation (our research saw some court staff give advice in apparent breach of the rules, whereas some refused to give even rudimentary information for fear of giving advice).

There is no indication in the Paper that the MoJ have grasped the extent of the change necessary to make a system work when cases involve litigants in person. The problems extend beyond family cases, which the Norgrove review may address.

Further evidence that litigants in person need significant support if they are to participate effectively in court proceedings is also found in the study. The ways in which unrepresented litigants participate in proceedings (if they participate at all) is different from represented litigants. They spent the bulk of their time dealing with court staff and less time dealing with judges (mainly because they are less likely to attend hearings). Both findings hint at the problems they have in engaging effectively in the critical decision-making processes. Our research also suggested that levels of activity in cases involving unrepresented litigants may have involved more court-based activity than those cases where all parties were represented. This was often because represented parties were making applications to move the case along because of the technical or other failings of the unrepresented’s participation. Similarly, within cases involving unrepresented parties, participation by unrepresented litigants was generally of a lower intensity than participation by represented parties.

In spite of the fact that unrepresented litigants participated at a lower intensity in court proceedings than represented parties, they made more mistakes. The problems faced by unrepresented litigants demonstrated struggles with substantive law and procedure. There was other evidence of prejudice to their interests.

It is also true to say that there was at best only modest evidence that cases involving unrepresented litigants took longer. Whilst this might suggest litigants in person lead to cases being strung out, it is probably mainly to do with their relative passivity in proceedings. Cases with passive litigants can often be relatively quick and overall this may outweigh cases where participation by litigants in person slows down the process.

It is also important to emphasise that cases with unrepresented parties were less likely to be settled. There are two main reasons which I would offer for this: one is that some litigants in person seek vindication through a court judgment (they want their day in court not settlement). Our evidence did not suggest that this as strong an explanation as is often reported. Another reason is the barriers in the way of litigants in person settling. These are numerous but include a perception held by litigants in person that they are not allowed to settle the case once it has come to court (they do not know what is appropriate in the court building in particular) and a perceived risk that represented opponents will take advantage of them in any settlement discussions.

In summary, what the research essentially shows is not that litigants in person gum up the courts with vexatious cases and applications (though some do) but that most struggle to participate in their cases if they participate at all. Where they do participate, the evidence suggests they do so sporadically; they sometimes damage their own interests as a result; and they probably create more work for their opponents and the courts themselves. Whether the most effective way of tackling this problem is through legal aid is debatable, but what is less debatable is that, where legal aid is withdrawn, there has to be consideration to how courts adapt to
successfully engage with litigants in person. As noted above this has resource and policy implications which need to be addressed and are not.

**Miscellaneous Other Points**

I have confined the bulk of this submission to points on which my own research has generated evidence of particular significance to the Inquiry. I make some broader points briefly, in the hope this may provoke further investigation of the relevant evidence from others:

**The Risks Involved in Cutting Social Welfare Law**

The policy of seeking to maintain decent levels of social welfare law provision is a policy carefully established against rigorous research evidence showing that justiciable problems cluster. One legal problem can trigger another which will lead to another. A crucial point is that the research creates a prima facie case that tackling such problems early is beneficial to the exchequer.

The Legal Service Commission’s Legal Services Research Centre has been the main source, along with Professor Dame Haze Genn, of this evidence and I assume that the Committee is seeking evidence from them. Justiciable problems lead to expenditure in housing, benefits, health and criminal justice budgets in particular. An education law practitioner made this point to me recently: ensuring that a child gets appropriate special educational needs provision is likely to have a significant impact on the likelihood of that child staying out of prison in later life.

The LSRC’s research was used as the basis of an estimate of the cost of (then) unmet legal need. It suggested that unmet legal need had a cost of £13 billion over three years. I was hoping that the impact assessments that accompanied the Green Paper would also contain assessments of the impact of the cuts on other budgets and broader, quantifiable social costs. Of course, such estimates are based on assumptions and data which mean they must be treated with a degree of caution but they also form an important tool for policy makers to assess their decisions and for stakeholders to hold them to account. That the LSRC were able to produce an estimate previously is evidence that it can and should be done for this programme of changes. I would hope the Committee encourages them to do so.

**Are There Alternatives to Cutting Social Welfare?**

The Green Paper reminds its readers of the need to make cuts and so encourages any critics of the cuts to suggest alternatives. It is very difficult to do so without significant detailed information on the underlying costs in the system and the resources then to be able to analyse that information. I also believe that there is a longer term need to look at the fundamentals of large parts of our legal system if we are to have any chance of avoiding a cycle of decline for access to justice in this country (see attached paper Legal Aid; System Failure or Broken Law first published in the New Law Journal for some ideas in outline).

What is worth noting is that the proposals generally cut elements of the system that are relatively cheap. The areas of public spending which are highest are the ones subject to least scrutiny (criminal defence, especially at the serious end of the spectrum, and public law children cases). There is a case for subjecting these areas of expenditure to the most searching scrutiny first. It is not clear that this has been done. Article 6 obligations under human rights legislation limit any government’s room for maneuver but that does not mean there is not room for maneuver than is currently suggested by the proposals.

A matter which requires greater attention is the level of remuneration earned by the Bar, and the Senior Bar, in particular relative to solicitors. At only one point is this discussed in the Green Paper (a discussion of base rates, at para 7.13). It can be read as implying that barrister rates are higher than solicitors (depending on how one reads the words “to an extent”):

“Although the base rates for barristers are already significantly higher than those for solicitors, this is balanced to an extent by the fact that enhancements are not available.”

It should also be noted in this context that barrister overheads are likely to be significantly lower than solicitors, further emphasizing the potential differential between solicitors and barristers.

Whether such differences are justified is not simply a matter of comparing rates but given the plans to make across the board cuts in remuneration levels account needs to be taken of the relative earnings of each sector. A start would be to examine the proportions of the legal aid budget spent on each sector of the profession and the likely reduction spending which will result from the proposed cuts. It may be that the Bar can bear more of the pain than is currently proposed. This is not however a matter of equity between the different professional groupings, but about seeking to ensure that the cuts fall on the broadest shoulders so that the strongest level of service is protected, limiting damage to the whole supplier base and ensuring the damage to the sustainability of ours system is as limited as possible.
LEGAL AID: SYSTEM FAILURE OR BROKEN LAW

This piece argues that those interested in access to justice have to move beyond seeing legal aid as the problem and look more fundamentally at the nature of law and legal institutions. We need to consider radical redesign of dispute resolution processes, not simply the tacking on of ADR and we should to consider radical simplification and codification of substantive law.

In the context of broader pressures on public spending, legal aid is an attractive victim for politicians making cuts. Lawyers are seen as inflating demand for, and cost of, their services and the typical legal aid client is a less sympathetic recipient of public funding than (say) an NHS patient or a needy school child. The cuts are beginning to bite with police station work and private family law cases being the first targets and other cuts are to be announced shortly if the Ministry of Justice is to make the “efficiency savings” expected of it. In the face of this, the increasingly desperate professions and legal advice sector make pleas for quality and access to justice which are likely to fall on deaf ears. Something, everybody agrees, needs to be done—but nobody can decide what that something might be.

This article seeks to shift the focus of that debate. It suggests that it may not be the legal aid system that is broken but the systems that it operates within which need attention. It suggests solutions which are radical and painful but offer some hope for the future of equal access to justice. Such change is only likely to bear significant fruit in the medium and long term but fail to plan ahead and we risk continuing a cycle of decline for legal aid and our justice system more broadly. The central premise is that we spend too much time focusing on issues of supply in thinking about the costs of legal aid and not enough focusing on issues of demand. If we spend all our energy concentrating on supply—on the cost and accessibility of legal services—we will continue to fail to address underlying systemic problems which beset our justice system.

What do I mean? Well it is a little noticed but important fact that legal aid expenditure is under control and has been for some time. Spending on both the criminal and non-criminal components of legal aid in England & Wales (E&W) had declined slightly in real terms since 2003–04 (Bowles and Perry 2009). Legal aid spending is no longer criticised on the basis that it is out of control. Whilst there is still work to be done on ensuring that supplier costs remain under control, especially at the upper end of the market, the LSC has been remarkably successful at controlling supplier costs with, of course, much pain inflicted on the providers.

The justification for legal aid costs has now shifted to comparing our system with others. In particular, it is claimed we spend more in absolute and per capita terms on legal aid than any other country in the World. Whilst one can cavil at the precision of such comparisons, there is a significant element of truth in this claim. We are more expensive but the important question to answer is: why is this so? and then, what can be done about it?

There are a raft of explanations identified in the Bowles and Perry study as to why our system is the most expensive. We have the best, most generous legal aid system. For all that it is a system that is showing increasing signs of strain, it is a system that is only matched by Scotland and to a lesser extent the Netherlands. But we also have a system that has to cope with much more demand for its services. Put simply we have more cases, particularly in crime. As a country we report more crime to the police and they interview more suspects, prosecute more accused, convict more defendants and imprison more convicts. This has a significant impact on the number of cases and the work that needs to be done on those cases. On the civil side, divorce rates are higher here impacting significantly on the number of family cases. Care cases drive such a significant part of the legal aid budget that our civil legal aid spend is substantially driven by the number of care cases and the legal resources that must be expended on them. We also have more generous eligibility and scope. For currently, probably unavoidable reasons (see below) there is less legal expenses insurance than in some other jurisdictions.

As well as having more cases, we spend more per case. This extra cost is often attributed to supplier induced demand: the idea that lawyers do more work than is strictly necessary. The evidence on this is somewhat contestable: lawyers respond to incentives—charging more than they otherwise could when incentives allow—but there is also evidence that this impacts positively on the quality of services. In any event, and crucially, supplier induced demand is only part of the story. There are a range of other factors which go some way to explaining why our system is more expensive. One, again identified by Bowles and Perry, is that we spend much less on courts than other countries. They suggest that if we take the spend on courts and legal aid together our system ceases to be the most expensive. There are other more subtle factors. There has been a small shift in the amount of crime prosecuted as serious crime which has had a dramatic impact on the Criminal Defence Service budget (Cape and Moorhead). There is the extent of work which is demanded in child care cases. And there is greater emphasis on quality in our system: the LSC has pioneered quality assurance in legal aid and this has very likely had an impact on costs per cases. There are also other structural factors, the GDP double whammy, in particular. This suggests that our legal aid budget is larger because we are (relatively speaking) a wealthy country and so feel we should spend more on our public services, but also—because the salary expectations of the general population generally (or the legal profession in particular) are higher than in other countries such services cost more to fund. Another structural issue, on the supply side, is that we have relatively low levels of salaried provision.
Ev w56  Justice Committee: Evidence

**SOME COMMON SOLUTIONS**

The last point hints at one of the common solutions offered for the legal aid crisis. It is suggested that more salaried services; public defenders and their civil equivalents should reduce costs. However, Public defenders have been tried in England and Wales. They were found to be of good quality but more expensive (Bridges et al, 2007). The NFP sector operated contracts on a salary style model in civil legal help: they provided good quality but were expensive. On that evidence salaried services do not look like an ideal vehicle for reducing costs in the short term, although that may have been because salaried services were targeted at the low cost work of high street practices where, it might be surmised, profit margins were narrowest. Salaried services which looked towards the 'higher end' work might stand more chance of making costs savings, although one would also expect vigorous critique of any such proposals from the Bar and others.

Another suggestion often made is more ADR or more compulsory ADR. I do not subscribe to the view that compulsory ADR necessarily involves a breach of anyone's human rights, but do raise a degree of caution about the cost-benefits of ADR particularly on low or moderate cost cases. The research evidence does not tend to show clear costs savings for ADR. Every practitioner knows why this is: most cases settle anyway. For ADR to be cost effective it must reduce costs significantly on the cases that would have settled later or gone to trial over but for ADR and above the extra costs added to the cases that would have settled anyway. Too often the benefits of ADR are compared with the costs of trial: it is generally a false comparison.

A third suggestion, hinted at above, is greater reliance on Legal Expenses Insurance. As de facto, privately funded legal aid schemes, legal expenses insurance raises some interesting conflicts between profit making and public interest, but let us put those to one side. Most commentary on legal expenses insurance agrees that until our legal system is cheaper and more predictable, legal expenses insurance is unlikely to work.

**SYSTEMS THINKING...?**

With the standard solutions to our problems looking distinctly unpromising, what alternatives can be offered? It is here that I return to my original theme: the idea that we need to think more broadly about where the pressures in the system come from and what forces drive up legal costs.

The first idea, and not a novel one, is that we need to look much more closely at polluter pays principles in legal aid expenditure. The financial services sector is, as we are often and painfully reminded, central to the health of our economy but it also manages to externalise at least some of its costs. It is dependent on the court system to enforce obligations and security and, as any debt advisor can tell you, debt advice is an important safeguard against sharp practice, including the harassment of debtors who can't pay rather than won't pay. More significantly perhaps, is the expenditure on prosecuting and defending fraud. Some attribution of those expenses to root causes may ameliorate some of the pressures facing the legal aid budget.

Another issue of concern is the extent to which Local and National Government are the generators of legal problems. Evidence that it is government, in all its guises, that generates legal problems and makes them more expensive to resolve is beginning to mount. Such problems appear often to simply derive from poor quality administration and could be tackled at a strategic level with sufficient foresight and resources. Here legal aid might be seen as part of the solution rather than part of the problem with legal aid cases and the costs expended on those cases being important drivers towards improving the administration of justice throughout government.

There is interesting work in Nottingham suggesting that such a focus can lead to the redesign of public services in a way that reduces costs for the 'defendant' government agency and reduces the costs to the 'claimant' legal aid budget (through reduced demand and/or reduced unit costs). Greater thought on how legal aid could be used to generate systems thinking and drive such change is one of the few opportunities within the current system for generating cost reduction and improvement in client welfare.

I do not believe that such reforms will be enough in themselves. A commitment to equal access to justice (or something close to equal) requires that we consider radically the design of our main justice frameworks.

At its simplest, I would reduce my first idea to eight words: *not alternative dispute resolution but changed dispute resolution*. We need to reconsider, on the basis of clear principles but also practical judgments as to what is achievable, how we would redesign the justice system to meet the challenges posed. Such a process of radical change is not easily executed, but the way the legal system is currently operating we can expect it either to fall into disuse or to be the province of the hyper-wealthy, biggish business and litigants in person only. We are, in all likelihood, more than part way to this outcome in any event. How might we reverse this trend or make it less invidious?

One approach would be to engage in a radical simplification of process. This is an idea so often stated and so little realised it suffices to emphasise that this needs looking at in a genuinely radical and open-minded fashion. To be sure, there would be trade-offs between quality of justice and simplicity but such trade-offs may be worth it if it rescues courts from increased irrelevance. Complexity does not secure the accuracy of justice it secures the denial of justice for all but the few. We should also think seriously about removing certain work from courts and challenging the assumption that a bilateral adversarial system is best for all the issues before it. Robust, well-funded Ombudsman-type services or inquisitorial adjudication may have more to offer for lower cost in certain areas.
A second idea worthy of significant attention is the idea that if you cannot remove disadvantage, perhaps consideration should be given to removing advantage. This is done in some foreign tribunals, which suggest lawyers (or other representatives) can be banned where they lead to inappropriate inequality of arms.

The third idea is the most challenging to any lawyer or judge weaned on the beauties of the common law or any politician who sees in each freshly enacted Statute a symbol of their own capacity to deliver change. That idea is to challenge the benefit, effectiveness, even justice, of having such a complex system of substantive law. We ought to, I believe, give serious consideration to radical simplification of our laws. Many of the features of common and statute law that make it such an engaging puzzle for many lawyers make it a massive barrier to access to justice. It is tempting to suggest that common law’s complexity is part of its strength. It may be complex, so the argument goes, but in the hands of an expert lawyer it is predictable and adaptable to the clients needs and to changing circumstances. I do not wish to dismiss that argument out of hand but it is worth considering the opposite possibility. A intriguing piece of Australian research points in a very different direction (Wright and Ellinghaus 2005). Using simulations, they compared the application of common law and a commercial code to see which was more predictable, more accurate (in ensuring those applying the law reached the correct decisions according to the Court of Appeal), more efficient and fair (as perceived by those applying the law and a panel of non-lawyers). As one would expect, a simpler codified approach was cheaper and quicker, but it was also fairer, more predictable and more accurate. The study was small and I would expect any fair minded reader to wonder at the extent to which it would apply in other contexts but I would also expect them to wonder about the benefits that might come from having dramatically simpler law both in terms of making it more accessible, less expensive and even—potentially—fairer.

This article first appeared in the New Law Journal in March 2010.

January 2011

REFERENCES


December 2010

Written evidence from Community Links (AJ 22)

SUMMARY

1. As a provider of debt, benefits and housing advice services to over 9,000 people a year in east London, much of which is funded by legal aid, Community Links welcomes the chance to submit evidence to this enquiry.

2. These proposals, combined with expected cuts to local authority funding for advice work, will almost certainly mean Community Links’ advice services would have to close. This is line with the Ministry of Justice’s impact assessment which estimates charities will lose, on average, 92% of their legal aid income.

3. Cuts to social welfare advice will not only have a significant social impact, but will dramatically affect the long-term economy of the local community, both through the extra public expenditure necessary to deal with increased social problems (estimated to be worth up to £10 for every £1 spent on advice) and the loss of income to the local economy (estimated at over £8 for every £1 currently spent). We recommend spend for advice services is reduced through removing demand rather than limiting scope or eligibility.

4. The removal from scope of welfare benefits advice will undermine the rollout of Universal Credit. The Department for Work and Pensions recognise the role of advice agencies in supporting individuals to challenge and navigate a changing system, but this support would no longer be available. We recommend benefits advice is retained at least until the rollout of Universal Credit is complete, and that the Justice Committee consult with their colleagues on the Work and Pensions Committee on this issue.

5. Telephone advice is not appropriate for the most vulnerable clients—appropriate and accessible face-to-face advice must be maintained for those with specific barriers, not only for practical reasons but also because of the lasting benefits of a “Deep Value” relationship between advisor and client that can only develop face-to-face.
Ev w58 Justice Committee: Evidence

**Introduction**

6. Community Links has provided advice services in the London borough of Newham for 30 years, and now runs the only drop-in advice service in the borough. We provided advice for 9,000 people last year: 1,500 for specialist help with debt, benefits and housing, funded by legal aid through the Legal Services Commission, and 7,500 provided with practical help funded by the local council and independent donors, or referred on to partner agencies in the Newham Advice Consortium.

7. Over 30% of our clients have some form of physical or mental disability, 87% are seeing us for the first time, 70% are not working, very few have internet access, and many speak English as a second language. Our clients are often vulnerable and face multiple challenges which we can solve through the wide range of other services we provide at Community Links—from employment support to childcare.

8. Last year 45% of our specialist advice was around debt worth almost £1 million. We helped people access £830,000 of benefits they were entitled to—much of this money will be recycled back into the local economy. An example of such advice:

Mr Ashall works as a porter at a private members club in London, earning under £12,000 a year. His wife used to work as a nurse but severe arthritis forced her to give up, and they started struggling to keep up with the mortgage and debt payments.

Mrs Ashall claimed Incapacity Benefit for six months but was then deemed fit to work and it was withdrawn. They approached Community Links when they were threatened with court action by their creditors.

Our advisors helped them negotiate a new debt payment plan which they could afford, and helped Mrs Ashall to successfully appeal the Incapacity Benefit decision, and also apply for Disability Living Allowance. Mr Ashall was entitled to Working Tax Credit but not claiming it, so we helped him apply for that too.

This debt and benefit advice ultimately saved the couple their home, and increased their income.

9. We have eight FTE legal aid funded advisors, three support staff, and run our own nationally accredited course training welfare benefits advisors. Volunteers contributed 5,698 hours to our advice work last year, including running our popular form filling service. Lawyers from Hogan Lovells and Clifford Chance work pro-bono providing face-to-face advice and representing people at appeal. We also offered money management courses, and legal advice on consumer, private housing, employment, family and immigration law in partnership with international and local law firms.

10. We welcome the chance to submit evidence to this inquiry on Access to Justice. Our submission looks specifically at the provision of social welfare advice for two of the questions posed:

(a) What will be the impact of the proposed changes on practitioners?

(b) What are the implications of the government’s proposals?

**Impact of the Proposals on Practitioners**

11. These proposals, combined with the expected cuts to local authority funding, will see organisations like Community Links unable to provide advice on legal matters.

12. The proposal to remove all benefits advice, almost all debt advice and much housing advice from the scope of legal aid will leave us with virtually no legal aid funding for our work.

13. The proposal to introduce a telephone advice line as the sole point of entry for legal aid, and provide much of the subsequent advice over the phone as well, will almost certainly mean we have no legal aid funding whatsoever, particularly if the contracts to provide telephone advice favour larger organisations.

14. The proposal to introduce a 10% cut in fees, independently of the other changes to legal aid, would almost certainly mean we were unable to provide our service in its current form—we already subsidise our legal aid advice from other sources.

15. Combined with the expected cut to local authority funding for advice, these proposals would almost certainly leave us with no advice service. The Ministry of Justice impact assessment claims charities will lose on average 92% of their legal aid funding—we expect to lose 100%. This would leave thousands of local people with no access to legal help or representation.

**The Implications**

16. We would like to highlight three implications of these proposals

They will cost government and society more in the long run.

17. There is a substantial body of evidence highlighting the economic and social benefits of social welfare advice\(^\text{32}\), suggesting the short term saving from cutting legal aid will not meet the long term cost implications borne by the public sector.

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\(^{32}\) Citizen’s Advice (2010) Towards a Business Case for Legal Aid
18. Citizen’s Advice have shown that legal aid advice on housing, benefits, employment and debt advice can save anywhere between £3 and £9 for every £1 spent. Research conducted for the Law Centres Federation put the possible savings at £10 for every £1 spent. These savings accrue through, for example, the reduced cost in housing support for those whose debts ultimately lead them to lose their home, or reduced spend on health, particularly mental health, interventions.

19. Research by Salford University for Leeds City Council identified the wider benefit to the local economy of advice services. They estimated that every £1 spent on advice generates £8.40 for the regional economy—worth £28 million in Leeds alone—through increased local spending as a result of individuals achieving higher incomes and better managing debts.

20. And research for Manchester City Council found that “although the level of debts was often quite small, the impact of debt and financial problems associated with living on a low income nevertheless constituted a significant barrier to work.”

21. Research in Nottingham has suggested that up to 40% of the demand for advice services is due to failures within organisations, particularly the public sector. There is evidence that charging the organisation responsible for the initial error for the cost of rectifying it—so called “polluter pays”—would pay for advice services and incentivise organisations not to make mistakes in the first place.

22. Cutting funding from benefits and debt advice would, in our experience, have an immediate social impact, leaving thousands of people struggling to get by. But it would also have a detrimental longer term economic impact on the most deprived communities in the country.

Removing welfare benefits advice from scope will jeopardise the introduction of Universal Credit.

23. DWP acknowledges the role the voluntary sector plays in helping people navigate the benefits system. The Universal Credit White Paper says: “Currently many people also look to voluntary sector organisations for advice and support in dealing with the system, and these organisations often devote effort to chasing progress on benefit claims and correcting errors.”

24. Much of this work is currently funded by legal aid; there were 144,000 cases of legal help for welfare benefits issues last year, with an 88% success rate (88,000 of these were carried out by not for profit organisations).

25. This support will be even more vital as the system undergoes fundamental change with the introduction of Universal Credit. This process will affect 19 million individual claims and an estimated eight million households. No change of this magnitude will work first time for everyone. The introduction of tax credits, for example, resulted in incorrect payments for hundreds of thousands of people, and advice agencies were crucial in supporting clients and reporting back to government on the issues faced. For example, many clients face difficulties accessing disability benefits:

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.

26. Good debt, benefits and housing advice makes it easier to get work. For example, there is evidence that being in debt makes it harder to find a job and that debt advice has a significant positive impact on an individual’s financial situation, despite being hard to access.

27. Ultimately Universal Credit should reduce the need for benefits advice, by radically simplifying the system. Cutting demand through system reform is a more effective and fairer way of reducing the legal aid bill in the long term than denying people the support to access the benefits they are entitled to.

33. Lord Justice Committee: Evidence

34. Ibid


36. Gibbons (2010), Out of Work and Out of Money, Manchester City Council

37. DWP (2010), Universal Credit: welfare that works

38. Gibbons (2010)

39. LSC statistical information, 2009/10

40. Ibid

41. The Socio-economic Impact of Law Centres

42. The Long-term Impact of Debt Advice on Low Income Households, Year 3 report, University of Warwick

43. Advice UK, (2009) Radically rethinking advice services in Nottingham, Nottingham City Council

44. Orton (2010)
28. Therefore we recommend the Justice Committee discuss with their colleagues on the Work and Pensions Select Committee the possible implications of these proposals on Universal Credit.

Telephone advice will not work for the most vulnerable clients

29. Very few of our clients would get an appropriate service from advice provided over the telephone. The proposal to introduce a phone line as the single gateway to accessing legal aid could put off many of our clients—particularly those not fluent in English, or with learning difficulties or mental health problems—from taking the first step towards accessing legal aid. And if the criteria for being referred on to face-to-face advice are too strict, many clients may drop out of the system with their needs unmet.

30. The experience of our clients using phone lines to access other government services (for example Jobcentre Plus) is that phoning can be expensive and the callback facility is not often offered. We recommend operators are mandated to offer the option of a callback at the beginning of every call.

31. Community Links research shows that a “deep value” relationship between advisor and client leads to better outcomes in advice work, including that clients are less likely to appeal a decision that has not gone their way, saving money down the line\textsuperscript{45}. This kind of deep value relationship is very unlikely to develop over the phone.

**SUMMARY OF RECOMMENDATIONS**

32. Cuts to the budget for social welfare advice should be achieved through reducing demand rather than eligibility or scope. Not doing so will cost more down the line.

33. Benefits advice should not be removed from the scope of legal aid at least until the rollout of Universal Credit is complete.

34. The Justice Committee should with the Work and Pensions Select Committee to further investigate the impact of removing benefits advice on the rollout of Universal Credit

35. Sufficient, appropriate and accessible face-to-face advice should be maintained for those who need it.

January 2011

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**Written evidence from Santé Refugee Mental Health Access Project (AJ 23)**

*What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?*

*The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?*

*What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?*

*Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?*

*What are the implications of the Government’s proposals? The Committee now intends to extend this inquiry, and will be taking oral evidence on it in February (witnesses to be confirmed).*

The project I co-ordinate is a voluntary organisation manned entirely by volunteers, myself included. We have helped hundreds of vulnerable Asylum Seekers since our inauguration six years ago. 90% of these are suffering Post Traumatic Stress and other more severe Mental Illness including attempted suicide. In spite of these disabilities they show fortitude and determination to succeed in their cases since many are political heroes in their countries of origin. It is for this reason that our volunteers are inspired to take time to assist in the resolution of cases in order to see justice finally done. What concerns our project is:

1. Lack of capacity in the London Region for Legally Aided Immigration Law practitioners who repeatedly say No to our initial enquiries as they cannot afford to take on any more cases, no matter how deserving.

2. Most clients previous to our being introduced to them, were unaware of where to turn for respected Legally Aided Immigration Lawyers (there are plenty of disreputable ones). Govt could produce lists of reputable lawyers (eg Community Law Centres) distributed by UKBA so that rogue firms could be avoided. A recent case we presided over used a firm who took £450 from the client for applying for Judicial Review that they knew would fail as it was based on no new evidence.

3. Government action could monitor the wreckless refusal procedures of Home Office immigration lawyers as they habitually refuse asylum without good reason. In many cases they haven't even read the applicant’s papers. This increases the costs as the applicant has to submit more and more applications unnecessarily. 99% of cases are refused initially and this causes delay, expense and delay.

repeated frustration. Improving the regulation of the Home Office lawyers who escape with impunity would save much public expenditure.

4. Fixed Fees are not conducive to optimum performance by Legally Aided firms as they operate on a tight budget and need payment up-front rather than at the completion which may take many years. This payment system has forced many Law Centres out of business because it does not provide for the low profit margins of Not-for-Profit firms. We therefore emphasise the importance of replacing the Fixed Fee system with a more up to date system which respects the nature of Not-for-profit firms such as the Law Centres Federation and provides sufficient operating funds to prevent financial disasters. This could take the form of a lump sum to cover the national network of Law Centres, which would be self-regulating and obviate the need for LSC interventions to such a close degree.

5. The Not-for-Profit system is proven to increase trust and quality of performance and should not be ignored. However, Voluntary Organisations such as Law Centres are far from amateur and have a proud history and philosophy. Many Politicians cut their teeth in these law practices! Because of the social handicap of being mentally ill many of our clients are prevented from getting help. We have the expertise needed to assess the client in a non-judgemental environment, having been trained in social diseases and how to respond in a way which elicits the best response from client and adjudicator. It is vital that our expertise is not lost, wasted or treated as irrelevant.

6. Where the client has a family there is a knock-on effect to the family of the refusal to gain access to justice. This may result in trauma throughout the family and delayed/impaired child development, especially where the individual or family have been detained in many cases for periods far longer than recommended. It is thus significant to get the justice right first time so that suffering is not prolonged and mental illness exacerbated until it reaches a crisis. Crises are much harder to control and more expensive.

In conclusion I need to emphasise the effort that has gone into strengthening and widening the Law Centres Federation body of UK-wide Law Centres, and point out that its value has been recognised by such far flung countries as Australia, US and Europe. Whilst this global recognition is increasing, the UK seems unconcerned about its demise. This seems negligent. Whilst there is an insatiable interest for volunteering in the field of asylum rights, there is still an insatiable stream of clients. The work we do would be greatly assisted by access to justice at the outset and not after repeated attempts which fail through inefficiency. The UK is known for its humane policies and it would seem contradictory to allow justice to our poor and vulnerable to be forgotten whilst holding up to the world a veneer of humanity. I believe the Government can and wants to do much better.

January 2011

Written evidence from the Advice Network & Advice Centres for Avon (AJ 24)

EXECUTIVE SUMMARY:

— These proposals will lead to a huge reduction in the provision of civil legal advice, leading to reductions in services and even greater unmet demand.
— Those providers that continue to receive legal aid funding will be less viable and less able to expand services, as need for them grows.
— There will be a reduction in cases being pursued, but this will simply mean that thousands of people lose access to justice, with disastrous outcomes for individuals and households.
— Failure to deal with problems at an early stage, due to the reduction in the availability of advice, will lead to increased spending in other demand-led budgets such as housing, social care and health.
— The four assertions that provide the motivation for these proposals do not stand up to scrutiny and are contrary to evidence.
— Thousands of poor and vulnerable individuals and families will be unable to secure access to justice, resulting in huge costs for them personally, for the state financially, and for society morally.

The Advice Network is a three-year project managed by Avon & Bristol Law Centre on behalf of Advice Centres for Avon (ACFA). ACFA is a network of advice agencies who have been working together for over 25 years; most members are registered charities and all offer free, confidential, impartial, high-quality legal advice on issues such as housing, debt, welfare benefits, community care, employment, education and health. For more details visit our website—www.advicewest.org.uk.

SUBMISSION

What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

1. We strongly disagree with the proposals to remove certain subject areas from scope for Legal Aid, to reduce the fixed fees for those areas that remain in scope, to insist that clients make initial contact by telephone when seeking advice, the removal of ‘passporting’ to free legal advice and the changes to the capital/contribution rules.
2. The number of specialist practitioners in the cases removed from scope will be reduced to zero in a vast majority of areas, and the reduction in fees will threaten the financial stability and viability of those providers that remain. Generalist-level provision will be available from alternate sources in Bristol and the surrounding areas in limited volume, but capacity across the local sector will be massively reduced. During a benchmarking exercise in late 2008 all local civil legal advice providers in Bristol, South Gloucestershire & North Somerset (including the CABx, Law Centre, branches of Shelter and Age Concern, and the various neighbourhood agencies) stated they were unable to meet demand at that time; ongoing discussions with local providers, both those funded by legal aid and those without contracts, continue to show that demand is rising and will continue to exceed even the current level of supply.

3. The civil law contract as currently does not meet the full-cost recovery test, and already, in many cases, requires subsidy, either from other aspects of an organisations activity or through worker time. It is unclear how those contracts that remain will be viable with a further reduction in the fixed-fee. In Bristol the services provided by six of the largest civil legal advice providers will be decimated, with reductions in, for example, debt being reduced by approximately a third because of this cut and a further third because of the complete cutting of the Financial Inclusion Fund announced in a written answer to Parliament on 19 January 2011.

The Government predicts that there will be 500,00 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

4. We agree that there will be a huge reduction in the numbers of people able to pursue legal action; however we believe this will represent a disaster for the thousands of individuals who will be unable to seek redress for issues that effect 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.

5. The complete removal of welfare benefits from scope will lead to thousands of households being denied even the below-poverty-line income offered by means-tested benefits. We simply do not know what these people will do to survive. In 2009/2010 the DWP made £3.1billion in overpayments and £1.3billion in underpayments; with this level of error in the system it is imperative that vulnerable individuals can retain access to advice and support in order to navigate the consequences of these errors. Specialist knowledge deployed on behalf of people with disabilities, people with children and older people is often the difference between a household having enough food to eat and literally going hungry. The tiny proportion of benefit claimants who want to scam the system will continue to scam the system—the people who will suffer from lack of advice are the thousands who are genuinely too ill to manage their affairs and those who lack the skills and perseverance to cope with a system that the Government itself believes is too complex and unwieldy. The fact that the basic welfare rights handbook used by advisers up and down the country is 1604 printed pages demonstrates that the system is often not navigable by those most in need.

6. The removal of most debt advice from scope is similarly short-sighted. This will remove support for complex bankruptcy cases—both those where it is the best option for an indebted client, and those occasions where a client wishes to challenge a bankruptcy being forced upon them. It will remove access to advice and debt management support for thousands of people who will not be able to self-manage problems, meaning that indebtedness will grow until people reach the point of losing their homes. As above we are unsure what vulnerable individuals will be able to do to stop their circumstances being made ever worse by unmanageable debts. The Governments proposal to retain debt advice for those people who find their home at “immediate risk” is a case of “too little too late”. We are unconvinced that provision will exist in sufficient volume to meet the demands of the legally-complex, time-consuming, and highly-pressurised cases that will result from this approach of allowing problems to fester and reach crisis point before making advice available. Alternative provision, such as National Debtline, may be sufficient for those individuals with simple debts who are literate, numerate and able to represent themselves to unsympathetic authorities in the public and private sector, but as above will leave those less able to manage their own affairs adrift and without help to maintain even the most basic standard of living.

7. Immigration advice is already subject to huge shortages, with Bristol agencies often finding that the only referral route that is not fully booked into the foreseeable future is in Newport, 30 miles away. Again, the issues dealt with in this category are of fundamental importance to those involved—family reunions, the migration of a vulnerable parent, deportation of otherwise law-abiding citizens who have failed to negotiate the complex and ever changing bureaucracy that governs entitlement to remain in the UK. The removal of the small amount of specialist immigration advice funded by legal aid will be a disaster, and will result in injustices occurring because individuals will be able to fully challenge the incorrect decisions made by the state. We also believe that this cut has the potential be a false economy, with litigants-in-person who haven’t benefited from advice but have managed to stagger through the appeals system slowing the tribunal system to a crawl, with increased costs for all concerned.

8. The removal of many housing issues from scope will lead to thousands of individuals in unsatisfactory and unhealthy housing conditions being unable to challenge their landlords and secure reasonable living conditions. There is already a substantial shortfall in supply of specialist housing advice; demand is so high because security of tenure issues, disrepair, re-housing and other housing related problems can be fundamentally
damaging to an individuals or a families well-being. Research has shown that living in a property suffering from disrepair has a particularly negative effect on children (increasing the chances of serious ill-health or disability by 25%), and that disrepair is much more common in properties occupied by people on very low income, living in the bottom 10% of private rented properties. The acknowledgement within the Governments own consultation papers that people pursuing these actions are more likely to be ill or disabled than others making use of the civil legal aid system makes the removal of much of the little access to advice there is for these matters even more inexplicable. Matters concerning money or property may seem of little importance to those who have a surfeit of either; however clients who qualify for legal aid for these actions will often have neither.

9. These proposals rest on four assertions, which we believe are unfounded and unsupported by the evidence:

10. Assertion 1: The areas for which Legal Aid is to be removed are not of sufficient importance to warrant financial support from the state

11. We hope we have shown above that the issues dealt with under civil legal aid are of fundamental importance, that they relate to basic functions such as being able to feed your family or heat your home, or to keep families together or reunite them, or to be in control of your finances rather than spiralling towards losing your home, or to be able to live somewhere where you feel secure rather than in fear of your landlord.

12. Assertion 2: The processes and procedures are user-friendly enough for people to represent themselves without assistance

13. This assertion ignores the needs of people with language issues, mental health issues, or limited capacity to manage their own affairs. It ignores the real complexity of legal system and associated bureaucracies, and ignores multiple statistics regarding the relative successes of people represented at a variety of tribunals and hearings, versus the more-prevalent failure of those not represented.

14. Assertion 3: Where assistance is required it can be secured from other services which are not funded via Legal Aid

15. 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.

16. Assertion 4: The financial cost of providing Legal Aid is unaffordable, with reference to the deficit reduction plan outlined in the Emergency Budget and Comprehensive Spending Review

17. The level of cuts being borne by the civil legal aid budget are, at 40% of budget, disproportionately large compared to cuts being enacted in other parts of government. 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.

What are the implications of the Government's proposals?

18. The proposals in relation to Social Welfare Law fail on their own tests, in that they will not reduce expenditure across government, the limited access to alternative forms of advice and support cannot cope with demand from people with complex legal-advice needs, and the procedures and processes of legal redress are so complicated they are inaccessible to many if not most legally-aided clients.

19. The proposals as they stand will therefore leave thousands of poor and vulnerable individuals and families without access to justice, resulting in huge costs for them personally, for the state financially, and for society morally. Even ignoring the moral case for the state offering support to citizens when they most need it the financial case is unanswerable. The Governments own Legal Services Research Centre has concluded that “The average cost per debt problem to the public and in lost economic output can be estimated at over £1000, with more serious problems involving costs of many times this amount.” This shows the fixed-fee for a debt matter (currently £200) is money well spent. Similarly research by Citizens Advice found that legal aid-funded welfare benefits advice saves the state up-to £8.80, and housing advice up-to £2.34 for every pound spent on advice in these areas.

20. The moral case is also, in our opinion, clear. It is disappointing that the government of the sixth-largest economy in the world cannot offer access to justice to vulnerable younger people, older people, people with disabilities, and people from black and other minority backgrounds who will be disproportionately affected by these cuts, and thousands of others who may have been unlucky or badly treated, people for whom legal aid was a lifeline that could lead to the resumption of normal life.
21. We therefore view the implications of these proposals with grave concern, and are pressing the Government to reconsider.

January 2011

Written evidence from the National Accident Helpline (AJ 25)

1. National Accident Helpline (NAH) is pleased to respond to the Justice Committee’s inquiry into Access to Justice, focusing on the Government’s green papers on legal aid and the implementation of Lord Justice Jackson’s proposals regarding civil litigation costs. We would also be delighted to provide further details of our submission through oral evidence if required.

Introduction to National Accident Helpline

2. NAH is the UK’s leading free advisory service for people who have suffered an injury as a result of an accident. We help these people seek financial assistance to aid their recovery, through our national solicitor network of over 200 specialist solicitor firms, our panel members, from across the country (including Scotland and Northern Ireland).

3. NAH is authorised by the Ministry of Justice (MOJ) in respect of regulated claims management activities and is a registered company, incorporated in the UK. Furthermore, we have a strong track-record of working with the MOJ to restrict the “cowboy” practices which give our sector a bad name. In December 2010, we reported three rogue firms for bad practice.

4. NAH was formed in 1993, in advance of both the introduction of conditional fee arrangements and the Access to Justice Act. We were formed by a group of solicitors who saw the economic advantages of pooling resources and advertising through a national brand to help people frightened of approaching solicitors directly to obtain advice and, where appropriate, pursue their rights to claim for personal injuries suffered by them.

5. The NAH model is significantly different to arrangements that operate in other areas of the personal injury market and that involve referral fees. The NAH model is a pooled marketing model, rather than a referral model. Indeed, this distinction was recognised when NAH was established in 1993 at a time when referral fees were not permitted in the legal system. The Law Society has recognised that the NAH model did not involve referral fees and that our pooled marketing arrangements are different.

6. We are proud of our Customer Charter, which goes above and beyond existing regulatory frameworks and has been designed as part of NAH’s wider campaign to champion the consumer, demystify the compensation process and remove the barriers to justice. The Charter guarantees that NAH will only help genuine claimants and will never cold call or pass on details to other organisations, as well as reaffirming its commitment to allowing customers to keep 100 per cent of their compensation.

7. NAH received around 195,000 enquiries in 2010 from consumers who were accident victims and who wanted advice and help on what to do. Of these, our legally trained call centre staff referred 62,000 to one of our panel members with a geographic or specialism link to the consumer, filtering out 68% of claims as either unlikely to succeed or spurious.

The Jackson Report and Its Implications

8. Our submission addresses the final two parts of the Committee’s inquiry:

— *Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?*

— *What are the implications of the Government’s proposals?*

9. In analysing any recommendations of reform in the area of civil litigation costs, National Accident Helpline takes as its starting point nine broadly-accepted, core principals of justice in personal injury cases:

The Nine Principles of Justice in Personal Injury Cases

(1) Accident victims deserve the right to seek redress for injuries caused to them through the negligence of another party, regardless of their financial means.

(2) Financially vulnerable claimants should not be deterred from making a legitimate claim on the grounds of any potential cost, whether known or unknown at the start of the claims process.

(3) Successful claimants should be entitled to the entirety of any damages received, in order to help them move on with their lives following their injury and provide full restitution for the damages caused.

(4) Claimants should be entitled to the same high standards of service and legal representation from all types of organisations, solicitors and bodies representing accident victims.

(5) Defendants in personal injury cases should be able to dispute claims that they believe to be false or without legal merit.

(6) Successful defendants in personal injury cases should not have to pay any claimant costs.
(7) The application of justice in personal injury cases involving public sector defendants should not place overly-punitive requirements on any party, regardless of whether they are an individual, private organisation or public sector body.

(8) Public bodies who contribute to the rehabilitation of the accident victim, such as the NHS or Department of Work and Pensions, should be recompensed for costs incurred by the party found responsible for the accident.

(9) The application of justice in personal injury cases should not reward unnecessary delays, contribute to any avoidable resource or cost burden for the court service, or impinge on the rights of claimants or defendants in other cases to access justice.

10. We assert that Lord Justice Jackson’s primary proposals will have a detrimental impact on a number of these principles, and will serve to restrict access to justice for victims of personal injury. We believe that, while the Government’s green paper deviates slightly from Sir Rupert Jackson’s principal plans, the core content of his missive is retained. Should the Government decide to implement the primary proposals set out in the green paper, accident victims, and particularly those from low income families, will be victimised further by an unjust legal system.

11. Principle 2 is particularly violated by the green paper’s primary proposals in that the net effect of many of them is to create a sense of the unknown from a claimant perspective in terms of costs during the process. For instance, proposals around qualified one way costs shifting are unclear as to who would qualify, leading to significant fear among potential claimants that they would be lumbered with a big legal bill. Any fear of having to pay costs, and uncertainty around what these costs might be at the start of a case, will prevent claimants from seeking the redress they deserve.

12. Among claimants, the fear of legal costs is already a substantial contributor in determining whether or not to take forward a claim. In September 2010, the National Accident Helpline published a report, *The Scale of Injustice: How the British public is paying the price for the compensation culture myth*, exploring the British public’s true attitudes towards personal injury claims and solicitors, and their awareness of legal rights. When asked, “What would hold you back from seeking legal help for a personal injury?”, a poll of 1,600 members of the British public gave the following results:

<table>
<thead>
<tr>
<th>What would hold you back from seeking legal help for a personal injury?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I am worried about how much it will cost me in legal costs/fees</td>
<td>35%</td>
</tr>
<tr>
<td>Nothing would hold me back from making a claim</td>
<td>20%</td>
</tr>
<tr>
<td>Not sure how to make a claim/who to talk to</td>
<td>19%</td>
</tr>
</tbody>
</table>

13. In the majority of cases therefore, the public’s biggest fear is that of legal costs. A recent survey conducted by the National Accident Helpline, answered by 228 previous claimants, resulted in corroborating evidence. We asked the sample, “If you had thought you might have to pay the other side’s legal costs, could you have afforded to go ahead with your claim?” The results were as follows:

<table>
<thead>
<tr>
<th>If you thought you might have to pay the other side’s legal costs, could you have afforded to go ahead with your claim?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I definitely could not have afforded to go ahead with my claim</td>
<td>70%</td>
</tr>
<tr>
<td>I probably could not have afforded to go ahead with my claim</td>
<td>18%</td>
</tr>
<tr>
<td>I cannot say if I could or could not have afforded to go ahead with my</td>
<td>7%</td>
</tr>
<tr>
<td>I probably could have afforded to go ahead with my claim</td>
<td>4%</td>
</tr>
<tr>
<td>I definitely could have afforded to go ahead with my claim</td>
<td>1%</td>
</tr>
</tbody>
</table>

14. These two sets of data demonstrate that a substantial number of personal injury victims will be put off from claiming because there is a real concern that they will have to pay large legal bills. This undermines two of the basic principles of justice in this area, Principles 1 and 2 outlined above. If somebody is the victim of an injury as a result of someone else’s negligence, they have every right to seek redress for physical and emotional trauma caused—which will very often impact their lives financially. Any system that instils a fear of claiming based around uncertainty that the process will be even more financially detrimental than the financial losses already sustained, is inherently wrong.

15. Furthermore, the proposals made by Sir Rupert Jackson for reform of success fees will actually reduce the amount of compensation received by the vast majority of successful claimants. This undermines the most basic principal of justice—that an injured person should be recompensed by the wrongdoer in order to return him or her to the same position they were in prior to the accident.

16. National Accident Helpline agrees that some reform to the success fee system is necessary. But we oppose any proposals to force claimants to pay solicitors’ success fees out of damages that are specifically awarded to compensate victims for burdens that their injury has brought. Any such proposals contravene Principle 3 outlined above. It is also worth noting that claimant solicitor costs are frequently dependant on defendant behaviour. We have considered 143,834 cases from 2005–2010 where Allianz provided an ATE premium to an injured claimant. Since Allianz operates a staged premium system—whereby admission from
the defendant within six months of the policy inception date results in a reduced premium—liability insurers are incentivised to deal with claims efficiently and astutely. In fact, the evidence shown demonstrates that in 75% of cases that are eventually lost or settled by defendants, liability insurers failed to admit liability within the six months of the policy inception date. In these cases the personal injury protocol states that liability should be investigated and admitted, where appropriate, in less than four months rather than the more generous six months allowed to qualify for the discounted premium under the terms of the policy.

<table>
<thead>
<tr>
<th>NON RTA CASES: DISCOUNT %</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discounted</td>
<td>22%</td>
<td>24%</td>
<td>26%</td>
<td>27%</td>
<td>25%</td>
<td>23%</td>
<td>25%</td>
</tr>
<tr>
<td>Non Discounted</td>
<td>78%</td>
<td>74%</td>
<td>73%</td>
<td>75%</td>
<td>77%</td>
<td>75%</td>
<td>75%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RTA CASES: DISCOUNT %</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discounted</td>
<td>63%</td>
<td>62%</td>
<td>62%</td>
<td>61%</td>
<td>61%</td>
<td>61%</td>
<td>62%</td>
</tr>
<tr>
<td>Non Discounted</td>
<td>37%</td>
<td>38%</td>
<td>38%</td>
<td>39%</td>
<td>39%</td>
<td>39%</td>
<td>38%</td>
</tr>
</tbody>
</table>

17. This data illustrates the volume of unnecessary delays in the system, entirely as a result of defendant behaviour. It is wrong to propose that such behaviour—whether the result of inefficiencies from liability insurers or of some other, more cynical motivation—should impact on access to justice for injured people. The proposals contained in the green paper are a license for liability insurance to make litigation unsustainable and uneconomic for claimants and their solicitors by deliberately delaying the investigation and settlement of good claims. This would undermine Principle 9, as referenced above, and impinge on the rights of the claimant (and indeed add to the burden on the courts) as a result of delay.

18. The implications of the Government’s proposals to remove recoverability of success fees also has a detrimental impact on consumers, in that the system will become one whereby solicitors can only afford to take on the most certain cases. Consumers with good, but less straight forward claims will be denied access to justice in large categories of personal injury cases. Solicitors will no longer be able to fund the vital investigative and background work that goes in to cases that do not proceed following the evidence gathering stage. This process is vital in weeding out less meritorious claims and saves the judicial system millions of pounds a year in doing so (and contravening Principle 9 as outlined above). It is also far less likely that solicitors will be able to take on more complex cases, which by their nature tend to be more devastating for the victim.

19. In reality, 75% of cases now operate on a fixed fee basis, a number that is likely to rise to 90% should the existing RTA claims portal be extended as is about to be considered in public consultation. With this in mind, many of the Government’s proposals will actually only have relevance to a small percentage of personal injury claims—those that fall outside the streamlined processes which are planned to be in place by April 2012. Higher value claims by their nature are more complex, which means that the damage caused by the Government’s primary proposals will affect those who are injured the most severely and need adequate redress the most.

Conclusion

20. National Accident Helpline oppose the Government’s primary proposals on the basis that they will restrict access to justice for victims of personal injury, dissuading tens of thousands of people from seeking the redress they deserve from negligent parties. These people, who often come from low income families and for whom a few thousand pounds makes a life-changing difference, will have no course for assistance in order to help them lift the financial burden caused by their injury, an injury that is the result of another’s negligence.

21. NAH would be extremely happy to discuss these issues further with the Justice Select Committee and would be happy to provide formal oral evidence to the committee.

January 2011

Written evidence from the Money Advice Trust (AJ 26)

1. Introduction

1.1 We are aware that the “Proposals for the Reform of Legal Aid in England and Wales” currently under consultation include the removal from the scope of the legal aid scheme a wide range of debt related issues (including insolvency, loans, credit card debts, overdrafts, utility bills, court fines and hire purchase debts).

1.2 Information provided to Money Advice Trust, (MAT) by Advice Services Alliance estimates that these proposals will take approximately 75,000 debt cases out of scope of legal aid. National Debtline, (NDL) /MAT (amongst others) are referenced in the consultation paper as an alternative source of advice for debt advice.
issues. The paper indicates that making use of existing telephone advice resources will minimise the impact of the proposed reforms with regards to the exclusion of the aforementioned debt related issues from the scope of Legal Aid. As MAT is referenced in the consultation paper, we feel it is important to clarify our position regarding our capacity to deal with additional debt advice enquiries.

2. NDL Capacity

2.1 In 2010 NDL dealt with approximately 150,000 debt advice enquiries and answered between 70–80% of calls presented based on its current staffing levels. In the short to medium term NDL does not plan any further expansion in numbers of advisers and therefore we are concerned about the additional volumes of additional calls that these reforms may generate to our service.

2.2 We are currently running a number of pilots to explore how we can increase the number of clients we advise. In July 2010 NDL introduced a “triaxial system” to allow a less experienced advisers to deal with less complex advice calls. In November 2010 MAT launched an online debt advice tool, “My Money Steps” to provide an alternative channel of accessing advice at NDL. As a result of these developments we predict that in 2011 NDL will be able to provide advice to approximately 200,000 clients.

3. Ensuring an Appropriate Fit

3.1 MAT has long been interested in ensuring that clients have access to a wide range of free advice services accessible through a variety of delivery channels. We also feel that it is important for clients to be matched with the channel that best suits their individual needs or the complexity of their case. We are aware that the Ministry of Justice is currently undertaking a rapid impact assessment looking both at client channel preference and the impact of advice and are happy to provide support with this research if called upon.

3.2 It seems that debt cases that require specialist legal debt advice are less likely to be suited to telephone advice given the need to review papers/contracts and/or represent a client in court. Complex cases of this nature are more likely to require face-to-face appointments rather than “self help” advice over the telephone. MAT currently receives a small number of referrals from Community Legal Advice and, whilst we may be able to expand the numbers of calls that are referred across, and are happy to work with MoJ/CLA to do so, the volumes are likely to be small compared to the total number of people likely to be impacted by the proposed reforms.

3.3 A Legal Services Research Commission (LSRC) survey47 showed that the incidence of justiciable problems is significantly higher for people with long standing health or disability problems, lone parents and single people and those on very low incomes. It is evident that the demographic profile of people who currently access debt advice through face-to-face agencies with legal aid contracts is often different from the profile of many NDL clients. In many cases, clients who are classed as “vulnerable” and require a degree of handholding through the advice process are signposted by NDL to a face-to-face service in their local area. Typically this would also include clients with literacy, language or certain mental health problems. We have always taken the position that telephone advice should complement and not replace face-to-face advice services.

4. Future Demand

4.1 In August 2010, MAT commissioned The University of Nottingham to undertake research looking at the likely future demand for debt advice throughout the period 2011–15.

4.2 Econometric forecasting methods were used to model the impact of developments in the macro economy on demand for debt advice based on the Office for Budget Responsibility’s (OBR) forecast for the UK economy.

4.3 Headline findings show that the unemployment rate and the average cost of credit are most closely associated with future demand for debt advice. The research suggests that a balanced forecast48 would see demand for debt advice rising steadily from current levels (approximately 1.4 million clients in 2010) through 2011 back to approximately 1.6 million individuals seeking advice from the free-to-client advice sector in 2013 (this exceeds that seen at the peak of the financial crisis in late 2009).

4.4 The research also suggests that approximately five million individuals across the UK find their debts a “heavy burden” and are “constantly struggling to keep up”. At present only one in six of these people is seeking advice from any source. This means that the potential “need” for debt advice is significantly higher than the volumes we are currently seeing.

4.5 Reflecting on this research, MAT is concerned that even if the capacity of the free-to-client sector was to remain constant in the coming years, the sector is likely to struggle to meet the additional numbers of clients predicted to be in need of debt advice over the coming years.

46 MMS is a new online debt advice initiative so at this stage it is difficult to predict with certainty of the volumes of clients that this will be able to serve in 2011. The tool incorporates an initial filter which asks clients who have what we class as an “emergency situation” to contact the helpline, (for example, the tool will not provide advice to clients who are at risk of court action). For more information visit www.mymoneysteps.org.

47 Causes of Action: Civil Law and Social Exclusion LSRC 2007

48 A balanced forecast takes a mid point between the OBR forecast for unemployment 2011–15 and that of a range of independent economic forecasts.
5. ISSUES IMPACTING THE CAPACITY OF THE FREE-TO-CLIENT SECTOR

5.1 The MAT research into future demand for debt advice does not take into account the additional impact of any significant changes to the capacity of the existing free-to-client sector. In addition to the 75,000 debt advice clients who are predicted to be impacted by changes to Legal Aid, we expect an additional 70,000 clients per year will not be able to access face-to-face debt advice if the Financial Inclusion Fund ends as predicted in March 2011.

January 2011

Written evidence from the Greenwich Housing Rights (AJ 27)

EXECUTIVE SUMMARY

A. In preparing this evidence I have chosen to concentrate on the issues raised by this inquiry directly affecting the services provided by the local advice partnership, Greenwich Legal Advice Services (GLASs), namely:

— What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?
— The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?
— What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?
— What are the implications of the Government’s proposals?

B. Evidence has been provided in relation to the service-related and user-profile information generated by GLASs during 2009/10. The evidence outlines the potential impact of the proposed legal aid reforms by attempting to extrapolate the impact of those reforms on current GLASs service provision.

C. GLASs is a partnership of five local voluntary sector advice providers. GLASs provides direct advice and representation services in social welfare law, along with a range of other services such as training, social policy work, campaigning and infrastructure support for local informal advice providers. GLASs receives funding from the Legal Services Commission and Greenwich Council and a range of other public-sector and trust funding streams.

D. The reforms represent a further threat to the funding of essential advice and advocacy services assisting marginalised and hard-to-reach sections of the community. Reductions in local authority, legal aid, Financial Inclusion Fund and London Council’s funding could lead to the demise of all not-for-profit, specialist advice services in the local area (Greenwich). We believe this situation is replicated throughout the country and would therefore urge the Government to conduct a strategic review of funding for advice and advocacy services.

E. A failure to do so will threaten social stability and reduce access to justice and place even greater pressure on public services currently trying to grapple with funding reductions and rationalisation.

1. Impact of the proposed changes on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid

1.1 In responding to this point we will outline the potential impact of the proposed changes on the Greenwich Legal Advice Services partnership (GLASs) to illustrate the likely wider impact of the reforms. GLASs is a partnership of five local not-for-profit advice providers: Greenwich Citizens Advice Bureaux, Greenwich Community Law Centre, Greenwich Housing Rights, Meridian Money Advice and Plumstead Community Law Centre. GLASs partners hold legal aid contracts in housing, employment, welfare benefits and, since November 2010, debt. GLASs partners also either administer or contribute to housing possession court duty schemes at both Woolwich and Bromley County Courts under Legal Services Commission (LSC) funding arrangements. GLASs partners receive grant funding from Greenwich Council and a range of other public-sector and trust funding streams. The combination of funding streams creates the capacity to offer a broad range of generalist and specialist advice services and other functions to meet our charitable objectives such as training, social policy work, campaigning and infrastructure support for local informal advice providers.

1.2 During 2009–10 the combined GLASs services:

— Responded to over 17,000 legal enquiries at the “generalist” level of advice.
— Conducted 1983 “specialist cases”, 1741 of which fell within the housing, debt, employment and welfare benefits categories of social welfare law.
— Recovered over £4,000,000 for clients by challenging benefit decisions, recovering backdated benefits, assisting with new or rectifying existing benefit claims and through the various mechanisms of debt advice.
— Helped client to manage approximately £10,000,000 of client debt.
The proposed reforms place all of the above outcomes at risk due to the wider impact of losing three of the four key areas of social welfare law (see below at 1.4). The impact on the local community cannot be overlooked.

1.3 Many practitioners rely on a combination of funding streams to be able to run an effective legal advice service. The MOJ must take cognisance of the fact that all public-sector funding streams (and many trusts and other grant funding streams) are under considerable pressure. The removal from scope of key areas of social welfare law will lead to the closure of a large number of practitioners. Those remaining will not be able to access funding or generate income to provide services to clients requiring advice in social welfare law. As essential services will close, highly skilled, experienced and dedicated staff will leave the advice sector. If the funding environment changes and the LSC seeks to increase scope (or otherwise undo the proposed reforms) it will be extremely difficult to recruit advisers with the requisite skills and experience. Given the number of agencies likely to close and law firms likely to move away from legal aid law, the LSC may also find that it will be difficult to find practitioners in a position to provide legal aid services in the future (should the economic and funding environment improve).

1.4 GLASs partners are no exception to this and the loss of essential LSC funding to provide specialist advice in debt, employment and welfare benefits will place the partnership’s financial viability in serious doubt. During 2009–10 legal aid funding represented approximately 20% of GLASs funding for service delivery. For some GLASs partners legal aid represented up to 50% of funding for advice services. Across all partners with a LSC contract, legal aid funding represented more than 50% of funding for specialist advice services in social welfare law. The proposed reforms will reduce funding for social welfare law advice by 68% (with reference to the current 2010 Civil Contract schedule allocation). Funding could be reduced further once the reductions in scope in housing law are taken in to account. A reduction of this level will lead to the complete loss of specialist advice in debt, welfare benefits and employment, and the potential loss of all housing services through the likely closure of GLASs partner agencies.

1.5 Local authority and other grant funding will be difficult, if not impossible, to obtain to mitigate the loss of funding for specialist advice services. In fact, grant funders may be reluctant to provide funding for any advice or advice-related services due to the instability caused by the proposed reforms. In reality planned reductions in local authority funding and the loss of Financial Inclusion Fund and London Council’s funding could lead to the complete collapse of local advice provision, across all areas and levels of law. The voluntary sector’s ability to provide advice will be reduced to basic support through informal advocacy organisations. The MOJ hopes these types of organisations will fill the inevitable void left following the closure of essential advice services. The organisations noted in the Green Paper as “alternative routes to resolution”, such as AgeUK, CPAG and Disability Rights Alliance, provide excellent services, but are not specialist advice providers and cannot replicate current service provision. The organisations noted in the Green Paper will also be facing reductions in or increased pressure on funding and will not be able to access funding to expand advice services.

1.6 Over the course of the law few years the LSC has positioned practitioners to able to respond effectively to the complicated nexus of presenting problems (the LSC terminology is “clusters” of legal problems, such as the underlying debt and benefit problems leading to rent arrears). The LSC has formed CLACs, CLANs and now CLASs to enhance joint-working, make efficiency savings and improve the ability of practitioners to respond to inter-related legal problems. The latest civil tender process provided for consortia arrangements for the same reason. By removing from scope a number of the areas of law regularly contributing to the escalation of legal problems the reforms will undermine practitioner’s ability to deal effectively with the areas remaining in scope. For example, a housing practitioner will have difficulty dealing with a possession case if the client cannot access advice on debt, welfare benefits, employment (etc.), the very problems affecting the client’s ability to pay their rent. So by focusing on the housing cases involving litigation and removing other areas from scope, the reforms are undermining a client’s ability to obtain advice at an early stage, which could prevent problems from escalating to the point where a landlord decides that litigation is necessary.

1.7 Many practitioners have undergone difficult, lengthy and expensive processes to alter their business models to meet the LSC’s requirements. Among other things partnerships and consortia have been formed, legal entities have been created and staff have been recruited, retrained and redeployed. Long-term business strategies have been formed and fundraising has been focussed on the basis of the LSC’s ever-changing plans. The costs of these activities have been borne almost entirely by practitioners. Whilst it is accepted that the LSC could not have anticipated the need to make such large reductions to legal aid spend, some thought must be given by the MOJ to the constant upheaval wrought on the advice sector by the recent waves of reform and the impending threats posed by the current reforms. A failure to do so by the MOJ is a signal failure to recognise the real losers through this process—the clients.

2. Reduction in cases in the civil courts as a result of the proposed reforms

2.1 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
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cases in the local courts. The vast majority of clients assisted by GLASs 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).

2.2 The proposed reforms will actually 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. One would question whether the MOJ has consulted judges or tribunal chairs on the likely impact that the reforms will have on both the administration of courts and tribunals and the ability of those systems to ensure equality of access and equality before the law?

2.3 The proposals runs contrary to the MOJ’s stated objective of ensuring access to justice and HMCS’s goal of ensuring that justice is delivered effectively and efficiently to the public, and that all citizens according to their differing needs are entitled to access to justice.

2.4 While the areas of housing law remaining in scope do often involve litigation, the de-stabilising effect of the proposed reforms on advice-providers (see above a 1 and below at 4) will reduce the ability of defendants or, in homelessness cases, appellants to access advice and mount an effective defence/appeal. The likely result is an increase in possession orders, evictions and homelessness.

3. Action the Government could be taking on legal aid that is not included in the proposals

3.1 We would urge the Government to delay the proposals and conduct a comprehensive and strategic review of the funding for advice, information and advocacy services. As indicated in the Green Paper, legal aid funding is just one of a number of streams contributing to the provision of advice to the public. However there appears to be no recognition from the MOJ that as all public funding streams are under pressure, the proposals for reforming legal aid will heap further misery on the poorest and most marginalised sections of the community. We accept that cuts must be made, but believe that the lack of coherent, inter-departmental Government policy about the scope and extent of the reductions could lead to the complete collapse of the advice sector. Given the impact on just one small fraction of the sector outlined above, and the resulting potential consequences for local statutory services, we are gravely concerned that the nationwide impact of these and other reductions has not been anticipated or planned for by the Government. Such short-sightedness by the MOJ and other Government departments, central and local, must be arrested and more time must be given to assess the true impact of these reforms on the public.

3.2 The Government is currently consulting on the proposals to implement the Jackson report recommendations on civil court funding and costs. It seems premature to consider reducing scope and eligibility and making other radical changes to what is considered by the MOJ as an unsustainable legal aid system before the proposals outlined in the Jackson report are fully considered. Surely it would be more sensible to consult on and then implement the changes suggested by the Jackson report, thereby increasing the financial sustainability of legal aid (or of legal aid providers) before considering the need to change the current provision of legal aid services?

4. Implications of the Government’s proposals

4.1 We would ask the Committee to consider the impact of the reforms on the users of legal aid services. To emphasise this point the Committee should consider that of the 19,000+ users of GLASs’ services during 2009–10:

— 20% had a disability.
— 60% were from a BME community.
— 55% were female.
— 23% were lone parents.
— 55% were reliant on Income Support, Jobseeker’s Allowance, Employment Support Allowance or Pension Credit.
— 60% were either unemployed, full-time students, carers, unable to work due to illness or retired.
More consideration must be given to how members of marginalised or socially excluded groups will access advice services and enforce their rights in the current economic climate. The reforms are likely to have a disproportionate effect on those sections of the community least able to make alternative arrangements for resolving problems or seek alternative avenues to resolve disputes.

4.2 Much has been made in the Green Paper of the availability of conditional fee arrangements as a means of funding legal services. It must be noted that for the vast majority of cases in the social welfare law categories of law this type of arrangement is not suitable. Reductions in scope and eligibility will essentially bar those with social welfare law problems from participating in the legal system.

4.3 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.

4.4 The reforms may lead to increased pressure on public services (at a time when public services are being “rationalised”). Due to the lack of access to advice services for already marginalised communities we anticipate that homelessness services, Social Services, the NHS, education departments and the courts system may all feel the brunt of increased indebtedness, a deterioration in employment practices, increased criminality, an escalation in rent and mortgage arrears, family breakdown, domestic abuse and mental and physical health crises. The cost in real terms of dealing with these issues will undoubtedly be greater than the planned reduction in legal aid spend, particularly in relation to the planned reduction in spend in social welfare law.

4.5 Viewed in isolation the reforms are of great concern to those providing and attempting to access advice. Viewed in the context of wider public spending reductions, the reforms represent a threat to social cohesion and civil society. As noted above, there appears to have been little thought by the Government in to the combined impact of a reduction in spending across a range of funding streams for advice and advocacy at a time when other social and support services are also facing cuts.

January 2011

Written evidence from the Brighton Housing Trust (AJ 28)

1. Executive summary

1.1 BHT is a charity delivering a significant amount of Legal Aid work in the Social Welfare and Immigration areas of Law. Our evidence and recommendations relate to the following concerns:

1.1.1 The proposals for telephone advice risk face to face to such a low, sporadic level, that it will be difficult to commission. We therefore recommend the Government consider procuring mixed telephone and face to face contracts at a local level.

1.1.2 The Telephone gateway and specialist casework service will simply not be appropriate in certain situations (in particular asylum where long interviews with interpreters and sight of original documents are needed).

1.1.3 The removal from scope of Welfare Benefits as an area of law threatens the effectiveness of work in other areas. We recommend it is retained in scope until the social welfare reform changes are embedded.

1.1.4 The removal of early stage preventative work will lead to an increase in civil court cases (and an increase in demand on other public services).

1.1.5 The proposals for Social Welfare Law will seriously destabilise the Not for Profit advice sector at a time when demand for their services is like to increase.

1.1.6 The proposals will deny Justice to vulnerable people.

2. Background

2.1 Brighton Housing Trust (“BHT”) is a charity based in the City of Brighton and Hove. It has provided legal advice since 1981. It has delivered services under Legal Aid funding since 1989 and has offices in Brighton & Hove, Eastbourne and Hastings.

2.2 We hold Legal Aid contracts in the “Social Welfare” areas of Housing, Debt, Welfare Benefits and Community Care. We also hold an Immigration contract. In the year to December 2010 we opened 5,428 new Legal Aid matters in total.

2.3 We are very directly involved in local Advice Partnerships in both Brighton and Hove and East Sussex. These partnerships bring together a range of local advice related services from across the public, private and voluntary sector to work strategically together to meet residents needs. The evidence we provide below is therefore informed by both our own experience of the delivery of legal aid services in this area and also our overall understanding of local need and provision.
3. “What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?”

3.1 We believe that the number of practitioners will diminish significantly. We note that, although the Government seek to deliver the vast majority of Civil Legal Aid via the telephone helpline, they state that they are committed to retaining local face to face provision for those who most need it. We are concerned that the proposed cuts to face to face advice are so significant local providers may find it difficult to achieve sufficient economies of scale to make delivery of face to face services feasible.

3.2 Under the current system face to face providers such as BHT are allocated with a set number of matter starts per year. This allows us to forecast income and budget expenditure on staff, premises, overheads etc. Our case mix currently comprises a mix of ’emergency’ and less immediate issues. As we manage the gateway to our service, we have the flexibility to respond to emergency issues as and when they present.

3.3 Under the proposals it appears the CLA helpline will sporadically refer a small minority of “appropriate” cases to local providers for face to face assistance. The clients in these cases will be usually facing immediate crises and deadlines (such as loss of home) as these are the cases that the Government proposes to retain in scope. To make this work, local face to face providers must therefore be in a position to “drop everything” and provide immediate assistance if and when the CLA refer a case. We are concerned that the Government will face significant challenges in commissioning such work.

3.4 We speculate that, perhaps, the Government envisages private practice mixing private work with legal aid work? If this is the case, we are concerned that many private practice firms would not be willing to commit to prioritising occasional emergency referrals from the CLA helpline over their private clients (particularly considering that legal aid pay rates are a fraction of commercial rates).

3.5 We are encouraged that the Ministry of Justice say they will consider, when tendering telephone advice services, how best to mitigate the impact on small firms who may otherwise be less likely to win the contracts. We recommend they give consideration to tendering mixed telephone and face to face advice services at a local level. This would allow local providers both sufficient predictable income to operate and sufficient flexibility to respond to emergency face to face need.

3.6 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.

3.7 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.

3.8 The following case study illustrates the challenges in taking witness statements in asylum case “Bayo (not her real name) was a 15 year old girl from Nigeria. She had been picked up Social Services and had claimed she was fleeing an arranged marriage in her home country. She was referred to BHT for assistance and repeated her story to us. After a week she disappeared from Social Services Care. She was found working in a brothel by police eight months later but insisted she had chosen to do out of her own free will. She returned to BHT and maintained her story about fleeing an arranged marriage. Eventually, after several months and a number of face to face appointments she disclosed that she had been sold to traffickers by her family, that they had provided her with a cover story regarding her arranged marriage and that she had been so terrified of repercussions from them that she had not dared deviate from it.”

3.9 The replacement of a face to face service with a phone based service for asylum cases will weaken the critical relationships that have been forged over years between our legal advisers and local BME community groups, migrant support groups, various Local Authorities and local services such as women’s refuges. These relationships are critical to ensure immigration advice is accessible to those who most need it and the best results are achieved.

3.10 We are also particularly concerned that the proposals to remove Welfare Benefit’s from scope will have a detrimental effect on the effectiveness of provision in other areas of Social Welfare related law.

3.11 Welfare Benefit’s advice helps to maximise client’s income by ensuring they receive everything they are entitled to under the law. Effective benefits advice is therefore crucial to achieving outcomes for people at risk of losing their homes due to rent or mortgage areas. As an area of law it is often far from simple or mechanistic and, in our experience, many clients facing homelessness greatly benefit from the intervention of a specialist benefits adviser.

49 Para 89–91 Legal Aid Reform: Provision of Telephone Advice Impact Assessment

50 For example in CIS/0546/2008, an appeal on a point of law relating to whether a family should be denied their entire benefit income for a period to repay an overpayment the Commissioner referred to the relevant regulation as a “masterpiece of obscurity”
3.12 Whilst we are aware that it is the Government’s intention that Universal Credit will provide a simpler system, this will not be phased in for a number of years. Furthermore it is likely that the ‘phasing in’ period will bring even greater complexity as there will be two legislative frameworks operating in parallel. We therefore recommend the government retain Welfare Benefits within scope at least until the social welfare reform changes are embedded.

4. “The Government predicts that there will be 500,00 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?”

4.1 We do not see how the proposals will contribute to any such reduction in the numbers of cases in the civil courts in the areas of law in which we deliver services. In fact, we are genuinely concerned that implementation of the proposals will lead to an increase in civil court and tribunal cases that could, and should, otherwise be avoided.

4.2 For example, in the area of housing law, the Government proposes to limit assistance to cases relating to the imminent repossession of a persons home, serious disrepair of rented accommodation and county court appeals on a point of law51. Of the housing cases we closed in 2009–10 we estimate only 20% of fell within this narrow category. The advice and assistance we delivered in the remaining 80% of cases was primarily directed at resolving issues at an early stage thereby avoiding unnecessary court action.

4.3 It is these early stage preventative interventions that will no longer be funded under the proposals. The following case study illustrates the potential impact: “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.”. Clearly there is a significant chance that, without BHT’s early advice, Sabir’s landlord would have deeper in debt and the situation would be more difficult to resolve to the satisfaction of the landlord. It is not unlikely, therefore, that Sabir would have been ultimately evicted and would have subsequently, as a vulnerable person, presented to the local authority as homeless.

4.4 The Government appear to concede that this is an issue in the consultation paper. In relation to housing and homelessness they state “We recognise that there are… issues—for example, welfare benefits cases or general debt problems—which, in time, could lead to a home being at risk if they are not dealt with expeditiously”52. They conclude however that it would be “…inappropriate to devote limited funds to a range of less important cases on the basis that they could, ultimately, lead to more serious consequences for the litigant”.

4.5 The principle is not just limited to Social Welfare and Housing Law. For example, we believe that, without the early input of quality Immigration legal advice, many more people will struggle with the leave application process, get turned down and end up clogging up an already over-burdened Immigration Tribunal system.

4.6 In our experience, early stage advice given under the Legal Aid scheme often filters out unmeritorious claims that would otherwise proceed to the courts or tribunals. Those cases that do proceed to tribunals do so on the basis of evidence and clear legal argument, thereby simplifying and streamlining the inquisitorial process.

4.7 We consider that these proposals will prove to a false economy in terms of the total impact on public finances. An early stage debt, benefits or housing legal aid intervention can successfully address a households financial problems at a cost to the public purse around £200. Contrast this with, for example, the costs of evicting a council tenant (recently estimated by Brighton and Hove City Council to be in the region of £9,50053).

5. “What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)”

5.1 We do not seek to give detailed evidence in this area. We do, however, recommend that Government reconsider whether the balance between savings in the criminal and civil legal aid budget has been correctly struck.

51 Paras 4.74–4.81, Proposals for the Reform of Legal Aid in England and Wales
52 Para 4.79, Proposals for the Reform of Legal Aid in England and Wales
53 See the “Turning the Tide Social Inclusion Pilot Evaluation” p 30
6. “Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?”

6.1 We do not address this question in our evidence.

7. “What are the implications of the Government’s proposals?”

7.1 We are deeply concerned that the proposals will increase both Social Exclusion and demand on health, housing and social care services.

7.2 We note the Solicitor General’s comments that “Not every problem—be it debt, housing, family-related or some other area of dispute—has to be tackled by a lawyer. We need to refocus our attention to find solutions.”

7.3 In our experience, from working strategically in local advice partnerships, not every problem of that nature is currently dealt with by a lawyer: it is the legally complex issues that get dealt with under legal aid funding. The Not for Profit (NfP) advice sector already provide a range of other advice related solutions for people, often, utilising volunteers when appropriate.

7.4 Legal Aid is, however, a key source of funding for the NfP advice sector and the Government predicts this Legal Aid will fall by 77% as a result of the proposals. This will have a serious destabilising effect on the very organisations that already deliver the “alternative solutions” the Solicitor General refers to.

7.5 Other key funders of advice, such as the local authority, cannot be expected to pick up the slack as they will also be having to implement significant cuts during this time and may well prioritise funding for their statutory services. Without a clear strategy for alternatively resourcing and supporting the NfP advice sector the Government risks the “perfect storm” whereby increased need for advice relating to the reshaping of welfare and public services coincides with a serious destabilisation and decrease in provision.

7.6 We believe that the proposals will in fact deny justice to vulnerable people. For example, in the area of Immigration Law the government proposes to limit assistance in immigration cases to those where clients are claiming asylum or seeking to challenge detention. More than half (63%)—552—of the new clients that were assisted for the year to December 2010 would not get help under the new system.

7.7 Immigration Law is an increasingly complex and frequently changing area of law (with nine relevant Acts of Parliament since 1993 alone, not to mention a substantial number of regulations and rule changes). The people affected are often unfamiliar with UK laws and procedures and have limited support networks. We are concerned that these proposals may have the effect of “driving problems underground” and that people who would otherwise regularise their Immigration status, find employment and pay taxes will, instead, find themselves living on the margins of society.

7.8 Many of the people we help with Immigration problems are experiencing acute emotional distress and are simply not able to resolve these problems themselves. One significant area to be affected, already recognised by the government, are cases involving people’s human rights, particularly their right to a family and private life (Article 8). This will involve cases determining whether people can join their spouses, children, parents, siblings etc. It will involve people who may have lived in this country for years having to leave the country, being separated from their family and friends. It will also include people escaping domestic slavery. This is a profoundly difficult area of law that both the Supreme Court and the House of Lords before it have continued to give relevant Judgements on. There is no real alternative source of advice and legal representation for most of the people who will be affected. The Home Office is an enormous government department. These proposals disregard the principles of the rule of law, access to justice and equality of arms.

7.9 The following case study gives an indication of the nature of the Immigration cases that will no longer be funded under Legal Aid: “Alisa (not real name) was a young Russian woman who came into this country following her marriage to a British citizen. Upon arrival her husband embarked upon a campaign of mental and physical abuse. He also raped her. He forced their young child to verbally abuse her in adult ways. However, due to her naivety and young age, she was unaware of her ability to report this to the authorities. She continued to live like this until eventually, after suffering further physical and sexual assault, a neighbour befriended her and helped her and her child to escape to a refuge. She was referred to BHT for Immigration Advice. At this point she had been in the UK for over two years—the point at which most spouses of British Citizens are able to secure permanent residency. However, when BHT assisted her to apply for further leave the home office dismissed all the supportive evidence from the police, her GP the Women’s refuge and her college and turned her application down. Thankfully BHT successfully, appealed against this.”

January 2011

54 Parliamentary Adjournment Debate on Legal Aid Reform 14 December 2010
55 Addendum to Legal Aid Reform: Cumulative Impact, Equalities Impact Assessment
56 Addendum to Legal Aid Reform: Cumulative Impact, Equalities Impact Assessment
Written evidence from the Riverside Advice (AJ 31)

Riverside Advice would like to express our thanks for the calling of this Select Committee inquiry, giving the opportunity to present our experiences on the importance of Social Welfare Law, and the consequences on vulnerable people of removal of Legal Help/Aid as proposed in the Green Paper.

Welfare Rights sector organisations do not have a large or loud voice;—for most just the every-day challenges of providing services with high demands prevent involvement in wider issues.

There are many negative impacts of the proposals in the Green Paper. In this evidence Riverside Advice have restricted our comments and points to our main expertise;

“relating it to the impact the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid”.

by describing the impact of taking Social Welfare Law (Welfare Benefits, Debt and Housing) “out of scope”, and the consequences to the vulnerable people who currently receive these essential services.

Executive Summary

1. Riverside Advice (RA) has 35 years of experience in delivering Social Welfare Law (SWL) to the most deprived and vulnerable people in Cardiff.

2. The proposals as set out in the Green Paper will bring to an abrupt end the majority of SWL specialist advice currently delivered to people across the UK, and consequently threaten the financial viability of all the organisations which deliver these services.

3. In Cardiff alone there will be a loss of the total budget of £900,000 for the provision of SWL, (Welfare Benefits, Debt and Housing), this is for 4,000 cases. This Contract is currently provided by a Not For Profit Consortium of Cardiff Law Centre, Cardiff CAB, Shelter Cymru and Riverside Advice. There is no other significant funding in Cardiff for SWL advice provision.

4. Taking SWL out of scope will result in the cuts being targeted at the services which will hit the most vulnerable in society. To those people who often already experience exclusion and barriers to services, including Advice services.

5. The impact of the removing SWL “out of scope” will end the essential early intervention and prevention work which current Welfare Benefit, Debt and Housing services provide. This means this will push many more cases onto the more expensive “litigation” stage. For example, if a Welfare Benefit case for a vulnerable client is not dealt with, and the person is deprived the welfare benefit income they are entitled to, this can soon become a debt problem, and escalate to a housing and homelessness problem, or equally a hospitalisation problem. The cost to the government, tax payer or society is £170 for a Welfare Benefit case,—the subsequent problems and cost of not providing this assistance at the appropriate time will be far higher.

6. 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.

7. The Ministry of Justice (MoJ) are required to make £350,000,000 of savings, 2% of this is proposed by taking several areas of Legal Aid/Help out of scope. This will include SWL categories. This doesn’t seem the most fair and appropriate way of making cuts which will essentially be targeted at those in poverty, and the most vulnerable and deprived. Perhaps cuts can be looked at on the administrative side of the MOJ, or on some of the very high cost cases, or from the much larger criminal legal aid budget.

Brief Introduction to Riverside Advice and Expertise

8. Riverside Advice RA was set up in 1975 as part of a local Community Development Centre.

9. RA is an independent community based Welfare Rights organisation providing specialist Social Welfare Law (SWL) services in Cardiff under the umbrella of AdviceUK.

10. We have a LSC Contract and Specialist Quality Mark (SQM) to deliver Legal Help/Aid in Welfare Benefit and Debt, this is as part of a Consortium with Cardiff Law Centre, Cardiff CAB, and Shelter Cymru.

11. RA is situated and delivers its Welfare Rights advice services in the deprived geographical areas to the west of Cardiff, primarily South Riverside, and delivering by outreach to the other main deprived areas to the west of Cardiff.

12. RA also deliver targeted Welfare Rights specialist casework services to vulnerable client groups across Cardiff, such as for those with:

— Mental Health Difficulties, (48% of cases).
— Carers of those with Mental Health Difficulties (25% cases).
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— BME’s with English Language and literacy difficulties (30% cases).
— Physical health difficulties, (25%).
— Vulnerable families with Children under four, (15% cases).

13. RA Welfare Rights Services are delivered mainly to people who have been referred to our services, (71%). The referrals are made through “networks” and from organisations and agencies in all sectors, many through government and government funded organisations and agencies. These “networks” have developed over many years of delivering services to vulnerable client groups, and the excellent reputation Riverside Advice has of delivering positive outcomes for people.

INFORMATION ON GREEN PAPER PROPOSALS

Impact and loss from proposed changes; The value of Social Welfare Law (SWL—Welfare Benefits, Debt and Housing) casework

14. Social Welfare Law (SWL—Welfare Benefits Debt and Housing) Advice is mainly and currently provided under Legal Aid/Legal Help—by Charities working in the not-for-profit/voluntary/third sector.

15. The Social Welfare Law advice services under Legal Help/Aid, often involve resolving complex matters of law,—and is provided relatively “cheaply” by extremely competent and experienced Advice Workers on a salaries of around £20,000 to provide between 250 and 300 Legal Help/Aid cases a year. These services, are actually good value for money. It is therefore totally inaccurate to say the current SWL services are “too much money spent on expensive fat cat lawyers”.

16. At RA 800 hours a year, or 25% of the time spent on the LSC cases is time not chargeable to LSC under the strict Legal Help/Aid Contract criteria rules. Additional funding RA receives from other sources allows us to carry out a full “holistic” service for vulnerable clients by providing additional time for casework (in addition to the LSC eligible work and time), which is required for these vulnerable clients to combat the barriers that often prevent them accessing their rights.

17. The vast majority of the current SWL (LSC Legal Help/Legal Aid) budget already currently goes to the Not-For-Profit sector, where experienced advice workers provide excellent services with excellent outcomes. Solicitors and lawyers delivering within these areas of Law are also most often working in the Not for Profit sector. The Not for Profit sector—such as CAB’s, Law Centres, are therefore not, as has been suggested, the new, future or “fall back” option for future delivery of SWL, as they are already the providers. These cuts however will render many, if not most of these well established organisations unviable.

18. There is much added value in the not-for-profit sector/voluntary sector. This can be financially—as the employers are non paid volunteers, and all the funding income goes to the delivery of services and not towards making a “profit”. In delivery of front line services, volunteers can also help in reducing overall costs. Quality Welfare Rights services, with the complexities of welfare rights law can-not however be run or delivered by “volunteers” alone as has been suggested, they have to be managed within an competent and experienced structure.

Importance and impact of SWL in prevention and early intervention

19. SWL law provides early intervention and prevention services to some of the most vulnerable and deprived people in society. This is essential to avoid problems escalating.

20. These SWL/Welfare Rights services by their nature, and by the restrictions of the current eligibility rules of LSC Legal Help and Legal Aid, (in receipt of Income Support or equivalent level of income), are targeted at those who already are in poverty, deprived and disadvantaged, and for many who already face major barriers to accessing their “rights”.

21. 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, costing far more to the government than the money spent on resolving the original problem promptly. The cost’s both financial and social of removing SWL Legal Help/Aid will be enormous for the future.

ALTERNATIVES SUGGESTIONS FOR DELIVERY OF SWL

22. 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.

23. Pro-bono. There is a place for pro bono work, but this would only meet at best the iceberg in terms of the need and demand for SWL services. In the area of Welfare Benefits, where the Law and system is complex
and ever changing it is time consuming and difficult to keep up to date, and to provide work in this area of Law it is essential you do so. So generally this casework will not be carried out on a pro-bono basis.

24. Volunteers have their acknowledged place within Welfare Rights organisations, but need an adequate support and supervision structure for them to assist with delivery of SWL. Due to issues such as the complexity of the system, the commitment, knowledge, training and level of expertise required to provide SWL volunteers will only ever be a part of a competent welfare rights service, and generally at the lower information or basic level. The higher casework level (ie funded through Legal Aid) for specialist matter is in the majority delivered by employed specialist caseworkers and could not be adequately replaced by volunteers.

OUTCOMES FOR CLIENTS FROM SWL SERVICES

Financial gains for SWL services

25. With the financial recovery and “gains” made for the clients of Riverside Advice last year, which was nearly £2,000,000, made by ensuring that through our services they received their correct entitlements. It is clear that there is a very high level of incorrect decision making by the current DWP and Social Security decision making processes and their need to be a process to challenge this. There is not, and will not be no effective alternative service for these vulnerable people to access their rights if SWL is taken out of scope. Many of these people who already feel they don’t have a voice, and experience barriers, and therefore the withdrawal of SWL will have a severe negative impact of their lives and their future, and society as a whole.

Over-turning DWP decisions at tribunal with representation

26. Statistics show how representation at Social Security Tribunal makes a significant difference to the outcome. If no one attends a Tribunal Hearing there is *18.7% chance of winning the tribunal, if both appellant and a **representative attended there is a *66.6% chance of success. (*DWP figures from 2006V Tribunals now under MoJ and do not publish the figures, ** representative means any representative). Riverside Advice maintains 80% success rate when our workers represent at a Tribunal hearing.

RELATED ISSUES FOR CONTINUATION OF VITAL SWL ORGANISATIONS AND SERVICES

27. CAB, Law Centres and other independent community advice agencies, such as Riverside Advice, the CAB, Law Centre, Speakeasy Advice in Cardiff not only face the withdrawal of much of their legal aid funding, but local authority support for free, independent advice is also being squeezed. Many of the current organisations who have been delivering services to the local communities for many years, often since the 1970s, and deliver to the most vulnerable and disadvantaged in society will not survive these cuts.

28. RA organisationally currently has seven different sources of funding amounting to £443,250. Every source of funding is currently under threat of either ending completely, being reviewed for ending/or cuts, or a “fixed term” project. RA therefore, as with most other Welfare Rights organisations see no viable future if the Legal Help/Aid cut to SWL proposed in the Green Paper is approved.

RECOMMENDATION FOR ACTION

29. To reconsider all the proposals in the Green Paper; particularly those relating to taking Social Welfare Law “out of scope”. Removing this part of the budget, from which the saving would be relatively small, will have a comparatively large and negative impact on the most vulnerable in society, and a future additional financial and social cost to the government, tax payer and society.

30. Other areas for consideration and potential alternative cuts are the very high cost cases, or criminal legal aid. The MOJ are required to make £350,000,000 of savings, 2% of this is proposed by taking several areas of Legal Aid/Help out of scope. This will include SWL categories. This doesn’t seem the most fair and appropriate way of making cuts which will essentially be targeted at those in poverty, and the most vulnerable and deprived. Perhaps cuts can be looked at on the administrative side of the MOJ, or on some of the very high cost cases, or from the much larger criminal legal aid budget.

January 2011

Written evidence from AdviceUK (AJ 32)

1. EXECUTIVE SUMMARY

1.1 The combination of proposed legal aid reforms with other local and national funding cuts could create the perfect storm in which local, face-to-face advice provision is wiped out in many areas.

1.2 89.5% of respondents to an AdviceUK survey of independent advice services were facing funding cuts, leading to reduced capacity, service changes and closures, insolvency and redundancies.

1.3 Appropriate alternative sources of help for cases taken out of scope do not exist. Conditional fees are not appropriate for most social welfare cases. Self representation is not a viable option that ensures equality in
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access to justice. Failing to provide advice for housing, debt, welfare benefit, immigration, education and employment cases taken out of scope could lead to costs for other Government departments and services, such as the NHS.

1.4 The Government should take action to reduce bureaucracy within legal aid and related justice systems and to free up advice services to intervene earlier and tackle systemic failings in public services and administration. AdviceUK studies have shown that nearly a third of demand for legal advice is the result of preventable failure in public administration. Other studies have also shown the cost benefits of early intervention by specialist advisers.

1.5 The Government should also conduct a review of advice provision in the areas of law ear-marked for legal aid cuts. This review should look at current funding sources, access and quality, infrastructure support and recommend a strategic way forward. It should be conducted before reforms to legal aid are considered.

2. ABOUT AdviceUK

2.1 AdviceUK is a membership organisation for not for profit (NFP) organisations that provide advice services. AdviceUK has 860 member organisations throughout the UK, 777 of which work in England and Wales—most of which are community-based and many are volunteer-led. Our members work in some of the poorest areas, helping people to solve social welfare problems, providing advice and legal support to over 2 million people a year. Around 60 AdviceUK member organisations currently deliver legal aid services (55 have confirmed legal aid contracts. A further 8 are awaiting the outcome of tenders).

2.2 AdviceUK supports members to improve the quality and effectiveness of their services and provides a national voice.

2.3 We have consulted member organisations regarding the issues on which the Committee seeks evidence. However the views expressed in this submission are not necessarily representative of the views of all AdviceUK members.

2.4 AdviceUK is a member of the Advice Services Alliance and has contributed to its evidence. We do not repeat the evidence submitted by ASA.

3. IMPACT OF PROPOSED CHANGES ON THE NUMBER AND QUALITY OF PRACTITIONERS

3.1 We have evidence that the overall impact of the proposed changes to civil legal aid scope, fees, eligibility and delivery channels, coupled with reductions in local government funding and the loss of other central government funding streams such as the Financial inclusion fund will create the “perfect storm” in which independent face-to-face legal aid in many localities will be wiped out.

Local, community based, face to face advice no longer viable

3.2 As evidence submitted by the Advice Services Alliance shows, NFP advice providers will be particularly hard-hit by the legal aid proposals. AdviceUK member organisations deliver legal aid funded advice primarily on social welfare law matters and immigration and asylum, with some focusing on education. The impact alone of cuts to scope, transfer of cases to the telephone advice channel and a 10% reduction in fees would mean that what they would have left by way of matters starts during the lifespan of current contracts would not be viable. The income from the small number of matter starts that would remain in scope would not be sufficient to employ suitably qualifies staff to deliver them. The only way that face to face legal aid services in the housing, debt, discrimination and immigration matters that remain in scope would be viable if scope cuts are implemented would be on a regional or national delivery basis, due to the low volumes involved. This would present real problems in providing localised access to legal aid advice on these topics. Cuts in other (local) funding streams could spell the end of local, community based advice provision.

Reduced quality

3.3 AdviceUK members with legal aid contracts predict that even without changes to scope, coping with a reduction of 10% in civil fees will be very difficult. Most are already struggling to deliver legal aid services on current fixed fees and have indicated to us that they feel the quality of service they are able to provide has reduced. Several of our members did not bid for new legal aid contracts in 2010. One member (Refugee and Migrant Justice), closed due to financial problems associated with their legal aid contract. An additional 10% cut in income will at least mean that quality will deteriorate further and more agencies may well become insolvent. Some will decide to pull out of legal aid provision, leaving gaps in provision. This will be the case particularly in areas where local authority funding is being reduced. Local authority funding has supplemented legal aid funding for many providers, enabling them to continue to provide a holistic service as legal aid funding has reduced in recent years.

Combined impact of legal aid, local authority and other funding cuts

3.4 A survey of AdviceUK members commenced in summer 2010 found that 41% have had funding cuts already and 58% expected cuts to be made to 2011–12 years funding. 71% were subject to a review of voluntary sector or advice funding.
3.5 A follow-on survey commenced in December, which is on-going, has so far found that 89.5% of respondent organisations are experiencing major funding cuts to their advice services. The total funding cut for these organisations is £2.17million—£64k per agency—an average 64% cut in advice funding per agency. 55% of organisations had seen already implemented, planned or proposed cuts to local authority funding.

3.6 What such cuts mean for advice services, according to our survey is reduced services and redundancies and in some cases, closure:

<table>
<thead>
<tr>
<th>Impact Statement</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduced number of clients able to advise</td>
<td>80%</td>
</tr>
<tr>
<td>The type of service we offer will/may have to change</td>
<td>76%</td>
</tr>
<tr>
<td>We’ll have to end a particular advice project or service</td>
<td>76%</td>
</tr>
<tr>
<td>Staff will be made redundant</td>
<td>68%</td>
</tr>
<tr>
<td>The organisation will/may have to close</td>
<td>32%</td>
</tr>
<tr>
<td>We will have to merge with another organisation</td>
<td>20%</td>
</tr>
</tbody>
</table>

Anti-localism

3.7 Flying in the face of the current Government emphasis on localism, we are seeing smaller local agencies close due to funding cuts and approaches to commissioning by local authorities. Sheffield, Birmingham and Gloucester City Council, for example are moving to the commissioning of single advice services for their areas. Such commissioning tends to favour larger, regional and national bidders. Gloucester advice agency GL Communities, for instance, which was formed by the merger of three smaller agencies, looks set to close its advice service in March. Such patterns are being repeated throughout England and Wales.

3.8 In London, the decision of London Councils to cut funding for advice services and repatriate funding to London Boroughs will have a dramatic impact. The Black and Minority Ethnic Advice Network (BAN), coordinated by AdviceUK, will lose £684,000 in funding, which enabled its 18 member agencies to advise nearly 11,000 BAME clients in 2009–10. The network also delivered public legal information workshops and advice seminars for 1,245 people.

Government cuts other debt advice funding

3.9 The proposed cuts in legal aid and local advice funding will also be compounded by the loss of other vital funding streams, such as the Financial Inclusion Fund face-to-face debt advice scheme. The scheme has funded over 300 debt advisers to assist 77,000 people per year since 2006. According to a statement by Treasury Minister Mark Hoban in the House on 19 January, this scheme appears due to end in March 2011. To date there have been no announcements regarding an alternative scheme.

4. Cases Affected

Alternatives do not exist or inappropriate

4.1 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.

4.2 Some suggested sources of alternative advice, such as Job Centre Plus and the Benefits Enquiry Line are inappropriate. They are not independent agencies.

4.3 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. The knock-on effect of this will be felt by other Government funded services, like the Health Service. Research published in 2006 found that adverse physical and mental health consequences follow over a third of civil justice problems and that 27% of civil justice problems led to stress-related illness. Nearly a quarter of the people affected by
stress sought medical treatment, with an average of nine visits each to a general practitioner. (Causes of Action: Civil Law and Social Justice (2nd edition) Pleasence P, 2006, page 60, TSO). Indeed, a range of professionals including GPs, Social Workers and Advocates, plus Members of Parliament, are likely to feel the impact of the reduced availability of free face to face legal advice.

4.4 Courts and Tribunals are also likely to see more traffic. The legal help services provided under legal aid (and other funding) by AdvicUK members frequently provide early intervention before recourse to Courts and Tribunals. For instance, housing advice services assist tenants to negotiate with landlords on rent arrears and disrepair matters at early stages, preventing later Court action.

4.5 Pro bono services from larger law firms are equally, no substitute. Though pro bono legal advice makes a valuable contribution to the advice sector, lawyers from larger city firms do not normally carry out casework and representation as part of the service and often do not have expertise in social welfare law and the justiciable issues presented by clients of legal aid providers. Pro bono advice also takes considerable resources to organise and administer.

4.6 We have deep concerns regarding the Government’s belief that in employment and welfare benefits cases the appellant/claimant would be able to represent themselves when making an appeal or legal challenge at court or tribunals. This misrepresents the reality of social security appeal tribunals and ignores the fact that social security law is ever changing and highly complex with many Acts, regulations, guidance and case law. Without specialist legal advice many claimants would not be able to make their case at tribunal, even more so at Upper Tribunal on a point of law. The same applies to employment tribunals—without help to prepare their cases appellants will be placed at a huge disadvantage. Legal help is not currently available for the actual tribunal hearing, yet the DWP and most employers have legal representation. Taking away help for preparing for these hearings will leave appellants even more disadvantaged.

4.7 The Green Paper contained suggestions that conditional fee arrangements could be used more widely. Such arrangements are not suitable for the majority of social welfare law cases.

Unequal impact

4.8 Legal aid services in the areas of law earmarked are cuts are disproportionately used by people with disabilities, mental health difficulties, carers and from Black, Asian minority ethnic and refugee communities. Typical client breakdowns at AdviceUK member advice centres show, for example:

Agency A

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage of Clients</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental Health Difficulties</td>
<td>48%</td>
</tr>
<tr>
<td>Physical Health Difficulties</td>
<td>50%</td>
</tr>
<tr>
<td>BME</td>
<td>37%</td>
</tr>
<tr>
<td>English Language and Literacy</td>
<td>30%</td>
</tr>
<tr>
<td>Carers</td>
<td>25%</td>
</tr>
<tr>
<td>Families with Children under 4</td>
<td>15%</td>
</tr>
</tbody>
</table>

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.

5. WHAT ACTION COULD THE GOVERNMENT BE TAKING ON LEGAL AID?

Cut red tape and tackle preventable, systemic failure and waste

5.1 We believe that there is action that the Government could take to both reduce bureaucracy and red tape within the legal aid scheme and justice system and free up advice services to tackle systemic failings in other public services and administration.

5.2 AdvicUK’s RADICAL and BOLD work has highlighted:

— The bureaucracy that permeates legal aid funding conditions and leads to agencies doing things that are not in the interests of clients.

— The systemic failings that legal advice tackles, particularly in some of the areas to be taken out of scope. Work in Nottingham has found that nearly a third of demand for advice is the result of preventable failure in public services/administration.

(It’s the System, Stupid! Radically Rethinking Advice, AdvicUK, 2008, Radically Re-thinking Advice Services in Nottingham, AdvicUK, 2009)

5.3 Not being able to deal with this failure does not mean that the failings go away—the failing public service and potentially other services will have to deal with a customer they have failed and the consequences
of this failure. What’s more, removing sources of independent advice means that the failure may not be spotted and challenged. It will be repeated. Rather than paying for a fleet of ambulances at the bottom of the cliff, better to fund a strong fence at the top and plenty of warning signs on the approach. Advice could actually do more to prevent problems associated with systemic failure if freed up to do more to improve the design and delivery of public services. The current funding focus on legal advice “after the event” does not permit/fund proactive work. Allowing legal advice services to address systemic failings must make economic sense.

5.4 There is a strong case for reforming legal aid. But rather than reducing scope and eligibility we should be looking at how publicly funded legal advice work in all currently funded areas can be freed in order to proactively tackle system failings. Intelligently funded advice work could save £millions and improve public services.

5.5 Furthermore, on the subject of systemic failings in public services and administration, the Government should be looking to tackle poor design and bad behaviour within Government departments and agencies which adds to legal costs rather than the advice and support for the “victims” of this failure. Costs associated with the complexity of law and judicial process should also be examined. Many commentators have noted problems in particular areas of law and administration in their responses to the Green Paper. The Immigration Law Practitioners Association (ILPA) for instance has highlighted, in its draft response to the Green Paper, the failings of the UK Borders Agency and legal complexity which add to legal aid costs (http://www.ilpa.org.uk/).

5.6 Indeed, the Solihull Early Legal Advice Pilot, in which the UK Borders Agency and Legal Services Commission were involved, showed the benefits of early intervention on behalf of clients by specialist asylum advisers. This led to far better decision-making and the potential for cost savings in the asylum process. (Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission Independent Evaluator Jane Aspden, October 2008.)

5.7 We strongly urge the Government to tackle such “pollution” rather than deciding that whole swathes of legal action that tackles it are “undeserving” of state support. This will disproportionately affect the most vulnerable and disadvantaged members of society and leave the maladministration, cost and waste in place.

Conduct a full and proper review

5.8 As we have outlined in sections 3 and 4 above, the proposals in the Green Paper will have widespread, unintended but very serious and costly implications. While the Green Paper sets out a rationale for the cuts, we believe they are rash and not fully thought through. They do not consider the combined impact of the proposals with other advice funding cuts. They are made on the back of many years of turmoil in legal aid that has seen providers jumping to new tunes every few years: The Making Legal Rights a Reality Strategy saw the now aborted project of joint commissioning of Community Legal Advice Centres and Networks: Fixed fees were introduced in 2007: A new procurement approach was introduced just last year in which the combined delivery of social welfare law was deemed essential.

5.9 The time has surely come for the Government to take stock and embark on a carefully considered strategy that ensures adequate access to legal advice. We suggest that the Government should therefore establish a review to examine how advice on social welfare, immigration, education and employment matters is currently funded and delivered. It should look at access to and the quality of this provision and how it is supported by infrastructure bodies. This review should be completed and publicly scrutinized before any further reforms to civil legal aid and other government funding schemes for advice are considered.

January 2011

Written evidence from the Motor Accident Solicitors Society (AJ 33)

1. Executive Summary

— There are around 675,000 personal injury claims related to Road Traffic Accidents in the UK every year, which represents over 78% of all personal injury claims.

— The Government’s interpretation of Lord Jackson’s recommendations will significantly impact on the ability of the majority of these RTA victims to access justice.

— Specifically, removing recoverability of costs and fees will lead to a huge reduction in damages for the most seriously injured victims. This contravenes the principle that the accident victim should always be returned to the position they were in before being involved in an accident through no fault of their own.

— Furthermore, the MOJ’s attempts to drive down costs will reduce the adequacy of independent, expert legal representation available to the victim.

— Even with the proposed 10% increase in general damages, MASS argues that the level of damages awarded are still woefully inadequate.
Ev w82  Justice Committee: Evidence

— As a key participant in the development of the original policy, we have real concerns that this process is not being addressed in the right way. The MOJ is intending to significantly alter complex new systems that are less than a year old without allowing the structures to bed in, and without proper evaluation.

MASS would very much welcome the opportunity to discuss these issues with the Committee as a witness to your oral evidence hearings on Access to Justice.

2. INTRODUCTION TO MOTOR ACCIDENT SOLICITORS SOCIETY (MASS), AND BACKGROUND ON ROAD TRAFFIC ACCIDENT CLAIMS

2.1 MASS is a non-profit making national association of solicitors who specialise in road traffic accidents, representing the accident victim.

2.2 Formed in 1991, MASS promotes the highest standards of legal services through education and representation in the pursuit of justice for the victims of road traffic accidents.

2.3 MASS comprises a membership of 180 solicitor firms that employ over 2,000 legal staff, throughout the UK. Collectively member firms conduct in excess of 400,000 road traffic accident personal injury claims each year.

2.4 MASS’ expertise lies in road traffic accident personal injury claims and therefore our response largely applies to the recommendations specific to personal injury.

2.5 Road accident personal injury (RTAPI) claims represent 674,977 claims a year out of a total of 861,325 claims, according to Compensation Recovery Unit figures published by the Government in respect of the year 2009/2010, which is over 78% of all personal injury claims.58

2.6 On 30 April 2010, a new streamlined process for low value Road Traffic Accident Personal Injury claims process (RTA process) was implemented by the Ministry of Justice, with the aim to improve the efficiency of claims up to £10,000, where there is no dispute of liability. It is estimated that the scheme covers in excess of 75% of all RTAPI claims. In conjunction with this new process, the insurance industry participated collaboratively with Claimant representatives and the Ministry of Justice in round table negotiations to agree a fixed costs regime. An agreement was reached with the Insurers as a result of this process. There are issues to be resolved in respect of the New Process, especially with regard to the Portal. Early signs are that the Process has been successful in reducing the time each case takes to reach a conclusion, and as well as reducing costs.

2.7 Prior to that, Insurers were also engaged in negotiations facilitated by the Civil Justice Council for a Fixed Recoverable Costs regime for RTAPI claims, implemented in October 2003. The figures for legal costs were agreed by Insurers as a culmination of the negotiations which took place. The scheme referred to covered RTAPI claims up to £10,000 of damages. As for the scheme referred to in paragraph 3.2, this represents an agreement with regard to an estimated number of RTAPI claims in excess of 75%. Although it was agreed that these figures would be reviewed annually, there has been no review and therefore no increase in the legal fixed costs agreed by the Insurers. Furthermore, the costs agreed by Insurers in April 2010 are lower than the costs agreed in 2003.

2.8 Other areas of civil litigation might learn from all that has been done collaboratively in motor accident claims to streamline and reduce costs, and case resolution times, while ensuring access to justice is preserved. However, it would be a mistake to approach different liability types in an identical way. The RTA process is an admitted liability process which will have limited application where liability is more commonly an issue between the Parties, for example, in employers and public liability cases, as well as in clinical negligence disputes.

RESPONSE TO SPECIFIC QUESTIONSPOSED BY THE COMMITTEE

Given MASS’ expertise and area of operation, we have concentrated our response on the second, fourth and fifth questions posed by the Committee.

The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

3.1 The Government’s prediction is presumably based on 500,000 cases which are part of the RTA process, and which will become part of such a process once the RTA portal has been extended to cases involving quantum up to £25,000 (from £10,000), and to other liability types including employers and public liability cases and those involving clinical negligence.

3.2 It is anticipated that the majority of these cases will be resolved without a Court hearing. To achieve this objective, real incentives need to be implemented to ensure that Insurers make reasonable offers, otherwise this prediction will prove hopelessly optimistic, ie cases will proceed to a hearing, since Claimants will have to do so in order to be adequately compensated.

58 Department for Work & Pensions Performance Statistics.
3.3 It is critical that the approach adopted in the RTA process is used and replicated in this respect. There is a dual incentive for the Claimant and Defendant to settle at the end of Stage 2, that is without Court proceedings (Stage 3). If the Claimant does not accept a reasonable offer, he or she will not recover any costs of Stage 3. If the Defendant does not accept a reasonable offer, the Insurers will pay between £500 and £1,000 extra in legal costs. It is for this reason that few cases have proceeded to a Court hearing under Stage 3. This dual incentive has to remain, and is overlooked by Lord Justice Jackson in his report. (A MASS representative was part of the four person CPR Committee, which drafted the Rules for the new RTA process.)

3.4 With effect from April 2000 under the Access to Justice Act 1999, legal aid for personal injury cases was excluded. However, to avoid an adverse impact on Access to Justice, the same statute introduced the recoverability of success fees and After the Event (ATE) insurance premiums from the unsuccessful opponent (Sections 27 and 29). This provided the accident victim with the necessary facility to pursue their right to justice by providing recoverability to mitigate the removal of Legal Aid.

3.5 It is also worth considering any adverse consequence of a potential increase in litigants in person, whereby cases are pursed through the courts, without the knowledge and expertise of legal representation, potentially increasing the work and time (and therefore cost) requiring by the courts and court staff. This will be confirmed, we anticipate, by the Association of District Judges.

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

4.1 Lord Justice Jackson’s final report on “Review of Civil Litigation Costs” was produced in December 2009 after one year’s research and investigation. His review was extensive and wide reaching and his final recommendations covered a broad aspect of civil litigation. Overall, Lord Justice Jackson proposed that all of his recommendations should be implemented in their entirety across all the relevant areas of law, in order to have the required effect. The Government however, in their consultation have declined to propose full implementation.

4.2 It would appear with regard to the recommendations specific to personal injury, these have largely been accepted by the Government, although there are some exceptions and alternatives. In particular, those not included are Referral Fees and Fixed Costs in Fast Track Litigation, which MASS would agree are large and significant issues which require considerable thought, discussion and negotiation before any action or change is made. Once again, it is imperative that any significant changes to the way solicitors operate their businesses and are able to provide quality and independent legal advice, is not curtailed to the point that is detrimental to the consumer.

What are the implications of the Government’s proposals?

5.1 Lord Justice Jackson was clear that his review and recommendations were in order to “promote access to justice at proportionate cost”. MASS would however question whether such deep and wide ranging changes would achieve this and opposes the ‘one size fits all’ approach. Care of evaluation, and over implementation, are essential.

5.2 The current system is not perfect. It is understandable that the Government has to analyse ways of reducing cost, particularly cost in maintaining the Court system. However, there are important principles at stake which must be preserved, specifically access to justice, and proper compensation to accident victims. Both of these key principles are under threat with some of the Jackson proposals. In short, huge damages reduction for the most seriously injured accident victims will result from the removal of success fee recoverability.

For example, from analysis of Stewarts Law data of all cases settled for damages of £25,000 or more concluded between May 2007 and 2009, applying the Jackson model gave the following results:

- Average general damages increase £11,532.
- Average reduction from damages from success fees £58,664.
- Average net loss to the Accident Victim £47,132.

In one case involving a young tetraplegic man, this would have reduced his damages by £236,044.

In the most seriously injured category of accident victims, it is estimated that around 44% of their claims may not be capable of being brought if the Jackson proposals are introduced. For example, analysis of the same Stewarts Law data sample, applying the Jackson model, gave the following results:

- In excess of 75% success probability required to make a case commercially viable.
- Those at risk beyond 25% would be at risk of not being represented.
- In 26% of cases, the Accident Victim would not have been represented post implementation.
- A further 18% would have been borderline acceptance cases.
- Virtually all complex/catastrophic injury claims would be borderline at best without the ability to recover a 100% success fee.
5.3 The Civil Justice system has undergone significant change over the past 10 years, especially in the field of motor accident claims. Successive Governments and the Judiciary have continuously looked to change the law and funding arrangements in particular, without necessarily allowing such changes to settle in, and in many cases rushing them in without allowing sufficient time and thought for any practical implications or unintended consequences that may occur. MASS submits that this appears to be happening again now and this was brought to the Justice Minister’s attention on 2 December not only by MASS but by most stakeholders present. The RTA Process was only brought in on 30 April last year and despite this, instead of evaluating how it performs in terms of streamlining claims and reducing costs, the MOJ has introduced proposed further changes as to how motor claims are conducted but more importantly the amount of compensation motor accident victims are going to recover. As a key participant in the development of the original policy, MASS has real concerns that the extension of this process is not being addressed in the right way.

5.4 Whilst MASS has supported most of the changes that have taken place in motor claims over the years and has been integral in many of the negotiations, our concern lies with the long term effect any further significant changes to the civil justice system may have on the accident victim and the legal representation available to them. Access to Justice is imperative and MASS believes that the accident victim must always be placed at the centre of the civil justice system and returned to the position (as far as possible) they were in before being involved in an accident through no fault of their own.

5.5 Furthermore, it would appear that successive Governments have become fixated on a notion that the United Kingdom is under the grips of a “Compensation Culture” and that legal costs are too high and unfair on the insurance industry. As reported by the Better Regulation Task Force, the facts show that the term “Compensation Culture” is a myth and perception rather than reality.

5.6 From 2000–01 to 2009–10 employers liability claims fell from 219,183 to 78,744; and public liability claims from 95,883 to 91,025, whilst motor accidents rose from 401,757 to 674,997. [CRU figures for the number of claims made between 1 April and 31 March in each year].

5.7 Employers liability claims have more than halved over the last decade, and public liability claims have remained about level. Motor claims have increased substantially, nearly 47% over the past five years. A major contributor to this increase has been Insurer activity in the referral fee market, by leading price inflation; and in third party capture by promoting claims which would not otherwise be pursued.

5.8 Motor claims have been targeted for a number of years on the basis that legal costs are too high. The Insurance Industry has consistently argued that one of the reasons for high motor insurance premiums is due to high and unacceptable legal costs. MASS finds this argument extremely surprising given that since 2003 the Insurance Industry has participated in, and agreed to, two separate fixed costs regimes, for legal costs for RTAPI claims up to £10,000. This represents in excess of 75% of all RTAPI claims since 2003 (see paragraphs 2.6 and 2.7).

5.9 Whilst road accident claims have risen over the last nine years, MASS is of the view that this rise in accident claims is in large part an issue arising from Insurer behaviour. Furthermore, there has been no reduction in motor insurance premiums, despite having a fixed costs regime which Insurers have agreed for seven years.

5.10 Consequently, MASS urges caution against attacking legal costs, on the basis of representation from the insurance industry, without first understanding where the problem lies, and why in some cases costs may be disproportionate.

5.11 Over the five years to 2009/10 road accident personal injury claims have risen from 460,000 claims a year to 675,000 (Compensation Recovery Unit statistics). This is an increase of 47%. Insurer motor insurance claims incurred costs over the same period have risen from £8.2 billion to £9.4 billion (ABI Annual Insurance statistics). This is an increase of 14%. It can be seen from these statistics that, whilst claims have gone up, the amount that each claim is costing has fallen.

5.12 Once again it is important to emphasise that in order to provide true Access to Justice, the consumer must have access to high quality and independent legal advice. If costs are driven down much further, legal representation for the accident victim will be inadequate, in an industry where there is such a clear need for independence and representation. This is exemplified with Third Party Capture which MASS has consistently campaigned against. One questions what Justice the accident victim receives when the Insurer acts as judge, jury and paymaster.

5.13 Consequently our concerns lie very much at the heart of the principle of ensuring that there is an affordable funding system to allow all consumers, on an equal basis, access to justice and quality, independent legal advice. Changing the funding system to one that requires accident victims to pay for legal advice out of their damages, is, we believe, fundamentally wrong.

5.14 The awards that accident victims receive should be maintained for them. Even with the proposed 10% increase in general damages, MASS argues that the level of damages awarded are still woefully inadequate bearing in mind there has been little or no “real” increase for over 10 years, despite the recommendations of the Law Commission that awards for PSLA should be dramatically increased.


5.8: (1) Where the present award is greater than £3,000 damages should be increased by a factor of at least 1.5, but not more than 2.

(2) Where the present award is between £2,001 and £3,000, damages should be increased by tapered increases of less than a factor of 1.5, eg an award of £2,500 should be uplifted by around 25%.

(3) If the increases are not implemented the recommended increases should be adjusted to take into account any charge in the value of money since publication of this report.

5.15 The Law Commission recommendation should be belatedly implemented, including the adjustment necessary to take account of the increase in the value of money over the 15 years since the Law Commission assessed damages levels and reached the conclusion which it reported in 1998.

January 2011

Written evidence from David Jockelson, Family Solicitor (AJ 35)

The present proposals for the reduction in the scope of Legal Aid in family cases fails to meet the announced intention of the Lord Chancellor that “no one of limited means is remotely barred from access when something of fundamental importance to them is affected”. Many case of fundamental importance will be excluded with very serious consequences of injustice and harm for parents and children as well as additional costs to the authorities.

1. My name is David Jockelson. I am a solicitor with Miles and Partners, Middlesex Street, London E1. I am family solicitor, doing almost exclusively “Public Law” family work—ie care cases. I have been practicing for 30 years. I have been a member of the Law Society Children Panel almost since its inception. I was awarded Legal Aid Family Solicitor of the Year last year.

2. Miles and Partners is a firm in the London Borough of Tower Hamlets. We do almost entirely Legal Aid work. We have been established for over ten years. We cover Mental health, Housing and Family.

3. I do not need to emphasise that we work in one of the most deprived areas of London. We deal with a very diverse range of clients, with a good proportion from the Bangladeshi community. More than half of our family clients are women needing advice and assistance.

Reduction in Scope

4. So far legal aid for my own area of work, care proceedings, is not threatened. But this firm also deals with many “Private Law” cases—which your members will not confuse with privately paying cases—this simply means cases that concern disputes between adults, sometimes about domestic violence but often concerning children—residence and contact to children.

5. Our main concern is about the proposal to remove any legal aid from these ordinary family disputes unless there is actual physical domestic violence.

6. I know that as soon as some people hear the word “dispute” they think “there must be a better way of resolving disputes than going to court—what about mediation? Negotiation? Surely these are cheaper and less damaging to the people involved?” This is the burden of what the Lord Chancellor told you in December.

7. However that can be a false and dangerous comfort. It assumes and depends on a degree of reasonableness that in our practical experience is often wholly missing. And a degree of leisureliness that is also missing.

8. You ask: The Government predicts that there will be 500,00 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

9. Instead of making general points and estimates let me ask you to consider a case which is typical of our workload and which illustrates the problem:

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

11. 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.

12. 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.

13. Please be aware of the simple fact that is often overlooked: 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?

14. Under the present plans she will not have legal aid to get advice and assistance or to defend this action.

15. She faces the loss of her children. The children face the prospect of the loss of their mother and home. This is as serious as care proceedings which will continue to have legal aid.

16. Is she really supposed to represent herself in court in these circumstances? Even if there are no language problems or literacy problems, it is unthinkable that her to have to represent herself and challenge his allegations without being able to assemble her own evidence.

17. It is not simply her rights that are being destroyed but those of the children. The court may try and establish the truth in a situation but without proper representation some terrible results will emerge.

18. **Urgency**: even more shockingly—If he threatened to remove the children from the UK there will be no legal aid for her to act to stop him! An appalling injustice and incalculable traumatic harm to the children would result.

19. If a father is harassing a family, causing fear and distress to the children, Social Services often tell the woman to get an injunction to protect them or they will take care proceedings.

20. She will not in future be able to do so unless there is actual recent physical violence. So either the children remain at risk or more care proceedings are taken—at greatly increased cost, both personal and financial.

21. **Contact rights of children**: To be even handed about this, there are also cases where a separated father may have been given or has negotiated contact rights to his children but these are ignored by the mother. He will have no representation or support in trying to maintain his links with his children, which is a gross injustice and a serious loss to the children and their emotional health. We have all been involved in such cases where a resident mother refuses all attempts at mediation or persuasion and it requires the authority of the court to promote the welfare of the children.

22. The courts and all professional involved in family cases accept the need for education and mediation in all cases and that litigation can often be counter-productive and damaging. Many of us work closely with such agencies. We can look towards a reduction in the number of litigated cases. However there will always be some that do need the authority of the court to decide. And, as explained above, all the cases depend on the background potential that the law will act authoritatively.

23. The Lord Chancellor said: “What we have done is try to ensure that no one of limited means is remotely barred from access when their life, liberty, home or something of fundamental importance to them is affected”.

24. The examples given above suggest that the present proposals fail to ensure this to a serious degree.

25. May I invite the Committee to assert that the matters referred to above are of fundamental importance to the adults and to the children involved and that legal aid must be preserved for such cases?

26. Some formula can and must be devised to filter out the cases which do involve matters of fundamental importance, particularly to children.

27. I would suggest that Legal Help be retained as it is now for simple and cheap preliminary advice and assistance which often allows a negotiated settlement. If the matter does go to court, then it may be that the judge at the first hearing makes an informed decision as to whether legal aid is needed in view of the seriousness of the issues and the ability of the parties. The question of financial eligibility would be separate and dealt with in the same way.

*January 2011*

**Written evidence from Youth Access (AJ 36)**

1.1 Youth Access welcomes the Justice Committee’s inquiry into Access to Justice.

1.2 **This submission aims to give the Committee an overview of the likely impact of the proposed changes on young people’s access to justice.**

1.3 We conclude that:

- The current legal aid system fails to meet young people’s needs. Civil and Social Justice Survey (CSJS) data indicates that young people have very high levels of need in the core areas of social welfare law (housing, benefits, debt), yet are far less likely to get advice under current arrangements than other age groups.

- However, the proposals restricting the scope of Legal Aid to exclude the bulk of social welfare law cases will lead to an increased number of people from all categories of vulnerable clients (including young people) being denied access to justice. This will lead to far higher costs to other public services in the longer term.
— The proposals must be viewed in the context of other advice and support services for young people (including Connexions and VCS youth advice agencies) being severely cut back by other central and local government cuts.

— We are extremely concerned at the proposals to shift resources away from face to face services and towards a Single Gateway telephone service. The evidence suggests that this will have a disproportionately detrimental impact on certain vulnerable groups, not least young people. CSJS evidence indicates that young people are far more reliant on face to face services than other age groups and are less likely to get advice through the telephone or online.

— There is a strong case for targeting legal aid investment where it can have the greatest impact. We believe this should involve reconfiguring services to be more client-centred and targeting services better at those client groups for whom getting advice has the greatest beneficial impact.

— Civil justice problems have a disproportionately adverse impact on young people; whilst getting advice has a disproportionately beneficial effect on this client group. This evidence points to potential economic benefits from targeting legal aid far better at young people.

2. ABOUT YOUTH ACCESS

2.1 Youth Access is the national membership association for a UK-wide network of over 200 agencies providing information, advice, counselling and support services to young people.

2.2 Youth Access is a full member of Advice Services Alliance.

2.3 Youth Access is recognised as the key representative body for youth advice services and is widely acknowledged as being the leading expert in young people’s needs for advice.

2.4 Youth Access believes that all young people have the right to access high quality information, advice and counselling services wherever they may live in the UK and promotes good practice through training, publications, quality standards, information, advice and consultancy.

2.5 Over recent years we have worked with the Legal Services Research Centre, amongst others, to develop a comprehensive evidence base on young people’s needs for legal advice, the impact of social welfare problems on young people, young people’s advice-seeking behaviour, barriers to access to advice services and the impact of advice received by young people.

2.6 This work has resulted in the publication of a series of influential reports, including:

— Young People’s Access to Advice—The Evidence, Kenrick, J, Youth Access, 2009.
— With Rights in Mind: is there a role for social welfare advice in improving young people’s mental health, Sefton, M, Youth Access, 2010.
— The Youth Advice Workforce, Youth Access, 2009.
— The impact of the recession on young people and on their needs for advice and counselling services, Youth Access, 2009.
— Under Strain: how the recession is affecting young people and the organisations which provide advice, counselling and support to them, Youth Access, 2010.
— Rights Within Reach: developing effective outreach legal advice services in youth settings, Verma, P and Wilkins, M, Youth Access/Law Centres federation, 2009.
— Locked Out: Young people’s housing and homelessness needs and the impact of good advice, Kenrick, J, Youth Access, 2007.
— Rights to Access: meeting young people’s needs for advice, Kenrick, J, 2002.

2.7 Summary briefing versions of the first two reports listed above are attached to this submission as supplementary material.

3. WHAT ARE THE IMPLICATIONS OF THE GOVERNMENT’S PROPOSALS?

The failure of the current legal aid system to meet young people’s needs

3.1 The current legal aid system fails to meet the needs of young people. It is adult orientated and overly focussed upon areas of law and outputs, rather than client groups and outcomes. Practitioners often have little understanding of young people and lack the specific skills to effectively serve them. Provider outlets are often “psychologically inaccessible” to young people. Successive policy developments—such as expanding the (little-used by young people) CLA service; CLACs and CLANs; the fixed fee regime; and the LSC procurement strategy—have served to further marginalise young people’s legal advice needs.
3.2 The evidence of this failure is starkly clear. Research has shown that each year:
- 16–24-year-olds will experience at least 2.3 million rights-related problems requiring advice.
- More than a quarter of these problems will be experienced by young people who are not in employment, education or training (NEETs).
- As many as 200,000 problems will result in young people trying, but failing, to obtain advice, often because there is no service able to help them.
- In all, considerably fewer than half of all young people with serious social welfare problems will actually manage to obtain advice.
- At least one million young people are left to cope with their problems unassisted.

3.3 The cost of the country’s collective failure to provide this vulnerable group with the legal advice services it needs is likely, based on existing research, to amount to at least several hundred million pounds a year.

Evidence of young people’s needs for advice

3.4 Young people have very particular needs for legal advice and ways of seeking help. Youth Access has worked with the Legal Services Research Centre to analyse and interpret data relating to the 18–24 year age group from the Civil and Social Justice Surveys. The data shows that:
- **Problem incidence:** Approximately one-third of 18–24-year-olds had experienced at least one civil justice problem in the previous three and a half years. While broadly similar to the population as a whole, it is likely that CSJS data significantly under-estimates the relative prevalence of young people’s problems.
- **Subject areas:** The pattern of young people’s problems differs markedly from that of other age groups. Young people are much more likely to experience problems relating to rented housing, homelessness, employment, discrimination and problems with the police.
- **Relevance to the proposed Legal Aid reforms:** Young people increasingly account for a disproportionate number of all people with problems in the key subject areas of social welfare law that fall within the remit of the Community Legal Service and that are proposed for exclusion or restriction from Legal Aid.
- **Multiple problems:** Young people, particularly the 22–24 age group and disadvantaged young people, are prone to multiple problems. As people experience multiple problems, they are increasingly likely to experience problems, such as homelessness, that play a direct role in social exclusion.
- **Interrelated needs:** Reflecting the complexity of the adolescent transition, young people’s social welfare problems rarely develop in isolation from inter-connected practical, emotional and personal issues—concerning for example, relationship breakdown, stress, depression, abuse, drugs and alcohol or education—pointing to a need for legal advice to be closely integrated with other services that young people use. Disadvantaged young people typically present to services with multiple problems, including a range of social welfare problems, as well as health, personal and emotional issues.

Evidence of barriers to access to legal advice for young people

3.5 Youth Access has consistently demonstrated for a number of years that there are significant barriers which make young people less likely to obtain advice. The evidence shows that:
- Young people are considerably less likely to obtain professional advice than other age groups; are much more likely to do nothing about obtaining advice; and are more likely to try but fail to get advice.
- In 2001 young people were seven times more likely to have experienced a homelessness problem than adults over the age of 25, but eleven times less likely to have obtained advice.

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61 These figures have been calculated by Youth Access using data from the 2006–08 Civil and Social Justice Survey. The calculations have been checked by the Legal Services Research Centre and are deemed to under-estimate the extent of young people’s unmet needs for advice.
62 Ministry of Justice economists have used CSJS data to estimate that over a three-and-a-half-year research period, unresolved law-related problems cost individuals and the public purse at least £13 billion.
63 The advice needs of young people—the evidence: Key research evidence on young people’s needs for advice on social welfare issues. Kenrick, J, Youth Access, 2009.
65 Young people's access to advice—the evidence: Key research evidence on young people's access to advice on social welfare issues. Kenrick, J, Youth Access, 2009.
67 For an analysis of data on young people and homelessness in the Legal Services Research Centre's Civil & Social Justice Surveys see Locked Out: The prevalence and impact of housing and homelessness problems amongst young people, and the impact of good advice, Kenrick, J, Youth Access, 2007.
— Young people are reluctant to access mainstream advice services established predominantly for the adult population.

— There is a low awareness among children and young people that they have rights at all, let alone knowledge of what those rights might be. This is matched by a low awareness of advice services, a lack of belief that anything can be done to help them and a fear of or reluctance to access advice services.

— Many young people feel disconnected from the legal system, feeling it is something that is “done to them” rather than something which conveys them rights. All this is particularly true of the most disadvantaged young people.

— Only 0.4% of advisers and solicitors practising social welfare law in the private sector report that young people are one of the client groups they target.

The cumulative impact of the proposals in the context of wider spending cuts

3.6 The impact of the proposed cuts to legal aid is likely to be severely detrimental both to the supplier base of legal advice providers and to vulnerable people’s access to justice, particularly when viewed in the context of wider public service cuts.

3.7 We concur with the submission of the Advice Services Alliance that the NfP advice sector is likely to be disproportionately affected by the proposals because these agencies tend to specialise in those areas of law where the Government proposes to make the deepest cuts.

3.8 We are deeply concerned about the future viability of many NfP advice agencies, given the cumulative effect of the Government’s legal aid proposals and other public sector cuts, including the termination of the Financial Inclusion Fund, the ending of London Councils’ funding for many advice services and local authority cuts to advice services.

3.9 The potential closure of some CABx, Law Centres and other NfP providers, and the certain reduction in capacity of many other agencies, will, in our opinion, lead to hundreds of thousands of vulnerable clients being denied access to justice.

3.10 We very much doubt that other parts of the voluntary and community sector will be able to “take up the slack”, as envisaged in the Government’s plans for a Big Society. Within the youth sector, for example, voluntary sector agencies, including many of the youth advice agencies within Youth Access’ membership, are currently facing very deep cuts and will be unable to conduct any advice work for which they do not receive specific funding. The Connexions Service, meanwhile, is being dismantled in many areas.

3.11 Evidence from the CSJS indicates that those unable to obtain advice for their civil justice problems experience a range of adverse consequences, costing the public purse over £13 million per annum.

The likely impact of shifting resources from face-to-face to telephone delivery

3.12 Our understanding from the Green Paper is that the “vast majority” of clients will access civil legal aid services through a “simple, straightforward telephone service” that will act as a single gateway to civil legal aid services. Face-to-face advice will only be available where cases are too complex to be dealt with by telephone or where the client’s specific needs would not be met.

3.13 We share the view of the Advice Services Alliance in its submission that the proposed shift to telephone services will impact severely on access to justice for many vulnerable groups and that there is a lack of evidence to support the MoJ’s justification for the shift on financial grounds.

3.14 Our own evidence indicates that young people are very likely to be adversely affected by the changes to an even greater extent than many other vulnerable groups. (We note that the MoJ’s Equalities Impact Assessment (EIA) states that it has taken account of evidence from the CSJS conducted by the LSRC, including work with Youth Access to examine data on how young people use different channels to get advice, but, oddly, the EIA does not then make any comment about the likely impact of the proposals on young people.)

3.15 Our research found that:

— Young people are far more likely to access advice face-to-face than other age groups. Data from the CSJS indicates that, whereas people aged 25 and over were more likely to make initial contact by telephone than face-to-face, the opposite was true for young people.

68 According to data analysed by Youth Access from the Workforce Survey conducted by the LSRC for the National Occupational Standards for the Legal Advice Sector project.

69 Getting earlier, better advice to vulnerable people, Ministry of Justice, 2006.

70 Kenrick op. cit. (Access)
Young people’s preference for face-to-face advice relates to trust, confidence and communication skills. The evidence suggests that remote mediums, such as email and the telephone, are not as conducive to building the trust with an adviser which is necessary for young people to open up about their social welfare problems.

Disadvantaged young people, who experience the most severe problems, are considerably less likely to have access to telephones and the internet than their better-off peers.

Cost, deprivation and communication skills are barriers to accessing advice by telephone. Many young people simply cannot afford the cost of a potentially lengthy phone call. The cost of calling (even some “free”) helplines can be prohibitively expensive for young people, who tend to use mobile phones with text-focussed call packages.

Those least likely to benefit from telephone advice services include young men and those with lower levels of education, language difficulties or lower incomes.

Young people tend to say they would prefer face-to-face advice for more complex problems. Successful helplines for young people tend to focus on sensitive personal, emotional and health issues rather than legal or practical issues.

Young people are less likely to use the internet for information and advice than other age groups. Although they are major users of the internet overall, young people mainly use the internet for entertainment and social networking and appear to be significantly less likely than other age groups to use it for formal information gathering and for getting advice. This was particularly true for disadvantaged young respondents to the CSJS; almost none of this group had used the internet to get advice about a legal problem.

The case for targeting legal aid investment where it can have the greatest impact

3.16 We believe there is a strong case for targeting legal aid investment where it can have the greatest impact.

3.17 We believe this involves taking a broader view than simply looking at issues of loss of liberty or imminent homelessness, but should involve reconfiguring services to be more client-centred and targeting services better at those client groups for whom getting advice has the greatest beneficial impact.

3.18 We make the case below (see paras. 3.19 to 3.25) for legal aid resources to be targeted at young people. This client group is disproportionately affected by social welfare problems but less able and less likely to obtain advice. The evidence also shows that young people’s legal problems tend to be severe and have a greater impact on their lives than similar problems for older adults. It is also becoming clear that young people benefit more from obtaining advice than older adults.

Evidence of the disproportionate adverse impact of civil justice problems on young people

3.19 Young people appear to experience relatively severe problems, evidenced by the type of problems they experience, their greater reliance on face to face services and the disproportionate impact that problems have on them.

3.20 Disadvantaged young adults are significantly more likely than the population as a whole to worry about their problems and to report (as a result of their problems) stress-related illness; violence (aimed at them); loss of home; loss of confidence; and physical ill-health.

3.21 Young people fare worse than average when they have a civil justice problem due to their inherent vulnerability and their relatively little experience of “the system” compared to older groups.

3.22 In addition, young people are less likely to obtain advice than older age groups, rendering it less likely that their problems will be resolved and the impact of their problems ameliorated.

Evidence of the disproportionate beneficial impact of getting advice on young people

3.23 Research for Youth Access has highlighted the positive contribution that advice can make to achieving good outcomes for young people.

3.24 CSJS data indicates that 18–24-year-olds are twice as likely to meet their objectives where they do manage to obtain advice in comparison to when they handle their problems alone. By contrast, older adults meet their objectives only slightly more often where they obtain advice.
Written evidence from AvMA (Action against Medical Accidents) (AJ 37)

1 Introduction

1.1 Action against Medical Accidents (AvMA) is the charity for patient safety and justice. AvMA provides specialist advice and support to over 3,000 patients and their families affected by medical accidents each year. Over the years AvMA has also helped bring about major changes to the way that the legal system deals with clinical negligence cases and in moving patient safety higher up the agenda. AvMA accredits solicitors for its own specialist clinical negligence panel which is a quality mark recognised by the LSC and others, and works with over 1,000 medical experts on its database.

1.2 The contribution that AvMA makes in its evidence to the Justice Committee is confined to those areas within our knowledge. AvMA has specific expertise in clinical negligence and healthcare law; we have considerable experience in providing assistance to clients who have suffered medical accidents either to help in making a complaint under the NHS complaints scheme or in finding legal representation from one of our panel members to pursue a civil claim.

1.3 We believe that the combined effect of introducing the current proposals for reforming civil litigation funding and costs and taking clinical negligence out of scope for legal aid would have a profoundly detrimental effect on access to justice. For example, we believe the changes would inevitably mean that:

- Many people, including some of the most vulnerable in society, would find it impossible to have their claim investigated or take forward a claim.
- Those who are able to claim will lose out by having legal costs deducted from their damages, which are based on actual need.
- The progress that has been made in improving the quality of advice and representation provided by clinical negligence claimant solicitors through the specialist panels developed by AvMA and the Law Society will be lost if this quality control exercised by the LSC is no longer required and non-specialists will be encouraged to “have a go” through the CFA route.

1.4 AvMA further believes that the current proposals represent a lack of imagination and of joined up working between the Ministry of Justice and the Department of Health. Millions of pounds could have been saved for the Department of Health by increasing access to legal aid for clinical negligence rather than encouraging increasing numbers of claimants to use the much more expensive CFA route. Another unintended consequence of the proposals is that a major driver for improving patient safety would be diluted by making it impossible for many genuine claims to go forward at all.

1.5 However, AvMA does accept the status quo is not an option. Within this paper we flag up some ideas about how the system as it applies to clinical negligence could be made more efficient and actually save more money for the State than the current proposals, but without harming access to justice. We would welcome the opportunity to expand on these ideas in providing further evidence to the committee.

2. What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

2.1 AvMA can only respond in relation to the impact on clinical negligence litigation, that is claims brought by patients against healthcare providers for damages for personal injury caused in the course of healthcare treatment.

2.2 A serious unintended consequence of the proposals would be the dilution of the benefits of clinical negligence panel membership (a quality mark for solicitors). Panel membership is awarded to individual solicitors by either the Law Society or AvMA (two separate panels) after the applicant has demonstrated expertise and experience in clinical negligence work by way of a written application (including details of a number of the applicant’s cases) and interview.

2.3 Membership of either AvMA’s clinical negligence referral panel or the Law Society’s clinical negligence panel has been a requirement for holding a legal aid franchise from the LSC. This requirement has led to a raising of standards in clinical negligence work and made a considerable contribution to the development of clinical negligence as a separate specialty (and not just a sub-speciality of personal injury). The effect of the LSC franchise requirements has been that almost every firm that undertakes clinical negligence work has at least one panel member supervising work; such membership generally being a requirement when firms recruit senior solicitors to their team. Without legal aid in this area of law including the compulsory requirement for panel membership it is inevitable that this externally assessed form of quality control will be lost or lose its impact. A return to non-specialist solicitors “having a go” at clinical negligence will mean more unmeritorious claims being made and also less success for meritorious claims.
2.4 Without legal aid some firms will find themselves with cash flow difficulties if all their clinical negligence cases have to be run on a CFA and they have to fund disbursements. While this already applies to current cases run on a CFA and those covered by before the event insurance the loss of legal aid with its disbursement funding and payments on account of costs will greatly increase this burden on small firms. The effect of this loss of funding will cause some firms to cease undertaking clinical negligence litigation work altogether.

2.5 We have particular concerns over catastrophic injury claims. These cases rely very heavily on expert evidence (for liability, causation and quantum) and take a considerable length of time to reach a conclusion. Thus a solicitor could be expected to fund one or two hundred thousand pounds worth of disbursements and carry as much again in unpaid work in progress for four to six years. The claimants in these cases are the most seriously injured claimants, including children and the least likely to have any personal resources to fund disbursements themselves. Before the event insurance is not even a partial solution to this problem as the insurers do not provide disbursement funding or pay costs on account, their benefit is that in the event the case is lost the solicitor is reimbursed but it does not benefit cash flow.

2.6 The largest firms in the country may try to channel claims to their offices. This will provide access to justice for some but not all (many will lose out if the same range of cases are not taken on or if firms cherry pick) but at a price. These firms are not as broadly spread out in geographical terms, clients will have to travel long distances or rely on email and telephone to contact their solicitors (or the solicitors will travel, in the case of significantly injured claimants, adding considerably to costs).

2.7 Batch processing of claims, already seen in road traffic accident cases and other personal injury claims will lead to the reduction in the quality of advice and a lack of contact between solicitor and client. There is also increased reliance on “paralegals” with large groups of unqualified staff supervised by a single solicitor. There is evidence that the pressure on the paralegals to complete cases and bill means that there is a tendency for the client to be encouraged to accept the first offer to get the case settled and billed. This inevitably leads to under settlement of cases in terms of value.

2.8 Further, in the field of clinical negligence it is vital given the issues involved that a client meets his or her solicitor at key points in the investigation and litigation of a claim, to give instructions and provide statements. However, if firms become larger and more process driven the personal contact with clients may be lost. This change has already been seen in personal injury work since the changes of the late 1990s.

2.9 The effects of these changes may also lead to a reduction in consumer choice as small firms merge with larger (or the fee earners transfer) and the work is transferred to the larger urban centres. This effect may also be exacerbated by the effect of insurers (chiefly Before the Event insurers) insistence on their insured being represented by solicitors on their panel. Before the Event insurers may sell claims to solicitors and/or use firms which will not claim against the insurer if the claim is unsuccessful (on the understanding more referrals will be forthcoming). This arrangement can work well especially for low value claims, however, it is a commercial arrangement between the insurance company and the firm of solicitors that does not always guarantee the best quality advice and representation to the injured party.

2.10 Membership of an insurance company solicitor panel is all about economics and economies of scale, not expertise. While some of the firms on an insurer’s panel may have solicitors who are members of the AvMA or Law Society clinical negligence panel they are more likely to be personal injury specialists only (i.e. where injuries are caused in the workplace or road traffic accidents). Expertise in personal injury does not necessarily qualify a solicitor to act in clinical negligence cases where the issues of causation are much more complex and often require a detailed knowledge of medical procedures, disease and the structure and policy of healthcare provision. This situation is only likely to be made worse by the effects of the loss of legal aid and the changes that are likely to ensue.

3. The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

3.1 It is important to note that the effect of the current proposals would indeed mean that savings would be made by stopping many clinical negligence claims, many of them meritorious, from being made. We believe there are better ways of making the system more efficient and realising savings without denying access to justice.

3.2 It might be easier to state which cases will not be so affected. At present claims with a value roughly between £50,000 and £1 million are very often funded by conditional fee agreements. While the changes will affect these cases too, it is likely that solicitors will continue to take on most of these cases and act for their clients under the new proposed CFA costs regime (although claimants will still suffer a reduction in their damages by the deduction of success fees). It is our view that clients with cases of this size will probably continue to find legal representation to pursue their claims.

3.3 Our main concern is for lower value claims (ie up to £50,000) and catastrophic injury claims (ie where damages are estimated to be in excess of £1 million). The issues differ between the two ends of the damages spectrum. For lower value claims, solicitors may feel that without recovery of the success fee a case is not financially viable on a costs benefit basis. For catastrophic injury claims, a solicitor may not be able to carry the disbursements or take the risk of an unsuccessful claim. We are also concerned about funding for
disbursements in all cases formerly legally aided. Most solicitors’ firms do not fund all disbursements, expecting instead their clients to pay at least the cost of initial expert opinion. Such costs are likely to be beyond the means of most claimants formerly eligible for legal aid.

3.4 At present there is no formal mechanism for settling claims without litigation, however, it is our opinion that serious consideration should be given to implementing a scheme that enables settlement of lower value claims. Such a scheme would address the issue of access to justice for the claimants in this category, many of which have claims arising out of a fatality and ensure the claims are expedited in a reasonable time at a reasonable cost. The NHS Redress Act was an attempt to provide for such a scheme. Whilst we do not suggest that the NHS Redress Act comes into force in its present form, we do believe that with some adaptations (for example more independence and the availability of independent advice) an NHS Redress Scheme could provide a suitable, low cost way of resolving many lower value claims. We would welcome involvement in any discussions about alternatives to litigation for clinical negligence.

3.5 The issues for claimants with injuries of the utmost severity whose cases attract damages in excess of £1m are in relation to the cost of disbursements and the length of time a case takes to settlement. The burden of disbursements in these cases and the number of years (commonly between 4 and 6) before either barristers of solicitors receive any fees, if at all, will mean that for many lawyers the cash flow difficulties will prevent them taking on these cases at all.

3.6 The risks of taking such a case on are so high for solicitors and barristers that there will be a tendency for only a small number of firms with sufficient resources to take on these cases and only when the likelihood of a case succeeding is very high. Proposals have been made by the government in the legal aid consultation to retain exceptional funding for cases where the ECHR is engaged. This may cover some cases involving brain damaged children and some fatal cases but would not be enough to ensure access to justice for all of the members of this group. Some mechanism must be adopted whereby all these cases (an adult brain damaged in the course of surgery is as needful of litigation funding and compensation for his injuries as is a child with cerebral palsy) receive funding from some form of self funding legal aid scheme, or at the very least, legal aid disbursement funding.

3.7 Finally we envisage that a significant number of potential claimants who are unable to find a solicitor to take on their cases will become litigants in person. At present few claimants act in their own cases in clinical negligence claims but it is inevitable that these numbers will increase when individuals fail to find a solicitor to represent them. We cannot predict whether these claimants will be successful or not in bringing a claim but we believe it is inevitable that they will encounter difficulties. Experts generally do not accept instructions from litigants in person, the courts will have to provide more advice and support on the litigation process. Litigants in person may not fully understand what is expected of them or what they can expect from disclosure and all these issues can cause delays and an increase in interlocutory applications. The increase in litigants in person and the resultant strain on the courts is another unintended consequence which we do not believe has been fully considered.

4. What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

4.1 On very high cost cases, in order to maintain access to justice and address the issues outlined above the government should consider keeping all cases with an estimated value of £1m or above within scope, not just children’s cases. Further all fatal cases should also be included, notwithstanding their low value on the grounds that they are of utmost importance to the clients and the issues are often as complicated as cases where the patient survives.

4.2 We do not believe exceptional funding is sufficient to ensure access to justice for these patients. Exceptional funding will always be discretionary and subject to available funding (ie no funding if the year’s budget is exhausted) and is no substitute for keeping this category within scope.

4.3 With regard to the lower value claims, these are often very serious, for example involving the death of a child or older person. These are unlikely to be able to be taken on under a CFA and we suggest that it must be in the public interest to keep such cases within scope for legal aid.

4.4 Within the legal aid arrangements, consideration could be given to the potential role of non profit organisations to provide telephone helpline advice or even run a self funding legal aid scheme. AvMA would be happy to discuss how such a scheme could be implemented.

5. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

5.1 In one significant area, no. The recommendations were made on the understanding legal aid would remain for clinical negligence. It is not entirely clear exactly what figures Sir Rupert based his views on (we understand he had difficulty in obtaining costs figures from a large enough group of solicitors to draw a conclusion) but in that he did, he made his recommendations in relation to funding and access to justice on the grounds that clinical negligence remained in scope of legal aid. It is the combined effect of both sets of proposals which makes them unjust.
6. What are the implications of the Government’s proposals?

6.1 As the number of cases that solicitors are willing to take on declines (by the government’s own estimate) there will be particular groups who experience reduced access to justice. Those who previously would have been in receipt of legal aid are likely to be the biggest group affected. Thus children, the poor, elderly and chronically sick will be more affected than those in work and who are more financially affluent.

6.2 Solicitors will not be prepared to take on the same range of cases. The quality of advice and representation provided will be lower.

6.3 Claimants with clinical negligence claims will struggle to find suitably qualified solicitors in their area to act for them. Either they will have to travel long distances (or give instructions by email or telephone) to see specialist panel solicitors or they will instruct local solicitors whose expertise is in personal injury only. This will be increasingly the case in rural communities away from the main metropolitan areas.

6.4 With fewer solicitors firms undertaking this specialised work there will be less consumer choice for the clients.

6.5 Of those who do succeed in their claims solicitors will be able to deduct up to 25% of their general damages and past losses by way of a success fee. These damages are not punitive but compensatory, thus claimants in clinical negligence claims face the possibility of being under compensated for their injuries.

6.6 Deducting solicitors’ costs from their client’s damages causes a conflict of interest between the solicitor and their clients. A solicitor may encourage a claimant to settle too early or continue to pursue a claim when it should have settled. Solicitors will have an interest in whether a claimant makes, accepts or rejects a P36 offer.

7. Our alternative suggestions

7.1 We accept that savings need to be found and believe that adoption of some or all of the following suggestions could deliver the same or even more savings in the field of clinical negligence than the proposals themselves. We suggest:

— Reduction of success fees in CFAs but on a tiered increasing basis according to when liability is admitted and the claim settled. This would provide a much needed incentive for the defence to speed up the assessment of and settling of meritorious claims and reduce costs.

— Consideration of a genuine one-way cost shifting arrangement.

— Making legal aid more efficient, for example by introducing a small levy on costs or damages to help fund the work (fully or partially).

— Retain legal aid, at the very least for cases involving severe disability or death. Consider even widening the scope of legal aid to include all clinical negligence cases, and possibly even personal injury cases. The use of a small statutory charge could make legal aid self funding.

— Alternatively, widen access to legal aid to any clinical negligence claim, but for the investigation and initial disbursements stage only.

— Make panel accreditation a requirement for running a clinical negligence either under legal aid or on a CFA.

— Introduce an alternative to litigation for smaller value claims (an amended version of the NHS Redress Scheme concept).

January 2011

Written evidence from the Forum of Insurance Lawyers (AJ 38)

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL has over 3,000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

Executive Summary

— The Government’s proposals should be extended to include provisions to ban referral fees, to abolish the indemnity principle and to introduce pre-action costs management.

— It is particularly important that the financial impact on the market of a ban on referral fees be considered in combination with the other reforms.

— FOIL believes that the implementation of the Government reforms will achieve the following:

   — A reduction in legal costs overall, and greater proportionality.
Evidence

In this submission FOIL will focus upon two of the questions raised by the Justice Committee:

— Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?
— What are the implications of the Government’s proposals?

The Jackson Recommendations

1. In his Final Report Lord Justice Jackson made it clear that he viewed his recommendations as “a coherent package of interlocking reforms”. FOIL endorses that view of the proposals: whilst there are aspects of the reforms which are disadvantageous to FOIL members and their clients, FOIL believes that overall the package represents a careful balance of the interests of all parties involved in litigation and that, as such, it is inappropriate to pick and chose between the provisions.

2. The current consultation on the Jackson recommendations covers a more limited range of issues which, if implemented, would significantly reform the civil litigation landscape, particularly with regard to personal injury claims. FOIL believes the proposed package represents a very significant step forward in creating a litigation environment in which money damages disputes can be resolved at much lower cost, and in which access to justice is achieved for both claimant and defendant.

3. In addition, FOIL members are following with interest the other proposed developments including the extension of the Portal and fixed recoverable costs on the fast track, costs and case management through the current court pilots, and the proposed pilot of a predictable damages tool.

4. There is a further recommendation which FOIL believes should be included within the package of priority provisions—the banning of referral fees. The current government consultation considering the banning of cash payments to potential claimants under the Conduct of Authorised Persons Rules 2007 is welcome but deals solely with this isolated issue. Referral fees create other, more widespread, problems which need to be addressed. Whilst the government has indicated that it will await the outcome of the Legal Services Board’s consultation before reaching a view, FOIL believes that the issue is so closely linked with the issues in the Jackson consultation, and has such a significant effect upon the legal services market, that it should be included within the current proposed reforms, to enable the financial impact of the abolition of referral fees to be considered alongside the impact of the other changes.

5. As Lord Justice Jackson indicated in a lecture in November last year, the issue of referral fees is inextricably linked with recoverable success fees and overall cost levels. A significant percentage of the costs currently paid by defendants to claimants is absorbed in the payment of large referral fees (sometimes as much as 50%); if they were no longer paid, substantial sums would be freed up which would enable success fees to be reduced, for the benefit of claimants, the taxpayer and society as a whole.

6. FOIL agrees with this analysis of the market: the combined effect of the reforms including the banning of referral fees would drive down success fees to lower levels than those currently listed in CPR Part 45. As it stated in its consultation response to the LSB, FOIL is concerned that this impact on the market has not been addressed in the economic impact reports commissioned by the Legal Services Board which largely confine themselves to reviewing the market as it stands at present.

7. Obviously, the combined effect of reform to CFAs and referral fees is not considered either in the impact assessments which accompany the Jackson consultation, as referral fees are not part of the current review. In its own impact assessment the Ministry of Justice concludes that:

“In line with the overall objective of reducing the cost of civil litigation, claimants using CFAs are likely to be worse off in aggregate as a result of the package”.

FOIL believes that this view is too simplistic as it fails to take into account the changes to the market which the reforms would drive. The market for legal services, particularly for personal injury, is mature and sophisticated and, as Lord Justice Jackson emphasises, it will respond to change.

8. To enable the full picture to be appreciated it is vital that inter-related provisions be considered together. Even without reform on referral fees the research of Professor Fenn, for Lord Justice Jackson, indicates that 61% of claimants will be better off and 39% of claimants will be worse off. FOIL agrees with Lord Justice Jackson’s view that including a ban on referral fees within the package would result in far more than 61% of claimants benefiting from reform and would significantly reduce the number of those claimants who would be worse off. There is the potential here for a significant win:win solution, reduced costs for defendants without reducing claimants’ damages.
9. In addition, FOIL believes that it would be convenient to include, within the proposed legislation, provisions to allow for the abolition of the indemnity principle and to allow for pre-action costs management, both of which are recommended in the Jackson Report.

THE IMPLICATIONS OF THE GOVERNMENT’S PROPOSALS

A reduction in cost

10. FOIL believes that the Government proposals will result in an overall reduction in litigation costs, to a more proportionate level. This change would reverse the escalation in costs being experienced currently. To quote just one set of figures, to give an indication of how disproportionate costs have become: in 1999, in motor cases, for every pound paid in damages a further 38p was paid in costs. By 2009 that figure had risen to 87p. In EL/PL cases the ratio increased from 37p to 93p for every pound, an increase of over 250% in ten years.

11. One of the major flaws in the current system, which creates cost inflation, is the lack of control by the claimant. The claimant has no responsibility for his costs, win or lose, and therefore has no interest in the level of costs charged. As one of the claimant participants in the research conducted by Charles River Associates for the LSB commented, claimants don’t “give a monkey’s” about the level of costs as the insurance company will pay them. The Government’s proposals will subdue this damaging indifference: by requiring claimants to pay a proportion of the costs themselves claimants will have an incentive to shop around and make cost-effective decisions on pursing their claims in a proportionate manner.

12. It should be remembered that the first impact of the reforms will not be upon claimants but upon their lawyers. All suppliers of services have an indirect interest in ensuring that their clients or customers are in a financial position to pay their fees but claimant lawyers are in a different position: they have a direct interest in the level of costs they recover from their opponent without reference to their client. Under the reforms claimant lawyers will have their own incentives to become more competitive and keep costs proportionate.

ACCESS TO JUSTICE FOR DEFENDANTS

13. FOIL believes that the Government’s proposals will enhance access to justice for defendants. The recent judgment of the European Court of Human Rights in MGN v UK has highlighted that justice is not just a matter for claimants, but also requires that a defendant is able to put forward and pursue a legitimate defence in an environment which treats all parties fairly.

14. It is frequently argued that when considering access to justice issues the focus should be upon claimants and that little sympathy should be extended to those who find themselves paying costs in personal injury claims, firstly, because costs are paid by insurers and injured claimants should have priority over shareholders in insurance companies; and secondly, because the “polluter pays”—only those who are at fault are required to pay legal costs. Both of these arguments are flawed.

15. As Lord Justice Jackson succinctly notes in his report the effect of the changes of the funding regime in 2000 was that the burden of financing a huge swathe of litigation was transferred from taxpayers (through the legal aid scheme) to opposing litigants. Ironically, in many cases those opposing litigants are funded by taxpayers—through the NHS, local councils, public authorities etc. With regard to insurance companies their funds obviously come from premiums, which many individuals and businesses are struggling to pay in the current economic climate. Under the current rules millions of other individuals are required to pay the costs of those involved in personal injury litigation. Once legal costs become disproportionate a painless route to litigation for one section of the community is only obtained through the imposition of an excessive burden on society as a whole.

16. The neat phrase “polluter pays”, adopted from the environmental context, is designed to give the impression that high legal costs, and a system which focuses entirely on the claimant, is justified as those paying costs are in some way “guilty” and therefore less deserving of appropriate treatment. This argument is false. When a business or an individual faces a claim and is held responsible for causing an injury or death, that defendant will have no direct responsibility for paying costs as these will be paid by the insurer. Higher costs, therefore, do not act as a just punishment, or deterrent to a wrongdoer: it is not the “polluter” who pays but millions of ordinary, “innocent” taxpayers and purchasers of insurance.

17. Under the current personal injury litigation system defendants pay all of the costs in all cases, whether the claimants win or lose. A defendant which loses a case, in which it may have raised a reasonable, but ultimately unsuccessful, defence, will be required to pay not only the costs of the claimant who has been successful but, in many cases, a further sum equaling the costs, as a success fee to the claimant lawyer with the aim that it be used to cover the costs of unsuccessful cases in the future. Lord Justice Jackson is particularly critical of this characteristic of the system, that defendants pay all of the costs of both winners and losers: the reforms would reduce this unjustifiable burden.
CONTINUED ACCESS TO JUSTICE FOR CLAIMANTS

18. It is useful to consider exactly what the phrase “access to justice” means. Throughout the development of civil litigation and funding procedure the right to bring proceedings has never been interpreted as a right to bring proceedings without cost. It is notable that although Art 6 enshrines the right to a fair trial in both civil and criminal proceedings, and includes the provision of free legal advice within the definition of a fair criminal process, there is no right to free funding for civil actions within the declaration. By way of example, until the year 2000 potential claimants seeking damages for personal injury were able to apply for legal aid to bring a claim, subject to means testing. In the event that the claim was successful the Statutory Charge was applied to enable the Legal Aid Board to recoup the costs which had been incurred from the successful claimant’s damages.

19. The rules on civil costs within this jurisdiction operate currently on the basis of costs shifting, requiring the losing party to pay the costs of the winning party. However, the rules have never required the losing party to pay a full indemnity: an award of costs on the standard basis requires the losing party to pay a proportion of the winning party’s costs, with the remainder being made up by the winner. The rationale of the principle is to protect the losing party from the direct effects of the costs agreement that the winner has entered into with his or her legal representative.

20. The concept of full compensation with the defendant paying all costs, without any risk to the claimant, is a very recent phenomenon. The “inviolable principle” of full recovery which, it is frequently claimed, is at the heart of the personal injury civil justice process, only became possible following the changes to the CFA rules in 2000. Before 2000 it was accepted, without controversy, that claimants would lose a proportion of their damages in costs—a situation which still exists in Scotland and Northern Ireland.

21. The claimant lobby has argued that if the system is changed only claimants with strong cases will be able to find representation. Lord Justice Jackson considered this argument in detail in preparing his final report. In his recent response to the Government proposals he indicates that in his view the new arrangements will not deny access to justice to claimants who have strong claims. He views with scepticism the claim that, following the reforms, fewer “risky” cases will be taken on, because he believes “that (with certain honourable exceptions) claimants with risky cases are already unable to find CFA lawyers”. He quotes various statistics which confirm that “cherry-picking” of strong cases is routine, and that a very large percentage of claims unlikely to be successful are removed from the system at an early stage. The vast majority of claims pursued under a CFA are successful. The current CFA regime increases costs enormously but does nothing to increase access to justice. The additional costs are merely a windfall for claimant lawyers.

22. It is claimed that without the success fees from winning cases to support tougher cases they would not be pursued. It is easy for claimant lawyers to state that under the reforms cases with prospects below a certain percentage will not be taken on but there is a danger here of maths being used as a smoke-screen. Given the opportunity to put data behind its claims, even under the current system the claimant lobby was not able to put evidence before Lord Justice Jackson to show that current levels of success fee are required to fund “lost cases”. If, under the reforms, success fees became irrecoverable, client pressure and competition would reduce their level and the level of hourly rates, firms would become more efficient, and the higher damages from a rise in general damages and from the amended Part 36 rules would provide claimants with more money from which to pay success fees.

23. If costs are reduced work practices will change. A proportionate amount will be spent on achieving access to justice for claimants, in place of a disproportionate amount. In effect this is the process that has already shaped defendant firms, as a commercially demanding insurance industry has driven down fees and required firms, in a very competitive market, to develop or die. In the claimant field the reforms recommended by Lord Justice Jackson will reshape the market to some degree; in a more competitive market claimant firms are likely to become leaner and fitter. Undermining this competitive environment by allowing disproportionate costs ultimately rewards inefficiency and waste.

A FAIRER SYSTEM

24. As with so many aspects of the law, on the issue of funding the devil is in the detail. Rules introduced with the laudable motive of increasing access to justice and ensuring that individuals could continue to fund litigation after the removal of legal aid have resulted in a litigation landscape so disproportionate, expensive and out of control that in the recent Court of Appeal case of Pankhurst v White [2010] EWCA Civ 1445, a case involving catastrophic injury and very large damages, the claimant’s funding arrangements were described as “grotesque”.

25. The claimant lobby has been vociferous in its defence of the current rules, arguing that any change would impact detrimentally upon vulnerable claimants. In truth, over the past fifteen years the claimant lobby has consistently made the same claim in response to many proposed changes. When CFAs were first proposed, to be available in tandem with legal aid, ethical and consumer protection issues were raised by claimant lawyers as an argument against their introduction. In 1996, with Lord Woolf reviewing the issue of access to justice, concern was being expressed at the possibility that fixed costs might replace CFAs. In 1998, with the Government proposing to introduce CFAs with recoverable success fees in place of legal aid, the claimant
Ev w98  Justice Committee: Evidence

lobby argued that under such proposals access to justice would be harmed. It is now argued that those same 
“damaging” CFAs are essential to maintaining access to justice.

26. If the government reforms are introduced the forces of the market will take effect, greater competitiveness 
will be introduced and, overall, costs will be reduced without affecting claimants, who would be empowered 
with the ability to control their own costs. “Access to justice” is an emotive phrase and liable to be abused but 
if a just result is to be achieved for all parties it is vital that the debate is widened, beyond the limited interests 
of claimants, to examine all of the facts.

January 2011

Written evidence from SCOPE (AJ 39)

1. Scope is a major disability organisation whose aim is to drive the changes that will enable every disabled 
person to have the same opportunities to fulfil their life ambitions as non-disabled people. We provide a range 
of services to disabled people: transition, residential care, domiciliary care and empowerment in the community. 
Many of the disabled people we support have complex needs. We believe that all disabled people should have 
real and effective access to justice and redress.

SUMMARY OF OUR KEY POINTS

2. Scope believes that the notion of access to justice is being fundamentally reshaped by the reforms to legal 
aid. It is too narrow a view to regard welfare benefits and debt cases as being primarily about financial 
entitlement. Whilst we do accept that legal aid should be targeted appropriately in light of the need to reduce 
the deficit, we consider that for cases to be prioritised in the way suggested is totally inadequate.

3. This purported basis for removing these areas of law from the scope of legal aid ignores the wider impact 
that goes beyond a simple money claim that withdrawing legal help will have. The loss of benefits, even for a 
short period, can have a huge impact on a disabled person’s quality of life. This also implies a narrow and 
short-sighted vision which fails to recognise that addressing problems as and when they arise (before reaching 
crisis point) saves costs further down the line.

4. There is significant evidence that the reforms will have a disproportionate impact on disabled people. In 
its own analysis of the likely impact of the changes, the Government has estimated that 21 percent of those 
affected are disabled people74. If the Government proceeds with the proposed measures, there is a great risk 
that this will create a two-tier justice system in which most disabled people will be left without adequate 
recourse to redress.

5. Finally, Scope has serious concerns about the justifications underpinning the Government’s reforms. In 
particular, we believe that in presenting the case for reform, the Government has overprojected ability to self 
represent as a viable option or the existence of alternative sources in the voluntary sector to fill the gap left by 
such major cuts.

Key Recommendations

6. The Committee should urge the Government to retain social welfare related matters within the scope of 
legal aid. It is concerning that there has been no consideration of the reforms in the context of the wider 
welfare reform proposals. This comes at a time when the benefits system undergoes radical reform, which 
makes ensuring that disabled people have access to quality legal advice all the more crucial.

7. The proposals take no account of the real underlying drivers of the increase in need for legal aid. The 
Committee should recommend that such an analysis is carried out to ensure that the reforms are tailored to 
those drivers. This would allow the Government to focus its efforts on removing the need for legal aid rather 
than provision, with the potential to achieve much greater cost savings and efficiencies. For instance, to the 
extent that the Government is successful in designing a welfare system that is less complex and less prone to 
error by implication, the stream of cases will be much less, and this will have a knock on effect in terms of 
legal aid expenditure.

8. The Committee should require that the Government takes reforms forward on the basis of a more realistic 
assessment of the alternatives if whole areas of law are set to be removed from the scope of legal aid. The 
proposals are premised on the assumption of the existence of alternative sources of advice. However, many 
organisations in the voluntary advice sector are already overstretched and underfunded. In addition, the 
implications of these reforms are further compounded by local authority funding for advice services which is 
also under threat, leaving the voluntary sector in no position to pick up the pieces.

74 Ministry of Justice (2010), Impact Assessment—Legal aid reform: scope changes 
Inquiry Questions

What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

9. Legal aid providers, both in private firms and those in voluntary organisations like law centres and charities, will be affected. We have great concerns that the proposals will only exacerbate the trend of continuing, significant decline in the supplier base of practitioners with specialist expertise and that the quality of legal service provision will suffer as a result. Whilst welfare benefits work has largely been carried out by voluntary sector organisations, the number of social welfare contracts issued to firms has been on a falling trend in recent years.

10. There is a major danger that the reforms will drive specialist providers out of legal aid work, making it more difficult to find high quality advice for complex cases and exacerbating unmet need levels. In many cases, once legal aid is withdrawn economic constraints will deter practitioners from taking on such as those involving welfare matters due to the legal complexity of issues in this area.

11. These proposals will put the voluntary sector in an even more difficult position. We anticipate that these organisations will be faced not only with funding pressures from removing legal aid but also with greater demand for advice and representation, thus the pressure on these organisations will undoubtedly increase. In many cases, the likelihood is that they will no longer afford to continue to offer these services.

The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

12. Of those, the highest proportion of cases to be removed from the scope of legal aid involve welfare and debt issues. The Government has estimated a reduction in caseload of 113,100 welfare benefit cases and 75,000 reform. Which cases will these be and how will the issues they involve be resolved?

13. Scope anticipates that there will continue to be a high demand for legal assistance in these areas and believes that further consideration is needed in terms of the timing of the reforms. The wide-ranging welfare reforms that the Government is implementing (such as the introduction of the proposed Universal Credit and the rollout of the Work Capability Assessment) could cause caseloads to rise, if only in the short term. The complexity of the benefit system has been one of the major causes for official errors. The accuracy of decision making has long been criticised and the high proportion of appeals that are successful is an illustration of the problems inherent in the system (40% of appeals against WCA decisions are upheld). Whilst the intention of the reforms is precisely to address this complexity, we believe that without access to legal advice in the transition period, wrong or unlawful decisions will go unchallenged. Such a radical change in the scope of legal aid is likely to mean no redress will be available for disabled people who would otherwise have been able to get legal help and pursue legitimate cases in relation to their benefits issues.

14. Also, we are very concerned about the estimated reduction in volume of 2,100 education cases. Despite the acknowledgement of the importance of legal aid to cases around Special Educational Needs (SEN), the Government does not afford them the same priority in assessing the merits for legal aid funding and maintains that some of these cases arise from personal choice. The legal aid funding currently covers a range of educational issues, including admissions, level of support and out-of-school provision. A significant number of the parents of children attending special schools had to take a legal case to the SEN Tribunal to secure their place because they were unhappy with the local authority special school they were offered—of this, 82% win their appeals once they reach the Tribunal itself and in 30% of registered appeals the local authority concedes before the cases reaches Tribunal stage. The current proposals go against the previous Government’s approach to extend legal aid funding for SEN due to the complexity of the matters of law.

15. The Government has argued that the non-for-profit sector will replace civil legal help but we fear that this optimism is misplaced. As set out before, we believe that the resulting gap would not be met by the
voluntary sector. The lack of resources in the non-for-profit sector (which will have to rely on a reduced amount of legal aid funding) means that access to legal information and advice will become even more restricted.

What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

16. In considering the sustainability of legal aid expenditure, there is a clear need to adopt a broader systemic view as part of the picture that generates the costs of legal aid. As it stands, the current legal aid system lacks accountability. We believe that looking at the impact of government policy and legislative proposals on the justice system is absolutely crucial to identify government induced demand for legal aid. There is benefit in looking much more closely at the “polluter pays” principles in legal aid. This will maintain scrutiny of those Government departments which are loading most cost into the legal aid budget. There is otherwise the risk of one-way cost shifting from the State to the individual.

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

17. While we recognise an examination of the various funding options is a crucial issue, Scope does not have the expertise to comment on this in detail.

What are the implications of the Government’s proposals?

18. Scope is very concerned about the cumulative adverse impact on disabled people’s access to justice resulting from the narrowed scope and more stringent financial eligibility requirements for legal aid. 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.

Eligibility

19. Turning first to the eligibility effects, under the current proposals the concept of “passporting benefits” will be abolished in relation to capital (but would be retained in respect of income) and greater contributions towards legal costs will be required. At present, those applicants who are in receipt of “passported benefits” automatically qualify for legal aid under both the income-related and capital-related means test.

20. We welcome the retention of passporting on income-side of the means test but would oppose the abolition of capital passporting. This is justified in the Green Paper on the basis that “benefits have become increasingly generous in terms of the capital which recipients are able to hold while still qualifying for the benefit”. Yet, it is anticipated that this change will have little if any impact on legal aid costs—as is highlighted in the impact assessment, the estimated savings that would be generated by this are minimal. The more significant savings would actually come from the reduction in scope rather than the introduction of the new means testing system.

21. Any new financial eligibility test must not reduce fair and equal access to justice to those that most need it. In this respect, it is important to stress that legal aid is already very targeted as only those in receipt of Income Support, Income-based Job Seeker’s Allowance and Income-Related Employment and Support Allowance are automatically entitled through passporting. This is justified in the Green Paper on the basis that “benefits have become increasingly generous in terms of the capital which recipients are able to hold while still qualifying for the benefit”. Yet, it is anticipated that this change will have little if any impact on legal aid costs—as is highlighted in the impact assessment, the estimated savings that would be generated by this are minimal. The more significant savings would actually come from the reduction in scope rather than the introduction of the new means testing system.

22. Financial eligibility criteria ought to take full account of a claimant’s circumstances. A model that cuts off entitlement without any consideration of the much higher costs that disabled people often face does not appear just and will introduce inequity in the system. A range of expenditure is taken into account to determine disposable capital but it is essential to consider the extra costs disabled people face to ensure accurate decisions are being made regarding entitlements to legal aid and the contributions people can make towards legal costs. Research conducted by Scope has shown that these extra costs of disability can be very significant. A stricter

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82 Ministry of Justice (2010), Legal aid reform impact assessment—financial eligibility: http://www.justice.gov.uk/consultations/docs/legalaidiaeligibility.pdf: “In aggregate it is estimated they would no longer receive £6 million worth of resource transfers in the form of legal services funded by the legal aid budget. Of this around £2 million would relate to increased contributions from clients and around £4 million would relate to the reduction in legally aided business no longer provided.”


84 Scope (forthcoming), Money matters survey results.

application of the means test would result in disqualifying those who are already at disadvantage and unable to meet the financial burden of bringing a case.

23. The implications of enforcing the means testing have not been properly examined in the Green Paper. Whilst we have objections in principle to the eligibility criteria of the type suggested in the current proposals, given that the Government’s justification is primarily based on the savings that these changes would deliver, some acknowledgement needs to be made of the cost implications. The impact assessment gives little evidence on what will be the increase in the number qualifying for legal aid subject to a contribution. In any case, administering the means testing will potentially give rise to additional costs which may be far from insignificant and on balance even outweigh the costs saved from having it.

Scope

24. Further compounding the adverse impact on disabled people are the changes in scope as a result of these proposals. The most serious aspect of concern is that areas of social welfare law will be excluded. This is fundamentally unfair and without quality advice to resolve social welfare issues, disabled people are more likely to experience problems which will exacerbate their financial and social exclusion. Also, in many instances, issues occur in clusters—it makes little sense that legal aid is only available in instances when an individual is at a risk of homelessness, when this is not available for the underlying cause of that (eg loss of benefits such as Disability Living Allowance).

25. Lack of legal aid funding is likely to lead to a build up of unresolved problems. There is significant evidence showing that early intervention is a vital route to effective resolution (and prevention) of such problems. A focus on intervention would prevent future legal need and save cost by taking pressure off state services. Unresolved issues can result in unemployment, loss of housing and many other escalating problems in which the impact on the individual involved can be severe, as this following case study illustrates:

“Some years ago I was claiming Job Seekers Allowance and the department officials made errors on three separate occasions stopped my benefit and it took up to eight weeks to get my payments restarted! During this time my Housing Benefit was also stopped. My landlord demanded rent and so I went overdrawn at the ban to keep up the rent. Naturally I accrued bank charges—large bank charges! In total I had £890 overdraft that took years to pay back on JSA and later IB.”

Although the Green Paper says that the Government’s approach seeks to protect the most vulnerable people, excluding social welfare issues from scope is against the aim of targeting need.

Self-representation

26. There are a number of other factors such as self-representation, which has been raised in the context of the proposed reforms. The Green Paper describes an ideal situation—one where claimants would be able to bring cases with little or no support or assistance—which reality makes untenable. Social welfare law is a very large and ever more complex area, making it practically impossible for any individual to prepare and present their case effectively. Nothing demonstrates this more vividly than the complexity of the benefit forms. A case in point is the ESA50 medical questionnaire for people claiming Employment Support Allowance. This is a self-assessment questionnaire that disabled people are asked to complete as a component of the Work Capability Assessment. The recent independent review of the WCA by Professor Harrington revealed that “46% found the questionnaire difficult or impossible to complete.”

27. Scope takes the view that disabled people should receive quality legal advice from the outset of their claim and throughout the whole process. The Green Paper overlooks that legal aid is an essential safeguard that addresses level playing field concerns where the other side will be represented (eg a local authority or other public bodies). Currently legal aid is available for help in preparing a case but not for legal representation. Scope believes that disabled people are to meaningfully access the justice system and put their cases properly, drawing between recognising that a decision is unfair and assessing whether there are any legal grounds for

28. This poses a challenge as an increase in self-representation can lead to a potential erosion of equity in outcomes. Evidence on the outcomes achieved by self-represented claimants shows that the effect tends to be adverse. The evidence in response to a parliamentary question by the Minister reveals that cases of litigants in person result in unfair outcomes: for instance, appeals against decisions on Attendance Allowance and Disability Living Allowance were much more likely to succeed if the individual was represented. There were 15,122 people who appeared at the tribunal with representation who were successful, in comparison to only 7,256 people winning their appeals without representation.

29. Closely linked to this issue of self-representation is that many disabled people will not realise that they face a legal problem. A clear distinction needs to be drawn between recognising that a decision is unfair and assessing whether there are any legal grounds for

86 Scope (forthcoming), Information, Advice and Advocacy report.
88 Written Answer (22 December 2010), Slaughter—Appeals: “To ask the Secretary of State for Justice how many appeal cases relating to (1) bereavement benefit have been heard in each of the last three years; and how many such appeals (a) with legal representation, (b) with legal representation funded by legal aid and (c) without legal representation were upheld”
challenging it. As the latter is likely to require a high level of legal expertise, disabled people might be discouraged from taking legal action even when their cases have reasonable prospects of success.

Cost-savings

29 Overall, the cuts to legal aid target areas of social welfare law for which costs have been low and roughly stable. Total legal aid expenditure on welfare benefits cases for 2009–10 amounted to 28 million. It is certainly the case that the greatest costs emerge from a very small area of legal service provision—in particular very serious criminal cases. Pursuing sweeping and across the board cost-cutting measures on this basis is unfair.

30. To put this figure into perspective, this would achieve very small costs savings contributing only 0.0185% to reducing the £150 billion deficit. Such indiscriminate cost-cutting can undermine the very objective of controlling costs. An important point that has been made repeatedly in the context of reforms is that costs to government providing legal aid cannot be assessed without considering the costs incurred by not providing legal aid, which would be significant. Citizens Advice Bureaux have estimated that for every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.

January 2011

Written evidence submitted by the Legal Aid Practitioners Group (AJ 41)

1. LEGAL AID PRACTITIONERS GROUP

We are a membership organisation of firms and not-for-profit organisations. LAPG was founded over 25 years ago to call for access to justice and to represent legal aid practitioners. Our membership covers practices of every size from sole practitioners to the largest legal aid practices, our members carry out all of the areas of law covered by legal aid contracts. Our members are situated throughout England and Wales.

2. EXECUTIVE SUMMARY

2.1. We are concerned that there will be a massive reduction in the number of providers both private practice and not-for-profit. (Section 3)

2.2. We believe that quality will suffer. (Section 3)

2.3. We have given some examples of the types of cases that will be out of scope and raised concerns about where vulnerable people will be able to access any advice, assistance or representation. Private practice has a lot of pressures on it including reduced income from other areas of work in an economic downturn and the challenges posed by alternative business structures. Not-for-profit organisations are affected by other spending cuts. However spending cuts in the police and local authorities will affect e.g. family and housing legal aid work. Or indeed there may be no service. Furthermore, there will be additional costs elsewhere e.g. on local authority housing departments, social services departments, courts, tribunals and the health service. (Section 4)

2.4. We have made limited comments on alternative funding and on Jackson. (Sections 5 and 6)

2.5. We share the concerns raised in the Consultation on the effects on social cohesion, increased criminality, reduced business and economic efficiency, increased resource costs for other departments and increased transfer payments from other departments. (Section 7)

3. What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

3.1. The Consultation Paper estimates that the number of providers will decrease to less than 1000. In the early 1990s there were 11,000 providers. The current number is, we believe, in the region of 3000.

3.2. It is already difficult for many clients to obtain advice and representation, in rural and urban areas. Even in parts of the country where there appears to be good supply as in London, clients often try many organisations before they either give up or find a practitioner to see them.

3.3. What will drive people away from providing legal aid services? It will be the combination of the effects of the proposals:

(i) The contracts awarded in 2010 in social welfare law demanded for the first time a holistic service in housing, welfare benefits and debt. Within weeks of those contracts starting, the Government proposed that welfare benefits and most debt be omitted from future funding. All the providers who spent a considerable amount of time and money re-designing their services will have to re-design them again.

89 Written Answer (02 November 2010), Fovargue—Legal Aid (Social Welfare cases): “To ask the Secretary of State for Justice how much his Department has spent on legal aid for social welfare cases (a) in total and (b) in respect of (i) welfare benefits, (ii) housing, (iii) debt, (iv) community care and (v) employment in each year since 2006-07.”

90 Citizens Advice (2010), Towards a business case for legal aid:
(ii) Similarly in family work, the LSC wanted a holistic service and awarded more points to those who
did a wide range of family work (Area A only). The contract was overturned following a successful
Judicial Review brought by The Law Society. The Consultation proposes that large amounts of family
law will be excluded from future contracts. Thus the firms geared up to deal with client issues at all
levels will need to reshape themselves.

(iii) It is hard to do any business planning when there are so many changes proposed by the sole purchaser
of the services.

(iv) 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.

(v) Indeed the plethora of payment ranges adds to the difficulty of delivering the service by making it
much more time consuming to calculate fees and any profitability.

(vi) Fixed fees which are not considered generous were brought in based on the current mix of cases. If
the mix of cases changes, this will affect the ability of providers if the shorter cases are taken out of
the system. Similarly if uplift on more complex cases is capped the ‘swings and roundabout’ argument
breaks down.

(vii) Not-for-profit providers will suffer the added blow of reductions in local authority funding and the
decline in grants from charitable organisations and Government Departments.

(viii) Private practices have often subsidised legal aid work from other work which is more profitable. At a
time of recession, other areas are not necessarily providing that cushion so legal aid work becomes
even more unattractive.

(ix) With the advent of alternative business structures in October 2011 it is not predicted that they will
want to run legal aid firms but they may seek out any part of the High Street practice that is profitable.
That will destabilise legal aid mixed practices further.

3.4. It is difficult to stress enough quality concerns that have already arisen.

(i) With hourly rates, providers were paid for the work they did and all bills were checked by the LSC
or the courts. With fixed fees there is pressure to deliver the service within budget and that mean
that clients are given a poorer service.

(ii) With such low rates, the only way to deliver the service is to use lower paid individuals. These may
be well trained and work in a small area of law and provide adequate or good advice. The fear is that
there is not enough quality assurance to be certain of this.

(iii) The client base is extremely vulnerable. It is therefore important that the right advice is delivered and
that standards are high. We do not believe that the system as currently designed can be certain of this.

4. The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its
proposed reforms. Which cases will these be and how will the issues they involve be resolved?

4.1. The cases to be taken out of scope are set out on pages 7 and 8 of the Ministry of Justice’s Impact
Assessment 28

4.2. Ancillary Relief (where domestic violence is not present):

(a) What types of cases? An example of a case which will no longer be covered: a pregnant woman Ms
A has a child by her previous partner and a child by Mr A. She lives with Mr A. Mr A works and
there is a reasonable lifestyle. Mr A tells her to leave as he has a girlfriend who is pregnant. Ms A
goes to the local authority to ask for housing. Currently she could obtain advice and representation to
return to the property thus ensuring that the state does not pay for her accommodation. In this case
that is what happened so the woman was able to return to the property and was not separated from
her children. Generally we have concerns about clients who have English as a second language or
have mental health issues and cases where disbursements have to be funded, paperwork prepared for
court and statements prepared. Form E is a complex form.

(b) How will they be resolved? While mediation is important it must be stressed that mediation has to be
entered into willingly. There must be openness on disclosure and there has to be the back-up of the
courts in case people do not comply with the mediated arrangements. The government appears to
believe that mediation can take the place of litigation and cites the statistic that in 2008 73% of
ancillary relief orders were not contested (4.157 green paper) to evidence that the majority of
individuals are able and willing to take responsibility for organising their own financial affairs. This
statistic is wholly misleading. How many of those had the benefit of sensible and practical legal advice
in order to equip and enable them to work together towards agreement? Many of them will be
agreements that could not have been achieved in mediation but were negotiated via solicitors. Arguably
the statistic demonstrates that solicitors are an effective gateway to resolution without litigation for
those in relationship breakdowns.
Ev w104  Justice Committee: Evidence

4.3. Clinical Negligence:
(a) What types of cases? While the CFA regime remains as it stands at present, the cogent arguments for retaining Clinical Negligence within legal aid scope which held sway in the consultation preceding the Access to Justice Act 1999 still apply. Assuming implementation of the government’s preferred civil costs reforms, there would be a case for reducing the scope of legal aid for clinical negligence in connection with those claims for which CFA funding would be financially viable. However, as the consultation paper recognises (4.167) there will be cases for which legal aid should remain available, for example those involving exceptionally high disbursements. Another example would be long-running cases where final settlement must of necessity be deferred (e.g. cases involving severe brain damage to children).
(b) How will they be resolved? If these cases are not resolved one result may be that the state will pay for the care of the person rather than from insurance companies paying out.

4.4. Consumer and General Contract Law:
(a) What types of cases? Very few of our members carry out cases in this area of law but some have raised concerns that claims for professional negligence will be outside scope if the paper is implemented. It is very difficult to bring a claim for professional negligence.
(b) How will they be resolved? We think that there will be very few organisations able to provide basic advice and for professional negligence cases we think it unlikely that there will be a thriving CFA market.

4.5. Legal help for Criminal Injuries Compensation Authority applications
We accept that CICA claims are a lower priority than some other forms of civil legal aid. However, it should be recognised that they cover a wide range of injuries from the lower tiers of the scheme through to injuries of the utmost severity and it is misleading to characterise them as relatively straightforward matters for which legal expertise is not required.

Consider, for example, CICA awards relating to non-accidental head injuries to infants which not only involve complex assessments and awards but can also take many years to finalise. Long-running CICA claims are problematic to firms in the private market in funding terms in view of the substantial unpaid work in progress that may become tied up for years on end but without the prospect of a costs award or success fee on conclusion of the case, meaning that costs must normally be met from the claimant’s award.

4.6. Debt matters where the client’s house is not at immediate risk:
For many years the policy of the LSC and the Ministry of Justice has been to recognise the importance of early advice and to place importance on early acts of advice. We refer to the experience of others in this eg Citizens Advice.

4.7. Education:
(i) This is a small amount of the legal aid budget. LAPG are very concerned that there is a proposal that education should be removed from scope. The clients represented in this area are often children with disabilities from deprived backgrounds who are trying to access essential educational services.
(ii) According to the Legal Services Commission Statistics, at least 92% of education cases are successful and the majority of these cases are Special Educational Needs cases. This represents extremely good value for money for the Government.
(iii) There are three main areas of work undertaken by education lawyers and these are as follows:
   — Admissions
   — Exclusions
     Special Educational Needs, including appeals to the Special Educational Needs & Disability Tribunal and appeals from the Special Educational Needs & Disability Tribunal to the Upper Tribunal (the vast majority of cases fall into this area).
(iv) In addition, cases such as bullying, transport for disabled children and disputes concerning higher education are also dealt with by education lawyers. Although education negligence is currently in scope, these cases are now very rare.
(v) Much of the work done by education lawyers is completed under the legal help scheme, which provides advice and assistance but which does not cover representation in court proceedings and pays at the rate of just £53.60 per hour. (The private rate for experienced education lawyers is often between £200–300 per hour.)
(vi) 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.
4.8. Employment

At this stage we make no comment on employment.

4.9. Specified housing matters:

(i) While it is welcome that many housing cases remain in scope, there seems to be an acceptance that the scheme will now fund litigation in court rather than the early advice currently funded.

(ii) It is unclear if the current proposals cover the following.

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- Homelessness reviews which have to be very thorough because if unsuccessful there are only grounds to appeal based on what is included in the review. Some reviews can take experienced practitioners ten hours to complete.
- Gypsy and traveller advice on issues which if successful may prevent eviction in future?
- Cases where nuisance needs to be pleaded eg an infestation or water penetration. It will be difficult to run a case where some causes of action are within scope and some are not.
- Breach of the covenant of quiet enjoyment. Landlords who harass tenants will be able to do so with very little chance of redress particularly if local authority cuts mean that they will not prosecute harassment and unlawful evictions.

4.10. Immigration where the litigant is not detained

The difficulty for the advisor is that a person can receive advice for the detention aspect but not for the immigration problem which has led to the detention. Who else will advise? It is a criminal offence for a non OISC registered provider to deliver advice. For desperate clients however the fear is that unscrupulous providers will charge for this work. We refer to ILPA for detailed consideration of this question.

4.11. Private law children and family cases (where domestic violence is not present) other than international child abduction cases, though mediation will remain in scope:

(i) An example of a case which is covered now is Mrs B who allowed her estranged husband to have their two boys every weekend. Mr B is Turkish but a British Citizen. Mr B threatened to remove the children from the jurisdiction if Mrs B did not terminate her new relationship. Mrs B wanted the children to see their father. They also had a good relationship with her new partner. With legal representation she sought a Prohibitive Steps Order to prevent the children being removed from the jurisdiction. Without access to that she might have resorted to not allowing contact.

(ii) Will parents in future only obtain representation once their children have been abducted?

(iii) Access to private law children act proceedings often saves the state money and concerned family members may take proactive steps to look after children where their parents pose a danger. Many then look after vulnerable children who would otherwise be costly for the state to care for.

4.12. Welfare benefits. It is self-evident what these cases are about and MPs will be aware from their surgeries of the many welfare benefit problems people have to deal with. These cases involve complex areas of law and the amounts involved can make a profound difference to the people receiving them. Importantly benefits problems addressed early can prevent many other problems in future, most obviously homelessness.

We do not have space to cover the following.

4.13 Miscellaneous matters

4.14 Upper Tribunal appeals (from the General Regulatory Chamber of the First-Tier Tribunal)

4.15 Public Interest cases

4.16 Tort and general claims

4.17 We would stress that the reference in the Green Paper to the possibility of exceptional fees being funded must not be taken out of context. Currently we understand that a few hundred cases are dealt with every year. They take months to be decided. That funding will not be able to cover the 550,000 cases no longer being funded under the current proposals.

4.18 While Legal Action Group and Advice Services Alliance have prepared excellent submissions on the advice sector we would highlight the lack of provision that will be available with the reduction of private practice in family matters. Here is an illustration from a member:

“I want to stress generally that neither the nfp sector nor any part of local authority-type organisations will be there to pick up the shortfall, if legal aid isn't there. For example, Domestic Violence: no solicitors to look at DV situations; in Devon, the County Council are proposing completely to scrap DV support services; 700 redundancies have been announced for Devon and Cornwall police; and of course there are budget threats to CAB, Shelter etc”.
Ev w106  Justice Committee: Evidence

5. What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

5.1. The Government is referred to the Law Society’s Access to Justice Review which is a thorough review of alternative sources of income and positive suggestions to ensure the future of a quality service for clients.

6. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

6.1. The Jackson Report stresses the importance of the legal aid scheme in ensuring access to justice. We have insufficient space to deal with this (very large) topic.

7. What are the implications of the Government’s proposals? The Committee now intends to extend this inquiry, and will be taking oral evidence on it in February (witnesses to be confirmed)

7.1. We refer to pages 9 and 10 of the Ministry of Justice’s Impact Assessment 28 which identifies that “A significant reduction in fairness of dispute resolution may be associated with wider social and economic costs such as:

— Reduced social coherenec.
— Increased criminality.
— Reduced business and economic efficiency.
— Increased resource costs for other departments.
— Increased transfer payments from other departments.
— On page 10 there is a discussion that if people address their disputes in different ways there may be implications for the economic efficiency of dispute resolution.

7.2. Many vulnerable people will be left unable to obtain advice, assistance and representation on complex areas of law.

7.3. We would ask the Committee to use its knowledge of the litigation process with its reliance on precedent and evidence to scrutinise how realistic is it for people with mental health issues, disabilities that make it harder to process paperwork, where English is not a first language or where the person is not literate to obtain a just resolution of their cases. The Green Paper recognises the disadvantaged composition of the client base for civil legal aid.

7.4. The telephone gateway proposals are brief but potentially will transform the delivery of legal aid work. The implications are that clients will no longer be able to obtain the advice, assistance and representation they wish. If a telephone gateway comes in which means that advice can only be accessed through that service, this has grave implications for client choice. A client could return to a firm or law centre he or she trusts. They may have advised in the past or been recommended. Under the proposals the client may have to ring the phone line and not be allowed face to face advice at all. We urge the Committee to ask that there be a further consultation on this.

January 2011

Written evidence from the Rochdale Law Centre (AJ 42)

Sadly, despite the Government’s pledge to protect the poor and vulnerable from the effects of public spending cuts these proposals appear to ourselves to target precisely that group.

The proposals in their current form will lead, we feel, to greater inequality of arms in many cases especially against large employers or public authorities.

The proposed reduction in rates of pay will also significantly affect the ability of providers to continue to deliver publicly funded advice and representation within a system that already lacks adequate resources.

The proposals are unlikely to result in a reduced workload for the civil courts. We predict that there will be a marked increase in the number of cases brought by litigants in person which will clog up the system and increase the amount of court time per case. This will be a drain on the already strained resources of the court system. Even worse, people will be put off from bringing or defending claims at all.

We propose that publicly funded legal services be block funded in defined geographic areas with consortia being formed by practitioners to commission services from appropriate providers in their area.

What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer legal aid?

1. The impact of the Government’s proposals to remove vast areas of law from the scope of the legal aid system is likely to be significant. Many private practices that undertake legal aid work already subsidise the legal aid work they do from other income streams. Legal aid work is already restricted and the number of paid
hours allocated to each case is woefully inadequate. The lack of adequate funding means that many legal aid practitioners have to put in hours of unpaid work to ensure that legal aid clients receive a proper service.

2. The reduction in fees will make the need to subsidise legal aid work more pressing, and many small to medium sized firms will find that they are no longer able to subsidise legal aid work, due to the economic pressure they will face.

3. The proposed cuts will impact even more significantly on voluntary sector providers such as Law Centres, who also face devastating cuts to the funding they receive from Local Authorities, themselves under pressure to save money.

4. Previous reductions in legal aid funding have already led to a reduction, over the past ten years, to almost half of firms undertaking family legal aid, and the proposed cutting of legal aid to private law family matters other than those that raise a human rights or public interest issues, will lead to a large number of the remaining firms finding that continuing to administer legal aid contracts will no longer be possible.

5. The removal of legal aid from employment will lead to a significant reduction in work for those practitioners who only undertake claimant work, as many claimants will not be in a position to afford legal advice. Employment practitioners who work in the voluntary sector such as Law Centres are likely to face redundancy as they are unable to undertake respondent work.

6. Immigration practitioners face a large reduction in the type of work they can undertake under these proposals. This will lead to a further reduction in the number of immigration practitioners. The reduction in the amount of work that can be funded coupled with the cost of accreditation required for immigration and asylum work could see a reduction in the number of people entering this area of work.

7. Over the past few years the reduction in funding for legal aid work has led to a decrease in the number of barristers who do it. Those barristers who do undertake it face financial pressure to diversify. This in turn will lead to a loss of specialist support for practitioners.

8. Law firms continuing to undertake legal aid work in social welfare law are likely, due to the uneconomic nature of the work, to allocate the work to junior or inexperienced caseworkers. This could lead to a reduction in the quality of advice available. The reduction in legal aid specialists is more likely to be felt in rural and smaller urban areas, and could result in significant areas of the country becoming advice deserts.

9. These proposals will have a significant impact on voluntary advice services which are often only able to cope with the large number of enquiries they receive, because they are able to rely on referring clients to legal aid practitioners.

10. The quality of advice that the voluntary sector can offer will also be adversely affected by the proposed cuts to legal aid funding, because many voluntary sector advice workers receive training and advice from legal aid practitioners. In Rochdale, the Law Centre provides a programme of training on issues such as immigration and asylum, housing, community care and employment law. This training is aimed at volunteers and paid workers in the advice sector.

The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

1. It is questionable whether the Government’s proposals will lead to a reduction of 500,000 cases in the civil courts. What is clear is that should the proposed reforms be implemented there will far fewer cases in the civil courts which are funded through legal aid.

2. It is our view that a large number of those cases where a party would previously have been eligible for legal aid will continue to be brought before the civil courts but they will be conducted by litigants in person. Alternatively parties may be deterred from accessing the justice system at all.

3. The proposed removal of immigration cases from scope will lead to an increase in the amount of court time needed for cases as unrepresented parties try to negotiate their way through the legal process. The increase in litigants in person, who have little or no knowledge of the judicial process, is likely to result in an increase in the amount of time courts spend on individual cases. This in turn is likely to result in an increase in costs to the court service.

4. It has been suggested that where people have brought complex legal cases before the immigration tribunal, and those claims fail for the lack of legal representation, those people have effectively been denied the right to appear before the Immigration Appeals Tribunal.

5. The removal of legal aid for immigration advice is also likely to result in an increase in people seeking assistance from MPs and their caseworkers.

91 Resolution briefing paper, January 2011
92 Jill Insley, a working life: the legal adviser, Guardian 22.01.11
93 Community Sector Coalition Proposed legal aid cuts: why and how to resist them January 2011.
94 ibid
6. The Government predicts that the implementation of their proposals may result in an increased use of mediation as an alternative to “unnecessary” court action. However in areas such as employment and family law, little account has been taken of the work undertaken by specialist legal aid practitioners who skillfully negotiate settlements at an early stage, thus reducing the number of case brought before the courts.\footnote{Resolution briefing paper January 2011} Non-availability of legal aid in such cases is likely to increase the number of cases before the courts.

7. In divorce cases mediation already plays a significant role. These proposals do not take into consideration that mediation is only likely to resolve matters if both parties agree to it. Mediation also needs to be introduced at an earlier stage in the proceedings, but only where it is safe and appropriate to do so.\footnote{ibid}

8. The proposals also fail to note that mediation does not enable parties to obtain advice on whether any financial settlement is in fact just. Lack of legal advice at this stage could result in one or both parties requiring further access to the legal advice in relation to housing, benefits or debt.

What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

1. We propose that the Government reform the delivery of publicly funded legal services along similar lines to the reforms being proposed in the NHS.

2. The services provided by Law Centres in particular operate in a way comparable with the NHS in that comprehensive legal services are provided from basic advice to representation in the higher courts, free at the point of need, regardless of ability to pay.

3. We propose that legal aid practitioners form consortia that would take responsibility for the legal aid budget for a defined area and purchase the necessary services from providers whether they be in the private, public or not-for-profit sectors. As with GPs solicitors delivering publicly funded legal services are in the best position to know the needs of their local community and to commission services accordingly.

4. Appropriate safeguards are in place as solicitors are already regulated by the Solicitors Regulation Authority whose role is complemented by the independent Legal Services Ombudsman.

5. Were the Government to take such an approach it would also enable them to cut the bureaucracy of legal aid by abolishing the Legal Services Commission (LSC).

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of the report?

1. At paragraph 9.33 of the Government’s Proposals for the Reform of Legal Aid in England and Wales\footnote{Ministry Of Justice Proposals for the Reform of Legal Aid in England and Wales Consultation Paper CP12/10 November 2010} it is stated that if Sir Rupert Justice Jackson’s proposals “were introduced without any changes to the legal aid scheme, legal aid would be a more attractive funding route because claimants would keep all of the general damages awarded”.

2. We disagree with this statement for the following reasons:

(i) The Government assumes, incorrectly, that legal aid and CFAs are interchangeable. They are not. For example if a proposed claimant is seeking to bring a clinical negligence claim, a solicitor is required to explore whether that client is eligible for public funding. If they are they must be advised of their likely eligibility and if they wish be referred to a solicitor able to conduct such publicly funded work. The first solicitor cannot just keep the case and offer the client a CFA. Similarly a claimant who is financially eligible for legal aid but whose claim has insufficient prospects of success cannot choose legal aid over a CFA. In practice the choice between legal aid and a CFA is rarely made on the basis of which of the two is more “attractive”.

(ii) The Government has ignored the fact that in reality a CFA may already be more attractive to a client than legal aid because of the presence of the statutory charge and/or monthly contributions towards their costs.

3. At paragraph 9.42\footnote{ibid} the Government suggests that positive efforts should be made to encourage take-up of legal protection insurance by householders as an add-on to household insurance policies, particularly in housing and employment cases.

4. We are concerned that many housing clients in particular whose cases may shortly be outside of the scope of legal aid will not find that such insurance is affordable. Many of the poorest and most vulnerable households cannot afford contents insurance at all without the additional £15–£20 that legal expenses cover might cost (this is the figure suggested by Sir Rupert Jackson). Research has suggested that those households on the lowest incomes already face a £1,300 “poverty premium” when buying goods and services such as insurance because they do not have access to bank accounts or because of where they live.\footnote{Rachel Williams “Poor families must pay an extra £1,300 a year for basic goods and services” 11 January 2011 The Guardian}
5. Sir Rupert Jackson recommends the simplification of housing law in accordance with Law Commission proposals as one way in which costs in housing cases can be reduced (recommendation no. 44). However the Government has not included this proposal in their consultation and is seeking to make social housing tenure more complex as set out in a separate consultation paper “Local decisions: a fairer future for social housing”. We support Sir Rupert Jackson’s call for simplification in this area. The case for doing so is also supported by other practitioners.  

6. Sir Rupert Jackson’s final report recommended (recommendation 16) that financial modeling should be undertaken to assess the financial viability of a Supplementary Legal Aid Scheme (SLAS) as the evidence does not support that such a scheme would be viable. It is unclear from the Government’s proposals whether they intend to carry out such modeling as part of the work that is to be done to enable a decision to be made on whether to implement such a scheme or not.  

7. We would urge the Government to consider as part of this exercise that without an increase in general damages for legally aided clients as well as those funded through a CFA legally aided clients will lose out. In addition accessing justice will cost more for legally aided clients when taking into account the statutory charge that will already apply to client’s compensation if they were legally aided and the other side aren’t paying their costs, they may also be contributing to their costs as the case progresses via monthly contributions and also a % take of a legally aided client’s damages seems to us to be another “poverty premium”. Why not take a percentage of all general damages towards a SLAS regardless of the type of claim and how it has been funded?  

What are the implications of the Government’s proposals?  

Employment cases  

1. Many cases will be unsuitable for CFAs and will not be picked up by the private sector. The lowest paid and most vulnerable workers are likely to fall into this category. These are also likely to be the individuals who do not have access to membership of a Trade Union eg claims for payments of the minimum wage, non payment of wages or non payment of holiday pay.  

2. Employment laws are numerous and complex with strict deadlines for bringing claims. It is very difficult for many workers to identify when their rights are being infringed especially those who are in less skilled jobs and who have learning disabilities or mental health issues or for whom English is not their first language. This may also result in many unmeritorious claims being issued in the Tribunal as the “filter” which early advice provides will not be there.  

3. Breaches of employment rights can often have a devastating effect on individuals and result in anxiety, depression and loss of confidence. This would make it extremely difficult and in many cases impossible for Claimants to confront employers or former employers in the Tribunal without representation.  

4. Although the Tribunal system was designed to be accessible to litigants in person, in practice the law is complicated and employers are almost always represented and have the means to instruct an advocate. If legal help is no longer available to Claimants this will result in increased inequality of arms between the parties. The current cost per case of employment advice is £230 which is a very small cost to ensure that those who cannot afford to pay have access to justice.  

5. Increasing numbers of litigants in person are likely to cause problems for the Tribunal system itself. Unrepresented litigants are less likely to comply with directions and to understand the rules of evidence. Litigants may follow the procedure but then be unable to face a former employer at a hearing.  

6. Claims with merits are more likely to succeed with specialist qualified advice and representation. For example over the past five years Rochdale Law Centre employment solicitors have recovered £1,000,000 in compensation for clients which has benefited the local economy and encouraged local employers to comply with the law.  

Housing cases  

7. In the area of allocations/re-housing by social landlords the provision of advice prevents homelessness and associated trauma eg family break-up, loss of employment and interrupted schooling. At Rochdale Law Centre we commonly see clients whose homes are overcrowded or in serious disrepair, or who have physical disabilities resulting in problems within their own accommodation eg using internal stairs. Advice and representation at an early stage enables these clients to make use of social landlord’s review processes and access suitable housing. This is a preventative measure rather than intervention only being available when there is a crisis.  

8. Current proposals may also mean no redress for tenants against unlawful evictions for clients who do not want to be re-admitted to the property but may have lost belongings and been severely traumatised. This may

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90 Department for Communities and Local Government Local decisions: a fairer future for social housing 22 November 2010 ISBN 9781409826460  
91 See Garden Court Chambers response to the Government’s proposals for social housing at http://www.gardencourtchambers.co.uk/imageUpload/File/Housing%20Team%20Responds%20to%20Government's%20Housing%20Plans.pdf
mean that landlords who have behaved the worst ie where there have been threats of or actual violence and intimidation, will remain unchallenged if the client is too afraid to return.

9. The cost of a housing case is minimal £174 and the benefits to a family are often immeasurable.

10. These types of case are important to protect the rights of the poorest and most vulnerable and these clients will not be able to fund advice and representation in any other way. Where the client’s goal is to be housed rather than damages CFAs other types of funding such as CFAs will be inappropriate.

Reduction in rates of pay

11. Civil Legal Aid rates have not been increased for a number of years. The rates already make it extremely difficult to provide services without additional funding from elsewhere. The rates paid for legal aid are considerably less than the rates recommended by the Courts for even a trainee solicitor. Many suppliers have already given up contracts and are struggling given increasing core costs such as premises and equipment.

12. The civil legal aid budget is relatively small and cuts to this will target the most poor and vulnerable in society. If the Government genuinely wants to build a fairer society these groups should not be made to bear the brunt of savings especially in a time when unemployment is high, state benefits are being reduced and affordable housing is scarce.

January 2011

Written evidence from the PCS (AJ 43)

1. The Public and Commercial Services Union (PCS) is the largest trade union in the civil service. We have over 300,000 members and represent over 60% of staff in the Ministry of Justice. Our members work in Her Majesty’s Court Service (HMCS) and the Tribunals Service undertaking all the key duties in the full range of posts necessary for the court and tribunals systems to operate. Our members provide services for all courts and Tribunals from magistrates’ courts to the appeal courts as well as the probate service. Our members are key to the successful running of courts and Tribunals in England and Wales

Closure of Courts

2. PCS shares the desire to ensure that the courts are an efficient service and fit for purpose in the 21st century and we will continue to support changes which improve the service to the public and the judiciary that our members provide. However, PCS is concerned that the decision taken in December 2010 to close 142 Courts (around a third of the courts) in England and Wales will damage the principles on which the justice system has been founded. Whether it is a county court or magistrates’ court or a family proceedings’ court, they must serve their community.

3. PCS campaigned to highlight our major concerns about the proposals to close courts during the consultation period. Fundamental to this campaign is our belief that the closure of courts would damage access to justice. Our members who deliver the service to the judiciary, lay magistracy and court users have expressed grave concern about the impact of court closures. Their responses to the consultation provided clear evidence that closures will adversely impact on court users and local access to justice.

4. For the courts now facing closure it is a shattering blow to community summary justice. We remain concerned about the consultation process and the quality of the information provided to all of the consultees. We are not satisfied that the responses by all the stakeholders to the consultation have been properly taken into account in the Government’s response.

5. More than 750 staff are affected by the court closures. The loss of the court, its court staff and court users to communities will damage local economies. The ripple effect on the profitability of small businesses will mean that the loss of these public sector jobs will also lead to loss of profits to small local businesses leading to further unemployment and potentially the degeneration of city and town centres. This domino effect will have a serious and long-term impact on local towns with the likelihood of rising unemployment, increasing social deprivation and rising crime.

6. We are concerned that the decision to close 142 courts will leave large parts of rural England and Wales, and some urban areas without a court in the future.

7. Seeking to balance efficiencies with the requirement to deal with justice locally is at the heart of the debate. We believe reducing the courts by a third and transferring the work of delivering justice to fewer larger centres well away from the communities where the offences have been committed, fundamentally undermines the requirement that the handling of local justice is done and seen to be done within the communities themselves. Public confidence is not built by dealing with cases further away from where the parties live. If justice is a distant thing, it is remote from those whose lives it affects. Citizens need to have confidence that the justice system works and is seen to work in their own communities.
OUT OF COURT DISPOSALS

8. Currently 95% of criminal issues which reach the court system are dealt with in Magistrates courts. However the Government’s green paper on sentencing reform “Breaking the Cycle” on the one hand speaks of the need to provide local access to justice but then outlines measures which we believe may undermine the delivery of justice. The green paper proposes that more use is made of out of court disposals. More than 50% of criminal offences now result in a fine or caution without getting to Court. Whilst out of court disposals have their place as a means of dealing with minor offences, if out of court disposals are increasingly used for more serious offences it may well reduce the public’s confidence in the justice system.

NEIGHBOURHOOD JUSTICE PANELS

9. PCS is concerned to see the green paper wanting to introduce Neighbourhood Justice Panels as a means of strengthening communities’ links to the delivery of local Justice. PCS considers that magistrates’ courts provide precisely that role. Paradoxically the closure of local magistrates’ courts will see those links weakened. Whilst there is mention of using Neighbourhood Justice Panels as a means of delivering restorative justice there is little evidence that this approach will have the support of local communities. We would need to have more information and more evidence from pilots to be convinced that these panels would improve local access to justice.

THE IMPACT OF LEGAL AID CHANGES ON ACCESS TO JUSTICE

10. PCS is deeply concerned at the government’s proposals to cut legal aid. This is a major detrimental change to the social fabric of the United Kingdom one which has been accepted as a key pillar of society since the Second World War. Their aim is reported to be to discourage a culture of litigation as they believe the public are too often prepared to hand over their personal problems to the state.

11. The reality of this message is that the aim is to reduce access to justice and reduce public services which help and protect some of the most vulnerable people within our society. It is not just PCS that recognises the seriousness of these aggressive changes. The following concerns have been raised.

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Richard Hawkes—chief executive officer of Scope: “The courts have traditionally been the last line of defence against the poor, unfair and unlawful decisions”.

Desmond Hudson—chief executive of Law Society: “If the government persists with these proposals it would represent a sharp break from the long-standing bipartisan consensus that effective access to justice is essential to underpin the rule of law”.

Nicholas Green—Chairman of the Bar Council: “A permanent contraction of justice cannot be justified by the ‘big society’ or by any other sort of philosophical mantra.” He also points out, “Nowhere do we see any promise to reinvest in the justice system once times improve”.

12. It is suggested that the reductions in legal aid for debt advice, social welfare (including appeals to social security tribunals), employment tribunals, clinical negligence cases and assistance in appeals against removal of benefits to asylum seekers will save millions of pounds and reduce the case numbers by hundreds of thousands. However, these groups of people are some of the most vulnerable within our society and the staff that manage this work some of our most dedicated and knowledgeable. It is vitally important that those entitled to benefits or asylum are accurately adjudged. Errors have knock-on financial costs, but also potentially tragic human costs for the people involved.

13. PCS agrees strongly with the decision to retain legal aid in cases where the state intervenes in a family and where there has been a forced marriage. These are important proceedings. Care cases include the representation of children who may have been harmed or let down by those who should be caring for them. Care cases often involve vulnerable parents. The parties to forced marriage are vulnerable and in need of protection.

14. In relation to domestic violence we agree with the decision to retain legal aid to protect the victim and to assist them in proceedings relating to property and the future of children. However, we are concerned about both lack of clarity and those cases where there has been violence which will not be covered by legal aid under the proposals. We are concerned that only where there have been proceedings for domestic violence are proceedings for ancillary relief clearly covered by legal aid under the proposals.

15. Domestic abuse involves abuse of power and some victims, whether subjected to physical violence or other forms of abuse, do not feel strong enough to use the courts. These victims will not get legal aid in order to get residence orders which may be necessary in order to get accommodation for their children or to protect them from violent or abusive partners seeking contact with, or residence of, the children.

16. Victims of violence may be brought before the court by their attacker seeking to perpetuate the latter’s control. Without the support of a lawyer they may be unable to stand their ground and not feel safe enough to express themselves. There seems to be no way that these victims can have a legally aided representation even if they have a mental illness or profound disability. Abusive individuals have ways of working through mediation superficially because they want the power of a court order to control the victim particularly where the victim is vulnerable.
Ev w112  Justice Committee: Evidence

17. Domestic violence includes wider domestic abuse including mental cruelty, non molestation proceedings may be taken in such cases. It is not clear whether if they take such proceedings victims will then be covered by legal aid for ancillary relief. It is clear that the fact a party has a criminal conviction relating to domestic abuse will enable the other party to have legal aid for ancillary relief. The state can prevent an individual taking a case to court but cannot prevent them being dragged to court by another wealthier and more powerful family member.

18. PCS is concerned that the removal of £350 million from the £914 million annual civil and family legal aid budget by 2014 will have a devastating impact as it will affect one in four of those seeking civil legal aid. The reality of hoping that parties can fend for themselves is not the mark of a caring society and neither will it provide a more efficient court service.

19. There is a real danger that the withdrawal of legal aid on the scale envisaged will increase the number of unrepresented cases being handled within the court system. We are concerned that the financial savings from cutting legal aid may result in a less efficient justice system.

20. PCS believes that many of the proposals that the Government are pursuing such as court closures, reduction in legal aid and sentencing reforms will fundamentally threaten access to justice. Investing in public services is in our view the solution to the deficit crisis. Instead of cutting jobs, we should be creating them. We should not be seeking to deliver justice on the cheap and making access to justice more remote.

January 2011

Written evidence from the Advice Services Alliance (AJ 44)

1.1 The Advice Services Alliance (ASA) welcomes the Justice Committee’s inquiry into Access to Justice. This submission aims to give the Committee an overview of the likely impact of the proposed changes on the advice sector as a whole.

1.2 We conclude that:
— the impact of the proposed legal aid cuts are made starkly clear in the impact assessment. Legal aid funding to Not for Profit (NfP) agencies as a whole will be cut by 77%.
  — The average impact on individual NfP providers will be a 92% cut in income from legal aid;
  — some agencies currently funded by legal aid will be forced to close as a result of these proposals and others will offer a much reduced service;
  — the loss of access to specialist expertise will result in a reduction in capacity in advice agencies not currently funded by legal aid;
  — for many people, there will be no realistic alternative sources of help;
  — as a result, a significant number of poor and disadvantaged people will be unable to resolve their problems;
  — in some areas of law, people will have to wait until their problems have become serious before they are able to get the help they need;
  — the cuts in legal aid will result in additional costs to other parts of the public sector, including to courts, tribunals, social services and the health service; and
  — telephone advice can not be a replacement for face to face advice.

2. About the Advice Services Alliance (ASA)

2.1 ASA is the umbrella body for independent advice networks in the UK. Full membership of ASA is open to national networks of independent advice services. A draft copy of this submission has been sent to our members for their comments. However, please note that this response does not necessarily represent any individual member’s view.

2.2 Between them, our members represent 1,743 organisations which provide advice services in England and Wales. We estimate that our members provide support to over five million people every year. In addition, the advice sector provides some 20 million pieces of information annually to members of the public—via websites and through leaflets. These services are largely funded through public sector grants and contracts, and charitable fundraising.

2.3 The voluntary advice sector provides support to the poorest and most vulnerable people eg disabled people, those facing homelessness, young people from disadvantaged backgrounds and older people. People often seek advice during times of personal, medical or financial crisis, events that can throw lives off course.

2.4 Prior to the most recent Legal Services Commission (LSC) tender, 377 voluntary advice organisations held contracts to deliver legal aid services. At the time of writing, the LSC have only recently published

102 p31 Legal Aid Reform: Cumulative Impact, Equalities Impact Assessment

103 p27, see above note 1
information about the outcome of the 2010 civil tender. We have not yet analysed this information and have therefore decided to use pre-tender figures in this submission. We do not anticipate that the current position is significantly different.

2.5 An outline of ASA’s membership illustrates the diversity of the advice sector (the figures refer to England and Wales only):

**AdviceUK**
Represents 777 advice organisations, ranging from small community organisations to large, regional or national providers of legal advice. 61 AdviceUK members had a contract with the LSC.

**Age UK**
Formerly Age Concern and Help the Aged. About 180 of their 335 members in England provide advice to older people.

**Citizens Advice**
Has 394 members in England and Wales, of which just over half (216) had a contract with the LSC.

**DIAL UK**
Is a division of SCOPE and has 89 members providing advice to disabled people. Four of their members had a contract with the LSC.

**Law Centres Federation**
Represents 57 Law Centres in England and Wales, all of whom had contracts with the LSC.

**Shelter**
Provides advice and representation in housing and other areas of law through 40 services in England. Shelter has a contract with the LSC to deliver legal aid services.

**Shelter Cymru**
Provides advice and representation in housing and other areas of law throughout Wales. Shelter Cymru also has a contract with the LSC to deliver legal aid services.

**Youth Access**
Represents 244 organisations in England and Wales which provide advice and counselling to young people.

3. **What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?**

**Impact of legal aid changes**

3.1 The impact of the proposed cuts to legal aid on the advice sector are made starkly clear in the impact assessments. Legal aid funding to NfP agencies will be cut by 77%.\(^{104}\) The average impact on NfP providers will be a 92% cut\(^{105}\) in income from legal aid.

3.2 The impact on the advice sector is severe because NfP agencies tend to specialise in those areas of social welfare law where the Government proposes to make the deepest cuts. In 2008–09, the NfP sector accounted for 46% of the spend on legal help in housing; 84% in debt; 76% in welfare benefits, and 60% in employment.

3.3 The extent of the impact will depend on how reliant agencies are on income from legal aid. Citizens Advice has published information\(^ {106}\) indicating that 15.1% of total bureau income in 2009–10 came from the LSC. Legal aid accounts for around 50% of Law Centres’ income.\(^ {107}\)

3.4 The impact of the legal aid proposals will be felt at three points:

- 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;
- the proposed changes in scope, apparently planned for October 2012 (before the end of the current LSC contract), will remove from scope welfare benefits, education, immigration, most of debt, and some housing work. This will mean that, for many NfP agencies, LSC contracts will cease to be viable at that point; and
- the proposed transfer, probably in 2013–14, of a significant proportion of casework from face-to-face advice to the telephone service will, in our view, herald the end of face-to-face local provision of legal aid in social welfare law in many areas of England and Wales.

**Impact of other public sector cuts on the advice sector**

3.5 It is not realistic to consider the impact of the proposed legal aid changes in isolation from developments elsewhere in the sector.

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104 see above note 1
105 see above note 2
106 see Introduction to the service 2010: http://www.citizensadvice.org.uk/index/aboutus/publications/introduction_citizens_advice.htm
107 Information given to us by the Law Centres Federation.
3.6 Historically, the advice sector has been funded from a number of sources. We have regarded this as a strength—an indication that the work of the advice sector was valued across government and by many charitable institutions.

3.7 This diversity of funding has enabled the sector, and individual agencies within the sector, to offer integrated services to members of the public—from basic information and support provided by a volunteer to specialist legal advice and representation, where necessary.

3.8 This diverse funding base is now under threat.

3.9 Taken together, local authorities are the largest funder of advice services. As the Committee will be aware, local authorities have been reviewing their budgets in the light of the changing public spending environment. At the time of writing, only a few local authorities have made public statements about their spending intentions for 2011–12.

3.10 However, it is already becoming clear that a number of local authorities will be making significant cuts to their funding of advice agencies. In most cases, they are under no statutory duty to fund advice services.

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

— London Councils’ funding of £684,000 p.a. to eighteen Black and Minority Ethnic organisations in the capital will end in June 2011, 18 months early;
— Somerset County Council is planning a 75% cut to its youth services;
— the Connexions services, an important source of information and support to young people, is currently being dismantled; and
— an inner-city Age Concern has been informed that its grant will be cut by 50%.

These cuts will lead to increased demand on the mainstream advice sector.

3.12 There is uncertainty about other important funding streams. On 19 January 2011, the Financial Secretary to the Treasury announced in the House of Commons that the “Financial Inclusion Fund will close at the end of March this year”. This funding supported the provision of debt advice to 77,000 people a year.

3.13 It seems clear that the advice sector is being disproportionately affected by the current financial situation. Unless action is taken, the advice sector will be significantly diminished in two to three years’ time.

Quality

3.14 We fear that the changes, including the 10% cut in fees, will exert a downward pressure on quality, as more legal aid work is passed to the lowest paid members of staff who are unlikely to have the skills and knowledge to deal with more complex cases. It will also create a greater incentive to take on only straightforward cases and more capable clients.

4. The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

4.1 We consider that the figure of 500,000 is an underestimate, as it fails to take into account the loss of telephone advice in areas of law that will be taken out of scope. In some areas of social welfare law, notably welfare benefits, education and employment, this has a significant impact on the overall picture.

4.2 Figures provided by the LSC\(^{109}\) for the year 08/09 give the following figures for the main social welfare law areas of law:

<table>
<thead>
<tr>
<th>Area</th>
<th>Figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>welfare benefits</td>
<td>137,557 (of which 22,615 provided by phone)</td>
</tr>
<tr>
<td>debt</td>
<td>132,936 (of which 28,026 provided by phone)</td>
</tr>
<tr>
<td>housing</td>
<td>139,771 (of which 26,450 provided by phone)</td>
</tr>
<tr>
<td>employment</td>
<td>28,218 (of which 12,942 provided by phone)</td>
</tr>
<tr>
<td>education</td>
<td>7,102 (of which 4,947 provided by phone)</td>
</tr>
</tbody>
</table>

4.3 The consultation suggests that the cases removed from the scope of Legal Help can be resolved elsewhere. We suggest that this is very unlikely. Our response will focus on those areas of law where the proposed scope changes will have the greatest financial impact on the advice sector. However, we have similar concerns about other areas of law, including employment and education.

\(^{108}\) This figure is based on information provided in National Audit Office report *Helping over-indebted customers*. Page 5 of the report states that 270,000 people were helped in the three and a half years until September 2009. See: http://www.nao.org.uk/publications/0910/over-indebtedness_report.aspx

Welfare benefits

4.4 Based on the LSC figures above, we estimate that nearly 140,000 welfare benefit cases will be taken out of scope of legal aid. The most recent figures available to us suggest that about half of these cases will involve appeals or reviews.\textsuperscript{110}

4.5 The Green Paper suggests that people should be able to seek advice from Job Centre Plus or the Benefits Enquiry Line—the organisations whose decisions they are challenging. The paper also suggests that other agencies will be available to provide advice, namely Age UK, CPAG, Disability Rights Alliance and Free Representation Unit.

4.6 The following quotations make it clear that this is not the case:

> Our concern is that while it is true that both Age UK nationally and our partners in local Age UKs and Age Concerns do provide some help and advice with welfare benefits it is most often not at a level comparative to that provided through legal aid. Primarily local Age UK and Age Concern organisations offer welfare benefits advice limited to improving the take up of benefits amongst those of retirement age.\textsuperscript{111}

> Unfortunately we do not have the resources to provide direct advice to people who are claiming benefits.\textsuperscript{112}

> It [MoJ] wrongly uses the role of FRU to support one of its conclusions. It points out correctly that FRU represents clients in tribunals...[however]...FRU does not provide initial advice to clients.\textsuperscript{113}

4.7 The availability of Legal Help in welfare benefits cases is often important because it enables people without means to secure the medical and other expert evidence that they need in order to pursue their case. Voluntary advice agencies are extremely unlikely to be able to pay for such evidence from their own resources.

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

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

4.9 The first two impacts are likely to increase the Tribunal Service’s workload. However, the Green Paper suggests that there will be no cost implications on the Tribunal service.\textsuperscript{115}

4.10 Finally, whilst we welcome the proposal to retain in scope debt and housing work that is aimed at preventing homelessness, it is difficult to see how this can be effective without welfare benefit expertise. Welfare benefit problems, particularly with housing benefits, are often the root cause of potential homelessness.

Debt

4.11 The removal of most debt problems from the scope of legal aid and the end of the Financial Inclusion Fund means the loss of capacity to provide specialist debt advice to over 150,000 people every year. This is at a time when there is evidence that unemployment is increasing and the demand for debt advice will increase.

4.12 The Green Paper suggests that National Debtline and Money Advice Trust (MAT) will provide an alternative source of help. National Debtline is part of MAT and we understand that MAT are making their own submission to the Committee indicating that they would not have the capacity to meet this additional demand.

4.13 There is a risk that removing non-homelessness debt cases from the scope of legal aid will force people to wait until they are facing homelessness before getting the advice they need. Leaving problems until the last minute can make them very difficult, and therefore more expensive, to resolve.

Housing

4.14 In relation to housing, the Green Paper suggests that Shelter would provide alternative routes to resolution.

4.15 We are aware that our member, Shelter, is submitting evidence to the Committee which will deal with this assertion.

\textsuperscript{110} Case lengths, case costs and fixed fees, ASA, 2007

\textsuperscript{111} Extract from e-mail from Age UK to the Ministry of Justice, dated 29th November 2010

\textsuperscript{112} Extract from statement on CPAG website: http://www.cpag.org.uk/

\textsuperscript{113} Extract from statement on Disability Alliance website:
http://www.disabilityalliance.org/legalaidref.htm

\textsuperscript{114} Extract from statement on Free Representation Unit website:
http://www.thefru.net/news/legal-aid-changes

\textsuperscript{115} page 11, Legal Aid Reform: Scope changes
4.16 We do not intend to repeat the expert evidence that Shelter will be providing in relation to housing law other than to emphasise again that the proposals will make it more difficult for people to obtain early advice.

Immigration

4.17 According to the impact assessment, 43,700 immigration cases will be removed from scope. The Green Paper suggests that following this, people will either be able to get help from other sources or will be able to represent themselves.

4.18 We have already set out our fears about the vulnerability of the voluntary sector to other funding cuts. This will severely restrict agencies’ ability to continue to deliver existing services, let alone take on high volumes of new clients. Moreover, it is a criminal offence for an organisation to give advice on immigration matters unless it is regulated by the Office of the Immigration Services Commissioner (OISC). Becoming regulated is a time-consuming process that would require the development of expertise or recruitment of new staff. This will be far beyond the reach of most voluntary sector organisations.

4.19 We do not agree that people will be able to represent themselves effectively. Immigration cases are frequently legally complex and involve in-depth factual investigation and collection of evidence such as witness statements and medical reports. They may involve issues of crucial importance to those involved such as the separation of children from their parents. Those involved are unlikely to speak good English and they may have suffered trauma. It is neither reasonable nor in the interests of justice to expect such individuals to navigate their way through complex UKBA and Tribunal procedures and get to grips with the complicated immigration and human rights law involved.

4.20 Furthermore, given the gravity of the issues at stake in immigration cases people are likely to try to represent themselves. This will mean that tribunal judges will find themselves having to deal with more unrepresented appellants. We anticipate that this will have the unwanted and costly effects of taking up more tribunal time and generating more appeals and applications to the High Court.

4.21 We are aware that Immigration Law Practitioners’ Association (ILPA) has set out these issues in considerable detail and with illustrative case studies in its interim response to the Green Paper and its submission to this Committee. We urge the Committee to pay close attention to ILPA’s comments.

Summary

4.22 We conclude that, for many people, there will be no realistic alternative sources of legal advice. Research published in 2006 found that adverse physical and mental health consequences follow a third of civil justice problems and that 27% of civil justice problems led to stress-related illness. Nearly a quarter of the people affected by stress sought medical treatment, with an average of 9 visits each to a general practitioner.

4.23 There is therefore a risk that more people with unresolved problems will suffer from stress and other ill health and will seek help from their General Practitioner and other health professionals.

5. What action could the Government be taking on legal aid that is not included in the proposals?

5.1 We do not intend to answer this question.

6. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

6.1 We do not intend to answer this question.

7. What are the implications of the Government’s proposals?

7.1 The focus of the Green Paper is on what the Government wants to take away. There is very little clarity about what the Government actually wants to have in place, and how the Government will secure the desired outcome.

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

7.2 There is serious doubt about whether there will be sufficient viable providers left to provide the face-to-face advice that the government appears to want for emergencies and for those who need face-to-face advice. Further, it is unclear which organisations with sufficient expertise will be left to deliver advice at county court housing duty schemes.

7.3 In order to illustrate this point, we have looked at the potential impact of the proposed reforms on one procurement area: Northumberland.

7.4 In 2010, the LSC sought to procure the following face-to-face cases in Northumberland: 980 debt, 570 housing and 680 welfare benefits. After the scope changes (based on the MoJ impact assessment), this would leave approximately 245 debt and 364 housing cases.

7.5 However, the impact assessments suggests that face-to-face providers will see an overall reduction of 76% in their legal help income as a result of the shift to telephone advice. We estimate that would leave 61 debt and 91 housing face-to-face cases in Northumberland—a contract with an approximate total value of £27,000.

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

Telephone advice

7.7 Finally, we would briefly highlight our concern about the proposal that, in future, the “vast majority” of clients will receive telephone advice rather than face-to-face advice.

7.8 We will be responding in detail to the Ministry of Justice on this proposal. However, the impact assessment itself outlines many of our concerns: “Delivering a greater proportion of advice by telephone may cause access problems for some clients, for example due to literacy issues, language barriers, problems acting on advice given, or an inability to pick up on non-verbal clues. In addition, telephone providers are likely to have diminished local knowledge. The requirement to access services through the CLS 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.”

7.9 In our view, this proposal itself requires serious investigation.

January 2011

Written evidence from the Junior Lawyers Division (AJ 45)

Government’s Green Papers on Legal Aid and The Implementation of the Jackson Review on Civil Litigation Funding and Costs

What will happen to the next generation of legal aid lawyers?
How cuts to legal aid will affect entry to the profession and hinder social mobility

Proposed cuts to legal aid look set to have a devastating effect on the legal aid sector. They will cut eligibility and remove whole areas from legal aid funding. The Government’s green paper itself admits that cuts will have a disproportionate affect on vulnerable members of society such as those with disabilities [1]. The Junior Lawyers Division is extremely concerned about the impact of these cuts on the recipients of legal aid and the ways it will undermine the legal aid sector and force closures of excellent and experienced legal aid firms. In particular we are very concerned how it will affect our members.

The Junior Lawyers Division represents 72,000 members including law students, trainee solicitors and solicitors up to five years qualified. It is made up of junior lawyers from all areas of practice. We support our colleagues in the legal aid sector and previously criticised the government for its decision to scrap LSC training contracts [2], which jeopardised hundreds [3] of potential new jobs for LPC graduates, who are already struggling to overcome so many barriers within the profession. Beth Forrester of the Junior Lawyers Division commented at the time: “The JLD is…very disappointed to see that those junior lawyers in particular, who are looking to progress in an area of law which is of maximum benefit to the community, are going to be hardest hit.”

The Junior Lawyers Division is concerned that the proposed cuts will severely affect entry to the profession, create job uncertainty and job losses and hinder social mobility. The future now looks even bleaker for those wishing to pursue a career in legal aid as well as those wanting to promote and encourage students from diverse backgrounds into the profession. In addition, trainees and newly qualified solicitors will no doubt be feeling insecure and worried about their futures.

Students wishing to pursue a legal career face the rising cost of University education followed by the already hefty burden of fees for legal qualifications such as the Legal Practice Course [4] and Bar Professional Training Course [5]. Graduates, often burdened by debt, then face the challenge of obtaining a training contract. Training contracts in all areas of law are hard to come by. In the legal aid sector one training contract can attract 300–400 applicants and recruitment of paralegals instead of trainees and newly qualified solicitors appears to be on the increase.

A recent Times Survey carried out by the College of Law found that over a third (35% in 2010) of students have more than £20,000 study debt, a rise on last year’s figure (27% in 2009). Of the nearly 2,000 who responded to the survey, more than 28% said that they would like to pursue a career in Legal Aid. However, 65% of these said that they were unlikely to take this further because of potential Legal Aid cuts. 80% of students feel that legal aid/publicly funded lawyers are underpaid. Nearly three quarters of the students believe that the Legal Aid budget should be ring-fenced to uphold access to justice for all.
Whilst it is a challenge to pursue a career in legal aid now, those wishing to do so in the future will not only face the above, but could be looking at a legal aid sector that will be struggling to survive, barely able to keep its head above water, let alone be able to train the next generation of aspiring legal aid lawyers.

Faced with such levels of debt those from low income families find it far harder to forge a career in legal aid and social mobility in the sector is poor. They cannot afford to become legal aid lawyers and the legal aid profession is becoming less and less representative of the people it serves; those without means. The key reasons for this was highlighted by Young Legal Aid Lawyers in their report of February 2010 “Legal aid lawyers: the lost generation in the national crusade on social mobility” and includes the lack of subsidised training opportunities, low salaries, the requirement from candidates of copious work experience in legal aid and often only obtained on an unpaid basis. Given the fears cited above, it looks an uphill struggle to convince those from deprived backgrounds to consider a career in legal aid.

Is there any hope for the future? Practitioners in their responses to the Government’s green paper are likely to offer alternatives to the proposed cuts, such as at the “polluter pays” principle, where for example, a department who wants to pass lots of laws or change procedures should meet the associated costs for the legal aid budget and the court system. If it passes laws in haste, or implements new procedures without thinking them through, it should meet the costs generated for legal aid and for the courts by those bad laws. If its poor decision-making and delay leads to challenges, it should meet the costs to the legal aid system and to the courts of those challenges. There are clearly some positive and alternative ideas to the proposed cuts that the Government needs to consider.

The legal aid system needs to be sustainable and we need to ensure that the profession has passionate and diverse young lawyers entering the sector. The scrapping of the LSC Training Contract Grant Scheme is a significant loss to the ability to train graduates in legal aid. Even Lord Bach, former legal aid minister, condemned the move, saying:

“This is a mean decision which will lead to some skilled and committed young lawyers not choosing the legal aid path, but looking to other parts of the law. Everyone knows that there may have to be some savings in the total legal aid budget, but to cancel this superb scheme which has worked so well for the last eight years in order to save £2.6 million, looks petty and incredibly short-sighted.”

Either the grant scheme should be brought back or an alternative found. There are other moves to support the training of graduates and the College of Law has recruited its first trainee, giving one would-be legal aid lawyer the chance to train in its legal advice unit for their first year and spend their second year at law firm Hodge Jones & Allen.

There is also commitment to encourage diversity in the legal sector by organisations such as Pathways to Law. These ideas need to extend to the legal aid sector. In their report mentioned above YLAL sets out 13 recommendations to address social mobility issues including: Educating and Informing through curriculums, work experience and mentoring, better careers advice, encouraging universities to offer law degrees with a sandwich year working in legal practice, reviewing the routes to qualification and practical help such as sponsored training contracts.

Whilst there are positive moves to support graduates who want to pursue a career in legal aid and efforts to improve social mobility in the sector, this will be undermined if the cuts envisaged are implemented.

January 2011

Written evidence from the Immigration Law Practitioners’ Association

1. The Immigration Law Practitioners’ Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-governmental organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, and other, advisory groups. ILPA is a member of the Legal Services Commission Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission and Immigration Representative Bodies group that sits under it. ILPA has attended Ministry of Justice meetings on the subject of legal aid and has also provided evidence to the Justice Committee and its predecessors on the question of legal aid as it affects immigration and asylum law.

2. This is ILPA's second submission to this enquiry, provided in response to the Committee’s call for evidence of 22 December 2010. This response is organised under the questions posed by the Committee.

3. This evidence should be read with the following annexes:

Annexe A ILPA initial response to the Ministry of Justice consultation paper with an annexe of case studies (published).
Annexe B ILPA briefing on the legal aid cuts (widely circulated).
Annexe C Initial evidence submitted to this enquiry, in the form of ILPA’s briefing for the Committee’s evidence session with the Minister on 15 December.

Annexe D a table of remuneration rates in immigration and asylum work prepared in the summer of 2010 for the CMX litigation that arose out of the closure of Refugee and Migrant Justice (submitted in evidence to the court).

Annexe E Additional case studies (widely circulated).

4. In the submission that follows, ILPA answers the Committee’s questions thus:

— The proposed changes would reduce the numbers of practitioners of quality offering immigration and asylum legal aid; the money spent on legal aid would purchase less access to justice for individuals.

— Issues raised in many immigration legal aid cases will not be resolved and injustice and breaches of the human rights of migrants and refugees and of their British/settled family members will result. ILPA highlights in particular cases that raise the question of the rights to private and family life of migrants and their family members; of persons facing removal or deportation; of persons in detention; of victims of domestic violence; of refugees seeking family reunion, and of the homeless and the destitute.

— Where justice is secured this will be through the more costly routes of public law challenges, challenges to refusals of exceptional funding will also be the source of significant costs.

— A “polluter pays” approach that looked to tackling cost drivers at source—in the UK Border Agency—would produce savings across the board, in cases funded by legal aid, those privately funded and those not funded at all.

— The evidence and knowledge base on which the Government’s proposals are based is inadequate, and perverse outcomes have not been sufficiently identified.

— The proposed telephone gateway is ill-suited to immigration and asylum cases and risks being the source of significant additional costs.

— Neither the Government’s proposals on legal aid, nor those on civil costs give sufficient priority to achieving equality of arms, or recognise the extent to which poverty, even absent other exacerbating factors, creates such inequality.

— Implementation of the proposals would result in injustice; violations of human rights; inequality of arms; reduced scrutiny of Government departments and with it reduced incentives for quality and efficiency; increased whole system costs and less value for the money that is spent; unsustainable pressures on other services, including MPs’ casework, and increased risks of exploitation of migrants and refugees denied legal aid.

SUBMISSION

What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

1. Based on experience to date ILPA anticipates:

— a continuing reduction in the numbers of quality firms practising in legal aid asylum and (if it remain in scope) immigration law and in the proportion of legal aid work that these firms do;

— that cuts in other areas of legal aid and to other funding streams will continue to lead to the closure of law and advice centres which do immigration and asylum alongside their other work;

— that the number of areas of the country left without asylum and (if it remain in scope) immigration legal aid advice will continue to rise;

— that the proposed changes will exacerbate the problems of perverse incentives built into funding structures that mean that those endeavouring to provide a high quality service to the full range of clients are under the greatest pressure; and

— that uncertainty and unpredictability as to the proposals that will be implemented and their likely effects, and the consequent inability to plan or make contingency plans will hasten departures from the field of legal aid immigration and asylum work.

2. Lawyers in private practice are likely to earn more if they switch to private rather than legal aid work. ILPA members’ concern is the effect on clients who will be left without access to representation and thus without justice. See the case studies in Annexes A and E which illustrate the role free legal representation played in achieving justice.

3. The years particularly since 2004 have seen many widely respected firms leave the field of legal aid immigration work. Winstanley Burgess closed its doors in 2004, while firms such as Wesley Gryk solicitors and Bates Wells and Braithwaite left legal aid work. When Wilkin Chapman closed its legal aid immigration and asylum work in Hull this left the area without legal aid advice in immigration and asylum. Dexter Montague closed its immigration and asylum legal aid in Reading. Both firms continue to do private work. In June 2010 Refugee and Migrant Justice, which, at the time of its closure had 13 offices in England, some 336 staff and a
5. Immigration and asylum work is financially precarious. There is no cushion to protect firms and organisations against the effects of uncertainty or to allow for contingency planning. Unlike some other areas of civil work such as housing or family very few immigration or asylum cases proceed onto the more highly remunerated public funding certificates. The consultation proposes to cut payment for legal aid by 10%. We append at Annexe D a table of the remuneration rates as of June 2010, which are further discussed in Annexe C.

6. The Ministry of Justice intends that asylum work remain within scope, recognising: “...the immediacy and severity of the risk to the individual...they could suffer persecution, torture or death...applicants may recently have fled persecution or torture. In these circumstances it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves without legal assistance”.

7. The notion that it suffices to leave asylum work within scope to protect it should be regarded with scepticism. ILPA has proposed to the Ministry of Justice that it examine the profits that firms are making on their legal aid work. For legal aid only firms this could be done by examining accounts filed at Companies House, for firms that do a mixture of immigration and private work it will be necessary to do further examination. If profits on legal aid work are less than 10%, and ILPA anticipates that this will be the finding, then the cuts would mean that they were not viable, even before the effect of changes in scope and the workload have been taken into account. The Legal Services Commission had envisaged that fixed fees would operate on a “swings and roundabouts” basis. Fixed fees already create an incentive for providers to do either those cases that will qualify for exceptional funding, or to do more simple cases. There are no swings (or no roundabouts) in asylum work; there are precious few in immigration work done well. We have seen no projections of the way in which removing immigration work will affect the viability of firms doing asylum and immigration.

8. Payment regimes need urgently to be addressed. Under the new contract, disbursements can be billed every six months (often months after payment has become due as a matter of professional ethics and then only on new cases, not the thousands of ongoing cases providers already have open) but profit costs cannot be billed until a case reaches a particular stage; the timing of which is in the control not of the Legal Service Commission or of representatives, but of the UK Border Agency. This already causes tremendous problems, not least for private providers who pay partnership tax on money they have never seen, and for the Legal Services Commission which does not know, beyond the broadest brush calculations, what it owes. Asylum cases generally take longer than immigration cases (and both take longer than cases in other categories of civil law) and the problems will be exacerbated if only asylum remains in scope. The Government’s intention to preserve asylum cases within scope will be thwarted if there are not lawyers of high quality willing and able to continue doing such work.

9. The latest tender, because of the way it was structured, has seen reputable firms fail to secure a contract and many more given a pro rata allocation of the number of case starts for which they bid.

10. The perception that legal aid lawyers are well-paid is erroneous. One ILPA member, managing partner of a legal aid firm outside London, who has some 20 years experience in this field, told The Guardian newspaper that he earns £42,000 a year. Another member, in a very similar position with similar experience, takes home £2,403 per month. A junior barrister, practising in immigration and asylum, made a profit of £16,118 last year after meeting expenses. We have set out remuneration rates in asylum and immigration, and contrasted them with Her Majesty’s Court Service Guideline Rates, in Annexe C; nominal hourly rates under fixed fees (£8.50) are c. 35% of the guideline rates for a solicitor with less than four years post qualification experience (£165) and can fall as low as 12% of those rates (£19.50). Meanwhile, given the time taken by preparation for advocacy and at the hearings themselves, junior barristers are similarly poorly remunerated.
and as a consequence the junior bar, which is essential to the development of the higher court advocates of the future, is at risk.

11. We have highlighted (see Annexes A and C) that the current funding system creates perverse incentives that encourage firms to "cherry-pick"; to seek to specialise either in cases of exceptional complexity that will take three times the fixed fee (which are then paid at hourly rates), or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee.\textsuperscript{123} Fixed fees, in and of themselves, provide perverse incentives to do less work on a case and thus have the potential to drive down quality.

12. ILPA's concern is that as income in the sector is diminished further still, provision will continue to decline and a critical point will be reached at which the number of providers who remain in the sector simply cannot meet even the level of demand for their services that the Legal Services Commission is prepared to fund. ILPA already has significant concerns from the experience of our members that there is unmet need. There is no guarantee that a future loss or losses equivalent to that of Refugee and Migrant Justice will be absorbed by the sector.

13. In the Ministry of Justice’s Equalities Impact Assessment it is estimated that the proposal to expand the current specialist Community Legal Advice telephone helpline and to make this the single access point for legal aid advice and referral to other practitioners will reduce income for private practices by 75% and for not for profit organisations by 85%. The effect of this on firms and organisations could mean the closure of many. There is no estimate of the costs of expanding the current telephone helpline to cover all initial requests for advice and help.

The Government predicts that there will be 500,00 (sic.) fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

14. Immigration cases cannot be resolved through mediation. They involve either applications to Government departments or actions instigated by Government departments. If an application is refused or an action taken, the UK Border Agency is likely to stand by that decision unless and until it is held to be unlawful (and sometimes, perusal of the caselaw illustrates, even then).

15. ILPA's primary concern is that the issues these cases involve will not be resolved and that people will be removed or deported from the UK in breach of their and their settled/British family members’ human rights; that victims of domestic violence will remain in abusive relationships, that family members of refugees will remain in the country of origin in danger, that homelessness and destitution will go unrelieved, including in circumstances that breach Article 3 of the European convention on Human Rights, and that the UK will be in breach of its obligations under human rights law, European free movement law and international instruments, including the Council of Europe Convention on Action Against Trafficking in Human Beings.

16. ILPA is concerned that many meritorious cases, including cases where the client is under constraint or duress (for example domestic violence and trafficking cases) will not get beyond the “telephone gateway”, within the timescales necessary, or at all, in asylum (and, if they remain in scope immigration and asylum support) cases and that existing referral systems, from for example non-Governmental organisations, that function well, will be lost.

17. Effective triage in asylum and immigration matters, whether face to face or by telephone requires high levels of skills, legal knowledge and experience, cultural awareness and sensitivity and being alert to linguistic difficulties. There is considerable potential for misunderstanding even when a client does speak English, although not as a first language and it would be difficult to identify the true nature of the problem with which a client presents without sight of documents whose import the client may not be able to comprehend. It is also necessary to move quickly given the immediacy of need and the timescales in immigration, asylum and support cases. It appears to ILPA that very significant additional costs could be incurred in the passage of cases, where they succeed in passing, through the gateway.

18. The proposal to expand the telephone advice service lacks details and the Committee should seek further information about the proposed funding of such a service and the quality standards in the specifications.

19. The Ministry of Justice has confirmed to ILPA it intends to cut funding for all immigration cases, including cases won by immigrants and appealed by the Home Office to the Upper Tribunal and higher courts, while observing that, as now, it is possible for any case to apply for funding on an exceptional basis. The Ministry has confirmed to ILPA that the cases cut would include refugee family reunion cases (the Home Office having confirmed in a recent meeting that 66% of appeals against decisions in refugee family reunion cases are allowed) and also immigration cases involving domestic violence, despite the more general exception for domestic violence cases in the consultation. The Chief Inspector of the UK Border Agency commented in his 2010 report on the entry clearance operation in Abu Dhabi and Islamabad:

\textsuperscript{123} Review of quality issues in legal advice: measuring and costing asylum work (June 2010) produced by the Information Centre for Asylum Seekers and Refugees for Refugee and Migrant Justice, the Immigration Advisory Service and Asylum Aid and the sources cited.
“It also concerned me that senior UK Border Agency managers were dismissive of determinations made by immigration judges to allow appeals. This is far too complacent, and the Agency should discover why, at the time of my inspection, it was losing half of its appeals.”¹²⁴

20. The consultation paper is either ill-informed or disingenuous in stating that in cases involving the right to private and family life under Article 8 of the European Convention on Human Rights,¹²⁵ people will be able to represent themselves in tribunals designed to be easy to navigate. As set out in Annexes A, C and E the complexity of the legal and evidential matters has resulted in many of these cases going all the way to the Supreme Court.

21. Our system is adversarial and as such there is only so much that an immigration judge can properly do to assist an unrepresented appellant without compromising judicial independence especially when, as is frequently the case, the Home Office does not send a representative to the hearing. Overstepping the mark will result in onward appeals, and decrease respect for the immigration judiciary. An inquisitorial system is enormously expensive. An immigration judge, without witness statements before him/her, would need to take a large number of family member witnesses through oral evidence in chief, with no witness statements to save time. In addition, an immigration judge is dependent upon the evidence put before him/her: if DNA evidence is required to prove a family relationship then the judge can at best adjourn for such evidence to be obtained, which will be of no avail if the appellant is unable to afford to obtain this evidence or to ensure that it is put before the Court.

22. Cases may involve a child or young person who claimed asylum, which was refused, was given leave to 17½ because no arrangements can be made for their safety and welfare on return, and now wishes to apply before the Court.

23. The consultation paper states of immigration detention:

“...the issue at stake—the appellant’s liberty—is extremely important. We do not consider that there are sufficient alternative forms of advice or assistance, or alternative sources of funding, in relation to these issues to justify the removal of legal aid. Nor do we consider that these cases are ones in which the individual could be expected to resolve the issue themselves.”¹²⁶

But in many cases the challenge to the detention will depend on the progress made with the substantive case, for example if removal is not imminent because the person has instigated a challenge to his/her removal. People deprived of their liberty and without funds are in no position to progress their substantive case unaided. The professional ethical dilemmas for a representative who identifies the need to progress the substantive case to make the case for bail are manifest.

24. As to those who are able to instruct legal representatives, the Consultation paper proposes:

“...a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights)”¹²⁷

25. In family cases, there is also the prospect that family members will bring public law challenges to the breaches of their own human rights, because the family member facing removal/deportation cannot do so in the Tribunal.

26. A reduction in the number of immigration appeals is one possibility, but another is a fairly static number of immigration appeals accompanied by a significant rise in the number of unrepresented appellants (litigants in person) before the Tribunal and indeed unrepresented claimants before the Administrative Court. In a removal case, a person who cannot afford representation or the fee to lodge an appeal might nevertheless at the last minute seek the intervention of the High Court to prevent his or her removal. Creating disincentives—such as lack of free representation and having to pay appeal fees—for individuals subject to immigration control to follow the appropriate avenues of challenge at the right time will in ILPA’s view inevitably create costs elsewhere in the system, not least of which the Administrative Court. See Annex C for ILPA’s comments on the effects: be they injustices or costs of having unrepresented appellants before the Immigration and

¹²⁴ Chief Inspector UK Border Agency An inspection of entry clearance in Abu Dhabi and Islamabad, January–May 2010, published 4 November 2010. The extract is from the foreword.
¹²⁵ Paragraph 4.203 of the Ministry of Justice Consultation paper.
¹²⁶ Paragraph 4.83
¹²⁷ Consultation paper question 4 and passim.
Asylum chambers of the Tribunals. We urge the Committee to call evidence from both the immigration judges of the First Tier and Upper Tier Tribunal, and also representatives of the Asylum Support Tribunal, a jurisdiction in which there is currently legal aid for preparation of cases but not for representation at appeal hearings.

27. Legal aid is only available to those who meet the means and merits tests for representation. It is suggested in the consultation paper that some immigration cases involve matters of “a free and personal choice.” This is true, but such applicants generally do not satisfy the means test for legal aid if they have the funds required to prove they can maintain and accommodate themselves as required by the relevant paragraphs of the immigration rules. Some cases have no or low prospects of success. Such cases do not satisfy the merits test for legal aid (the test for controlled legal representation at appeal is that prospects of success are 50% or more). The stated rationale for cutting legal aid in immigration is based on a case profile of cases that legal aid does not currently fund.

What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

28. ILPA has repeatedly advocated a “polluter pays” principle, as set out in Annexes A to C. The volume and speed, indeed haste, of changes to law and processes in immigration and asylum, along with the implementation of laws and processes whose legality can be identified as dubious from the outset, combines with the gravity of the issues at stake to produce a substantive amount of litigation. It is ILPA members’ experience that it is often necessary to resort to Judicial Review or the threat of Judicial Review to obtain a legally coherent decision from the Agency, sometimes to obtain any response at all after substantive delays. The quality of the UK Border Agency’s decision making and its conduct of litigation drive up costs for the legal aid budget, and indeed for the courts. These costs affect cases remaining within the scope of legal aid, and those privately funded, as well as those in areas it is proposed to cut. See Annexes A to C and E for examples.

29. There are savings to be made to the legal aid budget, but they are to be made by changing the conduct of the UK Border Agency. Absent the scrutiny that legal aid cases provide, that conduct is likely to deteriorate.

30. In advocating for a “polluter pays” principle, ILPA is not simply advocating that costs be moved around. The aspiration must be that if the UK Border Agency bears the costs of its actions, it will endeavour to make improvements be it in deciding whether it is appropriate to bring in new laws or procedures, and in the quality and legality of those introduced; in quality or in the way it conducts cases. The principle forms part of a notion of tackling problems and cost drivers at source that should be part of any “comprehensive” spending review.

31. ILPA’s experience of the consultation to date suggests that the Ministry of Justice does not have a detailed knowledge of immigration and asylum, of the legal aid system, or of the sector. What has been learned in past consultations and enquiries, including those carried out by the Justice Committee and its predecessors, is not sufficiently understood. The Ministry’s evidence base for its proposals and impact assessments is not adequate.

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

32. The proposals to implement the Jackson report appear to ILPA to give greater prominence to the proposals designed to protect defendants than to those designed, and against a very different legal aid background, to protect claimants and appellants. Neither the Government consultation paper on legal aid, nor on civil costs, gives sufficient prominence to ensuring equality of arms, nor significant recognition to the extent to which poverty, absent other exacerbating factors, in and of itself creates such inequality. ILPA will be responding to the consultation on these proposals and will forward a copy of its response to the Committee.

What are the implications of the Government’s proposals?

33. See Annexes A to C and E (Not printed). We highlight the following:

   — **Injustice and violations of human rights.** In immigration cases this will, as described above and in the Annexes, result in grave violations of human rights.

   — **Inequality of arms.** Legal aid is an essential safeguard against inequality of arms and also serves to maintain scrutiny of Government departments. Removing legal aid removes scrutiny and with it incentives for departments who escape challenge to pass better laws and make better quality decisions. This is about justice, but it is also about money—scrutiny is one way to try to ensure that departments spend their money doing what they should and do not waste it.
— Increased whole system costs, resulting from the inefficiencies arising from lack of scrutiny described above and also costs in the Courts and Tribunals. Some costs will arise from unrepresented appellants, others from cases being litigated in the High Court rather than before the Tribunal, others from litigation over legal aid funding refusals in areas where fundamental rights are at stake. Ministers in the Ministry of Justice have said that all Government departments must make cuts, but the problem is that this is happening in silos, no department is looking at savings it can make to another department’s budget. There may also, as the Ministry of Justice has already identified, be a displacement of immigration cases onto asylum cases, where people who would be at risk on return but could resolve their difficulties through an immigration route, see no choice but to put forward their claim for international protection.

— Less value for the money that is spent. Incentives for practitioners committed to work of high quality to remain in legal aid, or continue to do a substantial amount of work in legal aid, will be reduced. The sums invested in legal aid will purchase less, pound for pound, than before. Unrepresented appellants will take the place of representatives able to identify the issues on which a case turns and present them to the courts. Litigation will be displaced onto refusals of funding, or public law challenges in the High Court where matters would otherwise have been resolved before Tribunals. Matters that have been inadequately addressed in one forum will be addressed in other fora where they arise (for example immigration matters in family or criminal cases) without the groundwork having been done.

— Unsustainable pressure on other services. It is a crime to give immigration advice in the course of a business whether or not for profit unless the advisor is a solicitor, barrister, or registered with the Office of the Immigration Services Commissioner. So, deny legal aid and only those voluntary organisations registered with the Office of the Immigration Services Commissioner (OISC) will be able to help. Many people will go to MPs, as MPs and their caseworkers are not required to register with the OISC.

— Exploitation of those denied legal aid. There is concern that people who simply cannot manage without representation will put themselves at risk in seeking to raise money to pay for representation and may face exploitation, including by those who pretend that they are qualified to give legal advice to make a profit. The best protection against bad legal advice is good legal advice, for those who cannot pay that means good legal advice funded by legal aid.

January 2011

Written evidence from Ms H Williams, Ty Arian Ltd (Solicitors) (AJ 47)

My name is Ms Helen Williams. For approximately 18 years I have specialised in providing legal advice and representation in Welfare Benefits Law and I am currently the Managing Director of a solicitors practice, based in Swansea in South Wales called Ty Arian. I have also been a Peer Reviewer for the Legal Services Commission and have undertaken quality assessments, by reviewing other solicitors and advisers client casework.

Ty Arian commenced business in 2009. As a solicitors firm we believe that we are unusual as we specialise in and our sole focus is social welfare law. The six categories of law in which we specialise are:

Welfare Benefits;
Debt;
Housing;
Employment;
Community Care; and
Immigration.

Ty Arian’s vision is that everyone should be entitled to receive free high quality social welfare law advice and training regardless of who they are, how much money they have or where they live.

The founder members of Ty Arian have more than 60 years experience between them of providing legal advice and representation in Welfare Benefits, Housing and Debt Law. Prior to starting Ty Arian we have delivered Social Welfare Law services for years, assisting some of the poorest, most destitute and vulnerable people in our society.

Each of us has delivered legal advice via a number of different methods of delivery which have included the following:

— Specialist telephone advice services to members of the public via CLA (Community Legal Advice) and prior to that CLS Direct as it was formerly known.
— Face to Face advice to members of the public via meetings with clients at offices.
— Face to face advice to clients at outreach centres—where we have regularly met clients to assist them at local community centres, community education centres, church halls, charitable groups etc.
— The provision of advice in response to email enquiries.
— The provision of advice via the Specialist Support Service. This service provided second tier support to other solicitors and advisers in the Social Welfare Law categories in order to ensure other solicitors and advisers who were less experienced provided up to date, high quality legal advice services to their clients.
— Financial literacy awareness programmes in schools.
— Tribunal representation.
— Advice via charitable organisations.
— Expert Opinions & Reports eg within court proceedings.

Ty Arian now has more than 50 members of staff who specialise in the six categories of law listed above. We are proud to have a number of experts who are extremely knowledgeable in their own area of law and are able to provide specialist high quality legal advice and representation.

Ty Arian as an organisation prides itself on the provision of high quality legal advice services to our clients. As a firm we are passionate about our work and always want to do the best for our clients.

We were therefore appalled to discover that the coalition government are proposing savage civil legal aid cuts to the poorest and most vulnerable people in our society.

1. What impact will the proposed changes have on the number & quality of practitioners, in all areas of law, who offer services funded by legal aid?

I believe that many solicitors and advisers will adapt their practices to continue in business. They will move into other areas of law. They will need to stay viable in order to keep the business open and their staff paid. Businesses will therefore move away from non-publicly funded areas of work and will concentrate their skills on publicly-funded (within scope) work and other funded areas of work.

Specialist knowledge in certain areas of law which has taken years to build and the experts within those fields will disappear. Quality will drop—as there will no longer be contracted suppliers who are currently subject to strict auditing and quality assurance processes.

But the key issue is that the poor and vulnerable will no longer have access to justice. They will no longer be able to have free legal advice in some of the categories of law which affect their housing, their income and hence their health, safety and well being. They will either not be able to enforce their rights (eg as a result of incapability) or will be alone in endeavouring to enforce their rights as they will not be able to afford to pay for advice & representation themselves. That cannot be right, just or fair.

The most vulnerable and poorest clients will no longer be able to access high quality legal advice as they will not be able to pay for it.

What will then happen? Let’s take one example:

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 eg to crime as that may be the only way they can secure an income for their family. The divide between rich and poor will get wider which will build resentment, bitterness and anger in our communities. Violent outbursts will start to occur.

Under the proposed civil legal aid cuts all publicly funded Specialist legal advice services in Welfare Benefits and Employment law will disappear. Clients who need help with these issues will have to seek pro bono advice from inexperienced not quality assured advisers and the advice they receive if they receive any at all is likely to be sub-standard. Medical reports will no longer be funded as part of the Legal Help Scheme for Welfare Benefit tribunal proceedings and it will therefore be harder for disabled people to challenge Department of Work & Pensions, Jobcentre Plus and local authority decisions.

Whilst people will still have a right to appeal, it will be a right which they cannot enforce without help so the reality will be a “right without teeth” as they will not be able to access free legal advice or case preparation from a specialist.

The number of firms delivering publicly funded work continues to reduce. I understand the business case that it makes sense to contract with a smaller number of larger providers. I therefore understand that a reduction in supply has been actively encouraged in recent years. However, eg in our city of Swansea we believe that there are now only two or three providers who deliver publicly funded legal advice in the three Social Welfare Law categories of Welfare Benefits, Housing and Debt (we are currently awaiting publication of the final results following the outcome of the recent contracting tender process and final award notifications). This limits client choice. There are also now risks of advice deserts in areas where face to face advice contracts have not been awarded or if some of the businesses awarded contracts
continue to suffer financial hardship and close they will cease advice service provision. As there are already few specialist Social Welfare Law providers remaining in each area, should one provider close there are already risks to our clients’ access to justice. The specialist telephone services eg Community Legal Advice may be able to assist a proportion of those clients but clients eg with a number of mental health difficulties may never be capable of having their case conducted via a telephone service alone. A specialist telephone advice service should co-exist alongside face to face advice service provision.

2. The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

I don’t know the basis upon which this prediction has been made but, I believe that there will be more cases where litigants are acting in person and struggling with the justice system to resolve their issues, misunderstanding the system and the strength or weaknesses in their cases, frustrating the judicial process both for the decision makers and their opponents and thereby causing further delay and hence, increased public expenditure.

3. What action could the Government be taking on Legal Aid that is not included in the proposals (e.g. on very high cost cases)

Any category of law which affects the family home or the family’s income which as a result affects the family’s well being, health and safety should be protected as essential categories within the scope of public funding to give the poorest and most vulnerable access to justice.

4. What are the implications of the Government’s proposals?

What has prompted my written response is my fear that if the proposed savage civil legal aid cuts are implemented, clients will not be able to access legal advice and enforce their rights in certain categories of law. These advice services will then disappear and clients who are currently unaware of the proposed changes will no longer have a means to enforce their rights. For example—They will not be able to access legal advice services paid for by legal aid in Welfare Benefits and Employment Law (which are both proposed to be removed from the scope of publicly-funded work) altogether.

To remove all Welfare Benefit cases from the civil legal aid system is a national disgrace. It has a disregard for all those disabled appellant’s who have won their tribunal hearings with legal aid assistance over the years against large public sector organisations (DWP, JC+, local authorities etc) (eg people with physical and/or mental health disabilities). It is not correct to refer to all the “feckless” poor. There are numerous clients who as a result of their physical disabilities, or their mental health problems or illiteracy or language difficulties are unfortunately not capable of challenging a large public sector organisation’s decision on their own.

It has been suggested that a client (post the legal aid cuts) would be able to request advice from either the Department for Work & Pensions or Jobcentre Plus. I am appalled by this response. They will be the very organisations who have made the adverse decision in the first place and whose decision the client wishes to challenge. Clients need independent, legal advice tailored to the particular circumstances of their own individual case. This cannot be provided by the organisation which made the adverse decision. Nor do I believe is there any legal duty on that organisation to provide such independent, tailored legal advice in any event.

As all Social Welfare Law experienced advisers are aware, Social Welfare Law clients usually experience problem clusters. For example, a client who approaches us with an urgent, presenting problem eg an imminent possession hearing usually has other underlying Social Welfare Law issues with which they require advice and assistance.

Take the following employment case:

“We had a client contact us who was having problems with a former employer. She had been employed by them for a good number of years and had been given awards for work done when she was there. She was never subject to any disciplinary action, etc, whilst she was there.

She left the employment for personal reasons but didn’t part on the best of terms with her old boss. She applied for a couple of jobs, however was unsuccessful. One company offered her the position but then telephoned her and informed her that they could no longer honour the offer. They asked her to come in and speak with them regarding a reference they’d had from her former employers.

The lady interviewing our client told her that she had been given ‘the worst reference she had ever seen’ and that she was ‘completely unemployable’ with a reference of that nature.

She telephoned Community Legal Advice and came through to us. We telephoned her former employer and reminded him of the duties he had to provide a fair, true and accurate reference for our client. He denied giving her a bad reference but stated he would ensure that in future he would provide her with an appropriate reference.

About a month after the initial call I spoke with a delighted client who had been offered a job elsewhere after being provided with a proper reference. She is now back in work and very happy”.
This reference issue upon an initial consideration may seem extremely straight forward. Indeed at that stage it was. Had the client not received the legal advice at that time however, she would not have been able to support herself or her family and would have had to submit a claim for welfare benefits. To do so she would have had to approach the DWP and or JC+. She may then have started to run into difficulties paying her housing costs and her creditors. They may have commenced possession proceedings and debt recovery proceedings against her. Financial pressures usually cause domestic disharmony which if they continue can cause the irretrievable breakdown of family relationships. Spouses or partners may separate. Families become divided. Two households may become state dependant. She may then start to suffer low self esteem, low self confidence which later becomes anxiety and depression. Sometimes people become alcohol dependant to try to forget their problems. As a result, she may then need to approach medical and/or other public services. If homelessness becomes an issue, she will need to present herself as homeless to the local authority. Sometimes children end up in public child care. All these factors create financial and operational strain to our already overstretched public services. Hopefully this example has illustrated the downward spiral that Social Welfare Law clients experience and how early legal advice can prevent the ripple effect and provide that important first step up to avoid the escalation of problems.

A clients’ ability to have publicly funded legal advice in Housing and Debt post the proposed legal aid cuts will be significantly reduced unless his or her home is at imminent risk of possession. It therefore appears that post the proposed civil legal aid cuts the only areas remaining in scope are crisis management areas eg in Housing and Debt where there is an immediate risk of possession to the home.

This is an extremely short sighted view as if all the problem cluster areas are addressed quickly by experienced Social Welfare Law advisers, the client has the benefit of the holistic advice service which he or she needs and instead of just relieving the client of the one crisis presenting problem the client has assistance with the underlying issues as well and can try to avoid that downward spiral which so many of our SWL clients are drowning in.

If the problem cluster is not addressed then the emergency housing possession issue may be fixed this time but the underlying causes have gone unaddressed and it is therefore only a matter of time, maybe weeks or months before the family are in crisis again.

Managing each and every crisis will become more expensive for our public services in the long run as without preventative measures the clients will bounce from one crisis to another.

January 2011

Written evidence from the Association of Lawyers for Children (AJ 48)

EXECUTIVE SUMMARY

A.1 The Association of Lawyers for Children [“ALC”] is a national association of lawyers working in the field of children law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practicing in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children’s law, and several hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

(i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
(ii) lobbying against the diminution of such mechanisms;
(iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the welfare, health and development of children;
(iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people; and
(v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice. The ALC is automatically a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.

A.2 Impact of the proposed changes on the number and quality of practitioners is considered at pages 3 to 4. We explain that the government, which is well placed through its agencies to have conducted a proper impact survey, has failed to do so, and shows no signs of doing so now. We refer to the research currently being undertaken, in default, by The Law Society, and give our views as to the seriousness of the likely impact of these proposals both on the number and quality of practitioners.

A.3 Types of case which will not come before the court and how the issues involved will be resolved are considered at pages 4 to 5. We explain our view that a large proportion of the family cases taken out of scope will come before the courts but with the added disadvantage that the parents will be litigants in person, and we develop the consequences at paragraph 4.3 below.
A.4 What other action on legal aid could be taken is considered at pages 5 to 6. We refer to benefits of moving to a specialist Family Court jurisdiction, the introduction of “no fault” divorce, and the tackling of various “pinch points” within the family justice system such as CAFCASS and HMCS.

A.5 The implications of the government proposals are considered at pages 6 to 23. We set out and explain what we consider to be the five most serious implications of these proposals, namely (1) issues relating to the current Family Justice Review, (2) the singling out of a “domestic violence” component as a gateway to eligibility for funding in private law family cases, and the relegation of all other cases to the category of issues out of scope, (3) the impact of an increase in litigants in person, (4) the impact of introducing a single telephone gateway and (5) the resultant increase, rather than decrease, in acrimony and litigation.

1. What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

1.1 We confine our response to family law practitioners.

1.2 We refer to the research which is currently being undertaken on behalf of The Law Society by Andrew Otterburn. So far as we are aware no research whatsoever was undertaken by either the Ministry of Justice or the Legal Services Commission prior to these proposals being announced. This is despite the fact that the Legal Services Commission has extensive data on each provider’s payments from the Fund, and is in a position, through its local contract managers, to obtain relevant information from providers. Both the Ministry of Justice and Legal Services Commission were asked on 19 January 2011 why they did not appear to think it part of their function to conduct such research, given that they were well placed to do so, in order that they could consider the impact of these proposals. We hope that they can explain this to the Select Committee, since they were not in a position to explain it to us.

1.3 We are not in a position to conduct such comprehensive research ourselves. However, from the information that we have been able to collect from our members we can provide an opinion as to the likely impact on the number and quality of practitioners in family law.

1.4 If these changes are made there will a significant loss of client base, and many providers will no longer be commercially viable. We think that a large proportion of those firms who receive the bulk of their income from publicly funded work will find that a 10% cut of fees will wipe out all profitability, and they will cease practice. Large firms, who do a proportion of publicly funded work (generally because of a longstanding commitment to do that work) will have to consider whether they can continue, in effect, the altruistic subsidy of legal aid departments. We think that many are likely not to re-tender later this year when a new tendering round begins for family contracts commencing in December 2011.

1.5 In many parts of the country we envisage that there will be insufficient provision to handle conflicts of interest in public law cases where there are often many parties as well as intervenors, all of whom will need to be represented by separate firms.129

1.6 We would anticipate a move from quality provision of service to a service where unqualified staff, often with little or no experience, work under inadequate supervision. This will not produce savings, since litigation will be less efficient and therefore more expensive. Inexperienced staff will not be in a position to give clients robust advice to accept compromise solutions rather than contest cases over trivial differences. Cases will be poorly run and bad points taken. The training opportunities for solicitors to gain experience and qualify on to the Children Panel will be seriously affected. The effect on the junior Bar will be disastrous. Advocacy standards will inevitably fall.

2. The government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be, and how will the issues they involve be resolved?

2.1 We assume that this referable to the Table in Annex 1A of the Impact Assessment of Scope Changes, since this states, in the explanatory paragraph, that “approximately 500,000 cases might no longer fall within the scope of legal aid funding”. The figures for family are not broken down but are stated to be 211,000 for Legal Help (83% of the total), and 53,800 for legal representation (48% of the total). These have presumably be calculated by reference to the overall proposals set out in the Green Paper, and so they will include the cases to which we refer in detail at paragraph 4.2 below.

2.2 We do not know how these potential clients are to be assisted. Certainly they will not be absorbed by the NfP sector, since this will be particularly hard hit by the proposals. We regard it as highly probable that their problems will have to be resolved by the civil court. In other words, these persons will become involved in court proceedings as litigants in person, and without the benefit of legal advice or ongoing support in court through legal representation. We develop the consequences of this in more detail at paragraph 4.3 below.

128 At a meeting of the Civil Contracts Consultative Group held at the Legal Services Commission.
129 In its 2010 tender round, and consultation leading up to it, the Legal Services Commission operated, it will be recalled, on the basis that there needed to be a minimum of five providers in each procurement area. In practice, and particularly where a procurement area covers a large geographical area, five is not enough to provide reasonable cover.
130 IA MoJ 028, at page 16
3. What action could the government be taking on legal aid which is not included in these proposals?

3.1 We think there are a number of steps which could be taken, which are not included in these proposals, but would have a major impact in reducing the spend on family legal aid.

3.2 The government could accept that the family jurisdiction should be serviced by a Family Court, and introduce dedicated Family Court judges at all tiers. This would lead to much more robust case management, and facilitate much better continuity of judge responsible for such case management. That in turn would lead to cases being dealt with more efficiently and expeditiously, and this would itself lead to very significant savings in the legal aid budget,

3.3 No fault divorce could, at long last, be introduced. This would result in substantial savings in respect of Level 1 Legal Help, and free up considerable amount of judicial time. So far as advice and assistance with divorce alone is concerned, we observe that if no fault divorce is at long last brought into effect, this will enable both direct and indirect savings to be made. There would be direct savings, since advice and assistance with divorce itself could be restricted to cases involving procedural difficulties such as service, obtaining and translating foreign marriage certificates. There would, almost certainly be substantial indirect savings, since no fault divorce could reasonably be expected to have a knock on effect, in terms of reducing tensions, emotional upset and unreasonableness in connection with issues relating to finances and children making it more likely that these issues will be resolved without litigation.

3.4 Various “pinch points” in the Family Justice system, notably with CAFCASS and HMCS, could be addressed. These would likewise lead to cases being dealt with more expeditiously and so saving money.

3.5 These proposals, together with many others, are currently under consideration by the Family Justice Review, and this highlights the importance of the government waiting for their final report, due August 2011 before considering changes which affect legal aid in family proceedings (see paragraph 4.1 below, in which we develop this point further).

3.6 In the longer term, and in the context particularly of public law proceedings, significant improvements in social work practice (as presently being considered by the Munro review) will themselves result in substantial savings to the public law part of the legal aid family budget.

4. What are the implications of the government’s proposals?

In responding on this point, we will concentrate on what we perceive to be the most serious consequences of the proposals namely:

— The fact that these proposals, so far as they affect family law, cut across the work and independence of the Family Justice Review;
— The implications of picking out a “domestic violence” component in private law family cases, and providing that cases with this component are to be eligible for public funding whilst other cases are not, and the implications of taking other cases out of scope altogether;
— The impact of an increase in litigants in person;
— The impact of introducing a single telephone gateway;
— The resultant increase, rather than decrease, in acrimony and litigation.

4.1 The fact that these proposals, so far as they affect family law, cut across the work and independence of the Family Justice Review

4.1.1 The previous Administration announced on 20 January 2010 that a fundamental review of the family justice system would be undertaken and set out its terms of reference. The present Administration decided to proceed with that review, and in June 2010 the Chair of the Family Justice Review Panel, David Norgrove, launched a formal call for evidence. Responses were to be submitted by 30 September 2010, and by that date there was a clear understanding that an interim report would be produced by the Review Panel around March 2011 and a final report around August 2011.

4.1.2 This is a major and fundamental review. It is the most thoroughgoing examination of the family justice system since the work which led up to the enactment of the Children Act 1989, more than twenty years ago. We have contributed fully to that review, by giving oral and written evidence, attending workshops, and assisting with a project to analyse the day to day work of lawyers within the family justice system.

4.1.3 In providing information to representative bodies as to where the Review Panel had got to in their thinking, in the middle of November 2010, Panel members made it clear that they expected to receive critical feedback in respect of their interim report and would not draw final conclusions until they prepared their final report in August 2011.
4.1.4 Accordingly we suggest 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, we say, 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.\textsuperscript{133}

4.1.5 This issue was raised with the Minister with responsibility for Legal Aid, Jonathan Djanogly at the All Party Parliamentary Group meeting on Legal Aid held on 24 November 2010. How, he was asked, was the feedback to representative bodies referred to above to be squared with the Government’s stated intention to respond on the Green Paper during April 2011, so far as the family proposals were concerned? We were, and remain, wholly unconvinced by the Minister’s answer to the effect that the team dealing with the Green Paper and the Family Justice Review Panel were not operating in silos, but were looking at what the other team was doing. That is, of course, to be expected. However, we have no reason whatsoever to doubt the Review Panel members’ integrity, and their stated position above, as to the keeping of an open mind until they have considered feedback to their interim report, is clearly not compatible with the making of decisions as to the way forward by the Minister in April 2010.

4.2 The implications of picking out a “domestic violence” component in private law family cases, and providing that cases with this component are to be eligible for public funding whilst other cases are not, and the implications of taking other cases out of scope altogether

4.2.1 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.\textsuperscript{134} It would also run counter to the Legal Services Commission’s current policy on funding in this type of case.\textsuperscript{135}

4.2.2 Nor is it clear whether, in deciding to make domestic violence applications a portal to keeping other types of family application in scope, the framers of these proposals have kept in mind the distinction between “an order of the court” obtained by an applicant, and “a undertaking to the court” given by the respondent. Many injunction applications relating to domestic violence are resolved not by an order of the court, but by the respondent giving an undertaking as to his future conduct (which 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). Resolution by way of an undertaking accordingly has the well understood advantages of shortening proceedings, saving money, and reducing levels of tension and discord within the family. If it is intended that an order of the court is necessary, then this will have the following counter-productive and unintended consequences:

— 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;\textsuperscript{136}

— It is highly probable that many respondents will be able to demonstrate entitlement to public funding to meet the allegations against them.

4.2.3 There is a clear risk that, if alleging domestic violence is to be treated as an exclusive gateway to eligibility for public funding in related cases, then there will be an increase in allegations which are ultimately found to be false or exaggerated. 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.

\textsuperscript{133} See HM Government’s “Code of Practice on Consultation”, July 2008: Criterion 1 “When to consult”, paragraph 1.2: “It is important that consultation takes place when the Government is ready to put sufficient information into the public domain to enable an effective and informed dialogue on the issues being consulted on”.

\textsuperscript{134} Guidance on investigating domestic abuse, produced on behalf of the Association of Chief Police Officers by the National Policing Improvement Agency, 2008, Preface, at page 7: “The shared ACPO, Crown Prosecution Service (CPS) and government definition of domestic violence is: ‘any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality.’ (Family members are defined as mother, father, son, daughter, brother, sister and grandparents, whether directly related, in-laws or step-family)”.

\textsuperscript{135} Volume 3 Part C (20.32 2 Paragraph 2) of the LSC Manual states that “funding is not limited to persons who have suffered actual physical violence”.\textsuperscript{136} Eg police authorities which will face a higher level of applications for disclosure.
4.2.4 Paragraph 4.208 of the Green Paper quotes recent research\(^{137}\) as “demonstrating” that “in the vast majority of cases parents agreed contact arrangements informally without resort to the courts”. This is a wholly misleading picture of the research referred to, as has recently been described.\(^{138}\) and the research in fact shows that 74% of those who had been able to reach an agreement without a court order, explained that they had in fact done so with the advice and assistance of lawyers, judges, CAFCASS officers and other members of the existing family justice community.

4.2.5 Paragraph 4.209 of the Green Paper is even more misleading. The assertion that “the vast majority of children had the contact arrangement with their non-resident parent arranged informally without the assistance of the Courts, lawyers or mediators” is completely wrong. The research referred to leads to the entirely opposite conclusion (as referred to in paragraph 4.2.4 above), namely that the great majority of these arrangements were made as a result of engaging with the present family justice system.

4.2.6 Paragraph 4.209 of the Green Paper goes on to express concern “that the provision of legal aid in this area is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases which can have a significant impact on the long-term well-being of any children involved”. As we have explained in paragraphs 4.2.4 and 4.2.5 above, this conclusion is founded on a completely erroneous presentation of the available research. The overwhelming majority of those involved in the Family Justice system deplore those cases (which do indeed exist) which are needlessly prolonged, acrimonious and damaging to the children concerned. However, these tend to be either privately funded cases or cases involving litigants in person. The real issue is accordingly robust case management by the court. To the extent that public funding is involved in such cases, then existing rules as to scope of funding, costs limit and reporting duties need to be more rigorously applied.\(^{139}\) Additionally, there are professional conduct rules and codes of practice which exist to curb abuses in this area, and which likewise need to be more rigorously applied.\(^{140}\)

4.2.7 As we state above, the research referred to in paragraphs 4.208 and 4.209 has been quite erroneously presented. But in any event, we do not understand the assumption, implicit in paragraph 4.209 of the Green Paper that, because some proportion of children involved in relationship breakdown do not have their contact arrangements made by a court, this means that the parents of the remaining cohort should have no recourse at all to a court, and that, as stated in paragraph 4.210: “people should take responsibility for resolving such issues themselves”. Whilst there may be scope for simplifying procedures, improving judicial case management of such cases, and for “fast-tracking” the simpler kind of disputes, this approach appears to us to ignore a number of significant issues.

4.2.8 First, the fact that some people manage to resolve these issues without applying to the court ought not to be regarded as a sign that the court is redundant, but rather an encouragement to settle matters where at all possible in order to avoid having to litigate. Going to court ought indeed to be seen as a last resort in the simpler type of case.

4.2.9 There are, however, many private law children and family cases which are not at all simple, and where it would be quite unreasonable to expect people to sort things out for themselves. Some examples are:

- **Domestic abduction** (as opposed to international child abduction). Where a parent, who thinks they have agreed a pattern with contact with their former partner, hands over the child only to find that the child is not returned, but taken to a secret address, perhaps in another part of the country. Are they to be expected to apply for an order without legal assistance in these circumstances? How are they to trace the whereabouts of the child, and serve court process on the former partner? Are they to do this as a litigant in person?

- **Child alleges sexual or physical abuse.** Where contact stops following an allegation by the other parent to the effect that the child has complained she has been sexually or physically abused by, let us say, the father. The local authority conduct a brief enquiry, but as the mother is not letting the child see her father, conclude that the child is not at risk and decline themselves to intervene. In a case of a malicious allegation, what is the father to do? How is he to navigate his way through the many difficulties which such a set of circumstances throws up? In the case of a well-founded allegation, how is the mother and the child to be protected against privately funded litigation by the father (there is no domestic violence alleged, and so the mother will not be entitled, under the present proposals, to public funding).\(^{141}\)


\(^{138}\) See the article by Ian Bugg in *Counsel*, January 2011, Law in Practice: Family Legal Aid, pages 22–24 at page 24.

\(^{139}\) Solicitors are under a continuous duty, throughout the life of a publicly funded case, to review the merits of the case continuing with public funding. Costs Limitations are always placed on public funding certificates, and an application needs to be made to extend that limit. The application form includes a report on the case to date, what remains to be done, and a view as to the likelihood of the proceedings succeeding. Scope limitations limit the work which can be carried out to a certain stage of the proceedings, at which point a report on the merits of public funding continuing has to be submitted.

\(^{140}\) Eg Solicitors Regulation Authority Code of Conduct, Resolution’s Code of Conduct, and numerous Best Practice guides published by *The Law Society*.

\(^{141}\) It seems particularly incongruous that a child who has been sexually abused can obtain public funding to pursue a claim for financial compensation against either an individual or a public authority, but that his or her parent is unable to obtain public funding in order to protect the child, or to maintain an appropriate relationship with the child, as the case may be.
— **Removal from the jurisdiction.** Where a parent seeks to remove a child from the jurisdiction to settle perhaps on the other side of the world. What is the scope here for a mediated settlement?

— **Inaction by the local authority.** Where a parent who is exercising staying contact learns from police of the arrest of the parent with a residence order in connection with serious allegations, but the local authority does not step in, and leaves it to that parent to apply to the court for an urgent variation hearing.

4.2.10 Even types of case which, on the face of it, seem rather more straightforward, complications frequently and (which is significant) unpredictably arise. For example:

— **Deliberate and long term obstruction of a relationship with the other parent.** This might be by way of frequent moves of home and school (which in itself is potentially harmful to the child). This might be by development of illness behaviour within the child. This might be by emotional manipulation of the child, so as to avoid contact taking place or by other behaviours including so-called “parental alienation syndrome”.

— **Changing a child’s name.** This is frequently attempted with a view to obliterating a part of the child’s identity, usually the paternal and/or cultural identity.

— **Cases involving undiagnosed mental health conditions and personality disorder traits in one or both of the parents.**

— **Cases where one or more parents is from an ethnic or cultural minority group.**

4.2.11 The proposals seriously underestimate the impact on children’s welfare of the removal of skilled advice. The most comprehensive research available clearly indicates that almost half of all private law family cases involve allegations of serious abuse.142

4.2.12 If legal aid ceases to be available for these harder sorts of case, or if, worse still, private family law cases were to be removed altogether from the jurisdiction of courts, we anticipate that the law would fall into disrepute and that people would resort to all manner of unlawful and antisocial acts in order to obtain, as they saw it, redress, including violence and kidnapping. This is indeed flagged up as a possible consequence in the relevant Impact Assessment.143 The other side of the coin is that parents will give up in the face of obstruction from the other parent and lack of legal guidance so that children will be more likely to lose one parent.

4.2.13 Since the great majority of primary carers of children are women, these proposals (as is acknowledged) will have a disproportionate effect on women. The fact that they are primary carers does not seem to have been taken into account in reaching the conclusion that this is an area in which the litigant has the ability, and can be left, to present their own case.

4.3 The impact of an increase in litigants in person

4.3.1 We consider that this will be a major consequence of the proposals in the Green Paper, with devastating consequences both for the proper administration of justice, and children who are necessarily affected. It will result in increased cost to many agencies and government departments.

4.3.2 It is apparent that the impact has not been properly researched. We note from paragraph 4.269 of the Green Paper that the Ministry of Justice is undertaking further research into this area. We are not aware of anyone or any academic body having been so commissioned. We are, however, aware that on 14 January 2011, the Ministry of Justice requested assistance in identifying the relevant literature.144 This appears to be a belated attempt to identify what research has already been carried out, rather than the undertaking of further research. We will evidently have no opportunity to comment on this prior to the closing date for this consultation. This literature review should surely have been carried out before the consultation was launched. It is, in our view, essential that comprehensive research is carried out into the likely impact of an increase in the number of

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142 The Work of the Family Bar, Kings Institute for the study of Public Policy, February 2009 at paragraph 20, page xix.

143 IA number: MoJ028, paragraph 35(ii). It is hard to understand the basis on which that part of the impact assessment concludes that “the proposals aim to minimise any wider social and economic costs”. Certainly the examples of types of case we are drawing attention do not sit easily with the factors which are relied on in asserting that, namely (i) the litigant’s ability to present their own case; (ii) the availability of alternative sources of funding; and (iii) the availability of other routes to resolution.

144 Email from Kim Williams, Senior Research Officer, Corporate and Access to Justice—Analytical Services (CAJAS), not sent to ourselves (which is unfortunate) but to “experts, stakeholders and research funders”: “We are currently conducting a review of the research literature on litigants in person, with the aim of establishing what evidence exists on:

— 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.

As part of this work we are contacting experts, stakeholders and research funders such as yourself to ask for details of evidence that may be relevant. I would be most grateful if you could point me to any reports or articles you think may be useful for this review. The focus is on civil and family cases, and on empirical evidence. Although the focus is on the UK, international evidence will also be included.

Also, if you know of others who may be useful to contact, I’d be grateful if you could pass on their names, and contact details if possible.

There is a short deadline for this review, so I am aiming to have a list of evidence sources by 28 January. Responses by email are welcome, otherwise I will telephone in the next couple of weeks to discuss any leads you may have.”
litigants in person on courts and other agencies before any further steps are taken by the government which will impact significantly on the number of litigants in person.

4.3.3 We note the reference, in paragraph 4.268, to the research carried out in 2005 by Professor Richard Moorhead and Mark Sefton for the DCA on *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, and we note the comment in that paragraph that this research “did not find a significant difference between cases conducted by a litigant-in-person and those in which clients were represented by lawyers, in terms of court time”. We have looked carefully at this piece of research, and do not agree with the authors of the Green Paper’s summary of the research findings on that point. The researchers did find a significant difference in all areas of family law proceedings they looked at, apart from divorce petitions. There was a slight difference in adoption applications, and a marked difference in ancillary relief applications. In “Children Act cases” (which appears to have included children and finance cases) the differences are described as “statistically significant”, whilst for injunctions the researchers state that “the differences were starker”.

4.3.4 As to an increase in the numbers of litigants in person, the researchers observed that “There is no quantitative data available to judge the situation in family courts”. We think that the MoJ should have made it a priority to research this aspect, and the further impact of these proposed changes, before making changes which are likely to have such a detrimental impact of the administration of justice;

4.3.5 Quite apart from the 2005 research, there is an abundance of evidence from the judiciary and lawyers who daily grapple with the effects of cases involving litigants in person. The effects are hinted at in the 2005 research, but any practitioner or judge will confirm the major impact on court hearing times and length of cases which are directly attributable to lack of representation by lawyers.

4.3.6 We have no doubt that the effect of the Green Paper proposals, if implemented, will be a steep rise in the numbers of litigants in person, with consequential and severe detriment to court listing arrangements. We do not see how, in the current economic climate, with court closures, and reduced judicial sitting days the system will cope with a significant rise in litigants in person. There must be a real risk that the quality of judicial decision making will be affected, both because of the pressure of time, and the poor quality of evidence presented.

4.3.7 There will also be a knock-on effect on other cases, and in particular an increase in the severe delays in finalising care proceedings and other family cases, as a result of reduced judicial availability.

4.3.8 Paragraph 4.105 of the Green Paper proposes that Legal Help and Representation for children who are separately represented under rule 9.2A or rule 9.5 of the Family Proceedings Rules 1991 will remain. We support that, but point out that an increase in the number of such children’s parents who are litigants in person will exacerbate all the difficulties referred to above.

4.4 The impact of introducing a single telephone gateway

4.4.1 These proposals have not been properly researched, or the implications thought through. They will result in a poorer service, an increase in child protection issues and they will significantly add to costs in the long run. In our view the issues raised are sufficiently important to merit proper research, followed by a separate consultation, and no changes ought to be introduced until full consultation and evaluation has taken place.

4.4.2 First, we do not believe there to be a robust evidence base for believing that the quality of advice services provided through a telephone helpline is adequate, let alone a proper substitute for face to face advice in family work. In particular we are unaware of:

140 Litigants in Person: Unrepresented Litigants in First Instance Proceedings, at page 222 (95% where both parties were unrepresented went to final hearing, as opposed to 85% where one or both parties were represented).  
141 Litigants in Person: Unrepresented Litigants in First Instance Proceedings, at page 223, where, when the applicant was unrepresented 60% of cases went to final hearing, as opposed to 35% where represented).  
142 Litigants in Person: Unrepresented Litigants in First Instance Proceedings, at page 224.  
143 Litigants in Person: Unrepresented Litigants in First Instance Proceedings, at page 224, where the researchers point out that “Three quarters of ‘represented’ injunction cases ended either at or before the first appointment, whereas only 21% of cases involving unrepresented respondents so ended”.  
144 Litigants in Person: Unrepresented Litigants in First Instance Proceedings at page 252  
145 Litigants in Person: Unrepresented Litigants in First Instance Proceedings at page 182, where a judge is quoted as saying “it is far quicker to get the solicitor to summarise the facts than to ask the applicant to struggle”. Unfortunately the researchers do not appear to have gone on to ask what the impact was where both parties were unrepresented.  
146 In this context, it is important to note that, in the 2005 research Litigants in Person: Unrepresented Litigants in First Instance Proceedings only a very small sample (some 7%) of cases had no representation at all, i.e. all parties were litigants in person. The difficulties are, of course, compounded in such circumstances. There is no professional upon whom the task of preparing a set of ordered court papers and a case summary can be placed, as is the practice now, in order to assist the court.  
147 It is also likely to result in an increase in the number of cases satisfying the criteria for the child to be made a party in private law cases, often at a stage where parents’ positions (particularly in the absence of legal advice and representation) had become so polarised and difficult as to require extensive expert assessment. This will place additional stress on the Legal Aid Fund and on CAFCASS, who would be under a duty to provide the child with a Guardian ad litem.  
148 We understand, from an article in *Legal Action* (February 2011, forthcoming) by Adam Griffith and Marie Burton, “From face-to-face to telephone advice?” that some research in the United States was published in 2002, and that in 2009 a small-scale, qualitative research study by one of that article’s authors raised a number of significant issues about the effectiveness of telephone advice on matters which were not straightforward.
4.4.3 In our experience, the vast majority of adults who seek family advice from our members are distressed or in emotional turmoil. Many have mental health problems, personality disorder traits, learning difficulties and for many of them English is not their first language. The issues they want to discuss are of a painful and sensitive nature and even in a face to face interview it can take some persuasion for them to be able to explain the detail of their problem. Frequently they have a lot of correspondence or court papers. We consider a face to face interview to be essential where any of the following factors are present:

- Language difficulties;
- Learning difficulties (which are generally more apparent on face to face interview in any event);
- Mental health issues;
- Documents in existence which the person seeking advice thinks may be relevant to the problem in question;
- Any aspect which indicates that there may be a child protection issue;
- Immediacy of risk to caller and/or children involved;
- Caller ambivalent as to whether a victim of domestic violence;
- Caller is under legal disability (including a young person)
- Caller is unable to read and therefore cannot provide the advisor with the details of documents, in order to assess whether they might be relevant.

4.4.4 We note that the Legal Services Commission are currently researching whether case outcomes are dependent on the channel used. There is no indication as to when this research will be completed, how it is being undertaken, and whether it will be made public. We think it essential to evaluate the results of such research before designing a new scheme of the type envisaged.

4.4.5 In terms of relative cost we note that it is asserted that the average cost of cases dealt with through the helpline is more than 45% less than the cost of the equivalent face to face service.\(^{155}\) However, certainly so far as family cases are concerned, this appears to relate only to one-off pieces of advice given over the telephone, where it is suggested that the net cost is £51.95, as opposed to the net cost of fixed fee level 1 face to face advice of £86.66.\(^{156}\)

4.4.6 There are a number of issues which arise here. First, there is the question raised above of qualitative difference. Second, since advice under the pilot scheme was evidently paid for on an hourly rate,\(^{157}\) whereas the face to face advice under level 1 is delivered on a fixed fee basis, this is not a proper comparison. It is, in effect, an exercise in comparison between apples and pears. Third, face to face providers, both in terms of compliance with the Specialist Quality Mark and requirements of the Solicitors Regulation Authority are required, as part of their service, to send a client engagement letter dealing with various matters including a summary of the advice given to date and the steps now to be taken, and to keep detailed attendance notes. This reflects the understanding that a client with a problem is very likely to be unable to take in verbal advice even face to face and a letter will ensure that the advice is available to them in a permanent form. This does not appear to have been the case with the telephone pilot work.\(^{158}\)

4.4.7 In terms of client satisfaction, we note that the Legal Services Commission conducted a survey, in the summer of 2008, of approximately 50 clients who were dealt with by a specialist adviser under the telephone pilot, and approximately the same number who had been referred by the telephone service to a face to face provider.\(^{159}\) Presumably, as 93% of the former cases were one-off pieces of advice only all the former cases were regarded as straightforward. It is unclear whether the latter group were regarded as unsuitable for telephone advice because of evident complication. It is difficult, we would argue, to draw any conclusions on

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\(^{154}\) Family Community Legal Advice Helpline Pilot Evaluation, Legal Services Commission, January 2009, paragraphs 11.5 to 11.8

\(^{155}\) Ibid, paragraph 3.4

\(^{156}\) Ibid, paragraph 7.16

\(^{157}\) Ibid, Annex 1

\(^{158}\) Ibid, paragraph 7.3 where reference is made to “different working practices” of the three specialist providers involved, which appear to have included “a varying level of detail in attendance notes”.

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the basis of a small sample which appears to have involved comparison of groups who may have had very different case profiles, and some of the response data is, on any basis, quite puzzling. 161

4.4.8 We fully accept that one of the frustrations which potential clients have, and which makes the suggestion of a telephone gateway/referral system superficially attractive, is the difficulty often experienced in finding a solicitor who has, in fact, the capacity to take the client on. However, that is primarily a by-product of the LSC’s system of allocating and rationing “New Matter Starts”. Not only can a provider which has run out of matter starts not help the potential client—that provider cannot even suggest who might be in a position to help, since, despite repeated requests, the LSC has not been able to make available information about which providers have run out, and which still have capacity, in any given procurement area.

4.4.9 Quite apart from issues relating to the adequacy of service which the client would receive, we consider that there are many practical issues which need to be resolved. Some examples are:

— How are conflicts of interest to be dealt with? How, indeed, are they currently dealt with, if at all?
— The undesirability of permitting referral for specialist advice to the screening agency itself;
— What a fair allocation scheme would look like, and how, in practice, abuses would be prevented;
— What right there would be for a client to seek referral to a solicitor of choice, and how that would in practice work;
— How the LSC, and indeed providers, would deal with referral of a client who is already seeing a provider with regard to an existing case. 162

4.5 The resultant increase, rather than decrease, in acrimony and litigation

4.5.1 That this is the inevitable result of the proposed changes will be apparent from a careful reading of paragraphs 4.1 to 4.4 above.

4.5.2 Greater use of telephone advice, as opposed to face to face advice, will result in poorer quality of advice, and more persons seeking to resolve issues through court proceedings, not less.

4.5.3 Since such proceedings will not be in scope, for legal aid purposes, unless “domestic violence” can be proved to be present through a court order or pending proceedings, there will be an incentive for applicants to litigate this issue. There will be powerful incentives for respondents to defend them. There will be many more litigants in person. They will not have the benefit of advice as to what is reasonable or achievable. They will clog up the court lists, and their cases will take more time to resolve and this will have a knock-on effect on other cases, including public law children’s cases. As public funding will not be available for urgent and difficult cases such as child abduction within the United Kingdom, persons affected will be encouraged to take the law into their own hands, with the inevitable consequence that there will be more breaches of the peace, and the law will be brought into disrepute.

4.5.4 These proposals, we say, will have precisely the opposite effect in practice from what is intended.

January 2010

Written evidence from the Personal Support Unit (AJ 51)

The PSU is a small, independent charity based in the Royal Courts of Justice, which offers non-legal practical and emotional support to litigants in person, their friends, families and supporters, and other court users. The charity also has Units in the Principal Registry of the Family Division, Manchester and Cardiff Civil Justice Centres, and Wandsworth County Court. We also offer a loose “by request” satellite service at other London County Courts, managed by the base in the RCJ.

Currently, 5.4 staff support over 200 highly skilled and experienced volunteers. The PSU now supports around 6,000 clients per year; over 32,000 since the charity was established in 2001. However, in the last year the number of clients that we support has increased by one quarter. Similarly, it is the experience of our staff and volunteers, court staff and the judiciary that the number of litigants in person is increasing. In the RCJ, we have recruited extra volunteers to cope with this demand. We are also aware that there is a demand for the PSU’s service nationwide, however our expansion is slowed by instability in our funding. We are planning to expand to Birmingham, and know that Newcastle, Leeds, Liverpool, Bristol and beyond would benefit from the PSU’s unique service.

161 Eg the responses to questions 9 and 10 of the survey. Question 10 responses indicated that 52% of the group who had received telephone advice had resolved their problem, as opposed to 10% of the face to face group (understandable in the latter case, since that group’s cases were likely to be ongoing: worrying in the former case, since it would appear that half the telephone group had failed to resolve the problem). Question 9 responses considered whether or not the client, on the basis of advice tendered, felt able to resolve their problem. 82% of the telephone group felt so able. A higher percentage of the face to face group (94%), however, felt so able.

162 A provider might be giving Level 1 advice in a private law case, which, during the course of that advice, began to involve public law considerations. Under the existing regime the provider would properly start a new, public law file in such circumstances. What would the client and/or provider be expected to do under any new regime? Alternatively, the provider might have a contract to undertake mental health work, or another area of law, and the client might request advice which fell in these areas rather than the original family problem. How would this be dealt with?
Our clients typically come to the PSU worried, upset and extremely anxious, but after they have been supported by a PSU volunteer, they are much calmer and much more relaxed. The kind of emotional and practical support we provide is something that volunteers are eminently capable of providing and they are willing to give a significant amount of their time to support unrepresented litigants. The kind of problems we typically get involved with are ensuring that all the relevant paperwork, official forms and other documents are completed properly and submitted correctly, guiding people around court, and discussing cases. We will accompany our clients into court if required and requested, and often spend a significant amount of time with clients before the court case. Knowing that a PSU volunteer is available to support a litigant in person can often make a huge difference to the smooth running of a case. As such, the PSU is also valued and highly regarded by the judiciary—not least because the presence of a PSU volunteer can save costly court time.

We have already seen a significant increase in the number of litigants in person we support at the PSU. We fully expect to see a further increase in 2011. It is difficult for us to predict how cuts in Legal Aid will affect those coming to court. Almost all of our clients are litigants in person. Already lawyers are too expensive and Legal Aid has been denied or exhausted by the time clients reach the PSU. In 2010, 34% of our work was family-related and 27% to do with housing. As Legal Aid cuts will affect family cases in particular, we would expect the number of family cases that we see to rise. We are conscious of the possibility disparity and inequality of arms that might exist in relation to alleged domestic violence cases, were the proposals to come into force.

In the RCJ, many clients qualify for fee exemption and are thus able to bring multiple appeal/judicial review actions, although only a handful of litigants are obsessive. Whilst most litigants in person are not difficult or vexatious, those that are do clog-up the court system. The PSU deals with very human areas of the law: housing, family, bankruptcy, debt, wills, eviction, issues that will no doubt remain regardless of absence of public funding. We very much doubt that the clients the PSU see every day—for example, those at risk of losing their home, having to declare themselves bankrupt, or trying to get contact with their children—will go away. We are concerned about the long term consequences of the proposed cuts to legal aid, but we will leave it to others to comment on what action the government should be taking.

We are an ambitious charity which plans significant further expansion over the coming years. This will be even more acutely needed, across the country, if we see the increase in litigants in person that we are expecting. Our main concern and challenge is that of fundraising. The PSU has always had to fight to survive financially. As such, we are well-equipped to face the funding challenges that will no doubt arise over the next few years; what will be different, however, is the increased competition for resources in the 3rd sector. The possible loss of modest government grant is a real concern. However, we have a well thought out and energetic fundraising strategy and a broadening income base, so we believe we can continue to deliver our outstanding, instant-access service to the most vulnerable people tied up in the civil justice system.

February 2011

Submission from DAWN (Advice) Ltd (AJ 52)

POSSIBLE CUTS TO “SOCIAL WELFARE” RELATED LEGAL AID

The legal aid system is due to be reviewed following the Comprehensive Spending Review and publication of the Government Green Paper on Reforming Legal Aid. We understand the Government is giving serious thought to the removal of legal aid from the following areas currently funded: debt, employment and welfare benefits.

DAWN (Advice) Ltd relied on this funding to assist over 16,000 clients nationwide in 2009–10. These are our most vulnerable citizens with complex problems. The demand for advice in social welfare law is at an all time high due to the current economic climate, we do not see this demand diminishing any time soon. Should the proposed cuts be implemented, thousands of clients will be left without access to legal advice they will desperately need.

Our organisation employs over 50 staff members, all of these jobs would be at risk should the cuts become a reality as we cannot see how this funding could be replaced.

We recognise that these are difficult times and tough decisions are being made about public spending. However, it is important to understand the impact that these cuts are likely to have on you as a Member of Parliament and on your constituents. I would therefore ask you to consider the following:

1. Cutting these legal advice services will hit the most vulnerable and won’t save money in the longer term

Research has shown that the “legal problems” we help with often, if left unresolved, lead to further problems such as worsening mental and physical health, increased crime and reduced employment opportunities. These additional problems create additional demand elsewhere and the estimated cost to the public purse of unresolved ‘civil’ legal problems is in the billions.

The research report Towards a Business Case for Legal Aid published by Citizen’s Advice in July 2010 demonstrates that:
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.

2. These services provide excellent value for money

We are all familiar with the accusations of “greedy lawyers exploiting the legal aid system”. For social welfare law services, nothing could be further from the truth.

DAWN (Advice) Ltd is a charity and social enterprise and ensures that any excess funds are re-invested into the business for the benefit of the clients we assist on a daily basis.

Our caseworkers and solicitors, renowned for their skill, expertise and commitment, work hard to ensure that they achieve the best possible results for their clients whilst working under robust quality measures and strict rules on case length which ensure that the public funding being spent is done so in the most efficient and cost-effective manner possible.

3. People won’t stop needing help—so who will provide it?

Legal problems are not going to go away. In fact, without expert assistance to sort things out at an early stage, it is likely that their problems will become compacted and more difficult to resolve. Undoubtedly demands for help from GPs, MPs, Councillors and others will increase.

I fear that, should cuts to legal aid services go ahead, services such as ours will close. There is every likelihood that, in the near future, there will be a recognition from GPs, MPs, councillors and others (due to the hardships that they will be exposed to on an everyday basis), that such services form an essential part of the fabric of our society. Rebuilding advice services will be costly, far more costly than retaining the services that are already in place. The expertise that currently exists will have been lost, resulting in poorer provision at a greater price.

I therefore ask that you urge the Government not to pursue these reductions. I would be happy to provide you with any further background information that you would find helpful. In addition, you would be most welcome to visit our organisation and meet with our staff and clients.

January 2011

Written evidence from Lexis Nexis (AJ 55)

LEXISNEXIS INSIGHT—THE FAMILY JUSTICE SYSTEM

This briefing paper was prepared by the LexisNexis legal intelligence team.

Author: Geraldine Morris

BACKGROUND POINTS

1. Reform of the family justice system and spending review cuts will alter the way that those on low incomes can access justice.

2. The coalition government consultation on legal aid funding closed on the 14 February 2011. It is anticipated that family legal aid will be greatly restricted and no longer available in the majority of family cases, unless there has been recent domestic violence or the proceedings relate to a local authority application in relation to children.

3. The likely cuts in family legal aid availability follow the judicial review of the Legal Services Commission’s tendering process in 2010 which had cut the number of firms able to offer legal aid from 2,400 to 1,300. The High Court ruled that the tendering process was “unfair, unlawful and irrational”. The Law Society argued the tendering process was so flawed it threatened to create “legal aid deserts” around the country.

4. Citizens Advice Bureaux and law centres are experiencing funding cuts. The Ministry of Justice’s impact assessment shows that cuts will result in voluntary organisations that provide legal aid losing 77% of their legal aid income.

5. It was announced in December 2010 that nearly one third of magistrates’ courts (93 out of 300) and 49 county courts would close. Plans to build new courts have been cancelled.

6. The changes come about at a time when the family justice system is tackling the most significant overhaul of the procedural rules governing family proceedings in the last 20 years with the introduction of the new Family Procedure Rules 2010 (FPR 2010) taking effect from the 6 April 2011. At the time of writing a number of key practice directions linked to the rules are still awaited.
7. The new FPR 2010 includes a protocol which provides for all applicants who wish to issue relevant family proceedings to show that they have either attended a mediation and information assessment meeting with a mediator or that they are exempt from doing so. The protocol takes effect from 6 April 2011 but as yet the definition of a “mediator” has not yet been made available.

8. In 2010 a Family Justice Review was launched to examine the effectiveness of the family justice system and the outcomes it delivers, and to make recommendations for reform. The call for evidence closed in September 2010 and an interim report with recommendations for reform is expected in spring 2011.

9. In January 2011 the Law Commission issued a consultation paper Marital Property Agreements (Law Com 198) in relation to pre-nuptial, post-nuptial and separation agreements. The paper sets out a range of potential issues and options regarding marital agreements. The Law Commission has requested responses to the paper from members of the public, the legal profession and other interested parties. The consultation closes on 11 April 2011.

**Impact of Changes**

10. There has been a strong growth in the number of parties to family proceedings who are unable to obtain legal representation and act as “litigants in person”. Legal aid cutbacks, the introduction of the new FPR 2010 and court closures will particularly impact on litigants in person, with the resulting effect of more court time being needed to deal with cases in which the parties are not legally represented, further increasing already long waiting times for hearings.

11. Delays in children proceedings may mean that vulnerable children are affected by delays in care proceedings in England and Wales. In private children proceedings (i.e. between parents regarding residence and contact) delays in obtaining reports from the Children and Families Advisory Service (CAFCASS) and limited court resources are also leading to delays.

12. It has also been reported that there are significant regional differences in county court proceeding times, examples given include 65 weeks in London compared to 46 weeks in Humber and South Yorkshire producing a “postcode lottery”. Court closures and limits on legal aid are likely to exacerbate this.

**Alternatives Methods**

13. Alternative Dispute Resolution (ADR) methods, including mediation, in family proceedings are an alternative method of providing access to justice.

14. ADR cannot be a universal panacea—not every family case will be suitable. Examples of scenarios which may arise from the new mediation protocol are:

- cases of domestic violence—the mediation requirement does not apply where there have been domestic abuse allegations leading to police investigation or the issue of civil proceedings within the preceding 12 months. This does not address cases where either the domestic violence or abuse has been unreported but nonetheless would make mediation unsuitable because of issues between the parties and the concerns of the victim or where the domestic violence occurred more than 12 months ago but was no less serious than more recent domestic violence; and

- cases where a party may pay “lip service” to the concept of mediation but with no real intention to resolve issues via mediation.

15. In addition the lack of information regarding the experience, training and professional standards of mediators who may run mediation and information assessment meetings is a concern at this late stage prior to the introduction of the protocol on 6 April 2011.

16. The cutbacks in legal aid may lead to some parties taking a more reasonable approach and reaching a settlement either directly with the other party or with the assistance of ADR. Inevitably, there will be cases which cannot be settled for a number of reasons. In private children cases the consequences may be an increase in the number of children who have no further contact with a parent. In financial cases, lack of agreement may lead to housing issues, more welfare benefit claims and a greater number of children living below the poverty line. This means that the advice that such families may need on housing and welfare benefits will be less available.

**Reforming Family Law**

17. There is a lack of reform regarding some key areas of family law. The President of the Family Division, Sir Nicholas Wall, recently called for reform to the law relating to cohabitants and stated that women cohabitants, in particular, are often severely disadvantaged by being unable to claim maintenance and having their property rights determined by the law of trusts. In addition the President recently noted in a case involving £25 million that “it seems to me unfortunate that our law of ancillary relief should be largely dictated by cases which bear no resemblance to the ordinary lives of most divorcing couples and to the average case heard, day in and day out, by district judges up and down the country.” The recommendations of the Law Commission on marital agreements in due course will hopefully bring much needed clarity for those parties who have
sufficient assets to make such an agreement warranted; for those without, their access to family justice will be limited.

February 2011

Submission from Michael Burridge, Member of the Independent Monitoring Board for Haslar Immigration (AJ 57)

An Independent Monitoring Board (IMB) exists for every Immigration Removal Centre and for every prison. IMBs are statutory bodies specifically charged to:

(1) satisfy itself as to the humane and just treatment of those held at immigration removal centres; and
(2) inform promptly the Secretary of State, or any official to whom he has delegated authority, as it judges appropriate, any concern it has. To enable the Board to carry out these duties effectively its members have right of access to every detainee and every part of the Centre and also to the Centre's records.

The Board has asked me to write to you on their behalf expressing our deep concern at proposed cutbacks in the provision of legal aid in immigration cases.

In the course of their duties members of the Board are frequently asked by detainees to discuss various aspects of the detainee's case, as distinct from advising on the case. It would be inappropriate (and would probably constitute a crime) for a member of the Board to attempt to give legal advice to a detainee. However, in the course of their discussions with Board members, detainees not infrequently refer to legal advice which they are receiving in connection with any application relating to their detention.

Board members receive various comments from detainees on various aspects of the advice which they are receiving:

— sometimes (although not frequently) we receive complaints about the standard of service which the detainee is receiving from his lawyer;
— we hear comments suggesting that sometimes it is difficult for a detainee to find a lawyer to take on his case;
— we received a great deal of feedback as a result of Refugee and Migrant Justice (RMJ) going into administration. This was a well established and well respected charity which existed for the sole purpose of providing legal advice in the technical area of immigration law. RMJ was forced into administration by policy changes in the Ministry of Justice under the Coalition Government. Should you require it I could explain that this situation in more detail; and
— there is a further major problem looming. As you are no doubt aware, the Ministry of Justice is proposing to remove all legal aid for immigration (as opposed to asylum) cases. It must be acknowledged that it is proposed that there will be exceptions to these general principles, but the fact remains that if these proposals are accepted this will have a profound effect on many aspects of immigration law, which by its very nature has had to be conducted in the main on the basis of legal aid funding.

Here are some of the arguments which have been put forward to oppose cutting legal aid in this way:

— legal aid is an insurance policy against abuse of power and incompetence. Legal aid is an essential safeguard against inequality of arms and also serves to maintain scrutiny of the actions of powerful government departments
— the government should implement the “polluter pays” principle. This means that apart from looking at the legal aid budget, the Government should examine the work of its own departments making decisions which give rise to legal challenge. A vast amount of legislation has been passed in the last decade; much of it has been passed in haste and in many cases it is poor decision-making and delay which leads to legal challenges. It is submitted that there should be put in place a machinery whereby government departments should be ordered, in appropriate cases, to meet the costs of those challenges.
— Peoples' human rights will be violated. In the area of immigration many complex issues on human rights legislation have been argued all the way to the House of Lords, and now the Supreme Court. To remove legal aid funding from this type of case will inevitably create substantial injustices.
— Where will the people go? It is a criminal offence to give immigration advice in the course of a business unless the person giving out advice is a solicitor, a barrister or registered with the Office of the Immigration Services Commissioner. The laws involved are very complex. It is likely that the average immigration litigant, knowing little of what is supposed to happen, will be vulnerable to exploitation, including by those who pretend that they are qualified to give legal advice and who charge that service.

I would invite you to consider these representations which I have made on the half of the IMB. No doubt the Government will receive representations from many sources, but it may well take the view that many of
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these representations are to a greater or lesser extent motivated by self-interest. I am certain, however, that point will not be lost on you that the IMB is truly independent—as a matter of law it cannot be anything else. We hope that you will feel able to communicate these representations to the Ministry of Justice, stressing that they come from an independent source and should be read and considered in that light.

February 2011

Submission from Which? (AJ 58)

INQUIRY INTO ACCESS TO JUSTICE

1. Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, online services and books.

2. We apologise for the late submission of this written evidence for the Justice Committee’s ongoing “Access to Justice” enquiry. This is due to the fact that we were unable to submit this response to the Committee until we had agreed our response to the Ministry of Justice’s consultation which closed on 14 February 2011. Nevertheless, we hope this submission will be useful to the Committee’s ongoing enquiry. This short response only touches on the last two of the Committee’s questions; those regarding the Jackson Report: “Do the proposals to implement the Jackson Report recommendations on civil court funding and costs adequately reflect the contents of that report?” and “What are the implications of the Government’s proposals?”.

3. Which? agrees that Lord Justice Jackson’s proposals (if implemented as a whole) will result in the proportionate control of costs and will promote access to justice. Which? believes access to justice is about the right to initiate and defend meritorious claims at proportionate cost. The current system provides access to justice at a disproportionate cost and presents a costs burden for ALL consumers as costs incurred by insurers through civil litigation will eventually be passed on to ALL policyholders. We are firmly of the opinion that the current costs regime for civil litigation in England and Wales is not working properly and that it is time for reform.

4. For this reason, Which? has broadly supported the proposals put forward by the Ministry of Justice in their Consultation Paper implementing the first part of Lord Justice Jackson’s report. In doing so, we acknowledge that obtaining access to justice under some of the proposals may mean that individual claimants will have to contribute to their own legal costs. However, we believe that the ability to obtain access to justice will be preserved—it will simply not be entirely free at the point of delivery—and that the system will be fairer for all. We are satisfied that the proposed changes will promote a more balanced process for both claimants and defendants and will therefore result in an improvement on the current system.

5. From an organisational perspective, Which? also has views on why Lord Justice Jackson’s report is welcome in relation to defamation claims. As a non-governmental public interest campaigning organisation we receive an increasing number of libel threats based on our publication of reports and campaigning and policy material that is inherently in the public interest. Like many other non-governmental organisations with comparatively modest means (in comparison to the national and multi-national corporations whose products and services we review and comment and/or on whose commercial interests are impacted by our policy and campaigning positions), the skewed litigation risks caused by recoverable Conditional Fee Agreement (‘CFA’) success fees and After the Event Insurance (‘ATE’) premiums can and does impact significantly on our ability to publicise important consumer issues and research in print and online and on our strategy when dealing with libel threats arising out of the publication of this material.

6. A summary of our views is set out below on the parts of the Lord Justice Jackson’s report which we have agreed our response to the Ministry of Justice’s consultation which closed on 14 February 2011.

6.1 We agree that CFAs should continue to be permitted as a funding option but that CFA success fees should no longer be recoverable from the defendant and that this should be the rule for all types of case.

6.2 For defamation claims, we also support the abolition of recoverable CFA success fees and ATE premiums.

6.3 We support the abolition of the recoverability of ATE premiums from defendants so that we return to the position prior to the introduction of the Access to Justice Act 1999.

6.4 We agree with the proposed 10% increase in general damages (assuming recoverable CFA success fees and ATE premiums are abolished) as a proportionate way of striking the balance between access to justice to bring claims and access to justice to defend them.

6.5 We agree with the proposal on Part 36 Offers as they should encourage the submission of realistic settlement offers by both claimants and defendants.

6.6 Given our views on ATE premiums, we support the proposals on Qualified One Way Cost Shifting (QOCS) but are concerned about the impact on uninsured individuals access to justice, for example
individuals who might be wrongly sued by a copyright owner for unlawful online file sharing. We oppose the introduction of QOCS for defamation claims.

6.7 We do not support either of the Alternative Packages on recoverability proposed by the Government because we support Lord Justice Jackson's primary recommendations.

6.8 We favour a new test of proportionality of costs. We think this will require a streamlined court process and stronger judicial case management at the beginning of and during proceedings.

6.9 In principle, we do not oppose Damages-Based Agreements (DBA) but hope they would only be used where no other funding option is available.

7. For the Committee’s benefit, I have attached our full written response to the Ministry of Justice consultation (CP13/10—November 2010) which sets out in greater detail our views summarised above. I have also enclosed some market research we commissioned in April 2010 about consumer attitudes to “no win, no fee” legal claims. This found considerable consumer confusion about legal fees with just 7% able to correctly state that lawyers can currently claim up to twice the level of legal fees in a “no win, no fee” case. 64% thought that lawyers would be just paid their total legal fees.

8. We are happy to offer the Committee any further information and advice they wish to receive as part of their ongoing enquiry.

February 2011

Submission from Stephensons Solicitors (AJ 62)

ALTERNATIVE PROPOSALS TO REDUCE THE LEGAL AID BUDGET

CHANGE—DON'T CUT

INTRODUCTION

Stephensons Solicitors LLP is a substantial law firm, based in the North West, employing over 370 staff and with a turnover of approximately £15 million per annum. It is primarily dedicated to servicing the needs of the consumer with the majority of its client base being individuals, often of very moderate means. Stephensons is one of the largest suppliers to the Legal Services Commission and currently opens around 20,000 cases per year.

A significant part of the firm is engaged in litigation activities, usually for Claimants, with substantial departments specialising in, for example; personal injury, clinical negligence, housing, consumer and social welfare law.

The firm has long been used to servicing the needs of the more disadvantaged in society. We consider ourselves to be forward thinking and innovative. This approach has allowed us to remain profitable in many areas of law after the introduction of fixed fees, for example in legal aid and personal injuries. However, this experience has made us very alive to where the line has to be drawn and at what point, regardless of efficiency savings, innovative approaches, etc... access to justice for those most in need becomes hindered.

The Government is proposing significant cuts to the Legal Aid system in order to reduce the budget by £350 million. The proposals include removal of significant areas of advice from the system completely. No proposals are made as to how those affected would obtain advice or assistance. Essentially the proposed changes would result in thousands of people being unable to access good legal advice. Enormous pressure would be placed on the Court System and also those agencies, including MP Surgeries who would be left to carry the brunt of the burden.

We believe that there is a better way. Changes to the current scheme could result in savings of at least the figure sought by Government without reducing the extent of the advice available. The following is a summary of our alternative suggestions.

CONTRIBUTORY LEGAL AID SCHEME

ie a scheme whereby LA could be granted to applicants in cases which seek to recover an award of damages eg Clinical Negligence, Employment or Housing Disrepair cases. The applicant would agree that, in return for having the benefit of LA, if their case is successful, they will make a contribution to the fund from their damages—limited to say, 25% of total damages.

Such a scheme would have the dual benefit of:

(a) improving access to justice by ensuring that people have good representation; and

(b) building up a central fund which over time would become self financing and contribute to the LA fund generally.

The scheme could be limited to certain types of cases, over a certain value and strict risk assessment criteria would need to be applied eg cases would need to have prospects of success assessed at more than 60%
INVESTIGATIVE LEGAL AID SCHEME

Some cases are very difficult to risk assess at the outset, requiring some investigative work even to be able to make a decision as to whether it has good prospects of success. This happens most often in Clinical negligence cases. The following scheme is a variation on the Contributory Scheme suggested above.

It is a scheme which offers limited representation for cases which seek to recover an award of damages eg Clinical Negligence, Employment or Housing Disrepair cases and where investigative work is necessary before a risk assessment can be made. The representation would cover the initial investigative stages of a case, eg in a Clinical negligence case, obtaining all relevant records, and an initial medical report and Counsel’s opinion.

Once a risk assessment can be made, if the prospects of success are good then the case can be funded by a conditional fee agreement, or maybe legal expense insurance if available.

At the conclusion of the case, if damages are recovered, a contribution can be made to the LA Fund from the damages as in the Contributory Scheme.

Again this would allow increased access to justice, together with contributions to the LA fund.

TELEPHONE LED ADVICE

Legal Advice can be provided primarily by telephone in the vast majority of cases.

The current telephone advice scheme funded by the LSC is the CLA telephone advice scheme. This currently provides an excellent service in Housing, Welfare, Debt, Employment and Family cases. The KPIs show that the CLA service provides comparable service and quality to face to face advice, at significantly cheaper rates. In fact, in most cases the service and experience may be better as higher peer review scores are required to run a CLA contract. A saving of 40% can be obtained in Legal Help level work in these areas when provided by telephone. This could amount to some £60 million plus saving across the board simply by extending the current areas of work.

In addition to the Legal Help Advice, Certificated work could also be dealt with by telephone in 60-70% of cases, making significant savings over traditional face to face delivery models. We say this with some confidence knowing that if complex employment cases can be run to Tribunal Hearings in this manner then there are very few areas of work which can only be provided through face to face advice.

Our experience of the CLA service is in respect of employment advice—Cases in the Employment Tribunal (ET) are neither straight forward, nor are the procedures easily followed by the lay person. Skilled claimant employment advisers for lower income clients are in short supply. This has often been one of the contracts that the LSC has had most difficulty letting on a face to face basis. CFAs are unlikely to be appropriate in lower value cases, leading to a huge advice gap. CLA should be allowed to expand to provide almost all advice to eligible clients. Whilst the cases do concern damages, it is often money desperately needed by those on low income. If clients are unable to pursue that money for want of funding and specialist advisers, then it is more likely that further health, debt, housing and welfare issues will ensue, all at a cost to the public purse.

Equality of arms is vital in these cases. Litigants in person are hard pressed to pick their way through complex areas of law, especially when faced with experienced lawyers representing their employers.

In our experience employers are rarely willing to seriously engage with ACAS or settlement until late in the dispute. There is little incentive to settle pre-issue as a client can easily miss the three month deadline. The strength of a claim is often only perceived by an employer following exchange of witness statements in tribunal. A skilled adviser drafting this document can lead to settlement. CLA should therefore be the main channel for advice for this area. Once again, a 40% saving on face to face advice can be made.

As above, a contributory system could apply with a % of damages going into the fund.

Only 1 in 4 calls to the CLA helplines meet the financial criteria for Legal Help. Other cases are turned away. A “paid for” scheme could be devised on a contingency fee type basis which would quickly become self funding, thus widening the scope and numbers of people helped.

SIMPLER ADMINISTRATIVE SYSTEMS

1. The administration of legal aid could be significantly improved if the LSC would let go of its obsession with local delivery and the geographical location of offices. Because of the insistence that LH work is geographically distributed within relatively small procurement areas we have the ridiculous situation that we can act for someone who lives within our procurement area who travels say 20 miles, but we cannot act for someone who lives 50 yards away on the other side of a procurement boundary, or who works near our office but lives in a different area. There are currently something like 170 procurement areas.

The delivery of legal services has changed in recent years and geography is rarely a factor in either client care or quality of advice. CLA has shown that clients can receive excellent quality of advice even in complex cases without having to be seen face to face.
If a supplier is given a contract to deliver publicly funded services then provided they meet KPIs in respect of numbers of clients and outcomes, the location of the clients should not be relevant. If this suggestion were applied then the administrative burden of the state would be greatly eased.

As mentioned above for suppliers to deliver a viable service they need volume. Easing geographical restrictions and the need for a permanent presence or outreach services would greatly assist with this. Suppliers are best placed to know where their work comes from, when advice can be given by telephone and when face to face appointments are necessary. The LSC should simply set out their requirements in terms of numbers of acts of assistance to be delivered and the outcomes required and let the suppliers get on with it. Much of the data and overseeing by the LSC is burdensome and frankly unnecessary. Lessons can be learned from the Health Service about the measurement of KPIs.

2. The LSC needs to bite the bullet and deal with fewer, larger providers, thus reducing the burden of administration significantly. The last contract rounds were supposed to be addressing this problem, but in the end the LSC caved into pressure and protected its supplier base. There are currently some 4,000 firms providing publicly funded work across England and Wales. Consumer choice is important as is the need to cater for conflicts of interest, but there is no avoiding the fact that fewer firms would cost less to administer and dealing with larger, more sophisticated organisations would make for better use of IT systems and generally simpler and more cost effective administration.

CONTROLS OF EXPERTS FEES

We have been unable to obtain any statistics as to how much of the LA Fund is spent on Experts Fees. We do know however that in many cases expert witnesses are paid more than the legal advisors. Many expert witnesses are medical professionals.

To gain control over the fees paid out, there should be a panel of approved experts authorised to act in LA cases at agreed rates. This would have the dual benefit of maintaining standards and controlling rates.

March 2011

Submission from the Crossroads Women’s Centre (AJ 64)

We are writing to ask the Committee to hear evidence from women seeking asylum, particularly rape victims, who will be severely affected by the proposed cuts to legal aid. The All African Women’s Group, Black Women’s Rape Action Project, Legal Action for Women and Women Against Rape jointly co-ordinate daily sessions run by volunteers helping women seeking asylum. Even after women win their status they frequently face legal problems and are in need of good legal representation, particularly for help with housing, benefit, family separation and even with domestic violence and custody cases. We are concerned that the Committee should hear directly from women as well as from representatives of our four women’s organisations who have the experience of defending the legal and civil rights of hundreds of women.

We enclose three accounts from individual women on the impact of the proposed cuts in legal aid.

STATEMENTS FROM THREE WOMEN RE PROPOSED CUTS TO LEGAL AID

From Ms PM

I came to the UK in 2003. I fled Burundi to claim asylum here after my family was targeted because we’re Hutus. My husband and oldest son disappeared, my brother was killed in front of me and I was imprisoned, raped and tortured. I was forced to leave behind my three children because I didn’t know where they were. I finally found them living in Uganda in 2008, but because I didn’t have an automatic right to family reunion, it took another two years before they could come here to join me and their sister who was born here. I first made an application for visas for them to come here which was refused without being properly considered; then we asked for reconsideration which was also refused and finally we had to go to the Tribunal for an appeal hearing and then finally the visas were agreed. All this took two years, then another three months before they could actually get here.

I had a family lawyer representing me for the whole process, writing letters, filling in all the forms for the applications, taking detailed statements from myself and my children, gathering evidence for the hearing, and lots more besides. And I had a barrister who guided my case and presented it at the Tribunal. Over the two years while I was fighting, I had a number of preparation meetings with the solicitor and at least two meetings with the barrister. It was a very stressful and difficult time for my children and for me, especially because we had been separated for so long and none of us imagined that it would continue for so long after I found them. My children have now been with me for two months and of course we are overjoyed to be together, but we are all feeling the effects of being separated for so long which are coming out in many different ways. There is no way that I would have got my precious children back without a lawyer. If the proposed legal aid cuts come in, women will be denied the right to have a lawyer for a case of family separation. How many children will be deprived of their mothers’ presence and protection and how many lives will be destroyed by this vicious cut.
I also needed a lawyer to represent me against dispersal. In 2005, before I won my case, I was transferred by NASS to Chadwell Heath. Before that I had been living in North London where I had established a close support network of friends, and could easily get to Kentish Town, where Women Against Rape (WAR) is based. I have been receiving regular counselling and other support from WAR from soon after I arrived. I was devastated to be sent so far away and I just couldn’t manage being so isolated there, so I ended up being housed by a friend near where I used to live, in Haringey. I applied to Social Services for support, but right from the beginning, they tried to get rid of me. I found that the social services assessment is aimed at finding ways to off-load their responsibility for you and not to help you. Without a support lawyer who could quote the law and remind them of their duties, and also threaten them with court intervention, I would never have been able to fight this dispersal. I was suffering from symptoms of Post-Traumatic Stress Disorder and depression, as well as some gynaecological problems and I don’t think I would have survived without all the support I got. Without the legal representation which I was able to call on would still be living a long way from my support network which I depend on all the time.

From Ms MB

If the legal aid cuts go through and people are denied a lawyer for custody cases, I will lose all chance of ever seeing my children again. All my hopes rest on a new lawyer I have them, not letting me know what they were doing (if anything) about my case, at a time when I needed to know I was in safe hands. The difference with Fisher Meredith who now do my case is almost unbelievable, now I have a lawyer who calls me and makes sure I understand what she is doing and why, and wants to know what I think. She is absolutely determined that my family will be reunited and we are still pursuing my asylum claim even though I won in legacy. Other women in similar circumstances have just had their cases closed even though they also still have children back home who cannot join them. I can’t see Duncan Lewis and other firms going to all this effort, yet if I win my case it will set a life-saving precedent for other families.

I am just about to win housing from my local council. Again this would have been impossible without a lawyer. I think the council were deceiving me and acting like they cared when they tried to get me to accept a place in a scheme. But my lawyer fought this because in reality it was just a way to prevent me making my application. Many of the other women in AAWG have ended up destitute and homeless AFTER winning their claims because they got no help. They end up being raped and abused all over again.

From Ms JF

I left my three precious children in Rwanda after soldiers came to our house, killed my husband and raped me. I knew they would be safer without me, so I fled alone. I won asylum in the UK but I was denied the right to automatic family reunion. My children are now 16, 18, and 21 and they have had to grow up without their mother’s love and protection. I am fighting for the children to join me but so far we’ve been refused.

My fight to be reunited with my children would be impossible without legal aid as the government proposes. I got Indefinite Leave to Remain under the Legacy programme but that gives no automatic right to family reunion. I am appealing against my children being refused visa applications. Making those applications and appealing would no longer get legal aid if these cuts come in. All four of us have been separated for nine years and we are just holding on by our fingertips—it has been so hard. If I didn’t have a lawyer to pursue this I don’t see how I could have any hope of us being reunited, and it’s hard to see how I could have carried on facing that.

February 2011

Supplementary evidence from Shelter (AJ 67)

SHELTER’S EVIDENCE TO THE JUSTICE SELECT COMMITTEE ENQUIRY INTO ACCESS TO JUSTICE

I refer to Shelter’s written evidence to the committee, submitted on 24 January 2011 and our oral evidence on 7 February 2011.

As my colleagues stated in their evidence on 7 February, they had earlier that day had a meeting with the minister, Jonathan Djanogly. We had also seen a written parliamentary answer given the previous week.

Our conversation with the minister, and the content of his written answer, changed our understanding of the government’s proposals on legal aid for homelessness advice. On the face of the consultation paper, our understanding was that the government was proposing to retain in scope only the County Court appeal stage under s204 Housing Act 1996. We were pleased to learn that the government was in fact also intending to retain in scope advice on the application and review stages.

Our written evidence was drafted on our previous understanding and in oral evidence we undertook to clarify it in light of our later understanding.

In particular, Table 1 in our evidence should be revised to take account of the wider range of homelessness advice that would stay in scope and should now read (see overleaf):
Cuts to individual Shelter services, expressed as a percentage of total statutory / contract income to that office (from all sources), together with volume of legal aid cases to be removed from scope (per year):

<table>
<thead>
<tr>
<th>Service</th>
<th>Income Loss (% of income from all statutory / contract)</th>
<th>Numbers of cases out of scope</th>
<th>Percentage of cases out of scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lancashire</td>
<td>28%</td>
<td>421</td>
<td>48%</td>
</tr>
<tr>
<td>Cheshire</td>
<td>21%</td>
<td>274</td>
<td>44%</td>
</tr>
<tr>
<td>Cumbria</td>
<td>22%</td>
<td>457</td>
<td>67%</td>
</tr>
<tr>
<td>Manchester</td>
<td>17%</td>
<td>840</td>
<td>47%</td>
</tr>
<tr>
<td>Newcastle</td>
<td>39%</td>
<td>532</td>
<td>65%</td>
</tr>
<tr>
<td>Dorset</td>
<td>40%</td>
<td>800</td>
<td>49%</td>
</tr>
<tr>
<td>Cornwall</td>
<td>23%</td>
<td>204</td>
<td>37%</td>
</tr>
<tr>
<td>Devon</td>
<td>23%</td>
<td>403</td>
<td>28%</td>
</tr>
<tr>
<td>Somerset</td>
<td>31%</td>
<td>656</td>
<td>57%</td>
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<tr>
<td>Gloucester</td>
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<td>Thames Valley</td>
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<td>60%</td>
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<tr>
<td>Kent</td>
<td>40%</td>
<td>1322</td>
<td>53%</td>
</tr>
<tr>
<td>Milton Keynes</td>
<td>37%</td>
<td>777</td>
<td>61%</td>
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<tr>
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<td>52%</td>
<td>770</td>
<td>58%</td>
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<tr>
<td>Essex/Norfolk</td>
<td>35%</td>
<td>635</td>
<td>35%</td>
</tr>
<tr>
<td>West Midlands</td>
<td>28%</td>
<td>689</td>
<td>34%</td>
</tr>
</tbody>
</table>

The concerns expressed at paragraph 13 of our evidence have now been dealt with.

However, we should stress that our overall concern at the stark impact of the government’s proposals has not been dealt with and the rest of our evidence and the conclusions expressed therein remain our view.

March 2011