Young Legal Aid Lawyers:

Legal Aid Means Test Review Response

6 June 2022

YOUNG LEGAL AID LAWYERS

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About YLAL

Young Legal Aid Lawyers (YLAL) is a group of aspiring and junior lawyers committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. We have around 4000 members including students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers throughout England and Wales.

We believe that the provision of good quality, publicly-funded legal assistance is essential to protecting the interests of the vulnerable in society and upholding the rule of law. As well as campaigning for a sustainable legal aid system, our core objectives are to increase social mobility and diversity within the legal aid sector, promote the interests of new entrants and junior lawyers and provide a network for people beginning their careers in the legal aid sector.

Introduction

In February 2019, the government announced a review of the means test for legal aid.

On 15 March 2022, after completion of the review, the Ministry of Justice opened a consultation into its proposed reforms to the Legal Aid means tests for both civil and criminal legal aid.

YLAL has sought to address the questions within the consultation that are most relevant to our members within this response. As aspiring and junior lawyers, much of the administrative burden of legal aid applications falls on our members. Our response therefore focuses on those questions contained within the review that address the administrative burden and sustainability of legal aid.

Where a question is omitted from the chronological list, it is to be noted that this was intentional. We have not sought to address all of the questions posed, as some of them fall outside the scope of YLAL's membership and its aims.

Executive Summary

YLAL welcomes proposals contained in the review that would result in more people being eligible for legal aid. However, it is clear that these proposals as they currently stand do not go far enough, and there remains much work to be done to make material improvements to both access to justice, and the current workload of legal aid providers.

In our view, there has been an inadequate consideration of the extent to which the administrative burden on practitioners would actually be alleviated by the current proposals. While there are some benefits to the proposals, they do not cater to the specific issues identified by practitioners in different sectors of legal aid, and in some instances they would in fact further complicate the current assessment process. For example, the alignment of the means test for criminal advice and assistance/advocacy assistance with the means test for civil legal aid would improve access to justice for clients serving prison sentences, but changes to the rules on passporting clients in receipt of Universal Credit would inevitably increase the administrative burden on providers dealing with clients who do not fall under the prisoner categories (Q 108).

We believe that the proposed assessment criteria is incoherent, in that it does not reflect the financial reality of our clients. For example, the proposed changes to rules on passporting clients in receipt of Universal Credit could result in a client being eligible for certain benefits due to their low income and capital, but simultaneously assessed as being ineligible for help with legal fees. We are mindful that the current cost of living crisis will further limit many people's ability to fund legal representation, and that this will inevitably have a knock-on effect on access to justice.

Furthermore, many of the proposals will not substantially alleviate the administrative burden on practitioners, and in some cases would likely increase this burden. In our report, we put forward some straight-forward proposals which would aid practitioners, such as an online Civil Legal Aid Calculator which takes into account the new rules on financial eligibility (Q 99 / 101), and comprehensive guidance on the necessary evidence required regarding a client's financial status (Q 100). These measures would help to reduce time spent assessing client eligibility and preparing legal aid applications, which is especially crucial for firms during the initial stages of a case where hours cannot be made billable.

Finally, we set out in our report that the proposals on a whole would have little impact on the sustainability of the legal aid system. Fundamentally, this is because they do little to address the extremely pressing and substantiated concerns that legal aid providers currently have (Q 109). Even if the proposals do increase numbers of eligible clients, this will have a negligible impact on legal aid providers if they do not have the capacity (due to the extensive time required to assess legal aid eligibility) or financial capability to take on more clients. Without appropriate rates of remuneration

and investment in the legal aid sector, it is difficult for any proposals to the current legal aid system to tackle the extremely pressing and well-highlighted issues facing practitioners in all areas of the legal aid sector today.

Question 98: Do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for civil representation, increase it or leave it broadly similar?

It is common for much of the administrative work which goes into assessing eligibility for, and securing, legal aid funding to be done by junior solicitors, trainee solicitors and paralegals, who form one of the groups whose views YLAL seeks to represent.

Drawing on that experience, YLAL's position is that the proposals will increase the administrative burden on providers. In some cases, sensible measures could be taken to ameliorate this impact somewhat. However, we are concerned that the administrative consequences of some proposals do not appear to have been fully explored, especially as they concern means re-assessment following the initial grant of legal aid.

For applicants, the proposed changes would leave the administrative burden of applying for legal aid broadly similar.

Providers

Impact of proposals on means reassessment

Following the initial grant of legal aid, providers are also required to carry out means reassessments where there has been a substantial change in a client's means, in order to determine whether the client remains eligible for legal aid.

YLAL is concerned that the impact of these proposals on the frequency and complexity of the means reassessments, which providers are required to undertake, does not appear to have been fully explored. We would propose that this is an area which needs to be considered in appropriate detail before a decision is made to move forward with the new proposals. The following are some of our initial observations.

Under the new proposals, it seems probable that providers would spend significantly more time completing means reassessments for Universal Credit recipients, many of whom work variable hours and therefore receive fluctuating amounts of both employment income and Universal Credit. Whereas currently providers need only satisfy themselves that an applicant continues to receive Universal Credit, under the new proposals an unusually high-income month could trigger a full disposable income assessment.

Similarly, the introduction of an equivalised gross income threshold could make means reassessments for applicants who experience changes in household composition much more complex given the need to calculate an amended threshold.

The above matters are also likely to increase the administrative burden upon providers in a secondary capacity, as more time will need to be spent advising applicants on their ongoing legal aid eligibility; circumstances in which they may become ineligible; and the financial changes about which they need to inform their provider.

Equivalised gross income threshold

YLAL welcomes the Government's recognition that there is a significant gap between those who are eligible for legal aid and those who can in real terms afford privately funded legal representation.

However, we note that the introduction of an equivalised gross income threshold will mean that providers are likely to spend more time overall determining eligibility due to the need to first calculate the applicable threshold. In cases where it is eventually determined that an applicant is not eligible for civil legal aid, this may be particularly problematic, as providers cannot bill for the time spent completing the determination.

We would suggest that a sensible way to address this, should the proposals go ahead, would be via the introduction of a new online Civil Legal Aid calculator. This would speed the process and offer some certainty to providers.

Charging scheme for disregarded homes

YLAL is strongly opposed to the proposal to place a charge upon homes and other assets which are subject to the new mandatory disregard for inaccessible capital. Charges upon assets are outside the expertise of many providers, and this would inevitably create a greater administrative burden when attempting to advise applicants on the implications of accepting an offer of legal aid in such circumstances.

Retaining the need to apply to the LAA for means-free legal help at inquests

YLAL strongly feels that to retain the need to apply to the LAA for legal help without a means assessment being required ("means-free") at qualifying inquests is to retain an unnecessary administrative burden on both providers and the LAA itself.

The current system of applying to the LAA for means-free legal help often entails drafting detailed representations; back and forth correspondence with the LAA and the client; and a delay whilst the application is determined, which can ultimately have a knock-on impact on the inquest itself.

The Government has stated that maintaining this system mitigates the risk that providers will be unable to claim their fees on inquests which are found at billing not to be in scope. However, such scope determinations are already conducted by providers in respect of almost every other type of controlled work case, and it is unclear why the risk the Government identifies cannot be mitigated against by taking a less administratively burdensome step such as issuing appropriate guidance.

Applicants

In terms of applicants, the most administratively burdensome aspects of applying for legal aid tend to be the need to provide financial evidence, the need to review/complete application forms, and (in the case of civil legal help), the possibility of being required to attend a provider's office in person to sign the application form, as it is a condition of most providers' contracts that a certain number of controlled work application forms are completed in person.

These proposals are unlikely to significantly shift, reduce or increase that burden. Whilst some applicants may benefit from not being required to provide evidence of their outgoings, if their income is below the lower gross income threshold, this will largely be offset by the additional evidence required from Universal Credit recipients who are no longer passported.

Passporting non-homeowner Universal Credit recipients through the capital test is also unlikely to decrease the administrative burden for applicants, as in many cases we anticipate that they will still need to provide bank statements (the most common means by which non-homeowner applicants evidence their capital) in order to demonstrate their incomings and outgoings for the purpose of the income test.

Question 99/101: Do you think these proposals, if enacted, will improve the sustainability of civil legal aid? Please state yes/no/maybe and provide reasons.

Taking the proposals as a whole, we do not consider that they will improve the overall sustainability of civil legal aid. In order to explain this, we will look at it from the following perspectives: the client, the provider and the Legal Aid Agency.

Client

It appears from the consultation paperwork that the changes will mean that more people are likely to be eligible for legal aid. It is acknowledged that this is positive from a client's perspective. However, one thing that does concern us is the fact that Universal Credit recipients will no longer be eligible for passporting. Given that the government intends to transfer all benefits recipients by 2024 to Universal Credit, the number of people affected by this change has the potential to be very high.

The DWP's statistics show that in February 2022 there were 4.7 million households on Universal Credit. This compares with only 260,000 Jobseeker's Allowance claimants and 1.8 million Employment and Support Allowance claimants in the year to February 2021. Under the current proposals, an income assessment will be required for a large proportion of the applicants for Legal Aid who are currently passported, and by 2024 this will be the case for almost all working-age applicants. It therefore appears on first reading that by 2024, all recipients of benefits will no longer be passported.

In a number of areas of civil legal aid, clients are very vulnerable. Such clients may not have the capacity to understand what evidence is required, and may not be able to produce the relevant documents to show they meet the legal aid financial eligibility criteria. The initial request for documentation may put a client off applying for legal aid in the first place, or the lack of documentation may mean that the Legal Aid Agency is unable to offer funding at all. As of April 2022, 79% of Universal Credit recipients were either not in work or were on such a low income that they are required to search for higher-paid employment as a condition of their Universal Credit award. Many of these people will be those in particularly vulnerable situations, such as single parents with very young children. They would undoubtedly be eligible under the proposed new means test, yet may struggle to evidence this. Introducing a means test for Universal Credit recipients will therefore produce very low savings for the Legal Aid fund in real terms but may mean that a substantial number of people who are eligible for Legal Aid either fail to apply or have their application rejected due to failure to produce the relevant documentation.

The increased range of deductions from gross income will ensure that a wider range of people in different circumstances can access legal aid. These deductions should include credit card, "payday loan" and white goods hire-purchase repayments as priority debt repayments as these payments can

be crippling for people on low incomes. The Government should consider very carefully how rising energy bill payments can be factored into the calculation of disposable income.

The increase to the Dependants' allowance is very welcome, however YLAL proposes that the allowance be £400 per person, regardless of age, given the high costs of raising younger children.

It is also unclear whether pensioners will continue to be routinely excluded from accessing legal aid on the current proposals but it seems likely. The current full state pension is £185.15 per week which provides a monthly income of £801.66. Although deductions may be taken from this amount, these are likely to be significantly lower than for younger applicants who are in work and, therefore, pensioners may be detrimentally impacted. YLAL submits that the proportion of legal aid applicants who are 60+ is relatively small and there is little to be gained as regards sustainability from raising the age from 60 to relative pension age as this could knock quite a few vulnerable older people out of being eligible.

The availability of legal aid to pensioners is of particular concern in Court of Protection proceedings. Whereas those challenging a deprivation of liberty ('P') are entitled to non-means tested legal aid, frequently their spouses and partners are unable to access legal aid or afford legal representation. This is of concern because the Mental Capacity Act 2005 requires the court to consider the views of any person interested in P's welfare and any donee of a Lasting Power of Attorney. The court is often unable to do this effectively or efficiently because those who are required to be consulted are unable to obtain legal representation.

Therefore, whilst in theory it appears that more people will be eligible, the additional administrative burden may mean that less people receive legal aid funding in practice. This will likely increase the number of litigants in person, which increases costs to the whole of the justice system – for example, court cases can take longer than usual when there is a litigant in person involved in proceedings.

A further aspect of sustainability is whether potential clients consider that they will be able to afford to pay any income contributions requested throughout the lifetime of the case, bearing in mind that a case can easily last for several years. As acknowledged at paragraph 151 of the consultation document, 'some applicants, including those with a meritorious case, may decline an offer of contributory legal aid because of uncertainty about the total amount they may have to pay in income contributions'. The fact that 20% of all contributory offers are declined (paragraph 212 of the consultation) shows the scale of this problem.

As a result, the proposal to set a maximum payment period of 24 months (paragraph 152 of the consultation) is welcome, and does have the potential to make civil legal aid more sustainable for clients.

However, we are concerned by the proposed increase in the proportion of disposable income required as an income-related contribution. The increase in income thresholds will, in reality, only

counteract the effect of inflation and increases in the cost of living. The contributions requested from those required to make them will therefore continue to represent sums which are very high in proportion to the applicants' income.

For example, one recent offer of a legal aid certificate to a client whose disposable income was calculated at £517.52 per month requested contributions of £77.53 per month. This is not affordable for her. Under the new proposals she would not be required to make any contribution, which is a positive step. However, an applicant with a monthly disposable income of £729 per month would be asked for a contribution of £42.80 per month, which is still a substantial sum for a person on a low income, especially if they have dependent children. While the new bands proposed are more sustainable than the current income contribution rates, we would like to see the percentages for each band remain at the current rate (35%, 45%, 70%), which would mean that, for example, a client with a disposable income of £729 made a slightly lower contribution of £37.45 per month. Over 24 months this would amount to £128.40, a relatively small difference in terms of the overall legal aid fund, but a substantial sum for an individual.

One further issue regarding the sustainability of legal aid for clients, which is not addressed in this review, is the difficulty in which they can find themselves if their income increases - perhaps very slightly - during the lifetime of their case, meaning that they are no longer eligible for legal aid but cannot afford to pay privately for their solicitor to continue work. In these circumstances, a client could find themselves facing a full trial without representation, or having to settle a case on less favourable terms than they may have otherwise achieved. This creates a 'cliff-edge' situation which can have very serious consequences, and in some cases may discourage recipients of legal aid from seeking increased working hours while their case is ongoing. Consideration of any equitable way to assist those in this situation – for example, a six-month 'grace period' during which they continue to be eligible for legal aid, perhaps with contributions based on their new income – would be welcome.

The availability of providers willing and able to accept legal aid instructions is also crucial to the sustainability of civil legal aid for potential clients. It goes without saying that it is no help to a person in need of legal advice to be entitled to Legal Aid if they cannot find a solicitor to represent them. It will only be possible for these reforms to meet the second of the four objectives set out at paragraph 23 ('To target legal aid to those who need it most') if vulnerable litigants who are seeking Legal Aid are able to locate a provider with comparative ease.

As reported by the Law Society in September 2021 'almost 40% of the population of England and Wales do not have a housing legal aid provider in their local authority area, a figure that has grown by around 2% since 2019', while 'only 39% of the population have access to more than one provider in their local authority area'. Similar shortages exist in other areas of work: for example, the number of firms providing family law legal aid has halved since 2011, with a corresponding increase in the numbers of litigants in person.

Even in London, demand for legal aid lawyers outstrips their availability. One South-East London housing law firm reports that it frequently receives enquiries from clients from all areas of London who have already made enquiries to numerous firms which have simply not had capacity to take on their cases. In some cases, these clients have already attended at least one Court hearing unrepresented.

A vulnerable client, for whom even calling one firm may have required substantial courage and determination, might well simply give up the struggle to locate a solicitor after being told that one or two firms are too busy to assist; even those who continue to make enquiries are not guaranteed to be able to find a solicitor.

Providers

At first glance, it might appear that an increase in the number of people eligible for legal aid – and therefore in the number of potential clients – must increase sustainability for providers. In reality, however, most legal aid firms already receive more enquiries from potential, eligible legally-aided clients than they are able to assist. Lack of clients is not a problem for legal aid providers.

By contrast, research by the Law Society shows that the shortage of providers willing to accept legal aid for many aspects of civil work is in large part due to the difficulty of generating an income which enables firms to run a viable business and pay staff at a rate which enables them to enter and/or remain in the legal aid sector. While the reconsideration of remuneration rates for providers is not within the scope of this consultation, the sustainability of civil legal aid will not ultimately improve until fees for legally-aided work - which have not risen for more than 20 years - are increased to a rate which makes such work financially sustainable. While no one enters the legal aid sector for financial gain, the current low rates of remuneration means that many experienced practitioners feel they have no choice but to leave the legal aid sector.

However, the difficulty in generating sufficient income to ensure that a firm or provider remains viable is not solely the result of low fees. A different, although related, issue is the amount of time which fee earners spend making legal aid applications and then obtaining further information from clients so that a certificate is granted. Many legal aid firms cannot afford to employ extensive administrative support, meaning that time spent on legal aid applications represents time that cannot be spent on casework.

From this point of view, the removal of Universal Credit from the list of passported benefits is a serious concern. At present, providers are able to check using the DWP link on the CCMS website whether a client is in receipt of Universal Credit. If, therefore, they are confident that the client passes the capital contribution threshold, they can use delegated functions to start work even when a client cannot immediately produce their Universal Credit statement to show their exact monthly income. This is a crucial advantage of the CCMS system, and means that providers are able to start work on cases for clients who are struggling to log into their Universal Credit account. Such clients

are often among the most vulnerable in society, and need urgent help. While providers will be able to assist them in retrieving their statements in the longer-term, if necessary, the delay might mean that they miss out on assistance when they urgently require it. Clients with disabilities and/or mental health issues are therefore likely to suffer disproportionately negative effects from this proposal.

The removal of Universal Credit from the list of passported benefits will represent an additional administrative burden on providers, which will not in fact be offset by the proposed lower gross income threshold. The consultation document explains at paragraph 166 that the lower gross income threshold "would mean that applicants with low gross income who are certain or almost certain to pass the disposable income test do not have to go through a full disposable income assessment, reducing the time it takes to means test applicants and the associated cost". However, as explained above, even obtaining a Universal Credit statement in order to show that a very vulnerable client is below the lower gross income threshold may take significant time and effort. Over the course of a year, the increased time spent by a provider who has to carry out an initial means test for perhaps 60 clients in receipt of Universal Credit - whose passported status would previously have been confirmed by the DWP check on the CCMS system - will be substantial.

When a legal aid certificate is not granted, whether because the client ultimately proves ineligible; cannot provide the necessary documentation; or decide that they cannot pay the contributions requested, the fee earner has no way to recover the time that they have spent on the application. Even when a certificate is granted, the chargeable time which the provider is able to claim for making the application often does not reflect the actual time spent. The risk of a higher proportion of applications being rejected therefore has serious implications for the sustainability of civil legal aid work for providers.

By definition, those in receipt of Universal Credit will be on a low income. While the consultation document states that DWP's means test has different aims to the legal aid means test, and that some of those in receipt of Universal Credit will have household incomes exceeding £40,000 per year, this is a small minority of Universal Credit recipients. Even those with relatively high incomes are still very unlikely to be able to afford private legal representation without cutting back on essentials. Furthermore, as pointed out above, the vast majority of Universal Credit recipients have no other income, and will pass the legal aid means test. The current anomaly by which some of those on a state pension or legacy benefits are not entitled to legal aid, or have to make a contribution, while better-off recipients of Universal Credit are passported, will in any case be largely addressed by the proposed uprating of the income thresholds.

For the reasons set out above, we consider that the removal of universal credit as a passported benefit will have a substantial negative impact on the sustainability of civil legal aid for providers. This will ultimately disadvantage the most vulnerable clients.

Where a provider has used delegated functions, having good reason to believe that a client is eligible and with urgent work needed on the matter, they risk incurring counsel's fees and court fees if a certificate is subsequently not granted because a client does not or cannot pay the required contribution. Many providers will, in practice, be reluctant to make a claim on a certificate if they know that this will be recharged to the client. At present, a client who has £4,000 savings will be required to pay a quarter of this in order to secure representation. Not unsurprisingly, many are reluctant to pay such a large proportion of savings which may have taken many years to accumulate. This is particularly likely to happen when a case has been resolved by the time an offer is made. Paragraph 216 of the consultation document recognises this possibility. Disappointingly, however, it does not make any proposals to ensure that a provider in this situation – whose prompt action may well have enabled a good outcome for the client without the need for further litigation – is not ultimately left unpaid. Nevertheless, the proposed increase in the lower capital contribution threshold from £3,000 to £7,000 is therefore to be welcomed and should be one small step towards increased sustainability for providers.

In general, however, for the reasons outlined above, YLAL does not believe that these proposals will improve the sustainability of legal aid for law firms and other providers.

The Legal Aid Agency

Bar the change to passporting of Universal Credit recipients, it does appear that more clients will be eligible for legal aid. However, this is bound to have an effect on the Legal Aid Agency in terms of processing times. As of the week commencing 23 May 2022, a simple amendment to a certificate (for example increasing from £5,000 to £10,000) has a turnaround time of 5 weeks. If more clients are eligible for legal aid, we would anticipate these timescales only increasing, rather than decreasing. It appears that investment is also required into the agency to ensure that it has an adequate level of staffing to deal with the increased level of work.

Conclusion

It appears that without additional funding for both the Legal Aid Agency and the providers, the proposed changes, whilst positive at the outset, will not improve the sustainability of civil legal aid. Nonetheless, the uprating of the means threshold to reflect the increased cost of living and inflation since the time it was originally set is to be welcomed. However, unless legal aid work is sustainable for providers the proposals will only have limited value in improving access to justice.

It is simply not sustainable to expect very experienced solicitors to work on extremely low rates. The removal of Universal Credit from the list of passported benefits is also likely to have a seriously detrimental effect on sustainability both for providers and for clients, which will not be offset by the introduction of a lower gross income threshold. It is clear that the whole justice system needs adequate investment, something which is not addressed by this consultation.

Question 100: Do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for civil legal help, increase it or leave it broadly similar?

Taken as a whole, we consider these proposals are likely to increase the burden on both providers and applicants for civil legal aid. There are a number of factors to consider, which we set out in more detail below.

Changes Impacting the Administrative Burden

The proposed use of the OECD Modified scale with Before Housing Costs and After Housing Costs (paras 93-95) used to assess gross income and disposable income respectively.

Without commenting specifically on the positive or negative impact on these metrics more generally for applicants, an approach which adjusts gross income based on percentages per additional adult or child and disposable income based on fixed allowances, is likely to impose a significant impact on providers. This requires two separate calculations to be made alongside the full means assessment. This is, however, unlikely to place any additional burden on applicants as the evidence of means are likely to be the same. This could be mitigated with the provision of technology such as an online calculator that could be accessed by providers to speed up the process.

Housing costs

The inclusion of housing benefit as income and the applicant's actual housing costs being deducted as part of the disposable income assessment represents a significant change (paras 136-138). The inclusion of housing benefit/costs in a gross income assessment seems unnecessary, as the benefit can only be used in relation to rental payments and so is inaccessible income – it could never be used to pay for legal fees. Other responses have raised that this needs to be area-specific due to the big differences in rent across the county and the impact this variable could have on eligibility for legal aid. As rents vary even within cities it would be most fair for these boundaries to be smaller and more specific, however this will result in a substantial increase to the administrative burden.

Pension Contributions & Work Allowance

The proposed deduction of pension contributions is unlikely to increase the administrative burden if, as the consultation suggests, up to 5% of earnings are deducted as part of the disposable income assessment (para 104). If this is deducted without the provision of evidence by the applicant as the consultation suggests, then the burden will not increase for either the applicant or the provider, aside from the provider needing to make an additional (though simple) calculation. However, his could present more of a burden in the case of self-employed individuals or those making payments into a private pension if additional evidence was required. Deduction of either the Prisoners' Earnings Act levy is unlikely to increase the burden on either the provider or applicant, as it is already

considered in the means assessment as disposable income (para 105). It appears to merely warrant differing treatment of the levy which is already considered as part of the means assessment. The change in rate of the work allowance will not increase the burden on either party, as it is merely a change to a standard rate already considered by providers (paras 106-107).

Priority debt

The addition of priority debt to deductible income is a welcome change as it will create a more accurate picture of a client's disposable income. There is a small cost by way of administrative burden, but this can be mitigated by clear guidance on what is considered priority debt and acceptable supporting evidence. If one document evidencing all priority debt is available, this should be preferred. Further, clear guidance on how an 'average' calculation can be used when the debt is not paid back monthly is needed.

Payments in relation to Individual Voluntary Arrangements may not easily be evidenced via a bank statement, because it is unlikely to be clear that a payment is for a specific debt. Mitigation for this burden would be with clear guidance on which evidence can be accepted for each deduction (for example if the applicant works varying shifts rather than on a salaried basis). This is a welcome change, however simple guidance for both applicants and providers is essential to reduce the burden on both parties.

Changes to the income threshold

The proposed change to the lower gross income threshold to £946 per month is likely to reduce the administrative burden for providers and applicants as more applicants will be clearly eligible thus saving the burden of the disposable income test (paras 164-181). The increase of the lower disposable income threshold to £622 per month would decrease the administrative burden on both applicants and providers, as again, this is likely to increase access for applicants whilst reducing the number of disposable income tests carried out by providers to establish eligibility (para 177).

Passporting benefits

The proposed changes to passporting Universal Credit recipients represent a clear increase in the administrative burden for both providers and applicants. This is particularly important to consider given the projection that all legacy benefit recipients will be in receipt of Universal Credit by 2024 (para 141). Income under Universal Credit can therefore be analogous to the current passported benefits, in that they are intended to contribute towards essential living costs and not as disposable income.

It is our view that £500 is a low threshold for passporting and likely indicates a large number of Universal Credit recipients would be required to undergo the full means assessment, particularly once all benefits are amalgamated into this system. This could mean the burden will increase

particularly for recipients with children who may receive higher levels of support. If the state considers that a person is on such a low income that they require a top up from Universal Credit, then it is nonsensical to consider that this person may have the means to pay for their legal costs. Those who work and receive universal credit often work irregular shift patterns or are self-employed. It can be very burdensome to pick apart income on bank statements and average it out if it is irregular. Further, this calculation would inevitably be complex as there is an income disregard for Universal Credit which varies depending on certain household factors. It would be fair to mirror this in a legal aid calculation given the government's desire to make being in work more attractive than not (which this proposal would undermine in any event).

The additional administrative burden of having to keep fluctuating income under review on a monthly basis is unworkable from an administrative perspective for providers. It would create huge room for error which could have a significant impact on practitioners or clients. For example, if during a particularly busy month a provider undertook a substantial amount of work for a client who had forgotten to advise the provider that they worked extra overtime that month. This is an easy mistake to make in periods of high stress (such as when the circumstances of your life necessitate that you require legal representation). Continual assessment of the means of multiple clients may represent a significant burden on already stretched providers of legal aid, and take fee earners away from essential case work unnecessarily. The administrative burden could be significantly reduced if the provision of the applicant's National Insurance number could be used to determine eligibility rather than requiring review of evidence regularly by providers. A proposal such as this will make it unattractive for providers to take on cases where a potential client is over this £500 threshold versus e.g., a client who is in receipt of a passporting benefit.

In relation to the capital assessment, the key consideration is the passporting of non-homeowners in receipt of passporting benefits. Avoiding the capital assessment for those on passporting benefits (including all Universal Credit recipients) will, according to the consultation, reduce the number of capital assessments for applicants in receipt of benefits by around 80% (para 287). This will significantly reduce the burden on both applicants and providers as the capital assessment will no longer need to be carried out, along with provision of relevant evidence. However, if University Credit ceases to be considered a passporting benefit then the reduction to the administrative burden will not be significant. As more applicants receive Universal Credit, the passporting of non-homeowners will apply to fewer applicants. The benefit set out in the consultation is therefore significantly less likely to have as great an impact as suggested in the long-term.

Evidence of Guarantee Credit should be simplified to decrease the administrative burden. DWP seem to only issue Pension Credit on an annual basis and it can be very arduous for clients to request letters. It often involves long waiting times (sometimes over an hour) on hold to the DWP which some clients find particularly overwhelming. It can then take a long time for letters to arrive. Providers often have to continuously chase clients for this information. This is particularly

burdensome when working on time sensitive matters and where delegated functions are necessary. Bank statements are not sufficient as it is not clear from the payments what type of Pension Credit is being paid.

Passporting benefits are one of the best tools for lifting the administrative burden on clients and providers. We suggest that in line with income related ESA, JSA & IS being passported benefits, this should be expanded to include the contributory equivalents. The income is the same and by nature these benefits are only available to those who are unable to work and do not have any other source of employment-related income. Any other source of income would be caught in the capital assessment, as would savings.

The proposed changes to the pensioners' disregard will reduce the administrative burden due to the reduction of income bands from ten to three, however changing the qualifying age to State Pension age may increase the burden as more applicants may be ineligible (para 255).

Changes that are unlikely to impact the administrative burden

There are several points considered by the consultation that appear to neither reduce nor increase the administrative burden on either applicants or providers significantly, and as such these are dealt with briefly in this paragraph. Continuing to passport benefits as they currently are maintains the status quo and therefore does not affect the burden (paras 139-141). The income disregards as proposed in paras 186-188 are unlikely to affect the burden as the provider would merely need to be made aware of them, however mandatory and discretionary income disregards are a concern. Discretion is problematic and if there is to be discretion, we would emphasise the need for substantive guidance to avoid practitioners being penalised on costs if this discretion is exercised. Changes to the treatment of student loans is unlikely to change the burden as it can be evidenced in a similar way to current income and deductions (para 118).

Conclusion

Overall, these proposals taken as a whole are likely to increase the burden on applicants and providers of civil legal help. However, there are identifiable steps that could be taken to mitigate this burden, as we recognise that increasing the limits and inclusion of additional expenses that can be disregarded from disposable income are broadly positive changes. The changes to the gross income threshold and disposable income threshold will likely not have any substantive effect on the administrative burden, as they will make identifying applicants who are eligible easier and will remove the requirement to undergo the full means testing for many. Passporting benefits are one of the best tools for lifting the administrative burden and the introduction of the £500 threshold for Universal Credit recipients, particularly once legacy benefits are transferred, will represent a significant burden on providers and applicants.

A key factor to mitigate the increased burden represented by these changes will be clear guidance for providers from the Legal Aid Agency of exactly what will be considered acceptable evidence for each category of income or expense discussed above. It is important that further guidance is provided on what providers can do when applicants are unable to produce such documents, given that applicants for legal aid are often vulnerable and face additional barriers to providing documentation, for example when clients are being detained in hospital. Ideally, reliance should be on more easily accessible forms of evidence such as bank statements and pay slips. It can be very arduous for clients to request letters. It often involves long waiting times (sometimes over an hour) on hold to the DWP which some clients find particularly overwhelming. It can then take a long time for letters to arrive. Providers often have to continuously chase clients for this information. This is particularly burdensome when working on time sensitive matters and delegated functions are necessary.

It is important to note that any increase to the administrative burden is unattractive in the sustainability crisis faced by providers. A small department at a legal aid firm can receive substantial numbers of new client enquiries per week where solicitors and support staff are already working at, or close to, capacity. Further, applicants for legal aid find themselves in highly stressful situations and are often particularly vulnerable. Any increase to the burden of accessing legal aid for those who are entitled is undesirable as it may prevent those applicants asserting their legal rights as is just, fair, and ultimately the aim of the legal aid system.

As many of these changes are welcome and should increase the access to legal aid, we suggest that the focus should be on ensuring this administrative burden is streamlined and clear. We suggest that bank statements should be acceptable evidence of, for example, council tax payments or debt repayment where other documentation is not available, however a degree of flexibility is necessary.

Question 102: Do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for public family cases, increase it or leave it broadly similar?

Question 104: Do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for private family cases, increase it or leave it broadly similar?

The proposals, taken as a whole, are unlikely to significantly affect the administrative burden for providers and applicants for legal aid, in public family cases. It is likely that the administrative burden will remain broadly similar.

The proposals for the Legal Aid Means Test Review are more applicable to private law family cases, in that the means assessment of the legal aid application is more relevant and widely applicable to private law cases. It is quite often the case that public family cases, due to their nature, do not require a means assessment. Consequently, the proposals would not be relevant to those legal aid applications where a means assessment is not required.

In respect of the few public family cases where a means assessment is required, the proposals may slightly reduce the administrative burden. The proposals, taken as a whole, will broaden the scope of eligibility for legal aid and the various increases in the income and capital thresholds mean that more applicants are likely to be eligible for legal aid, compared to those eligible under the current means requirements. Whilst the increase in eligibility is a clear positive, this change, taken in isolation, is likely to increase the administrative burden, as more applications are likely to be made if more applicants are likely to be eligible.

Some of the specific proposals are more likely to increase the administrative burden. For example, the £500 earning threshold for Universal Credit recipients. This change is likely to mean that applicants will not be passported through the means assessment as they would be under the current rules, and therefore more time is going to be spent completing the means assessment.

Furthermore, the Government's proposal to introduce a cost of living-based approach in civil cases as equivalent to the existing criminal law approach will likely reduce the administrative burden. As family law matters, such as non-molestation and occupation orders, have overlapping and parallel applications to criminal matters, having a singular approach to means testing will simplify the application process and thus reduce the administrative burden.

Additionally, other proposals including the removal of means assessments in certain cases are likely to reduce the administrative burden. For instance, removing the means test for applicants under 18 for all civil representation will assist in slightly reducing the administrative burden. By enabling those under 18 to automatically access legal aid without a means test assessment, applicants and

those applying for legal aid will be able to make an immediate assessment, fast-tracking the applications. Nevertheless, this will have a minimal effect on the overall administrative burden of means testing as applications by minors are a small proportion of family law applications. The Government considered continuing to passport all individuals in receipt of Universal Credit, which would have maintained the current level of administrative burden. It would therefore have been more effective to keep it at this level.

In summary, there are some proposals which are likely to increase the time spent on completing applications and other proposals which are likely to reduce the time spent. It is likely that taking the proposals as a whole, and when considering the impact on public family cases, the proposals are unlikely to substantially affect the administrative burden on providers and applicants.

In the context of public family cases, the percentage of applicants who will be required to complete the means assessment is still likely to be low compared to private family cases and consequently, the administrative burden is likely to remain broadly similar.

Question 103: Do you think these proposals, if enacted, will improve the sustainability of legal aid for public family matters? Please state yes/no/maybe and provide reasons.

Question 105: Do you think these proposals, if enacted, will improve the sustainability of legal aid for family matters? Please state yes/no/maybe and provide reasons.

In terms of public family cases, many do not require a means assessment and therefore sustainability is likely to be unaffected. For cases that do require a means assessment, the proposals are likely to assist in improving sustainability in the short-term. The proposed increase in income and capital thresholds are likely to mean more applicants are eligible for legal aid opening up access to legal aid to a wider proportion of those in need of the service.

However, the use of a fixed capital threshold is likely to prevent it from being sustainable in the long term, as the rising cost of living will soon surpass the capital threshold. Hence a more sustainable approach to the capital threshold would be to introduce a forecasted incremental increase in the threshold to keep in line with inflation over the longer term.

In addition, the changes to assessments of disposable income to better reflect applicants' accessible capital will increase the sustainability of legal aid on the whole. Many private family law cases may involve property (such as jointly owned houses) which are subject to the dispute and not accessible at the time. Disregarding such assets will likely render the means testing more reflective of real means, thus improving sustainability.

In terms of public family law applications, the proposals are likely to increase the sustainability of access to legal aid, with the increase in the accessibility for under 18s and individuals with parental responsibility facing decisions regarding life-sustaining treatment for minors. However, only a small proportion of cases will be affected by this increase in accessibility.

Furthermore, the potential increase in administrative burden on providers and applicants may impact the sustainability of legal aid. With providers spending more time and energy on legal aid applications and means testing, this is likely to reduce the profitability of undertaking legal aid cases. This is particularly impactful taken alongside the cuts to legal aid. As a result, providers may begin to reduce the number of legal aid cases they can take on, thus restricting the access to legal aid lawyers for applicants.

Both private and public family law cases are witnessing a continuous rise in litigants in person which may hinder sustainability. With more people seeking to forego private legal services, there is likely to be an increase in the number of applicants for legal aid. The changes to the capital and income

threshold are likely to increase the accessibility of legal aid, but they may not be enough to meet the increase in demand.

Finally, the Government's proposals are likely to impact equally across socio-economic groups, therefore increasing the sustainability of the proposals on the whole.

Overall, the government's proposals will likely increase sustainability in the short term, however in the long term they will likely fall short due to the rising cost of living and inflation.

Question 106: Do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants of/for legal aid at the Crown Court and magistrates' court, increase it or leave it broadly similar?

This review acknowledges that *"everyone deserves access to justice, whatever their financial circumstances. Legal aid is absolutely crucial to a fair justice system because it opens up legal representation to people who would otherwise be unable to pay for it"* but does little to address the administrative burden associated with the Legal Aid process. In fact, it is submitted that these proposals are unlikely to reduce the administrative burden for providers of applicants for legal aid at the Crown Court and Magistrates Court, at least not in a significant way.

It is argued that administrative burden is inherent in the Legal Aid process. This is because of two main reasons. Firstly, because of the high volume of applicants of legal aid versus the decreasing volume of legal aid providers available and secondly, because of the one size-fits-all approach taken in determining when one qualifies for legal aid, leading to providers appealing decisions taken by the Legal Aid Agency, which is a complex and time-consuming process. In addition to the red tape associated with even the simplest Legal Aid applications (such as a CRM 14), the situation is exacerbated by an increasing amount of legal aid transfers between providers.

There are some positive steps proposed, with perhaps the most important being the removal of non-means tested legal aid for legal representation for under-18s. Two other proposals that are particularly welcomed are the increase of the lower gross income threshold and the continuation of passporting all recipients of passporting benefits through the income assessment for criminal cases in the magistrates' court.

However, there are deeper structural issues affecting Legal Aid, which are not sufficiently addressed. An example of that is transfers of legal aid, which currently require the current solicitors, proposed solicitors, and corresponding Court to approve the transfer, even if it is not challenged by either of the solicitors. This process takes up a lot of the Court's time, contributing to the backlog created by the Covid-19 pandemic and the lack of criminal legal aid lawyers. Responding to the latter issue, the London Criminal Courts Solicitors' Association (LCCSA), is taking industrial action, by refusing to take on low-paid cases in the magistrates' courts for cases such as burglary and assault on emergency workers. LCCSA acknowledges that *"this would see cases in magistrates' courts collapsing with defendants unable to access a lawyer"*.

According to the Ministry of Justice, it is expected that an additional £27m will be spent, because of these proposed measures, by 2022-23, rising to £36m by 2023-24. According to the review, *"the flow of this funding through the system has been slower than expected due to the effects of the pandemic on the court system and a lower than expected numbers of providers making claims where they are eligible but by the end of 2025, additional spend should be at 96% of steady state funding levels"*. However, it is submitted that this is perhaps an overly optimistic stance, as the steady decrease of

legal aid providers and increase of cases is not being addressed and will inevitably affect the above-mentioned statistics.

In conclusion, although the review addresses some topics, the proposals unfortunately remain shallow and do not go far enough in addressing the structural issues creating an administrative burden for the providers of Legal Aid at the Crown Court and Magistrates Court.

Question 107: Do you think these proposals, if enacted, will improve the sustainability of criminal legal aid? Please state yes/no/maybe and provide reasons.

The proposals for the means test, are designed to make legal aid more accessible to the public. However, the question of sustainability of legal aid is not dependent on a less restrictive means test. The proposed changes to the means test will not do much, if anything, to improve the sustainability of criminal legal aid practices. Put simply, there may be more legal aid cases, but will there be anyone there to provide the advice and representation?

As of February 2022, 1062 firms in England and Wales held a criminal legal aid contract. By contrast, there were 1386 firms in April 2016. This is a reduction of 10% in five years. Legal aid practice is no longer sustainable due to the lack of lawyers and law firms, increased admin, the over-bureaucratic nature of the Legal Aid Agency (LAA) and overall demands on legal aid lawyers. The proposed changes to the means test do nothing to remedy these factors.

Whilst enabling more people to obtain access to legal advice is a good thing, it does not improve the sustainability of criminal legal aid for practitioners. The nature of the fixed fee system results in legal aid lawyers leaving criminal legal aid in droves. The mere increase in work does not resolve the issue of payment. Solicitors are currently refusing to accept low remunerated work. This has always been an option with the SRA Code of Conduct, however good will has led firms to accept the work. This action began on 25 May 2022.

More clients will be able to access legal aid, but without an increase in colleagues means that legal aid lawyers will only find the issues become starker. Firms are continuing to close, and there are real issues with the recruitment for new entrants. Only 4% of duty solicitors are under 35. Even when trainees are found, legal aid firms struggle to retain them. Junior legal aid lawyers find themselves becoming increasingly more burnt out by legal aid practice. The system is chronically underfunded across the board, and the criminal justice system is at breaking point.

There is no dispute that increasing access to justice to people accused of criminal offences is a net benefit. Everyone deserves the right to good quality legal advice. However, the demands on legal aid lawyers are such that legal aid practice is no longer sustainable. Stephanie Boyce, President of the Law Society has warned MP's that "firms will continue to disappear until eventually the entire sector disappears". Therefore, whilst more people may be able to obtain legal advice, it does not mean that a lawyer will be there to provide that advice.

Question 108: Do you think that these proposals, taken as a whole, would reduce the administrative burden for providers of and applicants for legal aid for criminal advice and assistance/advocacy assistance, increase it or leave it broadly similar?

The review proposes to align the criminal A&A/AA means test with that of the new civil means test proposed. Young Legal Aid Lawyers (YLAL) would support this, at least to the extent that it improves access to justice for those serving prison sentences at the time they seek A&A/AA. This is where it would reduce the administrative burden on providers when securing Legal Aid funding in their cases. However, there are various considerations to be had when dealing with A&A/AA means testing, and YLAL suspects that the reduction of administrative burden may not apply across the board.

First, it is not contested that the majority of work making use of the A&A/AA framework is currently serving prisoners disputing sentences, prison disciplinary cases and Parole Board hearings. As such, this makes up the majority of the workload for providers supplying those services, and is naturally a significant factor in the consideration of whether administrative burden has been reduced for providers when securing Legal Aid is concerned.

Second, among the changes to the means testing, there is the proposal to remove benefits passporting for those applying for Legal Aid who are in receipt of Universal Credit exceeding £500 per month. These individuals would now be subjected to a full income assessment. This is as opposed to the previous method of passporting those in receipt of Universal Credit regardless of the amount received. YLAL is concerned that, although prisoners do not usually receive Universal Credit, the majority of those not in prison receiving it are likely to exceed this threshold. Further, with the rising cost of living, more people are likely to fall into this category.

Thirdly, YLAL is concerned that the administrative benefit of A&A/AA proposals is too readily focussed on the large proportion of applications being by or on behalf of those in custody. Inevitably, prisoners' cost of living and income is often low. While this is accepted, YLAL notes that the new benefits passporting appears problematic for providers with respect to other types of clients. Those other clients, YLAL considers, should not be overlooked in this assessment.

In light of the above, YLAL considers that the administrative burden will inevitably be higher for providers when dealing with clients not falling into the prisoner categories. The current requirement to obtain evidence to complete a CRM3 is a burden in itself. As with completing CRM14 applications, the automatic passporting of benefits significantly reduces the administrative burden. YLAL considers that this is an appropriate method and should be reflected when applying for A&A/AA funding.

YLAL points to the fact that many criminal defence firms do not provide specialist prison law services. Therefore, many of the A&A/AA cases encountered do in fact involve other matters such as pre-charge interviews with non-police bodies. Such matters present little difference in substance to

those at the police station, yet the burden placed on providers when accessing Legal Aid is significantly higher, which the proposals seem to exacerbate in light of the above.

In reality, any case not involving a prisoner will attract a significantly higher administrative burden. This would be a disadvantage to providers applying for Legal Aid on behalf of clients by removing the efficiency with which a passported benefit-check worked. As a result, the reduced efficiency for those not falling into the prisoner category is likely to balance out the benefit of reduced burden for prisoners.

YLAL does support the proposal to align the means testing for A&A and AA. As acknowledged in the LAMTR, the two often overlap in practice. Implementing this would serve to benefit both clients and providers, with increased efficiency when progressing from A&A to AA and securing funding. YLAL does, however, reiterate that in light of the above this reduced burden is mostly relevant to those serving as prisoners at the time they seek A&A/AA.

Question 109: Do you think these proposals, if enacted, will improve the sustainability of legal aid for criminal advice and assistance/advocacy assistance matters? Please state yes/no/maybe and provide reasons.

The current proposals will not currently improve the sustainability of legal aid for criminal advice and assistance/advocacy assistance.

Proposals only relate to areas of advice and assistance and advocacy assistance which are currently means tested:

- Free standing advice and assistance (for pre-charge work such as interviews undertaken by non-police agencies such as DWP)
- Advice and assistance on appeals against a conviction or sentence, or appeals to the Criminal Case Review Commission
- Advice and assistance or advocacy assistance within prison law (Sentence disputes, prison disciplinary cases and Parole Board hearings.) Most means tested advice and assistance /advocacy assistance (both in terms of volume and spend) falls under Prison law.

The proposals will not make changes to proceedings currently exempt from the legal aid means test. In relation to advice and assistance and advocacy assistance these include:

- Advocacy assistance before Magistrates' Court or the Crown Court
- Advice and assistance provided by a duty solicitor or provided to a volunteer during voluntary attendance
- Advice and assistance provided at a police station during an interview in connection to a serious service offence
- Representation for criminal proceedings where an individual appeals a conviction or sentence to the Court of Appeal

Proceedings set out in Reg25(2) of the Criminal Legal Aid general regulation e.g., individual has been committed to the Crown Court for sentence, but only where that individual did not apply for, or was not granted, representation for the proceedings that took place in the Magistrates' Court.

Most means tested advice and assistance and advocacy assistance affected by proposals relate to prisoners, who have minimal income and living expenses. This means that it is likely that proposed changes will have the result of enabling more people access to publicly funded legal help. In December 2021 the prison population stood at 79,000. It is expected to increase by a further 20,000 by 2025. However, the proposals do not provide for any uplift in fees for prison law work.

Whilst a greater population percentage able to access legal aid funded representation is a good thing, the damage caused by 25 years of budget cuts is unlikely to be repaired by proposals which

provide 40% less than what the Independent Review of Criminal Legal Aid identified as the bare minimum needed to start addressing the crisis.

Legal aid contractors face a number of sustainability issues:

- The enterprise of providing legal aid funded representation is no longer viable for many firms – since 2012 the number of criminal legal aid offices has fallen from 1,652 to 1,062
- Retainment of staff willing to work within criminal legal aid is difficult – criminal defence work, although stimulating, is strenuous, antisocial, and not well-paid. Defence firms face competition from businesses in other areas of law and CPS.
- Recruitment is difficult – only 4% of duty solicitors are under 35. The Legal Aid Census found that the most common salary for legal aid practitioners to be between £30,000 - £39,999, with the majority earning under £50,000. In addition, it was found that salaries were unfair having frequently needed to work beyond set hours to meet demands. Put together, these conditions do not seem attractive to newly qualified lawyers.

In relation to the sustainability of legal aid for criminal advice and assistance/advocacy assistance, the effect of greater eligibility, combined with the present reality of criminal defence provision is likely to result in the expansion of already identified legal aid deserts.

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