



BRIEFING PAPER

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Controversy in 2010-11 surrounding the Government's plans for legal aid reform

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Summary

The legal aid scheme is, in essence, the same as it was when founded in 1948; it is not a system of direct provision by the state but, rather, one in which the government funds private practitioners to provide the service. Nonetheless, since its inception, numerous changes have been made to the way in which the scheme is organised and managed. The Labour government, for example, oversaw more than 30 reviews and consultations on the subject of legal aid.

Soon after coming into office, the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, gave a speech in which he argued that expenditure on legal aid in England and Wales was excessive compared to that in other countries, that the taxpayer was funding cases which ought either to be funded by the person bringing the case or dealt with outside the courts and that significant reform was needed.

A green paper on legal aid reform was published on 15 November 2010. In determining which categories of case should retain funding, the Ministry of Justice considered where issues sit on what it termed a "spectrum of objective importance". Other factors which the Ministry of Justice considered in drawing up its proposals included the litigant's ability to present their own case and the availability of alternative sources of funding and of other routes to resolution.

The green paper's proposals were wide-ranging. For all legal aid, fees paid to practitioners would be reduced. The financial eligibility criteria for civil legal aid would become more restrictive, but perhaps the most controversial aspect of the green paper was the proposal to take some categories of case out of scope for legal aid funding. Amongst the categories to be taken out of scope were clinical negligence, education, employment, welfare benefits, debt (except where the client's home is at risk), housing (except where there is an immediate risk of homelessness) and private law children and family cases where domestic violence is not present.

Particular issues surrounding the availability of legal aid for victims of domestic abuse, the *Legal Aid, Sentencing and Punishment of Offenders Act 2012's* impact on clients seeking help with legal problems and on providers of legal aid services and the rise in the number of self-represented litigants (litigants in person) observed since the 2012 Act came into force are discussed in other Commons Library briefings, available on Parliament's [topic page for legal aid](#).

1. Legal aid now: the basics

The current legal aid scheme was established by the *Access to Justice Act 1999*, which set up the Legal Services Commission (LSC) to administer the scheme.

Help with legal costs is available at different levels. The Citizens Advice Bureau's Advice Guide [Legal system in England: Help with legal costs](#) explains the ways in which such help is offered.¹ The Community Legal Service's [Step-by-Step Guide to Legal Aid](#) for civil cases outlines the circumstances in which the various types of help might be available. Even when legal aid is granted, some costs may still fall to the recipient by way of a lump sum, monthly instalments or a statutory charge.²

To receive funding, civil cases must meet criteria relating to both **financial eligibility** and **merits**.³ Similarly in criminal cases, since 2 October 2006 defendants at the magistrates' courts must pass both the **means test** and the **interests of justice test** to be eligible for legal aid. Since January last year, "people who can afford it, [have been paying] towards their defence in the Crown Court in [five early adopter areas](#)" and the scheme was rolled out across the rest of England and Wales from April 2010.⁴ Details of the means testing scheme are available from the LSC website.⁵ The Law Society has raised concerns that the new scheme may limit access to justice for vulnerable people.⁶

¹ undated, accessed 26 January 2011

² LSC, October 2010

³ *ibid*: page 4-6. More detailed guidance on financial eligibility is contained within the Community Legal Service's [manual](#) (Legal Services Commission *LSC Manual Volume 2F (Financial Eligibility): Part F Financial Eligibility (undated)*).

⁴ Legal Services Commission [Crown Court Means Testing](#) [accessed 12 January 2011]

⁵ See [Criminal Legal Aid Eligibility](#) on LSC website.

⁶ Law Society press release, "Crown Court means testing: proposals flawed", 2 February 2009

2. Developments in legal aid: Labour's reforms

The Labour government oversaw a huge number of reviews of legal aid. The most significant of these was the **Carter review of legal aid procurement**.

Between 1997 and 2007 the cost of legal aid increased from £1.5 billion to £2.1 billion, with a 37% increase in spending on criminal legal aid.⁷ Amid mounting concerns, in July 2005 Lord Carter of Coles was commissioned to review legal aid procurement, both civil and criminal.

Lord Carter argued for a fundamental change in the way in which legal aid services are procured.⁸ He recommended a new system for England and Wales, driven by **best value competition** based on **quality, capacity and price**.⁹ This should (it was argued) allow proportionately more of the legal aid budget to go to civil and family work.

Various changes were made in response to the Carter review, including:

- In **civil legal aid**: move from hourly rates to fixed and graduated fees.
- A general "standard fixed fee" scheme for legal aid relating to matters such as consumer law, debt, employment, housing, public law and welfare benefits, with specialised fixed and graduated schemes for family law, care proceedings, mental health and immigration.¹⁰
- The intention was that the fixed and graduated fee schemes would eventually give way to full competitive **best value tendering** by legal aid providers.¹¹
- In **criminal legal aid**: the **Unified Contract (Crime)** came into force in July 2008¹² and has since been superseded by the **2010 standard crime contract**.
- **Fixed and graduated fee schemes** have also been implemented for matters such as legal advice provided in police stations, work done at the magistrates' court in certain urban areas, advocacy and litigation.¹³
- The Labour government intended to introduce **best value tendering** (BVT) for criminal legal aid, but their proposals met with opposition from the legal profession.¹⁴ The Ministry of Justice announced in December 2009 that the introduction of BVT was

⁷ DCA/LSC, [Legal Aid: a sustainable future](#), CP 13/06, July 2006, p3

⁸ Lord Carter, [Legal Aid A market-based approach to reform](#), July 2006

⁹ Ibid, p3

¹⁰ Further details of schemes and pay rates are available on the LSC's website : see [Pay rates and schemes](#) 13 October 2010 (accessed 27 January 2010)

¹¹ LSC, [Civil Legal Aid Contracts: The Next Five Years](#), April 2008, Chapter 4

¹² See LSC [Unified contract \(crime\) July 2008](#) for further details.

¹³ See LSC [Pay rates and schemes](#) March 2009

¹⁴ See, for example, Law Society press release, "[Society opposition to BVT causes LSC to think again](#)", 16 July 2008 and Law Society *Best Value Tendering for CDS Contracts 2010: A consultation paper: Law Society response* June 2009

postponed, with new and better proposals to be developed by March 2010.¹⁵

¹⁵ Ministry of Justice [Legal Services Commission Best Value Tendering Delayed](#) 17 December 2009

3. Labour's reforms: Commentary and critique

The LAPG prepared a *Briefing for MPs*, which provides summaries of some of the key criticisms of the Carter reforms (in particular those relating to fixed fees).¹⁶

The Constitutional Affairs Committee's report, *Implementation of the Carter Review of Legal Aid*, was published in May 2007.¹⁷ Although the Committee expressed support for the fundamental aims of the Carter reforms, it voiced some reservations and identified some shortcomings. For example:

- the plans had (the Committee argued) been introduced too quickly, in too rigid a way and with insufficient evidence. If the reforms were implemented, there would be a serious risk to access to justice among the most vulnerable in society.
- the relatively inflexible fees might encourage practitioners to 'cherry pick' more straightforward cases, to the detriment of vulnerable clients.
- the focus on price competitiveness might jeopardise the quality of the advice provided, especially in areas of specialist expertise: any reform that damaged the supplier base might thereby damage clients' interests.

In a [press release](#), the Committee expressed other concerns about the way in which the Government intended to proceed and suggested that "the Government has been unwise in attempting to reform the entire system rather than concentrating [on] those areas which cause the problem." The Committee's report was debated in Westminster Hall in July 2007.¹⁸

- The National Audit Office published its report [The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission](#) in November 2009. The report's executive summary highlighted a number of problems and deficiencies.¹⁹ The accompanying [press notice](#) also outlined the NAO's concerns.

The report by Sir Ian Magee CB on the [Review of Legal Aid Delivery and Governance](#) was published by the Ministry of Justice in March 2010. Its executive summary remarked that:

This review was set up because of concern from Ministers about the effectiveness of Ministerial accountability for and policy direction of legal aid; and of the transparency of financial management arrangements.

It also pointed to the many changes since the Legal Services Commission was created and argued that the governance of the LSC did not reflect best practice, financial forecasting was not transparent

¹⁶ LAPG, [Briefing for MPs - Legal Aid debate](#), 12th July 2007

¹⁷ Constitutional Affairs Committee, [Implementation of the Carter Review of Legal Aid](#), 1 May 2007, HC 223 2006-07

¹⁸ HC Deb [12 July 2007 c487WH](#)

¹⁹ National Audit Office [The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission](#) in November 2009: Key findings

and relationships with the legal market should be rethought.²⁰ In March 2010, the Ministry of Justice, responding to the Magee review, announced new plans for legal aid, which would include making the LSC an executive agency of the Ministry.²¹ The chair of the LSC also welcomed the move to agency status.²²

²⁰ Sir Ian Magee CB *Review Of Legal Aid Delivery And Governance*

²¹ Ministry of Justice news release [Straw Announces New Vision For Legal Aid Delivery](#) 3 March 2010

²² LSC Press release [Review of legal aid delivery and governance published](#) 3 March 2010

4. What now? The coalition government's review of legal aid

The [Coalition document](#) published on 20 May 2010 promised a fundamental review of legal aid to "make it work more efficiently".²³ An article in the *Independent* in June 2010 examined ways in which government departments, including the Ministry of Justice, might cut their budgets by 25 per cent and speculated that legal aid spending might be reduced by a third.²⁴

In a [speech to the Centre for Crime and Justice Studies](#), the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, spoke at length about the need to re-examine the nature and scope of legal aid funding. He wanted, he said, to balance necessary financial constraints with the true interests of justice. He drew attention to the comparative cost of legal aid spending in England and Wales:

Our legal aid system has grown to an extent that we spend more than almost anywhere else in the world. France spends £3 per head of the population. Germany; £5. New Zealand, with a comparable legal system, spends £8. In England and Wales, we spend a staggering £38 per head of population.

This, he argued, raised questions of when it was reasonable for the taxpayer to fund a person's legal costs and when that person should be expected to meet their own costs, perhaps through insurance. Some disputes should, he argued, be taken out of the jurisdiction of the courts. Hence, there would be a "fundamental reassessment" of legal aid over the coming months – with an emphasis on the public interest – and a consultation in autumn 2010:

I am only too conscious that legal aid is a key part of the income of the legal profession, who are key defenders of justice and the rule of law. Of course citizens wish to press their claims and assert their rights. But it is justice itself that matters. It is justice in the public interest that matters. We must spend what the taxpayer can afford on legal assistance only on those issues where the public interest requires it.²⁵

²³ HM Government *The Coalition: Our Programme for Government* May 2010

²⁴ ["How Do You Cut The State by a Quarter?"](#) *Independent* 24 June 2010

²⁵ *The Government's vision for criminal justice reform* 30 June 2010

5. What lies ahead? The green paper on legal aid reform

The following analysis concentrates for the most part on the availability of legal aid to those seeking help with their legal costs, although the impact on the legal profession and other providers of legal help is also discussed.

5.1 The green paper's proposals

The green paper was published on 15 November. In the foreword, Kenneth Clarke argues that the legal aid system has grown far beyond what had been intended in 1948. Previous, piecemeal attempts at reform have failed and tough choices lie ahead.²⁶ The Ministry of Justice is inviting views on a number of questions, but asks respondents to bear in mind the overall fiscal context.²⁷

The early parts of the green paper describe the Ministry of Justice's approach to reform, one plank of which is to dissuade people from going to court too readily at the taxpayer's expense and to encourage them instead to seek alternative methods of dispute resolution.²⁸ The scope of legal aid (it argues) is now too broad:

Although reducing spend is one of the main drivers for reform, the Government also believes that there is an overwhelming case for reform of the legal aid system. Since the modern scheme was established in 1949 its scope has been widened far beyond what was originally intended. By 1999 legal aid was available for very wide range of issues, including some which should not require any legal expertise to resolve.²⁹

The green paper's proposals are therefore wide-ranging:

Given the need to reduce substantially spending on legal aid, we have developed proposals for reform across scope, eligibility and remuneration of legal aid, covering legal advice and representation in:

civil cases: which include private disputes between individuals (or groups of individuals) and cases against public authorities;

family cases: which cover both public law, i.e. cases involving public bodies, usually related to the care and supervision of children; and private law, typically proceedings to settle the financial and care arrangements when relationships break down; and

criminal proceedings: which includes the prosecution of individuals for criminal offences and can lead to penalties including loss of liberty.³⁰

²⁶ Ministry of Justice [Proposals for the reform of legal aid in England and Wales](#) Cm7967 November 2010: p3

²⁷ Ibid: Executive Summary

²⁸ Ibid: Introduction

²⁹ Ibid: para 2.7

³⁰ Ibid: para 2.25

Chapter 3 of the green paper outlines the current legal aid system for criminal, civil and family legal aid. Trends in legal aid expenditure are examined in paragraph 3.37 onwards.

The scope of legal aid

The Ministry of Justice's proposals for changing the **scope of legal aid** are set out in chapter 4. No change is proposed for criminal legal aid:

The Government considers that those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it. We do not therefore consider that it is appropriate to restrict further legal aid in criminal cases.³¹

Changes will (the Ministry of Justice proposes) be made to legal aid for civil and family matters. The Ministry of Justice has considered where issues sit on a "spectrum of objective importance". At the highest end of the spectrum are cases where the individual's life is at stake or they are at risk of serious physical harm, where their liberty is at stake or they face intervention by the state in their family affairs, which could result in their children being removed from their care. Other highly important cases are those which might give rise to the individual losing their home. Judicial review cases are also considered to be important. On the other hand, proceedings where individuals are primarily seeking monetary compensation are not considered to warrant public funding, unless there is another aspect to the claim. The choices of the individual (and the degree of their control over the matter of the dispute) may also be relevant:

The Government recognises that there are many types of dispute where individuals may need to rely on legal aid to assist them in matters where external factors beyond their control have affected their lives. For example, an individual who has been detained because of their mental health may wish to challenge matters relating to their detention.³²

Other factors which the Ministry of Justice has considered in drawing up its proposals include the litigant's ability to present their own case and the availability of alternative sources of funding and of other routes to resolution.³³

Areas of civil and family law to retain legal aid

A full description appears in chapter 4 of the green paper. Amongst the areas of civil and family law to retain funding are:

- **Asylum:** The Ministry of Justice has (it says) taken account of the nature of the issues at stake (including the risks of persecution, torture or death if an asylum applicant is returned to an unsafe country) and the vulnerability of this group.³⁴ Legal help and controlled legal representation are therefore to be retained, although all welfare-related issues — including applications for asylum support under sections 4 and 9 of the *Immigration and*

³¹ Ibid: para 4.6

³² Ibid: paras 4.14 - 4.15

³³ Ibid: paras 4.22 - 4.29

³⁴ Ibid: paras 4.38 - 4.42

Asylum Act 1999— would be removed from the scope of legal aid.

- **Immigration detention:** In cases where the client is challenging their immigration detention or is seeking to vary or extend their bail (or is facing forfeiture of bail) the Ministry of Justice considers that the gravity of the issues at stake will continue to justify legal aid for advice and representation before the First-tier and Upper tribunals and higher courts. Legal aid will not be available for claims not directly related to detention or asylum. Publicly-funded legal assistance will continue to be available for proceedings at the Special Immigration Appeals Commission (SIAC).³⁵
- **Claims against public authorities:** Claims against public authorities are in scope for legal aid where they relate to serious wrong-doing, abuse of power or significant breach of human rights or have significant wider public interest. Although the Ministry of Justice is not persuaded that primarily financial matters would warrant legal aid funding, it recognises that some claims will raise issues of public safety and misuse of state power. Claims against public authorities should therefore (it proposes) continue to receive legal aid funding where they raise issues of abuse of a position of power and/or a significant breach of human rights and/or negligent acts or omissions falling far below the required standard of care. The Ministry of Justice also proposes a supplementary scheme, which would claw back some of the damages received in a successful claim funded by legal aid.³⁶
- **Allegations of abuse and sexual assault:** Because of the importance of the issue at stake and the serious harm alleged to have been done to the litigant, their vulnerability and the lack of alternative forms of assistance, it is intended to retain legal aid for these cases.³⁷
- **Community care:** Because of clients' potential vulnerability, the Ministry of Justice proposes that the current provision of advice through Legal Help should be retained.³⁸
- **Mental health:** All cases concerning mental health are currently funded by legal aid; most such cases involve clients who have been 'sectioned' and who may therefore be vulnerable. The Ministry of Justice does not consider that other sources of help, advice and funding provide a viable alternative to legal aid. Legal aid will therefore be retained for mental health and capacity detention cases (including appeals to the First-tier (Mental Health) Tribunal and onward appeals to the Upper Tribunal and appeals to the Court of Protection on deprivation of liberty issues. It will not, on the other hand, be available for tort or general damages claims (unless the claims are very serious).³⁹
- **Debt matters where the client's home is at immediate risk:** Current funding here is mostly for Legal Help, with some for Representation. The Ministry of Justice's stance is that people in debt can obtain help and advice from the national debt helpline and elsewhere and, generally, cases which are primarily financial are less deserving of legal aid. However, where the debtor's

³⁵ Ibid: paras 4.82 – 4.85

³⁶ Ibid: paras 4.43 – 4.55

³⁷ Ibid: paras 4.56 – 4.58

³⁸ Ibid: para 4.60

³⁹ Ibid: paras 4.92 – 4.94

home may be at risk — with consequent harm to health, safety, well-being and livelihood — funding may be appropriate, although the merits test will mean (as it does now) that most cases are funded at Legal Help level.⁴⁰

- **Housing:** Some housing cases may place the litigant's livelihood, health, safety or well-being at risk and, where the case concerns repossession with the immediate risk of homelessness, legal aid should (the Ministry of Justice proposes) continue to be available. So too should legal aid for serious housing disrepair where the litigant is seeking repair rather than damages.⁴¹
- **Domestic violence:** Current provision for domestic violence and forced marriage cases covers legal advice and representation. Again because of clients' vulnerability, the Ministry of Justice proposes to maintain this provision. Similarly, although it considers that legal aid is not normally justified for ancillary relief and private law family and children proceedings, legal aid will be justified in these cases where domestic violence or forced marriage is an important aspect of the case.⁴²
- **Family mediation in private family law cases:** On the whole, the Ministry of Justice considers that these cases might better be diverted away from court and resolved through mediation and so legal aid ought not to be routinely available. Legal aid for family mediation in private law family cases should, though, remain in scope, though Legal Help.⁴³
- **International child abduction:** Here too, legal aid will continue to be available because of the gravity of the issues at stake and the lack of adequate alternatives. Legal aid will also continue to be available under reciprocal international agreements.⁴⁴

Areas of civil and family law to be taken out of scope for legal aid

The green paper goes on to identify areas of civil and family law which (the Ministry of Justice proposes) would be excluded from the legal aid scheme. According to the green paper, difficult choices must be made:

4.146 The need to reduce public spending, and provide access to public funding for those who need it most, has required some very difficult choices to be made about where publicly funded legal assistance is no longer affordable. In making these proposals, we have applied the factors we set out in paragraphs 4.13 to 4.29 to determine whether funding is justified:

the objective importance of the issue, taking into account the matters at stake;

the litigant's ability to present their own case;

the availability of alternative sources of funding; and

the availability of other routes to resolution, and the advice and assistance available to individuals to help them achieve a resolution, including the extent to which the individual could be expected to work at resolving the issue themselves.

⁴⁰ Ibid: paras 4.61 – 4.63

⁴¹ Ibid: paras 4.74 – 4.81

⁴² Ibid: paras 4.64 – 4.68

⁴³ Ibid: paras 4.69 – 4.73

⁴⁴ Ibid: paras 4.86 – 4.88

4.147 Funding may still be available for some cases which we propose to exclude from the scope of the scheme, where the particular circumstances require it. (...) ⁴⁵

Amongst the areas which are currently excluded and will remain excluded are:

- **Personal injury cases:** the Ministry of Justice takes the view that alternative sources of funding (such as conditional fee agreements) are adequate. ⁴⁶
- **Damage to property, conveyancing, boundary disputes, defamation or malicious falsehood, making of wills, trust law and business cases:** these issues are considered to be of comparatively low importance. ⁴⁷
- For **inquests**, Legal Help for the preparation of written submissions will (under the terms of the green paper's proposals) remain in scope. The Ministry of Justice now proposes, however, not to implement section 51 of the *Coroners and Justice Act 2009*, which would have brought advocacy at certain inquests — such as those relating to deaths in custody and deaths in active military service ⁴⁸ — within the scope of the civil legal aid scheme. ⁴⁹

Other areas to be taken out of scope for civil legal aid include:

- **Ancillary relief cases** (such as disputes over financial provision on divorce) where domestic violence is not present. The Ministry of Justice argues that many such cases can and should be resolved between the parties, although it proposes (where cases do reach court) to make changes to the courts' powers, to enable the court to make interim lump sum orders against a party who has the means to fund the other party's representation. ⁵⁰
- **Clinical negligence:** Funding is available now for Legal Help and Representation. The Ministry of Justice considers that — despite the very serious issues which may be raised — these cases ought to be funded via conditional fee agreements. All criminal negligence cases would therefore be excluded from scope. ⁵¹
- **Consumer and general contract:** Here, the Ministry of Justice considers that the issues are not of sufficient importance to warrant legal aid and, moreover, other sources of advice and assistance are available. ⁵²
- **Legal help for Criminal Injuries Compensation Authority applications:** the Ministry of Justice argues that the process for making an application to the CICA is straightforward and, on balance, legal aid is not justified. ⁵³
- **Education:** The Ministry of Justice argues that, although matters such as school admissions and exclusions and student disputes are important to the parents and children involved, some cases may

⁴⁵ Ibid: page 57

⁴⁶ Ibid, para 4.148

⁴⁷ Ibid: para 4.149

⁴⁸ Library Standard Note SN/HA/4358 on [legal aid for representation at inquests](#) (28 January 2010) discusses those provisions in more detail.

⁴⁹ Ministry of Justice [Proposals for the reform of legal aid in England and Wales](#) Cm 7967 November 2010: paras 4.150 – 4.152

⁵⁰ Ibid: paras 4.154 – 5.162

⁵¹ Ibid: paras 4.163 – 4.169

⁵² Ibid: paras 4.170 – 4.172

⁵³ Ibid: paras 4.173 – 4.175

arise from personal choices and the people bringing such cases are unlikely to be particularly vulnerable. Much of the legal help given is for appeals to the First-tier (SEND) Tribunal for special educational needs and here, the Ministry of Justice suggests, legal aid is not justified because the Tribunal is designed to be accessible without legal assistance. All education cases would therefore be taken out of scope.⁵⁴

- **Employment:** As these cases are generally concerned with monetary damages, those bringing them are not particularly vulnerable and other sources of help (for example through trade unions) are available, the Ministry of Justice proposes to take them out of scope.⁵⁵ Even so, claims relating to unlawful discrimination which are currently within scope will remain so.⁵⁶
- **Welfare benefits:** Legal aid is available now for legal advice in relation to decisions about benefits, including advice (but not advocacy) for appeals to the First-tier (Social Security) Tribunal. Most spending is on Legal Help rather than Legal Representation. Given the availability of help and advice from voluntary organisations and others, the Ministry of Justice considers that legal aid is not justified. On the issue of clients' vulnerability, it argues:

While we recognise that the class of individuals bringing these cases is more likely to report being ill or disabled in comparison with the civil legal aid client base as a whole, we have also taken into account the fact that the accessible, inquisitorial, and user-friendly nature of the tribunal means that appellants can generally present their case without assistance.⁵⁷

Other than in judicial review, welfare benefits cases would therefore be taken out of scope.⁵⁸

- **Debt matters where the client's home is not at risk⁵⁹**
- **Other housing matters⁶⁰**
- **Immigration where the person is not detained⁶¹**
- **Private law children and family cases where domestic violence is not present⁶²**

Currently, the Lord Chancellor may grant legal aid in a case which would otherwise be excluded from the scope of legal aid funding, where the LSC requests it. Under the green paper's proposals, this **exceptional funding** would be replaced by a new scheme which would provide legal aid where the government was satisfied that its provision was necessary to fulfil domestic and international legal obligations, including those under the European Convention on Human Rights. In the words of the green paper:

It is not intended that exceptional funding will generally be available except where it can be demonstrated that it is necessary

⁵⁴ Ibid: paras 4.180 – 4.187

⁵⁵ Ibid: paras 4.188 – 4.192

⁵⁶ Ibid: paras 4.133 – 4.137

⁵⁷ Ibid: para 4.217

⁵⁸ Ibid: paras 4.216 – 4.224

⁵⁹ Ibid: paras 4.176 – 4.179

⁶⁰ Ibid: paras 4.193 – 4.197

⁶¹ Ibid: paras 4.198 – 4.204

⁶² Ibid: paras 4.205 – 4.215

to discharge those legal obligations, or where we are satisfied that the relevant test for legal representation has been met in inquest cases.⁶³

Financial eligibility

The means test

The green paper offers proposals for reforming the means test. These include the **abolition of capital passporting**, whereby people receiving certain income-based benefits are automatically financially eligible for civil legal aid.⁶⁴ There would be a **minimum capital contribution**, as the Ministry of Justice considers it “desirable for legally aided clients to have a direct financial interest in their case through contributing personally towards the cost of it, where they can afford to do so”.⁶⁵

The green paper sets out the changes:⁶⁶

Current Capital Contribution Scheme

<i>disposable capital</i>	<i>capital contribution</i>
£0–£3,000	£0
£3,001+	+ £1 per £1 over £3,000 up to the maximum likely costs of the case

New Capital Contribution Scheme

<i>disposable capital</i>	<i>capital contribution</i>
£0–£999	£0
£1,000–£3,100	£100
£3,101+	+ £1 per £1 over £3,100 up to the maximum likely costs of the case

Current Capital Contribution Scheme in Controlled Legal Representation in Immigration cases

<i>disposable capital</i>	<i>capital contribution</i>
£0–£3,000	£0

⁶³ Ibid: para 4.34

⁶⁴ Ibid: paras 5.9 – 5.12

⁶⁵ Ibid: paras 5.14 – 5.21

⁶⁶ Ibid: para 5.20

New Capital Contribution Scheme in Controlled Legal Representation in Immigration cases

£0–£999	£0
£1,000–£3,000	£100

Capital disregards (such as the mortgage disregard of up to £100,000 and the pensioner disregard) would be abolished,⁶⁷ although the LSC would have the power to waive the capital limits in certain circumstances.⁶⁸ There would also be an exemption for legal help, so that individuals ineligible, because of disposable capital held as equity, for Legal Help, Help At Court, Family Help (Lower) or Family Mediation would automatically qualify for the property eligibility waiver.⁶⁹

In contested property cases, the green paper proposes to

abolish the equity disregard (consistent with our proposal for non-contested cases);

retain the 'subject matter of the dispute' disregard for Legal Help, Help at Court, Family Help (lower), Family Mediation, and Controlled Legal Representation in Immigration and Asylum cases, but cap this at the first £100,000 of disputed assets (which is currently uncapped); and

retain the existing £100,000 'subject matter of the dispute' disregard for Family Help (higher) and Legal Representation.⁷⁰

In these cases, the mortgage disregards would be kept and extended.⁷¹

Income eligibility

At present, clients with a monthly income of £316 or more are required to pay monthly contributions throughout the life of the case. The level of contribution is determined against three bands of disposable monthly income and will vary between 0.4% and 20% of the client's monthly disposable income.⁷²

The green paper suggests two new options. One (based on the existing scheme) would require a larger proportion of disposable income, so that the proportion payable would range from 0.6% to 27.8%.⁷³ The other scheme would be reduced to a single band, regardless of monthly disposable income, where 50% of all disposable income over £311 would be required as a contribution.⁷⁴ Under this option, contributions would range from 0.8% to 28.8% of monthly disposable income.

⁶⁷ Ibid: paras 5.22 – 5.25

⁶⁸ Ibid: paras 5.33 – 5.37

⁶⁹ Ibid: para 5.38

⁷⁰ Ibid: para 5.46

⁷¹ Ibid: para 5.48

⁷² Ibid: paras 5.54 – 5.57

⁷³ Ibid: para 5.60 and table 3

⁷⁴ Ibid: paras 5.61 – 5.63 and table 4

A written answer in the Lords on 23 November put the potential savings from the green paper's proposals for exclusions at £279 million a year:

On 15 November the Justice Secretary announced the publication of a consultation on a package of proposals for the reform of legal aid. Impact assessments are published alongside the consultation document on the Ministry of Justice website at <http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm> [sic]. In relation to areas of civil and family law proposed for exclusion from the scope of the legal aid scheme, we estimate that approximately 500,000 cases might no longer fall within the scope of legal aid funding. This is approximately £279 million worth of legal services funded by the legal aid budget, per annum, once all the proposals have been fully implemented.⁷⁵

5.2 The impact of the green paper's proposals: the Government's predictions

The impact on those seeking help⁷⁶

The Ministry of Justice has published a set of equality impact assessments which attempt to quantify the potential for a disproportionate impact of the proposed legal aid changes on clients based on gender, race or disability ([see the links at foot of this page](#) on the Ministry of Justice website).

The assessment of the cumulative impact of the proposed changes on legal aid clients is given [here \(pages 11-12\)](#).

The cumulative assessment concludes that the reductions in legal aid scope will have a disproportionate effect on women as they comprise 57% of the affected caseload, but 51% of the population as a whole. However, this disproportion reflects the gender balance of civil legal aid claimants as a whole rather than reflecting a particular gender bias in the measures proposed.

The assessment identifies "the potential for the proposals to have a disproportionate impact" on black and minority ethnic clients, which again is "the result of the demographics of legal aid service users."

As regards people with disabilities, the assessment "cannot rule out that there may be a disproportionate impact relative to the population as a whole but, as with sex and race, if there is such a disproportionate impact then it would reflect the demographics of the user group for civil legal aid services."

In the case of both race and disability the assessment states that these conclusions should be treated with caution due to "a significant level of non-response in the data on legal aid clients".

The impact assessment does not look at the impact on low income groups of the various proposed changes – as eligibility for legal aid is subject to a means test, the effect of reductions in the scope of civil legal aid will predominantly affect people on lower incomes. (Disposable

⁷⁵ HL Deb [23 November 2010 c308WA](#)

⁷⁶ by Rod McInnes (x3793)

income must be no more than £733.00 a month for most legal services – see [Community Legal Advice legal aid calculator.](#))

However, it is likely that the proposal to remove welfare benefits cases from the scope of civil legal aid will have a particular impact on people in very low income groups. It is estimated that there were 113,279 relevant claims in the welfare benefits category, 18.5% of the total of 613,318 claims which would be affected by the proposals to reduce the scope of civil legal aid.⁷⁷

Statistics for the number of legal aid claimants in 2005/06 and 2009/10 were presented in response to a PQ in January 2011:

The proposed legal aid reforms will affect access to civil legal aid; however, they do not affect access to criminal legal aid. The estimated impact of the proposed legal aid reforms on the number that would not have had access to legal aid in 2008-09 has been published in the legal aid reform impact assessments on the Ministry of Justice website.

The following table outlines the number of people that claimed legal aid in 2009-10 and 2005-06. However, data is not available for 1998-99 as this pre-dates central recording of legal aid claimant data.

The figures are recorded separately for civil and criminal legal aid. Civil legal aid is split between legal help (advice) and legal representation. Criminal legal aid is split between crime lower (work at police stations and in the magistrates court) and crime higher (representation in Crown court).

Clients can also access civil legal advice from the community legal advice telephone line which is excluded from these figures.

	Total civil legal representation	Total civil legal help	Total crime lower	Total crime higher
1998-99	n/a	n/a	n/a	n/a
2005-06	151,333	744,267	1,488,900	121,500
2009-10	138,933	793,240	1,407,700	126,100

The impact on the legal profession

The [cumulative impact assessment](#) published by the Ministry of Justice suggests that the effect for legal aid providers would be

- between £144m and £154m less income from the legal aid budget per year
- a reduction in legal aid business, with the net cost to providers depending on how they adjust to this changing pattern of demand, e.g. in terms of reducing costs or moving into other business areas.⁷⁸

⁷⁷ Ministry of Justice [Legal Aid Reform: Scope Changes](#)

⁷⁸ Ministry of Justice *Cumulative Legal Aid proposals* 15 November 2010: page 2

The cumulative impact assessment also offers a competition assessment and small firms impact assessment. The **competition assessment** recognises that the reforms might reduce the number and range of legal aid providers, with some harm to competition:

Competition Assessment

53. The proposed legal aid reforms may directly affect the number, and possibly the range, of civil and family legal aid providers. The net impact of the proposals is likely to reduce demand for legal aid services and therefore likely to reduce demand for legal aid providers. This may negatively impact upon competition if the proposed reforms cause some providers to go out of business.

54. The impact on the incentive to compete vigorously is dependent upon provider reaction to the proposed set of reforms. Competition for legal aid contracts could be positively impacted if the same numbers of providers are competing for less legal aid clients. On the other hand the level of competition may remain the same or decrease slightly if the number of legal aid providers fall in line with or more than the reduction in legal aid clients.

55. The impact on competition will be assessed further as part of the consultation exercise.

Small firms would, the assessment continues, be affected:

Small Firms Impact Test

56. Small firms will be affected by the proposals to reform legal aid. The proposed reforms are likely to reduce the number of cases entitled to receive legal aid and negatively affect a large proportion of legal aid service providers. The majority of legal aid providers are small firms therefore, when comparing to the legal services population as whole, small legal aid providers are likely to be disproportionately affected by the proposed reforms. However, if the impact of the proposals on small legal aid providers is compared to the legal aid service provider population only, then small firms are unlikely to be disproportionately affected.

57. Overall, due to the dominance of small legal services providers in the legal aid market, the majority of providers impacted by this proposal are likely to be small providers.

58. The impact on small firms will be assessed further as part of the consultation exercise.⁷⁹

5.3 The impact of the proposed changes: controversy in the Commons

In announcing the publication of the green paper to the House of Commons, Kenneth Clarke argued for a return to first principles. The Labour government's reforms had, he suggested, only scratched the surface and so the green paper considered both basic principles and the need to find savings:

No other Government in the world believe that the taxpayer should pay for so much legal aid and litigation as we do in the United Kingdom. We have made clear our commitment to reducing the fiscal deficit to encourage economic recovery. (...) I

⁷⁹ Ibid: Page 13

estimate that the proposals in the consultation paper, if implemented, will achieve savings of about £350 million in 2014-15.

Criminal legal aid would, he said, be unaffected⁸⁰ but in civil and family law people would be discouraged from bringing cases to court, in favour of other forms of dispute resolution:

Legal aid will still routinely be available in civil and family cases where people's life or liberty is at stake, or where they are at risk of serious physical harm or immediate loss of their home. (...)

However, prioritising those areas requires that we make clear choices about the availability of legal aid in other areas. Therefore, we propose to remove from the scope of the scheme issues that are not, generally speaking, of sufficient priority to justify funding at the taxpayer's expense.

Payments to lawyers would also be reformed, with a move towards a competitive market, and there would be a reduction in fees:

I propose to reduce fees paid in civil and family cases by 10% across the board, and to make similar levels of reductions in rising experts' fees.⁸¹

A degree of consensus on the need for reform?

The Opposition has agreed with the Government that the legal aid budget needs to be reduced, but there is little agreement about how those reductions should be made.

When the green paper was announced, Sadiq Khan, the shadow Lord Chancellor and Secretary of State for Justice, remarked that the legal aid budget of more than £2 billion was not sustainable.⁸²

In a Westminster Hall debate on 14 December which she initiated, Karen Buck acknowledged that the Labour government had sought to reduce spending on legal aid and would have made more cuts if re-elected.⁸³ Later in the debate, Andy Slaughter outlined how the Labour government might have reduced legal aid expenditure if it had won another term. Social welfare would have been exempt from cuts:

There would have been cuts under a Labour Government. In some respects, we would have made cuts to private family law, although we should look again at the definition of domestic violence (...) We would, I think, have taken a much more forensic look at criminal legal aid, which has just been brushed over. However, we would not have made cuts to social welfare legal aid.⁸⁴

From the Conservative benches, Margot James asked where the Labour government would have made its cuts, had it been re-elected.⁸⁵ Karen

⁸⁰ In response to a question from Jack Straw, Kenneth Clarke undertook to ensure that any perverse incentives relating to criminal legal aid and guilty pleas were removed from the system. HC Deb [15 November 2010 c666](#)

⁸¹ HC Deb [15 November 2010 c659 - 662](#)

⁸² HC Deb [15 November 2010 c663](#)

⁸³ HC Deb [14 December 2010 c190WH](#)

⁸⁴ HC Deb [14 December 2010 c207WH](#)

⁸⁵ HC Deb [14 December 2010 c193WH](#)

Buck argued that the Labour government would have protected the civil and social welfare budget:

I have already said that there were areas, particularly very high cost criminal cases, in which the Government intended to go further. Ministers were also examining ways in which the civil and social welfare budget could be protected within the global legal aid budget, because it was understood that in many cases, savings in that area would lead to a false economy.⁸⁶

How will the providers of legal aid cope with reduced levels of funding?

In the Westminster Hall debate, Stephen Lloyd suggested that the impact on legal services could be “devastating”.⁸⁷ Sensational newspaper reports of barristers’ payments had, said Jeremy Corbyn, distorted the debate on legal aid provision which, in some inner city areas, was scant:

The cuts have been accompanied by a series of ill-informed, unfair media attacks on the entire legal profession and the legal aid system, which have been led by the *Daily Mail*, the *Daily Express* and the *Evening Standard*. Those newspapers routinely print isolated and outrageous figures about payments to some barristers, while at no time looking at the reality of the number of legal aid firms that are paid so little that they can no longer afford to represent anybody and have gone out of business. In inner-urban areas such as the one that I represent, which is the eighth poorest part of the whole country, many people simply cannot get any representation whatever, because there is no legal aid lawyer to deal with them.⁸⁸

Robert Buckland, a member of the Justice Committee, agreed with the Lord Chancellor that there had been too many consultations about legal aid – more than 30 since 2006:

We do not want permanent revolution. That has caused providers a lot of problems, and has led to some of the uncertainty about sources of work that the hon. Member for Islington North raised.⁸⁹

Who will fill the gap left by the removal of legal aid from (amongst others) education and debt problems?

Many of those voicing concerns about the green paper’s proposals have questioned how people would gain access to legal services to deal with some categories of dispute, once legal aid is removed from those categories. They have argued that alternative sources of funding should be found and particular attention should be paid to the situation of citizens advice bureaux and other not-for-profit providers of legal advice, who might be in a precarious position without legal aid funding. Ministers, though, have argued that the emphasis should be on changing behaviour – on encouraging people to resolve disputes

⁸⁶ HC Deb [14 December 2010 c193WH](#)

⁸⁷ HC Deb [14 December 2010 c196WH](#)

⁸⁸ HC Deb [14 December 2010 c198WH](#)

⁸⁹ HC Deb [14 December 2010 c201WH](#)

through other routes rather than providing alternative means of funding legal action.

In announcing the green paper, Kenneth Clarke referred to the equality impact assessment, arguing that the impact of the changes was justified by the public interest:

It is inevitably the case, of course, that litigation, and legal aid in particular, tend to be focused on the disadvantaged groups in society. (...) We have done an equality assessment, and we believe that the impact of the changes is, on balance, justified by the public interest in ensuring that the taxpayer pays only where there is a public interest in having a dispute resolved.⁹⁰

Sir Alan Beith questioned where people would get help with education, employment, debt and housing problems if not through legal aid. Kenneth Clarke argued that these were all areas not dealt with by litigation:

Employment issues go before a tribunal, for example, and those tribunals were originally designed precisely to avoid representation by lawyers and legalism. They were designed to be more straightforward and accessible forms of justice. Debt certainly requires advice, but much of it is not so much of a legal nature as of a practical nature-advising how to cope with negotiating with creditors and sort out the management of the debts incurred. I agree with the right hon. Gentleman that citizens advice bureaux and other such organisations are a central source of this advice. We will have to consider how far we can continue to enable such organisations to step in and give a wider range of advice, which will be needed when we stop paying people to go to lawyers all the time, as we tend to do on all these issues.⁹¹

For education cases (including those concerning children with special educational needs) Kenneth Clarke argued that disputes should not be settled in a legalistic way:

[T]oo often we are financing people who argue about the process that has been followed to resolve problems, instead of finding the best way of resolving the merits of how best to teach the child, where the child should be taught, or what support the child should have. We believe it is simply not right for the taxpayer to help inject an element of what is really legalism into problems that should in the end be resolved taking into account the best interests of the child from an educational point of view.⁹²

In November 2010, Yasmin Qureshi asked a business question about the removal of legal aid from social welfare cases and argued that Members would not be able to pursue cases on constituents' behalf.⁹³

In the Westminster Hall debate, Stephen Timms expressed concern that voluntary advice services could not, as the green paper suggested, step in to fill the gaps in provision because they too would be losing funding.⁹⁴ Later in the debate, Karen Buck too questioned this assumption:

⁹⁰ HC Deb [15 November 2010 c664](#)

⁹¹ HC Deb [15 November 2010 c665](#)

⁹² HC Deb [15 November 2010 c668](#)

⁹³ HC Deb [25 November 2010 c464](#)

⁹⁴ HC Deb [14 December 2010 c199WH](#)

The assumption underlying the Green Paper is that there is some mythical capacity in the voluntary and pro bono sector to deal with the areas of service where legal aid will be withdrawn. If we accept that there are cuts that will have a major impact on services, does the Solicitor-General agree that we have to be honest about the implications of those cuts and not effectively massage them away by saying that, somehow, somebody mythical will pick all this up?⁹⁵

In replying to the Westminster Hall debate, the Solicitor General, Edward Garnier averred that legal aid was “an acutely difficult area of public policy”.⁹⁶ Difficult choices lay ahead:

However, to be in government is to have to make decisions and choices. The main factor that we have to address at the moment is the economic difficulties that the national budget faces. Every day, we are paying £120 million in interest payments alone. Would it not be better if we could spend that money on legal advice and representation?⁹⁷

The consultation process was, he said, deliberately long.⁹⁸ However, the focus should be on finding solutions to problems, rather than bringing all problems before the law:

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.

I do not shrink from saying that this is a difficult area, or from saying that sometimes the state will have to provide legal assistance. However, we have to narrow the scope or ambit of the taxpayers' responsibility for providing legal advice and legal representation.⁹⁹

Jonathan Djanogly also suggested — in the context of a question about the removal of funding from education cases — that the aim was not to find alternative means of funding cases at law but, instead, to change the way in which people resolved disputes:

The way in which the impact will take shape in each Department - the hon. Lady mentioned education - is complicated because it involves determining whether our proposals will lead to behavioural change. We intend that that should be the case and that alternatives to court and taxpayer-funded remedies should be used to resolve disputes when at all possible.¹⁰⁰

What will become of welfare advice services provided by the Citizens Advice Bureau and other voluntary sector bodies?

In response to a question from Tom Brake, Kenneth Clarke undertook to consider how citizens advice bureaux¹⁰¹ could continue their work advising on welfare benefits, homelessness and debt:

⁹⁵ HC Deb [14 December 2010 c212WH](#)

⁹⁶ HC Deb [14 December 2010 c210WH](#)

⁹⁷ HC Deb [14 December 2010 c211WH](#)

⁹⁸ HC Deb [14 December 2010 c210WH](#)

⁹⁹ HC Deb [14 December 2010 c212WH](#)

¹⁰⁰ HC Deb [11 January 2011 c138](#)

¹⁰¹ Citizens Advice (the national body) and every Citizens Advice Bureau are independent charities, reliant on the support of a wide range of funders including central and local

[We] are concerned, more widely, about the present financial crisis affecting all kinds of outside bodies such as voluntary organisations and charities in many fields. Not-for-profit bodies such as NACAB are very important in giving the kind of advice and help that we are concerned with, so we will continue to look for a solution to that problem.¹⁰²

The question of alternative sources of funding for voluntary sector welfare advice services was raised again by Stephen Timms in November 2010, when Justice Minister, Jonathan Djanogly suggested other options for funding legal action and questioned whether, if the private sector was unwilling, the public sector should take the risk of funding cases:

People have the option of getting conditional fee agreements, also known as no win, no fee agreements. They can go to a lawyer and that lawyer will take a view on the chances of success. The question that must be asked - we will be very interested to hear the responses to it during the consultation - is whether, if the private sector is not prepared to take on the risk, the public sector should be prepared to do so and what proportion of that risk it will be prepared to take on.¹⁰³

The Government's intentions for the future of welfare advice services were described at more length in January, when Jonathan Djanogly answered more questions from Stephen Timms. On the question of replacing lost funding, he suggested that there was scope for better coordination:

The core funding for legal help, for instance, typically comes not from the Ministry of Justice, but from the local authority. We have to make up for a decade of people overlooking the need to co-ordinate funding, by seeing what the funding streams are and ensuring that they work in the way that they should. (...) There is currently a lot of duplication in the system.¹⁰⁴

Jonathan Djanogly also made a distinction between legal aid and general advice:

We need to distinguish between legal aid and general advice. A citizens advice bureau may provide legal aid services, but half do not do so. However, all will provide core advisory services, which are normally funded by local authorities.¹⁰⁵

Questions continue to be asked about the future funding of citizens advice bureaux. Ministers have made the point that much of CABx'

government, charitable trusts, companies and individuals. In 2008/09 the income of the national Citizens Advice charity was £56.19 million. The largest funder of the national Citizens Advice charity was government grants – the majority of this as grant-in-aid from Department for Business, Innovation and Skills; one of these grants is the Financial Exclusion Fund (due to end in March 2011) to tackle financial exclusion. Individual CAB are funded by money from local authorities, National Lottery funds, charitable trusts, companies, individuals and others. As each CAB is a charity it is reliant on the support of a wide range of funders but the Citizens Advice website states that 'local authorities provide nearly half of bureau funding; 22 per cent comes from the Legal Services Commission.'

¹⁰² HC Deb [15 November 2010 c669](#)

¹⁰³ HC Deb [23 November 2010 c160-1](#)

¹⁰⁴ HC Deb [11 January 2011 c141-2](#)

¹⁰⁵ HC Deb [11 January 2011 c151-2](#)

funding comes not from legal aid but from grants from central and local government:

Mr Pat McFadden (Wolverhampton South East) (Lab): (...) Does [the Leader of the House] accept that it is perverse to be cutting funds to citizens advice bureaux for advice on debt relief and financial management at the same time as the Government are making wider cuts in benefits that are driving more people to seek the advice for which they are cutting the funding?

Sir George Young: (...) I pay tribute to the work of the CABs, as all hon. Members do, and I hope that, as local authorities make difficult decisions, they will try to do their best to preserve the funding of CABs, to which people look at a time of recession and real problems of hardship. A £100 million fund is available to help certain charities, and I do not know whether the right hon. Gentleman has thought of applying to that.¹⁰⁶

Will the removal of legal aid from clinical negligence cases encourage “ambulance chasing” lawyers?

Robert Halfon asked how the most vulnerable people in clinical negligence cases would be protected and not exploited by “ambulance-chasing lawyers”. Kenneth Clarke suggested that no win, no fee agreements would meet that need:

No win, no fee is a perfectly suitable way of proceeding in clinical negligence cases. We have decided that that - as amended by Sir Rupert Jackson - is likely to be the way in which people will proceed in future. What we have done completes a process of steadily taking legal aid out of criminal injury claims, which has been going on for some years, and I commend it as a logical next step.¹⁰⁷

More recently, questions have been raised in the Commons about whether the exclusion of clinical negligence cases might feed the “compensation culture”. Justice Minister Jonathan Djanogly indicated that the Ministry of Justice would examine the specific impact on the NHS:

We will be interested to understand through our consultation the specific impact on the NHS of the removal of clinical negligence cases from the scope of legal aid, which should save some £17 million to legal aid. However, we also estimate that our proposals to reform no win, no fee conditional fee agreements will save around £50 million each year to the NHS in reduced legal costs.

(...)

There will still be power to grant legal aid in exceptional cases where a CFA will not be available, although it will be restricted. The fact remains that CFAs will still be available for people with no ability to fund their cases so that they can take proceedings.¹⁰⁸

¹⁰⁶ HC Deb [13 January 2011 c139-140](#)

¹⁰⁷ HC Deb [15 November 2010 c667](#)

¹⁰⁸ HC Deb [23 November 2010 c160-1](#)

5.4 Reaction to the green paper outside Parliament

Alan Travis, writing in the *Guardian*, offered an analysis of the likely effect of the cuts. He suggested that the protection offered to some areas of legal aid work had removed some of the political sting from the "swingeing" cuts:

The surprises rather lay in the parts of the legal aid budget that he had decided to protect. No cuts in asylum cases. No cuts in help for judicial review cases that have proved such an irritant to ministers of all governments. The deep cut in private family cases where more than 80% will be affected will not include those involving domestic violence, forced marriages or where children are at risk of being taken into care.

As Clarke told MPs: "Legal aid will still routinely be available in civil and family cases where people's life or liberty is at stake, or where there is risk of serious physical harm or the immediate loss of their home." He probably didn't have much choice, legally speaking, in making those exemptions but they were enough yesterday to soften the blow for most MPs.

Looking in turn at areas of legal aid expenditure, he analysed the green paper's proposals:

Family cases

There will be a reduction of 246,000 in private family law cases predicted to save £178 m a year. Legal aid to be withdrawn in all cases except those involving domestic violence, forced marriages or may result in children being taken into care. Public family law proceedings such as adoption will not be affected.

Welfare and debt cases

A reduction of 123,000 cases predicted to save £22m a year. This includes withdrawing legal aid from all welfare benefit cases in which initial legal help is given to those taking appeals to the social security tribunal which accounts for 113,000 cases. The cost of funding legal representation in a further 10,000 welfare cases represents 27% of those currently helped. Ken Clarke argued the tribunal was designed to allow claimants to represent themselves with advice available from welfare rights groups. A further 75,000 cases involving debt will also be affected. Exceptions to be made for those whose homes are at immediate risk.

Immigration cases

Around 43,700 fewer cases predicted to save £18m a year. These mainly cover appeals to against visa refusals, appeals to stay in the country but all asylum cases will be excluded as will appeals by those in immigration detention against their continued detention. However, legal aid will be withdrawn from those appealing against decisions to take away continued welfare support for asylum seekers.

Clinical negligence cases

Nearly all 6,100 cases a year are to be removed from legal aid to save £17m a year. This category includes cases where a client incurs loss because of incompetent medical treatment or an action is brought by a family of someone who has died as a result of

medical negligence. Justice ministry says 'no win, no fee' alternatives are available.

Employment cases

All legal help and representation is to be removed for appeals to the employment appeal tribunal including unfair dismissal, redundancy, discrimination, strike action, and wages issues such as equal pay

Legal aid is not an issue that garners much public or political support. The legal aid system was set up by Labour's postwar government as a pillar of the welfare state, guaranteeing access to justice as other postwar reforms ensured access to healthcare or education.

(...)

Labour made no pretence yesterday that they too would have cut the legal aid budget if they had won the general election.

The net result is that when the axe does finally fall there is precious little political support left for an issue that the public widely believes to be a lawyers' gravy train. Yet the numbers are stark enough. There will be 547,000 fewer people each year getting help to resolve legal cases that matter to them and who can't afford their own legal advice. Many of them will be about family matters but they will also involve redundancy, housing, and debt which are all bound to get worse in the public sector squeeze.¹⁰⁹

The Law Society has voiced concern about the likely impact of the green paper's proposals, both for people seeking help and for the law profession:

The government's proposals mean that only the poorest of the poor will continue to be able to obtain civil legal aid and even for them legal aid would cease to be available for some vital matters. But neither we nor the government can know how the Jackson proposals will work in reality and whether the squeezed middle will have access to justice.

If the government persists with these proposals it would represent a sharp break from the long-standing bipartisan consensus that effective access to justice irrespective of the means to pay is essential to underpin the rule of law. Comparisons with expenditure on legal aid in other countries hide many differences in approach and also imply that access to justice is a luxury rather than a foundation of a just and civilised society.

The Law Society will continue to lobby for the government to take a more constructive approach including implementation of the Society's own recommendations for legal aid, following an 18-month consultation with the legal profession.

Among more than thirty recommendations, our [access to justice review](#) suggests other ways to fund legal aid, rather than a willingness to cut the budget, irrespective of importance of access to justice.

(...)

Speaking on the BBC yesterday in response to our own chief executive, the Lord Chancellor suggested that the Law Society's

¹⁰⁹ Alan Travis "[Legal aid cuts: surprise exceptions take out the sting](#)" *Guardian* 15 November 2010

opposition to his proposed cuts was grounded simply in solicitors' self-interest in retaining an income stream.

This unfortunate remark overlooks the fact that solicitors need the income to run viable businesses to deliver legal aid and that many are already subsidising legal aid work from other income. The proposal to reduce rates by ten per cent will more likely than not see more suppliers leave legal aid work.¹¹⁰

The chairman of the Bar Council of England and Wales, Nicholas Green QC, has described the cuts to legal aid as a "shrinkage of justice". He has argued that, although many of the suggested reforms are potentially beneficial, painful questions need to be addressed:

[N]owhere do we see any promise to reinvest in the justice system once times improve. Are we therefore to assume that the shrinkage of justice is permanent? The justice secretary's statement to the house suggests that the Ministry of Justice is going back the drawing board on legal aid. He is asking the elemental question – what should the state fund, and what is legal aid for? This suggests that the funding reforms will become the norm.

He has suggested too that the cuts would leave the poor without access to justice:

The new thresholds for legal aid will mean that many who must be described as poor will be denied legal assistance when they come into contact with the courts at crisis points in their lives about decisions going to the heart of their personal lives and those of their families.

(...)

The devil is in the detail. At the Bar we have set up a major working group to respond to the consultation papers. We will work closely with the government to help it mitigate the pain that, it seems to us, inevitably will be inflicted. As legal aid is to be reduced by hundreds of millions of pounds, it is vital to ensure that alternative means of accessing the justice system available.¹¹¹

The *Law Gazette*, in its first reaction to the green paper, suggested that the legal aid scheme was being weakened:

Since its foundation, Clarke adds, the legal aid scheme's scope 'has been widened far beyond what was originally intended' – the inference being that this somehow justifies the scheme's emasculation.

(...)

First, margins are going to be squeezed immediately by a 10% cut in all fees paid under the civil and family legal aid scheme. This will apply both to prescribed hourly rates and to all civil and family standard and graduated fees.

This, however, is merely a harbinger of a fundamental shift to a price competitive tendering model for criminal legal aid – and then, 'over a longer period', the introduction of that model in civil and family services provided face to face. The latter at least appears to have been kicked back into the next parliament

¹¹⁰ Law Society [Legal aid green paper: Law Society response](#) 16 November 2010

¹¹¹ Nicholas Green "[Legal aid cuts are a brutal shrinkage of justice](#)" *Guardian* 16 November 2010

It is ironic in this context that the government is also seeking views on proposals for reducing bureaucracy associated with the legal aid scheme. For, with studied understatement, the paper notes that 'a move to full market competition is likely to present challenges in design and delivery'. Quite. And the precedents are hardly encouraging. Perhaps this explains the cautious timetable.

(...)

Industry experts were still digesting the proposals as the Gazette went to press – a reflection of their complexity. Steve Hynes, director of the Legal Action Group, commented: 'Legal aid practitioners are punch-drunk from all the administrative and policy changes of the last few years. We'll have to see what happens over the 12 weeks of consultation, when ordinary people become aware of the enormous impact all of this is going to have on access to justice.'¹¹²

The chief executive of Citizens Advice, Gillian Guy, has argued for the retention of legal aid for social welfare advice:

"Every year thousands of our clients need help from civil legal aid services at moments of real need," Gillian Guy will say. "We know from the experiences of our clients how difficult it can be for some people to access to the legal help they need. If people can't access legal help, the consequences can be dire – spiralling debt, homelessness, family breakdown, domestic violence, depression.

(...)

"Legal aid is not a deadweight on the state: to put the legal aid budget in perspective it's only two weeks worth of public funding to the NHS. Yet the savings to the state and society are on a scale of up to £10 for every pound put in, if interventions occur early enough to save costs to other public services."

She will tell delegates that legal aid reform is necessary because the current system is too complex, with too much bureaucracy involving unnecessary costs, but the test of successful reform would be to find new ways to deliver more for less.

"If social welfare is taken out of scope for civil legal aid with nothing to replace it – the reform will have failed. People will always need access to advice when they are faced with losing their home or spiralling debts. If these advice services are not funded from civil legal aid budgets they must be funded from somewhere else or vulnerable people will suffer."¹¹³

¹¹² Paul Rogerson "[News focus: more turmoil ahead for legal aid lawyers](#)" *Law Gazette* 18 November 2010

¹¹³ Citizens Advice press release [Legal aid cuts will exclude most vulnerable from access to justice, Citizens Advice Chief Executive warns](#) 12 November 2010

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