Consultation response

Shelter response to Ministry of Justice consultation:

Proposals for the reform of legal aid in England and Wales

February 2011

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This document contains information and policies that were correct at the time of publication.

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Shelter

About Shelter

Shelter is a national campaigning charity that provides advice, support and innovative services via our website, helplines and national network of services.

Shelter is a leading national provider of specialist social welfare law advice, and we help over 25,000 people each year under legal aid contracts. We employ over 200 advisers and 40 solicitors to give legal aid advice to the public.

Our services include:

- A national network of over 40 advice and support services
- Shelter's free housing advice helpline which runs from 8am–8pm (8am-5pm on Saturdays and Sundays)
- Shelter's website (shelter.org.uk/getadvice) which provides advice online
- The CLG-funded National Homelessness Advice Service, which provides specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, who are approached by people seeking housing advice
- A number of specialist services promoting innovative solutions to particular homelessness and housing problems. These include Housing Support Services which work with formerly homeless families, and the Shelter Inclusion Project, which works with families, couples and single people who are alleged to have been involved in antisocial behaviour. The aim of these services is to sustain tenancies and ensure people live successfully in the community.

This work gives us direct experience of the problems faced by those in need of social welfare law advice and well places us to comment on the Government's proposals for the reform of legal aid. Shelter specialises in legal advice on housing, welfare benefits and debt and therefore we restrict our comments to these areas.

Summary

Shelter is greatly concerned at the Government's proposals for the reform of legal aid in England and Wales. We believe that if the Government goes ahead with the proposals as they currently stand, the consequences will be far reaching both for the clients of legal aid and for the organisations that deliver advice services to the poorest and most vulnerable people in our society. We simply cannot reconcile the Government's claims to protect the most vulnerable with the proposals to reform legal aid in this way.

We do not agree with the Government's contention that much of the work covered by social welfare law is "practical" rather than "legal" and therefore should not be funded by legal aid. The idea that problems only become legal at the point of court proceedings seems fundamentally to misunderstand the nature of specialist legal advice. Legal aid only funds legal work. In our view, if the government believes that legal aid funding is being spent on non-legal work, it should require the LSC to enforce the existing rules, not amend the scheme to remove legal work from scope.

The Government must comply with its obligations under the European Convention on Human Rights, as well as Article 47 of the European Charter of Fundamental Rights[1]. We are concerned that these proposals either do not comply, or would require so many cases to be funded as exceptions that there would be little point in proceeding. At the very least, the Government risks opening up an additional sphere of litigation: challenges to refusals to fund. Since such challenges would be way of judicial review of a decision not to fund, they would be covered by legal aid.

Scope

Housing

- Shelter is alarmed that the Government proposes to remove 36% of all legal help housing cases from scope (38,000 cases).
- We support the Government's proposes to retain in scope cases relating to homelessness. However, the consultation paper defines homelessness so narrowly as to exclude many areas that would logically be included. We are encouraged that the Minister has since confirmed that this is now not to be the case and that, despite the wording of the consultation, it is the intention to retain all areas of statutory homelessness advice.
- We strongly disagree with cutting legal advice on landlord harassment and unlawful eviction; 'wrongful breach of the covenant of quiet enjoyment' and 'trespass' are to be removed from scope. The paper argues that these can be cut as they do not directly concern homelessness or the safety of clients. But these are all matters of law, and complex law at that, and with serious consequences to the individuals affected, including homelessness. We believe that to distinguish between forms of homelessness in this way, funding advice on some but not on others is illogical. All advice to tackle homelessness should be funded.

[1] Article 47 - Right to an effective remedy and to a fair trial. "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

- We disagree with the proposal to remove from scope disrepair damages claims (other than counterclaims in possession cases). Such claims are a key way of dealing with poor and rogue landlords who exploit vulnerable tenants. Many tenants would not be able to afford to pursue these cases privately, or afford insurance premiums for conditional fee cases, and therefore they would go unpursued, giving those landlords who exploit the most vulnerable effective impunity.

- We strongly disagree with the proposals that advice and representation on re-housing issues would go out of scope under the proposals. This would include, for example, detailed legal advice on transfers and assignments of tenancies, and any issues regarding the allocation policies of local authorities. These are key avenues for resolving serious housing problems.

Debt

- The proposed cut amounts to 75% of all legal help debt work, or 75,000 cases. Shelter is concerned that debt advice would only be retained in cases regarding the immediate risk of repossession, where the loss of the home is attributable to rent or mortgage arrears. 'Immediate' is not defined and we are unclear as to the point at which help would be legally aided, but the implication is that it would only be at the point at which proceedings are issued, or at best seriously threatened. We believe that as a minimum 'risk of repossession' – i.e. where there are arrears which are not the subject of a repayment agreement that is being complied with – should be the standard. Other charges against the property such as any kind of land charge, secured debt or order of enforcement of County Court judgments should logically be included as these also relate to the loss of the home.

- We do not agree that legal aid is not justified in the vast majority of debt issues. The plan to exclude debt advice in relation to credit card debts, utility bills, court fines or hire purchase debts is, in our view, short-sighted. We know that for example, credit card debts can mask housing problems. Shelter research from 2010 reveals that more than two million people have used credit cards to pay their mortgage or rent. This was a 50% increase on the figures for the previous year.[2] Advising a client defending County Court proceedings for debt is by definition a matter of law. Many cases that have not reached the courts also require legal advice on the enforceability of credit agreements, options around Debt Relief Orders and bankruptcy and on the consequences of non-payment.

Welfare Benefits

- All welfare benefits advice is to be excluded from scope of legal aid. This corresponds to 113,000 legal help welfare benefits cases. The Government argues that these are of lower importance because they are about financial entitlement rather than issues concerning safety or liberty. We do not agree with this. We believe issues concerning financial entitlement are extremely important when they concern the only source of income a client has. These clients are by their very nature the poorest in society. Welfare benefits problems are often the underlying cause of other issues, such as ill-health, debt and homelessness. Removal of funding to resolve these at an early stage will worsen problems and increase costs later.

- Welfare benefits law is complex and very often claimants are elderly, ill, disabled or otherwise vulnerable. They rely on their benefits for food, clothing and housing and to participate in society. If wrong or unlawful decisions go unchallenged it will increase social exclusion, with the particular impact on those groups identified in the Impact Assessment. To compound this, the proposals come at a time of major upheaval in Housing Benefit and with an entirely new benefits system (the

[2] Shelter press release, 6 January 2011, 2m pay for home on cards
http://england.shelter.org.uk/news/january_2011/2m_pay_for_home_on_cards

proposed Universal Credit) in the pipeline that people are likely to need legal advice to understand and challenge.

Work carried out in Nottingham identified that 40 per cent of the capacity of advice agencies is spent dealing with work that is generated by the failure of external organisations to make correct or timely decisions.[3] The Government claims that the proposed Universal Credit will reduce the number of errors in the administration of benefits[4]. We argue that if this is the case, then the demand for legal advice on welfare benefits will reduce, without the need to exclude it from scope.

Tribunals

- We are concerned by the proposals to withdraw legal aid from very vulnerable clients and encourage them to represent themselves before the courts or before tribunals.

- We know from our experience of staffing Housing Possession Scheme court desks that many clients with complex and interrelated social welfare problems turn up for court without representation and are ill equipped to represent themselves. Clients who arrive for court with no prior experience and not having received advice are anxious and ill-prepared, often without crucial evidence or documentation. If the proposals go ahead, there will be more such people across a wider range of courts and tribunals, putting additional pressure on court resources.

- We disagree with the assertion that the 'friendly nature of tribunal means that clients can present their cases themselves'. However "friendly" a Tribunal may try to be, at its heart the court and Tribunal processes are adversarial systems; parties have to put their case, argue it and question the 'other side'.

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

  - people will pursue their appeals when they should have been advised that their case has no merit;

  - people whose case has merit will pursue it but, without advice, will not present it effectively or will be unable to provide the necessary evidence;

  - people who should be appealing and whose entitlements have been denied will not do so.

  The first two impacts are likely to increase the Tribunal Service's workload. However, the consultation paper suggests that there will be no cost implications on the Tribunal Service[5]. Shelter finds this implausible.

Prevention & problem clusters

- If the government's proposals are adopted then they will positively preclude problems being dealt with holistically and preventatively. A client with a housing possession case arising out of a benefits problem will be able to get the possession proceedings dealt with under legal aid. But the legal aid provider, who is currently obliged also to deal with welfare benefits issues, will in future be actively

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[3] *It's the system stupid!* http://www.adviceuk.org.uk/projects-and-resources/projects/radical/ITSS and *Radically Rethinking Advice Services in Nottingham*, November 2009 http://www.adviceuk.org.uk/_uploads/documents/1MicrosoftWord-NottinghamSystemsThinkingPilot-InterimReport.pdf

[4] Ian Duncan Smith, quoted in the white paper press release http://www.dwp.gov.uk/newsroom/press-releases/2010/nov-2010/dwp153-10-111110.shtml "It will cut a swathe through the massive complexity of the existing benefit system and make it less bureaucratic to run. And by utilising the best data technology available, we will streamline the system to reduce administration costs and minimise opportunities for fraud and error at the same time."

[5] page 11, Legal Aid Reform: Scope changes http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf

prevented from doing so. To address problems early on and in their entirety is precisely to address the drivers of the demand for social welfare law legal aid further down the line. Early intervention, once a legal problem has been identified not only saves human misery but also costs to the taxpayer.

Alternative sources of assistance

- A further justification for the cuts given by Government is that alternative sources of assistance are available. We believe that in their consideration of this, the Government has erred greatly. Shelter is cited as an alternative source of advice. We were not consulted by the MOJ on this. In fact, rather than having an increased capacity to carry out advice work, Shelter is likely to lose all its income for welfare benefits advice and much of its income for debt and housing advice. We estimate that we will see a reduction of 46% in our income for legal aid advice work. This represents 30% of our total statutory and contract income, or 11,694 cases. Furthermore, many of the other organisations cited have made public their concern that Government wrongly envisages they could provide an increased amount of advice if legal aid is cut.

The Community Legal Advice Telephone Helpline

- Shelter helps people through a combination of specialist face to face advice, specialist telephone advice, generalist telephone advice and email and web advice and information. We also provide second tier specialist support via the telephone. We are therefore experienced in the provision of telephone services alongside face to face services.

  We do not agree with the proposals as set out in the consultation paper. We agree that telephone advice is of value and that it provides a useful service to clients. We welcome both an expanded telephone advice service and the development of a gateway through which clients could be referred to face to face service. However we do not agree that this should be the "single gateway" or sole method of accessing services. We believe in the fundamental importance of client choice, and that there should be a range of delivery models available.

- Shelter strongly believes that such a far-reaching and fundamental proposal as this, which represents a radical re-shaping of the provision of legal services, should be subject to a full and detailed consultation in itself. The limited detail in the paper is not such a consultation. We strongly urge the Government to consult fully and separately on proposals to develop a telephone gateway.

- As a provider of telephone advice services, and in particular of Community Legal Advice telephone services, we recognise the value and benefits that telephone advice brings. It can provide speed and flexibility for those who are not able to access face-to-face provision, for example because they are working or caring full time; it can help in advice deserts where there is no advice provision. Many cases can be dealt with extremely effectively over the telephone. But many others cannot.

- When a problem arises, many clients seek advice from providers they have used before and know and trust. A strong relationship between adviser and client is a central to clients providing vital information about their circumstances. In many cases, clients prefer to seek advice in person rather than over the telephone – this is the case even in sectors of the population otherwise expected to be familiar with technology. For example evidence from Youth Access highlights the fact that, despite being major users of the internet, young people do not prefer it as a means of accessing advice. The evidence suggests that remote mediums such as email and the telephone are not as conducive

to building the trust with an adviser which is necessary for young people to open up about their social welfare problems.[6]

- Local advice agencies are a part of the community and are embedded in it, and that local knowledge and involvement can often be crucial to client cases. It can be of wider importance as well; Shelter and other not for profit providers use their local knowledge and local contacts for local campaigning and work with, for example, local authorities to improve and promote good practice. We find it very surprising that the Government's very clear overall strategy of localism and belief in the importance of local decision making is so undermined by these proposals.

- Research by the Legal Action Group has revealed that people in social classes DE are the most likely to experience a social welfare law problem and the most reliant on local advice centres for help. This group are the least likely to use a telephone helpline or be able to travel far to access advice[7]. The Civil and Social Justice Survey has repeatedly identified the main ways in which clients make first contact with an adviser. Around half (52%) make initial contact an adviser by phone but it is also relatively common for first contact to be made in person (36%). It is also worth noting that even those who make initial contact by phone, go on to see their adviser face to face[8]. Urgent cases, cases with complex issues or large amounts of documentation, vulnerable clients, clients who do not speak English are some examples of those who need face to face advice. Many other clients simply prefer to approach face to face services.

- A further factor to take into account is the proposed cut to scope. In our view, the possibilities of increasing effective telephone advice would reduce as scope reduces.

- We certainly agree that Community Legal Advice should offer specialist advice in all categories. However, we do not believe that it will be possible to do so to anything like the degree suggested in the paper. The Impact Assessment estimates that 76% of work will be lost to face-to-face providers – 85% in the NfP sector – with the obvious implications for sustainability of local services and expertise.

- We have invested considerable time and resources in making our services available to the widest range of people. We have found that our face-to-face, telephone and web advice services address different people at different times. The client groups of each overlap but are not the same. Therefore driving all advice to telephone will result in a substantial cohort of those who currently seek face to face advice dropping out and not receiving any legal advice at all, with possible knock on affects to statutory services, such as social services and the NHS.

- In our view a better option would be to retain and expand the existing Community Legal Advice telephone service and market it properly, thereby increasing awareness and thus take up of the service. This would achieve the aim of driving clients to telephone advice and reducing costs without the need for compulsion and without the devastating impact on face to face provision that compulsion would entail.

- As an experienced provider of telephone advice, we consider that the government's proposals are extremely ambitious. We believe that the government has not done the necessary preliminary work on this and should do so before moving ahead with any such proposals. There should be a full consultation and lessons should be learnt from overseas provision[9] and other national helplines such as NHS Direct. Any extension should be piloted and fully evaluated.

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[6] Kenrick, J. Young People's access to advice – the evidence Youth Access 2009.
[7] Social Welfare Law: what is fair? LAG, 2010 http://www.lag.org.uk/Templates/Internal.asp?NodeID=93529
[8] Civil and Social Justice Survey 2004, 2006-9
[9] For example Pearson J and Davis L (2002) The Hotline Outcomes Assessment Study, Final Report – Phase III: Full-Scale Telephone Survey, Denver, Centre for Policy Research

Financial Eligibility

- Shelter is concerned at the proposals in the paper to reform eligibility. As a national provider of social welfare legal advice, both under Legal Help and under certificate, these proposals will have a significant impact on our clients.

- The current means test is very targeted, and even though the previous government increased eligibility levels slightly (by 5%) in 2009 the overall picture is one of declining eligibility. At best, 35% of the population are currently eligible for any form of means-tested legal aid – often required to pay substantial contributions – compared to over half of the population in 1998.

- We agree with the principle that those who can afford to pay for their own representation should do so. However, we are concerned that these proposals go far beyond that principle, and will deprive those who cannot afford self-funding of advice, and deter others from seeking it.

- In our view, legal aid should have the same capital limits as other means tested benefits, for reasons of simplicity, fairness and transparency. We consider that receipt of passported benefits – which are fully means tested – is a good proxy indicator for whether someone would find legal advice affordable.

- We do not agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution. £1,000 is a very low level of capital. This represents a substantial lowering of the existing contribution threshold from £3000 and the reality is that it is likely to be unaffordable for many clients.

- Our deepest concern at this proposal is that it will result in a deterrent preventing people from seeking advice. To someone on a low income, £100 is a great deal of money and there is a risk that people will simply not apply for legal aid. We do not agree that this will encourage a "responsible approach to litigation". The obvious question begged is where, given the strict merits tests that apply, is the evidence that there is currently an irresponsible approach to litigation? Instead, we consider that it will drive people away from advice.

- We do not agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases. We are concerned that there will be a disproportionate impact on homeowners with low income, particularly pensioners, who are often in need of social welfare law advice – perhaps because of debt or issues with benefits. The ability to resolve those issues at an early stage is often what stops the case spiralling and leading to possession proceedings later. This proposal will also impact disproportionately on those in London and the South East, and other urban areas, where property prices have increased at a rate far outstripping disposable income.

- Neither do we support the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases. The £200,000 limit is substantially lower than now and will impact particularly on those in London and the South East, and on those with capital but low income. We believe that legal aid eligibility should be based on ability to pay, but that there is not necessarily a correlation between ability to pay and ownership of property.

Civil Remuneration

- We do not agree with the proposal to reduce fees by 10%. There was a small uplift in controlled work rates in 2001, but that apart the hourly rates paid for civil work have not risen in 20 years. They have been far outstripped by rises in inflation and the overhead costs of doing the work. The result

is that margins have been squeezed by such an extent that the number of providers doing civil legal aid work has plummeted.

- We are very concerned not only about this proposal in isolation, but also the cumulative effect of it taken with all others. In particular, the Government estimates that over 70% of cases would go to the telephone gateway; of the remainder our own projections are that over 47% of our social welfare cases would go out of scope; if on top of that there are fee cuts of 10% on the very few cases that remain to us, it is very unlikely that we would have economically viable contracts.
- We are already concerned that fixed fees create a perverse incentive to take on simple and straightforward cases at the expense of long and complicated ones; a lower fee will simply strengthen the incentive. This will have clear implications for access to justice, particularly for vulnerable clients and those with the most difficult cases.

- We believe that the payment rates for legal aid work have fallen so far behind the rest of the legal services market that a rise is long overdue. However, we do recognise the constraints within which the government is operating, but would suggest that a freeze in rates is the most that the market could take.

Expert Remuneration

- We agree in principle that consolidated and codified expert fees are appropriate. We consider that there does need to be some restraint in the expert market and that expert fees can be disproportionately high. However we would urge the Government to proceed with some caution. Although the categorisations in the annexes to the consultation paper seem appropriate, the particular proposed rates seem to us to present a danger. In the context of housing litigation, clients may not be able to access suitable, or any, experts to assist with their case.

Alternative Sources of Funding

- We do not disagree in principle with a scheme to secure interest on client accounts. However in practice we are not convinced that it would generate sufficient monies to replace or substantially supplement legal aid; nor would it, given fluctuations in interest rates, be necessarily predictable, but money raised through such a scheme could be used in specific non-core ways. For example, it could be used to establish a fund that could, on a discretionary basis, fund deserving cases that would otherwise be outside the scope of legal aid. Or it could be used to establish a fund that would provide low-cost or interest free loans to struggling legal aid providers whose failure would impact on access to justice – such as the recent cases of Refugee and Migrant Justice and a number of law centres – enabling them to buy time to resolve their difficulties and restructure into a more sustainable form. Such a fund would need considerable thought and safeguards but could be a way of preventing increases in advice deserts.

Governance and Administration

- We welcome the opportunity to comment on the administration of legal aid. In our view, the combination of inconsistency, poor or non-functional IT systems, delay and excessive scrutiny has led to an unnecessarily bureaucratic and antagonistic relationship between the LSC and providers. A new agency is a chance for a new approach. We would be very happy to work with the MOJ and

LSC towards a simplified and less bureaucratic legal aid scheme, which would make its operation less burdensome to all parties and would of itself save considerable costs.

- In particular, there needs to be a period of stability. The permanent revolution of the last decade must stop. Above all, there must never be a repeat of the 2010 tender round, which was one of the most destructive, badly handled and chaotic processes the LSC has ever designed. Current contracts should run without further changes – to fees, scope, eligibility or delivery model – until their expiry in 2013. Future changes to the system should be introduced only at fixed and well-known intervals, say every three years with the expiry of contracts and major changes should be piloted, evaluated and amended before being rolled out.

Impact Assessments

- We are very concerned that the Government has carried out impact assessments that clearly show a negative impact for certain client groups but has not adapted the main consultation proposals to mitigate this. This renders the impact assessments nothing more than a paperwork exercise.

- It does not appear that the Government has made any assessment of the impact of these proposals, whether in financial or other terms, on other Government departments and statutory agencies. There is an acknowledgement that there will be impacts, but no attempt to quantify them and in particular to assess whether as a result the proposals would actually save money when taken across public expenditure as a whole. This must be done. We refer in this context to the research by Citizens Advice[10], which found

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

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

  For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80

Introduction

We are greatly concerned at the Government's proposals for the reform of legal aid in England and Wales. We believe that if the Government goes ahead with the proposals as they currently stand, the consequences will be far reaching both for the clients of legal aid and for the organisations which deliver advice services to the most vulnerable people in our society. We simply cannot reconcile the Government's claims to protect the most vulnerable with the proposals to reform legal aid in this way.

An accessible and fair legal system is essential for the appropriate resolution of disputes. Legal aid is key in ensuring that the legal system remains as accessible as possible to those who otherwise would not be able to pay for legal advice. We do not agree that legal aid has expanded beyond its original intentions. Rather, we believe that the legal aid scheme has adapted over time to ensure that the original intentions of legal aid continue to apply to modern day society. Our legal system and our legal aid scheme are rightly among the most admired in the world.

Throughout the consultation paper, the Government argues that legal advice is most needed at the point of litigation, particularly where the matter concerns the loss of a home or serious injury. Through this argument, the Government seeks to justify cuts to scope which would remove essential legal advice to

[10] Towards a Business Case for Legal Aid, Citizens Advice, July 2010

over half a million poor and vulnerable households. We disagree with the argument that early legal advice is less important than advice at the door of the court. We also disagree that advice is best given at the point someone is at immediate risk of losing their home. Early intervention is often much more effective in resolving legal problems before they escalate to crisis point. Legal aid needs to fund both early and late intervention in order to ensure that all those with legal problems access the advice and representation they need.

Much space in the consultation has been dedicated to making savings to the legal aid budget by cutting eligibility and by changing the delivery methods. These are seen as prime money-saving measures. However the impact assessments acknowledge the cost: that the most vulnerable will be disproportionately hit by these cuts. Shelter is disappointed that the consultation paper itself is silent on the negative and far-reaching consequences of the proposals, even though they are highlighted by the impact assessments.

We believe that the Government has, in its appraisal of the legal aid scheme, missed an essential area for consideration. In seeking its cost savings in cuts to scope, eligibility and cheaper delivery methods, the Government concentrates on the wrong issues. It is not exaggerated scope or overly generous eligibility rules that drive legal aid expenditure; it is not social welfare law clients rushing to litigation. It is external costs drivers that need to be considered. For example, it has been calculated that the last government introduced over 3000 new criminal offences. It also significantly increased the rights of individuals and provided mechanisms for enforcing those rights. However, there appears to have been very little consideration given to the cost of enforcing those rights or of prosecutions of new offences.

We believe that the Government should ensure that departments introducing new legislation should offset the impact of that legislation by a contribution to the legal aid fund. The current Legal Aid and Judicial Impact test which is meant to formalise such arrangements seems to be underutilised.
A further illustration of external cost drivers would be the cost to legal aid of ineffective decision making by public bodies. One example would be local authorities that fail to take homeless applications where there is clearly reason to believe an applicant may be homeless; other examples are housing benefit departments making incorrect decisions or DWP wrongly processing client information. Such inefficiencies drive the need for legally aided advice. These are the areas which Government should be assessing, in order to improve inter-departmental understanding of legal aid, avoid waste and genuinely ensure that legal aid continues to operate within the original intentions of the scheme.

Overall, Shelter is greatly concerned by the overall impact of the proposals to reform legal aid. We believe they would leave many vulnerable clients without essential legal advice, would irreparably damage the not for profit advice sector and would drive costs to the taxpayer in the long run. The detail of our concern is set out in answer to the consultation questions.

Consultation Questions

Scope

Question 1: Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme? Please give reasons.

Yes, we agree that these cases should remain in scope, but not that these are the only cases that should remain in scope. The Government says that in reaching its view on which types of cases and proceedings should continue to justify legal aid, the following criteria have been taken into account:

- Importance of the issue
- the litigant's ability to present their own case (including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law)
- the availability of alternative sources of funding
- the availability of alternative routes to resolving the issue

Whilst these are not Shelter's criteria, we agree that the cases which the Government would like to remain within scope meet the criteria given. However, some of the areas to be included are ambiguous and need clarification. Many types of cases and proceedings which in Shelter's view would pass the test for retention, are to be excluded. The overall impact of Government's application of these criteria is to make sweeping cuts to social welfare law legal aid. We set out in answer to Question 3 our views on the areas proposed for exclusion from legal aid funding.

We would also point out that the government needs to comply with its obligations under the European Convention on Human Rights, as well as Article 47 of the European Charter of Fundamental Rights[11]. We are concerned that these proposals either do not comply with the government's obligation, or would require so many cases to be funded as exceptions that there would be little point in proceeding. At the very least, the government risks opening up an additional sphere of litigation as challenges to refusals to fund are brought – and since they would be way of judicial review of a decision not to fund, such challenges would be funded.

Housing

The Government proposes to retain in scope cases which relate to homelessness, yet the consultation paper defines homelessness so narrowly as to exclude many areas which would logically be included. Shelter does not agree with this and welcomes the clarification the minister gave in a written answer on 31st January[12] and in a meeting with Shelter on 7th February that in fact it is proposed to retain all statutory homelessness advice and representation in scope. However, we remain concerned at the proposals to remove other areas relating to homelessness, such as unlawful eviction and also other crucial areas of complex legal housing advice.

Debt

The Government proposes to retain legal aid for debt cases where, as a result of rent or mortgage arrears, the clients' home is at immediate risk of repossession. 'Immediate' is not defined and we are unclear as to the point at which help would be legally aided, but the implication is that it would only be at the point at which proceedings are issued, or at best seriously threatened. Again, Shelter calls on the Government to clarify and does not believe that answers given to date are adequate. We believe that as a minimum 'risk of repossession' – i.e. where there are arrears which are not the subject of a repayment agreement which is being complied with – should be the standard. In our view, early advice is essential and it is illogical in such cases to restrict help only to those whose problems have already spiralled out of control such that there is an immediate risk of losing their home. Early advice enables problems to be resolved or settlements to be negotiated, saving costs down the line.

Furthermore, only debt cases where the loss of the home is attributable to rent or mortgage arrears would legal advice be available. Other charges against the property such as any kind of secured debt or charge or order of enforcement of County Court judgments should logically be included as these also lead to the loss of the home and are clearly matters of law.

[11] See footnote 1.
[12] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110131/text/110131w0003.htm#11013131001656

Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party? Please give reasons.

We do not propose to answer this question.

Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.

No, we do not agree.

The Government sets out its rationale for both retaining and removing cases from the scope of legal aid. It lists the four criteria mentioned in our answer to question 1. We believe that the Government has applied its own criteria in a flawed way, as we will explain below. However we also note that the Government has as a starting point, a view that the legal aid system has been widened beyond its original intentions and now includes some areas in scope which should not require any legal expertise to resolve. There is a recurrent theme throughout the consultation paper that the availability of legal aid has encouraged people to bring their problems before the courts too readily and this has resulted in inappropriate litigation and the use of lawyers in issues which do not need legal input. Unfortunately there is no evidence in the paper to justify the assertion either that problems are practical rather than legal or to demonstrate levels of inappropriate litigation. Yet, the Government uses these assertions to justify excluding from scope vast areas of social welfare law.

Practical vs Legal

Shelter does not agree with the government's contention that much of the work covered by social welfare law is "practical" rather than "legal" and therefore should not be funded by legal aid. The idea that problems only become legal at the point of court proceedings seems fundamentally to misunderstand the nature of specialist legal advice. As argued in Causes of Action: Civil Law and Social Justice[13],

> *The problems to which the principles of civil law apply are not abstract 'legal problems'. They are not problems familiar only to lawyers, or discussed only in tribunals and civil courts. They are for the most part the problems of everyday life – the problems people face as constituents of a broad civil society.*

All the cases that we deal with under legal aid involve a legal issue and require knowledge and application of the law to resolve. Legal aid does not fund matters that are not legal and that the government appears to believe that it does shows a fundamental misunderstanding of the nature of the scheme. There has to be a legal issue at stake as a first condition for receipt of funding.

In the debate in the House of Commons on 3rd February, the Minister cited the example of the local jobcentre which referred those who asked what benefits they may be entitled to, to the local law centre. He drew from this the conclusion that the legal aid scheme was funding basic benefit entitlement checks and that this work was either not legal or should have been done by the jobcentre – it was a duplication of funding[14]. In fact, the legal aid contract is explicit that such work is not covered[15]. In contrast, welfare benefits advice funded by legal aid is complex legal work generally advising clients on appealing adverse decisions of the DWP. This is a complex area of law codified by statute. The standard guide on

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[13] Pleasance, P. (2006) Causes of Action: Civil Law and Social Justice, Norwich: TSO, p1

[14] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110203/debtext/110203-0004.htm#11020330001622

[15] For example, the Contract Specification states at para 10.77 "You must not open a Matter Start where the matter could have been easily dealt with by the client, such as by an enquiry to the relevant benefits authority" and at 10.78 "Legal Help should not be used to assist the Client in completing forms unless an issue of law arises".

the subject runs to 1700 pages and requires bi-monthly updating[16]. Maurice Kay LJ described welfare benefits law as follows:

> *In the field of social security, primary and secondary legislation are notoriously labyrinthine. Sometimes the substantive entitlement to a statutory benefit is clothed in complexity and can only be determined after an interpretive journey that few are equipped to travel. These two appeals do not involve complex substantive law. However, they raise procedural and jurisdictional issues of real difficulty.*[17]

Similarly debt matters can often require matters of complex law; advising a client defending County Court proceedings for debt, for example, is by definition a matter of law. Many cases that have not reached the courts also require legal advice on the enforceability of credit agreements, options around Debt Relief Orders and bankruptcy and on the consequences of non-payment.

Legal aid only funds legal work. If the government believes that legal aid funding is being spent on non-legal work, it should require the LSC to enforce the existing rules, not amend the scheme to remove further legal work from scope.

In other areas, the government does recognise that problems are legal in nature but does not recognise the nature or extent of them. For example, unlawful eviction clearly fulfils the government's criteria for retention in scope in that it is about eviction / possession and an immediate risk of homelessness, yet the government proposes removing from scope actions for breach of the covenant of quiet enjoyment, which is the cause of action under which unlawful evictions are generally challenged.

The Government talks of the need to return to 'first principles' and remove certain areas from scope. Yet, the first principle of legal aid was precisely to 'provide legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right.'[18] The first recommendation of the Rushcliffe Report in 1945 was that legal aid should be available "in all courts and in such manner as will enable persons in need to have access to the professional help they require". There was a strong sense that people should have a right to the help they needed without having to rely on charity or the social conscience of the legal profession. The Legal Services Commission strategic plan for 2009-12 states that legal aid remains a 'pillar of the welfare state and society because it gives access to justice for the people who need it but can least afford it'.[19] As a statement of first principles Shelter wholeheartedly endorses this.

The consultation paper claims to ensure the protection of the most vulnerable in our society. Shelter simply cannot reconcile the proposed cuts to housing, benefits and debt with claims to protect the most vulnerable. We highlight below our reasoning.

Housing

Shelter is alarmed that the Government proposes to remove 36% of all legal help housing cases from scope (38,000 cases). Legal aid plays a crucial role in helping the most vulnerable to enforce their housing rights and thereby access justice and improve their housing situation. The proposals as they currently stand would limit it to possession proceedings, serious disrepair and some homelessness cases, thereby excluding many of the vulnerable from timely legal advice.

The Government asserts: 'we consider that cases concerning homelessness…. are sufficiently important to justify legal aid funding, given the seriousness of the immediate consequences (Para 4.193). Yet the consultation paper defines cases concerning homelessness so narrowly as to exclude

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[16] Child Poverty Action Group's Handbook
[17] Secretary of State for Work and Pensions v Borrowdale & Morina [2007] EWCA Civ 749 (para 1).
[18] Legal Aid and Advice Act 1949
[19] LSC Strategic Plan 2009-12 p5 http://www.legalservices.gov.uk/docs/about_us_main/Strategic_Plan_2009.pdf

essential legal advice precisely to those grappling with the ordeal of homelessness. The only homelessness work specifically included is that relating to County Court appeals under s204 Housing Act 1996. As mentioned previously, there has been subsequent confirmation from Government that all statutory homelessness cases would remain with the scope of legal aid, but Shelter is concerned that this was not spelt out in the consultation paper itself.

This omission has created the impression that Government seeks to remove from scope the pre-court work which is so very successful in both resolving issues early and saving costs further down the line. Currently advice can be given on an application to the local authority and on an appeal (strictly, a review of the decision under s202). In homelessness cases, s.204 appeals can only be brought on a point of law, and whether a point of law exists is often dependent upon the correct issues of fact and law having been put to the authority at the review stage, which precedes application to the County Court. If a relevant point of law is not made at review stage, it cannot be raised at appeal, even if it is a winning argument. Clients need expert advice to put forward appropriate and detailed representations – and in appropriate cases, to prevent the submission of unmeritorious appeals. If the aim is to avoid litigation, then a properly conducted review is essential. The proposed scope cuts as they are set out in the consultation paper, would remove opportunities to right wrongs at the earliest stage and would leave many households facing homelessness without appropriate advice. We welcome the Government's confirmation that this will not be the case.

This is particularly important as this consultation comes at a time when official figures show homelessness to be on the increase.[20] Furthermore, they coincide with the Localism Bill, which intends to introduce major changes to housing and homelessness law. The Government itself has said that the Localism Bill changes would lead to 'the most radical reform of social housing in a generation'.[21] Major change in the system creates complication and scope for error, at least in the short term, and increases the need for advice.

The MOJ recognises that withdrawal of legal aid for preventative work could lead to serious consequences, but suggests that such consequences may be too indirect or too far down the line to justify the use of legal aid. Shelter argues that this fails to understand the role played by social welfare law legal advice. Public funding has played a pivotal role in promoting early intervention before housing problems escalate. In so doing it prevents homelessness, provides access to justice for the most vulnerable and creates savings to the public purse.

According to the proposals, legal advice on landlord harassment and unlawful eviction would go as 'wrongful breach of the covenant of quiet enjoyment' and 'trespass' are to be cut from scope. The paper argues that these can be cut as they do not directly concern homelessness or the safety of clients. Shelter strongly disagrees. These are all matters of law, and complex law at that, and with serious consequences to the individuals affected, including homelessness. They therefore fall squarely within the government's criteria.

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

[20] Homelessness Briefing, Shelter, Crisis, Homeless Link, St Mungo's, December 2010
http://england.shelter.org.uk/professional_resources/policy_library/policy_library_folder/homelessness_briefing
[21] CLG Press Notice: *Radical reforms to social housing, 22 November 2010*
http://www.communities.gov.uk/newsstories/newsroom/1775875

continuing. This comes at a time when the government is proposing that the private rented sector is much more commonly used, including for vulnerable households.

In addition, advice and representation on re-housing issues would go out of scope under the proposals. This would include, for example, detailed legal advice on transfers and assignments of tenancies, and any issues regarding the allocation policies of local authorities. Unlawful policies can be challenged by judicial review, and such challenges remain in scope. But removing initial advice and the ability to negotiation with local authorities is likely to lead to more such challenges and increased costs.

We also note the proposals to remove from scope disrepair damages claims (other than counterclaims in possession cases). Such claims are a key way of dealing with poor and rogue landlords who exploit vulnerable tenants. Many such tenants would not be able to afford to pursue these cases privately, or afford insurance premiums for conditional fee cases, and therefore they would go unpursued, giving those landlords who exploit the most vulnerable effective impunity.

Case study

Angela approached Shelter when her older son, Mark, who suffers from severe autism, became the target of local bullies. The verbal abuse directed at her son, and then at her, escalated to the point that stones were thrown at them and death threats were made against Mark.

The intimidation continued every day and Angela was forced to leave all her curtains and blinds drawn 24 hours a day. The harassment was having a terrible effect on the families' mental health. Angela says: 'Mark was very upset, very scared and confused. He could not understand why they were doing this. He was going round in circles on the spot and banging his head with his fists and screaming.'

Shelter advised Angela on her rights under the council's allocations policy and challenged the decision of the local authority not to move them. Shelter secured medical evidence demonstrating the damaging effect of the abuse on Mark's physical and mental health and successfully appealed to the local authority to move Angela and her family into a higher priority band. As a result the family were re-housed and the abuse terminated. They have since rebuilt their lives and Mark's health and well being have improved.

'If it wasn't for support from Shelter we wouldn't have got the property we're in,' says Angela. 'People with a disability are so vulnerable and such an easy target for hooligans. It has taken a long time for my sons to feel safe again and if it wasn't for legal aid and Shelter we wouldn't be safe and sound now.'

The government's proposals in the Localism Bill to discharge homelessness duty into the private rented sector, and to end security of tenure, are likely to lead to a substantial increase in the number of vulnerable people renting in the private sector at a time when one of their key protections would be withdrawn. At present 44% of all households living in the private rented sector are living in non-decent homes, compared to 26% in the social rented sector.[22] Use of the private sector by vulnerable people is on the increase. Current Housing Benefit reforms will oblige the poorest tenants to live the parts of the sector with the worst conditions. The legal aid proposals risk lowering standards even further by removing one of the key mechanisms of enforcing rights and holding landlords to account. In the absence of better regulation of the private rented sector – for which Shelter has repeatedly called – there needs to be a mechanism for tenants to enforce their rights and seek redress.

[22] English Housing Survey Headline Report 2008-9, CLG 2010

A further problem that may arise from these proposals concerns cases where a client is seeking both damages for disrepair and specific performance to require the landlord to carry out repairs. Where, part way through the proceedings, the landlord carries out repairs, would the funding then to be withdrawn since the case would then be solely about damages? If so, this is a green light for landlords to delay carrying out repairs as long as possible. It should be noted that, in such cases, if the client wins on the damages claim, there will be no claim on the fund since they will be awarded costs or the statutory charge will bite, but without the support of legal aid they would not be able to bring the case at all.

Alternative sources of housing advice

A further justification for the cuts given by Government is that alternative sources of assistance are available and it is right to take these into account. Shelter believes that in their consideration of this, the Government has erred greatly. Shelter and local authority housing options teams are cited as alternative sources of advice. We were not consulted by the MOJ on this. In fact, rather than having an increased capacity to carry out advice work, Shelter is likely to lose all its income for welfare benefits advice and much of its income for debt and housing advice. Shelter estimates that we will see a reduction of 46% in our income for legal aid advice work. This represents 30% of our total statutory and contract income, or 11,694 cases[23]. See Table 1.

We remain to be convinced that local authority in-house advice services, valuable as they are, are geared up to absorb the amount of unmet need these proposals would create. Although the Homelessness Grant, which funds local authority housing options teams, was relatively protected in the CSR, there is no obligation on local authorities to use the grant to provide housing advice. The grant is not ring-fenced and local authorities have much discretion in how to allocate funds. Furthermore, the enhanced role given to housing options teams in the Localism Bill will mean that there is likely to be little scope for these teams to diversify into legal advice on complex housing and benefits matters such as those being taken out of scope. In any event, there would be a conflict of interest in local authority in-house services representing clients on reviews to the local authority itself. Often Shelter finds itself in the position of challenging, on behalf of clients, the decisions and actions of precisely those in-house teams.

[23] Shelter looked at the cases dealt with in 2010 and identified which would no longer be in scope. We then projected the ratio of excluded cases onto contract awards for 2010-13 to give an annual figure of cases we could no longer deal with. The table does not include new services with new legal aid contracts, where a national average rather than a local projection was applied.

Table 1: Cuts to individual Shelter services, expressed as a percentage of total statutory / contract income to that office (from all sources), together with volume of legal aid cases to be removed from scope (per year).

Service	Income Loss (% of income from all statutory / contract)	Numbers of cases out of scope	Percentage of cases out of scope
Lancashire	28%	421	48%
Cheshire	21%	274	44%
Cumbria	22%	457	67%
Manchester	17%	840	47%
Newcastle	39%	532	65%
Dorset	40%	800	49%
Cornwall	23%	204	37%
Devon	23%	403	28%
Somerset	31%	656	57%
Gloucester	24%	231	35%
Thames Valley	50%	1027	60%
Kent	40%	1322	53%
Milton Keynes	37%	777	61%
Herts	52%	770	58%
Essex/Norfolk	35%	635	35%
West Midlands	28%	689	34%

Welfare Benefits

All welfare benefits advice is to be excluded from scope of legal aid. This corresponds to 113,000 legal help welfare benefits cases. The Government argues that these are of lower importance because they are about financial entitlement rather than issues concerning safety or liberty. We do not agree with this. We believe issues concerning financial entitlement are extremely important when they concern the only source of income a client has. These clients are by their very nature poor. Welfare benefits problems are often the underlying cause of other issues, such as ill-health, debt and homelessness. Preventing resolution of these at an early stage will worsen problems and increase costs later.

As we have argued earlier, welfare benefits law is complex and very often claimants are elderly, ill, disabled or otherwise vulnerable. They rely on their benefits to be able to feed, clothe and house themselves and to participate in society. If wrong or unlawful decisions go unchallenged it will increase social exclusion, with the particular impact on those groups identified in the Impact Assessment.

Case study

Stephen is a 44 year old man who lives on his own and suffers from a narrowing of the spine and depression. He was brought into Shelter by his ex-partner as his benefits had stopped. As a result he had large debts, was in serious rent arrears and had tried to take his own life. He had been receiving incapacity benefit but this was stopped following a medical. He was certain that he had appealed this decision but the Job Centre had no record of this. He was advised by Job Centre Plus to claim employment support allowance. However he was not told at the time that, as he had failed an incapacity benefit medical, he would not get ESA payments until he had a new medical. Consequently he received no income for a number of months.

Shelter' representations got his housing benefit payments re-instated and backdated so there were no longer arrears on his property. He was referred to a Shelter debt adviser who assisted him with his debts. After protracted communication, the Job Centre eventually admitted that it had received the incapacity benefit appeal. However, because it was several days late no action had been taken. Shelter asked for it to be treated as a late appeal, which was agreed by the tribunal service. Shelter advised him that he could claim income support for the period that he had no money while the appeals were dealt with and successfully dealt with both appeals.

To compound this, the proposals come at a time of major upheaval in Housing Benefit and with an entirely new benefits system (the proposed Universal Credit) in the pipeline. The changes to Housing Benefit are complex and involve both the introduction of caps and a switch to calculations based on 30th percentile of local rents. Some transitional protection has been made available, but again entitlement is complicated and varies from claim to claim. It is highly unlikely that many people will be able to understand the implications of this without specialist advice. The resolution of a housing benefit problem is often directly linked to the resolution of a housing problem, so to exclude benefit work from scope is to ignore the key drivers of the need for civil legal aid in other areas. In cases where ground 8 of the assured tenancy grounds for possession applies, this is a mandatory ground and unless the benefits problems can be resolved to reduce the arrears below the threshold by the time of the hearing, the court has no discretion not to grant possession, regardless of the cause of the arrears.

The consultation paper does accept that Housing Benefit problems are linked to housing and debt problems but simply suggests that cases involving the immediate loss of a home could be picked up under 'Debt' cases at a late stage. Does this therefore suggest that Housing Benefit work can be done by a debt adviser under a debt contract? If so, this fails to address both the complexity of the issues and the fact that by then it will be too late to resolve the underlying benefits issue. Benefits appeals have short time-limits – just 28 days for Housing Benefit – and non-compliance with the right procedure can be fatal for an appeal.

Case study

After losing her job, Samantha fell into mortgage arrears. She entered into a sale and rent back agreement and some years later made a claim for local housing allowance but the claim was refused by the council on the basis that she had previously owned the property. Shelter took detailed instructions on her circumstances and as a result of our representations to the local authority they reviewed the decision and her claim was granted and she was given a discretionary payment.

'Shelter has been remarkable. I had no idea about the law and assumed the landlord could come in and chuck me out. Shelter put my mind at ease… top marks, they've done a first rate job. Without Shelter's help I don't know how I would have coped.'

Shelter's involvement resolved the case quickly and avoided the need for a lengthy and expensive appeal process.

Work carried out in Nottingham identified that 40 per cent of the capacity of advice agencies is spent dealing with work that is generated by the failure of external organisations to make correct or timely decisions. The pilot, carried out by Nottingham City Council, the Advice Nottingham group and Advice UK, has succeeded in engaging the interest of relevant bodies such as the DWP, but to date error in the processing of claims still makes up a significant amount of legally aided benefits work.[24] The Government claims that the proposed Universal Credit will reduce the number of errors in the administration of benefits[25]. Shelter argues that if this is the case, then the demand for legal advice on welfare benefits will reduce, without the need to exclude it from scope.

Alternative sources of benefits advice

As with the scope cuts to housing, there has been an unfounded reliance on there being alternative sources of assistance available to those in need of welfare benefits advice. The MOJ cites Job Centre Plus, yet 25% cuts to Job Centre Plus raise questions as to its capacity to step in and pick up legal advice left by cuts to scope[26]. Neither is Job Centre Plus sufficiently independent of the decision maker.

Disability Alliance is also named, but they themselves say:

> *We are particularly concerned that Ministers are made immediately aware that potential changes to Legal Aid and reductions in support simply cannot be met by small charities like Disability Alliance– despite the statement included in the consultation[27].*

Again, the Government cites the Free Representation Unit (FRU) as a source of advice. Yet FRU says:

> *We should point out that the consultation document gives a misleading impression of FRU. It [MOJ] wrongly uses the role of FRU to support one of its conclusions. It points out correctly that FRU represents clients in tribunals. It then illogically uses FRU's representation work in tribunals as part of the justification for withdrawing Legal Help for initial advice work in welfare benefits cases. FRU does not provide initial advice to clients. The work that FRU does can therefore be no part of the justification for withdrawing Legal Help in this area. FRU is in no position to replace the invaluable work of publicly funded solicitors, law centres and Citizens' Advice Bureaux in giving initial advice.[28]*

The Government urgently needs to review its unfounded assumption that alternatives routes to resolution are available.

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[24] *It's the system stupid!* http://www.adviceuk.org.uk/projects-and-resources/projects/radical/ITSS and *Radically Rethinking Advice Services in Nottingham*, November 2009 http://www.adviceuk.org.uk/_uploads/documents/1MicrosoftWord-NottinghamSystemsThinkingPilot-InterimReport.pdf

[25] Ian Duncan Smith, quoted in the white paper press release http://www.dwp.gov.uk/newsroom/press-releases/2010/nov-2010/dwp153-10-111110.shtml "It will cut a swathe through the massive complexity of the existing benefit system and make it less bureaucratic to run. And by utilising the best data technology available, we will streamline the system to reduce administration costs and minimise opportunities for fraud and error at the same time."

[26] Jobcentre Plus is to axe 9,300 jobs by March 2013 as sweeping budget cuts begin to bite the very service aimed at getting people back to work. Telegraph, 19 January 2011 http://www.telegraph.co.uk/finance/jobs/8267501/Jobcentre-Plus-to-axe-9300-jobs.html

[27] Extract from statement on Disability Alliance website: http://www.disabilityalliance.org/legalaidref.htm

[28] Extract from statement on Free Representation Unit website: http://www.thefru.net/news/legal-aid-changes

Tribunals

We disagree with the assertion that the 'friendly nature of tribunal means that clients can present their cases themselves'. However "friendly" a Tribunal may try to be, at its heart the court and Tribunal processes are adversarial systems; parties have to put their case, argue it and question the 'other side'. Even if judges adopt a quasi-inquisitorial role they are not able to be the advocate for a struggling litigant-in-person who has no idea about the procedural law governing the situation. Judges, tribunals and courts will spend significantly longer on a hearing or trial involving people who have not had any legal advice or assistance, the tribunal will have to spend the time to explain the points and procedure in order to ensure that the hearing is Article 6 compliant (right to a fair hearing). This is considerably more costly than providing legal advice and assistance at any early stage and preventing inappropriate cases getting to tribunal stage at all, and then ensuring that those that do get to that stage are properly and effectively prepared and presented.

The lack of specialist advice in cases involving appeals and reviews is likely to have three main impacts: people will pursue their appeals when they should have been advised that their case has no merit people whose case has merit will pursue their case but, without advice, will not present it effectively or will be unable to provide the evidence needed people who should be appealing and whose entitlements have been denied will not do so. The first two impacts are likely to increase the Tribunal Service's workload. However, the consultation paper suggests that there will be no cost implications on the Tribunal service[29].

Debt

The proposed cut amounts to 75% of all legal help debt work, or 75,000 cases. As stated in our answer to Question 1, Shelter is concerned that debt advice would only be retained in cases regarding the immediate risk of repossession, where the loss of the home is attributable to rent or mortgage arrears. In our view this excludes many cases which are extremely serious and which run the risk of homelessness. Other charges against the property such as any kind of land charge, secured debt or order of enforcement of County Court judgments should logically be included as these also relate to the loss of the home.

Shelter does not agree that the vast majority of debt issues do not justify legal aid funding as they are not of high enough importance. The plan to exclude debt advice in relation to credit card debts, utility bills, court fines or hire purchase debts is short-sighted. Shelter knows that for example, credit card debts can mask housing problems. Shelter research from 2010 reveals that more than two million people have used credit cards to pay their mortgage or rent. This was a 50% increase on the figures for the previous year.[30] The Government views advice on credit card debt as less important, however, such debts can often require matters of complex law; advising a client defending County Court proceedings for debt, for example, is by definition a matter of law. Many cases that have not reached the courts also require legal advice on the enforceability of credit agreements, options around Debt Relief Orders and bankruptcy and on the consequences of non-payment. These are legal matters, and it is currently a requirement of the legal aid scheme that advice is only given on legal matters that pass the sufficient benefit test. Therefore if the government believes that legal aid money is being spent on non-legal matters it should require the Legal Services Commission to enforce the existing rules, not change the rules to remove cases from scope.

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[29] page 11, Legal Aid Reform: Scope changes http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf
[30] Shelter press release, 6 January 2011, 2m pay for home on cards http://england.shelter.org.uk/news/january_2011/2m_pay_for_home_on_cards

The cuts to debt advice come at the worst possible time. Official figures show that unemployment is rising. Three years ago, the UK had an unemployment rate of just 5.2 per cent; today the figure is 7.9 per cent[31]. Unemployment is a major cause of personal debt problems in the UK. Recent research carried out between the Money Advice Trust and the University of Nottingham suggests that for every one per cent increase in unemployment, free-to-client debt advice agencies, such as National Debtline, receive an extra 60,000 enquiries per quarter.[32]

Problems caused by the lack of legal advice will be compounded by the withdrawal of the Financial Inclusion Fund. On 19th January 2011, the Financial Secretary to the Treasury announced in the House of Commons that the "Financial Inclusion Fund will close at the end of March this year". This funding supported the provision of debt advice to 77,00033 people a year. Agencies have already started making debt workers redundant as a result. While the Government has recently committed to providing some additional funding, the provision of debt advice in the future remains a major source of concern.

Those who will, under these proposals, find themselves without help are likely to be vulnerable. Research has highlighted that half of all adults in debt may have poor mental health[34]. The Scope Equalities Impact Assessment also confirms that the proposals would impact disproportionately on ill or disabled people.

Prevention & problem clusters

Removing areas from scope in this way reveals a failure on the Government's part to understand the interrelatedness of legal problems. Shelter believes that early advice on housing, debt and benefit problems is key in resolving them before they escalate. The cuts would prevent advisers addressing multiple, interrelated problems. Research has repeatedly shown that certain issues tend to occur together in clusters e.g. someone with a rented housing problem is more likely to face homelessness or difficulties with benefits.[35] The Legal Services Research Centre has been conducting the Civil and Social Justice Survey since 2001 and has repeatedly highlighted that problems come in clusters. Data from the original 2001 survey indicated that over half of the all the homelessness problems reported were reported in combination with a rented housing problem. Further analysis revealed a cycle of rented housing and homelessness problems. 2004 data also connected homelessness and rented housing and, further, indicated that both are linked to benefits problems. These findings were repeated in the most recent, 2006-9, survey.[36]

To address problems early on and in their entirety is precisely to address the drivers of the demand for social welfare law legal aid further down the line. Early intervention, once a legal problem has been identified, not only saves misery and money, but is also a key government policy and improving social justice and preventing poverty and homelessness. It is therefore all the more surprising that the government is proposing the removal of one of the key areas where early intervention can make a significant difference.

A further key, and repeated, finding of the Civil and Social Justice Survey is "referral fatigue"37. In essence, this means that the more times a client has to be referred from one adviser to another, the less likely it is that their problem is eventually resolved. It was precisely to address this issue that the LSC

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[31] La MAT press release 15 December 2010 http://www.moneyadvicetrust.org/content.asp?ssid=106bour Force Survey, ONS, January 2011

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[33] This figure is based on information provided in National Audit Office report *Helping over-indebted customers.* Page 5 of the report states that 270,000 people were helped in the three and a half years until September 2009. See: http://www.nao.org.uk/publications/0910/over-indebtedness_report.aspx

[34] MAT, 8th October 2009 http://www.moneyadvicetrust.org/content.asp?ssid=68

[35] LSRC Civil and Social Justice Survey

[36] http://lsrc.org.uk/publications/2010CSJSAnnualReport.pdf

[37] Community Legal Advice Centres and Networks ee, for example, p57 of the 2010 Annual Report

piloted CLACs and CLANs[38] and then, in 2010, required social welfare law providers to provide all of debt, housing and welfare benefits advice. If all a client's problems can be addressed by one agency, it is much more likely that they will be satisfactorily resolved. Satisfactory resolution benefits both the client and the public purse.

If the government's proposals are adopted then they will positively preclude problems being dealt with holistically, and will promote referral fatigue. A client with a housing possession case arising out of a benefits problem will be able to get the possession proceedings dealt with under legal aid. But the legal aid provider, who is currently obliged also to deal with welfare benefits issues, will in future be actively prevented from doing so. So even assuming that the government's optimism that there will be alternative non-legal aid sources of advice is well-placed (which we doubt; see above and below), clients will have to be referred on. These proposals institutionalise referral fatigue.

Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

We do not agree with the underlying proposals which would make this necessary, but do agree that if they were to be implemented this would be a necessary longstop protection. We would add cases that are of overwhelming importance to the client to the list, and remove the restriction limiting wider public interest to inquest cases.

We would also point out that the government needs to comply with its obligations under the European Convention on Human Rights, as well as Article 47 of the European Charter of Fundamental Rights[39]. We are concerned that these proposals either do not comply, or would require so many cases to be funded as exceptions that there would be little point in proceeding. At the very least, the government risks opening up an additional sphere of litigation as challenges to refusals to fund are brought – and since they would be way of judicial review of a decision not to fund, such challenges would be funded.

Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.

Whilst we do not fundamentally disagree with this proposal in principle, we can see considerable practical problems. Who is to determine suitability? Will suitability include any consideration of whether the client can in practice –as well as theory – access a provider willing to take the case on under a CFA? Will it include any considerations of affordability to clients, particularly in respect of insurance and disbursements? When will assessment of suitability be made – at first contact, or after investigation? What is to happen when a case changes its nature part-way through – for example in a disrepair case where the landlord carries out repairs during the proceedings but the client can still recover damages?

Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.

Shelter is concerned by the proposals to withdraw legal aid from very vulnerable clients and encourage them to represent themselves before the courts or before tribunals.

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[38]

[39] See footnote 1.

As we say in our answer to question 3, we disagree with the assertion that in welfare benefits cases, the 'friendly nature of tribunal means that clients can present their cases themselves'.

We know from our experience of staffing Housing Possession Scheme court desks that many clients with complex and interrelated social welfare problems turn up for court without representation and are ill equipped to represent themselves. Clients who arrive for court with no prior experience and not having received advice are anxious and ill-prepared, often without crucial evidence or documentation. If areas are to be taken out of scope, there will be more such people across a wider range of courts and tribunals, putting additional pressure on court resources.

Recent research[40] into the challenges people face when dealing with civil justice problems has brought to light important findings. Disadvantaged groups (lone parents, those with a long term illness or disability, mental ill health, those renting publicly, in receipt of welfare benefits, those with no academic qualifications) were less likely to have knowledge of rights and legal processes than more affluent and educated groups and were less likely to handle their problems alone. The research demonstrated low levels of knowledge relating to welfare benefits, rented housing and homelessness. A previous research study[41] had already highlighted that young people's lack of knowledge of their rights and entitlements, legal processes or where to go for help impeded their ability to recognise that they were dealing with an issue with legal elements. This in turn would affect their ability to plan how to resolve the issue. The findings in both these studies are borne out by Shelter's experience. We do not believe that such clients would be able to represent themselves.

We strongly urge the Government not to repeat the mistakes made in Australia in 1990s when there were major cutbacks to legal aid. As a direct result of funding cuts, there was an increased emphasis on clients undertaking large parts of the work associated with court proceedings themselves. Self-help kits were developed which often left the clients needing to seek advice on how to use them; vulnerable clients in particular found them very difficult. As the main driver was the political imperative to cut funding, there was little consideration given to the appropriateness of self-help for particular areas of law and there were poor levels of monitoring and evaluation.[42]

We would also point out that, while Tribunals may originally have been designed for lawyerless self-representation, that is not how they have evolved since. To take one example, welfare benefits law is extremely complex and codified and the issues that need to be raised before a tribunal many and varied. A radical simplification of the law and practice would be needed before we can be said to have returned to the conditions envisaged when tribunals were first created.

Conclusion

Social welfare law matters are complex, legal issues. The clients we assist are vulnerable and, by definition, poor. The Scope Impact Assessment and Equalities Impact Assessment rightly point out that the proposals will have a disproportionate impact on disadvantaged groups. When questioned on this recently, the minister explained that he considers this to be a proportionate means of achieving the cuts Government wishes to make[43]. Shelter is shocked by this view and strongly disagrees. We are most disappointed that the disproportionate impact of the cuts on vulnerable clients has not been enough to stop the Government in its tracks.

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[40] Balmer, N., Buck,A. et al Knowledge, capability and the experience of rights problems Plenet/LSRC, 2010
[41] Measuring young people's legal capability, Plenet, 2009

[42] Hunter, R., Banks, C. & Giddings, J. Australian Innovations in Legal Aid Services: Lessons from an evaluation study in Reaching Further; Innovation, access and quality in legal services, TSO, 2009
[43] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110125/text/110125w0003.htm#11012573000046

The Community Legal Advice Telephone Helpline

Shelter is a provider of a wide range of services through a wide range of delivery channels. We help people through a combination of specialist face to face advice, specialist telephone advice, generalist telephone advice and email and web advice and information. We also provide second tier specialist support via the telephone. We are therefore experienced in the provision of telephone services alongside face to face services. We currently hold a Community Legal Advice telephone contract in the debt and housing categories.

We would welcome the opportunity to discuss with the government our experience of the delivery of telephone services and to help in designing a telephone service that would assist clients.

However, we do not agree with the proposals as set out in the consultation paper.
In the first place, we consider that such a far-reaching and fundamental proposal as this, which represents a radical re-shaping of the provision of legal services, should be subject to a full and detailed consultation in itself. The limited detail in the paper is not such a consultation.

As a provider of telephone advice services, and in particular of Community Legal Advice telephone services, we recognise the value and benefits that telephone advice bring. They can provide speed and flexibility for those who are not able to access face-to-face provision, for example because they are working or caring full time; they can help in advice deserts where there is no advice provision. Many cases can be dealt with extremely effectively over the telephone. But many others cannot.

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

No, we do not agree.

We agree that telephone advice is of value and that it provides a useful service to clients. We welcome both an expanded telephone advice service and the development of a gateway through which clients could be referred to face to face service. However we do not agree that this should be the "single gateway" or sole method of accessing services. We believe in the fundamental importance of client choice, and that there should be a range of delivery models available.

When a problem arises, many clients seek advice from providers they have used before and know and trust. The importance of a relationship built up over time cannot be overstated – and in many cases also saves money, since the adviser is already familiar with the background and does not need to spend time going over it. A strong relationship between adviser and client is "instrumental to achiev[ing] a quality outcome and value for money"[44].

In many cases, clients prefer to seek advice in person rather than over the telephone – this is the case even in sectors of the population otherwise expected to be familiar with technology. For example a Youth Access report highlights the fact that, despite being major users of the internet, young people do not prefer it as a means of accessing advice. They tend to prefer face-to-face advice, although the telephone is an important means of access for example for making an appointment to see a face to face adviser. Young people's preference for face-to-face advice relates to trust. The evidence suggests that remote mediums such as email and the telephone are not as conducive to building the trust with an adviser which is necessary for young people to open up about their social welfare problems.[45]

[44] Time well-spent: the importance of one-to-one relationship between advice workers and their clients Council on Social Action 2009
[45] Kenrick, J. Young People's access to advice – the evidence Youth Access 2009.

Similarly many clients are referred to providers by friends and family, or other agencies in the community with whom they are already dealing. Last year the MoJ published the results of research on clients' experiences of using legal services for personal matters. In the MoJ study, 75 per cent of respondents identified their providers either through recommendations from family or friends, past experience or referrals. Only 5% of users heard about their provider through advertising and only 5% identified them by searching for information[46]. Furthermore, another small scale study has explored why, how and when community groups refer their users to other advice agencies. Interviews attempted to explore the reasons behind decisions about when and how to refer to other advice providers. It was very clear that personal relationships had a significant impact on referrals. Several interviewees expressed reluctance to refer users to people they don't know[47]. If all clients are to be channelled through a single gateway, the long-established relationships of trust and confidence between clients and providers will be lost.

Local advice agencies are a part of the community and are embedded in it, and that local knowledge and involvement can often be crucial to client cases. It can be of wider importance as well; Shelter and other not for profit providers use their local knowledge and local contacts for local campaigning and work with, for example, local authorities to improve and promote good practice. We find it very surprising that the government's very clear overall strategy of localism and belief in the importance of local decision making is so undermined by these proposals. This is the one area of policy in which the government is proposing a centralised monopoly of provision.

Case study

Geoff's landlord repeatedly threatened to evict him and eventually moved all his belongings out and changed the locks. Another tenant let him sleep on the sofa that night, but that tenant was also unlawfully evicted the following day when the landlord found out. Geoff came to Shelter and we obtained an injunction against the landlord.

Andrew was a tenant of the same landlord. Shortly after Geoff was evicted, he was also told that he had to leave the next day. Shelter obtained a without notice injunction preventing the unlawful eviction.

Shelter contacted the council environmental health department. The landlord was known to them and they were considering putting management orders in place. They called the landlord in to a meeting and agreed that he would obtain advice on how to lawfully evict and that the council would not, for now, take control of the properties.

Research by the Legal Action Group suggests that people in social classes D and E are most likely to experience a social welfare law problem and also least likely to seek advice over the telephone[48]. The Civil and Social Justice Survey has repeatedly identified the main ways in which clients make first contact with an adviser. Around half (52%) make initial contact an adviser by phone but it is also relatively common for first contact to be made in person (36%). It is also worth noting that even those who make initial contact by phone, go on to see their adviser face to face.[49] Urgent cases, cases with complex issues or large amounts of documentation, vulnerable clients, clients who do not speak English are some examples of those who need face to face advice. Many other clients simply prefer to approach face to face services.

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[46] Finch, S., Ferguson, C., Gilby, N., and Low, N. Baseline survey to assess the impact of legal services reform MoJ, March 2010
[47] The importance of being connected: whey, how and when referrals are made by community groups. ASA September 2009
[48] Social Welfare Law: what is fair? LAG, 2010 http://www.lag.org.uk/Templates/Internal.asp?NodeID=93529
[49] Civil and Social Justice Survey 2004, 2006-9

The Impact Assessment estimates that 76% of work will be lost to face-to-face providers – 85% in the NfP sector – with the obvious implications for sustainability of local services. If the scope limitations also come in, then only about 15% of the work currently done by the NfP sector will remain – and that will be subject to a 10% fee cut. The result is that NfP advice provision will be a thing of the past. Similarly private practice will disappear or move to private client work. There will be no-one left to refer the face to face cases to.

We therefore do not believe that there should be a single gateway. We welcome this proposal as a way of expanding client choice and improving access, particularly in advice desert areas, but believe it should be in addition to existing arrangements not in replacement.

Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.

Yes, we agree. We certainly agree that Community Legal Advice should offer specialist advice in all categories. However, we do not believe that it will be possible to do so to anything like the degree suggested in the paper.

In the first place, we refer to our answers above on the importance of client choice and local provision. Secondly, whilst we agree that many cases can be dealt with by telephone and that, in appropriate cases, telephone advice can be just as effective as face to face, we consider that the consultation paper is far too optimistic about the number of cases that can be dealt with in this way.

The arguments against the proposal are set out in detail in the Impact Assessment and the Equalities Impact Assessment, and we draw attention to and refer to those arguments. The one failing in them that we would observe is the failure to draw the obvious conclusion; that this is not an appropriate way to proceed. Many cases can be dealt with by telephone, but many cannot. An improved telephone offer is to be welcomed; a single gateway is not.

As an experienced provider of telephone advice, we consider that the government's proposals are extremely ambitious. This service would have to be extensively marketed, at considerable cost to the taxpayer, in order to make potential clients aware that this was their only source of legally aided advice. The government is proposing – whether it has realised this or not – a massive consumer re-education programme which will be extremely expensive to implement. The likely result of that is that it will become in the public mind a "one-stop" source of legal advice and will be called by people with a wide range of problems beyond those of current legal aid scope and beyond those currently eligible. To generate sufficient awareness to drive all legal aid problems to it is likely to result in much greater demand beyond the boundaries of traditional legal aid, and therefore the commitment of huge resources in staffing the helpline and managing the calls. There is no evidence that the government has given any thought to how to manage the volume of calls that are likely to result, or the costs of doing so.

We have invested considerable time and resources in making our services available to the widest range of people. We have found that our face-to-face, telephone and web advice services address different people at different times. The client groups of each overlap but are not the same. Therefore driving all advice to telephone will result in a substantial cohort of those who currently seek face to face advice dropping out and not receiving any legal advice at all.

In our view a better option would be to retain and expand the existing Community Legal Advice telephone service and market it properly, thereby increasing awareness and thus take up of the service. This would achieve the aim of driving clients to telephone advice and reducing costs without the need for compulsion and without the devastating impact on face to face provision that compulsion would entail. A further factor to take into account is the proposed cuts to scope. Given that the result is likely to be that only those cases that are in court or are about to be in court ("immediate risk of loss of the home") are likely to remain in scope, it will in practice be difficult for the telephone line to deal with them

and they will have to be referred to face to face providers for substantive court representation to be carried out. In our view, the possibilities of increasing effective telephone advice would reduce as scope reduces.

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

We question the assumption that cases can be dealt with on the telephone unless a particular criterion applies. Given the proposals to increase telephone use, the government should be devising criteria to determine when telephone advice is appropriate. For example, it is more difficult to determine with telephone advice if a caller is being manipulated or pressurised – as might apply in cases of domestic violence – than with face to face services.

The best approach is to identify what is the most appropriate method for each case, perhaps by reference to flexible guidance. Not all face to face services are carried out exclusively by face to face means – an initial meeting with the client could result in the rest of the case being carried out by telephone and in writing. Greater client choice and flexibility in the methods of delivering services is to be welcomed, but the government should work with existing providers to promote and develop this, not sweep all cases into a particular delivery model.

To a great extent the factors determining whether face to face or telephone advice is appropriate will vary with the circumstances of each individual case and client and it would not do to be too rigid in devising a set of pre-determined criteria. However, among the relevant factors we would include:

The circumstances of the client

- Mental health
- Physical disability, learning difficulties, issues of comprehension or other vulnerability
- Communication issues such as hearing impairment or lack of English
- Homelessness, lack of a telephone or other reasons for not being contactable for ongoing casework
- Literacy – not being able to comprehend letters or send in paperwork to a remote provider
- Whether the client is being pressurised or manipulated and the need to safeguard against that
- Whether the client prefers to seek advice anonymously or without being seen to approach a particular agency
- Client preference

Circumstances of the case

- Urgency
- Extensive or complex documentation needing to be read or prepared
- Proceedings issued or imminent requiring representation in court
- Legal or factual complexity or where a number of parties require advice
- Cases where local knowledge or understanding of local practice is important

Not all of these would arise in every case, and would not necessarily be a bar in every case where they do arise. But they give some indication of the complexity of the judgements to be made in individual cases.

We also query how, where a single organisation provides advice through the telephone gateway, matters such as conflict of interest will be dealt with. An obvious example from our work is where a separating couple each require advice on a joint tenancy; there are many many others.

We also point out that legal aid services are by definition targeted at the very poorest in society. Many such clients may not own telephones. Many others may only own mobile telephones – freephone and low cost numbers can be very expensive from mobile phones.

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

We believe that the government has not done the necessary preliminary work on this and should do so before moving ahead with any such proposals. Any extension should be piloted and lessons learnt from overseas provision[50] and other national helplines such as NHS Direct.

As an existing provider of Community Legal Advice and other telephone (and online) help and advice services, Shelter would be interested in having further discussions with government over how the existing CLA services can be expanded and improved and how a non-compulsory gateway can be developed. Representative bodies such as the Advice Services Alliance should also be involved.

Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline? Please give reasons.

Subject to assurances around matters such as price, accessibility and quality we have no problem in principle with this proposal.

Financial Eligibility

Shelter is concerned at the proposals in the paper to reform eligibility. As a national provider of social welfare legal advice, both under Legal Help and under certificate, these proposals will have a significant impact on our clients.

The current means test is very targeted, and even though the previous government increased eligibility levels slightly (by 5%) in 2009 the overall picture is one of declining eligibility. At best, 35% of the population are currently eligible for any form of means-tested legal aid – often required to pay substantial contributions – compared to over half of the population in 1998.

Shelter agrees with the principle, expressed in para 5.6 of the paper, that those who can afford to pay for their own representation should do so. However, we are concerned that these proposals go far beyond that principle, and will deprive those who can not afford self-funding of advice, and deter others from seeking it.

Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons.

No, we do not agree. In our view legal aid should have the same capital limits as other means tested benefits, for reasons of simplicity, fairness and transparency.

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[50] For example Pearson J and Davis L (2002) The Hotline Outcomes Assessment Study, Final Report – Phase III: Full-Scale Telephone Survey, Denver, Centre for Policy Research

We note that the Impact Assessment projects that this would save £6million, but that this is an estimate and that in fact there is considerable uncertainty as to how many people would be affected. We question how many people are in fact in receipt of passporting benefits whilst also being above the capital eligibility threshold, either absolutely or for contributions, and do not believe that this proposal is likely to deliver substantial savings. Set against those savings must be the costs to providers of conducting a more detailed means test and form-completion exercise with previously passported clients, and the costs to the LSC of undertaking a detailed means checking exercise as opposed to the current DWP entitlement check. In our experience, a large number of legal aid clients are in receipt of one or another passported benefit, and therefore the additional costs of conducting a full capital assessment – which would not affect the eventual result – are likely to be considerable. We consider that receipt of passported benefits – which are fully means tested – is a good proxy indicator for whether someone would find legal advice affordable. If in practice there are few clients that are caught by this then the administrative costs would outweigh the savings, whereas if there are more clients caught then requiring clients in receipt of means tested benefits to pay contributions is likely to deter them from seeking advice, thereby impacting on access to justice. They will not be able to fund advice from any other source.

Question 13: Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons.

No, we do not agree. £1000 is a very low level of capital. This represents a substantial lowering of the existing contribution threshold from £3000 and the reality is that it is likely to be unaffordable for many clients. Those that are eligible and have capital at this level are likely to have variable capital; it may be over that level just after they have been paid, and at zero before next pay day. Should advisers advise clients only to seek advice just before they are paid? Or only after they have paid household bills? The paper refers to “disposable capital”, which is the wording used in the legal aid regulations, but that is something of a misnomer since all that is disregarded is the client’s home and furniture, clothes and tools of their trade, but any other assets that they may have built up are included, including amounts they may have saved in expectation of household bills.

We also do not agree that such contributions should be collected by suppliers. The cost of collection is an additional administrative burden for providers, particularly where (assuming this is permitted) clients wish to pay in instalments.

Our deepest concern at this proposal is that it will result in a deterrent preventing people from seeking advice. To someone on a low income, £100 is a great deal of money and there is a risk that people will simply not apply for legal aid. We do not agree with para 5.17 that this will encourage a “responsible approach to litigation” (the obvious question begged is where, given the strict merits tests that apply, is the evidence that there is currently an irresponsible approach to litigation?); rather, we consider that it will drive people away from advice. Nor does it represent parity with private payers; they do not, as a general rule, have to pay 10% of their entire assets to be allowed to conduct litigation.

Question 14: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons.

No, we do not agree. We are concerned that there will be a disproportionate impact on homeowners with low income, particularly pensioners, who are often in need of social welfare law advice – perhaps because of debt or issues with benefits. The ability to resolve those issues at an early stage is often what stops the case spiralling and leading to possession proceedings later.

This proposal will also impact disproportionately on those in London and the South East, and other urban areas, where property prices have increased at a rate far outstripping disposable income.

We note the proposed eligibility waiver, but do not believe that that represents a satisfactory answer. In practice, most people are likely to qualify for it. A typical legal aid certificate will have costs of say £5000; a low income homeowner could only be able to access this by means of a loan, but repayment rates are likely to be substantially in excess of £100 per month even over 4 or 5 year periods, and therefore unaffordable. In practice, lenders are unlikely to lend to such clients. There is therefore an additional burden on lenders processing applications for loans from clients "going through the motions", and a risk that such applications will have an adverse effect on credit records.

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

The paper's Impact Assessment (para 77) states that this policy will "disproportionately impact upon those at the bottom of the income distribution" – within the lowest 20% of incomes nationally.

Question 15: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)? Please give reasons.

No we do not agree, for the reasons given above. In particular, the £200,000 limit is substantially lower than now and will impact particularly on those in London and the South East, and on those with some capital but low income. We believe that legal aid eligibility should be based on ability to pay, but that there is not necessarily a correlation between ability to pay and ownership of property.

Question 16: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

No, we do not agree. Given that we do not agree with the above proposals which create the need for a waiver, we do not agree with the proposal to implement a waiver. In our view it is very likely that the waiver will apply in most if not all cases and therefore all that will be achieved is to add an extra layer (and associated costs) to the application process. However, were the substantive proposals to be implemented, we agree that a waiver would be required broadly along the lines outlined in the paper.

Question 17: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

We refer to our answer to question 16. Again, if the substantive proposals are implemented we do not have a particular objection to this. However in the current climate an interest rate of 8% is too high. We suggest that an uplift to Bank of England base rate, say 1% over base rate but capped to 8% overall would be a better solution.

Question 18: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)? Please give reasons.

We refer to our answers above in respect of the substantive scheme. In particular we consider the gross capital cap to be too low and would not support the removal of the disregards. However, were the substantive proposals to be implemented, we would support this option as to some extent an amelioration of them.

Question 19: Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases, capped at £100,000 for all levels of service? Please give reasons.

Where property is in dispute, a client cannot release equity or borrow against it so the disregard is essential to ensure that cases can be funded. At present the disregard is capped only in respect of family proceedings and we consider that retention of the existing position is more appropriate. In family cases, it will often be that ownership is disputed and the client's notional share will be 50%, whereas in mortgage possession proceedings the client's share in the property would be taken to be 100%. Overall, many of these cases are anyway likely to be cost neutral because of the application of the statutory charge

Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.

No,for the reasons in our answer to question 14. In addition, in contested property cases any equity is not available to the client to release or borrow against.

Question 21: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients? Please give reasons.

Yes, we agree. The overall limit, as per para 5.46, is at approximately this level now (assuming that the subject matter of dispute disregard cap is extended from family to all cases) and the uncapping of the mortgage element adds a welcome degree of flexibility

Question 22: Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.

No, we do not agree with any increase in contribution levels. In most cases, certainly at the bottom of the contribution bands, clients will be dependent on benefits or on very low incomes and with no corresponding up-rating of benefits levels or the minimum wage it is difficult to see how an increase could be affordable. As the paper itself says at para 5.55 the "lower income limit is built into the means test to reflect essential expenditure...it broadly reflects the level of subsistence benefits payments which are intended to cover basic essentials". Any increase in contributions, therefore, will drive people who are at just above "basic subsistence levels" back closer towards those levels. The reality is that this will not be affordable and will either drive people further into debt or force them not to seek, or stop seeking, advice leading to their legal problems worsening.

We do not argue with the basic principle, expressed at para 5.63, that those who can afford to contribute should do so; but these proposals require those who can not afford it to do so as well. The definition of disposable income in the regulations in fact only allows deductions for tax and national insurance, housing costs, and small fixed amounts for employment expenses and each dependent. In reality, of course, household expenditure covers many more essential items such as food, utilities, transport, school costs, etc. Under the current system, someone on a disposable income of £733 would be permitted to retain £585.65 of it; under option 1 that would go down to £529.10 and under option 2 to £522. In short, this proposal is to remove up to 10% of the monthly disposable income of those who are

already in the lowest income quintile. That is simply unaffordable for many and will act as a real deterrent to seeking justice.

Question 23: Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.

For the reasons given above, we do not accept that an increase is appropriate and therefore support neither method.

Criminal Remuneration

Questions 24 -31

We do not propose to answer these questions

Civil Remuneration

Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.

No, we do not agree with the proposal to reduce fees by 10%. There was a small uplift in controlled work rates in 2001, but that apart the hourly rates paid for civil work have not risen in 20 years. They have been far outstripped by rises in inflation and the overhead costs of doing the work. The result is that margins have been squeezed by such an extent that the number of providers doing civil legal aid work has plummeted.

According to Citizen's Advice, in 2004 39 per cent of bureaux considered themselves to be in an advice desert, with over 60 per cent reporting difficulties in finding solicitors to take on housing cases.[51] In the 5 years to 2009/10, the number of civil (non-family) contract holders dropped from 3900 to 2800 – a 30% reduction, and that before the impact of the recent LSC tender round. The number of housing providers dropped by 20% over the same period.[52]

Most recently, the House of Commons Public Accounts Committee has criticised the LSC on the issue of fixed fees. It states: Because the Commission is the sole buyer of legal aid, it is important to know it is paying the right price for this and the effects its policies are having on the sustainability of providers. But it does not know enough about the costs and profitability of firms to know if it has set its fees at an appropriate level.[53] The LSC may not know whether it is paying the right price. But the flight from legal aid suggests that the market believes it is not.

The Impact Assessment is certainly right that it is a "key assumption" that the market can sustain a 10% reduction without "adverse implications" for supply. Unfortunately, there is no evidence whatsoever to support that "key assumption". By contrast, all the analysis and modelling of the legal aid sector that has been carried out over the last few years, by Otterburn[54] and others, has pointed to the fragility of the

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[51] Geography of Advice Citizens Advice 2004 p3 www.citizensadvice.org.uk/geography-of-advice.pdf
52 S.Hynes in Chapter 20, LAG Legal Aid Handbook, ed. Ling and Pugh, Legal Action Group, 2011
53 House of Commons Committee of Public Accounts The procurement of legal aid in England and Wales by the Legal Services Commission, 9th Report 2009-10, HC 322, 2 February 2010 p3
54 For Lord Carter of Coles' Legal Aid Procurement Review

sector and the tight margins on which it operates. All the evidence, therefore, is that there is no basis whatsoever for that unsupported “key assumption”.

We are very concerned not only about this proposal in isolation, but also the cumulative effect of it taken with all others. In particular, the government estimates that over 70% of cases would go to the telephone gateway; of the remainder our own projections are that over 47% of our social welfare cases would go out of scope; if on top of that there are fee cuts of 10% on the very few cases that remain to us, it is very unlikely that we would have economically viable contracts. The degree of cuts proposed are far beyond what our charitable resources can underpin.

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

We are already concerned that fixed fees create a perverse incentive to take on simple and straightforward cases at the expense of long and complicated ones; a lower fee will simply strengthen the incentive. This will have clear implications for access to justice, particularly for vulnerable clients and those with the most difficult cases.

Shelter believes that the payment rates for legal aid work have fallen so far behind the rest of the legal services market that a rise is long overdue. However, we do recognise the constraints within which the government is operating, but would suggest that a freeze in rates is the most that the market could take.

Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

No, we do not agree with this. For many providers certificated work, with the access to enhanced rates and inter partes costs that it brings, cross-subsidises uneconomic Legal Help work. The Impact Assessment appears to conclude that this proposal will not deliver any savings, which begs the question of why it is being proposed. We do not believe that is likely; we consider that this does represent a real cut. Even on the “estimate” that average enhancements are between 30-50% (an estimate arrived at despite the “unavailability of robust data on the current levels of enhancement”), it is likely that the approach of the courts and LSC on assessment of costs would change. If under the existing regime the courts allow 30% out of 100%, it seems more likely that in future 15% out of 50% rather than 30% out of 50% will be allowed. Where the range shrinks, the relative position of any case in the range will remain the same and therefore in absolute terms the enhancement paid will reduce. Therefore this represents a further significant fee cut, and for the same reasons as given in our answer to question 32 we do not believe that the market can sustain cuts to fees.

An additional point to be made here is that the existence of the higher rates payable for certificated work – whether through enhancements or inter partes rates – helps retain experienced practitioners (who tend to deal with the most complex and difficult cases) within legal aid by allowing them to access payments that better reflect their experience and seniority. If there is no or reduced career progression in economic terms, there is likely to be a de-skilling of the profession at the senior end as experienced practitioners move out of legal aid.

Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction? Please give reasons.

Yes, we agree. The rates set out are still substantially higher than the rates payable to solicitors and advisers, notwithstanding that barristers are self-employed with lower overheads. Beyond the specific

proposals, we see no good reason for maintaining a payment distinction between barristers and solicitor advocates doing the same work. We note the proposed Family Advocacy Scheme removes this anomaly, and suggest the same approach is taken to all civil work.

Question 35: Do you agree with the proposals:

- **to apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and**

- **to apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?**

Please give reasons.

No, we do not agree with this proposal. As set out in our answer to question 33, it is enhancement and inter partes rates that cross-subsidise the rest of legal aid work. Whilst this proposal would not affect the availability of inter partes rates, it would affect the rates payable in cases where inter partes costs are theoretically available but in practice not recovered. Many cases are resolved before trial on the basis of an agreed settlement with no order for costs; if in such cases solicitors were only able to recover at risk rates – instead of standard rates often with enhancement – there is likely to be a perverse incentive not to settle in pursuit of inter partes costs

Equally, external circumstances can change, either independently or directly as a result of our involvement, which renders the case no longer necessary and results in the claim being withdrawn by consent. A recent example concerns an elderly client who has been living in his property for 25 years. The landlord has been granted planning permission to demolish his block of flats and replace it with a block with more flats. The client was offered alternative accommodation but it was much smaller and not suitable for his needs. The landlord issued possession proceedings. We investigated, filed a defence and detailed evidence and as a result the landlord offered a better alternative premises with which the client was happy. But the offer was on the basis that the possession proceedings would be withdrawn by consent with no order for costs. In effect, we won that case and succeeded in meeting the client's objectives – which would not have happened without our involvement – but the way it was done was by the landlord finding a face-saving solution that did not require them to concede that they were in the wrong. In such a case, at present we would get standard rates plus enhancement; under the proposals, we would be limited to at risk rates and therefore be penalised for achieving early resolution and the avoidance of litigation.

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

We note much of the criticism that has been made of the conditional fee regime and in particular the effect on claimants whose prospects of success are less good than others. There has been real criticism of the effect on access to justice of creating a market incentivising solicitors only to take on the very strong cases. These proposals risk replicating those market conditions in legal aid. Indeed, as the paper makes no distinction between claims and defences and we therefore assume that the proposals apply to both, they go further; there is a real risk that defendants will not be able to defend their cases because decisions as to whether to take a case will be based on the identity of the claimant not the merit of the claim.

We also refer to our answers to questions 32 and 33 on the effect of reducing rates and the risk to the economic viability of the supplier base and particularly the potential de-skilling that may result.

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

We do not agree with the present ICC regime, so do not support either the extension of the rates to all cases above £25,000 or to all post-investigation cases.

Question 36: The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

No, we do not agree. As set out in our answer to question 35, we do not support this proposal at all. However, if it were to be implemented, certain types of cases would cause us particular concern and we consider should be excluded.

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

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

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

As a minimum, if all judicial review is not included, we believe that judicial reviews relating to homelessness more widely be included, since the issues at stake are of vital importance and costs considerations should not play a part in deciding whether to bring the case.

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

Question 37: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in family cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

We do not propose to answer this question

Question 38: Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply? Please give reasons.

We do not propose to answer this question

Expert Remuneration

Question 39: Do you agree that:

- **there should be a clear structure for the fees to be paid to experts from legal aid;**
- **in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;**
- **in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;**
- **the categorisations of fixed and graduated fees shown in Annex J are appropriate; and**
- **the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?**

Please give reasons.

Yes, we do agree in principle that consolidated and codified expert fees are appropriate. A similar position has existed in criminal cases for many years (by virtue of the Costs in Criminal Cases Regulations 1986) and in principle we would support its extension to civil cases. We consider that there does need to be some restraint in the expert market and that expert fees can be disproportionately high. However we would urge the government to proceed with some caution since in many cases the availability of high quality expert evidence can make all the difference to the case and therefore the need to control costs needs to be balanced with the need to ensure the retention of experts of suitable quality willing to undertake legal aid work. The categorisations in the Annex seem appropriate. However, the particular proposed rates in the Annexes to the consultation paper seem to us to present a danger in the context of housing litigation that clients will not be able to access suitable, or any, experts to assist with their case. The Housing Law Practitioners Association has put forward a detailed analysis of the consequences for these cases in their response and we share their concerns, particularly with regard to the impact on surveyor reports in disrepair cases.

Alternative Sources of Funding

Question 40: Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.

There are no barriers of principle. In practice, it is difficult to see that this scheme would raise a great deal at present with interest rates at a historic low. Given that interest rates go up and down, and the contents of client accounts vary, the amounts raised by this scheme would be inherently variable and unpredictable. The paper recognises this variability, but suggests that any funds raised could be used as a supplement.

In our submission to the Law Society's Access to Justice Review, Shelter said

> *A client account levy is a proposal that has been around for some time, and is one that we welcome. It would not generate sufficient monies to replace or substantially supplement legal aid, nor would it, given fluctuations in interest rates, be necessarily predictable, but money raised through such a scheme could be used in specific non-core ways. For example, it could be used to establish a fund that could, on a discretionary basis, fund deserving cases that would otherwise be outside the scope of legal aid. Or it could be used to establish a fund that would provide low-cost or interest free loans*

to struggling legal aid providers whose failure would impact on access to justice – such as the recent cases of Refugee and Migrant Justice and a number of law centres – enabling them to buy time to resolve their difficulties and restructure into a more sustainable form. Such a fund would need considerable thought and safeguards but could be a way of preventing increases in advice deserts.

We remain of that view.

Question 41: Which model do you believe would be most effective:

- **Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or**
- **Model B: under which general client accounts would be pooled into a Government bank account?**

Please give reasons.

We do not have a strong view on this. On balance, a central fund would be easier to administer, obviating the need for firms to account for interest themselves, and may also provide a measure of consumer protection of client funds, so that would be a preferable option.

Question 42: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:
a) mandatory model;
b) voluntary opt-in model; or
c) voluntary opt-out model?
Please give reasons.

Clearly a mandatory model is likely to raise more than a voluntary model. However we would suggest an exemption for the not for profit sector and firms whose legal aid practice represents more than say 50% of their turnover since they are already making a substantial contribution to access to justice.

Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.
To the extent that the proposals in the government's consultation on the Jackson proposals are adopted, this proposal effectively replicates the conditional fee agreement proposals into legal aid cases and we have no objection to all cases being on an equal footing. However, it is difficult to respond in detail since there is little detail in the proposal and we would wish to see more before commenting definitively.

Question 44: Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?

As per our answer to question 43, the same approach to legal aid cases should be taken as is taken in general civil matters following any implementation of the Jackson proposals

Other issues not raised in the consultation

Previous discussions of alternatives to legal aid provision have raised the possibility of an increased role for legal expenses insurance. Increased insurance provision, both before and after the event, could play a role in supplementing legal aid provision. However, we do not believe that insurance could replace

legal aid. Most legal expenses insurance (LEI) is currently an add-on to household insurance, but most legally aided litigants are not home-owners, and even those in the rented sector may find insurance unaffordable at all, or cancel it as being expendable at times of financial difficulty. Research carried out by The Cooperative Insurance and Shelter reveals that over one fifth of all households in the UK have no insurance protection plans in place and 42% of people say they cannot afford home insurance.[55]

Compulsion – requiring people to take out separate legal expenses insurance – would be unlikely to work since there would be a whole class of people who could not afford to take out cover, or who would be deemed by insurers to be an unacceptable risk. At best, expanded legal expense insurance would assist those at the top end and beyond the legal aid eligibility limits. For that reason, it may be welcome to widen the scope and availability of insurance, and incentivise (whether through tax breaks or otherwise) its take up, but it would be welcome because it would increase access to justice to people currently beyond the scope of legal aid, not because it would replace or supplement legal aid.

Experience in Germany, the most developed legal expenses market in the world, raises a number of important questions about the usefulness of LEI as an alternative to legal aid. For example, although aware of the general usefulnesss of a LEI policy, the German population view it as more expendable than other types of insurance, suggesting payments may not be kept up in times of financial difficulty – which is exactly when they are needed. Also insurers tend to terminate policies once they are invoked, which may mean only one problem in a problem cluster is addressed.

We wholly support the polluter pays principle. Recent studies in Nottingham have shown that considerable legal aid costs are caused by poor decision making or system failure on the part of public authorities and others; that has also been our experience as a major housing and social welfare law provider. We welcome the proposal for a discretionary surcharge set out in Chapter 3 of the Law Society's recent Access to Justice Review. This should be on top of, not instead of, the successful party's ability to recover costs at inter partes rates. Whilst it clearly would not be appropriate in every case, where a body has acted in a way that was unreasonable, incompetent or negligent it seems right that it should suffer the consequences of its failures.

Governance and Administration

Question 45: The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.

Legal aid is already the most regulated area of legal practice. But much of that regulation stems from the LSC, not the regulators. Not for profit providers that do not employ solicitors are not regulated at all, other than by the LSC. Those that employ solicitors are not either, but the individual solicitors are regulated by the Law Society. When the "special bodies" provisions of the Legal Services Act come into force in 2013 NfPs that employ solicitors will need to become Alternative Business Structures but those that do not will remain outside the regulatory regime. Therefore, in respect of the Not for Profit sector there is limited scope for regulatory transfer, since at the moment there is and will be no regulation of the sector except where solicitors are employed.

There is, however, scope for regulatory relaxation. The bureaucracy and complexity that has grown up around legal aid is huge and contributes substantially to the cost of service provision. This consultation paper does not seek radically reform the fee or funding structure (as opposed to rates and scope) and therefore is a missed opportunity. Simplification of the scheme would be welcomed.

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[55] http://www.myfinances.co.uk/insurance/news/product-news/-over-5-million-uk-households-without-home-insurance-$1378214.htm

Question 46: The Government would welcome views on the administration of legal aid, and in particular:

- **the application process for civil and criminal legal aid;**
- **applying for amendments, payments on account etc.;**
- **bill submission and final settlement of legal aid claims; and**
- **whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?**

The approach of the LSC is regrettably inconsistent and petty. Different offices take different approaches; processes change without proper announcement. Applications are rejected for minor errors which are obvious or could easily be dealt with by picking up the phone. Approaches to assessment seem to be more reasonable at the start of the financial year than at the end. There are considerable delays, seemingly due to under-staffing and / or under-training of staff.

The existing reporting mechanisms for controlled work are very cumbersome and require the input of a great deal of information. They are very time-consuming each month, and this is worsened by regular changes to the system requiring our internal systems to be re-designed. Even despite this, the system is not fit for purpose. As just one example, when a client returns seeking further advice on a previously closed matter, we are required to re-open the case and submit a further claim. But the LSC's electronic billing system is not designed to allow this to happen – despite it being a contractual requirement – so we have to inform a separate department of the LSC and request a manual adjustment. This is not only a laborious and time consuming process, for all concerned, but also one that increases the scope for error.

In addition to that, every other LSC contract – housing court possession schemes, prison debt advice, Community Legal Advice contracts – has different reporting requirements to controlled work contracts and to each other. The inability of the LSC to design a single relatively simple set of reporting requirements – using an IT system that actually works – causes us a great deal of time and expense in producing internal procedures that comply with what the LSC want.

Standard Monthly Payments are useful in assisting cashflow on new contracts where work is being undertaken but not yet being billed in any significant way. On "mature" contracts, however, where there is a regular flow of work being billed, SMPs require an additional level of complexity in our accounting process with the maintenance of a control account, and also require constant monitoring, negotiation with the LSC and adjustment because of the demands of reconciliation of payments with claims. Overall, therefore, we would prefer a return to payment by claim.

All of the above make working in legal aid a difficult and frustrating process. The combination of inconsistency, poor or non-functional IT systems, delay and excessive scrutiny has led to an unnecessarily bureaucratic and antagonistic relationship between the LSC and providers. A new Agency is a chance for a new approach.

We would be very happy to work with the MOJ and LSC towards a simplified and less bureaucratic legal aid scheme, which would make its operation less burdensome to all parties and would of itself save considerable costs.

Question 47: In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

We welcome electronic working where it creates efficiencies and saves costs, but not where it simply transfers an administrative burden from the LSC to providers. Experience of the LSC's adoption of electronic reporting of controlled work claims and of e-tendering does not inspire confidence in its ability to use electronic working in a way that would actually make processes easier.

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

What the system needs above all is simplification. When a Manual is 3 volumes and 1000 pages, yet still not complete or comprehensive, something has gone wrong. When a one-page form requires a sixty page guidance document, something has gone wrong56.

There needs to be a period of stability. The permanent revolution of the last decade must stop. Above all, there must never be a repeat of the 2010 tender round, which was one of the most destructive, badly handled and chaotic processes even the LSC has ever designed. Current contracts should run without further changes – to fees, scope, eligibility or delivery model – until their expiry in 2013. Future changes to the system should be introduced only at fixed and well-known intervals, say every three years with the expiry of contracts and major changes should be piloted, evaluated and amended before being rolled out.

Impact Assessments

Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

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

We are very concerned that the Government has carried out impact assessments that clearly show a negative impact for certain client groups but has not adapted the main proposals to mitigate this. This renders the impact assessments nothing more than a paperwork exercise.

It does not appear that the government has made any assessment of the impact of these proposals, whether in financial or other terms, on other government departments and agencies. There is an acknowledgement that there will be impacts, but no attempt to quantify them and in particular to assess

56 See http://www.legalservices.gov.uk/docs/forms/Guidance_For_Reporting_Contolled_Work_Version_7_October_2010(4).pdf for the 63 page guidance to the one-page CMRF form http://www.legalservices.gov.uk/docs/forms/TFF_Replacement_CMRF_Version_2_April_2008.pdf

whether as a result the proposals would actually save money when taken across public expenditure as a whole. This must be done. We refer in this context to the research by Citizens Advice[57], which found

- *For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.*
- *For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.*
- *For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80*

For further details, contact:

Elizabeth O'Hara

Policy Officer

0844 515 2045

elizabeth_ohara@shelter.org.uk

Simon Pugh

Head of Legal Services

0844 515 1233

simon_pugh@shelter.org.uk

[57] Towards a Business Case for Legal Aid, Citizens Advice, July 2010