



Rights of Women's briefing on the Ministry of Justice proposed changes to legal aid

Introduction

The ability to access free or low cost legal advice is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay privately for legal advice. Figures from the Community Legal Service confirm this analysis by showing that more women than men apply for civil legal aid. For example, in 2005/2006 62.2% of 154,153 applications for civil representation in family matters were made by women.¹ Despite evidence of the considerable need for quality legal advice and representation providers², over the past four years, the number of solicitors' firms and advice agencies undertaking publicly funded family law work has fallen by 25%.³ Since 1997, the legal aid budget has risen from £1.5 billion to £2.1 billion a year yet spending on civil legal aid has fallen by 24%.⁴ The consultation states that the proposals would, if implemented, save £350 million in 2014-15 making a substantial contribution to the Ministry of Justice's target of a real reduction of 23% in its budget. If taken forward, the proposals would be implemented before 2012.

We know from our work providing legal advice to women across England and Wales that legal aid is a vital, lifesaving resource. Legal aid enables women (and men) who cannot afford to pay for legal advice and representation get protection from domestic violence from the civil courts, end a violent or abusive relationship, access benefits and housing support that they are entitled to, protect their children from violence or abuse and resolve any immigration law problems that they have. Rights of Women will be campaigning against the proposed changes because:

¹ Legal Services Commission, Equalities Annual Report 2005/6, published June 2007.

² See, for example, Rights of Women's *Measuring up? UK compliance with international commitments on violence against women in England and Wales* which can be downloaded from www.rightsofwomen.org.uk.

³ Department of Constitutional Affairs, *A Fairer Deal for Legal Aid*, July 2005.

⁴ Department of Constitutional Affairs, *A Fairer Deal for Legal Aid*, July 2005.

- they are **discriminatory and will entrench inequality** because women and other vulnerable groups such as the disabled, poor and marginalised will be disproportionately affected;
- they will put women at **greater risk of violence** by making it harder for them to leave their relationships and resolve issues relating to their children;
- they will remove an important **check to abuses of power and incompetence** (legal aid is necessary to ensure equality of arms and to enable individuals to challenge decision taken by those in positions of power); and
- because the ability to access legal advice and representation is vital to protect and uphold everyone's **human rights**.

The following table sets out some of the proposed changes; given our work on violence against women and gender equality we are focussing on the changes that most affect the women we support.

Scope

The **scope** of legal aid provision refers to whether or not legal aid will continue to be available for particular areas of law. The Ministry of Justice states that the following factors have been taken into consideration when deciding what should and should not remain in scope:

- The importance of the issue (financial cases are not a priority, matters where life or physical harm are involved are).
- The litigant's ability to present their own case (are they traumatised? is a complex area of law? is the tribunal or court easy to access for a litigant in person?).
- The availability of alternate sources of funding e.g. conditional fee agreements (CFAs, these are often referred to as 'no win, no fee' arrangements).
- The availability of other sources of advice or routes to resolution. Advice may come from unions or voluntary sector organisations. Ombudsmen or other methods of dispute resolution may be available.

There are a number of different types of civil legal aid (for example, in relation to family or immigration law) that you may receive:

Legal Help: initial advice from a solicitor or immigration advisor.

Help at Court: having someone speak on your behalf (without formally representing you) at a court hearing.

Family Mediation: mediation in family disputes to deal with issues following relationship breakdown.

Family Help: help with negotiation and obtaining court orders in family disputes.

Legal Representation: having a barrister or solicitor represent you in court proceedings (e.g. to argue at the Family Proceedings Court that you are entitled to a non-molestation order).

Controlled Legal Representation: representation before:

- the First-Tier Tribunal for Mental Health in England and the Mental Health Review Tribunal in Wales (to challenge your detention under the **Mental Health Act 1983**)
- a First-tier Tribunal in asylum or immigration cases (to argue that a person is entitled to Indefinite Leave to Remain as a victim of domestic violence).

The following table sets out the proposed changes to the scope of legal aid:

Area of law	Currently in scope	What the Ministry of Justice proposes to remove from scope	Ministry of Justice arguments for removing from scope as set out in the consultation	Arguments for retention in scope
<p>Asylum support under section 4 and section 95 of the Immigration and Asylum Act 1999</p>	<p>Legal Help (not Representation) is currently available to assist applicants complete notices of appeal etc.</p> <p>No legal aid is available to help applicants complete the application forms (this is currently done by One Stop Services www.ukba.homeoffice.gov.uk/asylum/helpandadvice/onestopservices/)</p>	<p>Legal help so that no legal aid will be available for asylum support law cases.</p>	<p>Applications and appeals are straightforward and analogous to welfare benefits law (see below).</p>	<p>Notice of appeal complex, as is representing yourself if you are a vulnerable asylum-seeker who has only been in the UK a short time.</p> <p>Applicants may not speak English, face barriers accessing advice and may be traumatised.</p> <p>Applicants with mental / physical health problems particularly vulnerable.</p> <p>Devastating consequences of destitution, particularly on the vulnerable e.g. women.</p> <p>If asylum-seekers are unable to represent themselves in their asylum appeals why are they able to do so in relation to asylum support? Whist asylum support law not as complex as the law on international protection the vulnerability issues are the same.</p>

				Impact of not enough providers already.
Compensation from the Criminal Injuries Compensation Authority	Legal help is currently available for completing the application form for compensation (not for appealing against decisions).	All Legal Help so that this area of law is no longer funded.	Ability to self-represent. Straightforward application process. Support available to complete the forms available from voluntary sector organisations like Victim Support or from the CICA helpline. Claims financial in nature.	Vulnerable clients who may be traumatised. No specific support available for those with mental or physical health problems which may prevent them from completing the forms. Capacity and sustainability of voluntary sector to continue to provide support in the current economic climate?
Debt and proceedings under the Insolvency Act 1986	Legal help and Representation for issues relating to debt including bank loans, credit cards, rent, mortgage, council tax, utilities bankruptcy or Individual Voluntary Arrangements.	Legal Help and Representation will only be retained for those debt matters where the client's home is at immediate risk as a result of rent or mortgage arrears. Although Legal Representation will be retained where a person's home is at risk, in practice the merits test will continue to mean that most cases are funded at the Legal Help level.	Not important area of law as financial issues involved. Alternative sources of support available e.g. National Debt line, Money Advice Trust.	Will entrench women's economic inequality. The poor or those in debt are not the same as rich people with no money. Factors like a lack of education and social exclusion have to be considered. Ability of vulnerable groups to represent themselves e.g. those with physical or mental health problems. Importance of issues to those affected is very high, ability of individuals and family's to provide for themselves at stake. Snowballing effect: legal aid only available when situation is so bad that home at risk – better for a debt to be dealt with before it

				reaches this point. Consequences of CABx and Law Centres not being legally aided for all those in the community who benefit from their services. Link to financial relief cases e.g. bankruptcy within financial relief proceedings.
Employment	Legal Help in relation to employment law and Legal Representation for appeals to the Employment Appeal Tribunal. This includes advice in relation to: discrimination in the workplace, unfair and wrongful dismissal; redundancy and wages issues.	All Legal Help and Representation so that this area of law is no longer funded.	Low level financial claims. Alternative sources of advice and representation available e.g. through unions, ACAS or employer funded mediation. Tribunal easy to access, clients can self-represent.	Employment an area of women's inequality. Women less likely to be in professions which are unionised. Women more likely to experience low pay. Those with protected characteristics (e.g. gender, race, disability etc) particularly affected as discrimination cases will not be covered. Removing this area from scope seems contrary to the arguments set out in paras 4.133-4.137 of the consultation on the importance of challenging discrimination. What about those in domestic servitude attempting to recover wages or challenging their working conditions? Complexity of law. Sexual harassment as a form of violence against women that requires state action.

				Other protections complex to access e.g. restraining orders.
Family law: financial relief	<p>Legal Help, Family Mediation, Family Help and Legal Representation in relation to private family disputes over financial issues.</p> <p>This includes advice and representation on: disputes about the division of financial assets; applications for a lump sum payment or maintenance; transfer of tenancy; and divorce.</p> <p>In cases involving cohabitation applications under section 14 of the Trust of Land and</p>	<p>The consultation states that all advice and representation where “domestic violence” is not present will no longer be in scope but that where it is, it will remain in scope. However, it’s clear from the gateways below that this is not the case as applicants need to have an injunction or other evidence of “an ongoing risk of physical harm” because of the purported need to have “clear objective evidence of the need for protection”.⁵</p> <p>Advice and representation for proceedings will only available where related domestic violence issues can be demonstrated in one of the following ways (these are the ‘gateways’):</p> <ul style="list-style-type: none"> - where the Legal Services 	<p>In litigants and their family’s best interests for matters to be decided outside of court. In 2008 73%⁶ of financial relief orders were not contested showing that most people able and willing to take responsibility for their own affairs. Mediation will continue to be available.</p> <p>Although emotional issues raised clients can represent themselves as no vulnerability issues (because funding available where issues of domestic violence or forced marriage in some circumstances).</p> <p>Proposed changes to court powers to enable the Court to make an interim lump sum to fund the cost of representation to redress economic imbalance between the parties. The lump sum would be credited against any ultimate liability that the payer</p>	<p>Women’s economic inequality means they are less likely to be able to pay privately for advice and representation.</p> <p>Figures from the Public Legal Education Network indicate that people are already reluctant to bring proceedings because of the complexity of the law and a lack of reliable information etc.⁷</p> <p>Long-term financial impact of separation on women: separated / divorced women have a poverty rate of 27%, almost three times that of their former husbands.⁸</p> <p>73% shows that people don’t readily go to court – only where they can’t resolve the issue themselves.</p> <p>Financial relief proceedings may be used to maintain financial control by a perpetrator of violence.</p> <p>Extremely complex area of law,</p>

⁵ See paragraph 4.68 of the consultation and paragraphs 4.64-4.68 to read the full reasons.

⁶ Table 2.6, Judicial and Court Statistics 2008 (www.justice.gov.uk/about/docs/judicial-court-statistics-2008-05-chapt5.pdf).

⁷ ‘Knowledge, capability and the experience of rights problems’ Nigel Balmer et al, Public Legal Education Network, March 2010. The report can be read here www.plenet.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf.

⁸ ‘Marital splits and income changes over the longer term’ Stephen P. Jenkins, Institute for Social and Economic Research University of Essex, Feb 2008. The report can be read here www.iser.essex.ac.uk/publications/working-papers/iser/2008-07.pdf.

	<p>Appointment of Trustees Act 1996 (TOLATA which enable the court to make orders declaring an applicant's interest in a property) is currently funded.</p>	<p>Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant (e.g. an application for an injunction) or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship;</p> <ul style="list-style-type: none"> - where there are ongoing privately-funded (or self-represented) domestic violence (or forced marriage) proceedings (e.g. an application for a protection order), or where there have been such proceedings in the last 12 months and an order was made, arising from the same relationship; - where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced 	<p>might have to pay or part-pay costs. Other sources of advice available. Recoupment of costs through the statutory charge is not at a sufficient level.</p>	<p>not reasonable to expect self-representation (resulting trusts, maintenance pending suit, constructive trusts, proprietary estoppel, financial relief and bankruptcy...).</p> <p>Increasing numbers of litigants in person will prolong cases and increase costs.</p> <p>Lump sum orders deplete assets available for re-housing etc. Unlike the statutory charge (which means that assets taken when property sold in the future) the lump sum will remove assets at the time, reducing the amount available for families to re-house.</p> <p>Ability of applicants to apply for a lump sum to pay for legal costs likely to increase acrimony and further delay and complicate proceedings.</p> <p>How will a self-representing applicant know she can apply for a lump sum?</p> <p>Mediation not appropriate where there has been emotional / financial abuse, neither is self-representation.</p> <p>Mediation goes alongside legal</p>
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⁹ ACPO and NPIA Guidance on investigating domestic abuse (2008) page 38.

		<p>marriage, against any other person);</p> <ul style="list-style-type: none"> - where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent). <p>Applications under s 14 TOLATA will not be funded leaving cohabittees experiencing violence less protected than couples who are ending their marriage.</p> <p>Mediation will continue to be funded.</p>	<p>proceedings; individuals still need advice on settlement and to turn agreement reached in mediation into legal binding settlement. Not all survivors of domestic violence will report to the police or seek protection through injunctions: women may instead go into refuge or seek to relocate. In these cases even though there has been domestic violence legal aid for other family law proceedings will not be available. Gateways are very limited even with the focus on physical violence: what about cases where the perpetrator is given a harassment warning or a caution? What if a restraining order is imposed following acquittal? Discrimination against cohabittees, what happens when a cohabitee woman experiences domestic violence? Need to issue proceedings where one party does not disclose assets etc, in this situation couldn't go into mediation or try to reach settlement. Re-victimisation of facing perpetrator in court (even if she is legally aided he will not be, this</p>
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				will increase the number of cases where the perpetrator cross-examines the victim personally). Women often don't identify behaviour as abusive until then get legal advice on a related issue e.g. children or financial issues. Emotional abuse an indicator in domestic homicide, as are contested child contact proceedings. ⁹
Family law: private children matters.	Legal Help, Family Mediation, Family Help and Legal Representation in relation to private family disputes, such as child contact, residence, PSOs and specific issue orders.	The consultation states that all advice and representation where "domestic violence" is not present will no longer be in scope but that where it is, it will remain in scope. However, it's clear from the gateways below that this is not the case as applicants need to have an injunction or other evidence of "an ongoing risk of physical harm" because of the purported need to have "clear objective evidence of the need for protection" . ¹⁰ Advice and representation for	In best interests of family to resolve issues outside court, with help from a mediator if required, rather than protracting disputes through the courts; arrangements agreed informally without recourse to courts in vast majority of cases; continuing provision of legal aid funding for mediation; alternative sources of advice available online etc. Not a complex area of law. No protection issues raised because DV / forced marriage / public child law / international child abduction proceedings still in scope.	Women's economic inequality means they are less likely to be able to pay privately for advice and representation. Extremely complex and sensitive area of law involving the best interests of children. No other sources of funding available (no lump sum orders). Increase of litigants in person on both sides will delay proceedings, increase court costs, increase acrimony between the parties and result in prolonged uncertainty for children. Research from 2007 ¹¹ shows that in the vast majority of cases

¹⁰ See paragraph 4.68 of the consultation and paragraphs 4.64-4.68 to read the full reasons.

¹¹ *Omnibus Survey Report No. 38: Non-resident parental contact, 2007/8: A report on research using the National Statistics Omnibus Survey*, produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families (Lader, D) (2008) (Office for National Statistics).

		<p>proceedings will only available where related domestic violence issues can be demonstrated in one of the following ways (these are the 'gateways'):</p> <ul style="list-style-type: none"> - where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant (e.g. an application for an injunction) or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship; - where there are ongoing privately-funded (or self-represented) domestic violence (or forced marriage) proceedings (e.g. an application for a protection order), or where there have been such proceedings in the last 12 		<p>contact is agreed informally between parents. This shows that applicants to the court are a last resort.</p> <p>Medication not appropriate where there has been emotional / financial abuse, neither is self-representation.</p> <p>Not all survivors of domestic violence will report to the police or seek protection through injunctions: women may instead go into refuge or seek to relocate. In these cases even though there has been domestic violence legal aid for other family law proceedings will not be available. Gateways are very limited even with the focus on physical violence: what about cases where the perpetrator is given a harassment warning or a caution? Women may feel forced to accept solutions which are unsafe.¹²</p> <p>Increase in the separate representation of children under rule 9.5.</p>
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¹² See Women's Aid report 'Twenty-nine Child Homicides: Lessons still to be learnt on domestic violence and child protection' (Jan 2004) and Lord Justice Wall's report to the President of the Family Division on the outcome of his review of five cases where children had been murdered by their fathers in contact where there had been judicial involvement (Feb 2006). Both of these reports highlighted cases where mothers who had experienced domestic violence had agreed to contact. A number of reasons were put forward for this including the routinalisation of violence and effect of pressure to reach an agreement.

		<p>months and an order was made, arising from the same relationship;</p> <ul style="list-style-type: none"> - where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced marriage, against any other person); - where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent). <p>Mediation will continue to be funded.</p>		<p>The gateways do not allow legal aid to be given in other cases that raise serious safety concerns e.g where:</p> <ul style="list-style-type: none"> - social services advise a parent to seek a residence order or PSO because of safeguarding issues; - a child alleges physical / sexual abuse. <p>The inability of non-abusive parents to protect their children from harm will be reduced resulting in increased child protection proceedings. Cutting costs in this area of law will lead to increases in other areas.</p> <p>Schedule 1 applications for women who are not married but need financial provision for children are extremely complex. Women who are historical victims will be forced to face perpetrator who may use child proceedings to maintain control.</p> <p>Re-victimisation of facing perpetrator in court (see above). Child abduction within the UK where an emergency residence order or PSO was needed?</p>
Higher courts:	Currently legal aid is	All Legal Help and Legal	Not all cases that come before	To get the Court of Appeal or

<p>Court of Appeal, Supreme Court and references to the European Court of Justice</p>	<p>available for cases concerning areas of law which are not in scope which progress to one of these higher courts.</p>	<p>Representation in relation to these appeals (so cases would only be funded were they related to an area of law that remains in scope).</p>	<p>these courts are complex. Applicants may be able to access funding through the new excluded cases scheme (see below); although this would only enable cases to be funded where it is required by international human rights law.</p>	<p>higher courts you have to go through permission proceedings, how can a litigant in person do this? It is difficult to envisage a case that went to this level that did not involve a complex legal issue (it is only possible to go to the Court of Appeal on a child law issue were the appeal raises an important point of principal or law, or there is some other compelling reason for it to be heard). Private child law, financial relief, housing, employment and immigration cases that went to the Court of Appeal would be extremely complex; it is not feasible to expect people to represent themselves at this level of hearing even if there are no vulnerability issues. Costs to the higher court of longer cases involving litigants in person.</p>
<p>Housing</p>	<p>Legal help and representation on issues concerning the home, homelessness and disrepair including: possession actions, rent and mortgage</p>	<p>All Legal Help and representation in relation will be removed from scope (other than in relation to homelessness and housing disrepair (non-damages) cases, see below). This includes:</p>	<p>Importance of issues: relatively low (financial and property cases; some cases arise from personal choices e.g. right to buy). Ability to self-represent: no specific issues of complexity. Alternative sources of funding: CFAs for damages cases.</p>	<p>Complex area of law. Demographics of local authority and social housing? More likely to be disabled or socially excluded in another way. Position of women seeking a transfer because of domestic violence or harassment?</p>

	arrears.	<ul style="list-style-type: none"> - actions for damages and/or an injunction for unauthorised change of use of premises; - applications for a new tenancy under the Landlord and Tenant Act 1954; - an action for re-housing; - an action for wrongful breach of quiet enjoyment; - housing disrepair proceedings where the primary remedy sought is damages; - an action for trespass.. 	Alternative routes to resolution: e.g. Shelter, Local Government Ombudsman.	Pressure on other advice providers during the current economic client and following the changes to housing benefit? Snowballing: by not dealing with the issue when it arises the case is more likely to end up leading to possession proceedings.
Immigration	Legal Help and Controlled Legal Representation for a variety of immigration issues, including: nationality; leave to enter or remain in the UK (including the domestic violence rule); deportation; family visit application/appeals; visa applications and appeals (e.g. for students or workers); British Citizenship;	<p>All Legal Help and Controlled Legal Representation for immigration matters (other than for persons seeking release from detention or proceedings before the SIAC) will be removed from scope, including:</p> <ul style="list-style-type: none"> - applications and appeals under the domestic violence rule and contact child rule; - applications to enter or remain in the UK to visit family, to work or to study; - applications under EU/EEA 	<p>Unlike asylum these applications do not concern life and death issues.</p> <p>Many applications will be of relatively low importance (e.g. personal choices about where to live/work).</p> <p>Ability to self-represent: the Tribunal accessible; interpreters available free of charge; cases do not involve complex legal issues; no specific traumatisation issues.</p>	<p>Need to protect all victims of violence; cases under the domestic violence rule or that raise domestic violence or violence against women more generally (e.g. application made outside of the immigration rules because the person is not on a spousal visa) raise all the same issues as asylum cases (e.g. risk of physical harm, vulnerability, trauma, ability to self represent etc).</p> <p>Retention of rights under regulation 10 2006 regs following death, divorce or dissolution</p>

	<p>and, EU free movement rights.</p>	<p>law;</p> <ul style="list-style-type: none"> - applications for citizenship or other travel docs; - applications for refugee family reunion. <p>Discrimination cases currently in scope would remain in scope.</p> <p>Judicial review of UKBA decisions would remain in scope.</p>		<p>including domestic violence cases? Another complex area of law.</p> <p>Trafficking victims seeking residence orders under the NRM not covered, same vulnerability issues raised as in asylum cases. Under the CoE Convention on Trafficking legal advice has to be available.</p> <p>Migrant domestic workers in domestic servitude or MDWs more generally also vulnerable.</p> <p>Art 8 cases involve significant relationships and often the best interests of the child. If this area of law is so easy that a person can represent themselves why have there been so many House of Lords / Supreme Court cases on these issues?</p> <p>All immigration law complex, chances of success of applicants without representation currently much lower than those with.</p> <p>Costs in legal aid for immigration cases will have increased over recent years because of an avalanche of legislation and changes to the immigration rules and because of challenges to poor or unlawful UKBA decision-</p>
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				<p>making. Individual applicants should not have to suffer because of this – the responsible Government department should. Who will be available to do immigration judicial reviews if there are no immigration contracts or a significant reduction in the number of providers? Legal aid providers are highly regulated, where will privately paying clients go and how will quality of advice be ensured? How will people pay? Exploitation? How will you find out the correct immigration law position when the policies and regulations don't reflect the current legal position (e.g. in EEA law cases).</p>
Welfare benefits	<p>Legal Help is available for advice in relation to decisions about benefits and appealing decisions to the First-tier (Social Security and Child Support) Tribunal. Legal Representation is not available.</p>	<p>All Legal Help so that legal aid is not available for this area of law.</p>	<p>Issues not important, about entitlement not safety or liberty. Accessible, inquisitorial and user-friendly tribunal. Sources of advice from Job Centre Plus, Benefits Enquiry Line and voluntary sector organisations like the Child Poverty Action Group and Free Representation Unit.</p>	<p>As disability benefit involved clients in this group are more likely to have physical or mental health problems or learning difficulties. Tribunal is not accessible to those with learning difficulties, no easy read guides or audio guides for those who cannot read. Advice from sources like Job Centre Plus is often the problem, considerable numbers wrongly advised by these sources.</p>

				<p>Housing at risk if housing benefit in dispute – result in more possession proceedings, again snowballing of issues causes costs elsewhere.</p> <p>Very complex areas of law involved e.g. whether or not someone has the right to residence under EEA law and therefore passes the Habitual Residence Test.</p> <p>Potential loss of Law Centres and CABx and the consequences of this for marginalised and disadvantaged? 20% of local CABx get legal aid funding, 55% of law centres. Other sources of funding for these e.g. from local government also being cut.</p>
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The follow areas of law **will also be removed** from scope entirely:

- Cash forfeiture proceedings.
- Clinical negligence.
- Consumer and general contract.
- Education.
- Appeals to the Upper Tribunal in relation to decisions made by First-tier Tribunals within the General Regulatory Chamber of the Tribunal Service.

The following areas of law **remain in scope** (however, changes to eligibility will apply, see below):

- Asylum law.
- Claims against public authorities (but this has been restricted, see the table above) e.g a judicial review of a local authority decision.

- Claims arising from allegations of abuse or sexual assault (e.g. actions against local authorities for abuse that took place when a child was in care).
- Community care law (e.g. challenges to local authority assessments of need).
- Debt matters but only where the client's home is at immediate risk (see above).
- Unlawful discrimination that is currently within scope e.g. in relation to educational provision and consumer credit law (not for employment law or before the Special Education Needs and Disability Tribunal).
- Environmental matters.
- European Union cross-border cases.
- Public child law cases (cases which are brought by the local authority, for example, to take a child into care).
- Public law (e.g. judicial review actions that hold the state to account).
- Family law: domestic violence and forced marriage cases (in relation to non-molestation orders, occupation orders, FMPOs, applications to High Court for a wardship order). However, if you look at paras 4.64-4.68 the focus is on protecting victims from **“physical harm”** (compare this with the Home Office's definition of domestic violence: Domestic violence is **“any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”**) Where a victim wants legal aid to deal with other family matters e.g. child contact or financial relief following marriage breakdown legal aid will only be available **“where there is an ongoing risk of physical harm”**. Legal aid does not appear to be available for those against whom a protection order is sought; this will increase the number of women who are faced with questioning from the perpetrator of abuse.
- Family law: mediation in all private family matters. The consultation states that mediation will be retained to encourage out of court solutions and that **“This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is present, we intend to offer support through family mediation, as some couples may still be able to obtain value from the mediation process”**.¹³ Legal aid will not be available to turn an agreement reached through mediation into one that is legally enforceable, to get disclosure to allow mediation to take place or to get advice on entitlement and proposals made.
- International child abduction.
- International family maintenance (financial proceedings for child and family maintenance that take place in another country).
- Representation of children under Rule 9.5 (and 9.2A) of the **Family Proceedings Rules 1991** where the judge can make a child a party to the proceedings if it is in their best interests (e.g. in a contested child contact case the Judge may decide that the child needs separate representation from his/her parents).

¹³ See para 4.70 of the consultation.

- Housing (where the case involves possession proceedings, disrepair as a counterclaim in rent arrears possession cases, judicial reviews on the obligations of local authorities in relation to homelessness, actions under the **Mobile Homes Act 1983** where the owner is seeking eviction, challenging ASBOs and housing disrepair (where the claim is for a remedy other than damages).
- Proceedings before the Special Immigration Appeals Commission (SIAC).
- Legal Help and Controlled Legal Representation for claims brought by detainees that directly challenge their immigration detention or in relation to cases before the Special Immigration Appeals Commission (SIAC).
- Mental health law (e.g. proceedings at the Court of Protection, clients challenging their detention under the **Mental Health Act 1983**).
- Confiscation proceedings (relating to offences under the **Proceeds of Crime Act 2002** where proceedings are taking place independently from a criminal prosecution).
- Injunctions concerning gang-related violence (under section 34 of the **Policing and Crime Act 2009**);
- Action to appeal to the **First-tier (Care Standards) Tribunal** in relation to inclusion on a list of individuals who are considered unsuitable to work with children and vulnerable adults or in relation to prohibiting an individual from teaching and related activities.
- Inquests (Legal Help is currently available to assist bereaved families in making written submissions to the Coroner, Legal Representation is not generally provided).
- Restraining orders under sections 5 and 5A of the **Protection from Harassment Act 1997** and for bringing or defending injunctions against anti-social behaviour under section 3A of the Act.
- Quasi-criminal proceedings (proceedings which are funded as civil law issues but which the courts have declared criminal in terms of Art 6 of the **European Convention on Human Rights** (ECHR)).
- Mixed cases (those where some issues in scope and others are not).

Excluded cases

A new scheme is proposed to enable the funding of cases that are excluded from scope in exceptional circumstances (this will replace the current exceptional funding scheme). Funding for excluded cases will only be available where:

- the Government is satisfied that the provision of some level of legal aid is necessary for the UK to meet its domestic and international legal obligations, including those under the ECHR (in particular Art 2 and 6); or,
- where there is a significant wider public interest in funding Legal Representation for inquest cases (only).

Eligibility

Alongside changes to the scope of legal aid, changes are also proposed to the eligibility rules. These changes will not affect areas of law that are currently not subject to means testing (e.g. public child law, child abduction proceedings, certain mental health proceedings where a person is challenging their detention or where a child is a party to family law proceedings).

The general thrust of the proposals is to reduce the number of people who are financially eligible for legal aid:

- The merits criteria will be amended to enable funding to be refused in any case (even where it is currently in scope, see above) where alternative funding may be available, for example, through a CFA.
- Applicants for legal aid who are in receipt of passporting benefits will be subject to the same capital eligibility rules as other applicants. This would have two main implications for those on passporting benefits:
 - those with disposable capital in excess of £8,000¹⁴ would no longer be financially eligible for civil legal aid (even though they would be eligible for benefits). They would also become subject to the capital assessment with respect to their property and would be expected to rely on their own capital resources to fund their proceedings; and
 - clients in receipt of passporting benefits with capital of £8,000 or less may become liable to pay capital contributions towards their legal costs, based on an assessment of their disposable capital.
- Clients with £1,000 or more disposable capital will be asked to pay a £100 contribution to the costs of their case:

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

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

Current Capital Contribution Scheme in Controlled Legal Representation in Immigration
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¹⁴ £3,000 for controlled legal representation in immigration cases.

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

New Capital Contribution Scheme in Controlled Legal Representation in Immigration cases	
£0–£999	£0
£1,000–£3,000	£100

- The equity and pensioner capital disregards will be abolished for cases other than contested property cases.
- The mortgage disregard will be retained, the £100,000 limit will be removed and a gross capital limit of £200,000 will be imposed in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month).
- A discretionary waiver scheme for property capital limits will be introduced. Conditions in the waiver scheme would mean that costs are repayable at the end of the case or can be recovered at a later date through a charge on the property. The waiver could be used in cases where people are unable to get credit or service loan repayments.
- A property eligibility waiver will be exercised automatically for Legal Help for individuals in non-contested property cases (e.g. Family Help and Family Mediation) with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less).
- The ‘subject matter of the dispute’ disregard for contested property cases, capped at £100,000 for all levels of service, will be retained.
- The equity and pensioner disregards will be abolished for contested property cases.
- The mortgage disregard will be retained and uncapped for contested property cases but there will be a gross capital limit of £500,000 for all clients.
- The levels for income based contributions will be increased up to a maximum of 30% of the client’s monthly disposable income. Two models are proposed for doing this (see 5.59-5.63) one which is more tapered than the other.
- The waiver in domestic violence injunction cases would be retained.

The proposals to increase contributions will cause significant financial hardship and will deter those seeking advice and represented from obtaining it. Changes to the disregards will have similar consequences. Whilst the waiver in relation to domestic violence injunctions is useful, it would not apply in linked proceedings (e.g. in relation to children or financial matters following marriage breakdown).

Community Legal Advice

The Community Legal Advice helpline will be extended to provide a **single gateway to all** civil legal aid services. An applicant who calls will speak to an operator who will assess the case and signpost where necessary. If the operator believes that more detailed advice is necessary the client will be transferred to a specialist telephone advice service. The consultation envisages that the majority of civil Legal Help cases will be dealt with in this way with criteria developed to assess when face-to-face advice is required. Clients who have particular needs (e.g. language issues or learning difficulty) will be assessed on a case-by-case basis and where appropriate, face-to-face advice will be arranged. The helpline will be able to refer clients to not-for-profit organisations and private providers where legal aid is not available (referral fees will be paid by those providers to raise funds for the helpline).

The use of a helpline in this way raises a number of issues, not least how someone who is not legally trained can identify whether or not the client needs specialist legal advice. While telephone services are useful in reaching some client groups, a generic service of this nature will fail to meet the needs of those who are vulnerable. What about those without access to a telephone? Asylum-seekers etc? Children? How likely is it that a woman experiencing domestic or sexual violence will be able to disclose this to a (male?) operator? What training will operators have in violence against women issues? How will operators identify cases where abuse is happening, the woman herself may not identify her experience as abusive or violent? What steps are in place to ensure that emergency advice is available? Who will deliver the specialist legal advice by telephone and how will quality be ensured? Will referrals be made to specialist solicitors (e.g. in relation to issues like domestic violence or international child abduction)? How will these services be procured? What are the costs of procurement of this kind? How will all those involved be regulated (e.g. operators in relation to immigration law issues)? Is there any evidence that people want the helpline rather than being able to contact an advisor directly? Who determines how complex the case is and whether or not the person gets telephone or face-to-face advice? Can a service user appeal if they think that there requires face to face advice? What about confidentiality?

Remuneration

Changes are proposed in relation to remuneration for civil and criminal cases. In relation to civil cases all fees (whether for barristers, solicitors and experts) will be reduced by 10%. Enhancements to hourly rates paid to solicitors will be capped at 50% for cases in the Family Proceedings Court and county court and new criteria set. The minimum enhancement of 15% for members of relevant panels would be retained.¹⁵ Rates paid to barristers will be codified and reduced. The use of QCs in family cases will be restricted to the most serious / complex cases. A new structure of payment will be introduced for experts.

Alternative sources of funding

¹⁵ The Law Society's Family Law Panel (Advanced), the Resolution Accredited Specialist Panel and, in respect of proceedings relating to children, the Law Society's Children Panel.

A new scheme will be introduced to enable the Government to benefit from interest on client accounts, a number of models are proposed for doing this. A Supplementary Legal Aid scheme will be introduced which would enable a percentage of damages recovered in cases to fund the provision of legal aid.

Governance and administration

The LSC will be made an executive agency of the Ministry of Justice. Primary legislation will be used to abolish the LSC, transfer staff to the Ministry of Justice and vest all the relevant functions and responsibilities for the administration of legal aid in the Lord Chancellor.

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For further information about the proposed changes and to join our campaign against them contact Catherine Briddick, Senior Legal Officer on cate@row.org.uk.