Response of the
Bar Council of England & Wales

To the Consultation Paper CP12/10

PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES
Contents

<table>
<thead>
<tr>
<th></th>
<th>The Bar Council</th>
<th>I – III</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Executive Summary</td>
<td>1 – 22</td>
</tr>
<tr>
<td>3</td>
<td>Research: the Strategic Society Centre</td>
<td>23 – 37</td>
</tr>
<tr>
<td>4</td>
<td>Regulatory objectives of the Bar</td>
<td>38 – 53</td>
</tr>
<tr>
<td>5</td>
<td>Legal Aid – the economic and financial material</td>
<td>54 – 74</td>
</tr>
<tr>
<td></td>
<td>- The real cost of legal aid</td>
<td>55 – 57</td>
</tr>
<tr>
<td></td>
<td>- Financial objectives</td>
<td>58 – 59</td>
</tr>
<tr>
<td></td>
<td>- Shortcomings in the statement of Financial Objectives</td>
<td>60 – 65</td>
</tr>
<tr>
<td></td>
<td>- Court-related costs in selected jurisdictions</td>
<td>66 – 74</td>
</tr>
<tr>
<td>6</td>
<td>Evidence and Assumptions</td>
<td>75 – 81</td>
</tr>
<tr>
<td></td>
<td>- Gaps in the information</td>
<td>75 – 80</td>
</tr>
<tr>
<td></td>
<td>- Barristers and the distribution of publicly funded work</td>
<td>81</td>
</tr>
<tr>
<td>7</td>
<td>Outstanding reviews and Research</td>
<td>82 – 109</td>
</tr>
<tr>
<td>8</td>
<td>Rationale for the proposals</td>
<td>110 – 117</td>
</tr>
<tr>
<td>9</td>
<td>Inherent anomalies and unintended consequences</td>
<td>118 – 138</td>
</tr>
<tr>
<td>10</td>
<td>Role of the Courts and of legal profession in upholding the rule of law and the rights of citizens</td>
<td>139 – 145</td>
</tr>
<tr>
<td>11</td>
<td>Access to Justice – Article 6</td>
<td>146 – 152</td>
</tr>
<tr>
<td>12</td>
<td>Access to Justice and the proposals to exclude cases from the scope of legal aid</td>
<td>153 – 208</td>
</tr>
<tr>
<td>13</td>
<td>Access to Justice: Telephone Advice – is this proper access?</td>
<td>209 – 230</td>
</tr>
<tr>
<td>14</td>
<td>Access to Justice – the ‘fault line’ of the proposals</td>
<td>231 – 244</td>
</tr>
<tr>
<td>15</td>
<td>Excluded cases</td>
<td>245 – 263</td>
</tr>
<tr>
<td>16</td>
<td>Mediation: A complement to, not a substitute for, access to justice</td>
<td>264 – 285</td>
</tr>
<tr>
<td>17</td>
<td>Impact on the courts: Gridlock</td>
<td>286 – 306</td>
</tr>
<tr>
<td>18</td>
<td>Impact on the legal profession and on the Judiciary</td>
<td>307 – 346</td>
</tr>
<tr>
<td>19</td>
<td>Alternative proposals – savings of £350m</td>
<td>347 – 382</td>
</tr>
<tr>
<td>20</td>
<td>Experts</td>
<td>383 – 386</td>
</tr>
<tr>
<td>21</td>
<td>Conclusions</td>
<td>387 – 400</td>
</tr>
<tr>
<td></td>
<td>Appendix 1</td>
<td>387 – 400</td>
</tr>
<tr>
<td></td>
<td>Response to the specific Consultation Questions</td>
<td>387 – 400</td>
</tr>
</tbody>
</table>
The Bar Council

I. This is the response of the General Council of the Bar of England and Wales (“the Bar Council”) to the Consultation Green Paper ‘Proposals for the Reform of Legal Aid in England and Wales’.

II. The Bar Council is the governing body for all barristers in England and Wales. It represents and, through the independent Bar Standards Board, regulates over 15,000 barristers in self-employed and employed practice. Among its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners, to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of service to all clients, and to work for the efficient and cost-effective administration of justice. This response is made by the Bar Council acting in its representative capacity, in the public interest.

III. This response has been prepared with the benefit of detailed and specific representations made by a number of the Specialist Bar Associations including:

(a) Chancery Bar Association (“ChBA”)
(b) Constitutional and Administrative Law Bar Association (“ALBA”)
(c) Criminal Bar Association (“CBA”)
(d) Employment Law Bar Association (“ELBA”)
(e) Family Law Bar Association (“FLBA”)
(f) London Common Law and Commercial Bar Association (“LCLCBA”)
(g) Personal Injury Bar Association (“PIBA”)
(h) Professional Negligence Bar Association (“PNBA”)

This response also draws important material by contributions from
(i) Young Barristers’ Committee (“YBC”)
(j) Remuneration Committee of the Bar Council
(k) Civil Legal Aid Sub-Committee of the Bar Council (“CLASC”)
(l) The Equality & Diversity Committee of the Bar Council
(m) Midland Circuit
(n) North-Eastern Circuit
(o) Northern Circuit
(p) South-Eastern Circuit
(q) Wales & Chester Circuit
(r) Western Circuit

And, of course, from individual practitioners.
Executive Summary

1. The Consultation Green Paper CP12/10 (“the Green Paper”) makes proposals for the most radical revision of Legal Aid since the creation of the modern scheme in the 1940s. The Ministry of Justice claims that these proposals are driven only in part by the demands of the current economic crisis and that the true purpose is a “fundamental review”. However, the reality is that far from exploring ways to revolutionise the delivery of publicly funded justice, the thrust of these proposals is constrained to the demolition of much of the architecture of legal aid upon which so many disadvantaged members of the public rely.

2. Public interest is at the heart of this response. We will highlight how the proposals will cause irreparable damage to the current range of public funding across many areas of law, how the courts will become gridlocked with litigants in person, and how that damage can be avoided.

3. The Bar Council is eager to find ways to increase efficiency, reduce waste in the justice system and thereby reduce the cost of legal aid. The Bar has encouraged measures designed to minimise delays in civil and criminal trials, and to avoid unnecessary hearings, through the implementation of the proposals identified by Lord Carter in criminal law to the Public Law Outline in family cases. We recognize the value of reform but the legal aid system must provide full and proper assistance to those who really need it. The scope for legal aid must not be cruelly chopped but re-drawn in such a way as to ensure that vulnerable individuals continue to be protected.

4. The Ministry of Justice seeks to demonstrate how it will save £350m by the year 2014-2015 (see §2.4). It is far from clear that (a) £350m is indeed the target figure, or (b) how that saving is achieved. The Cumulative Impact Assessment contains proposals which would actually realise an estimated £395m to £478m once the full reductions have been implemented. The Impact Assessment(s) on which the consultation is based are woefully deficient in relation to financial data. Indeed, the evaluation of the effect of the proposals on the (substantial) part of the Bar practicing in criminal and civil legal aid work have been only superficially studied and (insofar as they have been appraised at all) have been seriously underestimated.

5. Many of the proposals for cost-savings in the Impact Assessments have no estimated likely savings identified - principally due to a lack of useable data (see below); it follows that we consider that the figure which would in fact be sliced from the Legal Aid budget could be even higher than that sought in the body of the Consultation.
6. In a time of austerity it is right that funds be directed only to those in need. But the current financial eligibility criteria are outdated and illogical. A root and branch reform may deliver substantial savings whilst maintaining vital services, by contrast the draconian proposals in relation to scope will result in a withdrawal of vital services.

7. We challenge the underlying basis for the ‘scope’ proposals in civil and family cases. Specifically, we reject the classification of family breakdown as being in a “range of other cases which can very often result from a litigant’s own decisions in their personal life … Where the issue is one which arises from the litigant’s own personal choices, we are less likely to consider that these cases concern issues of the highest importance” (§4.19). It is inconsistent with the emphasis the Government places on the family in society, that family breakdown is consigned to be one of the “less important cases”, when such breakdown is well known to “lead to more serious consequences for the litigant” (§4.20).

8. An assessment of the effectiveness of access to justice is best served by an understanding of the composition of those sections of society likely to seek such access. In many instances those entering the family and civil courts are socially, intellectually, emotionally or economically disadvantaged. If they experience difficulty in obtaining the advice they clearly require, then many abandon justice – compromising the very rights and freedoms which underpin our society, and more worryingly, possibly imperiling the lives of vulnerable. (Others, who do not understand the weakness in their cases, will not be advised against pursuing their cause.)

9. Research conducted by The Strategic Society Centre (SSC) to assist the Bar Council in responding to this Consultation reveals that:

For housing and social welfare:

(a) In the housing, employment, debt and welfare benefits problems which will be removed from scope and for which respondents had sought advice, that access to a Barrister, solicitor, Citizens Advice Bureau, Law Centre advice agency, or other Advice Agency (i.e. a legal services source¹) is more likely to lead to agreements being reached;

(b) For housing problems, the results suggest that accessing such a source has a significant positive impact on the health of the respondent.

And in divorce and relationship breakdown:

¹ We shall refer to this group as a ‘legal services source’ for this Executive Summary, though note that it is referred to as ‘Group 3’ in the research summarised further below.
(c) That those who access legal advice are much less likely to ‘give up’ trying to solve their problems, or follow their problems through to a conclusion, if they are advised by a legal services source;

(d) That agreement is reached (via mediation or otherwise) between couples when access is obtained to legal advice in more than a third of cases (and more than any other group);

(e) Results from this sample suggest that seeking advice from a legal services source to address a problem led to improvements in people’s health approximately 40% of the time.

10. The SSC research highlights the vulnerability of poorer people (with fewer financial resources) to feeling less able to pursue their justice objectives than those who are relatively better off. Significantly, the SSC research suggests that, regardless of who they turn to for advice, the type of divorce and relationship breakdown problems experienced by poorer people may be such that they are less likely to end in agreement.

11. The Bar Council urges the Government to reflect upon these findings when re-considering its policy of an extended role for alternative dispute resolution (ADR) processes.

12. In relation to access to justice, the SSC research suggests that eligible people (i.e. poorer people) are unlikely to be ‘over-accessing’ the family and divorce courts compared to their wealthier counterparts. Care must be taken to ensure that, for those problems where going to court represents the most cost-effective method of resolution, poorer people have equal access to justice through a court hearing.

13. The proposals to radically reduce the scope of legal aid in family cases, if implemented, will have the following deleterious consequences:

(a) The most vulnerable in society will not have proper legal advice and representation at a crucial – and often devastating – time in their lives.

(b) There is a risk that vulnerable adults and children will remain trapped in situations where they are exposed to (increasing) risk of harm.

(c) There will be an increase in unrepresented parties in cases which, in turn, will increase the length of cases and the costs (usually publicly funded) of the other parties.

(d) There is a high risk that first instance courts will not receive relevant information and evidence. This will increase the incidents of miscarriage
of justice, and create an upsurge in appeals. This is particularly regrettable at a time of heightened public anxiety regarding child protection.

(e) It will increase the burden on other areas of public spending as more people become dependent on social and mental health services.

(f) There will be an inequality of arms as between privately funded and legally aided parties.

(g) The right of a child to a relationship with both parents will not be adequately protected. (A child may be separately represented but very rarely is this the case). Currently that right is ensured through the parents’ legal action, but this is contingent on a parent’s ability to access justice.

14. The profiles of many families in private law disputes often reflect those subject to statutory interventions in public law cases. They struggle – until an incident or combination of factors – coupled with a breakdown between the parents and professionals results in statutory intervention. They often have combinations of ill health, socio-economic difficulty and personal vulnerability factors, which demand that they have representation in the courts. To these families the justice system is impenetrable and frightening; arguably without representation they will reject recourse to the law. This may reduce the costs to the Ministry of Justice but it adds immeasurably to the costs to society. Removing an area of legal redress from scope does not resolve the original problem, it merely pushes the problem onto a different public service: be it police, education, welfare, homelessness, the NHS or community mental health, the Green Paper is taking a cavalier risk with public money.

15. Removing large numbers of cases from scope will have profound cost implications for the civil and family courts. However, the Government has proceeded on the flawed basis that the reforms might lead to an increase in the volume of cases where people choose to represent themselves (litigants in person). The Government has wrongly assumed that any such effect should not have a significant impact on ongoing court or tribunal operating costs. Although vital research on the impact in this area has been promised, it is still awaited.

---

2 See Julia Brophy’s research for her ‘Review Child Care proceedings under the Children Act 1989’ (University of Oxford) (May 2006).
3 See IAMoj28, para.39.
16. The Bar Council deplores the all too easy reversion to targeting advocacy fees. Broadly static over the last 15 years, until recently subject to heavy cuts, this type of “salami slicing” was disavowed by the Lord Chancellor. With these particular proposals, the changes to the scope of, eligibility for, and provision of civil legal aid services in England and Wales will lead to a diminution in both:
(a) access to justice in those cases that a modern civilised state should ensure gain access to justice; and
(b) in the quality and availability of professional services to advise, assist and represent in such cases.

17. In crime, the approach in the consultation will deter good quality entrants, already saddled with substantial debt, from pursuing publicly funded work and accelerate the progress towards a two tier system between the private and publicly funded sectors. There will be a direct effect on equality and diversity, undermining the recent work under Lord Neuberger into entry to the profession. This will impact in turn upon the diversity of the judiciary.

18. Further, many of the proposals rest on the flawed premise that issues such as election of trial by jury, and the timing of guilty pleas, are decisions made by the lawyer. Moreover, there is an unwarranted disregard, in the most serious criminal cases, of the need for experienced and efficient advocates, which must be appropriately recognized in the fee structure.

19. The extent of the cuts and the absence of any proposals for considering other sources of funding will threaten the viability of the publicly funded Bar, praised by Lord Carter in his review of legal aid (and others, including, recently Lord Justice Moses) for their industry. Regrettably, the proposals set out in the Green Paper undermine professional confidence in the Government’s commitment to retaining quality advocacy in the state-funded justice system.

20. Importantly, the proposals undermine the regulatory objectives laid down by the Legal Services Act 2007. We argue that they run counter to the “public interest”, will inhibit rather than improve “access to justice”, and far from “protecting and promoting the interests of consumers” will undermine these interests. Given the acknowledged discriminatory impact of the proposals the legal profession will not emerge “independent, strong, diverse and effective”; countless women and BME practitioners – whose practices rely more extensively on public funds than their other professional colleagues – will be forced away from the work.

---

21. Far from delivering a simpler justice system, which is more responsive to public needs and which encourages people to resolve their disputes out of court using simpler, more informal procedures, we fear that the Justice Secretary’s proposals could lead to further disintegration of the justice system, higher costs and more delays. That is why we need to study the regulatory impacts of these proposals very carefully to see how far they preserve or curtail access to justice.

22. The Bar wishes to work constructively with this Government in seeking to identify potential savings which can be made in the delivery of justice which do not compromise (or undermine) the very structure of the justice system. Our paper concludes with some proposals for the delivery of savings.
Research: the Strategic Society Centre

23. In order better to understand the impact of the proposals in the Green Paper, the Bar Council commissioned research from the Strategic Society Centre (SSC)\(^5\).

Introducing the Research

24. The results presented on the following pages draw on analysis of recent data from the Civil and Social Justice Survey. The Civil and Social Justice Survey (CSJS) was a continuous household survey\(^6\) of civil legal problems which ran until January 2009, and was commissioned by the Legal Services Research Centre in London. It was superseded in 2010 by the Civil and Social Justice Panel Survey. The dataset analysed contains information on 6,115 separate law-related (‘legal’ or ‘justiciable’) problems described by those reporting them as ‘difficult to solve’.

25. The research investigated the whether the source of advice or information to which people turned had an effect on a range of problem characteristics and outcomes of advice, including the manner in which problems reach a conclusion, whether they include a court or tribunal hearing, and whether respondents experienced an improvement in their health as a result of advice obtained.

26. For each problem reported in the survey, respondents were asked to name the type(s) of organisation or individual from whom they tried to obtain information/advice (advice source/ source of advice). The research sought to differentiate between

- ‘informal’ sources, i.e. sources which could not be expected to be in a position to offer independent legal advice (Group 1)
- sources which might be expected to have some legal knowledge and, potentially, advisory capacity, though not necessarily independent of the problem being experienced, and, in any event, not eligible to be contracted to undertake civil legal aid work (Group 2)
- sources that could conceivably be eligible to undertake civil legal aid

\(^5\) The full report from the Strategic Society Centre will be available at the end of February 2011.

\(^6\) Being a household survey, the CSJS contains no information on the law-related problems of the non-household population, which includes, for example, people currently resident in mental health hospitals, in prison, in other institutions such as the armed forces, or homeless people. Thus, while any results that are statistically significant can confidently be expected to reflect the true picture of the household population of England and Wales, they cannot be assumed to apply to the entire adult population, and particularly not to those people not residing in residential households. All analyses have, however, been weighted for non-response among the sample population.
work (Group 3)\(^7\)

Note (see footnote) that barristers appear in Group 3.

### The Results of the Research: Social & Welfare Law

#### 27.
When considering together those housing, employment, money, debt and welfare benefits problems that would be removed from the scope of civil legal aid\(^8\) and for which respondents tried to obtain information and/or advice, those whose most sophisticated attempted source of help was a Group 2 source report *their problems reaching agreement* (including via mediation) *only two-thirds* as frequently as respondents who sought help from a Group 3 source. This statistically significant finding can confidently be assumed to reflect the experience of the household population of England and Wales.

#### 28.
When considering together those housing, employment, money, debt and welfare benefits problems that would be removed from the scope of civil legal aid and for which respondents tried to obtain information and/or advice, and when controlling for the financial eligibility of respondents for legal aid services, those whose most sophisticated attempted source of help was a Group 1 source report *their problems reaching agreement* (including via mediation) *less than two-thirds* as frequently as respondents who sought help from a Group 3 source. This statistically significant finding can confidently be assumed to reflect the experience of the household population of England and Wales.

#### 29.
For housing problems that would be excluded from scope for which respondents report having obtained some or all advice they sought, the proportion of people reporting their problems ending in agreement (via mediation or otherwise) increased as the level of sophistication of their advice source increased. For Group 1, agreement was reached in 23.5% of problems. For Group 2, in 28% of problems. For Group 3, the proportion

---

\(^7\) Group 1: General Enquiries at local council, an other Council Department, doctor or other health worker, social worker, MP or local councillor, landlord, church, school, commercial non-advice, accountant, other government department, non advice consumer financial institution, media, any other person/organisation not listed in Group 2 or 3;


Group 3: Barrister, solicitor, other lawyer, Citizens Advice Bureau, Law Centre advice agency, other Advice Agency.

\(^8\) Problems that respondents reported related to eviction, threat of eviction, homelessness or living in unsafe conditions have been excluded from all analyses.
increased markedly to 36.7%. Being a statistically significant result, this points to a clear association between type of advice source and likelihood of reaching agreement among the household population.

30. For housing problems that would be excluded from scope and for which respondents sought (and, in most cases, obtained) assistance, agreement is reached most often when a Group 3 source is contacted, approximately double the rate of agreement for when a Group 1 source is the most sophisticated attempted source, and over double the rate for when a Group 2 source is the most sophisticated. This statistically significant finding can confidently be assumed to reflect the experience of the household population of England and Wales.

31. For those same housing problems for which respondents tried (and, in most cases, obtained) advice, when analysis controlled for the financial eligibility of respondents for legal aid, it was found that people who sought the assistance of a Group 1 source report improvements in health approximately a third as often as people who sought assistance from a Group 3 source. This finding can be confidently assumed to reflect the picture among the wider household population. The result for Group 2 falls just short of being statistically significant. Nevertheless, in this sample, respondents seeking the help of a Group 2 source reported an improvement less than half as often as people seeking assistance from Group 1, and at less than a fifth of the rate reported by those contacting a Group 3 source. Although not statistically significant, this result it still likely to point to a similar picture among the household population, and merits further research.

The Results of the Research: Divorce & relationship breakdown

32. Considering divorce and relationship breakdown problems among people who obtained advice, and looking at the source of advice in isolation, respondents whose most sophisticated source of advice was a Group 2 source report 'giving up' trying to solve their problems over eight times more often than those of respondent consulting a Group 3 source. When financial eligibility for legal aid, experience of domestic violence and problem type (divorce or relationship breakdown) were controlled for, respondents consulting a Group 2 source gave up trying to resolve their problem five and a half times more often than respondents consulting a Group 3 source. These statistically significant findings can confidently be assumed to reflect the experience of the household population of England and Wales.

33. While not statistically significant, in this sample, when advice source, problem type and experience of domestic violence were controlled for,
respondents who were financially eligible for legal aid were almost three times more likely to give up resolving their divorce or relationship breakdown problems than ineligible respondents. This does not mean that eligible people who consulted a Group 3 source received legal aid services for such problems. It does, however, highlight the possibility that poorer people with fewer financial resources are much more vulnerably to feeling unable to pursue their justice objectives than those who are better off.

34. Considering divorce and relationship breakdown problems among people who obtained advice, in this sample, the problems of respondents whose most sophisticated source of advice was a Group 3 source reached agreement (via mediation or otherwise) over a third of the time (37.3%). By contrast, the problems of respondents whose most sophisticated source of advice was a Group 2 source report reaching agreement only 22.2% of the time.

35. In this sample, when controlling for source of advice, the divorce and relationship breakdown problems of respondents who were financially eligible for legal aid ended in agreement only 85% as frequently as the problems of other respondents. While further research (or a larger sample) would be needed to confirm this and to investigate other factors, this result suggests that, regardless of who people turn to for advice, the type of divorce and relationship breakdown problems experienced by poorer people may in themselves be such that they are less likely to end in agreement. This should be borne in mind when formulating policy around any potentially extended role for alternative dispute resolution (ADR) providers and processes.

36. When controlling for financial eligibility for legal aid, problem type (divorce or relationship breakdown) and whether the respondent reported experiencing domestic violence, in this sample, the divorce and relationship breakdown problems for which respondents obtained advice and who consulted a Group 2 source reached court approximately a fifth as often as problems where a Group 3 source was consulted. This result was statistically significant, and unsurprising. However, in this sample, it was also found that:

(a) problems where Group 1 was the most sophisticated source reached court as often as those where a Group 3 source was consulted.

(b) The problems of ineligible respondents reached court 1.3 times more often than those of financially eligible respondents (remembering that the effect of advice source on this rate has been accounted for separately). As well as being likely to reflect the lower level of assets that eligible respondents have (by definition), this result also suggests that eligible people (i.e. poorer people) are not ‘over-accessing’ the family and divorce courts
compared to their wealthier counterparts. A larger sample and further research is recommended to explore this picture more fully. However, this result sounds a note of caution; care must be taken to ensure that, for those problems where going to court represents the most cost-effective method of resolution, poorer people have equal access to justice via a court hearing.

37. In this sample, respondents with divorce or relationship breakdown problems reported an improvement in their health (physical and/or levels of stress) as a result of the advice obtained in 25% where a Group 2 source was the most sophisticated. This proportion rose to 39.1% among respondents consulting a Group 3 source. However, when eligibility for legal aid, experience of domestic violence and problem type (divorce or relationship breakdown) was controlled for, in this sample respondents consulting a Group 3 source reported an improvement in their health as a result of advice obtained twice as often as those for whom a Group 2 source was the most sophisticated source of advice.

**Regulatory objectives of the Bar**

38. The Government’s current consultation on the reform of legal aid\(^9\) has been developed with the avowed aim of achieving a fair balance between the need to reduce public spending, the need to protect the interests of justice and the wider public interest.\(^10\) Four years earlier, one of the New Labour Government’s favourite trouble shooters, Lord Carter had called for a “fundamental change” in the way legal aid services were procured. This was needed, it was said in his final report, so that clients had access to good quality legal advice and representation; so that a good quality, efficient supplier base could thrive and remain sustainable; so that the taxpayer and government received value for money; and so that the justice system could become more efficient, effective and simple.\(^11\) One could be forgiven for wondering what, after more than 30 separate consultation exercises on legal aid since 2006, had actually been achieved.

39. The diagnosis of the need for reform, offered by Lord Carter and the present Secretary of State for Justice, Kenneth Clarke are strikingly similar and the underlying issues about providing access to justice remain very much the same.

---

\(^9\) Proposals for the Reform of Legal Aid (November 2010), Cm 7967.

\(^10\) Ibid, para 1.7.

40. Responses to the latest in a long line of consultations are being developed by a very wide range of interested bodies – “stakeholders”. The “Justice for All Campaign” has over 1,300 supporters. Their concerns about reductions in scope and eligibility for legal aid are becoming reflected in growing parliamentary interest in the reform programme and its effects particularly on some of the most vulnerable in society.

41. The terms of today’s debate have changed in two important respects, one economic, the other regulatory.

42. The economic context in which debates about access to justice are taking place has parallels with the situation which Margaret Thatcher confronted in 1979 after the Winter of Discontent. But the present situation of course is much worse. The country currently faces a period of profound and unparalleled financial austerity. The Ministry of Justice, along with other Whitehall spending departments, is expected to deliver deep cuts – in the case of the MoJ of 23% (or more) - over the expected lifetime of the current Parliament.

43. The need to reduce the fiscal deficit and promote economic recovery is plainly a powerful driver of change in 2011. But the MoJ asserts that, notwithstanding the economic imperative for reform, fundamental change of legal aid is needed in any event. The legal aid system is said to have expanded so far in scope since its original design of 1949 as to be almost unrecognisable today. It is claimed, by Ministers in the previous Administration as well as by Ministers in the Coalition, to be one of the most expensive in the world, encouraging people to bring their problems to the courts too readily, problems which arguably do not need to be resolved by the courts with the help of lawyers. The availability of taxpayer funding for “unnecessary litigation” has led to the legal aid system once again “cascading out of control”, to adopt the vivid image of that distinguished Conservative Lord Chancellor, Lord Hailsham in the early 1980s.

44. Secondly, the regulatory context has profoundly changed the debate about access to justice. In the interval between Carter and Clarke, Parliament enacted the Legal Services Act 2007. Its provisions were designed, broadly speaking, to liberalise the arrangements for the delivery of legal services and to place the interests of consumers at the centre of those arrangements. The Act and the new regulatory architecture which it has created are becoming more familiar to the legal profession. The Act established a new over-arching regulator, the Legal Services Board (LSB) and recognised eight Approved Regulators (ARs) including the Bar Council and the Law Society. Underpinning the Act – 214 sections and 24 schedules – are the regulatory objectives. They are set out in Section 1(1) as follows:
(a) Protecting and promoting the public interest;

(b) Supporting the constitutional principle of the rule of law;

(c) Improving access to justice;

(d) Protecting and promoting the interests of consumers;

(e) Promoting competition in the provision of services;

(f) Encouraging an independent, strong, diverse and effective legal profession;

(g) Increasing public understanding of the citizen’s legal rights and duties;

(h) Promoting and maintaining adherence to the professional principles.

These are the objectives which the LSB must promote (Section 3) and the ARs must act in a way which is compatible with the regulatory objectives (Section 28(2)).

45. It follows that the LSB must not only have an interest in the effects of cuts in legal aid on the environment within which ARs operate and the ability of providers of legal services to offer services to consumers, but also in the effects of such cuts on the LSB’s ability to discharge its statutory duties. The ARs are also impacted because their action (or inaction), on behalf of their members, must be compliant with the regulatory objectives.

46. Quite apart from the effect of cuts on the consumers of legal services, cuts in family legal aid are likely to have a disproportionate effect on women and Black and Minority Ethnic (BME) practitioners who practise at the family Bar because a higher proportion of women and BME practitioners undertake this work. Cuts in criminal legal aid are likely to have a disproportionate effect on BME members who practise at the criminal Bar because a higher proportion of BME practitioners undertake publicly funded work. If women and BME practitioners are discouraged from entering practice in these areas, or from remaining in these areas and developing their practices, the pool of talent from which the judiciary of the future will be drawn will become narrower and shallower and the objective of making the judiciary representative of the community it seeks to serve will be undermined.

47. Any impact of the current legal aid reform proposals which is uneven or indeed discriminatory in relation to Equality Act characteristics will undermine the regulatory objective of “encouraging an independent, strong,
diverse and effective legal profession” (LSA 2007 Section 1(1)(f)). Where the impact is negative with no objective justification or if the impact assessment was non-existent or inadequate, the proposal could also undermine the second regulatory objective which is “to support the constitutional principle of the rule of law” (LSA 2007 Section 1(1)(b)) in that the proposal itself may be unlawful.

48. Proposals which have the effect of reducing diversity in the profession will have knock-on effects for the judiciary as well. This would not only run counter to the fulfilment of the rule of law objective (LSA 2007 Section 1(1)(b)) but also the objective of “protecting and promoting the public interest” (LSA 2007 Section 1(1)(a)).

49. Any impact or consequence which relates to “inequality of arms” - and there are so very many of these in the MoJ’s proposals for cutting legal aid – will tend to undermine three regulatory objectives: “improving access to justice” (LSA 2007 Section 1(1)(c)); “protecting and promoting the interests of consumers” (LSA 2007 Section 1(1)(d)) and “increasing public understanding of the citizen’s rights and duties” (LSA 2007 Section 1(1)(g)). If, as seems likely, consumers are not able to obtain legal advice and representation, plainly their ability to access justice will be compromised. If the effect of the proposals is to decrease the number of cases in which litigants are represented by professional advocates there will be an increase in the numbers of Litigants in Person and a consequent diminution in understanding of and capacity to exercise legal rights and comply with duties. The consumer will also, in effect, be excluded from the “market” on which the Legal Services Act was designed to operate.

50. What of the effect of the proposed cuts on the quality of advocacy? Any impact or consequence which relates to lowering of standards of work or levels of experience or competence of an advocate executing the work will tend to undermine the regulatory objective of “promoting and maintaining adherence to the professional principles” (LSA 2007 Section 1(1)(h)). The professional principles referred to in Section 1(3) (b) and (c) are “(maintaining) proper standards of work” and “(acting) in the best interests of clients”. Poor standards will of course also undermine the “rule of law” objective (LSA 2007 Section 1(1)(b)) and the “protection and promotion of the public interest” (LSA 2007 Section 1(1)(a)). Proposals to make reductions in access to or the quality of expert witnesses or reports risks making decisions based on insufficient or unsound evidence which cannot be in the public interest. It could also undermine the rule of law by weakening confidence in the judicial process.
51. Any impact of the proposals which is related to a reduction in funding for public interest cases by definition undermines “protecting and promoting the public interest” (LSA 2007 Section 1(1)a)) and “increasing public understanding of the citizen’s rights and duties” (LSA 2007 Section 1(1)(g)).

52. One could go on and identify further proposals set out in the MoJ’s proposals for reform of legal aid which cut across or indeed undermine the regulatory objectives. Further questions arise about whether, and if so how far, changes in the structures in which legal services may be delivered in the future (such as Alternative Business Structures, ‘ABSs’) may in fact be beneficial in the inevitable restructuring of the legal services market, which is being driven by a combination of hard economic reality, the new regulatory architecture and possible changes in the procurement of publicly funded legal services.

53. It is not clear to us (any more we suspect than it is to the MoJ or the LSB) whether the effect of this combination of circumstances will actually lead to overall savings in public expenditure, the protection of the interests of justice and the wider public interest. Far from delivering a simpler justice system, which is more responsive to public needs and which encourages people to resolve their disputes out of court using simpler, more informal procedures, we fear that the Justice Secretary’s proposals could lead to further disintegration of the justice system, higher costs and more delays. That is why we need to study the regulatory impacts of these proposals very carefully to see how far they preserve or curtail access to justice.

Legal Aid – the economic and financial material

54. Our response in relation to economic and financial matters can be summarised thus:

- The consultation is far from clear as to exactly what savings are sought, and the basis upon which those savings are calculated.
- The Impact Assessment(s) on which the consultation is based are woefully deficient and ought to be remedied before decisions are taken.
- The effects of the Government’s proposals on that (substantial) part of the Bar which conducts criminal and civil legal aid work have been only superficially studied and have been seriously underestimated.
- The non-economic arguments in the main body of our response demonstrate that, to borrow from Shakespeare, the quality of justice will be strained, and very severely. The material summarised here shows that the quantity of justice will be restrained too – through a shortage of
experienced barristers willing to undertake legal aid-funded work and through a lack of entry of young barristers to replace those who retire or exit.

- The savings sought of £350 million will not be achieved by the Government’s proposals – indeed we are certain that costs will increase, because of inevitable downstream effects on court costs.

- We would be happy to cooperate with the Government in its attempt to rein in public expenditure, and we have some ideas of our own which would help, but the consultation is so deficient in relevant facts and figures that it is impossible for us to put a value on them.

55. **The real cost of legal aid:** The current net cost of Legal Aid is £2.1bn. The Government has indicated that it proposes to reduce this figure by 23%. This cut has to be seen in the context of the fact that the Legal Aid Budget has been contained since about 2003 and has in fact dropped in real terms by about 11%; there has already been a reasonably substantial cut in legal aid in the last few years.

56. The identified assault on the budget is three-fold:

   (a) Removing some cases completely from the scope of Legal Aid (Chapter 4);

   (b) Getting assisted persons to pay more for legal services (or getting more or them to pay at least something) (Chapter 5);

   (c) Reducing the unit cost of the legal (and expert) services (Chapters 6, 7 and 8).

   (“the instruments of policy”)

57. The expenditure on Legal Aid can be categorised in a number of ways

   (a) Civil – Criminal;

   (b) Higher court – lower court;

   (c) Controlled – certificated;

   (d) Advice – representation; and

   (e) Combinations of the above.
Financial objectives: The stated objective of the Green Paper is to demonstrate how the Ministry of Justice can save £350m by the year 2014-2015 (see §2.4). The Bar Council would like confirmation that £350m is indeed the target figure. The Cumulative Impact Assessment states that in aggregate the package of measures would save an estimated £395m to £440m (on one reckoning even £478m) once the full savings have been realised. We understand that the Government is in fact looking for ways of spending nearly £500m less.

The Impact Assessments reveal that legal aid clients would no longer receive an estimated £251m to £286m worth of legal services. Legal Aid providers would receive between £144m to £154m less income per year. And that is without taking account of the fact that many of the proposals in the Impact Assessments have no estimated likely savings identified - mainly due to a lack of useable data (see below); it follows that we consider that the figure which would in fact be sliced from the Legal Aid budget could be even higher.

Shortcomings in the statement of Financial Objectives: These basic assumptions on which the proposals are based surely need clarifying.

The central (and vital) missing element in the Consultation Paper is any consideration of how the £500m should be or is intended to be allocated across the instruments of policy and the areas of legal aid (above).

Put simply, there do not appear to be any over-arching principles guiding the proposals. This is a serious flaw.

The common elements to the proposals is that they are intended to save money (how much is never really specified) but they carry enormous risks, including the exclusion of vulnerable individuals from access to justice, and compromising the quality of justice. If we assume that the savings are the ‘benefit’ to the Government of what is proposed, and the risks as being their true ‘cost’, then there is no indication of how these proposals can be rationally assessed in terms of costs and benefits.

There is a need for a coherent approach to assessing individual proposals; the need for a criteria, the need for evidence (data to assess ‘benefits’ and ‘costs’) to support conclusions. This is missing in this Consultation Paper.
65. In the circumstances, we wish to know:

(a) What is intended to be the allocation of savings over the three instruments of policy identified above and how that allocation was that allocation arrived at?

and

(b) What is the intended allocation of savings over the areas of legal aid above and how was that allocation arrived at?

66. **Court-related costs in selected jurisdictions** Discussions about the ‘spend’ on legal aid, and proposed cuts to the budget are almost always countered by Government (as they are in this instance once again) by the assertion that we spend more on legal aid than other comparable countries in Europe and elsewhere (see §2.9).

67. The essential fault of the argument is rightly acknowledged in the Green Paper (though sadly this is never acknowledged by Government Ministers when the opportunity for headline news is presented). The Government rightly acknowledges that “comparisons with other countries are difficult (because their systems of justice operate differently and their budgets are distributed differently)” (§2.9); regular references to other jurisdictions are plainly not helpful and don’t enhance the important debate.

68. We further remind the Government that

“Making international comparisons is complicated by differences in data collection methods and definitions. Costs in our justice system are distributed differently to those in other jurisdictions. A more inquisitorial style system is likely to spend more on inquisitors and the court process, and less on legal aid; and expenditure may be categorised under different budgets” (see §3.42).

69. When the Lord Chancellor was asked about this issue (Justice Committee 15 December 2010 (A to Q.11)) he accepted that “we are not comparing exactly like with like”\(^\text{12}\).
70. The Green Paper rightly refers the reader to the comparison with European judicial systems (see the footnoted reference in the Green Paper). In particular reference is made to Edition 2010 (data 2008): Efficiency and quality of justice European Commission for the Efficiency of Justice (CEPEJ): International comparison of publicly funded legal services and justice systems University of York October 2009:


In that report, there is found (page 27) the following table which is the comparison of court-related spending in EU countries:

<table>
<thead>
<tr>
<th></th>
<th>Legal aid spend per capita (LA)</th>
<th>Spend on courts per capita (C)</th>
<th>Public prosecution costs per capita (PP)</th>
<th>Sum of court-related spend per capita (LA+C+PP)</th>
<th>GDP per capita (Euros)</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>4.68</td>
<td>36.32</td>
<td>10.40</td>
<td>51.40</td>
<td>26,511</td>
</tr>
<tr>
<td>Germany</td>
<td>5.68</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>26,754</td>
</tr>
<tr>
<td>Netherlands</td>
<td>23.2</td>
<td>46.81</td>
<td>20.58</td>
<td>90.61</td>
<td>29,993</td>
</tr>
<tr>
<td>Sweden</td>
<td>10.57</td>
<td>51.32</td>
<td>9.85</td>
<td>71.74</td>
<td>28,832</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>57.87</td>
<td>8.09</td>
<td>14.52</td>
<td>80.48</td>
<td>24,579</td>
</tr>
</tbody>
</table>

71. The text below the table notes:

“One possible explanation for this smaller variation might be that services classified for E&W as 'Legal Aid' might be classified differently in other countries. For example, they could be part of the 'courts' component for other countries in table 7.2 such as the Netherlands.”

72. This suggests that, taking the court costs with legal aid, the figures are much closer. It also shows that the spend on the Courts of England & Wales is extremely low by comparison with the other countries.

73. It follows that when comments are made about the comparable cost of legal aid in different countries, the comparison is (as the Lord Chancellor appeared

the gap is quite substantial; it can be quite a small number of pounds per head to over £20 per head”. (uncorrected transcript).
to recognise to some extent) not being made like-with-like. Other jurisdictions operate a more inquisitorial system, where the cost falls more heavily on the courts.

74. Moreover, it is appropriate to note that even now legal aid is not as readily available for the population as it used to be. In 1950, the Act provided 80% of the population with a means-tested entitlement to legal aid, by 1973 this had dropped to 40% and by 2008 it only covered 29% of the population (Hynes & Robins, *The Justice Gap*, (2009) (LAG) at 21).

**Evidence and Assumptions**

75. **Gaps in the information:** The Bar Council is concerned about the paucity of evidence to support the key arguments, the lack of research or empirical data to support the data. There are – the Government itself acknowledges – many gaps in the information presented in the Green Paper and in its accompanying Impact Assessments and Equality Impact Assessments.

76. In particular, and in no particular order, we have identified the following:

(a) In relation to clients:

i. There is a significant proportion of non-responses for race and disability client characteristics (para 19 of EIA) (i.e. insufficient data in relation to ethnicity and disability for clients) in all categories;

ii. There is no centrally collected information on the financial circumstances of clients, including any benefits received, capital held and disposable income, which would allow a detailed assessment of the potential impact of the proposals using LSC data.

(b) In relation to providers, the LSC do not hold information as to non-legal aid income for providers

(c) In relation to the Bar:

i. The analysis conducted on the Bar has a different methodology. This is primarily due to the availability of data in relation to the Bar. Whereas the LSRC equalities data can be used to identify specific equalities status within individual providers, the Bar information is only available at aggregate level i.e. for the whole group. This means that, whilst financial impacts on the Bar by
category can be identified, the equalities implications of those impacts cannot be determined.

ii. Payments to barristers undertaking advocacy and related tasks under civil legal aid totalled £132m in 2008-09. However, because of the way that this information is collected, it is not possible to identify which hourly rates applied to the work, and so to carry out an assessment of the impact of this proposal at an individual barrister level. So calculations have been made across the Bar rather than analysing what the potential impact on individual barristers may be. The impact assessment accepts that due to this approach it is not possible to accurately quantify the effect of using benchmark rates.

iii. It has not been possible to analyse the financial impact of the reductions in barristers’ incomes by equalities strands as this information is not collected for barristers (para 1.92 of EIA – Cumulative).

iv. We note with concern that in the Impact Assessments it has not been possible to quantify or monetize the claimed benefits for 6 out of 7 of the options. The only option for which this exercise has been completed is the 10% reduction in fees for which the claim is that there will be a £72m saving over 10 years. It is not clear how this has been worked out or what the claimed savings will be over the 4 year period of the spending review*. In any event we question the value of projecting savings from this measure over that timescale when this is explicitly intended to be an interim measure pending a more radical change to market testing.

(d) In terms of civil fees, the EIA accepts that there are significant information gaps. We set these out in full:

i. The main information gaps in relation to this EIA concern the Bar. Whilst analysis has been possible at the national level using Bar Workforce Survey data, it has not been possible to conduct analysis specific to those individual barristers undertaking the work.

ii. Therefore it is said that the MoJ will seek to work with the Bar Council and Legal Services Board during the consultation period to draw upon all available data to fully understand the potential impacts of these proposals. Any more current data will be used to inform analysis during the consultation period and to support any
full IA and EIA that would accompany any consultation response. We have not been contacted to assist with this.

iii. In addition the MoJ does not have detailed information on clients’ cases, including whether enhancements have been paid, which would allow for a detailed financial impact assessment of the options. Nor does it hold financial information on providers which would allow them to assess any differences in their ability to absorb the impact of the proposals.

iv. To improve the legal aid evidence base, the MoJ intends to conduct a survey of legal aid clients to address the non-response issues in relation to client characteristics, improve the evidence in relation to capital and income, and seek a more developed understanding of potential behavioural responses to changes in legal aid provision. We have not seen this.

v. The MoJ invites respondents to the consultation to submit any evidence they have on the potential impact of the proposals on solicitors, NfP providers, and clients.

(e) In relation to experts, the LSC has virtually no data – even very basic information such as the number of experts used or how much they are actually paid. To this we would add that these proposals seem premature, because the Law Commission Report and draft Criminal Evidence (Experts) Bill are both imminent, and likely to impact upon both the procedure and frequency of instructing expert witnesses, at least in criminal cases (see below).

77. We are alarmed by the lack of evidence underpinning some of the key proposals set out in the Green Paper, particularly relating to clients and the Bar. In relation to clients there is insufficient data relating to disability and ethnicity. The existing data relating to gender is concerning. There is also insufficient information relating to income other than the concession that most legal aid clients have very low incomes.

78. We note that the Government purports to be obtaining at least some of this data through a survey. The period of consultation is 13 weeks. The notion that this sort of information can be garnered over such a short period of time is optimistic unless the data gathering exercise is well prepared and managed.

79. The Government indicates (§2.34) that it proposes to reduce the fees paid to lawyers by 10%, while not actually having any clear idea about the impact of the scope reductions; this is apparent from (§2.34) in which it is said that “we
have proposed some reductions to fees as detailed in Chapter 7. We will keep this position under review until the impact of any changes to scope can be assessed”. This is, with respect, a somewhat cavalier approach to significant cuts in pay to the publicly funded servant.

80. The Green Paper and its Impact Assessments (particularly the Equality Impact Assessments) acknowledge that further information is needed before detailed proposals can be made. We agree. We are deeply concerned about the quality and completeness of the data on which the Green Paper is based; we believe that the lack of vital information skews the proposals. The main source of data for providers is the Legal Services Research Centre (LSRC) equalities data which had an average response rate of 40%. For the Bar as a whole the Joint LSC / Bar Council 2007–2008 survey data is relied upon; this had a 34.7% response rate.

81. Barristers and the distribution of publicly funded work: While certain references are made to the Joint LSC / Bar Council data we would like to mention a number of aspects of the data which are not referred to in the consultation paper, including:

(a) Almost 2/3rs of all barristers (63.9%) specialise in civil or family work i.e. this work forms more than 50% of their total time or income;

(b) Almost 20% of civil barristers have practices constituting more than 50% publicly funded work;

(c) Almost 2/3rs of family barristers (64.1%) have practices constituting more than 50% publicly funded work;

(d) 40% of all barristers are reliant on public funding for at least 50% of their work;

(e) Women, both white and BME, tend to have a greater percentage of their practice made up of publicly funded work. BME females are more likely to have a greater proportion of their practice publicly funded, with 1/3 reporting more than 91% of their practice being funded in this way, and almost 2/3 (63%) of BME females reporting more than 50% of their practice being publicly funded.

(f) Gender and ethnicity are strongly related to area of practice for example family work is strongly associated with gender and immigration work with ethnicity.

(g) There are disproportionate numbers of women in all ethnic groups (especially BME women), at the junior end of the bar, with almost half of
all women being under 10 years call and just over half of BME women under 10 years call compared to 1/5 of men.

(h) Gross billing is also strongly related to gender and ethnicity with BME women billing by far the least.

(i) White men are substantially over-represented in silk, 18% of white men in the self employed bar in silk compared with 9% of BME men, 4% of white women and only 2% of BME women.

Outstanding Reviews and Research

82. **Outcome of the Family Justice Review: Autumn 2011**: Far-reaching and irreversible proposals are made in the field of family justice. It is proposed that large numbers of cases will no longer be dealt with by the courts (but resolved through mediation in a way which has not been successful hitherto) and that – absent agreement in mediation – parties will be required to litigate ‘in person’ their post-separation disputes.

83. These proposals cut right across a cross-departmental comprehensive review of the Family Justice System was launched in January 2010 under the independent chairmanship of David Norgrove, and is due to report finally in the Autumn of 2011.

84. The remit of the Review is to consider how the family justice system could work more efficiently while continuing to provide services that offer the best outcome for families. It has been tasked to examine how alternative dispute resolution services could be better utilised to help citizens take a greater role in resolving their problems.

85. The Bar Council firmly believes that it is premature to reach any conclusions about the funding or practice of the family courts (or family lawyers) until the Family Justice Review has finally reported. It would be wrong to make sweeping cuts to the scope of legal aid if in fact the Review is to identify other means of streamlining the system, making it more efficient.

86. It is, we believe, only logical that the funding proposals should await the wider review of the Family Justice System. This was inferred by the Lord Chancellor’s answer to the Justice Committee when he spoke on the 15th December 2010, when he referred to the fact that he has “a wider study of family law going on”

12 alongside this consultation (inferentially that this

\[12\text{ We are looking at mediation there where we think it doesn’t necessarily have a legal solution. ... it has to be reinforced by the courts, and that is why I have a wider study of family law going on.}\]
“wider study” would inform or influence the shape of the proposals currently in the Green Paper)\textsuperscript{14}.

87. The Bar Council is concerned that the proposals set out in the Green Paper actually interfere significantly with this independent review of the family justice system. This is a disappointing indicator that the Government does not recognise the value of the independent review of the family justice system.

88. The FLBA argues, we believe rightly, that the proposals for the reform of Legal Aid set out in this consultation paper has significantly undermined the clear terms of reference of the Family Justice Review just as the Review is about to formulate its interim conclusions.

89. **Proposals for structural reform of criminal legal aid:** The detailed proposals on structural reform of criminal legal aid are still awaited. The CBA wishes to sound a clear warning now. The introduction of a competitive market would for the first time formalise a system where there will be an incentive to instruct the cheapest advocate, rather than one both qualified and sufficiently experienced to take the case. At present, we are focusing on any and all ways in which the Criminal Bar can make constructive proposals to enable the Ministry of Justice to deliver the savings demanded in the Comprehensive Spending Review. That present necessity is an entirely different matter from principled arguments about the system.

90. There is a present danger that publicly funded work will become more and more understaffed, both among experienced practitioners and also among newly qualified practitioners. The process is already happening. In addition, there has been a dramatic fall in the number of pupillages available at the self employed bar (20% + fall over the last two years). LSC funding for training contracts for solicitors (available until recently) was never extended to assist pupillage at the Bar. The majority of the missing pupillages are in criminal sets while commercial sets are able to offer financially attractive prospects. The present approach in Chapter 6 of the consultation will further deter quality entrants to the profession from pursuing criminal work and accelerate the progress towards a two tier system with a gulf between the private and publicly funded sectors. This will have a direct effect on equality and diversity: there is a significant risk that only those with access to other

\textsuperscript{14} However, the impression that the ‘wider study of family law’ would inform the Green Paper proposals for greater use of mediation does not square with the Green Paper itself, which seems clear that the independent Family Justice Review panel will be required to build upon the recommendations of the Green Paper (see §4.73). Jonathan Djanogly MP further commented (APPG on Legal Aid meeting 24 November 2010) that the Family Justice Review would have to base its recommendations on the basis of the Green Paper proposals.
income, such as assistance from parents, will be able to afford to enter the legally aided bar, especially as the changes to tuition fees will increase the level of student debt accumulated before entering the profession. This will impact in turn the diversity of the judiciary, undermining the recent work under Lord Neuberger into entry to the profession.

91. We note with particular concern the words within paragraph 2.10 of the Consultation document ‘[previous] attempts at reform have been piecemeal’. This is unnecessarily dismissive of previous reform, in particular Lord Carter’s review of Legal Aid procurement, which reported in July 2006 and led to the introduction in April 2007 of the revised Advocacy Graduated Fee scheme, which was a fundamental review and reappraisal of the funding of criminal cases. It cannot be dismissed as ‘piecemeal’ reform so as to justify some of the current proposals which depart radically from Lord Carter’s scheme.

92. Other civil consultations. At present, the Green Paper does not even attempt to take into account the impact that other proposals, made in Green Paper CP13/10, may have on the delivery of legal services; nor does it attempt to consider the impact that proposals made in later consultations designed to implement the recommendations of Lord Justice Jackson may have. These various consultation papers clearly cover closely interlinked topics.

93. In particular, we are concerned that there has been insufficient account taken of the likely effect on access to justice of the Jackson proposals in considering whether there is a realistic alternative to legal aid in those cases in which it is proposed that legal aid should be abolished.

94. Further research into the impact on the court system of the LIPs: The proposed cuts to the legal aid budget will doubtless have a serious adverse impact on the functioning of the civil and family Courts.

95. In evaluating this impact, the Government relies on research commissioned by the then Department for Constitutional Affairs in 2005 into the effect of litigants in person in the civil and family courts.

96. This 2005 research must make troubling reading for the Government, for it does not in fact demonstrate that which the Government asserts that it does. What it demonstrates to us (particularly in the family courts, which carry the brunt of the ‘scope’ changes) is the following:

(a) Where one party was represented and one was not, the research shows:

“The existence of at least one party with a lawyer acting for them makes it easier for courts (they have a lawyer who can assist them with case) but raises issues about equality of arms and can put the
lawyer in a difficult position. They are asked to do more work which may, especially in ancillary relief cases, eventually be paid for by their client. Furthermore, it can create cost and ethical problems as well as unsettling the adversarial dynamic of litigation-negotiation”\textsuperscript{15} (emphasis added).

Note that this would be likely to be the situation under the 2010 Green Paper proposals in any case where domestic violence ‘is present’ – the respondent not being entitled to public funds, or in an ancillary relief case where the husband has assets in his name, the wife does not\textsuperscript{16};

(b) Where both parties were represented in proceedings, there were generally fewer hearings\textsuperscript{17}; this tends to demonstrate that lawyers assist in the resolution of issues without recourse to court – the higher instance of ‘settlement behaviour’ is given as the more plausible explanation\textsuperscript{18};

(c) Unrepresented applicants in Children Act proceedings looked to the court more to resolve disputes than unrepresented applicants\textsuperscript{19} - hence the burden on the court system;

(d) There is a high level of ‘back-office’ demand by litigants in person on the court service (attendance at court counters and correspondence and calls to the court)\textsuperscript{20}; this reveals a hidden cost in the system;

(e) Unrepresented litigants in family cases were consistently more likely to make errors (concerning procedural or administrative matters) than represented parties\textsuperscript{21}; in some cases these were significant, and involved “fundamental misunderstandings” of the nature of court orders or process\textsuperscript{22}; this raises serious implications for cost at the hearing and for the purposes of appeals, not to mention the additional stress on the Judges and for the litigants themselves;

\textsuperscript{15} 2/05: page 250.
\textsuperscript{16} Research shows that a wife (more economically vulnerable) would be more likely to have legal aid at present than a husband on straight means-testing grounds 2/05: p.251.
\textsuperscript{17} 2/05 Page 100 & 102: “Cases where both parties were unrepresented had higher levels of hearings in adoption, injunction and children act cases, but lower levels in divorce and ancillary relief (suggesting that the ancillary relief cases where both parties were unrepresented were largely uncontested”).
\textsuperscript{18} 2/05: page 102.
\textsuperscript{19} 2/05 page 101.
\textsuperscript{20} 2/05: page 114 & separately see page 126.
\textsuperscript{21} 2/05: page 130.
\textsuperscript{22} 2/05: page 132.
(f) The “general impression [among judges] was that unrepresented litigants were at a significant disadvantage. Some managed, but many struggled with paperwork, evidence, procedural steps and handing hearings in court”\textsuperscript{23}; there was concern about litigants misconceiving the remedies available to them, coping with the evidence, choosing and instructing an expert witness, lack of legal knowledge imposing burden on the judge\textsuperscript{24};

(g) Legal points in cases were missed; these may have had a bearing on the outcome of cases, and “judges were reluctant to research cases for unrepresented litigants as much as would be necessary to be sure that unrepresented litigants cases were dealt with fully on their substantive merits”\textsuperscript{25};

(h) There were dilemmas for court listings where litigants in person were involved, given the propensity for the hearings to overrun\textsuperscript{26}; “Inexpert, sometimes emotional, and procedurally naive litigants pose a number of ethical and managerial problems for judges.”\textsuperscript{27}

(i) The qualitative data suggested that unrepresented litigants achieved poorer outcomes on their cases\textsuperscript{28}, essentially for two reasons.

- Firstly, lack of representation frequently meant they were unable to present their cases in the best light (if they were able to present them at all).

- Secondly, a proportion of them brought cases that were inherently weak, either because they had not had the benefit of lawyers discouraging them from bringing cases in the first place, or because they were motivated to bring poor cases because of other grievances against their opponents or a broader disregard for the relevance of law to their disputes.

97. Note that in \textit{Children Act} cases, those involving unrepresented applicants against represented respondents involved more final hearings and fresh applications. Where both parties were unrepresented they involved more final hearings than where the respondent was represented or both sides were.

\textsuperscript{23} 2/05: page 153: see generally chapter 8 where the problems facing unrepresented litigants is well-described.

\textsuperscript{24} See generally chapter 8.

\textsuperscript{25} 2/05 page 160.

\textsuperscript{26} 2/05: page 170: “Some court staff said certain judges were more sympathetic to unrepresented litigants than others and, somewhat surprisingly, that they sometimes avoided listing litigant in person cases before such judges because that caused problems with lists overrunning.”

\textsuperscript{27} 2/05, page 261.

\textsuperscript{28} 2/05: page 221.
The difference in the distributions was statistically significant. These conclusions plainly raise significant concerns about the implications on the court system of more final hearings – both in terms of cost, and delay - the queues of court lists.

98. In domestic violence and injunction cases, where both parties were represented, cases were likely to end in the early stages, whereas when the respondent was unrepresented there were much more likely to be steps beyond the first appointment and there was more likely to be a final hearing. This is likely to increase under the proposals given that the applicant’s entitlement to public funds depends on her obtaining an order – not an undertaking: see §4.67 Green Paper proposals.

99. Note further the research findings in relation to injunction cases – particularly given the Green Paper proposals (by which the applicant would be entitled to public funds, the respondent would not):

“Cases where all parties were represented were likely to end in the early stages (usually by the giving of undertakings) whereas when the respondent was unrepresented there were much more likely to be steps beyond the first appointment and more likely to be a final hearing. Enforcement activity was also more likely (though the number of cases was small)" (emphasis added)

100. Many unrepresented parties in family litigation played no part in the proceedings at all:

“in family cases, there was a significant minority of unrepresented litigants who did not participate in any way apparent from the court file. In ancillary relief, Children Act and injunction cases about a third of unrepresented litigants did not appear to participate”.

Importantly:

“In many ways our data suggests that, in terms of access to justice, there is a prior problem to the problem of non-representation which is the decision not to participate. From the defendant’s perspective, this may be for rational reasons such as having a weak case or seeking to evade any judgment. From another perspective, if disengagement is for reasons of fear,
inability to secure representation, or as strategy of avoiding enforcement, it weakens the legitimacy of court process.”33 (emphasis added)

101. Aligned to the point immediately above, the researchers add this:

“… the closest that this research comes to suggesting any kind of access to justice crisis relates not to non-representation but to the exclusion of litigants who do not, apparently, at any stage or in any form, participate in legal proceedings taken against them. Of course, this may not be a problem at all: it may simply represent a rational response on the part of the parties, and one which does not necessarily damage the values of the justice system (though the extent of problems with enforcement suggest that it may be a more serious issue). The advice literature has, however, demonstrated that ‘lumpers’ of problems give up on solving their problems for a host of reasons, rational and otherwise (Genn, 1999 and Pleasence et al, 2004). We should be concerned and want to know more about this difficult to research group. Should and could defendants be more active? Would it benefit them and the interests of others participating in the system?”34. [emphasis added]

102. Importantly for present purposes the research reveals:

“What information we have... points to unrepresented litigants increasing the workload of the family courts”.35

103. We are left puzzled as to how it is therefore that the Government can state (§4.268) that:

“there is little substantive evidence on the impact that a litigant-in-person has on the conduct and outcome of proceedings. Research conducted by the former DCA in 2005 did not find a significant difference between cases conducted by a litigant in person and those in which clients were represented by lawyers in terms of court time.”

104. The Government indicates in the Green Paper (§4.269) that it is

“undertaking further research”

33 2/05: pages 247-8.
34 2/05, page 264.
35 2/05: Page 103.
into the issue of the impact of the increasing numbers of litigants in person on the court system (§4.269). When first asked about this research at a stakeholder meeting, (16 November 2010) Jonathan Djanogly MP indicated that the research was still being ‘scoped’.

105. It now appears (e-mail from Kim Williams to various interested parties: 14th January 2011) that the research is no more than a “review of the research literature on litigants in person”; it is further said (ibid.) that the aim of the ‘research’ is to establish what evidence exists on:
(a) who they are, how many there are, what are their motivations;
(b) what impact they may have on court processes;
(c) whether litigants in person have different outcomes compared to litigants with representation; and
(d) what action works in assisting litigants in person.

106. The lack of crucial information about the impact of litigants in person on the courts at the point of delivering the consultation which would substantially increase their numbers in the family and civil courts is astonishing. The Government appears determined to push through proposals which (it accepts) will materially affect the delivery of justice without properly evaluating the impact.

107. The Bar Council firmly believes that it is essential that there is proper research into the impact on the courts (particularly in terms of cost and delay) of the increase in the number of LIPs before radical proposals are made which will increase their numbers in the courts.

108. The research needs to be comprehensive, current and direct. We believe that there is little benefit we believe in simply reviewing research from other jurisdictions. The research:

(a) Needs to be of a significant sample of court users: the MoJ recognises (2010 Green Paper) that the 2005 research ‘sample’ was “small” (and for this reason, not entirely satisfactory);

(b) Needs to examine the relative cost of cases involving a litigant in person as against cases involving represented parties. The 2010 Green Paper acknowledges that it is difficult to assess whether a case involving a litigant costs more than one involving two represented parties – this is vital information before representation is removed on the basis of making for costs-savings.

109. Significantly, it is proposed that the research identified above will not in fact be available until after the conclusion of the consultation period (§4.269: “we will report our findings as part of the Government’s response to the
consultation”). This deprives the respondents to the consultation of the opportunity to comment upon it.

**Rationale for the proposals**

110. In reaching its view about which types of issue and proceeding should continue to justify legal aid, the MoJ has purported to take into account (see §4.12):

(a) the importance of the issue;

(b) 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);

(c) the availability of alternative sources of funding; and

(d) the availability of alternative routes to resolving the issue.

111. The MoJ discusses, and seeks to justify these considerations in the paragraphs which follow. In essence:

(a) *The importance of the issue*: In assessing which matters should remain in scope the MoJ has attempted to consider whether the consequences of the case at hand are objectively so serious as to add weight to the case for the provision of public funds. This may be because of the potential seriousness of the direct consequences, such as the loss of life, liberty or home or because the cases are the means by which an individual can hold the state to account by judicial review. The MoJ refers to a range of other cases which can very often result from a “litigant’s own decisions in their personal life” and cites the example of the immigration cases resulting from decisions about living, studying or working in the United Kingdom.

(b) *The litigant’s ability to present their own case*: Considerations have included the form of proceedings and the forum in which they are resolved, for instance, whether they are inquisitorial or adversarial, whether, in each type of case, the people bringing proceedings are likely to be predominantly from a particularly physically or emotionally vulnerable group, who would find it difficult to represent themselves in proceedings, particularly as a result of their age, disability or the traumatising circumstances in which they are bringing proceedings. In determining whether a litigant would be able to represent themselves, the MoJ has also taken into account whether the nature of the case is such that the level of legal complexity is likely to be particularly high.
(c) **The availability of alternative sources of funding:** The proposals take into account whether litigants are able to fund their case in other ways. Where the majority of cases could be brought using an alternative source of funding (such as the use of Conditional Fee Agreements to seek damages in clinical negligence cases), litigants might use these other sources of funding to bring or defend proceedings. The existing merits criteria in the civil legal aid scheme already reflect this principle to an extent, and the proposals in this IA build upon them.

(d) **The availability of alternative routes to resolution:** Considerations have included whether there are other forms of advice or assistance available to help individuals resolve their issues, without seeking legal advice. The proposals also take into account whether there might be other ways of resolving the issue so that it might not ordinarily be necessary to seek redress through the courts, such as the existence of an ombudsman or complaints procedure.

112. As to these points:

(a) **Importance of the issue:** We fundamentally disagree that relationship breakdown and its consequences are the product of “decisions” taken in the course of the person’s personal life which should – as a policy position – disentitle the applicant to public assistance in the pursuit of legal redress. At the centre of many family disputes is the child or children of the family. There is absolutely no extent to which the child has made the “decisions in their personal life” to be the subject of contested proceedings. The Bar Council reminds the Government that it has a duty pursuant to the UN Convention on the Rights of the Child, to prioritise the welfare of children. Therefore, in family cases the Government must consider not only the importance of the issue but the best interests of the child and whether it is in their interests that both parties are legally aided/ have equality of arms.

(b) There is an assumption in the Green Paper that proceedings where clients are primarily seeking monetary compensation are thought not generally to be of sufficient *importance* to merit public funding. The Bar Council agrees with the PNBA (see PNBA response to consultation) that this is a rather crude generalisation. The degree of injury of claimants in clinical negligence claims will vary, but, obviously, in some cases it will be of the highest order. What claimants in such cases are seeking is not so much compensation, but funds to enable them to try to live with the consequences of the negligence of one or more clinicians whose duty was to care for them. While in a claim for damages for breach of a commercial contract an award of damages may provide complete redress in that the
injured party will be put back into the position in which he would have
been had the contract not been broken, the position of a successful
claimant in a clinical negligence case will usually be very different. The
award of damages will contain an award of general damages which is
supposed to provide compensation for pain, suffering and loss of
amenity. However, the main element will usually be special damages
which will enable the claimant to try to live with the long term
consequences of his injuries. Those injuries will remain.

(c) A further factor to bear in mind in the context of clinical negligence is that
the defendant will usually be an NHS Trust, an organ of the state. That
victims of clinical negligence have suffered at the hands of the state is a
further factor taking their claims out of the ordinary run of what the
Consultation Paper calls “simple money claims”.

(d) While the potential seriousness of issues raised in some clinical
negligence claims is acknowledged in paragraph 4.164 of the
Consultation Paper, we suggest that insufficient thought has been given
as to why they are not just “simple money claims”. On the contrary, we
believe that the particular problems faced by victims of clinical negligence
in obtaining access to justice mean that the state would be failing in its
duties under Article 6.1 if some form of assistance by way of civil legal
aid were not available: see Airey v Ireland 2 EHRR 305.

(e) The litigant’s ability to present their own case Although the MoJ has
sought to consider the nature of the proceedings and the characteristic of
the litigant, it has failed to consider that there are aspects of the family
court process which are essentially adversarial (the resolution of disputed
facts having regard to allegations made; for example, determination of the
issue of physical, sexual or emotional abuse of a child). Quite apart from
the significant numbers of litigants in family court process who do not
have English as a first language, are suffering from mental illness or
personality disorder, have learning difficulties, there are significant
numbers who will be required to represent themselves notwithstanding
that they will be suffering from trauma and stress commonly associated
with relationship breakdown. Many litigants in family cases do fall into
the category of “people … from a particularly physically or emotionally
vulnerable group, who would find it difficult to represent themselves in
proceedings, particularly as a result of …the traumatising circumstances
in which they are bringing proceedings”.

(f) Clinical negligence is a specialist area of practice. The Bar Council is
concerned by the suggestion that claimants in clinical negligence claims
could be expected to present their own cases. Indeed, some are so badly injured that they lack legal capacity.

(g) The availability of alternative sources of funding We do believe that more careful thought does need to be given to alternative funding streams; we offer qualified support for the proposal that interim lump sums could be ordered (to cover costs) in ancillary relief claims, but nonetheless consider that the proposal for parties (usually wives) in ancillary relief proceedings to apply (unrepresented) for such interim lump sums is unrealistic.

(h) The combined effect of the proposals in this Paper and in the Consultation Paper on the Proposals for Reform of Civil Litigation Funding and Costs in England and Wales would be to exclude clinical negligence claims from legal aid at the same time as the current regime for CFAs is subject to very significant reform. It is inevitable that the new regime which is being proposed for CFAs is as yet untested. It appears to be ill-suited to clinical negligence claims.

(i) In these circumstances the Bar Council does not see how the authors of the Consultation Paper can be confident that CFAs (particularly if amended in accordance with Sir Rupert Jackson’s proposals) will provide “a viable alternative source of funding”.

(j) The availability of alternative routes to resolution While the Bar Council supports the proposals for increased use of mediation in civil and family disputes, it considers that the Green Paper is excessively optimistic about the prospects of removing large numbers of cases from the courts in this way. Mediation is not, and should not be regarded as, a substitute for access to justice. Furthermore, even mediated agreements require court orders in many cases (take ancillary / financial relief cases post-divorce for example) in order for them to be effective in relation to third parties (i.e. pension trustees).

113. The possibility of fundamental structural reforms to the profession is merely hinted at foreshadowed and is not set out even in outline in the consultation paper. There are arguments of principle, which are yet to be heard and resolved, concerning whether it is necessary or appropriate to implement fundamental changes to the way in which legal services in criminal cases, civil cases, and/or family cases should be delivered in future.

114. The Government is, in any event, imposing on itself a dangerously ambitious timetable for implementation of complex reforms. The current proposal to
proceed to phased implementation without the safeguard of a properly assessed pilot scheme is unacceptable.

115. There is no allowance or even recognition in the Green Paper of the potential for the proposals to be wrong, or the budgetary impact if they are.

116. The FLBA suggests three examples:

(a) The numbers of successfully mediated outcomes of private law disputes (while undoubtedly preferable for the families and for the family justice system) will not radically reduce the numbers of private law cases which require judicial intervention; if substantial numbers of private law disputes continue to come into the courts with unrepresented litigants, the cost to HMCS is likely to be significant; the increased workload of the courts is likely to produce a knock-on effect upon listing in other types of family (and non-family) cases. Where there is administrative delay in the processing of applications, this is likely to have cost implications for the parties – particularly in public law cases where the state is bearing the cost of children being held in foster care for the duration of proceedings.

(b) The number of applications for FLA 1996 orders will not remain static (as inferred in the Green Paper); the numbers of such applications will inevitably rise significantly as the allegation / order of domestic violence brings the applicant within the scope for legal aid for associated proceedings – an obvious advantage over the respondent who remains outside scope; further, given the need for the applicant to obtain an order in FLA 96 proceedings in order to be eligible for public funding for associated proceedings, the cases will inevitably take longer.

(c) The blunt proposal to exclude all parties from the scope of legal aid in private law cases (save where there is an allegation or order relating to domestic violence) will lead to more appointments of Rule 9.5 Guardians, imposing a significant cost-burden on the legal aid budget, and on CAFCASS.

117. The CBA takes the example of the proposal in Question 25 of the Consultation, namely to ‘harmonise the fee for a cracked trial …’, and notes that the Impact Assessment acknowledges that there is a possibility that this proposal may in fact encourage more cases to proceed to trial. This would significantly outweigh any savings achieved as a result of this proposal. Moreover, in the view of the YBC, it is wrong in principle to try and encourage guilty pleas by way of financial incentives for defence representatives. The MoJ approach reveals a fundamental misunderstanding of how criminal cases work.
Inherent anomalies and unintended consequences

118. The obvious risk of hastily prepared and ill-considered proposals is that they almost always contain anomalies, and often lead to unintended consequences. Some of these will have serious cost implications for the Government; we have been unable to cost them at present given the paucity of the data on which the proposals themselves are based.

119. We hope that the Government, having had the opportunity to reflect on the proposals, and digest the responses, will share our disquiet by a number of the anomalies which emerge through the Green Paper. We identify a few of these here.

120. **Burdens on the Court system:** The most significant unintended consequence of the proposals will be the enormous increase in the burden on the courts. We deal below with this more fully in answering Q6 (see ‘impact on the courts’) but draw attention here to our firm belief that the reduction in funding support for litigants will impose a considerable strain on the civil and family court systems by the appearance of large numbers of litigants in person – inevitably adding to the cost burden on the courts. This has been woefully under-estimated in the impact assessments, and has not been costed in the Green Paper.

121. **Less experienced advocates: cases less efficiently managed:** Lower rates paid to advocates will cause an exodus of experienced practitioners from the publicly funded bar; those with lower levels of experience and expertise will be required to fill the shoes of those leaving the profession, but by reason of their inexperience will be less efficient and less able to master the complex cases, leading inexorably to cases taking longer, and higher numbers of appeals.

122. **Accused of criminal conduct in the family court:** Although it is apparent that the Government “considers that those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it” (§4.6), the same person is excluded from the scope of legal aid for representation to defend themselves in respect of allegations of criminal or quasi-criminal conduct (assault and associated offences representing domestic violence) in the family / civil courts (§4.64 – no eligibility for public funds even if accused of domestic violence).

123. **Money claims arising from alleged abuse are supported by public funds / family disputes arising in relation to the same abuse are not:** Among the
most difficult cases in private family law are cases where a parent alleges that another parent has sexually abused the child, their child. This allegation often involves detailed and expert evidence. Under the Green Paper proposals, Legal Aid will not be available for the parents in these circumstances (see above). However, the Green Paper proposals indicate that the Government intends to retain legal aid:

“for money claims against both private individuals and public authorities where (i) they arise out of allegations of the abuse of a child or vulnerable adult; or (ii) they arise out of allegations of sexual assault. This provides legal aid for cases concerning, for example, allegations of abuse in local authority care, or in private educational or care institutions” (§4.56)

... for an applicant in “a damages claim which arises out of the abuse of a child or vulnerable adult...” (§4.17)

“We consider that money claims which arise out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault, have an importance that goes beyond a simple money claim” (§4.57)

“In the light of the importance of the issue at stake, the seriousness of the alleged harm suffered by the litigant, the likelihood of their vulnerability and the lack of sufficient alternative forms of assistance to justify the withdrawal of legal aid, it is our view that the provision of legal aid funding is justified. We propose that it is retained for these claims.” (§4.58)

Therefore it seems that where the alleged sexual assault or abuse is the subject of a monetary claim, legal aid is available; where the same sexual assault or abuse is the subject of a family dispute (where the court is determining whether the alleged abuser should have contact with the alleged victim child, or whether a prohibited steps order should be considered to prevent the alleged perpetrator having contact), legal aid is not available.

124. **Clinical Negligence cases:** In these cases, there is again a fundamental inequality of arms. The doctor will be funded and represented, whereas the potential claimant will not.

125. Further, in reviewing the proposals, we have identified a number of areas where the unintended consequences of the proposals may well be to *increase* the costs on the justice system as a whole.
126. We consider it may be helpful to identify a number of the areas here:

127. **Victims of domestic violence going unprotected**: In very many instances, victims of domestic violence will not seek injunctive relief in the courts; it is well-established from research that only a small number of victims ever report incidents of domestic violence; moreover, in some instances there is no need for injunctive relief, where (for example) the perpetrator leaves the home willingly. The domestic abuse may not have been any less significant than the abuse suffered by a victim who has obtained injunctive relief; the intimidation experienced may be no less. Yet if there have been no injunction proceedings (or prosecution) the victim will not be eligible for legal aid to pursue financial or children proceedings, and will have to face the perpetrator in those proceedings unrepresented; for this reason we can see increased numbers of applications for injunctive relief.

128. **False allegations of domestic violence**: Given that the sole criterion for the eligibility for legal aid in family cases is the allegation of domestic violence, it seems to us likely that there will be larger numbers of false allegations of domestic violence being made in order to secure the advantage of public funds; this will cut across Family Law Act 1996 proceedings, Children Act 1989 (residence/contact) and Matrimonial Causes Act 1973 (ancillary relief) proceedings. These false allegations will require determination and resolution by the courts; injunction proceedings are likely to take longer.

129. **Higher numbers of cross-allegations of domestic violence**: It is likely that there will be higher numbers of cross-allegations of domestic violence by the respondent in order that the respondent may secure representation in contested proceedings and ensure an equality of arms.

130. **Higher numbers of contested injunction hearings**: There will inevitably be higher numbers of contested domestic violence injunction proceedings given the requirement for an ‘order’ if the applicant is to be eligible for public funds in associated (Children Act 89 and ancillary relief) proceedings. It is notable that the resolution of the domestic violence injunction proceedings by the giving of undertakings would not entitle the applicant to public funds for other private law or ancillary relief proceedings. At present large numbers of domestic violence injunction proceedings are resolved swiftly, pragmatically (and economically) by respondents giving undertakings as to future conduct.

131. **Proceedings becoming more rather than less adversarial**. Paradoxically, we envisage that with litigants representing themselves, family proceedings will become more rather than less adversarial; this is the very opposite of what the Government wishes to achieve through these proposals, and which is a
recurrent theme of the Green Paper (but note in particular para.4.210 – the wish to remove the ‘adversarial’ context for dispute resolution for children).

132. **Higher incidence of Rule 9.5 appointments in family proceedings:** It seems likely rule 9.5 appointments are likely to increase in private law children cases, directed by Judges who simply cannot deal with cases involving two difficult litigants in person or where the court needs the forensic assistance of a lawyer; this has significant implications for CAFCASS’ budget, CAFCASS’ capacity to field guardians to represent children, and the legal aid budget.

133. **Payments for Committal in crime:** We understand and agree with the Government’s desire to keep as many cases that are suitable for disposal by the Magistrates’ Court in the lower court, without interfering with a defendant’s right to elect trial by jury. The CBA does not believe that these aims will be achieved by such measures. Rather it is feared that they will lead to an increase in Crown Court trials.

134. The current system relies on the indication of plea and mode of trial being dealt with at the first hearing in the Magistrates’ Court. At this stage there is often very little by way of served or disclosed evidence on which the advocate can advise. If the defendant elects trial by jury, the matter is then adjourned for the committal papers to be prepared and for the committal hearing to take place. Often the papers are only handed to the defence at the hearing and providing there is a case to answer the committal goes ahead. The defendant is not asked whether he wishes to change his plea nor if he wishes to change his decision to elect.

135. Changes to the procedure of a committal hearing, namely the inclusion of questions to ascertain whether the defendant wished to change his plea or his decision to elect could lead to a significant increase in cases being dealt with in the Magistrates’ Court. Strict timetabling will be required to ensure that papers are served in sufficient time for the defence team to analyse them and take instructions. Finally for this proposed system to have maximum effect in achieving its aim, an incentive by way of additional credit should be considered. The Bar reiterates that the decision to plead is that of the defendant and not the advocate. This proposed system by the Bar means that it is the defendant who will be penalised if he pleads at a PCMH not his advocate.

136. **Special preparation rates in criminal cases.** The Midland Circuit speaks for all at the criminal Bar by pointing out that it is not agreed, despite the encouragement to this effect within Question 25, that the provisions for Special Preparation would provide a reasonable enhancement for the most complex cases. The reference to “special preparation” is illusory in all but a
tiny number of cases. The rules for Special Preparation” are most unfairly and unacceptably confined and in any event this proposal would involve a reversion back to hourly rates – which have previously been regarded as undesirable. In a system that was designed to create certainty and predictability (by the use of page counts and proxies) to both the Government, as the paying party, and the person undertaking the work, this reintroduces an area of uncertainty and “judgment” which has been inconsistent and not uniformly applied. Few people have the necessary experience and expertise to assess the relevant claims (which will inevitably be ex-post-facto – a system which the Department has spent much time and effort trying to eradicate).

137. To this the CBA would add that the proposal that special preparation payments be relied upon where extra work is done has some merit, but only if the parameters of such payments are extended dramatically. Under the current regime, the ‘special preparation rate’ would only be available in cases where there are more than 10,000 pages of prosecution evidence or where it can be demonstrated that the case involves unusual or novel points of law or fact, or in the case of electronic evidence. Advocates should be able to claim upon the basis of a case summary or a written advice and where this has properly been done after the PCMH and plea of not guilty, this should be remunerated. The same should apply to skeleton arguments and other trial preparation documents which lead to a cracked trial following a successful (or unsuccessful) legal argument. Indeed, we would go further. If it is to be said that special preparation ‘provides reasonable enhancement’, we submit such payments should follow wherever and whenever work is reasonably done in advance of trial.

138. **Appeals:** The 2005 DCA Research into Litigants in Person recorded concerns about litigants in person failing to make relevant factual points, and (through ignorance) failing to rely on the relevant law. It seems to us that it is almost inevitable that there will be a higher number of appeals from first-instance decisions in which litigants in person have appeared and represented themselves.

**Role of the Courts and of legal profession in upholding the rule of law and the rights of citizens**

139. We are surprised to note the somewhat cynical view taken of the role of the courts, and the role of lawyers, in a number of disputes which it is envisaged will be removed from the scope of legal aid. Such a view does the Government little credit, and frankly does not assist the arguments. We fear
that the Green Paper proposals have been affected by this jaundiced view of the litigation process.

140. We note the Lord Chancellor’s response to the Justice Committee on 15th December 2010.

Answer to Q6 (15.12.10: Justice Committee) All our proposals have been put forward with precisely the people you are describing in mind but when they are facing serious problems, not when they are being persuaded or induced to believe that a lawyer and litigation might help them to get something they would not have asked for which is not of fundamental or great importance to their lives.

141. It is disappointing that the Government does not explain more fully what it means by “inappropriate litigation” and the “involvement of lawyers in issues which do not need legal input” (§2.5).

142. We reject the assumption in the Consultation Paper that contentious family or civil law litigation is such that “we would expect individuals to work to resolve their own problems, rather than resorting to litigation at a significant cost to the taxpayer” (§4.3); and we are left to speculate in which cases “very significant sums are currently spent” for the provision of “legal advice for issues where individuals are in fact looking for practical advice rather than the specific professional expertise offered by a lawyer.” (§4.26).

143. We reject the further inference (which may have been unintended) in §4.21136 that family lawyers do other than try and persuade their clients to resolve issues through lawyer-led negotiation or mediation.

144. Indeed, there is no acknowledgement in the Green Paper at all of the importance to the system, and to the client, of lawyer-led negotiation. The Green Paper appears to have been predicated on the basis that parties resolve their disputes either by litigation or by mediation – but ignores this important function of the lawyer. The Green Paper relies on evidence which suggests that ancillary relief cases, for instance, “can often be resolved by the parties reaching an agreement between themselves. In 2008, 73% of ancillary relief orders were not contested, indicating that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown” (§4.157). But those agreements are very likely to have been lawyer-led.

36 “Legal aid funding can be used to support lengthy and intractable family cases which may be resolved out of court if funding were not available. In such cases, we would like to move to a position where parties are encouraged to settle using mediation, rather than protracting disputes unnecessarily by having a lawyer paid for by legal aid.”
145. The Bar plays a significant role in facilitating agreed outcomes for clients in civil and family cases. In this respect we draw on the research of Mavis Maclean and John Eekelaar37 where they describe (in the family law context):

“The main activity was well-orchestrated bilateral negotiation with the client and welfare service, and then with the other side who were also talking with the welfare officer. Nine such meetings took place in that half-day. The court provided a safe and efficient location for this flurry of activity, and the framework to inspire confidence and deliver an enforceable plan for action. Could this have been achieved in another way? Not in present circumstances.

Access to Justice – Article 6

146. Access to Justice and Article 6: Article 6 of the European Convention of Human Rights and Fundamental Freedoms guarantees that “everyone is entitled to a fair and public hearing within a reasonable time”. Our view is that cuts in public funding for those who are the most vulnerable in our society will indeed have the effect of denying “effective” rights of access to the Courts; it is “effective” access which Article 6 guarantees38.

147. The right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6(1) of the ECHR (see, inter alia, Eur. Court H.R., judgment in McVicar v. the United Kingdom of 7 May 2002, ECHR 2002-III, § 46). It is important in this regard for a litigant not to be denied the opportunity to present his case effectively before the court (Eur. Court H.R., judgment in Steel and Morris v. the United Kingdom of 15 February 2005, ECHR 2005-II, § 59).

148. Confirmation of these points was recently re-stated in DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland (Case C-279/09) (delivered on the 22nd December 2010) in which it was remarked that:

“the granting of legal aid is a measure of social assistance which is derived from the principle of the social State and is necessary for the safeguarding of human dignity” (§24),

149. The Government cannot take a strictly fiscal approach to reform when it is compromising constitutional democratic principles, which include these

38 Golder v UK (1979-80) EHR 524 @ 536, para.35-36.
fundamental Human Rights and judicial independence. Many of the cases in which the family Bar specialize involve life/death type decisions; these cases involve what for many of us would be the unimaginable prospect of permanent separation from ones own child; since the abolition of the death penalty, there is no more draconian order for a Judge to make than to order the permanent removal of a child from their natural family.

150. The Code of Conduct under which the Bar operates includes “requirements” in the interests of justice “to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice”. The constant funding squeeze by the Government makes it more and more difficult for Barristers to operate within its Code.

151. Will the party’s rights of access (under the ECHR) be affected by these Green Paper proposals? Very probably yes. We say so having regard to the Second Chambers’ decision in the case of DEB Deutsche Energiehandels case:

> “the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself effectively. (Eur. Court H.R., judgments in Airey v. Ireland, § 26; McVicar v. the United Kingdom, §§ 48 and 49; P., C. and S. v. the United Kingdom of 16 July 2002, ECHR 2002-VI, § 91, and Steel and Morris v. the United Kingdom, § 61). Account may be taken, however, of the financial situation of the litigant or his prospects of success in the proceedings (Eur. Court H.R., judgment in Steel and Morris v. the United Kingdom, § 62)."

152. That decision re-inforces that:

> It is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

---

39 Coleridge J ‘Another Big Bang’ [2003] Fam Law 799. See also McFarlane J in Re X (Emergency Protection Orders) [2006] EWHC (Fam) 510 “there can be few more Draconian or important orders that justices are called upon to consider than making an EPO; particularly one made without notice to the child’s parents” (para.91); and also Munby J decision.

40 Bar Council Code of Conduct para.104.
In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.

**Access to Justice and the proposals to exclude cases from the scope of legal aid**

153. In a number of areas, the Consultation Paper excludes cases from Scope (see §4.145 onwards).

154. We are conscious that the Specialist Bar Associations will discuss the impact of these scope changes more fully in their own responses. We nonetheless address these in the order in which they appear in the Green Paper.

**Ancillary relief claims:** (§4.154 -162)

155. The Bar Council is very concerned about the potential inequality of arms in ancillary relief proceedings arising from the removal from scope of ancillary relief. Some recognition of this problem has emerged from the Green Paper with the proposal that courts will be empowered to make interim lump sum orders at any point in the proceedings “where [the Applicant] could demonstrate that they could not reasonably procure legal advice by any other means” (§4.161).

156. However, for many parties, this application itself will have to be made in person, which places the party (again more likely to be the wife) at a considerable disadvantage. For litigants in person, arguing for a lump sum order to obtain legal representation might be no less unachievable as conducting the entire case in person.

157. There is no analysis in the consultation paper or the impact assessments of the influence that being legally represented might have had on the high number of cases (73%) which settle through negotiation nor, sadly, the likely impact on the remaining 27% (the cases that fought) of removing those cases from scope. The figure is simply described as the percentage of cases for which no court hearing is listed.

158. The statistics do show, however, that 23% of all ancillary relief applications were initially contested but subsequently were concluded with a consent order and 4% being contested. This demonstrates that a significant minority
of the total number of cases have been negotiated at court. These are the cases targeted by the cuts.

159. The Bar Council states its considerable anxiety in relation to the potential inequality of arms to parties to ancillary relief proceedings arising from the removal from scope of ancillary relief. Some recognition of this problem has emerged from the Consultation Paper with the proposal that courts will be empowered to make interim lump sum orders at any point in the proceedings “where [the Applicant] could demonstrate that they could not reasonably procure legal advice by any other means” (§4.161).

160. The FLBA raises, once again, the issue of the recovery of the statutory charge in ancillary relief cases. Why is this not accounted back into the legal aid budget?

Clinical Negligence: (paras 4.163 – 4.169)

161. Those who sustain injury as a result of negligence by clinicians should have access to justice. It is, unfortunately, an inescapable fact that clinical negligence cases often require extensive investigation at an early stage in relation the issues of negligence and causation. Medical records and expert medial evidence need to be obtained. Conditional fees are unsuitable for such early investigations because it is only when they are complete that lawyers can form a view as to whether the claim is one which they would be prepared to undertake on a conditional fee basis. Legal aid therefore plays a crucial part in ensuring access to justice in this field.

(a) The proposals rightly recognise that the issues arising in clinical negligence cases will sometimes be very important. Claimants injured by clinical negligence suffer very many losses which will not be made good by provision by the state of social welfare, care, or accommodation. These include significant losses of earnings, accommodation, and therapies. It is commonly the case that what the local authority or Primary Care Trust will provide falls markedly short of what a claimant’s reasonable needs require. There is ample judicial recognition of this: see the ‘top-up’ arguments which reflected this fact in e.g. Sowden v Lodge [2005] 1 WLR 2129.

(b) The justification for withdrawing clinical negligence claims from scope altogether, is the fact that alternative funding will exist, primarily by reference to CFAs.

(c) The proposed removal of clinical negligence from scope will affect a significant number of claimants. Because of the restrictive financial eligibility criteria, these claimants are necessarily those of very modest
means. It is therefore of particular importance to consider whether it is viable that those claimants can realistically avail themselves of CFAs.

(d) Volume 1 of Lord Justice Jackson’s Preliminary Report (P54 to P57) provides some useful data from the LSC in relation to clinical negligence claims concluded in 2007/08. The LSC data contains some anomalies and inconsistencies. Nevertheless, it can be analysed as follows:

<table>
<thead>
<tr>
<th>Full recovery of LSC costs (Category B claims)</th>
<th>Number</th>
<th>Total Cost</th>
<th>Disbursement Cost</th>
<th>Average Cost</th>
<th>Average disbursement cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concluded before issue</td>
<td>73</td>
<td>£223,331</td>
<td>£176,885</td>
<td>£3,059</td>
<td>£2,423</td>
</tr>
<tr>
<td>Concluded between issue and trial</td>
<td>905</td>
<td>£40,591,292</td>
<td>£26,505,673</td>
<td>£44,852</td>
<td>£29,288</td>
</tr>
<tr>
<td>Concluded at trial</td>
<td>211</td>
<td>£19,456,042</td>
<td>£12,812,758</td>
<td>£92,209</td>
<td>£60,724</td>
</tr>
<tr>
<td>Total</td>
<td>1189</td>
<td>£60,270,665</td>
<td>£39,495,316</td>
<td>£50,690</td>
<td>£33,217</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Partial, or no costs recovery by LSC (Category A claims)</th>
<th>Number</th>
<th>Total Cost</th>
<th>Disbursement Cost</th>
<th>Average Cost</th>
<th>Average disbursement cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concluded before issue</td>
<td>2187</td>
<td>£10,539,233</td>
<td>£3,988,551</td>
<td>£4,819</td>
<td>£1,824</td>
</tr>
<tr>
<td>Concluded between issue and trial</td>
<td>525</td>
<td>£5,806,560</td>
<td>£2,060,590</td>
<td>£11,060</td>
<td>£3,925</td>
</tr>
<tr>
<td>Concluded at trial appeal</td>
<td>128</td>
<td>£2,261,958</td>
<td>£597,818</td>
<td>£17,672</td>
<td>£4,670</td>
</tr>
<tr>
<td>Total</td>
<td>2840</td>
<td>£18,607,751</td>
<td>£6,646,959</td>
<td>£6,552</td>
<td>£2,340</td>
</tr>
</tbody>
</table>

(e) The figures set out above (albeit now out of date, and containing anomalies) show that if any claim proceeds past the investigative stage, the disbursement costs are high. If the reforms to the CFA regime in Ministry of Justice paper *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales* are implemented, either the claimant or the solicitor will have to fund the cost of the disbursements in the event that the litigation is unsuccessful. Many claimants of limited means will be unable to do so. The Impact Assessment has assessed the ability/desire of
claimant solicitors’ firms to absorb the cost of the disbursements for unsuccessful claims, particularly where the success fee in the CFA will be reduced. The potential scope of those disbursements can be seen from the figures above.

(f) We therefore have real concern that the access to justice of the poorest in society will be damaged by the withdrawal of clinical negligence from scope.

(g) Within this group are children. Their parents’ means are not taken into account in determining eligibility for public finding. The proposed withdrawal of clinical negligence from scope will inevitably mean that their access to justice is dictated by their parents’ means, and not their own. This is wrong in principle. It risks infringement of their rights under Article 6 of the ECHR.

(h) We therefore recommend that clinical negligence should not be withdrawn from scope for claims by children. We are unable to identify the cost of this proposal, because data concerning the true ‘net cost’ to the LSC of clinical negligence litigation is not available.

(i) We support detailed consideration of a Supplementary Legal Aid Scheme (‘SLAS’) for clinical negligence claims as an alternative to the withdrawal of clinical negligence from scope for the reasons given in our response to Chapter 9 (below).

Consumer and General Contract (paras 4.170 - 4.172)

162. We consider that there is a good argument for requiring these categories of claimant to show that they have exhausted other lines of recourse before calling on the public purse.

(a) We have considered whether such an obligation, if imposed, would create a need for an amendment to the Limitation Act. However, we concluded that the 6 year limitation period for such claims should be sufficient, even with the additional burden of exploring alternative funding sources.

(b) We consider that total withdrawal of legal aid for this category of Claimant would be unjust. A "financial issue" may have an overwhelming impact on a person's life e.g. loss of home or pension means facing poverty. In such cases, there would be a real risk that such a person may end up looking to the state for support of a different (and possibly more expensive) sort.
(c) We consider that it is unduly optimistic to presume – without evidence and at a time when fundamental changes to the system of CFAs is proposed - that these are likely to be an adequate alternative. To give a simple example: a consumer case worth about £2,000 would attract a success fee at trial of no more than £200 under the new fees regime. It is wholly unrealistic to suppose that any solicitor would, let alone could, run a case to trial for such a sum.

(d) However, any case with a value of less than £5,000 is conducted on the small claims track for which CFAs are not available at all. To suggest that a claim that may have a value equivalent to five months earning for a basic wage earner is too small to merit attention shows an unrealistic grasp of the realities of finances of the most poorly paid.

(e) We consider it would be easier for these Claimants to obtain CFAs if the proposals to cut success fees and the recoverability of ATE - made in the Ministry’s response to the Jackson report - were abandoned but the proposal to remove the successful Defendant’s entitlement to costs were maintained. (This would effectively reduce an ATE premium to fairly nominal levels, as it would only need to cover defined disbursements).

(f) Even where available, BTE and CFA may only be available up to a certain limit which is unlikely to be adequate for large and complex cases or appeals on important points. In such cases, there will always be a need for public funding when such others run out.

(g) We recommend that changes be made to relevant Ombudsman schemes to give them both teeth and the funding necessary to apply their powers. Some Ombudsman findings cannot bind parties at all. None can do so above a certain limit. We note the recent case of Andrews v SBJ Benefit Consultants (2010) EWHC 287. The Defendant refused to honour the Ombudsman’s recommendation relating to sums due to the Claimant in excess of the Ombudsman’s binding limit of £100,000. The Claimant was left without remedy. If there is to be greater reliance on Ombudsmen, such a weakness can no longer be tolerated.

(h) Where limits exist they are out of date. The Financial Services Ombudsman’s limit of £100,000 was inherited from his predecessor, the Insurance Ombudsman. That limit is unchanged since the Insurance Ombudsman’s Bureau was created over 30 years ago.

(i) We recommend therefore, that changes be introduced to all relevant Ombudsmen schemes:
A All Ombudsman should have power to bind the non-
consumer party to make recompense up to an appropriate
limit.

B The Financial Services Ombudsman’s limit of binding
authority be increased to at least £500,000\(^{41}\) (bearing in mind
that he may have to rule on a loss of a pension or on an
insurance claim for the destruction of a house).

C A change be made to the Civil Procedure Rules so that a
Claimant’s right of action is preserved against a Defendant
who flouts an Ombudsman’s non-binding recommendation.

(j) We consider that CFAs alone do not provide sufficient sources of funding
for most consumers. BTE Insurance is still not sufficiently widely
available and, where it is, take up is poor and levels are inadequate for
many multi-track cases.

(k) We recommend:

A Proposals to cut success fees and the recoverability of ATE be
abandoned.

B The proposal to remove the successful Defendant’s entitlement
to costs be maintained. (This would effectively reduce an ATE
premium to fairly nominal levels, as it would only need to
cover defined disbursements).

C Legislation should be introduced to make BTE insurance a
compulsory component of consumer insurance policies
(whether car, household, or contents), with minimum levels of
cover of at least £100,000.

\*\*\*\*

163. We consider that it would be counterproductive to recent advances in the
recognition of the rights of victims of crime were the efficacy of their recourse
to the Criminal Injuries Compensation Authority (“CICA”) to be impeded by
lack of legal advice.

\(^{41}\) The original £100,000 would be worth approximately £350,000 in modern terms but that was a voluntary
limit set by the insurance industry as a measure of its own willingness to be bound. The present scheme is
statutory, a much higher limit would be justified. The proposal would reflect the value of a comfortable but
not wealthy house.
(a) **Overview:** legal advice for victims making applications for compensation from the CICA is a long established public funding commitment by all governments to date, reflecting the practical benefit it provides to many members of the public. Whilst it is accepted that public funding is finite, the cessation of this important and cost-effective publicly funded service would have a disproportionately adverse effect on the innocent victims of crime.

(b) **Two points of principle:** First, we note the proposed withdrawal of CICA funding is justified, in part, on the assertion that the provision of public funding for those at risk of losing their liberty is more “important”. This contention fails to accord with reason or principle and moreover, does not reflect the values of the wider members of the public. A proper and objective evaluation has to be taken of the situation as a whole having regard to the cost to benefit those suspected criminals who are at risk of losing their liberty, as against the requirements of funding advice for the innocent victims of crime. We consider such a proposal requires urgent review based on that criterion alone.

(c) Secondly, it is further stated on CICA funding that “...we consider that the issue at stake is not as important, since it is primarily a financial one...”. We believe this assertion of a primarily financial motive displays a misunderstanding of the true motivation of many innocent victims of crime. The impetus for CICA applications are diverse; for example, applicants simply seek recognition that a gross wrong has been inflicted, or as a validation of their allegations, or to assist to bring assailants to justice. We respectfully emphasise that police cooperation with prosecutions is a condition of the CICA scheme with which many applicants comply at no little personal cost to their own health and welfare. In essence many victims of crime are extremely brave people for whom the compensation is not the primary motivating factor in making an application.

(d) **Practical Benefits under the Scheme:** For many victims of crime the application process under the CICA Scheme is not a straightforward one, as characterised in para 4-173. For some it is perceived as intrusive and a perpetuation of the original criminal offence itself (for example, young abuse victims have to recount horrific abuse or women recording serious sexual and physical assaults). Moreover, the application form itself is a long and wide-ranging document that forms a central part of the decision making process, not only on the original application, but also on the review and appeal stages. Consequently the need for assistance is absolutely vital. Support for this point comes from the following source:
“Far too many cases involving the most vulnerable victims have been abandoned, or not even begun, because the victim cannot adequately give his side of the story...” Lord Williams of Mostyn, December 1998.

**Practical Reasons for Retention:** Against that background the following points highlight why this vital publicly funded service should be retained:

1. Legal Help is currently available to fund advice and assistance with preparing applications, reviews and appeals. Given the wide cross section of the public which benefits from the funding for a relatively modest cost, the service is justified on a cost/benefit assessment.

2. Many applicants are vulnerable members of society who practically will struggle to make such applications in the absence of assistance, whether by injury or by reason of special needs. Examples abound; child appellants of sexual and/or physical abuse, female victims of violence, victims who have suffered severe psychiatric injury, in addition to victims of traumatic brain injury.

3. Appellants who lack capacity either to handle the appeal or, of equal importance, the management of any compensation awarded, for example to ensure that tax payer’s money does not revert back to the benefit of the original criminal assailant (e.g. parent of the abuse victim).

4. Applications resulting from terrorist atrocities require the support/infrastructure of suitable and specialist advice.

5. Many applications raise complex or important legal points, including time bars on abuse claims, fatal accident claims, the proper calculation of awards including future loss claims for earnings and the necessary restrictions/entitlements to NHS/private medical care.

(e) In summary we contend that the present public funding for the victims of crime should be retained to demonstrate an on-going commitment and support to their needs.

(f) If funding for legal advice is to be withdrawn, we consider some other means would have to be found of ensuring that the interests of such victims was properly and uniformly represented. We consider it would
be undesirable to end up with a system in which the value of a victim’s compensation depended on whether, and if so, where and from whom, he obtains advice.

(g) The CICA is generally well advised and represented. Lack of equality of representation is not, in itself, an injustice – it may be a matter of choice. We consider it is an injustice, however, where the represented party derives its authority and funding for its own representation from the same state that has denied representation to the weaker party. We consider this might be an Article 6 breach.

(h) The initial paper application process is at present too inflexible and appears to be biased in favour of rejection without looking beyond the immediate facts. We are told of a recent case of a Claimant who suffered a serious and permanent brain injury in a domestic assault. She was rejected twice on paper by the CICA because – as domestic violence victims commonly do – she told the medical services she had suffered an accident. It took a represented hearing to obtain justice for her. We consider that if this proposal is to be introduced, the CICA would have to be structured to implement an automatic appeal to the tribunal in all cases turned down on paper.

(i) We consider that the desirable uniformity of result in the absence of representation might be achievable were there to be a change in the CICA’s function so that it is required actively to promote the interests of the victim, e.g. by making inquiries so as to identify areas of loss that the victim has not considered and to investigate claims in the manner of a claimant’s solicitor.

(j) If this proposal is implemented we recommend:

A. Compulsory referral to appeal to the CICA tribunal in all cases turned down on paper.

B. The CICA may not be represented at a tribunal or at a paper hearing unless representation is made available for the applicant.

C. The CICA’s function should be redrafted to create an obligation to conduct an inquisition directed at ascertaining facts to the benefit of the applicant.
Educational claims (4.180-4.187)

164. First, we wish to advance no case for retaining legal aid in relation to claims for damages in respect of educational matters such as educational negligence. It is recognised that these claims are for financial compensation only. They are almost inevitably historic, concerning the adequacy or suitability of education that persons received whilst in education. Such damages claims will not generally concern the education that a child is presently receiving and do not affect any continuing relationship between a child and the provider of the education. For those reasons, it is recognised that removing damages claims for education will impact less on access to justice, and be considerably less likely to have adverse affects on vulnerable groups.

165. Whilst accepting the rationale for the removal of legal aid for education which are concerned only with entitlement to damages for past breaches of the law, the Bar Council considers there is a fundamental distinction to be drawn with cases in which the issue is ongoing access to education, most notably cases involving special educational needs but also those involving e.g. school exclusions and other matters. Once again, it is not correct to characterise these cases as arising from “personal choices” (consultation p.64, para 4.182), both because there is no question of, say, a child with special educational needs having been placed in that position by choice, and for the more general reason that the issue (for example in an exclusion case) may include factual issues about what choices have been made. The issues at stake in these cases will be whether a child is able to access adequate education. That will have implications for the remainder of their lives. Such issues are at least of comparable importance to many in which it is proposed to retain legal aid.

(a) We disagree with the proposal to exclude all education cases from the scope of legal aid.

(b) The right to education and to effective access to the domestic system of education is a fundamental human right under Article 2 Protocol 1. As is clear from the wording of Article 2 Protocol 1, it is also an absolute right. To suggest that it should not be afforded the same importance as threats to life/safety/liberty/homelessness is to dilute the essence of everyone’s right to education.

(c) Exclusions from school can have a significant impact on a child’s future. A disproportionate number of young offenders have been excluded from school at one time or another, many permanently.
(d) Getting the right special educational needs provision also can have a significant impact on a child’s future. A disproportionate number of young offenders also have special educational needs. This is why an amendment has been made to the Education Act 1996 to ensure that those young offenders with special educational needs have those needs met whilst in custody and for the statement of special educational needs to remain effective when the child leaves custody. This supports our view that education – and effective suitable education – is the cornerstone of a child’s development.

(e) The proposal also misunderstands the nature and complexity of education cases and the disadvantage that a litigant in person - a parent – is at in forwarding his/her appeal on behalf of the child.

(f) That the appellant is the parent cannot found a justification for excluding education cases from the scope of legal aid. As a matter of primary legislation, children do not have standing in their own right to bring an appeal to the First Tier Tribunal or challenge their exclusion from school. Primary legislation provides only for a right of appeal by the parent. Whether the parent is vulnerable is irrelevant. The child, who is the subject of the appeal, will likely be vulnerable by virtue of his/her disability (autism, emotional behavioural disorder, Attention Deficit and Hyperactivity Disorder, etc) and special educational needs.

(g) In our experience, the parents we have represented are in fact themselves quite vulnerable. Some of them have themselves been in the care system. Others are themselves disabled and are in receipt of community care services from the local authority adult social services. Some have been victims of domestic violence, which incidentally was the underlying cause for the child’s emotional/behavioural disorder giving rise to special educational needs. Thus the impression given by the consultation paper as to the ability of the parent to forward the child’s case misunderstands the reality on the ground in many of these cases.

(h) We disagree that in education cases, parents should only need to present the facts to the Tribunal. The law on special educational needs is complex and the case law is still developing even though the system of special educational needs has been entrenched in domestic legislation since the Education Act 1981. The parent needs to understand what is required of him/her to succeed on appeal. This does require a fairly solid understanding of the law in the area which most parents will not have.

(i) Furthermore, complex special educational needs cases do involve threats to life/safety and homelessness. This is particularly true of severely
autistic children who require 52-week residential therapeutic school placements. This is rarely, if at all, offered by a local authority following a statutory assessment of the child’s special educational needs. More often than not, the local authority will propose a maintained day special school which does not begin to meet the child’s needs. The parent will then have to appeal to the First-Tier Tribunal.

(j) To make good his/her appeal that the child requires a 52-week placement, the parent will have to obtain his/her own independent expert reports. This will often involve reports from speech and language therapists, occupational therapists, educational psychologists, clinical psychiatrists and social work experts. Rarely will a local authority have taken a rounded approach to consult such a wide range of experts. The parent, who has limited funds, will not be able to reply on charitable organisations to arrange such expert reports. Without legal aid, many of these parents will not be able to forward their appeal in any sensible way.

(k) As matters currently stand, legal aid in respect of education cases is already extremely restricted in all aspects of education law, exclusions, admissions and special educational needs appeals. Only limited legal help is available. Legal representation at the hearing is often done on a pro bono basis. Although it is our view that the existing system is not itself sufficient, to dilute it further would be detrimental to the ability of parents and children to access the courts and tribunals in education matters.

(l) The coalition government’s education policy is founded on inclusion for all children. The free schools policy is to allow children more choice in their education. To therefore exclude education from the scope of legal aid appears contradictory to the coalition government’s own policy on inclusion in education.

**Employment** [§4.188-192]

166. The consultation paper proposes that Legal Help be retained in cases involving allegations of discrimination, but not in other employment cases.

167. But as ELBA points out employment cases do not separate easily into discrimination and non-discrimination cases. The vast majority of discrimination cases brought in the employment tribunal involve other claims as well.

168. This is because most employment cases arise when an employee is dismissed. This leads directly to claims for unfair dismissal and wrongful dismissal; but
also to discrimination claims. Often the discrimination claim will be that dismissal occurred, in whole or part, because of prejudice. But it can also arise from allegations of indirect discrimination or failure to make reasonable adjustments to a disability. In addition to claims arising directly from the dismissal, dismissal also triggers other claims. An employee who believes he is being underpaid, for example, will often choose not to endanger his job by protesting or bringing a claim. Once he has been dismissed, he is more likely to pursue the issue, particularly if he is also bringing a claim in relation to his dismissal. Some of these non-dismissal claims relate to discrimination, some do not. All of this means that discrimination and non-discrimination claims are interwoven in employment law in a way that they may not be in other areas. This will create significant problems in advising clients or conducting work on their cases, if their discrimination claims are in scope, while others are not.

169. If a claimant can receive help with only part of their case, that help is significantly less useful to them than if they can get help with all of their case. This is not merely because they are receiving less help; there is an important qualitative difference. A common use of Legal Help, for example, is to draft a claim for an employee. This is valuable for the employee, who has their claims accurately identified and explained. It is also helpful for the tribunal and the employer, who are confronted with a more coherent and organised case. The value to all parties is much less if the discrimination element of the claim is professionally drafted, but all the other claims are not.

170. There is very little legal aid for Employment Tribunals at the moment but to say that monetary damages are not sufficient to justify its continuation is surprising given that discrimination claims may involve monetary remedies but also deal with the right not to be discriminated against (which the Government recognises at paragraph 4.133). It cannot be right to say that those bringing claims are not likely to be ‘vulnerable’. They invariably are and by definition those who are disabled will cover a wide range of disabilities. Cases involving litigants in person tend to take longer as (i) the procedure (ii) the law must be explained. They rarely grasp concepts of relevance in relation to issues and evidence to be adduced and attested and it may be that there is a saving in Tribunal time if they did have legal assistance/representation.

171. To rely upon trade union representation is somewhat ironic given the decline in union membership over the last 20 years.
Other Housing matters [§4.193-197]

172. We do not agree that all the Housing cases listed at paragraph 4.193 should be excluded from scope.

(a) Whilst the proposals indicate that cases concerning possession and homelessness should remain in scope, due to the gravity of the consequences, the proposals then exclude actions for wrongful breach of quiet enjoyment and trespass. These causes of action are commonly used where tenants have been unlawfully evicted from their homes and should therefore remain within scope on the basis of the Government’s own reasoning. Illegal evictions often occur without any warning and render tenants roofless at very short notice. There can be no justification for excluding illegal eviction cases when claims for harassment are being kept within scope (see paras 4.123-4.125). In a housing context, illegal eviction is the most extreme form of harassment that can be experienced. It is unclear whether the Government intended to exclude illegal eviction cases given that at paragraph 4.197 it refers to legal aid being justified for cases which directly concern eviction. This is clearly the case in illegal eviction cases.

(b) It is also proposed to exclude actions for rehousing but it is not entirely clear what is meant by this. Claims for rehousing are usually claims under Parts VI and VII of the Housing Act 1996, namely challenges to local authority decision-making in relation to allocations and homelessness.

(c) Legal action in relation to allocations is by way of judicial review proceedings and would therefore remain in scope given that public law challenges remain in scope (see paras 4.95-4.99). Most applicants only seek rehousing where their existing housing conditions are intolerable and have an adverse impact on their family life. We consider that such cases are of high importance and should accordingly remain in scope, even where judicial review proceedings are not contemplated.

(d) It is clear that homelessness appeals under section 204 Housing Act 1996 remain in scope. Such appeals challenge adverse review decisions made under section 202 Housing Act 1996 and are necessarily based on the way any review of an adverse original homelessness decision has been sought. We therefore consider it that it is essential that homelessness reviews remain in scope if the right to appeal adverse review decisions on a point of law is to be of any real use to applicants.
(e) We also consider that actions under the Housing Grants, Construction and Regeneration Act 1996 should remain in scope given that this has been largely repealed save for the provisions in relation to *disabled facilities grants*. Given that these grants facilitate access by disabled occupants to enable them to use their homes, we consider that they are of fundamental importance as they concern the safety of disabled occupiers. In any event, legal action in relation to such grants is rare and would be by way of judicial review proceedings which remain in scope.

(f) We consider that the proposal to exclude *disrepair claims* where the primary remedy sought is damages is unlikely to lead to any real saving to the legal aid fund given that these cases are usually successful and costs orders are obtained against opponents. They therefore provide real access to justice for what are often marginalised groups, with little cost to the legal aid scheme.

(g) We note the proposal that private sector CFAs may be available to provide representation in such cases but this may well not be the case if the proposal for the reforms of CFAs adopted in the proposals to take forward the Jackson recommendations are also adopted. These would limit the success fees to 25% of the damages awarded (see para 9.27) and accordingly will provide little incentive to run claims where relatively low damages awards are made, as is the case with many disrepair claims.

(h) It is also the case that if disrepair damages claims are excluded from scope, (as well as clinical negligence cases) this will remove the vast majority of successful damages claims from scope and will obviously impact on the proposal to introduce a supplementary legal aid scheme at para 9.27.

(i) There is also a danger that if disrepair damages claims are excluded from scope it may lead tenants to seek to obtain redress in other ways, such as withholding their rent which in turn may lead to possession proceedings on the basis of rent arrears. Given that defending such claims is to remain in scope, the proposal to exclude disrepair damages claims may be considered to contain a perverse incentive for tenants with disrepair claims to invite possession proceedings so that they will be assisted in making a claim for damages.

(j) There is also a proposal to remove tortious and general claims such as negligence, *nuisance and breach of statutory duty* from the civil legal aid scheme (para 4.239). Such claims are often brought in what are usually considered to be housing disrepair cases where for example there is a claim in respect of water penetration from neighbouring flats or pest
infestations. We consider that such claims should remain in scope especially where the primary remedy is not damages but orders for works to avoid serious risks to health.

Immigration [§4.198-204]

173. The Green Paper proposes the removal of legal aid from those immigration cases which do not involve detention. Three reasons given in the consultation (at pp. 68-9, para 4.201) are that (i) such cases do not involve “immediate risk” to life and limb, and hence do not raise of issues of sufficiently fundamental importance to merit legal aid, and (ii) those affected will usually have made a “free and personal choice” to come or remain in the UK. In the view of ALBA, these reasons do not withstand scrutiny.

(a) First, it is correct to say that asylum cases raise issues of particular importance, concerning life and limb, and hence that removal of legal aid should not be contemplated in that area (as in relation to those who are detained). Asylum is all but unique in this regard. However, it does not follow that other immigration cases do not merit legal aid. On the contrary, such cases generally raise issues of comparable, if not greater, importance than many areas in which the consultation proposes that legal aid should be retained, the vast majority if which are not concerned directly with life and limb in this way. In particular:

(b) Immigration cases routinely involve Article 8 ECHR, the right to family and private life. At the very least, it is impossible to justify the removal of legal aid in cases where Article 8 is relied upon.

(c) The interests at stake will often be of fundamental importance to the individual, including (a) the ability of a child to live with its parent, or the enforced separation of parent and child (the child will often be a British citizen) (b) the ability of other family members to live together, including spouses, (c) the ability to stay in the UK after building a private life over many years. It is to be emphasised that such cases are not exceptional. They are the routine issues which arise in Article 8 cases.

(d) Even in cases where Article 8 is not raised directly, large parts of the Immigration rules are intended to give effect to the UK’s obligations under the ECHR, especially Article 8, and the issues may be no less fundamental.

(e) It is right to say there will be other cases in which the issues which arise are less fundamental. Most notably, ALBA considers that there may be less need for the retention in cases involving visit visa applications, and possibly also entry clearance for work permits and student visas.
(f) Secondly, it is wrong to characterise cases of this kind as being ones which will generally involve personal choice. Whilst, again, that might be said in relation to certain kinds of entry clearance application, it is not true of other cases. Most starkly, there is no question of choice for a child who will be separated from one or another parent, because one intends to remain in the UK and the other is not permitted to do so, or a young adult who faces removal after entering the UK as a young child. More generally, in a case where an ECHR right is applicable, it is wrong in principle to characterise the issue as one of choice, any more than it is a matter of preference not to be detained, or to be housed.

(g) Finally, ALBA does not consider that (as suggested in para 4.202) cases of this kind do not involve complex legal issues.

174. The Civil Legal Aid Sub-Committee of the Bar Council (CLASC) re-inforce these points; it welcomes the proposal to retain asylum (including, it is understood, Article 3 ECHR claims) and challenges to the legality of immigration detention in scope, but it does not agree that all non-asylum immigration work should be removed from scope, and questions a number of the assumptions underlying the proposal to do so.

175. The Bar Council supports CLASC in opposing the proposal to remove all non-asylum immigration work from scope. We have particular objection to the following being removed from scope:

(a) Those cases involving alleged violation of human rights, including Article 8, ECHR;
(b) Those involving a child;
(c) Cases where the applicant or appellant is in prison or immigration detention, including the underlying case;
(d) Challenges to state-initiated action, such as deportation or the revocation or curtailment of leave;
(e) EU cases; and
(f) All cases concerning appeals on a point of law in the Upper Tribunal and above.

176. The Bar Council adopts the detailed argument setting out the rationale for these points, which is set out in the CLASC paper for the MoJ (§101-117).
Private law children and family cases where domestic violence is not present (4.205-4.215)

177. In responding to this significant cut of public access to the courts (through the Government’s proposals to remove the majority of private law children and money cases from the scope of legal aid) we propose to highlight here
(a) Domestic violence cases (not caught by the scope provisions);
(b) Section 37/38 cases;
(c) Rule 9.5 / Rule 9.2A cases;
(d) Leave to remove cases;
(e) Ancillary relief; and
(f) Other complex family cases.

178. The Bar Council considers that this raises serious access to justice issues for many who will not be well-equipped or well-able (for a range of reasons) to represent themselves in the family courts.

179. **Domestic violence cases**: The Government proposes to keep in scope public funding for the victim of domestic violence where an allegation of domestic violence has been made, or proven; this is the qualifying criterion to bring an applicant within the scope of legal aid.

180. The Bar Council of course supports all forms of protection available for victims of domestic violence (including public funds to ensure representation), but we consider that this is a blunt and inapposite test to regulate the grant of public funds and leaves out of scope some cases where the safety of the victim and of the relevant child, may be compromised.

181. Only a small fraction of the 15.4 million domestic violence incidents per year are reported to the police, a smaller number to refuges and women’s aid and an even fewer still become the subject of an application for an injunction. It follows that a large number of people experience their ex partners as violent or frightening individuals and yet have not obtained an injunction or even reported domestic violence incidents as a crime.

182. Secondly, the proposal excludes from scope completely the alleged perpetrator of domestic abuse. Quite apart from the inequality of arms and the unfairness to the alleged perpetrator in representing him/herself in contested proceedings (Article 6), this also means that in the family courts, the situation will routinely arise in which the victim is obliged to be cross-examined by the perpetrator as to the allegations in an unrestricted way; this situation is avoided to a considerable extent in the criminal courts by virtue of Section 41, Youth Justice and Criminal Evidence Act 1999, and Criminal Procedure Rules 2010 Part 36.
183. The Bar Council is very concerned that these provisions may deter vulnerable victims from pursuing court protection if they know that they will have to face direct cross-examination from the person who has abused them.

184. Secondly, it appears to include only those who have suffered or at risk of suffering physical harm. It does not protect those suffering other forms of abuse. It is reasonably apparent from the Green Paper that ‘domestic violence’ has been defined / applied to connote physical harm or risk of physical harm (see §4.64: “the victim is at risk of physical harm”, and §4.67 “an ongoing risk of physical harm”). But domestic abuse is more includes a range of other pernicious behaviours which harm the individual. Domestic abuse is now much more widely understood to be any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality.

185. It is clear to us, as practitioners, that there are many women and men who are oppressed or exploited in their relationships who do not suffer physical harm at the hands of their partners, but would nonetheless be entitled to bring injunction proceedings so as to be protected from other forms of abuse, harassment and bullying; they would not – under the proposals – be eligible for legal aid to pursue their claims.

186. The Government needs to take proper note of the Supreme Court decision in *Yemshaw v LB Hounslow* [2011] Supreme Court decision ("It has long been known that psychological abuse within a domestic context can cause at least as much long-term harm to the victim (most commonly the woman) as physical abuse.” Lord Brown).

187. In this respect it is our view that the Government would be failing to take true account of “the likely vulnerability of the litigant” (§4.12).

188. **Section 37 / section 38 Children Act 1989 cases:** In many private law children case child protection issues arise. If a Judge considers that a *serious* child protection issue arises (such that the threshold for a care or supervision order with respect to the child may be satisfied), the court may direct the appropriate authority to undertake an investigation of the child’s circumstances (section 37 CA 1989). At the same time as directing that section 37 investigation, the court may make an interim care order or an interim supervision order with respect to the child concerned (section 38). Under an interim care order, the Local Authority will acquire parental responsibility for the child which they can exercise in such a way as to determine how a parent exercises his/her own parental responsibility. The
Local Authority can of course remove a child from the parental home under the interim care order.

189. In this way children can be removed into foster care by a Local Authority under court order made in proceedings in which the parents would not be entitled to legal aid and will have been unrepresented.

190. We wonder whether the Government has failed sufficiently to consider this point.

191. On 23 November 2010, Jonathan Djanogly MP was asked the following Parliamentary Question in the House:

   In many such private cases, child-protection issues arise. Can he [the Minister] give the House an absolute guarantee that private cases in which child protection becomes an issue will still receive legal aid? If not, these cost savings will be at the expense of our children’s future.

He replied:

Absolutely; where a public family law matter arises, that case will remain within scope. If a child is subject to being taken away from their parents, legal aid will be available.

192. In light of our submission (above) and the Minister’s assurance in the House, surely legal aid will have to be available for parents in any section 37 case?

193. **Rule 9.5 FPR 1991 cases:** Where private law children cases raise issues of “significant difficulty”, the Court may join the child to the proceedings as a party (this is done under Rule 9.5 of the Family Proceedings Rules 1991). These cases include cases:

   ▪ Where there are serious allegations of physical, sexual or other abuse in relation to the child;
   ▪ Where there are complex medical or mental health issues to be determined or there are other unusually complex issues;
   ▪ Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute (see above);

---

• Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court; and
• Where there is a contested issue about blood testing,
  However the parent in the same proceedings will NOT be represented.

194. Take simply the cases involving serious allegations of physical, sexual or other abuse; these cases usually require a careful forensic approach, disclosure and collation of significant quantities of sensitive information from the police and other agencies, and a requirement to cross-examine expert witnesses; it is unrealistic to suggest that litigants in person would be able to deal with such hearings themselves. Judges would be rightly horrified at the prospect of having to decide such cases without any assistance from trained professional lawyers.

195. Rule 9.2A FPR 1991 cases: Under Rule 9.2A of the Family Proceedings Rules 1991, more mature children can apply to be joined as parties in their own right in proceedings. The children play a much more direct role in the proceedings; it is more likely that such a child will give evidence in these proceedings. Are these young people to be required to do so in cases in which their parents are without representation? Is it envisaged that the parents may be required to cross-examine their own children?

196. Leave to remove cases: Practitioners are concerned about the removal of legal aid for ‘leave to remove’ cases. These are some of the most contentious and complex private law children cases where the stakes are high and the consequences for the “left behind” parent are invariably devastating.

197. Other complex private law cases: The Green Paper takes a very narrow approach to complexity – i.e. whether there is complex law involved or not [see 4.207]. This ignores the difficulties encountered by factual complexity and the significant problem of power imbalance (particularly where there is a local authority involved);

198. It follows that huge pressure will be brought to bear on CAFCASS due to:

   (a) an increased requirement for s7 reports where parties pursue issues, having not had the benefit of sensible advice; and

   (b) an increase in the number of r9.5 appointments by judges who simply cannot deal with cases involving two difficult litigants in person or where the court needs the forensic assistance of a lawyer.
Welfare Benefits (4.216-224)

Our response on this topic also embraces the topics Debt matters (paras 4.176 – 4.179 and Upper Tribunal Appeals (paras 4.216 – 4.224).

199. The Green Paper correctly states that the vast majority of legal aid funding in this area of law is spent on Legal Help, rather than Legal Representation. However, in our view, the proposals fail to address the extent to which the ability of claimants to participate in appeals at the appellate level will be undermined if Legal Help is removed:

(a) Members of the Bar regularly appear before the Upper Tribunal (Administrative Chamber) (formerly the Social Security Commissioners) and the higher courts in social security appeals. Statutory appeals are primarily concerned with the correct interpretation and application of rules of entitlement. Contrary to a comment made at para 4.218 social security appeals are not “suitable for resolution by the Parliamentary Ombudsman” who is concerned with the administration of benefits and not their adjudication according to the law.

(b) The legislation in this area is highly detailed and technical in nature and judges in the higher courts have described it as being “notoriously labyrinthine”. A cursory glance at the list of ‘cases pending in the higher courts’ on the Upper Tribunal’s website demonstrates the range of legal issues that need to be resolved by the Upper Tribunal and the courts in this area of the law.

(c) If a claimant wishes to challenge a decision of a First-tier Tribunal he or she must obtain permission to appeal to the Upper Tribunal (Administrative Chamber) (formerly the Social Security Commissioners). The Upper Tribunal can only entertain appeals on a point of law (i.e. arguments concerning the way the decision was made rather than the merits).

(d) In 2009/10 the Upper Tribunal received 3,700 appeals. The majority are decided without an oral hearing. In addition to the grounds of appeal, the Upper Tribunal requires the parties to make written submissions on the legal issues raised by the appeal. The Department of Work and

43 Secretary of State for Work and Pensions v Borrowdale & Morina [2007] EWCA Civ 749, per Maurice Kay LJ, “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” (para 1).

44 http://www.administrativeappeals.tribunals.gov.uk/Decisions/casesPendingHigherCourts.htm
Pensions has a specialist unit which deals with the majority of appeals but will often instruct counsel if there is an oral hearing.

(e) Claimants who wish to appeal on a point law are in need of advice and assistance under Legal Help from specialist advisors or lawyers in identifying errors of law and drafting grounds of appeal. Assistance at this stage is critical as a decision refusing to grant permission by an Upper Tribunal Judge cannot be challenged by way of judicial review. If permission is granted, claimants will also require assistance in drafting submissions or observations on the legal issues. In our view, the removal of Legal Help for claimants before the Upper Tribunal will seriously restrict claimant’s ability to take appeals to the Upper Tribunal and if leave is granted, to participate in the appellate process.

(f) We are also concerned that the removal of welfare benefits from the scope of legal aid for ongoing appeals to the Court of Appeal and the Supreme Court will be perceived by the public as creating an obvious imbalance between claimants and the Secretary of State for Work and Pensions as only the latter will, as a matter of course, be able to challenge decisions in the higher courts. This will undermine the legitimacy of the Upper Tribunal itself if there was to be no input from claimants’ representatives in any of the cases which shaped the development of welfare benefit law.

(g) In this area ALBA accepts that (bearing in mind that the general climate of financial stringency) there may be scope for some reduction in the availability of legal aid, and in particular recognises that the amounts of money which are at stake, coupled with the availability of other sources of funding, may make it disproportionate for legal aid to continue to be freely available via the legal help scheme.

(h) However, first, notwithstanding the sometimes small amounts of money involved, ALBA wishes to draw attention to the importance of these cases to the individuals involved. These cases are not properly thought of as being concerned with financial entitlement in respect of past breaches of the law. Rather, they are about prospective access to benefits which are intended to provide what may be no more than a subsistence income to persons who will be unable to provide for themselves, and are thus properly thought of as being in the same category as cases concerned with e.g. the right to a roof over one’s head. The distinction drawn between debt and repossession cases, and housing benefit cases (para 4.220) does not make sense in this context: the person’s ability to resist the debt or possession proceedings, and so obtain access to housing, may be

---

45 R (Cart) v Upper Tribunal and others [2010] EWCA Civ 859.
conclusively determined by the housing benefit case. A case concerning income support, used to purchase basic food and clothing, will raise issues that are equally stark.

(i) Secondly, in this area in particular there is an extremely powerful case for the retention of legal aid for cases of wider importance. Whilst it is right to say that the average case may be concerned with small amounts of money, there are cases at the level of the Upper Tribunal, Court of Appeal and Supreme Court, in which a legal issue will be determined which will conclusively affect entitlement to benefits for very large number of persons. From the government’s perspective, the case may therefore have budgetary implications in the millions or tens of millions, and perhaps more. The nature of social security law, contained in very complex secondary legislation, means that such cases arise often (though they are of course small in number compared to the overall volume of cases). It would be inappropriate if legal aid were not to be available in such cases, and the Upper Tribunal / Court of Appeal were to be dependent upon the accident of whether someone is willing to act on a pro bono basis, to ensure that the case was properly argued on both sides.

(j) Finally, the proposals in respect of destitute asylum seekers and others raise issues that are particularly stark. By the nature of their situation, including language and unfamiliarity with the UK, the ability of such a person to navigate through the system of claims and appeals is circumscribed. Benefits under sections 4 and 95 of the IAA 1999 are minimums for basic subsistence, and such persons are limited in their ability to mitigate the consequences of refusal by legal limits on their access to other services such as community care from local authorities, or NHS services. Accordingly, access to such benefits concerns access both to a minimum subsistence income and minimum levels of housing. The proposal to restrict legal aid in this area is therefore not warranted.

200. In summary, it appears that the Government believes that it is acceptable for litigants to represent themselves in Tribunals because of their “user friendly” nature. The Bar Council takes the view that there is an absence of reality about this proposition. As the South-Eastern Circuit makes clear in its response, whilst the Government may think that Tribunals are user-friendly, those whose practice actually involves proceedings in Tribunals know that the reality is that Tribunal-related work has some of the most complicated substantive and adjectival law in the English legal system. The law relating to Tribunals is complicated even for competent lawyers (as discussed above).
First-Tier Tribunals & Upper Tribunal (§4.231-235)

201. Secondly, no case is advance for retaining legal aid generally in relation to before the First-Tier Tribunals and the Upper Tribunal (§ 4.231-4.235). It is recognised that these claims are generally related to licensing or other regulatory decisions which affect commercial and business matters. Whilst recognising that livelihood issues are important for individuals, removal from scope is thought to have a less significant impact on access to justice and is considerably less likely to have significant adverse effects on individuals. Further, as these matters relate to commercial and business issues, it is more appropriate to expect legal assistance and representation to be paid for from insurance or other resources of the individuals involved.

202. It is the view of ALBA, however, that different considerations apply in relation to the other areas in which change is proposed. First, as the highest priority, ALBA considers that the proposed removal of legal aid in respect of all immigration cases not involving detention is not justified. Secondly, ALBA considers that removal of legal aid in non-damages education cases is not justifiable. Thirdly, whilst ALBA is willing accept that there may be scope for some reduction of legal aid in cases involving welfare benefits, the wholesale removal of legal aid in this area is disproportionate, and its implications have not been fully thought through. Accordingly, at the minimum, there is a strong case for the retention of legal aid in certain respects in this area. Each of these areas is considered further below.

203. Further, ALBA considers that there should be a power to grant legal aid in relation to cases where there is a significant wider public interest. ALBA does not consider that this power should be limited.

Public Interest Cases (paras 4.236 -4.238)

204. We question the purpose and effect of the proposal at paras 4.236-4.238 which seeks to prevent cases which are otherwise outside the scope of legal aid coming within scope because they have “a significant wider public interest” i.e. a case would be funded, even where the benefits to the individual litigant might not justify the likely costs, because they have the potential to benefit other people. It seems to us that the very purpose of having publicly funded legal services is to ensure that cases which benefit many individuals other than the claimant are supported in the public interest. We are not aware of the specific saving this proposal is said to generate and are doubtful whether the economic case for such a change is justified.

46 There may be individual areas or cases where legal aid may need to be retained to ensure compliance with Article 6 of the European Convention on Human Rights.
Tort and General Claims (paras 4.239-423)

205. The proposals are predicated on a reasonably intelligent, reasonably well educated and reasonably competent litigant. There are many who do not have home insurance, understanding, time, or the mental ability to separate their own emotional response to a problem from the legal realities. The latter are not well served by self representation. The point of Legal Aid is that it is a safety net for these vulnerable people.

(a) Legal Aid should not be removed from such wide classes of Claimants on the basis that a proportion of the population have access to other means of legal redress. The fact is that a substantial section of the population does not have such access.

(b) We consider it is over-simplistic to suggest that mere money is not a worthy object of legal proceedings. In more significant cases, litigants who fail to obtain any or any adequate compensation from tortfeasors or contract breakers, or who are unable to muster the resources to see off an unjust claim against them, may end up impoverished and being driven to make demands on other taxpayer-funded services.

(c) It is over-simplistic to suggest that mere money is not a worthy object of legal proceedings. In more significant cases, litigants who fail to obtain any or any adequate compensation from tortfeasors or contract breakers, or who are unable to muster the resources to see off an unjust claim against them, may end up impoverished and being thrown onto taxpayers resources. This may in itself operate as a disincentive to those who hold obligations towards others to honour / fulfil those obligations if they consider that the potential claimant will not be likely to pursue the remedy.

(d) We consider that it is unduly optimistic to presume – without evidence and at a time when fundamental changes to the system of CFAs is proposed - that these are likely to be an adequate alternative.

(e) We consider it would be easier for these Claimants to obtain CFAs if the proposals to cut success fees and the recoverability of ATE were abandoned but the proposal to remove the successful Defendant’s entitlement to costs were maintained. (This would effectively reduce an ATE premium to fairly nominal levels, as it would only need to cover defined disbursements)

(f) Even where available, BTE and CFA may only be available up to a certain limit which is unlikely to be adequate for large and complex cases or
appeals on important points. In such cases, there will always be a need for public funding when such others run out.

(g) We consider that the proposed Contingency Fees are unlikely to be attractive absent the features that make them so successful in the USA, namely, civil juries (who build an allowance for the contingency fee into the award) and punitive damages. Although a US litigant pays his lawyers a proportion of his damages in theory, the practice is that juries decide on the compensation and then inflate it to allow for the contingency fee. We consider that the current proposals are unlikely to be attractive to practitioners outside certain, limited areas of practice.

(h) BTE insurance is still optional in most cases. We consider that CFAs alone do not provide sufficient sources of funding for most consumers. BTE Insurance is still not sufficiently widely available and, where it is, take up is poor and levels are inadequate for many multi-track cases.

(i) We recommend that legislation should be introduced to make BTE insurance a compulsory component of consumer insurance policies (whether car, household, or contents), with minimum levels of cover of at least £100,000. Even that may leave a substantial section of the population without cover.

(j) We consider that it would be reasonable for anyone seeking legal aid for these categories of action to produce evidence that they have first exhausted efforts to obtain representation under BTE or CFAs.

206. We recommend:

A Legal aid be maintained for these categories of claim but applicants be required to first demonstrate that they have exhausted alternative methods of funding.

B Proposals to cut success fees and the recoverability of ATE be abandoned.

C The proposal to remove the successful Defendant’s entitlement to costs be maintained. (This would effectively reduce an ATE premium to fairly nominal levels, as it would only need to cover defined disbursements).

D Legislation should be introduced to make BTE insurance a compulsory component of consumer insurance policies (whether car, household, or contents), with minimum levels of cover of at least £100,000.
The Bar Council associates itself entirely with the concerns expressed by the Chancery Bar Association in its response in relation to two categories of case which would be excluded from scope in the ‘Miscellaneous’ category where the client-base is particularly vulnerable. Removing legal aid for these individuals will be removing Access to Justice for a vulnerable group of individuals.

(a) Contentious probate

Claims brought under the Inheritance (Financial Provision for Dependents) Act 1975 are brought because an individual has died upon whom the claimant was dependent. These claims are often brought by bereaved children who have been left no financial provision or elderly dependents. These claimants are therefore often extremely vulnerable. The family home is often the subject of probate the sale of which will often render the dependent homeless. These claims need to be made and relief obtained for this vulnerable class of people if these claims are not pursued these dependents will simply become a greater drain on government resources and welfare benefits. It is simply false economy to withdraw funding and not enable these claims to proceed particularly in circumstances where the usual order is that the Legal Aid funding is paid out of the proceeds of the net estate making the provision of funding cost neutral. Often a 1975 Act claim can be contingent upon the validity of a will. Provision must be made for these vulnerable individuals to be able to challenge a will for example if it is an integral part of whether a 1975 Act claim needs to be made.

(b) TOLATA (Trusts of Land and Appointment of Trustees Act 1996) Claims

Upon separation ownership of the family home is often a significant issue which needs to be determined. It is frequently the case that the primary carer of the children has not been a stakeholder in the mortgage by reason of them being the primary carer and not breadwinner. the consequence is that they are not then cited on the legal title of the property. It is often the primary carer who find that they must issue a TOLATA claim to establish a beneficial interest in the property. If the primary carer is denied the opportunity of bringing such a claim it will be the carer (often the mother) and the children who will be forced to leave the property often after many years and with no capital. In turn the mother will be forced to rely upon state welfare and accommodation. Again it is therefore simply false economy to remove legal aid for these type of cases. Unless and until Parliament puts cohabitation on a statutory footing these cases must be properly litigated, if they are not these vulnerable individuals often women and children will be denied access to justice. Occupation Orders can only ever be made in the short term. If the mother does not assert a beneficial interest in the Property she (and therefore
the children if she is the primary carer) have no right to occupy. Again it is of note that successful litigation of these claims is cost neutral as the preservation of any property secured the Legal Aid charge and accruing interest against the same.

208. It is of great concern that unlike the rest of the 'Miscellaneous' paragraph, these two areas of public funding have not been afforded any specific attention within the Green paper. A sweeping justification has been given that these cases are 'of low objective importance' and that the Government does not 'consider that the class of individuals bringing these claims is generally likely to be vulnerable'. It is clear from these comments and the observations made by the ChBA that these areas of law and the people who being these claims have not been properly understood.

Access to Justice: Telephone Advice – is this proper access?

209. The Green Paper proposes the "Provision of advice and information services by telephone" (§4.270). In other words, the first stop telephone advice and access point by the public which will have the effect of directing people to appropriate publicly funded services and further to refer ineligible 'clients' to paid-for services.

210. The Bar Council firmly opposes the proposal for a single telephone gateway to access civil legal aid advice. Firstly, the projected costs savings are unrealistic and the proposed gateway would not be cost effective. Secondly, if adopted this proposal would have grave consequences for both the quality of advice provided, and clients’ ability to access appropriate advice.

211. A telephone service may be of benefit for those who are articulate and/or who are unable to travel. Nevertheless, the proposal that use of the telephone service is an exclusive gateway to legal aid will significantly impede access to justice and will almost certainly be subject to a successful human rights challenge under Article 6 because it is a blanket prohibition and is therefore disproportionate since it prevents any consideration of the merits of the individual case.

212. We consider that the Government’s proposal that the telephone service should be a "single", "simple and straightforward" gateway to civil legal aid services is flawed. It is unrealistic to consider that the Operator will "diagnose their problems "and determine their eligibility, discuss range of options with them and route them to the service most suited to their circumstances, including legal aid specialists, a paid-for service or alternative sources of help. Query: what is more than one call is required: will there be continuity of advisor? If not, how will data be recorded / retrieved?
213. The projected costs savings are based on an assumption which is wholly unrealistic. The impact assessment estimates that cases currently dealt with by phone costs 45% less, and assumes that “savings generated from the existing provision of telephone advice apply to all new cases being transferred from face to face to phone”. However:

(a) The cases in which clients have sought help from the existing CLA helpline are unlikely to be representative of Legal Help cases as a whole. The consultation acknowledges that “complex” cases are not suitable for telephone advice

(b) The proportion of cases suitable for telephone advice is likely to diminish further as a result of the other proposals set out in the consultation

(c) Aside from the likely bias identified in above, there is no apparent reason why telephone advice should be more cost effective. It is acknowledged that providers will have to retain the ability to provide face-to-face advice, so there is unlikely to be any substantial savings in terms of the premises used.

214. The Bar Council considers (as CLASC has observed in its paper) that if the wider proposals set out in the consultation are implemented it is likely that a higher proportion of cases will at some stage require a referral for specialist face-to-face advice. In due course it is likely a higher proportion will also require Legal Representation under a certificate. Every instance of referral from one advisor to another requires some duplication of work, at the very least re-reading, and so waste. Overall the requirement that every case pass through a triage stage is likely to add an extra layer of bureaucracy, and cost

215. Quite aside from the level of legal expertise of the Operator (and their client care / communication skills) in order to be effective as a service, the telephone diagnosis route will require from the prospective client (who may be in distress or anxious) the characteristics set out below:-

(a) The financial wherewithal to make the call;

(b) An ability to speak and understand the same language as the advisor;

(c) An ability to use the telephone as a means of free expression;

(d) An ability to marshal relevant information and answer questions speedily given this is not a relationship / confidence building exercise;
(e) The awareness and understanding of the issues in a) the case and b) their potential case / defence / response so as to accurately identify potential factual points of significance;

(f) An insight / awareness into their own history / vulnerability so as to be able to volunteer / provide it to the advisor;

(g) An ability to make a call and talk in private without coercion / pressure from others; and

(h) An ability to process the advice given.

216. The Green Paper recognises that if more detailed advice is required, the operator may refer the caller to the CLA specialist telephone advice service BUT only if the caller has established that they are eligible for legal aid. Hence the first call may be the last free access point to specialist services.

217. This access service fails to take into account the fact that family clients are not the best judges of, or even advocates for, their case let alone having an accurate appraisal of the case against them.

218. Moreover, there are certain classes of potential litigant who will have particular difficulties in accessing the relevant information and advice by telephone:

(a) Learning difficulties provide an obvious barrier to both comprehension and articulation. The fact that the client is not formally recognised as having learning difficulties masks the frequency with coping strategies, acquired over years, have masked their limitations: the extent of which is often revealed only when a psychological cognitive assessment is provided within proceedings because their specialist lawyers have discerned problems with comprehension in face-to-face meetings and/or over time.

(b) Mental health issues/ drink or alcohol addiction. Clients often have a long history but not one they are willing to volunteer. Equally significantly, the dysfunctional parts of their history / personality have become absorbed by them: “normalized”. In this context what they experience is unexceptional and the details/ duration/ seriousness are likely to be minimised at the very least.

(c) Domestic violence: clients often fail to understand, or are unwilling to volunteer, that they have suffered abuse; it has become a part of their life. By its nature, victims become compliant, withdrawn, and selective in
what they reveal. Lawyers in face-to-face meetings are more likely to
detect this.

219. Finally, the key weakness of the telephone access point is that is depends on
self reporting, without an opportunity to test the information given against
other data or alleged facts and to form a view in limited time in an
impersonal and detached setting. It quite simply assumes too much of those
who have the most limited awareness of their own needs and have the
greatest difficulty in articulating them.

220. Many individuals do not always understand the true nature of the problems
they are experiencing and may, as a result be inappropriately referred or
advised. This is especially so where urgent action is needed for example to
apply to suspend a warrant of eviction or obtain an injunction.

221. Many do not realise the urgency of their own situation and it is only the
perusal of the documents which they bring with them to face-to-face advisers
which enables a proper identification of the problems to be made. For some,
the telephone service will be an additional hurdle to overcome before being
provided with face-to-face advice.

222. There is no good reason to deprive consumers of legal aid services of choice,
if they have a local preferred supplier of legal services whom they know and
trust they should remain able to obtain advice and assistance there.

223. No doubt for many of the reasons highlighted above, the LSC appeared to
have accepted in the recent past that telephone advice services had an
adverse impact on access to justice by some minority groups.

224. Indeed research from the Legal Services Research Centre showed in October
2008 that there was a current need for improved access to

“early legal advice for both existing clients and those who do not
get advice about the problems that they face. The proposals
outlined in this consultation document will allow the LSC to
secure easier access to face-face advice for people, in accordance
with the stated aims...”

[emphasis added]

225. There needs to be more data available in relation to the existing telephone
advice lines and their use together with a diversity break-down of the types
of people using them. It is also necessary for us to understand how the
Government defines ‘success’ in relation to the advice given or received.
226. In considering the scope and eligibility proposals it is important to consider the demographic of the end users of legal aid i.e. the clients. The Green Paper, the Equality Impact Assessments and the Impact Assessments make a number of important points which we would wish to highlight here:

(a) First, Legal aid recipients are amongst the most disadvantaged in society, reflecting both the nature of the problems they face as well as the eligibility rules for legal aid.

(b) Secondly, in terms of income the vast majority (97%) of community legal aid recipients in 2008-09 were in the bottom two income quintiles, with almost 80% in the bottom quintile and a further 17% in the second bottom quintile for Legal Help;

(c) Thirdly, the Eligibility EIA notes that data on all civil legal clients shows that 59% are female and 38% are male (in 2% of cases the sex of the client is not known). Women therefore make up a larger proportion of legal aid clients than the population as a whole, which is 51% female and 49% male.

(d) Fourthly, it also records that BME people are also over-represented among civil legal aid clients. The population as a whole is 92% white and 8% BME, whereas 64% of civil legal aid clients are white, 26% are BME, and the race of the remaining 11% is not known.

227. It is clear from the above statistics that there may be a disproportionate impact on women and BME clients if these proposals are implemented.

228. Emergency cases: On 7th January 2011, during the currency of this consultation period, the MoJ published a clarification note, indicating that “For the avoidance of doubt, the proposal is that for emergency cases clients will not be required to first ring the helpline.” Adding

“In the consultation paper we have not defined what constitutes an emergency case but we are seeking your views on which cases should not be required to first call the helpline. As indicated in Question 8 to the consultation paper, we welcome views as to the types of case that should, or should not, be dealt with through the mandatory ‘single gateway’ of the CLA telephone service.”
229. We propose the following:

Urgent cases:

- Any case where the person seeking advice or their child is suffering from domestic violence, threats, abuse or harassment and wishes to obtain legal protection for themselves or children.
- Any case where the person seeking advice is at risk of a non molestation order being made against them, or who is responding to an ex parte order that has already been made.
- Any case where the person seeking advice is at risk of an occupation order being made, has been ousted from their home (or has fled it as a result of violence or abusive behaviour) and seeks to return to it (whether that is by way of an occupation order or action of the other party).
- Any case where the person seeking advice is at risk of committal to prison for alleged breach of an order or undertaking.
- Any case where the advice sought relates to anticipated or actual child abduction.
- Any case where the advice sought is in connection with the urgent protection of children by means of securing or changing their residence or suspending their contact with a parent (including interim care orders, emergency protection orders, interim residence orders, applications to vary an existing contact order, prohibited steps orders).
- Any case where a child has been retained by a parent or other person in breach of contact or residence orders or where there are current threats to do so.
- Any case where the court has made tipstaff orders, location or passport orders or where a child is warded.
- Cases where there is a fact finding hearing or trial listed less than two weeks away (this might be better identified as any case where there is a hearing with a time estimate of one day or longer listed less than two weeks away).
- Cases where a person has been invited by the court to intervene in the case.

Other cases

We consider that there are other cases which should fall into this category:

- Cases where the person seeking advice does not speak English or is unable (through language or literacy problems) to read documents.
- Cases where the person seeking advice is suffering from a learning difficulty, communication problem, hearing loss, or mental health problem.
230. The rationale for this additional (non-urgent) group is that a telephone adviser cannot properly identify problems and advise if the person seeking advice cannot articulate or understand court papers and correspondence and in particular will not properly be able to assess urgency.

Access to Justice – the ‘fault line’ of the proposals

231. **The vulnerable:** Common to the arguments raised above in relation to the individual areas in which the public seek access to justice is the ‘fault line’ that the impact of the proposals falls most heavily on the vulnerable.

232. There are many who need to, and would, seek access to the courts but would not be able to do so without the benefit of representation in family and civil cases. Little thought appears to have been given to:

(a) Those who suffer mental illness: How will those with mental illness be able effectively to access the courts, let alone represent themselves once in the courts?

(b) Those with cognitive or learning disabilities;

(c) Those with alcohol / drug or substance misuse issues: These cases can be very difficult, and impossible for the parties themselves to resolve, particularly where one party does not accept that they have a problem. There is now a lacuna for funding of any expert evidence in private law matters (even hair strand testing). How is the court to deal with a case where expert evidence is plainly required to dispose of the application, but neither party can afford to pay for it?

(d) Non-English speakers, and those from communities where accessing a court is contrary to cultural / religious expectations: From our experience, many parties in family disputes are from cultures where accessing a court would be uncommon, even unacceptable; they do so because they are supported to seek advice and are able to seek relief from the courts with the benefit of support from a lawyer. Many of these people will be unable effectively to access a court, and equally unable to represent themselves before a family court in relation to issues concerning the upbringing of their children

233. In general, the proposals will have a greater impact on women, those from ethnic minorities and people with disabilities: Of the people who will no longer qualify for legal aid, women outnumber men by 6 to 4. It is a concern that 57% of the people affected will be women and 42% will be men; there is a
real concern that this will increase women’s poverty as women will be unable to represent themselves effectively in financial disputes.

234. We are also concerned that no consideration appears to have been given to those against whom enforcement orders are sought. What if a person is threatened with imprisonment for contempt for failing to comply with a contact order? Is that person to be unrepresented? There is nothing in the Green Paper proposals for those who face loss of liberty in the family or civil courts (in contrast to the position in the criminal court).

235. The voluntary sector: Those who are most affected by the proposals will need to rely more and more heavily on voluntary organisations. Yet the further proposed reductions in remuneration contained in Chapter 7 will be particularly difficult for law centres and the not for profit sector who have traditionally been at the forefront of providing access to justice for the most vulnerable groups. They are likely to be more dependent on public funding and have fewer opportunities to diversify. Indeed, we note that the Impact Assessments envisage a 92% loss of legal aid income for the not for profit sector and a 40% loss of income for solicitors firms. Most front-line providers will be driven out of civil legal aid work. The Bar cannot pick up the slack and, indeed, the loss of these providers - who are central to the supply chain of work for the Bar - will inevitably make it more difficult for those who remain eligible for legal aid to access the services of a specialist civil barrister.

236. The burden will fall on other organisations such as the CABs; however, there has been little thought given to the impact of the funding proposals on these organisations, and the impact that withdrawal of funding from organisations such as the CAB will have on access to justice. Again see:

Q16 Chair: You talked a moment ago about tribunals not needing lawyers, but the people who advise those affected in tribunal cases, for example, if it is not done by lawyers, are often experienced people in CABs, neighbourhood law centres and other voluntary organisations who at the moment are assisted by contracts with the Legal Services Commission. It is not clear from the statement so far how they are going to be supported in this kind of work. Even though it draws quite heavily on volunteers, there are perhaps still significant costs and there need to be some full-time and well-trained people to provide that kind of advice but not necessarily lawyers. How are they going to fund it?

47 Legal Aid Reform: Cumulative Impact Equalities Impact Assessment Tables G and H.
Mr. Clarke: On employment law trade unions provide a lot of advice, and employers can have access to advice from the local chamber and so on. I think that the role of citizens advice bureaux predominantly and other organisations of that kind is very important. We will have to keep an eye on the impact of changes generally. They are facing pressures mainly because of the acute financial problems and the fact that there are to be reductions in public expenditure. Not every citizens advice bureau receives any legal aid funding; only some do, but because of the changes we are making in scope I accept that citizens advice bureaux may see some withdrawal of that.

237. He added (answer to the same question as above):

I think that the role of CABs is becoming more important, not less. All of us as MPs are conscious of the fact that if you have a good citizens advice bureau, which I happen to have in Nottingham next to me, it is quite important to the people we are talking about. Therefore, the Government as a whole is trying to deliver that; it is part of trying to ensure that the necessary reductions in public expenditure don’t bear down too heavily on parts of the voluntary sector that need financing as long as they are efficient.

238. Quite separate from the role of the CABs, Law Centres provide invaluable support and service to many; the majority of them currently receive their funding from the LSC. They provide important welfare, debt and housing advice and rightly they are now worried about their future funding streams. Without Law Centres advice deserts will emerge in the areas of advice and representation. The Government’s commitment to these Law Centres is also woolly; no commitment has been offered in relation to these important even though the Lord Chancellor says\(^\text{48}\) that he accepts “that they are an important part of the picture”.

239. **Something of fundamental importance?** When giving evidence to the Justice Committee on the 15\(^{th}\) December 2010, the Lord Chancellor commented that (in answer to Q2):

> “What we have done is try to ensure that no one of limited means is remotely barred from access when their life, liberty, home or something of fundamental importance to them is affected.”

240. Surely the Government accepts that a relationship with a child is “something of fundamental importance” to each parent, and would be “affected” if the other parent decided – perhaps for capricious or base reasons – to withhold

\(^{48}\) Answer to Q19: 15\(^{th}\) December 2010.
that relationship. If so, then the whole question of the whether private law children’s cases should be excluded from scope needs to be reconsidered.

241. We note the Lord Chancellor’s comments (answer to Q.2: 15.12.10: Justice Committee): “the taxpayer should not pay for unnecessary or pointless litigation”.

The Government is surely not saying that proceedings concerning children who have been harmed by their parents are “unnecessary or pointless” – yet this is the effect of the proposals.

242. **The dedicated legal professional**: Advocates who undertake publicly funded work do so not in the expectation of great financial reward but having chosen to pursue what is often described as a vocational career - practitioners committed to doing publicly funded work - similar to the publicly-funded medical profession. Almost all criminal cases are publicly funded and for the vast majority of practitioners there is not the option of taking on private work to supplement income. Practitioners do so because they believe in the importance of having a strong Criminal Justice system in which the individual is protected by the State and from the State; where the accused is properly and fairly tried; and in which the actions of the State are rigorously scrutinized and where necessary, challenged. The publicly funded criminal practitioner is bound by a strict code of conduct and ethics. He or she may be instructed by either side, for the State or the individual, or by other interested parties. This means that the Government and the individual are able to seek proper advice and have their case argued fully before the Courts. The government and the individual both instruct the criminal practitioner for his experience and the quality of his advice and advocacy. Experience and quality therefore matter.

243. It must be remembered that access to justice affects both the State and the individual not only in criminal trials in the Magistrates’ and Crown Courts and Courts Martial, but also in the High Court, the Court of Appeal, the Supreme Court, the Judicial Committee of the Privy Council and the European Court of Human Rights. Some cases may be relatively straightforward but there is rightly the expectation from Government, the individual and the Judiciary that all cases are prepared and presented to a high standard. The Government and the individual daily need access to advice and advocacy from practitioners experienced across a wide range of specialist fields. This may range from advice to Government Law Officers to prosecuting a complicated terrorist or fraud trial on one side, to challenging control orders (or their successors) by judicial review or defending those accused of child abuse or murder on the other; and any case may ultimately include appellate work. The need for experienced practitioners is therefore
obvious when assessing access to Justice; and the need to recruit to the Judiciary from the profession, and the equality and diversity issues associated with that important task, is self-evident and is dealt with elsewhere in this response.

244. We recognise that, in contradistinction to civil and family cases, the proposals in this consultation would not have the effect in crime of removing access to publicly funded legal representation for swathes of the population. However, we make the fundamental observation that criminal advocacy must be fit for purpose, or it is of no use to those in need, however expensive or economic it may be. In respect of many of the proposals, junior barristers will be the worst affected since solicitors will seek to pass on the potentially unprofitable cases to the junior bar at cut prices. Cases of this nature will not be attractive to more senior advocates. Given the pressure already placed on the younger members of the criminal bar as a result of recent and ongoing cuts, this will only drive more talent away from the publicly funded part of the profession. But these proposals threaten to remove, through underfunding, quality advocacy at all levels in the criminal justice system.

Excluded cases (§4.246-4.262)

245. We note that the Government intends to replace the current exceptional funding scheme with a new scheme to provide legal aid for excluded cases where it is satisfied that the provision of some level of legal aid is necessary for the United Kingdom to meet its domestic and international legal obligations, including those under the European Convention on Human Rights (and, in particular, article 2 and article 6), or where there is a significant wider public interest in funding legal representation for inquest cases. Specifically, the Government proposes that:

“For the issues which we propose to exclude from the future scheme, however, we recognise that there will be cases in which the specific circumstances require funding, even though the case would not ordinarily be within the scope of the revised scheme. Accordingly, we propose to have a funding scheme for excluded cases to meet our domestic and international legal obligations including those under the European Convention on Human Rights.” (§2.28)

246. We note that it is not intended that this funding will generally be available except where it can be demonstrated that it is necessary to discharge those obligations, or where the relevant test for legal representation has been met in inquest cases.
247. We propose that the Ministry of Justice should consult separately on the criteria to be applied to individual categories of case once the decision on scope is made.

248. Of course, at present, the Lord Chancellor has the power to grant civil legal aid in an individual case which is excluded from the scope of funding where the Legal Services Commission (LSC) requests it. The extent of the current exceptional funding scheme is set out in guidance made by the Lord Chancellor. We know from §3C-268 (para.27) of the Funding Code that it would be “extremely unusual” for the Lord Chancellor to “authorise the Commission to fund an individual case that remained outside scope.” And this will apply, for instance, only where there is “a significant wider public interest (as defined in the Funding Code) in the resolution of the case and funded representation will contribute to it”.

249. There is nothing in para.4.34 or in 4.246 et seq of the Green Paper which gives any indication that the “exceptional funding” scheme will be any more widely drawn.

250. In particular, at paragraphs 4.236 to 4.238, the consultation paper proposes that there should be no power to bring cases back into scope that would otherwise be outside it where there is a significant wider public interest. In effect the recommendation is to delete paragraph 11 of the Lord Chancellor’s authorisation given under the Access to Justice Act 1999. It is intended to replace this with a much narrower rule that exceptional funding should only apply where it would otherwise breach an international obligation to deny it.

251. Whilst we agree with the proposal that there should be power to fund excluded cases, we disagree with the proposed abolition of the power to bring excluded cases back into scope where there is a significant wider public interest in the case. We say this for a number of reasons.

252. First, this proposal must be read together with the proposal to remove large areas from scope including welfare benefits, education, private law children and ancillary relief cases, certain housing disputes and non-asylum immigration matters set out elsewhere. If these matters are kept in scope then there is less need for a general residual public interest category. But if they are taken out of scope then it is crucial to retain a generally worded power to fund in appropriate cases where the public interest requires it. The proposals to take cases out of scope are extremely far reaching and they apply whatever

---

49 Although we still consider it should be retained to deal with cases where funding is clearly appropriate in the wider public interest but where there is no other category within which the application can fit.
the level at which the case is being considered, no matter how the issues have arisen and regardless of how many individuals have been, or will be affected.

253. Secondly, alternative funding will not normally be available in the kinds of cases with which we are concerned. In particular it is unlikely that CFAs will be available. This is so because of difficulties with costs recovery; and because many cases will not involve monetary recovery; and because some cases may be “hard” in the sense of groundbreaking yet very important.). In the rare case where some other alternative is available then that can already be taken into account in deciding whether or not to fund. The effect of withdrawing funding in these kinds of case will be to deny representation altogether. The question therefore is whether the relative importance of the issues at stake and the complexity of the case merit some publicly funded assistance.

254. Thirdly, many benefit, education, private law children or immigration claims raise issues of great complexity and this is all the more so where claims reach the upper Tribunal or higher courts. It is unrealistic to expect individual claimants to present their cases as litigants in person. In these cases, the article 6 rights of the individual are almost always engaged.

255. In this connection, and fourthly, the paper and the Impact Assessment do not fully consider the very substantial additional costs that are likely to be imposed on the Tribunal Service and Courts Service through having to deal with increased numbers of litigants in person. The paper suggests at 4.266-9 that there is little evidence that there is any difference in court time taken between cases that are represented and those taken by litigants in person but it is accepted that the sample is small. Moreover, it is impossible to tell from the paper whether it is comparing like with like. The removal of claims from scope means that very many more lengthy and complex cases will have to be dealt with by unrepresented claimants. The overwhelming experience of court users is that cases run more efficiently and more speedily and require less input from the court when the parties have received appropriate advice and representation. In any event the paper accepts that further research is needed and there is thus no evidence for the claim at para 39 IA:

“In addition the proposed reforms might lead to an increase in the volume of cases where people choose to represent themselves in court or at a tribunal without using legal representation (litigants in person). In this IA it has been assumed that on balance any such effect should not have a significant impact on ongoing court or tribunal operating costs”.

Page 88 of 173
256. But whatever the general position this statement cannot hold good for public interest cases. They are likely to be more complex in terms of the facts and law and can only benefit from professional advice and representation. Secondly they are, by their nature, test cases, that will provide an authoritative ruling on an issue one way or the other and so prevent other contested claims running the same issue. It is in the interests of the Court system as a whole that such cases are run competently.

257. Fifthly, feature of cases in areas such as education, benefits and immigration, is that the issues raised may have a much wider impact than in the individual case. For example the recent case of CPAG v Secretary of State\(^50\) concerned demands by the Secretary of State to recover overpayments outside the statutory scheme. The individual amounts were likely to be small but the issue affected some 65,000 claimants who had all been sent similar letters. On the facts the CPAG case was brought by a national charity but the point could equally have arisen on an individual application. On the proposals as they stand the case would have been out of scope and would have remained so when the applicant sought to resist the Secretary of State’s appeal in the Supreme Court. ALBA considers that the paper focuses far too narrowly on the idea of the importance of a case as being something that relates to the individual applicant only and that it does not take account of the wider impact. The impact assessment fails to consider or assess the costs associated with withdrawing advice in these areas in any detail. It alludes vaguely to the risk of increased crime or higher benefit uptake if people use their limited resources to fund a case but there is no evidence base and no attempt to assess the additional costs of, for example, dealing with families who have been made homeless having not been able to access benefits to which they were entitled and who have not received any debt advice. In individual cases the paper strikes the balance by saying that this is not sufficiently important to justify funding for advice or representation but this cannot apply where a single case might determine the same issue for many others.

258. Sixthly, we would suggest that it is inconsistent to take into account the wider public interest where a case is in scope and yet to exclude it altogether in other cases. Even if wider public interest issues may arise more often in cases that remain in scope (para 2.254) that does not mean that they will not arise elsewhere.

259. Overall, we suggest that public funding for cases that are outside scope should continue to be available in principle where it is in the public interest

\(^50\) The case is also illustrative of how important representation can be in a finely balanced issue like this. The Secretary of State succeeded before the Deputy Judge. The Court of Appeal allowed the appeal and the Secretary of State then appealed.
that the applicant should have advice or representation because the case raises a significant issue of general public interest. As at present this should not apply to business cases\textsuperscript{51}. The first part of this formulation makes clear that a case will not automatically qualify for funding once it is shown that greater public interest are involved\textsuperscript{52}. ALBA does not think it is right to define the basic criterion any more closely than this but the factors that will be relevant are:

(a) The number of individuals likely to be affected by any decision in the case and how they will be affected.

(b) Whether the Court or Tribunal hearing the case has expressed a view that representation is necessary. ALBA suggests that Courts or Tribunals granting permission should be encouraged to express a view on whether representation is required. Such a view would be a relevant factor but not be binding on any decision whether or not to fund the case.

(c) Whether it is reasonable to expect the client, on the facts of the case, to represent him or herself.

(d) The extent to which the facts of the case are likely to be an appropriate vehicle to resolve the point in issue.

260. ALBA does not agree with the proposal to remove the power to fund where the case is of overwhelming importance to the client. Again, the proposal fails to make allowance for those cases where even though a matter is out of scope the circumstances are such that the impact on the client is particularly severe. For example, even if claims to welfare benefits can generally be regarded as relatively unimportant, there will be some cases where this is not the case. Such claims cover a range of cases including those where the benefit claimed is necessary to prevent destitution. Similarly, funding a claim that is out of scope can forestall the need for later funding. An example is a dispute about housing status. Why should a family be required to wait until possession proceedings are brought against them before defending a claim on the basis that they have security? ALBA recognises that funding under this head is likely to be exceptional but the scheme should have built into it sufficient flexibility to deal with the exceptional case.

\textsuperscript{51} The paper implies at para 4.252 that business cases can be funded at present but the Lord Chancellor’s direction excludes these even from the public interest test.

\textsuperscript{52} It therefore addresses the point at para 4.252 that: the simple fact that there are a number of other people who may be assisted by the resolution of the case should not be determinative of the case being granted legal aid, given that the case concerns an issue which has not been deemed to be one where legal aid is ordinarily justified.
261. In relation to inquests ALBA considers that a different approach is necessary but the proposed test is not the right one. It fails to recognise why inquest funding is necessary and runs the risk that the UK will be in breach of its duty under the ECHR, at least in cases where Article 2 is applicable. Some inquests do indeed involve issues of wider public importance or learning lessons for the future and for these it is in the wider public interest that the families should be represented. ALBA agrees that funding should be provided in these cases. The same reasoning must also apply to public inquiries designed to investigate the circumstances of a death or deaths or to allow for the proper representation of the interest of the family of the deceased in criminal proceedings arising from the death. For other inquests a distinction needs to be drawn between those potentially engaging the state’s investigative duty under Article 2 of the ECHR and those that do not. In the former kind of case it is well established that the family of the deceased must be given an opportunity to be involved in the investigation to the extent necessary to protect their legitimate interests (see e.g. Jordan v United Kingdom (2003) 37 EHRR 2). In nearly every such case this will require representation. Although the inquest procedure is inquisitorial it is commonplace for the state body putatively responsible for the death to have expert representation and representation for the family is necessary to ensure that the circumstances are fairly and independently investigated.

262. In summary, we agree that funding should be retained where it is necessary to meet a domestic or international obligation (including arising under the ECHR). However, for the reasons given, we do not consider that funding should be so limited. Even if the public interest criterion is not to be retained, we consider that the criterion should be broader than whether the funding is necessary to enable the UK to meet a domestic or international obligation, and we consider that, if necessary, the Ministry of Justice should consult separately on the criteria to be applied to determine whether exceptional funding should be given.

263. Finally, we note that the Impact Assessment gives estimates of the proportion of cases which will be brought back into scope by virtue of this exceptional funding scheme. We do not know on what basis these figures have been compiled, but clearly it will be important to know precisely what financial impact any particular formulation of the criteria for exceptional funding will have.

---

53 In both these cases an inquest is liable to be adjourned without being resumed (ss 16-17A). In such a case the inquiry or criminal trial will be the only forum to investigate the death.
Mediation: A complement to, not a substitute for, access to justice ($4.69 – 4.73)

264. What evidence? The Bar Council has searched in vain in the Green Paper for any robust evidence to demonstrate that increased reliance on mediation will materially reduce the numbers of cases which proceed through the family or civil courts.

265. If the Government has access to such research

(a) Will it identify where in the Green Paper it is referred to;

And in any event

(b) it is called on now to produce it.

266. The relationship between mediation and litigation: Mediation “in the narrow sense of formal mediation, facilitated by an experienced mediator” has been in a state of development and expansion since the late 1970s, and has expanded almost exponentially since the adoption of Lord Woolf’s reforms. As Lord Neuberger recently observed54

“It plays a significant role in the satisfactory resolution of disputes. And, rightly used, in terms of the appropriate case and appropriate timing, mediation saves a lot of money, court time, heartache, and effort.”

267. Mediation is an important adjunct to, with a potentially strongly beneficial effect, on the civil and family justice system and can be highly effective in securing a relatively cheap and expeditious, and often imaginative, resolution of civil and family disputes.

268. Lord Neuberger further says:

“I think that there is a real question whether a concerted drive for an ever-expanding role for mediation, and indeed treating mediation as good and litigation as bad, is consistent with a commitment to equal access to justice. Uncritical encouragement, and ever increasing support of mediation and ADR, may well be antipathetic to our commitment to equal access to justice, to our commitment to a government of law.”

And adds, portentously,

54 Gordon Slynn Memorial Lecture 10 November 2010.
“Care will therefore be needed in assessing how and to what extent we can further extend mediation’s reach.”

269. Lord Neuberger speaks of a perceived “tendency, which has found increasing favour in some circles particularly those in which saving money is the main aim, that mediation is a sort of universal panacea, which, properly developed, should obviate the need for an effective civil courts system in England and Wales.” He makes clear that such a tendency would be “not merely wrong” but “misconceived, and actually risk undermining the very argument that their supporters wish to maintain”.

270. It would be a mistake to assume that all systems of dispute resolution are of equal status so that one means of delivery is as good as another, the only means of differentiating one from the other is price. Plainly if one version can be supplied at less cost than the other, it makes sense to expand production of that version at the expense of the other.

271. Lord Neuberger further spoke of the “proper role” for mediation being “one which focuses on its proper function as an adjunct to justice, as a complement to the justice system and not as a substitute for effective access to justice. If it is conceived of as a substitute for securing effective access to justice, the risk is run that we will institutionalise the denial of effective access to justice for some citizens”

272. He added:

“If we expand mediation beyond its proper limits as a complement to justice we run the risk of depriving particular persons or classes of person of their right to equal and impartial justice under the law. Citizens are bearers of rights, they are not simply or merely consumers of services.”

273. There is a risk – as Lord Neuberger observed that “Requiring all individuals to mediate before gaining access to the court door will necessarily have a greater impact on some classes of litigants than others.” Those who cannot afford to litigate, or who are deterred from litigating as a litigant in person “will then be faced with a choice. Accept a mediated solution, which may well not reflect their legal rights … or accept no solution at all”. There is a risk that financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate is a fetter on access to justice.

274. Professor Hazel Genn’s report: Twisting arms: court referred and court linked mediation under judicial pressure (Ministry of Justice Research Series 1/07) (May
shown that mediation did not result in speedier resolution of cases. There was, as the study put it, ‘little suggestion from the [evidence] that mediated cases experience more or less delay to resolution than non-mediated cases. It went on to conclude that,

“The main finding from this analysis is that there is no strong evidence to suggest any difference in case durations between mediated and non-mediated cases. Similar proportions of each type of case were resolved within 2 years of issue.”

275. Insofar as cost was concerned, where the mediation was unsuccessful there was an increase in costs of around £1,000 - £2,000. In addition to this, mediated cases showed an approximate increase in administrative costs of between 18 – 19%. Other, and more recent, preliminary research in County Courts suggests that mediation provided by the Court Service, rather than saving the court system money, costs it more money than having no mediation service.

276. **Future dependence on mediation**: The Government sets great store in the Green Paper on mediation as an alternative to court process. It is reasonably apparent that there is very little knowledge or understanding of how much mediation services will actually be used. In answer to the Justice Committee on the 15th December 2010, the Lord Chancellor said that

“We are continuing to fund mediation and we expect people to go to mediation first in far more cases than has been the practice until recent years. It has been growing steadily”.

277. The Lord Chancellor makes very general comments about the value of lawyer-led settlement / negotiation:

“we are not at all sure that thousands of pounds’ worth of lawyers on one side or the other, or both, necessarily reduces the conflict, resolves matters, and makes it easier to decide how the best interests of the children are maintained and that both parents’ rights are respected.”

But that does not deal with the fact that many people are unable to reach agreement through mediation or otherwise, and that agreements / orders often require enforcement powers of the court,
278. In his evidence to the Justice Committee (15 December 2010) the Lord Chancellor (response to Q.3) said:

We are looking at mediation there where we think it doesn’t necessarily have a legal solution. There are other areas, for example, education. You need the advice of educational experts; you do not need adversarial lawyers necessarily to resolve it. Welfare cases are a matter for the expertise of people who understand the welfare system and get the right details out of the claimant about his or her circumstances. To turn it all into litigation has been done to too great an extent because people think of legal aid and lawyers-lawyers’ letters and lawyers’ claims-and those are the areas where I think change will come. Obviously, it has to be reinforced by the courts, and that is why I have a wider study of family law going on.

279. There are certain categories of person (particularly the vulnerable in our society) for whom mediation will not be a realistic option. Will those who speak little or no English, or those with significant learning/cognitive difficulties, and those with mental health problems find themselves able to access mediation services. We doubt it very much.

280. **Funding for mediation:** If there is to be increased use of mediation, then there needs to increased funding for mediation. In answer to a direct question (Q5) on the issue of the funding of mediation, the Lord Chancellor said:

I am not sure we are increasing the total level of funding for mediation; I am advised that we are maintaining legal advice for mediation.

281. A further point arises – discussed by Lord Neuberger. The civil justice system is self-financing. If the Government expands the use of mediation and ADR, particularly if that expansion is outside the scope of court proceedings, this will reduce court fee income, perhaps very substantially, and it is on such fee income that the civil justice almost exclusively relies to maintain its self-financing. Any consequent shortfall will need to be made up from elsewhere: this will have one of two consequences. It will either mean that court fees have to increase across the board when they are already too high in some areas: this will decrease access to justice, which is a fundamental aim to which we all subscribe. Alternatively, it will convert a civil justice system which currently makes a modest profit, into a loss making operation, needing funds from the Treasury, which seems questionable to say the least in the present economic climate. At any rate from my perspective, this is another, and rather hard-nosed, reason for the Ministry of Justice to have well in mind
over the coming year or so, as it considers how best to promote mediation and ADR.

282. **Mediation not a substitute for the court**: In his Gordon Slynn Memorial Lecture (10th November 2010), Lord Neuberger of Abbotsbury MR referred to the work of Professor Genn and the conclusions which she and her co-authors drew in the 2007 Twisting arms report. They concluded as follows:

“The indications from these evaluations are that a more effective mediation policy would combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications for a positive outcome. The ultimate challenge in policy terms is to identify and articulate where the incentives might lie for the grass roots of the legal profession to embrace mediation on behalf of their clients.”

283. Lord Justice Jackson also echoed the call for greater education, both on the part of the public and the legal profession, in his final report.

284. Lord Neuberger referred to mediation as standing “in the shadow of justice”. Adding that justice is available for those who have genuine legal disputes which require court adjudication in order to ensure that rights are upheld and enforced.

285. He concluded with the sentiment: “Mediation is a complement to justice. It cannot ever be a substitute for justice”.

**Impact on the courts: Gridlock** (4.266-269)

286. Every legal aid practitioner and judicial office holder will affirm that the impact of participation by litigants in person (rather than legal representatives) in the course of litigation serves to give rise to delay, additional cost to the court system and to opponents, and to serious risks of points being overlooked which may have assisted the litigant or, indeed, brought him/her success.
287. The Government is right to predict that increasing numbers of litigants in person will have adverse consequences for the justice system:

This may potentially lead to delays in proceedings, poorer outcomes for litigants (particularly when the opponent has legal representation), implications for the judiciary, and costs for Her Majesty’s Courts Service

288. The Bar Council is confident that these will be the outcomes. The Government worryingly has little (if any) evidence to the contrary.

289. The 2005 Research Paper makes worrying reading (see above); in any event, the Government recognises the limitations of that research (“The size of the sample was, however, small”).

290. The Government merely “hopes” that the increased length of court hearings, and the possible longer delays in having cases listed will be offset by the fewer cases coming before the courts, they having been satisfactorily resolved in mediation (or because people have decided not to seek any remedy at all).

Q13 Ben Gummer: To move on to the issue of litigants in person, Helen Edwards in evidence two days ago said that the MoJ expected no additional cost as a result of moving various areas out of scope. That seems to be completely contrary to the evidence of a research paper done by the DCA in 2005 which confirmed what seems to be the opinion of every barrister and judge-I am not a barrister - that litigants in person considerably extend the time taken in court. Why does the Ministry of Justice seem to take a contrary view?

Mr Clarke: Broadly, our expectation is that if there is an increase in the number of litigants in person it will be balanced by a reduction in the number of cases where people have decided not to proceed with the claim at all, because they will not proceed with actions that are no longer in the scope of legal aid. That is broadly the argument. Otherwise, you are into a very uncertain area of prediction. I doubt whether Helen Edwards denied that when you do have a case of a litigant in person it takes longer. I have known in my time very experienced litigants in person who did it as a hobby and were very good; they knew what was relevant and got on with the case. But I personally accept that every court dreads suddenly discovering that there is a difficult case where one of the litigants insists on appearing in person. I quite agree with your point that it will take far longer, because not only is the litigant not well versed in the law and procedure, but
the main problem is trying to get across to the litigant what is relevant to the particular question before the court. I hope there is not a surge in litigants in person, but in cost terms cutting scope will offset, probably, any slight increased cost given the fact that some cases—we don’t know how many—might take a little longer because you have litigants in person.

291. The assessment of the Ministry of Justice seems to be based on speculation (“if”), generality (“broadly the argument”), on ‘hope’, chance, laced with ignorance (“we don’t know how many”) of what the real impact actually is going to be. We are not talking here about litigants who litigate for a “hobby”; this is insulting to the large numbers of parents who will have to represent themselves to assert basic Article 8 rights in the family courts.

292. At best the Government is making significant assumptions that there is likely to be a reduction in the number of cases and that, although there may be an increase in Litigants in Person, this will not increase costs on the court service; this seems naive in the extreme. Just because people will not be eligible for legal aid does not mean they will not take their cases to Court.

293. Moreover it is a worrying basis for any projection that people have decided not to proceed with the claim at all; this suggests an indifference to the possibility that meritorious claims may simply go unpursued because people are deterred from the process by virtue of the challenge of doing so.

294. The last few years has seen a dramatic increase in the administrative burden on advocates. This (largely unremunerated) work (which often takes many hours) consists of preparation of:

(a) case summaries;

(b) chronologies;

(c) schedules of findings sought by each party; and

(d) drafting orders.

In order for the court system to keep abreast of the workload, cases must be conducted as expeditiously as possible whilst striving to balance a party’s right to a fair hearing. To meet these needs, the case must be sufficiently pleaded to enable each party to know the case against them; as much of the evidence as possible should be reduced into written statements and exchanged with the other parties; the cross examination should be conducted thoroughly but succinctly with advocates advancing their case robustly but respectfully.
295. Litigants in person will inevitably find many of these tasks extremely challenging to accomplish and, for many, the experience of being cross examined by the alleged abuser is likely to have a re-traumatising effect.

296. The FLBA has prepared a detailed review of the impact on the family courts of the increased numbers of litigants in person – points all confirmed in the oral evidence of the President of the Family Division to the Justice Committee on the 7 February 2011.

297. As ELBA points out, the ideal of the employment tribunals being easily assessable to the lay-person has not been achieved. Our experience is that even under the current regime, substantial problems are created at employment tribunal hearings because parties are under-prepared and do not understand either employment law or the tribunal process. Weak cases are brought by employees who do not recognise that they are flawed; strong cases earnestly defended by employers who do no realise the implications of employment law. Both sides often fail to assemble the evidence that a tribunal needs in order to decide the case or present their cases in a manner which makes the work of the employment tribunal difficult.

298. This means that much tribunal time and effort is spent on what is, essentially, remedial work, that would not be necessary in a jurisdiction where legal representation for both parties is the norm. This means that employment tribunal hearings are longer than they would otherwise be.

299. For similar reasons, employment tribunal hearings are more likely to be adjourned, or to go part heard.

300. We make the fundamental observation that criminal advocacy must be fit for purpose, or it is of no use to those in need. Whilst, these proposals may be unlikely to create many more unrepresented defendants before the criminal courts, the inescapable conclusion must be that quality advocates will drain away from an underfunded profession, leaving defendants poorly represented at first instance i.e. before and during trial, and leading in turn to a marked increase in the need for appellate consideration of cases both large and small. The impact upon the courts is obvious. The proliferation of litigants in person, so relevant in particular to the family law proposals, may not be directly engaged in crime, but it should not be thought that the effect of draining experience and talent away from publicly funded criminal cases will have any lesser impact upon those cases and upon the courts and judiciary who have to deal with the same.

301. Moreover, as the Chancery Bar points out vulnerable individuals will not be capable of representing themselves in complex areas of law including probate
and TOLATA claims. To bring such claims often requires the litigant in person to have a knowledge of complex probate and trust law. It is extremely unlikely that an untrained litigant in person will have command of these principles.

302. Both of these cases are examples of claims which it is submitted cannot properly be dealt with by Litigants in Person. The burden of sorting the claim out as the case progresses will fall upon the Judiciary and the courts will inevitable become clogged up with individuals trying to pursue these remedies with no legal training.

303. In a 1975 Act claim, for example, the Estate (the Executors) and the beneficiaries will usually be privately represented. While mediation and steps to avoid litigation are as a matter of course considered, it is impossible for the Executors and beneficiaries to deal with a claim without the claim being set out properly in law and properly argued. If Litigants in Person are unable to do this then all cases which involve a LIP will as a matter of course have to be litigated because they will be unable to properly particularise and advance their case in law at a mediation. Conversely a case which would have been able to be settled without protracted proceedings will find itself litigated.

304. **Interim remedies**: We make a further point about interim remedies. In many civil and family cases (as in Chancery cases) there is often a need for urgent or interim action to be taken.

305. By way of example, in family cases:

(a) Will a litigant in person have the understanding to know what remedies to invoke to prevent domestic child abduction?

(b) Will a litigant in person be able to identify the legal routes to recover a missing child, by invoking the jurisdiction of the court to access data held by the DWP and telecom services?

(c) Will an unrepresented wife without access to legal advice have the knowledge (and the skill) to take freezing order proceedings to prevent her husband from dissipating matrimonial assets?

306. In chancery / family cases:

(a) Will a litigant in person know that there is a strict limitation period of 6 months from the date of probate to make a claim under the I(PFD)A 1975? (The court has no discretion to extend limitation for an claim which is brought under Section 9 of the 1975 Act namely to increase the net estate by bringing excluded assets back into the Estate. A potentially vital
remedy may be lost to the Litigant in Person through their own ignorance of the law);

(b) Will he/she know how to register a caveat to prevent probate in circumstances where the validity of the Will for example is in question?

(c) Will an unrepresented party know to obtain interim injunctive relief in relation to a TOLATA claim so as to obtain occupation of the family home, prevent the sale of the property or prevent the disbursement of the net proceeds of sale? These decisions which often amount to preserving the home for children while the claim is considered are vitally important. It is the weaker party, the non-earner (previously entitled to get legal aid), the primary carer often not party to the mortgage who will lose out. Their rights will not be protected at the outset and the very subject matter of the claim exposed to being disbursed and the vulnerable wrongly being made homeless.

**Impact on the legal profession and on the Judiciary** (Chapters 6 & 7)

307. **Impact on the legal profession:** Many legal aid providers (including barristers) have operated against a background of constant change in recent years; publicly funded practice is marginally viable for many of them.

308. Any substantial reduction in income for these practitioners is likely to cause increasing numbers to leave the market for publicly funded legal services, particularly when linked to proposals to remove large areas of work from the scope of public funding altogether.

309. The projected cumulative effect on the cohort of barristers presently undertaking civil legal aid work in England and Wales is said by the Ministry of Justice to be that their income will reduce in 2011/12 by 42% (£56m) (from an estimated £132m in 2008/9)\(^5\).

310. In fact, the loss to the civil legal aid Bar will be nearer to, and probably in excess of 50%. That arises from (1) the fact that the £132m spend on civil legal aid to the Bar represents figures two years out of date and (2) that in cases undertaken in 2011/12 fees earned (but paid in later years) will be paid at much lower levels.

---

\(^5\) Legal Aid Reform: Cumulative Impact Equalities Impact Assessment Table M. and see more generally the contribution of the Civil Legal Aid Sub-Committee of the Bar Council.
311. This figure has recently been clarified\textsuperscript{56} as follows\textsuperscript{57}:

The cumulative EIA sets out an estimate of the combined impact of implementing all the options considered in the individual EIAs (in so far as it has been possible accurately to assess impacts in those individual EIAs). Table M therefore takes into account the impact on the Bar of the following proposals:

- scope changes (‘Scope Changes’ EIA);
- 10% reduction in all fees paid in civil and family matters (‘Civil and Family Fees’ EIA);
- volume changes via eligibility reforms (‘Financial Eligibility’ EIA)
- crime remuneration changes (‘Legal Aid Remuneration - Criminal Fees’ EIA).

312. Importantly ‘Table M’ does not take into account:

(a) the impact on barristers of the codification of barrister rates in civil non-family matters and the attendant reduction in rates of 10%; and

(b) nor does it take into account the proposals to apply ‘risk rates’ to certain civil non-family cases, because it was not possible, on the basis of available data, accurately to quantify the impact of these proposals (see paragraphs 3.31 and 4.37, respectively, of the Civil and Family Fees’ EIA).

313. No other sector of publicly funded provision of essential social services is being asked to take a cut of anything approaching this magnitude.

314. **Gross and Net remuneration**: Members of the Bar working in the field of crime and family law do not work in this field for the money. Far from it.

315. We remind the Government that comparing the revenue of a business with the earnings of an employee is like comparing chalk with cheese. Out of revenue, a business will have to pay expenses, to arrive at a ‘profit’ figure. Like businesses, barristers have to charge VAT, so official figures showing what is paid to barristers includes VAT. Barristers are self-employed

\textsuperscript{56} Kevin Westall (MoJ) to Jan Luba QC: e-mail 27 January 2011.

\textsuperscript{57} In terms of assumptions used to underpin this analysis, all workings were based upon 2008/09 closed cases (para 21 in the Cumulative EIA), though it should be noted that some 2009/10 claims were used in crime analysis (para 33 in the legal Aid Remuneration – Criminal Fees’ EIA).
individuals, the equivalent of small businesses. Out of the net fee received for a case, a barrister will have expenses of roughly 35% for office and staff costs (chambers rent, clerks’ fees etc) as well as travel. Unlike employees, they receive no sick pay, holiday pay or pension contribution.

316. A survey of family barristers, conducted by King’s College London in 2008 (before the latest round of legal aid fee cuts), found that median taxable profits of barristers practicing family law were in the region of £66,000 a year. A quarter of family barristers have taxable profits lower than £44,000 a year.58

317. As stated above, these figures include no provision for sick leave, annual leave, employers’ or pension contribution.

318. The median number of hours worked was 46, with a quarter of barristers working more than 56 hours a week.59

319. In 2006 Lord Carter, who had been appointed by the Government to review legal aid procurement, published his report, which resulted in a new advocates’ graduated fee scheme, designed to improve the remuneration of junior barristers.

320. As a consequence, a barrister who has been practising for 1-5 years, who is continually employed on legal aid cases, could receive potential fee income of £50,00060 before the expenses of practice and tax (this equates to a taxable income of approximately £32,500). Although in reality, it is not known whether these figures are often achieved and these figures are more likely to be achieved closer to the five year mark. These figures include no provision for sick leave, annual leave or employers’ pension contribution.

321. A recent independent survey conducted for the Bar found that criminal barristers have relatively low billing compared with all other practice areas save for immigration.

322. The criminal bar has – within the last year – suffered the introduction of another 13.5% off its standard rates, to be taken by cuts of 4.5% annually over three years. In addition, recent government initiatives introduced by the Criminal Defence Service (Funding) (Amendment No.2)Order 2010 are designed to reduce the number of cases lifted from the AGFS scheme into VHCCs, ordinarily preserving the latter for the very few trials lasting more

59 Page 17.
than 60 days. Even under the AGFS scheme, daily fees for advocates are halved for days 40-60 of trial. These initiatives already exert considerable downward pressure on the fees available to the publicly-funded Bar.

323. **Impacts on entry to the Bar:** There is a present danger of quality practitioners and entrants to the profession deserting criminal & family work. The process is already happening. The approach in Chapter 6 of the consultation will not only further deter quality entrants to the profession from pursuing criminal and family work but it will accelerate the progress towards a two tier system with a gulf between the private and publicly funded sectors.

324. The Young Bar has particular cause to be concerned. The Young Barristers’ Committee (‘YBC’) wholly rejects the notion that savings of £95 million need to be found from remuneration in criminal legal aid.

325. Leaving to one side the fact that Lord Carter acknowledged that fees at the junior end were too low; the fact that the government recognised that the fees achieved after the ‘within – envelope’ redistribution were fair and reasonable; and the indications given that criminal fees had already born the brunt of the current economic climate. These further cuts will lower morale further, encourage practitioners to exit the market and dissuade talented individuals from coming to criminal legal aid. There is currently a quiet drip away from the criminal bar. It is greatest at the junior end where practitioners are less established and more mobile. This will accelerate to a steady stream of leaking talent and is the first step towards a two-tier justice system.

326. These proposals will also damage the achievements made in increasing the diversity of the profession. Fewer people from lower socio-economic backgrounds will be able to afford to come to the criminal bar. Student debt is already high and set to rise further. Pupillage awards are low (few criminal chambers pay more than the minimum £12,000) and the risk of being unable to establish a regular income or being able to repay debts will inevitably deter new entrants. This is a fact that has not been acknowledged in any of the impact statements. It will also impact significantly on the retention of women at the Bar. Criminal work, by its nature, requires being in court, unlike more paperwork based areas of law. The cuts will simply make it uneconomic for many women faced with childcare costs. Contrary to the findings at 1.16 of the EIA, the recent survey carried out by the Bar Council, into Barristers Changing Practice Status 2001-2008 (December 2009) showed that women barristers were disproportionately represented in the family and criminal practice. They are also 2 to 3 times more likely than men to have probationary, squatter or pupil status, making them the most financial vulnerable and therefore those who will be most effected by the cuts.
327. The YBC believe that there is scope for the government to make savings from systematic changes rather than from the already depressed fees of dedicated criminal practitioners.

328. One young pupil practising in family law wrote to the Bar Council on 5th January 2011 in these terms:

A pupil barrister who has recently paid his way through law school, bar school and pupillage (the latter being subject to only limited sponsorship from chambers), and who will continue to pay-off student loans etc for many more years, manifestly has an interest in his likely level of remuneration. However, barristers are highly skilled and employable individuals; pupil barristers need not go into child/family law practice, but some of us choose to do so in the interests of helping those most in need. Without professionals with this motivation, it will be those who are particularly ill-equipped to navigate their way through the judicial process with little or no professional advice or representation and who become exposed to courts which are over-stretched by the need to deal with unrepresented parties, who will lose the most.

For the avoidance of doubt: cutting public sector costs is an entirely valid exercise at the present time and one fully understood by members of the legal profession. Furthermore, ‘trimming the fat’ off public expenditure is in the interests of anyone who pays taxes (also true of all of the legal profession), but with the Proposals for the Reform of Legal Aid in England and Wales the Government has truly hit the bone and very unfortunate episodes involving child welfare will result.

329. One junior barrister practising in family law recites this example:

Barrister of three years call instructed in Family Law Act 1996 case to represent the Respondent. The Respondent is a 78 year old pensioner who has been subject to an Occupation Order excluding him from his home for a year. This followed the Applicant making allegations against him, which were subsequently proved to be false by a criminal court.

He now applies to discharge the order stopping him returning home. He suffers arthritis. He has had to move bedsits five times in the time since he has been prevented returning home. The property in question is in his name and has two bedrooms.

There are two bundles of documents, totalling some 650 pages in total. This includes the police file records, the statements of the parties, the documents filed

---

61 This is a real example from young barrister.
in the criminal proceedings, the judgment/transcript of the criminal trial, the orders made and the position statements of the parties in previous hearings. This takes four to five hours to read. Before the hearing, the Barrister drafts a position statement setting out the background, a suggested reading list and drawing the Court’s attention to the relevant legal principles. This takes 1 hour. Attending at Court, following just over an hour’s travelling time, for 9am and meets the Respondent for the first time. The Respondent does not speak good English and requires an interpreter. This means taking instructions, explaining legal and factual issues and giving advice is harder and takes longer. The matter is listed at 10.30am for thirty minutes. There are 7 other cases, on different matters, listed before the same District Judge.

Having spent an hour, talking through the case with the Respondent, the Barrister seeks out the Applicant’s legal representative. Discussions take place over the merits of the Respondent’s application to revoke/vary the Occupation Order. Position statements are exchanged and read. Two of the cases before the present case involve litigants in person. These both take over an hour each.

It is therefore 12.40pm by the time the matter is called before the District Judge. During the time outside Court, the two barristers have narrowed the issues: if the District Judge gives an indication that the Respondent may have merit in his application, the parties will agree a way of dividing up the property, through an Occupation Order, which will enable the Respondent to return home and live peacefully with the Applicant. The District Judge is referred to parts of the criminal trial bundle and agrees that the Respondent may have merit. Parties sent outside to agree an order. The District Judge has a busy afternoon list, and cases still from the morning. He will see the parties at 2.30pm. The barristers work through the lunch break and agree a draft form of order. They both take instructions on the same. Slight amendments are made. Back before the District Judge at 2.30pm. He is taken through the order. He explains that he is happy an agreement was reached. Out of court room at 3pm. Final conference with client, leave court building at 3.40pm.

Travel back to chambers, which take over an hour, to pick up, read and prepare the contested interim care order hearing which has just been placed in diary. There are four bundles and the matter starts at 10am next day, with parties to attend with position statements at 9am. No statement has been drafted at present. This preparation takes 5-6 hours to complete. Finish working day at 10pm. The next day, the Barrister has to find time to draft an attendance note for the solicitor who could not be present at the hearing. This takes him 1 hour.
The barrister involved said about this case:

“For this day’s work I was paid £465 by the legal services commission. This was remuneration for 6 hours preparation, 2 hours 20 mins travelling, 7 hours 40 mins at Court (i.e. c. £27 per hour) and 1 hour drafting an attendance note. This is a gross figure. My train ticket was £21. I have to pay chamber’s rent of 15%, VAT of 17.5% and tax of 40%. This leaves me roughly with about £190 net or just £11 per hour for the work done.

This despite that with the assistance of my opponent, we distilled a dispute which, without legal representation, would have required the Court to list the matter for a 1 day trial which would have delayed the matter, prejudiced the Respondent and used up unnecessary Court time. Given the amount of time, effort and expertise required in this case, I do not want to do any more cases where I am paid at that level for working that hard”.

330. The current proposals are a depressing reversion to the frequently targeted area of advocacy fees, broadly stagnant over the last 15 years and recently subject to heavy cuts described as “salami slicing” by the Lord Chancellor. The cuts and the absence of any proposals for considering other sources of funding will further depress hard working and diligent professionals praised by Lord Carter in his review of legal aid for their industry.

331. The Bar Council wishes greater clarity about the formulation of the 10% cuts across the board. Indeed it is difficult to respond to this part of the paper as much of the relevant information is missing. In particular the statistical base is poor. Figures are given for the total civil legal aid spend for 2009 (£97m at para 7.8) but these figures have not been provided for any sustained period. Nor have figures been provided for costs recovery where an order for costs has been made against the opposing party to the benefit of the Legal Aid fund.

332. The 10% reduction is difficult to comprehend especially when the projected cumulative effect on the cohort of barristers presently undertaking civil legal aid work in England and Wales is said by the Ministry of Justice to be that their income will reduce in 2011/12 by 42% (£56m) (from an estimated £132m in 2008/9)\(^2\).

333. In fact, the loss to the civil legal aid Bar will be nearer to, and probably in excess of 50%. That arises from (1) the fact that the £132m spend on civil legal aid to the Bar represents figures two years out of date and (2) that in

\(^2\) Legal Aid Reform: Cumulative Impact Equalities Impact Assessment Table M.
cases undertaken in 2011/12 fees earned (but paid in later years) will be paid at much lower levels.

334. No other sector of publicly funded provision of essential social services is being asked to take a cut of anything approaching this magnitude.

335. The current cohort of highly specialist practitioners who have dedicated the whole or a significant part of their professional lives to the public service by the provision of legal advice and representation in civil legal aid cases will be decimated by a change of this scale. The majority of them are women. There will be no capacity to replace them as these proposals are not intended to make long-term not temporary changes.

336. If the proposals package presently advanced were to be adopted in full (or anything like it) the Bar would not be able to accommodate civil legal aid work as anything like a mainstream activity. It would become a modest sideline in which non-specialist practitioners might be persuaded to engage if other, properly remunerated work were not to be available. The Bar’s rules of conduct would need immediate revision to release barristers from their current professional obligation to accept instructions in a civil legal aid case. The current first class mainstream service would be transformed to something akin to a residual also-ran in which non-specialists might engage on a ‘hobby’ or loss-leading basis.

337. It is against that backdrop, of the calamitous consequences for the provision of civil legal aid services from the independent Bar of the cumulative effect of the proposals, that the responses to the individual consultation proposals next set out must be considered.

338. Cuts of this magnitude are bound to have a devastating and irreversible effect on the size, shape, and profile of the legal profession as a whole. We are conscious that the specialist SBAs will address this specifically; the valuable ‘Week-At-A-Glance’ survey conducted for the FLBA in October 2008 revealed the extent to which the Family Bar considered that it would find utmost difficulty in remaining in practice at the family bar if the then cuts were introduced.

339. This resonates with comments of Lord Justice Jackson in his Preliminary Report in which he referred to a reduction in the number of solicitors prepared to undertake publicly funded housing work resulting in significant access to justice issues (para 5.1). His final report noted that the low level of remuneration for legal aid solicitors has already led to a dearth of legal advice for tenants.
340. These proposed cuts come on the back of considerable cuts to crime and family in recent years in particular:

(a) Crime: These latest proposals on defence fees come as the 13.5% cuts to advocacy fees made by the last government are being implemented. These proposals undermine professional confidence in the government’s commitment to retaining quality advocacy in the system.

(b) Family: The cut of £13m from the FGFS budget in 2008, then the further reductions introduced by the FAS.

341. The Lord Chancellor addressed this to some extent in answer to Q15 of the Justice Committee session on 15 December 2010:

We are quite sensitive to the pressures that what we are proposing will impose on the legal profession. They have already been subject to considerable squeezes in recent years and the freezing of fees and we have regard to that, but plainly it is not sustainable to have a situation where such a high proportion of practitioners are so dependent on so much legal aid for their living. The first purpose of legal aid is not to keep up the numbers of the legal profession but to provide access to law for the most vulnerable in the most serious cases. I think the quality of advocacy is being addressed. There is a lot of talk about addressing the quality of advocacy which I am sure the courts and the professions themselves will address if they are persuaded it is a serious concern.

342. Cuts to the publicly funded bar affects women and minority ethnic practitioners the most.

343. The Government recognises that these proposals are likely to have a disproportionate impact on female barristers and in particular female BME barristers. They also consider that the proposals to reduce income would not have an adverse impact on the quality and availability of barristers’ advocacy services.

344. **Impact on the future of the Judiciary.** It is from the pool of legal practitioners that the judiciary is currently selected. The proposals have a discriminatory effect on the ability of women and BME practitioners to make a reasonable bid for selection to the judiciary if their funding streams are adversely affected in the ways proposed.

345. Lord Judge, the Lord Chief Justice, alluded to this when giving evidence to the House of Lords Select Committee on the Constitution (15 December 2010):
The longer-term problem arises in the context of legal aid, which we are talking about now. I am not going into the whys and wherefores of the legal aid issue in terms of cuts, but can I just address one long-term consequence? A lot of people working in the criminal world and on family work do so on the basis of legal aid. There are shining men and women who go into the commercial court world. They do fine—they do the Chancery Division. But an awful lot of the judicial work at the coalface—the sentencing of the rapists; the trial of the terrorists; and so on and so forth—is done by people whose background is legal aid criminal work, prosecuting criminal cases and family work. If we cannot attract young men and women of real talent into doing criminal and family work on the basis of what is available on legal aid, we shall lose a significant part of the practising Bar, which is from minority ethnic backgrounds and women. If we lose them or don’t collect them, in 20 years’ time the Judicial Appointments Commission will have fewer applicants from these backgrounds than they have at present, which will in its turn stultify the progress towards a more diverse judiciary. I see those two questions running side by side, although one is a much longer-term problem.

346. **Women and ethnic minority barristers:** In the report of the Advisory Panel on Judicial Diversity in 2010 under the Chairmanship of Baroness Neuberger, the same point was made:

67. Some consultees expressed concerns that legal aid developments might also adversely affect the diversity of the pool of potential applicants for judicial appointment.

68. A survey by the Bar Council and Family Law Bar Association (FLBA) indicates that dependency on legal aid varies according to gender and ethnicity. 9% of white male family barristers derive more than 80% of their gross income from family legal aid, compared with 14% of BAME men, 17% of white women and 22% of BAME women barristers. According to the survey more than half (52%) of BAME female barristers derive more than 60% of their income from family legal aid, as do 41% of white women barristers.

69. The efficacy of planned reforms to legal aid is not within the Panel’s remit, but any disproportionate impact on women and BAME professionals would be a cause for concern, as it would impact upon the eligible pool for judicial office. This needs to be closely monitored.

[emphasis added]

It was further noted from the discussion groups informing the report that:
The proposed changes to the legal aid scheme will have an impact on the eligible pool in the future, as women and BAME lawyers make up a substantial part of both family and criminal practice areas.

**Alternative proposals – savings of £350m**

347. The Bar Council is anxious to work with the Government to assist it in identifying savings which do not impede access to justice or affect the quality and availability of professional services to advise, assist and represent in such cases.

348. The Bar Council has always said that at this time of unparalleled financial austerity the Bar must take a collaborative approach with Government and help it to identify where savings can be achieved without damaging access to justice.

349. Our list of savings below provides a starting point. We would have liked to have been able to attach figures to these proposed savings but in order to do so, we would have needed some reliable factual data from the MoJ with which to work; regrettably we find no such factual data either in the consultation document or its Impact Assessments.

350. Nonetheless, we would like to propose the following for consideration

**Criminal process and punishment**

351. We recognise that the required savings are much greater than those which our suggestions would initially yield. That is why the Bar Council urges the Government to take a bold and rational approach to sentencing policy, which accounts for so much of the Department’s budget. Second, the Bar Council has undertaken a tailor-made programme to prepare the Bar to work within a leaner system of publicly funded legal services, in which it is in the public interest that it should remain active. The Bar will continue to ensure that the Government is fully alive to the long-term consequences of any short-term cuts. The MoJ should consult separately on constructive alternative proposals, rather than drive ahead and to the detriment of the system, in the interest of these short-term cuts.
352. **Remove offences** from the statute books which do no more than replicate others, and simplify statutory language so that the criminal law may be more readily understood by lay people.

353. **Legislate for Goodyear indications in the Magistrates’ Court.** The pending amendment to Section 20(3) of the Magistrates Courts Act 1980, by Paragraph 6 of Part 1 of Schedule 3 to the Criminal Justice Act 2003, would allow for an indication of whether a custodial or non-custodial sentence would be imposed on a plea of guilty. If this provision does come into force it would go some way to encouraging early guilty pleas before the Magistrates’ Courts. **Sentencing discounts for early guilty pleas** should be given further consideration.

354. **Reconsider the justification for short sentences of imprisonment for 6 months or less**, save in the case of offenders who have breached a sentence which did not initially result in their immediate imprisonment. There should be a **further review of prisoners serving indeterminate sentences who have served their minimum term.**

355. **Modernization of the criminal justice system** ought to go some way towards reducing spend in this area. Paper PCMHs where the defence agree will reduce spend and free up court time. The government is also invited to consider the electronic service of evidence. Provided this is fairly remunerated (either per electronic ‘page’ or according to viewing time), such a measure has the potential to decrease costs. Notices of further evidence should be made available to download on-line. This will avoid delays between service and arrival of the evidence and would also avoid arguments as to when material had been served. The earlier the defence team receive the evidence in a case, the earlier they can advise the client on its contents. There are many further matters to consider in this area, including **removing bail review hearings in murder cases.**

356. **Unfreezing defendants’ restrained assets to meet the cost of their legal services;** One obvious example of alternative sources of funding would be to permit the use of restrained assets (with appropriate capping) as a source of funding for the defence of criminal proceedings. Consider the example of a defendant accused of a serious fraud who has £1 million on deposit in a bank account frozen under a restraint order. At the moment, legal aid has to fund his defence to the criminal charges. He is not allowed to use his own money. This type of case is a huge drain on scarce resources and it is a burden assumed by the government of its own volition. The argument that the sums restrained need to be preserved in the hope that, some time down the line after the expenditure of a great deal of legal costs, a confiscation order may
be obtained to benefit other departments is no answer to the problems created for the hard pressed legal aid fund.

357. We further invite consideration of compulsory legal services insurance for all corporate officers. This would impact upon a minority of cases, being those which represent the biggest single drain on the legal aid fund. Why can’t these cases be partially or entirely removed from the publicly funded sector?

**Family**

358. **Family Advocacy Scheme and Private Law Representation Scheme: the naturally occurring savings:** It is clear from discussions between the FLBA and the LSC (and also from the Green Paper itself) that the Government intends to implement the Family Advocacy Scheme and the Private Family Law Representation Scheme imminently (we believe, in Spring 2011) (see §7.2663).

359. These schemes will not just deliver cost-control; it is envisaged that they will bring in savings. Therefore, the Government should either

(a) Take urgent steps, with its statisticians, and in collaboration with the Bar, to evaluate and agree the likely level of savings to the legal aid budget between now and 2014/15;

And/or

(b) Defer the implementation of the Green Paper proposals to decimate the fees for the legal profession until the effect of the reduction in ‘spend’ occasioned by the FAS and PLRS is known.

360. **Twin-track private law cases:** The FLBA proposes ‘twin-tracking’ private law cases. This would be done at an enhanced FHDRA in private law proceedings.

361. The FLBA will propose that private law cases could be allocated to one of two ‘tracks’ as under the Civil Procedure Rules. The point of decision making (as to which track) would be the FHDRA which would be an ‘enhanced’ hearing giving the Judge the power to nominate one of two tracks for a given case – a ‘fast-track’ and a ‘multi-track’. Cases which fall under

---

63 The Government has recently confirmed its intention, subject to statutory consultation, to bring forward a Funding Order to introduce these schemes as soon as it is possible to do so.
the ‘fast-track’ could be subject of a more severely limited means/merit tested certificate of public funding. Cases which fall under the ‘multi-track’ would be within current scope for all parties.

362. We believe that it would be appropriate (and cost-efficient) for there to be limited (means and merit tested) legal assistance available to the client up to the point of the FHDRA so that basic advice can be given, and attempts made to negotiate a settlement prior to that point (something akin to ‘Family Help’ which is currently available in both private and public proceedings - subject to relevant criteria being met).

363. At the enhanced FHDRA the court will decide whether the case is fit for mediation, or whether there is an issue to be tried. If there is an issue to be tried (or the case is not otherwise fit for mediation) then the parties would be eligible for means/merit tested legal aid for the purpose identified. This would not be an open-ended commitment to public funding.

364. Case management rules would – as they are in civil work – be bespoke to each ‘stream’. How would it be decided which cases go to each ‘stream’? The expectation is that a significant number of cases would be in the faster stream, and would ordinarily be dealt with at District Judge level – in the Magistrates Court or in the County Court. Cases would escape the faster stream where they included predicted indicators of complexity, such as:

(a) Time estimate of more than 1 day; 64
(b) Those involving expert evidence;
(c) Those involving allegations of domestic violence which (if proved) would be likely to have an impact on the application before the court;
(d) Those involving other disputed issues of fact which (if proved) would be likely to have an impact on the application before the court;
(e) Those where the Local Authority has an involvement with the family; and/or
(f) Those falling within the terms of the Practice Direction supporting Rule 9.5 of the FPR 1991.

365. These more complex cases would ordinarily be dealt with at county court level before the district or circuit bench (or exceptionally in the High Court).

366. It is our view that the ethos of the fast-track claims in civil work can be very sensitively imported into simpler private law disputes:

a. The court may adopt any method of proceeding at a hearing that it considers to be fair.

---

64 As per CPR Rule 26 for the Fast-track.
b. The court may decide which cases at the outset are appropriate for mediation, and which first require some managed form of judicial fact-finding.

c. Hearings will be informal.

d. The court may limit cross examination.

e. The strict rules of evidence do not apply.

f. The court need not take evidence on oath.

g. The court must give reasons for its decision (CPR 27.8)

367. We consider that this proposal has the advantage of:

(a) ensuring that the cases which are fit for mediation are indeed referred there;

(b) ensuring that the cases which are NOT fit for mediation are not referred there – with the additional cost and delay involved in that exercise;

(c) that the interests of the children in the centre of the dispute are paramount. The FHDRA emphasises the importance of safety for the children concerned.

(d) It faithfully maintains the spirit of the Revised Private Law Programme – see Para.1.7: The Revised Programme is designed to assist parties to reach safe agreements where possible, to provide a forum in which to find the best way to resolve issues in each individual case and to promote outcomes that are sustainable, that are in the best interests of children and that take account of their perspectives.

Para.1.5: The Revised Programme incorporates these developments. It also retains the essential feature of the FHDRA as the forum for the parties to be helped to reach agreement as to, and understanding of, the issues that divide them. It recognises that having reached agreement parties may need assistance in putting it into effect in a co-operative way.

368. There would need to be provision for cases to move between ‘tracks’ if they proved to be more (→ multi) or less (→ fast) complex than appeared at the FHDRA.

369. **Recovery of the statutory charge in ancillary relief cases back into the legal aid pot:** The Bar Council supports the FLBA in its proposal that greater efforts are made to restore the sums recovered under the statutory charge to the Legal Aid fund.
370. The 2007-2008 figures published by the LSC reveal that as at March 2008 there was some £253.8m due by way enforcing the statutory charge. This is included among £405.171m debtors and includes £90m recoverable from service providers. For 2008-9 the accounts showed £212m debtors including £199m to be recovered from the statutory charge (pp 63-4).

371. It follows, in the view of the FLBA, that there should be greater concentration made on the effective recovery of the statutory charge AND (more important still) an account of the sums recovered to the Legal Aid fund. We believe that should this happen, it would significantly reduce the overall cost of legal aid.

372. Moreover we are also very concerned that the interest on the legal aid statutory charge is 8 per cent, a return to the government unavailable anywhere else in the market when the base rate is now 0.5 per cent.

373. The FLBA proposes that the Government should re-invest the Statutory Charge into the legal aid budget. The Government repeatedly fails to acknowledge that the sums recovered under the statutory charge in 2007/2008 contributed over two thirds of the cost of advocacy in all family cases under the FGFS. We must therefore assume that the entire sums recovered under the statutory charge find their way back into the overall family budget. We await confirmation by the Government in its response to the consultation. In the context of the Government’s search for savings of £350 million, this is no mean contribution.

374. It is indeed notable that one of the specific recommendations of Breakthrough Britain (2009) (page 134) was as follows:

We also recommend that payments to the Legal Services Commission from the operation of the Statutory Charge should be clearly ring-fenced for use by the Commission and not lost in other revenue to the Exchequer.

Clinical Negligence

375. Naturally occurring savings in clinical negligence: It is possible, indeed we consider likely, that the Ministry of Justice has overestimated the future cost of legal aid for clinical negligence cases such that a reduction in the estimate of the future cost can be properly made without making the proposed cuts (or at least while mitigating them considerably). We say this for two reasons.

376. The first reason is that credit may not have been given for recovery of costs from defendants. This will usually be the case where a claim settles or succeeds at trial. We believe that a large majority of legal aid clinical negligence claims result in a full recovery of costs. Obviously not all do, but
it may well be that the Ministry of Justice has failed to allow for the very substantial level of recoveries. If that is correct, then the net (and real) cost of legal aid for clinical negligence may be a fraction of the figure currently being used as the basis for cuts and even below the figure for which the Ministry of Justice is aiming.

377. The second reason is that Sir Rupert Jackson's Review of Civil Litigation Costs, Final Report which, as already implemented and as intended to be implemented, should result in a reduction in the costs of all clinical negligence claims, whether legally aided or not.

378. In particular, in chapter 23 of his report Sir Rupert Jackson set out a number of proposals designed to reduce the level of claimants’ costs (and defence costs paid by the NHSLA) in clinical negligence cases. These included:

(1) penalties for NHS authorities which fail to provide copies of medical records without good reason (this should impact directly on the costs incurred by legally aided claimants in investigating claims);

(2) an increase in the time for a response to the protocol letter of claim (the intention is that greater thought be given by defendants leading to more and earlier settlements, again reducing claimants’ costs);

(3) a requirement that the NHSLA obtain independent expert advice at that stage in relation to all save frivolous cases rather than, as to date, relying on the views of the clinicians who were alleged to have been negligent (again, this should put an end to – or at least substantially reduce – the all too common experience of our members that the NHSLA fights cases which should have been settled at an early stage; again, if successful, claimant’s costs should be reduced);

(4) a system for identifying and reporting cases where the defendant body had failed to address the issues until late in the day (by when costs had been run up on both sides) (again, this should lead to more earlier settlements);

(5) specific costs management measures for clinical negligence cases; and

(6) implementation of the NHS Redress Act 2006 (which provides for a scheme to be administered by the NHSLA in relation to low value clinical negligence claims with claimants’ lawyers receiving fixed fees).

379. These measures, both individually and collectively, should have the effect of reducing claimants’ costs in clinical negligence cases as a body and so also of the total claimants’ costs in legally aided clinical negligence claims. We
would observe that their implementation is largely a matter for the
government, if not entirely for the Ministry of Justice.

380. We suggest that allowance be made for the likely impact of these measures
on the future cost of legal aid for clinical negligence claims. This should, we
suggest, enable the Ministry of Justice to reduce its anticipated expenditure
on this area without having to implement (or to implement in full) the cuts
presently proposed.

**Generally**

381. We encourage the Government to consider carefully, and further, the IOLTA
scheme and the CARPA scheme which are discussed at §9.12 and §9.16 of the
Green Paper. We support further evaluation (and the proposed revenue
generating scheme) discussed at §9.21.

382. We consider that (depending on interest rates), such schemes offer the
potential to generate significant sums which may render unnecessary the
proposals to make significant reductions to the scope of legal aid, and the
rates of remuneration.

**Experts** (Chapter 8)

383. We are surprised that the MoJ is making the proposals in relation to experts
largely in the absence of any data. The MoJ seems to assume that its
proposals will not affect the number of experts available or have an impact
on clients or providers. We profoundly disagree.

384. Moreover, the lack of diversity information on experts is very worrying.
Certainly, in family cases and in other areas of civil law, ethnicity may be an
important issue when selecting an expert. Sometimes experts are selected
due to their particular ethnicity or cultural experience because of the nature
of the case or client. It is also not uncommon to select a female expert when
dealing with a vulnerable female client. Therefore diversity information is
crucial.

385. Anecdotally, the evidence suggests that in family work there are fewer and
fewer experts available particularly in certain disciplines such as Child
Psychiatry. The suggestion that there are more experts available in London,
and therefore they should be paid less, is doubtful. If the LSC does not hold
data on experts how does it know that there are more experts in London and
that necessarily means they are more available? Trends in crime cannot
simply be extrapolated to civil law. It is at the very least extremely surprising
that the Government has virtually no data in relation to such a large part of the civil legal aid budget.

386. We refer to the proposal we make above relating to changing the procedure of committals to provide an opportunity for the defendant to change his plea or decision to elect. If accompanied by additional credit when sentenced (or indeed the loss of credit if he pleads at PCMH without further evidence being served), we believe that this will increase significantly the number of cases dealt with in the Magistrates Court, thus saving costs.

Conclusions

387. A strong Criminal Justice system lies at the heart of a free society, in which criminal legislation is lawfully implemented and the individual is afforded proper protection. The Government must be mindful of the potential long-term harm that ill-directed cuts may have. Experience and quality are important to both the State and the individual. It is against this background that this response to the Government’s Green Paper is provided. Whilst further cuts, beyond the 13.5% announced last year, may be necessary, we submit that the Government should pause to consider whether the proposals of the Green Paper are in fact the appropriate course to take; and we invite the Government not only to consider this principled response but also to consult with practitioners on alternative methods to cut costs.

388. We take exception to the apparent attempt to introduce One Case One Fee (see consultation question 24, the intention to pay a single fixed fee for guilty pleas in either way cases which the magistrates’ court has determined suitable for summary trial), before this fundamental structural change to the provision of legal services has been debated at a level of principle. Ring-fenced advocacy fees, provided for under the current GFS and VHCC models, have a multitude of benefits including (a) transparency, (b) government control over expenditure, (c) protection of defendants from representation of insufficient qualification or experience, (d) a guarantee that government money is spent on that for which it is intended ie the provision of advocacy services in the criminal courts, (e) preservation of the defendant’s right to representation by advocates based upon merit rather than the financial interests of litigators, and (f) the identification of an advocate with duties to the court as well as to the lay client. The South Eastern Circuit put it thus: ‘We cannot stress strongly enough that, in our view, there is a compelling public interest in the setting of a standard fee for courtroom advocacy in cases which the Government has decided should be publicly funded. For many years the Government has accepted responsibility
for determining the level of remuneration for courtroom advocacy in criminal cases. The alternative is that standards will fall in a race to the bottom in the interests of profit, rather than the interests of justice. The most able practitioners will move out of publicly-funded work and the pool of talent from which judges with experience of criminal work are chosen will dry up. For these reasons, any proposal involving ‘One Case One Fee’ should be rejected.

389. The existing Graduated Fee scheme, with all its imperfections, is based on a swings and roundabout approach without which the scheme would not work. Some cases are plainly inadequately remunerated – those involving many hours of study of video-recorded interviews or relevant unused material for example. Other cases may sometimes be more appropriately remunerated. In any fixed fee scheme it is vital always to have regard to the overall picture, as well as individual elements. To identify and remove those adequately remunerated aspects of the advocates’ graduated fee, without considering those areas which are inadequately paid, destabilises a system which has, on the whole, been very effective in achieving financial control for the Government.

390. The National Audit Office Report dated 29th November 2009 and entitled ‘The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission’, said the following at paragraph 17:

‘We also conclude that there are significant weaknesses in the way criminal legal aid has been administered which the Commission needs to address before it can be confident it is procuring a cost effective service. The Commission has undertaken substantial reforms to how it procures legal aid services. The timetable for introducing these reforms has been challenging and the Commission has found it difficult to manage those changes. New schemes have not always been piloted. Implementation has often been delayed and post-implementation reviews have also sometimes been delayed, meaning the Commission does not always have timely evidence to establish whether planned savings have occurred. Furthermore, the Commission’s ability to make payments to criminal legal aid suppliers is undermined by poor administration, as we found during this study that information provided by suppliers is not routinely checked and has a high risk of inaccuracy. Our findings demonstrate that the way criminal legal aid has been both administered and procured in England and Wales presents risks to the value for money provided to the taxpayer, as well as to the sustainability of the service.’
We believe this comment is apposite today, applying it to the current proposals.

391. The U.S. Department of Justice Special Report entitled ‘Contracting for Indigent defense Services’ dated April 2000 includes amongst its conclusions the following:

‘The experiences of indigent defense systems discussed in this special report support the conclusion that contract systems can deliver quality indigent defense services when appropriate safeguards are developed and implemented. However, contract systems that do not jeopardize the quality of representation provided to indigent clients often do not produce the cost savings sought by county, regional, and state funders.’

And further

‘As the examples in this report illustrate, certain types of contract models, often established in the hopes of saving money, pose significant threats to the quality of representation. Two systems in particular—those that solicit bids solely on the basis of cost and fixed-fee systems, without caseload caps but with financial disincentives to investigate and litigate cases—are potentially devastating to the quality of representation.’

392. Over a number of years and a succession of consultation documents, the independent bar practicing in civil and family work has sought to engage with the Government to ensure adequate stewardship of limited public resources is exercised whilst attempting to safeguard the needs of the most vulnerable in society for access to justice. Striving to balance these two objectives has often tested the skills and creativity of the participants but, in general, the day to day business of the civil and family justice system has continued to the benefit of society.

393. The Green Paper represents a seismic shift in the landscape of the civil and family justice system such that it will conceivably be unrecognisable to today’s practitioners in a very short period of time.

394. The Bar is not opposed to change, but does resist change for change’s sake. If the current system can be modified to generate greater efficiency to the administration of justice whilst not interfering with an individual’s access to justice then those modifications are likely to be embraced by the profession. We would wish to be satisfied that a proposal has been fully and properly analysed, where the improvements to the system are clear, achievable and
legitimate and the cuts are necessary and proportionate to that aim. We would expect to see that the impact assessments identify no insurmountable difficulties. Finally we would wish to guarantee that the public does not suffer a bar or impediment to justice.

395. We consider that these should be the legitimate expectations of ALL members of society not simply the barristers. The Green Paper fails to satisfy any of these criteria.

396. The proposals will have the inevitable consequence of rendering irreversible changes to the administration of civil and family justice and any misapprehension that might exist that, when the economy recovers, a pool of experienced practitioners can simply re-germinate to fill the void must be dispelled at once.

397. Solicitor firms, not for profit organisations and barristers that currently derive most if not all their income from legally aided work will not survive the implementation of these proposals. No army of volunteers will emerge from the carcasses of these organisations to keep the system ticking and the occasional philanthropic advocate will serve only to highlight the injustice rather than address it.

398. The proposals have not addressed the impact on the vulnerable in society nor how those people will arrive at a solution to their problems. The theory that all litigants, irrespective of their circumstances, (except those who have sustained actual physical injury at the hands of their spouse) are capable of ventilating their disagreements in mediation or, failing that, of conducting litigation in person is far fetched and facile.

399. The assertion that an increase in litigants in person will have little impact on the court system is reckless given the complete lack of research data. The insinuation that parties who are deterred from litigating (by the fear of having to do so in person) provides a positive impact of the proposals is callous and depressing. It may be that the Ministry of Justice will cut costs, but at what price?

400. Access to justice should not be an economically driven commitment.
Response to the specific Consultation Questions

Schedule of 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.


We welcome the identification of the areas of civil and family legal work proposed to be retained in scope of the scheme at paras 4.37-4.144.

The paper identifies cogent reasons for the retention of the various discrete areas identified. We would not suggest that there are any countervailing considerations which could lead to the exclusion of any of the retained matters.

For instance, we recognise that an immigration or asylum applicant who is in detention and liable to removal from the UK is in a particularly vulnerable position. He will to some extent be isolated from any friends or family he has in the UK and English may not be his first language. He needs access to good quality legal advice in order to be able properly to challenge, if appropriate, the legality of his detention and his proposed removal.

The primary objection is to the proposed restrictions on access to public funds arising from a series of presumptions concerning the incidence (and lack of definition) of domestic violence, and the low level of complaints of (or applications regarding) the same.

The FLBA highlight that although (§4.61) “debt matters where the client’s home is at immediate risk” remain in scope (where the party may lose his/her home because of debt), the same legal aid assistance is not offered to a wife in financial relief claims post-divorce, where her continued occupation of the matrimonial home (possibly with dependent children) is in jeopardy. The occupation of the home (not merely the retention of a share in the home), is frequently at issue in ancillary relief cases.
While the Government rightly recognises the impact on the child and the parent of the consequences of international child abduction, which rightly remains in scope (§4.86), it does not consider that very similar considerations apply to domestic child abduction which is outside scope.

The FLBA further comments that the Government is right to retain public funding for public law children cases (§4.100). The Government rightly assesses that “the issues at stake in these cases are extremely important, and the very emotional nature of the subject matter, and the personal circumstances of the individuals involved, will often make it difficult for them to present their own case”. We simply observe (this is developed below) that many private law cases have the same characteristics.

**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.

**A 2**: The FLBA answers this question with a qualified YES.

There is a clear benefit in increasing the tools available to enable a less financially able litigant to meet her (or his) legal costs, and more generally to manage financially without recourse to state assistance during the continuation of financial proceedings consequent upon divorce or separation. The power to award interim lump sums on account of eventual entitlement would undoubtedly assist in achieving this, and is to be welcomed.

There are a significant number of cases where the more affluent party (probably the husband) will have no identifiable source of income from which to make provision for a costs allowance, and the interim transfer of a capital sum would be the appropriate remedy to enable costs on both sides to be met from family resources without recourse to the state. There will however inevitably also be cases where he has been able, innocently or mischievously, to place his assets in trust or otherwise legally beyond reach so that they are unavailable for a lump sum order. In this situation the lump sum order will fail to remedy any potential inequality caused by the absence of income between the parties.
We are very concerned about the ability of the party who needs the lump sum to be able to advocate for such an outcome in the courts. The applicant for such an interim lump sum will not be eligible for legal aid unless she/he falls into the ‘domestic violence’ category (see below). The payer may well oppose the application on the basis that there are insufficient matrimonial assets to make such a distribution. The application may involve a detailed study of bank accounts and company accounts to see whether money can be released for an interim lump sum; this is expert work. This is no task for a wife struggling to cope with the ordeal of relationship breakdown, coping with the new demands of child-care as a single parent, having to take on the role of forensic sleuth.

Consequently, we are clear that an application for such interim lump sum provision must remain in scope if the power is to be an effective tool in reducing the time and money expended in family court on litigating financial issues. If such an application is conducted professionally, it is far more likely to be successful in establishing the ability of the Respondent to make the lump sum payment that would fund the litigation, and consequently enable both sides to be properly privately funded.

The funding of such a single discrete application would then produce one of the following results: Either
(a) The making of a substantive lump sum order, usually accompanied by a costs order against the Respondent, so that the cost to the public purse would be neutralised, and thereafter privately funded litigation on both sides, or
(b) No order, in which case a fresh certificate of entitlement to public funding would be necessary.

Moreover, the argument set out in the Consultation Paper that public funds expended in relation to ancillary relief proceedings should be redirected to more deserving cases appears to suggest that each ancillary relief case that is publicly funded is a net loss to the public purse. This is to some extent illusory. The Government takes a charge out in respect of public money spent and secures it against assets recovered or preserved in the course of the proceedings. Therefore, the majority of cases should be approaching (if not entirely) cost neutral (see more on this issue below).
No account has been taken of the legal aid charge in the Green Paper and the Government should set out clearly the actual cost incurred in funding ancillary relief proceedings net of any charge. The availability of the power to order interim lump sums cannot and should not be seen as a replacement to the availability of public funds; rather as a means to ensure that if, within a family’s finances, there exists sufficient capital to fund both sides of a piece of matrimonial litigation without recourse to the state, the court has the tools to unlock that capital for the benefit of both parties, and to avoid unnecessary recourse to public funding.

**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.

A 4: NO.

The Bar Council opposes the removal from scope of the cases described in Chapter 4. This has been discussed extensively above, and will be the subject of more detailed individual responses of the Specialist Bar Associations and the Circuits.

The Government proposes that the majority of private law children and money cases will be removed from the scope of legal aid. We have discussed in the body of this response:

(c) Domestic violence cases (not caught by the scope provisions);
(d) Section 37/38 cases;
(e) Rule 9.5 / Rule 9.2A cases;
(f) Leave to remove cases;
(g) Ancillary relief; and
(h) Other complex family cases.

An allegation of (or in some instances order in relation to) Domestic violence as the ‘passport’ to public funding is an inapposite test; moreover, the Government’s definition of domestic violence (as apparent from the Green Paper) falls significantly short of the common understanding of this behaviour. In the recent Supreme Court decision in *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, Lord Brown said that “It has long been known that psychological abuse within a domestic context can cause at least as much long-term harm to the victim (most commonly the woman) as physical abuse”.

The FLBA considers that the Green Paper is overly optimistic about the likely success of mediation as a means of resolving the disputes which routinely come before the courts. It considers that the reliance placed on mediation as the solution to family dispute resolution is misplaced. In this respect, it is supported in our view by Lord Neuberger – the Master of the Rolls and Head of Civil Justice in England & Wales.

ALBA would therefore answer question 3 by stating that it does not agree with the proposal to exclude from scope legal aid in relation to education cases (other than those involving damages claim), immigration cases or welfare benefits for the reasons set out above.

The Bar Council considers that this raises serious access to justice issues for many who will not be well-equipped or well-able (for a range of reasons) to represent themselves in the family courts.

**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.

A 4: The Bar Council does not agree with the removal of the power to grant legal aid in cases other than those which it is necessary to meet domestic and international legal obligations or where there is a significant wider public interest.

There has been no proper evaluation (or explanation) of what is likely to be included in the exception category (in particular “where the provision of some level of legal aid is necessary to meet domestic and international legal obligations”).

**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.

A 5: Yes.
The Government’s review of Conditional Fee Arrangements has not been concluded. The merits criteria should not be amended until the extent and use of CFAs has been determined.

The Chancery Bar Association point out that a CFA would not be practicable when the client is elderly or has deteriorating health as there is an increased prospect of the client dying. In a 1975 Act claim for example where an elderly widow or widower may need to bring a claim for financial provision if she dies during the course of the litigation (which could reasonably take a number of years) then the CFA would not be enforceable and the claim dies with the claimant.

The FLBA considers that Conditional Fee arrangements are unlikely to be a suitable vehicle in the area of family law.

The YBC also suggests the Government should give consideration to implementing an arrangement whereby the solicitor or counsel who advises on whether funding should be granted is not the same solicitor or counsel who then has the conduct of the case. This may of course lead to some duplication of work but it should ensure that only truly meritorious cases are granted funding. The YBC previously suggested this in the response of the committee to the Jackson consultation.

**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.

**A 6:**

We have addressed this in some detail in the body of our response.

We would like to make this important additional point here.

The flaw in the Government’s understanding about, and hence approach to, the impact of these proposals on the courts is glaringly revealed by IAMoJ28 para.39:

> “the proposed reforms might lead to an increase in the volume of cases where people choose to represent themselves in court or at a tribunal without using legal representation (litigants in person). In this IA it has been assumed that on balance any such effect should not have a significant impact on ongoing court or tribunal operating costs”. (emphasis added by underlining)
We have no doubt whatsoever that there will be an increase in the volume of cases where people choose to represent themselves; we are equally confident that this will have a significant impact on ongoing court costs.

The Specialist Bar Associations and Circuits will provide detailed accounts of the impact on the courts of increased numbers of litigants in person in their fields of practice.

We highlight here the following points:

- That many would-be litigants will be deterred from taking steps to assert their proper rights – even for such basic rights as contact with their children – and will not seek access to the courts;

- That many people will be unable (through disability, learning disability / cognitive impairment / inability to speak the language) to access the courts effectively;

- There is a high likelihood that cases will take significantly longer;

- The YBC estimates that (as a general rule) the length of a hearing is doubled when one party is a litigant in person; the number of hearings required also increases;

- Significant numbers of unmeritorious applications will be made which require court time;

- The burden will fall heavily on the courts (as the 2005 research shows);

- There will be a much greater burden on the Judges to ensure that:
  - all the relevant evidence has indeed been adduced which should be adduced in order to make the best decision (in family cases this is particularly important given the imperative to reach a conclusion in the interests of the child);
  - that all of the relevant points of law have been taken which should be taken;
• There will be a significantly greater burden on the court staff (borne out by the 2005 research);

• There is a much greater likelihood of appeals given the unsatisfactory manner in which cases will be determined without legal representation; this adds to the cost to the system;

• Practice Directions (which are in place in order to try and increase efficiency in our court systems) will invariably be ignored:
  - Who will prepare the court bundles?
  - How will Practice Direction documents (designed to assist the court) be prepared and agreed with the other side?
  - Who will prepare the court orders? (Due to staff shortages it is becoming more and more common for counsel to be expected to type orders and file them. Drafts may be circulated a couple of times by counsel in order to iron out differences/interpretations. The reason behind this is to save on court costs of typing up orders, yet is it something which is going to be possible of one or both parties are litigants in person)
  - How will letters of instruction be agreed? Often drafts containing the proposed relevant background and questions to be put to e.g. a jointly instructed expert are circulated between solicitors. Legal representatives also use their experience to reach an agreement on who is an appropriate expert.

• There are serious implications for the conduct of proceedings involving litigants in person where there is a background of domestic abuse (in its widest definition) particularly (but not limited to) the appropriateness of a respondent cross-examining the complainant in circumstances where the breakdown of the relationship has been acrimonious (c.f. the position in criminal proceedings with cross examination of rape victims);

• There are concerns about the ability of a litigant in person to cross examine an expert witness, whether this be a child and family reporter or psychiatrist – again – it is hard to see how they can present their case fairly when they simply do not know what questions to ask or the boundaries for that questioning.
Furthermore, we note that in response to a recent Parliamentary question\textsuperscript{65}, Jonathan Djanogly MP said that he had estimated that... “removing from the scope of legal aid most private family law cases, except for those involving domestic violence, forced marriage and international child abduction, would reduce the number of people receiving advice under the legal aid scheme by about 211,000 annually and of those represented in court by just under 54,000 annually”. Bearing in mind that those who receive advice currently pursuant to the scheme will now simply consider issuing proceedings in person, the figure of 54,000 must be looked upon as a conservative estimate of the number of litigants in person who will be conducting their own cases. This figure does not account for the increase in litigants in person undertaking their own divorce and ancillary relief cases (94,431 cases in 2008)\textsuperscript{66}.

According to the Ministry of Justice figures, there were 113,590 applications issued in 2008 for private law orders in all tiers of the family justice system\textsuperscript{67}. Therefore, 54,000 represents around half of all cases dealt with in a year. That alone represents a significant increase in the burden on the court system and on the representatives of any party who is represented. It is unthinkable that legislation might be enacted that imposes this degree of change to the family justice system (already working at capacity) without assessing thoroughly the impact of the change.

However, the figure of 54,000 requires clarification. We know that 24,800 applications were issued in 2008 for non-molestation or occupation orders (in the County Court) and 24,466 were granted. This means that on the Green Paper proposal, approximately 89,124 applications were made in 2008 in excess of the number of cases in which an injunction was obtained (i.e. entitlement to legal aid). This figure might be reduced by the figure for injunctions obtained in the FPC and the High Court, although this is likely to be an insubstantial figure. 89,124 will include those cases that are currently privately paid, but it would be surprising if privately funded case constituted 40 % of the private law cases undertaken in the County Court. It requires further data to reassure the family bar that 54,000 is not a serious underestimate.

\textsuperscript{65} 23 November 2010: Tony Lloyd (Manchester Central) (Lab): What estimate he has made of the reduction in the number of family law cases that will be eligible for legal aid during the period of the comprehensive spending review.


The Community Legal Advice Telephone Helpline

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.

A 7: We have dealt with the issue of telephone helpline in the body of our response above. We do not propose to rehearse the points again here.

We strongly object to the proposal for a single telephone gateway to access civil / family legal aid advice. Firstly, the projected costs savings are unrealistic and the proposed gateway would not be cost effective. Secondly, if adopted this proposal would have grave consequences for both the quality of advice provided, and clients’ ability to access appropriate advice.

As the Civil Legal Aid Sub-Committee of the Bar Council observe a telephone service may be of benefit for those who are articulate and/or who are unable to travel. Nevertheless, the proposal that use of the telephone service is an exclusive gateway to legal aid will significantly impede access to justice and will almost certainly be subject to a successful human rights challenge under Article 6 because it is a blanket prohibition and is therefore disproportionate since it prevents any consideration of the merits of the individual case.68

The Bar Council is very concerned about the ability of many people to be able to access proper advice or support on the telephone, particularly in family-related disputes. We are concerned that a “single gateway” would fail a sizable proportion of those seeking professional and sympathetic assistance.

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.

A 8: No.

The Specialist Bar Associations confirm that specialist advice cannot effectively be offered (exclusively) by way of a telephone advice line.

The solution to advice deserts is not to remove the last remaining oasis of good legal advice but to fund an adequate environment providing legal help.

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

**A 9**: When the telephone operator considers that the circumstances of the case justify it in particular:

- Where there is an apparent language difficulty, and the caller is having difficulty making themselves understood;
- Where there is an apparent mental health issue;
- Where there is a child protection issue
- Where there is or may be an issue of domestic violence;
- Where the caller is a person under a disability (including a child)
- Where it appears that there is a need for urgent injunctive relief, failure to obtain which may have serious consequences for the caller.

The FLBA proposes that in relation to family disputes there should be an expectation of a face to face meeting. Child Protection issues and domestic abuse is often invisible and the method of eliciting a candid account from a client can be time consuming and taxing. This is not safely achieved by a telephone call; the safety of clients and often their children would consequently be placed in jeopardy.

**Question 10**: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?
A 10: We believe that the focus should be on local providers. The Consultation Paper is out of step with government policy which emphasises the importance of localism. We again emphasise the value of local knowledge and expertise, and the importance of swift and easy referral for face-to-face advice if this is required as the matter progresses. If a gateway is to be implemented we suggest it must be implemented a local level, with calls routed to local providers.

In family cases, a telephone operator would need to be able to refer a client to social services, mental health services, Cafcass, and the police.

However, the only person who could and should offer an opinion on whether a client has a cause of action is a qualified solicitor or barrister and placing a “gateway” between a client and adequate advice simply creates a dangerous barrier.

**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.

A 11: No.

It is highly questionable that the client’s best interests would be served by a system in which “paid advice services” pay an inducement to the “gateway” operator to buy the referral. Client choice is effectively removed at the point of entry and the market will inevitably be distorted.

**Financial Eligibility**

We would like to make the following general observations about financial eligibility, which contain proposals for reform of the criteria.

The Consultation Paper claims that proposals regarding financial eligibility “have been designed with the aim of making substantial savings in legal aid expenditure” (5.2), yet the proposals are modest, unimaginative and piecemeal.

The proposals are focused exclusively on Civil Legal Aid; the justification offered for this is that an assessment of the Crown Court contributory scheme will occur in 2012. Given the substantial savings which are required it is illogical not to make any allowance for the
extension of client contributions on relation to criminal legal aid. This is further evidence of the peripheral role that has been given to amending financial eligibility criteria as a means of addressing the serious financial constraints faced be the Legal Aid system.

An extreme and illogical distinction between ‘means’ derived from income and ‘means’ derived from capital is enshrined in the present system, and the government’s proposals are organised around maintaining this. (We suspect this approach stems from the tax system. Since taxes are recurrent, and have substantial incentive effects – for example on long-term savings decisions – a distinction between capital and income is natural. But in considering an individual financing a once-off expenditure, such as legal fees in a case, the distinction seems wrong).

A first (and fundamental principle) is that if an individual has access to adequate financial resources, they should be required to contribute to the cost of the legal services required to pursue a case. It should not matter whether the financial resources are capital or income.

In relation to capital, and notwithstanding the current complex and bizarre approach, the logical measure is the value of an individual’s net assets – the value of their assets less the value of their liabilities. The present system attempts to define some assets that ‘count’ and some that don’t and to allow only some liabilities to be offset. The case for fundamental reform is compelling.

The use of the word ‘adequate’ in ‘adequate financial resources’ (above) requires, as at present, some threshold above which an individual should contribute. Fairness and reasonableness suggests that there should be a progression in the contribution that an individual is required to make – the more the resources, the more that should be paid as a percentage of the total cost. The present all or nothing system in relation to capital is neither fair, nor effective in that it gives perverse incentives to get ‘under the wire’ of eligibility (the consequence of failing being a large, as opposed to modest, financial commitment).

The remaining issue in terms of capital is that financial resources in this form may not be immediately accessible. The resolution of this could be to establish a system of ‘Legal Loans’ (analogous to, and administered in a similar way to Student Loans). The benefits of this approach are:
a. It will potentially substantially increase the ‘contribution basis’ for legal aid.
b. It will create assets – the loan book – corresponding to a proportion of legal aid expenditure so that the latter can be reduced in net terms by selling a proportion of the created assets.

To summarise, the Government could properly consider, in our view:

a. Radically reform the approach to financial eligibility; income and net capital (value of all assets less liabilities) used together (rather than as a present separately) to define an individual’s resources. Thus substantially more contributions than at present, on a progressive scale.
b. To free up much more capital as a means of funding legal aid, a system of ‘Legal Loans’ making the decision of whether to pursue legal redress, similar to the decision of whether to pursue a university education.
c. To convert a possibly large proportion of current expenditure into loans – thus creating assets to offset the expenditure and thereby relieving burden on public funds.

**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.

**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.

A 13: The Specialist Bar Associations will respond individually to this question.

The Bar Council recognizes that in general terms it is important that litigants have some financial interest in the conduct of the litigation in order to ensure that costs are sensibly managed. This includes litigants with limited financial resources.

However, in some cases, including family law cases, there is no evidence that requiring a litigant to contribute to the costs makes any or any significant difference to the management of the case.

**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.
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.

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.

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.

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.

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.

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

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.

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.

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.
A to Qs 14-22: No.

We leave it to other representative bodies to respond in detail.

Criminal Remuneration

**Question 24:** Do you agree with the proposals to:

- pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates’ court has determined is suitable for summary trial;
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates’ courts scheme in either way cases; and
- remove the separate fee for committal hearings under the Litigators’ Graduated Fees Scheme to pay for the enhanced guilty plea fee?

Please give reasons.

The Bar Council has received a number of responses from specialist practitioners, the CBA and the Circuits. The unanimous answer to these three questions is NO

**Wrong in principle**

The Bar Council believe this proposal to be wrong in principle as it seems to be predicated on the basis that the election of Crown Court trial is a decision wholly within the gift of the lawyer and that the decision to elect may be driven by a desire to extract a higher fee from the legal aid purse for providing the same service. This is simply not the experience of practitioners in the Magistrates’ Courts and would be rightly considered by them as an affront. We are unaware of any evidence that this is a prevalent problem, and we do not believe that it is. We draw support for that view from Lord Carter’s own words, taken from the introductory paragraph of his final Report in 2006:

> “I have been impressed by the deep dedication and integrity of the professionals involved in legal aid work, and their real commitment to the principles of legal aid. They should be proud of their hard work on behalf of their clients, and acknowledged rightly as a credit to the legal profession.”

When the court decides that the case is suitable for summary trial, the right of election for trial by jury is the defendant’s. It is a fundamental principle of the Criminal Justice system. The defendant’s decision may be influenced by a number of factors, including, but not limited to, a
belief that he will receive a fairer trial in front of a jury, or that he has a
greater chance of acquittal in a jury trial. Whilst there remains a right
to elect Crown Court trial in either way offences, the legal profession
should not be penalised in fees if an accused exercises this statutory
right.

It is clearly right in principle that a guilty person should plead guilty as
soon as is possible, but experience has shown that there are many
reasons why a defendant may not wish to admit guilt at that early
stage, examples include: the evidence at that stage may be weak or
incomplete, the defendant may wish to remain on bail for as long as
possible, the defendant may believe that the witnesses will not turn up
to give evidence, or he has witnesses, or simply because the defendant
does not want to admit his guilt. The majority will only plead guilty if
so advised and that advice can usually only be properly given in full
knowledge of the evidence that will be called at trial. It must also be
noted that cases do not only conclude by the defendant pleading guilty
or there being a trial. The paper makes no acknowledgement that trials
also crack due to the Crown offering no evidence.

At present, Defendants are asked to indicate their plea at the first
appearance. It is then that mode of trial is dealt with. Usually there is
very little evidence before the court at this stage. The case is then
prepared for committal, often with the papers being handed to the
defence on the day of the committal hearing. At no point is the
defendant asked to confirm his decision to plead not guilty nor his
decision to elect. As mentioned above, the Bar believes that by altering
the committal hearing to include such questions provided that the
committal evidence is served 7 days in advance, this would
significantly reduce the number of cases going to the Crown Court, in
particular if additional credit was provided when sentencing. This
would make substantial savings and properly puts the consequences of
the decision in the hands of the defendant not the advocate. Such credit
should not be lost however if the Crown serve further evidence
between Committal and PCMH.

Experienced criminal practitioners know that further evidence is
generated in all but the simplest cases after committal for trial. Plea and
Case Management Hearings are in large part dedicated to timetabling
the service of further evidence. *A fortiori* the defendant at trial will face
evidence which may be substantially expanded beyond that of which
he was on notice at the date of committal.
It should be remembered that, in such cases, pleas of guilty at or after the PCMH are likely to be as a result of advice provided by the advocate, following a review of the evidence now served, discussions with the prosecution and a conference with the client. A plea to an alternative and/or lesser offence may now be acceptable to the Prosecution. A basis of plea and/or defence statement may have been drafted, and negotiation may have taken place with the prosecution leading to an acceptable resolution. The resulting guilty plea saves both court time and precious resources and it is only right that the advocate is remunerated properly for his work.

One young barrister gave the following example:

My client was charged with racially aggravated conduct causing harassment, alarm or distress. He elected Crown Court trial and I was provided with the papers after the committal. My client had felt threatened by the complainant in the case but accepted using racist language. He was very keen to have his day in court. I advised in writing on the evidence, I drafted a defence statement and I also drafted a basis of plea. I advised my client in conference and also negotiated with the prosecution on his behalf. After spending all day in court, my client entered a guilty plea to two out of three counts. Were it not for that work, there would have been a trial and at least three members of the public would have had to come to court.

The CBA is very concerned that a single fee for this type of work will lead to considerable pressure being placed on very junior advocates to act in such cases for a very small part of the fixed fee. Cases of this nature will not be attractive to more senior advocates. Given the pressure already placed on the younger members of the criminal bar as a result of recent cuts, this will only drive more talent away from publicly funded work.

The Bar Council has been considerably informed by practitioners on Circuit in this respect, and reflects the response of the Midland Circuit to these questions; this Circuit comments that these proposals are neither fair nor reasonable. They comment that it is fundamentally wrong that a self-employed advocate, who will have played no part in the decision to elect trial, should be obliged to accept instructions on the basis that there will be a brief fee if the case proves to be a trial, but, if not, counsel will receive such part (if any) of the fixed fee as the solicitors might be prepared to relinquish.
Finally as to principle, the South Eastern Circuit adds:

If these less serious either way cases are costing a lot in the Crown Court, the solution, if the Government believes there is a need for one, is surely not to cut fees under legal aid, but to change the law so as to limit access to the Crown Court. On the other hand, if the Government believes in the importance of allowing defendants to elect trial on indictment in less serious either way cases, then the Government must be prepared to shoulder the corresponding costs. To suggest otherwise would be irrational. For our part, a right to trial by jury in either way cases should remain in all but the least serious of cases. But if the Government believes that this constitutional right can no longer be afforded, then it should say so and should be prepared to argue its case against those, including the vast majority of qualified lawyers and jurist, who believe otherwise.

Wrong in practice

The Bar Council believes these proposals to be wrong in practice.

24.1. ‘pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates’ court has determined is suitable for summary trial’;

24.1.1 The introduction of “One Case One Fee” through this proposal, before there has been principled argument on the matter, is wrong. It will impact unfairly upon members of the Bar, in particular the Junior members who undertake a higher proportion of this level of work.

24.1.2 There would be every incentive for a litigator to deal with relatively straightforward cases in-house, and only send the potential “loss leaders” to Chambers. This would totally distort the balance of any swings and roundabouts built into the fees.

24.1.3 It introduces the invidious new concept of ex post facto negotiation between advocate and litigator, depending on the outcome of the case.

24.1.4 “Guilty plea or cracked trial” under RAGFS includes cases in which the prosecution offers no evidence, accepts a plea to a lesser offence or part guilty pleas – even including cases in
which the prosecution accepts at the Crown Court pleas which were offered but rejected in the Magistrates’ Court. Comment in relation to this aspect is set out further in the response to question 25 below.

24.1.5 Para 6.22 envisages that there will be only one extra appearance in the Crown Court. This is unlikely to be the case. Where the case is listed for trial, there could be 3, 4 or more hearings if reports were not available or if the prosecution was not willing to negotiate a reasonable outcome early in the life of the case. The practical effect of this proposal could be that a case might be fully prepared for trial, be listed on several occasions, and end up as a “late guilty plea” because of matters beyond the control of the defendant and/or the Advocate who would then be dependent upon the goodwill of the litigator.

24.1.6 In any event, the fees suggested will be grossly inadequate and will lead to wholly undesirable and unhealthy negotiations betweenlitigator and advocate. In reality, it is likely to lead to a similar situation to that which has developed with unassigned counsel in Magistrates Court cases, where Chambers are unwilling to undertake this work in order to try to protect young (and financially vulnerable) members of The Bar from abuse since many litigators will not agree a reasonable fee for the work (partially, no doubt, if not wholly because of the inadequacy of the scale fees) and, even if they do, junior counsel in particular frequently find it very difficult to collect the fee agreed.

24.2 ‘enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates’ courts scheme in either way cases;’

No. Whilst this proposal may provide some element of compensation for the Litigator, by the enhancement of other fees in the Magistrates Court, there is no such compensatory element for the Crown Court Advocate, who will be deprived, in all probability, of any fee for work reasonably and properly done in the Crown Court.

24.3 ‘remove the separate fee for committal hearings under the Litigators’ Graduated Fees Scheme to pay for the enhanced guilty plea fee’
No. Since the object of the previous proposal is to encourage more either-way cases to be dealt with in the Magistrates Court, the proposal should pay for itself. It would be wrong to penalise Litigators of further fees since they will be losing the LGFS fee from the Crown Court on such cases as it is.

**Question 25:** Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- the proposal to enhance fees for a guilty plea in the Litigators’ Graduated Fees Scheme and the Advocates’ Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and
- access to special preparation provides reasonable enhancement for the most complex cases?

Please give reasons.

The CBA is clear that the answer to these questions is NO.

**Wrong in Principle:**

Again, the Bar Council are of the view that this proposal in wrong in principle in that it is advanced on a premise which is wholly misconceived: that the cause of cracked trials is a failure on the part of the defence litigator/advocate to offer appropriate and timely advice as to the strength of the prosecution case and the appropriateness of a guilty plea.

Those with any real-world experience of criminal practice know that the issue of cracked trials is far more complex.

Cases crack for a number of reasons. There is no recognition within the consultation paper that a case often cracks because the prosecution shift their position. They may offer no evidence, they may accept a plea which was previously unacceptable. Additionally, a case may crack because the defence barrister has undertaken a substantial amount of work, for example on the unused material for which he is not currently remunerated, and/or is able to persuade the judge to stay the case as an abuse of process. Even in those cases where the defendant pleads to the indictment as a whole, this may be because of the late service of compelling evidence. Furthermore, a barrister has no control over a
defendant who wants to wait and see if prosecution witnesses attend his trial. The appropriate sanction for the latter conduct may lie in the calculation of credit for plea, but it is wrong in principle for it to be a financial penalty imposed upon the advocate.

The Western Circuit point to what may be a better and fairer way of addressing this issue, namely to follow the approach adopted in Liverpool and Bristol Crown Courts of identifying cases that may potentially plead guilty at an early stage thereby saving time and expenditure of resources on cases that can be dealt with swiftly. This process reduces pressure on the public purse in a number of ways; reducing the number of hearings required, reducing the volume of papers required and allowing court time to be used efficiently. It does not require an increase in the payment rate for guilty pleas and identifies cases that will be tried at an early stage.

Thereafter trial preparation can take place. The savings made in encouraging early pleas will no doubt fund in whole or in great part the expenditure on trial preparation.

Should a case crack, a trial is avoided but work has still been carried that should be properly remunerated. There must be an acknowledgment that work required as a result of a defendant pleading not guilty and made necessary by statutory obligation or order of the court can be properly rewarded.

The recent changes to CPS internal ownership of cases, namely placing cases in a “pool” rather than allocating them to a specific lawyer has made it increasingly difficult to obtain a binding decision from the Crown, often until a case is listed and at court for trial. A recent example by a barrister practising in London was a case where there were 6 hearings, each time with the defence asking the CPS to review the case, but it was not until it was listing for legal argument prior to trial that the case was dropped. This also affects acceptance of pleas and other matters which influence when cases crack.

The proposal that special preparation payments be relied upon where extra work is done has some merit, but only if the parameters of such payments are extended dramatically. Under the current regime, the ‘special preparation rate’ would only be available in a very small minority of cases where there are more than 10,000 pages of prosecution evidence, or where it can be demonstrated that the case involves unusual or novel points of law or fact, or in the case of electronic material. Advocates should be able to claim upon the basis of a case summary or a written advice and where this has properly been done
after the PCMH and plea of not guilty, this should be remunerated. The same should apply to skeleton arguments and other trial preparation documents which lead to a cracked trial following a successful (or unsuccessful) legal argument. Indeed, we would go further. If it is to be said that special preparation ‘provides reasonable enhancement’, we submit such payments should follow wherever and whenever work is reasonably done in advance of trial.

Wrong in practice

The Bar Council believes that the effect of this proposal is particularly damaging to the self-employed Bar which undertakes most of the more complex and demanding cases, which therefore require the most preparation. An increasing number of solicitors tend to keep in-house those cases which are less complex or burdensome and are likely to plead guilty at an early stage.

Increasingly the self-employed Bar is instructed in the more difficult, challenging cases, which require, for example, detailed attention to hearsay or bad character applications, or lengthy consideration of video-recorded interviews or lengthy preparation for any other reason. This is not a complaint. The self-employed Bar exists to undertake the more demanding work in which expertise and commitment is essential.

The present proposal will benefit most those who undertake the more routine work while hitting hard those who tackle the more difficult and demanding work. The claim that an increase in the guilty plea fee will “on average” provide “a reasonable level of overall remuneration” (para 6.27) is simply not justified, ignores the reality of the briefing practice of many solicitors and it will not provide reasonable remuneration.

For the reasons set out above, the concept of swings and roundabouts which is fundamental to the RAGFS would become completely unfair and unbalanced since the likelihood is that counsel, who tend to be instructed in the larger and/or more complicated cases, will suffer all the “swings” with little to opportunity gain on the supposedly compensatory “roundabouts”.

It is not agreed that the provisions for Special Preparation would provide a reasonable enhancement for the most complex cases. The reference to “special preparation” is illusory in all but a tiny number of
cases. The rules for Special Preparation” are most unfairly and unacceptably confined and in any event this proposal would involve a reversion back to hourly rates – which have previously been agreed to be undesirable.

In a system that was designed to create certainty and predictability (by the use of page counts and proxies) to both the Government, as the paying party, and the person undertaking the work, this reintroduces an area of uncertainty and “judgment” which has been inconsistent and not uniformly applied. Few people have the necessary experience and expertise to assess the relevant claims (which will inevitably be ex-post-facto – a system which the Department have spent much time and effort trying to eradicate).

The Impact Assessment acknowledges that there is a possibility that this proposal may in fact encourage more cases to proceed to trial. This would significantly outweigh any savings achieved as a result of this proposal. It is suggested that it would be more appropriate, and more likely to increase savings, to increase the credit available for a guilty plea. At the very least, this will not run the risk of increasing pressure on the legal aid budget.

**Question 26:** Do you agree with the Government’s proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences? Please give reasons.

The answer to this question is NO.

We do not accept the argument that since both rape and murder carry a maximum sentence of life imprisonment they are comparably serious offences. Very few convicted rapists are sentenced to life with a minimum of 30 years to serve. Murder has always been (and should always remain) the most serious offence in the criminal calendar. Justice demands that murder trials are afforded special treatment. The exceptional burden placed on advocates (particularly the lead advocate) must be appropriately recognized in the fee structure.

The graduated fee for murder trials was substantially reduced when the RGFS was introduced. Despite the attempts in the consultation paper to draw comparisons with sexual offences, the vast majority of the general public regard murder and manslaughter as the most serious of all offences. Under these proposals, there would be no incentive for
experienced counsel to become involved in murder trials, whether as leading or junior counsel.

Those whose practice includes prosecuting and defending in murders readily appreciate the very special challenges and burdens which these cases place on the advocates involved.

This proposal plainly fails to understand the burden of such cases. To quote one of the oldest Taxing Master’s Decisions: “even with the abolition of the death penalty, Murder remains a special case” in terms of the burden of responsibility involved and the importance of the matter to the general public let alone the client.

The suggestion that cases of Murder/Manslaughter are no more demanding than other serious cases could not be made by anyone who has had the responsibility for conducting such cases. The truth is that there is something uniquely important and demanding about homicide cases.

This is reflected in the sentencing regime for murder (and for some types of Manslaughter, such as many cases of Diminished Responsibility). Life sentences with minimum terms of 15, 25 and 35 years are commonplace. This equates to fixed term sentences or 30, 50 70 years - far beyond sentences imposed in other types of serious and complex work (contrary to the suggestion in Paragraph 6.30).

The volume of unused material is often very high in homicide cases - particularly in “whodunit” killings in which there are often other suspects/lines of enquiry, where the relevant unused material may exceed the volume of served material and may required, 20, 40, 80 hours work, for which there is no remuneration.

Plainly, there can be complexity in any type of case (not only “very serious” ones) but the fee scales should reflect the generality of the burden and responsibilities of the different types of offences.

In view of the general approach and tenor of these proposals, there is a real concern that behind this particular proposal lies an intent to reduce substantially the number of homicide cases in which the instruction of Queen’s Counsel is authorised. As will be apparent from the matters set out in this response, such an intent would be wholly undesirable and wrong.
It should be noted that the Young Bar also disagree with this proposal reinforcing our conclusion that this is the view of the whole Bar not simply those silks likely to be conducting these kinds of cases.

The Northern Circuit adds that consideration should also be given to the impact of the changes in the law relating to partial defences to murder. The senior judiciary recognise that the new statutory provisions on ‘loss of control’ raise some highly complex and novel points. We understand it is likely that these cases will be tried exclusively by High Court Judges to reflect this. This provides yet further evidence that the placing of homicide and certain sex cases into the same category is unjustified.

**Question 27:** Do you agree with the Government’s proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000? Please give reasons.

There have been mixed reactions at the Bar to this proposal.

The CBA answer to this question is YES – WITH RESERVATIONS.

This issue is not limited to complexity, but is also concerned with seriousness. Generally, more serious offences should attract a higher base fee, to reflect the greater responsibility borne by counsel. We accept that the £30,000 figure, in place since 1997, is a somewhat arbitrary gauge of seriousness and complexity in dishonesty cases. However, it remains the current best indicator of complexity within the graduated fee scheme. Cases of dishonesty and fraud involving higher sums continue to attract higher penalties upon conviction, and should therefore continue to attract more senior advocates. We propose that greater attention be given to amending the £30,000 figure, perhaps to £50,000, rather than to removing it altogether.

It is submitted that complete data should be disclosed in relation to the existing 3 categories (F, G and K) so that a proper analysis could be undertaken in order to seek to establish where the proper thresholds should be.

It is useful to compare, as the North Eastern Circuit has pointed out, the approach of the Sentencing Guidelines Council, wherein the ‘value’ of dishonesty offences is the principal factor in determining the correct sentence bracket. See, for example the guideline for fraud offences, where there are five brackets based on value:
• over £500,000;
• £100,000 – 500,000;
• £20,000 – 100,000;
• £5,000 – 20,000;
• less than £5,000.

No one suggests that there should be five steps in the fee structure, but we agree that the ‘stepping’ in the fee structure should roughly reflect that in the sentencing guidelines. The responsibility borne by an advocate conducting a serious fraud worth £99,000, where the sentence guideline indicates imprisonment, is significantly greater than in a shoplifting case. A single step, at £100,000, would not provide sufficient discrimination between such cases of significantly different levels of seriousness.

Question 28: Do you agree with the Government’s proposal to:
a) remove the premium paid for magistrates’ courts cases in London; and
b) reduce most ‘bolt on’ fees by 50%?
Please give reasons.

The answer to these questions is NO.

a) Removal of the premium is likely to have a marked effect upon the earnings of young barristers in particular. The lower standard fee for a guilty plea would be reduced from £284.35 to £221.59, and the higher standard fee from £1005.49 to £792.71. This loss to solicitors, we fear, would be passed on to young barristers who currently struggle to make a viable living as self-employed advocates. The problem is particularly acute in London as opposed to other cities because of the high degree of competition among advocates. As a result of this competition there is in place a Magistrates’ Court Protocol which is designed to reflect the minimum fee deemed appropriate for a hearing in the Magistrates’ Court (£50 for a hearing, £75 for a half-day trial and £150 for a full day, excluding travel or waiting). If the standard fee were to be reduced in the Magistrates’ Courts, we fear that solicitors may place chambers under significant pressure to reduce the rates paid to their pupils and junior tenants.
b) Bolt-ons were an important and recognized aspect of the Carter settlement. Thereafter, the last government imposed a 13.5% cut to advocacy fees which is still being implemented. We cannot accept that the principled need for bolt-ons under Carter has halved, in addition to the ongoing 13.5% cut, resulting in standard appearance fees making insufficient provision for increase in complex cases. We submit there should be further consideration of the scale of this proposed reduction, if indeed it is appropriate at all.

As mentioned above, there is concern that the CPS’s recent adoption of the “pool” system is actually increasing the numbers of mentions hearing as no CPS lawyer has overall control of the case. The defence are already shouldering the financial impact of such mentions within the main brief fee, however to further cut the bolt-ons will lead to an additional penalty once the included number of mentions is used up.

As the North Eastern Circuit observe, the purpose of bolt on fees (not all of which are properly so described) is to differentiate between cases which appear to be equivalent, but in fact are not. The need for that differentiation arises from the complexity of the work required. For example, a case is plainly more difficult if there is a PII application to protect a witness, for example where as sometimes happens the Defendant is a relative of serious criminals. Equally, sentencing hearings are often complex and lengthy with consideration of guidelines and authorities. The comparison with a Prosecution fee which is itself set at the level of the inadequate previous defence fee is plainly circular.

The Western Circuit observes that “bolt on payments” reflect unusual but important hearings such as abuse of process or disclosure. These hearings are often complicated and time consuming to prepare and inevitably involve the preparation of skeleton arguments. A half day hearing (2 ½ ) hours will require many hours of preparation. By April 2012, because of cuts already being implemented before this consultation, the payment for such a hearing will be £65. A combination of 2 ½ hours preparation and 2 ½ hours hearing will mean that the gross hourly rate for such a hearing is £13.
**Question 29:** Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates? Please give reasons.

The answer to this question is YES.

With the qualification that barristers are not litigators and therefore are not best placed to assess this question, we cannot identify any compelling argument to suggest that the currently anomaly should not be rectified.

Litigators in this area should be paid in the same way as advocates so as to promote consistency.

The VHCC scheme is cumbersome and awkward to administer and operate. The Graduated Fee Plus scheme should be implemented to provide certainty and promote efficiency.

**Question 30:** Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases? It would be helpful to have your views on:

- the proposed role of the assessor;
- the skills and experience that would be required for the post; and
- whether it would offer value for money.

Please give reasons.

The answer to this question is NO.

Employing an independent assessor/s (it is not entirely clear whether the proposal is to appoint one such assessor nationally, or more) will only add to the overall cost of a case, so in principle, this appears to be counter-productive.

We cannot identify any need for such appointments. The proposed role of the assessor “to review and challenge the defence representative’s assessment of a case” makes it clear that this proposal represents the introduction of a further and unnecessary layer of bureaucracy with which barristers will have to struggle in trying to reach agreement on sensible hours for work that reasonably needs to be done to properly represent their lay clients.
Moreover, we are concerned that the assessor/s would not enjoy true independence. The consultation paper suggests the assessor would “support decision making by contract managers and lawyers within the LSC’s Complex Crime Unit (CCU), taking a pro-active role in challenging assessments of work by representatives.”

If, contrary to our submissions, an assessor/s were to be appointed they would have to possess extensive experience of running VHCCC cases as a litigator or advocate. Only individuals with such experience would have the necessary insight to perform the role properly and be able to engage the trust of the professions. Therefore, without prejudice to our principled objection to this proposal, any assessor appointed should be drawn from a suitably qualified and experienced cadre of professionals. This would include experienced judges with a history of dealing with cases of serious fraud, and lawyers whose professional practice has been centred on managing serious fraud cases in a team-leading capacity.

The Midland Circuit observe that, bearing in mind how few cases will come within the scheme and the necessity for there to be some appeal mechanism (however limited), the cost of employing a suitably qualified assessor is unlikely to be outweighed by any savings.

**Question 31**: Do you agree with the proposal to amend one of the criteria for the appointment of two counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages? Please give reasons.

The answers to this question have been mixed.

The CBA was of the view that the answer is YES – WITH CONDITIONS.

It is not clear why it is felt that it is necessary to introduce this amendment to the existing criteria. We are not aware of any evidence to suggest that two-counsel certificates are being granted inappropriately simply because the page count limit is too low. No evidence is cited in the consultation paper to suggest that this is the case.

We are inclined to the view that in the light of the primary condition which must in any event be satisfied i.e. that the case “involves substantial, novel or complex issues of law or fact which could not be adequately presented by a single advocate”, and that all such
applications are considered by the senior resident judge at each court centre, this proposal is unnecessary and impractical if its objective is to guard against the possibility that a judge may feel compelled to grant an otherwise unmeritorious application because the existing page count criteria is too low.

If the proposed amendment was nevertheless made we are firmly of the view that any page count must include electronically served evidence as well as paper copy material.

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.

A 32: The answer across the Bar is NO.

As noted above, we question the assumptions that have been used to support this proposal of a 10% fee reduction and we do not agree that a cut of 10% will necessarily produce a saving of £72m over 10 years.

The figures do not take account of the reductions in scope and so the actual saving here is likely to be less. Para 28 states that the starting point is total expenditure minus any income and disbursements, but this overall figure will be reduced by the loss of some £274m legal services through reductions in scope. This is nearly 0.25 of the total spend. And so a 10% reduction will actually produce a lower saving than anticipated since it is based on current total spend.

The majority of family fees have been pared down to the minimum by several years of reductions by successive fee consultations as well as real term decreases as a result of inflation. The Green Paper offers no analysis to support the value to the fund or the impact of a 10% cut in fees. It is an arbitrary figure at best and has the appearance of a punitive recoupment at a time when the landscape of the family justice system is being fundamentally altered.

The proposed removal from scope of large sections of family cases (i.e. private family and ancillary relief) is estimated to save the fund £178 million, so it is debatable whether the government has any data at all to
place a value on a further 10% cut. Without an idea of what the figure of 10% means in real terms it is impossible to provide a meaningful response. However, it is questionable whether this approach represents good financial management.

As explained above, we consider that a cut of this level will have an adverse effect on the availability of publicly funded advice.

Subject to this, if a saving in the region of £7.6m per annum is to be made by reducing overall payments then we accept that an overall reduction in the fees rather than a more radical restructuring of civil legal aid fees would be indicated. In general, we consider that this is the least disruptive option rather than embarking on further change following the recent contracting round. However, this response is on the basis that a relatively stable period will follow without civil practitioners having to incur costs in responding to yet further new proposals such as market testing in the immediate future.

**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.

We do not agree with the proposal to cap enhancements and question whether this is necessary or whether it will deliver any substantial saving sufficient to justify the costs of change. The current hourly rates start at an extremely low level that is well under the bottom guideline hourly rate for a trainee solicitor§§. The current maximum enhancement allows for highly skilled, complex and urgent work to be remunerated at a more realistic level (albeit one still well below market rates). Para 7.9 makes clear that currently enhancements are generally allowed at a more modest level and we cannot see the need for a change here that excludes the possibility of a higher rate being paid where it is necessary to reflect the work that was actually and reasonably done.

The current proposals offer no incentive to practitioners to devote resources to disputes where and when they are most needed. The risk is that this will be a false economy because suitable expertise will not be

---

§§ SCCO Guideline rates [http://www.hmcourts-service.gov.uk/publications/guidance/scco/previous_rates.htm](http://www.hmcourts-service.gov.uk/publications/guidance/scco/previous_rates.htm) These start at £111 for a trainee solicitor in National 2 area and increase to £402 per hour for a Band A fee earner in Central London. The range for a 4 year qualified solicitor is £172-£296.
brought to bear at an early stage and further costs will be incurred later on.

Similarly the case for codifying criteria for enhancements is not made out. There is no evidence that the current approach operates inconsistently or inefficiently. The current bases for enhancements are well understood but are sufficiently flexible to take account of a wide range of factors. Fixed criteria are likely to result in a “tick box” approach not reflecting the actual complexity of any given case.

We note that almost as an aside the paper flags an intention to move in the future to remuneration of solicitors and barristers at the same rate. No rationale for this change is advanced. The only common feature is that both professionals work in the same public service. There is no justification for this change any more than there is for assimilating the rates paid to GPs/consultants, classroom assistants/teachers, firemen/coastguards.

**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.

We do not agree with the recommendation to codify the rates paid to barristers. The ‘current’ hourly rate in Table 5 is a benchmark rate for standard cases that is already itself out-of-date, yet the proposal is to apply this to all cases\(^{70}\) and then to subject it to a further 10% reduction.

The current proposals make no allowance for more complex cases where a greater level of experience, complexity or expertise has merited a higher rate. It is the experience of Counsel and their clerks that figures in excess of these sums are regularly paid in the more substantial cases.

We accept that if there is to be a 10% reduction across the board then it should plainly be applied equally to barristers’ fees. But the reductions should be to rates actually paid and not to notional standard rates.

\(^{70}\) Subject to some minor increase for QCs in the Supreme Court to reflect the complexity of cases before the Supreme Court. The paper refers to benchmark rates published by that Court [para 7.14] but omits to mention the actual rates being £18,000 for a one day appeal and a refresher of £3,000 per day [costs practice direction para 26.6].
We do not accept that a case has been made out for this change. The Impact Assessment does not quantify the savings that are likely to be made and the proposal is likely to impact adversely on access to the justice because practitioners will be less willing to take on the more demanding cases where a high level of attention an expertise is warranted.

**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.

A 35: The Bar Council endorses the points made in the submission of the Civil Legal Aid Sub-Committee in strongly opposing the proposal to extend ‘risk rates’ more generally and to freeze them at the levels in use since 2000. This is the central proposal most likely to render it uneconomic to engage in civil legal aid work at the Bar.

The evidence referred to in the consultation paper (see paragraph 7.17) suggests that there would be considerable advantages and savings if risk rates were applied to every civil non-family case, as suggested.

However, there must be a concern that applying risk rates to every civil non-family case will reduce access to justice as it may mean that the lawyers are unwilling to take on less meritorious (but not weak) cases lest they should be paid at risk rate rather than on recovery. This point does not appear to have been taken into account by the Government and it would be interesting to know whether this question has been considered.

The Bar Council wishes to re-inforce the representations made by its Civil Legal Aid Sub-Committee: this particular proposal is likely to have very serious implications for legal aid practitioners and have serious consequences for access to justice. The Bar would not be able to accommodate civil legal aid work as anything like a mainstream activity. It would become a modest sideline in which non-specialist practitioners might be persuaded to engage if other, properly
remunerated work were not to be available. The Bar’s rules of conduct would need immediate revision to release barristers from their current professional obligation to accept instructions in a civil legal aid case. The current first class mainstream service would be transformed to something akin to a residual also-ran in which non-specialists might engage on a ‘hobby’ or loss-leading basis. The loss of expertise over time will inevitably adversely affect access to justice by the loss of expertise mean a diminution in the quality of advice given and will reduce capacity to allow litigants to contest meritorious cases.

The Bar Council endorses the detailed written response of the Civil Legal Aid Sub-Committee under its sub-headings

- Assessment of risk
- Discouraging representation in cases that require it
- Likelihood of cost recovery

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.

We strongly oppose the proposal to extend ‘risk rates’ more generally and to freeze them at the levels in use since 2000. This is the central proposal most likely to render it uneconomic to engage in civil legal aid work at the Bar.

In the first place, we do not agree that the introduction of risk rates has been causative of the increased success rates described in paragraph 7.17. The source for this information is given as the LSC and it is unfortunate that a more detailed breakdown of the statistical basis for it has not been made available, nor has success been defined. The period from 2000 to date has also been characterised by a general move towards specialisation in the areas described and by the introduction and use of pre-action protocol procedures and more intensive case management. All of these factors are equally likely to have had an impact on outcomes and it is not possible to isolate one of them.

We also note that the statistics given for the success rates in clinical negligence and actions against the police show that practitioners are in fact being extremely cautious in selecting what cases to pursue. None of these cases started as VHCCs and so it seems that this selection has
taken place without the incentive that the paper considers to be necessary.

We consider that any proposal to extend risk rates must start from a recognition that they are so low as to make it impossible for a practice to be viable and meet its costs if it is confined to those rates. In order for the system to be fair and workable practitioners must have a realistic prospect of recovering a higher amount in a substantial number of cases through an award of costs from the opposing parties. It follows that:

A. Advisers must have had a proper opportunity to assess the chances of success to allow them to select what cases to pursue.

B. It must be proper for an adviser to decline to take on a case where the merits are insufficient to allow for a real chance of recovery of costs.

C. There must be a realistic prospect of recovery of costs in the event of a successful outcome.

The paper appears expressly or implicitly to accept each of these propositions. Thus it links risk rates to the end of the investigative stage (7.18), accepts that there are some kinds of case that should be pursued despite a borderline chance of success (7.20) and that risk rates should not apply where there is less chance of costs recovery (7.22-3).

However, the paper does not follow these points through and fails to recognise the way in which cases develop in practice.

Assessment of risk

As to the assessment of risk, it is unrealistic to suggest that advisers have had an adequate opportunity to do this as soon as a representation certificate has been granted. In some cases (for example clinical negligence) the investigative stage is lengthy and may include obtaining extensive medical records and the chance to consider them with experts. In these cases it may be appropriate to move to risk rates once proceedings are started. But in many other cases that is not so. For example, in possession proceedings the timetable is driven by the landlord’s decision to start the claim and there is no opportunity to carry out a full investigation before beginning to defend the claim. In judicial review proceedings (we deal with this more fully below) the
case can only fully be assessed after service of the Defendant’s detailed grounds and evidence rather than their summary grounds. In many other cases the merits can only fully be evaluated after disclosure and/or witness evidence has been exchanged and the standard limitations on public funding certificates recognise this by providing for claims to be re-assessed at various stages.

The proposed risk rates operate far too early to strike a fair balance and they require advisers to assume the risks of failure at a stage when they have not had an opportunity fully to consider them. While it would be possible to devise a scheme where different kinds of claim have different procedural triggers for risk rates we consider that this would be cumbersome, costly and inflexible. We consider that the current level of £25,000 strikes an appropriate balance and should be retained. If there is to be any reduction of this limit then it should not be so low as to preclude effective investigation.

**Discouraging representation in cases that require it**

The second general point of principle is that risk rates must not operate in such a way as to discourage advisers from taking on cases that should be represented. There is a real risk that the current proposals will do this. For example, the Funding Code allows for possession claims to be defended where the prospects of success are better than poor because the consequences for the occupier are so grave. The same applies where the case is of overwhelming importance to the litigant for some other reason. This is obviously correct as a matter of principle. People who are defending or vindicating fundamental rights should not be compelled to show that they have strong prospects before they can have access to the courts.

But it follows that in the long run approximately 50% of these cases will fail, not because of any lack of skill or diligence on the part of the advisers who took them on but through the proper operation of the Funding Code. This places lawyers who act in these cases in an invidious position. They must either accept a disproportionate reduction in their fees over all or refuse to take on cases without a significantly higher prospect of success than 50%. This would mean that cases will be undefended when they should be defended and will also mean that the funding code is misleading because it will give the

---

71 If anything, the current limit is itself too low when applied to appeals. Such cases will very often be at VHCC level but by definition the prospects are difficult to assess.
impression that cases will be defended in certain circumstances when that is not actually the case.

It would be possible to draw up categories of case where the considerations described above apply. For example cases where the represented party is defending a claim could be excluded from risk rates, or those involving the liberty of the subject or other fundamental rights. But we consider that a better approach is to retain the existing £25,000 limit as most of the cases in these categories are concluded at under this level and this strikes a fair balance.

**Likelihood of cost recovery**

Thirdly, the proposals significantly over estimate the prospects of costs recovery in many categories of case. The example given is that of a ‘best interests’ declaration where conventionally costs are not awarded because an Order of the court would have been required in any event. But there are other, much more common, classes of case where the chances of obtaining a costs order from the opposing party are remote. For example:

- Possession actions resulting from anti-social behaviour are acknowledged to be cases of high importance given the gravity of the consequences for the occupier. Theoretically, a defendant who resists a possession order can obtain a costs order against his landlord. In practice this rarely occurs, because in most cases, some type of order is made, either a suspended or postponed possession order or an adjournment on terms, and even where this is not the case, and no order is made, the court usually finds that there was some basis for bringing the proceedings and is unwilling to penalise what are invariably social landlords with an order for costs. In practice, the most that a defendant can achieve is no order for costs.

- In homelessness appeals, the practice of many local authorities is to compromise the claim by offering a reconsideration or a revised decision but on terms that the appellant does not seek any order for costs. This places the appellant’s representatives in the position where their duty to their client must prevail and so they do not recover costs despite the fact that they have succeeded in the claim. In his final report Lord Justice Jackson accepted that “this state of
affairs created difficulties for solicitors who are already operating in a harsh environment” (para 6.2). He accordingly recommended (para 7.1(v)) that where a housing claim is settled in favour of an assisted party, then that party should have the right to make the court to determine which party should pay the costs.

Similar practices apply in judicial review cases. If agreement cannot be reached on costs then the parties sometimes agree that the question of costs alone should be dealt with by the court (usually on paper). The difficulty here is that this often results in no order for costs because the court cannot readily evaluate the merits (see for example R (Scott) v LB Hackney). There has been little research into the types of costs orders that have in fact been made in these cases but the experience of practitioners is that it is common for no order for costs to be made.

The general feature of all of these cases is that the assisted party is not seeking to recover a sum of money on which the charge in s. 17 of the Access to Justice Act 1999 would bite. The opposing party can take advantage of this by making an offer that does not include costs and that gives the lawyers acting for the assisted party no choice but to recommend acceptance. The point does not arise in money claims because the client has an interest in preserving as much of the fund in issue as possible and so will often wish to reject a no costs offer.

For these reasons we oppose an extension of risk rates in all case that do not involve a claim by the assisted party for payment of damages. We accept that there are some cases within this category where costs are likely to be awarded in the event of success (for example a claim for an injunction to carry out works of repair) but these are a small class of cases concluded a relatively low cost and where we believe the success rate to be high (and therefore limited cost to the fund).

In summary:

- We do not agree that risk rates should be applied to all non-family cases where costs may be awarded against the opponent. The term “may” in the formulation of this question covers a range of case where the award of costs is very likely to where it is very unlikely despite success in the action. (Question 35)

- We do not agree with the proposal to extend risk rates to the end of the investigatory stage or once costs reach £25,000. This causes
risk rates to apply far too early and in cases where there has not been a proper opportunity to evaluate the merits. (Question 35)

- We consider that as a general rule risk rates should not apply to claims that are not for damages. (Question 36)

**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.

**A:** No.

We shall leave this question for others to provide a more detailed answer.

**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.

**A 38:** The current rules already ensure that Queen’s Counsel are “only used in complex, novel or exceptional cases which require that level of skill, expertise and experience.” As such the first “test” to be applied i.e. that the case involves substantial, novel or complex issues of law or fact which could only be adequately presented by a Queen’s Counsel – is already the guide that is in place and is working to weed out the cases suitable for Queen’s Counsel.

Queen’s Counsel are only used in family cases where there is:

- A genuine and significant challenge to statute or precedent case law;
- Significant novel points of law;
- Numerous experts with conflicting expert opinion on an issue key to the case outcome;
- Allegations of extremely serious abuse or non-accidental injury;
- Concurrent or threatened criminal proceedings of the most serious nature; and
- Unusually complex evidential problems.
It is quite bizarre to suggest that there must be an additional test of either that an opposing party has Queen’s Counsel or the case is exceptional for another reason. The case should already be an exceptional case as is well covered in the first part of the question.

As to whether another party has Queen’s Counsel the nature of family proceedings means that this is not the correct question. The case for/against each party is different. Each individual application should be considered on its own facts and the role of each party within the proceedings should be considered. Just because one party has Queen’s Counsel does not mean that all parties should – a clear example is in a fact finding hearing where the case against the parents perhaps necessitates the instruction of Queen’s Counsel, but perhaps the guardian’s case is not sufficiently complex so as to justify it. Although, there will undoubtedly be cases where equality of arms will justify the instruction of Queen’s Counsel.

The Commission rightly identify that Queens Counsel are usually instructed in public law children proceedings and as such the only other party, not legally aided, who would likely instruct Queens Counsel first would be the local authority. Local authorities rarely instruct Queens Counsel first and inevitably wait to see if the parents bring instruct leading counsel. In any event, the factors that cause the local authority to instruct Queens Counsel are quite different to those of parents facing serious allegations - it is an artificial condition and one that should be removed.

The Equality & Diversity (“E&D”) Committee of the Bar Council makes the point that it would be wrong to link the grant of a certificate for a QC in a care case to the appearance of a QC for the Local Authority; it is quite possible for a local authority reasonably to come to the conclusion that its case can be adequately presented by a skilled and competent senior junior (particularly if it is *prima facie* a strong case). The local authority case will, after all, often be supported by expert and/or medical evidence. By way of contrast a parent’s case will often be against expert and medical evidence and will require the experience and ability that only a QC can provide. Therefore the link and comparison to a local authority’s position is a false one. That is not to say that local authorities will not instruct QCs themselves but in these difficult and austere times budget constraint severely limit their ability to do so. However, the point remains that the consequences for the local authority, as opposed to those for a parent, are quite different.
The E&D Committee suggest that these cases are so few in number and that the amount spent on family QCs is so small that this proposed reform is both unnecessary and unjustified.

Of particular importance in considering this proposal is the impact that it is likely to have on diversity at the Bar. As indicated above, the Joint LSC / Bar Council 2007-2008 survey found that white men are substantially over-represented in silk, 18% of white men in the self employed bar in silk compared with 9% of BME men, 4% of white women and only 2% of BME women. As BME women are over-represented in family work, and publicly funded family work in particular, the proposal to limit the use of family silks will, we suggest, further decrease this poor ratio. This has an impact not only on barristers but also on the higher echelons of the judiciary. High Court Judges in particular tend to be silks. The proposals will lead to fewer family silks and less opportunity for women and BME women barristers to obtain silk and higher judicial posts which will ultimately lead to an even less diverse judiciary.

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.

A: The Bar Council is concerned to ensure that expert witnesses are reasonably remunerated and continue to work in publicly funded cases – in crime, family and civil.

We are nonetheless concerned about the proportion of the legal aid budget which is currently spent on experts.
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.

**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.

**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.

A 40-42: There is a range of views across the Bar to these proposals.

On one view, it is acknowledged that this is the clients’ money and should therefore be held on trust for them (we have no idea what sums are involved).

However, others (including the FLBA) would like to see more detailed consideration of the IOLTA scheme and the CARPA scheme which are discussed at Para §9.12 and Para §9.16 of the Green Paper.

These are schemes which plainly justify further evaluation (and the proposed revenue generating scheme) discussed at Para §9.21

**Question 43:** Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.

A: While we do not see a Supplementary Legal Aid Scheme (‘SLAS’) will make any significant contribution to funding social welfare law cases (few damages claims will remain within scope) The Bar Council acknowledges that a SLAS may have advantages for clinical negligence and personal injury claims.
We therefore support detailed consideration of a SLAS for clinical negligence claims as an alternative to the withdrawal of clinical negligence from scope for the reasons:

- We agree that the preferred option is a partially self-funded version where the fund draws on a percentage of general damages set at a level commensurate with that for CFA success fees ( paras 9.29-9.39).
- A claimant is likely to regard such a SLAS as a better option than a CFA. This is because it is only general damages which would be reduced to pay for his legal fees, rather than all damages other than future care and loss of earnings (which are to be the only protected areas in the CFA regime).
- In our experience, the award of general damages forms a smaller proportion of the overall award in larger claims. And it is those large claims that tend to require the most funding.
- We therefore have significant doubt that a SLAS would be workable unless it involved a high volume of claims. The most obvious way of achieving this would be to make all publicly funded clinical negligence claims subject to the SLAS.

However, we do not have sufficient data available to reach a concluded view on whether a SLAS is workable.

**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?

There is some support for this proposal.

The PNBA agrees that the amount recovered by the legal aid fund should be set as a percentage of general damages. It should be a fixed percentage, namely the 10% uplift which Sir Rupert Jackson recommends be introduced. That increase is intended to mitigate the effect of Sir Rupert’s proposal that success fees be recovered as a percentage of awards of general damages. Given that claimants who receive legal aid will not be subject to the risk of having to make such a payment, there is no reason why they should benefit from the proposed uplift.

The YBC also agrees with these proposals.
In fact, the YBC invite the Ministry of Justice to consider a levy on all money judgments given by the court, including costs orders. Whereas the present proposals are limited to successful legally aided cases, it is suggested that the proposals should apply to all cases of whatever nature, where financial relief of some nature is sought (including costs orders and default judgments). A levy of 1% or 0.5% would probably provide a considerable income that could be used to establish a Supplementary Legal Aid Scheme. The YBC sees no reason in principle why the proposals should be limited to successful legally aided cases whereas it would be unfair on defendants to have to pay a considerable surcharge on damages awarded where the claimant is legally aided but not otherwise.

Governance and Administration

We welcome the acceptance of the need for the abolition of the Legal Services Commission (LSC) which has shown itself unfit for purpose in its management of the finances of legal aid and in developing relations with service providers. The period of the LSC’s stewardship (particularly in more recent years) has been one of failed initiatives and has triggered the exodus of the very providers from legal aid services.

While many hourly rates have been restricted or frozen for practitioners over several years, the LSC grew like topsy with ever more staff employed on salaries with annual increases, enhancements and pension provisions of which those actually delivering the services could only dream.

**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.

The Bar positively welcomes moves to establish and enforce minimum quality controls in the provision of legal aid services, just as in other public services.

The LSC’s professed intentions to move in this direction never captured the real target – the quality of the end product to the customer. Instead it focussed on measuring bureaucratic indicators of office and file management.
Those funding legal services are always welcome to examine the written advices and other documentation generated by barristers undertaking civil legal aid work and, in due course, the Bar will engage in a Quality Assurance standard for Advocacy which will ultimately extend to advocacy in civil legal aid cases.

**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 following straightforward and obvious changes will produce efficiency savings in the administration of civil legal aid payments to the Bar:

- Instead of payments to barristers being routed through solicitors and other frontline providers by the funding authority they should be paid directly to the Bar in response to claims directly made to that authority by the Bar. There should be a simple explicit statement (statutory or contractual) of a barrister’s duty to provide the services to be remunerated under civil legal aid and of the funding authority’s duty to pay the barrister within a prescribed time from submission of a proper claim.

- Barristers like solicitors should ‘self verify’ their own claims. No elaborate screening or checking is required. Verification can be achieved by sampling. The consequences for a barrister of submitting an exaggerated or false claim or so severe the risk of overpayment is minimal.

- Responsibility for authorisation for a QC or more than one counsel should be transferred from the funding authority to the Court. It is much the best placed to assess whether deployment of those advocates was necessary.

- We believe that the arrangements could and should be considerably streamlined, particularly through electronic application forms, submitted by email, on templates which avoided duplication and allowed standardised information to be carried forward to later documentation.
**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.

A: The Bar Council is keen to promote all efficiencies in the working of the profession, and its relationship with its providers.

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

A: The Government will no doubt have taken close note of the conclusions and Recommendations of the report of the Public Accounts Committee (February 2011) (Sixteenth Report of Session 2010–11: HC564) and its various findings including:

- that the “Ministry has a range of financial management processes in place but lacks a consistent approach across its business, and to date it has not integrated financial management into its policy and operational workings. Until recently it was failing to place a sufficiently strong focus on financial management. So, for instance, it was the only major government department to deliver its 2009-10 accounts late.”

- “It is essential that the Ministry implements its Spending Review settlement on the basis of a full understanding of the cost and value of its services, so that financial cuts are best targeted to minimise the impact on frontline services. Yet the Ministry and its arm’s length bodies currently lack the detailed information they would need to do this. It is not good enough that by December 2010, the Ministry expects to have enough information on only 61% of the cost of its staff activities in its largest agency, with the remaining 39% due by December 2011. Given the size of the central resource available to the Ministry, a comprehensive understanding of the costs and value of services must be a priority.”

- “By its own admission, the Ministry has exercised insufficient control over its arm’s length bodies, including the Legal Services Commission. We do not share the Ministry’s view that there is little scope to influence the behaviour of arm’s length bodies. The Ministry needs to be clearer in its funding arrangements with these bodies about what its expectation of them is, setting out, for example, clear rules of engagement and
management information requirements. It should also tailor the depth and frequency of its oversight arrangements to reflect the real risks different bodies pose.”

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.

A: Given the enormity of the issues, and the wide-ranging impacts of the proposals, the Bar Council is concerned by the significant gaps in information in the Impact Assessments.

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

A: Five of the six specific Equality Impact Assessments (with the exception of the Eligibility EIA) assert that the proposed changes do not amount to ‘provisions, criteria or practices’ (PCPs) under the Act. We suggest that the Government, in seeking to effectively ‘opt out’ of equality legislation, is sending entirely the wrong message and is undermining many years of progress in the fight against discrimination which ultimately lead to an all encompassing form of primary legislation being introduced only last year.

The E&D Committee of the Bar Council has submitted a detailed response to this question, and we adopt and endorse all that they say. We concur with the point, in particular, that it is apparent from a review of the Impact Assessments that the Government has identified very significant gaps in its knowledge base and further that certain important assumptions have been made in the complete absence of any evidence or research. While the Green paper does acknowledge the need to conduct further surveys and research this appears to be limited to the consultation period. Absolutely fundamental data is missing in relation to clients in particular. We do not see how this chasm can be filled over the course of a few weeks. We suggest that thorough research is necessary before any real analysis of the impact of the proposals can be made. We are very concerned that there is substantial lack of data relating to race and disability. We fail to see how the impact on these groups can be assessed in the absence of the most basic information.
As we mention above (a point picked up by the E&D Committee and strongly by the FLBA) the Green paper refers to further research into the crucial area of litigants in person which is said to be conducted during (and the results published after the end of) the consultation period. As the E&D Committee rightly observe, this is the clearest possible example of putting the cart before the horse. How can the impact of an increasing number of litigants in person be assessed if the research is not carried out before proposals are formulated?

Such an approach leads the Bar Council to question whether the Government is truly interested in reasoned research findings, particularly any which might undermine its proposals. We hope that the Government will fully review and consider any research which is now carried out.

Also we understand that some of the further research the government has identified and proposed amounts to no more than literature review of existing research around the world. We suggest that new, UK based research is necessary as making comparisons with other jurisdictions is inevitably problematic and invariably distinguishable.

We share the concern of others that the Government appears not currently able to demonstrate that the means are proportionate due to the absence of important information.

The Bar Council further notes with concern that there has been inadequate assessment made of the impacts on other (non-MoJ) budgets of the proposals to exclude cases from the scope of legal aid. There is no easily identifiable reference to the impact on:

- HMCS
- The Health Budget
- Department for Education (CAFCASS)
- Local Authority budgets.

The Bar Council readily accepts (per Impact Assessment IAmoJ28) that “A significant reduction in fairness of dispute resolution may be associated with wider social and economic costs”, and believe that the Government has rightly identified those social costs. But these are social costs which cannot sensibly be ignored.
In short,

- the Government simply cannot run the risk of inevitably “reduced social cohesion” which will be brought about by the inability of many to access the law; we regret the likelihood that a “failure to apply the rule of law fairly may generate an inclination not to respect rules and regulations and not comply with social norms and expectations, generating social costs”.

- Family Courts cannot comply with their statutory obligation under section 1(1) CA 1989 to reach decisions which are in the best interests of children, given the acknowledgement that “In relation to family cases children would also be affected [by the removal from scope of private law cases] as well as their parents”.

- There is a likelihood of “increased criminality” – which is both a social and financial cost. We accept the proposition that “(t)his may arise if unresolved civil or family disputes escalate, or if criminal means are used to resolve disputes in future, or if a known lack of legal aid encourages people to take advantage of others who might find it harder to defend themselves in future”.

- We consider that “reduced business and economic efficiency” is inevitable, as is (see above) the inevitable “increased resource costs for other Departments”.

- There can be no question but that “if civil and family issues are not resolved effectively people might continue to rely upon the state, including because failure to resolve one issue may lead to another arising”. This may include health, housing, education and other local authority services including services provided by the voluntary and community sector”, and there will be “increased transfer payments from other Departments”.

However, the relevant section of the IA inexplicably concludes with the comment that “the proposals aim to minimise any wider social and economic costs”. We simply do not follow.

**Question 51**: Are there forms of mitigation in relation to client impacts that we have not considered?
Yes. As the E&D Committee point out, the government has not identified any mitigation in relation to client impacts. The reason for this is straightforward. As stated above, there is a wealth of missing information that needs to be sought. Once this is done, and a complete picture is obtained, it may well be possible to identify ways of mitigating some or all of the proposals.

The social costs described in IAMoJ28 (and discussed above) are enormous. We consider that it is inevitable that “wider social and economic costs” will “arise if disputes are resolved significantly less fairly for those no longer receiving legal aid”72 – yet this is not acknowledged by the Government. It is almost inevitable (not just possible73) that “case outcomes” will “be less fair than beforehand”.

We support more concentrated research into the impact on the courts, telephone gateways, and impact on related services provided by other departments before any proposals are implemented.

72 See IA MoJ28.
73 See IA MoJ28.