



The Bar Council

Bar Council response to the Ministry of Justice Consultation on Legal Aid Means Test Review

About us

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice Consultation paper on Legal Aid Means Test Review published in March 2022¹.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality, and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of Criminal and Civil Courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The General Council of the Bar is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Background

4. In February 2019, the government launched the Legal Aid Means Test Review as part of its Legal Support Action Plan. The review considered the means tests, including: 1) the income and capital thresholds for civil and criminal legal aid entitlement, 2) benefits passporting, 3) non-means tested areas of legal aid, 4) types of income and capital that are

¹ <https://consult.justice.gov.uk/legal-aid/legal-aid-means-test-review/>

disregarded when assessing financial eligibility, and the contributions system. On 15 March 2022, the government launched a consultation on changes that aim to make an estimated 5.5 million more people eligible for legal aid.

Scope of our response

5. The Bar Council welcomes the Ministry of Justice's efforts to make legal aid more accessible for those in need and increase the scope of legal aid eligibility by raising capital and income thresholds. While the Means Test Review is a step in the right direction, we would like to draw your attention to the proposals that remain key areas of concern and which we address in our responses below.

The consultation questions

Chapter 2: Overarching proposals

Equivalisation

Question 1: do you agree with our proposal to take household composition into account in the means test by using the OECD Modified approach to equivalisation? Please state yes/no/maybe and provide reasons.

Maybe. If adjustments are made to include the needs of key groups such as single parent families and disabled people. As the MoJ identifies in paragraph 207 of the consultation document, single parents stand to be disadvantaged by proposed changes to income passporting. The impact of the proposals on single parents therefore calls for further scrutiny.

Assessment of disposable income

Question 2: do you agree that we should continue to deduct actual rent and mortgage payments and childcare costs for the civil and criminal means assessments? Please state yes/no/maybe and provide reasons.

Yes. The Bar Council agrees with this approach as single households do not presently have their actual rent and mortgage payments deducted.

Question 3: do you agree with our proposal to deduct jobholder pension contributions as part of the disposable income assessments for civil and criminal legal aid? Please state yes/no/maybe and provide reasons.

Yes. We agree with this proposal, and we further suggest deducting the full amount of pension contributions that the applicant makes.

Question 4: do you agree with our proposal to limit the amount of jobholder pension contributions we deduct as part of the civil and criminal means assessments to 5% of earnings? Please state yes/no and provide reasons.

No. The full amount of pension contributions a person makes should be deducted. The current proposal would result in an increased administrative burden for providers.

Question 5: do you agree with our proposal to deduct any Prisoners' Earnings Act levy as part of the disposable income assessment for legal aid? Please state yes/no/maybe and provide reasons.

Yes.

Question 6: do you agree with the proposal to deduct agreed repayments of priority debt and student loan repayments taken directly from salary or deducted as part of the applicant's tax return as part of the disposable income assessment for civil and criminal legal aid? Please state yes/no/maybe and provide reasons.

Maybe. We agree with the proposal to deduct agreed repayments of student loan repayments and with deducting debt repayments from the income assessment.

However, when it comes to domestic abuse survivors, the MoJ's proposals should go further and consider debt such as payday loans and credit cards which is what many survivors of domestic abuse rely on to financially support themselves when they leave abusive relationships.

In addition, many victims and survivors have unsecured debt built up in their names by perpetrators which they must repay over extended periods of time. Unsecured debt repayments remove large portions of their disposable income. We therefore believe that unsecured debt should be included in the means test assessment, as this was evidently a large barrier to individuals seeking legal support.

Moreover, some domestic abuse victims and survivors especially those experiencing economic abuse find themselves in situations where they might not have access to the paperwork required to evidence the debt if they were not the ones to take out the loans. On some occasions, they might not even be aware of the debt accumulated in their name and these are challenges that need to be considered.

For all the reasons outlined above, the Bar Council recommends that victims and survivors of domestic abuse are not subject to a test for legal aid.

Income disregards

Question 7: do you agree with our proposals to disregard Modern Slavery Victim Care Contract (MSVCC) financial support payments from the income assessment? Please state yes/no/maybe and provide reasons.

Yes. Survivors of modern slavery are an inherently vulnerable population with special needs. They are often diagnosed with severe mental health disorders such as Post-Traumatic Stress Disorder, depression etc. which are considerable obstacles in the long process of accessing legal aid.

Additionally, survivors often face the difficulty of providing evidence of capital in the survivor's country of origin or providing evidence on assets held abroad when documents held are in their own language (and the LAA will only consider documents in English, Welsh or French).

For these reasons, we propose that survivors of modern slavery receiving MSVCC within their recovery and reflection period should be entitled to non-means tested legal aid. Our suggestion is in line with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, also known as 'the Palermo Protocol'. Article 6(3)(b) of the Protocol states that survivors should receive:

"Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand."

Our suggestion also echoes the spirit of the Council of Europe Convention on Action Against Trafficking in Human Beings and the EU Trafficking Directive (Directive 2011/36/EU) according to which the provision of support and information, specifically in relation to legal advice and rights should be provided without delay and should be free of charge.

Question 8: do you agree with our proposals to disregard Victims of Overseas Terrorism Compensation Scheme (VOTCS) payments from the income assessment? Please state yes/no/maybe and provide reasons.

Yes, we agree with this proposal.

Question 9: do you agree with our proposal to remove Back to Work Bonus payments from the civil and criminal income disregards regulations? Please state yes/no/maybe and provide reasons.

We defer to the Law Society on this question.

Question 10: do you agree with our proposal to remove housing benefit payments from the civil and criminal income disregards regulations? Please state yes/no/maybe and provide reasons.

No, we are concerned that the proposal to include housing benefit in gross income will disproportionately affect certain populations such as people living in more expensive parts of the country, disabled people, single parents (especially women) and survivors of domestic abuse.

We are concerned that this proposal may cause people to be taken above the gross income threshold and then they would not be assessed on disposable income. There is no current route to appeal this, so it could mean that victims and survivors may be prevented from accessing legal aid because they receive housing benefit, even though housing benefit cannot be spent on anything other than housing.

Survivors in refuge accommodation, or in move on support, could be disproportionately impacted by this, as they would be in receipt of the highest levels of housing benefit.

Benefits passporting

Question 11: do you agree that we should continue to passport any remaining recipients of income-based Jobseeker's Allowance, income-related Employment Support Allowance and Income Support through the income element of the civil and criminal means tests? Please state yes/no/maybe and provide reasons.

Yes.

Question 12: do you agree that we should continue to passport recipients of the Guarantee element of Pension Credit through the income element of the civil and criminal means tests? Please state yes/no/maybe and provide reasons.

Yes.

Chapter 3: Civil income thresholds, passporting and contributions

Proposed changes to gross income thresholds

Question 13: do you agree with our proposal to raise the gross income threshold for civil legal aid for a single person to £34,950 per year? Please state yes/no/maybe and provide reasons.

Yes. The Bar Council strongly welcomes this proposal as it will increase the scope of eligibility for legal aid. Uprating the current gross income threshold is a much-needed change which must be reviewed on a regular basis to take into account the raising costs of living.

Question 14: do you agree with our proposal to introduce a lower gross income threshold for civil legal help cases, with the threshold set at £946 per month? Please state yes/no/maybe and provide reasons.

Yes. Undertaking a full means assessment where the gross income already falls below the disposable income limit would become redundant.

Question 15: do you agree with our proposal to remove the £545 monthly cap on allowable housing costs for applicants for civil legal aid with no partner or children? Please state yes/no/maybe and provide reasons.

Yes, we agree with the proposal to remove the £545 cap on housing costs for those for whom no dependent's allowance deduction applies as it is highly unrealistic for the cost of housing in many local areas. Considering an applicant's full housing costs is a much fairer approach.

Question 16: do you agree with our proposal to deduct actual Council Tax as part of the civil means assessment? Please state yes/no/maybe and provide reasons.

Yes. It will make the income test fairer for individuals, because deducting the actual Council Tax as part of the means test assessment will better reflect household expenditure. That said, this approach will also create an administrative burden on providers.

Question 20: do you agree with our proposal to use median household spending as the basis for the proposed upper income threshold? Please state yes/no/maybe and provide reasons.

We defer to the Law Society and legal aid providers for more authoritative answers to these questions.

Question 21: do you agree with our proposal to set the upper disposable income threshold at £946 per month for an individual? Please state yes/no/maybe and provide reasons.

Yes.

Question 22: do you agree with our proposal to set allowances for dependents at £448 per month for each adult and child aged 14 or over, and £211 for each child under 14? Please state yes/no/maybe and provide reasons.

No. The allowances for all dependents should be increased and updated annually with no differentiation in the age of children.

Approach to means assessment for applicants receiving temporary support

Question 23: do you agree with our proposal to not take into account the means of anyone providing temporary assistance to the applicant in the civil legal aid means assessment? Please state yes/no/maybe and provide reasons.

Yes. We agree with the proposal to exclude the means of a person providing temporary assistance to the applicant. We further propose ending the means assessment of children in all cases.

Benefits passporting

Question 24: do you agree with our proposal to implement a £500 earnings threshold for applicants in receipt of UC who are currently passported through the income assessment for civil legal aid? Please state yes/no/maybe and provide reasons.

No. The proposal will reduce legal aid eligibility for people on benefits while creating unnecessary administration for legal aid practitioners.

We would also draw your attention to victims and survivors of domestic abuse. Since universal credit is paid jointly to a household, this could prevent survivors from being able to access support if they are seeking to leave their partners as they may technically be over the threshold.

Question 26: do you have any suggestions for ameliorating any administrative burden that our proposal to implement a £500 earnings threshold for applicants in receipt of UC (if enacted) may cause for providers and applicants?

Given the answer to Question 24, we make no further comment on this question.

Income contributions

Question 27: do you agree with our proposal to use a tiered model approach (40%/60%/80%) to determine the monthly income contribution? Please state yes/no/maybe and provide reasons.

The Bar Council is not in a position to assess whether the combined impact of raising both the income thresholds the percentages for each tier will be affordable for applicants.

Question 28: do you agree with our proposals for setting a minimum monthly income contribution of £20? Please state yes/no/maybe and provide reasons.

See answer to Question 27.

Chapter 4: Civil capital thresholds, disregards and passporting

Disposable capital thresholds

Question 29: do you agree with our proposal to increase the lower capital threshold to £7,000 and the upper capital threshold to £11,000? Please state yes/no/maybe and provide reasons.

Yes. The proposal to increase the capital thresholds are positive steps in the right direction.

Equity disregard for the main residence

Question 30: do you agree with our proposal to increase the equity disregard from £100,000 to £185,000? Please state yes/no/maybe and provide reasons.

Yes. As per Question 29, the Bar Council believes that the proposal to increase the equity disregard to £185,000 is a step in the right direction.

Question 31: do you agree with our proposal to amend the means test so that where a victim has temporarily left their home, the equity disregard should be applied? Please state yes/no/maybe and provide reasons.

Yes.

Subject Matter of Dispute (SMOD) disregard

Question 32: do you agree with our proposal to remove the £100,000 cap on the disregard for assets which are the Subject Matter of Dispute? Please state yes/no/maybe and provide reasons.

Yes.

Inaccessible capital

Question 33: would you support creating a new mandatory disregard in relation to inaccessible capital, and introducing a charging system to recoup legal costs in these cases?

Which legal services should this charge apply to? For example, Licensed Work only, or Licensed Work and controlled work?

What legal costs should be recoverable? Do you agree that the value of the charge should be any capital over the capital thresholds, once any disregards have been applied, up to the estimated cost of the legal services provided?

Do you think a waiver should apply (that is, do you think there are any cases in which we should not apply such a charge), and if so in what circumstances should it apply?

Do you have any concerns in terms either of how this proposal would operate practically, or its impact on access to justice?

Yes. The Bar Council welcomes the shift from a discretionary disregard to a mandatory disregard for inaccessible capital as it is expected to help provide clarity for many applicants. It should apply to both Licensed Work and Controlled Work.

Pensioners' disregard

Question 34: do you agree that we should revise the pensioners disregard as set out, by:

a) increasing the qualifying age to the State Pension Age b) increasing the disposable income bands to align with the proposed lower disposable income threshold for civil legal aid; and reducing the number of income bands?

Please state yes/no/maybe and provide reasons.

Yes to a) and b).

Other capital disregards

Question 35: do you agree with our proposal to disregard payments under the Scotland and Northern Ireland Redress Schemes for historical child abuse from the capital assessment? Please state yes/no/maybe and provide reasons.

Yes.

Question 36: do you agree with our proposal to create a discretion for the DLAC to disregard VOTCS payments? Please state yes/no/maybe and provide reasons.

Yes.

Question 37: do you agree with our proposal to create a discretionary disregard for benefit and child maintenance back payments from the capital assessment? Please state yes/no/maybe and provide reasons.

Yes.

Question 38: do you agree with our proposal to create a discretion to allow the DLAC and providers to disregard compensation, damages and/or ex-gratia payments for personal harm? Please state yes/no/maybe and provide reasons.

No. The MoJ rightly considers that it is not fair to expect damages and/or ex-gratia payments for personal harm to be used to pay for legal services. They should be disregarded as a matter of course, not on a discretionary basis.

Capital passporting

Question 39: do you agree with our proposal to reintroduce capital passporting for nonhomeowners in receipt of passporting benefits through the capital assessment for civil legal aid? Please state yes/no/maybe and provide reasons.

Yes.

Chapter 5: Immigration and asylum, under-18s and non-means tested cases

Means-testing for immigration and asylum proceedings

Question 40: do you agree with our proposal to align the immigration representation Upper Tribunal capital threshold (currently £3,000) with those usually used for civil legal aid – namely a lower threshold of £7,000 and an upper threshold of £11,000? Please state yes/no/maybe and provide reasons.

Yes. The Bar Council welcomes the MoJ's proposal to increase both the lower and upper capital thresholds for immigration and asylum cases in the Upper Tribunal. In this way, immigration and asylum cases will be brought in line with the newly proposed thresholds for civil legal aid.

Question 41: do you agree with our proposal to remove the exemptions on the payment of income and capital contributions for immigration and asylum representation in the Upper Tribunal, replacing them with the new proposed income and capital thresholds for civil legal aid? Please state yes/no/maybe and provide reasons.

No. This can be damaging to asylum and immigration applicants who may be relying on their capital to survive.

Question 42: do you agree with our proposal to increase the immigration representation First-tier Tribunal capital threshold from £3,000 to £11,000? Please state yes/no/maybe and provide reasons.

Yes. The proposal is a step in the right direction.

Legal aid applicants aged under 18

Question 43: do you agree with our proposal to remove the means test for applicants under 18 for criminal advice and assistance and advocacy assistance? Please state yes/no/maybe and provide reasons.

Yes.

Question 44: do you agree with our proposal to non-means test applicants under 18 for all civil representation? Please state yes/no/maybe and provide reasons.

Yes. But in addition, the proposal should be extended to family representation. There is no valid reason why family representation should be different to civil representation. In either case, the person under 18 is most unlikely to be able to represent themselves. The fact that they are unlikely to have sufficient income or capital to fail the proposed means test does not prevent them having to make a contribution which, the Bar Council submits, would be unfair.

Question 45: do you agree with our proposal to introduce guidance which indicates when the means testing of an applicant who has turned 18 during their case may be unnecessary? Please state yes/no/maybe and provide reasons.

Yes.

Question 46: do you agree with our proposal to continue means-testing applicants under 18 for civil legal help, family help (lower and higher) and Help at court? Please state yes/no/maybe and provide reasons.

No. The Bar Council does not accept that there is a valid justification between not means-testing applicants under 18 for civil representation but not civil legal help, family help (lower and higher) and Help at court.

Question 47: do you agree with our proposal to introduce a simplified means test for applicants under 18 for civil legal help, family help (lower and higher) and Help at court? Please state yes/no/maybe and provide reasons.

No. See above.

Non-means tested legal aid

Question 48: Do you agree with our proposal to remove the means test for legal representation for parents/those with parental responsibility whose children are facing proceedings in relation to the withdrawal or withholding of life-sustaining treatment? Please state yes/no/maybe and provide reasons.

Yes, we agree with this provision as it helps enhance the position of an already vulnerable party.

Question 49: do you agree with our proposal to remove the means test for legal help at inquests where the case relates to a potential breach of ECHR obligations or significant wider public interest? Please state yes/no/maybe and provide reasons.

Yes, the Bar Council agrees with this proposal. The means test should not stand in the way of upholding ECHR obligations or the significant wider public interest.

Question 50: do you agree with our proposal to amend backdating provisions so that providers can continue to have funding for legal help in relation to an inquest backdated to the date of application (whether for standalone legal help or following a successful ECF grant)? Please state yes/no/maybe and provide reasons.

Yes, we believe this would be very helpful indeed and we welcome the time this proposal would help save.

Chapter 6: Crown Court income and capital thresholds, passporting and contributions

Question 57: do you agree with our proposal to remove the upper disposable income threshold for legal aid at the Crown Court? Please state yes/no/maybe and provide reasons.

No. The Ministry of Justice should go further than the review proposes.

Prior to 2009 someone who was charged with a crime and chose to pay privately for their legal defence and was found innocent, could reclaim their legal costs from

“Central Funds” after an assessment that their legal expenditure had been reasonably incurred.

In 2009 the Government introduced the “Costs in Criminal Cases (General) (Amendment) Regulations 2009” which meant that if someone paid privately for their defence and was found not guilty they could only be reimbursed at legal aid rates.

In 2014 the Government made a further change by bringing in an income threshold for eligibility for legal aid, which meant that if someone’s income was above a threshold they were required to pay privately for their defence, and if found not guilty, were only reimbursed at legal aid rates.

The proposal in the current consultation is to remove that threshold so that in the Crown Court legal aid is available.

The Government Press Release that accompanied the publication of the consultation² stated:

“The financial cap on eligibility for Crown Court defendants will also be removed, ending the so-called ‘Innocence Tax’ which has forced some innocent people to pay their own legal costs despite being acquitted.”

That statement is misleading. Under the current proposal the innocence tax will remain in that those who pay privately and are acquitted will only be able to reclaim their fees at legal aid rates. They will still be ‘taxed’ on their innocence.

Civil servants in meetings with the Bar Council have sought to justify this remaining ‘tax’ as being akin to a choice to send your child to private school. That if someone wants to pay more for their education they are welcome to use their own money but the state will not reimburse them. The Bar Council rejects this analogy. If you are charged with a serious crime in which you are facing imprisonment, paying to have the best representation you can is not a lifestyle choice, it is to protect your liberty. The situation pre-2009 permitted reasonable costs to be reimbursed. This allowed for repayment at above legal aid rates, but not payment that was assessed as unreasonable.

The pre-2009 situation should be reinstated.

Sentencing hearings at the Crown Court

² <https://www.gov.uk/government/news/legal-aid-sector-put-on-sustainable-footing-for-years-to-come>

Question 72: Do you agree with our proposal that the sentencing hearings at the Crown Court, following a guilty plea at the magistrates' court, should continue to fall under the magistrates' court means test? Please state yes/no/maybe and provide reasons.

No. The proposal in the Criminal Legal Aid Independent Review should be implemented, namely that legal aid eligibility for Crown Court sentencing hearings follows that for Crown Court appeals.

Implementation

Question 87: do you agree with our proposal to implement the new means tests via a staggered approach, rather than on a single date? Please state yes/no/maybe and provide reasons.

Maybe. The changes should be implemented as soon as possible and reach those in need of legal aid without delay. If a staggered approach ensures this, then we do not oppose the proposal. However, we are concerned that staging changes may delay the full implementation.

Uprating

Question 96: do you agree with our proposal to carry out a review of the means test thresholds within 3–5 years after the implementation of the new means tests? Please state yes/no/maybe and provide reasons.

No. There should be uprating on an annual basis to identify any problematic areas and deal with them early, instead of exposing vulnerable applicants to further damage from potential errors that could be fixed as soon as possible. The thresholds once set should be increased automatically by inflation each year.

Equalities and provider impact

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

We believe that the providers will be further burdened by some of the proposals made, such as the decision not to passport all UC claimants which is going to impose a significant administrative burden on providers. Including the primary residence when assessing capital as well as continuing means testing children are liable to have a similar effect.

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

Maybe. Although the suggested provisions are a step in the right direction, these provisions alone will not improve the sustainability of civil legal aid.

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

Some of the provisions will create unnecessary bureaucracy unless new mechanisms are introduced to tackle the excess burden produced.

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

We are concerned that the overall impact on sustainability may be to reduce criminal firms' income, as low rates are currently subsidised by private work and increases in eligibility will reduce the amount of private work available.

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

We do have concerns around administrative burdens on criminal providers.

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