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Overview

This report comments on proposed changes in the Legal Aid Means Test Review, published in March 2022 for consultation by the Ministry of Justice (MoJ, 2022). This first review of the means test in 13 years proposes a wide range of changes in different parts of the legal aid system, and is consulting on 109 questions. This report does not seek to answer all of these questions, but rather to comment on the extent to which key aspects of the new system improve access to justice, by helping people with legal costs which they could not otherwise reasonably be expected to afford, given their income and other financial resources. It follows up on the findings of two earlier reports (Hirsch, 2018a and Hirsch, 2018b), which showed that the civil and the criminal legal aid systems respectively are denying help with legal costs to people who objectively could not be expected to cover these costs themselves.

Overall, the MoJ proposals create a substantially more generous legal aid system than the present one. Both increases in the income thresholds determining eligibility and efforts to structure the means tests more fairly would improve the ability of people to afford legal costs, at the point where they are required either to contribute to these costs or to cover them entirely. The proposed changes by no means eliminate cases where paying for legal services would leave people short of being able to afford a minimum living standard, but where this remains the case, the magnitude of that shortfall is greatly reduced.

However, the report also comments on several aspects of the proposals that could be improved. Most importantly, it shows that the progress made by these changes risks being very seriously undermined without more frequent and systematic inflation uprating than proposed – particularly in the present period of high inflation. It also points to some structural aspects of the proposals that

1 Background

In order to qualify for legal aid, applicants must undergo a complex means test with thresholds for both gross income and disposable income. Different conditions and thresholds apply for civil and criminal cases. These were last reviewed in 2010; the resulting LASPO regulations were implemented in 2012, using thresholds last updated in 2009. Since that time, prices have risen by 40%, according to the Consumer Prices Index.

The underlying purpose of legal aid is to ensure that people with insufficient means of their own to allow them to access justice, are assisted in doing so. This raises the crucial issue of what is meant by affordability. Someone with substantial savings can afford justice by drawing on these savings. Alternatively, someone with more than enough income to pay for the essentials of life can draw on this income to cover some or all of their legal costs, without this resulting in unacceptable hardship.

But how much income is needed to pay for life's essentials? The Minimum Income Standard (MIS), based on research at Loughborough University into what items members of the public think people

This report starts in Section 2 by commenting on the principles underlying structural changes in the means tests. It focuses on the means testing of disposable income; as made clear by the consultation paper, the testing of gross income is intended largely to exclude from the more detailed disposable income means test cases that would have failed this latter test anyway. Section 2 also comments briefly on the proposed new civil means test on capital.

In Section 3, the report then looks at the consequences of proposed changes in structures and threshold levels for the affordability of legal services for applicants and defendants, in terms of whether their household incomes before and after legal costs are w [(a)20ay

2 Structural changes and principles underpinning them

The MoJ's proposals seek to create a more rational structure for legal aid. This ambition is clearly welcome, and this section comments briefly on some of the proposed features.

2.1 Deductible costs

Before comparing a household's income to benchmarks determining access to legal aid, the system deducts certain unavoidable expenditures from gross income, that are also excluded from expenditure-based cost calculations used to construct disposable income thresholds. These deductions comprise:

- x All taxes on income including National Insurance Contributions.
- x Council tax in the existing system for criminal cases only, but in the new system for both civil and criminal cases. Since council tax is a fixed, unavoidable cost, this change is logical.
- x Childcare payments, in both systems before and after the proposed changes. While these could potentially be seen as discretionary, the close link between childcare services and the ability of parents to work means that they do not normally have the option of improving their disposable income by spending less on childcare. It thus makes sense to deduct them.
- x Rent or mortgage payments, with a cap on the level for single people removed in the new proposals. This also makes sense because even though households have discretion about the quality of housing that they buy or rent, at any one time these costs are fixed, changeable only by moving home.
- x Student loan repayments, newly proposed by the Review, reasonably so as these are not avoidable.
- x Priority debt repayments in the proposed system. These differ from regular loan repayments as (other than for mortgages, which are already covered under housing costs) they principally apply to clearing debt arrears. Thus, they are not simply part of paying over time for household goods and other living costs, but comprise additional and unavoidable costs on top of the regular cost of living.
- x Pension contributions up to 5% of salary, the standard gross employee contribution under auto-enrolled pension schemes. These contributions are not discretionary (p. 10.7D (u) - 8 p u o emmp

living allowances are assigned both to a single defendant and, based on an old equivalisation method (the McClements scale) to each other person in their household; all these are subtracted from gross income, and in this case disposable income refers to what is left over and available to contribute towards legal costs. The Crown Court system requires a contribution of 90% of all this remaining income, even though it does not impose this until it has reached a minimum threshold.

The proposals helpfully redefine disposable income on a common basis across the two systems, as the amount a single applicant/defendant has left after subtracting allowances for others (as in the current civil system), basing these allowances on expenditure benchmarks (as in the current criminal system). It sets a lower disposable income limit, equivalent to a single person's cost of living allowance, with contributory requirements starting from this level, rather than from zero as in 2.2 (f) 2.9 (6 (v))-5.6 (i)

This dramatic change in relative weightings principally reflects the fact that by mirroring the benefits system, the present civil system clearly over-weights support to families with children, relative to need, but the proposed system does not. This is a political choice. Benefits seek to prioritise tackling child poverty more than adult poverty. The legal aid system seeks to give equal access to justice to households on limited means, regardless of their composition. However, the inaccuracy of the equivalence scale used, according to the evidence cited above, suggests that the proposed system would go further than justified away from the former system's favouring of children, and **underweight** for children, relative to their needs. It is not the intention of this report to propose an alternative system of equivalisation: no system is perfect in covering actual needs. Rather the report notes the most serious consequence of this inaccuracy and proposes how to mitigate it.

Relative disadvantages of large households in contribution bands and an upper limit

The weightings given to different households in the disposable income means test are applied to the lower income threshold below which non-contributory legal aid is available. Both the proposed civil and criminal systems also have bands above this limit at which progressively higher percentages of income are required as contributions, and the civil means test has an upper limit above which no legal aid is available. The upper limit is in principle benchmarked on the average spending of the median UK household. While this principle is used to determine the applicant/defendant's disposable income limit, based on what a single person needs to spend to match the equivalised median, deductions for additional household members remain benchmarked to the lower limit, based on spending by the bottom half of households. As a result, the addition of cost of living allowances for additional household members raises the band thresholds and the upper limit by a lower percentage than it raises the lower limit. The result, illustrated using an example in Box 1, is that the upper limit and band boundaries represent a lower proportion of total household need the larger the household. This would be avoided if the width of each payment band were increased for additional household members, in proportion to equivalisation, which would also determine an increased upper limit for larger households in the civil system. While improving equity, such a change would add considerably to the administrative complexity of the means test. Therefore, this report does not recommend such a change. However, the report's recommended increase in allowances to lone parents would help in a simpler way to reduce inequities in the system to which the proposed application of the upper threshold contributes.

Box 1 How equivalisation in the proposed civil legal aid system produces different results at the lower and upper limits – an example

In the proposed civil system, a working single person starts contributing to legal aid (subject to a £20 minimum contribution) with disposable income above £622. An applicant living with a partner gets

In considering this issue, it is worth noting in what circumstances it would be possible for an applicant to pass the gross income test if housing-related benefits were disregarded, but fail it if these were taken into account. Appendix 1 makes these calculations, which show it could apply only to those paying very high rents as a consequence of living in a high-rent area. In most cases this would apply only to those living in London, although for a lone parent this situaen f f Lsia (d)-0.7 (1(i)7.6 (t)-6 (i)7. (t

off UC recipients would fail the civil test, whose income thresholds are lower. It therefore proposes to passport all defendants on UC, but only civil applicants receiving UC with household earnings below £500 a month.

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that cannot be directly met from their own resources; but rather, civil aid is granted selectively to target those who both

3 Outcomes: how well does the proposed system improve affordable access to legal services for applicants and defendants in low income families?

This section makes comparisons between MIS thresholds and the incomes at which people are charged for or excluded from legal aid, in the proposed system compared to the existing system. The focus here is on the civil and Crown Court disposable income means tests. The case of the magistrates' court means test, another variant of the criminal system, is discussed briefly in Section 3.4.

3.1 The disposable income threshold for non-contributory legal aid

Previous reports (Hirsch, 2018a and Hirsch 2018b) found that some applicants in the civil system had to contribute to their legal costs even when they had around half or less of the available income required, and up to 20% below for defendants in the criminal system. Due to the failure to keep thresholds in line with inflation, those shortfalls have been growing.

Table 1 makes these comparisons for both the civil and the criminal mPableartfalls have sakh

Table 1 MIS compared to highest available income at which someone can be eligible for non-contributory legal aid

Definitive box 2

son								
	Spending		Civil system				Crown court system	
								% of MIS
								114%
								112%

c) Lone parent two children									
	Spending requirements (MIS)	Civil rates				Crown court rates			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£1,642	£856	52%	£1,160	71%	£1,285	78%	1497	91%
2020	£1,649	£863	52%	£1,160	70%	£1,285	78%	1497	91%
2021	£1,690	£862	51%	£1,160	69%	£1,285	76%	1497	89%

Table 1 shows that, in the base year of 2019, the proposed system brings substantial improvements in available incomes as a percentage of MIS at the maximum income for which non-contributory legal aid is available. For a single person in the civil system, this rises from less than a third of

Figure 2 Shortfalls in available income compared to the Minimum Income Standard at civil non-contributory threshold, %
 (based on proposed changes implemented in 2023)

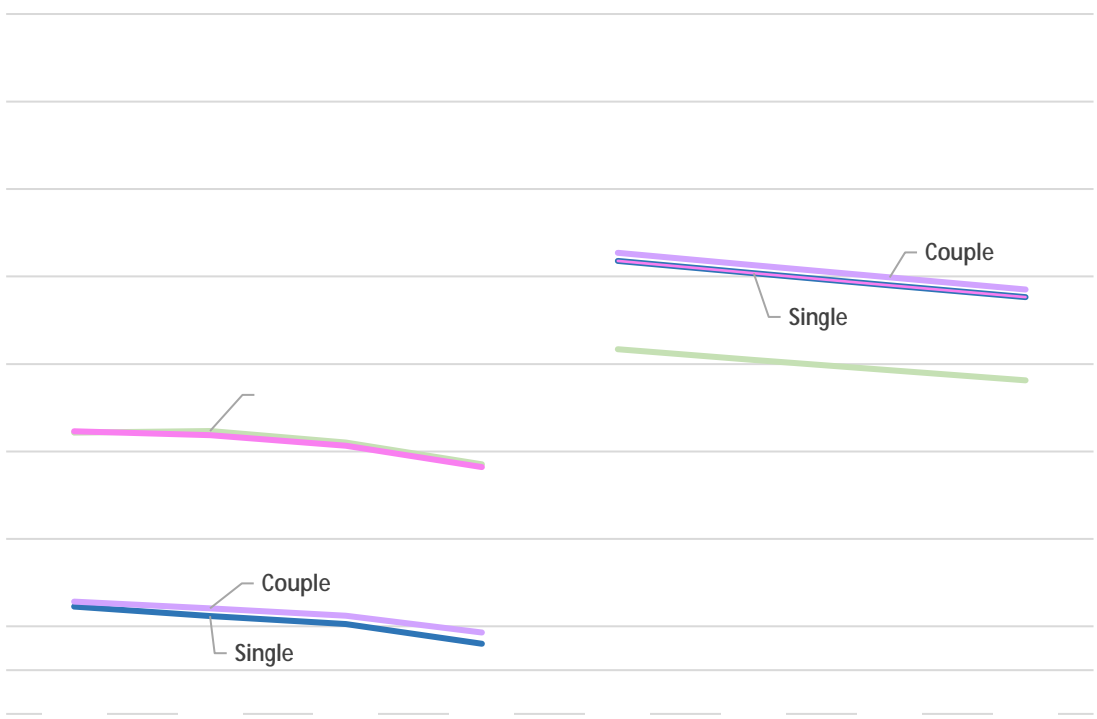


Figure 3 Shortfalls in available income compared to the Minimum Income Standard at Crown Court non-contributory threshold, %
 (based on change to new system in 2023)

Figure 2 shows the extent to which households of different types would have incomes closer to, although still below, MIS at the point where they become ineligible for non-contributory legal aid, in the proposed system from 2023 compared to under the existing system before that year. In the current system, where allowances are based on benefit entitlements, households without children have thresholds much lower relative to their needs than those with children, reflecting this feature of the benefits system. In the proposed new system, needs are reflected more accurately in the thresholds, except that lone parents are required to contribute to legal aid costs at incomes substantially lower relative to MIS than other groups. As discussed above, this is because the equivalence scale used under the current system underestimates their needs relative to other families. As a result, the disposable income of lone parents is only 0.7 (3) - 4.3.81

1) demonstrates how the objectives of the proposed system will be undermined in the absence of annual inflation upratings.

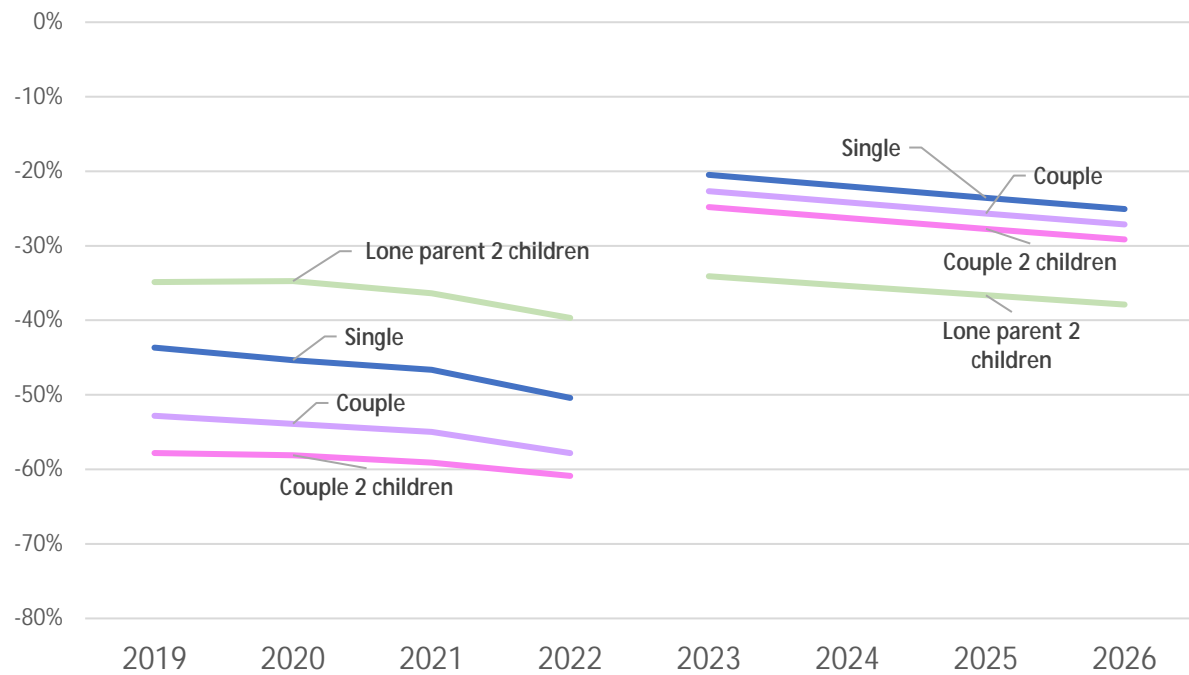
3.2 Contributions and the upper threshold for civil court applicants

In both the civil and Crown Court means tests proposed, eligible families above the disposable income threshold will pay contributions on additional income only,

Table 2 MIS compared to available income at the upper disposable income threshold, civil

c) Lone parent two children Spending									
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Figure 5 Shortfalls in available income compared to the Minimum Income Standard at civil upper disposable income limit, net of max contributions (based on change to new system in 2023)



3.3 Contributions for Crown Court defendants

With single defendants and members of couples qualifying for non-contributory legal aid at close to the MIS level, and those with children on low incomes likely to qualify through Universal Credit passporting, the risk of required contributions leaving defendants with insufficient means is much reduced. Figure 6 compares the relationship between income and MIS under the existing and proposed systems for single Crown Court defendants paying contributions. It does so by comparing the income available after housing costs before any contributions (shown on the horizontal axis, and in the top line on the graph) with what remains available after contributions in each of the two systems (the other two lines); the equivalent MIS spending requirement is shown as a horizontal line for reference.

Figure 6 Single

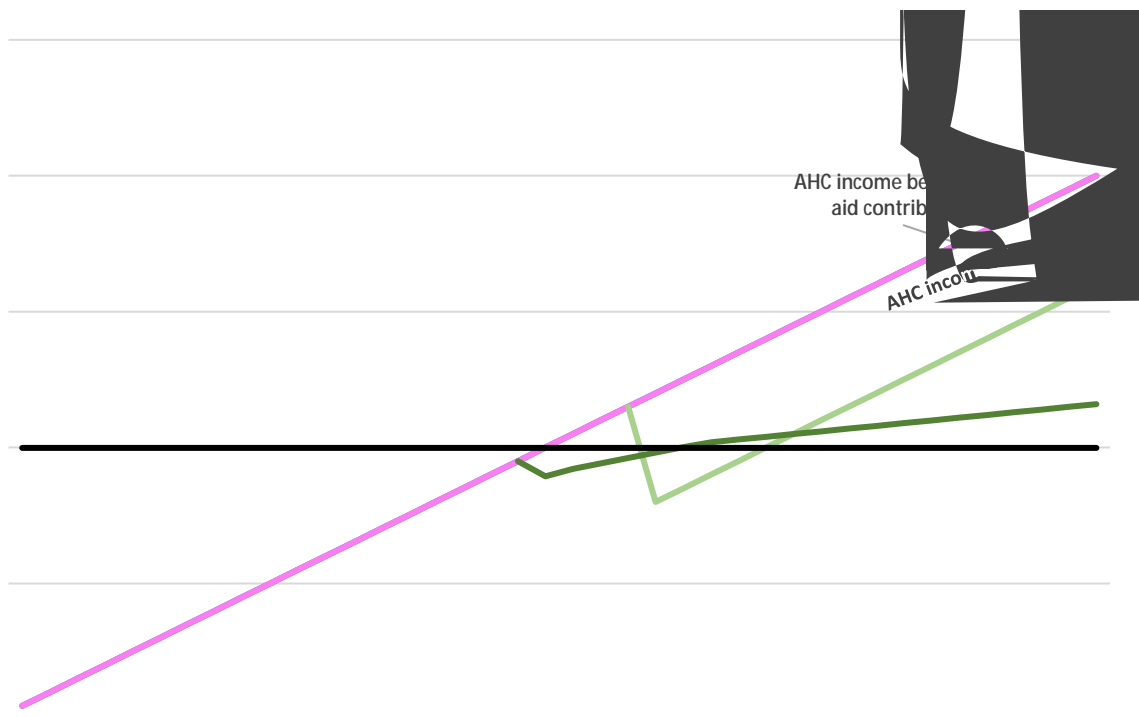
difference is that this dip is much smaller (£100) in the proposed system than in the existing system (£283).

3.4 The Magistrates' Court disposable income test – additional features and comparison with Crown Court test

For defendants in magistrates' courts, the proposed disposable income test has the same thresholds as in the Crown Court, but there are two main differences in the means test. The first is that there is no contributory entitlement, and anyone above the disposable income threshold determining non-contributory entitlement gets no legal aid at all. The second is that to compensate for this, an additional disposable income allowance of £400 is added, so that defendants do not rise above the threshold until they can pay this amount in private fees and still have enough left to cover the cost of living allowance with their remaining income.

Figure 7 compares the results of the proposals for legal aid for Crown Court and magistrates' court defendants in the same terms as Figure 6 (zooming in on a narrower range of income around the median where differences are most relevant). This graph assumes that costs in the magistrates' court are £400 a month; this is a relatively high level, but it is the level assumed in the proposals in order to protect defendants facing high private costs.

Figure 7 Single adult income before and after contribution to legal aid, Crown Court and magistrates court defendants, proposed, 2023



4 Conclusion and recommendations

(which would still be imperfect, and not reflect current government measurement methods). Another option would be to apply equalisation to all thresholds in the system including the upper limit of each contribution band and the upper limit for civil legal aid. This would improve the equity of the system, but would make it more complex, and still leave lone parents worse off at all of the thresholds than other groups. A much simpler, and effective, adjustment would be to give an additional allowance to lone parents, recognising the additional spending pressures that they face, in having to cover fixed costs

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Recommendations

In light of these considerations, this report makes two main recommendations designed to ensure that the very great improvements made by the proposals for the legal aid means test are preserved and followed through, while avoiding the largest differences in outcomes for different household types.

Recommendation 1: Uprate annually all thresholds and allowances related to disposable income by CPI, and uprate gross income thresholds by CPIH. On implementation, either backdate these upratings to 2019/20, from when the proposed thresholds have been derived, or use more recent expenditure data uprated to the implementation year.

Recommendation 2: For applicants or defendants living in lone parent households, assign a supplementary cost of living allowance equal to half the allowance that is allocated to an additional adult in the household.

In addition, a subsidiary recommendation is:

Recommendation 3: When comparing income to the gross income

Appendix 1

Housing support and the gross income test

The following calculations have been made to consider under what conditions the inclusion of housing-related support could cause a civil applicant to fail the gross income test. The Universal Credit system is used for these calculations given that for working age claimants, the old Housing Benefit system will be phased out by 2024.

For a single person, the gross earnings limit is £34,950.

Someone with these gross earnings would pay £7,441 in income tax and national insurance contributions, so have a post-tax income of £27,509. Since the income taper is 55% of post-tax income

Table A1 Maximum monthly rent supported by Universal Credit, by housing size and area, and eligibility for Universal Credit with earnings at gross income limit

a) Rental areas where a single adult may be eligible for UC at gross income limit

In the following areas, the Local Housing Allowance* (LHA) for one-bedroom property is above £926. Someone with earnings at the gross income threshold would have to have rent above this level to be eligible for UC

Central London	£1,284	Inner South East London	£1,150
Inner East London	£1,284	Outer North London	£1,070
Inner North London	£1,284	Outer East London	£1,050
Inner South West London	£1,284	Outer South West London	£1,050
Inner West London	£1,208	North West London	£1,000

In the remaining 142 areas (including four in Outer London) LHA for one-bedroom property is below £926

*The Local Housing Allowance is the highest amount of rent that can be supported through Universal Credit in a given local housing market area

b) Rental areas where a couple with two children, each needing their own bedroom, may be eligible for UC at gross limit

In the following areas, LHA for two-bedroom property is above £1,379. A family with earnings

c) Additional rental areas where a lone parent with two children, each needing their own bedroom, may be eligible for UC at gross limit
As with a couple with children, the three

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