

# **More affordable justice: Proposals to reform the legal aid means tests and implications for living standards**

**Donald Hirsch**

**Centre for Research in Social Policy  
Loughborough University**

**May 2022**



**Loughborough  
University**

.....  
Centre for Research  
in Social Policy  
.....

© Loughborough University

Published by the  
Centre for Research in Social Policy  
Loughborough University  
Leicestershire  
LE11 3TU

ISBN 978 0946831 58 6

All rights reserved. Reproduction of this report by photocopying or electronic means for non-commercial purposes is permitted. Otherwise, no part of this report may be reproduced, adapted, stored in a retrieval system or transmitted by any means, electronic, mechanical, photocopying, or otherwise without the prior written permission of Loughborough University.

# Contents

<b>Overview</b>	<b>1</b>
<b>1 Background</b>	<b>2</b>
<b>2 Structural changes and principles underpinning them</b>	<b>4</b>
<b>2.1 Deductable costs</b>	<b>4</b>
<b>2.2 Cost of living allowances and equivalisation</b>	<b>4</b>
<b>2.4 The basis for cost of living allowances and for disposable income thresholds</b>	<b>7</b>
<b>2.5 Cost of living allowances and the rising cost of living</b>	<b>8</b>
<b>2.6 Passporting</b>	<b>8</b>
<b>2.7 Capital test</b>	<b>10</b>
<b>3 Outcomes: how well does the proposed system improve affordable access to legal services for applicants and defendants in low income families?</b>	<b>12</b>
<b>3.1 The disposable income threshold for non-contributory legal aid</b>	<b>12</b>
<b>3.2 Contributions and the upper threshold for civil court applicants</b>	<b>18</b>
<b>3.3 Contributions for Crown Court defendants</b>	<b>22</b>
<b>3.4 The Magistrates' Court disposable income test – additional features and comparison with Crown Court test</b>	<b>24</b>
<b>4 Conclusion and recommendations</b>	<b>26</b>
<b>5 References</b>	<b>29</b>

## 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 could be reformed to help achieve the MoJ’s objective of making them more equitable. In particular, lone parents are substantially disadvantaged by the proposed structure, and this could especially undermine their ability to achieve justice in the civil system, with troubling consequences for family cases where they rely on the courts for protection. A simple adjustment in the structures proposed could remedy this inequity.

The report makes two main recommendations:

- 1) That all the thresholds and allowances used in the legal aid means test be updated annually in line the Consumer Prices Index (CPI) – and with the CPIH variant including housing for gross income thresholds. Such upratings should be backdated to take account of inflation since the collection of data on expenditure and income on which thresholds are based.
- 2) That lone parents be given a supplementary cost of living allowance equal to half the amount that would be assigned to a partner or additional adult.

A further, subsidiary recommendation is that Housing Benefit income, and the housing element of Universal Credit, should not be included when applying the gross income limit, because doing so would exclude some civil applicants in high-rent areas with low disposable income.

# 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 should be able to afford as a minimum, has become a widely accepted benchmark in the UK. In 2017, this benchmark was the basis for the Supreme Court's decision that the means-tested system for charging fees for accessing employment tribunals was denying employees access to justice (*R (UNISON) v Lord Chancellor* [2017]).

In 2018, the Law Society published a report by this author which tested the civil legal aid means test against the MIS criterion (Hirsch, 2018a). This found that the income thresholds for civil legal aid were well below the MIS level. The maximum disposable income at which legal aid was available was typically 10% to 30% below MIS, so people without the minimum required for an acceptable living standard even before legal costs would have to become worse off still in order to pay fully for legal services. Moreover, the lower disposable income threshold was in some cases over 50% below the MIS level, meaning that some people would have to make a contribution to any legal costs even though they had less than half what they needed to live on.

A follow-up report on the criminal system (Hirsch, 2018b) found that defendants were also having to start paying for legal aid with incomes below the MIS level, by up to 20%. Although this was a more modest shortfall than for civil applicants, defendants in magistrates' courts get no legal aid if their incomes are above this minimum threshold, while Crown Court defendants just above the threshold were having to contribute amounts that lowered their remaining income to 40-50% below what they need. While the disposable income limit for access to contributory legal aid in the Crown Court is high, allowing people with well above average incomes still to receive support if they have very high legal costs, even in these cases the burden of their contribution can leave them with less than they need according to MIS.

This unfavourable situation has deteriorated further, due to price increases which by April 2022 had totalled 14% since these calculations were made in 2018, according to the Consumer Prices Index.

The proposals in the current Review both increase the allowances and restructure the system. They go some way towards creating consistency between the civil and criminal means tests. They seek to make the system fairer, particularly in setting the relative allowances allocated to different household members, as well as introducing additional allowances for pension contributions, student loans and (in the civil system, to align it with the criminal system) council tax.

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 adequate to meet their minimum needs. These main calculations for the report again focus on the disposable income tests, following up on the previous reports' findings that under the present system these tests are requiring people to make payments that they cannot afford in order to access legal services.

## **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:

- All taxes on income including National Insurance Contributions.
- 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.
- 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.
- 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.
- Student loan repayments, newly proposed by the Review, reasonably so as these are not avoidable.
- 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.
- Pension contributions up to 5% of salary, the standard gross employee contribution under auto-enrolled pension schemes. These are ultimately voluntary expenses which employees could opt out of, but this would damage their long-term prospects of having adequate living standards in retirement. As part of the MIS research, members of the public have recently been consulted about whether income requirements should include an amount to cover auto-enrolled pensions. They unanimously agreed that contributing at standard rates to such a scheme should be the default assumption, since auto-enrolment suggests that the Government expects that people will need to make that provision for their retirement (Davis et al., 2021).

Thus, the starting point for income assessment, based on certain unavoidable expenses being deducted from gross income to define disposable income, now creates a sound and improved starting point for the income side of the legal aid means test.

### **2.2 Cost of living allowances and equalisation**

In the existing system, the criminal and civil means tests both have income thresholds that take account of the composition of the household, but they do so in different ways. Both systems start by considering household income, with the distinction between gross and disposable income outlined above. In addition, the civil system subtracts allowances for each household member other than the applicant, based on an adult or a child's entitlement in the benefit system. The resulting disposable income is compared to thresholds set for a single person. In the criminal system, cost of

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 the present Crown Court system. The proposed basis for the cost of living allowances follows the criminal system's practice of starting with a living cost benchmark for a single person (see below), and adding proportionate allowances for other household members based on an equivalence scale. The proposals switch to using the OECD scale, which replaced the McClements scale in official household income measurement in 2006.

These changes create a more logical and consistent system for income assessment. However, looking closely at the consequences of the new equivalisation method, as applied in the Review, reveals two significant impacts on the equity of the system across household types.

### ***Weighting for needs of household members***

Equivalence scales are used in poverty measurement to provide a means of adjusting incomes for household composition when making comparisons of the income distribution, particularly across time and across countries. The OECD scale, proposed for use in the new legal aid system, provides an internationally consistent basis for standardising income in this way. It is not based on any clear-cut assessment of the relative needs of households with different compositions, although its predecessor in the UK, the McClements Scale, drew on some evidence from economic modelling conducted in the 1970s. Recent analysis, drawing on empirical evidence from MIS studies in different countries and also supported by studies using other methods, showed that the OECD scale weightings tend to underestimate economies of scale, and hence the relative needs of singles compared to couples, and to underestimate the cost of children compared to adults, with the latter effect the most pronounced (Hirsch et al., 2021). While it is difficult to come up with any scale that is perfect, the most pronounced effect of these inaccuracies is on lone parent families, since both the diseconomy of living as a single adult and the substantial cost of children are underestimated relative to other groups. The high extra cost of being a lone parent is very tangible in the MIS studies, linked to certain fixed additional costs of having children – such as the need to own a car – having to be borne just by one adult rather than two, so that the relative impact of the addition of a child to a single adult household is especially high.

The change from the McClements scale to the OECD scale in the criminal system is unlikely to have profound consequences, since the scales are broadly similar. However, for the civil system the change in relative weightings from one based on relative benefit rates to one based on the OECD equivalence scale creates quite a dramatic change. Based on relative benefit rates, the current allowance for an applicant's partner is £191.41, which is 61% of the £316 lower income threshold allowed for a single person. In the proposed system, the allowance for an additional adult will rise to 72%, in line with equivalence scales. In contrast, for a child, the present system allocates almost as much to a child as to a single adult: £307.64, or 97% of the £316 threshold, but in the new system will allocate only 34% of a single's cost of living allowance to each child under 14.



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 larger households in contribution bands and at 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 an additional allowance of £448 when means-testing the couple's combined income. This adds 72% of the single allowance according to equivalisation, based on the assumption that it costs this much more to live as a couple.

However, this ratio works out differently when determining the upper threshold above which no legal aid is available. For a single, this upper threshold is just over 50% higher than the lower threshold: £946 compared to £622. Yet the allowance for additional members of the household stays the same. This means that the combined disposable income of the couple above which legal aid stops being payable is just £448/£946 or 47% above that of a single. Thus, if it costs a couple 72% more to reach a given living standard, they are worse off than the single at the point where they become ineligible for legal aid, but equally well off at the lower threshold where they become liable for contributions. This inconsistency has a greater effect the larger the family, since each member brings in an allowance which is calculated as a proportion of the lower threshold, but is applied also to income when comparing it to the upper threshold.

**2.4 The basis for cost of living allowances and for disposable income thresholds**

The principle used across the proposed means tests is to base cost of living allowances on survey evidence of actual expenditures on essentials, to reflect what people need to spend to conform with contemporary norms. For the disposable income thresholds determining non-contributory entitlement, the basis is expenditures excluding leisure and a few other items. For civil legal aid, the benchmark is average expenditure on non-excluded items of the lower half of the population by income, and for criminal the median for all households. The upper civil threshold also takes the median for all households, and in addition, includes leisure spending.

Actual household expenditure for a given section of the population does not directly measure need, and therefore is a different type of benchmark from the Minimum Income Standard research which considers what people require, regardless of what they actually spend. However, it is possible to compare these benchmarks to observe the extent to which they show a similar standard of living. Previous analysis of the cost of living allowance for the existing criminal system found it to be woefully inadequate according to MIS, typically amounting to only half what was needed as a minimum by a given household type, and well below the poverty line (Hirsch, 2018).

In contrast, even the lowest of the proposed cost of living allowances, the civil lower limit, creates a benchmark much closer to MIS. The proposed allowance is £622 (a steep increase from £316), but a single working person with net income after rent/mortgage and council tax will get full non-contributory legal aid up to monthly income of £738, taking account of the Work Allowance and the effect of the £20 minimum payment. With income above that level, charges will be imposed above a threshold of £688. As a comparison, in 2019/20, the basis period for household expenditures used to calculate the cost of living allowance, the equivalent MIS benchmark was £886 a month, or £702 excluding expenditure categories classified as leisure goods and services. The MIS research is clear that social participation is considered by members of the public to be part of what is essential, so the proposed benchmark cannot be said to meet the minimum so defined. On the other hand, in

referencing the threshold on spending on non-leisure items, the proposals recognise that contributions may be required when leisure spending is constrained. This is a policy judgement about how generous to make the system. In its own terms, the calculation for 2019/20 corresponds closely with the non-leisure needs identified by MIS: contributions would be based on a threshold of £688, very close to the non-leisure MIS budget of £702. In terms of adequacy, this is a vast improvement on the previous system. More extensive comparisons in adequacy for different groups and over time are presented in Section 3.

## **2.5 Cost of living allowances and the rising cost of living**

The proposals establish benchmarks that come far closer to enabling people to meet their living costs and still have access to justice than the previous system, not least because it had become far less adequate over time due to the failure to uprate thresholds with rising prices. It therefore seems a glaring omission in the present proposals that there is not provision for continuous uprating, just at a time when high rates of inflation are returning. This is all the more so because of the explicit labelling of ‘cost of living allowances’ and their anchoring in real data about what people spend. As costs, incomes and expenditures rise over time, the thresholds will quickly become out of date. Yet the proposals as set out make it likely that thresholds, based on evidence from 2019/20, will be introduced four years later in financial year 2023/24, and are unlikely to be uprated until at least 2026/27, based on the decision to review them every three to five years.

The implication is that thresholds will be seven years out of date before they are changed again. Using the Bank of England’s inflation forecasts (which optimistically project inflation as returning to the 2% target by 2024), prices will be 20% higher in 2026 than in 2019. Hence a severe deterioration in the adequacy of incomes of people excluded from legal aid is built into the system as presently proposed. As an example of the consequences of this, detailed below, a single applicant would get non-contributory legal aid with income sufficient to cover all but 17% of a MIS budget (associated with the exclusion of leisure items) based on 2019 calculations, but by 2026, they would need to fall 32% short of MIS to be eligible. The obvious remedy to this is to uprate all thresholds and allowances annually in line with inflation, starting with a retrospective uprating from 2019/20 to the year in which the proposals are implemented.

## **2.5 Housing Benefit**

A new feature of the proposed system concerns the treatment of Housing Benefit as income. In the present system, it is disregarded for gross income, and then disposable income takes account of rental costs net of Housing Benefit received. In the proposed system, Housing Benefit is counted towards gross income, and the full rent is deducted when calculating disposable income. This produces the same result for disposable income, but for the first time takes Housing Benefit into account in gross income on the basis that it is being compared to a benchmark related to median gross incomes, out of which everyone needs to cover the housing costs to which housing benefit is contributing. The inference is that the whole of Universal Credit, including its housing element, would also be counted as income.

This change would have the effect of excluding some applicants with high housing costs on the basis of income allocated to help cover those costs. It seems perverse to regard them as being in the upper half of the income distribution, based on earnings plus housing-related benefits, when these benefits have been paid only because the state regards them as having too little income to cover their housing costs in full.

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 situation could arise more widely in southern England. In such a situation, it is misleading to argue on the basis of income including housing-related benefits that they are well-off relative to a median household. Median households in these affluent areas have higher gross incomes than average, and taking account of high housing costs, the applicants in question are not very well off. Another way of looking at this is that the higher housing costs being paid by people in these areas are not giving them a better living standard than people paying less elsewhere, because the additional cost is related to price, not quality of housing.

For the above reasons, it seems appropriate to continue to disregard housing benefit or the housing element in Universal Credit in the gross income test. This is in line with disregarding those disability benefits that are also provided to cover additional costs. It is true that this is not a perfect analogy, because the gross income threshold is based on a calculation which includes income required to cover normal housing costs, and a more precise (but complicated) system would only disregard the portion of housing costs associated with living in an area with above-average housing costs. It is also true that someone with a higher-than-average mortgage resulting from living in such an area, whose gross income is the same as the earnings plus benefits of a tenant who is helped with the cost of renting, would not be treated in the same way. However, this simply illustrates how a gross income threshold is by its nature a very rough and ready mechanism for distinguishing who is well-off and who is in need, with the disposable income threshold a much fairer way of doing so. The main principle argued for here is that where relatively high costs directly trigger additional income, this should not be used to disqualify applicants through the gross income test.

On a technical note, the suggestion here that the gross income test should disregard 'the housing element in Universal Credit' should be taken to mean that if a Universal Credit award (after tapering) is lower than the housing element used in its calculation, the entire award should be disregarded, and if the award is greater than the housing element, only the award minus the housing element should be counted as income.

## **2.6    Passporting**

In the social security system, entitlement to some kinds of benefits can trigger other entitlements, such as the exemption from certain healthcare charges for people awarded various types of out-of-work benefits. The principal purpose of this is to recognise that the limited means of people receiving such benefits makes it hard for them to afford such charges. They represent an additional 'benefit in kind', added to the value of the cash benefits themselves.

The purpose of passporting legal aid entitlements, as justified in the Review, is not to provide additional entitlements for people on low incomes, but rather to 'streamline' the system by avoiding having to make an assessment for people almost certain to qualify for non-contributory legal aid anyway. In this sense, it is primarily a technical exercise to determine where this is the case.

A particular issue in designing the new system has been how to passport those receiving Universal Credit (UC), given that it is used to support both non-working households and those who are working on low incomes, for whom disposable income, including the UC, can be much higher than for someone without any earnings. The MoJ's assessment is that most UC recipients will pass the means test for non-contributory legal aid in the criminal system, but significant numbers of better-

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.

Based on the assessment of who is likely to pass the disposable income test, this policy is coherent, and at least gives peace of mind to defendants on UC that they will not have to contribute to legal costs. This reassurance is particularly significant for families with children, since, as shown later in this paper, the income at which they could otherwise fail the means test is less adequate relative to their needs than for households without children. The great majority of families with children on below-median incomes are eligible for tax credits or UC.

A different justification for passporting UC cases would have been that it seems inconsistent that a family deemed in need of income assistance from the state (based on the UC means test) should be required to relinquish some of that assistance to pay for legal costs. This would have implied that any recipient of UC should be awarded full non-contributory legal aid, including civil applicants. The Review has rejected such an approach on the grounds of equity between two households with the same disposable income, one of which includes a UC element and another not. This could be the case for example when comparing a single adult and a family, since as discussed above, families with children receive more favourable financial support relative to their equivalised income, and they are therefore the main beneficiaries of in-work UC. Thus, the decision not to passport all UC cases is another way (apart from equivalisation itself) that the proposed legal aid means test is not giving special treatment to families with children in the way the benefit system does. Having taken this decision, it is important, especially in the civil system, to consider whether equal treatment relative to need of different household types is actually being achieved. Chapter 3 below shows that in fact families with children, especially lone parents, are being relatively *disadvantaged* by the proposals.

## 2.7 Capital test

Applicants for civil legal aid are ineligible if they have savings or capital assets above a given threshold, on the basis that they are in a position to pay for legal services themselves. Given the principle of targeting legal aid to those least able to access legal services with their own financial resources, this is a logical restriction. The Review proposes realigning the upper capital threshold above which legal aid is unavailable with median financial wealth (£11,000), and to realign the amount disregarded for housing equity to the median housing equity level (£185,000).

There is no reason to think that someone with over £11,000 of accessible financial assets would be unable to achieve an adequate living standard, regardless of income. This is well above what is needed to maintain a minimum household budget and its 'lumpy' purchases, with some months requiring higher expenditure because of the need to buy larger items. Thus it seems reasonable to assume that requiring people with additional financial assets to allocate them towards legal costs and/or living costs until they reach this threshold will not in itself cause hardship or prevent access to justice. On the other hand, as the Review acknowledges, there will be times when in practice someone with housing equity above £185,000 and few or no accessible savings would indeed be unable to pay for legal services. The Review makes the argument that nevertheless, in a system whose resources need to be prioritised, it is inappropriate to help those with above average wealth, even where this is locked up in housing. It is worth noting that this decision constrains the extent to which the legal aid system gives access to justice for those who are not in a position to pay for it themselves. It is also inconsistent with some other areas of public policy, including the social care means test's disregarding of the entire value of a home that one lives in, and also the exclusion of such assets from benefits means tests. The Review's argument here implies that civil legal aid is not like social care services or the income safety net, which should be available to *anyone* with a need

that cannot be directly met from their own resources; but rather, civil aid is granted selectively to target those who both cannot afford legal services and have below-average income and wealth. It is significant that for criminal legal aid, where defendants have no discretion about whether to be involved in a legal process, there is no direct capital limit, and adequate access to legal services is treated more as a right. It could also be argued that some civil applicants have no real choice about use of the legal system, for example in domestic abuse cases where the alternative to seeking a protective injunction is to face physical danger. As the criminal system illustrates, it would be possible to seek to make civil legal aid more generally available to anyone unable to pay directly for legal services, and the decision to make it more specifically targeted to households who are below average in terms of both income and wealth is a political choice.

### **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 means tests, in both the existing and proposed systems, for years between 2019 and 2026. The starting point of 2019 is the year from which the new system's expenditure benchmarks have been derived. The estimates to 2026 assume that minimum costs rise in line with the Bank of England's inflation projections, made in February 2022. The income thresholds shown in this table are the highest monthly 'available incomes' at which non-contributory legal aid is available. Box 2 explains what is meant by available income.

#### **Box 2 – comparisons of 'available income' with the MIS threshold – definitions.**

The tables and graphs in this report make comparisons between the monthly budgets required to meet the Minimum Income Standard, not including rent, childcare and council tax, and the amount available for these purposes for households with income at each means-testing threshold. To distinguish these amounts from 'disposable income', which has various definitions in different parts of the existing and proposed means-tests, this standardised amount available to cover household costs is labelled as 'available income' (as it was in the previous reports comparing the legal aid system to MIS). For example, in the proposed system, the highest available income that a household could have and still be eligible for non-contributory legal aid (Table 1), comprises monthly amounts as follows:

- Cost of living allowances for all household members
- A Work Allowance for each adult (on the assumption that all adults in the household work)
- An additional £50 for civil and £250 for Crown Court cases to reflect the fact that contributions below the minimum contribution amounts of £20 and £100 respectively are not imposed, and that the starting contribution rate is 40% of income above the lower threshold. For example, someone with income just less than £250 above the Crown Court threshold would have calculated contributions just under £100, which would not be imposed because £100 is the minimum contribution.

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

*Definitions - see box 2*

<b>a) Single person</b>									
	Spending requirements (MIS)	Civil system				Crown court system			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£886	£286	32%	£738	83%	£801	90%	£1,013	114%
2020	£908	£283	31%	£738	81%	£801	88%	£1,013	112%
2021	£924	£280	30%	£738	80%	£801	87%	£1,013	110%
2022	£989	£277	28%	£738	75%	£801	81%	£1,013	102%
2023	£1,028	£274	27%	£738	72%	£801	78%	£1,013	99%
2024	£1,049	£271	26%	£738	70%	£801	76%	£1,013	97%
2025	£1,070	£268	25%	£738	69%	£801	75%	£1,013	95%
2026	£1,091	£265	24%	£738	68%	£801	73%	£1,013	93%
<b>b) Couple no children</b>									
	Spending requirements (MIS)	Civil system				Crown court system			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£1,485	£488	33%	£1,252	84%	£1,330	90%	£1,592	107%
2020	£1,517	£486	32%	£1,252	83%	£1,330	88%	£1,592	105%
2021	£1,547	£483	31%	£1,252	81%	£1,330	86%	£1,592	103%
2022	£1,656	£485	29%	£1,252	76%	£1,330	80%	£1,592	96%
2023	£1,722	£489	28%	£1,252	73%	£1,330	77%	£1,592	92%
2024	£1,756	£489	28%	£1,252	71%	£1,330	76%	£1,592	91%
2025	£1,792	£489	27%	£1,252	70%	£1,330	74%	£1,592	89%
2026	£1,827	£488	27%	£1,252	69%	£1,330	73%	£1,592	87%

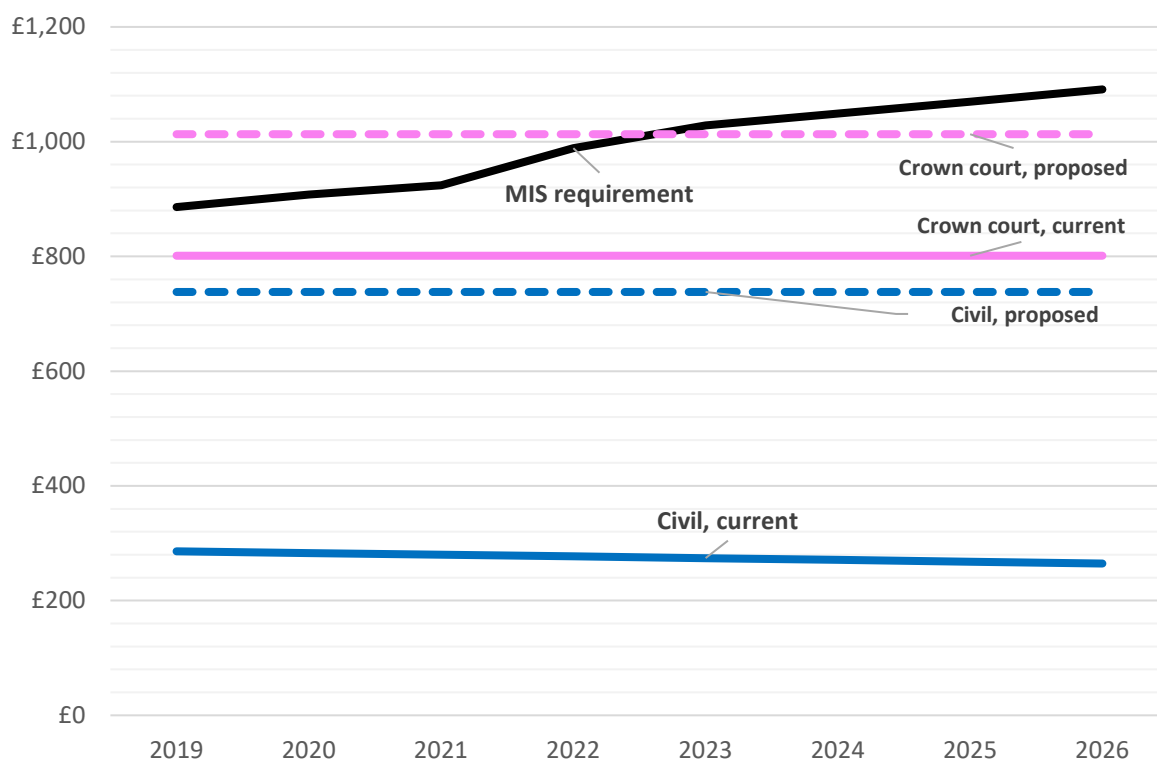


c) Lone parent two children									
	Spending requirements (MIS)	Civil rates				Crown court rates			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£1,642	£856	52%	£1,160	71%	£1,285	78%	1497	91%
2020	£1,649	£863	52%	£1,160	70%	£1,285	78%	1497	91%
2021	£1,690	£862	51%	£1,160	69%	£1,285	76%	1497	89%
2022	£1,808	£878	49%	£1,160	64%	£1,285	71%	1497	83%
2023	£1,881	£899	48%	£1,160	62%	£1,285	68%	1497	80%
2024	£1,918	£908	47%	£1,160	60%	£1,285	67%	1497	78%
2025	£1,957	£917	47%	£1,160	59%	£1,285	66%	1497	77%
2026	£1,996	£927	46%	£1,160	58%	£1,285	64%	1497	75%
d) Couple two children									
	Spending requirements (MIS)	Civil rates				Crown court rates			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£2,015	£1,054	52%	£1,674	83%	£1,814	90%	£2,076	103%
2020	£2,049	£1,062	52%	£1,674	82%	£1,814	89%	£2,076	101%
2021	£2,096	£1,061	51%	£1,674	80%	£1,814	87%	£2,076	99%
2022	£2,242	£1,081	48%	£1,674	75%	£1,814	81%	£2,076	93%
2023	£2,332	£1,109	48%	£1,674	72%	£1,814	78%	£2,076	89%
2024	£2,379	£1,121	47%	£1,674	70%	£1,814	76%	£2,076	87%
2025	£2,426	£1,133	47%	£1,674	69%	£1,814	75%	£2,076	86%
2026	£2,475	£1,145	46%	£1,674	68%	£1,814	73%	£2,076	84%

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 the MIS level to just 17% short of it; as referred to above, this approximately covers a MIS budget without social participation. In the criminal system, available income increases from 10% short of MIS to 14% above it.

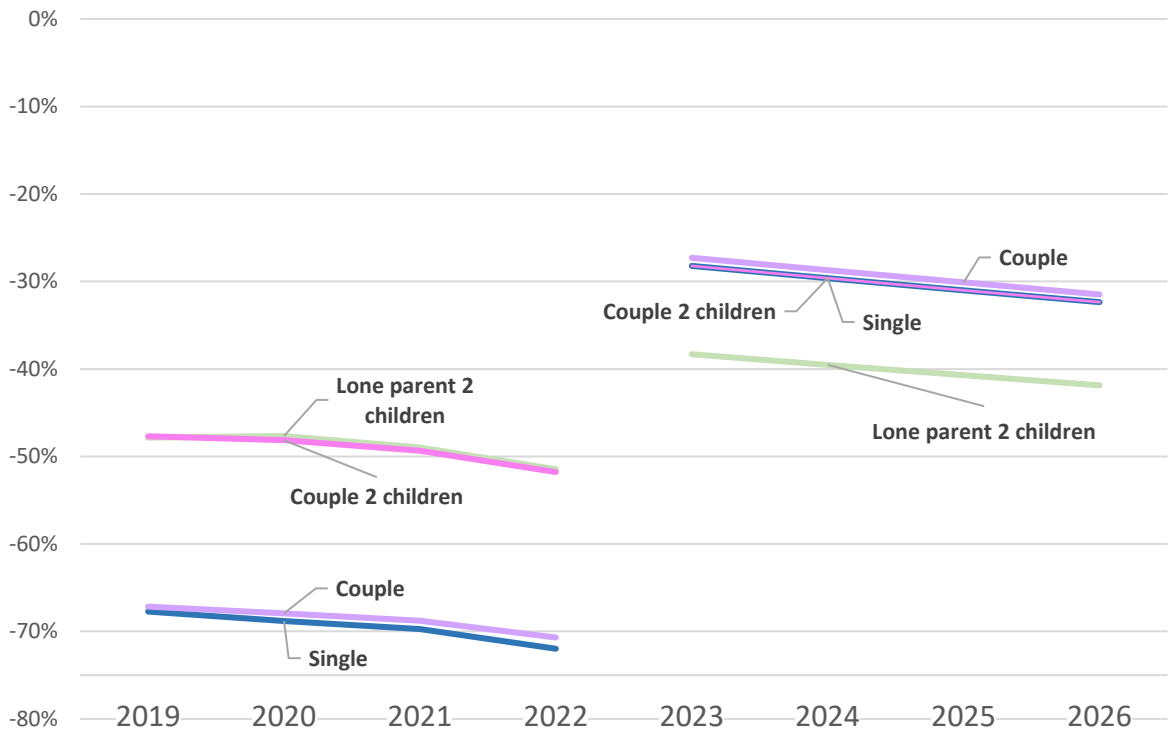
Before considering how these improvements vary by household type (also quantified in table 1), it is worth looking at the trend over time for the case of singles. Figures for different years are also shown in Table 1, and illustrated in Figure 1. This shows that notwithstanding the increase in thresholds for both means tests, the fact that each is constant over time while the MIS requirement increases with rising prices, causes available income at each threshold to become progressively less adequate. For example, by 2023, when the proposed system is likely to be implemented, income at the criminal threshold will have once again fallen behind MIS, and for the proposed civil system the gap will have widened from 17% to 28% below the MIS threshold.

**Figure 1** Monthly income available to single adult at highest income eligible for non-contributory legal aid  
(See Box 2 for definitions)



Figures 2 and 3 extend this analysis to show the trend in available income at the limit for non-contributory legal aid for four different household types. (For the families with children, expenditure requirements are based on a pre-school and a primary school child.)

**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)

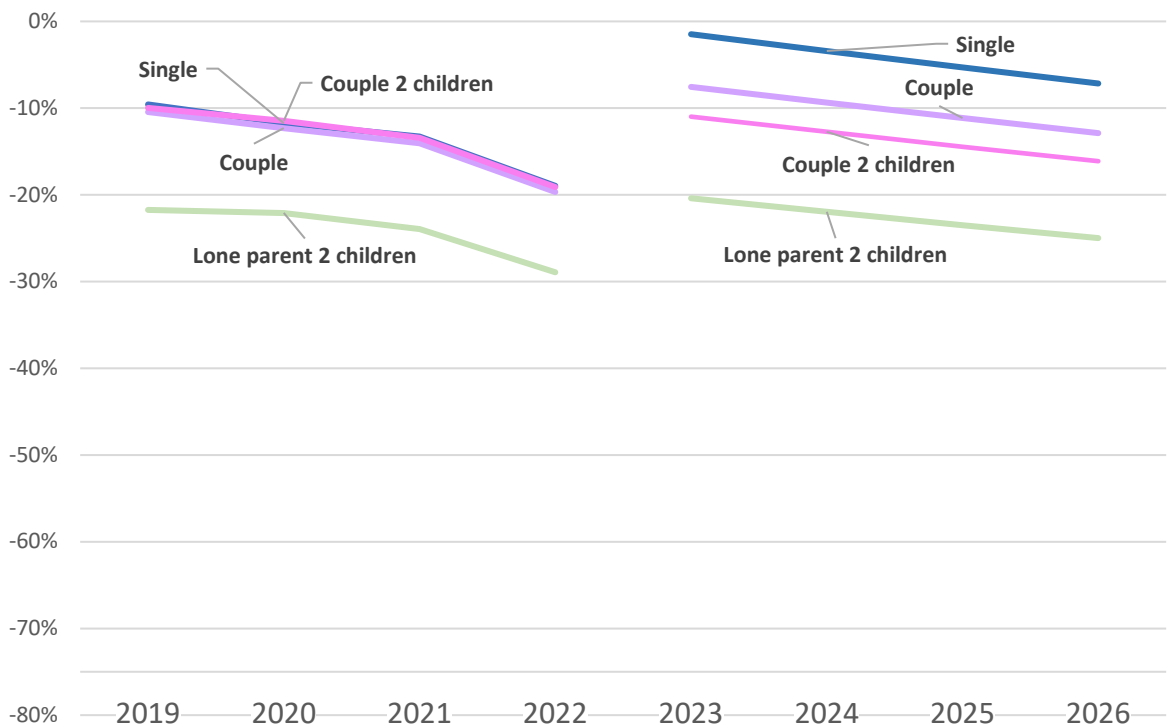


Figure 2 shows the extent to which households of different types would have incomes closer to, although still below, MIS at the point where they become ineligible for non-contributory legal aid, in the proposed system from 2023 compared to under the existing system before that year. In the current system, 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 underestimates their needs relative to other families.

The result for lone parents is that under the present proposals, after further erosion by inflation, thresholds will leave them over 40% short of MIS, a similar level to that applying in 2017, the year on which the original comparison with MIS under the present system was based. (Hirsch, 2018a, appendix 3, showed a 44% shortfall for a couple with two children, compared to 42% by 2026 under the proposed system in the current estimates.)

This disadvantaging of lone parents in the civil system is particularly problematic given the frequent importance of civil redress in family disputes and domestic violence cases, and the reliance of this group on financial help to pursue such cases. This can be exacerbated by the potential for the court process to be used to perpetuate abuse through vexatious proceedings that drain a victim/survivor's resources. In addition, lone parent families are the demographic group most likely to be on low incomes: half of children in such families have household income at least 25% below MIS (Padley and Stone, 2022).

Figure 3 shows broadly similar patterns for the criminal (Crown Court) system, but with significant differences. The most obvious is that both the existing and the proposed legal aid means tests have more generous income thresholds for non-contributory legal aid in the Crown Court system than for civil legal aid, with singles set to be eligible for full legal aid if their income is below a level just slightly (1%) below the MIS level in 2023, falling to 20% below for lone parents. Unlike for civil legal aid, households with children are not currently doing better than those without children in this respect, because equivalence scales rather than benefit scales are already being used to give additions for extra household members. In the proposed system, the proportion of needs met by income is lower than for singles not just for lone parents but also for couples with and without children. This is because as households get larger, the effect of the £100 minimum payment raises the effective income threshold by a constant amount, and this covers larger proportions of smaller households' needs. However, importantly, defendants with children who are on incomes as low as the levels shown in Figure 3 are highly likely to qualify for legal aid through passporting, since the great majority of lone parents and most couple parents on low incomes are eligible for Universal Credit.

Overall, this suggests a relatively favourable picture for Crown Court defendants in 2023, in which households without children are eligible for full legal aid if their incomes are significantly below MIS, while low income families with children are likely to be passported via UC. The most important remaining anomaly is that inflation will erode this position, so that for example by 2026 a defendant with a partner but no children will have to start contributing 80% of additional income to legal costs where the couple's income is 13% below the minimum that they require. While acknowledging that the calculation on which this is based does not seek to cover the leisure elements of a minimum budget (which are included in MIS), it is also notable that the aim is *not* to constrain a defendant's disposable income to the minimum needed for essentials, but rather to link it to *median* spending on most non-leisure items. The fact that for a couple this benchmark equates to expenditure 7% above MIS in 2019 (the expenditure year to which it is referenced) but 13% below MIS by 2026 (see Table

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, subject to the minimum contributions referred to above. These contributions are calculated in bands of income, imposing a higher percentage of additional income on each successive band. In the civil system, the highest contribution band has an upper limit above which no legal aid is available, but the proposals for Crown Court defendants removes this upper limit.

In the civil system, while the structure of contribution requirements is largely unchanged in the proposals, the incomes of those paying these contributions will be very different, with the proposed household income level above which contributions are required being more than doubled for households without children, raised by around 50% for couples with children and increased by more than a quarter for lone parent families (Table 1). While these thresholds are still below the MIS level, the narrowing of this deficit makes it more likely that someone with somewhat higher income, close to the upper threshold of legal aid (which rises by 29% in the proposals) can afford to contribute to its cost and still have adequate income to live on.

Table 2 shows that it is indeed the case that in 2023, a single person could almost reach the MIS threshold and still be eligible for contributory legal aid under the proposed upper threshold. However, after paying the maximum income-based contributions, they would fall 20% short. While this would still be about enough to cover non-leisure components at the minimum (MIS) level, the stated intention of this part of the means test is to set the threshold higher than a 'minimum', at median expenditure levels including leisure, and this is reflected when comparing the 2019 expenditure calculations with minimum needs in that year (see Annex C, paragraph 6 of the proposals). In 2019, the benchmark was 14% above the MIS level before legal aid contributions and only 8% below after the maximum contributions are made.

In the case of a civil applicant just *above* the upper threshold, who was excluded from legal aid, the above calculations would apply if private legal costs came to £194.40 a month - the maximum contribution for someone eligible under the proposed system. This amount could cover a certain amount of legal advice, but would go only a small way towards paying the cost of legal representation for litigation. So while the proposals do widen the range of incomes at which legal aid is available, it by no means guarantees such support to anyone unable to afford their own civil costs.

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

*Definitions - see Box 2. Maximum contribution is the total that can be contributed at this income level.*

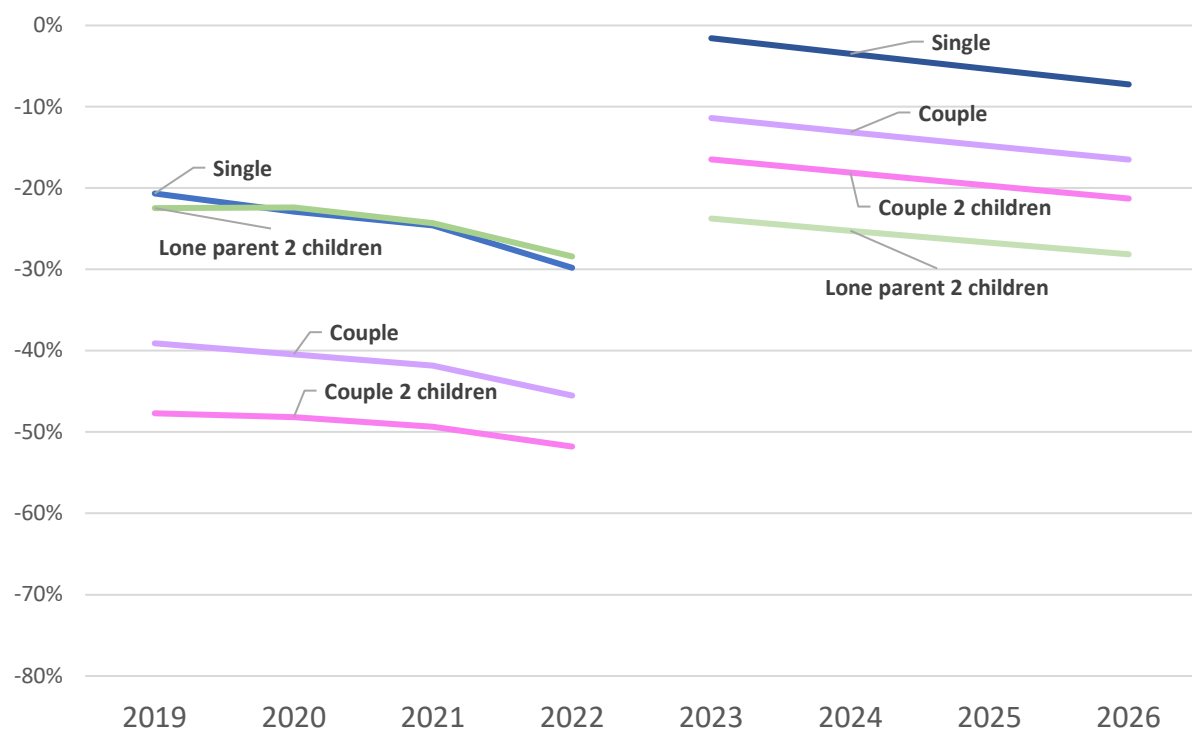
a) Single person									
	Spending requirements (MIS)	Income above which ineligible				Income net of maximum contribution to legal costs			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£886	£703	79%	£1,012	114%	£499	56%	£818	92%
2020	£908	£700	77%	£1,012	111%	£496	55%	£818	90%
2021	£924	£697	75%	£1,012	110%	£493	53%	£818	88%
2022	£989	£694	70%	£1,012	102%	£490	50%	£818	83%
2023	£1,028	£691	67%	£1,012	98%	£487	47%	£818	80%
2024	£1,049	£688	66%	£1,012	96%	£484	46%	£818	78%
2025	£1,070	£685	64%	£1,012	95%	£481	45%	£818	76%
2026	£1,091	£682	62%	£1,012	93%	£478	44%	£818	75%
b) Couple no children									
	Spending requirements (MIS)	Income above which ineligible				Income net of maximum contribution to legal costs			
Year		Current	% of MIS	Proposed	% of MIS	Current	% of MIS	Proposed	% of MIS
2019	£1,485	£905	61%	£1,526	103%	£701	47%	£1,332	90%
2020	£1,517	£903	60%	£1,526	101%	£700	46%	£1,332	88%
2021	£1,547	£900	58%	£1,526	99%	£696	45%	£1,332	86%
2022	£1,656	£902	54%	£1,526	92%	£698	42%	£1,332	80%
2023	£1,722	£906	53%	£1,526	89%	£702	41%	£1,332	77%
2024	£1,756	£906	52%	£1,526	87%	£702	40%	£1,332	76%
2025	£1,792	£906	51%	£1,526	85%	£702	39%	£1,332	74%
2026	£1,827	£905	50%	£1,526	84%	£702	38%	£1,332	73%

<b>c) Lone parent two children</b>									
	<b>Spending requirements (MIS)</b>	<b>Income above which ineligible</b>				<b>Income net of maximum contribution to legal costs</b>			
<b>Year</b>		<b>Current</b>	<b>% of MIS</b>	<b>Proposed</b>	<b>% of MIS</b>	<b>Current</b>	<b>% of MIS</b>	<b>Proposed</b>	<b>% of MIS</b>
2019	£1,642	£1,273	78%	£1,434	87%	£1,070	65%	£1,240	75%
2020	£1,649	£1,280	78%	£1,434	87%	£1,076	65%	£1,240	75%
2021	£1,690	£1,279	76%	£1,434	85%	£1,076	64%	£1,240	73%
2022	£1,808	£1,295	72%	£1,434	79%	£1,091	60%	£1,240	69%
2023	£1,881	£1,316	70%	£1,434	76%	£1,112	59%	£1,240	66%
2024	£1,918	£1,325	69%	£1,434	75%	£1,121	58%	£1,240	65%
2025	£1,957	£1,334	68%	£1,434	73%	£1,131	58%	£1,240	63%
2026	£1,996	£1,344	67%	£1,434	72%	£1,140	57%	£1,240	62%
<b>d) Couple two children</b>									
	<b>Spending requirements (MIS)</b>	<b>Income above which ineligible</b>				<b>Income net of maximum contribution to legal costs</b>			
<b>Year</b>		<b>Current</b>	<b>% of MIS</b>	<b>Proposed</b>	<b>% of MIS</b>	<b>Current</b>	<b>% of MIS</b>	<b>Proposed</b>	<b>% of MIS</b>
2019	£2,015	£1,054	52%	£1,948	97%	£850	42%	£1,754	87%
2020	£2,049	£1,062	52%	£1,948	95%	£859	42%	£1,754	86%
2021	£2,096	£1,061	51%	£1,948	93%	£858	41%	£1,754	84%
2022	£2,242	£1,081	48%	£1,948	87%	£877	39%	£1,754	78%
2023	£2,332	£1,109	48%	£1,948	84%	£905	39%	£1,754	75%
2024	£2,379	£1,121	47%	£1,948	82%	£917	39%	£1,754	74%
2025	£2,426	£1,133	47%	£1,948	80%	£929	38%	£1,754	72%
2026	£2,475	£1,145	46%	£1,948	79%	£942	38%	£1,754	71%

The above analysis shows that the proposals have been well designed to ensure that a single person with income just below the upper threshold can meet most or all of their minimum needs both before and after a contribution to legal costs. However, two aspects of the proposals make the picture less favourable. The first is the failure to uprate costs with inflation, so a more or less adequate system based on 2019 expenditures would be considerably less adequate if implemented in 2023. The second important feature of the upper limit is the way weightings determine how this means test interacts with household composition.

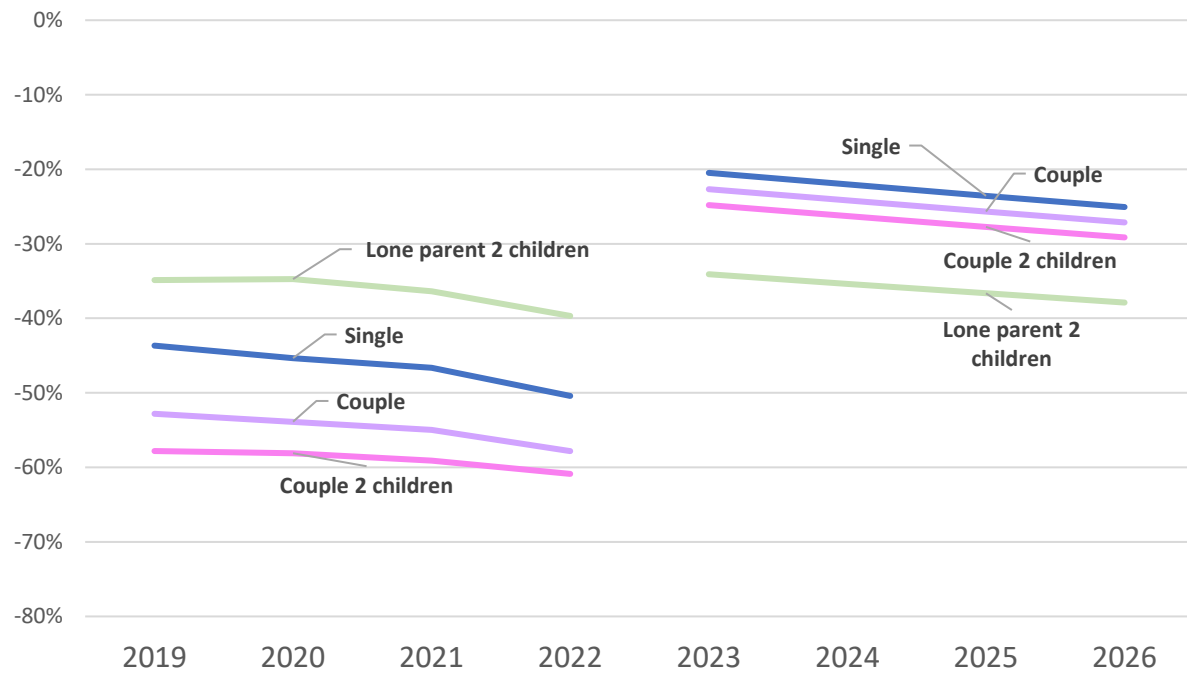
Figures 4 and 5 illustrate both the erosion over time of the real value of the upper threshold and the lower proportion of need that this represents for larger households. The latter is worsened at this threshold by the basing of allowances for additional members on percentages of the lower rather than the upper threshold – see Box 1 above. This causes families with children to have eligibility for legal aid removed at much less adequate incomes than single people; for a lone parent family this would be a quarter below MIS before legal costs and a third below if they make the maximum contributions at the upper threshold. It should also be noted, however, that the gap between larger and smaller household types is somewhat narrower when considering incomes after maximum legal contributions, in Figure 5, than before legal costs, in Figure 4. This is because the maximum legal contribution is the same regardless of the size of household, and so represents a relatively larger proportion of a single person’s costs than a family’s.

**Figure 4 Shortfalls in available income compared to the Minimum Income Standard, at income above which applicant is ineligible for civil legal aid (based on change to new system in 2023)**





**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 adult income before and after contribution to legal aid, Crown Court defendant, 2023

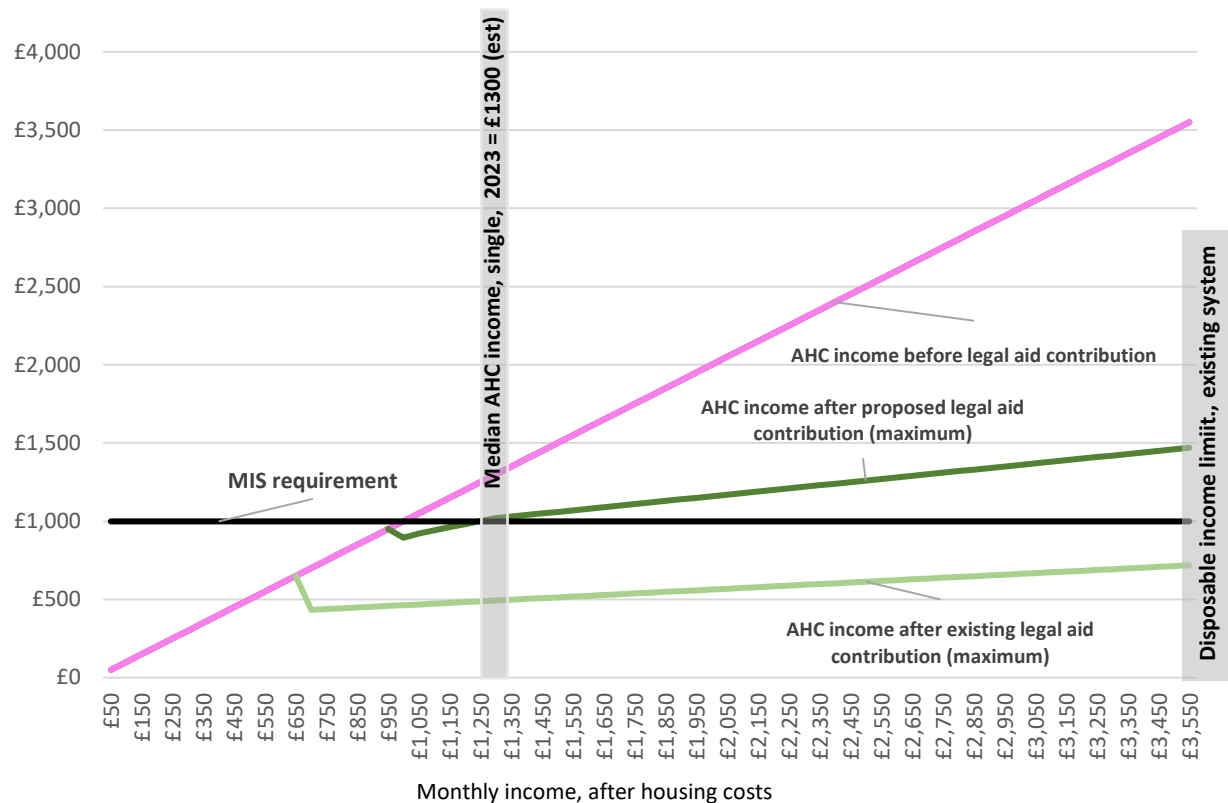


Figure 6 shows a very stark contrast between the current and proposed systems. Under the current system, when a Crown Court defendant starts contributing to legal aid costs, this brings their income to below half what they need. Since 90% of all additional income may be taken in contributions, a defendant with very high legal costs is left with insufficient income for a minimum standard of living even when their available income would otherwise be three times the median – at which point they reach the upper limit and become ineligible for legal aid. Under the far more generous proposed system, a defendant is only required to contribute when they are almost at the MIS level; and if they are on median income, they reach this minimum income standard even after the contributions. Furthermore, the tiered rates of contributions, which rise quickly to 80% at about the level of the median household income shown in the graph, mean that for defendants with above average incomes, very high defence costs reduce net incomes somewhat less brutally than the present 90% contribution rate.

An additional feature of Figure 6 worth noting is that the proposed system reduces, but does not eliminate, the ‘cliff edge’ whereby someone whose income is just above the lower threshold for contributions ends up worse off than someone just below that limit. In the present system, the first £283 of disposable income is disregarded when assessing if someone is eligible for non-contributory legal aid, but if their income is just above that level they must contribute 90% of the £283, or £255, as a minimum contribution. The proposed system no longer disregards an initial tranche of income, and only imposes contributions on the tranche above the lower limit. However, since it also does not impose that charge until it is above £100 (for administrative reasons), there is still a ‘cliff edge’ of this amount, whereby someone with a £99.99 assessed contribution pays nothing, but someone with very slightly higher income will contribute £100, leaving them with that much less in their pocket each month. In this respect, the two systems are structurally similar, even though described and rationalised differently. In practice, as shown by the dip in the lines in Figure 6, the main

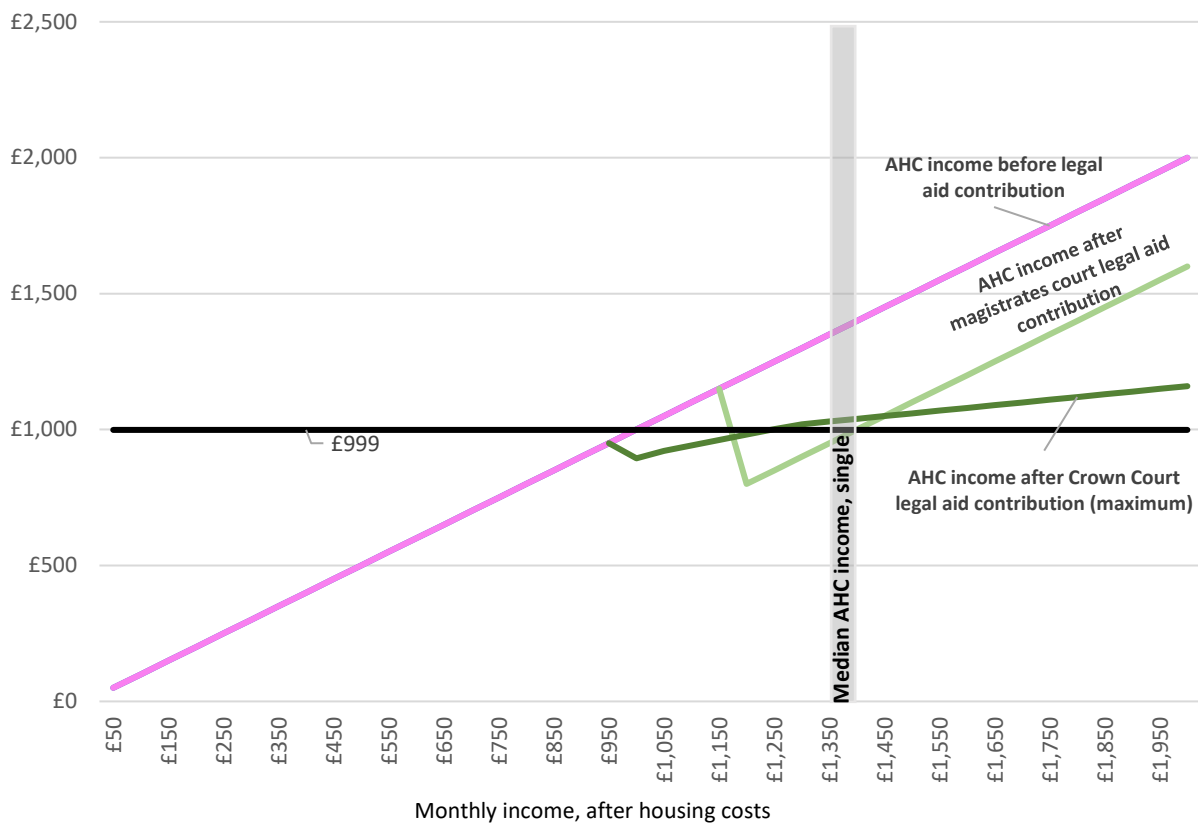
difference is that this dip is much smaller (£100) in the proposed system than in the existing system (£283).

### 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**



The graph shows that defendants in magistrates' courts can get non-contributory legal aid at a slightly higher maximum income level than Crown Court defendants, but those with incomes above that level face a sharper cliff edge because they have to pay in full for their legal costs. This creates a small range of income at which relatively high legal costs can bring a single defendant's income below the MIS level, but this is unlikely to affect a very large number of people. Where incomes rise above the median, magistrates' court defendants become better off than those in the Crown Court, despite the latter being eligible for legal aid (assuming that the cost of defending Crown Court cases is higher). This is because income-based contributions exceed £400 a month at just above the median income level.

## 4 Conclusion and recommendations

The analysis in this report confirms that the proposed changes to the legal aid means test would greatly reduce the extent to which people on low incomes can only access the legal system by sacrificing expenditures enabling them to maintain a minimum socially acceptable standard of living.

As a starting point, the proposed system gives a single person access to non-contributory legal aid with well over twice the available income as in the present system. This is still not enough to reach the Minimum Income Standard based on what the public thinks is needed for a minimum acceptable standard of living. However, the threshold for this entitlement is based on expenditure calculations which, in the year they were made, allow a single person to afford all the non-leisure items in MIS. This makes the baseline threshold compatible with the system's stated aims of covering most essential items, with leisure the most prominent exclusion. In the criminal system, the baseline is more generous, and has been set at a level that slightly exceeds MIS, including leisure. This again produces an initial outcome broadly in line with the stated aims of the system, which seeks to ensure that defendants are able to afford legal services without legal costs bringing their net incomes to below what an average person spends in categories counted as essential.

However, two underlying difficulties of the proposals in their present form risk partially and in some cases almost fully reversing these improvements.

The first and most important is the failure to uprate the cost of living allowances regularly in line with the rising cost of living. This obvious and inherent contradiction may not matter much if a combination of low inflation and reasonably frequent review meant that the system remained broadly in line with actual living costs. However, the fact that 2019 expenditure benchmarks are being proposed as a basis for thresholds likely still to be in operation in 2026, and that prices are expected to rise by a cumulative 20% over that period, means that uprating matters a lot. The decline in the value of incomes at means-tested levels under the present system illustrates how failing to uprate can lead to people with inadequate incomes falling far short of being able to afford to access justice. It is worth noting however that, while the thresholds themselves have not been uprated, the linking of allowances for additional household members to benefits in the civil system have at least caused these allowances to rise in those years when benefits have been increased with inflation. Under the present proposals, even this partial link with prices would be lost.

Appropriate indices to use to uprate thresholds and allowances are CPI for disposable income and CPIH for gross income, since housing costs are included in gross income and CPIH, but not disposable income and CPI. Both indices are recognised as national statistics.

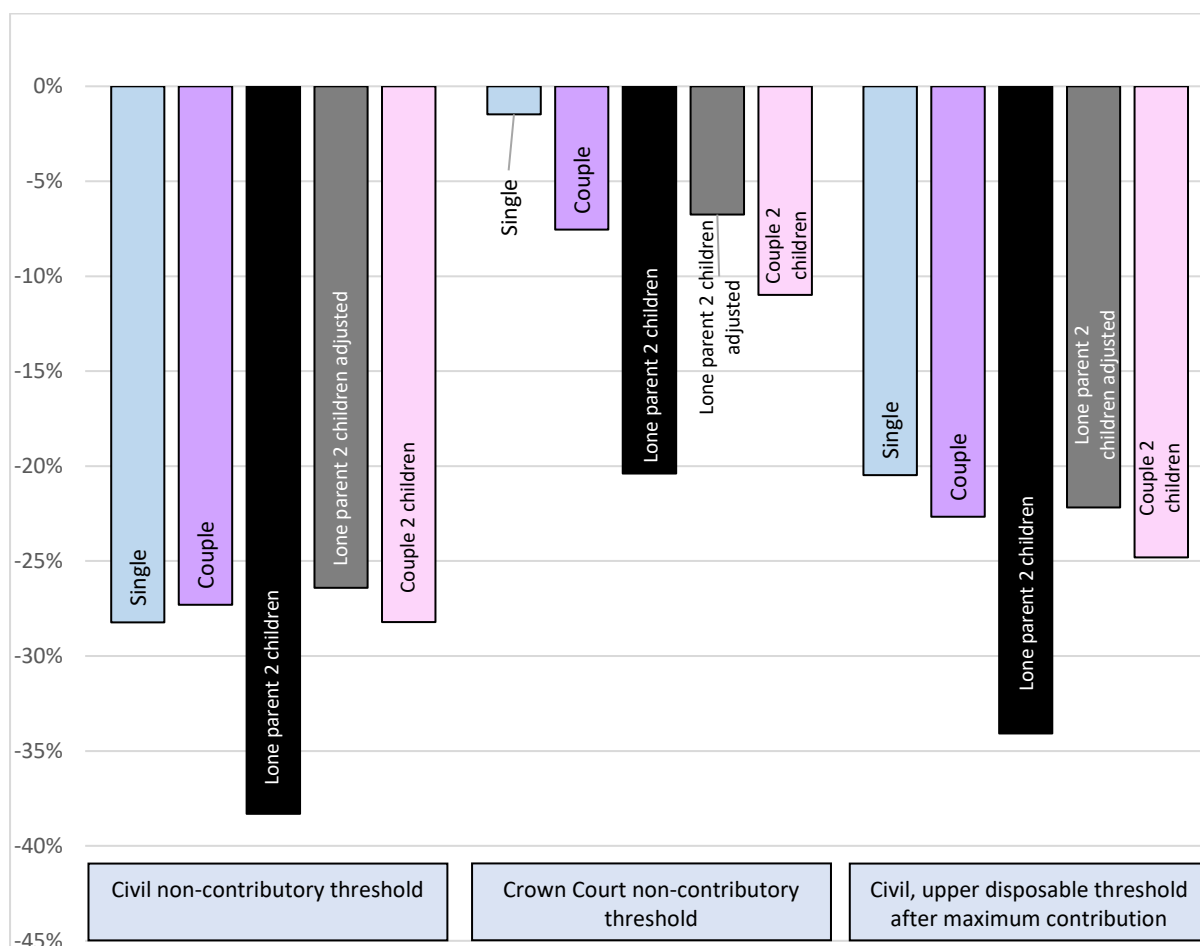
The second main difficulty concerns the way that income thresholds are adapted to the composition of the household and hence its expenditure needs. Despite a welcome standardisation of how this is done, the proposals create significant differences across household types in the adequacy of incomes at the point legal aid is restricted. This is partly because of evidence that equivalence scales are inaccurate in relation to actual relative needs, and also because equalisation is not consistently applied to the bands and upper limits of the civil means test. These drawbacks create the greatest anomaly for lone parents in the civil system, who are also commonly in need of civil redress in family cases, and rarely have income high enough to afford it without the help of legal aid.

It needs to be acknowledged that such difficulties with equalisation can never be fully ironed out – there is no perfect formula to equalise the needs of households accurately in all circumstances. Rather, it is important to seek to limit the size of inequities across household types, while keeping the system simple. On this basis, this report does not recommend an adapted equivalence scale

(which would still be imperfect, and not reflect current government measurement methods). Another option would be to apply equivalisation 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 of having children, which adds more proportionately to a household budget than for couple parents, in a way not reflected in equivalence scales.

Specifically, Figure 8 shows how the relative adequacy of incomes of various household types at each of the thresholds would change if a lone parent received not just the single adult's cost of living allowance, but in addition, half the allowance allocated to an additional adult. This would mean setting the adult allowance for the lone parent at halfway between the amount proposed for a lone parent and the amount proposed for a couple. In all three aspects of the system shown in Figure 8, the current Review proposals cause lone parents' available incomes to fall short of MIS by a far greater amount than other groups, but this gap is effectively eliminated by the additional allowance.

**Figure 8 Shortfalls of available income compared to MIS, effect of proposed lone parent adjustment, 2023**



## 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 threshold for civil legal aid, continue to disregard income from Housing Benefit, and disregard income due to the inclusion of the housing element of Universal Credit.

## 5 References

Davis, A., Hirsch, D., Padley, M. and Shepherd, C. (2021) *A minimum income standard for the United Kingdom in 2021*. York: Joseph Rowntree Foundation.

Hirsch, D. (2018a) *Priced out of Justice? Means testing legal aid and making ends meet*. London: The Law Society.

Hirsch, D. (2018b) *The affordability of legal proceedings for those excluded from criminal legal aid*. London: The Law Society.

Hirsch, D., Concialdi, P., Math, A., Padley, M., Pereira, E., Pereirinha, J., and Thornton, R. (2021) The Minimum Income Standard and equivalisation: Reassessing relative costs of singles and couples and of adults and children. *Journal of Social Policy*, 50(1), 148-167.

Ministry of Justice (2022) *Legal Aid Means Test Review*.

Padley, M. and Stone, J. (2022) *Households below a minimum income standard, 2008/09 to 2019/20*. York: Joseph Rowntree Foundation.



## 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, in order to have a non-zero Universal Credit award, they would have to have a pre-taper Universal Credit entitlement of at least £27,509 times 0.55 = £15,130.

The basic allowance for Universal Credit is just £4,019 a year for a single person.

Therefore, in order for someone on the gross earnings limit to have a Universal Credit award, their rent would need to be at least £15,130 minus £4,019 or £11,111 a year, equal to £926 a month. Only if their rent is above this level would the inclusion of Universal Credit (including its housing element) potentially put them above the gross income threshold. (If their earnings are lower than £34,950 a year, a Universal Credit entitlement would be possible with a lower rent than this, but that would not put them above the gross earnings limit, since the higher amount of Universal Credit entitlement would be smaller than the lower amount of earnings).

For a single person to be entitled to £926 a month for the housing element of Universal Credit, they must live in an area where the local housing allowance for a one-bedroom property is at least this high. Table A1 shows that this is only the case in some areas of London, including all inner London areas and about half of the outer London ones.

The same calculation can be made for families with children. The figures in Table A1 have been calculated for families with two children of different gender of whom at least one is over 10, who would be entitled to rent support covering a three-bedroom property. They show a similar result for a couple with children as for a single adult. For a lone parent, there are a wider range of areas where a family at or above the gross income limit could be eligible for housing support in Universal Credit, but these are still all expensive areas in southern England.

**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 a 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 a 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 a three-bedroom property is above £1,379. A family with earnings at the gross income threshold would have to have rent above this level to be eligible for UC*

Central London	£1,920	Outer North London	£1,600
Inner East London	£1,920	Outer South West London	£1,600
Inner North London	£1,920	Outer East London	£1,550
Inner South West London	£1,920	North West London	£1,550
Inner West London	£1,920	Outer West London	£1,400
Inner South East London	£1,675		

*In the remaining 141 areas (including three in outer London), LHA for a three-bedroom property is below £1,379*

**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-bedroom LHA applies to this case.*

*But a lone parent at the gross income limit could receive UC with any rent above £844.*

*This means that, in addition to the areas listed in (b), lone parents in the following 48 areas in southern England could receive UC while earning at the upper limit*

Outer North East London	£1,375	Chichester	£995
Outer South London	£1,375	Chelmsford	£985
Guildford	£1,375	Maidstone	£975
Walton	£1,350	Milton Keynes	£975
Outer South East London	£1,300	Luton	£975
South West Herts	£1,300	Canterbury	£975
East Thames Valley	£1,275	Worthing	£970
Chilterns	£1,250	Cambridge	£950
Brighton and Hove	£1,200	Basingstoke	£950
Crawley & Reigate	£1,200	Bristol	£950
South East Herts	£1,200	Bournemouth	£950
Reading	£1,150	Southampton	£925
High Weald	£1,130	Cherwell Valley	£900
Harlow & Stortford	£1,125	Ashford	£900
Oxford	£1,100	Warwickshire South	£900
Winchester	£1,100	Eastbourne	£900
Blackwater Valley	£1,100	Portsmouth	£875
South West Essex	£1,075	Bedford	£875
Aylesbury	£1,050	Solihull	£875
Newbury	£1,050	Medway & Swale	£850
North West Kent	£1,050	Salisbury	£850
Stevenage & North Herts	£1,050	Cheltenham	£850
Southend	£1,000	Colchester	£850
Bath	£995	Sussex East	£850

**Centre for Research in Social Policy  
Department of Social Sciences  
Loughborough University  
Leicestershire  
LE11 3TU**

**Tel: +44 (0)1509 223372  
[www.crsp.ac.uk](http://www.crsp.ac.uk)**

**ISBN 978 0946831 58 6**