



*PROPOSALS FOR REFORM OF  
LEGAL AID IN ENGLAND AND  
WALES*

A response from the  
**Housing Team at  
Garden Court Chambers**

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11 February 2011

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## The Authors

This response to the Ministry of Justice Consultation Paper *Proposals for reform of Legal Aid in England and Wales* ("the Consultation Paper") is made by the team of specialist Housing Barristers based at Garden Court Chambers in London.

The Garden Court Housing Team contains more than 20 practising barristers including two QCs (Jan Luba and Stephen Knafler). All the members of the team have contributed to this response.

Our response is informed by our day-to-day experience in undertaking publicly funded work in housing cases and in cases raising housing related issues.

The Housing Team has a reputation for excellence in this field and is highly ranked for Social Housing work in the independent directories:

"Best known for representing tenants, Garden Court is home to a wealth of intelligent and passionate barristers who are 'extremely committed to their work and always willing to go that extra mile.' Clients appreciate the set's strength and depth in a range of disciplines, such as immigration and civil liberties, which naturally complements its housing expertise. The full spectrum of housing law is catered for here, particularly homelessness, unlawful eviction and disrepair issues."

***Chambers UK - The Bar: A Client's Guide 2011***

"Garden Court Chambers has a large specialist housing law team that is particularly committed to representing tenants, other occupiers and the homeless."

***The Legal 500, 2010 Edition***

The Housing Team produces a free weekly *Housing Law E-Bulletin* for over 1000 subscribers and contributes articles and case reports to professional publications such as *Legal Action*.

Members of the team have also written or co-written the following important practitioner text books: *Defending Possession Proceedings* (LAG); *Repairs: Tenants' Rights* (LAG); *Remedies for Disrepair and Other Building Defects* (Sweet & Maxwell), *Support for Asylum Seekers* (LAG), *Using the Housing Act 2004* (Jordans), *Housing Allocation and Homelessness* (Jordans), the *Housing Law Handbook* (Law Society), *The Homelessness Act 2002: A Special Bulletin* (Jordans) and *Housing and the Human Rights Act: A Special Bulletin* (Jordans).

Between them the members of the Housing Team have decades of experience of dealing with the sharp end of issues relating to social housing. The team comprises:

<b>Barrister</b>	<b>Year of Call</b>
David Watkinson	1972
James Bowen	1979
Jan Luba QC	1980
Stephen Cottle	1984
Beatrice Prevatt	1985
Marc Willers	1987
Bethan Harris	1990
Edward Fitzpatrick	1990
Stephen Knafler QC	1993
Liz Davies	1994
Michael Paget	1995
Adrian Marshall Williams	1998
Adrian Berry	1998
Alex Offer	1998
Catherine O'Donnell	2000
Marina Sergides	2000
Desmond Rutledge	2001
Tim Baldwin	2001
Maya Naidoo	2002
Irena Sabic	2002
John Beckley	2003
Stephen Marsh	2005
Shu Shin Luh	2006
Deirdre Malone	2006
Alex Grigg	2007
David Renton	2008
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## Section 1: Introduction

### 1. Introduction

1. We welcome this opportunity to respond to the Government's proposals for the future of Legal Aid in England and Wales. This response is from the Housing Team at Garden Court Chambers and we focus specifically on Chapter 4 and Chapter 7 of the Consultation Paper in this response. Moreover, our response focuses on housing issues and we leave responses on other areas of law to our colleagues in the Crime, Immigration, Family and Civil Teams at Garden Court Chambers to provide their expertise. In our response to Chapter 4 on Scope we do provide a detailed analysis of the impact of removal of advice on welfare benefits and debt from scope and its particular impact on housing cases. Our colleagues in the Civil Team will also provide a broader response to these proposals in their specific response.
2. Our responses are based on the reforms proposed in the Consultation Paper. For example, we note that the Consultation Paper makes no other reference to cases that concern Gypsies and Travellers specifically, particularly in relation to scope. The types of cases we have in mind are possession cases concerning caravan sites or unauthorized encampments, injunction claims under s 187 B Town & Country Planning Act 1990, statutory appeals concerning planning permission issues (ss 288/9 of the 1990 Act), and judicial review of decisions to evict or concerning enforcement action. All these are currently in scope. Since there is no proposal to remove them, we assume they will remain and do not address this further save to add that seems to us correct in principle as these cases concern judicial review, judicial review type (statutory appeals) and cases where the clients are at risk of losing their homes (para 4.75 of the Consultation Paper refers).
3. As will become plain from the detail of our specific responses, we do not share the Government's analysis of what cases are "safe" to remove from scope of funding by Legal Aid as set out in Chapter 4 of the Consultation Paper. It is our view that the Government

misunderstands the importance of provision of public funding to tenants and vulnerable people in these cases. It is our view that the Government has failed to understand the complexities of these cases and has fundamentally misunderstood the law and how the court deals with these cases and the fundamental importance of the provision of public funding to uphold the rule of law.

4. Further, it is our view that the Government has misunderstood the issues concerning reduction in remuneration as set out in our response to Chapter 7. It is our view the consequences of these proposals will be devastating to clients, local authorities and the court service. Such proposals will increase the size and number of advice deserts, the loss of specialist advisers and put greater burdens on the court service and local authorities. It is our view that the impact assessments demonstrate that the Government has not properly analysed these issues and has no idea of the consequences of these reforms.

## **Chapter 4: scope**

**Question 1: Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 – 4.144 of the consultation document within the scope of the civil and family legal aid scheme? Please give reasons.**

5. We welcome the intention to retain civil legal aid for cases where a person's home is at immediate risk, for homelessness appeals, for ASBO and injunction applications in the County Court, and for public law. We agree with the Consultation Paper that proceedings where the individual faces homelessness are of high importance (para 4.15) as are those where the litigant is seeking to hold the state to account by judicial review (para 4.16).
6. We make no comment on the types of case and proceedings that have no housing-related issues.

**Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party? Please give reasons.**

7. This is not a housing-related matter and we make no comment.

**Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 – 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.**

8. The proposed housing-related exclusions are as follows:
  - debt matters where the client's home is not at immediate risk (paras 4.176 – 4.179);

- an action to enforce a Right to Buy;
  - an action to enforce a Right to Buy a freehold or extend the lease;
  - actions to set aside a legal charge or the transfer of a property;
  - actions for damages and/or an injunction for unauthorised change of use of premises;
  - an action against the Housing Grants, Construction and Regeneration Act 1996;
  - applications for a new tenancy under the Landlord and Tenant Act 1954;
  - an action for re-housing;
  - an action under the Access to Neighbouring Land Act 1992;
  - an action for wrongful breach of quiet enjoyment;
  - housing disrepair proceedings where the primary remedy sought is damages, including damages for personal injury;
  - an action for trespass; or
  - an action under the Mobile Homes Act 1983 which does not concern eviction (all at para 4.194);
  - welfare benefits including asylum support.
9. Specifically we do not agree with proposals to exclude actions for re-housing, actions for wrongful breach of quiet enjoyment and housing disrepair proceedings, actions to set aside a legal charge, actions under the Mobile Homes Act 1983 not involving eviction, actions under Access to Neighbouring Land Act 1993 and we address those specific headings below. Although we acknowledge that the number of clients with cases falling into the remaining categories are likely to be modest when compared to the number of clients who obtain advice regarding possession proceedings, disrepair or homelessness. Nevertheless, we resist their removal from scope. The remedies provided by these causes of action are useful in conjunction with other remedies sought that remain within scope and therefore it is a fundamental misunderstanding to treat these actions as freestanding and demonstrates a fundamental flaw in the Government's understanding of the complexity of housing cases which often cut across many legal disciplines. Further we question whether any significant costs savings

would be achieved by these proposed cuts given that the impact assessments, in our analysis, fail to deal with these issues adequately.

### **Actions for re-housing**

10. We are unclear as to what is meant by this category as claims for “rehousing” are usually claims under Part 7 Housing Act 1996 (homelessness) so they remain with the proposed scope. Alternatively, they may be challenges to decisions made by a local housing authority concerning applications for an allocation of social housing (Part 6 Housing Act 1996). Those latter are brought by judicial review after an internal review process has been exhausted (s.167(4A) Housing Act 1996) and we therefore understand them to remain in scope (per para 4.16 of the Consultation Paper).
11. In both types of case, the impact on the livelihood, health, safety and well-being of the applicant and his or her family is significant and should be therefore be categorised as falling within the criteria at para 4.15. The defendant is the local housing authority – a public authority – and both challenges can only be brought on a point of law (homelessness appeals pursuant to section 204 Housing Act 1996 or judicial review proceedings). The purpose of the appeal or judicial review is therefore to hold the public authority to account and ensure that its policies, practices or decisions are lawful.
12. From the consultation paper it is unclear whether action by claims for Judicial Review pursuant to sections 188(1) or 188(3) Housing Act 1996 against refusals to accommodate pending a decision under section 184 or review under section 202 remain within the scope of provision of legal aid. On the criteria set out in paras 4.15 and 4.16 such claims ought to be but the consultation paper fails to identify whether such claims remain in scope by its failure to define the category of “rehousing”.

### **Actions for breach of covenant of quiet enjoyment**

13. We are firmly opposed to the withdrawal of public funding for these actions.

14. In our experience, claims in respect of breach of covenant of quiet enjoyment arise in circumstances where a person has been suddenly and unlawfully evicted from their home. Claims are virtually always preceded by a letter before claim together with attempts at intervention by the local authority, and so the landlord is warned of his or her unlawful behaviour and asked to re-admit the client. A claim for an injunction requiring re-admittance is only issued if the landlord has refused, or has clearly ignored the letter before claim save when such injunctions are sought on an emergency basis when eviction has just occurred leaving a family street homeless and to prevent re-letting.
  
15. Further injunctions apply in respect of s 3 of the Protection from Eviction Act 1977 in respect of non-secure tenancies and licences where there may be no covenant of quiet enjoyment or the tenancy or licence has been terminated by notice. Moreover in such claim harassment or violence perpetrated by the landlord is often an issue and injunctions may be obtained pursuant to s 3 of the Protection from Harassment Act 1997. Other forms of injunctive relief may be obtained such as to protect or deliver up the property of the tenant.
  
16. Clients who have been evicted outside of the legal process find themselves suddenly deprived of their home and usually their possessions. If they are adults without children, they will not be entitled to emergency accommodation from a local housing authority. Moreover, a family may necessarily not be entitled to homelessness assistance as a local authority may only consider them homeless if they are making reasonable efforts to be re-admitted (See Homelessness Code of Guidance 8.16). They are dependent on the charity of friends or family for emergency accommodation, which is often no more than a sofa. Without access to their possessions, they may be deprived of important documentation (such as passports, credit cards or bank statements), means of communicating (if a computer has been retained by the landlord), and sanitary provisions. Often the only clothes they have are those that they were wearing when evicted. In short, they are suddenly and arbitrarily made homeless without the opportunity of making any plans.

17. In our opinion, obtaining an injunction in order to re-admit them into their home is “of high importance given the potential impact on the livelihood, health, safety and well-being of the individual and family” (para 4.15). The client will usually need an urgent remedy from the Court and an injunction to re-admit is almost invariably granted. The ability to take urgent Court action so to re-admit the client into his or her home is of the highest importance.
18. We recognise that, once an injunction has been obtained and an applicant re-admitted, the claim may continue in damages. Often the substantive claim for an injunction and/or specific performance of the tenancy agreement becomes irrelevant, either because the landlord has agreed to the client's continued occupation or because the client has taken steps to surrender his or her tenancy and move elsewhere.
19. However, damages remain an important remedy. First because many of the client's possessions may have been destroyed, or retained, by the landlord. Clients who are financially eligible for public funding are not in a financial position to replace their belongings within a reasonable period of time. The special damages claim, if successful, directly reimburses them for their lost possessions and for the cost of any possessions that they have been able to replace.
20. Secondly, the process of being unlawfully evicted is extremely traumatic and it is therefore reasonable that the wrong-doer – the landlord – should pay general damages. The eviction itself has usually left lasting effects on the client. The consultation paper fails to identify the different heads of damages recoverable in addition to special damages. The client may be entitled to claim general damages as compensation for the eviction and the effects it had on them and also aggravated and/or exemplary damages. The latter two heads of damage are not compensatory but are “punitive” in nature to demonstrate the court’s disapproval of the landlord’s conduct. There may be further heads of compensatory damages, for example for harassment or battery or loss of a tenancy deposit.
21. Thirdly, damages are a remedy of right in law whereas injunctions are equitable remedies which the courts will not grant if they are unworkable or likely to be ineffective and damages may be awarded by

the court in lieu of an injunction. So a an unlawfully evicted tenant may only have a remedy in damages in such a claim.

22. Fourthly, there is a high rate of recovery of legal costs against landlords who unlawfully evict tenant. Under the current Funding Code, the damages claim could only continue where there are at least moderate prospects of success and, in addition, where the client's legal representatives have considered whether the defendant has reasonable prospects of satisfying the judgement. If the defendant landlord is a "man of straw", public funding will be refused (para 4.7(2) Funding Code Guidance). However, given that a landlord owns property such refusal is unlikely and the landlord may be prevented from disposal of assets by way of freezing injunctions. There is therefore a realistic possibility both that the claimant will succeed and that damages and legal costs will be recovered from the defendant. It should be noted that a claim brought by a tenant against a landlord for harassment and/or unlawful eviction will be allocated to the fast track and not to the small claims track and so legal costs will be awarded on the usual principles (CPR 26.7(4)).
23. Fifthly, in unlawfully evicting a tenant or licensee, the landlord is not only breaching the covenant for quiet enjoyment but is also committing a criminal offence (s.1 Protection from Eviction Act 1977). Landlords are rarely prosecuted for this crime. There is therefore a significant public interest in funding individuals who are financially eligible for public funding so as to ensure that the individual landlord is held to account.

#### **Housing disrepair proceedings where the primary remedy is damages**

24. In our experience, there are far fewer housing disrepair claims brought since the introduction of the pre-action protocol for disrepair claims. The protocol provides a sensible and proportionate method of resolving any dispute over repairs between landlord and tenant without the need to resort to litigation.
25. First, it follows that claims for damages for disrepair are usually issued against recalcitrant landlords, who have not complied with the pre-

action protocol. It would weaken the force of the pre-action protocol if landlords knew that the threat of civil proceedings could not be pursued.

26. Secondly, as with claims for breach of covenant of quiet enjoyment, the claimant's legal representatives have an ongoing duty to report to the Legal Services Commission about the prospects of success and the ability of the defendant to satisfy judgement. It follows that claims are only pursued where the prospects of success are at least moderate and the defendant is believed to be able to satisfy judgement. In most cases, therefore, the claimant will be successful and have a costs order in his or her favour, so that the publicly funded legal costs can be recovered.
27. Thirdly, living with a continuing breach of a repairing covenant is itself stressful and there is an impact on the health, safety and well-being of the individual and his or her family. The impact on the individual is aggravated by the recalcitrance of the landlord in failing to carry out the repair. Before an individual claims damages, he or she has already lived with a significant degree of disrepair that may have an impact on health and over which he or she has no control. The impact on children can be considerable.
28. Fourthly, the failure of a landlord to put premises into repair often leads to the tenant withholding rent and the absence of public funding to assist with disrepair claims is, in our view, likely to trigger this conduct by the tenant leading claims for possession for not payment for rent thereby leading to the tenant bringing counterclaims and costly litigation which are likely to attract public funding. It is our view that prevention is better than cure and the availability of legal aid provides for that prevention.
29. Fifthly, damages claims where quantum is less than £5,000 are already excluded from the current scheme. Publicly funded housing disrepair claims will be allocated to the fast track and the claimant would expect to benefit from a costs order in the usual way.

30. Sixthly, there is an in-balance of power in the relationship between landlord and tenant. The landlord will almost invariably have greater resources than the tenant and be able to afford legal representative. Without public funding, the parties will have no equality of arms.
31. If damages claims for breach of repairing covenant are to be taken out of scope, we would suggest that they are subject to qualified one way costs shifting, as proposed in the Jackson Review for personal injury claims.

### **Actions to set aside a legal charge**

32. The Consultation Paper states claims for possession remain in scope and the proposal is that actions to set aside a legal charge will be excluded now be excluded. We disagree with this proposal. It is our view there is a risk that this exclusion will be to the detriment of home owners if they are unable to get public funding until much later on in proceedings when an order for sale is sought and then a claim for possession begins. The exclusion is not understood to be merely seeking to exclude work in respect of claims to the District Land Registry or before an Adjudicator. If a legal charge on someone's home stems from a judgment in relation to an unregulated credit agreement to which the Consumer Credit legislation is inapplicable and work in relation to debt where the client's home is not immediately at risk is also excluded, home owners will be much worse off. They will not be able to access publicly funded advice where there is merit to apply to set aside the charging order and the original judgment order. Instead the client will have to suffer delay, with the delay being used undermine any application to set aside, until their case comes within is in scope upon the charging order being made absolute and an order for sale is sought. It means that in order to be assisted with public funding the client will have to wait for their home to be at risk before they can do anything about it.

### **An action under the Mobile Homes Act 1983 not involving eviction**

33. We do not agree with this exclusion from scope. Given that the Mobile Homes Act 1983 will now apply to all Gypsy and Traveller caravan sites

there is a need for the Government to carry out an impact assessment of the consequences of removing from scope the determination of very many practical questions of interpretation of the law that may arise from the new provisions applying to such sites. It is our view there are many issues aside from questioning service charge or levels of increase of pitch fee which fall short of concerning possession but which concern the Gypsy and Traveller way of life. We have seen a draft response to this consultation prepared by the Community Law Partnership of Birmingham and we share their concerns in this area.

### **Actions under the Access to Neighbouring Land Act 1992**

34. We do not agree with this exclusion from scope. This is generally the only remedy for residential occupiers in leasehold properties affected by defects that do not arise within their own properties nor within the demise of their immediate landlord and or there is an argument with the freeholder. Claims pursuant to this legislation allows the source of the problem to be dealt with expeditiously by first obtaining sanction of the court. The practicalities of resolution of such claims will depend on expert evidence to determine what reasonable works are required . It is our view that it is short sighted to withdraw availability of public funding from what is designed as a hands on practical remedy designed to replace more costly and lengthy litigation such as negligence or nuisance claims.

**Question 4: Do you agree with the government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding legal representation for inquest cases? Please give reasons.**

35. We confine ourselves to comment on housing-related matter.
36. We are concerned that "significant wider public interest" may not encompass challenges to an aspect of a local housing authorities and/or registered housing providers policy or practice. Such claims can result in very important declarations as to the lawfulness of a public

authority's practice or policy. For example, the series of cases considering the applicability of Article 8 of the European Convention of Human Rights in relation to claims for mandatory possession orders such as in *Manchester City Council v Pinnock* [2010] UKSC 45.

**Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement? Please give reasons.**

37. We do not oppose, in principle, the proposal that public funding should be refused where alternative sources of funding are available. As the Consultation acknowledges, this is already the current position.
  
38. In our experience, however, clients seeking legal representation on housing-related matters who are financially eligible for public funding rarely have other sources of funding available. By definition, those clients have very limited means. Whilst Conditional Fee Agreements may be available, the cost of insurance against the risk of losing and paying the other side's costs can be prohibitive. Clients with such limited means do not have their own legal expenses insurance. The difficulty of obtaining insurance in such cases has been identified in (1) *Regina Sibthorpe* (2) *Danri Morris v Southwark London Borough Council* [2011] EWCA Civ 25 which demonstrates the difficulties faced by clients in obtaining after the event insurance and the potential difficulties and risks solicitors face when they are committed to representing clients in housing cases. Further given the lack of meaningful statistics in the Consultation Paper means that claims made such as at para 7.8 are mere assertions "*availability of legal aid may be encouraging people, and their lawyers, to bring cases which have too little chance of success to attract a CFA*" as there is no evidence cited in support, public funding is subject to strict control as to merits and for many such cases there is no general market for after-the-event insurance and CFAs are not a viable option we reject such assertions.
  
39. We would wish to see retention of the current provision.

**Question 6: we would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings**

40. We are not in a position to provide anything other than anecdotal evidence.
41. Members of our housing team appear in the County Court, Administrative Courts and higher Courts on a daily basis. We observe litigants in person in other cases. There seem to be more and more litigants in person and, as the Consultation Paper anticipates, we would certainly expect a rise in their numbers if the proposals are approved and implemented. Cases involving litigants in person invariably take a greater time and impose a higher and disproportionate demand on judicial and administrative resources of courts. Judges and ushers are extraordinarily patient and helpful but inevitably people with no legal training who are presenting their own case will be significant slower.

**Questions 7 – 11 inclusive:**

**Single Gateway Proposals (paras 4.270 – 4.273)**

42. We are concerned at the proposal for access to publicly legal advice to be through a single gateway of the proposed Community Legal Advice helpline exclusively.
43. It is proposed that the first triage will be carried out by an operator who may not have been legally trained. Consequently the burden will be on the caller, seeking legal advice, to identify his or her legal problem. In our experience, nearly all housing-related problems are complex and laden with complex and extensive documentation. The information sought and the advice given needs to be specifically tailored to the particular problem. We are concerned that a telephone interview will not be able to achieve that client-specific advice.

44. We support any measure which makes it easier for potential clients to seek advice and we recognise that a telephone helpline can make it easier for some people to seek advice, particularly if that helpline operates outside working hours or if it allows people in work to access advice without having to take time off work to visit an advisor.
45. However, we oppose such a helpline being the **only** gateway to advice. We note the limited clarification of use of this proposed helpline published on the 5 January 2011 but this does not satisfy our concerns. First, using a telephone helpline may create problems for vulnerable client groups, for example those with language difficulties or those with mental health problems or learning difficulties.
46. Secondly, individuals may not themselves recognise the true nature of their problem and may not therefore give the person answering the telephone call the information which is needed in order for them to be properly advised. For example, a person may not recognise that an order for possession is being sought on mandatory grounds if they have failed to consider the significance of what is contained in a notice of seeking possession.
47. Thirdly, imposing a single gateway could add to the time in which it takes for a person to receive urgent advice. For example, a person who has been served with a warrant of possession may have a very short period of time in which to make an application to suspend the warrant. In our view, they will not be well served by having to gain access to legal aid services via a helpline when what is required is an urgent application to the court.
48. Fourthly, research carried out from fieldwork in October 2010 by the Legal Action Group "*Social Welfare Law: what is fair?*"<sup>1</sup> shows that people in social classes D and E are less willing to use a telephone service:

"What emerged is that people in social class DE are most reliant on advice centres and are least likely to use the internet or telephone-based services to access advice. A large majority of respondents, while they might not use legal

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<sup>1</sup> <http://www.lag.org.uk/files/93536/FileName/SocialWelfareLawbooklet.finalversion.PDF>

advice centres themselves, view such advice centres as the place to which they would go if they needed to obtain advice on SWL. People in all social classes are more likely to report problems in housing and employment law.” (Summary of results, p 6 of report)

49. It is our experience that such social groups are the people who are most likely to require advice and representation in respect of housing issues and are the social groups which legal aid was designed to protect.
50. We are also concerned at the lack of clarity in the Consultation Paper as to whether those referred on from a single gateway would have a choice as to which specialist provider they are referred to. We consider that there is no good reason to deprive consumers of legal aid services of choice. If a person has a preferred supplier of legal services, we consider they should be able to contact that supplier directly.

**Proposals to remove Welfare Benefits (paras 4.216 – 4.224) and Debt from scope (paras 4.176 to 4.179)**

We comment below on the likely impact of the above proposals on people at risk of losing their homes. The Housing Team at Garden Court Chambers understand that members of the Civil Team at Garden Court Chambers will be making a separate detailed response to the Consultation Paper to remove welfare benefits and debt from the scope of legal aid. We are, however, concerned to explain the destabilising effect that such a removal from scope will have clients and on suppliers of housing advice and representation.

**Our response in summary:**

- The Green Paper seriously underestimates the importance of welfare benefits advice in avoiding and resolving possession proceedings: outstanding housing benefit issues are often the root cause of rent arrears possession claims; the majority of tenants we represent are not in a position to resolve these housing benefit issues without specialist advice;
- The proposals will mean proceedings being adjourned and delayed (thereby increasing use of court time and costs) due to the absence of proper advice that resolves the underlying issue;

- The limited debt advice that will continue to be available and the availability of legal advice and assistance to defend a possession claim itself will be too little too late. It will not provide the timely and fully fledged expert welfare benefits and debt advice that many clients need to avoid the loss of their home.

## Our response in detail

### **The Proposal to remove Welfare Benefits from scope (paras 4.216 – 4.224)**

#### (i) – HB and related welfare benefits issues are often the cause of rent arrears

51. The main causes of rent arrears are frequently delays in administration and payment of housing benefit ('HB'). Indeed HB is one of the factors which the Rent Arrears Pre-action Protocol requires public sector landlords to take into account when considering whether to issue proceedings in the first place. HB issues are highly relevant to the outcome of possession proceedings when brought on discretionary grounds<sup>2</sup> and the Court of Appeal has held that outstanding HB issues must be resolved before a decision can be made on a possession claim.<sup>3</sup>
52. The difficulties with the administration of HB have been well documented and research has established that some landlords were issuing possession proceedings as a means of putting pressure on the local authority benefit section to process the tenant's HB claim.<sup>4</sup> The Local Government Ombudsman's 'digest of cases'<sup>5</sup> contains many graphic examples of vulnerable tenants being wrongly evicted due to maladministration of housing benefit.<sup>6</sup> In our view, access to proper

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<sup>2</sup> Housing Act 1985 Ground 1, Housing Act 1988 Grounds 10 and 11, Rent Act 1977, Schedule 15.

<sup>3</sup> *Haringey LBC v Powell* (1995) 28 HLR 798 (CA).

<sup>4</sup> "Improving the Effectiveness of Rent Arrears Management" published ODPM (June 2005).

<sup>5</sup> Available on the LGO's website: <http://www.lgo.org.uk/publications/digest-of-cases/>

<sup>6</sup> E.g. Luton Borough Council (07B10865), 27 August 2009, where a vulnerable tenant was wrongly evicted for rent arrears while a housing benefit appeal was pending and London Borough of Newham

welfare benefits advice is essential to effective legal assistance in this area.

53. When providing legal advice and assistance to a person at risk of losing their home, it is essential that any legal advisor thoroughly checks the housing benefit position:
- Is HB in payment, is there a shortfall and if so why?
  - Are there gaps in the tenant's history of HB entitlement, and if so why?
  - Does a new HB claim need to be made or an appeal against a decision?
  - Has there been any overpayment of HB in the past, and if so why? Are any deductions for recovery being made?

54. Where problems are identified, in any case that is not completely routine, the person concerned will need proper welfare benefits advice. Often a person needs help to sort out the whole of their welfare benefits situation, to pursue appeals, challenge overpayment decisions, and to communicate in a meaningful and effective way between DWP and housing benefit authority. We frequently see cases in which a referral to an expert welfare benefits advisor has been the key step taken that has enabled a person being able to retain their home. Unfortunately, we sometimes see cases in which inexpert welfare benefits advice has been provided which has merely exacerbated a problem.

County court pre-action procedures can only work effectively and as intended if tenants have access to proper welfare benefits advice.

55. The Civil Practice Rules (CPR) Part 55 requires both parties to rent arrears possession proceedings to address any underlying benefit issues from the outset of the proceedings so that these can be resolved before a final decision on whether to grant any possession order can be made.

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(09 003 325), 09 November 2010, where the council gave wrong advice to a woman about local housing allowance, such that she was unable to pay the shortfall, leaving her in rent arrears.

56. The Practice Direction on possession claims (PD55A) requires: -
- the claimant (i.e. the landlord) to provide information in the Particulars of Claim on whether the defendant is in receipt of social security benefits (PD 55A para 2.3 (5)(a));
  - the defendant (i.e. the tenant) to give details of any outstanding social security and HB payments, as well as any applications for review or appeals not yet concluded (PD 55A. para 5.3 (2)(a)-(b)).
57. The importance of addressing HB issues has been further underlined by the introduction of the '*Pre-action Protocol for Possession Claims based on rent arrears*' in October 2006. The Protocol refers to debt and benefits advice at several stages in the process both pre and post issue of notice, as well as requiring referral to specialist debt and benefit advice:
- Before issuing a notice of seeking possession - the landlord should contact the tenant to discuss, amongst other things, their "entitlement to benefits" (paras 5) and offer to assist in any claim the tenant may have for HB (para 6). **The landlord should advise the tenant to seek assistance from CAB, debt advice agencies or other appropriate agencies as soon as possible (para 8).** (our emphasis)
  - Before issuing possession proceedings - the landlord should arrange an interview with the tenant which should include a discussion of the HB position (para 9). If the matter does go to court then the landlord should disclose his knowledge of HB situation 10 days before the hearing (para 12(b)).
58. If the Green Paper's proposals are realized, a key aspect of the Pre-action Protocol will become a 'dead letter' as there will be so few agencies to which tenants in rent arrears can be referred to.

The need for advisors in welfare benefits law to have expertise in the area

59. The view put across in the Green Paper is that social security reviews and appeals are straightforward and do not really need input of paid legal advisers. The reasons given for withdrawal of this area from scope include

- the accessible, inquisitorial, and user-friendly nature of the tribunal means that appellants can generally present their cases without assistance;
- the appellant is only required to provide short reasons for disagreeing with the decision in plain language;
- in many cases decisions are overturned simply because the tribunal is able to elicit additional information which was not available to the Department (para 4.217).

60. The above does not accurately reflect what we know from our work as housing lawyers to be the experience of many of our clients facing problems with their housing benefit and other welfare benefits. The complexity of social security law is widely recognized. The rules governing claims and decisions on entitlement to HB are extremely complicated<sup>7</sup> and generate many thousands of appeals to the first-tier tribunal,<sup>8</sup> as well as many appeals on a point of law to an Upper Tribunal.<sup>9</sup> The superior courts have described the benefits system as “enormously complex”,<sup>10</sup> and social security legislation as “notoriously labyrinthine”.<sup>11</sup> Lord Justice Wall, for example, observed:

“In my view it remains an apparently non-eradicable blemish on our operation of the rule of law that the poorest and most disadvantaged in our society remain subject to regulations which are complex, obscure and, to many, simply incomprehensible.”<sup>12</sup>

61. In *Haringey LBC v Powell*,<sup>13</sup> the leading case on HB issues and possession claims for rent arrears, the Court of Appeal described how

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<sup>7</sup> The current edition of CPAG’s annotated Housing Benefit and Council Tax Legislation (23<sup>rd</sup> edn) 2010/2011, consists of 1286 pages.

<sup>8</sup> The total number of social security appeals (including DWP benefits and Tax Credits) was 339,200 for the year 2009/10: Source: Annual Statistics for the Tribunals Service, 2009-10.

<sup>9</sup> The total number of appeals to the Upper Tribunal was 3,700 for the years 2009/10: Source: Annual Statistics for the Tribunals Service, 2009-10

<sup>10</sup> *Kerr v Department for Social Development* [2004] UKHL 23.

<sup>11</sup> *Secretary of State for Work and Pensions v Borrowdale & Morina* [2007] EWCA Civ 749.

<sup>12</sup> *R (on the application of Gargett) v London Borough of Lambeth* [2008] EWCA Civ 1450, para 36.

<sup>13</sup> (1995) 28 HLR 798 (CA).

the HB situation in that case had, on any view, become “*hopelessly confused*”: -

“On the one hand it was said the application was too late. On the other hand it was said that the document showed that no benefit was due and yet on a third basis, ... some sums may have been due or were due but they had been credited against an overpayment which had taken place during the earlier part of the period ... What was clear and is clear is that not all of those explanations can have been correct, nor were they consistent with each other.”

62. Sadly, this type of HB scenario is all too common and a local authority HB department may take an entrenched view on matters. The county court is not a forum where HB issues can be adjudicated on and sorted out. It does not have capacity to do so, nor does it have authority<sup>14</sup> to adjudicate on HB entitlement.
63. In our experience, substantive HB issues are not resolved until a welfare benefits expert is engaged.

**The Proposal to remove Debt Advice from scope save where the client’s home is at immediate risk (Debt (paras 4.176 to 4.179))**

64. It barely needs to be pointed out that the provision of debt advice at the 11th hour is far less likely to be an effective means of helping a person avoid the loss of their home than advice provided at an earlier stage.
65. The Green Paper refers to debt advice being available from other sources, although these other sources could not conceivably plug the gap, and we do not understand the government to be contending that they would. The government’s justification for the removal of debt advice includes that “*it is right to expect individuals to take responsibility for their own financial affairs*” (paragraph 4.62). We fundamentally disagree with this reasoning: part of taking responsibility for one’s affairs is to seek timely advice when needed.
66. The logic of the Social Welfare Law contracts, which include housing, debt and welfare rights advice, is that the “joined up service” is effective to prevent homelessness and is cost-effective. Now what is being

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<sup>14</sup> *Haringey LBC v Cotter* (1997) 29 HLR 682 CA.

proposed as regards debt advice is a scheme which will be of minimal effect in homelessness prevention and which on any view is not cost-effective. It is our experience that in the past clients faced real difficulties obtaining free debt advice or, if a service was available, appointments were hard to come by.

67. The proposals to remove almost all LSC funded debt advice will mean solicitors' firms or agencies that have provided LSC funded debt advice hitherto may simply cease to exist or cease to provide debt advice at all. This will mean that even in the limited category of cases where funding is still available for debt advice (where the home is at immediate risk) clients will not be able to find qualified advisors to provide it.

### **Question 3**

68. For the reasons set out above, we do not agree with the proposals to exclude Debt and Welfare Benefits from the scope of the civil and family legal aid scheme (**Question 3**).

### **Impact Assessments**

#### **Option 7 – Remove welfare benefits advice from scope**

69. We note and agree with the conclusion on client impacts (at 7.35) that the proposed change to welfare benefits advice will have a significant disproportionate impact on ill or disabled people, female clients and BAME clients.
70. We do not agree that the impact assessment has properly identified the severity of the impact of the removal of expert welfare benefits advice to those who are at risk of immediate loss of their home due to rent arrears. For the reasons set out above, it (a) fails to take into account the complex nature of the advice needed to resolve substantive HB issues in possession proceedings, and (b) it wholly underestimates the difficulties facing such clients if they were left to resolve those issues without the assistance of someone with expertise in welfare benefits. In short very many vulnerable and disadvantaged clients facing

possession proceedings in the court courts for rent arrears are in need of this type of help. Accordingly, we would strongly urge the Minster to rethink this proposal and retain welfare benefits within scope in this type of case.

71. In relation to **Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?** – No, for the reasons set out above.
72. In relation to **Question 50: Are there forms of mitigation in relation to claimant impacts that we have not considered?** The Housing Team's response is that the Green Paper fails to consider retaining welfare benefit within scope for clients who are facing possession proceedings for rent arrears (as well as mortgage arrears).

**Option 3 – Remove debt matters where the client's home is not at immediate risk from scope**

73. We agree with the conclusion on client impacts (at 3.36) that the proposed change to debt advice will have a disproportionate impact on ill or disabled people.
74. We do not agree that the impact assessment has properly identified the severity of the impact of the removal of debt advice save for those about to lose their home due to rent or mortgage arrears. In our view the suggestion that a claim for possession can be defended or resolved by last minute debt advice is wholly unrealistic. We suggest that free debt advice should continue to be available to all who qualify on their means - to assist the vulnerable and disadvantaged clients who we see in the county courts on a daily basis.
75. In relation to **Question 50: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?** No, for the reasons set out above.

## **Further comments re impact of proposals**

76. First, the removal of welfare benefits from scope will have a serious destabilising impact on suppliers of housing advice and representation. For those suppliers of housing advice who do not also provide advice on family law, it was a pre-requisite of applying for social welfare contracts in the recent contract round that they also provided welfare benefits and debt advice. To remove payment for that advice will clearly severely damage those organisations ability to survive. The existing advice desserts will expand as some providers will be forced to close. Organisations such as Shelter, whom the Consultation Paper cites as alternative sources of advice, also rely on income from welfare benefits and debt advice via public funding. It is our experience that few local authorities now provide welfare benefits and debt advice and they will often make referrals to law centres or advice centres per the guidance in the pre-action rent protocol. Those local authorities that do provide such advice are likely to be badly hit by current local authority cuts.
77. Secondly, particularly in relation to housing possession claims based on rent arrears, costs are often saved by an early intervention by a welfare benefits adviser. If housing benefit issues are resolved at an early stage, then it is likely that possession proceedings can be halted at a very early stage, even prior to issue thereby saving time and cost.
78. It is our overall view that the removal of debt and welfare advice from the scope of public funding will have a devastating impact on vulnerable clients in housing cases.

## Chapter 7: Remuneration

### **Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10% rather than undertake a more radical restructuring of civil and family legal aid fees?**

79. If cuts have to be made, we would agree with the proposal to reduce all fees paid in civil and family matters by 10% rather than undertaking a more radical restructuring of civil legal aid fees especially in the light of the recent upheavals solicitors doing civil legal aid work have undergone with the new civil legal aid contracts. However, we do not agree that civil fees should be cut by 10% as this is likely to lead to the loss of some practitioners and a consequent reduction in access to justice which is regrettable. LJ Jackson referred in his preliminary report to a reduction in the number of solicitors prepared to undertake publicly funded housing work resulting in significant access to justice issues [para 5.1] and stated in his final report that the low level of remuneration for legal aid solicitors has already led to a dearth of legal advice for tenants. It is considered that such a cut will be particularly catastrophic for law centres and the not for profit sector who have traditionally been at the forefront of providing access to justice.
80. As identified in the response submitted by the Bar Council it is difficult to respond to this part of the paper as much of the relevant information is missing as the statistical base is poor. Figures are given for the total civil legal aid spend for 2009 (£97m at para 7.8) but these figures have not been provided for any sustained period. Nor have figures been provided for costs recovery where an order for costs has been made against the opposing party to the benefit of the Legal Aid fund.
81. In this respect, we agree with the Bar Council that the consultation exercise does not meet the basic requirements in the Code of Guidance on consultation at point 3 that:

*Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.*

82. It is clear that many legal aid providers (including barristers) have operated and continue to operate against a background of constant change in recent years and publicly funded practice is marginally viable for many of them. Any substantial reduction in income for these practitioners is likely to cause increasing numbers to leave the market for publicly funded legal services, particularly when linked to proposals to remove large areas of work from the scope of public funding altogether.

**Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so we would welcome views on the criteria which may be appropriate**

83. We do not consider that we are in a position to comment on solicitors enhancements but would question whether the proposal to cap enhancements is necessary given that paragraph 7.9 of the Consultation Paper makes it clear that currently enhancements are generally allowed at a much lower level than the maximum possible. We would assume that the maximum enhancement is only payable where it properly reflects the level of complexity of any given case and the particular expertise of the solicitors involved.

**Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5 above, subject to a further 10% reduction? Please give reasons.**

84. We do not agree to the proposal to codify rates and then subject barristers' fees to a further 10% reduction. We consider that the proposed codification and consequent cut in fact amounts to a much larger reduction which would consequently have a much greater impact of the viability of any continued civil legal aid practice at the Bar. As is acknowledged at paragraph 7.11 of the Consultation paper, the rates which have been used in the table are only for standard cases. There are of course more complex cases which require greater expertise and experience and warrant higher payments.

**Questions 35/36: Do you agree with the proposals:**

- **to apply risk rates to every civil non family cases where costs may be ordered against the opponent and**

- **To apply risk rates from the end of the investigative stage or once total costs reach £25000 or from the beginning of cases with no investigative stage? Please give reasons**

**The Government would also welcome views on whether there are types of civil non family case (other than those described at paragraphs 7.22 and 7.23 above) for which the application of 'risk rates' would not be justifiable, for example because there is less likelihood of costs recovery or ability to predict the outcome.**

85. We strongly oppose the proposal that risk rates should apply to every civil non family case where costs may be ordered against the opponent.
86. As a matter of principle risk rates should not apply:
- where claims are being defended as opposed to being brought;
  - where there is no realistic prospect of recovering costs in the event of a successful outcome; and
  - in any event before there has been a proper opportunity to assess the risks involved.
87. We do not accept that the availability of legal aid is encouraging lawyers to bring cases which have little chance of success as suggested in paragraph 7.17 of the Consultation Paper and that risk rates are necessary to discourage this practice. In housing, the only cases which are brought as opposed to defended, are homelessness appeals, disrepair and illegal eviction claims. The vast majority of disrepair and illegal eviction claims are successful and therefore there is little cost to the legal aid fund in funding such cases but they provide access to justice to a vulnerable and often marginalised section of society.
88. It is accepted in the Funding code that possession claims may be defended where the prospects are better than poor because it is considered that the consequences of the loss of a home are so grave. Lawyers are encouraged to defend these claims where the prospects of success are borderline and there is no justification for then applying risk rates. If it is the case that risk rates discourage lawyers from proceeding with cases which have little chance of success this would

mean that possession cases which have sufficient merit to be defended, will be left undefended.

89. Whilst it may be appropriate to apply risk rates to claims which are solely for damages, the government, in the Consultation Paper, proposes to remove such damages claims in housing cases from scope. If this proposal is adopted, we would suggest that all the other housing cases which remain in scope should not be subject to risk rates.
  
90. It is acknowledged in paragraph 7.22 the Government does not believe that it would be appropriate to apply risk rates in some “exceptional cases” where even in the event of success an order for costs is unlikely to be made. The Government states this is likely to be in a “small number of cases” and provides an example of the withdrawal of artificial ventilation in a best interest case. The Government fails to identify what classes of case form exceptional cases. It is our view that given the gravity of the loss of a home that possession cases involving rent arrears and anti-social behaviour ought to fall into this class of case. Although, in theory, a defendant tenant who successfully resists a possession order may obtain a costs order against his landlord, in practice this never occurs, because in most cases, some type of order is made against the defendant, either a suspended or postponed possession order or an adjournment on terms and even where this is not the case, and no order is made, the court usually finds that there was some basis for bringing the proceedings and is unwilling to penalise what are invariably public authority landlords with an order for costs. In practice, the most that a defendant can achieve is no order for costs.
  
91. Equally, although it is possible to obtain costs orders against opponents in homelessness appeals, it is often difficult to do so, given the practice of many local authorities to settle such proceedings by buying off the applicant with a favourable decision but no order for costs. In his final report Lord Justice Jackson accepted that “this state of affairs created difficulties for solicitors who are already operating in a harsh environment” [paragraph 6.2]. We would oppose any imposition of risk rates in homelessness appeals until the proposal that where a housing claim is settled in favour of a legally aided party, that party should have the right to make the court determine which party should

pay the costs as set out in recommendation 7.1(v) of LJ Jackson's final report, is adopted.

92. We consider that the present threshold of £25, 000 before risk rates are imposed should be retained as any earlier threshold is likely to render a housing legal aid practice uneconomic and will lead to the loss of those practitioners who have specialised in this area with the consequent impact on access to justice for their clients.
93. If risk rates are to be imposed, earlier than once costs reach £25 000, we would oppose the imposition of risk rates from the issue of a funding certificate as this would mean that there would be no opportunity to assess the merits of a case before risk rates applied. We consider that as a matter of principle, barristers should be able to assess the merits before risk rates apply which would not necessarily be the case even if risk rates applied at the end of investigative stages, given the practice of most solicitors dealing with housing cases to apply for full representation rather than investigative help. If risk rates are to be imposed at an earlier stage, this must allow for a proper opportunity for the Bar to evaluate the merits before such rates apply to them.

### **Impact assessments**

94. In respect of question 32 it is of note that the Chairman of the Bar is already advising Counsel to diversify their practice and no longer rely on publicly funded cases. This in our view will lead to lessening the expertise at the Bar in dealing with publicly funded cases and add increase the advice deserts found in England and Wales.
95. In respect of questions 35 and 36 it is noteworthy that in options 3 and 4 it is not possible to quantify the savings in costs (see pages 4 and 5 of Part 7 of the Consultation Paper).
96. Table M of the Cumulative Equality Impact Assessment provides:

Table M: <b>Impact on legal aid expenditure on barristers</b> by category of work	Current total		% impact
	Impact		
Civil legal aid	£132m	£56m	42%
Criminal legal aid	£284m	£34m	12%

Total	£416m	£90m	22%
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97. The thrust is to reduce the fees, which represent both contributions to their chambers, overheads and personal income, of civil legal aid barristers by 42%. In response to a question as to what assumptions or analysis had been carried out in respect of this assessment the response on the 27 January 2011 from Kevin Westall, Head of Civil Procedure and Legal Aid Reform Implementation, Ministry of Justice was:

“Thank you for your query about whether Table M of the cumulative EIA took account of all the proposed Civil and Family remuneration changes (especially “risk rates”) or just the 10%.

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

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

Table M does not take into account the impact on barristers of the codification of barrister rates in civil non-family matters and the attendant reduction in rates of 10%, nor does it take into account the proposals to apply ‘risk rates’ to certain civil non-family cases, because it was not possible, on the basis of available data, accurately to quantify the impact of these proposals (see paragraphs 3.31 and 4.37, respectively, of the Civil and Family Fees’ EIA).

In terms of assumptions used to underpin this analysis, all workings were based upon 2008/09 closed cases (para 21 in the Cumulative EIA), though it should be noted that some 2009/10 claims were used in crime analysis (para 33 in the Legal Aid Remuneration – Criminal Fees’ EIA).

I hope that this is helpful.”

98. It is therefore our view that no accurate quantification of the impact of these reforms has been carried out and the impact assessments provided are clearly inadequate and meaningless. It is our view that without proper analysis of the impact of these proposed reforms the policy pursued by the Government will create irrevocable damage to

the provision of legal services for vulnerable people in England and Wales.

## **Summary**

Although we appreciate that in England and Wales we are all facing difficulties with the state of public finances we note that in Scotland and Northern Ireland there are no similar proposals to radically reform the provision of Legal Aid for housing and other matters. We believe the proposals set out in respect of Housing issues in the consultation paper are fundamentally flawed and will be highly damaging to the interest of clients in need of such assistance and to wider society. Consequentially we do not support the proposals set out in Chapter 4 and 7 of the Consultation Paper for our reasons given above.

We note that it is a fundamental issue that citizens should have a roof over their head which is suitable, affordable and decent. We note that one of the cornerstones of democracy in a civilised society is the right of an individual to be able to challenge decisions and enforce their rights irrespective of their means. Sadly, the reforms proposed in this Consultation Paper seriously undermine those principles.

***Housing Team***  
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