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**ATLEU**

ANTI TRAFFICKING AND  
LABOUR EXPLOITATION UNIT



Survivor Collective



# Joint response to the Legal Aid Means Test Review: Access to Legal Aid for Survivors of Trafficking and Modern Slavery

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# 1. Introduction

This is a joint submission by Anti Trafficking Labour and Exploitation Unit (ATLEU), Focus on Labour Exploitation (FLEX), Hope for Justice, Simpson Millar, and Survivor Collective. We are civil society organisations and legal aid providers working to end trafficking and modern slavery, and support survivors to access justice and remedy. This submission is informed by our direct or partners' experience of the challenges faced by survivors of trafficking and modern slavery in accessing legal aid.

In this response, we respond in detail to Question 6, 7, 38, 41, 42, and 46 and 98 which are the questions most relevant to the obstacles experienced by survivors of trafficking and modern slavery and legal aid providers. We also provide shorter commentary on other questions.

This submission is coordinated by ATLEU. Please contact Kate Elsayed-Ali, Policy Manager, [kate@atleu.org.uk](mailto:kate@atleu.org.uk), for further information.

## 2. Executive Summary

### 2.1 The importance of legal support for survivors of trafficking and modern slavery

We welcome the Ministry of Justice's consultation on the Legal Aid Means Test Review and the expressed commitment to ensuring access to justice whatever an individual's financial circumstances. We agree that Legal aid is absolutely crucial to a fair justice system.

Survivors of trafficking and modern slavery present with complex legal and support needs. They often need assistance to access a variety of different types of legal advice and representation. This includes (but is not limited to) immigration and asylum, criminal law (non-prosecution), civil compensation, criminal injuries compensation, community care, welfare benefits, housing, debt advice as well as public law issues which arise.

Access to early, specialist legal advice and representation is absolutely critical for survivors of trafficking and modern slavery to secure rights, support, justice and remedy. The consequences of not being able to access it can be devastating and leave survivors destitute, homeless, at risk of removal, and at risk of further exploitation or re-trafficking. It damages survivors' ability to recover, make informed choices, and achieve lives free from exploitation. It undermines access to justice as well as the prevention of trafficking and modern slavery.

It is for this reason that access to legal advice is a recognised support entitlement of survivors of trafficking and modern slavery across multiple international frameworks. The Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), and Directive 2011/36/EU (Trafficking Directive) both state that the provision of support and information, specifically in relation to legal advice and rights should be provided without delay and should be free of charge.

## 2.2 Barriers in access to legal advice for survivors of trafficking and modern slavery

Survivors of trafficking and modern slavery experience significant obstacles in access to legal advice despite it being key to their ability to secure rights and their immigration status and their recovery from exploitation.

**One such obstacle is the stringency of the current legal aid means test**, which results in many survivors failing to meet the financial eligibility criteria, despite their low income, lack of capital, and inability to afford legal advice otherwise. It does not reflect the diverse and often fluctuating financial reality for survivors of trafficking and modern slavery, nor the complicated means of evidence with which survivors present. The means test creates administrative burdens and financial risks for providers and is a disincentive to take on cases of trafficking and modern slavery.

There are a number of other serious obstacles in access to legal aid, which fall outside of the scope of the current means test review, but need to be urgently addressed. These include:

### **Legislation too narrowly defines what is in scope for legal aid**

The volume of queries which ATLEU receives annually to its advice line about access to legal aid reveals considerable confusion about what is and is not in scope under legal aid, with many legal providers refusing to open cases on an incorrect basis. Considerable confusion exists about when survivors of modern slavery are entitled to legal aid amongst First Responders, support providers and solicitors alike.

Without clear and comprehensive communication about what the Legal Aid Agency (LAA) considers to be in or out of scope, this situation will continue. Although the Legal Aid Agency published a 'Clarification of Immigration Funding in Trafficking Case' information document<sup>1</sup>, clarifying that legal advice is available for matters of immigration for a non-asylum case, it is not widely known about and indeed is difficult to find on the Legal Aid Agency webpage.

### **The funding structure for immigration legal aid is inadequate to deliver good quality legal advice to survivors.**

The complexity of immigration cases involving survivors of trafficking and modern slavery increases time required for case work. As such, they are ill-suited to payment by standard

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<sup>1</sup> Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/716499/Clarification\\_of\\_immigration\\_funding\\_in\\_trafficking\\_cases.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716499/Clarification_of_immigration_funding_in_trafficking_cases.pdf)

legal aid fixed fees which do not change to reflect the time taken or level of work carried out. The cases can involve complicated and interconnected immigration issues that run over a long period of time, and clients often also have other legal issues ongoing not directly related to the immigration case but which may nevertheless impact on it (such as ongoing criminal cases). Legal advisers also assist such clients in navigating the NRM, for example by following up with the relevant Competent Authority about a referral already made.<sup>2</sup>

For controlled work cases involving victims of trafficking and modern slavery, the Legal Aid Agency do not make payments of the value of the case until it is closed and organisations are required to “cash flow” cases, sometimes for years, before they are reimbursed. There has been welcome change in payments on account of the fixed fee in an immigration controlled work case after substantive work is done, but that does not match the value of time spent on the file to that point, and cases take a long time to reach a payment point, if subject to Home Office delays. By their nature cases involving victims of trafficking often involve a number of expenses (known as disbursements) for interpreters and expert reports and medico-legal reports that must be paid up front by lawyers. Even though payments on account can be sought through stage claims on immigration cases after 3 months, the volume of costs is an unattractive cost burden for providers when they are also not recovering the value of profit costs incurred.

Research by the University of Liverpool, University of Nottingham Rights Lab and ATLEU<sup>3</sup> resoundingly concluded that the standard fixed fees payable to immigration legal aid lawyers are too low as to facilitate the complex legal work necessary on cases involving modern slavery to a sufficiently high quality. While it is possible to charge for the actual time spent on cases if the work carried out exceeds the certain threshold – thus meeting the escape fee – this is deemed too risky by many lawyers and does not adequately address the situation. The report also found that some dedicated legal practitioners are carrying out legal work on behalf of survivors without receiving adequate payment, in their own time, and at personal cost to their own wellbeing. They are also spending time rectifying poor-quality legal work carried out on survivors’ cases by other legal practitioners.

### **Poor decision making by the Legal Aid Agency**

Legal Aid Agency decisions on trafficking and modern slavery cases are poor. Refusals of applications are frequent, often due to a failure to understand the applicable law or apply lawfully the legal aid regulations. There is a lack of clarity within the Legal Aid Agency on how cases for victims of trafficking should be handled. There is also evidence of more obstructive conduct. Both are wasteful, resulting in unnecessary and adversarial litigation against the state at significant expense to the public purse, whilst denying legal aid to those who need it most.

### **Restrictions in the scope of legal aid for survivors**

Survivors of trafficking and modern slavery are now significantly less able to access legal advice when they need it since the Legal Aid, Sentencing and Punishment of Offenders Act

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<sup>2</sup> *Access to legal advice and representation for survivors of modern slavery*, May 2021, available at <https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf>

<sup>3</sup> *Access to legal advice and representation for survivors of modern slavery*, May 2021, available at <https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf>

(LASPO) came into force. There are three key areas where victims are not able to access legal advice as they are out of scope for legal aid. These are: immigration advice prior to entering the NRM; advice on trafficking identification; and advice on applying for compensation from the Criminal Injuries Compensation Authority (CICA) scheme.

### ***Advice prior to entering the NRM***

Advice before entering the NRM is not within the scope of legal aid for all survivors, in spite of NRM decisions having a direct effect on immigration decisions. The Nationality and Borders Act will make clear that pre NRM advice can be provided if a survivor is already accessing another in scope matter.<sup>4</sup> We welcome a move to recognise the importance of pre NRM advice but unfortunately this change will not reach many people in need, such as survivors who are in or have recently escaped exploitation and may be destitute or highly vulnerable, who are unable to find a legal aid lawyer, cannot articulate an in scope matter in the absence of legal advice (for example, cannot identify themselves that they have an asylum claim) or those who do not have a need for immigration advice that falls within LASPO. Those individuals will still be able to apply for exceptional case funding (ECF) for pre NRM advice if they have a human rights claim<sup>5</sup>, but in practice, applications for ECF for pre-NRM advice do not resolve quickly, risking leaving the individual in a risky situation or feeling compelled to consent to an NRM referral before receiving advice in order to secure support, raising questions, in the case of adults, about informed consent. We have experience of two applications for exceptional case funding for pre NRM advice, one initially made in August 2020 and one in January 2021, both of which are awaiting a final decision, after making representations in relation to the changes coming in with the Nationality and Borders Act to assist the decision making process this year.

A lack of advice at the pre-NRM stage may leave survivors unwilling to enter the NRM if they are not clear about its impact on their immigration status, or other potential implications of consenting to an NRM referral. In our experience, survivors also like having the reassurance and independence of an advocate when approaching the government. Independent NGO First Responders have limited capacity, especially for adults across all areas of exploitation. Many First Responders are not qualified to provide immigration advice, and receiving this advice can be key to understanding the implications of coming forward to the government. Many support organisations find it impossible to fund interpreters and without access to interpreters, victims' accounts will necessarily be incomplete or perhaps erroneous, with serious implications. Owing to the nature of their experiences, it is unlikely that survivors of trafficking and modern slavery will be able to pay for legal advice. Legal aid should therefore be made available for pre-NRM advice in all situations so that victims can make a fully informed decision before entering the NRM and for consent to be genuine.

### ***Advice on trafficking identification***

There is no free standing entitlement to legal aid for advice solely about the NRM identification process, unless this is linked to an application for leave to remain after receiving a positive RG. We have been told that the Single Competent Authority will send out a request for a survivor to complete a witness statement themselves, acknowledging this is a legal document that can be used in legal proceedings, even if they have no lawyer to assist them.

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<sup>4</sup> [Nationality and Borders Act s66](#)

<sup>5</sup> [Nationality and Borders Act s67](#)

A positive CG decision will rely heavily on the account given by the survivor themselves. For good decisions to be made, it is vital that victims are given support to provide the Competent Authority with the most complete picture possible, without this many survivors may not self-identify or recognise what information is relevant to a trafficking decision. Survivors of trafficking and modern slavery cannot be expected to provide adequate evidence without legal advice and support. Many do not speak English, and thus require interpreters; many are traumatised and have difficulty disclosing until they are in a safe, therapeutic environment; and many will simply struggle to put forward a coherent account of their experiences orally or in writing. Moreover, survivors require a lawyer to engage with complex legal frameworks to demonstrate how their circumstances fulfil the necessary criteria for identification. A lack of investment in specialist advice and support early on in the process means that it is increasingly necessary to obtain costly independent medical and expert evidence to overcome negative decisions by the Competent Authority or their failure to take into account alternative supporting evidence.

### ***Advice on applying for compensation***

Compensation plays an important role in assisting survivors of trafficking and modern slavery to hold those responsible to account, provide for their families, and rebuild their lives. It plays a crucial role in a survivor's recovery and in reducing vulnerability to future exploitation. It is also a key prevention measure, acting as a deterrent to perpetrators of trafficking and modern slavery.

There is currently no single law which enables a survivor to get compensation from their trafficker for being trafficked. To recover compensation, they have to patch together several different claims which encompass the many wrongs done to them. This can make bringing claims against their traffickers complicated and is why a civil remedy for modern slavery has been called for. However, the situation is worsened immeasurably for survivors by the lack of genuine access to legal aid for this type of case, and allows traffickers to continue to act with impunity.

Despite their considerable complexity, compensation claims on legal help files fall in the 'miscellaneous' category. This attracts the lowest rate of remuneration, a fixed fee of just £79 in comparison to a fixed fee of £157 in housing or £259 in public law. Within the miscellaneous regime personal injury and employment matters attracts a higher fee £203 and £207 respectively, however, even where the trafficking compensation claim involves personal injury or employment work the lower fixed fee is applied. The hourly rate paid is also lower than in other categories of law. Low rates of pay mean there is little business case for a provider to undertake trafficking compensation claims. The lack of a specific contract for providers to undertake trafficking compensation claims also makes the work less desirable.

For many survivors of trafficking and modern slavery, an application to the Criminal Injuries Compensation Authority (CICA) is the only route to obtain compensation. Typically, these survivors are unable to identify their trafficker, or their trafficker will have no significant assets. Often they are simply too vulnerable to face their trafficker in court or contemplate further legal proceedings. Despite this, there is no legal aid available for those wishing to submit an application to CICA or appeal a refusal.

The Exceptional Case Funding regime is purportedly in place to provide legal aid to those who would otherwise suffer a breach of a Convention or EU law right. However, the Legal Aid Agency does not accept that an application to CICA involves the determination of Convention or EU rights and so routinely refuse applications.

The CICA scheme at present is not fit for purpose. It is not genuinely accessible by an unrepresented survivor of trafficking and modern slavery and the vast majority are refused compensation in circumstances where it ought to be granted.

While Advice on a Trafficking Compensation Claims (i.e. a claim against the trafficker in either the employment tribunal or High Court) is technically in scope (although there is no legal aid contract for it) provision is in such short supply that in practice very few of those identified as victims of trafficking ever receive advice on compensation.

### **Conclusion and recommendations: changes needed to legal aid outside of the means test review**

The consequence of the obstacles detailed is that, currently, many survivors are simply unable to access the legal advice that they need, despite it being crucial to their recovery. This leaves survivors at risk of destitution, deportation and ultimately re-exploitation. The system at current is not fit for purpose. Many providers are deterred from undertaking this work, which leaves survivors and support workers struggling to secure lawyers. There are now significant 'legal aid deserts' around England and Wales where there are either no legal aid practitioners or there is no capacity for them to take on cases.

Before addressing the changes that need to be made to the legal aid means test, we would like to highlight other important changes to Legal Aid that, while out of the scope of this review, would significantly overcome the barriers and consequences described here. We recommend that:

- The Ministry of Justice and the Home Office produce a statement which positively, clearly and comprehensively expresses the legal aid entitlement of survivors in England and Wales, across all legal areas, providing more detail than set out in the current statutory guidance (under section 49 of the Modern Slavery Act 2015).
- Immigration and asylum cases funded by legal aid for potential and confirmed victims of trafficking and modern slavery be paid on an hourly rate, in line with Unaccompanied Asylum Seeking Children cases.
- Individuals with indicators of trafficking and modern slavery should automatically fall within the scope of legal aid for a minimum of five hours' independent immigration advice from a legal aid lawyer prior to making an NRM referral, whether or not they already have a matter within scope of LASPO.
- Advice and disbursements while an individual is going through the NRM, relating to their conclusive identification as a victim, should be brought within the scope of legal aid. This advice would not be tied to another in scope matter, to give flexibility for cover under different legal aid categories.

- All advice and disbursements relating to CICA matters should be brought back into scope of legal aid. In addition, trafficking and modern slavery should be defined within the CICA scheme rules as a crime of violence.
- Introduce into law a specific civil remedy for trafficking and modern slavery.
- Establish a legal aid contract for compensation claims relating to trafficking and modern slavery cases.

## 2.3 The Legal Aid Means Test: not fit for purpose for survivors of trafficking and modern slavery

In general, the complexity of the present means test creates administrative burdens and financial risks for providers. It means that providers, rather than working towards building the trust necessary for disclosure, need to start the relationship with their client by asking intrusive and complex financial questions. These disincentives decrease the accessibility of legal aid for individuals<sup>6</sup> and the sustainability of civil legal aid work for providers<sup>7</sup>. In addition, there is no independent right of appeal<sup>8</sup>. The present income limits do not reflect financial reality and have not been increased since 2009. This problem is particularly acute in a time of rising inflation and a cost of living crisis.

The complexity and stringency of the current means test has excluded many survivors of trafficking and modern slavery from access to legal aid that they vitally need and cannot otherwise afford. The income test does not reflect the complex, diverse and often fluctuating financial reality of many survivors. Survivors who work as part of their recovery are effectively penalised for doing so. The capital test is excessively burdensome. The requirement to provide evidence that assets abroad should not be considered is particularly onerous. Many survivors cannot access evidence on assets held abroad, particularly those who lose contact with family members back home as a consequence of their trafficking experience, or do not feel able to disclose their trafficking history to access the documentation requested. In other cases, the documentation simply does not exist. It is virtually impossible for survivors to continue to engage with lawyers and provide all the documentation required without ongoing support, especially when evidence of means is in another language or in a cash economy.

The reality is that the vast majority of survivors who are found ineligible for legal aid, or are required to make a contribution, are forced to go without legal advice as they cannot afford to pay for it. Others borrow large sums to do so, ending up in debt, which drives vulnerability to further exploitation, or are prevented from accessing legal aid due to accessing other

<sup>6</sup> See 'Trapped capital' and financial eligibility for legal aid, Dr Emma Marshall and Daniel Rourke, April 2022 (§4.3.1-4.3.3), available at <https://publiclawproject.org.uk/content/uploads/2022/04/Trapped-capital-FINAL.pdf>.

<sup>7</sup> See 'Droughts and Deserts: A report on the immigration legal aid market', Jo Wilding, 2019 (p31-33), available at <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>.

<sup>8</sup> Regulation 45(1)(a) of the Civil Legal Aid (Procedure) Regulations 2012 excludes means testing decisions.

entitlements, such as subsistence payments, income which is specifically designated to support their recovery.

We provide evidence on these issues in detail in response to Question 7.

## 2.4 Proposals must go further to ensure access to legal advice and representation for survivors of trafficking and modern slavery

We welcome the long overdue proposed increases to overall income and capital limits that would make more people eligible for legal aid, as well as new 'disregards' that make the tests fairer by excluding certain types of income and capital.

We are also pleased to see that the needs of survivors of trafficking and modern slavery and have been considered in the review, with the proposal to disregard Modern Slavery Victim Care Contract (MSVCC) financial support payments from the income assessment.

However, a disregard of MSVCC payments alone will not sufficiently reduce the number of survivors of trafficking and modern slavery who require legal aid but are found financially ineligible. It is not sufficient to address the obstacles posed by the diverse, complex and often fluctuating financial situations, and complicated means of evidence, with which survivors of trafficking and slavery uniquely present. No changes are proposed to the capital test for this group which currently excludes many from legal aid. Additionally, the income threshold could prevent survivors of slavery from securing decent work and moving on with rebuilding their lives due to the need to access legal aid as a consequence of their slavery. It will also not address the administrative burdens and financial risks which dissuades providers from taking on cases of trafficking and modern slavery. Unless further changes are made, the proposals will not remedy many of the current obstacles experienced by survivors in accessing legal aid.

Given the strong public policy benefits in preventing trafficking and modern slavery, supporting victims, and ensuring prosecutions of perpetrators, our primary recommendation in response to this consultation is the following:

### **RECOMMENDATION:**

- **Remove the means test for victims of trafficking and modern slavery: Anyone with a positive Reasonable Grounds decision under the National Referral Mechanism (NRM) and/or in receipt of MSVCC financial support payments within their recovery or reflection period or receiving ongoing support via the Recovery Needs Assessment (RNA) should be entitled to non-means tested legal aid.**

We hope that this recommendation will be supported and implemented. This is the single most impactful change that could be made to the means test to ensure that vulnerable survivors of trafficking and modern slavery can access the legal advice and representation they need but cannot afford otherwise. It would also remove a substantial administrative

burden on legal aid providers that contributes to the current lack of availability of specialist legal advice for survivors.

Outside of the scope of this consultation, there are other urgent changes required to the legal aid scheme in order to remedy the current situation where taking on cases involving victims of trafficking and modern slavery is not sustainable for legal aid providers. We have detailed these in section 2.2 of this Executive Summary and would be happy to discuss further.

### 3. Response to consultation questions

#### Ch. 2: Overarching Proposals

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

**Maybe.** The ‘OECD Modified approach to ‘equivalisation’, though widely used, has been criticized for underestimating the costs of key groups. The ‘Minimum Income Standard’ developed by the Joseph Rowntree Foundation more accurately reflects the income that different households require to maintain a socially acceptable living standard. It is based on what people need to be able to both meet their material needs and participate in society. An appropriate safeguard would be to introduce a hardship review process, like the one available in criminal legal aid. This would allow the Legal Aid Agency (LAA) to consider an applicant’s need to incur additional expenditure or retain additional capital, above the normal limits. Following a successful review, the LAA could disapply income or capital thresholds or contributions.

**RECOMMENDATION:**

- Introduce a hardship review process, like the one available in criminal legal aid, to consider an applicant’s need to incur additional expenditure or retain additional capital, above the normal limits.

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

Yes

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

**Yes.** We agree with deducting debt repayments from the income assessment but in our view all types of debt should be covered by this proposal and not just what is considered ‘priority debt’<sup>9</sup>.

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<sup>9</sup> Legal Aid Means Test Review, March 2022. Para 115: Priority debts are defined by the government-funded Money Advice Service as “debts that carry the most serious consequences if you don’t pay them”. Non-payment of these debts may result in a criminal conviction (potentially resulting in a prison sentence), a fine, disconnection of utilities, repossession or eviction.

Many survivors of trafficking and modern slavery have debts to service as a direct result of their exploitation. They feel compelled to service them, particularly given the safety risks to themselves and family back home if they do not, but suffer significant financial hardship as a result and are unable to obtain legal advice in the meantime.

Given the nature of debts incurred as a consequence of trafficking and forced labour, which could be debts owed to the criminal gangs who exploited them or exorbitant fees charged to facilitate the trafficking journey and work placement, legal aid providers would continue to struggle to meet the evidential requirements to qualify for this new proposed deduction.

It does not appear that other types of debt that we have had experience of survivors being penalised for would be disregarded under this proposal. Simpson Millar has represented a client who had been trafficked to the UK and sought legal aid for legal representation, which was refused for over a period of 12 months. By the time legal aid was granted, the individual had obtained employment, albeit on a low salary. He had obtained hardship loans from the benefits agency which he was required to pay back. These are not considered when calculating eligibility and he concluded that he could not afford to pay contributions to the LAA and discharge the debt to the benefits agency and opted not to pursue a compensation claim.

#### **RECOMMENDATION**

- Our primary proposal is that survivors of trafficking and modern slavery should be exempt from the means test and entitled to non-means tested legal aid. This would remove the challenges addressed here.

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

**Yes, but we recommend a more substantial change in order to ensure access to legal aid for survivors of trafficking and modern slavery who need it**

#### **Summary**

Survivors of trafficking and modern slavery are an extremely vulnerable group who have experienced multiple traumas and violations of their human and labour rights, and who present with complex legal and support needs. They often need assistance to access a variety of different types of legal advice and representation including immigration and asylum, community care, welfare benefits, housing, identification and support, compensation, criminal law advice and public law issues. Currently, due to the complexity

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Para 116: These include: • court fines and orders • Council Tax arrears • TV Licence arrears • child maintenance arrears • gas and electricity arrears • Income Tax, National Insurance and VAT arrears • mortgage, rent and any loans secured against your home • hire purchase agreements, if what is bought is essential – such as a vehicle that is required for work purposes • missed payments owed to DWP or HMRC • payments in relation to Individual Voluntary Arrangements.

and stringency of the means test, many survivors are found financially ineligible for legal aid despite lacking the income or capital to pay for it.

As expert organisations who support survivors of trafficking and modern slavery to access rights, justice and remedy, we recognise the positive intention behind the proposal to disregard MSVCC financial support payments “...on a mandatory basis when assessing an applicant’s income for both the civil and the criminal means tests”<sup>10</sup>. We are pleased that the government recognises that survivors of trafficking and modern slavery need legal support and representation. We welcome the acknowledgement that financial support provided under the MSVCC is intended to meet essential living costs in this period, and assist with survivors’ social, psychological and physical recovery, and that applicants should not be expected to use them to pay for legal services.<sup>11</sup> We welcome the spirit of this proposal to ensure that survivors of trafficking and modern slavery are not penalised in access to legal aid by financial entitlements that are the result of their traumatic experience of exploitation.

However, the mandatory disregard of MSVCC payments and uprated thresholds will not be sufficient to prevent many survivors from failing to meet the financial eligibility criteria despite their low income, lack of capital, and inability to afford legal advice otherwise. Nor will it address the administrative burdens and financial risks for providers which dissuades many from taking on cases of trafficking and modern slavery and has led to a critical lack of legal aid lawyers available for such cases.

This is because it will not address:

- The diverse, complex and often fluctuating financial reality of survivors, which is many ways unique to this group. This also includes factors such as informal debt repayments to traffickers, and remittances sent to provide for family in the country of origin which often involves a lump sum transfer to reduce fees incurred. Survivors are often in unstable forms of work where their income will fluctuate.
- The penalisation of survivors who work and do so as part of their recovery.
- The inclusion of partner income and assets despite this relationship often being complicated by the trafficking experience or abusive
- The complicated evidence of means required for assets abroad (income and capital). This is often overwhelming for survivors and usually requires them to have access to ongoing support, such as from an Independent Advocate, in order to be able to work through the processes, obtain the information and documentation requested, and therefore stay engaged with lawyers.
- Survivors penalised during their cases as a result of compensation awards received or due to the back payment of benefits or entitlements.

#### **RECOMMENDATION:**

Given the strong public policy benefits in preventing trafficking and modern slavery, supporting victims, and ensuring prosecutions of perpetrators, our primary recommendation is to:

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<sup>10</sup> Legal Aid Means Test Review, March 2022, para 131

<sup>11</sup> Legal Aid Means Test Review, March 2022, paras 130-131

- **Remove the means test for victims of trafficking and modern slavery: Anyone with a positive Reasonable Grounds decision under the National Referral Mechanism (NRM) and/or in receipt of MSVCC financial support payments within their recovery or reflection period or receiving ongoing support via the Recovery Needs Assessment (RNA) should be entitled to non-means tested legal aid.**

### **Diverse, complex and often fluctuating financial situations of survivors of trafficking and modern slavery**

Despite the proposed disregard of MSVCC payments and increased thresholds, many survivors of trafficking and modern slavery will continue to find themselves ineligible for legal aid despite being on a low income and in receipt of state benefits. The proposal does not address the unique needs and complex and often fluctuating financial reality experienced by survivors of trafficking and modern slavery.

Recent research commissioned by the Law Society compared legal aid eligibility thresholds to the minimum income standard set under criteria supported by the Joseph Rowntree Foundation, and found that the monthly disposable income limit excludes people from all types of household at incomes that put them below the minimum income standard.<sup>12</sup>

In *R(K & AM) v SSHD [2018] EWHC* the High Court found that subsistence under the MSVCC to mean a level beyond ‘the minimum sum needed to stave off destitution’ because the purpose of the duty to provide material assistance is to ensure effective continuous support for psychological recovery and reintegration. The case clarified the entitlement was non-means tested however it is unclear if this extends to those survivors in long term support under the RNA policy, whose guidance states: “the RNA assesses: whether the victim has financial recovery needs arising from their modern slavery experiences [and] whether other sources of financial assistance outside of the MSVCC are available to the victim and able to assist with those financial recovery needs.”<sup>13</sup>

A report by survivors with lived experience of the NRM and RNA found that the evidence requirements for demonstrating their need for financial support were “too high” with some survivors paying for their own recovery costs without a guarantee they will be reimbursed by the Home Office, often borrowing money from others and incurring debts as a result. The lack of clarity around the means-testing of subsistence payments, depending where a survivor of slavery is in their recovery is not only administratively burdensome for legal aid providers, it also means survivors are having to continually assess their eligibility for legal aid, and make decisions around work and income based on this, instead of focusing on their recovery.<sup>14</sup>

<sup>12</sup> See LAG article: <https://www.lag.org.uk/article/207151/revisiting-the-legal-aid-means-test>

<sup>13</sup> Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1031733/recovery-needs-assessment-ie-sca-update\\_041121.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031733/recovery-needs-assessment-ie-sca-update_041121.pdf)

<sup>14</sup> Anti-Trafficking Monitoring Group. *One day at a time: A report on the Recovery Needs Assessment by those experiencing it on a daily basis*. April 2022. Available at: [https://www.antislavery.org/wp-content/uploads/2022/04/RNA\\_One\\_Day\\_At\\_A\\_Time.pdf](https://www.antislavery.org/wp-content/uploads/2022/04/RNA_One_Day_At_A_Time.pdf)

Survivors of trafficking and modern slavery will often send money home, often at significant financial hardship to themselves. However, the Legal Aid Agency requires that payments be regular in order to be deducted from the calculation of disposable income. This is unrealistic for survivors and can mean that these payments are not eligible for deduction. Many survivors, especially migrant domestic workers, will often save up money over a period of time in order to send it in one lump sum to reduce the cost of transfer fees.

As outlined in response to question six, people who have been trafficked will often have debts to service, which they feel compelled to meet due to safety risks and suffer significant financial hardship to do so. These debts do not appear to be ones considered priority debts under the proposals and so will not be deducted.

These two examples demonstrate how the complex financial reality of survivors is not currently taken into account for deductions under the means test. This results in a situation where survivors appear to have higher disposable incomes than the means test will calculate, which will not be addressed by the proposed MSVCC payment disregard.

**Case example:** CD, a European national, was identified as a victim of trafficking. He had fled a NRM safe-house as he felt unsafe there. This meant he only received £35 per week, rather than the £65 per week received by those in safe-house accommodation. CD was taken advantage of by a member of the Romanian community and he ended up with a significant debt to pay off. He found work in a number of factory jobs. His income was continually uncertain but was often over the disposable income limit making him ineligible for legal aid. He did not have Settled Status or Discretionary Leave as a victim of trafficking so needed immigration advice but didn't earn enough to be able to pay for this. This left him trapped. He felt unable to bring a case challenging the Legal aid rules as there was a risk that he would be required to pay his opponent's costs, which in this case would have been the Government. Costs exposure could be as high as £5000, at this early stage.

Survivors are also often in unstable forms of work where their income will fluctuate. This presents an obstacle that the proposed changes to the means test will not address.

**Case example:** J was trafficked to the UK for the purpose of labour exploitation. J had been promised a job in a factory for which he would receive the sum of £500 a month. In fact, he was required to work lengthy hours, 7 days a week, receiving just £10 and two packets of tobacco per week. J was threatened with violence and was in a state of constant fear. J eventually escaped his traffickers with the help of an anti-trafficking charity who helped J and his fellow workers to leave and report their treatment to the Police.

J was referred to ATLEU for advice and assistance with a trafficking and modern slavery compensation claim and proceedings were issued against the factory that benefited from his forced labour. Six months after the issue of proceedings J obtained new employment but did not have fixed hours meaning that his earnings fluctuated. J would be under the LAA income threshold for 2-3 months but would then in other months exceed the threshold, often by £50-£60. As a result of a 3-month period in

which J exceeded the income threshold, J's legal aid was withdrawn and his claim in the High Court could not continue.

Those with income from sex work may also be found ineligible. This can leave survivors trapped in abusive relationships or in sexual exploitation, yet unable to access legal aid and therefore legal advice and representation due to their income.

**Case example:** AB came from Thailand in 2013 because she needed to work to support her elderly parents and disabled sister. She realised that she was being brought to do sex work but was forced to take part in sexual acts and drug taking without her consent. She suffered for two years until she was picked up in a police raid and recognised as a potential victim of trafficking. The police felt it was so important that she provide evidence to their investigation that they wrote to the Home Office to ask that she be allowed to remain in the UK. Their request was ignored and AB had to wait another two years for a decision, only for the Home Office to make a negative CG decision. With irregular immigration status and no other way to earn money AB returned to sex work to earn money. She rented a flat in Central London to see clients. She used her earnings to cover the rent and to continue sending money home to her family – her father was by this time very unwell and the family continued to rely on her income to pay for his healthcare and to meet her sister's needs. AB's income exceeded the gross income limit for legal aid. Her rent was high as it was in Central London and therefore much of it could not be deducted for the purposes of calculating disposable income. The legal aid rules allow for a maximum deduction of £545 for an individual's rent. AB didn't want to continue sex work but felt she had no choice as she wasn't allowed to work legally and couldn't access immigration advice to regularise her status. Eventually her mental health declined dramatically and by the summer of 2018 AB twice attempted suicide. Only when she was admitted to hospital for psychiatric treatment, did she become eligible for legal aid. Following this she obtained legal advice which led to the negative CG decision being overturned and a grant of refugee status.

With intensive legal support provided under legal aid she successfully challenged the negative Conclusive Grounds decision, the failure to grant discretionary leave, the negative asylum decision, and the termination of her NRM support.

#### **Penalised for working to support recovery**

The proposed MSVCC disregard and uprated thresholds will do little to help those with the right to work and who are working as part of their recovery. As survivors recover from their experiences, some enter employment resulting in implications for the means test. Many will continue to be pushed over the eligibility threshold and penalised from free legal help, leaving them in limbo, dissuading them from work and impacting on their recovery.

The report by a coalition of organisations, *Access to work for survivors of slavery to enable independence and sustainable freedom*, demonstrates that the right to work has strong benefits for survivors, helping them to recover from exploitation and the trauma experienced, regain independence and achieve sustainable freedom. Work has been shown to provide survivors with structure and opportunities for integration, building community links and networks. It provides the important practical option of meeting their own needs, being able

to repay debts, and provide for any dependents either in the UK or in migrant workers' countries of origin.<sup>15</sup>

Survivors of trafficking and modern slavery should be supported to access work, not forced to choose between working and being able to access legal support. The proposed MSVCC disregard and threshold uprating will not be sufficient to remove this barrier to work for survivors, with the consequence that survivors will be dissuaded from seeking work that would be beneficial to their recovery.

### **Evidential challenges to prove both income and capital means**

The proposed changes alone do not address the challenges that needing to prove partner income and assets poses to many survivors. A partner may be abusive, controlling or may not know about a victim's trafficking history. Many people who have been trafficked lose contact with family in their country of origin. This can be due to reluctance to disclose their trafficking experience due to trauma, or as a result of guilt at their failure to have been able to send remittances that were expected.

**Case example:** EF was trafficked into domestic servitude. She sought to extend her discretionary leave as a victim of trafficking and had a strong case to do so. Her case was held up for months as the Legal Aid Agency required a signature from her husband on a form and a valuation of their house. Her husband resided in a remote village in the Philippines and did not have email and was hard to contact. He was unable to provide evidence of the value of their home. Repeated attempts to secure this information from him led to him feeling so aggrieved that it ultimately led to a breakdown in the marriage. Only when the marriage had broken down did the Legal Aid Agency agree to grant legal aid to EF.

The means test review is not proposing any disregard in relation to income from capital for survivors of trafficking and modern slavery. Yet, the capital test is extremely problematic for this group of people. Unless more substantive changes are made to the means test as we have proposed, it will continue to be extremely difficult and time consuming for survivors and legal aid providers to provide evidence of resources and assets in a survivor's country of origin. It is also often overwhelming for survivors, and indeed virtually impossible for them to do so without ongoing support such as from an Independent Advocate, especially when evidence of means is in another language or in a cash economy.

**Case example from ATLEU:** The requirement to demonstrate that assets held abroad should not be considered is particularly onerous for people who have been trafficked. A Hungarian national who had been trafficked to the UK had been coerced into signing over a property in Hungary by their traffickers. Although she no longer had access to the property, and the traffickers' actions in respect of the property was one of the reasons for her seeking legal advice, legal aid was only granted following pro bono assistance from solicitors in Hungary who were able to obtain documents confirming that the traffickers had taken over the victim's property. This was the result of ATLEU working in partnership with others internationally to meet the victim's needs. This

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<sup>15</sup> *Access to work for survivors of slavery to enable independence and sustainable freedom* (2021), available at [https://www.antislavery.org/wp-content/uploads/2021/03/Coalition\\_AccessToWork\\_report\\_v3.pdf](https://www.antislavery.org/wp-content/uploads/2021/03/Coalition_AccessToWork_report_v3.pdf)

service would not normally be available to victims approaching private legal aid providers in the UK and those in similar circumstances would likely just be refused legal aid on eligibility grounds.

Survivors face barriers providing evidence on assets held abroad when documents held are in their language. The Legal Aid Agency will only consider, and review documentation submitted in English, Welsh or French meaning survivors face delays in their initial application at a time when there is no legal aid in place because they are reliant on pro-bono assistance to translate their documents.

Where applicants for legal aid have a bank account abroad there is a requirement that they provide bank statements for the Legal Aid Agency both when they apply for legal aid and when requested throughout the lifetime of the case as updating evidence of means is needed. For some people who have been trafficked and are now resident in the UK this can be so difficult that it has led to them abandoning their case. It is ATLEU's experience that survivors with complicated evidence of means require a higher level of support and assistance on a long-term basis in order to be able to engage with legal proceedings, as these matters are so often long-running ones. Survivors who may have ongoing complex needs such as learning disabilities, mental health difficulties and trauma will invariably require ongoing support to access legal representation.

#### **Survivors penalised as a result of compensation awards received or due to the back payment of benefits or entitlements.**

Survivors of trafficking and modern slavery have become ineligible for legal aid due to the receipt of compensation awards in some cases, and due to the receipt of back payments of benefits or other entitlements in other cases. The current proposed disregard of MSVCC payments would not address this obstacle.

ATLEU has represented many clients who have become ineligible for legal aid due to the receipt of compensation awards, which were often received without notice. ATLEU's client, A, received a Proceeds of Crime Act Award with no notice which made them become ineligible for legal aid. They were then forced to withdraw from High Court proceedings in a compensation claim against the trafficker.

If a survivor becomes ineligible for legal aid during High Court proceedings, their only option is to withdraw, or see if they can find a Solicitor who will act under a no win - no fee agreement (which is extremely difficult in practice), or find the resources (usually from being indebted) to pay privately for a lawyer. In the latter two options, the survivor will not have costs protection so if they were to lose the case then they would also be liable for their opponents' fees. Therefore, it is much more likely that the compensation case will be withdrawn.

Survivors can be penalised for compensation awards that are fairly moderate, given the gravity of the crime and harm experienced, that then make them ineligible for legal aid to pursue compensation claims against their trafficker. This also has the effect of facilitating impunity for traffickers, as well as a missed opportunity to use financial sanctions against traffickers as a deterrent.

**Case example:** A client of Simpson Millar is a survivor of modern slavery whose legal aid was incorrectly revoked due to a criminal injury compensation award (CICA) taking them over the capital limit. This decision was flawed and was made despite clear representation in the application about the expectation for the LAA to disregard any CICA award made within the last 12 months. It has since been successfully challenged and the funding reinstated. However, the survivor is also owed a significant amount of money from the Home Office relating to MSVCC back payments, which had not yet been received at the time of the application. The LAA's decision was unrelated to MSVCC back payments in this case, and although subsistence in the MSVCC is non-means tested, this does not mean the LAA will not raise objections in future if when the back payment is issued the LAA consider the monies to form part of the capital test.

Damages received in connection with being trafficked or in a situation of modern slavery should always be for the purpose of rebuilding the survivor's life.

Survivors can also be penalised for the receipt of back payments of benefits and other entitlements. This is despite the fact that benefits and other entitlements are intended for living expenses and recovery needs and those in receipt of back payments will have suffered hardship and perhaps become indebted while not receiving them.

**Case example:** Simpson Millar recently represented a client who became ineligible for legal aid after receipt of a back payment of NRM subsistence payments. These, added to her savings, meant that she was pushed slightly over the threshold and she lost her entitlement to legal aid. She was unable to afford the contributions without putting herself at grave financial hardship. She has since disclosed that during the period in which she became ineligible for legal aid she was subjected to exploitation.

Back payments of benefits and other entitlements have resulted in survivors of trafficking and modern slavery being found ineligible for legal aid.

### **The consequences of survivors of trafficking and modern slavery being unable to access legal aid due to the means test complexity and stringency**

The reality is that the vast majority of survivors who are found ineligible for legal aid, or are required to make a contribution, are forced to go without legal advice as they cannot afford to pay for it.

The consequences of not being able to access legal advice can be devastating and leave survivors destitute, homeless, at risk of deportation, and at risk of further exploitation or re-trafficking. It damages a survivors' ability to recover, make informed choices, and achieve lives free from exploitation.

It undermines access to justice as well as the prevention of trafficking and modern slavery. In all types of cases of trafficking and modern slavery represented by our organisations, even those of strategic importance, many survivors have concluded that they cannot continue with litigation once found ineligible for legal aid. Similarly, we have had cases where a change to a

survivor's circumstances – often related to their beginning to recover and move on from slavery for example resulting from a slight increase in earnings for those who have the right to work or due to a back payment of benefits – has required them to make a contribution to legal aid that they cannot afford resulting in them being forced to drop out of legal proceedings, undermining their entitlements to legal support and justice. This also results in a situation whereby traffickers are not being held to account and are left free to continue to act with impunity, undermining a criminal justice response to trafficking.

Cases involving victims who are ineligible for legal aid are amongst the most difficult to challenge through the courts. Even where pro bono representation is secured, legal representatives must embark on litigation where costs are not protected, at least for the initial permission stage of the proceedings. This will usually deter most victims from bringing such a challenge.

**Case study:** M, a victim of trafficking had been unable to be considered for discretionary leave as a victim of trafficking as a result of an unlawful policy on discretionary leave. He brought a judicial review against the Home Office that was then went to the Court of Appeal. Unfortunately, he was unable to pursue the case as he was over the income threshold for legal aid in a low income job. He was offered pro bono assistance but still felt unable to proceed as he was unable to meet the cost of disbursements, including the cost of a transcript of the decision that was under challenge and was mandatory to obtain. There was also a slight risk of adverse costs if he lost the case. Ultimately he felt that this was too stressful, risky and difficult to proceed with.

It is important to note that the way applications for legal aid are treated has a profound impact on victims of trafficking and modern slavery. The need for satellite litigation frequently protracts proceedings, sometimes for several years, during which time victims are unable to access legal assistance and their entitlements, most notably compensation, and move on from their trafficking experiences. Many report feeling that they are held in a limbo during this time. The length of time that satellite litigation takes can also create distrust between clients and their legal representative, as the client cannot understand the reason for the substantial delays in their case.

For many survivors the prospect of pursuing a challenge that may take over a year before they can commence their compensation claim is too distressing and difficult to contemplate; others find it difficult to grasp the cause of the delay. Many victims come from countries where a legal challenge against the government would result in repercussions for them. Whilst every effort is made to explain that they will not experience such repercussions in the UK many are deterred from pursuing this course of action.

### **Conclusion and recommendation**

We have explained in detail the complexities faced by survivors of trafficking and modern slavery in passing the income and capital thresholds of the means test, and demonstrated how these will not be addressed to any significant extent by the disregard of MSVCC payments, nor changes to thresholds, nor other minor disregards introduced that may extend to some survivors of trafficking and modern slavery (e.g. those in receipt of particular benefits).

Therefore, in order to ensure that survivors of trafficking and slavery can access the legal aid that they need in the interests of recovery, justice, prevention and a criminal justice response to perpetrators, we recommend the following:

- **Remove the means test for victims of trafficking and modern slavery: Anyone with a positive Reasonable Grounds decision under the National Referral Mechanism (NRM) and/or in receipt of MSVCC financial support payments within their recovery or reflection period or receiving ongoing support via the Recovery Needs Assessment (RNA) should be entitled to non-means tested legal aid.**

We hope that this recommendation will be supported and implemented. This is the single most impactful change that could be made to the means test to ensure that vulnerable survivors of trafficking and modern slavery can access the legal advice and representation they need but cannot afford otherwise. This would also cut down significantly on bureaucracy for legal representatives, making victims of trafficking and modern slavery less financially complex and risky to open cases for.

However, at a very minimum, if this change is not supported and implemented we would recommend the following:

- Passporting anyone in receipt of MSVCC payments through the income test assessment

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

**No.** We are concerned that the proposal to include housing benefit in gross income will have a disproportionately negative impact on people living in more expensive parts of the country. The proposal may disproportionately impact single parents (indirectly discriminating against women, who are more likely to be single parents) and disabled people. It will also disproportionately impact applicants in London and other areas where housing costs are highest.

### **Ch. 3: Civil income thresholds, passporting and contributions**

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

Yes, we are strongly in favour of raising the gross income threshold for civil legal aid. The current thresholds have not been increased for over a decade and are vastly out of touch with financial reality, excluding people from legal aid who cannot afford it and are already unable to sustain an acceptable standard of living.

However, we are concerned that in a time of rising inflation and increasing costs of living, that this increased threshold will be quickly meaningless unless it happens on a regular basis. We recommend that a robust rating mechanism is put in place to ensure that thresholds do not fall behind again.

We would also welcome greater analysis by the Ministry of Justice as to the level of income that is required to be able to privately fund legal costs which we expect would be considerably higher than the proposed thresholds linked to median earnings. We recommend that a safeguard is introduced in the form of a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

#### **RECOMMENDATION**

- Ensure that means testing thresholds and allowances are updated automatically on an annual basis against CPI (CPIH for the gross income limit, which includes housing costs) and review how the overall scheme is operating every 3 – 5 years.
- Introduce a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

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

**Yes.** We agree that wherever gross income already falls below the disposable income limit, there should be no need to undertake a full means assessment as this creates unnecessary administration for providers.

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

**Yes.** We support the proposed removal of the £545 cap on housing costs for those for whom no dependent's allowance deduction applies. The £545 housing cap (which has applied since

December 2001) is an unrealistic allowance for the cost of housing. Taking account of an applicant's full housing costs is a much fairer approach and one we support.

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

**Yes.** We agree with the proposal to deduct actual council tax as part of the means assessment, thus better reflecting household expenditure and making the income test fairer for individuals. However, we note that this will result in an increased administrative burden on providers as working out a client's monthly council tax is not necessarily straightforward. Work carried out to means assess claimants is complex, time consuming and largely unpaid, meaning that providers simply do not have the ability to carry out these calculations.

**Question 17: do you agree with our proposal to increase the work allowance in the civil legal aid means test to £66 per month? Please state yes/no/maybe and provide reasons.**

**Maybe.** We agree in principle with increasing the work allowance. However, the proposal is to use a 2019 Lloyds/ You Gov report, which is not reflective of current average monthly travel costs for work. This is particularly the case given considerable rise in fuel costs since 2019, along with an increase to public transport costs. A more recent estimate should be used to calculate the work allowance.

In relation to the situation of survivors of trafficking and modern slavery, we have evidenced in detail the complex nature of employment for many survivors. Many are in unstable employment, with income that fluctuates significantly from one month to the next.

#### **RECOMMENDATION**

- Our primary proposal is that survivors of trafficking and modern slavery should be exempt from the means test and entitled to non-means tested legal aid. This would remove the challenges addressed here.
- However, more broadly beyond survivors of trafficking and modern slavery, we recommend that a more recent estimate to calculate the work allowance is used than the 2019 Lloyds/ You Gov report, and ideally one which is more likely to encompass the employment situations of vulnerable and marginalised groups.

**Question 18: do you agree with our proposal to use a Cost of Living Allowance drawing on essential household spending as the basis of our proposed lower income threshold? Please state yes/no/maybe and provide reasons.**

**Maybe.** We support an increase to the current thresholds, which is urgently needed. However, any Cost of Living Allowance should take into account what people need to maintain a socially acceptable living standard, which is the approach taken by the Minimum Income Standard, rather than using the amount that people actually spend (when this may not

achieve an acceptable standard of living). This amount has been limited further by disregarding spending that is deemed to be 'non-essential'.

#### **RECOMMENDATION**

- Introduce a safeguard in the form of a civil hardship and eligibility review process which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

**Question 19: do you agree with our proposal to set the Cost of Living Allowance at £622 per month for an individual? Please state yes/no/maybe and provide reasons.**

**Maybe.** While we strongly support an increase in the 'Cost of Living' allowance/ lower disposable income threshold and note that it represents a considerable increase from the current threshold of £316, we do not agree with the approach taken to determine its level as we believe it should take into account what people need to maintain socially acceptable living standards. We are further concerned by the lack of annual uprating, giving current rising inflation and prices. We are also concerned by the lack of any mechanism to waive income limits or contributions in cases of hardship/inability to afford private legal costs.

#### **RECOMMENDATION**

- Ensure that means testing thresholds and allowances are uprated automatically on an annual basis against CPI (CPIH for the gross income limit, which includes housing costs) and review how the overall scheme is operating every 3 – 5 years.
- Introduce a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

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

**No.** Income thresholds should be set at a level that ensures that individuals excluded from legal aid can afford to pay privately for in scope legal services.

#### **RECOMMENDATION**

- Ensure that means testing thresholds and allowances are uprated automatically on an annual basis against CPI (CPIH for the gross income limit, which includes housing costs) and review how the overall scheme is operating every 3 – 5 years.
- Introduce a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

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

Yes. We strongly support raising the threshold from the current level of £733. However, we are concerned that the increase will be quickly eroded by inflation and believe it is vital that the threshold is updated annually in proportion to CPI.

#### **RECOMMENDATION**

- Ensure that means testing thresholds and allowances are updated automatically on an annual basis against CPI (CPIH for the gross income limit, which includes housing costs) and review how the overall scheme is operating every 3 – 5 years.
- Introduce a civil hardship and eligibility review process, which could lead to normal income or capital eligibility limits being disapplied or contributions waived.

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

**No.** The OECD modified scale has been criticised for significantly underestimating the cost of a child and ignoring the greater cost to single parent of having children compared to a couple. Survivors of trafficking and modern slavery are less likely to be in receipt of child maintenance payments, so are subject to extra financial hardship.

We consider that the allowances for all dependents should be increased and updated annually in proportion to CPI.

#### **RECOMMENDATION**

- Ensure that means testing thresholds and allowances are updated automatically on an annual basis against CPI (CPIH for the gross income limit, which includes housing costs) and review how the overall scheme is operating every 3 – 5 years.

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

**Yes.** We agree with the proposal to exclude the means of a person providing temporary assistance to the applicant. It can lead to very unfair outcomes, particularly in circumstances where a friend or distant family member has shown considerable kindness in supporting an applicant through a life crisis usually to avoid them becoming destitute. It is completely unreasonable to expect their generosity would or could extend to privately funding the client's legal representation.

In trafficking cases, the request for evidence of this temporary assistance from friends and family can be traumatising and result in further harm to the survivor, as they may have to disclose their trafficking experience in order to justify or explain their request for the evidence.

Finally, it would be preferable to amend the Means Regulations themselves rather than the guidance.

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

**No.** We oppose this proposal which will reduce legal aid eligibility for those on benefits and considerably increase the administrative burden on legal aid practitioners. We are particularly concerned by the equalities implications and the unintended adverse consequences that may result. The proposal will reduce eligibility for legal aid amongst a cohort which has already been assessed by the Government to require means tested benefits.

#### **RECOMMENDATION**

- Continue to passport recipients of Universal Credit through the income test.

**Question 25: what administrative impacts do you anticipate our proposal to implement a £500 earnings threshold for applicants in receipt of UC will have for providers and applicants?**

The administrative impact of this proposal will be significant. At present, means assessing clients that are passported through the income test is relatively simple. Under this change, any UC recipient that is working would need to be fully means assessed by the provider.

It takes a considerable amount of time to go through a person's bank statement(s) and work out what payments relate to and whether they count as income or not. Means testing takes much longer where clients who require an interpreter; have limited digital skills; or lead chaotic lives meaning that obtaining evidence and records of their finances is much more time consuming. Individuals living in poverty are frequently forced to rely upon informal forms of credit. This can leave a trail of transactions on bank statements that must be individually accounted for (to demonstrate that it is not undisclosed income) which can be time consuming for practitioners. It is also common for clients to be in informal or less predictable types of employment which means their income fluctuates.

Providers will feel this administrative burden not only at the start of case, but every time the client's income needs to be reassessed due to a change in circumstances. This will be particularly burdensome when a client's income fluctuates.

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

We strongly recommend maintaining the current passporting rules at legal help stage (i.e., at most, only introducing these proposals at certificated stage). As legal help rates are so low,

any additional administrative burdens at this stage will be particularly difficult to bear at this stage. The risk of creating adverse incentives for providers to turn away non-passported clients at legal help stage is particularly high, because many firms already view this work as non-profitable or loss making.

## **Ch. 4: Civil capital thresholds, passporting and contributions**

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

**Yes.** However, we do not consider that people facing serious legal problems should be forced to sell their homes to ensure they are able to access justice and enforce their rights. Sale of the family home is likely to result in adverse impacts on the health and wellbeing of the applicants and their children.

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

**Yes, but we propose that this disregard is applied more broadly.**

This proposal relates specifically to victims of domestic abuse. However, we consider that the proposal should also apply to victims of other forms of exploitation who have had to temporarily leave their home, including victims of trafficking and modern slavery.

Currently, survivors of trafficking and modern slavery are being ruled ineligible for legal aid on the basis of owning a property in their country of origin, despite the fact that they have left this home on account of being trafficked to the UK and now live in the UK. We believe that penalising a survivor for a home that they have left as a result of trafficking unlawfully undermines the purpose of LASPO paragraph 32.

### **RECOMMENDATION**

As detailed throughout this submission, our primary recommendation to address the obstacles experienced by survivors of trafficking and modern slavery in accessing legal aid is that they should be exempt from means testing. This would overcome the challenges described here.

However, if this is not supported, we suggest the following additional change to this proposal in order to overcome a barrier experienced by some survivors of trafficking and modern slavery:

- Expand the categories of 'victim' to which this equity disregard applies to also include victims of labour exploitation, trafficking and modern slavery.

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

**Yes, but we propose that this disregard should be applied more broadly to encompass other forms of entitlements and should be made mandatory.**

As evidenced in our response to Question 7, survivors of trafficking and modern slavery have become ineligible for legal aid due to the receipt of back payments of benefits or other entitlements, including subsistence payments under the MSVCC and asylum support.

#### **RECOMMENDATION**

As detailed throughout this submission, our primary recommendation to address the obstacles experienced by survivors of trafficking and modern slavery in accessing legal aid is that they should be exempt from means testing.

If this is not supported, we suggest the following additional change to this proposal in order to overcome one of the barriers experienced by some survivors:

- Introduce a mandatory disregard for benefit and child maintenance back payments from the capital assessment.
- Expand the categories of back payments that this disregard applies to encompass back payment of other benefits and entitlements that survivors of trafficking and modern slavery have received, including MSVCC and RNA payments and asylum support.
- Amend legal aid procedure regulations so that refusals made on means grounds carry a right of appeal to an Independent Funding Adjudicator.

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

**Yes - but this proposal should go further.**

We agree that compensation, damages and/or ex-gratia payments for personal harm should be disregarded for capital assessment purposes. However, we consider that where the payment is intended to compensate for personal harm, the disregard should be mandatory. We are concerned that a discretionary disregard introduces additional complexity and may result in unfair decisions that do not carry a right of appeal to an independent third person. We recommend that an amendment be made to the legal aid procedure regulations so that refusals made on means grounds carry a right of appeal to an Independent Funding Adjudicator.

As highlighted in response to Question 7, survivors of trafficking and modern slavery have been ruled ineligible for legal aid on account of compensation received, often at short notice, for having been in a situation of trafficking and modern slavery. This has forced survivors to drop out of cases, including those of strategic importance. Or, to see if they can find a Solicitor who will act under a no win - no fee agreement (which is extremely difficult in practice), or

find the resources (usually from being indebted) to pay privately for a lawyer. In both these options, the survivor will not have costs protection so if they were to lose the case then they would also be liable for their opponents' fees. Therefore, it is much more likely that the compensation case will be withdrawn.

Survivors can be penalised for compensation awards that are fairly moderate, given the gravity of the crime and harm experienced, that then make them ineligible for legal aid to pursue compensation claims against their trafficker. This also has the effect of facilitating impunity for traffickers, as well as a missed opportunity to use financial sanctions against traffickers as a deterrent.

We believe that damages received in connection with being trafficked or in a situation of modern slavery should always be for the purpose of rebuilding the survivor's life and should not result in a survivor losing eligibility for legal aid. Please see relevant section under Question 7 for more information.

### **RECOMMENDATION**

Our primary recommendation in response to the means test review is that survivors of trafficking and modern slavery should be exempt from means testing. This is the single most impactful change to the means test that would remove the obstacles experienced by survivors in accessing legal aid, including the challenges addressed here.

If this recommendation is not supported and implemented, we would suggest this specific proposal go further:

- Introduce a mandatory disregard for compensation, damages and/or ex-gratia payments for personal harm

## **Ch. 5: Immigration and asylum, under-18s and non-means tested cases**

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

**Yes.** We welcome the proposal to increase both the lower and upper capital thresholds for immigration and asylum cases in the Upper Tribunal. This change is long overdue and will bring immigration and asylum cases in line with the newly proposed thresholds for civil legal aid, which will see the capital upper threshold raised from £3,000 to £11,000.

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

**No.** We have concerns that many asylum and immigration applicants will have no recourse to public funds and will be relying on their capital to survive. We are also concerned for survivors who have entered work as a way to regain independence and recovery, and to support themselves and their families, including family members overseas for whom they are the breadwinners. In our experience, supporting family members is a strong motivating force for survivors and has been a push factor into exploitation. Faced with a choice between one's own interests in pursuing an immigration case and continuing to provide essential support, even in the short term, will mean that paying income and capital contributions lead survivors to opt out of their legal cases. We also have experience of several survivors who do not spend benefit money because they may not be used to having decent resources, or feel comfortable making necessary purchases for a home after living frugally, or need to support family. With money accrued in this way, capital can reach several thousand pounds, despite this being money a survivor actually needs for living and home costs. Requesting a contribution towards legal funds for these people will quickly deplete their capital and could lead to destitution. Individuals with statutory appeals moving to licensed work could quickly find themselves without representation as they cannot afford it.

The rationale given for removing exemptions is to bring the Upper Tribunal (statutory appeal) contributions system in line with the approach elsewhere in civil legal aid, simplifying the approach to means testing for the Legal Aid Agency. Unfortunately, we do not consider that this change will simplify the process for providers or applicants, who will move between two very different funding regimes on the same case at pace, when the tight turnaround between a First Tier and Upper Tribunal statutory appeal is taken into account. At Controlled Legal

Representation stage, contributions are not required. If an Appellant then needs to apply for permission to appeal, licensed work will be required 14 days after the Appellant was sent written reasons for the decision they wish to appeal against. Delegated functions will be exercised but to progress with the appeal the Appellant will very shortly need to deal with income and capital contributions, and the provider will need to advise the Appellant of the likelihood of contributions falling due before even proceeding to delegate functions, adding to the administrative burden on them at a high pressure time. Statutory appeals have very different time frames contrasted to other civil proceedings, like judicial review. We agree with the description of this client group in paragraph 306:

*“many of whom are likely to be particularly vulnerable and may find it difficult to represent themselves or understand the legal position in this area without professional support (therefore ensuring access to justice).”*

We respectfully submit that there is no distinction between the circumstances of the Appellant at First Tier Tribunal and Upper Tribunal stage and access to justice should be preserved for the same Appellants, in relation to the same appeal, under the same conditions in both venues.

The transfer of Upper Tribunal immigration and asylum representation from controlled work to licensed work took place with the introduction of the 2018 Standard Civil Contract. The changes were not publicly consulted on. Practitioner bodies were consulted and at the time, the Immigration Law Practitioners’ Association (ILPA) opposed the proposals. ILPA noted at the time that there was no obvious rationale for making the changes. The explanatory memorandum<sup>16</sup> to the Civil Legal Aid (Procedure, Remuneration and Statutory Charge) Regulations 2018 explained:

*“8.3 During consultation with the consultative group, some representatives raised concerns about the effect of the move from Controlled to Licensed work. Their key concerns were around the extra administrative burden on providers and the need to use the LAA computer system (Client and Cost Management Service).*

*8.4 Following consideration of these concerns, the LAA felt that the benefit of proceeding with the change was proportionate to the potential difficulty caused to providers, and the Ministry of Justice decided to proceed with the changes.”*

Although the change to licensed work for statutory appeals was introduced in 2018, no contributions were introduced at that point. The timing of these changes now would coincide with radical changes to immigration law and process brought in by the Nationality and Borders Act, which the sector and survivors will have to rapidly adapt to. We are concerned about how this provision will work in relation to expedited appeals under s.24 of the Act,<sup>17</sup> where a further right of appeal for such cases is removed so they cannot proceed to the Court of Appeal. This underlines the importance of representation at the Upper Tribunal, especially when a related appeal before the First Tier Tribunal will be transferred to the Upper Tier.

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<sup>16</sup> [https://www.legislation.gov.uk/ukxi/2018/803/pdfs/ukxiem\\_20180803\\_en\\_001.pdf](https://www.legislation.gov.uk/ukxi/2018/803/pdfs/ukxiem_20180803_en_001.pdf)

<sup>17</sup> <https://www.legislation.gov.uk/ukpga/2022/36/section/24/enacted>

Administrative convenience within the Legal Aid Agency does not seem a sufficient rationale when balanced against the potential harm and negative impact these changes could bring for individuals. Targeting resources at those who need it most should include applicants for legal aid who have sufficient merit in their statutory appeal to justify a provider considering an application for permission to appeal.

We are also concerned that imposing an income and capital test will add to the administrative burdens for providers in explaining these tests to clients and corresponding over changes that may be required to contributions, adding pressure to a sector that is already under strain, and making Upper Tribunal work even more unattractive to undertake. We would welcome knowing if applications for certificates to under Upper Tribunal work have remained at pre-2018 levels, as an indication about the capacity in the sector to bear further adaption.

#### **RECOMMENDATION**

- Maintain the current exemption on the payment of income and capital contributions for immigration and asylum representation in the Upper Tribunal

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

**Yes.** We are pleased to see a similar proposal to increase the capital threshold for controlled work in the First-tier Tribunal and we support this being increased to £11,000 in line with the upper capital threshold proposed in the wider Means Test Review. However, we reiterate that in our view capital limits should be aligned with welfare benefits, exclude the primary residence and properly exclude trapped/inaccessible capital.

We have concerns that many asylum and immigration applicants will have no recourse to public funds and so will be relying on their capital to survive. Requiring these people to pay for their own legal representation if their capital exceeds £11,000 will lead to depletion of capital and ultimately, could lead to destitution.

We note that at present, individuals who are directly or indirectly in receipt of Asylum Support under s.4 or s.95 of the Immigration and Asylum Act 1999 are 'passported' through both the income and capital means tests for immigration and asylum proceedings. This should remain the case and we recommend that this regulation is extended to include all areas of civil legal aid, making Asylum Support a 'passporting' benefit.

#### **RECOMMENDATION**

- Asylum support to be made a passporting benefit for all areas of civil legal aid.

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

**Yes.** Removing the means test altogether for applicants under the age of 18 will promote access to justice for children, who are a particularly vulnerable group.

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

**Yes.** We also recommend that the Ministry of Justice consults with providers and experts before this guidance is finalised.

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

**No.** We recommend that the means test should be removed for applications under the age of 18 in all areas of civil legal aid because children are a particularly vulnerable group and to provide consistency of approach and clarity for providers. The current situation where children can be refused legal aid for matters of overwhelming importance to them (such as asylum claims) due to aggregating the resources of the maintaining adult, inevitably leads to some children going without assistance for these matters if their maintaining adult is unable or unwilling to pay privately.

We disagree that the interests of a child or young person are more likely to be aligned with their maintaining adults at controlled work level. We are unsure as to why there would be a difference between controlled work and representation stages that is significant enough to maintain a means test for controlled work but not for civil representation. We welcome expansion of the rationale here, with examples of casework that this assessment is based on.

A key reason given for removing means testing for applicants under 18 for civil representation is efficiency. Legal aid providers assessing means should benefit from the same efficiency that LAA decision makers will have the benefit of. Means testing maintaining adults as well as applicants under 18 causes a considerable administrative burden for providers and clients and can be particularly complicated, meaning errors are more likely which may discourage providers from feeling able to take on cases. We are not aware of a “light touch” means test for under 16 year olds at controlled work level. Providers need to undertake a full means test for every child. (The “light touch” test is set out in the Means Guidance that applies to Full Representation, Family Help (Higher) and Exceptional Case Funding.<sup>18</sup>) There is therefore a means test to undertake for a child but also an “equitability of aggregation test”. This double test creates financial risk for providers if they decide it is inequitable to aggregate means but are concerned the LAA may later dispute their assessment.

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<sup>18</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1067378/Means\\_Assessment\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1067378/Means_Assessment_Guidance.pdf) see 9.1.3 and 1.1.5-7

An example of the unnecessary nature of the current aggregation test, but the lack of clarity providers must deal with, is the case of children in local authority care. The controlled work guidance on financial eligibility states at 9.1.2<sup>19</sup>:

*“Where a child is a ‘looked after’ child i.e. the responsibility of the local authority, it would usually be inequitable for his or her foster carer’s/social worker’s income and capital to be aggregated with that of the child.” [our emphasis]*

This wording is not clear that aggregation is always inappropriate for children who are looked after. This means that in addition to a means assessment, a provider must do a justification as to why it is not equitable to include a foster carer or social worker’s income. In practice, it is our experience that the Legal Aid Agency does not expect aggregation with foster carers or social workers, questioning why there is simply not an exemption from the means test for these (and all) under 18 year olds, in line with a rationale in this consultation for removing the means test for licensed work.

We would also recommend that the means test is removed for any young person aged over 18 who is a care leaver receiving local authority support. It would bring greater clarity and efficiency for providers and applicants for legal aid to acknowledge that any child receiving local authority support should be exempt from the means test, as they are by definition of the support received, still dependent young people and not financially independent.

The administrative burden of the current full means assessment required for all under 18s at controlled work level is highlighted by unaccompanied asylum seeking children. It is our experience that social services frequently do not provide a supporting letter that details everything required by the Legal Aid Agency for means assessment purposes, and it can be difficult to secure an accurately worded letter, especially when social workers may change or be off duty, and all the while the provider is responsible for assisting a young person. Children may also receive additional small sums, for example, from foster carers or college, which makes a means assessment complicated for a provider, and the risk level high if it is considered wrong by the Legal Aid Agency on audit.

Another group of children impacted are children whose parents have made an asylum claim. Following the case of *G v G* [2021] UKSC 9, a child who is a dependent on an asylum claim should now generally be understood to have made a claim for asylum in their own right. The child’s interests may be aligned with their parents but they may have something distinct to raise in an asylum claim for themselves. Immigration providers now have additional administration over these claims, and the administration of a means test for that child. These children may be part of a family claim for asylum support, but not in all cases.

## **RECOMMENDATION**

- Remove the means test for applicants under the age of 18 in all areas of civil legal aid.
- Remove the means test for applicants over the age of 18 if they are a care leaver and in receipt of any form of local authority financial support, in all areas of civil legal aid.

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<sup>19</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/983065/Lord\\_Chancellor\\_s\\_guidance\\_on\\_determining\\_controlled\\_work\\_and\\_family\\_mediation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983065/Lord_Chancellor_s_guidance_on_determining_controlled_work_and_family_mediation.pdf)

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

**Maybe.** We consider that the means test for those under 18 applying for legal help ought to be removed in its entirety. Any factors that must be set out in guidance provide more complexity for providers and applicants to navigate. It is our strong submission that the administrative burden would be best minimised by removing the means test entirely for these types of work. However, at the very minimum, we would support the extension of the simplified “light touch” means test to all applicants aged under 18 where it is not considered equitable to aggregate their income with their maintaining adult.

We are not aware of the “light touch” approach for legal help assessments already being in place for all forms of controlled work. This is not set out on the keycard, on the CW1 form or in the financial eligibility guidance for controlled work<sup>20</sup>. If the intention is to extend an approach for civil representation to controlled work means assessments, we ask that this is made clear in guidance and on the face of relevant legal aid forms.

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<sup>20</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/983065/Lord\\_Chancellor\\_s\\_guidance\\_on\\_determining\\_controlled\\_work\\_and\\_family\\_mediation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983065/Lord_Chancellor_s_guidance_on_determining_controlled_work_and_family_mediation.pdf)

## **Ch. 8: Implementation and review of the new legal aid means tests**

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

**Maybe.** We are clear that the new means test should be implemented as soon as possible to ensure those who are entitled to obtain legal aid, are able to obtain it. In principle, we support the idea of a staggered approach if it enables quicker implementation of the new means test when compared to implanting the new means test on one date.

However, we are deeply concerned by the uncertain timeframe for implementing the new means test and would be concerned if the staggered approach led to further delay. At present, the figures used for the means test review to establish new thresholds are already out of date and so the longer it takes to put the new means test in place, the less impactful changes become as they are eroded by increases in the cost of living over time.

**Question 88: do you agree with our proposal to implement the non-means tested areas of civil legal aid (if confirmed following consultation) before any other areas? Please state yes/no/maybe and provide reasons.**

**Maybe.** Implementation ought to take place as soon as possible. The following could and should be implemented promptly:

- Removing the means assessment for survivors of trafficking and modern slavery
- Including asylum support as a passporting benefit
- Removing the means assessment for all applicants under the age of 18

**Question 92: do you agree with our proposal to allow existing recipients of legal aid to seek a reassessment under the new means-testing rules, when implemented? Please state yes/no/maybe and provide reasons.**

Yes. We support allowing existing recipients of legal aid to seek a reassessment under new-means testing rules. However, we query the fairness of asking people who would be entitled to pay a lower contribution, or no contribution, at all under the new rules to continue to do so whilst systems are updated, and new rules put into place.

The longer it takes to implement new rules, the more likely it is that a requirement to pay contributions will cause hardship. We reiterate the need for a procedure to request a hardship review and powers to waive contributions.

**Question 95: do you have any further comments about our proposals in relation to the transition from the old to the new means-testing regime?**

We are concerned about the delay in implementation of the new means test. We appreciate that this is a complex and lengthy process, however waiting years for implementation is very problematic, particularly given the current economic climate. In our view, it must be a priority to implement the new means test as quickly and efficiently as possible to ensure the most vulnerable people in society have access to justice.

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

**No.** Whilst we are strongly in favour of regular monitoring and uprating of the new means test, income and capital thresholds, 3-5 years is too long for a review of the means test thresholds. It is important that there is a clear commitment to uprating on a regular basis, in proportion to CPI (or in the case of the gross income limit which includes housing costs, CPIH).

The figures being relied upon in the consultation are based on data for the financial year ending in 2020. We understand that these figures may be reconsidered prior to the implementation of the new means test review and we would strongly recommend this takes place, else they will have been significantly eroded by cost of living increases in the interim.

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

**No.** As addressed in detail in our response to Question 7, while we appreciate the spirit and intention behind the proposed disregard of MSVCC payments, it does not go far enough to sufficiently reduce the number of survivors of trafficking and modern slavery who require legal aid but are found financially ineligible or to address the obstacles presented by the diverse financial situations and complicated evidence of means with which survivors of trafficking and modern slavery uniquely present. It will not address the administrative burdens and financial risks which dissuades providers from taking on cases of trafficking and modern slavery.

Given the strong public policy benefits in preventing trafficking and modern slavery, supporting victims, and ensuring prosecutions of perpetrators, our primary recommendation in response to this consultation is the following:

**RECOMMENDATION:**

- **Remove the means test for victims of trafficking and modern slavery: Anyone in receipt of MSVCC financial support payments within their recovery or reflection period or receiving ongoing support via the Recovery Needs Assessment (RNA) should be entitled to non-means tested legal aid.**

Removing the need to conduct the means test for survivors of trafficking and modern slavery would remove a substantial administrative burden on legal aid providers. It would go some way to address some of the complexities that are acting as a disincentive for legal aid providers to take on cases of trafficking and modern slavery, leaving a severe shortage of available legal aid lawyers for many survivors.

There are many urgent changes outside of the scope of this review which are required to the legal aid scheme in order to remedy the current situation where taking on cases involving victims of trafficking and modern slavery is not sustainable for legal aid providers. We provide evidence and recommendations about these challenges in the Executive Summary, section 2.2. However, this is the single most impactful change that could be made to the means test to ensure that vulnerable survivors of trafficking and modern slavery can access the legal advice and representation they need but cannot afford otherwise.

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

Please refer to our response under Questions 96 and 98.

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

Please refer to our response under Question 98.