



# Government Response to Justice Committee's Third Report of Session 2010/11: The Government's proposed reform of legal aid

June 2011



# **Government Response to Justice Committee's Third Report of Session 2010–11: the Government's proposed reform of legal aid**

Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

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## **Ministerial Foreword**

The justice system in England and Wales is urgently in need of reform, burdened as it is by spiralling costs, slow court procedures, unnecessary litigation, all of which add to a fear of a compensation culture. The Ministry of Justice is tackling these issues head-on with steps including an independent review of family justice, measures to streamline civil justice, a criminal justice system efficiency programme and improvements to the 'no-win, no fee' conditional fee regime. The overall aim is a fundamental shift in the justice system towards greater effectiveness and efficiency.

Legal aid reform is a crucial element of this wide-ranging agenda. Instead of ensuring that the use of law is generally a matter of last resort, today's legal aid system too often encourages people to bring their problems before courts, even when they are not the right place to provide good solutions, and sometimes for litigation that people paying from their own pocket would not have pursued.

In addition, the current system has expanded into areas far beyond its original scope. It is now by far one of the most expensive systems in the world, second only to Northern Ireland. It costs over £2 billion a year, or £39 per head of population, compared with £8 per head of population in New Zealand, a country with a comparable legal system, and £5 in some continental jurisdictions. In the current fiscal climate this is unaffordable.

This backdrop provides the context to the Government's proposals for reform, which were set out in a consultation document published last November. They sought to address these problems by ensuring access to public funding in those cases that most require it; discouraging unnecessary litigation, reducing costs and delivering better value for money.

Today we publish our response to the consultation as well as introducing a Bill to give effect to those measures requiring legislation. In addition, we are publishing this document, our response to the Justice Committee's comments on our proposals, which arose from its inquiry into Access to Justice. The Government welcomes the Committee's recognition that reform is necessary and our measures are 'fundamental, extensive and bold'. We use this response to address each of the points they raise.



**Jonathan Djanogly**

## **The Cost and Operation of the Current System**

**The Government's dramatic proposed reform of legal aid is consequent upon the need to make drastic reductions in public expenditure — the Ministry of Justice must cut its spending by almost a quarter, and reductions in legal aid costs will form an important part of that. In that context we accept the necessity of certain changes, and the fact that there are other grounds for making some of them, but we make specific recommendations about how we think the Government's proposals should be refined. (Paragraph 11)**

1. The Government welcomes the Committee's acknowledgement that there is a need to reform legal aid and, importantly, to make savings from the current level of expenditure, which is among the highest in the world. As the committee notes in the introduction to its Report, our proposals are fundamental, extensive and bold. Our response to the specific conclusions and recommendations of the Committee in its Report are set out below and should be considered alongside our response to the consultation paper '*Proposals for Legal Aid Reform in England and Wales: the Government Response*', and the Impact Assessment and Equalities Impact Assessment, which have also been published today.<sup>1</sup>

**We are disappointed in the dearth of evidence on legal aid expenditure at case level to enable the identification of key influences on cost. We note the difficulties in collating quantitative evidence for useful national and international observations to be made, and we believe that a series of small-scale domestic qualitative research studies, examining the drivers of cost per case, would provide the Government with more valuable data to inform its efforts to reduce spending. It may be possible to reduce the amount of legal work required, for example, by reducing the complexity of particular areas of law, and thereafter to adjust the level of fixed fees accordingly. (Paragraph 30)**

**The Ministry of Justice needs to develop a greater understanding about what is driving demand and the cost of cases in order for there to be confidence in its estimates of the impact of its proposals for reform. Reducing spending on legal aid may have financial implications — and indeed may inflate costs — in other parts of the legal system. (Paragraph 37)**

2. The Government is confident that its programme of reform is well evidenced and represents the most proportionate and effective package of measures available to meet our objectives for legal aid reform.

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<sup>1</sup> See: <http://www.justice.gov.uk/consultations/legal-aid-reform.htm>

3. The Government accepts that the evidence base available to inform policy making can always be improved. The Impact Assessment that we have published alongside our response to consultation draws on the existing evidence base to assess the impacts the programme of reform is expected to have, both on the costs of legal aid, and on the wider system of justice. These identify a number of areas where we would ideally have liked more information. We set out below the main pieces of analytical work which are planned or underway to address these gaps, including those that have been raised as being of specific concern both before and during the consultation period. This work will help us improve the evidence base and improve future policy making and implementation. However, there is a pressing need for reform to meet our objectives for legal aid, including delivering substantial savings during the current spending review period and we must therefore proceed on the basis of the information that we have.
4. Alongside our response to consultation, we have published a literature review bringing together the available evidence base on litigants-in-person, which was carried out by the Ministry of Justice's (MoJ) Analytical Services team, as this was an area of concern raised in a number of consultation responses. In addition, we are planning to conduct a new study of legal aid clients to provide additional information on a range of client characteristics, including protected characteristics and income and capital. This will inform the post-implementation review outlined in the Impact Assessment, and help to improve our policy making in the future. We are also working with the Legal Services Board (LSB) with a view to conducting possible further research on providers. The Legal Services Research Centre (LSRC) will be examining alternative modes of access to legal advice, comparing face-to-face and telephone based services.
5. The causes of legal problems and disputes, criminal offending, and the way in which they drive costs generally, and demand for legal aid in particular, are complex. The Ministry of Justice (MoJ) and Legal Services Commission (LSC) already work closely to develop their understanding and analysis of drivers of demand for legal aid. Additionally, the MoJ is working to improve its suite of models which analyse demand on, and flows through, the different parts of the justice system. By linking this work to our operational and financial business planning processes, the MoJ and its Arms' Length Bodies will be able to better assess, on a consistent basis, the impact that savings in one area will have on the others, and the likely consequences for legal aid expenditure.

## **Lessons from international research for efforts to reduce costs**

**The research, however exploratory, suggests to us that having critically scrutinised the way our legal procedures have evolved there is potential for the Government to devise longer-term options for reform, rather than concentrating on simple options, such as reducing scope.**

**(Paragraph 38)**

**International comparisons are difficult, because of the many variables between different systems, and there are significant gaps in the research. However, it remains the case that the legal aid system in England and Wales is one of the most expensive in the world and, in the context of the budget savings the Government needs to find, this strengthens the case for examining legal aid costs to see where they can be reduced. (Paragraph 39)**

6. The Government appreciates the Committee's acceptance that savings need to be found from the legal aid budget. As the Committee notes, the legal aid system in England and Wales is one of the most expensive in the world, and the growth in demand is unsustainable. As set out above, we are working with colleagues in the LSC to understand the drivers of demand for legal aid. However, it is important that we press ahead with reform of legal aid, based on the evidence that is available.

## Reducing costs: Measures in the consultation paper

By far the largest area of savings in the Government's proposed reforms is the removal from scope of various categories of law, and it is on this area that much of our evidence has focused and on which we concentrate in this Report. However, a further important saving — £72 million annually — would be realised from the Government's proposed 10% reduction in fees for civil and family legal aid. We do not underestimate the difficult situation faced by many legal aid providers. In some cases they have been subject to a fees standstill for ten years. The ability of smaller firms, particularly in rural areas, to provide services has been significantly reduced by tests and procedures implemented by the Legal Services Commission. We are aware that the other proposed changes, such as those to scope, will exacerbate those difficulties. However, given the extent of savings which the Ministry of Justice is having to make, we think in principle that it is correct that fees are reduced rather than, for example, further changes made to scope. We expect the Department to monitor closely the impact this change, combined with others, has on the supply of legal aid providers. It should be prepared to respond quickly — and potentially explore whether the pool of providers can be expanded, particularly by allowing smaller firms to provide services — if supply threatens to diminish to a critical level. We shall scrutinise the performance of the Department in this respect throughout the remainder of this Parliament. (Paragraph 46)

7. The Government welcomes the Committee's support for its proposals on fees. We also agree that it is important that the impact of this measure on supply is monitored and we will do this. The Government will be working closely with the LSC to ensure that they have robust mechanisms in place to identify any developing market shortfall and that they are able to respond promptly, effectively and appropriately, should this materialise in any form. The level of supply in the legal aid market will, of course, also inform our approach to any future proposals on competitive tendering. At Annex F of the Government response, we set out why we believe that the reform of fees, in both civil and criminal matters, will be sustainable. In the longer term, we intend to introduce competition into the procurement of legal aid. We intend to start with criminal matters, and we will be consulting on our detailed proposals later in the year.

**We also welcome the steps the Government is taking to reduce bureaucracy and costs in the administration of legal aid but we are concerned that such steps are carried out in such a way as to ensure that real administrative savings are made. (Paragraph 47)**

8. The Government is committed to delivering real administrative savings of £8.4 million from the abolition of the Legal Services Commission (LSC) and the establishment of an Executive Agency within the MoJ with responsibility for administering legal aid. This saving will be delivered through initiatives such as more effective utilisation of shared and centralised services. Additionally the LSC will achieve overall overhead reductions of 23% during the current CSR period.
9. These savings are being delivered through a number of pieces of work. These include rationalisation of the management structure, movement to sharing property with the MoJ and other government organisations, and through programmes such as the LSC's Integrated Delivery Programme, which is outlined below, and changes to the way the LSC undertakes its work.
10. In advance of this transition, the LSC has already begun a programme of work delivering a new, more efficient, case management system for processing civil legal aid work. The LSC's Integrated Delivery Programme will allow providers to submit applications and bills electronically and is also expected to result in improved financial control over the legal aid fund. A pilot for the system is due to start in early 2012.
11. Savings to the LSC will also be driven by the creation of an electronic applications process for civil cases, which will remove the substantial data entry elements of processing paper applications, amending certificates, and billing. A scanning facility will also significantly reduce the need to manage paper, which as a result will reduce administrative functions such as post handling, document production, the counting and recording of applications and filing. Equally, providers will save on a significant proportion of paper, envelopes and postage costs as a result of the implementation of electronic working. The electronic forms will also look to minimise the burden on providers by only asking for information relevant to a particular client and their case, rather than requiring all fields to be completed as is currently the case. Generic data (such as the client's personal details) will only need to be entered once and be re-used to populate fields automatically.
12. The new electronic system will also be able to both assess whether it has all the information required to make a decision and request any further information needed to complete an application. This will reduce the likelihood of applications being rejected and the need for providers to provide further information. Providers will also make savings by being able to track the progress of an application or bill online, raise electronic queries and view the status of the certificate – all of which will reduce the time and cost associated with contacting the LSC directly.

13. In addition to the introduction of a new IT system for civil case management, the LSC is also in discussion with representative bodies about other ways in which bureaucracy can be reduced. The aim of these discussions is to achieve administrative savings both for the LSC and providers. The scope of this work includes looking at existing business processes, audit activity and seeking input from providers into areas such as contract simplification.

## **Other means of reducing costs: criminal cases**

**While we welcome the Government's recognition that reductions in scope cannot readily be made in the field of criminal legal aid, we were struck by the evidence of the Director of Public Prosecutions that cost savings could be achieved by greater efficiency in the courts, which in turn depends on all the agencies concerned working together more effectively. We expect the Ministry of Justice to take a lead in pushing this work forward. (Paragraph 49)**

14. The Government is committed to delivering greater efficiencies in the courts. On 1 April this year, the MoJ brought together Her Majesty's Courts Service and the Tribunals Service (HMCTS) into one integrated agency providing support for the administration of justice in courts and tribunals. Unifying courts and tribunals into a single service will create a platform to improve the accessibility of our services, drive up quality and develop new ways of working which better meet the needs of our customers. In addition, through bringing corporate functions together we will remove duplication in management and increase the efficiency of the administration, with administrative savings of around £35 million a year helping us focus resources on the front line.
15. The criminal justice system deals with around 1.8 million cases each year. Operating on such a large scale can be challenging for those that work in the system. The average straightforward case heard in the magistrates' courts takes 19 weeks from the offence being committed to the case concluding, and only four out of every ten trials in the magistrates' courts go ahead on the planned day. MoJ and LSC also work closely with HMCTS and colleagues across the Justice System, including in criminal justice with the Crown Prosecution Service (CPS) and the Home Office, to ensure that efficiencies are properly identified and delivered.
16. MoJ has for example supported the development by the judiciary and prosecution of an early guilty scheme at Liverpool Crown Court, as noted by the Committee in its Report. This is operating successfully. More than 2,600 defendants pleaded guilty at Liverpool Crown Court last year, and the early guilty plea scheme is helping to identify increasing numbers of those guilty pleas at an early first hearing.

17. MoJ is also committed to building on its other existing work with partners both within and outside government to ensure that the wider justice system is as efficient as possible. For example, both MoJ and LSC are part of the Very High Cost Cases (VHCC) sub-group of the CJS Operational Board. The sub-group, chaired by the Chief Executive of the CPS, includes representatives from across the CJS including prosecutors (CPS, SFO), separate investigators (SOCA), the Attorney General's Office, the Law Society and the Bar Council. The Sub-Group is scheduled to complete its work by January 2012 and will consider all aspects of VHCC litigation including case planning by prosecutors, disclosure of evidence (including electronic disclosure), plea negotiations, judicial case management, abuse hearings, litigation and case management skills, asset recovery and compensation.
18. An efficiency programme for the criminal justice system is being developed collaboratively with all of the criminal justice agencies, which will be focused on system-wide inefficiency, to deliver a more efficient and cost-effective system. Proposals and implementation plans to increase the efficiency of the Criminal Justice System will be published by December.

## **Judicial Review**

**While we support the Government's retention within scope of judicial review and asylum matters, we were interested in Sir Anthony May's suggestion that consideration be given to removing automatic legal aid for those judicial review applications which are, in effect, seeking reconsideration of previously dismissed appeals, an example being emergency applications within the Administrative Court in asylum cases. We recommend that the Government assesses the potential cost savings which might be made from this change and consult on its merits. The Government should also consult on whether the principle could be applied to other areas of judicial review. (Paragraph 52)**

19. The Government is grateful to the Committee (and to Sir Anthony May) for the views on the potential for savings in expenditure on judicial review cases. Similar proposals were put forward in a response to the consultation submitted by a sub committee of the Council of Judges. We have considered the suggestion, and agree that it has the scope to achieve some limited savings in legal aid. We have therefore decided to limit the availability of legal aid in immigration and asylum judicial reviews which have already had a hearing on the same, or substantially the same, issues or where the judicial review is challenging a removal direction.
20. Full details are at Annex A of the Government response.

## Reducing the number of cases prompted by poor decision-making

We welcome the steps being taken by the Department for Work and Pensions to increase the quality of decision-making, and the work undertaken by that Department and the Tribunals Service to ensure that cases which do not need to be dealt with at tribunal are resolved earlier. We note that funds are transferred from the DWP as recompense for the expense caused to tribunals as a result of policy changes. However, we think there is potential for such a “polluter pays” principle to be extended considerably, with the DWP (and other public authorities whose decisions impact upon the courts and tribunals) required to pay a surcharge in relation to the number of cases in which their decision-making is shown to have been at fault. We think that in rejecting this idea as a “robbing Peter to pay Paul” transfer of funds around the public purse, the Minister is overlooking the potential benefit such a policy would have in providing a financial incentive to public authorities to get their decisions right first time. We accept that there would be bureaucratic hurdles to be jumped over in creating such a system, but we think the potential benefits merit further consideration and that, in the long-term, cost-savings could accrue from such a policy. (Paragraph 60)

21. The Government agrees with the Committee that we should endeavour to ensure that more decisions made by public authorities are right first time, and that only those cases which cannot be otherwise resolved should reach tribunal hearings. Focusing on making better initial decisions will deliver better outcomes for those citizens affected by those decisions, and will be more efficient for the taxpayer.
22. The Committee focussed in particular in its Report on decision-making in Social Security cases. The Government is working to deliver improvements in this area, both by improving the original decision-making and review processes, and by simplifying and streamlining the appeals process, including at the Tribunal. MoJ is working with Jobcentre Plus and the Pensions, Disability and Carers Service to streamline appeals against Employment and Support Allowance to ensure that the right cases reach tribunal hearing stage with all the relevant information having been fully considered. MoJ is also taking forward similar work jointly with other government departments. For example, we are working with UK Border Agency over the handling of asylum cases, to improve customer service and ensure that resources are focussed on the right cases.

23. The Committee should also note that MoJ already monitors the impact of new measures and policy changes proposed by other government departments on the justice system. This includes working closely with other departments on specific Justice Impact Tests to identify any potential impacts and costs not only to legal aid but also to the courts and tribunals from any new policies. As part of this work, MoJ also ensures that, where appropriate, agreement is secured to mitigate any impacts or costs that are identified as part of the clearance process for such policy. We agree that this work needs to be given continuous emphasis, and an appropriate level of commitment and resource.
24. While costs provisions are very limited in proceedings before tribunals, it is already the case that the courts can award costs against losing defendants in civil (non-family) cases in which the opponent is legally aided, where they consider this appropriate, and last year, the legal aid fund recovered £170 million in costs and damages in civil proceedings awarded against non-legally aided parties. However, strict application of the “polluter pays” principle might call into question the effective cost protection that the legal aid fund currently receives when funding litigation. A significant proportion of cases funded by the LSC are not successful, and any requirement for the LSC to routinely meet the costs of other parties in unsuccessful cases would be a significant drain on the fund.
25. As the Committee has recognised, there would be bureaucratic hurdles to such a system. It is difficult to see how it could be applied to Legal Help (legal advice and assistance), where it would be difficult to determine whether the original decision on which the advice is sought was wrong, and who was at fault. We also believe that it might have unintended consequences in some cases, for example in criminal prosecutions, or in care proceedings. We do not wish to discourage prosecutions or interventions in cases of suspected child abuse, because of concerns about costs.
26. The Government does not therefore believe that there is scope to extend the “polluter pays” principle further. Instead our focus is to work with officials on other departments and public bodies to ensure better decision making about at the outset, and throughout the conduct of the case.
27. Further details are at Annex L of the Government response.

## **Other cost savings**

**While we have not had time to assess these measures in detail, we recommend that the Government assesses the merits of the cost-saving proposals put forward by the Law Society. While we understand the need for short-term savings and support many of those set out in the consultation paper, we hope that the Government will now turn its mind to addressing some of the long-term cost drivers of legal aid, not least with a view to reducing the extent of some of the limitations to scope proposed in the consultation paper, the impacts of which we consider below. (Paragraph 63)**

28. The Government has considered carefully all of the responses received during the consultation on our legal aid proposals, including the alternative proposals for reform put forward by the Law Society. We do support those proposals that seek greater efficiency across the justice system and we are working with our partners to achieve this.
29. However, we have concluded that they do not represent a realistic alternative to the Government's programme of reform. The response to the consultation sets out at Annex L the Government's assessment of the alternative proposals put forward during the consultation.

## **Impact of scope changes on vulnerable clients**

**According to the Government's own figures, the changes it is proposing to the scope of legal aid will result in 500,000 fewer instances of legal help and 45,000 fewer instances of legal representation being funded by legal aid annually. The Government has conceded that it does not know the extent to which these reductions would impact upon people with disabilities and black and minority ethnic people because of information gaps. While it is taking some steps to address those gaps, evidence we have received, and the Government's own thinking, suggest that these people, as well as other vulnerable groups, rely more on legal aid services than do the less vulnerable, and so there is the potential for them to be disproportionately hit by the changes. If this were to happen it would sit uneasily with the Government's commitment to protect the most vulnerable in society. (Paragraph 69)**

30. We recognise that there are a number of data gaps in relation to client and provider protected characteristics in the available data sources. The Equalities Impact Assessment published alongside the Government response takes into consideration the relative limitations of each data source in terms of the strength of the conclusions that can be drawn regarding potential equalities impacts. As set out earlier, for the future we are planning to conduct a new study of legal aid clients to provide additional information on a range of client characteristics, including protected characteristics and income and capital.
31. However, as the Committee accepts, savings from the legal aid budget are needed in the current financial climate. In developing our proposals for legal aid, our objectives were to:
  - reduce unnecessary litigation;
  - target legal aid to those who need it most;
  - substantially reduce the cost of legal aid; and
  - deliver better value for money overall.
32. Some respondents to the consultation raised valid concerns about our original proposals and in some cases therefore, we have decided to amend our original proposals where we believe this better meets our aims for legal aid. We have, for example, decided to retain legal aid for Special Educational Needs (SEN) cases, asylum support for accommodation for destitute asylum seekers, unlawful eviction cases, and to expand the criteria for allowing access to legal aid in cases involving domestic violence and child abuse. However, it is inevitable that, in view of the need to make substantial savings in the cost of legal aid, there will be reductions in service in those areas we consider to be of lower priority.

## **Scope: private law children and family cases**

**The Government is right to retain legal aid in scope in cases where actions by a public authority “affect the integrity of the family unit”. We accept there is a philosophical difference between the state intervening to remove a child from a family and an absence of contact between a parent and child as a result of relationship breakdown, and that the case for the taxpayer to fund legal costs is significantly stronger in the former than in the latter case. (Paragraph 79)**

**We note concerns put to us that many of the parents involved in difficult cases involving children will face problems in accessing a court and representing themselves and that this could impact adversely on the wellbeing of the children concerned. We note further the argument put to us by the Family Law Bar Association that, while the consultation paper appears geared towards meeting the interests of the party seeking legal aid, it does not meet the interests of children involved in proceedings. We call on the Government to address these issues specifically in its response to the consultation. (Paragraph 80)**

33. The Government welcomes the Committee's endorsement of its proposal to retain legal aid in public law family cases. We accept the argument put forward in response to the consultation that legal aid is needed in some private law children cases for the wellbeing of those children involved.
34. Protecting children from abuse is of paramount importance. We have therefore decided that legal aid will be available in private law children cases where a child is at risk of abuse, for the party seeking to protect the child from harm. Legal aid will also be retained for children who are separate parties to proceedings.
35. As with providing legal aid in private family cases involving domestic violence, clear objective evidence is required to avoid providing an incentive for false allegations. In addition to providing legal aid in cases where there is evidence of domestic violence (see response below), we have decided that legal aid should be available for the protective party where one of the following types of evidence of child abuse is provided:
  - there is a criminal conviction, or ongoing criminal proceedings, for a child abuse offence against the person from whom the protective party is seeking to protect the child (unless the conviction is spent);
  - a local authority has put a Child Protection Plan in place to protect the child who is the subject of the proceedings from abuse by or including abuse by the person from whom the protective party is seeking to protect the child; or

- there has been a finding of fact by the family courts that child abuse on the part of the person from whom the protective party is seeking to protect the child has occurred.
36. We have also decided to retain legal aid for children who are separately represented under Rules 16.2 or 16.6 of the Family Procedure Rules 2010, and for child parties in any other private family law cases. Annex B to the Government response sets out further details.

## Domestic violence as a criterion

**Given that family law is the single most expensive area of legal aid provided through the community legal service we understand why the Government is seeking to reduce spending on it. However, we are concerned that using the presence of domestic violence as a proxy for the most important cases will lead to a perverse incentive to make false allegations of such violence or, where such violence has occurred, cause it to feature in disputes before the courts where it might otherwise not have done so. As well as potentially harming children in such circumstances, this could add unnecessary expense, including the cost of legal aid for persons accused of domestic violence. Additionally, there is the converse problem of victims of domestic abuse who do not want such abuse to be brought to court and who will therefore be ineligible for legal aid. We therefore call on the Government to reconsider its use of domestic violence as a gateway to legal aid funding and to bring forward alternative proposals by which to focus family law legal aid expenditure on the most deserving cases. (Paragraph 87)**

37. The Government agrees with the Committee that there is a risk of allegations of domestic abuse being made where they would not otherwise have been. This was also raised in responses to the consultation. However, as the Committee recognises, those who have been the victims of domestic abuse are amongst the most vulnerable in our society. Without legal aid, victims in these cases will potentially be facing intimidation and continued risk of harm. As a consequence they may find it impossible to represent themselves in court.
38. To reduce the risks of false allegations of domestic violence, this will require clear, objective evidence. We have carefully considered suggestions made in consultation responses about the circumstances that might provide such evidence. We have decided that legal aid should be available for the party at risk where one of the following types of evidence of domestic violence against that party by the other party is provided:
  - a non-molestation order, occupation order, forced marriage protection order or other protective injunction is either in place or has been made in the last 12 months;
  - there is a criminal conviction, or ongoing criminal proceedings, for a domestic violence offence by the other party towards the applicant for funding (unless the conviction is spent);
  - the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them from violence by the other party; or
  - there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim.

39. To avoid providing an incentive to make false allegations, we have decided that ongoing proceedings for a domestic violence order (such as a non-molestation order or an occupation order) or forced marriage protection order in which an order has not yet been made would not provide sufficient evidence, but legal aid would continue to be available where an emergency domestic violence order application and an emergency application in respect of a child are made at the same time.
40. We are mindful that some victims of domestic violence do not want to seek an injunction or pursue criminal proceedings against their abuser. By accepting as appropriate evidence the fact that a victim has been referred to a Multi-Agency Risk Assessment Conference and is the subject of a plan to protect them, legal aid will be available to victims who have had no previous contact with the justice system.
41. We have also set out above our decision that legal aid should be available for the protective party in private law children cases where there is evidence that the child involved is at risk of harm, and the circumstances that would be accepted as evidence.

**If the Government does insist on retaining domestic violence as a criterion for legal aid eligibility it should adopt a definition of domestic abuse which explicitly incorporates non-physical abuse and we welcome the Minister's statement that he will consider this matter further in light of the consultation responses. Further to broadening the definition of domestic abuse, the Government should ensure that undertakings as to future conduct rather than orders of the court are sufficient to confer eligibility. (Paragraph 88)**

42. The Government's intention is to ensure that legal aid is targeted to those who need it most. It is therefore right that legal aid should be available for victims of domestic violence in private law children and family cases to those at serious risk, where it is needed to assist the victim to assert their rights. We have set out above the circumstances that will be accepted as evidence of domestic violence, and these are not restricted to cases of physical harm.
43. We have considered whether undertakings given during the course of domestic violence proceedings should be accepted as evidence of domestic violence. An individual accused of abuse can give an undertaking without admitting that domestic violence has taken place, and undertakings do not involve a finding of fact by the courts. This means that undertakings may be given in cases where domestic violence has not taken place. Undertakings are therefore not in themselves sufficiently clear, objective evidence of domestic violence and, for that reason, we have decided that they should not be accepted for this purpose.

## **Mediation**

**The Government's commitment to the provision of mediation in private law cases is very welcome and its aspiration to use mediation to divert as many cases as possible from the courts is prudent and generally in the best interest of both parties and any children involved. However, we agree with the President of the Family Division that mediation cannot be a panacea and that it will not work in all cases. Further work needs to be done on how difficult and unresolved cases can be dealt with if legal aid is not available. (Paragraph 98)**

44. The Government welcomes the Committee's support for mediation and our intention to continue funding in this area. We agree that mediation may not necessarily offer a solution for all cases, and therefore have recognised the need for certain exceptions, such as in cases that involve domestic violence or child abuse. We do believe that individuals should be aware that mediation is available as an option. The President of the Family Division has recently issued a pre-action protocol supporting this approach, which requires the majority of self-funding individuals looking to issue proceedings to attend a mediation information and assessment meeting prior to coming to court.
45. When successful, mediation can have considerable advantages in relation to family disputes as it can be a cheaper, quicker and less acrimonious process than contested court proceedings. It can help reduce levels of hostility between parents, and it offers real opportunities for resolving matters in such a way that separating couples can maintain as good a relationship as possible.
46. The Family Justice Review interim report outlined the benefits of mediation in supporting parties to resolve their disputes. However, the Government accepts that some cases will need to be resolved in court, and this route will remain available for those who decide it is necessary.
47. In privately funded ancillary relief cases, the Government intends to enhance the court's power to order one party to divorce and related proceedings to pay an amount to the other to enable the other to secure legal services for the proceedings. Further details are at Annex C to the Government response.

## **Rule 9.5 cases**

**We share concerns raised with us that parents in rule 9.5 cases will not be eligible for legal aid, and that courts will have unrepresented litigants in cases which involve significant difficulty. We urge the Government to consider amending its proposals to permit legal aid provision in any rule 9.5 case where it is clearly necessary. (Paragraph 101)**

48. The Government's view is that the protection of the child is the priority, and that providing the child with a neutral Cafcass guardian, together with legal representation (which could at least partially fund expert reports), should help to assist the judge in reaching an informed decision in these cases. Multiplying the number of represented parties and the numbers of expert reports in these cases will not necessarily make a judge's decision any easier or better.
49. Legal aid will be available under the exceptional funding scheme where, in the particular circumstances of the case, the failure to provide legal aid would be likely to result in a breach of the individual's rights to legal aid under the Human Rights Act 1998 or under European Union law.

## **Timing of the proposals**

**The Family Justice Review Panel is undertaking a fundamental reassessment of the family law system and its recommendations are likely to have a significant impact upon that system. The Government should wait until the Review Panel has produced its full report before implementing changes to the legal aid system in the area of family law. (Paragraph 105)**

50. The independently chaired Family Justice Review published its interim report on 31 March this year.<sup>2</sup> The Family Justice Review proposals aim to achieve a speedier, less costly family justice system, and in their interim report they have made a number of provisional recommendations to achieve these ends.
51. The Family Justice Review is a separate and independent programme of work, looking at the entire Family Justice System. Our proposals are not dependent on the outcome of that review and are focused on legal aid. The direction of travel set out in the Family Justice Review's interim report is in line with our approach to legal aid reform. The panel's recommendations seek to encourage individuals to resolve issues following separation independently, wherever possible, including by encouraging the use of mediation. Continuing to provide legal aid for family mediation will support that aim. The Review also made recommendations about making information and advice on a range of issues, including court resolution, available to those beginning the process of separation.

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<sup>2</sup> See <http://www.justice.gov.uk/publications/family-justice-review.htm>

## **Help and advice from other sources**

**We welcome the Government's provision of funding for face-to-face debt advice for a further year and the £100 million Transition Fund, designed to help not-for-profit organisations change to a business model which leaves them less reliant on public funds. However, long-term concerns remain: how will sufficient debt advice be provided once the deferred ending of the face-to-face service happens? How many organisations will be able successfully to adapt their income streams in the manner encouraged by the Transition Fund? What will happen to those who cannot afford the clients who use their services? The answers to these questions are not known and the Government should be prepared to extend further the provision of face-to-face debt advice and offer a second round of Transition Fund grants if necessary. (Paragraph 123)**

**We note that the Government recognises the difficulties faced by the not-for-profit advice sector. It is unsatisfactory that, on the Government's own admission, the Cabinet Office has been brought in at a late stage. We welcome the work it is doing to assess the situation and to find ways of helping the voluntary and not-for-profit sectors, but we are concerned that leadership and coordination across departments has not covered all relevant areas. Representatives of organisations in this field have made it clear they do not believe it will be possible for their organisations to meet all the unmet demand which will be created by the proposed changes to legal aid. That assertion casts doubt on a key condition for the Government's proposed reforms – that clients will be able to access non-legal aid-funded sources of advice. (Paragraph 128)**

52. The Government welcomes the Committee's support for creation of the Transition Fund and the extension of funding for face-to-face debt advice for 2011/12. As the committee is aware, on 12 February 2011 the Government announced continued funding of £27 million in 2011/12 to maintain the face-to-face debt advice programme (previously the 'Financial Inclusion Fund') in Citizens Advice Bureaux and other independent advice agencies across England and Wales. The Government is working to place this programme on a more sustainable footing in the future, to ensure that individuals can access the support they need easily, and that the service delivers the best possible value for money.
53. We also note the related questions that the Committee poses in relation to the Transitional Fund. The Government has already announced an additional £7 million funding for the Transition Fund, provided by the Department of Health, bringing the total to £107 million this year.

54. The Government recognises the importance of advice services, and particularly the challenges they are facing in the current spending context. However, it is important to emphasise that legal aid represents only one funding stream for not-for-profit (NfP) advice organisations and in many cases is not the largest source of funding. For example, income from legal aid comprises approximately 15% of funding received by Citizens Advice Bureaux (CABx) and approximately half of all Bureaux do not derive income from legal aid.
55. The Government acknowledges the integral role that NfP advice centres play in many communities. Many are becoming increasingly innovative and developing new ways in which significant local demand can be met. We recognise the important contribution they make and we will therefore be reviewing the impact of recent Government proposals on the sector. This will include identifying the scale of the issue both in terms of funding and effectiveness of advice; developing a plan for future central government funding arrangements for advice services to simplify, streamline and consolidate the current complex funding mechanisms and to recommend sustainable alternative funding models.
56. Through the consultation period, MoJ ministers met on a number of occasions with representatives of NfP organisations, including Citizens Advice and Law Centres Federation, and with ministerial colleagues from other Government departments to discuss the impact of the legal aid proposals and to seek their views.
57. It was not MoJ's intention to suggest that voluntary sector organisations could replace the provision of legal aid. The department considered a number of factors in deciding how to prioritise public funds, and the availability of alternative forms of advice and assistance was one relevant consideration. MoJ will continue to work closely with NfP legal aid providers to consider their role in the future in helping people, though this may not necessarily be through specialist legal advice. Many of the issues with which they deal, such as debt, require practical help rather than legal advice. As set out in paragraph 52 above, much of the funding for these services comes from sources other than legal aid. Even where these organisations do not provide legal advice, many do provide help and advice in terms of leaflets, publications and information available on their websites. NfP providers will be able to apply for future contracts for the areas of legal aid remaining in scope alongside other providers.
58. It is also important to note that legal aid will continue to be available for debt cases where there is an immediate risk of homelessness, because of the severity of the potential impact of homelessness on the livelihood, health, safety and well-being of the litigant and their family.

## **Self-representation at tribunals without assistance**

**While the nature of tribunals generally means that legal representation is not necessary, we are concerned that the removal of legal aid for legal help could cause more cases without a realistic chance of success to reach tribunals (thus increasing the tribunals' costs). We are also concerned that the ability of the most vulnerable people to present their cases will be weakened because they will not have had help and advice in preparing them. This could deny justice to the individuals concerned and increase the time and expense necessary to deal with the case at tribunal. The increasing complexity of procedure in some tribunals has made it difficult for vulnerable people to represent themselves. We urge the Government to initiate consultations in order to develop proposals to make tribunals more user-friendly and less legalistic. (Paragraph 132)**

59. MoJ recognises the Committee's concerns and will continue to maintain a strong focus on ensuring tribunal processes remain accessible and informal. For example, in the social security jurisdiction, use is made of informal tribunal rooms, specially trained clerks and most importantly judges who are trained in helping unrepresented appellants give their side of the story and the appropriate consideration of equality and diversity and other cultural issues.
60. As has been noted elsewhere, MoJ and DWP are also working together to ensure that customers are given clear information about the appeals process, and that there is an appropriate level of contact to ensure decisions are explained, and that all the necessary evidence is available at the right time. MoJ is also taking forward similar measures with other Government departments such as the UKBA where the MoJ have joint working to improve initial decision making and improve efficiency of the appeals system for immigration appeals.

## **Costs to the public purse of removing legal aid**

**It has been put to us that the removal from scope of many areas of social welfare law will lead to significant costs to the public purse as a result of increased burdens on, for example, health and housing services. We are surprised that the Government is proposing to make such changes without assessing their likely impact on spending from the public purse and we call on them to do so before taking a final decision on implementation. (Paragraph 136)**

61. The Government recognises that early advice can be helpful in a range of contexts. However, in our view what people often need is practical help rather than legal advice. The approach adopted by Government in making decisions about the future provision of legal aid has been to focus resources on those who most need help, for the most serious cases in which legal advice or representation is justified.
62. The Ministry of Justice has been discussing the potential impact of these reforms with officials in other government departments, including the Department for Education, the Home Office, the Department for Work and Pensions and the Department for Communities and Local Government. However it is not possible to predict how clients will respond to a reduction in legal aid and so it is not possible to quantify accurately these wider costs.
63. We believe that it will be cheaper and more efficient for public authorities to ensure that they make better, more robust, decisions to reduce the number of disputes that arise, and to resolve issues informally rather than through a legal process wherever possible.
64. As the Secretary of State for Justice noted in his foreword to the legal aid consultation, the current legal aid scheme bears very little resemblance to the one that was introduced in 1949. It has expanded significantly beyond its original intentions, so much so that it is now one of the most expensive in the world, available for a very wide range of issues, including some which should not require any legal expertise to resolve. The Government believes that this has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the taxpayer funding unnecessary litigation and is why we believe that our final package of proposals are both proportionate and necessary, not only to make essential savings, but also to properly re-focus the legal aid scheme on those areas where it is most needed.

65. Having carefully considered the consultation responses, we remain of the view that funding should be available for high priority social welfare law matters, including community care, employment cases concerning discrimination, housing cases that address housing disrepairs which pose a serious risk to the life or health of the individual or their family, and debt and housing cases where the client is homeless or facing the risk of homelessness. As indicated in Annexes A and B of the Government response to the consultation, in order to ensure that funding is retained for these high priority areas, funding will be removed for less serious cases, including social welfare law cases.

## **Impact of scope changes: immigration**

**As with the social welfare scope changes, the Government's contention that immigration law (other than detention cases) should be removed from scope because the issues concerned are of relatively lesser importance and that the user-friendly nature of tribunals mean that individuals should be able to navigate their way through them without publicly funded assistance has been strongly criticised. Again, as with the other scope changes, it seems likely that there will be consequential costs for budgets other than legal aid, and we recommend that the Government assesses these fully before deciding whether to proceed with its proposals. (Paragraph 143)**

66. As set out in the Government response, we believe that individuals in immigration cases should be capable of dealing with their immigration application, and it is not essential for a lawyer to assist. Tribunals are already designed to accommodate litigants-in-person, and interpreters are provided free of charge.
67. During the development of our legal aid reform programme, the MoJ has worked closely with other departments, (particularly the Department for Education, Home Office and the UK Border Agency). The Impact Assessment acknowledges that that there may be wider costs, which may impact on other public bodies but highlights that it is not possible to quantify these.

**ILPA raised two questions about the Government's proposals, namely: whether immigration cases involving domestic violence will remain within scope; and whether claims based on Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman or degrading treatment or punishment) will remain within scope. We would appreciate clarification of the Government's position on these areas. (Paragraph 144)**

68. Immigration claims in relation to rights to enter, or remain, in the United Kingdom based on Article 3 of the European Convention on Human Rights will remain in scope.
69. Immigration applications under the Domestic Violence Immigration Rule will be out of scope, because they are immigration cases. These cases are comparable to other immigration applications, and whilst individuals may need help in filling in the forms, we do not believe that they will generally require specialist legal advice.
70. Full details are set out at Annex B of the Government response.

## **Impact of scope changes: education**

**We do not believe that it is generally in the interest of children with special needs that public funds should have to be devoted to funding legal representation in disputes about their needs. This inevitably diverts local authority funding into paying for lawyers, experts and court proceedings when those funds could be better spent on providing the facilities which special needs children require. We believe that, in the context of its consultation on special educational needs, the Government should aim to reduce dramatically the requirement for legal proceedings in this area. (Paragraph 150)**

71. The MoJ has been in close contact with the Department for Education (DfE) in considering its final approach on Special Educational Needs (SEN) cases. We have also taken account of the views expressed during consultation, as set out in the Government response.
72. There were a number of arguments put forward by respondents which, when taken together, have persuaded us that legal aid funding for SEN matters should be retained. For example, respondents to the consultation proposals argued that SEN cases were very similar to community care cases which we had proposed retaining within scope, because both types of case concerned disputes about the statutory provision of services to vulnerable disabled persons to enable them to live fulfilled lives. In addition, respondents were concerned that appellants would instead choose to recast their appeal as a disability discrimination claim under the Equality Act 2010, which remains within the scope of legal aid. It was argued that this would lead to more acrimonious disputes with poorer outcomes for children. It was also argued that the parents of children with SEN were significantly more likely to be disabled than other parents, and that they had very significant caring responsibilities.
73. For these reasons, the Government has decided that legal aid should continue to be available, as it is currently, for legal advice in preparation for the First-tier (Special Educational Needs and Disability) Tribunal, and for legal advice and representation at the Upper Tribunal (and higher courts). However, we do not consider that legal aid should be extended to cover representation at the First-tier (Special Educational Needs and Disability) Tribunal. We consider that the accessible nature of the tribunal, with legal aid available for legal advice, will mean that legal aid for representation will not generally be necessary.
74. Full details of the reasons for retaining SEN cases within the scope of legal aid are set out at Annex B to the Government response.

## **Overall impact of scope changes**

**The scale of savings sought by the Government requires changes to be made to the scope of legal aid. However, we have outlined some concerns about the impact of some elements of those scope changes and hope the Government will address those concerns. The effect of doing so might be to reduce the level of savings realised; however, we have set out above some proposals for savings not covered in the consultation paper which, if implemented, could help offset any shortfall in savings accruing from the refinement of the scope proposals we are advocating. (Paragraph 151)**

75. The Government notes the Committee's views. Our response to the consultation sets out the final programme of reforms that we intend to implement, and our rationale for doing so. This is the result of careful consideration of over 5,000 responses we received during the consultation period. Where respondents have raised valid concerns about our original proposals, we have decided to make some changes, for example, to retain legal aid for SEN cases, to ensure our objectives for legal aid reform are met.

## **Legal aid as a national public service**

**We note the fears expressed by some providers that the Government's proposals could result in the end of legal aid as a national public service. We are not convinced that this will necessarily be the case but we think that, for several reasons, there could be significant under-supply of providers in some areas of the country, or indeed some 'advice deserts'. We note the Minister's assertion that the savings to be made of £350 million have to be seen in the context of an overall budget of £2.2 billion. The Government's own impact assessment notes that there is "much uncertainty" about the impact on providers and we urge the Government to conduct a more thorough assessment of the likely effect on geographical provision of each category of civil and family law before deciding whether to implement the proposals. (Paragraph 156)**

76. The Government's final Impact Assessment sets out as clearly as possible the potential impact on providers of our final package of reforms. We will continue to monitor the legal aid market to ensure that there is sufficient provision across the country to ensure appropriate access to justice. It would be unrealistic, however, to expect that there will be no change in the overall level of provision under these proposals. As we have made clear, our objectives for legal aid reform are:

- to reduce unnecessary litigation;
- target legal aid to those who need it most;
- substantially reduce the cost of legal aid; and
- deliver better value for money overall.

77. Overall, we have concluded that the legal aid reform programme is likely to be sustainable. Further details of our assessment of sustainability are set out at Annex F to the Government response.

78. The MoJ will be working closely with the LSC to ensure that they have robust mechanisms in place to identify any developing market shortfall and that they are able to respond promptly, effectively and appropriately, should this materialise in any form. We will also work with them to ensure a thorough approach is taken to the future procurement of services, placing access to provision at the heart of our approach and ensuring that we continue to assess the sustainability of the legal aid market throughout the procurement process.

## **Competitive tendering**

**The Government has begun a separate consultation on the introduction of a competitive tendering model for legal aid and its potential to encourage efficiencies and innovation. We note the reference to this work by the Minister in answer to a question about possible advice deserts and believe that any competitive tendering model adopted should have as a key objective the avoidance of such deserts. We look forward to the outcome of the consultation exercise. (Paragraph 159)**

79. The Government notes the Committee's views and agrees that ensuring a sustainable supply of providers to enable access to justice should be a key objective of any competitive tendering model. We intend to consult on detailed proposals for introducing competition into the procurement of criminal legal aid later in the year. In the longer term, and subject to good progress being made in the crime context, we intend to introduce competitive tendering for civil and family legal aid services. We will continue to assess the sustainability of the legal aid market throughout each procurement process.

## **Telephone helpline**

**We accept there are concerns about the ability of some vulnerable clients to access services via a telephone helpline. However, the scale of the savings to be made through the use of such a helpline (£50 – 70 million annually) and the fact that some clients might benefit from such a service, means that this is an option worth pursuing. We encourage the Government to do so, but would also urge it to work with both public and private providers of services to make sure the helpline is designed in a way which makes it effective for vulnerable clients. We urge the Government to monitor closely the effectiveness of the helpline, particularly for vulnerable clients. (Paragraph 163)**

80. The Government welcomes the Committee's support for the provision of telephone advice through the Community Legal Advice (CLA) helpline, which offers citizens the opportunity to access services in a more convenient and accessible manner. The CLA helpline service has high rates of customer satisfaction and in designing an enhanced service the Government will continue to engage with key stakeholders from the public, NfP and private sectors. The Government is committed to monitoring the continued effectiveness of the helpline, and ensuring that vulnerable clients can effectively access legally aided advice services.
81. The Committee should note that the estimated savings of £50 to £70 million quoted in its Report are derived from the stand-alone Impact Assessment. It measured the impact of implementing these proposals relating to the CLA helpline in isolation from the others outlined in the consultation paper. The Impact Assessment published alongside our consultation response sets out the impact of our final package of reforms.
82. Full details of the Government's decisions on the Community Legal Advice helpline appear in Annex D of the Government response to the consultation.

## **Conclusions**

**The full cost implications of the Government's proposals cannot be predicted with a great deal of accuracy given the difficulties in knowing what impact behavioural change will have on the number of cases brought to the courts and the incidence of litigants in person. (Paragraph 171)**

**There is insufficient information about the impact of litigants in person on court processes, although we welcome the literature review and related work being undertaken by the Department in order to gain a better understanding of this issue. In any event, it seems probable that the Government's proposals, if implemented, are likely to lead to an increase in the number of litigants in person. We urge the Government to build on the findings of its ongoing research by establishing an expert group, involving members of the judiciary, lawyers and others, to review what can be done to make more effective the manner in which the courts and tribunals handle litigants in person, with a view both to making recommendations aimed at containing costs and ensuring that justice is done (Paragraph 172)**

83. The Government notes the Committee's concerns, although it is confident that the final Impact Assessment, and the Equalities Impact Assessment, published alongside the Government's response to the consultation, are as comprehensive and robust as possible in the circumstances. We also thank the Committee for its suggestion that the Government should establish an expert group that looks at helping litigants-in-person. We will give this further consideration.
84. As set out in the Government response, our review of the research on whether there is likely to be an increase in litigants-in-person as a result of the proposed changes was not conclusive. The evidence on the impact of litigants-in-person on case duration was mixed. This was affected by the case type and how active the litigants were. It suggested that cases took longer when the unrepresented litigant was active but could take less time when the litigant was inactive. Our review also found that litigants-in-person could face problems in court, such as understanding evidential requirements. It also suggested participants could find the oral and procedural demands overwhelming. Research with court staff, the judiciary and other parties' representatives suggested they felt compensating for these difficulties created extra work for them.
85. The Government does accept, even if there is no conclusive evidence of this, the likelihood of an increase in volume of litigants-in-person, and potentially some worse outcomes for them materialising. But it is not the case that everyone is entitled to taxpayer funded legal representation for any dispute or to a particular outcome in litigation. Our new exceptional funding scheme will mean that no one will be deprived of their fundamental rights of access to justice. Taxpayer funded representation has had to be targeted on priority areas.

**We have identified a number of areas where more radical change, going beyond the savings required in the short-term, should be explored. These will require the building up of a better evidence base.**  
**(Paragraph 173)**

**The Government's proposals to reduce the cost of legal aid are a response to the budgetary situation and to the high level of expenditure on legal aid in this country by comparison with others. The proposals present a severe challenge to many of those involved with the justice system, because they assume that less use will be made of legal proceedings, that voluntary and not-for-profit organisations in difficult financial circumstances will be able to find new ways of funding legal advice, and that courts and tribunals will make it easier for litigants to appear before them without legal assistance. In our view, it will also be necessary for public bodies to improve their decision-making so as to generate fewer appeals to the courts and tribunals, an approach which needs to be encouraged by shifting financial responsibility for some of the costs to the bodies whose decisions incur them. Ministers need also to look at other proposals to reduce the cost of legal aid, such as stricter merit tests applied by the courts with regard to judicial review. The Government's proposals, which need considerable further refinement, assume a major change in the way the accessibility of the justice system has come to be viewed, and it is a change for which many of those involved are unprepared. (Paragraph 174)**

86. The Government's response to the consultation sets out the final package of reforms that we will be taking forward. These have been refined in light of the responses to the consultation. We have set our response to the alternative proposals put forward on consultation at Annex L.
87. As the Government's response to the consultation made clear, our objectives for legal aid reform are:
  - to reduce unnecessary litigation;
  - target legal aid to those who need it most;
  - substantially reduce the cost of legal aid; and
  - deliver better value for money overall.
88. We acknowledge that this is a delicate balance, but we believe that the final reform programme, amended to take account of the valid concerns raised by respondents to the consultation, best meets these objectives.



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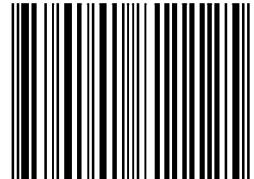
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