

Simplicity versus Fairness in Means Testing: The Case of Civil Legal Aid

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Abstract

For most state financial benefits, the making of any payment, or its level, depends upon a means test to assess the applicant's income or wealth. Attempts to make such tests fair often lead to procedures that are complicated to administer and confusing for the applicant. This paper describes the analysis underlying a review of means testing for civil legal aid in England and Wales, to achieve considerable simplification without sacrificing fairness.

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I. INTRODUCTION

Practically all reforms to the tax and benefit system are hailed as a simplification, and indeed some are. Almost all produce significant numbers of gainers and also losers, sometimes intentionally, sometimes not.

Child support was reformed in 1998–99, with the aim of abolishing complex rules that 'do not fit either with people's lives or with other systems that provide support for families' (Department of Social Security, 1999, p. 2). The Department's earlier Green Paper on assessing maintenance payments (Department of Social Security, 1998, p. 23) said that

We believe that the current complicated assessment formula should be scrapped. It seeks to be fair to everyone and ends up with a system that is so complex that no one can tell whether it is fair or not. The current rules combine the disadvantages of an impersonal and

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rule-bound system with the expense and delay of an individually tailored assessment. On the one hand, it is inflexible and rigid; on the other, it is complex, unclear and very difficult to understand.

The complex means test for assessing maintenance contributions from an absent parent was replaced with a simple slice of post-tax income (15 per cent of net income for one child, 20 per cent for two and 25 per cent for three or more), with essentially no allowances; albeit with some provision for those on low earnings or for those who have a second family. The new system is simpler. However, it changed the liability of almost all new cases, and some of the consequences were not intended (Paull, Walker and Zhu, 2000).

The government's most recent significant change to the benefit system — the introduction of child tax credit and working tax credit — is also described in terms of simplification and fairness (HM Treasury, 2002).

The community charge (poll tax) introduced in the 1980s, notwithstanding its far-reaching policy and political implications, was also presented as a simplified system (Department of the Environment, 1986).

Complex rules and regulations create problems. On the other hand, it can be argued that a fair means test should take account of individual lifestyles and expenditures. Reducing complexity brings the danger of an over-simple, 'rough justice' means test.

However, a complex test that takes account of many and varied expenses supports certain approaches to life at the expense of others. It is not a 'lifestyle-neutral' means test. For example, up to a few years ago, school fees could be used by assessment officers as a deductible discretionary allowance in the determination of civil legal aid eligibility. At its most extreme, a complex means test could enable applicants to fulfil the eligibility criteria almost irrespective of the level of income or capital they have been entitled to receive — provided they have been 'creative enough' in spending it. In that sense, complexity does not equal fairness but might hinder it. Simplification may thus in some cases promote fairness, by applying a less individualistic test.

The literature on means testing has highlighted these dilemmas (see, for example, Atkinson (1993)). Research and debate are especially pertinent since means tests affect large numbers of people in Britain and have been steadily expanded since the Second World War (Hills et al., 1997). In addition to means-tested benefits such as income support and working tax credit, other government resources, such as financial help for students as well as legal aid, are distributed through means testing. A key debate includes the targeting of benefits to those most in need. Dilnot, Stark and Webb (1987), for example, examine two different methods of targeting the poor: targeting by contingent circumstances, such as unemployment, sickness or parenthood, and targeting by income. They further state that discussions surrounding targeting are often carried out in emotive terms of 'means testing' and 'universalism'. Dilnot et al. conclude that

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microeconomic modelling work is required to illustrate trade-offs between effects such as cost of schemes and benefits to the poor. Much research and debate has also focused on the take-up of means-tested benefits. Noble, Smith and Munby (1992) conducted work on family credit and found that take-up was relatively low in general, but higher for single parents and council tenants. Similarly, Fry and Stark (1993) found different take-up rates for a number of means-tested benefits depending on socio-demographic profiles. Their statistical models showed that take-up was lower for families with large other incomes and higher in regions with high unemployment.

Despite many similarities, it is crucial to stress the different purposes behind various means assessment tests. For example, the income support test exists to guarantee a minimum standard of living. It is intended to ensure a subsistence level of income, the minimum deemed necessary for decent survival. Legal aid, on the other hand, is aimed at giving access to justice in defined areas of law to those who cannot afford their own legal costs. Therefore, the means test for income support is not strictly comparable to the civil legal aid means test. Means tests cannot be viewed in isolation from their target groups, the nature of the payments made, the purpose of the test, the resources available and the overall context in which means tests operate within any given country.

This paper describes an investigation to improve the balance between simplicity and fairness in civil legal aid in England and Wales by analysing the distributional consequences of alternative regimes. As a consequence of this work, the system has now been reformed, and appears to be working well. The modelling work has continued in order to monitor the new means tests.

Section II summarises how legal aid means testing is addressed in some other countries. Section III describes the administrative structure of legal aid in England and Wales and the wider reform programme of which this work is a part. Section IV describes the old means tests. Section V describes the modelling and Section VI the new scheme derived from this work and how its impacts compare with those of the old scheme. Section VII briefly concludes.

II. INTERNATIONAL COMPARISONS OF CIVIL LEGAL AID SCHEMES

There is a potentially very wide variety of means-testing schemes and of rationales behind them. This is reflected in the diversity of legal aid means tests applied in other jurisdictions. The means tests can be classified as ranging from *open*, i.e. flexible and individually oriented means tests, through *complex* systems to *closed* financial means tests which do not take account of applicants' individual needs and circumstances. All tests, however, consider income and capital in some form, and in most jurisdictions a contribution is expected from those who can afford it. Often, applicants in receipt of their country's social assistance are eligible without a contribution to be paid.

At the one extreme, open means tests are highly discretionary. They take account of the applicant's needs and individual circumstances. The rules applied to applicants' income or capital are not rigid. The civil legal aid scheme in Italy ('patrocinio gratuito') provides an example of this type of individually oriented means test: the means test is personal to the applicant and not related to a general scale of disposable income or capital.

Complex systems are characterised by fixed rules and processes (with only very limited discretionary elements). Most of the legal aid means tests in other jurisdictions fall within this category, as indeed did the old civil legal aid means tests in England and Wales. They aim to take account of living expenses by allowing for various capital and income disregards. Allowances for dependants are commonly used, as are allowances for housing which are often capped. Further, some means tests include fixed allowances in relation to, for example, travel to work or childcare. Eligibility is then assessed on *disposable* income and capital.

The most *simple* legal aid means tests do not take account of individuals' specific circumstances. They therefore tend to be more transparent and less time-consuming to administer. For example, a number of eligibility tests within the European Union take account of *net* income and the existence or number of dependants only (France and the Netherlands). The Dutch means test only distinguishes between single people and families in general (independent of the number of children in the household).

A further example of a simple test is provided by the means test in Queensland, Australia. The Queensland test determines legal aid eligibility by using a *gross* income measure. The test assesses eligibility for salary earners by reference to household type (the number of people depending on the income) and gross weekly income tables as well as applicants' assets. The formula takes into account the number of people in an applicant's household who are dependent on the income, including maintenance dependants. Household members are taken to include anyone who is financially related to the applicant. The income of any financially associated person must be declared as part of the total household weekly income. There are allowed gross weekly income limits for households of various sizes. Adopting this approach has meant that the full means test is only required in relation to applicants who are self-employed or in other circumstances where a detailed review of means is indicated.

Research to provide a basis for the new Queensland means test was conducted by the National Centre for Social and Economic Modelling at the University of Canberra (Percival and Fischer, 1997). Similar to our project, this study used a microsimulation model of the Queensland population. The legal aid means test in operation at the time of the research project was simulated in order to compare its outcomes with those of alternative simpler tests. Particular attention was paid to finding a restricted set of indicators that could successfully

predict legal aid eligibility. Australian administrators are now considering whether a simplified legal aid means test should be applied across Australia.

III. THE LEGAL AID REFORM PROGRAMME IN ENGLAND AND WALES

Substantial changes have been made to the England and Wales legal aid scheme in the last few years, driven mainly by a sharp rise in costs. As Rickman, Fenn and Gray (1999) point out, 'legal aid expenditure has risen dramatically in recent years, prompting attention from successive governments'. This followed decades of largely unchecked expenditure since the scheme's introduction in the late 1940s.

The new Legal Services Commission (LSC) replaced the previous Legal Aid Board (LAB) in April 2000. The LSC, established under the Access to Justice Act 1999, is the major public funder of civil legal services and criminal defence services. LSC spending in 2001–02 was about £730 million on civil legal aid and £980 million on criminal legal aid (discussed briefly at the end of this section). Administrative costs, additional to these figures, were about £72 million. The LSC is an executive non-departmental public body with a much wider role than the LAB. This broader responsibility extends to education, the provision of direct services and the strategic development of legal services to best meet the needs of the general population.

Aid for civil cases is managed by the Commission through the Community Legal Service (CLS). The CLS brings together networks of funders and suppliers into Community Legal Service Partnerships (CLSPs) to provide the widest possible access to information and advice based on local need (see Pleasence et al. (2001)). The aim is that users of legal and advice services are directed to the most appropriate service for their need through these networks. CLSPs now extend across more than 99 per cent of England and Wales. In addition to supporting the work of CLSPs, the CLS also funds legal and advice services from the Community Legal Service Fund. The LSC funded an estimated 1.25 million acts of assistance through the Community Legal Service Fund in 2001–02. Many others received assistance provided and funded by other partners within the CLS. A further key element of the reform programme has been the establishment of a network of quality-assured providers of legal services, who operate under contract with the Commission. At present, around 6,000 solicitors' firms and advice agencies have contracts with the LSC.

The reform programme has also encouraged conditional fee agreements (CFAs). Under CFAs, successful clients pay for their solicitor's basic costs and disbursements such as experts' reports. If the case is successful, most of these costs are subsequently recoverable from the unsuccessful opponent under the 'loser pays' costs provisions of the Rules of Court. The solicitor also becomes entitled to a success fee in addition to the basic costs. These success fees cover

the solicitor's unsuccessful cases. Legal expenses insurance (LEI) policies are now also available which provide cover for the solicitor's fee and/or for the opponent's costs should the case be unsuccessful.

The LSC is further responsible for the Criminal Defence Service (CDS), which in April 2001 replaced the old system of criminal legal aid and provides services to people accused of crimes. An estimated 1.7 million acts of assistance were given to people arrested, charged or suspected of criminal activity in 2001–02. Total expenditure for criminal legal aid was approximately £980 million in the same year. Since the introduction of the CDS, means testing in the magistrates' courts has been abolished. If a person is going before the Crown Court, he or she needs to complete a statement of means which goes before the Judge. The Judge in the Crown Court has the duty to consider making a Recovery of Defence Costs Order at the end of the case. The Order is not dependent on the defendant being convicted, but an order against an acquitted defendant is exceptional. The means of the defendant are taken into account. If the person has got complex financial circumstances, the Judge might ask the LSC's Special Investigations Unit to investigate. The analysis described in this paper does not, however, extend to criminal cases.

IV. THE OLD CIVIL LEGAL AID MEANS TESTS

Civil legal aid in England and Wales provides two main levels of service, as described in Table 1: Legal Help (until April 2000 called 'Green Form' or 'Advice and Assistance') and Legal Representation (until April 2000 called 'Civil Legal Aid'). Net expenditure is predicted to be around £332 million for Legal Help and £420 million for Legal Representation in 2002–03. Further levels of service, not shown in Table 1, include Approved Family Help (Help with Mediation and General Family Help) and Family Mediation. Payments for these levels of publicly funded legal services are substantially lower than those for

TABLE 1
Levels of Service for Civil Legal Aid

<i>Service</i>	<i>Used for:</i>
Legal Help ^a	Initial advice and assistance with any legal problem
Legal Representation	Legal representation so that the applicant can be represented in court if taking or defending court proceedings Available in two forms: <ul style="list-style-type: none"> • Investigative Help (funding limited to investigation of the strength of a claim) • Full Representation (funding is provided for representation in legal proceedings)

^aIncludes Help at Court.

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Legal Help and Legal Representation. For Approved Family Help, the figure for the 12 months ended December 2002 was about £0.5 million (though it is anticipated that this will increase). Payments for Family Mediation from April 2001 to March 2002 were around £13.4 million.

In determining whether an applicant should receive Legal Representation, the individual has to qualify not only on the means test but also on a merits test. The merits test is covered by the so-called Funding Code (Legal Aid Board, 1999; Pleasence, Buck and Christie, 1999). The Code contains a set of rules to determine which individual cases may receive public funding.

Both the old and the new means tests look at individuals' income and capital in order to decide whether applicants lack sufficient means to pay their own legal costs (the resources of couples are aggregated unless they have opposing interests). Separate forms have to be completed for means and Funding Code assessment. The Legal Representation means form is typically completed by the applicant, often with help from their solicitor. The application is then sent to the relevant LSC Regional Office,¹ where the decision is made as to whether an applicant qualifies on the means test and under the Funding Code criteria. A central Special Investigations Unit (SIU) deals with means assessments for applicants with complex and unusual finances and who are apparently wealthy.

The main features of the old means tests for Legal Help and Legal Representation are shown in Table 2. The disposable income limits were (and in the new scheme still are) uprated in April each year, at the same time as the uprating of income support allowances. For Legal Representation, applicants with disposable income between the lower and upper limits were (and still are) required to pay a contribution towards the legal costs. These contributions were (as now) paid on a monthly basis for the lifetime of the case. Assessment officers for Legal Representation had relatively broad discretion. They could, for example, allow additional deductions in calculating disposable income for membership of professional associations connected with employment, fines and judgements, and payments of arrears of tax, mortgage, gas or electricity.

As regards disposable capital, applicants with an amount under £3,000 were in the same position as those with none. Applicants with up to £6,750² of capital

¹These are: Birmingham, Brighton, Bristol, Cambridge, Cardiff, Chester, Leeds, Liverpool, London, Manchester, Newcastle, Nottingham and Reading. Until April 1997, the Benefits Agency's Legal Aid Assessment Office at Preston was responsible for civil legal aid means assessment. The means assessment process was transferred to the Legal Aid Board's Area Offices between October 1997 and February 1998. Key aims of the transfer were to improve upon fairness, efficiency, transparency and consistency of decision-making.

²In personal injury cases, the upper disposable capital limit was £8,560.

TABLE 2
The Old Means Tests for Legal Help and Legal Representation (April 2001)

	<i>Legal Help</i>	<i>Legal Representation</i>
Income	Actual income of applicant and partner in the past seven days ^a	Expected income for the following 12 months ^a
Capital	Value of savings and anything else of substantial value (e.g. jewellery, antiques) ^b	Cash savings; bank or National Savings Bank accounts; National Savings Certificates; Premium Savings Bonds; money that can be borrowed against the surrender value of any life insurance or endowment policies; anything of substantial value (jewellery, antiques etc.); value of any dwelling other than that in which applicant lives
Income deductions	Income tax; National Insurance contributions; £30.20 per week for partner; £31.45 for each dependant aged 15 or under; £32.25 for each dependant aged 16 or over	Income tax; National Insurance contributions; superannuation; pension contributions; employment expenses (i.e. fares to work, trade union membership and childcare where reasonable); rent; water rates; council tax; mortgage payments (to a maximum mortgage debt of £100,000); annual allowances for family and dependants (partner: £1,575 per annum; dependant aged 15 or under: £1,640; dependant aged 16 or over: £1,682)
Capital deductions	£335 if one dependant, £535 if two dependants, £635 if three dependants, £100 for each extra dependant	Value of the house applicant lives in if mortgaged or owned outright (although any value in excess of £100,000, after allowing a maximum of £100,000 for any mortgage, must be included); value of household furniture and effects and tools of trade; value of things that the case is about; back-to-work bonus under section 26 of the Jobseekers Act 1995
Disposable income limits	£87 per week	Lower income limit: £2,767 per annum Higher income limit: £8,196 per annum
Disposable capital limit	£1,000	Lower limit: £3,000 Upper limit: £6,750 ^c
Passporting	Automatically eligible on income if receiving income support, income-based jobseeker's allowance, working families' tax credit ^d or disabled person's tax credit ^d	Automatically eligible on income and capital if receiving income support or income-based jobseeker's allowance
Contribution	No contribution payable	Disposable income: if between £2,767 and £8,196, then contributions payable on a monthly basis (excess of disposable income above £2,767 divided by 36) Disposable capital: if over £3,000, then all disposable capital payable in a lump sum

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Notes to Table 2

^aDisability living allowance, attendance allowance, constant attendance allowance, council tax benefit, housing benefit and payments made under the Earnings Top-Up Scheme or the Community Care Direct Payment Scheme were not counted as income.

^bItems left out of capital calculation: value of the house in which the applicant lives if mortgaged or owned outright (although any value in excess of £100,000, after allowing a maximum of £100,000 for any mortgage, must be included); value of household furniture and effects and tools of trade; value of things that the person wants advice about; back-to-work bonus under section 26 of the Jobseekers Act 1995; payments under the Community Care (Direct Payments) Act 1996.

^cIn personal injury cases, the upper disposable capital limit was £8,560.

^dOnly if the amount (if any) to be deducted from the maximum tax credit as a result of other income the applicant received was determined at not more than £70 per week.

had to contribute all of their disposable capital over £3,000.³ Anyone with capital above the upper limit was (and is) not eligible for any support. The capital limits had remained unchanged since April 1992.

Applicants in receipt of income support or income-based jobseeker's allowance were (and still are) passported to free, non-contributory Legal Representation. Recipients of these two benefits do not have to go through the process of having their means assessed for the purposes of civil legal aid eligibility. Recipients of other types of means-tested benefits, such as working families' tax credit, were not (and still are not) automatically entitled to free Legal Representation.

Successful applicants for Legal Help did not (and still do not) pay a contribution. Under the old test, applicants were eligible on the income side if they received income support, income-based jobseeker's allowance, working families' tax credit or disabled person's tax credit.⁴ However, capital still needed to be assessed for applicants on those benefits. In general, the old test for Legal Help was simpler than the old Legal Representation test. Deductions from income included only the following: income tax, National Insurance contributions and dependants' allowances. Various benefits were not counted as income (for example, disability living allowance). The providers (for example, solicitors) assess eligibility for Legal Help.

Despite improvements to the old Legal Representation test over a number of years, the system remained complicated and, in some cases, problematic. The calculations involved were very detailed and complex. One area of particular concern was the assessment of disposable income and, in particular, some of the allowances made for expenditure. This could advantage, for example, applicants with a relatively high income and reasonable standard of living and with relatively large mortgages and maintenance payments which counted as deductible allowances. This, in rare cases, led to better-off 'undeserving'

³The calculation of disposable capital is different for pensioners, who may benefit from an extra allowance. If their annual disposable income was less than £2,768 (excluding net income earned from capital), then certain amounts of savings were disregarded.

⁴Only if the amount (if any) to be deducted from the maximum tax credit as a result of other income the applicant received had been determined at not more than £70 per week.

applicants being granted civil legal aid — occasionally, when the recipient was well known, this was picked up by the media.

It was also questioned whether the Legal Representation means test was as effective as it could be, considering the amount of time assessment officers needed to spend on decisions. Additionally, although the discretionary elements of the test had been restricted over a number of years, there were still areas of ambiguity. It was felt that the complexity of the assessment process militated against transparency of decision-making, making the system not as user-friendly as it could be. It was not always easy for applicants and their legal representatives to understand the outcome of the assessment process.

V. MODELLING MEANS-TEST REGIMES

In investigating the potential for simplifying the Legal Representation means test, we were interested in reducing the number of questions that an applicant had to answer, the amount of time it took administrators to complete an assessment and the uncertainty involved in the whole process. We were also concerned to leave the entitled population essentially unchanged or, if possible, to improve the eligibility status of those most in need. In essence, we explored the thesis that ‘fairness and consistency could be achieved equally well with a simple as a complex system’ (Lord Chancellor’s Department, 1991, p. 54). The project proceeded on the basis that the net spend on legal aid assistance should remain unaffected by any change to the Legal Representation means test.

The focus in this paper is on the microeconomic part of the project. This micro-analysis involved three different stages. First, in order to proceed effectively to devising and testing alternative simpler means tests, the effects of the current complex Legal Representation means test needed to be established. A detailed profile of the currently fully eligible, partially eligible and ineligible groups was required. Secondly, alternative means tests then had to be devised and tested. These means tests were aimed at reducing the complexity of the current test, and at the same time targeting those least likely to be able to meet their own legal costs. Determinations needed to be made of which people were advantaged and which disadvantaged by specific changes to the means test. This meant going beyond mere numbers of eligible persons to providing a picture of the consequences of a potential new means test for a range of people. Finally, in respect of the best new test models, it was then necessary, on the basis of the characteristics of the potential new eligible population, to estimate the impact on take-up and expenditure. Policy-makers were involved in decision-making at each of the project stages.

Various routes to simplification were explored. Tests were devised with the ultimate aim of arriving at a standardised system with straightforward calculations on income. In order to arrive at a simpler means test, it was essential to dispense with many of the allowances permitted under the old test.

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Exploring the effects of the old Legal Representation means test provided the framework for analysis. Investigating the effects of fundamental changes to the means test necessitated a comparison with the pattern of applicants and the eligible population under the old, existing means test.

A large-scale government social survey, the Family Resources Survey (FRS), was used as the main data source throughout the project. A number of Legal Representation applicant surveys were also conducted, in order to be able to compare the eligible population with those who actually come forward and apply for help with their legal problem. In total, six applicant surveys have been conducted. The two most recent applicant surveys were conducted in January 2002 and in November 2002, in order to monitor the new test after its implementation in December 2001. Some applicant surveys have been used to model the take-up of Legal Representation among those currently eligible. It was important to estimate take-up and the likely cost impact of a changed means test for a number of reasons. First, even if the total numbers eligible remain the same, changing the means test may change the demand for Legal Representation if the eligible population now has slightly different characteristics. An additional concern was that the eligible population might be different from the applicant population in the sense that certain groups in the eligible population are more likely to apply than others.

The microsimulation part of the project involved constructing models of the old Legal Representation test and Legal Help test to simulate eligibility rules. The models developed were applied to the FRS in order to calculate the numbers eligible for Legal Representation and Legal Help, as well as defining the characteristics of the eligible population. The models were then developed to simulate alternative options.

Much of the work involved very detailed modelling of special allowances, such as travel-to-work costs and maintenance payments. The FRS was chosen because it contains good detail on many of the allowances that had to be modelled. However, the FRS lacks information in some areas. For example, it does not contain local authority identifiers (which means that council taxes need to be estimated). The Family Expenditure Survey (FES), the main alternative to the FRS, has a smaller sample size and lacks information on, for example, travel-to-work costs.

Modelling Legal Representation and Legal Help posed a number of special concerns:

- We have no information in the FRS data-set either on use of Legal Representation / Legal Help or on whether benefit units were in reality entitled to it at the time of interview. ('Benefit unit' is the standard Department for Work and Pensions term for a single adult, or a household living as a married couple and any dependent children, regardless of whether they are in receipt of, or eligible for, any welfare benefits. This term is also

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used in connection with anyone involved in legal action for which, subject to means testing, they would be eligible for legal aid.)

- The estimates for eligibility are partly dependent on the receipt of means-tested benefits. In calculating eligibility, we have to use modelled entitlements to these benefits rather than recorded receipts. Since take-up of these benefits is incomplete, this could bias results.
- We model results for each benefit unit on the assumption that the income and capital of all family members are included in the assessment, but this may not always be the case: for example, in a family case where the wife is the claimant and the husband the defendant, only the income of the wife would be included. Likewise, children can be granted Legal Representation regardless of the circumstances of their parents.
- Finally, the old Legal Representation means test was based on an estimate of the applicant's annual income over the following 12 months, rather than their actual income at the time of the application. This is hard to get right in our model, since data-sets are short-term snapshots of the benefit unit's circumstances at the time of interview. We can get some way towards the Legal Representation measure by using the FRS's measures of usual earnings, but this is unlikely to be exactly right.

For all these reasons, in addition to the usual methodological caveats regarding, for example, sampling errors or modelling errors, the results have to be treated with due caution.

The results of the microeconomic modelling exercise indicated that, under the old regime for Legal Representation, around 47 per cent of benefit units in England and Wales were eligible. These and subsequent numbers are based on the findings reported in Buck (2000) and Buck and Stark (2001) and were used to inform the actual changes to the means test. Table 3 shows that in April 2001, there were a total of 27,111,000 benefit units in England and Wales. Of these, 7,700,000 were eligible under the old rules for Legal Representation without a contribution and 5,009,000 were eligible for partial Legal Representation. These

TABLE 3
Eligibility for Legal Representation under the Old Rules (April 2001)

<i>Eligibility status</i>	<i>No. of benefit units (thousands)</i>	<i>Percentage of benefit units</i>
Complete (passported and non-passported)	7,700	28%
Partial ^a	5,009	19%
None	14,401	53%
Total	27,111	100%

^aEligible for Legal Representation with a contribution to be paid from income and/or capital.
Source: IFS Legal Aid Model.

figures show how many benefit units *in theory* were eligible for Legal Representation.

It is important to stress that levels of access to justice cannot be solely assessed by the calculation of a particular percentage of eligibility. This percentage needs to be supplemented by an overview of *who* the people eligible are. Therefore, the research project took account of some of the key characteristics used in the FRS to describe benefit units. Particular attention was paid to the benefit unit type, the housing tenure and the employment status of the head of the household. Some regional information was also included. Lastly, gross income deciles were seen as an insightful mechanism to highlight possible fairness issues. Gross income deciles refer to the position in the income distribution of each benefit unit, ranging from the poorest 10 per cent (decile 1) to the richest 10 per cent (decile 10).

The results showed that most of the fully eligible population were located in the poorest 50 per cent of the general population, in income terms, although some were drawn from income deciles 6, 7, 8 and even 9 and 10. As would be expected, the fully eligible tended to be unoccupied, seeking work or retired. Nearly 40 per cent lived in local authority rented accommodation. Around 20 per cent lived in mortgaged accommodation, with a further, perhaps surprising, 19 per cent owning their home outright. The fully eligible tended to be the single unemployed, single pensioners and single-parent families.

Those in the partially eligible population were also more likely to be located in income deciles 3, 4, 5 and 6. Around 16 per cent were in deciles 1 and 2. A relatively high percentage (15 per cent) were located in gross income deciles 7, 8, 9 and 10. As would be expected, a lower proportion than among the fully eligible lived in local authority rented accommodation. Compared with the fully eligible, there were significantly more benefit units living in mortgaged and owned-outright accommodation (60 per cent compared with 40 per cent). As regards employment status, the partially eligible were predominately employed (46 per cent). This compared with 8 per cent employees among the fully eligible. A relatively high proportion of the partially eligible could, further, be found among the retired. In terms of benefit unit type, the highest proportion (30 per cent) could be found among the single employed, followed by single pensioners (20 per cent). A higher proportion of benefit units with a single earner or two earners *and with children* were eligible for partial Legal Representation than for full Legal Representation (15 per cent compared with 6 per cent).

As regards Legal Help, Table 4 sets out the eligibility levels for Legal Help for April 2001 under the old rules. Out of all benefit units, 32 per cent were eligible for Legal Help. As indicated earlier, one of the most important distinctions compared with past and present Legal Representation rules is that there are no contributions to be paid for Legal Help.

TABLE 4
Eligibility for Legal Help under the Old Rules (April 2001)

<i>Eligibility status</i>	<i>No. of benefit units (thousands)</i>	<i>Percentage of benefit units</i>
Full	8,553	32%
None	18,557	69%
Total	27,111	100%

Source: IFS Legal Aid Model.

As with the Legal Representation test, we investigated the eligible groups in detail. Most of the eligible population were located in the poorest 50 per cent of the general population, in income terms, although some were drawn from income deciles 6, 7, 8 and even 9 and 10. Benefit units eligible for Legal Help could further be found among the single unemployed (26 per cent), single-parent families (17 per cent) and single pensioners (21 per cent). Nearly 40 per cent lived in local authority rented accommodation and around 24 per cent lived in mortgaged accommodation, with a further 18 per cent owning their home outright. The eligible tended to be seeking work (19 per cent), retired (29 per cent) or unoccupied (24 per cent). Sixteen per cent of the fully eligible population were employees.

There is an important distinction to make between benefit units eligible for Legal Representation and benefit units applying for Legal Representation. The profile of the people eligible is different from the profile of applicants. Although eligible, certain groups in the population might be less likely to have a 'justiciable problem'⁵ or to seek Legal Representation to solve a problem (see Pleasence et al. (2003)). For example, data from the applicant surveys show that, not surprisingly, a single-parent family's likelihood of applying for Legal Representation in a family case is very high. In non-family cases, the data indicate that younger age groups are more likely to apply. Pensioners are least likely to apply for both non-family and family cases.

VI. COMPARISON OF OLD AND NEW REGIMES

The first step in examining alternative means tests was to examine a range of radical simplifications. For example, the impact of not having a capital test was investigated. This showed that ignoring capital did not lead to a particularly great increase in eligibility. However, although there would be relatively few winners from such a development, an examination of the characteristics of the people affected demonstrated that a significant number of 'nightmare case' applicants

⁵Genn (1999) defines a justiciable problem as a problem for which a legal remedy exists.

TABLE 5

Structural Elements of the New Means Test for Legal Representation*Gross income cap*

Benefit units whose annual gross income is above this figure are ineligible for civil legal aid whatever their outgoings. This initial cap acts as a filter. It is a simple, gross income 'hurdle' test. One of the aims of this feature is to make it clear to potential applicants whether they have a chance to qualify on the means test.

Upper income limit

Benefit units that have an income above this figure, once defined allowances are taken off their gross income, do not qualify. If they are between the upper and lower limits, then they qualify with contributions to be paid.

Lower income limit

Benefit units that have an income below this figure, once defined allowances are taken off their gross income, qualify without a contribution to be paid.

would become partially, or even fully, eligible (for example, people who are asset-rich and are able to live comfortably off their capital and investment income). Tests were also conducted on the effects of passporting means-tested benefits. For example, the effect of passporting all means-tested benefits was investigated. This would result in a considerable increase in eligibility levels.

Ultimately, the approach taken in the research project was to develop a gross annual income test with the structural elements set out in Table 5.

Comparison of the old Legal Representation capital limits with the capital limits for income support showed that the test applied for income support purposes was in some ways more generous than that for legal aid. Income support recipients are allowed £8,000 in capital.⁶ The Legal Representation test had an upper capital limit of £6,750. This could mean that working individuals who earned an amount equivalent to income support rates could be worse off than their out-of-work counterparts. Conversely, if the practice of passporting income support had been ended and income support benefits counted as income, some families passported would have become ineligible. The effects on eligibility levels of developing the means test to achieve horizontal equity between these population groups were tested through microeconomic modelling. They were found to be minimal. The new proposed test therefore contains an upper disposable capital limit of £8,000.

By working through examples, alternative working models were obtained which fulfilled the main objectives for a new scheme. The primary objective was to identify a Legal Representation means test that confined assessment of the

⁶If income support / income-based jobseeker's allowance recipients' capital is over £3,000, they are treated as having an assumed income from it, called tariff income. Recipients are assumed to have an income of £1 for every £250, or part of £250, by which their capital exceeds £3,000 but does not exceed £8,000.

applicant's means to essential elements whilst maintaining current eligibility levels and leaving the entitled population as unchanged as possible. However, since some change is unavoidable, a secondary objective was to make those with the greatest need eligible.

The values of the lower income limit and upper income limit used in the different options were found through an optimising procedure. We were aiming for a system that would simplify the assessment procedure whilst ideally changing no one's entitlement state (from, say, fully to partially entitled, or from partially entitled to not entitled). In other words, in this ideal system, all benefit units would be on the diagonal in our main output tables (see, for example, Table 7). We implemented a simple measure of the extent to which the pattern of entitlements from our reformed legal aid systems deviated from the pattern under the old system. Each benefit unit whose state changed was given a score; our error measure was then the aggregate of these scores for all benefit units in the Family Resources Survey. Since we considered some changes to be more severe than others, our score for deviation had the following properties:

- among the losers, poor benefit units scored more, whilst among the gainers, the rich scored more;
- benefit units moving from full to no entitlement, or vice versa, scored more than benefit units moving to or from partial entitlement.

However, the resulting income limits are reasonably robust to different measures of deviation (for example, simply counting the benefit units off the diagonal).

The option chosen by policy-makers for implementation (see Table 6) had, upon implementation in December 2001, a gross annual income cap of £24,000. The upper disposable annual income limit was £8,137 and the lower disposable annual income limit was £3,079. These limits applied to the financial year April 2001 to March 2002 and have been, and will be, updated each year at the

Notes to Table 6

^aGross income includes: earnings or profits from business; maintenance payments; pensions; all welfare benefits (excluding council tax benefit and housing benefit); income from savings and investments; dividends from shares; monies received from friends and relatives; student grants and loans.

^bIn addition, the full amount of any of the following welfare benefits: attendance allowance, disability living allowance, constant attendance allowance, invalid care allowance, severe disablement allowance, exceptionally severe disablement allowance, any war pensions, Independent Living Fund payments, fostering allowance (to the extent it exceeds the relevant dependant's allowance), back-to-work bonus under section 26 of the Jobseekers Act 1995, payments made under the Earnings Top-Up Scheme and payments under the Community Care Direct Payment Scheme.

^cThis disposable income limit is set at the old Legal Help limit plus 75 per cent of the difference between the old Legal Help disposable income limit and the higher disposable income limit for the new Legal Representation test.

^dBand A: monthly disposable income between £264 and £386 means a monthly contribution of a quarter of income in excess of £259; Band B: monthly disposable income between £387 and £513 means a monthly contribution of £31.75 and a third of income in excess of £386; Band C: monthly disposable income of between £514 and £695 means a monthly contribution of £74.08 and half of income in excess of £513.

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TABLE 6
**The New Means Tests for Legal Help and Legal Representation
 (April 2002 to March 2003)**

	<i>Legal Help</i>	<i>Legal Representation</i>
Income		Income for the previous month
Gross income ^a limit (monthly)		£2,034
Capital	All land and buildings other than the applicant's home if mortgaged or owned outright (including interest in time shares) and the market value of the applicant's home in excess of £100,000 (after allowing for any outstanding mortgage but only up to £100,000); money in the bank, building society, Post Office, premium bonds, National Savings certificates etc.; investments, stocks and shares; money that can be borrowed against the surrender value of insurance policies; money value of valuable items (e.g. boat, caravan, antiques, jewellery); money owing to the client; money due from an estate or Trust Fund; money that can be borrowed against business assets	
Income deductions	Income tax; National Insurance contributions; maintenance payments made; £45 for client and/or partner in receipt of salary or wage; childcare expenses incurred because of employment; housing costs (rent or mortgage repayments (less any housing benefit), although the amount allowed if the applicant has no dependants is limited to £545); endowment policy premiums (if paid in connection with a mortgage); actual costs of accommodation if the applicant is neither a tenant nor an owner-occupier; fixed monthly amounts for dependants (partner: £133.40; each dependant aged 15 or under: £145.57; each dependant aged 16 or over: £149.04) ^b	
Capital deductions	Not included: loans or grants from the Social Fund; back-to-work bonus under section 26 of the Jobseekers Act 1995; home contents; personal clothing; personal tools and equipment of trade; payments under the Community Care Direct Payment Scheme; savings, valuable items or property the ownership of which is the specific subject of the court case	
Disposable income limits (monthly)	£611 ^c	Lower income limit: £263 Higher income limit: £695
Disposable capital limit	£3,000	£8,000
Passporting	Automatically eligible on income if receiving income support or income-based jobseeker's allowance	Automatically eligible on income and capital if receiving income support or income-based jobseeker's allowance
Contribution	No contribution payable	Disposable income: if between £263 and £695, then contributions payable on a monthly basis according to bands ^d Disposable capital: if over £3,000, then all disposable capital payable in a lump sum

For notes, see opposite.

beginning of April. The updated new means-test limits for April 2003 were the following: £3,204 for the lower annual income limit and £8,484 for the upper annual income limit. The annual gross income cap has been increased more substantially, to £27,456. For both Legal Help and Legal Representation, passported applicants are those on income support and income-based jobseeker's allowance. Around 45 per cent of the Legal Representation applications presently received are from people on income support or income-based jobseeker's allowance.

As Tables 7 and 8 show, the new test results in almost identical Legal Representation eligibility in the new scheme, with an increase of about 0.3 percentage points in the proportion of benefit units with full eligibility and a 1.3 percentage-point decrease in the proportion of benefit units with partial eligibility. The number of benefit units moving from partial to complete eligibility is 149,000, while 60,000 move from complete to partial eligibility. The number of benefit units moving from partial eligibility to being ineligible is 463,000, while 211,000 move from being ineligible to partial eligibility. The number of benefit units moving from being fully eligible to being ineligible is 16,000.

As can be seen in Tables 9 and 10, the new income limit results in a substantial increase of 2,594,000, or about a third, in the number of benefit units

TABLE 7

Eligibility for Legal Representation in 2001–02: Thousands of Benefit Units

		Old regime			Totals for new regime	
		<i>Complete</i>	<i>Partial</i>	<i>None</i>		
New regime	<i>Complete</i>	7,624	149	0	7,773	12,441
	<i>Partial</i>	60	4,397	211	4,668	
	<i>None</i>	16	463	14,190		14,669
Totals for old regime		7,700	5,009			
			12,709	14,401	27,111	

Source: IFS Legal Aid Model.

TABLE 8

Eligibility for Legal Representation in 2001–02: Percentages

		Old regime			Totals for new regime	
		<i>Complete</i>	<i>Partial</i>	<i>None</i>		
New regime	<i>Complete</i>	28.1	0.6	0.0	28.7	45.9
	<i>Partial</i>	0.2	16.2	0.8	17.2	
	<i>None</i>	0.1	1.7	52.2		54.1
Totals for old regime		28.4	18.5			
			46.9	53.1	100	

Source: IFS Legal Aid Model.

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TABLE 9
Eligibility for Legal Help in 2001–02: Thousands of Benefit Units

		Old regime		Totals for new regime
		<i>Complete</i>	<i>None</i>	
New regime	<i>Complete</i>	8,190	2,956	11,147
	<i>None</i>	362	15,602	15,963
Totals for old regime		8,553	18,557	27,111

Source: IFS Legal Aid Model.

TABLE 10
Eligibility for Legal Help in 2001–02: Percentages

		Old regime		Totals for new regime
		<i>Complete</i>	<i>None</i>	
New regime	<i>Complete</i>	30.2	10.9	41.1
	<i>None</i>	1.3	57.6	58.9
Totals for old regime		31.6	68.5	100

Source: IFS Legal Aid Model.

eligible for Legal Help. On the other hand, only 362,000 benefit units move from being fully eligible to ineligible. Under the new Legal Help test, 58.9 per cent of benefit units are ineligible, compared with 68.5 per cent under the old Legal Help test.

Winners and Losers

We examined the characteristics of the winning and losing benefit units under each potential new means-testing scheme. This was undertaken using Family Resources Survey classifications — specifically, gross income decile, benefit unit type, housing tenure and employment status.

Winners are mainly single-earner couples with children, the single employed and bottom-decile single benefit units. The losers are predominantly to be found in the middle-range and higher gross income deciles, living in the South-East and London, mortgagors and couples with and without children. However, the numbers of winners and losers are very small relative to the total numbers of eligible benefit units.

Tables 11 and 12 provide an overview of fully eligible and partially eligible benefit units as modelled under the new Legal Representation test.

TABLE 11
Profile of Benefit Units Fully Eligible for Legal Representation (7,773,000)

<i>Income decile</i>	<i>Per cent</i>	<i>Type of benefit unit</i>	<i>Per cent</i>	<i>Housing tenure</i>	<i>Per cent</i>	<i>Employment status of head of household</i>	<i>Per cent</i>
1	29	Single, unemployed	27	Local authority rented	40	Employee	9
2	21	Single, employed	4	Housing Association	8	Self-employed	4
3	19	Single-parent family	17	Other rented unfurnished	6	Seeking work	21
4	16	No-earner couple without children	4	Rented furnished	7	Waiting to start	1
5	9	No-earner couple with children	7	Mortgaged	21	Sick or injured	8
6	5	Single-earner couple without children	1	Rental purchase	—	Retired	32
7	2	Single-earner couple with children	4	Owned outright	19	Unoccupied	25
8	<1	Two-earner couple without children	<1				
9	—	Two-earner couple with children	2				
10	—	Single pensioner	24				
		Couple pensioner	9				
Total	100	Total	100	Total	100	Total	100

Source: IFS Legal Aid Model.

TABLE 12
Profile of Benefit Units Partially Eligible for Legal Representation (4,668,000)

<i>Income decile</i>	<i>Per cent</i>	<i>Type of benefit unit</i>	<i>Per cent</i>	<i>Housing tenure</i>	<i>Per cent</i>	<i>Employment status of head of household</i>	<i>Per cent</i>
1	3	Single, unemployed	12	Local authority rented	24	Employee	45
2	13	Single, employed	31	Housing Association	5	Self-employed	8
3	16	Single-parent family	4	Other rented unfurnished	5	Seeking work	3
4	19	No-earner couple without children	3	Rented furnished	7	Waiting to start	<1
5	19	No-earner couple with children	<1	Mortgaged	34	Sick or injured	7
6	14	Single-earner couple without children	5	Rental purchase	<1	Retired	28
7	11	Single-earner couple with children	8	Owned outright	25	Unoccupied	9
8	3	Two-earner couple without children	2				
9	1	Two-earner couple with children	6				
10	—	Single pensioner	22				
		Couple pensioner	7				
Total	100	Total	100	Total	100	Total	100

Source: IFS Legal Aid Model.

VII. CONCLUSION

Microsimulation methods have been employed to simplify drastically a means test used for public services, making it easier for both applicants and assessors, and without producing unacceptable numbers of gainers and losers. The implementation in December 2001 of the new legal aid means test also illustrates how an operational and policy change can build on prior research work.

The new means test has now been in operation for two years and indications are that eligibility and applicant numbers and the cost implications are broadly in line with expectations. Two minor amendments were introduced post-implementation in August 2002. The initial gross income cap was increased from £24,000 per annum to £27,000 per annum (and to £27,456 from April 2003). Additionally, a higher gross income limit was introduced for applicants with more than four dependent children. The research project has been continued as a monitoring exercise, aimed at ensuring that possible problems with the test are detected and remedied early.

Behavioural implications of the new rules cannot be assessed in detail, as the types of cases funded by legal aid have changed over recent years. In addition, whereas it is possible to investigate whether the profile of applicants has changed since the introduction of the new means test, it is difficult to examine whether any people have been discouraged from applying due to the new regime. However, as the new means test is simpler than the old one, we would suggest that clarity of decision-making has been improved. The new regime is more user-friendly, with applicants and their advice and legal representatives more likely to understand the outcome of the assessment process. The gross income cap, for example, indicates indisputably whether applicants are likely to meet the basic financial eligibility criteria. Further, the new rules and the change in complexity are also likely to have discouraged some of the more 'frivolous' cases: the new means-testing regime makes it difficult for people with a good income and high expenditure (and therefore a relatively good standard of living) to qualify.

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