

Running up a down escalator: Improving the legal aid means test as living costs rise

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Key points

- The delay to implementing improvements to the legal aid means test is making legal services completely unaffordable to millions of people on low incomes.
- By 2025, people with children will typically not qualify for full civil legal aid unless they have less than half the income that they need as a minimum, and those without children less than a fifth of what they need – that is, in very deep poverty.
- Even partial civil legal aid will be denied to some people with less than half the income they need.
- Some criminal defendants will have to contribute to their own legal costs even with 40% less income than they need as a minimum.
- Government plans to remedy this with much higher thresholds have been delayed at least until 2026.
- As well as requiring urgent implementation, the new system will need to be adjusted to reflect recent inflation, to avoid people with far too little to live on being charged for legal services.
- An inflation-adjusted launch of the reforms in 2025 would dramatically reduce the shortfalls in the incomes of people being denied legal aid based on the means test.

1 Introduction

The means tests for eligibility for legal aid have not been updated for more than a decade. As a result, people whose incomes are too low to afford a decent standard of living, even without legal costs, are being required to contribute substantial amounts to such costs in order to access justice.

Two reports published in 2018 demonstrated, for the civil (Hirsch, 2018a) and criminal (Hirsch 2018b) means tests, that qualifying thresholds were being set below the income required for a minimum acceptable standard of living. This was defined as the Minimum Income Standard (MIS), a widely accepted calculation of what income people require as a minimum in the UK, based on detailed deliberations by groups of members of the public.

These reports were followed by a review of the means test (Ministry of Justice, 2022), which proposed restructuring and substantially raising the highest income levels at which people are eligible for legal aid, meaning that 5.5 million more people would have incomes that qualified them for such help should they need it.

Yet the implementation of these reforms has been delayed, with the earliest date of their introduction now set at summer 2026, with even then a phased implementation envisaged (MoJ, 2024). This more than four-year implementation time-frame, whose length is attributed to ‘competing Government priorities’, has been particularly unfortunate because it has taken place over a period in which prices have risen rapidly. Consumer prices have already gone up by a quarter since 2019, the year on which spending levels for proposed new means-test thresholds have so far been benchmarked. This has added to uncertainty about how adequate the eventual reformed system will be in helping people unable to afford their legal costs, while in the meantime the present unreformed system falls further and further short of doing so.

This paper follows up a response to the proposed changes (Hirsch 2022), by considering, two years after they were published, both the effect of not implementing them and how changes in minimum living costs might affect the adequacy of the new system once it is brought in. In particular, it contrasts the consequences of not having the means test in place in 2025 with the benefits of doing so.

The report focuses on four thresholds. For both the civil and criminal (Crown Court) legal aid system, we consider the lower disposable income limit, below which people are eligible for full non-contributory legal aid. For the civil system, we also consider the upper disposable income limit, above which no legal aid is available. For the Crown Court system, the upper disposable income limit is being abolished. However, people above the lower limit will potentially have to allocate most of their additional income (above the threshold) to legal costs, with a top rate of 80% of income imposed. This means that most defendants required to contribute to costs will end up with available income not much higher than those at the lower limit, making it even more important that at this lower level they have enough to cover minimum needs.

These comparisons demonstrate both the effects of the delay in implementation and the significance of how the new thresholds will be updated. They do not cover every aspect of the proposed new system, which is discussed more comprehensively in the earlier response (Hirsch, 2022). However, they do incorporate an amendment to the reform, proposed in that response, which the MoJ (2023) agreed to following the consultation: an enhanced cost of living allowance for lone parents, whom the original proposals had denied legal aid on lower incomes, relative to need, than other groups.

2 Three underlying drivers

An earlier paper (Hirsch, 2022) described in some detail the structure of the proposed new system, and the influence it would have on whether people unable to afford legal costs because of low income, qualified for legal aid. Without repeating this description, it is worth noting that the reforms introduce more rational criteria for setting disposable income benchmarks, based on cost of living allowances both for a single person and for others in the household based on recognised 'equivalence scales' (additional costs assumed for adult and child family members expressed as a standard ratio to the single person's allowance). As well as the cost of living allowances, other factors determining how much income is left to cover day-to-day costs for people at the threshold of legal aid eligibility include the addition of a small 'work allowance' for those working and permitted deductions from actual income (such as for housing and childcare costs) that have become more comprehensive in the proposed new system.

The adequacy of people's living standards at the incomes at which legal aid becomes restricted can be seen not as a fixed feature of legal aid, but rather as a moving picture determined by the dynamic interaction of three driving forces. The first is when the reforms are actually implemented (up to that point an already-inadequate system, with fixed thresholds, will deteriorate further with rising costs). The second is how much costs rise over time. And the third is how the cost of living allowances in the new system are set and updated.

The third of these factors is particularly important because of the significance of the second: unless cost of living allowances are increased significantly above those published in 2022, the adequacy of income at the means-test thresholds will be much lower than implied in those proposals. Specifically, the original plans referenced costs to household spending levels in 2019, but since then, minimum household budgets are reckoned to have risen by between one-third and one-half, according to the most recent MIS data. This means that a cost of living allowance that exactly covered MIS requirements in 2019 would fall up to 50% short of covering them today. The Ministry of Justice (2023) has said that it will "reconsider the thresholds prior to implementation to obtain a better view of the impact of the recent rise in inflation", without giving a specific commitment about how inflation will be taken into account.

Importantly, the proposed new cost of living allowances have not been calculated directly with reference to *need* but rather to household *expenditures*. Specifically, the non-contributory threshold for civil legal aid is based on average household expenditures, excluding leisure and a few other items, by the bottom half of the population by income; the criminal equivalent on median household expenditure excluding the same items; and the upper civil threshold on median expenditure on all items.

As shown below, for the year on which these are originally based, 2019, this produces a great improvement in means-tested thresholds relative to minimum needs. However, this improved relationship will potentially worsen again under the new system, not only because there is not a clear-cut plan for regular uprating, but also because changes in actual expenditure levels do not necessarily mirror increases in the level of expenditure *required*

for an acceptable standard of living, as set out in MIS budgets. Where costs are rising but incomes are not, expenditure may fall relative to need, with more people having to go without essentials due to income constraints. Very strikingly, evidence so far available since 2019 has shown a wide gap opening up between increases in expenditure and increases in expenditure requirements – due both to constrained spending in the pandemic and to the failure of incomes to rise in line with costs during the subsequent inflationary period. In fact, by 2021/2022, average consumer spending remained *lower* in cash terms than pre-pandemic despite having started to grow again (ONS, 2023).

In reviewing the adequacy of the cost of living allowances, therefore, the MoJ should consider not just how household expenditures are changing over time, but also how costs are changing. The analysis below includes calculations of what would happen to their adequacy should the cost of living allowances, having been originally benchmarked against expenditure levels, were subsequently raised in line with the Consumer Prices Index, in order to prevent them deteriorating in real terms.

3 The adequacy of incomes at the threshold for non-contributory legal aid

At present, a single person gets full civil legal aid if their 'disposable' income, after subtracting housing costs up to a maximum limit, is below £316 a month. Under the reforms, this is due to be almost doubled, to £622 a month, and some new deductions from gross income, including council tax and student loan repayments, are being allowed. The equivalent threshold for Crown Court cases is being raised from £473 to £713 per month. In both cases, an allowance for an additional adult and for each child will be calculated according to the standard 'equivalisation' ratio for adjusting income by family size.

Figures 1 and 2 show, for a single person, how these changes in the thresholds compare to the MIS level, at different times and under different assumptions. The figures are based on how much a household would have available net of rent/mortgage and council tax, compared to how much they need to spend on other items according to MIS.

First, these graphs remind us of how low incomes are, relative to need, at the levels at which someone presently becomes ineligible for non-contributory legal aid. In the civil system (Figure 1), comparing the lower line to the 'MIS line' shows that in 2019 people with only a third of what they need were unable to access full legal aid. The rise in the minimum cost of living while the thresholds have not increased¹ means that by next year, people with below a fifth of what they need (i.e. falling over 80% short of the MIS budgets) may have to make contributions to civil legal costs. For legal aid for Crown Court defendants, the present system is more generous than in civil cases, but even in 2019 defendants with incomes down to 10% below MIS needed to contribute, and by 2025 this gap will have risen to over 40%. (Note that because criminal defendants have no choice about whether to get involved in court action, the system has had higher income thresholds to ensure they are able to afford legal services than for civil litigants.)

This deterioration under the present system is clearly the result of the failure of thresholds to rise to match a steep increase in the MIS benchmarks, during a period of steep inflation. The MIS budgets have in fact increased significantly faster than the Consumer Prices Index for a variety of reasons. To some extent, the increase arises from actual prices of items that go into a minimum basket, which do not change at the same rate as the overall CPI. In addition, some changes in the contents of minimum baskets, such as more health and hygiene items needed following the pandemic, have contributed to the increase (see Davis et al., 2022, pages 27-29, and Davis et al, (2024, forthcoming).

Figures 1 and 2 also show the effect of the proposed reform on the means-test thresholds for non-contributory legal aid, relative to MIS benchmarks. Had they been implemented in 2019, the year whose expenditure levels provide the basis for the initially-proposed cost of living allowances, the improvement would have been very great. In the civil system, a single person would have got full legal aid with available income about five-sixths of the MIS level,

¹ In fact, the maximum 'available income' at which someone can access legal aid, shown in the lower line of Figure 1 is slowly reducing over time, since this is defined as being net of council tax, whose level is increasing. In the existing criminal system, and in both systems when reformed, council tax is deductible.

rather than around one-third of MIS without the reforms. In the criminal system it would have gone from 10% below to about 14% above MIS.

However, the actual impact of the reforms in this regard depends both on when they are eventually implemented and the extent to which the cost of living allowances are adjusted to reflect increases in living costs since 2019. As shown in Figures 1 and 2, if the 2019-based threshold were retained with no adjustment, the threshold would fall from five-sixths in 2019 to only just over half the MIS level by 2025 (although it would still be higher than the one-third in 2019 under the present system). For the Crown Court system, the shortfall under such a scenario would increase to over a quarter, considerably more than the shortfall of one-tenth in 2019 under the present system. In this respect, the reformed Crown Court thresholds would provide worse protection than they had previously.

Figure 1 Monthly income available to single adult at highest income eligible for non-contributory legal aid: civil

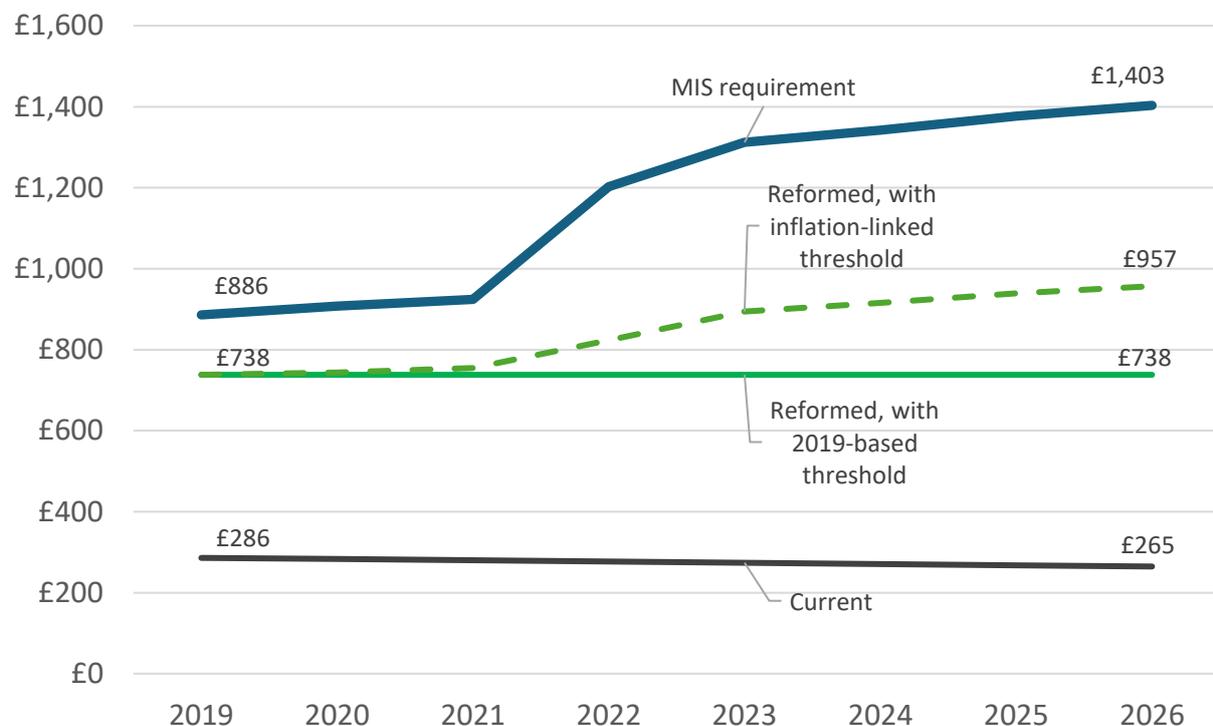
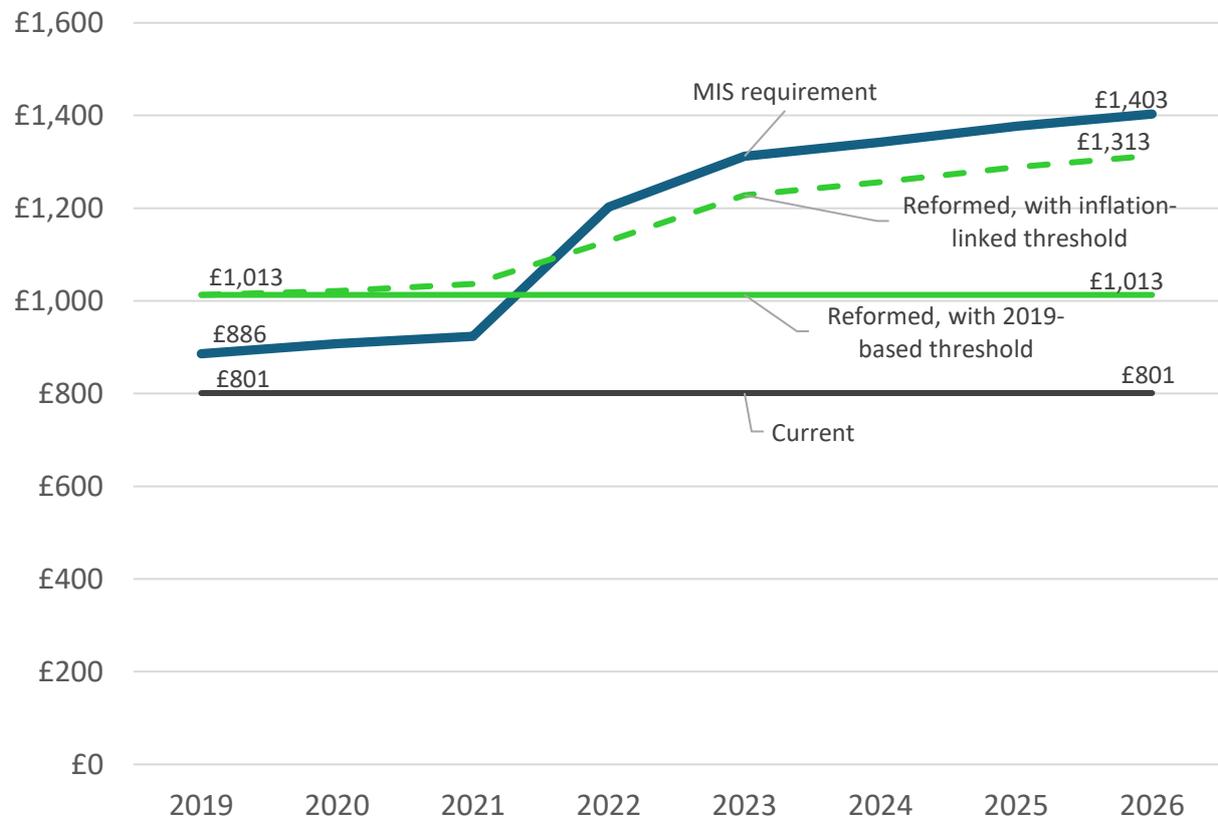


Figure 2 Monthly income available to single adult at highest income eligible for non-contributory legal aid: Crown Court



Notes: ‘Available’ income is a consistently-defined measure of income net of housing costs, childcare and Council Tax, comparable to the MIS levels shown in this report. For detail see Box 2 in Hirsch (2022), page 12. Graphs use MIS benchmarks as published up to 2023, and for subsequent years show them uprated by actual and projected CPI inflation.

Given that the MoJ have clearly stated that they will consider thresholds in light of inflation before implementing them, this comparison may seem unfair. However, they have not said on what basis they will uprate them; showing the extent of shortfalls under the presently published (2019-based) figures underlines the importance of doing so in a way that avoids losing the benefits of the reforms.

One option would be to make adjustments based on changes in average household expenditures, in the latest year that consumer spending data are available at the time of implementation. However, this may fall badly short of meeting need, given that expenditures have been constrained by the pandemic and income constraints, growing much more slowly than prices or minimum budgets since 2019. An alternative would be to peg them to the CPI, and this scenario is shown in Figures 1 and 2. Such a policy would reduce but not eliminate the erosion of thresholds relative to MIS, given that MIS budgets have risen faster than the CPI. By 2025, the civil thresholds would be slightly over two-thirds of MIS (rather than just under half without the uprating) and the criminal ones only about 6%, rather than 26%, below.

Thus, by 2025, the income at which a single person is denied full legal aid will be extremely low if changes to legal aid have still not been implemented, and the extent to which the change improves this will be heavily contingent on how cost of living allowances are uprated. Figures 3 and 4 summarise these 2025 outcomes for different family types, based on the cost of living allowances for additional family members and on the MIS thresholds calculated for those families.

As shown in Figure 3, the implementation and inflation-uprating of the reformed system would not eliminate the situation where people without enough income have to contribute to civil legal costs, but it would greatly reduce the level of income shortfalls at which this is possible. For singles and couples without children, eligibility for non-contributory legal aid in 2025 would require available income below about two-thirds of MIS (i.e. a 'shortfall' compared to MIS of one-third), rather than below just one-fifth of MIS if the old system is still in place (a shortfall of four-fifths). For families with children, the reformed and uprated threshold would be roughly three-quarters of MIS rather than below half if the present system is still in place.

Figure 4 shows equally great benefits from implementing and uprating the proposed system in the case of Crown Court defendants. In this case, shortfalls of between a third and a half under the current system are reduced to between one-eighth of MIS and zero under the reform scenario. Note that for lone parents, full legal aid would be available up the point where available income met a family's needs in full, according to the MIS calculation. This result, as well as the fact that shortfalls would be proportionately smallest for lone parents in the reformed system (Figure 3) reflects the MoJ's decision to add a lone parent allowance worth 70% of that of an additional adult. This is greater than the 50% allowance proposed in Hirsch (2022) in response to the consultation on the original proposals, which would have been about enough roughly to equalise outcomes across family types.

Figure 3 Shortfall, compared to Minimum Income Standard, of highest available income at which full civil legal aid available, projected 2025

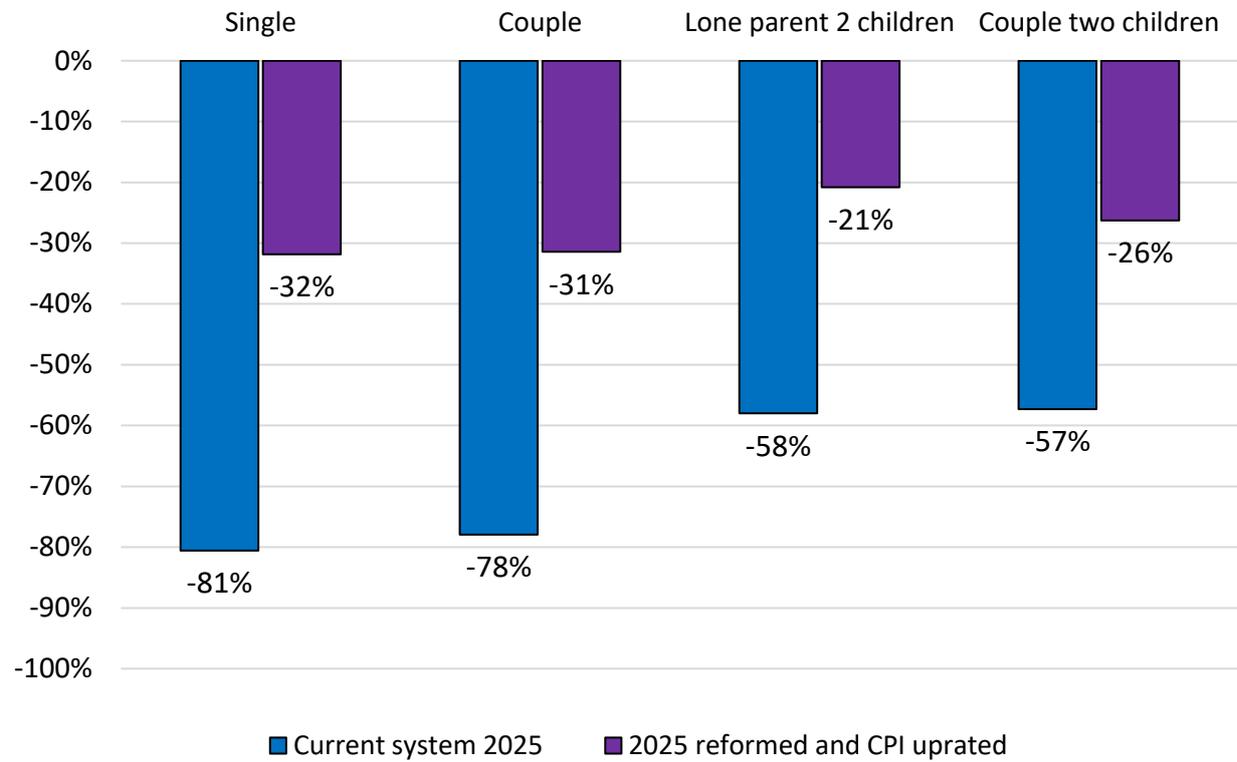
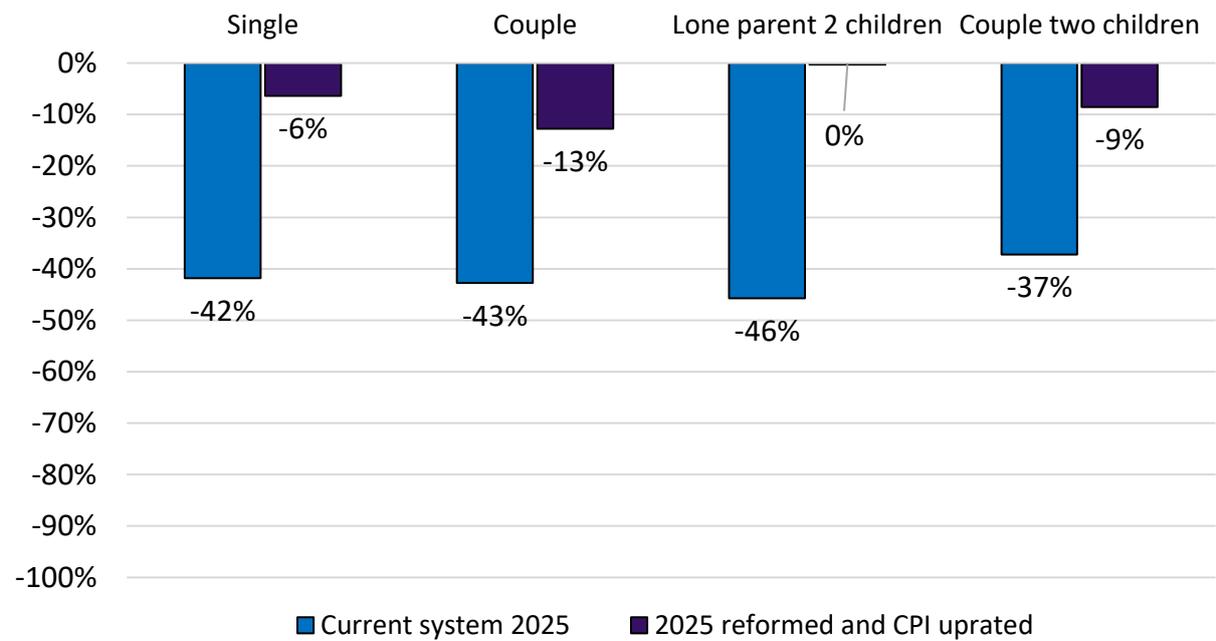


Figure 4 Shortfall, compared to Minimum Income Standard, of highest available income at which full Crown Court legal aid available, projected 2025



4 The adequacy of income at the upper civil threshold for legal aid

Some people with income above the thresholds for non-contributory legal aid may get partial legal aid, requiring them to make a contribution to costs based on their income. However, if their disposable income is above the upper threshold for civil legal aid, they have no such entitlement and must cover all costs themselves. For a single person, this threshold is due to rise from £733 to £946 a month. The new upper threshold is based on median household expenditure, including leisure and other items excluded when calculating the lower thresholds.

Figure 5 shows what percentage of MIS these thresholds represent: how much income, relative to the minimum required, entitles you to any legal aid, following the two scenarios for 2025 used above. Figure 6 shows how much someone just below this level, and therefore eligible for contributory legal aid, must pay towards their legal costs before getting the remainder covered.

These graphs show that, both before and after the payment of maximum contributions, available income at the upper threshold falls below minimum needs to a far smaller extent in the new system, uprated, than under the present system. In 2025, if the current system is retained, some households can be excluded from any legal aid even where they have below half what they need. A reformed system could ensure that this is only the case for incomes down to between 6% and 16% below need: a much smaller shortfall (Fig 5). In the case of people who do just qualify for contributory legal aid, Figure 6 shows that maximum contributions in the present system could reduce available income to up to around a third of the minimum required (i.e. two-thirds below MIS), but the reforms could improve this to about three-quarters (a shortfall of about 25%). While this would still prevent many people from accessing justice without suffering significant hardship, there are also likely to be many cases where legal action becomes feasible where under the present system the costs incurred would be prohibitive.

Figure 5 Shortfall, compared to Minimum Income Standard, of highest available income at which any civil legal aid available, projected 2025

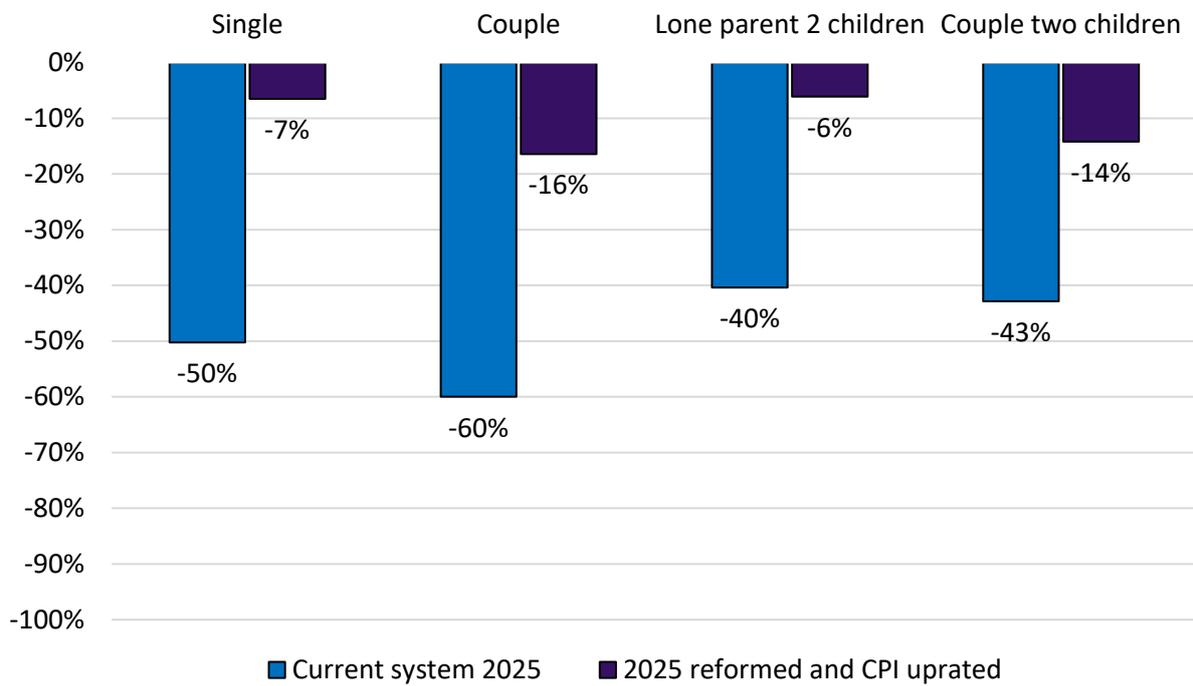
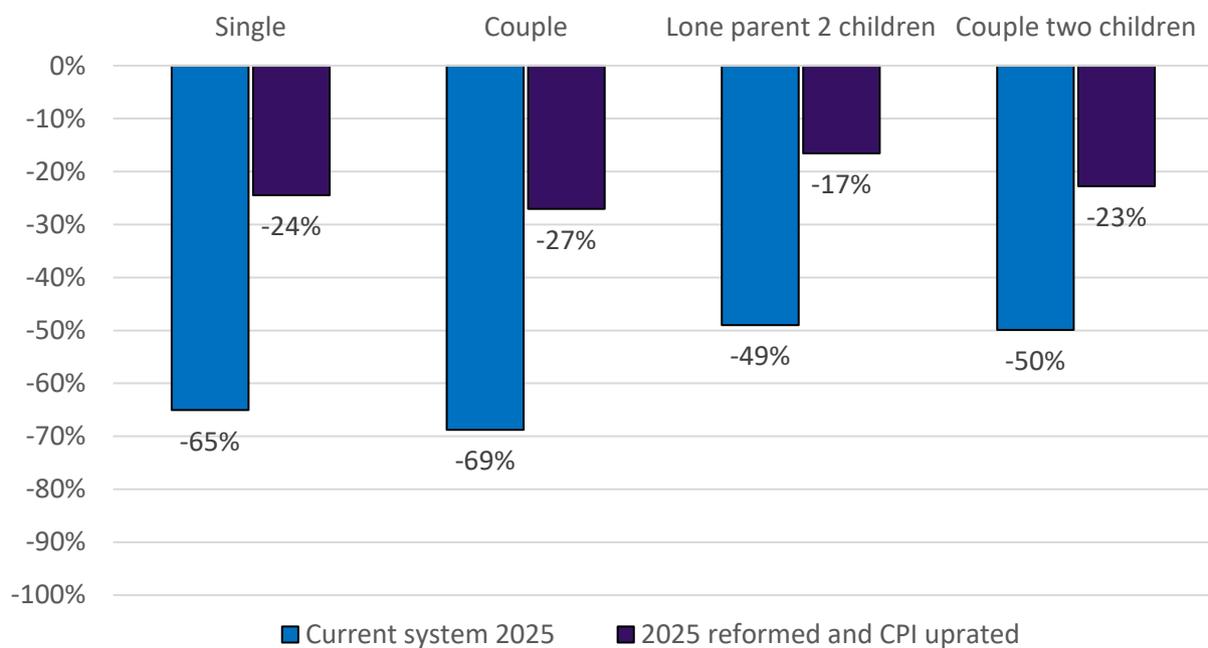


Figure 6 Shortfall, compared to Minimum Income Standard, of available income after deduction of maximum contribution to civil legal aid, projected 2025



Note: Figure 6 assumes that CPI uprating applies not just to income thresholds but also to contribution bands.

5 Conclusion: implementing an urgently needed reform

This report shows that every delay to the implementation of the announced reforms to the legal aid means test results in more people being denied access to justice based on income. Recent inflation has brought this to seemingly absurd extremes. By 2025, if the reforms are not sped up, some people may be denied full legal aid based on incomes which would have to be up to five times as high just to provide an acceptable living standard. In other words, you can be in very deep poverty and still be required to pay if you want to access justice. Furthermore, it is possible to have less than half what you need as a minimum and be ineligible for any civil legal aid support at all. Even with the relatively more generous allowances for Crown Court defendants, full legal aid can be denied for people with more than 40% less income available than they need as a minimum.

This dire state of affairs will be improved when the new system is introduced. Yet much of the improvement will be lost unless the new thresholds are substantially uprated to compensate for prices being 27% higher in 2025 than in 2019, the year on which the new rates are benchmarked. The risk is that as time passes, the gains from reform are so much offset by the losses to inflation that making progress towards adequate income thresholds seems like walking up a down escalator.

Therefore as matter of urgency, the new system of legal aid should be brought in within the next year, with previously announced thresholds increased to fully reflect inflation over the six years between 2019 and 2025. Even with these actions, some people who require legal services will only be able to pay for them by reducing the income set aside for daily living costs to below the minimum level considered acceptable by the public. However, such shortfalls would be greatly reduced, and this would be a significant step towards creating a fair means test for legal aid.

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