



Joint Committee on Human Rights:

The implications for access to justice of the Government's proposed legal aid reforms

Written Evidence

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"I find it hard to believe that a government which truly respected the rule of law - which had taken the trouble to understand what that phrase really means, and to study the consequences of what it has in mind - would have contemplated introducing the [civil legal aid proposals]".

Lord Hope, Former President, Supreme Court

HL Deb, 11 July 2013, Col 469

JUSTICE considers that the proposals for reform in *Transforming legal aid* are ill-considered, rushed and unsupported by evidence.

We consider that each of the proposals under consideration by the JCHR will undermine the rule of law and significantly restrict access to justice for individuals without independent means. We are specifically concerned that the proposals to restrict eligibility for prisoners and persons with less than 12 months lawful residence are incompatible with the right to the equal protection of the law and the right to equal treatment protected by Article 14 ECHR and the HRA 1998. Further proposals to restrict access to judicial review are based upon scant evidence of the need for reform and could undermine the long-term constitutional function of judicial review.

The Government has failed to answer serious concerns raised, including by representatives in both Houses, members of the senior judiciary, members of the legal professions and groups representing individuals affected by the proposed changes (from civil society and public bodies alike), about the constitutional function of legal aid, the impact of these measures on the effectiveness of our justice system and the credibility of our judiciary or the ability of individuals to hold public bodies to account.

We regret that this process has become less about a rational approach to making justifiable savings and more about a new “ideological” approach to the distribution of legal aid, based not upon the complexity or seriousness of individuals’ complaints, but about categories of persons deemed deserving or undeserving of public support by virtue of their status. This process appears to have become overtly politicised by Ministers suggestions in the press that cases funded by legal aid as time-wasting and unworthy and legal aid lawyers caricatured as “fat-cats” unduly drawing on public funds. Unsupported allegations that public law is used as a “promotional tool” for “left-leaning” organizations and lawyers undermine any confidence that the Government is approaching this exercise objectively.¹

Yet, the Government proposes to introduce each of these significant changes by secondary legislation, over a short timetable of around 6-8 months, with little to no opportunity for effective parliamentary scrutiny.

¹ See for example, Daily Mail, The judicial review system is not a promotional tool for countless Left-wing campaigners, The Rt Hon Chris Grayling MP, Lord Chancellor, 6 September 2013

Background

1. JUSTICE is an independent law reform organisation and the United Kingdom section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote the *protection* of human rights and the rule of law. Over the past 55 years, JUSTICE has contributed to the development of policy on legal aid, including publishing research on the work of public defenders² and contributing to the debate on the long term impact of the significant changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”).³ JUSTICE does not represent individuals and does not undertake legally aided work. However, for a significant period of our history, we supported individuals who sought to challenge miscarriages of justice with the support of experienced legal teams funded principally through legal aid. We continue to work on the importance of equal access to justice for all. We welcome the opportunity to submit evidence to the JCHR inquiry on the impact of certain of the proposals in the First Consultation Paper on access to justice and human rights.
2. On 9 April 2013, the Ministry of Justice published *Transforming legal aid: delivering a more credible and efficient system* (“the First Consultation Paper”) for consultation.⁴ The consultation closed on 4 June 2013, allowing around 40 working days for response. Having received over 16,000 responses, the Government published its response to the consultation, *Transforming Legal Aid: Next steps* (“Next steps”), on 5 September 2013.⁵ A further specific consultation on judicial review – *Judicial Review: Proposals for further reform* (“the Judicial Review Consultation”) – including proposals earlier considered in the *First Consultation Paper* were also published in September 2013.⁶

² See JUSTICE, *A Public Defender*, (1987) and *Public Defenders: Learning from the US experience*, (2001).

³ For examples of our work on LASPO, see, our response to the Green Paper consultation – (<http://www.justice.org.uk/resources.php/159/legal-aid-green-paper-justice-response>), Press Summary (<http://www.justice.org.uk/data/files/resources/282/press210611.pdf>) and our letter to the Lord Chancellor on the principles of legal aid reform (<http://www.justice.org.uk/resources.php/48/legal-aid-cuts-must-be-guided-by-principle>).

⁴ CP 14/2013

⁵ JUSTICE’s response to the First Consultation Paper is available here: <http://www.justice.org.uk/resources.php/349/transforming-legal-aid> *Next steps*, here: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>

⁶ <https://consult.justice.gov.uk/digital-communications/judicial-review>

3. We make specific comments on each of the four areas of concern for the JCHR below. As a preliminary, we make brief comments on the progress of the consultation, the timing of the review, the Government's approach to the formulation of this policy and the constitutional function of legal aid. In the interests of brevity, in the main, this submission will focus on our key human rights and access to justice concerns. Further detail can be found in JUSTICE's response to the *First Consultation Paper*. We would be happy to provide supplementary written or oral evidence to the Committee as required.

Timing, effectiveness and evidence-based policy making

4. JUSTICE has a number of preliminary concerns about the conduct of the consultation:
 - a. ***Timing:*** Closely following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, these proposals are rushed and unsupported by evidence. The First Consultation Paper acknowledged that the Government has been incapable of assessing the impact of LASPO, yet it set an ambitious timetable for reform. Offering less than 40 working days to respond and showing a clear disregard for evidence-based policy making, JUSTICE is concerned that this consultation process appears to have been a largely "tick-box" exercise. Despite receiving over 16,000 responses, the Government was capable of producing *Next Steps* over the long summer break, publishing its final proposals at the start of the Autumn party conference season at a time when Parliamentarians would have little opportunity for consideration. The timetable for reform remains swift, with the changes proposed to be largely complete by mid-2014. We regret the Lord Chancellor's response to the Committee's request for time to complete its inquiry. However, we consider that this reflects the urgency and lack of reflection evident in the Government's approach to these reforms thus far. Importantly, JUSTICE – and many other respondents to the consultation – have raised concerns that the introduction of badly-planned legislation, which is then subjected to early, costly challenges, would undermine even the Government's least ambitious plans of public litigation savings.

- b. **Evidence based policy making:** A number of flaws in the Consultation Paper undermine the Government's commitment to evidence-based policy making:
- i. The case for reform is broadly based on assertions and implications, and expressed in pejorative language.
 - ii. Evidence to support the Government's case for reform is routinely absent. Where evidence or argument is provided, it is weak and undermined by simple analysis.
 - iii. The Impact Assessments provided lack information and are not fit for purpose.
 - iv. Ministers appear to have approached the consultation with a fixed ideological position and a closed mind.

We deal with each of these concerns in greater detail in our response to the *First Consultation Paper*. However, we are concerned that the inadequacy of the evidence for reform is compounded by the short treatment of the consultation in *Next Steps*, specifically, in Annex B. The analysis of the concerns expressed by many of the consultation responses, including members of the senior judiciary and public authorities who will be affected by these changes, is cursory.

- c. **Legal basis for the reforms:** The Government considers that these changes can be made in secondary legislation with limited need for further parliamentary scrutiny. We are concerned that a number of the relevant proposals will be open to challenge under the Human Rights Act 1998, the Equality Act 2010 and LASPO itself.⁷ We have some doubts over the Government's analysis, expressed below. As the Government proposes to make these changes by secondary legislation, members may wish to a) subject the justification provided by Government for change to close scrutiny and b) ask Ministers to better explain the Government's view that these changes should not be subject to full parliamentary scrutiny, but can be lawfully introduced by secondary legislation.

⁷ For example, the removal of the right to choose may have been unlawful pursuant to section 27(4) LASPO. The Government maintains its view that the residency test may be introduced through secondary legislation following LASPO. While LASPO clearly permits the Secretary of State to make arrangements for the provision of legal aid, it is difficult to argue that this power includes the ability to exclude whole classes of persons from eligibility without further scrutiny by Parliament.

The constitutional significance of legal aid and human rights law

5. The *First Consultation Paper* entirely neglected to consider the significance of access to legal aid for the rule of law or its wider constitutional importance for the effective operation of our civil and criminal justice system. This default is not remedied by the cursory treatment of the concerns raised by many consultation respondents in Annex B to *Next Steps*.

6. It is clear that both the domestic common law and our international legal obligations support effective and equal access to justice within the civil and criminal justice system, in order to enable individuals to protect their rights in law. Those standards exist to ensure that within our jurisdiction everyone may enjoy equality before the law, without unjustifiable exclusion on the basis of means, status or other characteristics.⁸ As recognised by Lord Bingham, any other approach would fundamentally undermine our commitment to the rule of law:

[D]enial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law.⁹

7. The case law of the European Convention on Human Rights (“ECHR”) expressly recognises that in order to protect the right to a fair hearing in cases which are legally complex, access to civil legal aid may be essential.¹⁰ In determining access to legal aid in civil proceedings in cases where an individual is unable to fund civil litigation to protect his/her rights, the importance of the issue to be determined, the complexity of the case and his/her capacity to otherwise participate in the proceedings will be key.¹¹ The European Charter of

⁸ See for example, *ex parte Khawaja* [1984] AC 74

⁹ Tom Bingham, *The Rule of Law*, Allen Lane, London, 2010, pp. 85 and 88. That the rule of law included a requirement on the State to furnish civil legal aid, in addition to protection for those accused of crimes was clear. The rule of law includes that “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”. That the principles of the common law protect the right of access to justice, including through the testing of rules which might inhibit access to the court is clear. See *R v Lord Chancellor ex p Witham* [1998] QB 575 (this case dealt with the implications of court fees for access to the courts).

¹⁰ *Airey v Ireland* (1979) 2 EHRR 305 at 26

¹¹ *Steel & Morris v United Kingdom* (2005) 41 EHRR 22 at 59

Fundamental Rights builds on these standards where it is relevant.¹² Most recently, the United Nations (“UN”) has recognised the need to provide guidance to States on the important role played by legal aid in ensuring democratic principles.¹³

8. In May, the UN Special Rapporteur on the Independence of Judges issued a stark statement on the global importance of legal aid as a “right in itself”. She made clear that while States are free to determine their model for the provision for legal aid, it should be available to all those within the territory or subject to the jurisdiction and its provision must remain effective, accessible and independent from Government:

Legal aid is both a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the rights to a fair trial and to an effective remedy. It represents an important safeguard that contributes to ensuring the fairness and public trust in the administration of justice.

Legal aid should be as broad as possible...to contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to people otherwise unable to afford legal representation and access to the court system.¹⁴

9. Quite aside from the determination of whether a lack of legal assistance will undermine the right to a fair hearing as protected by the common law, the HRA

¹² The Government ought to recall its obligations to comply with Article 47 of the EU Charter of Fundamental Rights when implementing EU law, which provides that ‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’. Importantly, Article 47 TEU does not include the additional requirement of Article 6 ECHR that a fair hearing be provided in the determination of “civil rights and obligations”. See *DEB v Germany*, [2010] ECR I- 13849, 28.

¹³ Several international and regional human rights treaties recognise access to free legal assistance as an essential component of the right to a fair trial. Although many of these focus on criminal justice, international law appears to mirror the requirements of the common law and the ECHR that legal assistance may be essential where otherwise a hearing would be rendered unfair. For example, In its General Comment No. 32 (2007), the Human Rights Committee acknowledged that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”, and encouraged States to provide free legal aid not only in criminal proceedings, but also in other cases where individuals do not have sufficient means to pay for it.

¹⁴ A/HRC/23/43, Report of the Special Rapporteur on Judges and Judicial Independence, Geneva, 15 March 2013., http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43

1998 or the Charter of Fundamental Rights, JUSTICE considers it clear that a number of these measures are likely to amount to unjustifiable discrimination and incompatible with common law standards of equal access to the law and/or Article 14 ECHR.¹⁵ We return to this issue in greater detail, below.

10. At a time when many countries are looking to the United Kingdom for inspiration to inform their own access to justice reforms, it is disappointing that we are proposing to develop our own system of legal aid without full consideration of our domestic or international commitments to support individual access to justice. In light of the specific statutory duties on the Lord Chancellor to uphold the rule of law, and the specific functions and responsibilities of the Ministry of Justice, which are inherently connected with maintaining the credibility of our justice system, this approach to such significant change is shortsighted.¹⁶
11. Clearly, it must be open to the Government – and to Parliament – to review whether the existing arrangements for legal aid are working, including whether the procedure adopted remains affordable and effective. However, the constitutional importance of access to justice places a significant responsibility on reformers to justify the need for change and to ensure that adequate safeguards are in place for the protection of the individual within both the civil and criminal justice systems. The Government has so far fallen short of this responsibility.

Eligibility and the residence test

12. JUSTICE strongly opposes the proposal to introduce a blanket ban on eligibility for legal aid based on residence. The Government proposes to exclude from civil legal aid anyone who cannot demonstrate that they are lawfully resident within the UK and that they have had 12 months continuous such residence. This discriminatory bar stops one small step short of an arbitrary exclusion from justice

¹⁵ See also Article 21 TEU, which expressly prohibits discrimination on the basis of nationality.

¹⁶ Constitutional Reform Act 2005, sections 1 and 17 set out the Lord Chancellor's statutory duty to uphold the rule of law. Section 17 makes reference to the Promissory Oath undertaken by the Lord Chancellor that: "*I do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.*" Legal Services Act 2007, section 1 further defines the regulatory objectives of the Legal Services Board and other relevant authorities as including (a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; and (c) improving access to justice.

of non-nationals within the jurisdiction. The proposal is novel in rendering a whole class of individuals ineligible regardless of the seriousness of their claim.¹⁷ It creates a two tier justice system for those without independent means based on the ability to evidence time spent within the UK.

13. The Government has made no effort to source reliable figures on likely savings or on the number or types of claimant that will be excluded. Instead, it accepts that claimants must act as a litigant in person or “decide not to tackle” the case. In many cases, the withdrawal of legal aid will lead to individuals being denied access to a remedy. Importantly, the *First Consultation Paper* appears to imply that all litigation occurs by choice. Legal aid may be sought to defend actions brought by the State or third parties, and in these circumstances an individual may have little choice but to defend a claim in person. The increased costs of self-representation to the courts are significant, through lengthier proceedings and risk of misapplication of law, yet no attempt is made to address these costs.
14. The *First Consultation Paper* proposed limited exceptions to this blanket rule apply only with respect to members of the armed forces and asylum seekers, ignoring the carefully carved out limits to scope identified by Parliament during its lengthy and detailed debates on LASPO. Importantly, new exceptions proposed in *Next Steps* do not provide for a general exception for ‘vulnerable persons’ or ‘cases concerned with liberty’ (see para 2.14, *Next Steps*). Annex B of *Next Steps* explains clearly that the further exception proposed will be closely linked to the exceptions identified in LASPO.
15. The following examples illustrate some of the types of issues which will still be excluded:
 - a. *Homelessness*: homeless people and people facing homelessness, including families with children, may find it difficult to prove eligibility in order to challenge local authority decisions to refuse support.¹⁸

¹⁷ For example, all UK born infants under 1 year old would be excluded from support to represent their interests in care proceedings. Victoria Climbié, had she survived the horrific abuse which led to the Climbié Inquiry, would equally have been denied representation.

¹⁸ See Shelter’s Consultation Response, for example, http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/briefing_legal_aid

- b. *Human trafficking victims*: Despite lengthy discussion about the need to secure access to legal advice and assistance for human trafficking victims in LASPO, victims of the slave trade brought to the UK against their wishes will now be eligible but only in connection with some immigration and employment claims and claims against an alleged trafficker. No provision is made for claims about eligibility for support, including healthcare.¹⁹
- c. Similarly, *victims of domestic violence* will now be eligible, but only in relation to a limited number of cases.
- d. *Immigration detainees*: Immigration detainees will now be eligible for legal aid, but only for claims in relation to the fact of their detention. It appears that any and all challenges relating to mistreatment during detention will be ineligible for support. This would mean that recent reported sexual abuse claims at Yarl's Wood would not attract funding for legal aid.²⁰
- e. *Newly settled refugees*: The exemption for asylum seekers will end as soon as their claim is determined, resulting in vulnerable, newly-settled refugees being left without access to legal advice or assistance.
- f. *Families of victims of crime within the UK, who are resident overseas*: Where the UK is involved in the death of an individual, whether through direct State action or negligence, it bears the responsibility to provide an investigation in which the family may participate effectively (for example, the family of Jean Charles de Menezes).

16. Other high-profile claims which would be barred include those brought by Guantanamo detainees alleging UK complicity in torture;²¹ claims for *habeas corpus* by individuals illustrating UK control over their detention abroad²² and claims against UK armed forces for violations of international human rights

¹⁹ The Catholic Church has, for example, written to Ministers to raise particular concerns about trafficking victims: <http://www.guardian.co.uk/law/2013/may/22/catholic-church-legal-aid-trafficking>

²⁰ <http://www.theguardian.com/uk-news/2013/sep/14/yarls-wood-immigrant-sex-abuse-tanja>. The JCHR conducted a lengthy inquiry on the treatment of asylum seekers and made a number of recommendations connected with treatment in detention. These recommendations were based on a series of visits to places of detention, including at Yarl's Wood. Tenth Report of Session 2006-07, *Treatment of Asylum Seekers*, HLPaper 80, HC60.

²¹ *Al Rawi and others v The Security Service and others* [2011] UKSC 34

²² *Secretary of State for Foreign and Commonwealth Affairs and another v Yunus Rahmutullah* [2012] UKSC 48

standards overseas.²³ The scrutiny of the domestic courts in these cases has contributed to redress for serious violations of human rights standards, promoted the development of the rule of law in international relations, and stimulated recognition of the importance of public and parliamentary scrutiny on the global work of the security services and the armed forces on behalf of society as a whole.

17. In practice, the test is likely to exclude a significant number of wider classes of individual from eligibility. These may include:

- a. Children who have lived in the United Kingdom throughout their lives, but whose residence has not been regularised by their parents.
- b. Children who are without parental support and who cannot provide evidence of twelve months lawful residence. This group might include street children who have severed family ties, leaving all documentary evidence of right to residence behind.
- c. Disabled people, and in particular, persons with mental health problems or learning disabilities, who have not kept records of their right to residence or the period of their continuous residence.

18. JUSTICE considers that the residence test will violate the common law guarantee of equality before the law and the UK's international human rights obligations. For example, EU nationals who exercise rights of free movement are entitled to equal treatment, yet there is no specific exemption to ensure the residence test does not operate as a barrier to EU nationals.²⁴ Specific articles of the Refugee Convention, the UN Convention on the Rights of the Child, the Convention on the Elimination of Discrimination against Women, the UN Convention on the Rights of Persons with Disabilities and the Trafficking Convention will be engaged.²⁵ There is a strong argument that the residence test could operate to violate the principle of non-discrimination in Article 14 ECHR and the positive procedural obligations

²³ *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58; *Al-Jedda v The United Kingdom* (27021/08) [2011] ECHR 1092; *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26; *Al-Skeini and Others v the United Kingdom* (55721/07) (2011) 53 E.H.R.R.18.

²⁴ Article 24(1) Treaty on the European Union

²⁵ The Refugee Convention, article 16; Council of Europe Convention on Action Against Trafficking in Human Beings articles 10, 12 and 15. See also UNCRPD, Articles 12 and 13, CEDAW, Article 15.

on the State to investigate and prevent violations of the Convention.²⁶ Residence – and nationality – is clearly a relevant status for the purposes of Article 14 ECHR. Yet none of these concerns are addressed by the Consultation Paper.

19. The Government has failed to grapple seriously with the practical implications of this test. All applicants for legal aid or assistance will need to be subject to verification of residence. There is no proposed provision for emergency assistance, subject to subsequent verification. The costs and potential delay have not been realistically costed, nor does it appear that any significant consideration has been given to the sufficiency of evidence capable of providing effective verification. The documents which many may consider necessary to illustrate residence rights and duration – passports, visas, bank and employment records – are not necessarily readily or routinely available to many vulnerable people or those from low income households (those most likely to be in need of legal assistance). The time which may need to be taken to verify eligibility for legal aid even for those who satisfy the proposed residence requirement may be significant. The likelihood is that these measures will, in practice, further add to the number of litigants in person appearing in our courts, with associated costs and delays which may adversely impact on the efficiency and reputation of our justice system.²⁷

Restricting legal aid for prisoners

20. The *First Consultation Paper* proposed restricting the scope of legal aid for claims brought by prisoners. *Next Steps* has announced that the Government intends to introduce these measures largely unchanged in delegated legislation by end 2013.

21. The Government proposes to restrict access to legal aid – funded from the criminal legal aid allocation – for prison law matters.²⁸ Currently, prisoners can

²⁶ Articles 2, 3, 4 and 8 ECHR – and possibly 5 and 6 ECHR which ensure access to an independent and impartial tribunal - will be engaged by the examples set out in this section. See also legal advice prepared for the Public Law Project and others by Michael Fordham QC, published as part of the PLP response to the First Consultation Paper.

²⁷ On the impact of litigants in person on the effectiveness of hearings, see *Wright v MWS Ltd* [2013] EWCA Civ 234 at 2.

²⁸ First Consultation Paper, paras 3.1 – 3.22

access legal aid for advice and representation relating to treatment, sentencing, disciplinary matters and Parole Board reviews. The Government proposes to now limit funding to cases which involve:

- a. The determination of a criminal charge;
- b. An individual's liberty, in so far as article 5(4) ECHR is engaged; or
- c. Claims where legal representation must be provided as a result of the successful application of the "Tarrant" criteria (In *Tarrant* the court considered the circumstances where an individual would be entitled to representation at an oral hearing).²⁹ However, legal aid will not be available to challenge an assessment of whether or not the Tarrant criteria is satisfied.

22. The case for reform is based on three factors:

- a. The *First Consultation Paper* claims that prisoners' claims "undermine the credibility of the system";
- b. Savings will be made; and
- c. Alternative mechanisms for dispute resolution – including the internal prisoner complaints system, prisoner discipline procedures and the probation complaints mechanism – will provide a more appropriate remedy without call for access to legal aid.

23. JUSTICE does not consider that the Government justifications for change stand up to scrutiny: the restriction of access to effective, quality and specialist advice for prisoners threatens to undermine access to justice for an already marginalised group in society. The exclusion of prisoners will clearly also give rise to a significant risk of incompatibility with the common law right of equal access to the law and Article 14 ECHR.

24. Significant weight is placed by the Lord Chancellor upon the apparent public distaste for claims brought by prisoners, but little evidence has been produced to support these claims or to illustrate damage to the credibility of the legal aid system.³⁰ The Secretary of State has confirmed that the primary motivation for

²⁹ [1985] QB 251

³⁰ See the Lord Chancellor's evidence to the House of Commons Justice Committee on 3 July 2013. During this session, the Lord Chancellor explained the Government view that: "the taxpayer should not be paying legal aid for prisoners to go to court to debate which prison the Prison Service has decided to detain them in, what the

reform is ideological, telling the House of Commons Justice Committee “I do not believe that people in our prisons should be able to get legal aid to go to court.” Yet, it is clear that the rule of law acknowledges the significant importance of ensuring access to a remedy for prisoners, who are particularly vulnerable to abuse and exclusion “behind closed doors”.³¹ The orthodoxy that prisoners continue to enjoy the rights – except in so far as the right to liberty is restricted by their sentence - is trite. In *Campell and Fell v United Kingdom* [1984] 7 EHHR 165, the Strasbourg court stresses that “justice cannot stop at the prison gates”. There is no consideration in the *First Consultation Paper* of these domestic or international standards, beyond an assertion that the Government believes that these cases are not of sufficient priority to justify funding.

25. The importance of access to justice for prisoners is simply illustrated in the kinds of cases which would not now be covered by legal aid. This should not be treated as an exhaustive list:³²

- a. *Mother and baby units*: Legal aid has been used to prevent female prisoners being refused access to baby units and being separated from their children.³³
- b. *Prisoners with disabilities*: Many cases have been brought by disabled prisoners seeking redress for treatment violating the right to be free from inhuman and degrading treatment or torture enshrined in article 3 ECHR.³⁴

conditions are in their cell, or whatever” (Q202), that “is why we have prison visitors, a prison complaints system, independent monitoring boards and a prisons ombudsman-to make sure that those safeguards are in place. I do not believe that it is appropriate for us then, on top of that, to be paying for legal aid for those cases to go to court (Q205).

³¹ That prisoners are in a vulnerable position and subject to the absolute coercive power of the State is recognised in most international human rights instruments and within the domestic law. As Lord Woolf recognises in his report, *Prison Disturbances*: ‘a prisoner, as a result of being in prison, is particularly vulnerable to arbitrary and unlawful action’ (1991), para 14.293. See also *R v Board of Visitors of Hull Prison* [1979] 1 QB 425 and *Raymond v Honey* [1983] 1 AC 1.

³² For example, many of the serious issues identified in the Joint Committee on Human Rights report on deaths in custody about the treatment of prisoners – segregation, access to healthcare and restraint to take a few – would now be treatment issues for which prisoners would no longer be able to access criminal legal aid to lodge a complaint, even if it had been shown that a remedy was not possible using the alternative mechanisms identified in the First Consultation Paper. See Third Report of Session 2004-05, *Deaths in Custody*, HL 15-I/HC 137-I

³³ *R (P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002.

³⁴ *R (Graham) v Secretary of State for the Home Department* [2007] EWHC 2950 (Admin).

- c. *Prison communications*: Legal aid has helped secure prisoners' rights to contact their lawyer, the press and others to publicise their treatment without interference.³⁵
- d. *Segregation*: Segregation of prisoners can have a serious potential impact on their mental health.³⁶
- e. *Categorisation*: The categorisation of prisoners can have a significant impact on their treatment as well as on the likelihood that they will be released on licence.³⁷
- f. *Disciplinary matters*: Any disciplinary matters which Governors consider fall short of a "criminal charge" will likely be denied access to legal aid, unless proved that the "*Tarrant*" criteria are satisfied.³⁸

26. The *First Consultation Paper* asserted that the criteria proposed were designed to ensure that in any case involving the right to liberty (engaging Article 5 ECHR) legal aid will continue to be available. JUSTICE doubts whether the distinctions drawn will ensure that all decisions affecting an individual's liberty will be open to effective challenge (for example categorisation and segregation will be excluded, despite each likely impacting on a prisoners' release date).

27. The Government makes a bold assertion that prisoners can use the prisoner complaints mechanism effectively. *Next Steps* reiterates the Government view that sufficient measures are in place to ensure that both people with disabilities and children and young people will be able to access these alternative mechanisms. However, under existing rules, prisoners are only eligible for legal aid if their case cannot be resolved under the complaints mechanism. Further, no effort is made to assess how successful previous claims have been and what impact removal of legal aid would have on their outcome. JUSTICE notes that none of the suggested alternate mechanisms of redress outlined is able to award a binding remedy to the complainant, and in particular that the complaints system

³⁵ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 : *R v Secretary of State for the Home Department, Ex parte Simms* [1999] Q.B. 349.

³⁶ *R v Deputy Governor of HMP Parkhurst ex p Hague* [1992] AC 148: *R (SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750.

³⁷ *R (Vary and others) v Secretary of State for the Home Department* [2004] EWHC 2251 (Admin): *R (Blagden) v Secretary of State for the Home Department* [2001] EWHC 393 (Admin).

³⁸ The case of *Tarrant* considered the circumstances in which an individual might be entitled to representation at an oral hearing. The criteria include the seriousness of the implications of the hearing for the individual prisoner.

operates entirely within the prison service, thereby lacking independence. Further, there is widespread criticism by Her Majesty's Inspectorate of Prisons of the failings in existing complaints management, which is slow and ineffective.³⁹

28. *Next steps* makes clear that civil legal aid for judicial review will remain open to prisoners. However the scope of legal aid for judicial review has been significantly restricted under LASPO and will be further restricted by these proposals (see below). In any event, much of the assistance which would now be withdrawn is not easily categorised as judicial review, specifically, provision made in connection with preparation for release, including securing access to courses and suitable accommodation. Shifting this work from one budget to another would, of course, lead to little or no saving. It appears that the Government's intention is that this work should no longer be funded.
29. The financial analysis of the implications of these proposals is exceptionally scant. This is perhaps unsurprising in light of the Lord Chancellor's admission that the principal motivation for change is ideological, not financial. It is extremely unlikely, in JUSTICE's view, that these changes will lead to significant savings or that any estimated savings can be justified in light of the disproportionate impact on individual prisoners and associated costs to other parts of the public budget. Others have conducted more detailed analysis of the likely costs associated with the removal of legal aid for prisoners in connection with their treatment. Importantly, the Parole Board has explained the important function which skilled prison law advice plays in reducing delay and expense both in connection with its functions and likely further on-costs for the Prison Service. We share the concerns expressed by prison law experts and, in particular, the Parole Board that the removal of assistance for categorisation claims or preparation for release will – by unduly retaining people in high security conditions or in custody at a point beyond necessary – lead to significant costs for the public purse.⁴⁰

³⁹ For example, in relation to Brixton Prison <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/brixton/brixton-2010.pdf> at paras 3.34-3.45. See also the HMIP's response to the Consultation Paper <http://www.justice.gov.uk/downloads/about/hmipris/transforming-legal-aid-response-hmip.pdf>

⁴⁰ See Consultation Response, Parole Board, June 2013 (<http://www.justice.gov.uk/downloads/offenders/parole-board/pb-response-transforming-legal-aid-consultation-june-2013.pdf>) and the analysis of the costs associated with the Government's proposals prepared by Dr Nick Armstrong, Matrix Chambers (<http://legalaidchanges.wordpress.com/2013/06/25/dr-nick-armstrong-matrix-note-on-costs-implications-of-civil-legal-aid-proposals-3/>)

Borderline cases

30. JUSTICE is concerned that the decision to remove “borderline” cases from the scope of public funding is ill-considered. The proposals in the *First Consultation Paper* misunderstood the nature of a “borderline” assessment. Despite assertions in the *First Consultation Paper* that borderline cases are “unlikely to succeed”, prospects of success can be exceptionally difficult to determine due to uncertainty in the law or variable features of the case which cannot be resolved by further investigation. These include cases which are complex, where the law is in a state of flux or where a fact sensitive proportionality analysis is at the heart of a case. In recognition of the uncertainty associated with these cases, funding is already only awarded to those cases with particular value to society or the individual.⁴¹ Many of these cases may involve a human rights element.

Judicial Review

31. The Government proposes to further restrict the availability of funding for judicial review by only funding the cost of work done on applications for permission for judicial review if an application succeeds.

32. Access to legal aid for judicial review was significantly restricted in LASPO. Since then, the Government has consulted on and determined to introduce changes which would restrict timetables for judicial review and which would empower the court to refuse to hear claims deemed “totally without merit” and to increase fees. Other proposals to restrict access, including further restrictions on oral hearings and timing were dropped. Responding to that consultation, JUSTICE regretted that there was neither evidential basis for reform nor any clear financial benefit to be gained. In those circumstances, the proposed changes appeared to be designed primarily to insulate public decision making from judicial scrutiny. We regret that the same is true of these proposals and do not support the Government’s proposals for change.

33. JUSTICE is concerned that the proposal to restrict access to legal aid for judicial review beyond the already significant restrictions in LASPO (and elsewhere) will

⁴¹ Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104).

limit the ability to access advice on public law only to those with the means to pay privately, making publicly funded work unviable. The changes appear designed to insulate public decision-makers from effective judicial oversight. The determination that the risk of public law litigation should be met by lawyers representing vulnerable people without other means to challenge life-changing decisions, in our view, shows a profound misunderstanding of administrative law in practice.

34. Judicial review provides an essential opportunity for people aggrieved by poor public decision-making to challenge those decisions before an independent and impartial tribunal with the power to undo or reverse its effects.⁴² In a country with no written constitutional guarantee controlling the relationship between the citizen and the State, this function takes on a particular significance. Even a brief review of recent case law shows that judicial review cuts across public decision-making and can impact significantly on public spending and individual access to public services.

35. As elsewhere, the case for change is unsupported by evidence and couched in misleading assertions. The implication that cases withdrawn before permission are 'futile' was undermined by the acceptance in the *First Consultation Paper* that, of those cases which proceed to hearing and do not secure permission, many yet result in a concrete benefit to the claimant. For example, in many cases, the possibility of judicial review may influence a public authority to reverse a decision or to change its practice without resorting to proceedings. Similarly, the implication of both the *First Consultation Paper* and *Next Steps* is that all cases which are refused permission should never have been brought, and this could easily have been determined by the advising solicitors at the point of issue. This neglects that cases develop throughout the course of proceedings, notably with evidence disclosed and concessions made by local authorities during the course of proceedings. Similarly, the law may shift during the course of a case, to the benefit or the detriment of either party.

36. Applications for judicial review are already subject to significant restrictions, including eligibility and merits tests. Changes in LASPO restricted public law work substantially, particularly in connection with immigration decisions. Since the

⁴² *R (Cart) v Upper Tribunal* [2011] UKSC 2, Lord Dyson at 122.

implementation of LASPO, providers can no longer self-certify on judicial review cases, but must obtain permission from the Legal Aid Agency before pursuing a case. In addition, in judicial review claims, the involvement of judicial oversight at a preliminary stage provides for the scrutiny of claims and those deemed “totally without merit” can be dismissed at an early stage.

37. It is suggested by the *First Consultation Paper* and *Next Steps* that initial advice and preparatory work will continue to be funded, subject to other limitations on scope and eligibility. The distinction between preparatory work and work to support an application for permission is artificial, will create significant uncertainty in practice and is likely to lead to significant argument. However, in any event, JUSTICE considers that this limited provision for funding is yet undermined by the shift of risk on issue. This shift creates a number of clear risks. The most significant of these will be that the nature of public litigation will be significantly affected, creating a significant litigation advantage for public authorities. Awareness that individuals may never be funded – or supported – to pursue proceedings could create a significant disincentive to constructive engagement during the pre-action protocol phase. Will individuals pursue complaints following advice in the knowledge that they may be left to represent themselves if they want to take their claim to court? It is indeed possible that these proposals risk an increase in litigants in person in the administrative courts, with the associated costs already highlighted in shifts in civil courts post-LASPO.

38. Parliamentarians may also wish to consider how – in cases that might proceed – litigation practice might be affected. JUSTICE is concerned that – from the consideration of settlement between issue and permission hearing to the potential for late concessions – this change will significantly alter the nature of administrative law practice in a way which will significantly favour public defendants. Increasingly, in a move which regularly saves resources, permission and substantive hearings are “rolled-up” and considered together. Thus, the shift of risk to public law solicitors may stretch to the whole costs of any claim, unless this trend is reversed, leading increasingly to two separate hearings, with two distinct sets of court costs.

39. The information provided by Government on projected savings to be achieved as a result of these changes is severely lacking. The Government, on its own best estimate, concedes that the potential savings to be made are minimal, costed at

around £1m. The impact assessment makes no acknowledgement of the public good served by judicial review, in particular the preventative and channelling functions which ensure that individuals receive access to services they need at an early stage to avoid further and costly service provision. Others have provided more detailed assessments of the likely costs associated with the introduction of these measures, which may be significant.⁴³

40. Ultimately, the Government argues that the impact of these proposals will be driven by providers “decisions” – providers will only “refuse” to take on cases which “would not be considered by the court to be arguable in any event”. This misinterprets the statistics and shows an extremely limited understanding of the operation of judicial review. Refusing to fund any work done on the application for permission unless successful is unsustainable and will discourage most providers from taking on all but the most “open and shut” case. Even in these claims, the provider may yet find the claim unfunded as the ground in the case shifts in a way which might be unforeseeable at the time of issue (including, for example, in light of concessions made by the defendant public authority). This approach to funding entirely neglects that research shows an inconsistent approach to permission by the judiciary and the fact that there are difficult cases in administrative law – often test cases where the law is in a state of development – which may fail on their merits (including in rolled up hearings) yet succeed on appeal.

41. In the *Judicial Review Consultation*, the Government concedes that cases which are withdrawn or settled between issue and permission may be funded under a discretionary scheme operated by the LAA. It is clear that this funding is intended to be exceptional and will never be available where cases proceed to permission and are refused. The Government explains that this new proposed discretion will be administered by the LAA on “the Lord Chancellor’s behalf” and that it will be designed to be determined “depending on the circumstances”.⁴⁴ JUSTICE considers that this discretion will give little comfort to providers and does not meet our concerns about the likely impact of these measures on judicial

⁴³ See the analysis of the costs associated with the Government’s proposals prepared by Dr Nick Armstrong, Matrix Chambers (<http://legalaidchanges.wordpress.com/2013/06/25/dr-nick-armstrong-matrix-note-on-costs-implications-of-civil-legal-aid-proposals-3/>)

⁴⁴ Judicial Review Consultation, paras 125 - 127

review. We are particularly concerned that the language used in the consultation closely links the discretion to the function of the Lord Chancellor, who not only bears responsibility for these reforms, but may himself be the defendant in litigation brought where the exercise of this particular discretion is sought.

42. In short, these proposals will require all public lawyers to put the business risks of any claim before its merits. It remains our view that individuals with good claims that the State has acted unlawfully may be deprived of a remedy for want of representation. In any event, these proposals – combined with LASPO restrictions on access to publicly funded public law work – will seriously restrict the ability of practitioners to continue to provide services at all.

43. The Committee may wish to consider the proposed changes to legal aid for judicial review alongside the other proposals in the *Judicial Review Consultation*. These include restrictions on standing for third parties in public interest litigation and changes to the costs rules which appear designed to deter third party interventions in the public interest. As a package, these measures, whether by design or coincidence, would significantly restrict the importance of judicial review as a constitutional tool for the oversight of executive and administrative action.⁴⁵ This will reduce transparency, accountability and the promotion of responsible government, to the detriment of us all.

Exceptional funding

44. The Government has referred to the possibility under LASPO (Section 10) for individuals to apply for exceptional funding. This exception was provided, under pressure from members of both Houses to secure assistance in cases where legal aid is required by ECHR or EU law. By and large, the bulk of these claims were expected to be human rights claims which would otherwise be out of scope. We are concerned that members should not be easily misled by the operation of the exceptional funding “safety net”. The provision for exceptional funding in LASPO came into force in April and is, as yet, largely untested. During the passage of LASPO, the Ministry estimated up to 8,000 claims in a year.⁴⁶ To July

⁴⁵ JUSTICE will produce a full, more detailed response to the Judicial Review Consultation in due course (the consultation closes on 1 November 2013).

⁴⁶ http://www.publiclawproject.org.uk/documents/Legal_Aid_Briefing_PLP.pdf

2013, there had been a few hundred. Then, only two claims are known to have been granted in cases other than inquests. We understand that that figure has risen to nine. It is, in practice, proving impossible to get exceptional funding without legal support. The form is lengthy (14 pages) and requires a merits assessment of the claim. No provision is made for assessments to be made in emergency cases and no special provision is made for especially vulnerable groups, such as those with learning difficulties or dementia. These practical considerations aside, the Lord Chancellor himself appears to misunderstand the scope of Section 10, LASPO when he suggested in evidence to the House of Commons Justice Select Committee that it will be open to persons subject to the residence test.⁴⁷

45. Exceptional funding is offered only for claims out of scope. Persons excluded under the residence test would not necessarily be out of scope; they would be excluded from legal aid by virtue of their characteristics, ineligible regardless of the nature of their claim, not its nature. Although the exemption may be cited by the Government's in its justification, in JUSTICE's view, the application of the "exceptional funding" test (even if it were expanded to apply to cases where ineligibility results from status) maintains two distinct groups of individuals subject to distinct treatment in their access to the law and will yet require significant justification in its own right.

⁴⁷ See HC 91, Q 211.